Case Note

Google LLC v Defteros: Defamation, Publication and Hyperlinked Search Results

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Abstract

This case note examines the High Court of Australia's decision in *Google LLC v Defteros*, in which a majority of the Court held that Google was not liable as a publisher of defamatory matter to which its search results, generated in response to a user query, linked. It explores the increasingly convoluted application of the principles of defamation law — specifically, the element of publication — to search engine operators and other internet intermediaries in the digital age. It argues that the High Court's decision in *Google LLC v Defteros*, while more pragmatic than past jurisprudence in this area, ultimately raises more questions than it provides answers. In particular, it explores three fundamental issues: whether any clear ratio decidendi can be discerned from the Court's decision; the problems with following *Crookes v Newton*, a persuasive Canadian decision which the majority relied on most heavily in this case; and the significance of the Court's decision within the context of the ongoing national defamation law reforms.

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I Introduction

> In point of principle, the law as to publication is tolerably clear. It is the application of it to the particular facts of the case which tends to be difficult, especially in the relatively novel context of internet search engine results.[1]

In *Google LLC v Defteros* ('*Defteros*'),[2] the majority of the High Court of Australia held that Google was not a publisher of defamatory matter to which its search results linked, where those results were generated in response to a user query. The majority, comprising five Justices of the full Bench writing in three separate judgments, allowed Google's appeal from the Victorian Court of Appeal, holding that the appellant was not liable for publishing the defamatory matter complained of. In separate judgments, Gordon and Keane JJ dissented from the majority, agreeing with the finding of the Supreme Court of Victoria at trial and the Court of Appeal that Google was a publisher of defamatory matter to which its search results linked. *Defteros* is the only defamation case the High Court heard in 2022. The Court's decision departs somewhat from previous lower court jurisprudence on the issue of the search engine operator's liability for publication of defamatory matter, which had evinced a clear preference for a conservative and broad approach which imposed liability in most circumstances. By contrast, the High Court in *Defteros* ruled that the mere provision of a hyperlinked search result alone, absent any other feature, will not amount to publication of any defamatory matter to which it links.

This case note examines three of the most salient issues arising from the Court's decision. First, Part II explores the background to the case, including the element of publication in defamation, which has become an increasingly complex and contentious area in relation to internet technologies. Then Part III examines whether any clear and principled ratio decidendi is capable of being distilled from the somewhat difficult and, at times, conflicting majority judgments. In Part IV the case note then turns to consider the majority's problematic following of *Crookes v Newton*,[3] a leading Canadian decision on defamation liability for hyperlinking. Part V places *Defteros* within the ongoing reforms to Australia's national uniform defamation laws — in particular, the development of a 'no-liability' provision for search engine operators. It concludes that whether *Defteros* represents a pragmatic shift in the Court's approach to publication in the digital age, or merely a straightforward application of analogous cases, remains to be seen.

II Background

A *The Element of Publication*

Before turning to the facts and decision in *Defteros*, it is first necessary to explain the element of publication, which was at issue in the case. The principles of publication were recently restated by the High Court in *Fairfax Media Publications*

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1 *Trkulja v Google LLC* (2018) 263 CLR 149, 163–4 (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) ('*Trkulja*').

2 *Google LLC v Defteros* (2022) 96 ALJR 766 ('*Defteros*').

3 *Crookes v Newton* [2011] 3 SCR 269.

Pty Ltd v Voller ('*Voller*'),[4] in which the Court dealt with the liability of social media users for defamatory third-party comments left on their posts. Publication is one of the three elements that a plaintiff must prove to establish a cause of action in defamation in Australia. It has been held to be the actionable wrong that completes a cause of action in defamation and upon which an action is founded.[5] It comprises the 'bilateral' act of the defendant communicating, by any means, the defamatory matter to at least one recipient other than the plaintiff in a comprehensible form.[6] As such, a defendant commits the tort of defamation when (and where) a third party receives the defamatory matter that the defendant has communicated in comprehensible form. Liability for publication is both strict and broad: strict in that any degree of active and voluntary participation in the process of publication amounts to publication itself, and broad in that the 'breadth of activity captured … is vast'.[7]

The principles of publication have become increasingly difficult to apply since the advent of the digital age, particularly to users of internet technologies such as internet service providers,[8] internet search engines[9] and social media platforms and users.[10] However, as Rolph notes, the difficulty lies not necessarily in the sheer scale of publication that internet technologies enable, but in the 'disaggregation of [the] steps [of publication] brought about by internet technologies'.[11] Internet technologies allow 'the creation and dissemination of, and profit from, defamatory matter' to be completed at different stages, by different parties, with different intentions.[12] In attempting to reconcile these emerging and evolving technologies and the novel means of communication they enable with the 'settled' principles of publication, common law courts and academics alike have discovered that '[i]n many ways, internet technologies challenge the basic principles relating to publication in defamation law'.[13]

The issue of the liability of search engine operators has arisen on multiple occasions in Australia. In *Trkulja v Google Inc LLC [No 5]* ('*Trkulja [No 5]*')[14] the Supreme Court of Victoria ruled that Google was the publisher of defamatory search results provided by its search engine in response to user-initiated queries. In his judgment, Beach J reasoned that because Google's search engine 'operate[s] precisely as intended' in producing search results, it had *intended* to publish the matter.[15] When Mr Trkulja commenced further defamation proceedings against Google five years later for allegedly defamatory image results and autocomplete

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4 *Fairfax Media Publications Pty Ltd v Voller* (2021) 95 ALJR 767 ('*Voller*').
5 *Webb v Bloch* (1928) 41 CLR 331, 363 (Isaacs J).
6 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 600 (Gleeson CJ, McHugh, Gummow and Hayne JJ) ('*Gutnick*').
7 *Defteros* (n 2) 776 [25] (Kiefel CJ and Gleeson J), quoting *Crookes v Newton* (n 3) 281–2 [18] (Abella J).
8 See, eg, *Godfrey v Demon Internet Service* [2001] QB 201.
9 See, eg, *Trkulja* (n 1).
10 See, eg, *Voller* (n 4).
11 David Rolph, 'The Concept of Publication in Defamation Law' (2021) 27(1) *Torts Law Journal* 1, 2.
12 Ibid.
13 Ibid.
14 *Trkulja v Google Inc LLC [No 5]* [2012] VSC 533 ('*Trkulja [No 5]*').
15 Ibid [27].

predictions, McDonald J followed *Trkulja [No 5]* in finding that it was 'strongly arguable' that Google had intentionally participated in publication of the matter.[16] On appeal, the High Court in *Trkulja v Google LLC*[17] did not rule definitively on the issue of publication, although it agreed with McDonald J's finding. In *Google Inc v Duffy* ('*Duffy*'),[18] the Supreme Court of South Australia applied *Trkulja [No 5]* in holding that Google was liable for the publication of defamatory matter contained in search results and in content to which the search results linked.[19] By contrast, in *Bleyer v Google Inc*,[20] McCallum J held that only after Google had received actual notice of defamatory results published by its search engine and failed to remove the results within a reasonable time would it be liable for publication.[21] These cases demonstrate that Australian courts have generally taken a conservative approach to the issue of internet publication (and in particular to proceedings brought against Google), preferring to apply the orthodox principles of publication rather than develop specific exceptions for such cases.[22] The decision in *Defteros* is therefore somewhat surprising given the weight of lower court authority.

B *The Material Facts in Defteros*

1 *The Complaint*

In 2004, Mr Defteros, a criminal law solicitor in Melbourne who acted for figures involved in the infamous 'gangland wars', was charged with conspiracy to murder and incitement to murder together with one of his clients.[23] Although the charges against Mr Defteros were withdrawn in 2005, *The Age* newspaper had published articles on its website reporting on the prosecution in the intervening period, including an article entitled 'Underworld Loses Valued Friend at Court' (the 'Underworld article') which contained material defamatory of Mr Defteros.[24] Rather than sue *The Age* for defamation, Mr Defteros instead sued the authors of a book, one of whom was the author of the Underworld article, which included a chapter based on the Underworld article.[25] The parties agreed to settle the claim and, as a term of the settlement, Mr Defteros released the authors from liability for any article published in *The Age*.[26] In 2016, Mr Defteros became aware that searching the internet for his name using Google's search engine produced a search result which contained a hyperlink to the Underworld article.[27] Subsequently, a solicitor working at Mr Defteros' firm completed a Google 'removal request form' which (although

16 *Trkulja v Google Inc* [2015] VSC 635, [67].
17 *Trkulja* (n 1).
18 *Google Inc v Duffy* (2017) 129 SASR 304 ('*Duffy*').
19 Ibid 465–6 [595] (Hinton J).
20 *Bleyer v Google Inc LLC* (2014) 88 NSWLR 670.
21 Ibid 686 [85].
22 Cheng Vuong, 'Defamation Law and the Search Engine Operator Exception' (2019) 38(4) *Communications Law Bulletin* 15, 17.
23 *Defteros* (n 2) 771 [1] (Kiefel CJ and Gleeson J).
24 Ibid.
25 Ibid 808 [182] (Edelman and Steward JJ).
26 Ibid.
27 Ibid 771 [2] (Kiefel CJ and Gleeson J).

riddled with inaccuracies of the prior dispute with the authors of the book) notified Google of the defamatory matter and requested that Google take action to remove, delink or otherwise disable the hyperlinked search result.[28] After reviewing the request, Google elected not to take action in relation to the hyperlink pursuant to its Reputable Source Defamation Push Back Policy.[29] In response, Mr Defteros brought proceedings against Google in the Supreme Court of Victoria, alleging that Google was a publisher of the defamatory matter in the Underworld article. Google denied publication and pleaded, in the alternative, the defences of common law and statutory qualified privilege and innocent dissemination.[30]

2 *Procedural History*

At trial, Richards J held that Google's 'provision of [the] hyperlink … facilitate[d] the communication of the contents of the linked webpage to such a substantial degree that it amount[ed] to publication of the webpage'.[31] Her Honour also held that Google was only liable, 'as a secondary publisher' when a reasonable time had elapsed after it had been notified of the defamatory matter.[32] The Court of Appeal upheld the conclusion that Google became a publisher of the Underworld article seven days after it received notice in the form of the removal request.[33] In doing so, the Court of Appeal followed the South Australian Court of Appeal's reasoning in *Duffy*. In particular, the Victorian Court of Appeal agreed with the approaches of Hinton J and Kourakis CJ in *Duffy*, which centred on 'enticement' to the reader to click on the hyperlink and 'incorporation' of the defamatory matter in the search result, respectively.[34] Google subsequently applied for special leave to the High Court on four grounds of appeal: first and foremost, 'that the Court of Appeal was wrong to conclude that [Google was a publisher]' and, in the alternative, that 'the Court of Appeal was wrong to reject [Google's] defences of common law and statutory qualified privilege' and innocent dissemination.[35]

3 *The High Court's Decision*

The High Court delivered judgment on 17 August 2022, finding in favour of Google by a 5:2 majority. In three separate judgments, the majority employed markedly different reasoning to find that Google had not published the defamatory matter and therefore did not consider the defences raised.

In the leading joint judgment of Kiefel CJ and Gleeson J, their Honours held that although 'the breadth of activity captured by the traditional publication rule is

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28 Ibid 808 [183]–[185] (Edelman and Steward JJ).
29 Ibid [186].
30 Ibid 771 [3] (Kiefel CJ and Gleeson J).
31 *Defteros v Google LLC* [2020] VSC 219, [55] ('*Defteros Trial*').
32 Ibid [64]. However, as the Court in *Voller* clarified, it is erroneous to draw a distinction between primary and secondary publishers when considering publication alone. A person or entity is either a publisher or not. The distinction is only relevant to the common law and statutory defences of innocent dissemination, which are available only to those deemed secondary publishers: *Voller* (n 4) 784 [84] (Gageler and Gordon JJ).
33 *Defteros v Google LLC* [2021] VSCA 167, [92] (Beach, Kaye and Niall JJA).
34 Ibid [86]–[87].
35 *Defteros* (n 2) 772 [8] (Kiefel CJ and Gleeson J).

vast', it has its limits.[36] In doing so, their Honours distinguished *Defteros* from two of the Court's leading authorities on publication in which the strict and broad publication rule was applied to impose liability: *Webb v Bloch*[37] and *Voller*.[38] In both cases, the defendants had either 'suggested that the matter be written; caused it to be published; approved, concurred or showed their assent or gave their approbation to the libel; or assisted or encouraged the damage to another's reputation' — features absent in the present case.[39] Kiefel CJ and Gleeson J were instead persuaded by the reasoning in a series of United States and Canadian decisions concerning liability for referring to defamatory matter (including via hyperlinking), which their Honours viewed as more closely analogous and readily applicable to the facts in *Defteros*.[40] Of particular salience was the reasoning of Abella J in the Supreme Court of Canada's decision in *Crookes v Newton*, in which the provision of a hyperlink alone was held not to amount to publication, but to 'content-neutral'[41] referencing which merely communicates the *existence* of content rather than the content itself. Their Honours rejected the suggestion that the hyperlinked search result enticed users to read the Underworld article, finding that 'call[ing] attention to' matter does not equate to enticement, especially where users are already seeking the information to which a hyperlink directs them.[42]

Gageler J substantially agreed with the reasoning of Kiefel CJ and Gleeson J and their Honours' reliance on *Crookes v Newton*, particularly on the basis that consistency across the common law world when dealing with new technologies is desirable.[43] However, his Honour expressly qualified Kiefel CJ and Gleeson J's reasoning by noting that there are several circumstances in which a hyperlink may amount to publication. His Honour invoked the 19th century decision of the English Court of Appeal in *Hird v Wood*,[44] which his Honour viewed as standing for the principle that drawing attention to defamatory matter in an enticing or encouraging manner may constitute publication.[45] Nevertheless, Gageler J found that the hyperlinked search result here was produced 'organic[ally]'[46] in response to a user-designed and initiated query and that it lacked any enticing or encouraging feature.[47] His Honour further held that the aims and purposes of an alleged publisher's conduct, commercial or otherwise, are irrelevant to the question of publication — it is the bilateral act of communication that is key.[48]

In their Honours' concurring judgment, Edelman and Steward JJ agreed with the conclusion of non-publication reached by the other Justices of the majority, albeit

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36 Ibid 776 [25].
37 *Webb v Bloch* (n 5).
38 *Voller* (n 4).
39 *Defteros* (n 2) 776–7 [31] (Kiefel CJ and Gleeson J).
40 Ibid 777 [35].
41 Ibid 778 [43], quoting *Crookes v Newton* (n 3) 286 [30] (Abella J).
42 Ibid 780 [51].
43 Ibid 782 [65].
44 *Hird v Wood* (1894) 38 SJ 234.
45 *Defteros* (n 2) 782 [66].
46 Ibid 783 [70], quoting *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435, 447–8 [21]–[22] (French CJ, Crennan and Kiefel JJ).
47 Ibid 783 [71].
48 Ibid 783–4 [73]–[74].

through decidedly different reasoning. Notably, their Honours imposed a quadripartite taxonomy on the methods of publication previously unarticulated in the Australian law of defamation. These are: (i) performing the act of communication; (ii) authorising the act of communication; (iii) procuring, provoking or conducing the act of communication; and (iv) ratifying or adopting the communication.[49] According to their Honours, for publication to be proved under the latter three categories, a common intention to publish must be established between the alleged secondary publisher (the defendant) who performs the conduct described in the category and the primary publisher who actually performs the act of communication, such as to make the defendant a joint tortfeasor. Here, unlike the other majority judgments, Edelman and Steward JJ found that Google's conduct in providing a hyperlinked search result constituted facilitating access to the Underworld article, rather than 'mere referencing'.[50] Nevertheless, their Honours held that 'merely facilitating' the communication of defamatory matter does not evince a common intention, and therefore does not amount to publication.[51] Like Gageler J, their Honours expressly reserved the question of whether the provision of enticing or sponsored hyperlinked search results would constitute publication.[52]

In Gordon J's dissenting judgment, her Honour directly contradicted Edelman and Steward JJ in finding that *The Age* and Google both intended to 'facilitate access to news articles', a finding confirmed by Google's 'commercial interest in providing … responsive search results'.[53] Her Honour also rejected the relevance of *Crookes v Newton* to Australian defamation law for two reasons. First, the United Kingdom, United States and Canadian decisions upon which it relies are inconsistent with the strict publication rule due to their reasoning turning on concepts foreign to Australian law.[54] Second, the characterisation of hyperlinks as 'references' which do not communicate content is 'inconsistent with the application of the strict publication rule to publication by reference'.[55] Her Honour then went on to consider and reject the defences raised by Google for reasons which this case note does not consider.

Keane J penned a relatively brief dissenting judgment in which his Honour also distinguished *Defteros* from *Crookes v Newton* on the basis that Google intentionally brought its search engine users and the Underworld article together, unlike the defendant in *Crookes v Newton* who was indifferent as to whether readers would click on his hyperlinked footnote.[56] Keane J also rejected any concerns relating to the flow of information online and freedom of expression, noting that liability for publication has always been expansive in Australia so as to ensure redress for all persons injured.[57]

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49 Ibid 811 [200].
50 Ibid 814 [216].
51 Ibid 813 [212].
52 Ibid 815 [222].
53 Ibid 790–791 [110]–[111], quoting *Defteros Trial* (n 31) [187] (Richards J).
54 Ibid 798 [142].
55 Ibid.
56 Ibid 787 [99].
57 Ibid 788 [102].

III What is the Ratio in *Defteros*?

Although the majority's decision in *Defteros* has been applauded by some in the legal profession as a 'common sense' outcome,[58] the competing characterisations of Google's conduct and the nature of hyperlinks in the different judgments calls into question whether any clear and principled ratio can be discerned.

What is clear from the joint judgment of Kiefel CJ and Gleeson J is that the strict publication rule, although broad, has its limits. In *Defteros*, the High Court has declared that one such limit is that a search engine operator will not attract liability for the publication of defamatory matter by returning an 'organic' search result which contains a hyperlink to the matter. As discussed in Part II(3), the word 'organic', as used by Gageler J, refers in this context to a search result generated in response to a user-initiated query which does not entice or encourage the user itself. As these many qualifications demonstrate, this does not create a bright-line principle that a person who provides a hyperlink to defamatory matter is immune from liability in all circumstances. On the contrary, the majority explicitly reserved the question of liability for sponsored links and hyperlinked search results which somehow entice or encourage users to read the content to which they are linked.

In discussing the latter category of hyperlinked search result, both Gageler J and Edelman and Steward JJ confined *Duffy* to its facts — specifically, that the snippet of the search result in that case contained defamatory matter.[59] This should be taken to strongly suggest that if a hyperlinked search result somehow encourages or entices the reader to click on the hyperlink in any way — a matter to be determined on a case-by-case basis[60] — then such conduct will likely constitute publication. Notably, this framing of the *Duffy* decision by Gageler J and Edelman and Steward JJ was most recently affirmed by the Supreme Court of South Australia itself in the second round of litigation brought against Google by Dr Duffy. In *Duffy v Google LLC*,[61] Tilmouth AUJ held that Google was liable as a secondary publisher of hyperlinked search results on the basis that the 'intriguing' snippets that its search engine produced 'did more than describe a story about a person'; they contained inflammatory words suggestive of the plaintiff's wrongdoing, language which 'consisted of more than a reference or subject matter heading'.[62] Tilmouth AUJ thus distinguished *Defteros* from *Duffy v Google LLC* in finding that the hyperlinked search result in the former 'merely "assisted" persons searching the Web to find and access information', while those in the latter 'were likely to entice the user to select the … hyperlink'.[63] The decision in *Duffy v Google LLC* thus stands as lower court authority supportive of the dicta in *Defteros* that enticing hyperlinks will likely still amount to publication.

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58 Jerome Doraisamy, 'What *Google v Defteros* Means for Defamation Law', *Lawyers Weekly* (online, 18 August 2022) <https://www.lawyersweekly.com.au/wig-chamber/35254-what-google-v-defteros-means-for-defamation-law>.

59 *Defteros* (n 2) 782–3 [67]–[68] (Gageler J), 810 [199], 816 [229] (Edelman and Steward JJ).

60 Ibid 782 [66] (Gageler J), quoting Clement Gatley, *Gatley on Libel and Slander*, eds Richard Parkes and Godwin Busuttil (Sweet & Maxwell, 13th ed, 2022) 253–4.

61 *Duffy v Google LLC* [2023] SASC 13.

62 Ibid [96].

63 Ibid [91], [96].

The problem with this limitation on the strict publication rule and the qualifications to it is that the differing reasons of the judgments make it difficult to identify a precise juridical basis on which it is founded. On one view, the judgments of Kiefel CJ and Gleeson and Gageler JJ, in following *Crookes v Newton*, suggest that the principled basis on which *Defteros* was decided is the characterisation of the provision of a hyperlink simpliciter as mere referencing — conduct which their Honours viewed as falling short of the bilateral act of communication. By contrast, Edelman and Steward JJ accepted that Google's conduct here amounted to facilitating access to the Underworld article — more than mere referencing — but nonetheless held that it did not constitute publication. The basis for this, their Honours held, was that liability for third-party comments can only be imposed if a common intention with the primary publisher is established such as to make the secondary author a joint tortfeasor.

With respect to the reasoning of Kiefel CJ and Gleeson and Gageler JJ, a question arises as to the extent of *Defteros*'s applicability. Specifically, it remains unsettled whether the provision of a hyperlink alone will fail in all circumstances to amount to publication. At the outset of Kiefel CJ and Gleeson J's judgment, their Honours formulate the question which the Court has been called on to answer as

> whether providing search results which, in response to an enquiry, direct the attention of a person to the webpage of another and assist them in accessing it amounts to an act of participation in the communication of defamatory matter.[64]

This framing suggests that the ratio in *Defteros* could be applied to future cases in which the defendant has provided a hyperlink (absent enticement or a common intention with the primary publisher), regardless of whether the defendant is a search engine operator. Further, no argument was run by either party as to whether Google, as a search engine operator, is categorically a publisher. The potential for *Defteros* to apply to future cases of hyperlinking generally is supported by Gageler J's consideration of *Crookes v Newton*, a case which involved a natural person providing a hyperlink on his own website, rather than a search engine generating one in response to a user-initiated query. His Honour was more willing to adopt the reasoning of Abella J on the basis that the Canadian Supreme Court had reached a conclusion on liability for hyperlinking using identical common law principles of publication, which remains good law in that country; these factors, his Honour posited, make it desirable that Australia synchronises this point of defamation law with the law of other common law jurisdictions.[65]

A further complication that arises from the several judgments in *Defteros* is the role which intent and purpose play in determining liability for publication, if any. Central to this issue is certain conflict in the reasoning in the decisions in *Voller* and *Defteros*. In *Voller*, the majority of the Court found that the defendants had published the defamatory comments left on their Facebook posts by third parties. Gageler and Gordon JJ, who were in the majority in *Voller*, reached this conclusion using the

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64 *Defteros* (n 2) 775–6 [24].
65 Ibid 782 [64]–[65].

'commercial purpose' of the defendants as a key plank in the reasoning.[66] By contrast, there are several express statements in the majority judgments in *Defteros* which discount the relevance of the defendant's intention,[67] including by Gageler J, who explicitly rejected the Supreme Court of Victoria's reasoning that Google's commercial interests are in any way dispositive of the question of publication.[68] By contrast, Gordon J, in dissent, maintained her line of reasoning from *Voller*, finding that Google's conduct being motivated by an attempt to 'obtain a commercial benefit' precluded it from denying publication.[69] With respect, the view of the majority in *Defteros* on this point is to be preferred. This is because the tort of defamation is one of strict liability, as is the element of publication; it is incorrect to '[treat] the particular defendant's purpose in participating in the communication as relevant to whether the defendant is responsible for the publication'.[70] As such, the focus of the analysis should be directed towards the 'fact of communication', rather than any motive that Google might have in conducting its business the way it does.[71]

IV Problems with the Approach in *Crookes v Newton*

As stated in Part III above, the majority in *Defteros* were heavily influenced in their reasoning by Abella J's judgment in *Crookes v Newton*. This may be problematic in that *Crookes v Newton* is a Canadian case decided overtly on policy grounds that lack Australian equivalents.

In *Crookes v Newton*, the defendant, Mr Newton, published an article on his personally owned and operated website concerning the defendant, Mr Crookes.[72] Although the content of the article itself did not contain defamatory matter, Mr Crookes brought defamation proceedings against Mr Newton for two hyperlinked references in the article, which, when clicked, directed the reader to articles which contained matter defamatory of Mr Crookes. He argued that this hyperlinking to the defamatory matter constituted publication of the matter itself.[73]

In Abella J's majority judgment, her Honour, much like Kiefel CJ and Gleeson J in their Honours' judgment, recognised the breadth and strictness of the common law publication rule — that it captures '*any act* [which] convey[s] defamatory meaning' regardless of the form and manner of the act.[74] Her Honour did so by surveying the leading English and Canadian authorities on publication — many of which, such as *Hird v Wood*, were cited in *Defteros* — and finding that acts of reference such as pointing to defamatory matter or expressing approval of it have been held to amount to publication.[75] However, her Honour ultimately distinguished

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66 *Voller* (n 4) 787 [101], quoting *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766, [224] (Rothman J).
67 See, eg, *Defteros* (n 2) 780 [54] (Kiefel CJ and Gleeson J), 816 [226] (Edelman and Steward JJ).
68 Ibid 783 [73].
69 Ibid 791 [112].
70 David Rolph, 'Before the High Court: Liability for the Publication of Third Party Comments: *Fairfax Media Publications Pty Ltd v Voller*' (2021) 43(2) *Sydney Law Review* 225, 238.
71 Ibid 240.
72 *Crookes v Newton* (n 3) 278 [5].
73 Ibid [6].
74 Ibid 281 [16] (emphasis in original).
75 Ibid 281–3 [18]–[19].

the act of hyperlinking alone from the range of conduct captured by the strict publication rule, finding that a hyperlink, as a mere 'content-neutral' reference to a source which the person who provided the hyperlink does not control, does not constitute publication.[76] Abella J's reasoning is thus clearly echoed in the reasoning of Kiefel CJ and Gleeson J. In both judgments, there is an acceptance of the strict publication rule, the range of conduct that it captures and that there must be some limitations to it. However, Abella J's judgment ultimately diverges from the common law principles common to the defamation law of both Canada and Australia in traversing a host of policy concerns, which Fischer and Lazier note serve as a more '[persuasive]' basis for her Honour's judgment.[77] In particular, Abella J expressed concern at various points in her judgment that to apply the strict publication rule to hyperlinks — '[central] [to] … facilitating access to information on the Internet'[78] — would create 'an untenable situation'.[79] Unlike the judgments in *Defteros*, which demonstrate a reticence to alter the fundamental principles of publication for new technologies,[80] Abella J expressly names the detrimental effect on the functioning of the Internet that the application of the strict publication rule to hyperlinks would have as a key plank in her Honour's reasoning:

> The Internet cannot, in short, provide access to information without hyperlinks. Limiting their usefulness by subjecting them to the traditional publication rule would have the effect of seriously restricting the flow of information and, as a result, freedom of expression. The potential 'chill' in how the Internet functions could be devastating, since primary article authors would unlikely want to risk liability for linking to another article over whose changeable content they have no control. Given the core significance of the role of hyperlinking to the Internet, we risk impairing its whole functioning. Strict application of the publication rule in these circumstances would be like trying to fit a square archaic peg into the hexagonal hole of modernity.[81]

The above excerpt demonstrates what is most problematic for the adoption in Australia of the reasoning in *Crookes v Newton* in *Defteros*: that the policy concerns in the former are ultimately based on freedom of expression, a right guaranteed by the *Canadian Charter of Rights and Freedoms*.[82] Fischer and Lazier observe that in 2008, the Supreme Court of Canada embarked on the 'constitutionalization' of Canadian defamation law so as to align it with the right to freedom of expression.[83] They argue that Abella J's decision is not so much a principled common law approach to the issue of hyperlinks in defamation law, but 'a recognition that freedom of expression must be protected pragmatically'.[84] Indeed, her Honour noted that '[p]re-*Charter* approaches to defamation law in Canada largely leaned towards protecting reputation', a jurisprudence which has evolved to 'achiev[e] a proper balance between protecting an individual's reputation and the foundational role of

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76 Ibid 285–6 [26]–[30].
77 Iris Fischer and Adam Lazier, '*Crookes v Newton*: The Supreme Court of Canada Brings Libel Law into the Internet Age' (2012) 50(1) *Alberta Law Review* 205, 207.
78 *Crookes v Newton* (n 3) 288 [35].
79 Ibid 285 [25].
80 *Defteros* (n 2) 788 [102] (Keane J), 802 [155] (Gordon J),
81 *Crookes v Newton* (n 3) 288–9 [36].
82 *Canada Act 1982* (UK) c 11, sch B pt I cl 2(b) ('*Canadian Charter of Rights and Freedoms*').
83 Fischer and Lazier (n 77) 205.
84 Ibid 215.

freedom of expression'.[85] *Crookes v Newton*, then, may be understood as 'a nuanced and pragmatic approach to balancing freedom of expression and the protection of reputation'.[86]

Somewhat notoriously, Australia lacks a bill of rights and a true analogue to the Canadian right to freedom of expression. While the High Court has recognised that Australian defamation law also 'seeks to strike a balance between … society's interest in freedom of speech and the free exchange of information and … an individual's interest in maintaining his or her reputation',[87] it has also recognised that the Australian '*Constitution* contains no express right of freedom of communication or expression'.[88] Many have argued that this has had the consequence of skewing the balance in favour of protecting reputation at the expense of freedom of expression, leading to Australia becoming 'the defamation capital of the world'.[89] Kiefel CJ and Gleeson J, whose joint judgment is the most accepting of and reliant on Abella J's reasoning, were acutely aware of this dilemma, as was Gordon J in her dissent (which partly turned on *Crookes v Newton* being so alien to Australian defamation law that it should not be followed).[90]

What ultimately separated the two judgments was that Kiefel CJ and Gleeson J believed there to be common law reasoning capable of being extracted from the Canadian constitutionalism and applied to the facts in question. Their Honours stated at the outset of their examination of Abella J's reasoning that the policy concerns in *Crookes v Newton* cannot and should not be followed, and that they were merely superfluous to the 'essential reasoning' of Abella J's judgment that can and should be followed.[91] With respect, this conclusion is far from incontrovertible, especially given Canadian commentary on *Crookes v Newton*, such as that by Fischer and Lazier, which views the decision as the Supreme Court of Canada reorienting its nation's defamation law in harmony with a constitutionally guaranteed right, of which there is no Australian analogue. Perhaps more telling of *Crookes v Newton* being a questionable juridical basis for an ostensibly analogous Australian case is that the preponderance of Australian authority on internet publication cases, analysed in Part II, clearly favours preserving the strict publication rule and applying it in its entirety to search engine operators, rather than attenuating it. Whether *Defteros* signifies a shift towards a more liberal and pragmatic Australian defamation jurisprudence — and a moderated publication rule — in response to evolving technologies, or a simple carve-out in this very factually specific case remains to be seen.

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85 *Crookes v Newton* (n 3) 287 [32].
86 Fischer and Lazier (n 77) 216.
87 *Gutnick* (n 6) 599 (Gleeson CJ, McHugh, Gummow and Hayne JJ).
88 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567.
89 See, eg, Matt Collins, 'Nothing to Write Home about: Australia the Defamation Capital of the World' (Speech, National Press Club, Canberra, 4 September 2019).
90 *Defteros* (n 2) 798 [142] (Gordon J).
91 Ibid 778 [41] (Kiefel CJ and Gleeson J).

V *Defteros* in the Context of the Stage 2 Review of the Model Defamation Provisions

A particularly noteworthy aspect of *Defteros* is its timing. Specifically, the High Court handed down its decision amid the Stage 2 Review of the Model Defamation Provisions ('Stage 2 Review') and only five days after the release of the draft Part A Model Defamation Amendment Provisions[92] ('MDAPs') and accompanying Background Paper[93] by the Meeting of Attorneys-General. Begun in 2021, the Stage 2 Review is the second part of the evaluation of the national uniform defamation laws led by the Defamation Working Party, a body convened by the Council of Attorneys-General in 2018 with the remit of assessing the effectiveness of current defamation laws.[94] The national uniform defamation laws were enacted as separate statutes by all Australian states and territories at the beginning of 2006 following consensus by all state and territory attorneys-general on the laws in 2004.[95] The national uniform defamation laws were introduced to harmonise the previously fragmented defamation laws of each Australian jurisdiction. This fragmentation had, until 2006, led to considerable uncertainty and incoherence in dealing with the increasing volume of defamation claims involving internet publication across multiple jurisdictions and resulting choice of law issues.[96]

Part A of the Stage 2 Review focuses specifically on the liability of internet intermediaries (including search engine operators such as Google) for publication of third-party content online, and possible avenues for ameliorating the problems associated with applying the strict and broad publication rule in its entirety to these intermediaries.[97] Part A consists of seven recommendations. Of particular significance to the issues in *Defteros* is Recommendation 2, which is the provision of '[a] conditional, statutory exemption from liability in defamation law for standard search engine functions'.[98] Recommendation 2 is contained in the MDAPs 2022 under sch 1 cl 9A(3)–(5). Interestingly, the drafting of these model provisions and the rationale provided for them in the Background Paper align broadly with the ratio and reasoning in *Defteros*. Clause 9A(3) provides:

> A search engine provider for a search engine is not liable for defamation for the publication of digital matter if the provider proves: (a) the matter is limited to search results generated using the search engine from search terms inputted by the user of the engine rather than terms automatically suggested by the engine, and (b) the provider's role was limited to providing an automated process for the user to generate the search results.[99]

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92 *Model Defamation Amendment Provisions 2022* (Parliamentary Counsel's Committee) ('MDAPs').

93 Meeting of Attorneys-General, Parliament of New South Wales, *Stage 2 Review of the Model Defamation Provisions Part A: Liability of Internet Intermediaries for Third-Party Content* (Background Paper, August 2022) ('Background Paper').

94 Owen Griffiths, 'Reform of Defamation Law' (Brief, Parliamentary Library, Parliament of Australia, 2020).

95 David Rolph, 'A Critique of the National, Uniform Defamation Laws' (2008) 16(3) *Torts Law Journal* 207, 207–8.

96 Ibid 209–10.

97 Background Paper (n 93) 4.

98 Ibid 5.

99 MDAPs (n 92) sch 1 cl 9A(3).

This drafting accords almost entirely with the High Court's formulation in *Defteros* of an exception to the strict publication rule for 'organic' hyperlinks generated in response to third-party queries, or, as the Background Paper states in discussing the Victorian Court of Appeal's decision in *Defteros v Google LLC*[100] and *Crookes v Newton*, 'the mere hyperlink principle'.[101] That cl 9A(3)(a) explicitly excludes 'terms automatically suggested by the engine' strongly suggests that the Defamation Working Party agrees with and wishes to preserve the correctness of previous lower court authority such as *Trkulja*, which held that it was 'strongly arguable' that Google had published autocomplete search predictions.[102]

The search engine exception in the MDAPs 2022 also deals explicitly with sponsored links,[103] one of the two key types of hyperlinked search results reserved by the Court in dicta in *Defteros* as likely still amounting to publication of its linked content. Clause 9A(4) provides that the search engine exception 'does not apply in relation to search results to the extent they are promoted or prioritised by the search engine provider because of a payment or other benefit given to the provider by or on behalf of a third party'. However, the MDAPs 2022 are silent as to liability for the other category of hyperlinked search results that the Court intimated would still constitute publication after *Defteros*: those that entice or encourage the user to click on them and access the content to which they link. Nevertheless, it is still highly likely that the generation of these types of hyperlinked search results will attract liability for publication; as discussed in Part III, the Court strongly suggested that these hyperlinks evince an intention to communicate the contents to which they link, rather than the mere provision of the hyperlink itself, and it was careful to preserve authorities such as *Duffy* which, Gageler J reasoned, must be properly understood as having been decided on this basis.[104] It should also be noted that cl 9A(5) provides that the exception 'appl[ies] regardless of whether the digital intermediary or search engine provider knew, or ought reasonably to have known, the digital matter was defamatory'. Accordingly, any notice of defamatory matter in 'organic' hyperlinked search results given to a search engine operator, whether it be in a concerns notice or, as occurred in *Defteros*, a request form lodged with the operator's legal department, will be immaterial to its liability for publication.

It is interesting to note that the rationale for the search engine exception given in the Background Paper also aligns with several key planks of the majority's reasoning in *Defteros*. Like Gageler J's attempt to harmonise the approach of Australian defamation law to liability for hyperlinking with that of other common law jurisdictions, the Background Paper notes that the High Court's previous characterisation of search engines as publishers when performing this routine function is undesirable on the basis that it had 'diverge[d] from other comparable jurisdictions'.[105] Similarly, the Background Paper supports the following of *Crookes v Newton* (and therefore aligns with Kiefel CJ and Gleeson J's reasoning) in stating that 'search engines simply use an automated process to provide access to third-party

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100 *Defteros v Google LLC* (n 33).
101 Background Paper (n 93) 19, citing *Crookes v Newton* (n 3) (Abella J).
102 *Trkulja* (n 1) 163 [38] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
103 MDAPs (n 92) sch 1 cl 9A(4).
104 *Defteros* (n 2) 782–3 [68].
105 Background Paper (n 93) 5, 28.

content'[106] — that is, the provision of hyperlinked search results alone is merely an act of referencing. The rationale also expressly contradicts the dissenting opinions of Gordon and Keane JJ on the point of the commercial purpose of search engine operators. As discussed in Part III, their Honours found that the 'commercial interest' of Google in providing the search results to users was redolent of publication; by contrast, the Background Paper expressly states 'that in performing their standard functions, search engines have no interest in the content'.[107] However, this aspect of the rationale is still somewhat problematic as a matter of principle, as it too focuses unduly on the intent of the purported publisher, when, as stated in Part III above, publication is an element of strict liability. Like its openness to following an otherwise alien and highly constitutionalised Canadian decision, that the majority of the High Court in *Defteros* reached an almost identical conclusion to the forthcoming MDAPs via a highly similar analysis may suggest that the High Court is more open to taking a pragmatic rather than strictly principled approach to defamation law in the evolving digital age.

VI Conclusion

Defteros stands as a somewhat curious decision of the High Court, not the least because it bucked the prevailing trend in lower courts by finding Google not liable for publication. Although the implementation of the Part A MDAPs would provide a statutory answer to most of the points of defamation law that were at issue in *Defteros*, it is important that the Court continue to refine and clarify its approach to internet publication more generally so that clear principles may be distilled and applied to the various other issues not addressed by the reforms or the Court's decision. Although the Court expressed a certain openness to following a Canadian decision that was somewhat alien to the Australian principles of publication, only time will tell whether this portends a shift towards a similarly pragmatic defamation jurisprudence, or the mere accumulation of further common law principles to an already vexed area of law.

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[106] Ibid 5.
[107] Ibid.