australian defamation law

update

Liability of internet intermediaries in Australian defamation law

Matt Collins[1]

Ramifications of the Broadcasting Services Amendment (Online Services) Act 1999 (Cth)[2]

A vexed question for defamation law arising out of the advent of the internet is the extent to which intermediaries, such as internet service providers (ISPs) and internet content hosts, might be liable for material which they did not create but which is carried or hosted by them.

The 1999 amendments to the *Broadcasting Services Act 1992* (Cth) appear, perhaps inadvertently, to have altered the common law position.

At common law, the liability of intermediaries turns on whether the intermediaries can be said to have 'published' the offending material and, if so, whether they can rely on some defence, the most important of which is the defence of innocent dissemination.

Publication

In the United Kingdom, there is now authority for the proposition that, at common law, intermediaries are 'publishers' of material hosted or carried by them. In *Godfrey v Demon Internet Ltd*,[3] Morland J held that whenever an ISP transmits a defamatory posting from a news server, it publishes that posting to any person who accesses the newsgroup containing the posting.[4] His Honour's judgment is consistent with the approach towards publication in non-internet contexts in Australia.[5] The contrary view, favoured in the United States, is that internet intermediaries are not publishers of

1 Dr Matt Collins is a Melbourne barrister. He recently completed a PhD thesis entitled *Defamation and the Internet*.

2 See also M Collins, 'ISPs and Defamation: A Partial Solution' [1999] *Law Institute Journal* May issue.

3 [1999] EMLR 542.

4 Ibid, [33].

5 See for example *Webb v Bloch* (1928) 41 CLR 331, 363-6; *Urbanchich v Drummoyne Municipal Council* (1991) Aust Torts Reports¶81-127 at 69,192-69,194.

material hosted or carried by them, at least where they play no editorial or participatory function in connection with the publication of the material.[6]

Defence of innocent dissemination

In light of the decision of the High Court in *Thompson v Australian Capital Television Pty Ltd*,[7] it is unlikely that internet intermediaries would be able to rely successfully in most cases on the common law defence of innocent dissemination. That defence protects 'subordinate distributors' from liability in cases where they do not know that a publication is defamatory, they do not know that the publication is of such a character that it is likely to contain defamatory matter, and their absence of knowledge is not due to negligence.[8]

Broadly, in *Thompson*, the Court took the view that a television station relaying a live current affairs program produced by another station was an original publisher, rather than a 'subordinate distributor' of the program.[9] Even if the relaying television station were a 'subordinate distributor', it could not claim the benefit of the defence. Live current affairs programs carry a high risk of defamatory statements being made.[10] A relaying television station which arranges its affairs so as to make monitoring difficult or impossible fails to discharge the requisite duty of care.[11]

The reasoning in *Thompson* is likely to apply to internet intermediaries, at least in respect of bulletin board (newsgroup) postings and web pages. Such intermediaries could arrange their affairs so as to monitor and censor the material they host or carry. Such material carries a risk of defamatory statements being made. Where an internet intermediary fails to monitor or censor bulletin board postings and web pages hosted or carried by it, it has probably failed to discharge the duty of care to which the defendant was held in *Thompson*.

Broadcasting Services Act 1992 (Cth)

As if the liability of internet intermediaries were not already uncertain enough, the Commonwealth Parliament has weighed in unhelpfully with cl 91(1) of Sch 5 to the *Broadcasting Services Act 1992* (Cth) (the Act). That provision was set out in the *Broadcasting Services Amendment (Online Services) Act 1999* (Cth), which commenced operation on 16 July 1999.

Relevantly, cl 91(1) provides that any State or Territory law, or rule of common law or equity, is of no effect to the extent to which it subjects an 'internet content host' or 'internet service provider' to criminal or civil liability in respect of hosting or carrying 'internet content', in a case where the host or provider is not aware of the nature of the content. Each of the terms in inverted commas is defined in Sch 5.

Clause 91(1) is, in effect, a new defence to defamation law for internet intermediaries. In defamation proceedings, it is now open to internet intermediaries to plead that:

- they satisfy the definition of an 'internet service provider' or an 'internet content host';
- the material complained of by the plaintiff satisfies the definition of 'internet content';
- they were not aware of the nature of the internet content at the time of publication; and
- accordingly, any liability to which they would otherwise be subject under criminal or civil defamation law is excluded by the operation of cl 91(1).

6 *Lunney v Prodigy Services Co* 683 NYS 2d 557 (NYAD, 2 Dept, 1998), applying *Anderson* 361 NYS 2d 913 (NYCA, 1974).

7 (1996) 186 CLR 574.

8 See for example *Emmens v Pottle* (1885) 16 QBD 354; *Vizetelly v Mudie's Select Library Ltd* [1900] 2 QB 170.

9 Above n 7, 589-90.

10 Ibid, 590.

11 Ibid.

Although the Minister for Communications, Information Technology and the Arts could exclude defamation law from the operation of cl 91(1),[12] he has not done so.

Clause 91(1) was primarily intended to override State and Territory laws exposing internet intermediaries to criminal or civil liability for hosting or carrying pornographic and other offensive material.[13] There is little doubt, however, that it is broad enough to operate as a new defence to defamation law.[14]

At first glance, cl 91(1) appears to provide relief to internet intermediaries from the uncertainty of the common law. There are, however, a number of difficulties in applying the clause in a defamation context. Three difficulties deserve particular consideration.

Clause 91(1) does not apply to all internet publications

First, the definition of 'internet content' in cl 3 of Sch 5 to the Act limits the scope of the protection afforded by cl 91(1). 'Internet content' excludes 'ordinary electronic mail', 'information that is transmitted in the form of a broadcasting service' and information that is not 'kept on a data storage device'. The liability of internet intermediaries in respect of those forms of publication continues to be governed by the ordinary rules of defamation law.

'Ordinary electronic mail' does not include newsgroup postings,[15] but will include email messages sent in the usual way, including email messages sent to large mailing lists.

'Information that is transmitted in the form of a broadcasting service' will include 'webcasts' of radio and television programs, but curiously not if they are available on demand.[16]

The exclusion of information that is not 'kept on a data storage device' probably excludes instantaneous forms of internet communication, such as chat services and voice communications, from the ambit of cl 91(1).[17]

Clause 91(1) does not apply to all internet intermediaries

Secondly, the definitions of 'internet service provider' and 'internet content host' in the Act are not so broad as to encompass all kinds of internet intermediaries.

The definition of 'internet content host'[18] is confined to persons who host, or who propose to host, internet content in Australia. It will therefore not be available to internet intermediaries located outside Australia who host webpages and bulletin boards, even where they contain material that is published in Australia, or content that has been created in Australia.

12 Under cl 91(2).

13 See for example Commonwealth, *Parliamentary Debates*, 21 April 1999 (Senator Ian Campbell, Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts).

14 Indeed, the potential application of cl 91(1) to defamation law was recognised by Professor David Flint and Mr Patrick Fair in their submissions to the Senate Select Committee on Information Technologies hearings concerning the Broadcasting Services Amendment (Online Services) Bill 1999 on 27 April 1999.

15 Schedule 5, cl 3 definition of 'ordinary electronic mail'.

16 Because of the way in which 'broadcasting service' is defined in s 6(1) of the Act. See further Collins, above n2.

17 See Explanatory Memorandum to the Broadcasting Services Bill 1999 (Cth) (definition of 'internet content').

18 Schedule 5, cl 3.

The definition of 'internet service provider' is, in effect, limited to providers of services for carrying internet communications between two or more points, at least one of which is in Australia.[19] ISPs located outside Australia are therefore potentially able to avail themselves of the protection afforded by cl 91(1), provided that the relevant communication originated from, or is destined for, a point within Australia.

Clause 91(1) does not apply where the host or provider is aware of the nature of the content

Thirdly, and most importantly, cl 91(1) has no operation where the internet content host or internet service provider is aware of the nature of the internet content which it hosts or carries. It appears that actual knowledge is required; an internet intermediary will not be denied the benefit of cl 91(1) where it ought to be aware of the nature of the content, or is not aware of the nature of the content due to its own negligence.

An internet intermediary will, however, be denied the benefit of cl 91(1) if, after it becomes aware of the nature of the offending content, that content continues to be accessible from its computer system. No heed may be paid to unsuccessful attempts by the intermediary to remove the offending material or to prevent it from continuing to be accessible.

Accordingly, in cases where the intermediary knows the nature of the offending material, liability will turn on the operation of the ordinary rules of civil defamation law discussed earlier.

Summary

In summary, c1 91(1) was not primarily intended to create a new defence to civil defamation law. As a result, it complicates, rather than clarifies, the liability of internet intermediaries who host or carry defamatory material which they did not create.

In the first place, rather than establishing a simple defence applicable to all internet intermediaries in respect of all forms of internet publication, cl 91(1) has a selective operation. In those cases falling outside the scope of clause 91(1), liability continues to depend on the ordinary rules of defamation law — cl 91(1) thereby complicates, rather than simplifies, the law.

Secondly, by limiting its availability to cases where the internet intermediary is not aware of the nature of the content hosted or carried by it, cl 91(1) discourages intermediaries from monitoring content, and potentially imposes liability even in cases where the intermediary has made all reasonable efforts to prevent offending content from continuing to be accessible. In each of these respects, the operation of cl 91(1) is undesirable.

For these reasons, it is submitted that the rules of defamation law ought to be exempted by the Minister from the operation of cl 91(1). Urgent consideration ought to be given to establishing a simple, negligence based defence for internet intermediaries. Such a defence would provide a single standard applicable to all intermediaries and all forms of publication, and impose liability only where an intermediary's conduct in failing to prevent its computer systems from being used for the publication of defamatory material has fallen below an appropriate standard of care. Courts ought to be able to take into account a range of matters in determining the appropriate standard of care, including genuine attempts by the intermediary to prevent the publication of defamatory material via its computer system, and prompt efforts to prevent defamatory material from continuing to be accessible after its existence has been brought to the intermediary's attention. ●

19 Schedule 5, cl 8(1) provides that an 'internet service provider' is a person who supplies, or proposes to supply, an internet carriage service to the public. An 'internet carriage service' means a listed carriage service that enables end users to access the internet. A 'listed carriage service' has the same meaning as in the *Telecommunications Act 1997* (Cth). Under ss 7 and 16 of that Act, a 'listed carriage service' means, in effect, a service for carrying communications by means of guided or unguided electromagnetic energy between two or more points, at least one of which is in Australia.