# Centre for Media Transition

Hi there

Mixed results in defamation and copyright
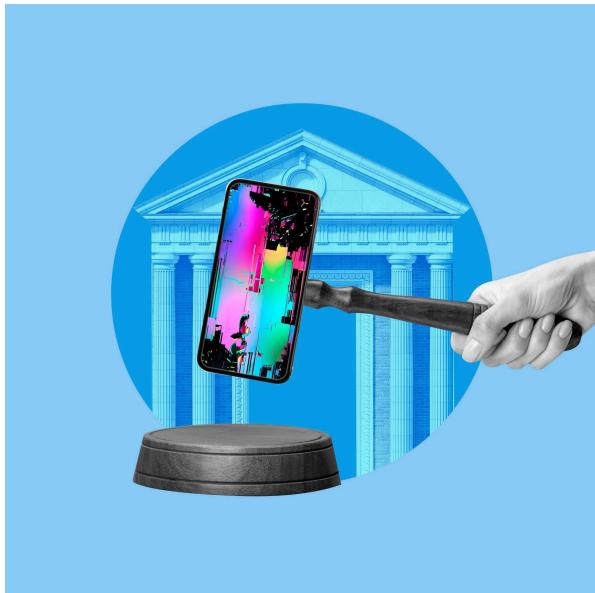
Media law and ethics are in the spotlight this fortnight — with mixed results for press freedom.

Last week, there was the Federal Court hearing of Bruce Lehrmann's appeal against Justice Lee's headline-making rejection of Lehrmann's defamation claim against Network Ten and Lisa Wilkinson. Reports of the appeal hearing noted some sceptical comments from the Bench. Lehrmann — who is already facing enormous costs in the matter — was represented only by a solicitor, while the media respondents had specialist defamation barristers, Matt Collins and Sue Chrisanthou. Referencing Justice Lee's previous quip about Lehrmann and the lion's den, the Gazette of Law and Journalism observed, 'Lehrmann has another shot at his hat'.

Then yesterday, former Defence Minister Linda Reynolds learned she had been successful in her defamation action in the WA Supreme Court. This case did not involve a media defendant — instead, Reyolds brought an action against Brittany Higgins for social media posts she made in 2022 and 2023. Reynolds was awarded damages of $135,000 for one tweet and $180,000 for another. From a report in The Australian, it appears that Higgins successfully defended other tweets.

Also in the past fortnight we've seen the decision of the Full Court of the Federal Court in *The Game Meats Company of Australia v Farm Transparency International.* Farm Transparency is an animal rights group who wanted to publish a video, acquired by trespassing, of alleged animal cruelty at an abattoir owned by Game Meats. Farm Transparency sent the video to a local government department, then gave the footage to Channel Seven. Seven – on notice from Game Meat's lawyers – ran a story but declined to show the footage. As Media Watch showed last week, this is a decision that raises real concerns for public interest journalism. The Full Court ruled in favour of Game Meats, issuing an order preventing publication of the video and also requiring that Farm Transparency destroy its copies. Additionally – and this is the staggering part – Farm Transparency is required to assign copyright in the video to Game Meats. Below, copyright and media law specialist, Dr Sarah Hook, explains the decision and how it breaks new ground – not for the better.

An even more remarkable outcome – this time in a good way – was seen in the judgment in favour of Nine Entertainment in its defence against the defamation claim from surgeon Mujad Al Munderis. Below, I look at the difference between the application of the new(ish) public interest defence in this matter and in the action brought by Heston Russell against the ABC. Whereas the ABC failed on public interest as its only defence, Nine succeeded in its defences of contextual truth and public interest.

Also this week, Monica considers the ABC's new guidelines that will govern public comments by staff. She observes that while they make the internal complaints process clearer, it's hard to see how they help to manage different views on the place of impartiality at the national broadcaster. And finally, Chris Hall tells us about his recent exchange with Google's Gemini in which the AI assistant made a startling admission about quality control of its own free and subscription offers.

Derek Wilding
CMT Co-Director

Game Meats v Farm Transparency

The contortions of copyright law
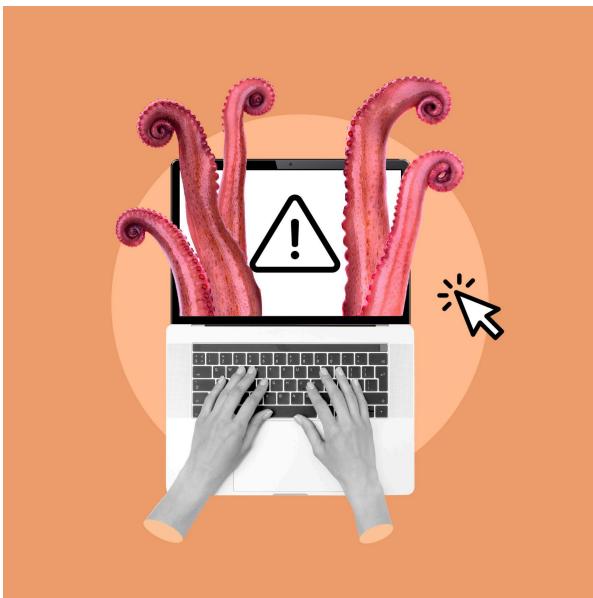
Copyright is more often a sword than a shield but the recent case of *The Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd* illustrates that it can also be used to restrict access and publication of material a company would rather not show. In *Game Meats* there was an extraordinary outcome: forcing an assignment of copyright over footage taken while trespassing over a goat slaughterhouse.

This remedy goes much further than a simple injunction or destruction order. In effect it requires a constructive trust until the assignment in writing is made. This means that any third party seeking to publish the material would be in breach of The Game Meats Company's copyright. This, in turn, overcomes the issue in *ABC v Lenah Game Meats.* In that case, decided back in 2001, the High Court discharged an interim injunction preventing the ABC from broadcasting footage obtained at a possum processing plant because Lenah Games Meats could not identify a right on which to order the injunction. (Although there was consideration in this case of a tort of invasion of privacy, such a right has not evolved at common law in Australia; instead, a new statutory tort came into existence in June this year.)

Injunctions as well as the imposition of fiduciary relationships and constructive trusts are not novel in intellectual property cases. Injunctions are also common in confidentiality and contract cases, but the actual assignment of copyright as a result of a successful trespass case is certainly novel.

There are many cases where restraint of publications has been sought for journalists who have trespassed in order to get the story – although rarely successful. Even the Pentagon Papers were able to be published. In *Douglas v Hello! Ltd* Michael Douglas and Catherine Zeta-Jones were able to restrain via interlocutory injunction the ability to publish photographs, but the injunction was discharged two days later and the photos subsequently published. In *Lincoln Hunt Australia Pty Ltd v Willesee* an injunction to stop a recording being published when reporters filmed the lobby of a company was refused. In *Windridge Farm Pty Ltd v Grassi* a similar slaughterhouse situation arose where the plaintiff applied for an order that copyright be assigned but was refused. This was because the plaintiffs did not threaten to publish but merely to show the video to a veterinarian and authorities connected with animal welfare.

These farm trespass cases are situations where defamation actions are generally precluded and where injurious falsehood claims do not succeed as they do not involve

false statements. Until now, they have been seen by animal welfare activists as perhaps the only way to make sure that companies are treating their animals fairly. The idea that the Court has power to grant an injunction in the appropriate case to prevent publication of a videotape or photograph taken by a trespasser even though no confidentiality is involved is not novel, especially where publication would be unconscionable – however, the assigning of copyright itself seems unusual. The court in *Game Meats* is basing an unprecedented step on the back of two paragraphs of obiter in *ABC v Lenah Game Meats Pty Ltd*.

Obviously, this order is to ensure any third parties do not publish, however it raises some odd questions, such as whether the plaintiffs would still have moral rights in the footage, were the company to use it later? Where is the public interest considered? Making these copyright cases rather than privacy and defamation means that the public interest in the footage and any consumer rights to know, as well as animal rights, can rightly be ignored. This is clearly not the purpose of the *Copyright Act* which is to incentivise creativity. Farm Transparency International have indicated a willingness to take this to the High Court – we may see the slaughter yet.

Sarah Hook
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Applying the public interest test
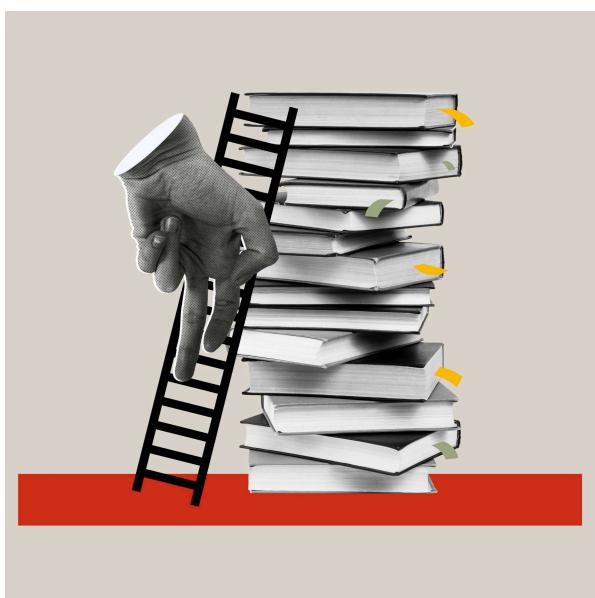
Nine Entertainment's success in defending its reporting in the Sydney Morning Herald, the Age and 60 Minutes on surgeon Dr Munjed Al Muderis was astonishing. Serious allegations of failures in patient care are quintessential defamation fodder; when directed at a public figure with a background of personal and professional achievement, they almost invite litigation. But here, in a major breakthrough for publishers, Nine chalked up the first successful use of the new public interest defence.

This new defence was introduced in New South Wales and most other Australian states

and territories in 2021, but in 2023 it failed at the first hurdle when the ABC tried to use it to defend its reporting on Heston Russell. In that case, Judge Michael Lee observed that this wasn't the ideal matter on which to test the new defence. But the circumstances in Al Muderis were quite different, not least because, in addition to public interest, Nine succeeded on the defence of contextual truth. (As we saw in the same publisher's defence against Ben Roberts-Smith, contextual truth allows a defendant to rely on the substantial truth of claims that are at least as serious as those on which the plaintiff sues.) It's worth looking at both the Russell case and Al Muderis and asking what we now know about the new defence.

The public interest test has three core elements. A publisher must establish that the matter concerned an issue of public interest; that they subjectively believed that publishing this material was in the public interest; and that this belief was reasonable in the circumstances. The first point is relatively easy to establish for any example of serious journalism. The recent judgments show the second element will need the journalists to give evidence and to show that they formed this belief at the time, and that they didn't rationalise it all later. The third requirement – that it was reasonable in the circumstances to believe that publication of the matter was in the public interest – is what Justice Lee in the Russell case described as "the heart of the matter". The relevant section in the Defamation Act (s 29A) includes a non-mandatory list of factors that can be taken into account, including aspects such as the steps taken to verify the information.

In Al Muderis, Justice Abraham said that deciding whether a journalist's belief was reasonable involves "an assessment of that belief in the context of all the information garnered from the investigation that the journalist had". Here, she found the journalists formed a belief that although Dr Al Muderis had experienced great success with his osseointegration surgery for amputees, the information on the public record was incomplete, with a significant cohort of patients who did not share this experience, and that it was in the public interest for the community, including prospective patients, to know about this. The fact that this belief was reasonable largely came down to the work the journalists had done in order to get to this point. And they had, indeed, interviewed a very large number of health professionals and former patients – so large, in fact, that they were able to corroborate the stories of some anonymous participants with those who were prepared to be named. Justice Abraham accepted the publishers' statement that by the end of the investigation they had "spoken to approximately 76 sources … and reviewed thousands of pages of emails, business records and scientific papers". Nine also explained the successes Dr Muderis had experienced as well as the perceived failings, and it conducted a lengthy interview with him and included the substance of his position in the publications.

In contrast, in the Heston Russell case, Justice Lee identified problems both in the verification of facts and in the way in which the article was presented. The reports had

centred on very serious allegations concerning a platoon of Australian commandos in Afghanistan, including an incident where an Afghani prisoner had apparently been shot because there was insufficient room on a helicopter that was evacuating the soldiers and their prisoners. In effect, Justice Lee found that the ABC overstated the extent to which its main source had identified Russell's platoon as the unit involved, as well as the extent to which the response to an FOI request confirmed the claims made by the ABC. The lead journalist didn't follow up with sources that might have verified important claims, and while it was reasonable for another journalist to expect to rely on the existing research, he still had an individual responsibility to inform Russell of the nature of a follow-up article and obtain a proper response before publication. The ABC also ran into problems when it added 'key points' to its article which included a significant factual error.

These two cases, taken together, suggest that the public interest defence is not without its hazards. They show that although the new test is a long way from the treacherous 'responsible journalism' test of the notoriously difficult qualified privilege defence, it still involves examination of the conduct of the publisher in order to establish whether the belief about the matter being in the public interest was reasonable. The Al Muderis case (assuming the decision is upheld on appeal) shows that the legal landscape has shifted a little over the last few years, and that the new defence can succeed for public interest journalism. That said, there is perhaps a further challenge ahead: can a publisher establish public interest without also having established substantial truth or contextual truth?

Derek Wilding
CMT Co-Director

Speaking of the ABC ...

What the ABC once called a social media policy is now a public comment policy, though the new policy remains vague on what staff can and can't say publicly.

There are a few changes though: the former policy didn't include private conversations between ABC staff and others on messaging apps like Whatsapp and it didn't include comments made by staff in public fora, like literary festivals. The latter does. Nor did the former policy detail levels of risk attaching to different positions. The new policy says workers at the "highest risk of undermining the independence and integrity of ABC content" include journalists, producers, news editors and senior leadership. And it makes clear that in the event of an alleged breach, HR should be on the end of the phone line,

rather than senior management or members of the ABC board, presumably in a nod to the mess the ABC found itself in when Antoinette Lattouf was unceremoniously removed by her line managers from her short-term presenting stint over a social media post on Gaza.

The overhaul had been coming for a long time, according to Managing Director Hugh Marks. But it's hard to imagine that the recent Federal Court judgment in the Lattouf case didn't give the work some urgency. Judge Rangiah found that an Instagram post by Lattouf of a Human Rights Watch claim about Israel's conduct of the war, might have been "ill-advised and inconsiderate of her employer", even risking damaging the ABC's reputation for impartiality. But the ABC, in a state of panic over a campaign by the pro-Israel lobby dismissed Lattouf in contravention of the protections she had under the Fair Work Act to express her political opinion. The ABC didn't argue that it too had protections under the act. In any event, the judgment could have paved the way for staff wanting to test how far they could go in exercising their freedom to publicly express their political opinions before the ABC could stop them.

Now, there's some detail around how that might happen and in what circumstances. Staff must be mindful that if they say something that on social media, at public events or in any context where comments may "reasonably" be expected to reach a public audience, including on private messaging apps like Whatsapp, that undermines the ABC's independence or editorial integrity, their job could be on the line – though that decision is one which now lies firmly distanced from the ABC board. Public comments that don't meet the standards set out in the guidelines will be managed in consultation with People & Culture and judged against Editorial Policies and staff might end up being found to be in breach of the ABC's Code of Conduct. In other words, a line manager concerned about what a staff member has said publicly might refer them to People and Culture for a possible breach of the ABC's Code of Conduct, but staff can't be summarily dismissed, as Lattouf was by a line manager acting alone. In a sense, it's what always has been the process, but it's now in writing for the those who might have missed their induction to the ABC.

The new policy doesn't offer much more detail on what might be considered to be in breach of the Code of Conduct. It simply says that employees "will not make any public comment that undermines your perceived or actual ability to perform your role; undermines the independence or integrity of the ABC or any ABC editorial content; implies

ABC endorsement of your personal views; is on behalf of the ABC, or in a way that could be seen as representing the ABC, without prior authorisation".

But that's vague and possibly troublesome for the ABC as it continues to face criticism, largely from activists, over its coverage of Israel's war against Gaza. The guideline doesn't get to the nub of whether – as the activists say – some observable events can rub up against how impartiality is commonly practised and when that happens, journalists have a moral duty to reject the impartiality embedded in the ABC's Editorial Policies and importantly in its charter. Under the new public comment guidelines, doing that might get a staff member into a spot of bother, which might be why the Media, Entertainment and Arts Alliance says the new policy is punitive towards those with expertise or lived experience who speak out against the way the national broadcaster covers some issues.

In the end, the new policy – much like the Rangiah judgment – does little to breach the gap between the broadcasters' statutory obligations to be impartial and the happily growing diversity of ABC staff.

Monica Attard
CMT Co-Director

AI and scholarly hallucinations
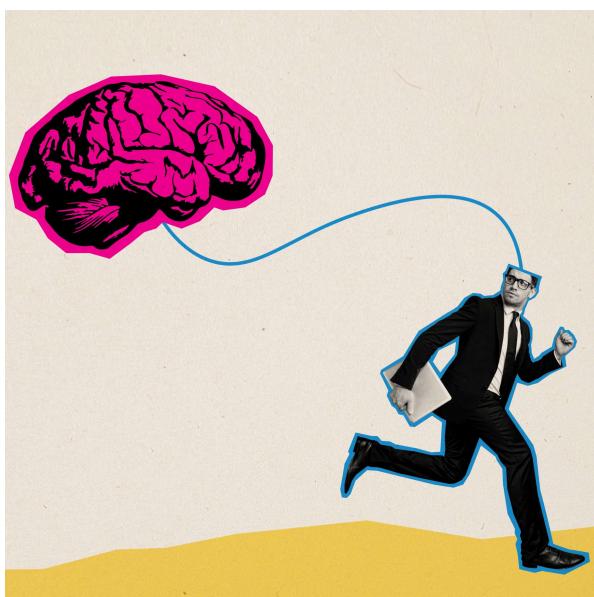
AI is a big deal at the moment. Grants are given to research into AI. Job ads are asking for AI knowledge or skills. And the first step in learning for many undergraduates, fresh out of high school, is to "just ask chat". What's more, the newest version of ChatGPT apparently has "new 'PhD' abilities" whatever that means.

On social media, the hype is next level. On LinkedIn, there are posts promising that AI can cut research time in half. On YouTube, influencers claim AI can help "Smart PhD Students Find a Research Gap". It got me thinking. Am I a smart PhD student? Could I have saved time by engineering a research gap prompt using ChatGPT Playground,

inserting the prompt into Gemini to get a research gap. Then put the gap into ThesisAI to generate a full literature review, and then have an LLM write a thesis, making sure to get an AI to change it so it passes AI detection software. Using these tools could a PhD be completed in a couple of hours?

Despite the hype, I can't seem to find any good uses for LLMs. Maybe this is because I started my PhD way back in the middle of 2022 and I am used to outdated practices like reading and writing. I haven't used an LLM for my literature review. I don't use it to write or check my writing. I didn't use it to analyse my interviews or do any content analysis.

What I have done is test LLMs to see what they know about my area of study. More importantly I wanted to know if they mention any of my articles. After all, if people are using them to learn about things, it would be great if my work was brought up in conversations with AI.

The most interesting thing I have found is that accuracy is not the top priority for LLM outputs. This should be an obvious problem if you intend to use LLMs for any kind of research. I asked Gemini about platform journalism. It gave a general summary of the concept, combining it with social media journalism. I asked for more specifics and, as part of its answer it said,

"In the academic paper 'Platform Journalism as an Emergent Form of Social Media Communication,' the author, Daniel Funke, begins by discussing the rise of 'platform journalism.' He defines it as a distinct form of journalism created for and shaped by the unique affordances of platforms like YouTube and TikTok."

I had not seen that paper before, so I asked for a link. Gemini then apologised and said that it "should have been more careful to verify the existence of the article before presenting it as a fact."

I asked why it had fabricated an article, and it explained that its "primary directive" is to be "helpful" and provide complete answers. This primary directive can override the goal of being accurate.

I thought that perhaps the issue was that I was using a free version of Gemini. I asked if upgrading would have avoided the fabrication. Apparently using a more powerful LLM does not ensure accuracy, as Gemini explains (if you can believe it!).

"The error was in my flawed prioritization of being 'helpful' by creating a plausible-sounding answer instead of being 'truthful' by admitting a limitation. **A more powerful model might be even more skilled at synthesizing plausible but fabricated information, so the same fundamental flaw in logic could still lead to a similar**

result. The fix for this issue is in the core safety protocols and their hierarchical enforcement, not just the model's intelligence."

Accuracy is a priority for researchers. So, for me the current LLMs are not accurate enough to be useful in my work. I also lack the resources to develop my own custom AI model, which some news organisations are experimenting with. For now, I will continue to just read a lot. To write things myself. And to make time for thinking and reflection.

Chris Hall
UTS Phd Candidate

We hope you have enjoyed reading this edition of the *Centre for Media Transition newsletter* - News and the public interest: defamation, copyright and public comment - *Issue 15/2025*   **ISSN 2981-989X**

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GEN AI AND JOURNALISM

FINDING A WAY FORWARD FOR AUSTRALIAN NEWS
AN EXAMINATION OF LOCAL AND INTERNATIONAL REGULATORY INTERVENTIONS

REGIONAL NEWS MEDIA
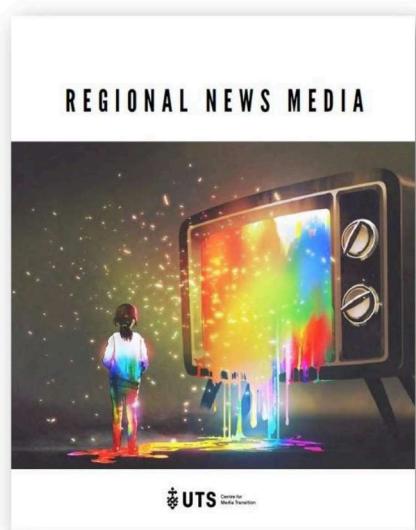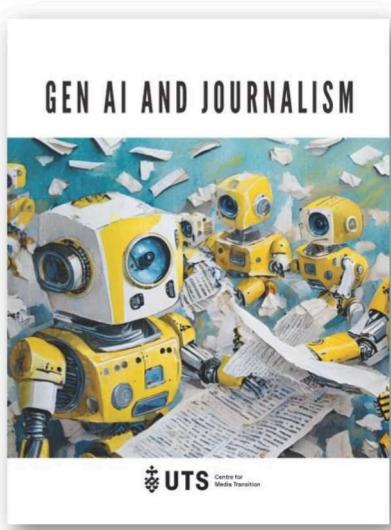
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We pay respect to the Elders both past and present, acknowledging them as the traditional custodians of knowledge for this land.