



**CONSUMERS
FEDERATION
OF AUSTRALIA**

Developing and promoting
the consumer interest

11 April 2019

By email: policy@justice.nsw.gov.au

Review of Model Defamation Provisions
c/o Justice Strategy and Policy Division
NSW Department of Justice
GPO Box 31
SYDNEY NSW 2001

Dear Madam/Sir

Review of Model Defamation Provisions

The Consumers' Federation of Australia (**CFA**) warmly welcomes the opportunity to provide a submission to the Discussion Paper released by the Council of Attorneys-General as part of its Review of Model Defamation Provisions.

This submission focuses on clause 9 of the Model Defamation Provisions which restricts the ability of corporations from initiating legal action for defamation. CFA strongly supports the retention of this provision and considers that the exemption for corporations with fewer than 10 employees should be removed.

About CFA

CFA is the peak body for consumer organisations in Australia. CFA represents a diverse range of consumer organisations, including most major national consumer organisations. Our organisational members and their members represent or provide services to millions of Australian consumers.

CFA's member organisations include membership-based organisations, organisations that provide information, advice, counselling or assistance to consumers, and organisations that identify regulations or market features that harm consumer interests and propose solutions.

A list of CFA's organisational members is available at:

<http://consumersfederation.org.au/members/cfa-organisational-members/>.

Corporations seeking to silence public criticism

CFA is concerned about the practice of corporations in Australia taking steps to suppress consumer criticism or commentary.

This was an issue raised in the context of the Review of the Australian Consumer Law in 2017, relating to the use of non-disclosure clauses or agreements as part of a settlement of a consumer complaint.¹ Such clauses can prevent consumers from discussing their problem publicly and with regulators, limiting the amount of public information about common concerns (including product safety concerns).

¹ CAANZ, Final Report, Review of Australian Consumer Law, page 84-85 available at: https://cdn.tspace.gov.au/uploads/sites/86/2017/04/ACL_Review_Final_Report.pdf

CFA is also aware of the practice of some corporations using legal threats, including in relation to defamation, to stifle consumer criticism about a businesses' products or practices. This can particularly affect consumer organisations, including members of CFA, who are attempting to inform consumers and the public more broadly about their concerns.

The United Nations Guidelines on Consumer Protection² states that a key consumer right is "access to adequate information to enable consumers to make informed choices according to individual wishes and needs". Consumers should have access to a wide variety of information to inform their purchasing decisions, and denial of such information can not only detract from their rights but effect the effectiveness of the market more broadly.

Causes of action for defamation

CFA strongly supports the continued exclusion of for-profit corporations to be able to sue for defamation pursuant to clause 9 of the Model Defamation Provisions. We note that the recent NSW Statutory Review of the *Defamation Act 2005* (NSW), which applies the Model Defamation Provisions in the NSW, found that the exclusion remains appropriate.³

There are a number of reasons to exclude corporations from being able to take legal action for defamation.

First, reputation is rightly considered a personal right and thus should only be available to natural persons. In this way, it is similar to the right of privacy. In its inquiry into privacy law, the Australian Law Reform Commission found it was not appropriate to extend privacy protection to corporations and other commercial entities.⁴ It noted that corporations are obliged to operate in a relatively transparent way.

Second, corporations have a range of other causes of action to protect themselves, including the tort of injurious falsehood, as well as protections under the *Competition and Consumer Act 2010* (Cth) (for example, the prohibitions on misleading and deceptive conduct and misrepresentations). The tort of injurious falsehood is probably the most relevant action. This action, however, involves a number of hurdles that appropriately protects a defendant. For example, actual loss must be provided in injurious falsehood (damage to reputation in defamation is presumed) and malice needs to be established (there is strict liability in defamation).⁵

The most important reason though, as described above, is that corporations can use defamation actions as a means of silencing criticism of corporate products or conduct. Such silencing impedes realisation of fundamental consumer rights. We also note that corporations generally have the resources and opportunities to engage in marketing, publicity and 'reputation management' as a means of protecting their reputation.⁶

Exemption for smaller businesses

CFA considers that the exemption in clause 9 for corporations with less than ten employees is no longer justified. The employee threshold is arbitrary and lacks a policy justification. In the digital economy, it is increasingly common practice for businesses to use a range of different contractors from service companies, overseas agencies and commission-incentivised external sales staff. This means that businesses can be quite substantial in nature, yet have ten or less employees.

Moreover, many of the arguments that apply to larger corporations apply similarly to smaller corporations. In particular, consumers have the right to be informed about the products and practices of smaller businesses in the same way that they do in relation to larger businesses.

In the experience of CFA members, it can be smaller corporations that are quick to initiate legal threats of defamation, having a less sophisticated approach to managing their reputation. Such

² United Nations Guidelines for Consumer Protection, available at: https://unctad.org/en/PublicationsLibrary/ditccplpmisc2016d1_en.pdf.

³ NSW Department of Justice, Statutory Review: Defamation Act 2005, paragraph 2.1, available at: <https://www.justice.nsw.gov.au/justicepolicy/Documents/defamation-act-statutory-review-report.pdf>

⁴ ALRC, For Your Information: Australian Privacy Law and Practice, Report 108, paragraphs 7.58 -7.60, available at: <https://www.alrc.gov.au/publications/7.%20Privacy%20Beyond%20the%20Individual/corporations-and-commercial-entities>.

⁵ See *Orion Pet Products v RSPCA* [2002] FCA 860.

⁶ SCAG Working Group of State and Territory Officers, Proposal for Uniform Defamation Laws, July 2004, paragraph 4.5.

businesses can benefit from incentives to make threats, on the basis that the cost of doing so is tax deductible. For the consumer or consumer organisation that is threatened, however, they will likely not have the resources to defend themselves legally, resulting in a retraction or apology. Perhaps more concerningly, they will face the incentive of not making the representation to begin with, even if it is justifiable or true. This in turn limits the rights of consumers to information and can serve to benefit businesses that engage in unfair or unethical conduct.

If it remains desirable to have a threshold which allows smaller businesses to sue for defamation, then we considered that other measures should be used to define relevant businesses. For example, gross revenue of less than \$200,000 would seem far more appropriate, as this is more similar to the work of an individual.

Please contact me at
questions about this submission.

should you have any

Yours sincerely

A handwritten signature in black ink that reads "Gerard Brody". The signature is written in a cursive, flowing style.

Gerard Brody
Chair