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SUBMISSION TO COUNCIL OF ATTORNEYS-GENERAL REVIEW OF MODEL DEFAMATION PROVISIONS – PART A MODEL DEFAMATION AMENDMENT PROVISIONS (MDAPs) AND BACKGROUND PAPER

Thank you for the opportunity to make submissions.

1. SUPPORT FOR THE AMENDMENTS

We welcome amendments to the Model Defamation Provisions to clarify the position of internet intermediaries.

Disputes are best resolved between the complainant and the originator of allegedly defamatory material. We commend this policy objective and the MDAPs to the extent they serve that purpose. Our comments below identify instances where the proposed drafting may be at odds with that sound policy objective.

In our experience, under the current legislation, many complainants choose to sue only an internet intermediary and not make any claim against the originator, even when that originator is identifiable. This is clearly problematic. The originator is not given an opportunity to defend their content. Instead, there is often a complex, technical, and protracted dispute about the intermediary's role. The MDAPs should ensure complainants take action against the originator, rather than an internet intermediary, at least where the originator is reasonably identifiable.

We welcome the recent decision in *Google LLC v Defteros* [2022] HCA 27, and also welcome these proposed reforms to provide legislative clarity on other matters.

2. RECOMMENDATION 2, PROPOSED SECTION 9A: SEARCH ENGINES

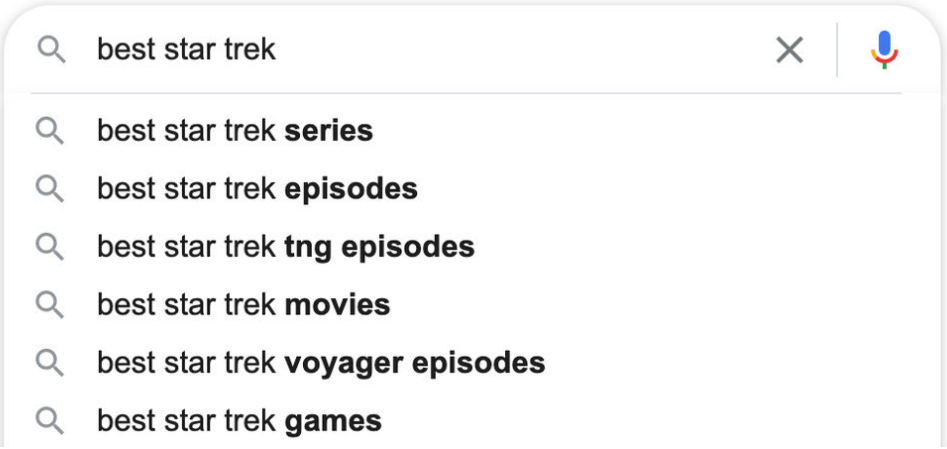
We welcome the proposed statutory exemption from liability for search engines and appreciate your consideration of our feedback on search engine liability in previous

submissions. This reform would provide much needed certainty as to the status of search engines under the Australian law, to the benefit of the Australian public.

Under the current proposal, we have some concerns with respect to the drafting of section 9A(3)(a) insofar as it may make a distinction between search results derived from automatically generated search terms as opposed to manually entered search terms.

While we understand there may be a desire to retain search engine liability for the search terms themselves, when they are automatically generated, the actual search results which are generated in response to automated search query predictions should be treated in the same manner as search results generated in response to manually entered search terms. This is because predictive search terms or "Autocomplete" is simply a tool for users to manually accept or not accept, and have become a useful innovation across many surfaces to aid the experience of users. The predictive text is exactly that, that is, intended to predict the user's manual entry.

Autocomplete is a feature within Google Search that is of real benefit to search engine users. Our automated systems generate predictions that help people save time and avoid spelling errors by allowing them to quickly complete the search they already intended to undertake. This is particularly so for users of mobile devices. Cumulatively, it saves over 200 years of typing time each day. Here is an example of what this looks like in practice:



Importantly, the results generated in response to searches including an Autocomplete prediction are no different to those that would be generated if the user typed the query manually themselves.

Moreover, we have clear content policies that govern Autocomplete predictions, as well as a user reporting feature whereby anyone can report possible violations. These include policies that prohibit predictions concerning, inter alia, sensitive and disparaging terms associated with named individuals.

Proposed section 9A(3)(a) of the MDAPs should be amended to remove the references to "search terms inputted by the user of the engine" and "terms automatically suggested by the engine", since those expressions do not seem to be necessary and could cause confusion.

We are also of the view that the drafting of the following terms is potentially confusing, complex and unnecessary:

- the "digital matter" must be "limited to" search results, and
- the provider's role must be "limited to" providing a process for the user to generate search results.

Inevitably a search results page will provide a variety of "matter" and "processes" in conjunction with the provision of search results. For example, a search for "Prime Minister of Australia" might return, in addition to organic search results, a knowledge panel with a quick snapshot of information on the topic based on Google's understanding of available content on the web. A search for "Sydney Weather" might return, also in addition to organic search results, a "Weather Onebox". This is not to say that the content of the knowledge panel or Onebox itself should necessarily be exempt from liability, but to the extent the associated search results concurrently appear with other items, the search results should not be subject to liability merely because they are served in conjunction with, for example, a knowledge panel or a Onebox.

We propose a workable section 9A(3) might read as follows:

> *A search engine provider for a search engine is not liable for defamation for the publication of search results if the provider proves the search results were generated automatically.*

3. RECOMMENDATIONS 3A AND 3B, PROPOSED SECTION 31A: SAFE HARBOUR FOR OTHER DIGITAL INTERMEDIARIES

We support the introduction of a safe harbour defence similar to that proposed in Recommendation 3A, subject to the comments below.

We prefer Recommendation 3A to Recommendation 3B because Recommendation 3B would not prevent claims against intermediaries where the original poster is identifiable.

If Recommendation 3A is adopted, we submit that the drafting of proposed section 31A should be amended to put beyond doubt that:

- the new section provides a complete defence if the complainant has sufficient information about the originator to commence proceedings, and

- a complainant cannot send a concerns notice to a digital intermediary (and therefore cannot commence proceedings against the intermediary) without having sent, at least 14 days prior, a complaints notice.

We also have lingering concerns (in respect of both Recommendations 3A and 3B) about the proposed complaints notice process. We have discussed some of these issues in previous submissions.

First, in our experience (for example, as an intermediary that hosts user generated content on YouTube and Maps), it is unusual to request that originators disclose their identity and other information without a court order or some similar structure protected by the rule of law. Originators typically do not respond to correspondence from intermediaries, let alone consent to the disclosure of their identity and other information to a potential plaintiff. As far as we are aware, the equivalent defence under the UK Act is rarely, if ever, used and has not been effective in ensuring disputes are resolved between the complainant and originator.

Second, we rarely have access to a physical address for service for our account holders. For sound privacy-preserving reasons, most internet intermediaries do not have processes in place to verify information that an account holder chooses to provide. Therefore, expecting digital intermediaries to possess information that would allow a complainant to serve a prospective defendant (without an order for substituted service) is unrealistic. However, we understand that the intention may be that the originator would volunteer their contact details to be shared directly with the complainant in the context of a specific complaint, rather than consent that the intermediary reveal whatever account level data has been provided to the intermediary by the originator when creating an account. We respectfully suggest that this intention is made more explicit in the drafting or at least explanatory materials.

Third, we also submit that the drafting of proposed section 31A(3)(b)(ii) should be clarified to ensure that it is clear that "the location where the matter could be addressed" must be the complete URL of the webpage and any other helpful information (e.g. a timestamp identifying allegedly defamatory content within a long form video on YouTube). Without the complete URL of a YouTube video, for example, we are unable to locate and remove the video from YouTube with any certainty.

We understand some stakeholders are concerned that giving a safe harbour to digital intermediaries will leave plaintiffs in defamation actions unable to force the removal of content from the Web. We consider this concern to be unfounded. First, originators can clearly be compelled to remove content. Second, most digital intermediaries maintain and enforce content policies in relation to their products. For example, YouTube maintains and enforces a set of community guidelines. Third, Google also performs legal removals consistent with court orders against third parties of which it is notified. Fourth, to the extent a digital intermediary needs to be ordered to remove defamatory content, proposed

section 39A (discussed below) makes it clear that the Court can make such an order where appropriate. Finally, for completeness, to the extent a complainant is concerned about material that is menacing, harassing or offensive, that may be better addressed under the *Online Safety Act 2021* (Cth) rather than defamation law.

4. RECOMMENDATION 5, PROPOSED SECTION 39A: COURT ORDERS

In relation to Recommendation 5, we support in principle the additional power for the Court to make removal orders under the proposed section 39A. However, we consider the provision as drafted could be too broad.

Absent a requirement that the proposed Court order must specify the location of the content to be removed (i.e. a URL), Courts may consider themselves empowered (or inadvertently proceed) to make orders in the nature of general monitoring obligations, directing intermediaries to go forth and find all instances and variants of the material that is allegedly unlawful. On one reading, such an order may call for an imprecise and subjective evaluative exercise. In addition to being unduly burdensome (and by their nature practically impossible to comply with or enforce), such orders pose serious threats to principles of freedom of speech. They are outlawed, for example, in the EU under Article 15(1) of the E-Commerce Directive (Directive 200/31/EC), which provides that member states are not allowed to impose any obligation on internet intermediaries to monitor information they transmit or store, or to actively seek out indications of illegal activity. They are also expressly precluded in England and Wales by the E-Commerce Directive and implementing E-Commerce Regulations 2002, which is retained law following Brexit.

We suggest clarifying that the Court's power is limited to ordering that end-users that the intermediary identifies as being in Australia be prevented from accessing existing content at specific locations (i.e. URLs) on the Web. This would also be consistent with the position in the UK, where the Court's powers are limited by section 17(2) of the *Defamation Act 2013* (UK), which expressly states that the Act extends to England and Wales only.

5. TRANSITIONAL PROVISIONS: COMMENCEMENT DATE

In our view, the proposed amendments should apply from the commencement date of the amended Act, for all publications occurring after the commencement date, even where these publications are the same, or substantially the same, as publications made before the amendments came into force.

6. CONCLUSION

Thank you again for the opportunity to make submissions.

Yours sincerely,

[redacted]

Government Affairs and Public Policy

Google Australia