Suing Google, Facebook or Twitter for Defamation

By **Michael Douglas,** Bennett & Co

A person defamed on the internet has choices. They can ignore it. They can throw flames back at their antagonist. Or they can go the legal route and consider defamation litigation.

In that event, the defamed person may have a choice of who to sue. In many cases, they will be able to sue a person—human or corporate—other than the original author of the defamatory content. They might sue the individual author and the company the individual author works for; this is what happens in many cases where a defamed person sues both a journalist and the media organisation that published the journalist's content.

This article focuses on defamation on the internet and suing the entities behind the digital platforms that have become essential to our lives. By 'digital platforms', I mean the likes of Google, Facebook, Twitter and so on. Sometimes, these platforms are called 'internet intermediaries' or simply 'intermediaries'[1]—terms that connote that these platforms connect internet users to content created by others.

In the content that follows I explain the principles that are relevant to a defamation claim against an intermediary for content 'authored', or created, by others. Suing intermediaries like Google and Facebook for defamation is more difficult than suing others but not impossible.

The subject is currently under consideration by those empowered by the Council of Attorneys-General to make further amendments to Australia's defamation laws.[2] Here, I also make some comments on law reform and float an idea for making it easier for defamed persons to protect themselves against serious reputational harm without spending their life savings: a right for defamation to be forgotten.

Publication by intermediaries

An essential element of a claim for defamation is that the defendant published the defamatory matter.[3] 'Publication' is a bilateral act, by which a person communicates defamatory matter to a person other than the plaintiff.[4] Anyone who participates in dissemination of the defamation is a publisher.[5] The concept of 'publication' has been distinct from that of 'authorship' for many decades.[6]

By making content available to others, intermediaries 'publish' that content.[7] However, some would say that the manner in which intermediaries publish defamation is distinguishable from the way that others publish defamation. Some have made a distinction between 'primary' and 'secondary' publishers, with intermediaries usually being the latter.[8] With respect, those views are based on a misunderstanding of the law.

Other than for the purposes of analysis of an innocent dissemination defence, which distinguishes 'primary' from 'subordinate' distributors,[9] the distinction is one without a difference. Decisions to the contrary conflate the law on publication—which the High Court has described as 'tolerably clear'[10]—with the requirements of the defence.[11] Those decisions also misrepresent defamation as a tort other than one of strict liability.[12] The point is implicit in the transcript of the High Court hearing of the *Voller* appeal, of 18 May 2021:[13]

> MR YOUNG: But the point I was going to make, your Honour, is that it cannot be said, in our respectful submission, that the appellants, simply by operating this page have intentionally lent their assistance to the communication of this particular set of posts containing allegedly defamatory material. They did not have sufficient knowledge to have that sheeted

1 See Kylie Pappalardo and Nicolas Suzor, 'The Liability of Australian Online Intermediaries' (2018) 40(4) *Sydney Law Review* 469.

2 Specifically, they are considering further amendments to the Uniform Defamation Acts: *Civil Law (Wrongs) Act 2002* (ACT); *Defamation Act 2006* (NT); *Defamation Act 2005* (NSW); *Defamation Act 2005* (Qld); *Defamation Act 2005* (SA); *Defamation Act 2005* (Tas); *Defamation Act 2005* (Vic); *Defamation Act 2005* (WA).

3 See generally Michael Douglas and Martin Bennett, '"Publication" of Defamation in the Digital Era' (2020) 47(7) *Brief* 6.

4 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, [26]; see also [44] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

5 *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478, 505 (Bridge LJ).

6 See *Byrne v Deane* [1937] 1 KB 818; *Webb v Bloch* (1928) 41 CLR 331.

7 See, eg, *Defteros v Google LLC* [2020] VSC 219.

8 NSW Government, *Discussion Paper – Attorneys-General Review of Model Defamation Provisions – Stage 2* (2021) (**DP**) DP 16 [2.7].

9 Eg, *Defamation Act 2005* (WA) s 32(2).

10 *Trkulja v Google LLC* (2018) 263 CLR 149, [39].

11 Eg, *Google Inc v Duffy* (2017) 129 SASR 304. The point is made by Basten JA in *Fairfax Media Publications Pty Ltd v Voller* (2020) 380 ALR 700, 712–4 [48]–[49]; see David Rolph, 'Before the High Court – Liability for the Publication of Third Party Comments: *Fairfax Media Publications Pty Ltd v Voller*' (2021) 43(2) *Sydney Law Review* (Advance) 4.

12 See Alastair Mullis and Richard Parkes (eds), *Gatley on Libel and Slander* (Sweet & Maxwell, 12th ed, 2013) [1.8].

13 *Fairfax Media Publications Pty Ltd v Voller; Nationwide News Pty Limited v Voller; Australian News Channel Pty Ltd v Voller* [2021] HCATrans 88 (18 May 2021).

home to them, in our submission. And it is really no different than the public noticeboard case.

KIEFEL CJ: As in Byrne v Deane?

MR YOUNG: As in Byrne v Deane.

KIEFEL CJ: But there, the defamatory material was forced upon the alleged publisher. It is not a case of actively encouraging people to use facilities which enable publication. That is a distinction, is it not?

MR YOUNG: Yes – I mean, to some extent I agree with your Honour because the golf club rules did not permit - - -

KIEFEL CJ: Made them a trespasser, in effect.

MR YOUNG: - - - third-party comments. But the case turned on applying a concept of knowledge and inferred intention.

KIEFEL CJ: But where you are coming close to here is really a discussion of whether or not a host of a site should be given some particular application of the innocent dissemination defence. We are not really in the realms of publication, are we? It is really what you are discussing is innocent dissemination defence and that is not really a matter – a topic for us, is it?

The authors of a Discussion Paper on proposed defamation law reform recently asked whether intermediaries should be shielded from liability unless they 'materially contribute' to the publication.[14] The premise implicit in that question is false. When an intermediary publishes matter according to common law standards—for example, by providing a social media platform which disseminates defamatory matter to users—the intermediary does materially contribute to the publication. When the matter is consumed via social media in this way, the intermediary is *the* cause of the publication, in the sense that publication could not have occurred in the way that it did but for the intermediary's service.[15]

The language of 'materially contribute' conflates causal concepts with what is essentially a normative issue.[16] The real question is: *should* intermediaries be held liable for content they publish (according to common law principles) that they do not author?[17] The current defences available to intermediaries for defamation claims provide a justifiable basis by which intermediaries may avoid liability.

Key defences for intermediaries

The Uniform Defamation Acts contain a defence of innocent dissemination.[18] Intermediaries will not be liable for defamation where they facilitate the publication of defamatory matter created by authors; and where they neither knew, nor ought reasonably to have known, that the matter was defamatory, provided their lack of knowledge was not due to any negligence on their part.

The innocent dissemination defence is a defence to liability rather than a denial of the publication element. However, it does provide Google and intermediary publishers with some protection where they are unaware of the existence of the defamation.

Another important defence is contained in clause 91 of Schedule 5 to the *Broadcasting Services Act 1992* (Cth) (**BSA**). This defence was described by the authors of the recent Discussion Paper as follows:

> Clause 91(1) of Schedule 5 to the BSA, inserted in 1999, provides an immunity for 'internet service providers' and 'internet content hosts' in certain circumstances in relation to third-party material.
>
> It provides that a law of a state or territory, or a rule of common law or equity, has no effect to the extent that it:
>
> - subjects an internet content host or internet service provider to liability for hosting or carrying 'internet content' where they are not aware of the nature of the internet content, or
> - requires the internet content host or internet service provider to monitor, make inquiries about, or keep records of, internet content that is hosted or carried.[19]

With regard to the text, context and purpose of the BSA, intermediaries ought to be properly considered 'internet content hosts'.[20] Accordingly, where intermediaries are not aware of the existence of defamatory content which they publish according to common law standards, they will not be liable in defamation.

It is not difficult to put such publishers on notice of the defamatory content.[21] A quick email to a generic company email account, or completing the platform's reporting feature, may suffice. In *Defteros*, Richards J considered that a reasonable time for Google to consider a notice and remove content was 7 days; that finding may guide courts' consideration in future cases.[22]

14 DP 63, Question 10.

15 See, eg, *Civil Liability Act 2002* (WA) s 5C(1)(a). Anyway, the 'but for' test is not even necessary for defamation. The principles of causation of special damage in the context of defamation will be considered shortly in the appeal from: *Rayney v Western Australia [No 9]* [2017] WASC 367.

16 See James Edelman, 'Unnecessary Causation' (2015) 89 *Australian Law Journal* 20. David Lewis recognised this in his scholarship on causation: 'We sometimes single out one among all the causes of some event and call it "the cause", as if there were no others… I have nothing to say about these principles of invidious discrimination': David Lewis, 'Causation' (1973) 70(17) *Journal of Philosophy* 556.

17 This is analogous to the 'scope of liability' issue for negligence, which is bound up with principles of remoteness. See, eg, *Civil Liability Act 2002* (WA) s 5C(1)(b). It is a question on which educated people can disagree. I have changed my position on the issue over time, after reading more analyses and witnessing Facebook's early 2021 tantrum in response in the proposed media bargaining code.

18 See *Defamation Act 2005* (WA) s 32.

19 DP 31.

20 See *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125; *Fairfax Media Publications; Nationwide News Pty Ltd; Australian News Channel Pty Ltd v Voller* [2020] NSWCA 102.

21 This para is seen in: Michael Douglas and Martin Bennett, '"Publication" of Defamation in the Digital Era' (2020) 47(7) *Brief* 6, 8.

22 *Defteros v Google LLC* [2020] VSC 219, [64].

What this means is that, under the current law, Facebook, Google et al will have no liability for defamation they publish unless the defamed person tells them about it. In some cases, this might be abused: a person who is not really defamed may cry defamation to remove content they find objectionable. I propose reform to respond to this situation below.

The transnational character of litigation against intermediaries

The content above speaks of suing 'intermediaries', which are also described as 'digital platforms'. In reality, it is companies that may be sued. Intermediaries are often comprised of several companies. To sue 'Facebook' for example, may require naming multiple defendants: like the American Facebook Inc and the entity in the tax haven, Facebook Ireland Ltd.

The corporate groups that underpin intermediaries straddle nation states. They have a transnational character. Therefore, litigation involving intermediaries may engage principles of private international law.[23]

Foreign companies behind intermediaries do not always accept the authority of Australian courts. There is a need to reform Australian law to better adapt to internet intermediaries taking a recalcitrant approach to the jurisdiction and power of Australian courts, in whose geography these intermediaries derive millions of dollars. For examples of intermediaries' behaviour that warrants the reform I have in mind:

- *Australian Information Commission v Facebook Inc (No 2)* [2020] FCA 1307:[24] the American company challenged the court's jurisdiction over a claim related to the Cambridge Analytica privacy scandal, as it affected Australian Facebook users.
- *X v Twitter* (2017) 95 NSWLR 301: the American and Irish corporate defendants did not even bother to enter an appearance or make substantive submissions on the issue of jurisdiction.
- *Google Inc v Equustek Solutions Inc* [2017] 1 SCR 867:[25] following the Supreme Court of Canada's judgment, the American Google obtained relief from a comparatively inferior US court purporting to nullify the effect of the judgment of Canada's top court.
- *KT v Google LLC* [2019] NSWSC 1015: the American Google was briefly in contempt after failing to comply with an interlocutory injunction that enjoined removal of defamatory reviews, following frequent requests by the defamed person to Google for the content to be removed.

These cases demonstrate how transnational businesses complex multi-national corporate structures to shield their operations from liability via a 'jurisdictional veil'.[26] These structures depend on the historical premise that 'jurisdiction is territorial'. That premise is a pre-internet creature. The law has moved on; it is now quite easy for an Australian court to claim jurisdiction over a company overseas.[27]

The contemporary approach to generous long-arm jurisdiction of common law courts is represented by this dictum of Lord Sumption:

> In his judgment in the Court of Appeal, Longmore LJ described the service of the English court's process out of the jurisdiction as an "exorbitant" jurisdiction… This characterisation of the jurisdiction to allow service out is traditional, and was originally based on the notion that the service of proceedings abroad was an assertion of sovereign power over the defendant and a corresponding interference with the sovereignty of the state in which process was served. This is no longer a realistic view of the situation… Litigation between residents of different states is a routine incident of modern commercial life. A jurisdiction similar to that exercised by the English court is now exercised by the courts of many other countries… It should no longer be necessary to resort to the kind of muscular presumptions against service out which are implicit in adjectives like "exorbitant". The decision is generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum.[28]

Sumption referred to 'modern commercial life'. In the *Digital Platforms Inquiry*, the ACCC described how digital platforms are now 'an integral part of life for most Australians'.[29] As part of the 'modern life' of most Australians, some Australians will suffer harm. They ought to be able to obtain a remedy for that harm, in a court of their own country, according to Australian law—no matter where the entities that caused that harm are based. Australian law should adapt to our modern digital lives.

Addressing practical barriers: jurisdiction, power and enforcement

To understand how the law should be adapted, it is necessary to understand the distinction between jurisdiction and power.

23 Or the 'conflict of laws'. See generally Martin Davies, Andrew Bell, Paul Brereton and Michael Douglas, *Nygh's Conflict of Laws in Australia* (LexisNexis, 10th ed, 2019).

24 Noted in: Michael Douglas, 'Facebook's further attempts to resist the jurisdiction of the Federal Court of Australia futile',*ConflictofLaws.net* (online), 18 September 2020.

25 Noted in: Michael Douglas, 'A Global Injunction Against Google' (2018) 134 *Law Quarterly Review* 181.

26 Mary Keyes, *Jurisdiction in International Litigation* (Federation Press, 2005) 66–9, quoting Peter Muchlinksi, 'Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases' (2001) 50 *International & Comparative Law Quarterly* 1, 17.

27 See Martin Davies, Andrew Bell, Paul Brereton and Michael Douglas, *Nygh's Conflict of Laws in Australia* (LexisNexis, 10th ed, 2019) pt II ; Michael Douglas, 'The Decline of "Exorbitant Jurisdiction"?' (2019) 93(4) *Australian Law Journal* 278; Michael Douglas and Vivienne Bath, 'A New Approach to Service Outside the Jurisdiction and Outside Australia under the Uniform Civil Procedure Rules' (2017) 44(2) *Australian Bar Review* 160.

28 *Abela v Badraani* [2013] 1 WLR 2043, 2062–3 [53].

29 ACCC, *Digital Platforms Inquiry: Final Report* (2019) 40.

'Jurisdiction' is a term used in a variety of senses, including authority to decide. 'Power' is a distinct concept[30] that is sometimes confused with jurisdiction in scholarship.[31] Jurisdiction provides the anterior legal justification for the exercise of power; a court may use its powers in exercise of its jurisdiction.[32]

Superior courts are said to have auxiliary equitable jurisdiction in aid of the legal rights[33] the subject of a defamation action to enjoin removal of defamatory content. But this is better understood as a *power* of a court of equity. Some courts also possess statutory powers to the same effect;[34] and in many cases, inherent powers which may bind a third-party in order to protect the administration of justice.[35] Rules regulating injunctions are not a source of power; they are the court's regulation of a power, either express, inherent, or implied/incidental, that they would possess anyway, even if the rule were not there. This is to say: an Australian court has power to order an intermediary to remove defamatory content around the globe.[36]

Whether a court has jurisdiction over an intermediary is an anterior issue. It will be determined by jurisdictional rules concerning service, among other things.

For corporations, like those behind intermediaries, rules on service are affected by the *Corporations Act 2001* (Cth). It is easy to serve a local corporation. Foreign corporations that carry on business in Australia are required to register, which then makes it easy to serve them.[37]

Foreign companies behind intermediaries often do not consider that they 'carry on business' in Australia. They are wrong. By deriving data and income from Australia—either directly or through artificial corporate structures—they absolutely carry on business in Australia.

For examples of reasoning of courts on how foreign companies carry on business in the forum despite their objections, see:

- *Australian Information Commission v Facebook Inc (No 2)* [2020] FCA 1307.
- *Tiger Yacht Management Ltd v Morris* (2019) 268 FCR 548.
- *Valve Corporation v Australian Competition and Consumer Commission* (2017) 258 FCR 190; ACCC v Valve (No 3) (2016) 337 ALR 647 (Edelman J).
- *Google Inc v Equustek Solutions Inc [2017] 1 SCR 814; Equustek Solutions Inc v Google Inc* (2015) 386 DLR (4th) 224; *Equustek Solutions Inc v Jack* (2014) 374 DLR (4th) 537; *Equustek Solutions Inc v Jack* [2012] BCSC 1490.

In the absence of registration, foreign companies are still amenable to the jurisdiction of Australian courts under long-arm rules. But these principles on service often lead to expensive jurisdictional fights.

Foreign companies behind internet intermediaries—like Google LLC—should be compelled to either register as carrying on business in Australia, or as accepting service in Australia. That would avoid jurisdictional fights that increase costs for people seeking access to justice.

However, even if an Australian court has jurisdiction, a resulting judgment may have little practical use unless it can be enforced. Enforcing a monetary remedy overseas—in a jurisdiction in which a company behind an intermediary is based—is often difficult. It depends on the private international law of the foreign jurisdiction in which enforcement is sought. The HCCH Judgments Convention has sought to remedy this situation, but it is not in force and it would not apply to defamation.

The laws of the United States—where many intermediaries are based—make it particularly difficult, if not impossible, to enforce Australian orders made in a defamation proceeding in that jurisdiction.[38]

This situation could be remedied by law reform making enforcement easier. Options include:

- Explicit provisions allowing Australian subsidiaries of foreign companies behind intermediaries, and their employees, liable in contempt as if they were in the shoes of a foreign company that would otherwise be in contempt for failing to comply with an Australian court order.[39]
- Allowing money judgments against foreign intermediaries to be enforced against Australian subsidiaries.
- Requiring foreign parent companies of intermediaries to keep a percentage of liquid assets in Australia, taken from income derived from Australians, to be used to compensate those who are harmed by intermediaries'

30 *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365, 377 [6].

31 Eg, Dan Jerker B Svantesson, 'Jurisdiction in 3D – "Scope of (Remedial) Jurisdiction" as a Third Dimension of Jurisdiction' (2016) 12(1) *Journal of Private International Law* 60.

32 *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339, 353 [31] (French CJ, Kiefel, Bell and Keane JJ); see further Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (Federation Press, 2nd ed, 2020) 14.

33 See Michael Douglas, 'Anti-Suit Injunctions in Australia' (2017) 41(1) *Melbourne University Law Review* 66.

34 Eg, *Federal Court of Australia Act 1976* (Cth) s 23.

35 See *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380.

36 See Michael Douglas, 'A Global Injunction Against Google' (2018) 134 *Law Quarterly Review* 181; Michael Douglas, 'Extraterritorial Injunctions Affecting the Internet' (2018) 12(1) *Journal of Equity* 34, cited in: Law Commission of Ontario, *Defamation Law in the Internet Age* (Final Report, 2020); *Eva Glawischnig-Piesczek v Facebook Ireland Limited* (Case C18/18).

37 *Corporations Act 2001* (Cth) s 601CD; *Corporations Act 2001* (Cth) s 601CX(1).

38 See, eg, *Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act* 28 USC 4101- 4105 ('SPEECH Act'); First Amendment of the US Constitution. See further Richard Garnett and Megan Richardson, 'Libel Tourism or Just Redress? Reconciling the (English) Right to Reputation with the (American) Right to Freedom of Speech in Cross-Border Libel Cases' (2009) 5 *Journal of Private International Law* 47; David Rolph, 'Splendid Isolation? Australia as a Destination for "Libel Tourism"' (2012) 19 *Australian International Law Journal* 79.

39 Courts may have this power in a variety of contexts; see, eg, *KT v Google LLC* [2019] NSWSC 1015.

functions.[40] The assets could reside in an Australian subsidiary against whom the judgment is enforceable, making foreign anti-enforcement orders more difficult.

A right for defamation to be forgotten?

This article has explained how a necessary condition of an intermediary's liability for defamation is that the corporate person behind the intermediary is put on notice of the existence of the defamation.

The trigger to put an internet intermediary on notice that they are publishing defamatory matter should be quick and inexpensive. A defamed person should not need to go to a lawyer like me before they can protect their reputation via defamation law.[41]

There are many different ways in which the value of a 'quick and cheap' defamation notice/trigger for intermediaries' publications could be put into effect in a way that puts the interests of Australian consumers first. Here is me roughly spitballing a potential process:

- Intermediaries are required to develop a tailored 'Report defamation of an Australian person' feature into every aspect of their platform.
- Natural persons, and those with capacity to sue under the incoming changes, can utilise the feature without going to a lawyer or issuing a concerns notice.
- The feature requires the reporting person to (1) briefly describe what is wrong with the content, and (2) provide their contact details.
- The impugned content is reviewed by an employee of the intermediary for basic legibility. If it makes sense, and seems genuine, the content is immediately taken down, pending review.
- An independent 'defamation commissioner' reviews the complaint ASAP and within 7 days. If it is prima facie defamatory (not having regard to defences), the intermediary's content stays down. Of course, if the intermediary's publication is linking to some other website, that content would remain online; but its visibility, and so propensity to cause damage via the grapevine effect, would be diminished.
- The intermediary then has an obligation to use best endeavours to notify the author of the removed publication of the outcome. The author has standing to challenge the defamation commissioner's decision via merits review, at that stage noting any defences to defamation. (Cf the process for challenging a decision of the Privacy Commissioner.)[42]
- If the intermediary does not take the content down after initial review, prior to determination of the defamation commissioner, it does not have a defence to defamation.
- This whole system—and the office of the defamation commissioner—is funded by intermediaries.

The proposal is not that novel. It is a rough defamation version of the GDPR's right to erasure. We may see an equivalent law in the *Privacy Act 1988* (Cth) soon anyway.[43] Both privacy and reputation are human rights which Australia must protect as part of its international obligations.[44] The value of each lies in basic human dignity and personal autonomy. Businesses—like internet intermediaries—ought to adapt to ensure these values are protected. There ought to be a right for defamation to be forgotten.

Conclusion

I love Google. Google made my phone. At home, Google tells me the news in the morning and controls my music. Gmail is great. But I don't love Google so much that I think that the foreign companies behind it should not have to comply with the same law as everyone else.

The enormous power of digital platforms is the subject of a great deal of academic attention around the world.[45] Some of that literature deals with black letter law;[46] a lot of it does not. Balkin, a law professor at Yale, has explained the phenomenon in terms of 'information fiduciaries': a category of persons and businesses who collect, analyse, use, sell, and distribute personal information. He argues that '[b]ecause of their special power over others and their special relationships to others, information fiduciaries have special duties to act in ways that do not harm the interests of the people whose information [they deal with]'.[47]

The special power of digital platforms informed the *Digital Platforms Inquiry*, and other recent Australian law reform proposals.[48] It should shape the future direction of Australian laws with respect to defamation. If intermediaries want to avoid liability for defamation, then they ought to take a more active role in protecting reputations from unjustified harm. Until then, it will be possible—although difficult—to sue them for defamation in an Australian court.

40 A hybrid of an insurance scheme deployed for other torts and the Media Bargaining Code.

41 On that issue, the new mandate that a concerns notice of a particular form be issued before proceedings can be commenced is a retrograde step that will inhibit access to justice for many Australians with legitimate claims.

42 Eg, *Ben Grubb and Telstra Corporation Limited* [2015] AICmr 35; *Telstra Corporation Ltd v Privacy Commissioner* [2015] AATA 991; (2015) 254 IR 83; *Privacy Commissioner v Telstra Corporation Limited* (2017) 249 FCR 24.

43 Australian Government, Attorney-General's Department, *Privacy Act Review – Issues Paper* (October 2020) 11; ACCC, *Digital Platforms Inquiry: Final Report* (2019) 470–1.

44 See ICCPR art 17. See *Australian Associated Press Pty Limited and Secretary, Department of Home Affairs (Freedom of information)* [2018] AATA 741, [134].

45 This para is derived from a draft of a chapter of a forthcoming text I am co-authoring: David Rolph et al, *Media Law – Cases, Materials and Commentary* (Oxford University Press, 2021, forthcoming) ch 11.

46 See generally, for example, Kylie Pappalardo and Nicolas Suzor, 'The Liability of Australian Online Intermediaries' (2018) 40(4) *Sydney Law Review* 469.

47 Jack M Balkin, 'Information Fiduciaries and the First Amendment' (2016) 49 UC *Davis Law Review* 1183, 1186.

48 See Australian Government, Attorney-General's Department, *Privacy Act Review – Issues Paper* (October 2020) 18, questions 48–52.