ARTK ADDITIONAL SUBMISSION TO CAG REVIEW OF MODEL DEFAMATION PROVISIONS REGARDING LIABILITY FOR THIRD PARTY COMMENTS ON PUBLISHER FACEBOOK PAGES

On 24 June 2019, Justice Rothman of the NSW Supreme Court delivered his judgment in proceedings brought by Dylan Voller against three media organisations.

His Honour held that the media organisations were the primary publishers of third party user comments posted on their public Facebook pages. This means the media companies are liable as publishers of any defamatory comments posted by third parties, even if they are unaware of the comments, and a defence of innocent dissemination is not available.

By extension, this decision means that any company or individual with a public Facebook page could be sued for defamation over arms-length, and even anonymous, comments posted on their page.

Facebook does not provide the functionality for page owners to 'close' comments on public Facebook pages. Facebook does provide filters, which are largely used to automatically hide comments which contain profanities or offensive language, however this functionality is not foolproof.

Pending an appeal, ARTK is strongly of the view that legislative reform is required to give effect to the established legal position that defamation is a 'strict liability' tort. For publication to be established, a defendant must have actual, nor merely constructive, knowledge of the matter complained of and an intention to publish the matter complained of.

ARTK proposes that a new exemption should be enacted which provides that certain intermediaries are not publishers of third party content until they are notified of the existence of the third party content and fail to take such steps as are reasonable in the circumstances to take down the content. This should be an exemption, rather than a defence, so that the parties do not incur the costs of taking legal proceedings to a trial, and the courts' resources are not used unnecessarily.

The exemption could be drafted along the following lines:

*Any person or entity (**the operator**) which operates a webpage, online account or profile or other online presence **(online facility**) which:*

a) *allows third party content to be communicated on the online facility as part of its functionality; and*

b) *b) is owned by another person or entity,*

is not a publisher of any third party content which appears on the online facility unless the person or entity:

c) *is notified Of the existence of that third party content and that it is or may be defamatory; and*

d) *does not take such steps as are reasonable in the circumstances and within the person or entity's control to remove the third party content from the online facility within 5 business days.*

Given that publication is an element of the cause of action for defamation, the onus should be on the plaintiff to establish that a defendant is a publisher of third party content.

Finally, we note – to highlight how important this matter is to deal with – that platforms such as Facebook and Google are unavoidable trading partners for publishers and media companies, and businesses across all industries and all sizes in the modern economy. The platforms are active participants in the economy and society. We draw the Working Party's attention to the work undertaken by the ACCC's Digital Platforms Inquiry for expansion on this.