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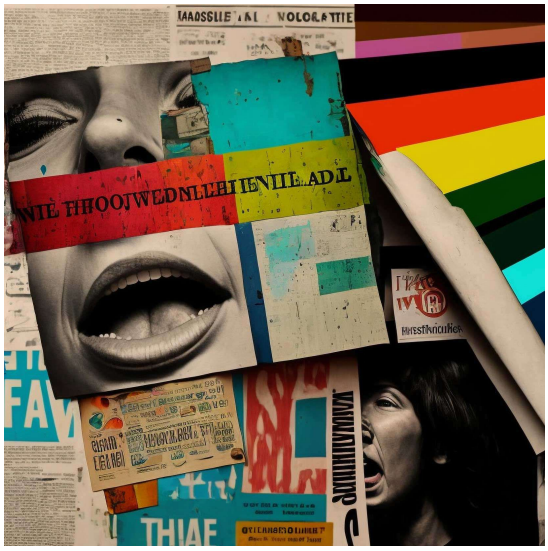
Centre for Media Transition

Hi there

Media & Tech - everywhere, all at once



Developments in technology and judgments on journalism are coming from every corner. Below, Michael looks at Twitter's withdrawal from the voluntary EU Disinformation Code and the impending application of the Digital Services Act in the EU, while Sacha notes the release of a new Australian government consultation on AI and considers some of the higher level principles for tech regulation.

Earlier this week, there was the announcement that Bruce Lehrmann had settled his defamation action against news.com.au and Samantha Maiden, while continuing his action against Ten and Lisa Wilkinson for initial reports of Brittany Higgins' allegations that she was raped in Parliament House, as well as the separate action against the ABC for broadcasting the National Press Club event featuring Higgins and Grace Tame.

But the biggest media story of all – in what Jason Bosland has described as 'the biggest defamation case we've ever had' – was the success of *The Sydney Morning Herald*, *The Age* and *The Canberra Times* in defending the defamation action brought by former SAS soldier, Ben Roberts-Smith.

Yesterday, Justice Besanko delivered a summary of his findings on the Federal Court's YouTube channel (with 10,000 of us watching live!). Besanko J found the publisher had successfully established defences against 14 separate imputations. Because the articles were published in 2018, the publisher was unable to use the new public interest defence that came into effect in Victoria and New South Wales in 2021. But in a surprising development, the publisher succeeded with the established defences of truth and contextual truth. While not requiring the publisher to reach the same standard of proof as in a criminal trial, this was still a difficult case to run because of the seriousness of the imputations, some of which

suggested Roberts-Smith had been directly or indirectly involved in murder when serving in Afghanistan in 2009 and 2012. The defamation action commenced in 2018, with 110 days of public hearings and with costs so far estimated at $25,000,000.

While the Roberts-Smith case will continue to draw public debate in the months ahead – with an appeal likely – this fortnight also saw some other important wins for investigative journalism.

First there was the dismissal by the Federal Court of the appeal by Peter V'landys over the ABC's 7.30 report on 'wastage' of thoroughbred racehorses, which I discuss below. And then there was the ABC Ombudsman's report that cleared the network's recent coronation coverage that included a 45 minute panel discussion featuring Stan Grant. The Ombudsman found the program did not breach the broadcaster's impartiality rules. But, as Monica explores below, was there another way to cover the critical issue of Indigenous dispossession?

Derek Wilding
CMT Co-Director

Coronation dreamin'

It's been the talk of Australian journalism for two weeks now: who is to blame for ABC TV host Stan Grant temporarily standing down as host of Q+A following criticism of his coronation day articulation of the ongoing impact of colonial conquest on the Indigenous population.

Should News Corp shoulder the blame because it published some 30 pieces criticising Grant? Or the social media racists who may have taken their cue from that criticism? Or the ABC itself?

In a withering article published on the ABC site, Grant, a Wiradjuri man, didn't name names. But he did point the finger at ABC management, excepting the head of the news division Justin Stevens. As for the rest of ABC management and staff, none, he said, had stuck up for him as the criticism flowed over his passionate elucidation of the harm and grief caused by the UK's colonisation of this land on a panel broadcasting just before the coronation ceremony.

As Derek has written, the ABC Ombudsman has noted the panel did not breach the corporation's impartiality rules but it was 'jarring and distracting for some in the audience'. Viewers complained too, and in their droves. The ABC received some 1,832 complaints,

which is a lot.

The ABC had 7 months' notice of the coronation date, which is a long time in the world of television. It is anyone's guess why it chose to cobble together a panel, the cheapest of all television formats, to proffer the ABC's taxpaying owners, broadcasting a few hours before the event. Surely the hard, uncomfortable truth deserved more than a panel. There was scope for the ABC to be ambitious with its coronation coverage, to have produced a documentary on the dispossession of Australia's Indigenous population and the ongoing trauma it has inflicted. Enough time even to have produced a documentary on the ongoing trauma of all the Indigenous populations around the British empire. ABC Managing Director, David Anderson says the panel was an appropriate editorial decision even if 1,832 complainants and the ABC own ombudsman beg to differ.

When it comes to hard truths, there'll always be arguments as to why they should or shouldn't be aired at any particular time. But if it was going to choose the cheap option, why the ABC decided to place the sole burden of speaking to such horrific history on the shoulders of Stan Grant – and why it was so tardy in defending him against the utterly predictable onslaught – is strange.

And is News Corp absolved of any blame? Not entirely. It loves to hate the ABC and its tone is often shrill. However, there was a story of public interest value in the number of complaints to the ABC about the broadcast, and what that said about where Australia finds itself in 2023 as it prepares to vote in a referendum on The Voice and as the country has space to contemplate a future as a republic.

Blaming News Corp for Grant's decision to take a break from the ABC is odd when the decision to place Grant in the firing line on a panel was the ABC's alone. With so many options available to it, the ABC chose that moment on that day to discuss issues fundamental to Australian identity, in a way that attracted criticism when it could have been credit.

Monica Attard
CMT Co-Director

Defamation v code complaint

In 2019 the ABC's 7.30 program ran a report on the 'wastage' of thoroughbred racehorses, revealing that horses were ending up at abattoirs despite an industry policy on rehoming. The report was hard hitting – and in parts, hard to watch. While its focus was on what happened to the horses, including the practices at a particular abattoir in Queensland, it included comments from Peter V'landys, then head of Racing NSW, that state's regulator of thoroughbred horse racing.

V'landys sued for defamation but his claim was rejected by Justice Wigney in the Federal Court and then, last week, by the Full Court in a judgement delivered by Justice Rares. In rejecting the plaintiff's arguments about the meanings conveyed by the program, the Full

Court found that the program did not present V'landys as lying about his knowledge of the slaughter of racehorses or of turning a blind eye to animal cruelty, as he claimed. The court drew a clear distinction between meanings of that kind and those which it said would have been conveyed to the ordinary, reasonable viewer of 7.30 – namely, 'that he might have been, or probably was, incompetent as a regulator'.

It's here that we can see the importance of the decision because – despite its disapproval of the way in which V'landys' comments were incorporated into the program – it affirms the important role of investigative journalism and, specifically, the role of 7.30 and programs like it – in questioning the conduct of public officials and holding them to account. Because this decision was based on a rejection of the meanings ('imputations') that the plaintiff said were conveyed by the program, it isn't a full exploration of the public interest in investigative journalism – as we might see in the ABC's use of the new 'public interest defence' in the action brought by Heston Russell. But it is a decision that effectively limits a plaintiff's attempts to recast legitimate points of criticism that emerge from investigative reporting.

It's a bit disappointing, then, that the significance of the decision seems to have been overlooked in favour of comments about how the interview with V'landys was incorporated within the program. In a paragraph right at the end of the 50-page judgement, after delivering his decision that comprehensively rejected all aspects of the appeal, Rares J commented on the way in which the V'landys comments were presented. The reporter had not shown V'landys the damning footage taken at the Queensland abattoir when asking him questions on practices within the industry, and the program had spliced this footage and comments from other interviewees – critical of the regulator – between V'landys' comments. Rares J described this as 'not high quality journalism or fair or decent treatment of him'.

So here we have a comment on ethical standards, separate from the decision on whether, at law, the program defamed V'landys. If the program were to be examined under the ABC's Code of Practice, presumably it would involve the obligations to 'provide a fair opportunity to respond' and to not 'misrepresent any perspective'. I'm not sure Justice Rares' criticisms would support a breach finding, but it would clearly be reasonable for the matter to be considered under the Code. And a well designed code with an effective complaints scheme is itself a reasonable alternative to legal action.

Derek Wilding
CMT Co-Director

Nowhere to hide/ Twitter 2.0

When Twitter submitted its transparency report under the EU Disinformation code in February, the commission publicly criticised it for being short of data, with no information on commitments to 'empower the fact-checking community'. This was something of an understatement. The report contained very little information at all, with nothing supplied under the qualitative reporting elements or the quantitative service level indicators introduced in June 2022. Instead, Twitter noted it would 'engage with the relevant stakeholders as to the best way to provide details on Twitter's compliance with the Digital Services Act' and to account for platforms' respective product and policy models, the risks they face, and the resources available to them.

It seems a bit rich to blame resourcing when Elon Musk has laid off more than 75% of Twitter's staff, including heavy cuts to its trust and safety team. But, reading between the lines, perhaps it should have been less of a shock when, last Friday, Europe's internal market commissioner Thierry Breton revealed Twitter had withdrawn from the Disinformation Code entirely. Breton also sounded a warning: 'You can run, but you can't hide'. Under the new Digital Services Act (DSA), companies designated as very large online platforms or very large search engines must undertake annual independent risk assessments and provide comprehensive data against agreed indicators every 6 months. Breaches attract penalties up to 6% of global turnover. Twitter was designated alongside 18 other services on 25 April and has 4 months to comply.

The DSA gives little flexibility for different product and policy models, risks or resourcing, all of which look pretty shaky under 'Twitter 2.0', the 'town square of the internet'. Soon after Musk's takeover, the company signalled a shift in its content-moderation approach towards 'Freedom of Speech, Not Freedom of Reach', or, in policy speak, 'de-amplification of violative content'. Since then, Twitter has cheerfully announced several related innovations, including crowd-sourced fact-checking system community notes (formerly Birdwatch), and labelling of de-amplified posts. These might have promise as part of a comprehensive strategy to combat misinformation. But if such a strategy exists, it appears to be failing.

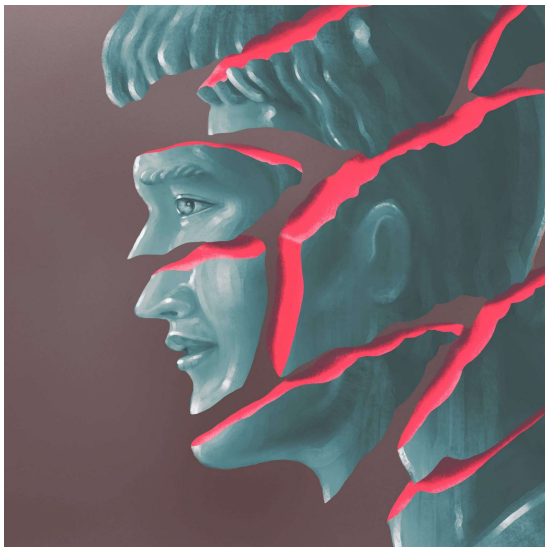
In part, this is directly attributable to Musk's own reach – and behaviour – on the platform. Science Feedback has shown that misinformation superspreaders increased their reach significantly after Musk engaged with their posts, and the Institute for Strategic Dialogue found that Musk's Twitter activity changed considerably after he bought the platform – from engaging mostly with his fans to interacting with right-wing accounts. But product and policy models are also to blame. Reset found that Musk's decision to roll back controls on Kremlin-controlled media substantially increased the reach of Russian disinformation. And recent research in Australia has found evidence of coordinated manipulation boosting misinformation on the Voice.

Meanwhile, signatories to Australia's code recently submitted their local transparency reports. It's no surprise that Twitter's is pretty threadbare: the company shut down its

Australian office in January. Twitter hasn't signalled an intention to quit Australia's code, but with the government to grant ACMA new powers to call platforms to account, there may soon be nowhere to hide here either.

Michael Davis
CMT Research Fellow

The right not to be extinct



This week AI industry leaders admitted that AI poses an extinction risk. 'Mitigating the risk of extinction from AI should be a global priority alongside other societal-scale risks, such as pandemics and nuclear war,' said the group, which includes OpenAI CEO Sam Altman.

Ok, let's think this through. Let's say you have a machine that generates text and images based on all the content that's out there on the internet. If your machine spreads defamatory lies that someone has been in prison, when in fact they haven't, are you responsible? If your machine copies the work of artists who don't want to be copied, are you responsible? And if your machine leads to, um, the extinction of humanity, are you responsible?

Regulators globally are recognising it's time to act. Yesterday, the Department of Industry, Science and Resources released a discussion paper on supporting responsible AI. The paper nominates misinformation as a key issue, and in an interview with Sabra Lane on AM, Industry and Science Minister Ed Husic singled out the protection of news as a particular concern. Even big tech is now calling for regulation. Last month, OpenAI's Sam Altman told US Congress that guardrails were needed in the form of an AI regulatory agency and mandatory licensing for companies.

That would be a start, and here are two more ideas. First, as I wrote in 2020 in relation to privacy, the law needs a straightforward way to apportion an appropriate degree of responsibility to the digital services that cause the harm. The same is true for AI. To achieve this, we should switch from a caveat emptor (buyer beware) approach to a caveat venditor (seller beware) approach. Instead of putting the responsibility on users for their treatment, digital platforms ought to bear responsibility for how they treat consumers. For one thing, this would mean that section 230 of the US Communications Decency Act, which gives digital platforms immunity from responsibility for content on their sites, needs to be completely redrafted.

Second, this responsibility can be meted out in the form of general principles. Instead of articulating all the minutiae in an attempt to cover every future innovation, for instance, let's

mandate fairness and outlaw coercion. Such an approach recognises that legislating at the micro level is tricky. Rather, let's legislate larger, sweeping provisions. In some cases, the law already does this, including prohibitions in the Australian Consumer Law against 'misleading and deceptive' conduct. Indeed, one of Australia's biggest privacy wins came last year, when the Federal Court ordered Google to pay $60m in penalties for making misleading representations about the collection of location data. Further provisions in the law could buttress consent, mandate fairness, outlaw coercion and mandate a degree of transparency.

For now, Europe leads the way with digital regulation. In 2018, it implemented the GDPR to protect privacy, which last week saw Meta fined 1.2 billion Euros for mishandling consumer data. Last year – as Michael mentions above – it implemented the Digital Services Act, which imposes obligations on platforms for mitigating risks related to the spread of harmful and illegal content. And now there's an AI Act in the works - about which Altman has expressed some concerns. In the face of an 'extinction risk', Europe's response hardly looks like regulatory overreach.

Sacha Molitorisz
Senior Lecturer, UTS Law

Come work with us

CMT is looking for a new team member! We've just posted ads for a Research Officer to work on the ARC-funded Discovery Project, *The Future of Co-Regulation in the Digital Platform Era* . We're looking back over the use of co-regulation in the broadcasting, telecommunications and internet sectors and forward to how it might be redeployed in the regulation of digital platforms. The Research Officer will be appointed on a part-time basis (three days per week) for a fixed term of two years. Inquiries can be directed to Derek or the UTS Recruitment Team.

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The Centre for Media Transition and UTS acknowledges the Gadigal and Guring-gai people of the Eora Nation upon whose ancestral lands our university now stands.
We pay respect to the Elders both past and present, acknowledging them as the traditional custodians of knowledge for these places.