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14 September 2022

Policy Reform and Legislation
Department of Communities and Justice
GPO Box 6
Sydney NSW 2001

BY EMAIL defamationreview@justice.nsw.gov.au

Dear Sir/Madam

**Submissions to Attorneys-General Review of Model Defamation Provisions
Stage 2 Part A – Discussion Paper and Draft Model Amendment Defamation
Amendment Provisions**

Microsoft Corporation (**Microsoft**) and its Australian operating subsidiary Microsoft Pty Limited welcome the opportunity to provide written submissions in response to the exposure draft of the Stage 2 Part A Model Defamation Amendment Provisions and accompanying Background Paper.

Microsoft has provided submissions at each stage of the Model Defamation Provisions review process, including its 19 May 2021 submission responding to the questions in the Stage 2 Part A Discussion Paper.

We now respond to the exposure draft, with reference to the Recommendations in the Background Paper.

Recommendation 1 – conditional statutory exemption for mere conduits, caching and storage services

Microsoft supports the proposed conditional, statutory exemption from defamation liability for mere conduits, caching and storage services.

Microsoft has no comments in relation to the drafting in proposed section 9A.

Recommendation 2 – conditional statutory exemption for standard search engine functions

Microsoft supports the proposed conditional, statutory exemption from defamation liability for standard search engine functions.

Recommendation 2 applies only to narrowly defined 'standard search engine functions'. As the Discussion Paper identifies, the proposed exemption "would not cover autocomplete functions provided by some search engines, or content that is paid advertising." Microsoft understands that position.

However, when Microsoft looks at section 9A of the proposed Model Defamation Amendment Provisions 2022 (**MDAP**) (the red underline is added by us):

(...)

(3) A search engine provider for a search engine is not liable for defamation for the publication of digital matter if the provider proves:

(a) the matter is limited to search results generated using the search engine from search terms imputed by the user of the engine rather than terms automatically suggested by the engine, and

(b) the provider's role was limited to providing an automated process for the user to generate the search results.

The effect would be that a search result, which is part of an entirely automated process, would not have the benefit of the exemption if there was any involvement of autocomplete in engaging the search.

That is not the stated intention. Microsoft is concerned that the existence / involvement of autocomplete would contaminate a clear line to the intended exemption, without a proper basis.

Microsoft submits that the wording in red underline should be deleted.

Without the words in red there is no still no protection for the autocomplete terms themselves, but the exemption should apply to search results whether or not they have come via autocomplete.

Recommendation 3 – alternative options for a new internet intermediary defence

Microsoft is supportive of the alternative models presented in Recommendation 3A and Recommendation 3B.

Given that the models are presented as alternatives, Microsoft strongly prefers recommendation 3A, providing a safe harbour defence for internet intermediaries, subject to a simple complaints notice process over recommendation 3B, being an innocent dissemination defence for internet intermediaries subject to a simple complaints notice process. 3A best serves the objective in the Background Paper of focusing the dispute “between the complainant and the originator”.

We note that for the 3A alternative, the proviso in proposed section 31A(c) requires the alternative actions in 31A(c)(i) or (ii) to be taken within 14 days. Those actions may involve consultations with a poster to explore consent and involves providing the poster with a copy of the complaints notice.

Microsoft submits that as a matter of practical reality, 14 days is a very short turn-around deadline for the process to play out.

Other than that, Microsoft has no comments in relation to the drafting in the proposed section 31A alternatives.

Recommendation 4 – interactions with Online Safety Act

Microsoft's position is that an exemption from section 235(1) of the *Online Safety Act 2021 (OSA)* for defamation law is not required.

Microsoft is not aware of any aspect of current defamation legislation that conflict with section 235(1). To the extent that there is a conflict (such as may arise in Recommendation 5, below), Microsoft's position is that the OSA immunity should prevail.

Recommendation 5 – orders against non-parties

Microsoft does not oppose the clarification and enhancement of court powers to make orders against non-parties to limit access to defamatory material online in Australia, provided the material is clearly identified with reference to specific URLs. Content based removal orders without specific URLs are infeasible and effectively impose a monitoring obligation. Further, requiring specific URLs to be included in court orders ensures that only material determined by the court to be defamatory are removed.

MDAP section 39A(2) allows orders concerning the “continued publication or republication” of material.

Microsoft has real concerns with any order which establishes an ongoing obligation to take action over “material” where such an order may give rise to “monitoring” obligations which could not be satisfactorily met, even if significant resources were expended. A party could thereby be found in contempt in proceedings where they are not involved. An order of this type would offend clause 235(1) of the *Online Safety Act 2021*.

The imposition of an order against a non-party should be limited to the precise publication that was the subject of a court finding against a defendant, with reference to the specific URL.

Recommendation 6 – preliminary discovery orders

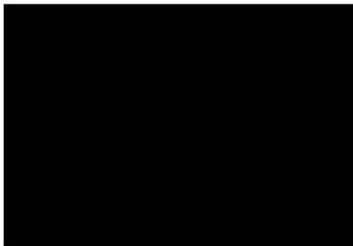
Microsoft supports the amendment in relation to preliminary discovery orders and has no comments in relation to the drafting in proposed section 23A.

Recommendation 7 – mandatory requirements for offer to make amends

Microsoft supports the amendment in relation to the mandatory requirements for a preliminary discovery order and has no comments in relation to the drafting in proposed section 15(1B).

Please let us know if there are any questions about Microsoft’s submission.

Yours faithfully,

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Senior Corporate Counsel, Corporate External and Legal Affairs
Microsoft Australia and New Zealand