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Policy Reform & Legislation

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BSA SUBMISSION ON THE REVIEW OF MODEL DEFAMATION PROVISIONS STAGE 2

BSA | The Software Alliance (**BSA**) thanks the Meeting of Attorneys-General (**MAG**) for the opportunity to contribute to the review of the proposed *Review of Model Defamation Provisions – Stage 2 Discussion Paper*¹ (the **Discussion Paper**). BSA is the leading advocate for the global software industry before governments and in the international marketplace. BSA's members² are among the world's most innovative companies, creating software solutions that spark the economy.

Enterprise service providers enable the operations of other companies. It helps organisations of all sizes and across all industries operate more securely and efficiently, enhance product and service development, and increase opportunities to innovate and grow.³ As providers of enterprise services, BSA members' business models do not depend on monetizing their users' content and they recognize that they must earn their corporate customers' trust and act responsibly with their data.

BSA supports efforts to halt the spread of defamatory and other illegal content online. BSA members champion a trusted digital ecosystem and invest heavily in updating and improving their systems to ensure that these remain safe and secure. Appropriately tailored intermediary liability protections are an integral part of such efforts. Policies to achieve these objectives must maintain appropriate limitations of liability for intermediaries with respect to third party-generated content while establishing mechanisms that encourage the removal of illegal content.

¹ Attorneys-General Review of Model defamation Provisions – Stage 2 Discussion Paper, <https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/discussion-paper-stage-2.pdf>

² BSA's members include: Adobe, Altium, Amazon Web Services, Atlassian, Autodesk, Aveva, Bentley Systems, Box, Cisco, CNC/Mastercam, Dassault, DocuSign, IBM, Informatica, Intel, MathWorks, Microsoft, Nikon, Okta, Oracle, PTC, Rockwell, Salesforce, ServiceNow, Siemens Industry Software Inc., Slack, Splunk, Synopsys, Trend Micro, Trimble Solutions Corporation, Twilio, and Workday.

³ How Enterprise Software Empowers Businesses in a Data-Driven Economy, <https://www.bsa.org/policy-filings/how-enterprise-software-empowers-businesses-in-a-data-driven-economy>

Question 1 – Categorising internet intermediaries

Is the grouping of internet intermediary functions into the three categories of 'basic internet services', 'digital platforms' and 'forum hosts' a useful and meaningful way to categorise internet intermediary functions for the purpose of determining which functions should attract liability? Why?

As the MAG has recognised, there is a rich ecosystem that supports today's digital economy. Consumer-facing online services are now supported by dozens of backend services that operate invisibly but play an important role in routing network communications. For instance, a consumer facing service may utilise an infrastructure-as-a-service provider that hosts its content, a content delivery network that ensures fast load times around the world, an identity access management provider that controls access to the site, a third-party cybersecurity firm that prevents fraudulent transactions, and many more. Whatever regime is adopted for the purposes of the Model Defamation Provisions (MDPs) must be flexible enough to account for the complex landscape of stakeholders and the unique relationship each type of service provider has with their customers or consumers.

Broadly, BSA supports the MAG's proposal to adopt a tiered risk-based approach with a focus on the degree to which internet intermediaries have a role in determining the content that is published. This allows potential defamation liability to be attached to higher risk services that have a direct role in determining the content that is published, while providing clear protections from liability from defamation claims for services with limited or no role in such determinations.

However, BSA has some concerns regarding the term "basic internet services" as it does not fully encompass the full depth and breadth of the entities that should be included this category and be provided full immunity from liability arising from defamation for third party content as contemplated under option 1b of the Discussion Paper. An option would be to adopt another more neutral terminology for the categories such as "Category 1 Services".

The Australian Competition and Consumer Commission (ACCC) Digital Platforms Inquiry Final Report defines "digital platforms" as online search engines, social media, and digital content aggregators.⁴ Again, whilst this definition is appropriate, the term "digital platforms" can be misconstrued as meaning something far broader. The term is often commonly used to refer a range of entities and services (e.g., "platform-as-a-service" enterprise cloud services) that, for the purposes of this taxonomy, should be categorised as "basic internet services" or "Category 1 Services" (as proposed).

Question 2 – Categorising basic internet services

(a) What internet intermediary functions should be categorised as basic internet services? It is proposed that to be categorised as a basic internet service the internet intermediary must be a mere conduit (similar to telephone or postal services) in that they do not have an interest or involvement in the nature of the content they transmit or host.

(b) What are the key concepts that should determine if an internet intermediary function is a basic internet service? Is passivity and neutrality an appropriate basis on which to determine which internet intermediary functions attract liability?

(c) Are there any functions that could be categorised as 'basic internet services' but should give rise to liability, or are there circumstances in which basic internet services should be liable?

In line with the concepts of **passivity** and **neutrality**, service providers should generally be categorised as a "basic internet service" or "Category 1 Service" (as proposed) if: (1) they are passive facilitators that generally lack the ability to "heighten or minimise this risk of harm" associated with

⁴ Australian Competition and Consumer Commission, *Digital Platforms Final Report*, <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>

defamation as they have little to no role in determining the content provided by their customers,⁵ and (2) they do not profit from content their customers make available to the public.⁶

As the Discussion Paper rightly notes, there is a broad range of “network layer” services and “cloud service providers” — including enterprise services — whose “passivity and content neutrality” makes them appropriate candidates for inclusion within such category of services.⁷ By taking this principle-based approach to categorisation of internet intermediaries instead of listing specific functions, the MDPs would also have some level of protection against becoming outdated by technological changes.

Further, with no interest in, nor the capacity to promote content being generated or accessed by users, BSA agrees that all entities in this category should be afforded full immunity from liability arising from defamation for third party content as contemplated under option 1b of the Discussion Paper.

Question 6 – Immunity for basic internet services

(a) Is it necessary and appropriate to provide immunity from liability in defamation to basic internet services?

(b) If such an immunity were to be introduced, should it be principles-based or should it specifically refer to the functions of basic internet services?

(c) Are there any internet intermediary functions that are likely to fall within the definition of basic internet services (as outlines in Issue 1) that should not have immunity?

(d) Is there a risk that providing a broad immunity to basic internet services would unfairly deny complainants a remedy for damage to their reputation? What risks exist and how could they be mitigated?

As noted above, entities that are categorised as “basic internet services” or “Category 1 Services” (as proposed), including enterprise service providers, are not active participants in the publication process and as such, should be accorded full immunity from liability arising from defamation for third party content under the MDPs. Considering their neutral and passive role in the digital publication process, it is both appropriate and necessary to provide such category of services this immunity from liability.

BSA thanks the MAG for providing the opportunity to comment on the Model Defamation Provisions. If you require any clarification or further information in respect of this submission, please contact the undersigned at brianf@bsa.org or +65 8328 0140.

Yours faithfully

Brian Fletcher

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BSA | The Software Alliance

⁵ See Discussion Paper at Para. 2.6

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⁷ See Discussion Paper at Para. 3.30 and 3.36