



May 14, 2019

By email: policy@justice.nsw.gov.au
Attn: Council of Attorneys-General's Defamation Working Party

Dear Defamation Working Party members,

Thank you for the extended opportunity to provide a submission to the Council of Attorneys-General's (CAG) Defamation Working Party (DWP) on the Review of Model Defamation Provisions.

By way of background, the Digital Industry Group Inc. (DIGI) advocates for the interests of the digital industry in Australia. Its members include Google, Facebook, Twitter, Amazon and Verizon Media whose services range from search engines, to content communications platforms, to online stores. DIGI's vision is a thriving Australian digitally-enabled economy that fosters innovation, a growing selection of digital products and services, and where online safety and privacy are protected. DIGI's mission is to advocate for policies that enable a growing Australian technology sector that supports businesses and Internet users, in partnership with industry, governments and the community.

In order for Australia to be a country where technology companies of all sizes can grow and where Internet users can access the world's best digital products and services, we need legal protections and certainty for online intermediaries that host content authored by other people. Without this protection, the hosting of user-generated content becomes a high-risk offering for companies, yet this is also an offering that is increasingly central to freedom of expression in Australia. Today, the Internet is where people share opinions and ideas, connect with others and access information; this free exchange is a crucial part of Australian democracy, and the ability for Internet companies to enable this speech must be protected.

While the Model Defamation Provisions have played an important role in harmonising state-based defamation laws that existed prior to 2005, they were not written for a digital age. There is now an opportunity to modernise these provisions to offer better solutions for Internet users and online intermediaries, while also ensuring a fair and clear process for people and organisations that have their reputations seriously maligned on the Internet.

In this submission, we have worked with outside counsel to provide a detailed legal analysis on four of the questions raised by the DWP in its discussion paper: Question 3 — single publication, Question 11 — qualified privilege, Question 14 — serious harm; and Question 15 — innocent dissemination and 'safe harbours'.

DIGI looks forward to further engaging with this inquiry as it progresses. Should you have any questions or wish to discuss any of the representations made in this submission further, please do not hesitate to contact me.

Best regards,

A handwritten signature in black ink, appearing to read 'Sunita Bose', written over a light blue horizontal line.

Sunita Bose
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Question 3: single publication

- (a) *Should the Model Defamation Provisions be amended to include a 'single publication rule'?*
- (b) *If the single publication rule is supported:*
- (i) *Should the time limit that operates in relation to the first publication of the matter be the same as the limitation period of all defamation claims?*
 - (ii) *Should the rule apply to online publications only?*
 - (iii) *Should the rule operate only in relation to the same publisher, similar to section 8 (single publication rule) of the Defamation Act 2013 (UK)?*

DIGI strongly recommends the introduction of a 'single publication rule', with the limitation period commencing from the date of first publication of the defamatory material in any format, whether or not the first publication is made in print or digital form. This rule would remedy the loophole that currently exists in Australian defamation law regarding online publications, whereby a publication that remains online is not subject to any limitation period so long as a plaintiff can prove that it was downloaded

and viewed by at least one reader within 12 months of bringing a claim.¹ DIGI considers that the form of the single publication rule that should apply would reflect, but would also extend beyond the current framework provided under Section 8 of the *Defamation Act 2013* (UK), applying to the republication of a statement by any person, and not just the original publisher.

1. Australia's current position

Under the Model Defamation Provisions, a person who claims to have been defamed by a publication has one year from the date on which the defamatory matter is communicated to a party (other than the claimant themselves). If the defamatory material is published online, communication occurs whenever a third party downloads the material. This position gives rise to the 'multiple publication rule', whereby each time an Internet user accesses and downloads the defamatory publication, the material is considered 'recommunicated,' and therefore giving rise to a separate cause of action with its own separate limitation period.

The 'multiple publication rule' has been accepted by the High Court in *Dow Jones & Co v Gutnick* (2002) 210 CLR 575, a case familiar to the DWP, involving online publications, with the majority of the High Court [26] stating that:

Harm to reputation is done when a defamatory publication is comprehended by the reader, the listener, or the observer. Until then, no harm is done by it. This being so it would be wrong to treat publication as if it were a unilateral act on the part of the publisher alone. It is not. It is a bilateral act in which the publisher makes it available and a third party has it available for his or her comprehension.

With the greatest of respect to the High Court, this position is fundamentally ill-suited to the digital age. This position, formed in 2002, was based on an Internet described by their Honours as a medium no different to radio and television. Their Honours expressed doubts that the platform could be described as having a 'uniquely broad reach' [39]. The Internet of 2002 is not the Internet of 2019. Most significantly, the process for members of the public to publish content online in 2002 was far more difficult, time-consuming and expensive than it is in 2019; today, people can easily publish content on any platform that hosts user-generated content, including social media websites and comment sections on news media websites. The High Court's summation that 'those who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographic restriction' does not reflect modern societal attitudes towards consuming and producing media for distribution on the web. It also ignores the fact that, in the context of uploaded social and news media posts, the majority of 'views' of that content (and therefore opportunities to cause damage to a subject's reputation) occur within days of publication. A single publication rule would reflect this reality and close the loophole that can be exploited by plaintiffs who seek to complain about online publications many years after they have realistically caused any reputational harm to the plaintiff.

Further, a single publication rule would assist in encouraging content providers to maintain robust digital archives of materials published on the web. By forcing plaintiffs to sue promptly, a single publication rule would embolden providers of digital archives to maintain, and facilitate access to, their archives, for they will not be exposed to the risk of being sued over content in their archives which, while potentially defamatory, was not actioned by a plaintiff at the time of publication, when the risk of harm to reputation is at its highest.

To achieve this aim however, DIGI submits that Australia should adopt a single publication rule which extends to entities which hold digital archives of published content. Otherwise, the loophole would remain open for such entities. DIGI explores this proposal further below.

¹ *Dow Jones & Co v Gutnick* (2002) 210 CLR 575.

2. The United Kingdom's position

Section 8 of the *Defamation Act 2013* (UK) has the effect that the one-year limitation period commences on the first publication of defamatory matter by a given publisher. Unless a publication complained of is materially different to the matter that was first published by that publisher, any cause of action for subsequent publications made by that publisher is treated as having accrued on the date of the first publication. In short, the limitation period does not refresh on further publications of the same or similar material, by the same publisher.

In formulating this position and, as a consequence, shifting away from the multiple publication rule, the open ended liability for defendants under a multiple publication regime, the outdated nature of the rule in the digital age, and the practical problems for online publishers, given the sheer volume of publications and interactions on their platforms, were all raised as reasons for the inclusion of a single publication rule. These reasons, in the Australian context, are still present today. DIGI echoes these concerns and says further that the foundations of the UK position, formed in 2013, are only advanced in the current environment, as the Internet and its accessibility continues to grow.

3. The United States' position

More than 27 states in the US, including California, Illinois, New York and Texas, by legislation or judicial decision, have adopted what is considered to be a single publication rule. The reasoning for this rule is captured in the case of *Firth v New York* (2002) 775 NE 2d 463 ('*Firth*'):

In addition to increasing the exposure of publishers to stale claims, applying the multiple publication rule to a communication distributed via mass media would permit a multiplicity of actions, leading to potential harassment and excessive liability, and draining of judicial resources. Further, the single publication rule actually reduces the possibility of hardship to plaintiffs by allowing the collection of all damages in one case commenced in a single jurisdiction.

Firth also described the consequences of continuing a multiple publication rule in a modern environment, stating that:

'inevitably, there would be a serious inhibitory effect on the open, pervasive dissemination of information and ideas over the Internet, which is, of course, its greatest beneficial promise.'

4. Plaintiffs can still claim damages for future harm

One of the arguments posited against a single publication rule is that, unlike hard copy material stored in libraries or archives, the material on the Internet is more readily accessed by search engines, and may continue to do damage into the future [Discussion Paper: page 15]. We refer to and repeat the remarks of Tobin and Sexton in *Australian Defamation Law and Practice*:

It should be kept in mind that damages in defamation proceedings are awarded for all probable damage, past and future, caused by the publication.

As such, the propensity for republications to further damage a complainant should not be a reason for the continuance of a multiple publication rule, as this consideration is already accounted for in the Model Provisions relating to the quantification of damages.

5. Conclusion: Single publication

DIGI submits that the position in both the UK and the US, advocating and subsequently adopting a single publication rule, is the most practical and effective move forward in a digital age.

DIGI considers that Australia should adopt a variant of the single publication rule akin to that in Section 8 of the *Defamation Act 2013* (UK), but which provides further clarification to confirm that any

online platform, while a ‘publisher’ at common law, is not responsible for the actual *creation* of the defamatory matter but is instead a ‘mere conduit’, or host, of such material. This would reflect the widespread consumer use of platforms, including social media, where individual users may publish words, images and videos. It would also reflect the widespread consumer use of search engines that returns search results including snippets, being extracts of content created by third parties and published on websites, in response to certain keywords entered into it by end users.

Such a clarification is necessary because, Section 8 of the UK Act focuses on publications and substantially similar re-publications by the *same originator*. This creates a loophole whereby a complainant could conceivably argue that the republication of an original publication on an online platform or search engine is made by a different ‘person’, and therefore not caught by the single publication rule. Therefore, such a clarification is vital in protecting the spirit of a single publication rule.

Question 11: qualified privilege

- (a) *Should the ‘reasonableness test’ in clause 30 of the Model Defamation Provisions (defence of qualified privilege for provision of certain information) be amended?*
- (b) *Should the existing threshold to establish the defence be lowered?*
- (c) *Should the UK approach to the defence be adopted in Australia?*
- (d) *Should the defence clarify, in proceedings where a jury has been empanelled, what, if any, aspects of the defence of statutory qualified privilege are to be determined by the jury?*

As noted by the DWP, the qualified privilege defence traditionally recognised that there are limited circumstances where a person has a legal, moral or social duty to communicate information to a recipient who has a corresponding interest in receiving it – for example, giving a job reference, answering police inquiries, or parent-teacher interview, where, even if untrue, the communicator should be protected from liability in relation to that information.

6. Qualified privilege in Australia

Historically, the qualified privilege defence has had limited application, as it could generally not be relied on by media defendants whose publications are to a broad and untargeted audience; as such, the media defendant could not prove that they had a ‘duty’ to provide that information to the general public, who are not members of a particular class of recipient with a ‘corresponding interest’ in that information.

Clause 30 of the Model Defamation Provisions captures, and sought to broaden, the defence of qualified privilege outside of its traditional ‘duty-interest’ form. It applies to the publication of material where:

- the recipient has an interest or apparent interest in having information on the subject;
- the matter is published to the recipient in the course of giving to the recipient information on that subject; and
- the conduct of the defendant in publishing that matter is reasonable in the circumstances.

Since the introduction of the Model Defamation Provisions, the statutory qualified privilege defence has been successfully established on a number of occasions, although not by media defendants. More generally, DIGI endorses the submissions by Australia’s Right to Know which indicate that the ‘reasonableness’ threshold has been held too high for media defendants in Australia, rendering the clause 30 defence of limited use. DIGI also endorses Australia’s Right to Know’s submission that the defence has ‘put Australian media and members of the public who publish material about matters of public concern at much greater risk than their US and UK counterparts, and [this] has made Australia less attractive as a home for content businesses.’ Australia’s Right to Know’s argument is increasingly

important in a digital age where members of the public frequently use platforms to publish material about matters of public interest concern themselves, in forms such as public posts, petitions and reviews.

7. The UK approach

In comparison to clause 30 of the Model Defamation Provisions, the *Defamation Act 2013* (UK) replaces the *Reynolds* defence with a statutory defence of ‘publication on a matter of public interest’. Under Section 4 of the Act, a defendant must show that:

- the statement complained of was made about, or formed part of a statement on, a matter of public interest; and
- that the defendant reasonably believed that publishing the particular statement was in the public interest.

In determining ‘reasonable belief’, the court is to have regard to all the circumstances of the case and ‘make such allowance for editorial judgement as it considers appropriate’. The Reynolds factors are not mandatory, but may be considered and applied where necessary. DIGI notes that media defendants in the UK have traditionally had more success both with the former Reynolds defence as well as the new Section 4 defence than Australian media defendants have had with qualified privilege, either under clause 30 of the Model Defamation Provisions or pursuant to the ‘qualified privilege on government and political matters’ defence created in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

Generally, DIGI submits that a stronger qualified privilege defence is essential to the ability for the media in Australia to thrive and succeed. Without a qualified privilege defence, media companies in Australia are perpetually put at risk of a successful defamation action on matters involving anonymous sources and whistleblowers, and which otherwise contain conclusions about matters which are rapidly developing or for which clear, unimpeachable facts can be secured. The media’s inability to report on such matters behind a strong, but balanced, qualified privilege defence potentially deprives Australians of important news content, and also has the potential to unfairly shield wrongdoers. DIGI further submits that, in addition to incorporating the UK qualified privilege defence into the Model Defamation Provisions, the defence should also be amended to remedy the ail in the qualified privilege defence which, as explained below, renders it unusable for Internet intermediaries.

In *Google v Duffy* [2017] SASFC 130, Peek J held that Google could only rely on the qualified privilege defence under clause 30 of the Model Defamation Provisions² if it could prove that it had acted reasonably in relation to each of the ‘publications’ of the search snippets that were generated following a Google Search for the search terms identified by the plaintiff which, in the plaintiff’s pleading, were to “persons unknown”. In Peek J’s view, to avail itself of the clause 30 qualified privilege defence Google would have to identify each person who received the snippet -- which could amount to many thousands of people -- and enter evidence about the circumstances in which they each sought the information for which they searched. This would establish whether, as required by clauses 30(1)(a) and (b), that each recipient has an apparent interest in having the information and the matter is published in the course of giving to the recipient information on that subject. Such an approach is unworkable and infeasible. Google’s attempt to argue that clause 30 is made out on the basis that, as a general proposition, a person searching for information about a person has an apparent interest in receiving that information, failed.

Given these matters, DIGI considers that Section 4 of the *Defamation Act 2013* (UK) should be adopted in Australia, with one important clarification. This clarification should reject Peek J’s requirement that the qualified privilege defence be proven for every single instance where the matter complained of is published to recipients. Instead, it should acknowledge that the digital era means that a wide range of digital services, including search engines, provide tremendous consumer value in making information readily available and accessible, and should therefore afford such digital services a level of protection. This would reflect Hinton J’s formulation where his Honour concluded (at [311]) that:

² Cl 30 of the Model Defamation Provisions is s 28 of the *Defamation Act 2005* (SA).

Google's conduct in providing a search engine which allows persons to access the voluminous material on the Internet, so as to better inform themselves about the way in which they wish to conduct their affairs or of matters of controversy, is, speaking generally, reasonable... there is no doubt that the exchange of information on the Internet serves a great public purpose. Search engines which make that material accessible also serve that great public interest. The same reasons which support a finding of a sufficient interest for the purposes of common law qualified privilege support a finding that, as a general rule, the referencing of material on the World Wide Web is reasonable.

Question 14: serious harm

- (a) Should a 'serious harm' or other threshold test be introduced into the Model Defamation Provisions, similar to the test in section 1 (serious harm) of the Defamation Act 2013 (UK)?
- (b) If a serious harm test is supported:
 - (i) Should proportionality and other case management considerations be incorporated into the serious harm test?
 - (ii) Should the defence of triviality be retained or abolished if a serious harm test is introduced?

DIGI strongly supports the introduction of a serious harm test. Further, given the inconsistencies that exist in civil litigation rules and legislation between States, DIGI considers that the further processes for dealing with insignificant and trivial defamation claims provided for in Section 60 of the *Civil Procedure Act 2005* (NSW) and applied by the NSW Supreme Court in *Bleyer v Google Inc* [2014] NSWSC 897 should be incorporated into the Model Defamation Provisions.³

8. 'Serious Harm' under the *Defamation Act 2013* (UK)

Section 1(1) of the *Defamation Act 2013* (UK) provides that "a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant."

As Dr Matthew Collins QC opines in *Collins on Defamation*, the UK serious harm test:

...affords a mechanism for bringing actions to an end at an early stage where, for one reason or another – including reasons that are unrelated to the meaning conveyed by the statement complained of – the publication of the statement has not caused and is not likely to cause serious harm to the reputation of the claimant or, in the case of a body that trades for profit, serious financial losses to the body.

The operation of a serious harm test provides the courts with an opportunity to remove claims prior to the commencement of trial, in circumstances where the publication conveys a meaning that will not materially harm to the reputation of the claimant, or where the damages claimed are disproportionate to the use of judicial and court resources necessary to pursue them.

³ Section 60 of the *Civil Procedure Act 2005* (NSW) requires parties to 'implement Court procedures 'with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute.' A similar provision is contained in s 24 of the *Civil Procedure Act 2010* (Vic). In *Bleyer*, McCallum J called in aid of ss 60 and 67 of the NSW Act to permanently stay a proceeding commenced over Google snippets which were allegedly defamatory of the plaintiff and which the plaintiff could show were only published to one person.

9. The test in practice

The following cases are examples of claims that failed to pass the UK's serious harm threshold test:

- *Bexant v Rausing* [2007] EWHC 1118 (QB): a claim based on an email and letter that was only published to the claimant's accountant and daughter;
- *McBride v Body Shop International plc* [2007] EWHC 1658 (QB): a claim based on a publication to only one or two recipients;
- *Wallis v Meredith* [2011] EWHC 75 (QB): a claim based on a publication only to the claimant's solicitor;
- *Kordowski v Hudson* [2011] EWHC 2667 (QB): a claimant was a bankrupt, who sued the defendant for spoken words to an individual, who then tweeted the words, but did not sue either the defendant or the individual in respect to the tweet;
- *Carrie v Tolkien* [2009] EWHC 29 (QB): the defendant published a comment on the claimant's website. There was no evidence that the comment, which had been accessible for just over four hours, had been accessed by any person during that time; and
- *Citation plc v Ellis Whittam Ltd* [2013] EWCA Civ 155: an 'over-enthusiastic, misguided and ill-intentioned piece of salesmanship by a former employee of Citation, if such it was, has caused no apparent damage [to the plaintiff's reputation]' (per Tomlinson LJ).

As the above cases demonstrate, the notion that a threshold test represents a significant restraint on claimants seeking to protect their reputation has not been the experience under the UK regime. Claims that have failed to meet the threshold are those that would arguably have been caught by the triviality defence; however before a stage where substantial costs, time and judicial resources have not been incurred to contend with the claim.

10. The triviality defence and other relevant tools in Australia

The introduction of a serious harm test is also consistent with Section 60 of the *Civil Procedure Act 2005* (NSW) which states that 'the practice and procedure of the court should be implemented with the object of resolving the issues in such a way that the cost to the parties is proportionate to the importance and complexity of the subject matter in dispute.' Section 60 has only been successfully deployed in one defamation claim in Australia. In *Bleyer v Google Inc* [2014] NSWSC 897, McCallum J held that a defamation claim relating to Google snippets that had received limited views in Australia should be permanently stayed on the basis that the costs likely to be involved in running the matter to trial (estimated by Google to be \$370,000 not including any appeals) would be disproportionate to the value of the relief that the plaintiff could have hoped to have obtained.

Publishers and Internet intermediaries also have available the defence of triviality through clause 33 of the Model Defamation Provisions. However, triviality has very limited application to protect publishers from spurious defamation claims. This is because triviality operates as a defence, rather than as a threshold hurdle which must be overcome by the plaintiff before a defamation action can continue. Therefore, the triviality defence does not allow defendants to escape the potentially crippling costs of defending a spurious defamation claim until an adjudicated conclusion.

DIGI notes the statistics provided in the discussion paper on Australian defamation cases heard over the five year period to 2017. As found in this review, of the 189 cases with substantive decisions, only 87 resulted in an award of damages. Of those 87 cases, only 38 cases awarded the plaintiff \$100,000 or more. Compare these figures to the well-established costs of defamation litigation, which can readily exceed \$1 million per party. Such costs of pursuing and defending defamation litigation also does not tend to vary materially based on the triviality or otherwise of the allegedly defamatory publication; a fully contested trial over a trivial publication can still require a trial spanning many hearing days, and significant preparation on substantive defences. For example, in *Smith v Lucht* [2015] QDC 289, a trial over a defamatory publication which was ruled to be trivial consumed four hearing days, followed by an appeal which ran for one hearing day. Similarly, in *Barrow v Bolt* [2014] VSC 599, another claim dismissed for triviality, a trial consumed five hearing days and an appeal took

a further hearing day. In both matters, the parties were required to prepare evidence and arguments about the defamatory publications and the defences of qualified privilege, and the Court was required to consider them, notwithstanding the trivial nature of both publications.

It is evident from the UK's implementation of the threshold test, in comparison to the approach taken under Australia's Model Provisions, that the serious harm test is far more efficient and effective way to manage trivial claims.

11. Conclusion: Serious harm

DIGI considers that the introduction of a serious harm test appropriately raises the bar to bringing a cause of action in defamation. We believe that a threshold test of this nature would provide a necessary balance between the claimant's right to protect their reputation, and the court's right to not be encumbered by spurious or frivolous claims.

Question 15: innocent dissemination and 'safe harbours'

- (a) *Does the innocent dissemination defence require amendment to better reflect the operation of Internet Service Providers, Internet Content Hosts, social media, search engines, and other digital content aggregators as publishers?*
- (b) *Are existing protections for digital publishers sufficient?*
- (c) *Would a specific 'safe harbour' provision be beneficial and consistent with the overall objectives of the Model Defamation Provisions?*
- (d) *Are clear 'takedown' procedures for digital publishers necessary, and, if so, how should any such provisions be expressed?*

DIGI maintains that the uncertainty surrounding the current innocent dissemination defence and the circumstances in which it applies requires statutory clarification. As such, DIGI submits that the existing protections for digital publishers are insufficient to protect against liability for material that appears on the publisher's platform, and that either:

- Internet intermediaries should benefit from a protection from a defamation suit where they are not themselves the original creators of defamatory material that they host, at least until a court has issued a ruling adverse to the original creators and a specific breach of the ruling is brought to the intermediary's attention; or
- a safe harbour mechanism be established in the Model Defamation Provisions which reflects, but improves, the framework created by Section 5 of the *Defamation Act 2013* (UK).

12. The current framework

Clause 32 of the Model Defamation Provisions sets out the defence of innocent dissemination. The clause provides that it is a defence to the publication of defamatory matter if the defendant establishes that:

- it was published merely in the defendant's capacity of, or as an employee or against of, 'a subordinate distributor';
- the defendant neither knew, nor ought reasonably to have known, that the matter was defamatory; and
- the defendant's lack of knowledge was not due to the defendant's negligence.

A 'subordinate distributor', for the purpose of the provision is a person who was not the first or primary distributor of the matter, was not the author or originator of the matter, and did not have any capacity to exercise editorial control over the content or publication of the matter prior to first publication.

In theory, the concept of subordinate distributor provides protection for broadcasters of live programs, operators of, or providers of access to, communications systems by which the matter is transmitted by a person over whom the operator or provider has no effective control, and operators or providers of any equipment, which retrieves, copies distributes or makes available in electronic form, defamatory material.

However, in practice, as highlighted by the Law Council of Australia:

While Internet service providers and search engines may not author or have capacity to exercise editorial control over the content of a matter, many Internet service providers 'publish' material uploaded to their servers, which may make them originators under Clause 32. Further, Internet service providers often have usage agreements that permit them, in certain circumstances, to delete or modify content stored on their servers, with the effect that they arguably have 'capacity to exercise editorial control'.

The uncertainty surrounding the classification of intermediaries as subordinate distributors capable of successfully relying on the defence of innocent dissemination has only been perpetuated by the Courts' interpretation of the regime, which we address below.

It is also important to note that Clause 32 operates within a framework that has multiple approaches to intermediaries. A framework which *Collins on Defamation* describes as one in which:

Statutory intervention has complicated rather than clarified the law in Australia. Determining whether intermediaries are liable in respect of material hosted, cached, or carried by them but which they did not create, involves considering whether the intermediary is a publisher of the relevant material and, if so, whether the intermediary is able to avail itself of the common law defence of innocent dissemination, the clause 91 defence of Schedule 5 to the Broadcasting Services Act 1992 (Cth), and the statutory modifications to the common law defence of innocent dissemination which operate in Queensland and Tasmania.

13. The position in Australia

The facts and outcome of *Thompson v Australian Capital Television Pty Ltd (1992) 177 CLR 106* are well known to the DWP and fellow respondents to the Discussion Paper. However, they are important to restate, as they demonstrate the difficulties intermediaries face when attempting to utilise the innocent dissemination defence under the current framework.

The issue in *Thompson* was whether Channel 7 was liable for the publication of the *Today Show*, a current affairs program filmed live to air and produced by another network in Sydney. Channel 7 received and simultaneously telecast the program in the ACT. The episode which drew complaint contained an interview with a young woman who, during the course of the interview, alleged that she and the applicant had an incestuous relationship, resulting in her becoming pregnant when she was 14. The interview was a pre-recorded segment within the live program. In simulcasting the content, Channel 7 did not monitor the statements made, nor did it have foreknowledge of the content that was sought to be broadcast on the program, nor an opportunity to edit the material. The Full Court of the Federal Court, affirmed by the High Court on appeal, held that Channel 7 was an original publisher of the *Today Show*, and was not able to rely on the defence of innocent dissemination. Channel 7 did not conduct the interview and it had no involvement in the production of the *Today Show* because, as mentioned, it was produced by another network. It did not receive any notification of the materials that would be broadcast, only the times in which the segments would run. Yet, despite all these factors, Channel 7 was unable to categorise themselves as subordinate distributors.

DIGI takes the position, following *Thompson*, that Internet intermediaries that host or cache defamatory content on their platform risk being unable to rely meaningfully on the innocent dissemination defence. This is despite the sheer volume of material processed on such platforms, which in the context of search engines, involves more than a billion searches a day. The current position is that, if intermediaries of this nature have the technical ability to control and supervise, they face significant risk if they do not do so. This is despite the position being, as a matter of practice, onerous bearing on unmanageable.

In this regard, we note that the Victorian Court of Appeal and Supreme Court of South Australia have applied *Thompson* to Internet intermediaries such as Google by holding that, once Google is placed on notice that it is returning a search result linking to an allegedly defamatory web page, if it does not de-index the URL for the web page within a 'reasonable time', Google is itself liable for any defamatory content conveyed by the web page.⁴ However, neither Court has provided any guidance on how long a 'reasonable time' is. Further, in *Duffy*, Hinton J held (at [624]):

If there are over sixty trillion web pages in existence and greater than 100 billion searches each month conducted on the Google search engine, I very much doubt that liability of a search engine operator for the publication of defamatory material post-notification and after the passing of a reasonable time to take action will have a chilling effect on the freedom of expression. If I am wrong, it is in my view for the legislature to intervene.

With respect to Hinton J, the outcome in *Duffy* has exactly the chilling effect as predicted. Internet intermediaries, including social media websites and search engines, are not the creators of defamatory content, and do not have the ability to determine whether any allegedly defamatory content is true or would otherwise be defensible. However, following *Trkulja* and *Duffy*, such intermediaries are placed in a position whereby they are obliged to act as a censor, without the essential benefit of the perspective of the originator of the content.

Placing intermediaries in such a position negatively impacts Australian digital services by failing to provide necessary protections for hosting speech that comes in the form of user-generated content. As a result, it negatively impacts Australian Internet users who use the Internet to express their opinions about a wide range of issues; it is therefore fundamentally antithetical to the essential notion of offering people freedom of expression.

14. Legal liability for intermediaries in UK and US

The consequences of requiring intermediaries to act as censors are significant. The implications are conveyed by Nielsen J in the US case of *Auvil v CBS* 800 f Supp 928 (ED Wa, 1992), where, in holding that television broadcasting intermediaries ('affiliates') cannot be liable in defamation in the State of Washington for content that they are re-broadcasting on behalf of an originating television network, the United States District Court for the Eastern District of Washington upheld that such a position:

[w]ould force the creation of full time editorial boards at local stations throughout the country which possess sufficient knowledge, legal acumen and access to experts to continually monitor incoming transmissions and exercise on-the-spot discretionary calls or face \$75 million dollar lawsuits at every turn. That is not realistic.

These sentiments are expressed in the Communications Alliance submission, and DIGI endorses those remarks. To impose these obligations on such intermediaries would be to position those platforms to take a restrictive approach to the content which they provide. The impact this has on the platform's ability to endorse free speech, a foundational goal of all social networking platforms, outweighs any possible benefit of applying the innocent dissemination defence in the current fashion. Such obligations have wider ramifications as set out by Dame Frances Cairncross in her recent review of the sustainability of news in the UK. She said "*If platforms were liable for all content on their services, they would be forced to vet everything they, or users, uploaded, placing strict constraints on*

⁴ *Trkulja v Google Inc (No 5)* [2012] VSC 553; *Google Inc v Duffy* [2017] SASFC 130.

*what could be shared or surfaced. The overall effect might well be to reduce the online availability of news, and to harm users...*⁵

Section 230 of the *Communications Decency Act 1996* (US) also provides a broad safe harbour for Internet intermediaries:

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider...No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

DIGI believes that such protections, as outlined above, should be reflected in Australia and extended to apply to other online platforms which host, but do not create, potentially defamatory content.

15. Conclusion: Innocent dissemination

The application of Clause 32, couched in a framework that is in itself uncertain, demonstrates the need for an amendment which distinguishes content creation from distribution and clarifies the categories and types of intermediaries capable of relying on the defence, and removes the residual tests contained in Clause 32 which relate to 'editorial control'.

The Model Defamation Provisions should require a plaintiff to pursue the content originator in defamation, and either obtain a judgment against the originator or obtain a settlement with the originator, before an intermediary is required to remove, de-index or otherwise hide any content. Plaintiffs may also apply for injunctive relief.

16. Safe harbour and takedown procedures

While Eady J's decision in *Metropolitan International Schools* (as described above) may not necessarily apply directly to social media websites (which host content that has been published following human input on behalf of the end user), Section 5 of the *Defamation Act 2013* (UK) now provides such intermediaries with a separate defence, applicable so long as the intermediary, on request by a plaintiff, identifies the original creator of any material that is hosted on the website and claimed to be defamatory, such that the plaintiff can pursue the originator directly. DIGI considers that, in addition to the protection from suit for Internet intermediaries mentioned in the previous section, the DWP could consider some helpful elements of Section 5 of the UK regime, so that any intermediaries which cannot, for any reason, rely on the protection can still have access to a separate avenue through which they can limit their exposure. Such an approach also ensures that plaintiffs can still obtain suitable relief, by ensuring where practicable that they are given the identity of the originator of any allegedly defamatory matter, where it is available to an intermediary, and can thereafter pursue that originator directly.

The practical effect of the safe harbour created by Section 5 of the *Defamation Act 2013* (UK) is that Internet intermediaries that are based in England and Wales and which host content published by other users are required to keep records of the contact details provided by those users. DIGI considers that this may be appropriate in some circumstances, for it enables Internet intermediaries to ensure that any robust online debate occurs such that persons are ultimately responsible for what they publish. That said, intermediaries should only lose protection if they do not respond to a lawful compulsion to disclose a user's details (such as a preliminary discovery order or a subpoena), in order to protect users' privacy rights.

DIGI, however, does not consider that the further obligations created by cl 2(2) of the Schedule to the *Defamation (Operators of Websites) Regulations 2013* (UK) should form part of the Model Defamation Provisions in Australia. Clause 2(2) requires Internet intermediaries to contact the originator of matter published on the intermediary's website, inform the originator that a complaint has been made and, so

⁵ See

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779882/021919_DCMS_Cairncross_Review_.pdf, page 94

long as the notice provides sufficient detail about the complainant's identity and the bases on which the publication is defamatory of them,⁶ offer them with a choice: provide sufficient details to the intermediary which would allow a complainant to commence proceedings, or follow a counter notice procedure which may result in the intermediary removing the post. DIGI's position on cl 2(2) is that it does not solve the censorship concerns that currently exist in Australia following *Trkulja* and *Duffy*. Instead, DIGI considers that an intermediary's responsibility to respond to a plaintiff should be limited to providing the plaintiff with the originator's contact details as provided by the originator when signing up to the website, in response to a legal compulsion to do so. If a plaintiff cannot contact the originator on those details, or the intermediary does not hold the originator's details -- for example, because the intermediary is one that does not directly collect this information, such as search engine or hosting provider -- the Model Defamation Provisions should entitle a plaintiff to obtain summary relief against the originator, which may then include an order requiring an intermediary to remove the defamatory matter. DIGI also notes that such a regime should be drafted to ensure that online platforms are permitted to share this information in compliance with the Privacy Act 1988, the European Union's General Data Protection Regulation, and any other similar legislation that may apply to online platforms and which restricts information sharing.

17. The effect of the *Broadcasting Services Act 1992* (Cth)

Finally, DIGI notes that Schedule 5, cl 91 of the *Broadcasting Services Act 1992* (Cth) provides what, on its face, appears to be a defence akin to a safe harbour defence for Internet intermediaries:

- (1) *A law of a State or Territory, or a rule of common law or equity, has no effect to the extent to which it:*
- (a) *subjects, or would have the effect (whether direct or indirect) of subjecting, an Internet content host to liability (whether criminal or civil) in respect of hosting particular Internet content in a case where the host was not aware of the nature of the Internet content; or*
 - (b) *requires, or would have the effect (whether direct or indirect) of requiring, an Internet content host to monitor, make inquiries about, or keep records of, Internet content hosted by the host; or*
 - (c) *subjects, or would have the effect (whether direct or indirect) of subjecting, an Internet service provider to liability (whether criminal or civil) in respect of carrying particular Internet content in a case where the service provider was not aware of the nature of the Internet content; or*
 - (d) *requires, or would have the effect (whether direct or indirect) of requiring, an Internet service provider to monitor, make inquiries about, or keep records of, Internet content carried by the provider.*

However, as has been noted by ninemsn and the Communications Alliance, cl 91 is of limited utility because it does not clearly include search engines and various other Internet intermediaries within the definition of 'Internet content host' or 'Internet service provider', and cl (c) does not repair the ails created by *Duffy* and *Trkulja*, because the protection is lost once the service provider is made 'aware' of the nature of the Internet content that is the subject of the complaint. Therefore, cl 91 does not provide Internet intermediaries with the necessary protections that should be extended to them.

18. Conclusion

As outlined throughout this submission, offering online intermediaries protection is extremely important. Such protections should also include explicit reference to the applicability of Internet intermediaries, including social media providers, which would be in compliance with the US-AUS free trade agreement and would avoid potential uncertainty. It is important to emphasise that offering such protections would not diminish protections for plaintiffs, who are still left with recourse against the original authors of defamatory content. Furthermore, if a Court has made a finding that particular content is defamatory of a plaintiff, and that is brought to the attention of an online intermediary in

⁶ As required by s 5(6) of the *Defamation Act 2013* (UK) and reg 4 of the *Defamation (Operators of Websites) Regulations 2013* (UK).

conjunction with a specific allegation that the intermediary is publishing the content, it would be reasonable to end the intermediary's protection from suit at that point. Finally, none of the above precludes any online intermediary from determining its own content standards about how it responds to complaints about material that is alleged to be defamatory, false, or harassing; the protections would simply offer a level of legal certainty about an intermediary's legal position. This legal certainty is crucially important given the central role online intermediaries increasingly play in enabling people's free expression of information, opinions and ideas -- such matters are essential to both a thriving digital economy and, more fundamentally, to democracy.