Online defamation position remains unclear after *Voller* settles and Anti-Trolling Bill lapses

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AT A GLANCE

- In September 2021, the High Court delivered a landmark decision in *Voller*, confirming that Facebook page operators are liable as 'publishers' for defamatory third-party comments left on their social media posts.
- The media and insurance industries are still awaiting clarity on the issues raised in *Voller* as the defence arguments were not fully tested given the matter was settled out of court in March 2022.
- Similarly, potential direction offered in the *Social Media (Anti-Trolling) Bill 2022* – created in response to *Voller* – is no longer available as the bill lapsed at dissolution in April 2022.
- The issue remains a live debate for social media platform providers, their insurers and the legal sector.

INTRODUCTION

In September 2021, the High Court delivered a landmark decision confirming that Facebook page operators are liable as "publishers" for defamatory third-party comments left on their social media posts in *Fairfax Media Publications Pty Ltd v Dylan Voller*; *Nationwide News Pty Limited v Dylan Voller*; *Australian News Channel Pty Ltd v Dylan Voller* [2021] HCA 27 (read more here).

The *Voller* decision sent shockwaves through the industry, particularly the media and legal industries and the views were polarising. Some welcomed the *Voller* decision as an adequate way to protect people's reputations, while others believed it reached too far and illustrated the need for Australian defamation law to be updated for the digital age.[1]

In any event, the judgment was a preliminary one. Many awaited the proceedings to progress so that there could be a judgment on the defences being run by the media companies.

Since that decision, there have been some substantial developments:

1. In direct response to the *Voller* decision, the *Social Media (Anti-Trolling) Bill 2022* was tabled by the former Morrison Government in the House of Representatives.
2. On 11 April 2022, the Anti-Trolling Bill lapsed at dissolution after the election was called and is now no longer proceeding.
3. In March 2022, the *Voller* case settled out of court.

In this article, we look at what was intended to be rectified by the Anti-Trolling Bill and what the settlement of the *Voller* case means for the industry.

THE ANTI-TROLLING BILL

One of the key concerns following the *Voller* decision was that people or organisations who maintained social media platforms could be liable as publishers of defamatory material, even when they were not aware of the defamatory material or did not intend its publication.

In managing the risks associated with the *Voller* decision, certain commentators were concerned about the impact it would have on free speech and important discourse around certain content, given that the *Voller* decision effectively forced social media operators to censor comments or disable engagement functionality to limit the risk of liability.[2] Others opined that the risk was an "unmanageable" one in circumstances where certain users are posting multiple times per day and there are high volumes of comments on those posts.[3]

In some cases, publishers stopped posting some content. For example, Dave Earley of *The Guardian Australia* revealed that they would "not post stories about politicians, Indigenous issues, court decisions, anything that we feel could get a problematic reaction from readers."[4] The absence of such stories from public discourse would have an obvious catastrophic impact on the way important issues are debated, considered and notified to the public.

In our earlier article, we observed that the censoring task would be an onerous one, especially for smaller businesses that are not established with the necessary resources to undertake the monitoring task. The Hon. Bruce Billson, Australian Small Business and Family Enterprise Ombudsman, echoed this concern in the Committee Hansard.[5]

The Anti-Trolling Bill was significant because it sought to reverse the *Voller* decision by providing that an Australian person who maintains or administers a social media platform is not a publisher of third-party comments on their page for defamation purposes, and therefore cannot be liable in defamation. In addition to this, the Anti-Trolling Bill sought to achieve the following outcomes:

- establish a complaints system that must be implemented by social media providers
- require providers of social media services to have a nominated entity in Australia to allow them to comply with their obligations under the Anti-Trolling Bill
- authorise courts to issue end-user information disclosure orders (EIDOs), which require the social media provider to divulge the contact details of the person who posted the alleged defamatory material so that prospective complainants can identify and commence proceedings against the poster
- provide a conditional defence for social media service providers where material is posted on their platform and posted in Australia – the defence is available if the provider has complied with the above conditions in the Anti-Trolling Bill
- give certain powers to the Attorney-General so that they can intervene in certain circumstances.

Prominent legal practitioners have weighed in on the debate of the necessity to redress the *Voller* decision and on the need for an Anti-Trolling Bill.

The Law Council of Australia expressed the view that "intervention at the federal level in the law of defamation should not occur until the completion of the Stage 2 Review process and should form part of any package of reforms to the liability of online intermediaries more broadly".[6]

Professor Michael Douglas contends that the Anti-Trolling Bill conflates publication of defamatory material with liability for defamation. He says mere publication does not result in liability and liability can be avoided through the defences available, such as innocent dissemination (which was being argued in the *Voller* case).[7]

Offering a different perceptive, high-profile lawyer, Nyadol Nyuon, who herself has been a victim of online trolling, has criticised the Anti-Trolling Bill as not being "useful" to most people in Australia due to the cost and effort involved.[8] Meanwhile, barrister Sue Crysanthou SC described the Anti-Trolling Bill as "a violent assault on the tort of defamation by the Commonwealth, for which no rational basis or reason has been provided" and that it provides "immunity to large corporations that make money hosting forums where defamatory publications are made."[9]

Interestingly, the latter point is one that was addressed in the *Voller* decision and was used by some of the majority judges to illustrate why the Facebook page operators should be deemed as publishers of such comments.

VOLLER SETTLEMENT

The Guardian reported that the *Voller* proceedings were settled out of court.[10] It is curious that the defendants in the *Voller* case did not want to use the proceedings to test the strength of their defences to mitigate the earlier finding that they are publishers of third-party comments of defamatory material. With a settlement made, the strength of their arguments remains unknown.

The defence of innocent dissemination is the most relevant defence that could be used to address the issues arising from the *Voller* decision. The defence of innocent dissemination might be available to a person who innocently disseminated defamatory material, by not knowing the matter was defamatory and where their lack of knowledge was not due to any negligence on their part. In Victoria, the defence is found in section 32 of the *Defamation Act 2005* (Vic).

Section 32 defines what a 'person' is for the purposes of the section. In the context of defamatory material appearing online, the defence could arguably be run by operators of social media platforms under one of the three prescribed categories:

- **section 32(3)(e)** – a broadcaster of a live programme (whether on television, radio or otherwise) containing the matter in circumstances in which the broadcaster has no effective control over the person who makes the statements that comprise the matter
- **section 32(3)(f)** – a provider of services consisting of – (i) the processing, copying, distributing or selling of any electronic medium in or on which the matter is recorded; or (ii) the operation of, or the provision of any equipment, system or service, by means of which the matter is retrieved, copied, distributed or made available in electronic form
- **section 32(3)(g)** – an operator of, or a provider of access to, a communications system by means of which the matter is transmitted, or made available, by another person over whom the operator or provider has no effective control.

WHERE TO FROM HERE?

It's fair to say this area of law is in a state of flux. The *Voller* decision remains the current state of the law and social media platform operators should continue to be vigilant in monitoring their social media pages for defamatory content. This includes proactively disabling comments where a potentially controversial topic may lead to third-party commenters posting defamatory material.

The Anti-Trolling Bill reflected the former Morrison Government's desire to pierce the social media veil, identify the creators and/or authors of defamatory comments, and distinguish them from the 'publisher' (a.k.a. platform) hosting those defamatory comments.

Whether the Anti-Trolling Bill would have redressed the perceived imbalance created by the *Voller* decision depends on which side of the fence you sit on. However, as it is now no longer on the agenda given Labour's success at the recent Federal election, we will have to wait for further clarity once another similar case is run and the defences are truly tested.

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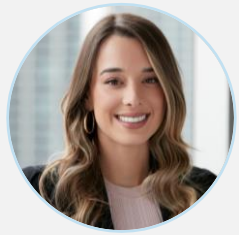

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