# Hurt feelings win is no protection for investor losses

## THE AFR VIEW

Legal types may argue endlessly about the judicial reasoning behind Federal Court judge Michael Lee's decision to award $280,000 to Elaine Stead, the former director and head of venture capital at failed investment fund Blue Sky Alternative Investments, for two relatively short but vituperative items written by Rear Window columnist Joe Aston in *The Australian Financial Review*. Far be it for the editors of the *Financial Review* to challenge the fine legal reasoning in Justice Lee's 97-page judgment. Rather than the legal reasoning per se, however, this is a case study in defamation law as it has evolved in Australia. According to Justice Lee on the opening page of his judgment, defamation law attempts to balance a fine line of tension between two supposed rights: the right to freedom of expression and the right to reputation. As he continues later, the law places a high value on reputation.

Yet the *Financial Review* maintains that there should be no "right" to reputation. The person who manages other people's money, or looks after their children, or cooks their restaurant meal, or builds the bridge they drive over every day, should not own their reputation like they own their private real property. Other than in extreme circumstances, the reputation of money managers, of those who operate childcare centres, or architects and builders should be set in the marketplace of ideas and public debate, other than in extreme circumstances. Blue Sky left a trail of victims after it misled investors on the value of its assets, and then collapsed. As the *Financial Review*'s Chanticleer columnist writes, it was one of the worst financial collapses of the past five years. No one has been held to account. Justice Lee accepted that Aston's expressed opinions were mostly honestly held. He also held that the columnist was acting in the public interest in covering Dr Stead, including her "indiscriminate" talk on social media at a time of existential crisis in the company.

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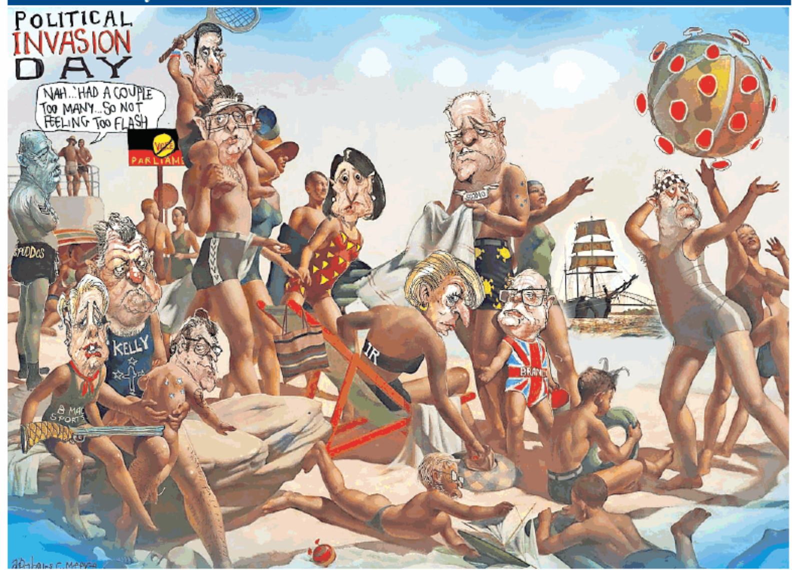
Many might puzzle at how a financial newspaper that has helped publicise an investment company's failures ends up being the one in the dock. On our legally inexpert reading of the judgment, it comes down first to detail, such as whether the "untold" investor losses Aston referred to actually happened within the precise time frame claimed, and whether they were literally untold, as opposed to just significant. And then it comes down to incivility, such as calling someone a "cretin" in a column renowned for its rudeness. As Justice Lee repeats in his judgment, "I can't help feeling that we wouldn't be here after almost two weeks of a hearing if he had chosen his words with less – how can I put it? – vitriol."

Justice Lee finds that "reputation" is not some commodity that should be bought and sold in the marketplace, justifying its treatment as a personal private property right against which damages can be awarded when subjective feelings get hurt. But, especially in the age of the internet, when everyone is a publisher and when potentially defamatory statements are rife, the idea that the high-cost court system can usefully or efficiently regulate the free exchange of opinions critical to a well-functioning democracy becomes even more far-fetched.

In this case alone, the legal costs of regulation – to all the parties and taxpayers – run into the millions. These costs will far outweigh the $280,000 in damages awarded against the *Financial Review* after what the judge describes as an "impressionistic process" of quantifying Dr Stead's hurt feelings, the damage to her reputation, and the appropriate amount for vindication. In public choice theory, such regulation persists in part because the legal profession and politicians have an interest in maintaining it, even when it threatens to chill the free speech needed to help protect ordinary investors against the risks of financial entrepreneurs free to promote unwise use of their money. It is the nature of defamation law – and no reflection on Justice Lee – that less significance is attached to the losses of investors than to the hurt feelings of an investment manager.

From the Gallery — David Rowe




# Media code a Stalinist show trial

**Targeting big tech**

**A perfect storm of bad policy with natural support from media companies and politicians could hurt consumers massively.**

**Richard Holden**

Last week Google Australia's managing director Melanie Silva told a Senate committee that if the government's proposed media bargaining code becomes law, Google will turn off its widely used search engine in the country. Yikes!

This is neither an idle threat nor an unreasonable one. The media bargaining code is hopelessly flawed. It misunderstands the cause of the decline in media revenues, seeks to extract money from unrelated activities of technology companies such as Google and Facebook, has requirements that threaten the core business of those companies, and has a bargaining system that could most politely be described as "rigged".

It is the public policy equivalent of a Stalinist show trial.

And it is, sadly, easy to see how it came about. An overzealous competition regulator with questionable economic acumen in Rod Sims proposes something that, if one doesn't really think about it, sounds plausible.

This benefits local media companies and hurts big bad multi-trillion-dollar, multinational technology companies. Those local media companies naturally come out in favour of it, and politicians, who live and die by their media coverage, fall in behind it.

It is the perfect storm of bad policy with no check on it.

The animating premise behind the media bargaining code is that the revenue of traditional media companies – newspapers especially – has declined sharply over the past 20 years. That's right. But it wasn't at the hand of the Googles and Facebooks of the world.

Consulting firm AlphaBeta showed that between 2002 and 2018, newspaper revenue fell from $4.4 billion a year to $3 billion. That is indeed a very substantial decline.

But the overwhelming majority of this came from the loss of classified advertising, which fell from $1.5 billion in 2002 to just $200 million in 2018.

Did this revenue go to the tech companies? No. Almost all of it was captured by online "pure-plays" focused on specific market segments such as motor vehicle sales, job ads, or real estate listings. This was a dotcom-dot-au effect, not a dotcom effect.

Add to this the fact that other newspaper revenue has been pretty stable. Yes, print subscriptions have declined, but online subscriptions have substituted for this.

> *The only problem for the ACCC narrative is that the big technology companies were not the winners from the advertising upheaval.*

They have increased sharply, as one would expect, as reading habits migrate from clunky physical newspapers to mobile devices and tablets.

Likewise, print display advertising has fallen but has been more than offset by increases in online advertising revenue.

The bottom line is that newspapers used to have their own monopoly – on classified advertising. And a technological innovation – the internet – destroyed that monopoly. The only problem for the Australian Competition and Consumer Commission narrative is that the big technology companies were not the winners from that change.

But, of course, over the same period tech companies went from barely even existing to being the most valuable companies in the world. They are big, powerful, and foreign-owned. There are legitimate questions about whether they pay all the tax they should. They make the most convenient targets.

The bargaining code itself not only begins with this faulty premise about what has caused the decline in newspaper revenues, it forces tech companies to share revenue that they don't even get from news-related search or content provision.

Ask yourself this: how much revenue do you think Google, for example, generates from searches for news about the US Capitol riot compared with searches for digital cameras or flat-screen televisions?

In 2019, Google reported that it made about $10 million in revenue from ads from news-related queries in Australia. And whether that number is exactly right or not, try yourself doing a news search and then a product search and see what leads to ads popping up at the top of your search.

It's click-throughs on those ads and auctioning those ads that drive revenue. When they're not there, no revenue for the search engine.

Worse still, the bargaining code will force tech companies to give media organisations advance notice of changes to their algorithms. This is a shocking and unprecedented infringement on core intellectual property – actually the only intellectual property of these organisations. Fines of up to 10 per cent of local revenue (not profit, revenue) await failure to comply.

And if there is a dispute, there is so-called "baseball arbitration", where each party makes an offer and whichever offer is closer to the panel's determination becomes binding. And who makes up the arbitration panel? It is appointed by the Australian Communications and Media Authority. One would be hard pressed to think of a less impartial process.

The Morrison government needs to come to its senses about the media bargaining code and realise that it is absurdly slanted in favour of media companies. If it doesn't, then companies like Google and Facebook are well within their rights to exit Australia.

That will hurt Australian consumers massively – and we won't be very forgiving to those who caused it to happen through a combination of media capture and bungling.

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