glassdoor

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September 14, 2022

VIA ELECTRONIC MAIL

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

Re: Part A exposure draft amendments to the MDAPs

Dear Sir or Madam:

I write on behalf of Glassdoor, Inc. ("Glassdoor").

Glassdoor is committed to supporting safe online spaces and greatly appreciates the opportunity to provide this submission in response to the draft Part A Model Defamation Amendments Provisions ("draft Part A MDAPs"), as well as the accompanying Background Paper and Summary Paper.

Executive summary

Founded in the U.S. in 2007, Glassdoor is a platform for employees to share their authentic workplace experiences. The Glassdoor platform provides job seekers with critical and otherwise hard to find information about prospective places to work. Information about what it is actually like to work at a company was traditionally hard to obtain, and the workplace by its very nature is not a level playing field.

By hosting anonymous workplace reviews and enabling greater workplace transparency, Glassdoor empowers job seekers with valuable information as they consider a critical decision greatly impacting their lives: where to work. Providing this information supports job seekers in Australia and worldwide in finding jobs and companies they will love. And, in our experience, employees often would not be willing or able to post frank, honest and informative workplace experience reviews without protection from fear of unfair retribution or retaliation. Anonymity for the authors of workplace experience reviews is critical to providing this protection.

The ability to post workplace reviews anonymously has a dual purpose: Anonymity enables reviews that are authentic, transparent and honest; it also prevents employees from being identified and thereby being put at risk of retaliation or reprisals from potentially vengeful employers in the wake of unflattering or negative reviews. Simply put, platforms like Glassdoor work because users feel sufficiently protected - on account of anonymity - to share honest and candid reviews of their workplace experiences from which others can and do benefit.

Glassdoor considers that the draft Part A MDAPs represent an important step in the direction of facilitating free speech on the internet, including about employees' workplace experiences. However, Glassdoor also respectfully suggests several changes.

In summary:

1. Glassdoor considers that in certain contexts, hosts of online review sites should have the benefit of a specific qualified privilege defence to reflect the public benefits of such sites.
2. We support **recommendations 1 and 2.** Some of the drafting issues raised below are relevant to these proposals.
3. As to **recommendations 3A and 3B**, Glassdoor is supportive of both Model A and Model B, and makes some suggested amendments.
4. We do not support **recommendation 4.**
5. We do not support **recommendation 5**, and consider that refinements are required if it is to be enacted.
6. We are strongly supportive of **recommendation 6.**

In this letter, we provide background information about Glassdoor and explain why preserving and protecting user anonymity is important for us and our users. We also provide observations in relation to the current drafting of the draft Part A MDAPs.

About Glassdoor

Glassdoor was founded in 2007. We are an online platform that enables employees to share their personal and authentic experience of what it is really like to work at an organisation. Glassdoor users share their opinions on an anonymous basis by posting job reviews and salary information on the Glassdoor platform. Over half of Glassdoor's traffic is from international sources, including Australia. These workplace experience reviews and salary insights - of which there currently are over 117 million for some 2.3 million companies worldwide - provide an unprecedented, authentic and candid look at what workplace conditions and company cultures are really like from the perspective of those who know a company best: the people who work there.

A Glassdoor workplace experience review includes a user's rating of multiple workplace attributes from 1-to-5 stars, as well as a lengthier written review component inviting contributors to describe the "pros" and "cons" of their workplace and to provide advice to their employer. These reviews are submitted by people around the world, including in Australia, and can be viewed by anyone who accesses Glassdoor's website. Access to the Glassdoor website is free of charge and, because we recognise there are often two sides to a story, companies are also able and encouraged to respond to any review (also free of charge). Company responses to user reviews are also publicly available.

Relevance of the draft Part A MDAPs to Glassdoor

Glassdoor performs an important social and economic role. It encourages good employer behaviour by providing a platform on which employees can provide authentic and candid feedback describing their workplace experiences. It enhances the efficiency of the employment market by redressing information imbalances that can otherwise exist between employers and employees. Glassdoor also provides job seekers access to better information about prospective employers by enabling current and former employees to speak candidly and authentically, resulting in workers and job seekers being empowered to make more informed choices about where to work. This enhances the likelihood of their having more satisfying tenures or careers at their chosen workplace. *See* https://www.glassdoor.com/research/satisfied-workers-stay/. This benefits employees and employers alike, as well as the community and economy as a whole.

Glassdoor receives many take down requests in relation to negative or unflattering reviews, which are easily flagged on our site. All such "take down" requests are carefully considered in the context of Glassdoor's published Community Guidelines, and generally fall into two categories: Some are justified, in which case Glassdoor will remove the flagged review from its site. Others, however, are not justified, and sometimes unfortunately are simply veiled or explicit threats made by companies acting intolerantly in response to meaningful good faith criticism.

It is critical that any reform of Australian defamation law protects the significant public interest in continuing to make available candid and valuable information about workplace conditions and culture to job seekers and others.

The importance of anonymity

While many companies treat their employees well and compensate them fairly, some do not. And an unfortunate number of employees feel they are not paid justly or treated appropriately and respectfully in the workplace. These employees are deserving of a level playing field in order to voice their opinions. As explained above, anonymity is critical to enabling this to occur. If employees have to identify themselves, then many would refrain from contributing reviews or be far less candid when doing so. Removing anonymity would undermine the public benefits of a workplace experience review site and, ultimately, harm job seekers.

We are therefore committed to protecting our users' identity. A loss of this anonymity could place users' livelihoods, reputations and economic wellbeing at risk. In recognition of this, we have elected to stand behind our users leaving reviews when appropriate, and have engaged in legal action to protect their anonymity in more than 100 cases.[1]

It merits noting that, in the offline world, anonymity has long been a means by which individuals can freely enjoy their right to impart and receive information. This is something we typically take for granted. Individuals are free to enter public spaces, walk down the street, enter shops, engage in conversation and debate and much more without sharing or verifying their identity.

Using pseudonyms and pen names to conceal an author's identity has been common throughout history. There are many examples of female authors, including Mary Ann Evans (George Eliot) and Nelle Harper (Harper Lee), taking male pseudonyms to ensure their work would be taken seriously. Similarly, the benefits of anonymity for in-person support groups and forums are well accepted. Groups such as Alcoholics Anonymous and Narcotics Anonymous allow individuals to speak freely without verifying their identity or being stigmatised, thus benefiting recovery.[2]

These benefits extend to the online world. For example, online anonymity has proved a powerful tool for those in or exploring LGBTQ+ communities, enabling authentic and honest expression. For those who may not be 'out' to their family and friends, anonymity allows them to explore their identity and obtain support in a safe and comfortable way. Indeed, the Stonewall School Report (2017) found that nine in ten LGBTQ+ young people felt they could be themselves online because of the protection of their anonymity.[3]

There are also very strong arguments supporting whistleblowers' right to remain anonymous. In the Australian context, anonymity encourages whistleblowers to report wrongdoing without the risk of being identified. In 2016, the Fair Work Ombudsman launched an 'Anonymous Report' tool, which allows individuals to submit anonymous reports relating to workplace practices. A total of 20,000 reports were received from mid-2016 to February 2018, with the tool assisting the Fair Work Ombudsman in uncovering unlawful practices in the workplace. For example, in one instance, employees were paid around $50,000 following a report that employees were receiving $8 per hour. Without the use of anonymous reporting tools to protect whistle-blowers, it becomes difficult to identify inappropriate or unlawful conduct or practices in the workplace.

Debate around online anonymity has traditionally centred around two distinct arguments: one maintaining that anonymity encourages and facilitates abusive behaviours online, and another asserting that anonymity protects the internet's most vulnerable and at-risk users. The opposing nature of these two

[1] https://www.glassdoor.com/about-us//app/uploads/sites/2/2021/08/Legal-Fact-Sheet-August-2021-1.pdf
[2] https://dl.acm.org/doi/10.1145/3134726
[3] https://www.stonewall.org.uk/school-report-2017

positions ignores a critical middle ground: that anonymity legitimately protects and benefits many people in an array of contexts even if they are not physically vulnerable, at-risk or in danger of bodily harm. Further, it misses that anonymity enables some of the most positive aspects of the online world and encourages creativity and expression. In the case of workplace experience reviews on a site like Glassdoor, anonymity levels the playing field with respect to the discussion of workplace-related issues and information available to job seekers. This transparency allows employees to give candid assessments of their employers (who have far greater resources to retaliate if they so choose) without suffering undue or unjust personal consequences.

Accordingly, Glassdoor is broadly supportive of reforms that would provide platforms with protection in relation to each anonymous post until they have been put on notice of the particular post and have had an opportunity to consider material which might demonstrate a lack of foundation for any defamatory material in that post. This approach would enable platforms to make appropriate and considered decisions as to when to take material down.

Changes to the draft Part A MDAPs

On the basis of the policy considerations described above, Glassdoor makes comments on the specific draft Part A MDAPs now proposed as follows.

Qualified privilege defence for review sites

As further explained below, Glassdoor supports the proposed reforms. However, Glassdoor considers that there are strong public policy grounds to supplement them with an additional qualified privilege defence for workplace review sites. Such a defence would enable the continued publication of good faith reviews after the 14 days allowed under recommendations 3A and 3B for material to be taken down. This is important, as employers may otherwise take the approach of asking for all negative reviews to be taken down, thereby distorting the information made available to employees on the website, and depriving users of the informational and wellbeing benefits the site can provide.

Glassdoor proposes that it should be a condition of such a defence that the site in question enables the subject of each review to post a response (subject to usual rules prohibiting menacing, harassing and other unacceptable posts). This is the case in respect of Glassdoor: every employer which or who is reviewed on the site can respond by way of a comment visible to all users.

Malice would be a defeasance of the defence (as it is for qualified privilege more generally). Since malice is routinely inferred where there is knowledge of, or reckless as to, falsity, this would still protect employers. Employers who are falsely accused of wrongdoing could for example provide decisive evidence of falsity such as a statutory declaration or documents, after which the platform would have to take down the post to avoid liability unless the poster can provide evidence which is equally, or more, compelling.

Such a defence would have at least the following benefits:

- it would enable ongoing publication of good faith reviews, and encourage employers to provide constructive and informative responses;
- it would thereby support employee wellbeing, and the efficiency of the Australian labour market;
- it would still protect employers against false and malicious allegations.

Recommendations 3A and 3B

Glassdoor is supportive of both Model A and Model B. However, Glassdoor suggests some improvements to the drafting, which will provide greater certainty:

1. The scope of application of the defences is unclear because of ambiguity in the current drafting of the definition of "online service". It should be amended to more clearly include platforms which enable employees to post information about employers. Whilst the "or other interaction" in (c) could encompass such platforms, this is not sufficiently clear. The application of the definition should not be dependent on users being able to "interact".
2. "Access prevention steps" should accommodate a situation where the digital matter is substantially altered. It should not be required that the material be blocked or taken down entirely. For example, if an online post is amended to in effect, remove "the sting" of the alleged defamatory material, that is in effect, removing the relevant material. The material is transformed into a new online post that no longer bears the relevant alleged defamatory imputation, and therefore the post about which the complainant has complained, is no longer available for download.
3. It should be clarified that the access prevention step could be taken by the defendant or the poster, in response to a complaints notice. The digital intermediary should still have the benefit of the defence if the poster decides to take an access prevention step in response to a complaint, rather than the digital intermediary.

Glassdoor's support for these reforms reflects Glassdoor's view that, while admittedly imperfect from its perspective, they are nevertheless better than the status quo.

The reforms are not, from Glassdoor's perspective, the ideal solution. Glassdoor notes that the most likely outcome in the majority of cases (if either option is implemented) will be that materials representing the employee voice will simply be removed without true interrogation of its merits. Glassdoor is also concerned that, more broadly, this reform may incentivise the collection of additional consumer data (so as to enable a platform to access the defence). In particular, the requisite information to be provided is so as to enable the concerns notice to be sent, and the commencement of proceedings. This approach could be characterised as having a punitive effect on platforms which choose not to collect and disclose contributor details. It discourages the facilitation of anonymous speech. It would instead be preferable if the draft MDAPs operated in a manner consistent with data minimisation practices. Glassdoor remains of the view that an approach similar to Section 230 of the U.S. Communications Decency Act would be substantially preferable and supportive of legitimate worker speech rights and the dignity and protection of labour and fundamental workplace rights.

Recommendation 4

Glassdoor does not support recommendation 4. Section 235 of the Online Safety Act contains important principles which are appropriate in an Australian internet context. It should not be necessary to provide any carve out from that section for defamation law, which should be consistent with it.

Recommendation 5

Glassdoor has serious concerns in relation to recommendation 5, for the following reasons:

1. Unless orders are confined to immediate take-down of particular content, it may be challenging for platforms to keep track of them;
2. Any requirement for platforms to monitor content to detect new posts which fall within an injunction would be problematic, and inconsistent with existing public policy settings;
3. Any injunction restraining "republication" of content or similar could have adverse and unintended effects (such as preventing the publication of defensible content) as it may extend to matter which is not in identical terms to the matter complained of in the original proceeding;
4. There is no demonstrated need for such orders; and

5. There are strong public policy reasons to resist injunctions to restrain defamatory content which have been recognised for hundreds of years in the case law. Those public policy reasons remain valid today. In a review site context, depending on the form of an order, injunctions could have the effect of skewing employer review results, and of deterring or preventing employees from sharing authentic workplace experiences. This would be to the detriment of the employment market, as it would aggravate existing information asymmetries between employers and employees, and would make it harder for job seekers to find jobs and companies they will enjoy working with.

In particular, Glassdoor notes that the proposed section 39A(2) provides for the Court to order a person who is not a party to the proceedings to take the steps the court considers necessary in the circumstances to "prevent or limit the continued publication or republication of the matter." Current Australian case law supports the concept that a republication may differ from the original publication, and that different defences may be available in respect of a publication and its republication: see eg. *Greinert v Brooker* [2018] NSWSC 1194. Any order preventing the republication of matter could be difficult to enforce because it could extend to matter which is different from the original matter complained of. The effect of an order could well be to prevent the future publication of defensible material (where a republication is defensible). If only one platform is targeted by such an order, then the order may be futile as republication may occur elsewhere on the internet. Such an approach could also be inequitable: see *Duffy v Google Inc* [2011] SADC 178; BC201140573. Further, if it later transpires that a republication is defensible (for example because evidence emerges that the allegation made is true), then each person the subject of such an order would have to seek revocation of the order prior to publishing the true allegation or otherwise risk conviction for contempt.

Such a result would potentially be inconsistent with the public policy reflected in section 235 of the Online Safety Act (and previously in clause 91 of Schedule 5 of the Broadcasting Services Act 1992) that hosting service providers should not be required to monitor online content hosted by them.

It would also cut across key freedom of speech principles which underlie the longstanding jurisprudence in this area. English and Australian Courts have traditionally refrained from, and more recently have been cautious about, restraining defamatory speech because they recognise that to do so is fundamentally inconsistent with freedom of speech principles. Australian Courts are very cautious about restraining defamatory speech: *Australian Broadcasting Corporation v O'Neill* [2006] 227 CLR 57. For a plaintiff to obtain an injunction, they are required to establish that there is no reasonably arguable ground of defence and that the balance of convenience favours the granting of an injunction: *ABC v O'Neill,* supra, *Lovell v Lewandowski* [1987] WAR 81; *National Mutual Life Assn of A'asia Ltd v GTV Corp Pty Ltd* [1989] VR 747; [1988] Aust Tort Reports 80-192; *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153; *Zanchi v General Television Corp Pty Ltd* (unreported, Sup Ct Vic, Harper J, 27 May 1992); *Rural & General Insurance Ltd v Australian Broadcasting Corp* (unreported, App Ct NSW, Kirby P, 19 June 1995); *Jakudo Pty Ltd v South Australian Telecasters Ltd* (1997) 69 SASR 440. The general approach of the courts is reflected in the *National Mutual* decision (VR at 764):

> In the case of an application to restrain a libel, however, the very great importance which our society and our law have always accorded to what is called free speech, means that equity exercises great care in granting injunctive relief and does so only where it is very clear that it should be granted. It has been said in high places, and said on high authority from the Bench, that it is by no means rarely a benefit to society that a hurtful truth be published. It has been felt, we think, that it is usually better that some plaintiffs should suffer some untrue libels for which damages will be paid than that members of the community generally, including the so-called news media, should suffer restraint of free speech.

Any such power should make it clear that the entity the subject of the injunction application should not only have the right to be heard, but should also be entitled to separately defend material if appropriate. This may be important where a republication which a plaintiff seeks to restrain is defensible (eg. Because it includes material from the plaintiff which balances the original defamatory sting) even though the original publication is not (eg. Because it does not contain balancing material).

Any power should also be limited to requiring take down of the particular matter complained of. It should not extend to orders which require ongoing monitoring. If there is a concern to address future publications, it should be addressed by way of an entitlement to separately seek further take down orders at the appropriate time. This is appropriate for reasons including that the Court can consider afresh at that time whether take down remains appropriate, and whether the particular publications in question ought to be taken down or remain. It may well be necessary for the Court to hear the matter afresh at that time, particularly if new facts have come to light. In that regard, the observations made in relation to the declaration of falsity remedy recommended by the Law Reform Commission are relevant: see New South Wales Law Reform Commission, *Defamation* (Report No 75, 1995) Ch 8. A New South Wales Attorney-General's task force noted in 2002 in relation to the declaration of falsity remedy that "the problem of the proposal is that despite mentioning the need for speed, it in fact requires there to be an extensive court process, which, even if expedited, nonetheless has a lot in common with the full trial": Attorney-General's Task Force on Defamation Law Reform, *Defamation Law: Proposals for Reform in New South Wales* (April 2002).

Recommendation 6

Glassdoor is strongly supportive of this proposed reform. Glassdoor considers it appropriate that there be some recognition in the reforms of the inherent value of anonymity in the process of journalism, whistleblowing, or other instances of legitimate online anonymous information dissemination, examples of which are discussed earlier in this submission. This reform is an important step in this regard. It is important for caution to be exercised in relation to preliminary discovery orders. This is particularly apparent in the employer review context, where employees could face unfair employment consequences for criticising employers even where their posts are accurate.

As previously stated, there should be express protections in relation to types of anonymous speech which should be protected in the public interest. This includes disclosures in whistleblowing, such as disclosure of bullying and harassment, and the sharing by current or former employees of authentic workplace experiences.

Glassdoor is concerned that such a reform would not have any impact on the way in which preliminary discovery orders are issued in jurisdictions in which state and territories will not be applicable (for example, the Federal Court of Australia), and while it is beyond the scope of this review, considers that legislation should be introduced at a commonwealth level to implement these reforms to ensure they have effect in all jurisdictions within Australia.

Thank you for the opportunity to provide this submission. We would welcome the opportunity to discuss these further.

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