

Article Information

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Crackdown on keyboard warriors? - the Government consults in response to *Fairfax Media Publications Pty Ltd v Voller* (2021) 392 ALR 540

In September 2021, the High Court handed down the controversial decision of *Fairfax Media Publications v Voller* (2021) 392 ALR 540 (*Voller*). You can read our analysis of the first instance decision [here](#).

In effect, the High Court confirmed that owners of social media pages would be liable, as publisher, for defamatory comments made on their public Facebook pages, regardless of their knowledge of those comments. While *Voller* was limited to comments made on Facebook, the High Court's decision would also apply to other social media platforms (such as LinkedIn, Instagram and Twitter). Further, while the unsuccessful plaintiffs in the High Court were large media organisations such as Fairfax Media, there was nothing by the High Court to suggest the same outcome would not apply to smaller organisations or individuals, likely with far less capacity to monitor and moderate comments on their social media pages.

Impact of *Voller*

The implications of *Voller* are far-reaching. The majority of the High Court concluded that social media page owners would be liable for *any* defamatory comments, regardless if they were aware of those comments, or if the comments were entirely unrelated to the original post.^[1] The effects are already being felt, with various media outlets having now disabled comments for their posts (a feature unavailable to the plaintiffs at the time of their conduct), and US media giant CNN removing their Facebook page in Australia completely.^[2] While the High Court ultimately did not consider the potential defences available, such as innocent dissemination, there remains concerns that individuals and businesses of all sizes could face expensive proceedings as publisher by aggrieved plaintiffs.

Federal Government's response

In rapid response to the High Court's decision in *Voller*, the Australian Government has prepared an exposure draft of the Social Media (Anti-Trolling) Bill 2021 (**Bill**). In the explanatory paper to the Bill, the Australian Government states:

Liability concerns may have a chilling effect on free speech, as people who administer social media accounts may censor comments or disable functionalities due to a fear of being held liable in defamation for content that they did not post.

In some cases, the *Voller* decision may have contributed to decisions to limit the ability for the general public to interact with social media posts about news and current events.^[3]

The Bill seeks quash the *Voller* decision by making it clear that social media page owners are *not* 'publishers' of defamatory material posted on their pages by third parties.

It is important to note that defamation is a tort at general law which has been modified, and to a large extent, regulated by harmonised state and territory legislation. However, since 2004, the Standing Committee of Attorney-Generals across

Australia have been committed to a consistent approach with respect to defamation legislation, which is expected to be continued in their review of the Bill.

The proposed Bill

The Bill takes a somewhat controversial approach by asserting that page owners cannot be liable as publishers for comments made on their posts, while at the same time stating that social media providers (Facebook, Twitter, etc.) will be publishers, in addition to the actual commenter.

The Bill provides that Australian page owners (which includes body-corporates incorporated within Australia)[4] are not to be taken as publishers of comments made on their page for the purpose of the general law of defamation.[5] At the same time, the Bill makes social media providers publishers of comments on its platform when those comments are made in Australia.[6] It does, however, provide social media providers with a defence if they have a compliant complaints scheme, and have followed that scheme.[7]

Complaints scheme under the Bill

The aim of the complaints scheme is to focus proceedings on the dispute between the victim and the originator of the defamatory content. It does this by creating a scheme under which the victim is able to make a complaint to the social media provider about a particular comment.

Following the making of a complaint, the social media provider will have 72 hours to notify the commenter that their comment is subject of a complaint and seek their consent to remove the comment.[8] The complainant also needs to be provided with the country location data of the commenter within 72 hours of the complaint.[9] Following this, if the complaint is still not resolved to the complainant's satisfaction, the social media provider may seek the consent of the commenter to provide the commenter's contact details to the complainant.

End-user information disclosure orders

The Bill also introduces the ability for a court to make an order which would compel the provider of a social media service to disclose a commenter's country location data, and if the comment was made in Australia, the commenter's contact details.[10] Previously, leave of the Court would be required to serve overseas entities such as Google (who tend to not be willing to participate in proceedings of this kind) with orders for preliminary discovery, a long and often costly process.[11] The scheme aims to streamline this process to assist prospective applicants to unmask those who hide behind anonymity with a view to eventually instituting proceedings.

Take Aways

The Bill will not only largely displace the High Court's decision of *Voller* but also displace a lot of the current common law surrounding defamation. While the decision of *Voller* largely relied on traditional views about publication, the Australian Government is making a clear policy statement that it sees these traditional views as outdated and requiring amendment to suit the social media age. It should be noted that the Bill only amends proceedings under the general law of defamation. It may still be possible for page owners to be liable for comments which are misleading and deceptive if they have knowledge of the misleading and deceptive comments and decide to leave them on their public page as was found to be the case in *Australian Competition and Consumer Commission v Allergy Pathway Pty Ltd (No 2) (Allergy Pathway)*. [12] *Allergy Pathway* was referred to in *Voller* by Steward J (dissenting) in support of the view that knowledge of the comments was required before a page owner could be held a publisher.[13] While owners and operators of public social media pages may breath a sigh of relief, social media platform providers are on notice.

The Bill will also, in part, address concerns about 'keyboard warriors' who hide behind anonymous account profiles with the intention of inflicting serious reputational damage to individuals and businesses. There are however concerns that the proposed Bill will provide large social media companies with a 'safe harbour' to hide in while at the same time publishing inflammatory content designed to cause a stir.

If anything, the decision of *Voller* and the Bill only reinforces the importance of having a sound social media strategy for your business, which includes appropriate moderation and regulation of social media accounts.

The Australian Government is currently seeking feedback on the Bill which you can submit until 21 January 2022 through the Australian Government's [online consultation hub](#), or to the Defamation Taskforce at defamation@ag.gov.au.

Piper Alderman has a nationally recognised defamation practice (for both plaintiffs and defendants), and can assist with social media policies and advice. [Please contact us if you require advice on these matters.](#)

[1] *Fairfax Media Publications Pty Ltd v Voller* (2021) 392 ALR 540, 552 at [55] (Kiefel CJ, Keane and Gleeson JJ), 564 at [105] (Gageler and Gordon JJ).

[2] Jill Disis, 'CNN will no longer publish content on Facebook in Australia' *CNN Business* (online, 29 September 2021) <<https://edition.cnn.com/2021/09/29/media/cnn-facebook-pages-australia-intl-hnk/index.html>>.

[3] Attorney General's Department (Commonwealth), 'Social Media (Anti-Trolling) Bill 2021: Explanatory Paper' (1 December 2021) < <https://www.ag.gov.au/system/files/2021-11/explanatory-paper-social-media-anti-trolling-bill-2021.PDF>>.

[4] Exposure Draft of the Social Media (Anti-Trolling) Bill 2021 s 6 (definition of 'Australian person').

[5] *Ibid* s 14(1)(c).

[6] *Ibid* s 14(1)(d).

[7] *Ibid* s 14(2).

[8] *Ibid* ss 16(1)(b) and (e).

[9] *Ibid* s 16(1)(d).

[10] *Ibid* s 18(2).

[11] See, for example, *Lin v Google LLC* [2021] FCA 1113.

[12] (2011) 192 FCR 34, 42 at [33] (Finkelstein J).

[13] *Voller* (n 1) 585 at 175.