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30 April 2019

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

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

Dear Madam/Sir

Marque Lawyers Submissions for Review of Model Defamation Provisions

1. Scope of this submission

1.1 Marque Lawyers is grateful for the opportunity to provide a submission on the Council of Attorneys-General's (**COAG**) 'Review of Model Defamation Provisions' (**Discussion Paper**).

1.2 Our perspective on defamation law is influenced by our practice in that area. In particular, we observe a consolidated mass media industry in which independent voices are decreasingly common. Recent cases show that defamation plaintiffs have an unreasonably strong position, and this is placing too great a burden on the freedom of the press.

1.3 The submission addresses three particular topics raised in the Discussion Paper.

(a) A right for corporations to sue for defamation: we support the abolition of the corporate right to sue altogether.

(b) The single publication rule: we support the introduction of a single publication rule in terms similar to the UK legislation.

(c) Qualified privilege: we support the introduction of a broader defence which better reflects the principle that robust public debate requires some latitude to make errors.

2. Context: the importance of press freedom

2.1 Australia has no legally protected right of free speech in its legal framework. Consequently, a free press is a notion, not a reality. It is a potentially lethal weakness.

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2.2 The implied freedom of communication in relation to government and political matters, which is an established component of Australia's constitution, necessarily contemplates and encompasses a free press to the extent of the implied freedom's reach. This is because the constitutional system of elective democracy, from which the implied freedom is derived and which it protects, cannot function without a free press.

2.3 While the early thoughts that the implied freedom may extend to provide a direct defence to defamation claims proved to be false, the interconnection between the implied freedom and defamation action still exists. The point is that, even in the context of the very limited and arguably weak protection of free speech which the implied freedom affords, the recognition that our democracy requires a degree of free communication points directly to the need for close scrutiny of any law which has a tendency to limit or "chill" that freedom (whether or not it raises a constitutional issue).

2.4 Australia is the defamation capital of the free world, which is a bizarre situation. That is because our defamation law is unbalanced, and it is making it unduly difficult for important stories to be told. Reform is needed, and the balance between the personal right to reputation, and the general right to free speech and the societal necessity for a free press must be remade.

3. Topic 1: A right for corporations to sue for defamation

3.1 Question 2 in the Discussion Paper asks should the Model Defamation Provisions be amended to broaden or to narrow the right of corporations to sue for defamation?

3.2 We submit that the right of corporations to sue for defamation should be removed from the model defamation provisions altogether. Alternatively, if a right remains it should not be broadened to include a wider class of corporations.

3.3 First, the most obvious reason for which a corporation should not have a right to sue in defamation is that it has no personal reputation to protect. To experience defamation is to be exposed to hatred, ridicule or contempt. A corporation is a legal fiction. It cannot experience these or any other feelings. The law of defamation is not an appropriate vehicle for the protection of other corporate interests.

3.4 In contrast, individuals involved in the operation of a corporation have a personal reputation and are capable of experiencing hatred, ridicule and contempt. They deservedly maintain a right to sue on a defamatory statement about a company which identifies or implicitly refers to the individual. Removing the corporate right to sue in defamation will not change this.

3.5 Secondly, the exclusion of a corporate right to sue in defamation is consistent with the objectives of the Model Defamation Provisions. A corporate action unreasonably limits freedom of expression. The ability of powerful and well-resourced corporations to silence legitimate criticism by threatening defamation actions (i.e. SLAPP suits) must be the countervailing concern. The COAG articulated this in 2004 when considering the introduction of the Model Defamation Provisions, as the Discussion Paper outlines at paragraph 2.5.

3.6 Thirdly, the current, narrow permissions for non-profits and small corporations to sue in defamation are ill-adapted for their intended purpose. In our submission these should also be removed. In particular, the arbitrary allowance for a corporation with fewer than 10 employees to sue makes little practical sense. A publisher is often in a position in which it cannot readily identify the size of a corporation the subject of a story, and therefore cannot assess whether there is a defamation risk. This creates a further unreasonable burden on freedom of expression.

3.7 For small corporations, there is logically a greater likelihood that a critical publication will at least tacitly identify the individuals involved in running the company, and those individuals will have a personal right to sue if they are defamed. Otherwise, those corporations will retain alternative legal rights which they may pursue if they are the subject of false or malicious statements. Depending on the circumstances, claims of misleading or deceptive conduct, negligent misstatement or malicious falsehood may be available to them. In that regard, the exclusion of a corporate right to sue does not undermine the objective of the Model Defamation Provisions to provide effective and fair remedies.

3.8 Lastly, the burden of a corporate action in defamation would be born principally by the press, and secondarily by lobby and activist groups. Other corporations would typically already face liability in misleading or deceptive conduct for false statements published in trade or commerce; providing a wide and effective remedy for inaccurate statements by one company against another; trade rivals for example. The additional burden on the press and activists would be unjustified in light of the importance of their role maintaining accountability and facilitating legitimate public debate.

3.9 As an alternative, if a broader corporate right to sue were introduced then there should also be an exclusion from liability for the press or for publications made for the dominant purpose of consumer or environmental protection. These may operate in a similar way to the exclusion of liability for misleading or deceptive conduct for 'information providers'[1] and the exclusion of liability for boycotts for those conducted for the purpose of environmental or consumer protection[2].

3.10 These examples from competition and consumer law reflect a recognition of the importance of protecting information providers and activist actions from certain actions by corporations. The Model Defamation Laws should reflect a similar policy position. The best way to do that is to exclude an action for corporations altogether. An alternative is to apply carve outs to protect those most unreasonably burdened by a corporate defamation right.

4. Single publication rule

4.1 Question 3 in the Discussion Paper asks whether the Model Defamation Provisions should be amended to include a single publication rule. We submit that a single publication rule is

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[1] See *Australian Consumer Law* s 19.

[2] See *Competition and Consumer Act 2010* (Cth) s 45DD.

necessary to achieve the objectives of the Model Defamation Provisions because the current position unduly burdens publishers with perpetual liability for internet publications.

4.2 The intention of the Model Defamation Provisions is to enact a 1 year limitation period; shorter than the more common 6 year period for other civil claims, and shorter than the limitation period for defamation actions in some states prior to the introduction of the uniform law. There are good reasons for this. A defamation is best cured when addressed expeditiously. The worst damage caused by a defamation is likely to be suffered in the period immediately following publication. And a publisher should not be exposed to the uncertainty and risk of a possible defamation action for publications which are no longer current.

4.3 In the context of internet publications, the statutory limitation period is entirely ineffective while a multiple publication rule remains. That is, the multiple publication rule undermines the legislative intent to restrict defamation actions to a limitation period of 1 year. Instead, the multiple publication rule creates an absurd position in which a publisher has finite liability for a printed article, but infinite liability for the same article published online.

4.4 An online publisher, when determining whether to publish an article must conduct an analysis of defamation risk. Presently, continuing liability increases the risk profile. This may result in the constraint or abandonment of legitimate news items for a publisher with a low risk appetite or a low defence budget. This kind of constraint on press freedom is unjustifiable, especially when this outcome is contrary to the intended operation of limitation period provided in the Model Defamation Law.

4.5 The risk arising from broader dissemination of internet publication is more appropriately addressed in the context of damages, rather than the context of a limitation period. For example the 'grapevine effect'[3] allows the court to address republication of defamatory material following an initial publication when assessing damages. This is a more suitable means of providing recourse for the potential for extensive republication which is inherent to the internet.

4.6 As to the operation of a single publication rule, we submit that the present issues are best overcome by adopting a provision similar to that of the *Defamation Act 2013* (UK). It provides a clear and finite limitation period for all kinds of publication by the same publisher, resolving the present absurdity. It also preserves rights of action against different publishers who may republish the same or similar defamatory material. This reflects an appropriate balance in the interests of individuals and the press and best achieves the objects of the Model Defamation Provisions.

5. Expansion of the qualified privilege defence

5.1 Question 11(c) in the Discussion Paper asks whether the UK approach to the qualified privilege defence should be adopted in Australia. Broadly, we take this question to enquire whether there is sufficient protection for publications on matters of public interest. In our view, there is

[3] See for example *Bauer Media Pty Ltd v Wilson [No 2]* [2018] VSCA 154 and *Wagner & Ors v Harbour Radio Pty Ltd & Ors* [2018] QSC 201.

insufficient protection in Australia for publications on matters of public interest, or for publications concerning public figures.

5.2 Consider there is a sliding scale; at one end there is a very strong protection for individuals and a very narrow qualified privilege defence. This is the Australian position. In practical terms, it offers no clear defence for the press other than on political matters, based on *Lange*[4].

5.3 At the other end of the scale is a regime in which public figures have no action available for defamation without proof of malice. This is the position in the United States following the decision in *New York Times v Sullivan*[5]. Justifying the position, the US Supreme Court referred to 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials'. It further recognised 'that erroneous statement is inevitable to free debate and that it must be protected if the freedoms of expression are to have the "breathing space" that they "need… to survive"[6].

5.4 One challenge for the US approach is the definition of who is a 'public figure'. This need not be a basis for ruling out the approach as a viable option in Australia. The Australian legislature may define public figure narrowly, potentially by reference to particular roles such as parliamentarians, local government figures, etc. A similar approach has already been adopted in the Model Defamation Provisions in order to identify 'proceedings of public concern' the subject of the defence of fair report of proceedings of public concern.

5.5 Perhaps in the middle of the scale falls the UK defence for publications on matters of public interest. It is narrower than the US position in that the question of 'public interest' is likely to be narrower than the test of 'public figure'. For example, it may not apply to publications concerning the private lives of public figures (unless it brought into issue their ability to perform their public role).

5.6 We accept that there may be arguments against the adoption of the US approach, including the challenge of defining a public figure and the absence of a requirement for the publisher to act reasonably. However, the principle that a free press needs latitude to make errors is important, and should be better reflected in Australian defamation law. The current qualified privilege defence does not achieve this. Its operation is too narrow as a result of the reciprocal interest element. This works to exclude the defence for the press other than on political matters, based on *Lange.*

5.7 In order to better protect the public interest in press freedom, a broader defence should be adopted which moves further down the sliding scale towards the UK or even the US positions. In our submission the UK public interest defence reflects a better balance of the competing

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[4] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

[5] 376 U.S. 254 (1964)

[6] Citing *NAACP v Button* 371 U.S. 415, 371 U.S. 433.

interests of freedom of expression and personal reputation than our current qualified privilege defence. We recommend its adoption.

6. Conclusion

6.1 The current review presents the opportunity to correct the imbalance between the rights of individuals to protect their reputation and the public interest in a free press and public debate. We urge the COAG to take up this opportunity.

6.2 We would be very happy to expand or explain any part of this submission. Please contact Hannah Marshall or Michael Bradley if you have any queries.

Yours sincerely

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