RESPONSE TO

MODEL DEFAMATION AMENDMENT PROVISIONS 2022

PART A STAGE 2 REVIEW

8 SEPTEMBER 2022[1]

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[1] This submission is based on the contribution of law students enrolled in Media Law at Macquarie University in 2021.This document and its contents do not reflect the position of Macquarie University which takes no position on these matters.

EXECUTIVE SUMMARY

This submission in response to the August 2022 Consultation Draft of the Model Defamation Amendment Provisions 2022 ('Model Amendment') is based on the concepts articulated in the prior submission made by law students enrolled in Media Law at Macquarie Law School in 2021.

The Model Amendment is overall excellent because it not only meets the legitimate expectations of the public but it also accommodates existing and foreseeable technology. Indeed, the Model Amendment is so well-written that it lends itself to final tweaking to achieve precision. Clearly, a great deal of care and research was put into the Model Amendment and the drafters should be commended.

While objections have been raised that aspects of the Model Amendment are unnecessary in light of the recent High Court decision in *Google LLC v Defteros* [2022] HCA 27, this is not the case. In fact, legislation is clearly needed in light of the universe of ambiguities in the law arising in the internet space between *Fairfax Media Communications v Voller* [2021] HCA 27 and the more recent *Defteros* decision.

This submission is limited to Recommendations 1, 2, 3A, and 3B. In all other respects, no changes in the Stage 2 Review are suggested.

With respect to Recommendations 1 and 2, this submission proposes a modification of Model Amendment §9A (1) (c) (iii) and §9A (3) (a) to clarify meanings to reflect how search engines actually operate.

With respect to Recommendations 3A and 3B, this submission supports the Safe Harbour approach as being superior to the Innocent Dissemination defence. The Safe Harbour is preferable because it provides more certainty and thereby promotes compliance.

A key aspect of this submission is that the law should promote ease of compliance as opposed to judicial or administrative enforceability. If the statutory regime is clear and capable of being complied with, and meets with general industry and community approval, this is in the public interest because formal enforcement can be problematic when dealing with offshore internet entities.

Recommendations 1 and 2

Section 9A (1)(c)(iii)

Section 9A (1)(c)(iii) provides that a digital intermediary is not liable for defamation if the intermediary proves that it did not 'encourage the poster of the matter to publish the matter.' It is submitted that this phrase is sufficiently ambiguous as to frustrate the ability of the law to provide certainty and predictability.

The problem is with the word 'encourage' – what does it mean in this context? If it means nothing more than providing a blank space with words saying something to the effect 'place your comments here' then almost anything will amount to legal encouragement.

For example, in EU law, the General Data Protection Regulation ('GDPR') will not apply to a website operator unless Europeans are targeted by the website. This has led to confusion. Does merely having a drop-down menu listing one or more EU member States in an order form qualify as targeting Europeans? Unclear but it may be so.

What does the phrase 'encourage the poster of the matter to publish the matter' mean in plain English? Does it mean that the defence will be lost if the intermediary encourages publication of the specific matter published? That would be a meaningful limitation but there is no indication that the clause is so intended. It could just as well be construed as meaning that the defence will be forfeited if the host invites any comments.

Correcting the ambiguity requires first understanding exactly what is intended? The Background Paper does not offer much in the way of explanation except to state that they were drawn from the EU's E-Commerce Directive and the DSA.

It is respectfully suggested that 9A (1)(c)(iii) be deleted. Subparts (i), (ii), (iv), and (v) provide quite comprehensively for loss of the defence if the intermediary does any act beyond that of merely being a passive host. Words such as initiate, edit, and promote adequately encompass the acts that should deprive the intermediary of the defence. 'Encourage' is simply unclear and diminishes the quality of the otherwise well-crafted section.

Section 9A (3)(a)

Section 9A (1)(c)(iii) provides for search engine defamation immunity if:

(a) the matter is limited to search results generated…from search terms inputted by the user of the engine rather than terms automatically suggested by the engine

A fundamental issue with this clause is that it is contrary to how search engines work in practice. That is, when a user begins to type a search term, the search engine automatically attempts to complete the search request. And in this respect, virtually all searches would be outside of the defence.

For example, when using Google, the search term 'Lincoln Center for' resulted in the search being automatically completed with the words 'the performing arts' added by Google. This is a routine phenomenon and as it anticipates the search, it saves time for web users. But this commonplace practice rather clearly amounts to 'search terms suggested by the engine.'

It should be noted that this practice is not limited to Google searches and appears to be common among search engines. Since this is how search engines work, unless there is widespread agreement among search engines to discontinue this rather consumer-friendly activity, the proposed statutory language is unhelpful.

And this raises the issue of compliance as opposed to enforcement. Major search engines are located outside of Australia. Meaningful enforcement of laws relating to search engines is problematic at best. As a basic matter of private international law, fines and penalties imposed by one country will not be enforced in another country. Similarly civil judgments will be unenforceable in other countries when the judgment contravenes strong public policy (evidenced by statutes or constitutions) of the enforcing country. In other words, enforcement in an American court is not going to happen.

But even with enforcement doubtful, laws can still be beneficial if they promote compliance by providing certainty and meet community expectations. Unfortunately, here, the proposed language does not promote compliance because it is contrary to how search engines do business. Indeed, if a domestic search engine was created and it complied with the statute, it would be at a competitive disadvantage to offshore companies that continue with current practices.

It is recommended that §9A (3)(a) be deleted.

Recommendations 3A and 3B

In their initial submission, the Macquarie Media Law Students endorsed both the Safe Harbour (3A) and the Innocent Dissemination Defence (3B). While that position remains unchanged, based on the discussions and proposals that have been promulgated by the various parties to the consultation, it is submitted that the Safe Harbour is the preferable route if only one avenue is to be enacted.

Safe Harbours are generally to be preferred over defences simply because a well-crafted Safe Harbour promotes compliance in the first instance. The relative weakness in the innocent dissemination route is that it pre-supposes publisher liability and then seeks to exculpate the otherwise offending conduct. On the other hand, the Safe Harbour literally becomes part of the business plan in the first instance.

From the perspective of economies to all concerned, a Safe Harbour may permit more expeditious resolution of claims. The innocent dissemination defence lends itself to the uncertainties of litigation because it is intensely factual, the Safe Harbour is just that – a safe harbour if the boxes are all ticked, so to speak. This approach works quite effectively in other areas of law such as securities.

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