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To: NSW Department of Communities and Justice  
By email: [defamationreview@justice.nsw.gov.au](mailto:defamationreview@justice.nsw.gov.au)

Thank you for the opportunity to express the Internet Association of Australia (IAA) perspective on the Review of Model Provisions – Stage 2 Discussion Paper. Many of IAA's members are small to medium sized internet service providers (ISPs) and we are therefore keen to ensure effective and efficient regulation in the sector.

This submission will focus specifically on questions 2 and 6 as they have the most significance to our members.

## **Question 2: Categorising basic internet services**

- *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.*
- *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?*
- *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?*

IAA agrees that the term 'basic internet services' covers internet intermediaries who are mere conduits and are not interested, or involved, in the content they transmit or host. As highlighted in the [Discussion Paper](#), the mere conduit logic applies similarly to telephone line or postal services, as basic internet providers facilitate internet access and do not *directly* participate or profit from the creation or dissemination of user content.

We strongly support the principle that internet service providers (ISPs) and hosting providers should be incorporated within basic internet service providers. ISPs merely connect users to internet services through telecommunications facilities, while hosting providers simply provide internet users with access to hosted services. Hosted services typically comprise the basic compute, storage and operating systems over which users and forum operators create their content services. As such the hosting provider is not directly involved in the creation or mediation of content itself, and neither does it manage the specific applications within which content is created and used.

IAA also agrees that passivity and neutrality are a good starting position from which to determine what internet functions should not attract liability. If this logic is to be applied, we believe that under no

circumstances should basic internet providers be held liable as they are merely passive facilitators of content.

IAA does not consider there to be any circumstances in which basic internet service providers should be liable for content itself as ISPs are not publishers, in that they do not make any active decisions on the posting of content.

#### **Question 6: Immunity for basic internet services**

- *Is it necessary and appropriate to provide immunity from liability in defamation to basic internet services?*
- *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?*
- *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?*
- *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?*

We believe it is necessary for basic internet providers to receive statutory immunity from liability in defamation, especially as they do not actively participate in publication or contribute to risk of harm to reputation. Taking this step would provide certainty for basic internet service providers that they will not be exposed to the risk of being sued for defamation relating to third-party content.

As established in the Discussion Paper, UK courts provide strong protection to internet intermediaries against defamation claims. In *Bunt v Tilley & Ors* [2006] EWHC 407 (QB), defamation claims against internet service providers were dropped based on the understanding that simply providing internet access does not incur liability for defamatory material sent via a third-party platform. Instead, ISPs were noted as a 'passive medium of communication'<sup>1</sup> or as mere conduits who merely facilitate access.

The High Court of Australia also noted in *Dow Jones & Company Inc v Gutnick* [2002] HCA 56 the active elements of web services and web browsers in uploading defamatory content online. In this case, basic internet providers were not considered as playing an active role in the dissemination of defamatory content.

IAA believes taking this step would be especially beneficial for smaller internet service providers, as it would provide them with legal certainty and allow them to focus on providing better services to their customers instead of on compliance obligations. It may also reduce the likelihood of freedom of expression being undermined or restricted, as internet intermediaries will not feel compelled to take a risk averse approach and remove content in the face of defamation liability.

IAA advocates for a principles-based approach and believes all basic internet providers should be provided with immunity. We also do not see any risks in providing basic internet providers with immunity, especially as they have no vested interest in the type of content which is generated or accessed by internet users. There are also ample mechanisms that cause content to be removed or blocked under the issuing of court orders and take down notices. Such orders can be served on hosting providers and internet service providers where those specifically accountable for publication of the material fail to act.

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<sup>1</sup> *Bunt v Tilley and others* [2006] EWHC 307 (QB) 345 per Eady J

Once again, I would like to take this opportunity to thank you for providing us with the opportunity to contribute to the review.

### [About the Internet Association of Australia](#)

The Internet Association of Australia Inc (IAA) is a member-based association representing the Internet community. Founded in 1995, as the Western Australian Internet Association (WAIA), the Association changed its name in early 2016 to better reflect our national membership and growth.

Our members comprise industry professionals, corporations and affiliate organisations. IAA provides a range of services and resources for members and supports the development of the Internet industry both within Australia and internationally. Providing technical services as well as social and professional development events, IAA aims to provide services and resources that our members need.

IX-Australia is a service provided by the Internet Association of Australia to Corporate and Affiliate members. It is the longest running and lowest cost Internet Exchange in Australia. Spanning six states and territories, IAA operates over 30 points of presence and operates the New Zealand Internet Exchange on behalf of NZIX Inc in New Zealand.

IAA is also a licenced telecommunications carrier, and operates on a not-for-profit basis.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Narelle Clark', with a long horizontal stroke extending to the right.

Narelle Clark  
Chief Executive Officer  
Internet Association of Australia