Submissions on the Part A draft amendments to the MDPs

Introduction

1.1 This submission is made by Banki Haddock Fiora (**BHF**) and is a response to the following documents released by the Meetings of Attorneys-General (**MAG**) on 12 August 2022 as part of its ongoing review of the Model Defamation Provisions (**MDP**s):

(a) the consultation draft of various amendments to the Model Defamation Provisions (**Draft Amendment Provisions**); and

(b) the Background Paper; and

(c) the Summary Paper.

1.2 BHF is an Australian boutique law firm specialising in media, technology and intellectual property that was established 25 years ago. The firm and its partners are acknowledged in highly respected global surveys, including Chambers & Partners, Legal 500, Doyle's Guide and Managing Intellectual Property and many of our partners are regularly named in the 'Best Lawyers' in Australia list published in The Australian Financial Review.

1.3 Bruce Burke, Leanne Norman and Marina Olsen oversee the firm's defamation and media law practice. Together, they lead what is perhaps the strongest defamation practice in the country. The firm regularly acts for radio stations, television networks, newspapers, and book publishers.

Summary

For the most part, BHF welcomes the Draft Amendment Provisions and the intent behind them. The Draft Amendment Provisions address a number of significant issues with the current legislative regime and common law position in respect of digital intermediaries. However, BHF submits that several matters warrant further attention if the MAG and the Defamation Working Party (**DWP**) are to take full advantage of what is a once-in-a-generation opportunity to enact truly meaningful, much-needed and clear reforms to Australian defamation law.

Section 4: definitions

3.1 BHF has a concern that the proposed amendments to section 4 do not have the desired effect of clarifying the position of forum administrators.

3.2 The Background Paper states that the term 'digital intermediary', which itself picks up the defined term 'online service', is intended to include forum administrators.[1] This would include, for example, media outlets in their operation of Facebook pages as page administrators. The terms 'digital intermediary' and 'online service' are defined as follows:

[1] Background Paper, 21.

digital intermediary, in relation to the publication of digital matter, means a person, other than an author, originator or poster of the matter, who provides an online service in connection with the publication of the matter.

online service means a service provided to a person to enable the person to access, search or otherwise use the internet, and includes the following services:

(a) a transmission or storage service,

(b) a content indexing service,

(c) a service to provide, encourage or facilitate social or other interaction between persons,

(d) a service to allow the use of a search engine.

3.3 It is not apparent that a forum administrator, or even a Facebook page administrator (this is what the defendants in *Fairfax Media Publications Pty Ltd v Voller* [2021] HCA 27 were), are caught by these definitions. There is scope for reasonable minds to differ on whether, in establishing or operating a Facebook page, a forum or page administrator provides an online service by providing, encouraging or facilitating social or other interaction between persons (paragraph (c) of the 'online service' definition). It follows that a forum or page administrator may not necessarily (on the current definitions) be a digital intermediary in respect of third party comments posted on their page. The position of forum and page administrators is less than clear on the face of the current definitions.

3.4 Given the purpose of the Draft Amendment Provisions is to clarify the law as it relates to publication on the internet, the scope of these definitions, which are key to the amendments, should be made clear. It should not be left for a Court to resolve that ambiguity.

3.5 A second concern is that the current definitions do not adequately protect individuals from liability for defamatory third party posts made on their individual social media pages, or defamatory comments made in response to posts made by individuals.

3.6 *Voller* appears to stand for the proposition that individuals are publishers of comments poster by third parties on their individual social media pages. In those circumstances, an individual could not be said to be providing an online service, as per the proposed definition, and would therefore not be a digital intermediary in relation to comments on posts which appear on their pages. This outcome is anomalous and BHF suspects that this is not what the drafters of the proposed amendments intended.

3.7 If, however, that is what the drafters intended, the position should be made clear and the policy justification for that differential treatment should be identified. There does not, at present, appear to be a sound policy rationale for a distinction being drawn. The distinction is also at odds with the approach taken in other areas of defamation law; for example, the defence of innocent dissemination does not depend on whether the defendant is an individual or a corporate or other entity.[2]

[2] See, e.g., *Bottrill v Bailey (Civil Dispute)* [2018] ACAT 45.

Subsection 9A(1): an exemption for mere conduits, caching and storage services

4.1 Subsection 9A(1) attempts to give effect to Recommendation 1, which is that the MDPs be amended to introduce a conditional, statutory exemption from liability in defamation law for mere conduits (including internet service providers (**ISP**s)), as well as caching and storage services.

4.2 BHF agrees in principle with Recommendation 1, provided that the MDPs are also amended to empower Courts to make blocking orders applicable to non-parties (including mere conduits, and caching and storage services), as suggested in Recommendation 5. This is discussed further in paragraph 4.4 below.

4.3 Certain stakeholders have expressed the view that Recommendation 1 is unnecessary, as it simply confirms the position at common law.[3] BHF is less sure that the common law is entirely clear on this point. Prior to *Google LLC v Defteros* [2022] HCA 27, the common law position had not come before the High Court for comment, and some would argue that the lack of unanimity in *Defteros* highlights the continuing uncertainties in this area. Even if it is correct that basic internet services are not publishers at common law for the purposes of defamation law, in our view, there are nevertheless clear benefits to giving statutory expression to what is said to be the common law position. A statutory exemption would, at a minimum, allow for greater clarity and certainty in this area.

4.4 The amendments contemplated by Recommendation 1 should be accompanied by amendments that empower Courts to make blocking orders against non-parties who are mere conduits, and caching and storage services (especially ISPs). In circumstances where, for example, a social media service provider is unwilling to give effect to a defamation judgment or comply with a defamation injunction and is located in an overseas jurisdiction where enforcement is not a straightforward proposition, a blocking order issued to the various ISPs located in Australia may be the only practical means available to a person to prevent access to the defamatory material in Australia.

4.5 Empowering Courts to make orders against ISPs also bring the MDPs in line with the *Online Safety Act 2021* (Cth), which gives the eSafety Commissioner broad coercive powers, including against ISPs, for the purpose of achieving a takedown outcome.

4.5 As for the proposed subsection 9A(1), BHF has the following comments:

(a) First, it is unclear whether paragraph (1)(c) is necessary in light of paragraph 1(b). For example, if an intermediary encourages the poster of the matter to publish the matter (subparagraph 1(c)(iii)), it almost certainly would not be able to make out that its role in the publication was limited to providing a caching service, conduit service or storage service.

(b) Secondly, because the language in paragraph 1(c) is overly general and ambigious, the exemption is liable to be read down over time. The language in paragraph 1(c) may be read in such a way as to have the unintended consequence of excluding, from the exemption, digital intermediaries that should be or are intended to be covered. For example, there is a sense in which an ISP initiates the steps required to publish the matter (subparagraph 1(c)(i)), namely, it establishes the necessary infrastructure that facilitates publication.

(c) Admittedly, in circumstances where there is a clear legislative intention to exempt ISPs from liability, the likelihood that paragraph 1(c) will be read down so as not to apply to ISPs is low. However, the broad language in paragraph 1(c) may give rise to uncertainty and unintended

[3] See *Google LLC v Defteros* [2022] HCA 27 at [143]; see also *Crookes v Newton* [2011] 3 SCR 269; *Bunt v Tilley* [2007] 1 WLR 1243; *Metropolitan International Schools Ltd v Designtechnica Corpn* [2011] 1 WLR 1743.

results in relation to newer technologies or in relation to services that exist at the periphery of caching services, conduit services or storage services. For example, does an email service or instant messaging service that sends push notifications to its users risk losing the benefit of subsection 9A(1) because of paragraph 1(c)(v)?

(d) In its present form, paragraph 1(c) leans too heavily on legislative intention.

Accordingly, BHF proposes that paragraph (1)(c) be deleted. Alternatively, BHF proposes that the matters described in paragraph 1(c) be described with greater specificity.

(e) Thirdly, subsection 9A(1) raises a question as to how messaging apps should be dealt with for the purposes of defamation law. Messaging apps are increasingly ubiquitous and defamation cases involving WhatsApp message groups, or direct messaging on other platforms are not uncommon.[4] BHF does note, however, that it does not appear that an entity operating a messaging app has been a party to any defamation proceedings in Australia in relation to messages on its platform to date.

(f) The services provided by a messaging app presents as a conduit service in that it is analogous to an email service. However, multi-party messaging groups are also analogous to messaging boards or forums. At what point (if any) should a service that facilitates multi-party messaging not be regarded as a mere conduit. And, at what point, if any, should such a service be held responsible for defamatory material of third-party users (subject to any safe harbour or innocent dissemination defence)?

(g) This is essentially a policy question. However, regardless of how this question is decided, the status of multi-party messaging services should be made clear (i.e. section 9A should specify whether multi-party messaging services are, or are not, conduit services).

Accordingly, BHF proposes that the DWP or MAG consider consulting on whether multi-party messaging services should be covered by a statutory exemption in section 9A, and include in section 9A a subsection that either establishes a bespoke statutory exemption or makes it clear that multi-party messaging services do, or do not, attract the exemption in subsection 9A(1).

Subsection 9A(3): an exemption for standard search engine functions

5.1 Subsection 9A(3) attempts to give effect to Recommendation 2, which is that the MDPs be amended to introduce a conditional, statutory exemption from liability in defamation law for standard search engine functions.

5.2 Subject to one caveat, BHF agrees with Recommendation 2.

5.3 BHF is opposed to a carveout in the proposed liability exemption for autocomplete suggestions.

5.4 The Background Paper states (at page 29) as follows:

> …. search engines are highly sophisticated and constantly evolving. There are some existing functions that go beyond the description above and most likely there will be others in the future. One example is autocomplete suggestions which involve more interested engagement and responsibility on the part of the search engine. This involves a search engine predicting the user's search with reference to other users' common searches, which

[4] See, e.g., *The Sydney Cosmetic Specialist Clinic Pty Ltd v Hu (No 3)* [2018] NSWSC 823; see also *Mulley v Hayes* [2021] FCA 1111; 286 FCR 360; *Lee v Sheen* [2021] QDC 18.

may create a suggestion that is itself defamatory. While this is done by algorithm, it is not a search engine function that simply connects the user to the webpage of a third party. The use of algorithms in this case generates suggested word associations that may be highly defamatory – and importantly, that the search engine has the ability to remove. This would not fall within the parameters of standard search functions that are able to access the exemption.

5.5 The above passage emphasises that autocomplete suggestions are different to standard search functions in significant respects. BHF respectfully disagrees with this appraisal. In particular, the statement that 'autocomplete suggestions… involve more interested engagement and responsibility on the part of the search engine' suggests (incorrectly in our view) that search engine providers make a conscious choice to publish the specific autocomplete suggestions that appear in response to a search input.

5.6 Autocomplete functionality is not so dissimilar from standard search functions, and, where there are differences, those differences do not, in our view, justify an alternative liability regime. The proposed carve out does not appear to have regard to how the technology which operates and underpins the autocomplete suggestion feature.

5.7 Like standard search functions, autocomplete functionality operates on a massive scale and generates significant social and economic value. The autocomplete results are based on the same or similar indexing technology that is used to generate search results, supplemented presumably by user history, trending searches, device tracking and geographical location of the user.

5.8 The Background Paper highlights the fact that autocomplete suggestions can be removed by search engine providers, whereas indexed material cannot be removed from the internet. However, this argument overlooks the fact that when a major search engine (for example, Google) 'de-indexes' online material, that material is for all intents and purposes removed from the internet for a substantial proportion of internet users.

5.9 BHF considers that it will be vanishingly rare for there to be a defamatory autocomplete suggestion in circumstances where there is no underlying defamatory online material upon which to sue. In the vast majority of instances, a defamed person will have a remedy against a person involved in the preparation and upload of the defamatory online material (including a remedy in damages for any republication of that material via an algorithm-generated autocomplete suggestion) as well as an avenue to have that material removed. As we understand it, removal of offending material can, in turn, be expected to result in a recalibration of autocomplete results.

5.10 It is conceivable that the appearance of a defamatory autocomplete suggestion may be the result, not of underlying defamatory online material, but the search activities of a substantial number of individual users. The resulting reputational damage, unfortunate as it is, cannot be sheeted home to the search engine provider, for the simple reason that the search engine provider does not control, and cannot be expected to take responsibility for, the actions of countless third-party actors. In such instances, it is appropriate, and consistent with principle and the approach taken in analogous areas of law, that the loss should lie where it falls.

Accordingly, BHF proposes that, in paragraph 3(a), the words 'rather than' be replaced with 'including but not limited to', so that autocomplete functionality is covered by the exemption.

Section 15: Contents of offer to make amends

6.1 BHF endorses the proposed amendments to the offer to make amends regime, so as to better accommodate digital intermediaries. These proposed amendments give effect to Recommendation 7.

6.2 BHF notes that some stakeholders have resisted the proposed amendments for a variety of reasons, including that it offends the fundamental purpose of an offer to make amends.

6.3 Some stakeholders have suggested that a necessary element of an offer to make amends is an offer to publish a correction or clarification and to remove this requirement for digital intermediaries would undermine a vital purpose of the defence. BHF disagrees. It is no longer correct to state that an offer to make amends ***must*** include an offer to publish a reasonable correction or clarification. It has never been the case that an offer to include an apology is necessary, at least under the Uniform Defamation Laws enacted in 2005.[5] In those jurisdictions which adopted the stage 1 reforms, an offer to make amends must now include (our emphasis added):

> … an offer to publish, or join in publishing, a reasonable correction of, or a clarification of ***or additional information about***, the matter in question or, if the offer is limited to any particular defamatory imputations, the imputations to which the offer is limited…[6]

6.4 It is clear from current drafting of section 15 of the MDPs that an apology is not a requirement of an offer to make amends. Further, it is no longer the case that, in the absence of an apology, a correction or clarification is required. An offer to publish *'additional information about'* the matter in question is sufficient. When introducing the stage 1 reforms, the NSW Attorney-General stated:

> Section 15(1)(d) currently provides that an offer to make amends 'must include an offer to publish, or join in publishing, a reasonable correction of the matter in question'. Some stakeholders submitted that this incorrectly assumes that every matter complained about is capable of a reasonable correction. In some instances the complaint may not relate to a factual inaccuracy but to an omission of contextual information, which cannot be corrected as such. Schedule 1 [13] amends section 15(1)(d) to provide that the mandatory requirement for an offer to make amends may be fulfilled by an offer to publish 'a clarification of or additional information about' the matter in question.[7]

6.5 In *Massoud v Nationwide News Pty Ltd; Massoud v Fox Sports Australia Pty Ltd* [2022] NSWCA 150, a case in which BHF acted for two of the defendants/respondents, the former iteration of section 15 of the MDPs was the subject of consideration. In that case, 2GB proposed in its offer to make amends to, *inter alia*, publish:

> A correction published below the headline of each of the Matters Complained Of that are online articles hosted by the Station, as follows:
>
> 'Correction: Josh Massoud has denied threatening to "slit" the employee's throat. Rather, he says that he told the employee that "if you weren't so young, I'd rip off your head and shit down your neck". Massoud denies that these words were intended as a threat because it is "impossible, physiologically" to rip a person's head off or "shit down their neck".'

6.6 Leeming JA (with whom Mitchelmore JA and Simpson AJA agreed) found that this did not meet the requirement of the former section—that is, an offer to publish a reasonable correction. It was not a correction, according to the Court of Appeal. However, his Honour stated at [233]:

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[5] BHF notes and acknowledges the position was different under previous iterations of the defence which existed in NSW prior to the *Defamation Act 2005* (NSW).
[6] *Defamation Act 2005* (NSW), section 15(1)(d).
[7] New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 July 2020, 2869 (Mark Speakman, Attorney-General).

> What 2GB proposed was unquestionably an offer to publish "additional information about" the matter in question, and thus capable of engaging the amended form of s 15(1)(d). But it falls short of being a "correction".

6.7 In our view, the defence has moved away from the purpose of the offer achieving vindication through the publication of an apology or correction (or even clarification). As Leeming JA noted in *Massoud* at [236] (our emphasis added):

> But merely supplementing a defamatory publication with a further publication which falls short of acknowledging error is unlikely to amount to sufficient vindication so as to engage the purpose which underlies the defence. ***True it is that the Legislature has more recently broadened the class of offers which may engage this defence,*** but that is no answer to the purpose which was reflected in the unamended form of the section, which is the form applicable to 2GB's publications.

6.8 Further, the intent behind the current offer to make amends regime was discussed by McColl JA in *Vass* at [78]:

> The clear intent of the introduction of the amends provisions being to promote speedy and non-litigious methods of resolving disputes about the publication of defamatory matter (s 3(d), 2005 Act), the amends provisions operate primarily prior to the commencement of defamation litigation. Where the publisher carries out the terms of an offer to make amends (including payment of any compensation under the offer) that is accepted, an aggrieved person is precluded from asserting, continuing or enforcing an action for defamation against the publisher in relation to the matter in question even if the offer was limited to any particular defamatory imputations (s 17(1)).

6.9 In our view, the offer to make amends regime has moved away from the express requirement of a reasonable apology or correction. The purpose of the offer to make amends regime is to facilitate speedy and non-litigious resolution of defamation proceedings.[8]

6.10 In those circumstances, it is unclear how the proposed changes offend the *current* purpose of the offer to make amends regime. Further, vindication is still achieved for a complainant who can point to the fact that a digital intermediary took access prevention steps, following receipt of a concerns notice.

6.11 Further, it needs to be acknowledged, as it has been elsewhere, that in some circumstances it is impossible for a digital intermediary to satisfy the requirement that 'include an offer to publish, or join in publishing, a reasonable correction of, or a clarification of or additional information about, the matter in question'. A digital intermediary may not be in a position to know what is an appropriate or reasonable clarification, or what requires correcting, or what additional information should be published about the matter. It is not suitable, or just, to expect a digital intermediary to try and satisfy this requirement of section 15 by simply expecting them to base any proposal on what is stated in a concerns notice.

Accordingly, BHF supports Recommendation 7.

[8] See *Pingel v Toowoomba Newspapers Pty Ltd* [2010] QCA 175 at [61] (per Fryberg J).

Section 23A: Courts to consider balancing factors when making preliminary discovery orders

7.1 Section 23A attempts to give effect to Recommendation 6, which is that the MDPs be amended to provide that Courts should take into account:

(a) the objects of the MDPs; and

(b) any privacy, safety or public interest considerations arising,

when making preliminary discovery orders.

7.2 BHF has no objection to Recommendation 6, but queries whether the proposed amendments are strictly necessary. Generally, Courts are not confined in the matters they are able to have regard to when disposing of a preliminary discovery application and are not prevented, by existing rules of procedure, from having regard to the objects of the MDPs or to any privacy, safety or public interest considerations arising.

7.3 Moreover, Courts already have ample inherent and implied jurisdiction to deal with an abuse of process or a preliminary discovery application brought for an ulterior motive or collateral purpose.

7.4 Additionally, there are sufficient safeguards currently in place to prevent the misuse of information obtained pursuant to preliminary discovery orders, and the use of such information for purposes other than the proceedings anticipated by those orders.

7.5 It is true that the rules which allow for preliminary discovery differ from jurisdiction to jurisdiction. This may result in a degree of forum shopping but this does not strike us as an issue, in and of itself, in this context.

7.6 Preliminary discovery applications are currently being used in defamation contexts (including in the Federal Court) without any major complications or difficulties, and there is no evidence to suggest that there is or is likely to be large scale abuse of the preliminary discovery system. In circumstances where the existing regime appears to be functioning as intended, BHF queries the need for the amendments contemplated by Recommendation 6.

7.7 On this note, BHF is also concerned that the provision as currently drafted will not be picked up by section 79(1) of the *Judiciary Act 1903* (Cth), because of r 7.22 of the *Federal Court Rules 2011* (Cth). Thought should be given as to how to overcome this, noting that many defamation cases are now being commenced in the Federal Court.

Accordingly, BHF proposes that the DWP and MAG consider whether the amendments contemplated by Recommendation 6 are strictly necessary.

Section 31A: two alternative options for a new defence for internet intermediaries

8.1 There are two proposed versions of section 31A, which give effect to Recommendations 3A and 3B respectively.

8.2 BHF strongly prefers the safe harbour defence set out in Recommendation 3A over the modified innocent dissemination set out in Recommendation 3B. This is because, in the first instance, the locus of any dispute should be between the originator or poster and the complainant.

8.3 In *Douglas v McLernon (No 4)* [2016] WASC 320, Kenneth Martin J aptly stated at [1]:

> There still manifests a perception in some members of the community that the laws of defamation do not apply to publications made over the internet. Consequently, there is a lingering misapprehension that anything at all can be posted concerning another person over the internet no matter how defamatory or scandalous the uploaded material may be and that the posted material will enjoy a complete immunity. That perception is wrong…

8.4 This misconception most likely arises from the fact that, historically, defamation has mainly involved traditional media and publishing organisations. That environment has now changed and today almost all Australians have access to a platform that they can use to broadcast their views and to publish materials to a large audience.

8.5 In *Voller*, the originators of the comments sued upon were never held accountable for their posts. Decisions such as *Voller* reinforce the misconception referred to in *Douglas v McLernon*—those who posted the comments in that case were not held accountable for their actions. In this sense, the status quo ensures those who have most control over the content of the publication (and who are morally culpable) are never, or rarely, held to account.

8.6 In this new environment, it is preferable that people be held accountable for views and comments they make online, in the same way they would be held liable and accountable in the offline world. This is for two reasons:

(a) one way to create a safer environment online is to ensure those responsible for defamatory, abusive and otherwise problematic speech are held accountable for their actions. It is not to the point that a digital intermediary is also, technically speaking, a publisher. A regime which attempts to force a complainant to try and resolve a dispute with the originator may create a cultural change in society whereby people on digital platforms think more carefully about what they post (in the same way a commercial publisher does). Further, it may reduce the current problem that exists on several platforms of defamatory material posted by trolls and anonymous persons. By creating a regime which attempts to remove the misconception referred to above in *Douglas v McLernon*, the internet becomes less of a 'wild west' where individuals and originators post defamatory content mostly without consequence; and

(b) the originator of a defamatory comment is in the best position to determine whether it is defensible (on the basis of truth or otherwise). A digital intermediary should only be party to a defamation dispute concerning material on its platform in select circumstances, including when an originator either does not wish to defend a publication (either by refusing to give up their details to the complainant or otherwise), or where a publication has been found to be indefensible and the originator does not wish to remove the post.

8.7 The safe harbour defence does not give social media giants and other internet conglomerates, in effect, a 'free pass', as has been suggested by some stakeholders. Those who argue for this view highlight the fact that in the overwhelming majority of cases posters or originators are likely to withhold consent to their details being provided to the complainant.

8.8 However, even if it does transpire that, in practice, almost all posters or originators withhold consent to their details being provided, it is not correct to say that a complainant in that situation is without a remedy against an internet intermediary. In a situation where consensual disclosure of identifying information is impossible, an internet intermediary is put to a choice: either take access prevention steps in respect of the material (unless there are no access prevention steps that are reasonable in the circumstances, such as when something is plainly not defamatory or where no one is identifiable) or run the risk of a defamation proceeding. Such a proposal in our view better achieves the objects of the MDPs than the status quo, including:

(a) ensuring that the law of defamation does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance; and

(b) providing effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter.

8.9 The safe harbour defence better achieves the objects of the MDPs than the status quo as it better balances the seemingly competing objects outlined in the extract above. The status quo presently permits an aggrieved person to simply complain about a post without the originator ever knowing that a complaint has been made. To avoid liability in this situation, a digital intermediary, who often has no context or information about the publication in question, may simply take it down to avail themselves of the innocent dissemination defence. This might be so in circumstances where there might be a valid defence to the publication: such as truth or honest opinion.

8.10 It is worth mentioning at this juncture that, in this context, it is primarily the freedom of expression of the poster or originator (not of the internet intermediary) that is at stake. While an internet intermediary may have a business interest in its users being able to voice their opinions without censorship, that is a different interest to that enjoyed by those users, or even a journalism business. It is therefore consistent with the objects of the MDPs that a safe harbour defence be introduced so that the focus of any dispute be between an originator or poster and the complainant.

8.11 While the safe harbour defence admittedly may leave a complainant without a remedy in damages against an anonymous poster or originator, it is worth keeping in mind that there appears to be anecdotal evidence[9] to suggest that most complainants who are subjected to online defamation are concerned primarily or solely with achieving a takedown outcome. It is also worth keeping in mind that the reputational damage caused by an anonymous poster or originator is likely to be limited (especially if it becomes clear that the relevant material was taken down because the poster or originator was not prepared to identify themselves and stand behind what they published).

8.12 In summary, it is simplistic to say that the safe harbour defence shields internet platforms completely from liability in defamation. The safe harbour defence has the effect of focusing liability for defamation on a poster or originator, while preserving the liability of internet platforms, in the event a poster or originator refuses to unmask themselves. When an originator refuses to unmask themselves, which in effect leaves an aggrieved person without a remedy as against the originator, an internet platform will be required to take reasonable access prevention steps and, failing that, will be exposed to a potential defamation action.

Accordingly, BHF proposes that the first proposed version of section 31A be implemented, subject to our comments below.

Section 31A (first proposed version): safe harbour for digital intermediaries

9.1 Under the first proposed version of section 31A, a safe harbour defence would be made out if a digital intermediary proves:

(a) it was a digital intermediary in relation to the publication (that is a person, other than the author, originator or poster) who provided an online service in connection with the publication of the matter;

[9] See Michael Douglas' submission to Stage II, Part A dated 9 September 2022, 3.

(b) at the time of the publication, it had a mechanism that was easily accessible by members of the public for submitting complaints notices; and

(c) if the complainant duly gave the digital intermediary a complaints notice — within 14 days the digital intermediary either:

(i) with the poster's consent, provided the complainant with sufficient information to enable a concerns notice to be given to the poster or proceedings commenced against the poster; or

(ii) took the access prevention steps in relation to the publication, if any, that were reasonable in the circumstances.

9.2 One issue that has been raised by various stakeholders is that it is unclear, under the proposed defence, whether it will be necessary for a given notice to have been duly given for a defendant to rely upon the defence. Say, for example, a complainant chooses not to engage with the complaints scheme at all, and issues a concerns notice to a digital intermediary instead. In that situation, does an intermediary have a defence available to it because it can satisfy elements 1(a) and (b)? Certainly, the policy intention is that the defence would have this effect,[10] but it is unclear on the present drafting. As such, it would be preferable to change the present formulation of the defence, so that it provides for two distinct situations: where a duly given notice is not received, and when one is (the latter triggering the required actions in paragraph (1)(c)). BHF proposes the following wording to make clear that a digital intermediary can still rely upon the defence where a duly given notice has *not* been given:

(1) It is a defence to the publication of defamatory digital matter if the defendant proves the defendant:

(a) was a digital intermediary in relation to the publication, and

(b) had, at the time of the publication, a mechanism that was easily accessible by members of the public for submitting complaints notices under this section (the defendant's complaints mechanism), and

(c) the plaintiff:

(i) did not, prior to commencing proceedings in respect of the publication, duly give a complaints notice under this section about the publication to the defendant; or

(ii) if the defendant duly gave the defendant a complaints notice under this section about the publication to the defendant—the defendant, within 14 days after being given the complaints notice, either

(A) provided the plaintiff with sufficient identifying information about the poster of the matter, but only if the defendant obtained the poster's consent in accordance with subsection (2) before doing so, or

(B) took the access prevention steps in relation to the publication, if any, that were reasonable in the circumstances.

[10] Background Paper, 35.

9.3 A second issue relates to the absence of a statutory mechanism providing for the early determination of whether a digital intermediary has a defence under this provision. The defence should incorporate a mechanism similar to that which exists in relation to serious harm and that which exists in the proposed subsection 9A(6).

9.4 It is not preferable for a digital intermediary to rely upon the existing mechanisms for early determination of a claim. In this respect, BHF notes the high bar for a summary dismissal application[11] and the general reluctance of Courts, particularly the Federal Court, which hears many defamation claims, to entertain separate questions.[12]

9.5 BHF notes some stakeholders have stated that a period of 14 days for a defendant to take action under paragraph (1)(c) is far too long, claiming that most of the damage done by digital matter occurs in the first 24–48 hours of a matter's publication. There is also a suggestion that big tech companies and media organisations have the resources to deal with such complaints quickly, and make a decision on what action to take in relation to a complaint within 24–48 hours. In response to this, BHF states:

(a) it is unclear how publications by digital intermediaries differ from traditional newspaper articles and radio broadcasts in terms of the likely time of the greatest damage, where most of the damage (both to reputation and hurt to feelings) occurs shortly after publication;

(b) reducing the time for an intermediary to take action after being duly given a notice to 24 or 48 hours would be, in effect, a de facto take-down regime. Not all online defamation is indefensible, or even an actionable defamation. Defamation raises very complex issues and it takes time to consider whether a publication is defensible. To have such a short time period where action must be taken would force digital intermediaries' hands—in effect, they would be forced to take material down without considering the merits of the claims by the aggrieved person;

(c) the 24–48 hour window also does not adequately account for the time it will likely take for an internet intermediary to contact the poster or originator, pass on relevant information and receive a response;

(d) imposing a rule on the basis that larger digital intermediaries have resources to meet such a strict deadline (even if that were the case) ignores the fact that smaller digital intermediaries may not have such resources; and

(e) there is no compelling reason for why the timeframe for actioning complaints in Australia should be more compressed than in the UK, which requires a digital intermediary to take down a post within 48 hours of receiving a valid complaint where the digital intermediary cannot contact the poster.[13] For the reasons set out above, BHF also queries whether a 48 hour window is adequate.

9.6 BHF is also of the view that the DWP should give consideration as to the interrelationship of concerns notices and 'complaints notices' under the proposed section 31A defence. It is not addressed in the Background Paper or Draft Amendment Provisions. In this respect, BHF also draws attention to the Law Council of Australia's submission to the Council of Attorneys-General dated 4 June 2021 (**LCA Submission**). For example, it might be sensible to clarify that a complaints notice

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[11] *Cox v Journeaux (No 2) (1935)* 52 CLR 713 at 720; 9 ALJR 127; see *General Steel Industries Inc v Commissioner* for Railways (NSW) (1964) 112 CLR 125 at 129–130; [1965] ALR 636; (1964) 38 ALJR 253; BC6400590 ('obviously untenable').
[12] See the discussion in *Nunn v Alyward* [2021] NSWDC 534, especially at [7]–[17].
[13] See *The Defamation (Operators of Websites) Regulations 2013* (UK).

cannot constitute a concerns notice, particularly in circumstances where a duly given complaints notice requires a digital intermediary to take action within 14 days (or face liability for a post), whereas a valid concerns notice triggers a 28 day period during which an offer to make amends may be given (which may provide a complete defence for a digital intermediary).

9.7 BHF suggests that section 31A be amended to ensure that a digital intermediary has the benefit of the safe harbour defence even where a contribution or indemnity claim is brought against that internet intermediary by another internet intermediary or group of other internet intermediaries. Again, in this regard, a useful starting point may be Appendix 2 to the LCA Submission (see the language in the proposed section 19A(11)).

9.8 Finally, BHF considers that there may be utility in having internet intermediaries submit their complaints schemes to a regulator (for example, the eSafety Commission) for approval, and for the safe harbour defence to be available to those internet intermediaries whose complaints scheme have been approved in this manner.

Accordingly, BHF proposes that the first proposed version of section 31A be revised to make it clear that the digital intermediary has a defence if no complaints notice is served; to allow for early determination; and to address the contribution and indemnity issue.

Section 31A (second proposed version): modified innocent dissemination defence

10.1 The observation above at paragraph 9.2 above is repeated in respect of the second proposed version of section 31A. Otherwise BHF has no further comments on the second proposed version.

10.2 However, if the MAG or DWP are of the view that Recommendation 3A should not be implemented, BHF is of the view that the second proposed version of section 31A affords far better protections to internet intermediaries than the current innocent dissemination defence.

10.3 In this regard, Rothman J in the first instance decision of *Voller* was of the view that the media companies in that case were primary publishers of the third-party comments (the Court of Appeal and High Court subsequently indicated that it was premature to consider the defence of innocent dissemination). Even leaving the first instance decision in *Voller* to one side, the breadth of the language used in the current innocent dissemination defence makes it difficult for digital intermediaries to ascertain their exposure with certainty.

10.4 The fact that a digital intermediary does not have certainty under the current innocent dissemination defence in respect of material alleged to be defamatory is reason enough for the position to be made certain by statute, as is proposed by Recommendation 3B.

Accordingly, BHF proposes that the second proposed version of section 31A in the event Recommendation 3A is not implemented.

Section 39A: New Court powers for non-party orders to remove online content

11.1 Section 39A is an attempt to give effect to Recommendation 5, which is that the MDPs be amended to provide that where a Court grants an interim or final order or judgment for the complainant in an action for defamation, a Court may order a person who is not a party to remove, block or disable access to the online matter within the scope of such order or judgment.

11.2 Recommendation 5 gives effect to a policy stance that at, at least at first instance, the dispute should be between the originator or poster and the complainant. For the reasons set out above, BHF welcomes this. Recommendation 5 also allows for removal orders to be directed to various points in

the ‘chain of publication’, including to digital intermediaries that come within the exceptions set out in section 9A.

11.3 BHF agrees with the proposed section 39A subject to some caveats and on the proviso that the safe harbour defence and section 9A exemptions are implemented (s 39A being, in effect, a tradeoff for the new protections).

11.4 The first caveat relates to the procedure in the proposed section 39A that affords third parties the right to be heard in relation to orders made under section 39A, BHF does not think section 39A should be enacted in a form that lacks this procedure.

11.5 The second caveat is that BHF has a concern that the powers contemplated by section 39A are too broad. Section 39A empowers a Court to order that a non-party digital intermediary take the steps the court consider necessary in the circumstances:

(a) to prevent or limit the continued publication or republication of the matter, or

(b) to comply with, or otherwise give effect to, the judgment, injunction or other order mentioned in subsection (1).

11.6 There is some ambiguity as to the breadth of the Court’s powers: what types of orders can they make to prevent or limit the continued publication? Conceivably, a Court might consider it necessary to impose active moderation requirements on a digital intermediary, which would be contrary to other areas of defamation law. Such an approach also seems to be envisaged by the Background Paper.[14]

11.7 The imposition of active moderation requirements could also offend against subsection 235(1) of the Online Safety Act 2021 (Cth) (**OSA**). As discussed in paragraph 0 below, it is not clear if the OSA applies to all digital intermediaries, or to just those which operate and host in Australia. If the latter construction is preferred, it may be that subsection 235(1) of the OSA would prevent the Court from making orders against some digital intermediaries but not others.

11.8 The proposed section can be contrasted to section 13 of the *Defamation Act 2013* (UK), which is as follows:

> 13 Order to remove statement or cease distribution etc
>
> (1) Where a court gives judgment for the claimant in an action for defamation the court may order—
>
> (a) the operator of a website on which the defamatory statement is posted to remove the statement, or
>
> (b) any person who was not the author, editor or publisher of the defamatory statement to stop distributing, selling or exhibiting material containing the statement.

11.9 Section 13 expressly limits a Court’s ability to make orders to remove a statement, or to stop distributing, selling or exhibiting material containing the statement. Because it is more specific, the language in section 13 does not lend itself as readily to the imposition of active moderation requirements. Similar language should be employed in any Australian provision.

[14] Background Paper, 46.

Accordingly, BHF proposes that the section proposed by Recommendation 5 be re-drafted in a way to resemble section 13 in the UK's *Defamation Act*.

11.10 A third caveat is that under the proposed section 39A Courts may make orders which, in effect, injunct, digital intermediaries on a world-wide basis. It is trite to say that some Australian Courts, such as the Supreme Court of New South Wales, have the ability to make injunctions against parties outside the jurisdiction who have either submitted to the jurisdiction or been duly served. Courts also have ample power to injunct parties (whether in or out of the jurisdiction) with respect to their conduct outside the jurisdiction: see *X v Twitter Inc* [2017] NSWSC 1300; 95 NSWLR 301.[15] However, as was acknowledged in *X v Twitter*, defamation requires different considerations in this context, citing *Macquarie Bank v Berg* [1999] NSWSC 526. In the latter, an injunction was sought in respect of an internet publication in circumstances where the defendant was overseas. In essence, what was sought was an extra territorial injunction in respect of defamatory matter. As Justice Simpson stated, extraterritorial injunctions in respect of defamatory matter present unique and difficult issues when a Court is required to exercise its discretion to issue an extraterritorial injunction. At [13]-[14], her Honour stated:

> The consequence is that, if I were to make the order sought (and the defendant were to obey it) he would be restrained from publishing anywhere in the world via the medium of the Internet.
>
> The difficulties are obvious. An injunction to restrain defamation in NSW is designed to ensure compliance with the laws of NSW, and to protect the rights of plaintiffs, as those rights are defined by the law of NSW. Such an injunction is not designed to superimpose the law of NSW relating to defamation on every other state, territory and country of the world. Yet that would be the effect of an order restraining publication on the Internet. It is not to be assumed that the law of defamation in other countries is coextensive with that of NSW, and indeed, one knows that it is not. It may very well be that, according to the law of the Bahamas, Tajikistan, or Mongolia, the defendant has an unfettered right to publish the material. To make an order interfering with such a right would exceed the proper limits of the use of the injunctive power of this court.

11.11 In *Macquarie Bank v Berg,* it was apparently conceded by one of the parties, as recorded at [12] of the judgment, that there were 'no means by which material, once published on the Internet, could be excluded from transmission to or receipt in any geographical area'. Whether that concession was correct at that time (or simply not within the Court's knowledge through judicial notice or evidence), that does not represent the position today. Many digital intermediaries (and other internet website operators) regularly employ geo-blocking. For example, the whole premise of section 115A of the *Copyright Act 1968* (Cth) is that a carriage service provider be required to block access to foreign websites to its Australian customers. Orders under that section do not remove the offending websites from the internet for *all* internet users, just those which are in Australia.

Accordingly, BHF proposes that the proposed section should also provide that, unless the interests of justice require otherwise, any order made under section 39A does not extend to preventing or limiting publication to persons located outside Australia.

Sections 51 to 54: savings and transitional provisions

12.1 BHF has no substantive issue with proposed savings and transitions provisions in the Draft Amendment Provisions, save as to say that proposed subsection 53(1) states that the section applies

[15] See also *Helicopter Utilities v Australian National Airlines Commission* (1963) 80 WN (NSW) 48, 51; *Dunlop Rubber Company v Dunlop* [1921] 1 AC 367; *Tozier and Wife v Hawkins* (1885) 15 QBD 680.

to ‘2022 amendments about the content of concerns notices’. This amendment is referred to by the Background Paper, which states that the ‘‘concerns notice amendments’ are the updates to the mandatory requirements for concerns notices, to better accommodate online publications.’[16]

12.2 As far as BHF can discern, none of the amendments affect the contents of concerns notices, which have already been dealt with separately in the *Defamation Amendment Act 2020* (NSW) and its analogues.

12.3 It may be that this is intentional and it is thought that the proposed amendments to section 15 of the MDPs are considered as being directed to concerns notices. If this is the case, this may cause ambiguity if and when section 53 is applied in a judicial setting. Concerns notices and offers to make amends are two distinct creatures of the MDPs—while one might be responsive to the other, they are not the same thing. On the other hand, it also might be possible that this is a drafting error and that it is intended to state that section 53 is intended to apply to amendments to the contents of *offers to make amends*. Whichever is the case, it should be made clear.

Accordingly, BHF proposes that subsection 53(1) be revised so that it refers to ‘offers to make amends’, if that is what is intended.

Other matters

13.1 Recommendation 4 is that the Commonwealth Government consider amending the *Online Safety Act 2021* (Cth) to clarify the operation of subsection 235(1) in a defamation context. The substance of this provision was formerly in clause 91 of schedule 5 to the *Broadcasting Services Act 1992* (Cth) (**BSA**), and was referred to colloquially as the ‘broadcasting services immunity’.

13.2 Subsection 235(1) of the OSA provides, in effect, that a law of a state or territory, or common law or equity has no effect if it:

(a) subjects an Australian hosting service provider or ISP to liability where they are not aware of the nature of the online content; or

(b) requires an Australian hosting service provider or ISP to monitor online content.

13.3 In our view, this recommendation is sound for all the reasons set out in the Background Paper.[17]

13.4 On one view, it may be sensible that defamation law be excluded from section 235 of the OSA for the sake of consistency between digital intermediaries, as it only applies to an ‘Australian hosting service provider’. In section 5 of the OSA, that term is defined as: ‘Australian hosting service provider’ means a person who provides a hosting service that involves hosting material in Australia. It is widely known that many larger digital intermediaries, such as Meta and Twitter, operate and store content on servers outside of Australia.[18] There is presently ambiguity as to whether the immunity (for lack of a better word) in the OSA would apply to these types of overseas digital intermediaries as they may not come within the definition of ‘Australian hosting service provider’. If it is the case that some digital intermediaries have the benefit of the OSA immunity and some do not, this may create potential issues and unequal treatment (for example, see our discussion about the potential power for the court to order that an intermediary moderate). BHF assumes that there is no such intention to treat digital intermediaries differently by having regard to whether they meet the definition of ‘Australian hosting service provider’ in the OSA.

[16] Background Paper, 59.
[17] Background Paper, 44–46.
[18] See, e.g., *Facebook Inc v Australian Information Commissioner* [2022] FCAFC 9.

Accordingly, BHF agrees with Recommendation 4 and, if the OSA immunity is to operate in a defamation context, BHF proposes that the OSA be amended to ensure local and foreign digital intermediaries are treated equally.

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