Tarikh Pendengaran: 13 Julai 2020

**DALAM MAHKAMAH PERSEKUTUAN MALAYSIA DI PUTRAJAYA**
**PERMOHONAN SIVIL NO. 08(L)-4-06/2020(W)**

**Dalam perkara komen-komen dalam suatu artikel bertajuk *CJ orders all courts to be fully operational from July 1***

**Dan**

**Dalam perkara suatu permohonan minta kebenaran untuk memulakan prosiding komital kerana menghina Mahkamah selaras dengan Perkara 126 Perlembagaan Persekutuan dan Aturan 52 Kaedah-Kaedah Mahkamah 2012**

**Dan**

**Dalam perkara mengenai Seksyen 13 Akta Mahkamah Kehakiman 1964**

**Dan**

**Dalam perkara mengenai Kaedah 3 Kaedah-Kaedah Mahkamah Persekutuan 1995**

**Dan**

**Dalam perkara Aturan 92 Kaedah-Kaedah Mahkamah 2012**

**PEGUAM NEGARA MALAYSIA ... PEMOHON**

**DAN**

1. **MKINI DOTCOM SDN BHD (No Syarikat: 489718-U)**
2. **KETUA EDITOR, MALAYSIAKINI ... RESPONDEN-RESPONDEN**

# RESPONDENTS' WRITTEN SUBMISSION (REVISED)

# (ENCLOSURE 19)

## I Introduction

1. On 17.06.2020, this Honourable Court had granted the Applicant leave to commence committal proceedings against the Respondent pursuant to Order 53 rule 3(1), Rules of Court 2012[1] (the "**ROC**") (the "**Leave Order**"). The Leave Order was made on an *ex parte* basis. The Applicant then filed an application for committal orders against the Respondents on 18.06.2020 ("**Enclosure 19**").

2. The Respondents applied to set aside the Leave Order by way of Enclosure 22. Enclosure 22. That was was dismissed by this Honourable Court on 02.07.2020, this Honourable Court having concluded that the Applicant had established a *prima facie* case on the basis of the presumption of section 114A(1), Evidence Act 1950 ("**EA**") The Respondents were given leave to file such further affidavits they considered necessary.

3. The Respondents will only rely on this written submission for the purposes of Enclosure 19.

4. For clarity, the Respondents withdraw the written submission dated 29.06.2020 (marked as Enclosure 35).

5. The Respondents further rely on the following affidavits:

    5.1. Additional Affidavit affirmed by Premesh Chandran on 09.07.2020 (Enclosure 57); and

    5.2. Expert affidavit affirmed by Dinesh Arnold Nair exhibiting his independent expert report dated 08.07.2020 (the "**Report**") (Enclosure 58).

6. The Applicant relies only on the affidavit filed in support of Enclosure 2. The Applicant has not filed any rebuttal affidavits.

[1] Respondents' Bundle of Authorities ("**RBOA**"), tab 5

## II The case against the Respondents

7. The 1st Respondent operates an on-line news portal called "Malaysiakini" which operates at www.malaysiakini.com (the "**On-Line News Portal**"). Launched in 1999, it currently has approximately 8 million unique visitors each month and 25,000 online subscribers.

8. As is the common practice for such on-line news portals, subscribers can leave comments on articles that are published.[2]

9. The subject of the intended committal proceedings is certain third-party comments identified in paragraph 7 of the Statement pursuant to Order 52 rule 3(2) ("**Enclosure 3**") (the "**Comments**") that were uploaded with respect to an article entitled "*CJ order all courts to be fully operational from July 1*" that was uploaded onto the On-Line News Portal on 09.06.2020 (the "**Article**").

10. Enclosure 19 is supported by Enclosure 3. It is settled law that the purpose of such a statement is to, in effect, frame the charge against the contemnors.[3] Applicants are thus confined to matters stated in such a statement which, due to the quasi-criminal nature contempt proceedings, are to be strictly adhered to.

11. As was made clear during the hearing of Enclosure 22, the charge against the Respondents centres on their having allegedly facilitated the publication of the Comments. This is apparent form paragraph 10 of Enclosure 3 and the submission made by learned counsel for the Applicant with respect of Enclosure 22, where it was stated to this Honourable Court that the Applicant relies on the second limb of section 114A ("*who in any manner facilitates*").

12. Pertinently:

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[2] Enclosure 32, paragraph 10

[3] See for instance, ***Tan Boon Thien & Anor v Tan Poh Lee & Ors [2020] 3 CLJ 28***, p.37, para 26, RBOA, tab 18

12.1. The Applicant has not stated, or given particulars of, how the Respondents facilitated the publishing the Comments. The Applicant relies merely on the fact the 1st Respondent operates the On-Line News Portal.

12.2. Enclosure 3 merely states that the 2nd Respondent is the "Ketua Editor". It does not state how the 2nd Respondent facilitated the publication of the Comments, or any other facts which link him to the publication of the Comments.

12.3. The Applicant has not stated that the Respondents were knowingly involved in the publishing of the Comments, or given particulars of how they can be considered to have been so involved. As explained below, this is critical to the case of the Applicant.

13. The Respondents accept that the Comments are offensive and inappropriate. As stated on 02.07.2020 in open court, they had at the earliest possible opportunity tendered an unreserved apology for having unwittingly allowed for the airing of the Comments. This was stated in paragraph 5 of Enclosure 23, and paragraph 6 of Enclosure 32. That apology is reiterated herein[4]:

"*The Respondents regret the tone and tenor of the Comments and unreservedly apologises to this Honourable Court and the Judiciary as a whole for having unwittingly allowed for their airing. Neither of us had any intention of scandalizing or undermining the Judiciary in any manner whatsoever.*"

## III Matters leading to Enclosure 19

### *A. The entitlement to comment*

[4] Affidavit in Support of Enclosure 22 (Enclosure 23). Also stated in the 1st Respondent's Affidavit in Reply affirmed on 29.06.2020 (Enclosure 32), at paragraph 6

14. The freedom to comment is a significant feature of online media as it allows for discussions about topical matters of public interest. The traditional purpose of the press, which is still an important objective, has been disseminating information and generating public discussion on matters of public interest. This allows for readers to develop informed views, or opinions, on such matters.

15. These twin objectives are equally important to news presented in a digital format. Readership preference has caused a shift to such a format as is demonstrated by the fact that all major newspapers have an on-line presence.

16. These twin objectives are crucial to the freedom of expression which, in turn, is a cornerstone of any democratic society. It is for this reason that the press has come to be known as the Fourth Estate. It is also for this reason that, subject to laws made under Article 10(2)(a) of the Federal Constitution[5], the freedom of expression is guaranteed under Article 10(1)(a).

17. These twin objectives can only be achieved through a free and frank discussion about such matters. Such discussions are protected by the constitutional guarantee of the freedom of expression. For this reason, such discussions are as important as the news itself and is an essential dimension of any such on-line news portal.

18. The principles above have been judicially recognized by the courts in Malaysia. In ***Public Prosecutor v Pung Chen Choon [1994] 1 MLJ 566***[6], Edgar Joseph Jr SCJ said, at p.581:

"*Moreover, if counsel for the accused is correct in his contentions regarding question 4, it would be a complete answer to the charge under s 8A(1) of the Act because, in the words of Patanjali Sastri J (as he then was) in Brij Bhusan v State of Delhi24 at p 134 para 25:*

[5] RBOA, tab 1
[6] RBOA, tab 10

***<u>There can be little doubt that the imposition of pre-censorship on a journal is a restriction on the liberty of the press which is an essential part of the right of freedom of speech and expression declared under art 19(1)(a). [Equivalent to our art 10(1)(a).]</u>***

*As pointed out by Blackstone in IV Commentaries at pp 151 and 152:*

***<u>'the liberty of the press consists in laying no previous restraint upon publications, and not in freedom from censure for criminal matters when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public, to forbid this is to destroy the freedom of the press.</u>'"***

19. The right to receive information is protected under Article 10(1)(a), Federal Constitution[7]. In ***Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333***[8], this Honourable Court, per Gopal Sri Ram FCJ (as he then was) said, at p.344:

"***<u>The right to be derived from the express protection is the right to receive information, which is equally guaranteed</u>***. *See Secretary, Ministry of Information and Broadcasting, Government of India v Cricket Association of Bengal AIR 1995 SC 1236.*"

20. In ***Siti Sakinah bt Meor Omar Baki v Zamihan Mat Zin & Anor [2017] MLJU 1811***[9], the role of the press as being, in effect, the Fourth Estate was acknowledged. Relying on the decision of Zawawi Salleh J (as he then was) in ***Sivabalan all P Asapathy v The News Straits Time Press (M) Bhd [2010] MLJU 483***[10]. Wan Ahmad Farid JC said:

[7] RBOA, tab 1
[8] RBOA, tab 11
[9] RBOA, tab 12
[10] RBOA, tab 13

"*[43]* ***Our society must by now learn to accept that the press, known as the fourth estate, has a role to play in democratic Malaysia. I accept that the media has a role and even duty in the dissemination of news that is of public interest and concern****, for so long as it is exercised responsibly, as in the instant case. In Sivabalan all P Asapathy v The News Straits Time Press (M) Bhd [2010] MLJU 483 Mohd Zawawi Salleh J (now JCA) had made the following remarks:*

> *The Reynold's privilege represents a reasonable and proportionate response to the need to p rated reputation* ***while sustaining the public exchange of information that is vital to modern Malaysian society****."*

21. Both the Respondents take the role of the press seriously and are committed to the ideals of the same. This commitment has been acknowledged by the accolades that they have received.[11]

***B. The posting of comments***

22. Third-party online subscribers have been allowed to publish comments on news reports posted on the On-line News Portal since August 2009.[12]

23. It currently receives about 2000 comments each day.[13]

24. Neither of the Respondents play a role in the posting of comments. This is explained further in paragraphs 27 to 35 below.

25. It has been independently verified by an expert (see para 4.4 of the Report) that only third-party online subscribers who are registered are permitted to post comments. They are cautioned at the time of the posting and comments and must agree to terms and conditions (the "**T&C**") for posting before they can comment.

[11] See Exhibit PC-1 of Enclosure 32
[12] Enclosure 32, pp.14-16
[13] Ibid

This is achieved by the display of a caution on the On-line News Portal which briefly summarizes the applicable terms and conditions.[14]

25.1. Part 7 of the T&C deals with comments by third parties.[15]

25.2. First, it stipulates that the 1st Respondent reserves the rights to disclose the subscription profile to law enforcement agencies should they require it for valid purposes.

25.3. Second, the 1st Respondent reserves its right to remove comments that are, amongst others, obscene, profane, defamatory, violent etc.

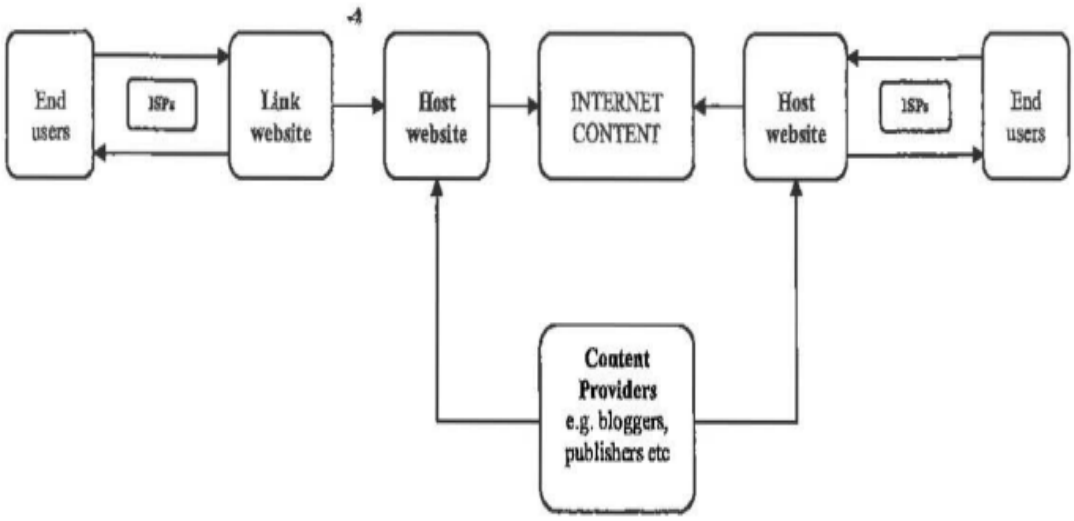
25.4. Third, the 1st Respondents warns the users to refrain from abusive comments, foul language, vulgar, slanderous, threatening or sexually-oriented comments or of the use of any other method of communication that may violate any law or create needless unpleasantness. The posting of such comments can result in a ban.

25.5. Fourth, the 1st Respondent also notifies users that a comment cannot be posted if it contains certain banned words. This will be explained further below.

25.6. Fifth, the 1st Respondent makes it clear that it "cannot edit a comment once it is posted". Such comments "are either approved or rejected".

26. The flow of information on electronic media (generally) can be usefully summarized in the following manner[16]:

[14] Enclosure 32, p.40
[15] Enclosure 32, pp.43-44
[16] Professor Ian Cram, *Borrie & Lowe: The Law of Contempt* (4th edn, 2010), p.615, RBOA, tab 35




## *C. The take down policy*

*(i)* *Comments left on the On-Line News Portal*

27. Due to the volume of such comments[17], it is not possible for the 1st Respondent to directly moderate comments prior to their being uploaded or, in other words, play a censorship role.

28. In addition, it would not be possible for the On-line News Portal to monitor every comment that is published. Users may not post their comments immediately after the news are published. It depends on the time they read the news item. A news item published at noon could be read by some at night, or the day after, or at a later time.[18]

29. Comments are posted at all hours, and on different days. On top of that, given the nature of social media, some old news items may spark interest or go viral at a future point in time. This may result in comments being posted years after a news item was published.[19]

[17] Enclosure 33, paragraph 15
[18] Enclosure 57, p.20
[19] Ibid

*(ii)* *The system*

30. As explained below, the 1st Respondent relies on three systems to address offensive comments. The facts stated in paragraphs 31 to 35 below have been independently verified by an expert and forms the subject of the Report.

(a) Pre-publication

31. A filtering system which disallows comments which contain certain foul words.[20] Comments with such words will not be allowed by the system to be uploaded. The filter software can compare words in the comment with a list of words provided by the editors and block the comment accordingly. The 1st Respondent is not able to filter substantive contents as sentences and paragraphs have infinite permutations. Such an evaluation could be possible in future using advanced artificial intelligence.[21]

(b) Post-publication

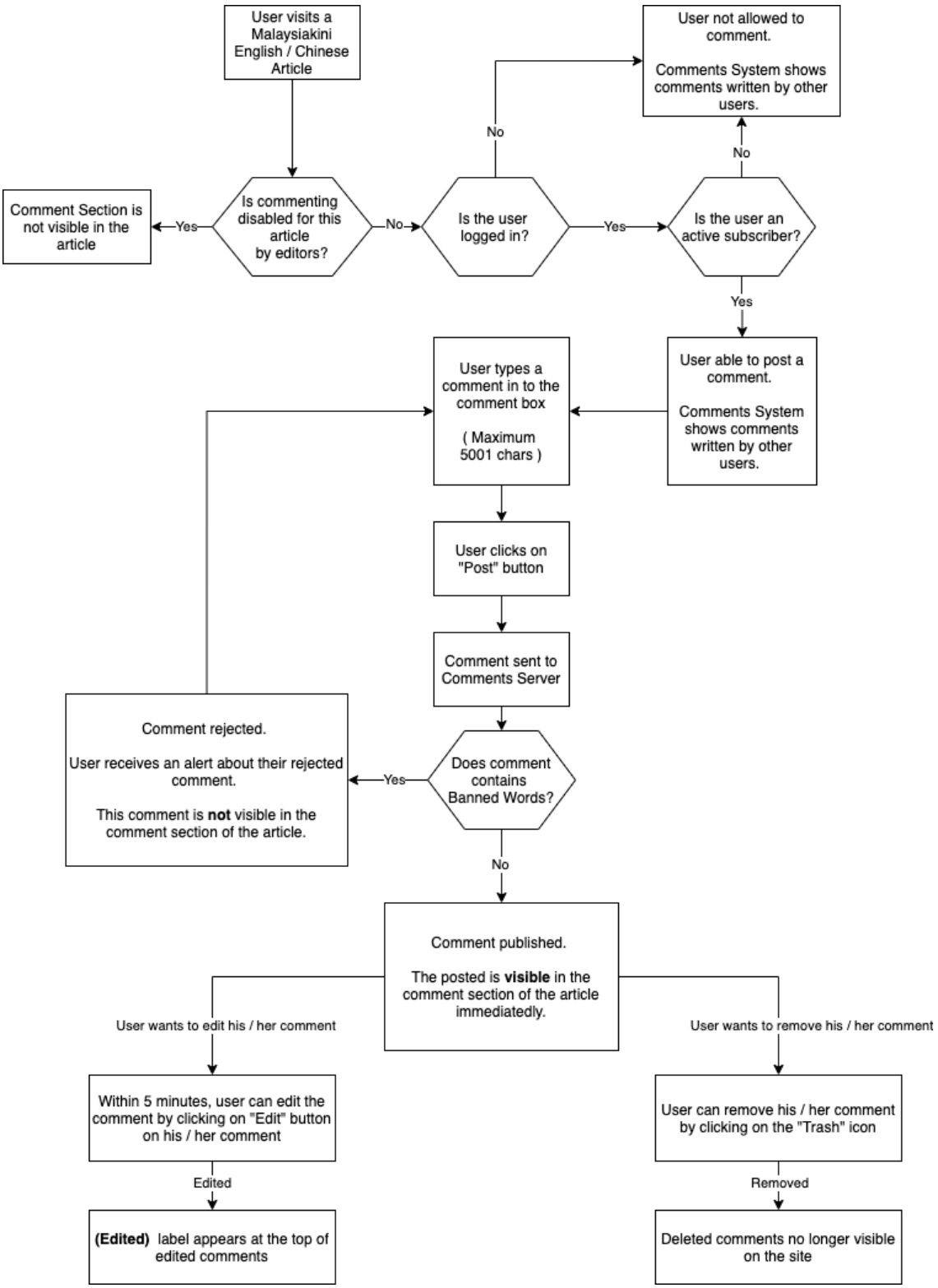
32. Any comment which contains a "suspected word". The system will pick up such a comment and flag the comment to the moderator for attention.[22]

33. A peer reporting process. This entails other users or readers of the On-line News Portal reporting offending comments. Upon the receipt of such a report, an editor will immediately examine the report and determine if the said comment should be removed.

34. The 1st Respondent plays no direct role in the publication of comments by users prior to such publication with the exception of the filter system. The matters above

[20] See p.15 of the Expert's Affidavit affirmed on 09.07.2020 (Enclosure 58) for a list of the banned words
[21] Enclosure 57, p.21
[22] See p.16 of Enclosure 58 for a list of all the suspected words

have been comprehensively explained by an expert in his report in Enclosure 58. The process of commenting can be summarized in the diagram below.[23]

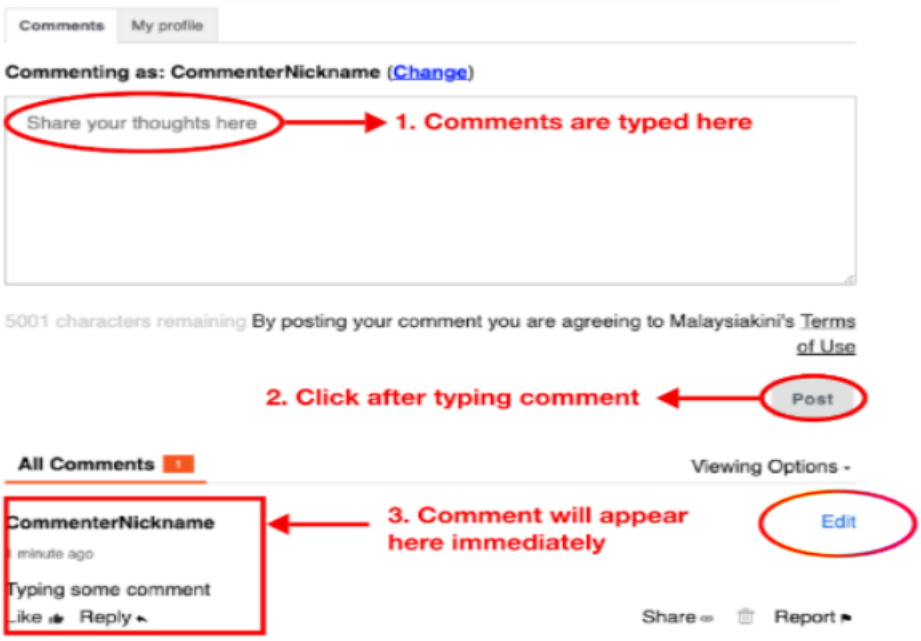



[23] Enclosure 57, p.22

35. In summary, the following can happen once a comment is posted:

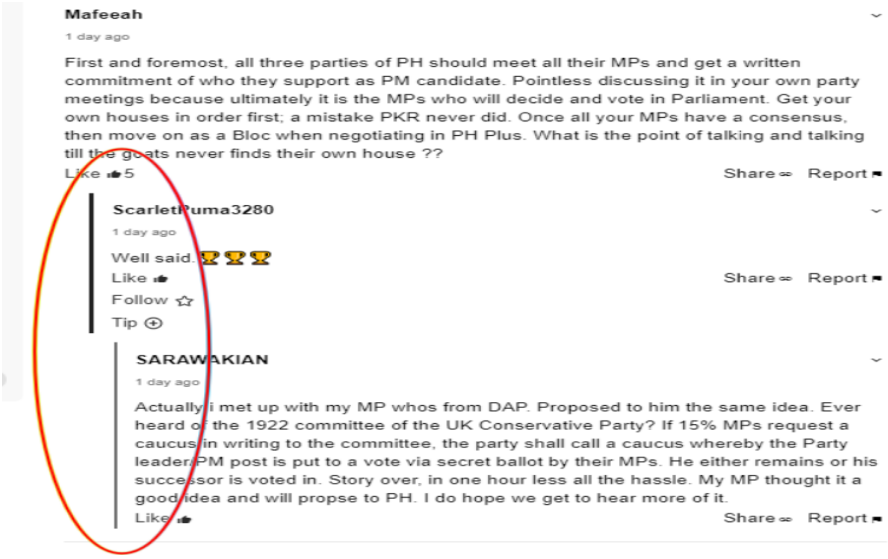
35.1. It can be removed by an editor following the processes described above.

35.2. It can be edited only by the user who made the comment within 5 minutes from making the said comment. The word "edited" would appear beside an edited comment.[24] The word "edited" does not refer to an editing by the editorial team.




35.3. Other users can comment on comments. A line would appear on the left side for such comments.[25]

[24] Enclosure 57, p.35
[25] Enclosure 57, p.38




*(iii)* *The Code*

36. The law as it stands does not require internet content providers such the 1st Respondent to censor comments prior to their being uploaded.

37. To the contrary, internet content providers are not permitted to do so.

38. The Malaysian Communications and Multimedia Content Code (the "**Code**")[26] was prepared by the Communications and Multimedia Content Forum Malaysia (the "**Forum**") pursuant to section 213(1), Communications and Multimedia Act 1998 ("**CMA**"). The Forum is established under section 94. It was registered by the Malaysian Communications and Multimedia Commission ("**MCMC**") on 01.09.2004 pursuant to section 95(2), CMA.

39. A breach of the code invites enforcement by the MCMC. A breach of direction by the MCMC as regards compliance render a person liable for a fine. It is respectfully submitted that the Code has force of law.

40. The Code applies to, amongst others, Content Application Service Providers, defined as persons who provide content application services.[27] A "content

[26] Respondents' Supplementary Bundle of Authorities (2) ("RSBOA2"), tab #
[27] See p.8

applications service" means an applications service which provides content.[28] An "applications service" means a service provided by means of, but not solely by means of, one or more network services.[29] "Content" means any sound, text, still picture, moving picture or other audio-visual representation, tactile representation or any combination of the preceding which is capable of being created, manipulated, stored, retrieved or communicated electronically.[30]

41. Part 5 of the Code deals with online content. It applies to, amongst others, Internet Content Hosts. The 1st Respondent would fall under this category.

42. Section 1.1 expressly provides:

*"In adhering to this and relevant parts of this Code, no action by Code subjects should, in any way, contravene Section 3(3) of the Act, which states that "**Nothing in this Act shall be construed as permitting the censorship of the Internet**""*

43. The principles in the Code for online content make it clear that responsibility for any content primarily rests with the creator of the content.

[28] See section 6, CMA, RSBOA2, tab #
[29] Ibid
[30] Ibid

**4.0 Principles**

**4.1** The following principles shall guide the parties who review, administer, apply, are affected by and/or are subject to this Part of the Code :

(a) There shall be no censorship of the Internet as provided in Section 3(3) of the Act.

(b) Responsibility for Content provided Online by Code Subjects primarily rests with the creator of the Content.

(c) In acknowledging that in the fast-changing online environment, it is very often impractical, costly, difficult and ineffective to monitor Content, Code subjects will nonetheless fulfill, to the best of their ability the requirements of the Code.

(d) Users are responsible for their choice and utilisation of Online Content.

(e) As users are able to independently exercise the choice on whether to access, read or digest and consume various online materials, the application of the Code, by Code Subjects under this Part shall take cognisance of this fact.

(f) Any measures relating to content which are recommended by this Part from time to time shall be:

(i) Technologically neutral;

(ii) Fair; and

(iii) Widely affordable and not adversely affect the economic viability of the communications and multimedia industry.

42

(g) Any guidelines that apply to the provision of online Content should not unduly restrict the growth of the industry but serve to enhance a conducive environment to encourage and stimulate the Malaysian communications and multimedia industry.

44. The Code expressly provides that monitoring of activities by users is not required.

**11.0 Measures not required**

**11.1** IASPs, ICHs and Content Aggregators shall not be required to undertake any of the following:

(a) Provide rating systems for Online Content;

(b) Block access by their users or subscribers to any material unless directed to do so by the Complaints Bureau acting in accordance with the complaints procedure set out in the Code;

(c) Monitor the activities of users and subscribers; or

(d) Retain data for investigation unless such retention of data is rightfully requested by the relevant authorities in accordance with Malaysian law.

45. Even where an Internet Content Host is notified of a user that provides prohibited content by the Complaints Bureau under the Code, ***the said provider has 2 working days to take down the prohibited content***. Such providers are merely required to: first, notify users of certain legal requirements; second, have the right to withdraw its services if a person contravenes the law or provides prohibited content; and third, retains the right to remove prohibited content.

> **10.0 Internet Content Hosting Provider (ICH)**
>
> **10.1** An ICH being a person in its capacity of merely providing access to Content which is neither created nor aggregated by itself but which is hosted on its facilities shall incorporate terms and conditions in the contracts and legal notices as to terms of use with users and subscribers of their services. This shall include the following terms:
>
> (a) Users and subscribers shall comply with the requirements of Malaysian law including (but not limited to) the Code and shall not provide prohibited Content nor any Content in contravention of Malaysian law;
>
> (b) The ICH shall have the right to withdraw its hosting services where a user or subscriber contravenes (a) above; and
>
> (c) The ICH shall have the right to remove such prohibited Content provided such removal is in accordance with the complaints procedure contained in the Code.
>
> **10.2** Once an ICH is notified by the Complaints Bureau that its user or subscriber is providing prohibited Content and the ICH is able to identify such subscriber or user, the ICH will take the following steps:
>
> (a) Within a period of 2 working days from the time of notification, inform the user or subscriber to take down the prohibited Content.
>
> (b) Prescribe a period within which the user or subscriber is to remove the prohibited Content, ranging from 1 to 24 hours from the time of notification.
>
> (c) If the user or subscriber does not remove such prohibited Content within the prescribed period the ICH shall have the right to remove such Content.

46. News portals cannot be expected to moderate all contents published by third parties. Furthermore, this allows for on-line news portals to protect themselves from liability. In ***Tamiz v Google Inc [2013] 1 WLR 2151***[31], Richards LJ said, at pp.2161-2162:

"*24 By the Blogger service Google Inc provides a platform for blogs, together with design tools and, if required, a URL; it also provides a related service to enable the display of remunerative advertisements on a blog.* ***It makes the Blogger service***

[31] RBOA, tab 26

***available on terms of its own choice and it can readily remove or block access to any blog that does not comply with those terms (a point of distinction with the search engine under consideration in the Metropolitan International Schools Ltd case [2011] 1 WLR 1743, as the judge himself noted in that case). As a matter of corporate policy and no doubt also for reasons of practicality, it does not seek to exercise prior control over the content of blogs or comments posted on them, but it defines the limits of permitted content and it has the power and capability to remove or block access to offending material to which its attention is drawn.***"

## *D. The Article*

47. The Article was published on 09.06.2020 in the Bernama news online portal.[32] The 1st Respondent subscribes to the Bernama news wire and has the right to republish its news. The On-line News Portal republished the Article. The Article concerned a statement by the Chief Justice on courts being fully operational from 01.07.2020. It essentially reproduced parts of the statement made by the Chief Justice.

48. On 12.06.2020, the police contacted the Executive Director of the 1st Respondent, Mr R.K. Anand, at about 12.45pm and informed him that the police are investigating certain comments on the Article on the On-line News Portal.[33]

49. This prompted the editorial team to immediately review the comments on the Article at about 12.50pm on the same day. Prior to this, it had not been aware of any offensive comments having been made as no report had been made by a user or reader. The Comments do not contain any of the "suspected words" identified in the system. It was only then that the editorial team became aware of the Comments.[34]

[32] Enclosure 57, p.41
[33] Enclosure 33, paragraph 22
[34] Enclosure 32, paragraph 23

50. These, and other comments, were then removed at about 12.57pm on the same day.[35]

51. The Comments were thus taken down within approximately 12 minutes from the time Mr R.K. Anand was alerted by the police.

52. On 15.06.2020, the 2nd Respondent was contacted by the police and asked to give a statement. He did so on 16.06.2020. On 24.06.2020, the MCMC asked for the details of the individuals who published the Comments. On 26.06.2020, the 1st Respondent provided the details to the MCMC and the police. The details provided were the e-mails, names and payment mode used when the said individuals registered their accounts with the On-line News Portal.[36]

53. The 1st Respondent has since permanently banned all five users who posted the Comments.[37]

## IV The undisputed facts before this Court

54. It is respectfully submitted that having regard to the material before this Honourable Court, it is beyond dispute that:

54.1. Neither of the Respondents moderates, or plays any direct role in, the publishing of any comments on the On-line News Portal, unless it is flagged for containing a "suspected word" or is reported by other users.

54.2. Neither of the Respondents authored the Comments;

54.3. Neither of the Respondents were involved in the posting of the Comments. The On-Line News Portal was used a facility for the Comments. This is

[35] Enclosure 33, paragraph 23
[36] Enclosure 32, p.18
[37] Enclosure 57, p.23

distinct from the act of facilitating. The word "facilitate" means "means "[t]o make the occurrence of (something) easier; to render less difficult." (see Black's Law Dictionary (11th edn, 2009)).

54.4. Neither of the Respondents have been shown to have been actually aware that the Comments had been posted. The Comments do not contain banned words or any "suspected word";

54.5. The 1st Respondent was made aware of the Comments at about 12.45pm on 12.06.2020 through its Executive Director, Mr R.K. Anand;

54.6. The Comments were taken down at on the same day at 12.57pm. From the time the 1st Respondent became aware of the Comments, it took only about 12 minutes for the Comments to be taken down. This was well within the 2 days permitted by section 10 of the Code (see paragraph 45 above); and

54.7. In any event, the 2nd Respondent was not involved in any way whatsoever. He is not a "Content Application Service Providers" within the meaning of section 6, CMA and he could not be viewed as being a publisher of the Comments. Furthermore, there is no legal basis to hold him vicariously liable for the acts (if any) of the 1st Respondent.

## V Submission

### *A. The burden of proof*

55. The burden of proof remains with the Applicant throughout the contempt proceedings.

55.1. The applicable standard of proof is the criminal standard of beyond reasonable doubt. In ***Wee Choo Keong v MBF Holdings Bhd & anor and another appeal [1995] 3 MLJ 549***[38], Wan Adnan FCJ said, at p.574:

"*I would like to respond to two legal points raised in arguments by the learned counsel for the second appellant (third defendant). But first, I like to say something on the standard of proof that is required to prove a charge in contempt of court proceedings.* ***It is already well established that in contempt of court proceedings, proof must be proof beyond reasonable doubt, and that where there is a doubt the doubt ought to be resolved in favour of the person charged. In other words, the proof must be of the standard as is required in a criminal case.***

*In Alligarh Municipal Board & Ors v Ekka Tonga Mazdoor Union & Ors 1970 AIR SC 1707, it was held:*

> *In order to bring home a charge of contempt of court for disobeying orders of courts* ***those who assert that the alleged contemners had knowledge of the order must prove the fact beyond reasonable doubt*** *... In case of doubt, however, the benefit ought to go to the person charged.*"

55.2. That burden always rests with an applicant. In ***VIS Trading Co Ltd v Nazarov and others [2016] 4 WLR 1***, Whipple J said:

*"31 I agree with the claimant's submissions on this point. The fact that the first defendant has produced some documents, in purported compliance with the 21 May 2015 Order, does not determine the compliance issue in the first defendant's favour; nor does it require the claimant to make any application for cross-examination. Rather, the first defendant is on notice of the claimant's case that the defendants have failed to comply with the 21 May*

[38] SRBOA2, tab #

*2015 Order, and the claimant is entitled to continue to advance that case, even in the face of purported compliance by the first defendant since the date of the application.* ***The burden of proof remains on the claimant throughout, to the criminal standard, and the claimant can invite the court to conclude, on the basis of all the evidence in the case, that the defendants have not yet complied with the 21 May 2015 Order****. If the contemnor chooses to remain silent in the face of that dispute, the court can draw an adverse inference against him, if the court considers that to be appropriate and fair, and recalling that silence alone cannot prove guilt. This is not to put the burden of proof on the first defendant; far from it, the burden remains on the claimant."*

55.3. In ***Al Muderis v Duncan [2018] NSWSC 925***, Rothman J said:

*"[75]* ***The burden of proof remains on the plaintiff/prosecutor in a contempt proceeding (whether civil or criminal).*** *Further, the standard of proof is the criminal standard and the plaintiff/prosecutor must prove the guilt of the defendant/contemnor beyond reasonable doubt."*

***B. "Scandalizing" contempt***

56. The acts said to be contemptuous fall within that type of contempt referred to as "publication contempt". Furthermore, the contemptuous acts complained fall into the category of "scandalizing the court" contempt. This is separate and distinct from "sub-judice" contempt.[39]

57. Central to these is the question of whether the Respondents can be said to be responsible in law for the publication of the comments.

58. Scandalizing the court is a species of criminal contempt. In ***PCP Construction Sdn Bhd v Leap Modulation Sdn Bhd (Asian International Arbitration Centre,***

[39] See ***Uthayakumar a/l Ponnusamy v Abdul Wahab bin Abdul Kassim (Pengarah Penjara Kajang) & Ors [2020] 2 MLJ 259***, paragraph 25(b) (RBOA, tab 8)

***intervener) [2019] 4 MLJ 747***[40] ***("Leap Modulation")***, this Honourable Court, in a joint judgment by Ramly Ali, Azahar Mohamed, Rohana Yusuf, Tengku Maimun and Nallini Pathmanathan FCJJ said, at p.767:

"*[50] The common law position on contempt of court has been elaborated by Lord Morris in the Privy Council in the case of McLeod v St Aubyn [1899] AC 549 as follows:*

> *Committals for of court are ordinarily in cases where some contempt ex facie of the court has been committed, or for comments on cases pending in the courts.* ***However, there can be no doubt that there is a third head of contempt of court by the publication of scandalous matter of the court itself. Lord Hardwicke so lays down without doubt in the case of In re Read & Huggonson [1742]. He says, 'One kind of contempt is scandalising the court itself'.*** *The power summarily to commit for contempt of court is considered necessary for the proper administration of justice.*"

59. Ramly Ali, Azahar Mohamed, Rohana Yusuf, Tengku Maimun and Nallini Pathmanathan FCJJ had further stated, at paragraph 55, that the test was:

"*[W]hether, having regard to the facts and the context of the publication, the impugned statements pose a real risk of undermining public confidence in the administration of justice?*"

60. For this type of contempt, the Applicant must prove, on a beyond reasonable standard that:

60.1. *Actus reus* – the publication of the Comments was the intentional act of the Respondents, or either of them; and

[40] RBOA, tab 7

60.2. *Mens rea* – the Respondents intended to publish the Comments. In ***Leap Modulation***, this court concluded:

"*[61]* ***The only requirement is that the publication of the impugned articles is intentional.*** *It is not necessary to prove an intention to undermine public confidence in the administration of justice or the Judiciary. It does not matter whether the author or the publishers intended the result. It follows therefore, that it is no defence for the author of such impugned statements to claim that he did not know that the statements would have the effect of undermining public confidence or that he did not intend to erode public confidence in the administration of justice.*"

## *C. The intention to publish*

### *(i) What needs to be shown for intention*

61. With respect to *mens rea*, the Applicant seeks to wholly rely on the presumption of publication in section 114A, EA. For reasons explained below, the said provision does not assist the Applicant.

62. In ***Leap Modulation***, this court decided that there is no need to prove an intention to undermine public confidence in the administration of justice or the Judiciary. It is however necessary to prove intention to publish. The important question is therefore what amounts in law to be an intention to publish.

62.1. In ***Leap Modulation***, this Honourable Court adopted the reasoning in the decision of the Singapore Court of Appeal in ***Au Wai Pang v Attorney-General [2016] 1 SLR 992***. This court held:

"*[66] The attorney general also referred to the Singapore case of Au Wai Pang v Attorney-General [2016] 1 SLR 992; [2015] SGCA 61 where the Singapore Court of Appeal declined to follow Dhooharika.* ***The exposition by***

***Andrew Phang JA is meticulous and extensive. We can do no better than to accept and adopt the judicial reasoning set out there.***

*[67] In essence we concur that adopting a mens rea test which requires the prosecution to prove an intention to interfere with the administration of justice needs proof of the subjective intention of the alleged contemnor to so interfere. This is difficult to establish because it entails an inquiry into the inner workings of the alleged contemnor's mind."*

62.2. In ***Au Wai Pang***, the Singapore Court of Appeal adopted its earlier decision in ***Shadrake Alan v AG [2011] 3 SLR 778***. Andrew Phang JCA said:

*"[17] The applicable principles in relation to the offence of scandalising contempt were laid down by this court in Shadrake ([9] supra). They are as follows:*

*(a) The purpose of the law of scandalising contempt is to ensure that public confidence in the administration of justice is not undermined - its purpose is not to protect the dignity of judges (see Shadrake at [21]-[22]).*

*(b) The test for whether scandalising contempt is committed is whether there is a real risk that the impugned statement has undermined - or might undermine - public confidence in the administration of justice in Singapore (see Shadrake at [36]). This is subject to the caveat that where an impugned statement constitutes fair criticism, it is not contemptuous (see Shadrake at [80]-[86]).*

*(c)* ***The necessary mens rea is simply the intention (of the maker of the statement) to publish that statement. It is not necessary for the Prosecution to prove that the statement maker intended to undermine public***

***confidence in the administration of justice (see Shadrake at [23]).***

*[18] We affirm these principles and note further that although the requisite mens rea was seemingly narrowly defined in Shadrake (as pertaining only to the intention to publish), we caution against an overtly pedantic approach to delineating the "elements" of the offence. To be clear, what must be present in order to sustain a conviction for scandalising contempt is that: (a) the statement in question poses a real risk of undermining public confidence in the administration of justice; (b)* ***the respondent had intended to publish the statement in question****; and, importantly, (c) the respondent had not done so pursuant to fair criticism (and on the interrelationship between (a) and (c) above, see Shadrake at [86] as well as Gary K Y Chan, "Contempt of Court and Fair Criticism in Singapore: Shadrake Alan v Attorney General [2011] SGCA 26" (2011) 11 Oxford University Commonwealth Law Journal 197 at 202 and 205-206). This last-mentioned point relates to the element of fair criticism (and the attendant concepts of both good and bad faith, as well as the existence of a rational basis). It will be recalled that, in Shadrake (at [80] and [86]), this court preferred (without expressing a conclusive view) the approach which considered fair criticism as an ingredient of the offence which the Prosecution had to prove (as opposed to being a separate defence which placed the burden of proof on the respondent). We assume once again - for the purposes of the present appeal - the approach (albeit without arriving at a conclusive view) that fair criticism should go to liability and, in so doing, are taking the Appellant's case at its highest."*

62.3. Knowledge is a key element in publication. This was made clear by the ***McLeod v St Aubyn [1899] AC 549***[41], which was cited with approval by this court in ***Leap Modulation***. The Privy Council made it clear that a person

[41] RBOA, tab 25

cannot be held liable for contempt if he had no knowledge of the contemptuous statements. Lord Morris said, at p.561:

"*The appellant was not alleged to be the writer or author of the article or letter in the Federalist of March 31. He was not the printer or publisher of the newspaper. He was a mere agent and correspondent of it at St. Vincent.* ***On the evidence it must be assumed that he innocently, and without any knowledge of the contents, handed under the circumstances he stated the copy of the newspaper to Mr. Wilson. It would be extraordinary if every person who innocently handed over a newspaper or lent one to a friend, with no knowledge of its containing anything objectionable, could be thereby constructively but necessarily guilty of a contempt of a Court because the said newspaper happened to contain scandalous matter reflecting on the Court. The respondent arrived at the conclusion that the appellant was guilty of negligence in not making himself acquainted with the contents of the newspaper before the handing of it to Mr. Wilson. This assumes there was some duty on the appellant to have so made himself acquainted. That is a proposition which cannot be upheld. A printer and publisher intends to publish, and so intending cannot plead as a justification that he did not know the contents. The appellant in this case never intended to publish.*** *Their Lordships are of opinion the appellant was not under the circumstances of this case guilty of a contempt of Court. Their Lordships are also of opinion the apology offered by the appellant before his committal contains sufficient to have called on the respondent to stay his hand. It is an unconditional expression of regret for the act for which he was arraigned.*"

*(ii)* *Section 114A, EA inapplicable*

63. In this context, it is respectfully submitted that section 114A, EA lends no assistance in proving intentional publication. Section 114A(1), EA provides:

*"A person whose name, photograph or pseudonym appears on any publication depicting himself as the owner, host, administrator, editor or sub-editor,* ***or who in any manner facilitates to publish or re-publish the publication is presumed to have published or re-published the contents of the publication unless the contrary is proved****."*

(a) The presumption does not apply

64. Firstly, where there is evidence to prove the fact that is the subject of the presumption, the presumption does not apply. It is only where no such evidence exists that resort can be had to the presumption. In ***Public Prosecutor v Chia Leong Foo [2000] 6 MLJ 705***[42], Augustine Paul J (later FCJ) said, at pp.723-724:

"*Before analysing the scope of the presumption provisions* ***it must first be observed that penal provisions like these must be strictly construed and must not be extended beyond their clear meaning.***

*…*

*The clear meaning of the presumption provisions is that upon proof of certain facts another fact shall be presumed to have been proved. In the case of s 37(d) of the Act the presumption of possession and also of knowledge of the nature of the drug arises upon proof of custody or control of anything whatsoever containing the drug.The language of the subsection makes it clear that it is activated upon proof of custody or control of anything whatsoever containing the drug. The matters to be presumed are the additional elements necessary to constitute possession. Similarly, in the case of s 37(da) of the Act upon proof of possession of the drugs a presumption of trafficking arises without proof of any of the acts that constitute 'trafficking' as defined in s 2 of the Act. The applicability of the presumption provisions must be considered against this background.* ***Their language shows that they have been enacted to provide evidence of the facts to be presumed upon proof of the basic facts. It is these basic facts that raise the presumed facts. Thus they contemplate a situation where there is no evidence of the facts to be presumed.***

42

***Where there is such evidence and the presumption provisions are still invoked it would mean that what has been proved to exist has, at the same time, also been presumed to exist. This is illogical as it would amount to facts which have been proved as also having been presumed. This would go beyond the explicit words and object of the presumption provisions as they are designed to meet a situation when there is no evidence of the facts to be presumed. As I said earlier presumptions are only a special mode of proving facts which must otherwise be proved by evidence. It follows that where there is such other evidence presumptions cease to apply as such evidence, being not inadmissible, is capable of proving the very facts to be presumed. Presumptions are therefore restricted in their operation to instances where there is evidence only of the basic facts. The limitation on the use of the presumption provisions in the face of available evidence can be discerned if the ramifications of their use in such circumstances are considered. It must first be observed that reliance on the presumption provisions where there is available evidence of the facts to be presumed will be unfavourable to the accused.****"***

65. In the case at hand, there is no issue as to the 1st Respondent operating the On-Line News Portal which had uploaded the Comments. The assertion by the Applicant that the 1st Respondent operates the On-Line News Portal is not denied. Thus, the need for the presumption has been displaced.

66. As such, taking the Applicant's case at its highest, section 114A(1), EA would, if at all, only apply to the 1st Respondent which facilitated the publication of the Comments.

66.1. This merely gives rise to a presumption of the fact of publication (the *actus reus*), and not the intention to publish (the *mens rea*).

66.2. The said section does not affect the 2nd Respondent. He did not facilitate the publishing of the Comments. The first limb of section 114A(1) does not

apply as the 2nd Respondent's name, photograph or pseudonym does not appear on the Article web page in the On-line News Portal.

(b) Presumption of fact in publication, not intentional publication

67. In any event, the provision only allows for the presumption of fact in publication. It does not enable a presumption of intentional publication. It cannot be used to finally determine guilt or liability. Culpability must have its basis in specific and substantive provisions of the law.

68. In ***Tong Seak Kan & Anor v Loke Ah Kin & Anor [2014] 6 CLJ 904***[43], Abdul Rahman Sebli J (now FCJ) said, at p.913:

"*[22] Clearly the legislative scheme of s. 114A(2) is merely to presume or presuppose that the registered owner of the blog is the publisher of the publication and the presumption is rebuttable by proof to the contrary.* ***It is by no means an irrebuttable presumption and neither does it finally determine the publisher's liability or guilt. No one can be found liable in a civil claim nor guilty in a criminal prosecution on account of s. 114A(2) standing alone unless of course there is total failure of rebuttal.***"

69. Mariette Peters (as she then was)[44] wrote in '*Section 114A A* Presumption *of Guilt?*' [2012] 6 MLJ ciii:

"*To conclude that s 114A is a presumption of guilt, however, may not be entirely accurate. This is because firstly, it is a presumption that may apply also to civil cases, thus it is a misconceived notion to conclude that it automatically presumes guilt.*

***Secondly, s 114A of the Evidence Act is not a provision that creates an offence in itself. It merely presumes the identity of the person responsible for the publication and the very act of publishing alone is neither an offence, nor does***

[43] RSBOA, tab 11
[44] Now Judicial Commissioner

***it attract liability. Culpability for such publication must have its basis in specific and substantive provisions of the law, which may require the burden to prove other elements beyond a reasonable doubt before a finding of liability or guilt may be made.*** *A charge in criminal defamation for instance, will require the prosecution to further prove that the publication is defamatory and that the publisher had the intention to harm the reputation of the person of whom the publication is made.*"

(c) Section 114A intended to address the mischief posed by internet anonymity

70. Further, section 114A, EA was intended to be applied in a narrow sense.

71. Section 114A was introduced to address the mischief posed by internet anonymity "*since it is this very fact that makes it extremely difficult, if not impossible, to trace the alleged offender*"[45]. In moving the bill for the Evidence (Amendment) (No.2) Act, Dato' Seri Mohamed Nazri Abdul Aziz (the then Minister in Prime Minister's Department) said:[46]

"*Perkembangan yang pantas dalam penggunaan internet dan teknologi maklumat pada masa kini telah membawa kepada berleluasanya jenayah siber dan kesalahan jenayah yang dilakukan melalui internet. Sehubungan dengan itu, kerajaan telah mengenal pasti bahawa Akta Keterangan 1950 perlu dipinda bagi* ***menangani isu ketanpanamaan internet iaitu, dengan izin, internet anonymity****.*

72. A provision of law giving rise to a presumption can only be understood as serve as a means to proving the fact presumed where this was an ingredient of an offence or element of a cause of action. In ***Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169***, Mohamed Azmi SCJ said, at p.171:

[45] Mariette Peters, '*Section 114A A Presumption of Guilt?*' [2012] 6 MLJ ciii, cv, RSBOA, tab 17
[46] RSBOA, tab 12

*"In the course of the prosecution case, the prosecution may of course rely on available statutory presumptions to prove one or more of the essential ingredients of the charge."*

73. Section 114A is intended to apply to cases where publication cannot be proved by evidence of publication in cases of internet anonymity.

*(iii)* *No proof of intention/Presumption rebutted*

74. As explained above, the *mens rea* requirement requires the Applicant to show that the Respondents knew about the Comments.

(a) Defamation cases

75. In *Borrie & Lowe: The Law of Contempt* (4th edn, 2010)[47], the learned editors wrote, at p.615:

"*The position of internet service providers and website owners is a matter of much controversy, however, and the law remains very uncertain.* ***Given the lack of case law in relation to contempt and the internet, it is useful to look at the approach being taken to electronic media in other areas of the law for some guidance.***"

76. The defamation cases concerning publication on the internet from around the Commonwealth have provided some assistance in discerning whether a party can be treated in law as a publisher responsible for third party comments. It must be borne in mind that these cases are not determined on the criminal standard, and the principles would apply with even more force where contempt proceedings are concerned.

77. The learned authors of '*Alridge, Eady & Smith on Contempt*' (5th edn, 2017) cautioned, at p.326:[48]

[47] RBOA, tab 35
[48] RBOA, tab 36

"*Although in some ways it is illuminating to compare the law of defamation with that of contempt, in the context of responsibility for publication,* ***it has to be remembered that there are important distinctions in the nature of the respective wrongs, not least because liability for publication contempt is criminal in character***."

78. As a general rule, the fact that a party provides a facility for members of the public to comment on material published does not in itself impose legal responsibility on that party for third party comments. Providing a facility is not the same as facilitating or enabling as these latter words require intentional participation.

79. In ***Totalise plc v Motley Fool Ltd and another [2001] IP & T 764***[49], the Defendant managed a discussion board that allowed members to upload comments. The Plaintiff claimed that it had been defamed by third party comments. Owen J said, at p.769:

"*The journalist is responsible at law for the material which he publishes.* ***The defendants take no such responsibility. They exercise no editorial control. They take no responsibility for what is posted on their discussion boards. It is noteworthy in this context that the postings on the second defendant's boards carry the statement on behalf of the second defendant:***

> *'This content above represents the opinions of the author and does not represent the opinions of Interactive Investor International plc or its affiliates. You should be aware that the other participants of this discussion group are strangers to you and may make statements which may be misleading, deceptive or wrong.'*

***The defendants simply provide a facility by means of which the public at large is able publicly to communicate its views. In my judgment, they are not***

[49] RBOA, tab 29

***responsible for the publication of such material within the meaning of the section.***"

80. Were it otherwise, even internet service providers – who provided access to the internet – would be legally responsible. In ***Bunt v Tilley and others [2007] 1 WLR 1243***[50] such a claim was rejected. Eady J said, at p.1246:

"*9 When considering the Internet, it is so often necessary to resort to analogies which, in the nature of things, are unlikely to be complete. That is because the Internet is a new phenomenon. Nevertheless, an analogy has been drawn in this case with the postal services. That is to say, ISPs do not participate in the process of publication as such, but merely act as facilitators in a similar way to the postal services. They provide a means of transmitting communications without in any way participating in that process.*"

81. For there to be legal responsibility, there must have been awareness or an assumption of responsibility such as to show knowing involvement. Knowledge is key to responsibility. Eady J said, at p.1249:

"*21 In determining responsibility for publication in the context of the law of defamation,* ***it seems to me to be important to focus on what the person did, or failed to do, in the chain of communication. It is clear that the state of a defendant's knowledge can be an important factor. If a person knowingly permits another to communicate information which is defamatory, when there would be an opportunity to prevent the publication, there would seem to be no reason in principle why liability should not accrue. So too, if the true position were that the applicants had been (in the claimant's words) responsible for "corporate sponsorship and approval of their illegal activities****".*

[50] RBOA, tab 30

*22* ***I have little doubt, however, that to impose legal responsibility upon anyone under the common law for the publication of words it is essential to demonstrate a degree of awareness or at least an assumption of general responsibility, such as has long been recognised in the context of editorial responsibility.*** *As Lord Morris commented in McLeod v St Aubyn [1899] AC 549, 562: "A printer and publisher intends to publish, and so intending cannot plead as a justification that he did not know the contents. The appellant in this case never intended to publish." In that case the relevant publication consisted in handing over an unread copy of a newspaper for return the following day.* ***It was held that there was no sufficient degree of awareness or intention to impose legal responsibility for that "publication".***

*23 Of course, to be liable for a defamatory publication it is not always necessary to be aware of the defamatory content, still less of its legal significance. Editors and publishers are often fixed with responsibility notwithstanding such lack of knowledge.* ***On the other hand, for a person to be held responsible there must be knowing involvement in the process of publication of the relevant words . It is not enough that a person merely plays a passive instrumental role in the process****. (See also in this context Emmens v Pottle (1885) 16 QBD 354, 357, per Lord Esher MR.)*"

82. As explained by the New Zealand Court of Appeal in ***Murray v Wishart [2014] 3 NZLR 722***[51], it is necessary to show actual knowledge, as opposed to constructive knowledge. O'Regan P and Hellen France J said, at p.752:

"*[144]* ***These concerns lead us to conclude that the actual knowledge test should be the only test to determine whether a Facebook page host is a publisher.*** *That is consistent with at least some of the authorities to which we have referred, (Sadiq v Baycorp (NZ) Ltd,95 A v Google New Zealand Ltd96 and Davison v Habeeb97) and with the Law Commission's analysis.98 It conforms with the approach in Byrne v Deane, which is, we believe, the most appropriate analogy and*

[51] RBOA, tab 31

*with the decision in Urbanchich v Drummoyne Municipal Council. It makes the liability risk of a Facebook page host no greater than that of an organiser of a public meeting – another appropriate analogy, in our view.* ***It is consistent with the right of freedom expression in the Bill of Rights, bearing in mind the unavailability of the innocent dissemination defence. And it provides a situation where liability for defamation is not imposed on the basis of negligence****."*

83. The importance of knowledge was underscored by Eady J in ***Metropolitan International Schools Ltd (trading as SkillsTrain and/or Train2Game) v Designtechnica Corp (trading as Digital Trends) and others [2010] 3 All ER 548***[52] ***("UK Google Case")***, where he said, at p.562:

"*[54] The next question is whether the legal position is, or should be, any different once the third defendant has been informed of the defamatory content of a 'snippet' thrown up by the search engine. In the circumstances before Morland J, in Godfrey v Demon Internet Ltd [1999] IP & T 232, [1999] 4 All ER 342, [2001] QB 201,* ***the acquisition of knowledge was clearly regarded as critical. That is largely because the law recognises that a person can become liable for the publication of a libel by acquiescence; that is to say, by permitting publication to continue when he or she has the power to prevent it. As I have said, someone hosting a website will generally be able to remove material that is legally objectionable. If this is not done, then there may be liability on the basis of authorisation or acquiescence.***"

84. Pertinently, Eady J took into consideration Google Inc's 'notice and take down' procedure in determining whether there had been knowing involvement. Eady J said, at p.563:

"*[58] It may well be that the third defendant's 'notice and take down' procedure has not operated as rapidly as Mr Browne and his client would wish, but it does not follow as a matter of law that between notification and 'take down' the third*

[52] RBOA, tab 32

*defendant becomes or remains liable as a publisher of the offending material. While efforts are being made to achieve a 'take down' in relation a particular URL, it is hardly possible to fix the third defendant with liability on the basis of authorisation, approval or acquiescence."*

85. In ***Tamiz v Google Inc [2013] 1 WLR 2151***[53], a claim for defamation was made against the defendant which hosts blogs provides the tool for the creation of blogs. It also permits the use of its URL if required. The defendant was notified of defamatory statements in an anonymous blog hosted by it. The defendant forwarded the complaint to the blogger, who removed the comments three days later.

85.1. The central question that arose for determination was whether the defendant could be regarded as a publisher in law. Like the On-Line News Portal, the defendant has a policy for its users. It makes clear that is not involved in the creation of blog contents and *does not vet the same*. It has a report feature. It will remove comments which have been adjudicated by a court to be defamatory. In this case, it went one step further than its own policy by having determined on its own accord that the comments were defamatory. It then asked the blogger to remove the comments (see paragraph 13).

85.2. The court ultimately concluded that the defendant could not be regarded as a primary or secondary publisher. Richard LJ said, at p.2162:

*"25 By the provision of that service Google Inc plainly facilitates publication of the blogs (including the comments posted on them).* ***Its involvement is not such, however, as to make it a primary publisher of the blogs. It does not create the blogs or have any prior knowledge of, or effective control over, their content. It is not in a position comparable to that of the author or editor of a defamatory article. Nor is it in a***

[53] RBOA, tab 26

***position comparable to that of the corporate proprietor of a newspaper in which a defamatory article is printed. Such a corporation may be liable as a primary publisher by reason of the involvement of its employees or agents in the publication****. But there is no relationship of employment or agency between Google Inc and the bloggers or those posting comments on the blogs: such people are plainly independent of Google Inc and do not act in any sense on its behalf or in its name. The claimant's reliance on principles of vicarious liability or agency in this context is misplaced.*

*26* ***I am also very doubtful about the argument that Google Inc's role is that of a secondary publisher, facilitating publication in a manner analogous to a distributor. In any event it seems to me that such an argument can get nowhere in relation to the period prior to notification of the complaint. There is a long established line of authority that a person involved only in dissemination is not to be treated as a publisher unless he knew or ought by the exercise of reasonable care to have known that the publication was likely to be defamatory****: Emmens v Pottle (1885) 16 QBD 354, 357–358; Vizetelly v Mudie's Select Library Ltd [1900] 2 QB 170, 177–180; Bottomley v FW Woolworth & Co Ltd (1932) 48 TLR 521. There are differences in the reasoning in support of that conclusion but the conclusion itself is clear enough. The principle operated in Bottomley's case to absolve Woolworth from liability for publication of a defamatory article in a consignment of remaindered American magazines that it distributed: the company did not check every magazine for defamatory content, there was nothing in the nature of the individual magazine which should have led it to suppose that the magazine contained a libel, and it had not been negligent in failing to carry out a periodical examination of specimen magazines****. Since it cannot be said that Google Inc either knew or ought reasonably to have known of the defamatory comments prior to notification of the claimant's complaint, that line of authority tells against viewing Google Inc as a secondary publisher prior to such notification. Moreover, even if it were to be so regarded, it would have an unassailable defence during that period under section 1 of the 1996 Act, considered below.***"

85.3. The court however concluded that knowing involvement could give rise to legal responsibility. Richard LJ said, at p.2165:

> *"34 Those features bring the case in my view within the scope of the reasoning in Byrne v Deane [1937] 1 KB 818.* ***Thus, if Google Inc allows defamatory material to remain on a Blogger blog after it has been notified of the presence of that material, it might be inferred to have associated itself with, or to have made itself responsible for, the continued presence of that material on the blog and thereby to have become a publisher of the material****."*

86. In ***Oriental Press Group Ltd & Anor v Fevaworks Solutions Ltd [2013] 5 HKC 253***[54], the respondent was a provider, administrator and manager of a website which hosts one of the most popular internet discussion forums in Hong Kong. It was sued in respect of defamatory statements posted by third-party users. Consistent with the approach taken by the English courts, knowledge was a significant factor for liability. Ribeiro PJ said, at pp.273, 275 and 279:

> "*[56] The distinction between the first or main publishers of a work which contains a libel49 and subordinate publishers of that work, central to the innocent dissemination defence, was developed in the era of mass communications in the print medium.* ***As we have seen, the defence was designed to relieve from the strict publication rule, persons such as wholesalers, distributors, booksellers, librarians, newsagents and the like. While such persons came within the very broad traditional concept of 'publication' since they intentionally participated in distribution of the work, they were relieved of liability if they could show that they did not know and could not with reasonable care have known the defamatory content of the article they were disseminating.***
>
> *…*

[54] RBOA, tab 34

*[63]* ***Plainly, if a defendant knew the content of a defamatory article and authorised or participated in its publication, that defendant would be liable as a main publisher. As Eady J pointed out in Bunt v Tilley, 'It is clear that the state of a defendant's knowledge can be an important factor' – a point to which I shall return. But in the present case, it is not in dispute that the respondents were unaware of the offending words until some time after they had been published on the forum…***

…

*[78] And as laid down by Romer LJ in Vizetelly****, to avail himself of the defence, the defendant must establish '… that he was innocent of any knowledge of the libel contained in the work disseminated by him.'***

*[79]* ***The knowledge criterion is also reflected in the traditional inclusion of printers as within the class of first or main publishers – and in the more recent tendency to question whether such treatment of printers ought to be maintained.***"

87. Pertinently, a subordinate publisher cannot be held responsible if, upon acquiring knowledge of the defamatory statement, he promptly took all reasonable steps to remove the offending content from circulation as soon as reasonably practicable. Ribeiro PJ said, at p.285:

"*[97] In my view, it is consistent with the policy underpinning the defence that the same standard of reasonableness should be applied in a situation of acquired knowledge.* ***A subordinate publisher should be afforded the continued protection of the defence if he proves that upon becoming aware of such content, he promptly took all reasonable steps to remove the offending content from circulation as soon as reasonably practicable.***"

88. It is not possible to conclude on the material before the court that the Respondents encouraged the publication of the Comments for financial gain or otherwise.

*(iv)* *Control*

89. In the Applicant's written submission filed in opposition of Enclosure 22, the Applicant claimed that the Respondents had had control over the uploading of the Comments. Respectfully, this submission is misconceived.

90. It is necessary to appreciate the element of "control" in the legal sense.

91. The decision of the High Court in ***Stemlife Bhd v Bristol Myers Squibb (M) Sdn Bhd & Anor [2010] 3 CLJ 251***[55] is instructive. There, citing ***Bunt (supra)*** with approval, Zabariah Mohd Yusof J (as she then was) said:

"*[24] First and foremost I would like to stress that the nature of statements printed in media like newspaper or books is of a different nature as compared to statements which is posted in the internet or websites.* ***The difference is not as to the result after it is printed but more so at the beginning before the statement or matter is put in printed form.*** *Take for instance a matter that is to be printed in books or newspapers, the editor or publisher would have the opportunity to edit or vet the material first before it is put in printed form. The issue of whether the editor or publisher did really read or edit the material, does not matter, but what is of importance is that he would have the opportunity to ensure that before it is put in printed form, the words or the statement do not offend others. Thus the editor or the publisher would have notice or at least knows what is about to be printed.* ***Compare this with the situation of an individual who posts his/her views or statements on to the website, which more often than not is not being subjected to editing; the owner or proprietor of the website would not be in the know of what is to be put up on the website until it is on the website, which by that time the damage is already done. Now, can the owner or proprietor of a weblog/***

[55] RSBOA, tab 15

***website be responsible for such acts of individuals when there is no advance knowledge or notice been made available to him as to the defamatory statements about to be made on to his website.***

*[25]* ***My considered view on this is that as in the example of printing of materials in the newspapers or books, there is some element of control which is present in the publisher or the editor, whereas there is none as in internet service providers such as the 1st defendant. Here we are talking about before the words or statements are to be printed. No doubt the 1st defendant can remove any postings on the website, however that is after it has been put on the website, not before. This is the sort of control that is available to the 1st defendant.***

*[26]* ***The manner of postings being put onto a website is that it appears directly on the website at the click of a button. This is where the 1st defendant loses its control vis-a-vis as to what is to be put on the website.***"

92. For there to be publication, there must be some positive overt act of dissemination of the alleged contemptuous remarks, of which the defendant had control over the circulation of the same. Zabariah Mohd Yusof J said:

"*[44]* ***The principle that can be derived from the cases above is that to amount to publication there must be:***

*a)* ***some positive overt act on the part of the defendant in disseminating the alleged defamatory remarks or statements****;*

b) ***the defendant must have control on the circulation of the statements or words complained of***"

93. One could not be deemed as a publisher merely through the passive role of facilitating the circulation of the alleged contemptuous remarks. Zabariah Mohd Yusof J said:

"*[46]* ***The 1st defendant is merely an internet service provider which performed a passive role in facilitating postings on the internet and thus cannot be deemed a publisher at common law****, as was illustrated in the case of Bunt v. Tiley & Ors [2006] 3 All ER 336 where it was held that:*

> ***An internet service provider which performed no more than a passive role in facilitating postings on the internet could not be deemed to be a publisher at common law. It was essential to demonstrate a degree of awareness or at least an assumption of general responsibility, such as had long been recognised in the context of editorial responsibility, in order to impose legal responsibility under the common law for the publication of words. Although it was not always publication, there had to be knowing involvement in the process of publication of the relevant words. It was not enough that a person had played merely a passive instrumental role in the process.*** *On the evidence in the instant case the claimant had no realistic prospect of being able to establish that any of the internet service provider defendants had, in any meaningful sense, knowingly participated in the relevant publications…*

*[47] The 1st defendant in their submission had cited American cases. I am minded to exercise caution when citing American cases because of the 1st amendment which has resulted in a substantial divergence of approach between the American and the English Law on defamation cases. Nevertheless I am of the view that those cases cannot be set aside entirely considering the development of the internet era which is of recent origin and the present case law authorities on such matter which is certainly lacking. As indicated by Morland J in Godfrey v. Demon Internet Ltd [1999] 4 All ER 342, those American decisions are "educative and instructive as to the workings of the internet and the problems which arise when defamatory material finds its way into the internet".*

*[48] Hence, in the American case of Cubby v. CompuServe Inc [1991] 776 F.Supp 135 where the court ruled that CompuServe's editorial control over the contents of*

*the forum were no more than that of a public library or book store. It would not be feasible for CompuServe to examine every posting it carries for potential defamatory statements.*

*[49] The New York Court of Appeal in the case of Lunney v. Prodigy Services Co which was decided on 2 December 1999 (unreported) ruled that* ***even if Prodigy were to exercise the power to exclude certain vulgarities from the text of certain bulletin board messages, this would not alter its passive character in the "millions of other messages in whose transmission it did not participate". It was held that Prodigy was not the publisher of the bulletin board messages.***

*[50] The plaintiff submits that the suggestion by the defendant in its submission that defamatory articles will always be vulgar and that libelous matters on the 1st defendant's website (over which the 1st defendant has ownership and editorial control) will similarly be reported and that this, if done, constitutes not just a defence but a bar to any claim for libel, is unsubstantiated by any authority. I think the plaintiff had misconstrued the submissions of the 1st defendant on this point.* ***The community reporting and the "keyword alerts" are ways in which the 1st defendant exercise control on what is being posted onto its website. There is nowhere in the submissions of the 1st defendant that states that defamatory publications will always be vulgar.***"

94. Zabariah Mohd Yusof J further referred to, and cited with approval, the decision of the Supreme Court of Canada in ***Crookes v Newton [2011] 3 SCR 269***[56]. There, the defendant was the owner and operator of a website that published articles on various political issues, including freedom of speech and Internet control. The defendant published an article on his website which contained hyperlinks to material that allegedly defamed the claimant. The hyperlinks linked to content on websites produced independently of the defendant's own site. The question before the Supreme Court of Canada was whether hyperlinking to defamatory material on a different website constitutes publication of the defamatory material.

[56] RSBOA, tab 14

*"26 A reference to other content is fundamentally different from other acts involved in publication.* ***Referencing on its own does not involve exerting control over the content.*** *Communicating something is very different from merely communicating that something exists or where it exists.* ***The former involves dissemination of the content, and suggests control over both the content and whether the content will reach an audience at all, while the latter does not. Even where the goal of the person referring to a defamatory publication is to expand that publication's audience, his or her participation is merely ancillary to that of the initial publisher: with or without the reference, the allegedly defamatory information has already been made available to the public by the initial publisher or publishers' acts. These features of references distinguish them from acts in the publication process like creating or posting the defamatory publication, and from repetition.***

*27 Hyperlinks are, in essence, references. By clicking on the link, readers are directed to other sources. Hyperlinks may be inserted with or without the knowledge of the operator of the site containing the secondary article. Because the content of the secondary article is often produced by someone other than the person who inserted the hyperlink in the primary article, the content on the other end of the link can be changed at any time by whoever controls the secondary page.* ***Although the primary author controls whether there is a hyperlink and what article that word or phrase is linked to, inserting a hyperlink gives the primary author no control over the content in the secondary article to which he or she has linked.*** *(See David Lindsay, Liability for the Publication of Defamatory Material via the Internet (2000), at pp. 14 and 78-79; Collins, at paras. 2.42 to 2.43 and 5.42.)*

*28* ***These features – that a person who refers to other content generally does not participate in its creation or development – serve to insulate from liability those involved in Internet communications in the United States****: see Communications Decency Act of 1996, 47 U.S.C. s.230 (1996); see also Jack M. Balkin, "The Future of Free Expression in a Digital Age" (2009), 36 Pepp. L. Rev. 427, at pp. 433-34; Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997); Barrett v.*

*Rosenthal, 146 P.3d 510 (Cal. 2006); Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157 (9th Cir. 2008).*

*…*

*30 Hyperlinks thus share the same relationship with the content to which they refer as do references. Both communicate that something exists, but do not, by themselves, communicate its content. And they both require some act on the part of a third party before he or she gains access to the content.* ***The fact that access to that content is far easier with hyperlinks than with footnotes does not change the reality that a hyperlink, by itself, is content-neutral – it expresses no opinion, nor does it have any control over, the content to which it refers.***"

95. The court recognised that hyperlinks are an important element of the Internet's utility such that any attempt to subjecting them to the traditional publication rule would have a chilling effect on the freedom of expression. Abella J said, at pp.288-289:

"*36 The Internet cannot, in short, provide access to information without hyperlinks.* ***Limiting their usefulness by subjecting them to the traditional publication rule would have the effect of seriously restricting the flow of information and, as a result, freedom of expression. The potential "chill" in how the Internet functions could be devastating, since primary article authors would unlikely want to risk liability for linking to another article over whose changeable content they have no control. Given the core significance of the role of hyperlinking to the Internet, we risk impairing its whole functioning. Strict application of the publication rule in these circumstances would be like trying to fit a square archaic peg into the hexagonal hole of modernity.***"

(a) Application to contempt cases

96. It is respectfully submitted that the principles stated above (in so as they pertain to intentional publications) are equally relevant to determining the mental

element in "scandalizing" i.e. intentional publication They serve to demonstrate that nothing short of actual knowledge is sufficient.

97. The undisputed facts in Part IV above make it clear that the Respondents had no knowledge of the Comments let alone being knowingly involved in their publication. That publication was the consequence of the automatic uploading of comments that the On-Line News Portal allowed for and which was necessary to ensure that there was no censorship as required under the Code.

98. The 1st Respondent immediately removed them upon being made aware.

***D. Actus reus***

99. Even if section 114A(1), EA applies to the 1st Respondent to presume the fact of publication, that presumption has been rebutted by the undisputed facts.

99.1. The Respondents reiterates the legal principles on defamation cases above and need to show actual knowledge.

99.2. The Respondents also reiterate the undisputed facts in Part IV above.

***E. Section 98(2), CMA as a defence***

100. Section 98, CMA provides:

*"(1) Subject to section 99, compliance with a registered voluntary industry code shall not be mandatory.*

*(2)* ***Compliance with a registered voluntary industry code shall be a defence against any prosecution, action or proceeding of any nature, whether in a court or otherwise, taken against a person (who is subject to the voluntary industry code) regarding a matter dealt with in that code****."*

101. The CMA does not define "action" or "proceeding". However, "proceeding" is widely defined under the Courts of Judicature Act 1964 to mean "any proceeding whatsoever of a civil or criminal nature and includes an application at any stage of a proceeding".

102. As noted above, the 1st Respondent has complied with the Code at all material times. The 1st Respondent has a complete defence under section 98(2), CMA.

## VI Conclusion

103. In view of the matters above:

103.1. There is no question of the 2nd Respondent being involved in any manner. It is respectfully submitted that Enclosure 19 should be dismissed against him.

103.2. There is no question of the 1st Respondent having intentionally published the Comments. It is respectfully submitted that Enclosure 19 should be dismissed against it.

Dated this 10th day of July 2020

Surendra Ananth

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**Counsel for the Respondents**

Malik Imtiaz Sarwar

Surendra Ananth

Khoo Suk Chyi

This **RESPONDENTS' WRITTEN SUBMISSION (REVISED) (ENCLOSURE 19)** is filed by Messrs Surendra Ananth, solicitors for the Respondents named above with its address for service at No.4, Dalaman Tunku, Bukit Tunku, 50480 Kuala Lumpur.

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