



Friday 12 April 2019

Review of Model Defamation Provisions
C/o Justice Strategy and Policy Division
NSW Department of Justice
Email: policy@justice.nsw.gov.au

RE: Review of Model Defamation Provisions

CHOICE is concerned about any potential reforms to defamation provisions that would enable corporations to silence consumer criticisms. Any reforms must ensure that the very powerful cannot use the courts and their significant resources to prevent criticism.

In 2006 CHOICE launched its annual Shonky Awards. The Shonky Awards exist to name and shame the worst products and companies seeking to take advantage of Australian consumers. In that inaugural awards ceremony we called out a dangerous dummy that posed a choking hazard for babies, a 'Purely Fish' frozen meal containing only 48% fish, and a robot vacuum cleaner that performed so terribly that we felt it was a complete waste of money.

CHOICE's spokesperson at the time explained why CHOICE was launching the Shonkys and what we hoped to gain from publicly shaming companies that were doing the wrong thing by Australian consumers:

'It's not good enough for companies to be alerted to the problems that we've found, and consumers have consistently complained about, and still after a number of months have not really addressed those issues.

So hopefully it'll make them rethink their packaging, or their claims, or the content of their products and be a bit more up-front about what they're really giving consumers.'

From its inception, the Shonky Awards set out to very deliberately - backed by extensive investigation and evidence - injure the reputation of companies to pressure them to do better by their customers in circumstances where they repeatedly failed to respond to individual consumer complaints. Twelve

years later we are continuing to call out product safety risks, misleading advertising and poorly performing products and the Shonky Awards are achieving what we had hoped they would.

By shining a light on bad behaviour, we have achieved changes to markets that benefit Australian consumers. For example, in 2009 we awarded Nurofen a Shonky. The company Reckitt Benckiser was selling a range of Nurofen painkiller products directed at specific problems - back pain, period pain, headaches. All of these Nurofen specific pain products appeared to address different problems, but in fact the contents of the packets were identical. Following this Shonky Award, there was increased media reporting on Nurofen, culminating in a successful ACCC legal action in 2015 and widespread consumer awareness of this misleading marketing tactic. This is just one example. Over the years of running the Shonky Awards, we have seen several winners become the subject of ACCC proceedings. As the Shonky Awards have become more successful and achieved broader media coverage, other companies have opted to make voluntary changes to address the problems raised without needing the regulator to intervene.¹

The reason I write to you about the Shonky Awards in the context of a review of the Model Defamation Provisions is this: in the absence of Clause 9 of Division 2 of the Provisions, the Shonky Awards would be a magnet for defamation claims.

CHOICE takes great care to conduct a thorough investigation and verification process in the months before any Shonky Award is published. Consequently, were the companies that we name able to sue for defamation we would hope to rely on the Clause 25 defence of substantial truth. However, the threat of litigation - even ultimately unsuccessful litigation - is an additional matter to take into account when deciding whether or not to speak truth in public forums is a viable way of achieving outcomes for Australian consumers. It is also worth noting that CHOICE is a comparatively large organisation with access to legal advice when needed. We may be in a position to defend against baseless litigation threats, but smaller advocacy organisations may not be as well placed to respond and may choose to deal with risk by avoiding making public criticism of corporations. This would be a great loss.

CHOICE calls out bad behaviour that harms consumers. We do so in an environment where individual consumers are making decisions based on less information than is held by businesses. For instance, if a Thermomix kitchen machine explodes and an individual injured by that explosion requests a remedy from the business, there is a serious information asymmetry at play. The business knows exactly how many other customers have made similar complaints; the consumer is only aware of their own circumstances. This leaves them in a poor position to bargain and may lead them to accept a worse remedy than they are entitled to under law. The role of CHOICE, other not-for-profit consumer organisations and news outlets is in part to address this imbalance by publicising these stories.

¹ For example, shortly after receiving a Shonky Award in 2017 for labelling its nutritionally incomplete cat food 'Complete Cuisine', Coles confirmed it was removing the word 'complete' from the product's packaging.

We are in a position that an ordinary, individual consumer is not. We can conduct investigations, assess complaints and determine whether or not a problem is widespread. There is a public benefit in releasing the results of these investigations and there is a public benefit in using the media to pressure companies to do the right thing. If companies could sue for defamation, there is no doubt that some would use this power to silence criticism and undermine consumer rights.

In the case of Thermomix, the company made use of non-disclosure agreements to silence individual consumers. Increasingly, we are seeing indications that consumers are being asked to sign non-disclosure agreements that include broad non-disparagement clauses. These clauses may seek to prevent a person from ever posting a negative comment about the business on social media, even if the critical comment is not linked to the specific case that has prompted the settlement. In the case of one Thermomix customer that we spoke to, the agreement sought to prevent her from talking to anyone about the injuries she sustained from the faulty product.² This is how companies are already seeking to manage their reputations - not by improving their products and services, but by pressuring customers with legitimate grievances into silence through the use of heavy-handed legal tactics and high-pressure negotiations. If companies had additional standing to silence advocacy bodies and news outlets in order to shield themselves from valid criticism, it seems likely they would seize this new opportunity.

CHOICE 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 also support removing the exemption for corporations with less than ten employees. The same reasons for publicly calling out bad behaviour still exist with smaller corporations and the exemption is not justified.

For further information please contact CHOICE on

Yours sincerely,



Sarah Agar
Head of Campaigns and Policy

² CHOICE, May 2016, 'Mass Incident Report to the ACCC - Consumer reports of Thermomix product failure and serious injuries', available via <https://www.choice.com.au/consumer-advocacy/policy-submissions>