SUBMISSION TO STAGE 2 REVIEW OF THE MODEL DEFAMATION PROVISIONS
PART A: LIABILITY OF INTERNET INTERMEDIARIES FOR THIRD-PARTY CONTENT
BACKGROUND PAPER: *MODEL DEFAMATION AMENDMENT PROVISIONS 2022 (CONSULTATION DRAFT)*

9 SEPTEMBER 2022

Australia's Right to Know (**ARTK**) coalition of media organisations appreciates the opportunity to make a submission to the Defamation Law Working Group (the Group) regarding the *Background Paper: Model Defamation Provisions 2022 (Consultation Draft)* of the *Stage 2 review of the Model Defamation Provisions, Part A: liability for internet intermediaries for third-party content.*

As we have previously stated in our *Response to Council of Attorney Generals, Review of Model Defamation Provision – Stage 2* dated 2 June 2021 (**June 2021 Response**), the interests of ARTK members in Stage 2 reform are largely limited to liability for third party comments. We approach that liability in two ways:

(a) *Liability for third party comment/s (***TP comment/s***) posted to members website/s over which they have complete control.*

As will be recalled, ARTK has accepted that we are the publisher of such comments and may be liable for them; and

(b) *Liability for TP comments posted to websites and/or platforms that our members do not own and control but in relation to which they maintain an account, such as Facebook.*

Despite the outcome in the Voller High Court matter, ARTK continues to maintain that our members should not be liable for third party comments posted in these circumstances. We have previously drawn the distinction between ourselves as being **the Operator** of such an account as opposed to **the Owner** of the website or platform and adopt the same terminology here.

We have applied this dual lens to our consideration of the draft *Model Defamation Amendment Provisions 2022* (**MDAP 2022**).

[1] Section 4 Definitions [Part A, consequential amendments]

Insofar as a potentially defamatory TP comment is published on the website of an ARTK member, we believe we are likely to constitute a "digital intermediary" and that the two alternative s31A defences could be available to us.

The Background Paper includes consideration of the Voller High Court case and indicates that the MDAP 2022 are intended to relieve the liability for publishers of TP comments that Voller imposed. Unfortunately, ARTK does not believe that the definitions achieve that goal.

Insofar as such a TP comment is made in circumstances where an ARTK member is merely an Operator, we believe it is highly likely that the s31A defences will fail based on the definitions alone. We take that view because the ARTK member cannot be a "digital intermediary" unless it "provides an online service". "Online service" is itself defined as a "service provided to a person" in the circumstances further set out in that definition.

ARTK believes it is highly likely that should the definitions remains as they are, they will need to be tested in court and a finding will follow that where an ARTK member is merely an Operator it does not provide a service to a person in that capacity. The Owner of the website or platform provides the Service: an Operator merely takes advantage of that service in the same way that the person who posts the TP comment does. So while (for example) Facebook may be able to rely on whichever s31A defence is enacted, we believe the likely outcome will be that ARTK members cannot.

Naturally, this issue will not be limited to ARTK members but will apply to any person or entity who is an Operator including, but not limited to, forum administrators. Whether the costs of testing the proper construction of the definitions will fall to an ARTK member or to a member of the public remains to be seen. To remedy the problem for all Operators, we recommend a rethink of the definitions of "digital intermediary" and "online service" to allow those definitions to apply to those that do not provide a service.

[2] Section 9A [Part A, recommendations 1 and 2]

ARTK makes no comment about section 9A.

[3] Section 15 Content of offer to make amends [Part A, consequential amendment using new terminology]

ARTK has no objection to this amendment and makes no comment about how it is worded.

[4] Section 15(1B) [Part A, recommendation 7]

ARTK has no objection to this amendment and makes no comment about how it is worded.

In saying this, we note that we suspect this amendment will have no practical impact on ARTK members. We each have our own publications, broadcasts and websites through which a reasonable correction or clarification of report can easily be made. That being the case, it is difficult to imagine a court finding that an Offer to Make Amends made by an ARTK member that did not include an offer to apologise or correct was "reasonable" for the purpose of that member availing itself of the defence prescribed in s18(1)(c) of the Act.

[5] Section 23A [Part A, recommendation 6]

ARTK has no objection to this amendment.

[6]-[7] Section 31A Alternatives (3A Safe Harbour Defence and 3B Innocent Dissemination Defence)

ARTK repeats the concerns set out at paragraph [2] above about the effectiveness of either of these defences in relation to TP comments published in circumstances where the ARTK member is only an Operator.

We accept that the circumstances in which a TP commentator would voluntarily agree to their "sufficient identifying information" being supplied to a complainant will be few and far between. Nonetheless, of the two choices our members prefer 3A because it allows for engagement with the TP commentator whereas 3B does not.

During the Roundtable discussion for the MDAP 2022, a number of the participants indicated that they would be raising concerns about the drafting of s31A in their written submissions. Consequently, we limit ourselves to the following matters:

- The content required of a Complaints Notice issued for the purposes of s31A is not identical to that required of a Concerns Notice. However, in practice a Concerns Notice may also constitute a Complaint Notice (the reverse may not necessarily be true given a Complaints Notice does not have to set out the imputations said to arise from the matter complained of). An amendment to the effect that where this occurs, a Concerns Notice may be relied upon as a Complaints Notice for the purpose of establishing a s31A defence would be useful.

- From time to time it may be the case that a Concerns Notice does not meet the requirements of a Complaints Notice or a Complaints Notice is issued that does not set out all of the information required of proposed s31A(3)(b). For example, on occasion ARTK members have received Concerns Notices that set out the imputations said to arise from the matter complained of but do not state that the MCO is factually inaccurate or what the factual inaccuracies leading to the MCO being defamatory are said to be.

  If that were to occur then, it could be said that the plaintiff did not "duly [give] the defendant a complaints notice under" s31A because what the plaintiff gave was deficient. But so long as the defendant was a digital intermediary in relation to the publication and "had, at the time of the publication, a mechanism that was easily accessible by members of the public for submitting complaints notice under the section", the s341A defence could nonetheless be raised.

  ARTK submits that relying on such a technicality is unlikely to be happily met by the bench and it would be better for s31A to be amended to deal expressly with what is to occur in circumstances where a Complaints Notice lacks required information. This is already provided for in relation to Concerns Notice at s12A(3) of the Act and could easily be adopted in relation to Complaints Notices.

[8] Section 39A [Part A, recommendation 5]

ARTK has no objection to this amendment.

[9]-[11] Part 6, Division 1

ARTK has no objection to, and makes not comments about, these amendments.

ADDITIONAL RECOMMENDATION

ARTK has previously recommended that the Stage 2 amendments be subject to prompt review due to the novel concepts they raise. We recommend this occur two (2) years after the amendments are implemented. To achieve this outcome we recommend that a further amendment be included in the MDAP 2022 as follows:

[12] Section 49

(1) Omit the number 5 in subsection 49(2). Insert instead –
2

(2) Omit the words "this Act" in subsection 49(2). Insert instead –
the 2022 amendments

(3) Omit the number 5 in subsection 49(3). Insert instead -
2

TIMEFRAME FOR LEGISLATIVE CHANGES

We note that since 1 July 2021 Phase 1 changes to the unified defamation laws were passed and operational in Victoria, New South Wales, South Australia and Queensland. We also note Tasmania and the Australian Capital Territory passed and implemented the changes shortly thereafter. However Western Australia and Northern Territory have still not passed – or implemented – the Phase 1 changes.

Lastly, we also note the timeframe for completion of Phase 2 is the end of this year 2022. We trust that WA and the NT will have passed and implemented Phase 1 amendments to the unified defamation law before the end of 2022.