

13 March 2020

Committee Secretary  
Select Committee on Foreign Interference through Social Media  
Department of the Senate  
PO Box 6100  
Canberra ACT 2600

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Dear Secretary

**Re Foreign Interference through Social Media**

Please accept this submission to the Select Committee on Foreign Interference through Social Media. I am a PhD candidate and casual academic at the Faculty of Law of the University of Technology Sydney. My research examines the extent to which publishing fake news for profit may be treated as a form of fraud.

I note that the Committee's Terms of Reference require it to inquire into and report on matters beyond "foreign interference through social media" alone. The Terms of Reference also refer to "use of social media for purposes that undermine Australia's democracy and values, including the spread of misinformation", "responses to mitigate the risk posed to Australia's democracy and values, including by the Australian Government and social media platforms" and "any related matters".

This submission concerns a specific type of misinformation spread on social media: fake news. It uses the expression "fake news" to refer to false stories published on websites that look like legitimate news websites. It does not use the expression to refer to the posting or sharing of false information on social media and forums, or to denigrate the legitimate news media. In this sense, it uses the expression to refer to what its modern usage originally meant: the faking of *the news*, not just the spreading of misinformation.

The purpose of this submission is to argue that the Commonwealth, States and Territories could and should treat publishing fake news for profit as a form of fraud. Put simply, fake news publishers obtain a financial advantage by deception because they generate advertising revenue by publishing false stories, and treating the publication of fake news for profit as a form of fraud is an appropriate way to hold publishers accountable without enacting new laws. This argument is relevant to foreign interference through social media because most fake news websites are operated from outside Australia, social media is the means by which fake news stories spread, and the proliferation of fake news stories, particularly those that draw upon political, social or cultural tensions, may pose a threat to our democracy and values. It is also relevant because it proposes a new solution to the problem and characterises the threat as one that is often financially (rather than ideologically) motivated.

The submission is split into six parts. The first charts the financial motivations of fake news publishers. The second explains how publishing fake news for profit contravenes s 192E of the *Crimes Act 1900* (NSW). The third answers the question:

“Why is publishing fake news for profit not being treated as fraud already?” The fourth sets out reasons why publishing fake news for profit *should* be treated as fraud. The fifth compares treating the publication of fake news for profit as fraud with other solutions to the problem. The final part describes the enforcement options available to the Commonwealth, States and Territories.

***Fake news publishers are often financially, not ideologically, motivated***

The common conception of fake news is that its publication is ideologically motivated—that those on the fringes of the political spectrum spread false information to push their own agendas, or that foreign powers spread false information to destabilise social and political systems. Undoubtedly, there is truth to this common conception. But the reality of the situation is more complicated.

People have all kinds of reasons to spread false information online. Some do it in pursuit of a personal or political agenda. Some do it to shock or insult or enrage. Some do it in the belief (sometimes justified, sometimes not) that readers will interpret their content to be satire. But many, in particular those who publish *real* fake news (i.e. websites that masquerade as news websites), do it to turn a profit via advertising.

The proof of this profit motive comes from the mouths of the publishers themselves.<sup>1</sup> Several prominent fake news publishers have admitted to publishing fake news primarily to earn money.<sup>2</sup> Others have disclaimed the profit motive yet disclosed earnings of tens of thousands of dollars.<sup>3</sup> There is even evidence of publishers employing writers to create content.<sup>4</sup>

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<sup>1</sup> See, eg, Terrence McCoy, “Inside a Long Beach Web Operation That Makes up Stories about Trump and Clinton: What They Do for Clicks and Cash”, *Los Angeles Times*, 22 November 2016 (describing fake news publishers saying that “they are making so much money that they feel uncomfortable talking about it because they don’t want people to start asking for loans”); Craig Silverman, “Here Are 50 Of The Biggest Fake News Hits On Facebook From 2016”, *Buzzfeed*, 30 December 2016 (quoting fake news publisher as describing the 2016 Presidential Election as “definitely good for business”); Joshua Gillin, “The More Outrageous, the Better: How Clickbait Ads Make Money for Fake News Sites”, *Politifact*, 4 October 2017 (quoting fake news publisher as saying: “the goal is to get to the point where

<sup>2</sup> See, eg, Andrew Higgins, Mike McIntire and Gabriel Dance, “Inside a Fake News Sausage Factory: ‘This Is All About Income’”, *New York Times*, 25 November 2016 (quoting fake news publisher as saying “For me, this is all about income, nothing more”); Scott Shane, “From Headline to Photograph, a Fake News Masterpiece”, *New York Times*, 18 January 2017 (reporting fake news publisher insisting that the money, not the politics, is the point); Craig Silverman, Jane Lytvynenko and Scott Pham, “These Are 50 Of The Biggest Fake News Hits On Facebook In 2017”, *Buzzfeed*, 28 December 2017 (reporting fake news publisher describing taking advantage of online hoaxes as “a way to make money”).

<sup>3</sup> See, eg, Caitlin Dewey, “This is not an interview with Banksy”, *Washington Post*, 23 October 2014 (reporting fake news publisher disclosing earnings of up to \$10,000 per day from a false story describing the arrest of the anonymous artist known as Banksy); Laura Sydell, “We Tracked Down A Fake-News Creator In The Suburbs. Here’s What We Learned”, *All Things Considered*, 23 November 2016 (reporting fake news publisher making between \$10,000 and \$30,000 per month yet insisting that it is not about money); Eli Saslow, “‘Nothing on This Page Is Real’: How Lies Become Truth in Online America”, *Washington Post*, 18 November 2018 (describing fake news publisher earning as much as \$15,000 in a “good month”).

<sup>4</sup> See, eg, Terrence McCoy, “Inside a Long Beach Web Operation That Makes up Stories about Trump and Clinton: What They Do for Clicks and Cash”, *Los Angeles Times*, 22 November 2016; Craig

Publishing fake news is a real business. Like any business, it takes time, effort and ingenuity to succeed. The publisher has to purchase a domain name, build a website that looks like a legitimate news website, host the website on the domain, engage an advertising service to place advertisements on the website, create false and inflammatory stories, publish those stories on the website, and promote the stories on forums and on social media. To evade censorship the publisher may have to hop from domain to domain repeating the process over and over again.<sup>5</sup> But the real art (if dishonesty is an art) is devising the right kind of stories—stories that people not only will want to read, but that they will want to share.

Publishing stories that people want to share is the key to making money via fake news.<sup>6</sup> The more people who visit the website, and the more people who click advertisements, the more money the publisher will make. Fake news publishers have worked out that stories that shock or scare or enrage readers are the most capable of building momentum. The threat posed to Australia's democracy and values arises because content that engages with political, social or cultural conflict is often capable of attracting substantial attention.

Appendix 1 to this submission lists the 50 most prominent fake news stories of 2016, 2017 and 2018 according to analyses undertaken by *Buzzfeed*.<sup>7</sup> Only one of the stories has direct relevance to Australia—"Pope Francis Forgives 4,444 Pedophile Priests in Australia". That is probably because the Australian population is too small, and perhaps too cohesive, to generate as many engagements as a story specific to the United States. Nevertheless, the list gives an indication of the kind of stories that are able to gain traction online.

Many of the stories on the lists are frivolous or ridiculous. Several report false political events or events of significance to international relations. Several are defamatory or contain false stories about individuals. A striking number refer to outlandish crimes, with a particular emphasis on paedophilia—something that most parents fear and most people abhor. And several are intended to inflame passions against ideologies or movements. Taken together the stories on the list do not convey an impression of a network of individuals pushing a particular political or ideological agenda. Rather, they convey an impression of shameless attention seeking, which

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Silverman, "Here Are 50 Of The Biggest Fake News Hits On Facebook From 2016", *Buzzfeed*, 30 December 2016.

<sup>5</sup> Craig Silverman, "Publishers Are Switching Domain Names To Try And Stay Ahead Of Facebook's Algorithm Changes", *Buzzfeed*, 1 March 2018.

<sup>6</sup> Hunt Allcott and Matthew Gentzkow, "Social Media and Fake News in the 2016 Election" (2017) 31 *Journal of Economic Perspectives* 211, 222 (stating that fake news websites attract a much higher proportion of their traffic from social media (41.8%) compared to legitimate news websites (10.6%)); Brittany Vojak, "Fake News: The Commoditization of Internet Speech" (2017) 48 *California Western International Law Journal* 123, 140-143; Jacob L Nelson and Harsh Taneja, "The Small, Disloyal Fake News Audience: The Role of Audience Availability in Fake News Consumption" (2018) 20 *New Media & Society* 3270 ("social network sites play an outsized role in generating traffic to fake news").

<sup>7</sup> Craig Silverman, "Here Are 50 Of The Biggest Fake News Hits On Facebook From 2016", *Buzzfeed*, 30 December 2016; Craig Silverman, Jane Lytvynenko and Scott Pham, "These Are 50 Of The Biggest Fake News Hits On Facebook In 2017", *Buzzfeed*, 28 December 2017; Craig Silverman and Scott Pham, "These Are 50 Of The Biggest Fake News Hits On Facebook In 2018", *Buzzfeed*, 28 December 2018. The analyses include only stories found to be 100% false. They do not include misreported news or partisan misrepresentations of real events. The stories are ranked according to the total number of "engagements" on Facebook—shares, comments and reactions.

tends to prove what the publishers themselves have said: “It’s a way to make money”.<sup>8</sup>

Publishing fake news is a modern way to make money by telling lies. Traditionally, to make money by telling lies is considered to be fraud. Some commentators have referred to fake news as “*fraudulent* news”.<sup>9</sup> But few have put the two together and argued that publishing fake news for profit could actually constitute fraud.<sup>10</sup> The following section makes that argument using existing Australian law.

### ***Publishing fake news for profit could be treated as fraud***

The laws of each Australian State and Territory prohibit obtaining a financial advantage by deception, although the wording of the individual offences varies.<sup>11</sup> Consider the *Crimes Act 1900* (NSW) as an example. Section 192E(1) provides:

- A person who, by any deception, dishonestly—
- (a) obtains property belonging to another, or
  - (b) obtains any financial advantage or causes any financial disadvantage,
- is guilty of the offence of fraud.

There are five elements to the offence.

The first is to engage in “any deception”. To engage in deception is to deceive. To deceive is to knowingly induce a person to believe that a thing is true when the thing is in fact false.<sup>12</sup> A person who publishes fake news online deceives in three ways. First, by creating a website that looks like a typical news website, the person induces readers to believe that the website is in fact a legitimate news website. Secondly, by publishing articles using the form and language of typical news articles, the person induces readers to believe that the articles are in fact legitimate news articles. Thirdly, by making statements in the articles, the person induces readers to believe that the statements are in fact true.

The second element of the offence is to “obtain property belonging to another” or “obtain any financial advantage” or “cause any financial disadvantage”. The fake news publisher obtains a financial advantage because he or she generates revenue by hosting advertisements on the website. Readers view the website and may click on the advertisements. And an advertising service pays the fake news publisher an amount per view or per click.

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<sup>8</sup> Craig Silverman, Jane Lytvynenko and Scott Pham, “These Are 50 Of The Biggest Fake News Hits On Facebook In 2017”, *Buzzfeed*, 28 December 2017.

<sup>9</sup> See, eg, PEN America, *Faking News: Fraudulent News and the Fight for Truth*, 12 October 2017.

<sup>10</sup> David O Klein and Joshua R Wueller, “Fake News: A Legal Perspective” (2017) 20 *Journal of Internet Law* 5 (identifying fraud and unfair and deceptive trade practices as potential tools to fight fake news); John Allen Riggins, “Law Student Unleashes Bombshell Allegation You Won’t Believe: ‘Fake News’ as Commercial Speech” (2017) 52 *Wake Forest Law Review* 1313, 1327 (dismissing fraud as viable solution); Ari Melber, “Capitol Report: Regulating Fraud News”, *New Jersey Law Journal*, 30 January 2017 (suggesting FTC could treat non-political fake news stories as fraudulent).

<sup>11</sup> See Appendix 2 to this submission for an extract of each fraud offence.

<sup>12</sup> See, eg, *Re London and Globe Finance Corporation Ltd* [1903] 1 Ch 728, 732 (“To deceive is, I apprehend, to induce a man to believe a thing is true which is false, and which the person practising the deceit knows or believes to be false.”) (Buckley J). See also s 192B of the *Crimes Act 1900* (NSW), which provides further clarification of the definition of “deception”.

The third element of the offence is to have obtained the financial advantage “by” the deception. This is a causation requirement. The prosecution must prove that the defendant obtained the financial advantage because of the deception, not for some other reason.<sup>13</sup> In relation to fake news, depending on the form of advertising employed, the publisher is paid by the advertising service each time a user views the website or clicks on an advertisement. There is a direct relationship between publication of the false stories, readers viewing the website and the amount the publisher is entitled to paid. But for the false stories, there would be no readers; and but for the readers, there would be no revenue. The deception is the first link in the chain pursuant to which the publisher obtains the financial advantage.

The fourth element is to have obtained the financial advantage “dishonestly”.<sup>14</sup> The definition of dishonesty varies between the States and Territories. In New South Wales, the Crimes Act provides that dishonest “means dishonest according to the standards of ordinary people and known by the defendant to be dishonest according to the standards of ordinary people”.<sup>15</sup> Whether conduct is dishonest is a question of fact to be determined by the jury.<sup>16</sup> The test allows a defendant to evade conviction in two circumstances. The first occurs where the prosecution is unable to prove that what the defendant did was dishonest according to what the jury believe to be dishonest according to the standards of ordinary people. The second occurs where the prosecution is unable to prove that the defendant knew that ordinary people would consider her or his conduct to be dishonest. It does not allow a defendant to evade conviction by claiming simply: “I did not consider what I did to be dishonest”.

The dishonesty requirement limits the reach of the offence. It means that a jury can acquit a person who has engaged in deception on the ground that her or his conduct was nevertheless not dishonest. This may seem contradictory on the basis that deception is inherently dishonest. But deception is not necessarily dishonest. For example, if a person lies to recover property of which he or she is the rightful owner,

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<sup>13</sup> *R v Kovacs* [1974] 1 WLR 370, 373; *R v King* [1987] QB 547; *R v Ho & Szeto* (1989) 39 A Crim R 145; *R v Jenkins* (2002) 6 VR 81.

<sup>14</sup> This element does not exist in Western Australia. Section 409 of the *Criminal Code Compilation Act 1913* (WA) requires the prosecution to prove that the defendant acted “with intent to defraud”. This submission later argues that publishing fake news for profit is a “fraud that does not defraud”. For that reason, the requirement that the accused have “intent to defraud” means that a person who publishes fake news for profit cannot be convicted of fraud in Western Australia.

<sup>15</sup> *Crimes Act 1900* (NSW) s 4B(1). The test is known as the “*Ghosh* test” because it originated in an English Court of Appeal decision called *R v Ghosh* [1982] 3 WLR 110. The *Ghosh* test is also employed in the Australian Capital Territory and South Australia: see *Criminal Code 2002* (ACT) s 300; *Criminal Law Consolidation Act 1935* (SA) s 131(1). In Queensland and Tasmania the test for dishonesty is the test that was approved by the High Court in *Peters v The Queen* (1998) 192 CLR 493, which asks whether the defendant was dishonest according to the standards of ordinary decent people, but not whether the defendant knew that he or she was dishonest according to those standards: *R v Dillon*; *Ex parte Attorney-General (Qld)* [2016] 1 Qd R 56; [2015] QCA 155, [48]; *R v Fitzgerald* [1980] Tas R 257, 262, 264. In Victoria the test for dishonesty asks only whether the accused acted without a belief in a legal right to obtain the financial advantage: *R v Salvo* [1980] VR 401; *R v Bonollo* [1981] VR 633; *R v Brow* [1981] VR 783; *R v Todo* (2004) 10 VR 244.

<sup>16</sup> *Crimes Act 1900* (NSW) s 4B(2). The position is the same in the ACT: *Criminal Code 2002* (ACT) s 302. It is the same in South Australia: *Criminal Law Consolidation Act 1935* (SA) s 131(2). It is the same in Victoria: *R v Todo* (2004) 10 VR 244, [26]. It is the same in Queensland: *R v Dillon*; *Ex parte Attorney-General (Qld)* [2016] 1 Qd R 56; [2015] QCA 155. And it is the same in Tasmania: *Tasmania v Clark* [2018] TASSC 64, [10]-[11].

it may not seem right to say that doing so was dishonest. In this way, the dishonesty requirement mimics the common law of larceny, which provides that a person who has a “claim of right” to property cannot be convicted of stealing it.<sup>17</sup> But it also goes further, as it operates in circumstances where the line between fraud and legitimate business practices is hard to draw, and gives a jury discretion to acquit a defendant who they do not consider to have been sufficiently dishonest.

In relation to fake news, the prosecution would have to convince a jury that the fake news publisher obtained the advertising revenue dishonestly. Here it is possible to conceive of jurors forming different opinions. Some might think that the conduct of a fake news publisher is *not* dishonest. This line of thinking would emphasize that the fake news publisher does not deceive the person from whom he or she obtains the financial advantage—i.e. the advertising service. The argument would assert: (1) the advertising service agreed to pay the publisher each time a person clicks on an advertisement or views the page upon which the advertisement is displayed; (2) people visited the website and clicked on or were exposed to the advertisements; and (3) therefore, the publisher is entitled to be paid pursuant to the agreement. This reasoning is built upon the fact that, as between the fake news publisher and the advertising service, the exchange is legitimate. But it suffers from one crucial flaw. It ignores the dishonest means by which the publisher attracts people to the website. Although the publisher and the advertising service have entered into a legitimate agreement, the publisher fulfils her or his end of the bargain by deceiving readers. It seems reasonable to expect that most jurors would consider this to render obtaining the revenue dishonest to the requisite standard.

The final element is intent. The publisher must have intended to dishonestly obtain the financial advantage by deception. This element is likely to be easy to satisfy in view of the work done by the publisher. The publisher registers the domain name, makes the website, engages the advertising service, writes the articles, publishes the articles and promotes the articles on social media and message boards. These actions betoken a premeditated scheme to make money by deception. However, at the same time, it is important to note that a publisher who believes that the stories are true, or does not intend readers to interpret the stories as assertions of fact, cannot be said to have intent to deceive. This means that a journalist who makes a mistake, a satirist whose article is taken seriously, or a conspiracy theorist who truly believes her or his false content, cannot be convicted of fraud.

As publishing fake news for profit is capable of satisfying each element of s 192E of the Crimes Act, there is no doubt that it at least *could* constitute fraud. The only limiting factor among the elements is a question of fact, namely: would a jury consider obtaining a financial advantage by publishing false news stories to be dishonest? Therefore, the real issue is not whether publishing fake news for profit *could* be treated as fraud; rather, the issue is whether authorities *should* treat

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<sup>17</sup> *R v Fuge* (2001) 123 A Crim R 310, 314-315. Section 131(5) of the *Criminal Law Consolidation Act 1935* (SA) s 131(5) makes further provision as to the meaning of “dishonesty” along the lines of a claim of right: “The conduct of a person who acts in a particular way is not dishonest if the person honestly but mistakenly believes that he or she has a legal or equitable right to act in that way”. And, as mentioned in the previous footnote, the test for dishonesty in Victoria asks only whether the accused acted without a belief in a legal right to obtain the financial advantage. This means that a publisher charged with fraud in South Australia or Victoria could disclaim having acted dishonestly by arguing that he or she believed that he or she had a legal right to generate revenue from advertising by publishing false information. But there may be complications with that kind of argument.

publishing fake news for profit as fraud. The remainder of this submission addresses that issue.

***Why is publishing fake news for profit not being treated as fraud already?***

Before turning to why publishing fake news for profit should be treated as fraud, it is necessary to consider a preliminary question: why is publishing fake news for profit not being treated as fraud already? As the previous section explained, the case for fake news constituting fraud is straightforward. There are five elements to the offence and publishing fake news for profit is capable of satisfying each of them. Clearly, something has blinded prosecutors, commentators and politicians from recognising that publishing fake news, like other ways of making money by telling lies, might constitute fraud. What that “something” is becomes apparent upon a comparison of fake news and more conventional frauds.

Although publishing fake news for profit is capable of satisfying each element of s 192E of the Crimes Act, it does not fit into the mould of a conventional fraud. Conventional frauds involve conduct like inflating earnings when applying for a loan, winding back the odometer before selling a car, cheating at gambling, or, to take a more modern example, posing online as a beautiful woman longing for companionship to cheat a lonely man out of funds capable of funding a flight to Australia. The common theme in each of these examples is a victim of dishonesty being deprived of something of value. The bank loses the amount beyond which it would have loaned the applicant with knowledge of the applicant’s true financial position. The purchaser of the car pays more than he or she would have paid with knowledge of the true odometer reading. The gambler loses what he or she should have won. And the poor schmuck whose new girlfriend from Belarus turned out to be a male teenager from some other country loses both dignity and the money advanced to fund the flight to Australia.

In these conventional frauds, one person lies to another in order to obtain something of value from that person. Publishing fake news for profit is unlike conventional frauds in this regard. To start with, there are three parties involved: the fake news publisher, the reader and the advertising service. This in and of itself is not unconventional. Many frauds involve more than two parties. Credit card fraud is a common example. If one person uses another person’s credit card to purchase something, he or she deceives the seller by pretending to be the person entitled to pay with the card, and causes either the bank or the true owner of the card to suffer a loss equivalent to the purchase price. Although the person deceived is not the person who suffers the loss, common sense dictates that using someone else’s credit card should constitute fraud. It is well established that the person deceived does not have to be the person who suffers the loss.<sup>18</sup>

Publishing fake news for profit takes this one step further. In the credit card example, neither the bank nor the true owner of the card is happy to pay for the purchase made by the person who misappropriated the card. In contrast, the advertising service is happy to pay the fake news publisher, so long as the publisher has exposed readers to the advertisements, and subject to its terms and conditions. The publisher and the advertising service have a bona fide agreement, and the fake news publisher is

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<sup>18</sup> *R v Kovacs* (1974) 58 Cr App R 412, 416; *R v Charles* [1977] AC 177, 192; *R v Clarkson* [1987] VR 962, 980; *R v Benli* [1998] 2 VR 157, 161.

entitled to be paid in accordance with that agreement. The advertising service is not defrauded.

The fundamental difference between the person who obtains a financial advantage by publishing fake news and the person who obtains a financial advantage by means of a conventional fraud is that the fake news publisher does not *defraud* anyone. To defraud is to deprive by dishonest means.<sup>19</sup> Those who read fake news are not defrauded because they do not pay to read the stories. And the advertising services are not defrauded because they are not subjected to the deception. Therefore, publishing fake news for profit is not a conventional form of fraud; it is something else—a “fraud that does not defraud”.

A fraud that does not defraud is a dishonest acquisition unaccompanied by a dishonest deprivation. There appear to be three kinds of transactions capable of constituting a fraud that does not defraud. The first is where a person dishonestly obtains something that has no owner. In this case there is no dishonest deprivation because there is no person to deprive. The second is where a person dishonestly obtains something that comes into existence upon its acquisition, such as a licence.<sup>20</sup> In this case there is no dishonest deprivation because there is no deprivation per se, only acquisition. The third is where one person deprives a second person of something pursuant to a bona fide transaction but does so by being dishonest to a third person. In this case there is no dishonest deprivation because the deprivation, as between the first and second person, is honest.

Publishing fake news for profit is a fraud that does not defraud of the third kind. The deprivation of the advertising service is honest in the sense that the publisher and the advertising service have a bona fide agreement pursuant to which the publisher is entitled to be paid. But the acquisition by the publisher is dishonest because the publisher deceives other people in order to become entitled to be paid by the advertising service.

Fraud offences throughout Australia appear to capture frauds that do not defraud because they require the prosecution to prove only that the defendant *obtained* a financial advantage by deception. They do not require the prosecution to prove that the defendant caused someone to suffer a corresponding financial disadvantage, although in conventional cases the two go hand in hand.

Publishing fake news for profit has not been recognised as a form of fraud already because the notion that it is possible to commit a fraud that does not defraud has not been appreciated. In part that is because frauds that do not defraud are rare. But it is also because there is no traditional victim to make a complaint. Publishing fake news for profit is the perfect example. The readers might resent being lied to and the advertisers might resent advertisements appearing alongside false stories. But neither the readers nor the advertisers are likely to feel entitled to contact the authorities because they have not suffered any dishonest deprivation.

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<sup>19</sup> See, eg, *Re London and Globe Finance Corporation Ltd* [1903] 1 Ch 728, 732 (“To defraud is to deprive by deceit”); *Scott v Metropolitan Police Commissioner* [1975] AC 819, 839 (“to deprive a person dishonestly of something”); *R v Olan* [1978] 2 SCR 1175, 1182 (“dishonest deprivation”).

<sup>20</sup> See, eg, *Cleveland v United States* 531 US 12 (2000).



*Publishing fake news for profit should be treated as fraud*

For publishing fake news for profit to be treated as a form of fraud, authorities must be willing to prosecute frauds that do not defraud. This would involve a change in practice, as I am not aware of any Australian decisions in which a person has been convicted for perpetrating a fraud that does not defraud.<sup>21</sup> Obtaining a financial advantage by deception is the fraud offence of choice for prosecutors in New South Wales.<sup>22</sup> But the typical case involves obtaining a financial advantage whilst causing a financial disadvantage, or at least creating a risk of a financial disadvantage. The language of the Crimes Act, which allows prosecutors to charge a person with obtaining a financial advantage *or* causing a financial disadvantage, apparently was not introduced with the prosecution of frauds that do not defraud in mind.

Nevertheless, there are good reasons to use fraud offences to combat frauds that do not defraud, particularly in relation to the publication of fake news. Consider what the position would be if a person published and sold fake hard copy newspapers in the street. The person would obtain a financial advantage in the form of the purchase price. And the person would cause the purchasers to suffer a financial disadvantage because the purchasers themselves pay the purchase price. In other words, to publish and sell a fake newspaper in the street would be a conventional form of fraud, as the purchasers are *defrauded*.

Compare this dissemination of hard copy fake news to the dissemination of online fake news. In both the publisher creates a fake news publication. In both the publisher publishes false stories in that publication. In both the readers read the stories. In both the readers may form false beliefs or alter their behaviour in response to the stories. In both the publisher profits as a consequence of the readers reading the stories. The only difference is that the hard copy publisher profits by charging the readers, whereas the online publisher profits by exposing readers to advertisements.

The only difference is the business model.

The hardcopy fake news publisher adopts a conventional buyer and seller business model—the newspapers are sold to the readers. But the online publisher adopts a two-sided market business model. A two-sided market is one in which there are two interrelated groups of consumers.<sup>23</sup> Google’s search engine is a prominent example.<sup>24</sup>

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<sup>21</sup> There are examples in the United States of America. The federal mail and wire fraud statutes have been employed to prosecute those who defraud others of “intangible rights”. One example is the right to “honest services”. An employee who accepts a bribe or a kickback is said to have defrauded her or his employer, not of any money or property, but of its right to her or his honest services. The employer is deceived but is not deprived of anything tangible. The employee obtains something tangible (i.e. money) by means of the deception. Therefore, the “intangible rights doctrine” allows federal prosecutors to prosecute frauds that do not defraud by means of the fiction that it is possible to defraud a person of an intangible right. See generally *Skilling v United States* 561 US 358 (2010).

<sup>22</sup> Between July 2018 and June 2019, 16196 of 19402 fraud-related charges (83.5%) were for obtaining a financial benefit by deception: NSW Bureau of Crime Statistics and Research, *Criminal Court Statistics June 2019* ([www.bocsar.nsw.gov.au/Pages/bocsar\\_court\\_stats/bocsar\\_court\\_stats.aspx](http://www.bocsar.nsw.gov.au/Pages/bocsar_court_stats/bocsar_court_stats.aspx)).

<sup>23</sup> See generally David S Evans, “The Antitrust Economics of Multi-Sided Platform Markets” (2003) 20 *Yale Journal on Regulation* 325; Lapo Filistrucchi, Damien Geradin and Eric van Damme, “Identifying Two-Sided Markets” (2013) 36 *World Competition* 33.

<sup>24</sup> See generally Robert H Bork and J Gregory Sidak, “What Does the Chicago School Teach About Internet Search and the Antitrust Treatment of Google?” (2012) 8 *Journal of Competition Law & Economics* 663; Giacomo Luchetta, “Is the Google Platform a Two-Sided Market?” (2013) 10 *Journal*

On one side are the users of the search engine who wish to find out information. On the other are advertisers who wish to advertise to the users. If there were no users, there would be no one to whom the advertisers could advertise. If there were no advertisers, there would be no revenue to fund the search engine. Google must attract both users and advertisers to profit in the two-sided market for online search.

The two-sided market is nothing new. Any business that profits via advertising makes use of a two-sided market, as does any business that operates as an intermediary, such as an insurance broker or a real estate agent. The difference today is the scale in which two-sided markets operate and the opportunities that exist to profit from one side without charging the other. Both of these changes were brought about by the internet. The internet has made it possible to reach millions of people with low investments in time and capital. Online businesses can provide free-to-access products and services but profit from the sale of data and attention.

Unless fraud offences are interpreted to extend to frauds that do not defraud, online businesses that profit by utilising user data and attention will be free to deceive their users to generate higher profits. The fake news publisher is the most blatant example because the deception employed is easy to detect. But the risk of online businesses deceiving users to obtain data and generate attention extends far beyond fake news. It also extends to social media and search engines, as well as other means of profiting by providing free-to-access content.

An opponent of this argument would probably seek to characterise frauds that do not defraud as “victimless crimes”. In relation to fake news, that opponent would argue: the readers are not victims because they do not pay to read the stories; and the advertising services are not victims because they are not deceived and receive the attention of the readers for which they pay. Such an argument takes an unduly narrow approach both to what it means to be a victim and to the purpose of criminal fraud. It also fails to appreciate the way in which the negative consequences of publishing fake news for profit can exceed those of conventional frauds.

Just because the readers do not pay to read the stories does not mean they are not victims. Whilst the readers may not lose any money as a result of reading the stories, they may form false beliefs and alter their behaviour in response to those false beliefs. If the false stories are political in nature, the readers may vote in ways in which they might otherwise not have voted. If the false stories concern healthcare advice, the readers may decline beneficial treatments, or pursue treatments that are incapable of offering any legitimate assistance. And if the false stories provide bogus information during a natural disaster, the readers may place themselves in serious physical danger, or take steps to protect themselves from non-existent dangers. The fake news published in the lead up to the 2016 Presidential Election in the United States, during our recent bushfire crisis, and today with respect to coronavirus, are clear examples of the damage caused by the spread of these kinds of false stories.

Furthermore, being a victim of fraud involves more than being deceived or suffering a financial loss. It also involves being exploited. The conventional fraudster exploits the trust of her or his victims, as well as other traits such as a lack of financial literacy, or a predisposition to believing things that are too good to be true, to secure a personal

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*of Competition Law & Economics* 185; James D Ratliff and Daniel L Rubinfeld, “Is There a Market for Organic Search Engine Results and Can Their Manipulation Give Rise to Antitrust Liability?” (2014) 10 *Journal of Competition Law & Economics* 517.

financial gain. The fake news publisher does much the same thing, except that he or she exploits other traits, such as rabid political partisanship, suspicion of institutions, and other fears, prejudices and desires. The readers are victims because they are unwittingly used to further the financial ends of the publishers.

In some ways publishing fake news is even more exploitative than conventional fraud. Whilst a conventional fraudster seeks to deceive particular individuals, the fake news publisher seeks to deceive the world at large. The fake news publisher relies on generating as much attention as possible, not convincing individual people to provide personal information or enter into particular transactions. If the two are weighed against each other in terms of the reach of the exploitation, the conduct of the fake news publisher is worse than that of the conventional fraudster. Publishing fake news involves a more prolific form of deception. In relation to political fake news in particular, the side effects of the deception are further reaching than those of a conventional fraud—the conventional fraudster does not undermine the integrity of an election, for example.

If all of these factors are taken into account, it is clear that publishing fake news has much in common with conventional fraud, and that in some ways it is worse. The only real objections to treating it as fraud are that the readers do not pay to read the stories and the advertising services are not subjected to the deception. But neither of these objections should be considered to be fatal.

The fact that the readers do not pay to read the stories should not be taken to counterbalance or cancel out the profit made by the publishers. That is primarily because the offence is *obtaining* a financial advantage by deception. But it is also because fraud traditionally does not require the prosecution to prove that any person suffered a loss. Even fraud offences that require proof of “intent to defraud” capture frauds in which the victim is *deprived* of something of value but, for some reason, suffers no ultimate *loss*.<sup>25</sup> In such cases, the law cannot be said to be concerned with compensating or avenging the victim. Instead, the law must be said to be concerned with prohibiting the perpetrator from making a dishonest gain, bringing about a transaction in a dishonest way, or merely placing the financial interests of the victim at risk. To treat publishing fake news as fraud would address the first two of these three concerns.

Similarly, the fact that the advertising service is not subjected to the deception does not necessarily negate the fraudulent quality of the profit made by the publisher. So far this submission has treated the advertising service as a neutral party in the fake news business model. But it is possible to characterise it as either a perpetrator or a victim. If an advertising service was aware of fake news publishers engaging its services to host advertisements on their websites, it could possibly be characterised as obtaining a financial advantage by deception from the businesses who engage its services, or as participating in the obtaining of a financial advantage by the fake news publisher. Alternatively, if the advertising service required website owners to agree not to place advertisements alongside false information, and website owners agreed to

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<sup>25</sup> For Canada see: *R v Olan* [1978] 2 SCR 1175, 1182 (“The element of deprivation is satisfied on proof of detriment, prejudice, or risk of prejudice to the economic interest of the victim. It is not essential that there be actual economic loss as the outcome of the fraud.”). For the United States see my own work: “Publishing Fake News for Profit Should be Prosecuted as Wire Fraud” (forthcoming in volume 60 of the *Santa Clara Law Review*) nn 98-111. For Western Australia see: *Brown v Deveroux* [2008] WASC 299, [89]-[94].

the condition whilst intending to publish fake news, the advertising service could be said to be a victim of fraud. To enter into an agreement with no intention of fulfilling one's end of the bargain is to make a "false promise". Unlike simply failing to perform one's end of a bargain, which constitutes only a breach of contract, making a false promise constitutes fraud.<sup>26</sup> A fake news publisher who falsely promises not to publish fake news thus both obtains a financial advantage from the advertising service (by deceiving the readers) and defrauds the advertising service (by falsely promising not to publish fake news).<sup>27</sup>

### *Fraud compared with other solutions*

To treat publishing fake news for profit as fraud would have considerable advantages over other solutions to the fake news problem (although, like each of the solutions, it alone is not capable of solving the problem). The prevailing solutions may be roughly broken down into five categories. This section will address each of them in turn.

The first category comprises fact checking and the debunking of false stories. Legitimate media organisations, as well as dedicated fact-checkers like *Snopes* and *PolitiFact*, monitor stories being shared online. They check the veracity of suspicious sounding stories. And they publish articles setting out the extent to which those stories have adhered to the truth. The practice is undoubtedly a vital element of the overall fight against fake news. But, as a single solution, it suffers from several flaws. The primary flaw is that research has demonstrated that false stories are far more likely to be shared than true stories or corrections,<sup>28</sup> which means that readers deceived by fake news may never be exposed to the truth. Another flaw is that fake news publishers prey upon established viewpoints and prejudices, which means that readers who do encounter a fact check may refuse to accept the falsity of the fake

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<sup>26</sup> *Crimes Act 1900* (NSW) s 192B(1)(a); *Criminal Code 2002* (ACT) s 325; *Crimes Act 1958* (Vic) s 81(4)(a); *Criminal Law Consolidation Act 1935* (SA) s 130; *Criminal Code Act 1924* (Tas) sch 1 s 252A(2); *Criminal Code Act 1983* (NT) sch 1 s 1. The position is the same in the United States: *Durland v United States* 161 US 306 (1896). It is the same in the United Kingdom: *Fraud Act 2006* (UK) s 2(3). And it is the same in Canada: *R v Stanley* (1957) 26 CR 180; *R v Gregg* [1965] 3 CCC 203, 209.

<sup>27</sup> Google's AdSense terms and conditions for Australia provide: "Google has the right to withhold or adjust payments to you to exclude any amounts Google determines arise from invalid activity. Invalid activity includes ... clicks, impressions, queries, conversions, or other events solicited or generated by ... false representation". The reference to "false representation" could be interpreted as capturing the publication of fake news. But the terms and conditions do not require website owners to agree not to publish false representations. They only provide that Google has the right to withhold or adjust payments if a website is soliciting users by false representations. This means the website owner who publishes fake news and profits via AdSense has not made a false promise to Google. See Google, *AdSense Online Terms of Service* (<https://www.google.com/adsense/new/localized-terms>) (accessed 15 February 2020).

<sup>28</sup> In 2017 the debunking of false stories by Facebook's fact checking partners generated only 0.5% of the engagements generated by the fifty top performing fake news stories: Craig Silverman, Jane Lytvynenko and Scott Pham, "These Are 50 Of The Biggest Fake News Hits On Facebook In 2017", *Buzzfeed*, 28 December 2017. See also Soroush Vosoughi, Deb Roy and Sinan Aral, "The Spread of True and False News Online" (2018) 359 *Science* 1146 ("Falsehood diffuse[s] significantly farther, faster, deeper, and more broadly than the truth in all categories of information"); Philip M Napoli, "What If More Speech Is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble" (2018) 70 *Federal Communications Law Journal* 55, 77-78 (explaining how filter bubbles inhibit dissemination of counterspeech).



news story.<sup>29</sup> In other words, factchecking may only aid readers who are motivated enough to seek out the truth—readers who are not part of the problem.

The second category of solution involves efforts to improve the news or information literacy of readers. Research demonstrates that people tend to believe false news stories because they lack the skills to tell whether a story is legitimate,<sup>30</sup> or fail to engage in analytic thinking.<sup>31</sup> Therefore, several commentators have proposed that the solution to the fake news problem is to teach people how to spot fake news,<sup>32</sup> and both governments and organisations now run news and/or information literacy programs in schools and communities.<sup>33</sup> Like fact checking, improving news and information literacy is a vital element of the overall fight against fake news. But it too has significant flaws—the most significant being that it is too slow. The proliferation of false information online is a pressing issue. Its solution cannot wait for generations of children to grow into competent information consumers.

The third category of solution to the fake news problem is platform censorship. This solution involves platforms such as Facebook, Twitter, WhatsApp and others taking steps to prevent the publication and spread of false information. The most aggressive censorship involves taking down false material and deleting accounts. The least aggressive involves flagging false content or integrating with fact checkers to rate the veracity of content. All of the major platforms now implement at least some measure of censorship of false information.<sup>34</sup> In some cases the measures have been self-

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<sup>29</sup> Jonas De keersmaecker and Arne Roets, “‘Fake news’: Incorrect, but hard to correct. The role of cognitive ability on the impact of false information on social impressions” (2017) 65 *Intelligence* 107, 109-110; Alice E Marwick, “Why Do People Share Fake News? A Sociotechnical Model of Media Effects” (2018) 2 *Georgetown Law Technology Review* 474, 508; Paricia L Moravec, Randall K Minas and Alan R Dennis, “Fake News on Social Media: People Believe What They Want to Believe When it Makes No Sense At All” (2019) 43 *Management Information Systems Quarterly* 1343, 1353.

<sup>30</sup> Sam Wineburg, Sarah McGrew, Joel Breakstone and Teresa Ortega, “Evaluating Information: The Cornerstone of Civic Online Reasoning”, *Stanford Digital Repository*, 22 November 2016 (“Overall, young people’s ability to reason about the information on the Internet can be summed up in one word: *bleak*.”).

<sup>31</sup> Gordon Pennycook and David G Rand, “Lazy, not biased: Susceptibility to partisan fake news is better explained by lack of reasoning than by motivated reasoning” (2019) 188 *Cognition* 39, 48.

<sup>32</sup> See, eg, Nicole A Cooke, “Posttruth, Truthiness, and Alternative Facts: Information Behavior and Critical Information Consumption for a New Age” (2017) 87 *The Library Quarterly* 211, 217 (“the bulk of disinformation on the Internet could be combated with basic evaluation skills”); Gordon Pennycook and David G Rand, “Lazy, not biased: Susceptibility to partisan fake news is better explained by lack of reasoning than by motivated reasoning” (2019) 188 *Cognition* 39, 48 (“interventions that are directed at making the public more thoughtful consumers of news media may have promise”); Kalev Leetaru, “A Reminder That ‘Fake News’ Is An Information Literacy Problem – Not A Technology Problem”, *Forbes*, 7 July 2019.

<sup>33</sup> See, eg, Pavni Diwanji, “‘Be Internet Awesome’: Helping kids make smart decisions online”, *Google*, 6 June 2017 (introducing Google’s platform for children to learn how to use the internet safely); Jon Henley, “How Finland starts its fight against fake news in primary schools”, *The Guardian*, 29 January 2016 (describing strategy employed by Finnish government); Alina Tugend, “These Students Are Learning About Fake News and How to Spot It”, *New York Times*, 20 February 2020 (giving example of students comparing videos about our bushfires); Sam Gringlas, “How Some Are Trying To Teach Senior Citizens To Spot Fake News”, *NPR*, 24 February 2020.

<sup>34</sup> See generally Adam Mosseri, “Working to Stop Misinformation and False News”, *Facebook*, 7 April 2017 ([www.facebook.com/facebookmedia/blog/working-to-stop-misinformation-and-false-news/](https://www.facebook.com/facebookmedia/blog/working-to-stop-misinformation-and-false-news/)); Kristie Canegallo, “Fighting disinformation across our products”, *Google*, 16 February 2019 ([www.blog.google/around-the-globe/google-europe/fighting-disinformation-across-our-products/](https://www.blog.google/around-the-globe/google-europe/fighting-disinformation-across-our-products/)).

imposed. In others the measures have been imposed in response to codes of practice introduced to counter the spread of false information.<sup>35</sup> But the pressure to censor false information places the platforms in a tricky position. Censoring too much risks being criticised for violating freedom of speech or being accused of bias. Censoring too little risks being criticised for fuelling the spread of misinformation.

The fourth category of solution is to enforce existing laws. As the notion that publishing fake news for profit may be fraud has gone unnoticed, this leaves primarily laws of defamation. A person who is defamed by a fake news article may be able to sue the publisher to claim damages, and there are examples of this happening in the past few years—the most notorious being the parents of the children killed in the Sandy Hook massacre suing Alex Jones for claiming that they were paid actors perpetrating an elaborate hoax.<sup>36</sup> But the extent to which defamation laws are capable of curbing the spread of false information is limited. Defamation is a breach of the civil law in most jurisdictions. This means that an individual person must sue the fake news publisher. Few people have the financial ability to fund defamation proceedings, and in many cases suing for defamation only brings further attention to the defamatory material, which deters those able to sue from commencing proceedings. Moreover, not all fake news is defamatory, which means that defamation law cannot be employed to meet the entirety of the problem.

The fifth and final category of solution is to enact specific laws to prohibit or curtail the proliferation of fake news. This solution has been employed in nations such as France, Germany, Malaysia, Russia and Singapore.<sup>37</sup> In each case it has been subjected to criticism that the laws are designed to (or are capable of being used to) suppress legitimate speech.<sup>38</sup> In the case of Russia, at least, it is clear from the legislation itself that the laws go far beyond preventing the spread of false information.<sup>39</sup>

If these five categories of solution are considered together, it is clear that there is a problem. Fact checking, improving news literacy and platform censorship require individuals and organisations to take responsibility for detecting and counteracting fake news. But they place no blame upon those most responsible—the publishers. Defamation, in contrast, does blame the publishers. But it does so only where a person

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<sup>35</sup> See, eg, European Commission, *Code of Practice on Disinformation*, 26 September 2018 (<https://ec.europa.eu/digital-single-market/en/news/code-practice-disinformation>). The Australian Government has committed to asking the major digital platforms to develop a voluntary code of conduct for disinformation and news quality. See Australian Government, *Regulating in the digital age: Government Response and Implementation Roadmap for the Digital Platforms Inquiry* (2019) 7. But the platforms do not appear to be receptive to the idea: Paul Karp, “Google and Facebook reject plan for Australian code of conduct on fake news”, *The Guardian*, 12 September 2019.

<sup>36</sup> Elizabeth Williamson and Emily Steel, “Conspiracy Theories Made Alex Jones Very Rich. They May Bring Him Down.”, *New York Times*, 7 September 2018.

<sup>37</sup> See generally Daniel Funke and Daniela Flamini, “A guide to anti-misinformation actions around the world”, *Poynter* ([www.poynter.org/ifcn/anti-misinformation-actions](http://www.poynter.org/ifcn/anti-misinformation-actions)) (accessed 11 March 2020).

<sup>38</sup> See, eg, Emma Thomasson, “Germany looks to revise social media law as Europe watches”, *Reuters*, 8 March 2018; Yantoultra Ngui, “Malaysia Passes ‘Fake News’ Law That Critics Call an Assault on Speech”, *Wall Street Journal*, 3 April 2018; Angelique Chrisafis, “French MPs criticise ‘hasty and ineffective’ fake news law”, *The Guardian*, 8 June 2018;

<sup>39</sup> Shannon Van Sant, “Russia Criminalizes The Spread Of Online News Which ‘Disrespects’ The Government”, *NPR*, 18 March 2019.

has been defamed and that person is willing and able to sue. And laws prohibiting the publication or proliferation of false information are by their nature susceptible to abuse or criticism. In other words, none of the solutions are capable of holding the publisher to account in an acceptable manner.

Treating the publication fake news for profit as fraud does not share these weaknesses. Unlike the first three categories, it is capable of holding the publisher to account. And, unlike the fourth and fifth categories, it does so without requiring an individual citizen who has been defamed to sue, and without creating an impression (or, worse, a reality) that the purpose of the law is to suppress legitimate speech. Fraud is an established offence with settled principles of application. The criteria according to which publishing fake news may constitute fraud is straightforward: the publisher must knowingly publish false information to make a profit. The profit motive is a better qualifying factor than something based on, for example, protecting the public interest or the integrity of an election. People know that making money by telling lies is fraud. It should not take much to convince the person on the street that publishing fake news for profit should be treated in the same way.

### ***Available enforcement options***

If prosecuting authorities adopt the position that publishing fake news for profit constitutes fraud, they may pursue either of two enforcement options.

The first option is to charge fake news publishers with fraud under State and Territory laws, or with using a telecommunications network to commit a serious offence pursuant to the Commonwealth Criminal Code.<sup>40</sup> The publishers will face maximum penalties of imprisonment for five or ten years depending on the offence with which they have been charged. This would deter would-be publishers who live in Australia from publishing fake news. It would also bring about a shift in the public attitude towards fake news—away from it being seen as an unfortunate by-product of free speech and towards it being seen as a dishonest and exploitative way to make a financial gain.

The second option is for Australian authorities to issue notices pursuant to s 313 of the *Telecommunications Act 1997* (Cth) directing telecommunications networks to block access to sites publishing false stories for profit. This option may be the more appropriate solution for fake news published outside Australian jurisdictions. As a solution, it would prevent Australians from accessing fake news websites, which in turn would eliminate revenue generated by Australian readers, and thereby reduce the incentive for fake news publishers to write stories with content of interest to (or, more importantly, damaging to the interests of) Australians.

Adopting either approach might incur criticism that the law is being used to inhibit freedom of speech or freedom of the press. Authorities would have to be very careful not to use their powers to restrict satirical content, mistakes made by journalists or content conveying opinions rather than false statements of fact. And they would have to exercise discretion when determining whom to charge or censor. It may be more appropriate to charge or censor a publisher who is prolific, or who publishes false political, health-related, disaster-related or defamatory content, for example.

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<sup>40</sup> *Criminal Code Act 1995* (Cth) sch 1 s 474.14.



However, at the same time, it must also be remembered that fraud is an accepted exception to freedom of speech—even in countries like the United States where freedom of speech is given express constitutional protection.<sup>41</sup> One aspect of successfully treating the publication of fake news for profit as fraud would be making the case to the public that publishing fake news is a form of fraud and that it should be treated accordingly. The message is simple: fake news publishers publish lies to profit via advertising; fraud means making money by telling lies; therefore, publishing fake news for profit is fraud.

### ***Conclusion***

This submission has argued that publishing fake news for profit could and should be treated as a form of fraud. In doing so, it has presented one particular solution to one particular kind of false information spread online—the kind that generates revenue for its publisher. The individuals who publish this kind of false information may not be the actors with respect to which the Committee was established to report upon. But they are certainly part of the same ecosystem. And the part they play in that ecosystem should not be underestimated.

Consider the character of the misinformation spread in the lead up to the most recent presidential election in the United States. The fact that foreign actors created false social media accounts and used bots to spread false information has been given significant attention. But less attention has been given to the fact that a significant proportion of the false information spread by those foreign actors was created by individuals (who in many cases were American citizens), not to influence the election, but instead to turn a profit. The interests of foreign actors bent on disrupting the domestic political landscape were intertwined with those out to make a dishonest dollar on the internet. It is not possible to address the threats posed by one without addressing the threats posed by the other.

The ubiquity of the two-sided market business model on the internet has fuelled the rise of the fraud that does not defraud. Unless full effect is given to the language of fraud offences throughout Australia, any person who profits by providing a service for free will be at liberty to do so by deception. For that reason, I urge the Committee to recommend that authorities consider treating the publication of fake news for profit as a form of fraud. To do so would not usher in an era of mass censorship. It would reassert what was once an accepted principle—that making money by telling lies is a crime.

Yours sincerely



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<sup>41</sup> *Curtis Publishing Company v Butts* 388 US 130, 150 (1967) (naming mail fraud statute as an exception to right to communicate information of public interest); *Illinois ex rel Madigan v Telemarketing Associates* 538 US 600, 621 (2003) (“the First Amendment and our case law emphatically do not require ... a blanket exemption from fraud liability for a fundraiser who intentionally misleads in calls for donations”); *United States v Alvarez* 567 US 709, 723 (2012) (“Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment.”).



## Appendix 1—Top 50 Fake News Stories of 2016, 2017 and 2018

Top 50 Fake News Stories of 2016			
Rank	Title	Website	Engagements
1	"Obama Signs Executive Order Banning The Pledge Of Allegiance In Schools Nationwide"	abcnews.com.co	2,176,777.00
2	"Woman arrested for defecating on boss' desk after winning the lottery"	thevalleyreport.com	1,765,146.00
3	"Pope Francis Shocks World, Endorses Donald Trump for President, Releases Statement"	Ending The Fed (removed)	961,000.00
4	"Trump Offering Free One-Way Tickets to Africa & Mexico for Those Who Wanna Leave America"	tmzhiphop.com	801,741.00
5	"Cinnamon Roll Can Explodes Inside Man's Butt During Shoplifting Incident"	empireherald.com	764,814.00
6	"Florida man dies in meth-lab explosion after lighting farts on fire"	thevalleyreport.com	668,842.00
7	"FBI Agent Suspected in Hillary Email Leaks Found Dead in Apparent Murder-Suicide"	Denver Guardian (removed)	567,000.00
8	"RAGE AGAINST THE MACHINE To Reunite And Release Anti Donald Trump Album"	heaviermetal.net	560,038.00
9	"Police Find 19 White Female Bodies In Freezers With "Black Lives Matter" Carved Into Skin"	tmzhiphop.com	525,066.00
10	"ISIS Leader Calls for American Muslim Voters to Support Hillary Clinton"	worldnewsdailyreport.com	522,812.00
11	Hillary Clinton In 2013: "I Would Like To See People Like Donald Trump Run For Office; They're Honest And Can't Be Bought"	conservativestate.com	507,000.00
12	"Woman Stabbed Her Husband To Death Because He Wouldn't Eat Her ASS!"	tmzhiphop.com	444,568.00
13	"Robredo: If Elected Vice President Of Duterte, I Will Immediately Resign My Post"	adobochronicles.com	442,915.00
14	"Woman murders college roommate for sending too many Candy Crush requests"	thevalleyreport.com	438,599.00
15	"Donald Trump Protester Speaks Out: "I Was Paid \$3,500 To Protest Trump's Rally"	abcnews.com.co	426,972.00
16	"Drug Kingpin Joaquin 'El Chapo' Guzman Escapes Mexican Prison For The Third Time"	abcnews.com.co	426,081.00
17	Obama passed law for grandparents to get all their grandchildren every weekend	react365.com	399,700.00
18	"President Obama Confirms He Will Refuse To Leave Office If Trump Is Elected"	burrardstreetjournal.com	383,724.00
19	"Mexican Drug Lord 'El Chapo' Breaks Out Of Prison For 3rd Time"	satiratribune.com	380,645.00
20	Van Full Of Illegals Shows Up To Vote Clinton At SIX Polling Places, Still Think Voter Fraud Is A Myth?	thelastlineofdefense.org	366,702.00
21	"Chick-fil-A President Dan Cathy – 'We Don't Like The Blacks Either'"	tmzhiphop.com	364,566.00
22	"Security Detail Tackles Homeless Man On Oscars Red Carpet, Turned Out To Be Rob Zombie"	heaviermetal.net	357,176.00
23	"Man shoots off his own penis taking selfies with gun"	thevalleyreport.com	352,256.00
24	Pence: "Michelle Obama Is The Most Vulgar First Lady We've Ever Had"	usanewsflash.com	352,000.00
25	"Pro-Lifers Declare "Ejaculation Is Murder: Every Sperm Cell Is A Life"	straightstoned.com	342,546.00
26	"Man's Penis Gets Ripped Off After Attempting To Rape A Pit Bull"	empireherald.com	342,046.00

27	Fort Wayne Man Dressed As Clown Shot In Head; Condition Critical - Daily Finesser	dailyfinesser.com	333,684.00
28	Rupaul claims Trump touched him inappropriately in the 1990s	worldnewsdailyreport.com	301,193.00
29	Los Angeles Tap Water Contains 12% Xanax and 4% OxyCodone	satiratribune.com	293,462.00
30	Saudi Arabia: Panel of Scientists admits Women are Mammals, yet 'Not Human'	worldnewsdailyreport.com	290,599.00
31	African Billionaire Will Give \$1 Million To Anyone Who Wants To Leave America if Donald Trump is Elected President	empireherald.com	279,277.00
32	Girl Infects 586 Men With HIV On Purpose, Plans On Infecting 2,000 More Before 2017 - TRENDING	tmzhiphop.com	278,434.00
33	Casey Anthony Starts Home Daycare Business In Florida	thebostontribune.com	274,458.00
34	Daycare Busted Running Toddler Fightclub, Parents Outraged	celebtricity.com	260,853.00
35	Obama Signs Executive Order Declaring Investigation Into Election Results; Revote Planned For Dec. 19th	abcnews.com.co	258,902.00
36	Mike Pence: "Sarah Palin Is My Role Model For Beautiful, Smart American Women" - Newslo	politicops.com	253,959.00
37	Graham Says Christians Must Support Trump or Face Death Camps	bizstandardnews.com	247,045.00
38	BREAKING Romanian Hacker With Access To Clinton Emails Found Dead In Jail Cell	Christian Times (removed)	242,500.00
39	The United States Revokes Scientology's Tax-Exempt Status - ABC News	abcnews.com.co	241,665.00
40	Michael Jordan Says I Won't Release Another Shoe Until Black People Unite - TRENDING	tmzhiphop.com	239,396.00
41	Woman With Too Much Makeup Mistaken As Clown; Attacked By Angry Mob - Daily Finesser	dailyfinesser.com	236,192.00
42	WHOA! Hillary Caught On Hot Mic Trashing Beyonce' With RACIAL SLURS!	thelastlineofdefense.org	232,084.00
43	Atlanta Officer Kills Black Woman, Injures Child, Following Breastfeeding Argument	baltimoregazette.com	221,455.00
44	Woman Puts Poison On Her Vagina To Kill Husband When He Went Down On Her	celebtricity.com	211,837.00
45	Morgue worker arrested after giving birth to a dead man's baby	worldnewsdailyreport.com	211,367.00
46	Actor Bill Murray Announces 2016 Presidential Run	abcnews.com.co	209,719.00
47	Pope Francis Shocks World, Endorses Hillary Clinton for President, Releases Statement	kypo6.com	203,100.00
48	Babysitter Discovers "Clown Doll" In Kid's Room Was A Real Person, Raping The Child At Night - TRENDING	tmzhiphop.com	198,614.00
49	Trump Claims America Should Never Have Given Canada Its Independence	burrardstreetjournal.com	198,558.00
50	Zimbabwe: Pride of lions kills 5 poachers and injures 3 others	worldnewsdailyreport.com	184,897.00

### Top 50 Fake News Stories of 2017

Rank	Title	Website	Engagements
1	Babysitter transported to hospital after inserting a baby in her vagina	worldnewsdailyreport.com	1204400
2	FBI seizes over 3,000 penises during raid at morgue employee's home	worldnewsdailyreport.com	1145470
3	Charles Manson to be released on parole, to Johnson County, TX	breakingnews365.net	1125031
4	Police: Chester Bennington Was Murdered	yournewswire.com	1042032
5	Morgue employee cremated by mistake while taking a nap	worldnewsdailyreport.com	993205
6	Angry Woman Cuts Off Man's Penis for Not Making Eye Contact During Sex - TRENDING	viralmugshot.com	981423
7	Female Legislators Unveil 'Male Ejaculation Bill' Forbidding	burrardstreetjournal.com	966498

	The Disposal Of Unused Semen		
8	President Trump Orders the Execution of Five Turkeys Pardoned by Obama	realnewsrightnow.com	914429
9	Elderly woman accused of training her 65 cats to steal from neighbors	worldnewsdailyreport.com	690437
10	Couple hospitalized after man gets his head stuck in his wife's vagina	worldnewsdailyreport.com	672093
11	Colorado: Hunter claims he was sexually assaulted by a sasquatch	worldnewsdailyreport.com	618761
12	Las Vegas: Video Confirms Multiple Shooters, Co-ordinated Attack	yournewswire.com	607065
13	BREAKING: NFL Fines Pittsburgh Steelers \$1m Each For Skipping National Anthem	thelastlineofdefense.org	590091
14	LAW PASSED: All Child Support in the United States Will End by Beginning of 2018	tmzbreaking.com	558201
15	Popeyes manager arrested for allegedly dipping chicken in cocaine based flour to increase business sales. - Channel22News.com	channel22news.com	545320
16	White Baseball Players Kneel in the 50's to protest Black Lynchings	breakingnews247.net	497070
17	CIA Agent Confesses On Deathbed: 'We Blew Up WTC 7 On 9/11'	yournewswire.com	423549
18	Celebrities Call For 'Total Hollywood Strike' Until Trump Resigns	yournewswire.com	416123
19	NPR: 25 Million Votes For Clinton 'Completely Fake'	yournewswire.com	394781
20	World's most popular candy to be removed from shelves by October 2017!	breakingnews247.net	390453
21	Se extiende la edad para jubilarse	12minutos.com	389957
22	Hendersonville Man Caught Molesting Pig after his penis gets stuck	sundayinquirer.com	365853
23	Yolanda Saldivar Dead At 54: Selena Fans Rejoice - Chicago Civic Tribune	civictribune.com	356690
24	Justin Bieber: Pedophiles Run The 'Evil' Music Industry	yournewswire.com	344838
25	Morgue Employee Cremated By Mistake While Taking A Nap	abcnews-us.com	334100
26	Chicago Man Arrested for Slapping 25 B*tches Because He Was Tired of B*tches	viralactions.com	333438
27	WikiLeaks: Clinton Bribed 6 Republicans To 'Destroy Trump'	yournewswire.com	332300
28	Whataburger announced they will be closing all restaurants as of February 2018 - Channel 45 News	channel45news.com	328863
29	No more child support after 2017!!!!!!	react365.com	327281
30	Ex Army Sniper Takes Out Neighbor's Home Intruder From Bedroom Window	theseattletribune.com	325395
31	Newport Introduces "Marijuana Cigarettes" That will Go On Sale Worldwide Next Year	viralactions.com	309431
32	Death row inmate eats an entire Bible as his last meal	worldnewsdailyreport.com	306278
33	17-year-old teenager sues his parents for being born white	worldnewsdailyreport.com	303568
34	Sharks spotted in mississippi River near Davenport has been confirmed as Great white shark	breakingnews365.net	303295
35	Retired MI5 Agent Confesses On Deathbed: 'I Killed Princess Diana'	yournewswire.com	298754
36	Vuelve el Servicio militar obligatorio para menores de 25 años	12minutos.com	283732
37	Woman rolls over hairdresser with her car after he "ruined" her hair	worldnewsdailyreport.com	268937
38	Texas Church Shooter Was Antifa Member Who Vowed To Start Civil War	yournewswire.com	267606
39	Servicio militar OBLIGATORIO para jóvenes de 18 que no trabajen ni estudien	noticias-frescas.com	266041
40	GM just Announced that they will be bringing the Square Body	channel45news.com	252633

	back in 2018 - Channel 45 News		
41	Beyoncé welcomes 2 baby boys with husband Jay-Z. - Channel 28 News	channel28news.com	248146
42	Hospital employee arrested for impregnating 26 women in coma	worldnewsdailyreport.com	247947
43	JUST IN: Sharia Law Finally Banned In All 50 States. Do You Support This?	redcountry.us	247870
44	Kaepernick signs 2 year 5.7 million dollar deal with the Jaguars - Channel 24 News	channel24news.com	245623
45	Racist Boy Dies for 5 Minutes, Comes Back & Says Jesus is a N***	celebtricity.com	244606
46	Man accused of ejaculating in his boss' coffee everyday for 4 years	worldnewsdailyreport.com	241878
47	Tainted buffet at Jacksonville strip club blamed after severe diarrhea incident on stage	borderherald.com	240554
48	L'Islande vous paye 4500 euros/mois pour vous marier avec une islandaise	actualite.co	239866
49	BREAKING: Charles Manson Dies in California Hospital	empirenews net	235379
50	Plane accidentally empties toilet tank over cruise ship, 23 injured	worldnewsdailyreport.com	231361

### Top 50 Fake News Stories of 2018

Rank	Title	Website	Engagements
1	Lottery winner arrested for dumping \$200,000 of manure on ex-boss' lawn	worldnewsdailyreport.com	2,383,021.00
2	Former first lady Barbara Bush dies at 92 - CNN	breaking-cnn.com	2,290,000.00
3	Woman sues Samsung for \$1.8M after cell phone gets stuck inside her vagina	worldnewsdailyreport.com	1,304,430.00
4	BREAKING: Michael Jordan Resigns From The Board At Nike-Takes 'Air Jordans' With Him	trumpbetrayed.us	911,336.00
5	Donald Trump Ends School Shootings By Banning Schools	www.8shit.net	830,116.00
6	Florida Man Arrested For Tranquilizing And Raping Alligators In Everglades	www.huzlers.com	824,137.00
7	Two altar boys were arrested for putting weed in the censer-burner	thereisnews.com	797,628.00
8	North Korea Agrees To Open Its Doors To Christianity	yournewswire.com	760,314.00
9	Man Eats Girlfriends Booty For The First Time Dies From E. Coli	www.huzlers.com	633,642.00
10	Muslim Figure: "We Must Have Pork-Free Menus Or We Will Leave U.S." How Would You Respond This?	www.vtamedia.com	631,589.00
11	California: Pro-Choice activist proudly breaks world record by getting her 27th abortion	worldnewsdailyreport.com	573,244.00
12	Pedophilia Included As 'Sexual Orientation' On New LGBT Pride Flag	yournewswire.com	472,135.00
13	Funeral Home Employee Cremated By Mistake While Taking A Nap	abcnews-us.com	448,400.00
14	Trump Set To Legalize Medical Marijuana In All 50 States	yournewswire.com	440,882.00
15	BREAKING NEWS: Stevie Wonder arrested for watching kiddie porn	wittheshit.com	430,935.00
16	New mosquito species discovered that can get you pregnant with a single bite	thereisnews.com	406,727.00
17	Gives birth to a black child and blames the coffee her husband drinks	thereisnews.com	401,759.00
18	Dekalb man sued for sucking the uterus out of woman	www.breakingnews247.net	377,213.00
19	Carnival cruise ship Triumph overturns and sinks.	www.react365.com	357,367.00
20	3 men contracted Aids from running a train on a sex doll	wittheshit.com	333,213.00
21	Obama Announces Bid To Become UN Secretary General	yournewswire.com	323,446.00

22	Macomb County fears 'vigilante' serial killer after third pedophile murdered in 1 week	nbc9news.com	308,177.00
23	Smallville' Star Confesses She Sold Children To Rothschilds And Clintons	yournewswire.com	286,338.00
24	BREAKING: Coronation Street's Malcom Hebden dies aged 78	florida-times.com	281,650.00
25	California Gov. Jerry Brown To Release 10,000 Pedophiles, Rapists From Prison	yournewswire.com	256,741.00
26	Florida: Babysitter tied crying one-month-old baby to ceiling fan for 26 hours	worldnewsdailyreport.com	253,825.00
27	Florida Man Accidentally Burns Home Down After Lighting Nike Shoes On Fire In Protest Of Nike's Colin Kaepernick Ad	www.huzlers.com	251,066.00
28	Beloved Actor And Back To The Future Star Michael J. Fox has died at the age of 57	www.yahoonews-us.com	249,000.00
29	Trump Invites Thai Boys To White House; Boys Request To Return To Cave	www.burrardstreetjournal.com	249,260.00
30	Anthony Bourdain Was About to Expose an Elite Pedophile Ring Before He Died	www.neonnettle.com	239,243.00
31	Viral Sensation "Lil Tay" Has Been Picked Up By Los Angeles Child Protection Services	www.huzlers.com	237,327.00
32	Post Malone's Tour Manager Quits Says Post Malone Smells Like Expired Milk And Moldy Cheese	www.huzlers.com	235,214.00
33	Lil Tay Rushed To Hospital After Being Beat By Group Of Children At A Playground	www.huzlers.com	234,888.00
34	Man Kills His Best Friend After Their Balls "Touched" During Threesome	www.8shit.net	231,055.00
35	Pedophile's Decapitated Corpse Found On Judge's Doorstep After Bail Hearing	www.cvikasdrv.com	217,289.00
36	Canadian trapper survives brutal sexual assault by 200-pound beaver	worldnewsdailyreport.com	204,833.00
37	Inmates Played "Look At Me" While They Raped XXXTentacion's Alleged Murderer	www.huzlers.com	195,766.00
38	Biology student has been denounced for crossing a weed plant with strawberries	thereisnews.com	193,886.00
39	MAN CUTS OFF HIS DICK TO SHOW HIS FAITHFULNESS TO ESTRANGED GIRLFRIEND	www.react365.com	192,731.00
40	Manchester to be renamed Personchester after sexism complaints	uokhun.uk	176,285.00
41	7 Arrested After Retirement Home Raided By FBI For Running Elderly Fight Club	www.huzlers.com	171,600.00
42	Mother arrested for leaving children in the car for 9 hours while at all-you-can-eat buffet	worldnewsdailyreport.com	169,720.00
43	Texas: Man freed after outliving 99-year prison sentence for horse theft	worldnewsdailyreport.com	168,539.00
44	Man accused of raping a cow claims it is the reincarnation of his dead wife	worldnewsdailyreport.com	166,508.00
45	Pope Francis Forgives 4,444 Pedophile Priests In Australia	yournewswire.com	158,358.00
46	Superstar DJ Avicii Found Dead After Exposing Pedophile Ring	yournewswire.com	157,927.00
47	Man arrested for putting fake arrow decals on the floor in IKEA and for creating a labyrinth with no exit	thereisnews.com	148,807.00
48	Erie, Pennsylvania: Woman high on meth dies after pumping gasoline into her anus	cbsnews10.com	147,289.00
49	Teen on 'female Viagra' crashes into building while masturbating to gear shift	worldnewsdailyreport.com	143,028.00
50	Sex Robots That Can Cook, Clean Efficiently Will Be Available By 2019	www.huzlers.com	142,160.00

## **Appendix 2—Fraud Offences**

### *Criminal Code 2002 (ACT)*

#### **332 Obtaining financial advantage by deception**

A person commits an offence if the person, by deception, dishonestly obtains a financial advantage from someone else.

Maximum penalty: 1000 penalty units, imprisonment for 10 years or both.

### *Criminal Code Act 1983 (NT) Sch 1*

#### **227 Criminal deception**

- (1) Any person who by any deception:
- (a) obtains the property of another; or
  - (b) obtains a benefit (whether for himself or herself or for another),
- is guilty of an offence and is liable to the same punishment as if he or she had stolen the property or property of equivalent value to the benefit fraudulently obtained (as the case may be).

### *Crimes Act 1900 (NSW)*

#### **192E Fraud**

- (1) A person who, by any deception, dishonestly:
- (a) obtains property belonging to another, or
  - (b) obtains any financial advantage or causes any financial disadvantage,
- is guilty of the offence of fraud.

Maximum penalty—Imprisonment for 10 years.

### *Criminal Code 1989 (Qld)*

#### **408C Fraud**

- (1) A person who dishonestly—
- ...
  - (d) gains a benefit or advantage, pecuniary or otherwise, for any person;  
or
  - (e) causes a detriment, pecuniary or otherwise, to any person; or
  - ...
- commits the crime of fraud.

Maximum penalty—5 years imprisonment.

*Criminal Law Consolidation Act 1935 (SA)*

**139—Deception**

A person who deceives another and, by doing so—

- (a) dishonestly benefits him/herself or a third person; or
  - (b) dishonestly causes a detriment to the person subjected to the deception or a third person,
- is guilty of an offence.

Maximum penalty:

- (a) for a basic offence—imprisonment for 10 years;
- (b) for an aggravated offence—imprisonment for 15 years.

*Criminal Code Act 1924 (Tas) Sch 1*

**252A Acquiring a financial advantage**

- (1) Any person who by any deception dishonestly acquires for himself or for any other person any financial advantage is guilty of a crime.

**253A Fraud**

Any person who, with intent to defraud, or by deceit or any fraudulent means –

- ...
  - (c) gains a benefit, pecuniary or otherwise, for any person; or
  - (d) causes a detriment, pecuniary or otherwise, to any person; or
  - ...
- is guilty of a crime.

*Crimes Act 1958 (Vic)*

**82 Obtaining financial advantage by deception**

- (1) A person who by any deception dishonestly obtains for himself or another any financial advantage is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).

*Criminal Code Act Compilation Act 1913 (WA)*

**409 Fraud**

- (1) Any person who, with intent to defraud, by deceit or any fraudulent means —
  - ...
  - (c) gains a benefit, pecuniary or otherwise, for any person; or
  - (d) causes a detriment, pecuniary or otherwise, to any person; or
  - ...is guilty of a crime and is liable —
  - (g) if the person deceived is of or over the age of 60 years, to imprisonment for 10 years; or
  - (h) in any other case, to imprisonment for 7 years.