

**COMMUNICATIONS
ALLIANCE LTD**



NSW ATTORNEY GENERAL

ATTORNEY GENERAL'S REVIEW OF THE
DEFAMATION ACT

COMMUNICATIONS ALLIANCE SUBMISSION
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INTRODUCTION

Communications Alliance welcomes the opportunity to make this submission in response to the Attorney General's review of the *Defamation Act 2005 (the Act)*.

This submission is also endorsed and supported by one company that is not a member of Communications Alliance, namely Yahoo!7.

This submission addresses the defamation liability of online intermediaries involved in the facilitation of the dissemination of information, including search engines, communication conduits such as ISPs, and online content hosts.

Online platforms – from small bulletin boards to services like YouTube, eBay, Amazon, Facebook and Twitter - have connected the world in ways that were never possible before. Previously, speaking to a large audience required owning a broadcast tower, and reaching consumers around the world required constructing physical shops everywhere. Today, all it takes is an online host or service for users to connect or entrepreneurs to find and reach customers worldwide.

These intermediaries are an integral part of Australia's digital economy and today's 'Web 2.0' environment. Over the years, we have seen the development of the web from a 'Web 1.0' environment to 'Web 2.0'.

'Web 1.0' popularised Internet content delivery mechanisms, removing the geographical and physical restrictions associated with traditional content distribution. Traditional content producers adopted new and innovative ways to reach audiences via the web and the Internet provided publishing opportunities for creators who may not have been able to access or cover the costs of mainstream content production and delivery channels.

'Web 2.0' saw the popular adoption of user generated content and social networking sites. These services enabled and popularised interactivity between online services and Internet users, as well as between the multiple users of these services, encouraging the massive popularity of mash-ups, citizen journalism and user created content. Web 2.0 has led to an explosion in the volume and range of content available and democratised content production distribution, and consumption by removing the barriers to entry for content creators and establishing the Internet as a primary delivery channel for both professionally produced content and user generated content. It is also dependent on the role and protection of Internet platforms such as content hosts.

About Communications Alliance

Communications Alliance is the primary telecommunications industry body in Australia. Its membership is drawn from a wide cross-section of the communications industry, including carriers, carriage and internet service providers, content providers, search engines, equipment vendors, IT companies, consultants and business groups.

Its vision is to provide a unified voice for the telecommunications industry and to lead it into the next generation of converging networks, technologies and services. The prime mission of Communications Alliance is to promote the growth of the Australian communications industry and the protection of consumer interests by fostering the highest standards of business ethics and behaviour through industry self-governance. For more details about Communications Alliance, see <http://www.commsalliance.com.au>.

1 SUMMARY OF SUGGESTED REFORMS

- 1.1 Communications Alliance submits that the Act should be amended to provide that merely indexing defamatory matter or facilitating its dissemination (such as occurs when a search result is generated automatically by a search engine, and when content is transmitted via a communication conduit such as an ISP) does not amount to publication of the defamatory matter, whether or not the intermediary has knowledge of the defamatory content. In addition, the Act should be amended to protect content hosts, which simply act as platforms, and do not play a part in creating or publishing the hosted content.
- 1.2 In the event that an online intermediary is, prima facie, liable as a publisher of defamatory content, Communications Alliance submits that it is imperative that the Act contain a safe harbour that provides certainty to both defamed persons and online intermediaries. That safe harbour should include provisions as set out below.
- 1.3 Communications Alliance submits that the Act should be amended to provide for a single publication rule.
- 1.4 Communications Alliance submits that the Act should be amended to provide that a court does not have jurisdiction to hear an action for defamation against a person who is not domiciled in Australia unless the court is satisfied that, of all the places in which the matter complained of has been published, Australia is clearly the most appropriate forum in which to bring an action in respect of the matter.
- 1.5 Communications Alliance submits that the Act should be amended to provide that a matter complained of is not defamatory unless its publication has caused or is likely to cause substantial harm to the reputation of the plaintiff.

2 OVERVIEW

- 2.1 The position of online intermediaries with respect to liability for defamation under the Act is unclear.
- 2.2 In particular, the question of when an online intermediary will be treated as a publisher of defamatory content is unsettled, as are the circumstances in which an online intermediary will be found to have satisfied the requirements of the Schedule 5, Clause 91 of the *Broadcasting Services Act (Cth)* (**the BSA defence**), or the defence of innocent dissemination in s 32 of the Act.
- 2.3 That uncertainty imposes unreasonable burdens on online intermediaries as well as potential plaintiffs, and is a bar to speedy resolution of disputes about the publication of defamatory matter online. A lack of clarity is also bound to lead to uneven implementations of legal requirements, ranging from the removal of legitimate speech to harmful monitoring and surveillance of users, which invade privacy and unduly restrict speech.
- 2.4 Another matter to be addressed in this submission is the extent to which the position under Australian law with respect to liability of online intermediaries is out of step with international developments, in particular with regard to the question of where and when publication occurs. Technology changes rapidly, and it is imperative for Australian laws to adapt so that the costs of compliance do not harm the pace of innovation.
- 2.5 Communications Alliance respectfully submits that the reforms proposed below are necessary in order to embody a workable law in the current online environment and to bring Australian defamation law in line with international developments.

3 ONLINE INTERMEDIARIES – IN WHAT CIRCUMSTANCES SHOULD THEY BE TREATED AS PUBLISHERS?

3.1 For the reasons set out below, Communications Alliance submits that the Act should be amended to provide that merely indexing defamatory matter or facilitating its dissemination (such as occurs when a search result is generated automatically by a search engine, and when content is transmitted via a communication conduit such as an ISP) does not amount to publication of the defamatory matter.

3.2 In addition, the Act should be amended to protect content hosts, which simply act as platforms, and do not play a part in creating or publishing the hosted content.

3.3 Search engines

3.4 With respect to search engines, the English High Court recently determined that the operator of a search engine was not a publisher of the snippets of content (*snippets*) that appear in response to a search conducted by a search engine user. This decision provided much needed certainty for search engine operators in the UK.

3.5 In [Metropolitan International Schools Ltd v Designtechnica Corp \[2009\] EWHC 1765](#), Mr Justice Eady considered the automatic way in which the snippets were generated. When a search engine user conducts a search, there is no human input from the search engine operator. The search engine operator has no role to play in formulating search terms, and therefore has no power to prevent the snippet appearing in response to the user's request unless it has taken some positive step in advance of the search request being made. Based on this, Eady J found that a search engine operator cannot be characterised as a publisher at common law of the snippets.

3.6 For the reasons set out below, Communications Alliance submits that it would impose an unreasonable burden on search engine operators, and will often be of no practical benefit to defamed persons, to require search engine operators to respond to a "take down" request in order to avoid liability as a publisher of defamatory snippets.

3.7 As to whether imposing such a burden on search engine operators would be likely to benefit defamed persons, it is important to keep in mind that a search engine operator can block access only to certain identified URLs from its search engine, but not access to related URLs, nor access to the identified URLs via other search engines, nor access to the identified URLs by typing those URLs into a browser. No action taken by a search engine operator will result in the content itself being removed from the Internet. The only result is that the content at the URL complained of will not appear in search results generated by the particular search engine that was the subject of the take-down request.

3.8 In addition, there would be nothing to prevent the author of the defamatory content from which the snippet was generated, or the person making that content available, from posting the content at another URL, which would then be automatically indexed by search engine crawlers (without any knowledge on the part of the search engine operators) and available to be displayed in response to search requests.

3.9 As to the burden, major search engines automatically process more than a billion searches each day. Unless the process of responding to a take-down notice was itself automated – which would have serious implications for the free flow of information on the Internet – a search engine operator would be faced with a massive administrative burden. It is likely that search engine operators would be forced, for economic and administrative reasons, to err on the side of blocking access to content complained of,

with little or any regard to the merits of the complaint, which would itself have an undesirable chilling effect.

- 3.10 There are strong policy justifications for extending strong protection to search engines, quite apart from the need for legal certainty and the matters of burden versus benefit discussed above. Search engines provide the road map for the World Wide Web. Legal rules that impose potential liability on search engines for snippets of content generated automatically as a result of search requests have the potential to unduly fetter innovation and commercial competition with respect to a technology that has enormous social utility.

3.11 ISPs and other communication conduits

- 3.12 If search engines are the road map for the World Wide Web, ISPs and other facilitators of content are the highways, warranting strong protection from liability for defamatory content accessed via their facilities.

- 3.13 UK courts have recognised this and have extended strong protection to such intermediaries.

In *Bunt v Tilley & Ors* [2006] EWHC 407, Mr Justice Eady struck out a defamation claim against two ISPs on the ground that the ISPs had done no more than facilitate Internet publications, and on that basis were not publishers of the relevant Internet publications for the purposes of defamation law.

Bunt v Tilly & Ors [2006] EWHC 407 (QB)

Paragraph 9

"When considering the internet, it is so often necessary to resort to analogies which, in the nature of things, are unlikely to be complete. That is because the internet is a new phenomenon. Nevertheless, an analogy has been drawn in this case with the postal services. That is to say, ISPs do not participate in the process of publication as such, but merely act as facilitators in a similar way to the postal services. They provide a means of transmitting communications without in any way participating in that process."

Paragraph 37

*"I would not, in the absence of any binding authority, attribute liability at common law to a telephone company or other passive medium of communication, such as an ISP. It is not analogous to someone in the position of a distributor, who might at common law need to prove the absence of negligence: see *Gatley on Libel and Slander* (10th edn) at para. 6-18. There a defence is needed because the person is regarded as having "published". By contrast, persons who truly fulfil no more than the role of a passive medium for communication cannot be characterised as publishers: thus they do not need a defence."*

3.14 So far as Communications Alliance is aware, this question has not been determined by an Australian court. Further, it is essential that these facilitators have legal certainty so that there is an environment which encourages them to continue to provide their services. Merely facilitating the dissemination of content, when content is transmitted via a communication conduit such as an ISP, should not amount to publication of the defamatory matter. In fact, any other position would be unworkable.

3.15 Hosting platforms

3.16 Under Article 14 of the EU Electronic Commerce directive, "content storage" or hosting platforms are exempted from liability in certain circumstances.

3.17 The UK High Court recently held that the hosting exception in Article 14 applies specifically to defamatory content. In [Kaschke v Gray & Anor \[2010\] EWHC 690](#), which involved a defamation claim in relation to hosted content, Mr Justice Stadlen held (at paragraph 75):

"...the question to be asked is whether the information society service provided by the defendant in respect of the information containing the defamatory words which would otherwise give rise to liability consists only of and is limited to storage of that information. If the answer to that question is that it does consist only of storage of the information, [Article 14] immunity is potentially available even if it would not be available in respect of other information also stored by the defendant in respect of which the service provided by the defendant goes beyond mere storage."

4 A CERTAIN SAFE HARBOUR FOR ONLINE INTERMEDIARIES

4.1 Of course, an online intermediary will only need to take advantage of a safe harbour in the event that it is found to be a publisher of the content complained of.

4.2 As the law currently stands, an online intermediary that is held to be, prima facie, a publisher of defamatory matter, has two potential defences available to it: the BSA defence and the defence of innocent dissemination in s 32 of the Act. For the reasons outlined below, there are significant shortcomings with each of these defences.

4.3 The BSA defence

4.4 This defence applies to "Internet content hosts" and "Internet service providers". It exempts these intermediaries from liability for defamatory material hosted, cached or carried by them in certain circumstances. It is not clear whether the defence applies to search engine providers.

4.5 An Internet content host, for the purposes of this defence, is a person who hosts Internet content, or proposes to host Internet content, in Australia: the defence cannot be relied on by intermediaries who host Internet content outside of Australia. Internet content is confined to material that is "kept on a data storage device", but does not include email. There is uncertainty as to whether Internet content would include instantaneous Internet communications such as instant messaging and chat services.

4.6 An Internet Service Provider, for the purposes of the defence, is a person who supplies, or proposes to supply, an Internet carriage service to the public.

4.7 To take advantage of the defence, an intermediary must show that it was "not aware of the nature of the Internet content". It is unclear what kind of knowledge is required

before an Intermediary will lose the benefit of the defence. In particular, it is not clear whether an intermediary who is aware that particular content is being hosted or transmitted, but not aware of the facts and circumstances that result in that content being defamatory (or make it likely that a court would find the content to be defamatory), can rely on the defence. This uncertainty may lead to intermediaries removing or blocking access to content that is unlikely ever to be found by a court to be defamatory.

- 4.8 The requirement that an intermediary not be aware of the nature of Internet content acts as a disincentive for intermediaries to respond to technological advancements that may allow for greater monitoring of Internet content. Responsible intermediaries should not be penalised, i.e. by loss of their limitation of liability, for engaging in voluntary measures to prevent illegal content from being accessed.
- 4.9 A further shortcoming of the BSA defence is uncertainty regarding the question of how soon after becoming "aware of the nature of Internet content" an intermediary has to remove or block access to such content before it loses the limitation on liability. Many removal processes require manual input and engineering. It will often be impossible to just "press a button" and remove precisely the content complained of. In many cases, the intermediary will need to exercise human judgment, discuss internally and even seek legal advice before making an informed decision. To deny intermediaries the opportunity to take these steps prior to any decision as to whether or not to remove material risks putting complainants in a position to censor content that would never have been found by a court to have been defamatory.

4.10 Innocent dissemination – s 32

- 4.11 The statutory defence of innocent dissemination contained in s 32 of the Act can be relied on by a subordinate distributor who neither knew nor ought reasonably to have known that the matter was defamatory, provided that that lack of knowledge was not due to negligence.
- 4.12 It is not clear whether a search engine operator could rely on this defence if sued in respect of a defamatory snippet.
- 4.13 Nor is it clear what matters will be relevant to determining whether an intermediary ought reasonably to have known that matter was defamatory. In particular, there is no provision, as there is in the BSA defence, that for the purposes of the defence there is no obligation on an intermediary to monitor or make inquiries about content hosted, cached or transmitted by it.

4.14 A safe harbour for online intermediaries

- 4.15 As already noted, Communications Alliance submits that an online intermediary that does no more than facilitate the dissemination of defamatory matter should be deemed not to be a publisher of that matter, whether or not the intermediary is on notice of the allegedly defamatory matter. That is the position in the US under s 230 of the *Communications Decency Act* (47 USC § 230). The stated policy underlying s 230 of the *Communications Decency Act* included a perceived need to "preserve the vibrant and competitive free market" in Internet service provision.
- 4.16 In the event that an online intermediary *is*, prima facie, liable as a publisher of defamatory content, Communications Alliance submits that it is imperative that the Act contain a safe harbour that provides certainty to both defamed persons and online intermediaries.

- 4.17** Communications Alliance submits that a safe harbour should include [at least] the following:
- (a) A provision to the effect that there is no obligation on the part of an online intermediary involved in the facilitation of the dissemination of information (**Online Intermediary**) to monitor that information or to make inquiries about content hosted, cached or transmitted by it.
 - (b) A provision to the effect that an Online Intermediary has no liability for damages or other monetary relief to any person in respect of defamatory matter complained of unless:
 - (i) the complainant has notified the Online Intermediary of the allegedly defamatory matter in accordance with the relevant provisions of the safe harbour, and
 - (ii) the Online Intermediary has failed to satisfy the relevant conditions of the safe harbour. This should include at the very least transmitting, hosting, routing, providing connections and caching content.
 - (c) A provision to the effect that a complainant seeking to trigger the operation of the safe harbour provide at least the following information in writing to the Online Intermediary:
 - (i) The words or matters complained of and the person or persons to whom they relate;
 - (ii) The publication that contains those words or matters, identified by top level domain and specific URL;
 - (iii) The facts and circumstances which have caused the complainant to consider that those words or matters are defamatory;
 - (iv) The details of any matters relied on in the publications which the claimant considers to be untrue; and
 - (v) Why the claimant considers the words or matters to be harmful in the circumstances in which they were published.
 - (d) A provision to the effect that an Online Intermediary has no liability for damages or other monetary relief to any person in respect of defamatory matter complained of if, on receipt of a notice in accordance with the terms of the safe harbour, the Online Intermediary:
 - (i) where possible, forwards the notice electronically to the creator of the words or matters complained of ('notice and notice'). Then, if a court rules that the content is indeed defamatory, the Online Intermediary has 14 days from the date of receipt of the court order, or such other period as the court may specify, to remove or block access to the words or matters complained of; or in the alternative
 - (ii) has 14 days from the date of receipt of all information required to be provided by the complainant, or such other period as the court may specify, to remove or block access to the words or matters complained of ('notice and takedown'). In order to ensure legitimate speech is not wrongly removed, a person whose content is removed should have the ability to send a counter notice that requires the material to be reinstated. In this case, an Online Intermediary would

have no liability for access to the material unless a court order is issued for its removal.

- (e) A provision to the effect that where notices are sent in bad faith or materially misrepresent that material or activity is defamatory, there should be appropriate penalties.
- (f) The Intermediary should not be liable where they follow this process in good faith, and the intermediary would not be liable in any event, unless they have liability under applicable law.

5 SINGLE PUBLICATION RULE

- 5.1 Communications Alliance notes that the UK Government is currently considering the introduction of a single publication rule for defamation. The Draft Defamation Bill presented to the UK Parliament in March 2011 provides for a single publication rule. A consultation paper released by the UK Ministry of Justice at the same time notes [at paragraph 72] that the current position, where each communication of a defamatory matter is a separate publication giving rise to separate cause of action, is not suited to the modern Internet age. Communications Alliance shares this view.
- 5.2 One of the major factors that led to consideration of a single publication rule in the UK was the burden faced by intermediaries. A rule which provides for a fresh publication every time material is accessed online has the effect that the limitation period applying to defamatory publications online is, for practical purpose, endless. Intermediaries are potentially liable for defamatory material published by them many years after the initial publication.
- 5.3 The US has, since 1952, had a single publication rule for defamation. The rule, which is set out at § 577A of the Restatement of Torts 2d, applies in at least 27 US States.
- 5.4 Communications Alliance submits that the Act should be amended to provide for a single publication rule.

6 FORUM SHOPPING

- 6.1 In the US, the single publication rule has come to be understood as determining not only the time of publication, but also the choice of law to be applied in determining the action: see the discussion by Gleeson CJ and McHugh, Gummow and HayneJJ in [Dow Jones and Company Inc v Gutnick 210 CLR 575](#) [at paragraph 35]. In 2010, the US also introduced the *Securing the Protection of Our Enduring and Established Constitutional Heritage Act* (known as the SPEECH Act) to prevent foreign libel judgments from being enforced in the US.
- 6.2 The UK draft Defamation Bill seeks to address libel tourism by providing that where a defamation claim is brought against a person who is not domiciled in either the UK, or another Member State, the court has no jurisdiction to hear the claim unless it is satisfied that England and Wales is clearly the most appropriate place in which to bring the action. In commentary on the Draft Bill, the UK Ministry of Justice says that the proposal is intended to "overcome the problem of courts readily accepting jurisdiction simply because the claimant frames their claim so as to focus on damages which has occurred in this jurisdiction only". The example is given of a statement that was published 100,000 times in Australia and only 5,000 times in England. In such a case, the Ministry of Justice suggests, there would be a good basis on which to conclude that the most appropriate jurisdiction in which to bring an action in respect of the statement was Australia rather than England.
- 6.3 Communications Alliance submits that the Act should be amended to provide that a court does not have jurisdiction to hear an action for defamation against a person who is not domiciled in Australia unless the court is satisfied that, of all the places in which the matter complained of has been published, Australia is clearly the most appropriate forum in which to bring an action in respect of the matter.

7 REQUIREMENT TO SHOW SUBSTANTIAL HARM

- 7.1 The UK Draft Defamation Bill contains a provision to the effect that a statement is not defamatory unless its publication has caused or is likely to cause substantial harm to the reputation of the claimant. The clause reflects and builds on recent case law dealing with trivial defamation claims and claims where the statement complained of is unlikely to cause the plaintiff substantial harm.
- 7.2 Communications Alliance submits that a requirement to show substantial harm would discourage trivial claims from being brought. It would also result in unmeritorious actions being struck out at an early stage, before costs had accumulated on both sides.
- 7.3 Communications Alliance submits that the Act should be amended to provide that a matter complained of is not defamatory unless its publication has caused or is likely to cause substantial harm to the reputation of the plaintiff.



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