SUBMISSION - STAGE 2 MODEL DEFAMATION PROVISIONS PART A

Introduction

1 On 12 August 2022, the Meeting of Attorneys-General (**MAG**) agreed that the draft Part A of the Model Defamation Provisions (**MDPs**) and accompanying Background Paper should be released for public consultation.

2 Importantly, the Background Paper states that this does not represent an endorsement of the policy recommendations or draft amendments by the MAG or the Defamation Working Party.

3 The Background Paper says that the decision on 'this' will be made following the exposure draft consultation process.

4 Part A of the Stage 2 Review of the MDPs (**Review**) is said to address the 'liability of internet intermediaries in defamation law for the publication of third-party content online'.

5 This submission should be read with and in addition to the submissions made by Ms S Chrysanthou SC and others as it focusses on Recommendation 4.

6 Recommendation 4 of the Review is that the Commonwealth Government should give close consideration to whether an exemption from s 235(1) of the Online Safety Act 2021 (Cth) (**OSA**) for defamation law is desirable, in the interests of clarity of the law.

Commonwealth legislation

7 The thrust of this submission is that the liability of internet intermediaries (or 'digital intermediaries' as defined in s 4 of the draft MDPs) for defamation published in Australia is a subject matter which is recognised implicitly from Recommendation 4 itself as within the legislative powers of the Commonwealth and prospectively is likely to be legislated by the Commonwealth, within the context of the Commonwealth Government's policy direction of seeking to regulate internet

intermediaries across a range of subject matters, and therefore should only be addressed by Commonwealth legislation.

8 An attempt by the MAG to amend the MDPs, to impose, reduce or exempt the liability of internet intermediaries for publication of third party defamatory content could lead to inconsistent state and territory legislation with Commonwealth legislation, and the MDPs could be invalid in that respect under s 109 of the Commonwealth Constitution.

9 Section 235(1) of the OSA expressly provides that a **law of a State or Territory has no effect** to the extent to which it subjects certain internet intermediaries (as defined) to liability (whether criminal or civil) where they were not aware of the nature of the online content or where they are required to monitor, make inquiries about, or keep records of, online content hosted or carried by them.

10 This section protects an 'Australian hosting service provider' as defined in section 5 and section 17 of the OSA from liability, and an 'internet service provider' as defined in section 19 (1) of the OSA from liability.

11 The definition of 'internet service provider' is broad, being a person who supplies an internet carriage service to the public. This applies for example to Google, Meta and Twitter.

12 The definition of a 'hosting service provider' would appear to be narrower and only applies to an Australian service provider. It may include an operator of a website which is able to control the content it makes available to internet users: *Fairfax Media Publications Pty Ltd v Voller* [2020] NSWCA 102 at [21] Basten JA.

13 Section 235 is already operative. It protects the internet intermediaries identified in Recommendations 1, 2, 3A or 3B from liability unless or until they are aware of the internet content.

14 Recommendations 1 and 2 proceed on the basis that the exemption from liability would apply irrespective of whether the internet intermediary is made aware of the defamatory content published by third parties. It is unclear how these Recommendations could be in conflict with s 235(1) as they exempt liability regardless of awareness and do not impose liability.

15 Recommendations 3A and 3B impose liability only after the internet intermediary is aware of a complaint but then fails to take 'access prevention steps' which were reasonable in the circumstances, or specific to Recommendation 3A, the internet intermediary identifies the 'poster' to the complainant.

16 The Background Paper suggests that Recommendations 3A and 3B would be consistent with s 235 of the OSA in not subjecting internet intermediaries to liability until after the prescribed period following receipt of a valid complaints notice. In other words, after they are aware of the allegedly defamatory content. It is unclear how Recommendations 3A and 3B could be in conflict with s 235(1) as they exempt liability before awareness.

17 Recommendations 1, 2, 3A or 3B apply only to internet intermediaries (as defined in s 4 as digital intermediaries) and not to administrative hosts, account holders or other internet or social media users. To the extent that s 235(1) of the OSA applies to internet service providers or Australian hosting service providers as the OSA defines them, no conflict arises with the current MDPs with the defence available under s 32, which is dependent on the awareness of the subordinate distributor, or with Recommendations 1, 2, 3A or 3B.

Commonwealth Government Policy Direction

18 In the circumstances, it is suggested that in order to avoid uncertainty as to the validity of the amendments to Stage 2 of the MDPs, Recommendation 4 is that the Commonwealth Government should give close consideration to whether an exemption from s 235(1) of the OSA for defamation law is desirable, in the interests of clarity of the law.

19 The Commonwealth Government has legislated a number of laws relating to internet communications and can be expected to continue to do so in accordance with its policy direction.

20 This collection of Commonwealth laws seek to implement a policy direction toward the regulation and imposition of liability upon internet intermediaries in Australia where those intermediaries breach relevant local laws. The direction is not as the

amendment to the MDPs propose, to exempt and remove liability from internet intermediaries, irrespective of whether they are aware of the third party content.

21 Once the internet intermediary is aware of the third party content, certain obligations of due care may be imposed by legislation and failure to take reasonable care may result in liability.

22 This policy direction began in dramatic fashion with the introduction of the *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019 (Cth)* in the wake of the Christchurch terrorist attack on 15 March 2019. The legislation was enacted weeks later on 6 April 2019 to protect the public from the dissemination of abhorrent violent content uploaded by a terrorist/criminal third party and impose heavy sanctions on internet intermediaries which did not remove the content quickly.

23 On 26 July 2019, the Australian Competition and Consumer Commission (ACCC) published its '*Digital Platforms Inquiry Report*' making important findings about the functions of digital platforms and the need for consistency across definitions and 'take down' regimes in Australia. It closely scrutinised the conduct of digital platforms and recommended strengthening protections in the areas of competition, advertising, consumer, and privacy laws, and the development of a digital platforms code of practice.

24 In response to the Facebook/Cambridge Analytica data harvesting incident in March 2018, the Commonwealth Government had already committed to strengthening privacy protections by introducing a binding code of practice for social media and other online platforms that trade in personal information, and by enhancing enforcement mechanisms and penalties provisions under the *Privacy Act 1988 (Cth).*

25 *The Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill* 2021 (the Online Privacy Bill) is proposed to enhance the protection of personal information by enabling the introduction of an Online Privacy code (OP code), and enhancing penalties and enforcement measures against social media service providers and other internet intermediaries.

26 The OSA or *Online Safety Act 2021 (Cth)* was enacted to impose liabilities on internet intermediaries where they fail to comply with the online safety provisions protecting Australian children and adults from offensive and abusive content whether originated from third parties or not.

27 These Commonwealth Acts and initiatives impose 'fault based' liability on internet intermediaries in circumstances where a third party originator may have posted content online which breaches the law in some respect but the Commonwealth Government looks to internet intermediaries with the power and control over the provision of the online service to take reasonable steps once on notice or aware of the content in order to prevent the continued breach of the law, notwithstanding they did not originate it.

28 In late 2021, the then incumbent Commonwealth Government introduced in Parliament the misnamed and misdirected *Social Media (Anti Trolling) Bill 2021*.

29 The Bill was severely criticised as an anti-trolling measure. It would have had no effect on eliminating or reducing trolling and probably would have increased it. The Bill was also plainly inconsistent with the general policy direction of the Commonwealth Government by seeking to provide immunity for social media page owners and defences for administrators from liability for defamation for publishing third party content. The immunity would have changed the direction of Government policy from requiring internet intermediaries to exercise reasonable care to protect victims by removing content once aware of the defamatory content to no care required at all. The Bill lapsed due to the 2022 Federal election.

30 While this Bill failed to proceed, it demonstrated a significant step taken by the Commonwealth in the exercise of its powers on the subject of defamation. It is time that the Commonwealth legislated the extent of liability of internet intermediaries for publication of third party defamatory content to ensure the law is consistent and coherent across a number of areas within its powers.

31 The policy threshold of that liability is clear from s 235(1) of the OSA. The Commonwealth requires the internet intermediaries to be given notice of the content before they may be at fault or liable for not taking steps in response. In the balancing

of important rights of Australian citizens against the rights of global internet intermediaries, an exemption of the latter for merely identifying the poster/originator with their consent is not balanced.

32 Recommendation 4 has exposed the weakness of the States and Territories dealing with this issue and may be seen as pre-emptive of prospective Commonwealth Government legislation.

33 The Commonwealth Government never signed the Intergovernmental Agreement formed between the Attorneys-General of the States and Territories in 2005 in relation to defamation reform.

34 Clause 6.7 of the Intergovernmental Agreement was intended to restrict the right of the Commonwealth to introduce a Bill that would alter or significantly affect the operation of the MDPs as enacted by the States and Territories **without the agreement of the States and Territories.**

35 The Commonwealth Government did not accept that proposal and is not restricted by the MDPs or the reforms being recommended by the States and Territories. Its agenda is a national one.

Defence or Immunity

36 The technical flaws in Recommendations 3A and 3B are set out in the submissions made by S Chrysanthou SC and others, including myself.

37 If there is to be a change to the MDPs to clarify the law, it should be by way of amendment to s 32(3) enabling the internet intermediary to show its innocence or lack of fault on the facts of the case under s32(2) as a subordinate distributor. Once an internet intermediary is aware of the defamatory content however, it takes responsibility and may be liable for its decision to continue publication.

Procedural flaws

38 Recommendations 5, 6 and 7 concern procedural issues:

(a) court powers for non-party orders to remove content online;

(b) court discretion when making preliminary discovery orders about originators;

(c) mandatory requirements for offers of amends to be updated for online publications.

39 The Federal Court applies the *Federal Court of Australia Act 1976* (Cth). To the extent of any inconsistency of the MDPs with the Commonwealth legislation, the State and Territory legislation would be invalid and inoperative. This has already been recognised with respect to s 21/juries, and s 40/costs. I anticipate the inflexible provisions of s 12A and s 12B of the MDPs in relation to the mandatory requirements of concerns notices may also be inconsistent on this basis.

40 At one point, the CAG forlornly posed the question whether the Commonwealth legislation applicable to the Federal Court should be amended to provide for jury trials, following the judgment in *Wing v Fairfax Media Publications Pty Ltd* [2017] FCAFC 191. In the absence of the Commonwealth Government being a signatory to the Intergovernmental Agreement, this question went unanswered.

Reform Process and Lack of Uniformity

41 In 2019, the Council of Attorneys-General (**CAG**), as it then was, proposed that reforms to the MDPs would be approached in two stages. The first stage was to 'modernise the Act' and respond to the most pressing concerns 'raised by stakeholders' implementing 'international best practice'. The second stage is/was to consider potential amendments to the Act that address the responsibilities and liability of digital platforms for defamatory content published online.

42 In passing, the terms 'stakeholders' and 'international best practice' should be questioned.

43 'Stakeholders' is an inapt term to describe the collective interests of the persons who made submissions. It was not a level playing field of interested parties. A number of parties did not have a fair 'stake' in the process and a number of essential parties were absent from the process and consultation.

44 The 'international best practice' was for the most part simply adopting some of the reforms introduced in the Defamation Act 2013 (UK), albeit with changes of wording which will just serve to confuse. The differences between the UK defamation laws, of the common law and a collection of statutes, and the Australian defamation laws, of the common law modified by the MDPs, will cause comparative difficulties in due course.

45 One of the most significant reforms introduced in the UK, for example, was the removal of juries as of right (s 11) which has liberated the courts in providing a cost effective procedure to determine issues quickly and relatively inexpensively by judge alone. As Nicklin J said in *Bokova v Associated Newspapers Ltd* [2018] EWHC 2032 (QB) at [9]–[10]:

> "To an extent, this represents a culture shift in defamation pleadings, but it is one that has to be embraced in the new era where meaning will regularly be tried as a preliminary issue. Since the abolition of the 'right' to trial by jury in defamation proceedings, by s.11 Defamation Act 2013, libel actions now fall to be determined (and case managed) in the same way as any other civil proceedings in the High Court. One of the principal benefits of the change in mode of trial is that the way is now clear for the Court to determine the actual meaning of a publication as a preliminary issue. Indeed, as the natural and ordinary meaning of a publication is a matter upon which no evidence beyond the words themselves is admissible, in most cases meaning can be determined as soon as it is clear that the issue of meaning is disputed between the parties.
>
> The benefits are obvious. Indeed, if there is no factual dispute on the issue of publication (e.g. a dispute over the actual words published, reference or innuendo), I struggle to see circumstances in which the parties would want to proceed through the stages of defamation litigation *without* having meaning determined. Its determination can lead to the parties resolving the dispute without the need for further litigation. Even if the claim cannot be settled at that stage, there remain significant benefits for the future conduct of the case…"

46 These observations were ignored in Australia. The MDPs resolutely stood by the use of juries as of right in s 21 in whichever jurisdiction pleased. Notwithstanding the express object that the MDPs be uniform (s 3), there is a mishmash of rights across the eight jurisdictions of the States and Territories - plus the Federal jurisdiction - on this issue as a result.

47 The CAG promoted itself as progressive in adopting 'international best practice' but it only introduced some of the UK reforms. This most basic reform has profoundly

changed the practice and procedure of defamation law in the UK as Nicklin J observed above. The CAG proceeded with its self-inflicted lack of uniformity.

48 On 27 July 2020, the CAG agreed to the implementation of the *Model Defamation Amendment Provisions 2020*.

49 Two weeks later, on 11 August 2020, the *Defamation Amendment Act 2020 (NSW)*[1] was passed and assented in New South Wales.

50 On 31 March 2021, the CAG agreed that New South Wales, South Australia, Victoria and all other jurisdictions that were able to do so would commence the *Model Defamation Amendment Provisions 2020* on 1 July 2021, and the remaining jurisdictions would commence those provisions as soon as possible thereafter.

51 On 12 April 2021, the CAG released the Discussion Paper for Stage 2 of the Review of the Model Defamation Provisions.

52 On 1 July 2021, the Model Defamation Amendment Provisions took effect in New South Wales, Victoria, South Australia, Queensland, and the Australian Capital Territory.[2] They subsequently took effect in Tasmania on 12 November 2021.[3] They remain to be enacted in Western Australia and the Northern Territory.

Transparency

53 The speed with which the NSW Government proceeded to legislate the amendments is distinctly at odds with the fact that Western Australia and the Northern Territory have still not done so two years later, let alone after the amendments were proposed to be implemented Australia wide one year later.

54 There has been no explanation for the delay of these two jurisdictions for not introducing the Stage 1 reforms as agreed by the CAG. The MAG (as it is now) should release the minutes of the CAG/MAG meetings to disclose the differing positions of

1. Defamation Amendment Act 2020 (NSW) No 16.
2. Justice Legislation Amendment (Supporting Victims and Other Matters) Act 2020 (Vic); Defamation (Miscellaneous) Amendment Act 2020 (SA); Defamation (Model Provisions) and Other Legislation Amendment Act 2021 (Qld); Civil Law (Wrongs) Amendment Act 2021 (ACT).
3. Defamation Amendment Act 2021 (Tas).

the States and Territories with respect to the reforms since the process began in 2018 to explain the reasons for the delay or opposition that has occurred at least in these two jurisdictions.

55 For the sake of transparency, the MAG should also release the minutes of the Defamation Working Party, preferably since the reform process began in 2005 but certainly from 2018 to date, to confirm the jurisdictions which the members of the Defamation Working Party represented, the differing positions taken and whether there has been fair representation of the interests of each State and Territory in the process of forming the MDPs and their amendment.

56 As referred to above, those who made submissions in the process have been referred to as 'stakeholders'.

57 A law firm which often represents defamation plaintiffs, Bennett & Co, noted in Stage 1 that a review of the submissions made in response to the Stage 1 Discussion Paper showed that 'many were composed by organisations and individuals often associated with defendants'. They said it was entirely appropriate that people express their views, but their views:

> "*...should not be conflated with the public interest. Allowing media companies and their defenders to map the boundaries of defamation law is akin to insurance companies determining the outlines of personal injury law, or allowing banks to determine what financial regulation is in consumers' interests. Serving sectional (commercial) interests does not advance the broader public interest.*
>
> *Unlike defendants, defamation plaintiffs do not have an industry association or the institutional resources of a media corporate. They do not make law reform submissions.*"

58 This point was well made if one considers the submissions made in Stage 1 and Stage 2. There has been a large volume of submissions made by media companies and their defenders. It appears that the volume or number of submissions made by

'stakeholders' in favour of or against the questions raised by the CAG when forming its views about the recommendations for reform under Stage 1 was highly influential.

59 That flawed approach is likely to continue in Stage 2. It is evident in the Summary Paper for Stage 2 Part A. Consider this passage:

> *"While **stakeholder** views on Part A differ, there is general agreement on the need to clarify the law in this area. **Many** were of the view that any reform should focus the dispute between the complainant and the originator of the matter in question. A **common concern** was the potential chilling effect on free speech of defences that require internet intermediaries to remove content to avoid liability. **A number of stakeholders** submitted that it is not fair to hold an internet intermediary liable for third-party content of which they are unaware."*

60 The inherent bias in those stakeholder views is obvious. The last submission of a 'number of stakeholders' is misleading and made without regard to s 235(1) of the OSA but the proposition is stated as if such liability is a matter unfairly balanced against freedom of speech.

61 The number of submissions should not have been determinative or even necessarily influential when an essential section of the community, defamation plaintiffs, did not participate in numbers and in their absence, their interests were not demonstrably safeguarded by the CAG. The Stage 1 reforms were heavily weighted in favour of the media. Notably, the major reforms in Stage 1 were:

(a) serious harm threshold introduced for plaintiffs as part of the cause of action;

(b) mandatory concerns notices required for plaintiffs before commencing proceedings;

(c) public interest defence introduced for defendants;

(d) contextual truth defence widened for defendants;

(e) cap on damages redefined to apply only to a most serious case rather than a cut off, and aggravated damages isolated to limit damages awards.

62 The reform process should have engaged in a more principled, balanced and comprehensive consultation. As it concerns Australian citizens whose interests were/are being 'balanced' against international companies and local companies, the process should have involved the Commonwealth Government and better still, the Australian Law Reform Commission.

63 The change in balance effected by Stage 1 will mainly affect individuals given the limited scope for companies to bring actions for defamation. Stage 1 showed a predisposition to establishing barriers for plaintiffs in exercising their rights to sue for defamation in favour of defendants rather than addressing the perennial issue for plaintiffs and defendants alike, access to justice – cost and speed of proceedings and practical and efficient remedies.

64 The other stakeholder significantly absent from the process was/is the Federal Court of Australia. While the Chief Justice of the Supreme Court of South Australia made a limited submission on juries for the sake of clarity in Stage 1, there has been no involvement of the Federal Court Chief Justice or Judges of that Court. That involvement might have been particularly important in respect of a number of the procedural proposals which will probably not be applicable in the Federal Court.

65 However there is a basic reason that Federal Court Judges might not be involved in this process and that concerns the separation of powers. Making reform submissions to governments is not appropriate for a judge given their independence.

Modernisation of the Law

66 The internet has grown from its infancy over 30 years ago. The intermediaries that provided the internet service were protected with an immunity from liability under s 230 of the Communications Decency Act 1996 (US). That immunity allowed internet intermediaries to build their networks form the US into a global communications service for the benefit of the global community generally, but also to become vast profit making companies, largely unregulated by governments.

67 The internet was hailed as a revolution in knowledge and free speech for all. Many have criticised the law, and particularly defamation laws in Australia, as being inadequate and needing 'modernisation' to adapt to the benefits of the internet and social media.

68 The High Court's approach to the application of defamation law to the workings of the internet has been cautious from the first judgment in *Dow Jones & Co Inc v Gutnick* [2002] HCA 56. It resisted the call for a 'root and branch' revision of defamation law to apply to publication on the internet and to take into account its special features.

69 That caution continued more recently in *Trkulja v Google LLC* [2018] HCA 25 and *Fairfax Media Publications Pty Ltd v Voller* [2021] HCA 27. The High Court may have reached the limit however, in *Google LLC v Defteros* [2022] HCA 27, although the case may be distinguishable on its facts.

70 The caution exercised by the High Court in respect of Australian defamation law has been valuable because of the unintended path the internet has taken since it began with social media becoming a weapon and means by which people can abuse, harass and menace others and destroy reputations with ease, anonymity and apparent impunity.

71 As a matter of policy, the Commonwealth Government has the legislative responsibility and Constitutional power to regulate these abuses and excesses in the protection of its citizens. Those companies with the responsibility and power to do so as internet intermediaries must be required to take reasonable care to stop and prevent the abuse and excess when they are made aware of it.

72 The law needs to ensure there remains in place a 'fault based' liability for internet intermediaries who fail to take care with respect to publications they facilitate or continue in Australia after they have notice. That is not a policy to be formulated and implemented by State and Territory governments. It is an issue of international importance in which Australia is only one of all the countries affected.

Conclusion

73 The clear conclusion is that the Commonwealth Government should exercise its powers to cover the field with respect to the 'liability of internet intermediaries in defamation law for the publication of third-party content online'. This should be done within the context of the Commonwealth Government's policy direction of seeking to regulate internet intermediaries across a range of subject matters and in doing so, it should proceed to reform defamation law generally for the national interest.

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