MODEL DEFAMATION AMENDMENT PROVISIONS 2022

SUBMISSION BY DEFAMATION LAWYERS

A. EXECUTIVE SUMMARY

1. The NSW Attorney General Mark Speakman is proposing more changes to the Defamation Act in the Stage 2 Reforms.

2. This is at a time when the Stage 1 Reforms have been problematic in many respects, causing significant additional upfront expenses for plaintiffs which prejudice pre-litigation settlements particularly in cases where the parties are individuals. The so-called Uniform Law has not been so for over a year because Western Australia and the Northern Territory have not passed the changes, defeating the purpose of Act which originally commenced on 1 January 2006.

3. This next stage of changes leaves ordinary Australians without the ability to have defamatory material removed from the digital platforms operated by foreign technology giants[1]. The NSW Government seeks to give them "*safe harbour*", meaning that they are not liable for defamatory content on their platforms even after being put on notice of it and its falsity. Under these proposals, the providers of the service, defined as "digital intermediaries" will only have to act when the publisher is anonymous, and they will get a full defence where they disclose the identity of that person or take the publication down within 14 days. This means that Google, Facebook and Twitter have absolute immunity even when the person who posted the material is malicious or a known defamer just because they are not anonymous. Unless a plaintiff is able to afford hundreds of thousands of dollars in irrecoverable legal costs he or she will have no remedy – and the defamatory publication will stay online.

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[1] The largest social media platforms in the world (by number of monthly active users) are operated by companies incorporated in either the United States of America or China: Meta (Facebook, Instagram, WhatsApp), Google (YouTube), ByteDance (TikTok/Douyin), Tencent (WeChat, QQ), Sina Corporation (Sina Weibo). The leading social media platforms in Australia as at January 2022 also include Twitter, Pinterest and Reddit whose operators are all incorporated in the United States of America.

4. The foreign tech giants that operate social media platforms generate eye-watering profits[2] by giving a platform to trolls, leaving reputations permanently destroyed. To be clear, under these proposals, these internet giants would not be liable even if the plaintiff gives them incontrovertible proof of falsity and the material remains online after such notice.

5. The NSW Government has failed to point to any public benefit to justify these laws which operate exclusively for the benefit of internet intermediaries. The so-called "issue" created by the High Court's decision in *Voller*, which makes people liable for third party comments on their social media accounts, is not addressed at all insofar as the liability of the account holder is concerned. The only immunity granted in those cases is to the service provider (e.g. Facebook, Twitter, YouTube).

6. All of these problems could be addressed by ensuring that third party content on *any* website is defensible as innocent dissemination - this means that everyone has the same defence. The Law Council of Australia advocated for this position a year ago. Expert defamation lawyers pointed out the benefits of this to the Commonwealth Government earlier this year when it attempted to pass the misconceived so-called *Anti-Trolling* legislation.

7. Recommendation 3A (safe harbour for digital intermediaries) being a new defence s31A should not be enacted. The alternative proposal 3B (new innocent dissemination defence) is preferable, but even that is unnecessary and requires substantial redrafting to operate effectively.

8. The signatories of this submission propose simple amendments to section 32 of the *Defamation Act* that will afford equality for all when it comes to defamatory third-party content on the internet (and elsewhere) and ensures that a plaintiff has an effective remedy if defamatory content is left online.

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[2] In 2021, Google's parent company, Alphabet, reported annual gross profit of $146.698 billion, an increase of 50.01% from the previous year. Similarly for the same reporting period, Meta reported annual revenue of $95.28 billion, an increase of 37.54% from the previous year.

B. INTRODUCTION

Purpose of defamation laws

9. Defamation laws should seek to balance the competing rights of members of the public to protect their reputations and privacy, to exercise their freedom of speech and to access accurate and true information. Defamation laws must protect and balance these fundamental individual rights in a liberal democracy.

State and Territory legislation background

10. From 1 January 2006, model defamation laws were enacted in all Australian states. Those model provisions were adopted in the ACT on 23 February 2006 and on 26 April 2006 in the Northern Territory. Prior to the model defamation laws, parties to defamation proceedings could face different laws in eight different jurisdictions that could arise in a single proceeding. The model defamation laws to date have brought increased (but not complete) uniformity to defamation law in Australia that has otherwise reduced the legal time and cost to prosecute and defend defamation disputes throughout Australia.

11. The Uniform Laws were initially prepared haphazardly and without adequate consultation and in many instances reflected compromised positions between the various jurisdictions. Those laws were intended to be reviewed and amended five years from the date of commencement and despite interested persons making submissions on potential amendments in 2010-11, no review took place at that time.

12. Finally in 2020 the New South Wales Attorney-General proposed changes and sought submissions from interested parties. After the consultation process, New South Wales proceeded by passing reforms many of which were not the subject of that consultation process. The reforms have been the subject of substantial criticism. They were simplistically adopted from reforms implemented in the UK, misleadingly branded as 'international best practice', and are conceptually flawed.

13. Importantly, no steps were taken to address changes in defamation litigation over the last decade specifically arising from publications over the internet including social media.

14. On 1 July 2021 a number of States and the Australian Capital Territory commenced amendments to the defamation laws (**Stage 1**). Those amendments have not been passed in Western Australia and the Northern Territory. That means that defamation laws are no longer uniform in Australia.

15. The Stage 1 amendments are, in many respects, misconceived and have increased the time and cost being expended on defamation litigation, particularly in so far as the changes to the Concern Notices provisions are concerned. The changes relating to small companies and not-for profit organisations were not the subject of proper consultation and are inconsistent with some of the apparent purposes of the legislation.

16. A recent paper submitted by three expert defamation barristers to the Attorney-General's Department raising issues with those Stage 1 changes is attached to this submission as **Appendix A**.

17. Stage 2 should not proceed without addressing the fundamental defects arising from the Stage 1 amendments.

The Commonwealth and defamation laws

18. In 2004 the Commonwealth engaged in a process to pass defamation laws that would be uniform throughout Australia, including the preparation of a discussion paper and draft bill. Prior to the proposed Commonwealth legislation being considered by the Commonwealth Parliament, the states and territories passed the Uniform Defamation Law commencing on 1 January 2006.

19. The Commonwealth has broad powers under the Constitution to enact legislation that would regulate nearly all defamation claims. Commonwealth legislation could cover all matters relating to corporations, anything published over the internet, by radio, television or streaming broadcast, via any carriage, postal or telecommunication service, in any state or territory.

20. The liability of international corporations acting as internet intermediaries is plainly a federal issue requiring urgent reform, as is the ability of corporations to sue. In that regard, the changes made to the state uniform laws, are not fit for purpose particularly in relation to not-for-profit organisations such that the Commonwealth needs to intervene. The standing of companies to sue for defamation where harm is incurred

would bring Australia in line with the common law and other jurisdictions. Such changes are important because otherwise companies have no redress for false statements made about them because of the information provider defence in the *Competition and Consumer Act* 2010 (Cth).

21. A federal act will give the Commonwealth the ability to keep up with international standards on digital communications. Additionally, defamation legislation needs to be able to be amended from time to time to adapt to the ever-evolving digital world.

22. The best and most efficient way for that to occur is through the Commonwealth Parliament because seeking the agreement of each state and territory has been a difficult process that has resulted in inefficiencies, unacceptable delays and unworkable compromises.

23. Further over recent years the Federal Court of Australia has recognised its jurisdiction in defamation claims and most significant defamation disputes are now determined in that Court. That has given rise to difficulties where the state uniform law is inconsistent with federal legislation such as *the Federal Court of Australia Act* 1976 (Cth) or the *Evidence Act* 1995 (Cth). This has caused lack of uniformity on the question of juries and section 40 (costs) has also fallen away in the Federal Court whilst still applying in State courts. The Stage 1 changes to the concerns notice provisions in s12B are also likely in the same category. At least one of the Stage 2 proposed provisions is also problematic in this respect – proposed s23A (preliminary discovery). Further, proposed s9A traverses some of the same ground as s235 of the *Online Safety Act* 2021 (Cth) which will likely cause confusion, increased cost and inconsistency.

24. Federal legislation covering the field in defamation would solve these issues - so that like other torts, that matter would be determined by the court hearing the matter in accordance with the provisions applicable to that court.

Costs

25. Another difficulty that has been an ongoing problem in defamation litigation is its cost to litigants. The reforms carried out by the states in Stage 1 have not in any way attempted to reduce those costs and in fact have had the opposite effect by introducing reforms that have already made pre-litigation steps unworkably expensive and led to an

increase in costs by reason of unnecessary procedural disputes early in the proceedings. This includes the serious harm changes that, as presently drafted, are procedurally problematic and have already caused disproportionate costs in small matters between individuals, see e.g. *Wilks v Qu* [2022] VCC 620.

C. MODEL DEFAMATION AMENDMENT PROVISIONS 2022

Definitions

26. The model provisions deal with the rights and responsibilities of three types of people:

    a. Providers of social media services ("**digital intermediaries**");

    b. People who post defamatory material on the internet ("**posters**");

    c. People who are defamed on the internet ("**plaintiffs**") who complain about defamatory material posted online by posters on platforms hosted by digital intermediaries.

27. Other users of the platforms conducted by the digital intermediaries are not in our view dealt with by the model provisions at all ("**account holders**"). Those are people or organisations, for example, who have social media accounts such as a small business or community sporting group on Facebook, or local Book Club on Twitter or hobby club on Instagram. The liability of those persons for third party comments on their social media accounts is not addressed by the model provisions.

28. The definition of digital intermediary in the proposed s4 of the model provisions makes it clear that it only applies to those who *provide* the online service being the operator of the platform. It does not apply to users of the online service, including account holders.

29. The suggestion that the model provisions overcome the complaints about the High Court's decision in *Voller*, namely third party comments on social media pages of account holders, is incorrect. The result of proposal 3A, discussed below, would be to give a privileged position to internet giants over all other internet users, including Australia's media companies who promote their publications on social media. No logical policy reasoning has been advanced for this preferential treatment. Presently the local Council library does not have immunity for being sued for a defamatory book on

its shelves but it is able to rely on the defence of innocent dissemination if it has not been notified of the book's defamatory character. YouTube is functionally no different to a local Council library and there is no public policy reason that it should be afforded greater protections from liability in defamation.

Recommendation 3A

30. Under the existing law, posters are publishers (being authors), so are digital intermediaries and also account holders using the platforms where the post is made. Digital intermediaries and account holders need to rely on defences (such as innocent dissemination and s235 of the *Online Safety Act* 2021).

31. This position would be drastically varied by proposal 3A of the model provisions which provides that digital intermediaries have a defence when certain steps are taken. They are given a defence if they can show that their online service has a complaints mechanism that meets the prescribed requirements and that they comply with a complaints notice defined in the proposed s31A.

32. The purpose of the proposed section appears to contemplate a complete defence (or safe harbour) where the poster can be identified by the plaintiff (with no further steps necessary by the digital intermediary). Otherwise, the section offers a potential defence where the poster is anonymous if the digital intermediary discloses information about the poster's identity or removes the post within 14 days.

33. This means that plaintiffs have a potential remedy against digital intermediaries when the poster is anonymous but no remedy when the poster can be identified.

34. Those of us who practice in defamation are acutely aware of internet trolls whose identities are known but who wilfully disregard court orders and persist in publishing seriously defamatory posts on the internet that are plainly false. Those persons disseminate their bile using Twitter, YouTube and other platforms that fall within the definition of online service in the model provisions.

35. At present, digital intermediaries are at least potentially motivated to remove such content on complaint by a plaintiff because of the need to comply with the current defamation laws.

36. The real vice of proposal 3A is to enable digital intermediaries to do nothing at all when faced with complaints about posts by such persons. That would leave the plaintiff in a position of being defamed on those platforms for all time, or otherwise left with legal bills amounting to hundreds of thousands of dollars against such trolls. Sums of money that they would never recover.

37. True it is that under proposal 3A, the digital intermediary could eventually be ordered to take down the post of such an online troll (proposed s39A, discussed further below), but only after the plaintiff had sued the poster, successfully obtained a court order and then further sought a third party order against the digital intermediary. In our experience that process could costs hundreds of thousands of dollars that would not be recovered against the troll and is not recoverable under the proposed model provisions against the digital intermediary.

38. Typical Australians could never afford this proposed process. At present, some plaintiffs may be able to obtain the services of defamation lawyers who will act "*no win no fee*". That potential service will fall away under this proposal because there is no one to pay the costs in the event that the court orders are eventually obtained and no person who will pay any damages award and cost order made by the court. The existing concerns that defamation law only benefits wealthy Australians will be increased under this proposal in so far as internet publications are concerned. The NSW Government has not explained why such an unfair position is justified.

39. Separately, the drafting of s31A under proposal 3A does not appear to achieve the desired outcome stated in the background paper in any event. The entire scheme appears to be able to be avoided by a plaintiff by not sending a complaints notice. The section would need to be completely revisited if proceeded with.

40. Another unfairness in the provision is that malicious publications are afforded the safe harbour protection so long as there is no malice actuating the provision by the digital intermediary of the online service. So if it is found that Google is not malicious in making its platform YouTube available online (which is likely), it is safe from a claim in relation to a seriously defamatory publication that Google knows to be false and still does not take down upon receipt of complaint.

41. It follows that proposal 3A of the model provisions would allow internet giants to continue to publish for all time highly defamatory posts, **even once they know the post is false**. There is no public interest in such a defence, indeed it is not in anyone's interest other than the internet giants. Free speech was never intended to protect malicious publications and the Defamation Act should not be amended to provide a cloak to these companies who handsomely profit from the dissemination of such material.

Recommendation 3B

42. Proposal 3B offers a new innocent dissemination defence for publications on the internet but again only protects online service providers and no one else because of the definition of "digital intermediary", discussed above.

43. All users of the internet should have a defence for publishing (unmoderated) third party content unless on notice of its defamatory character, at which point they should be entitled to rely on an innocent dissemination defence if they remove the defamatory post within a reasonable time after such notice.

44. The requirement of a complaints mechanism is expensive, unnecessary and unduly cumbersome as an element of such a defence. It again serves to privilege large organisations who may have the luxury of establishing such a mechanism, leaving out other users of the internet, like social media account holders. Yet again, it appears to be a defence that can only ever be used by the internet giants.

45. The malice problem that arises for proposal 3A also arises for proposal 3B and should be rectified if the provision is proceeded with. No person or company should be immune from suit for seriously defamatory content on the internet which it knows to be false or otherwise published maliciously after it is on notice of such malice or falsity.

Recommendation 5

46. Proposed s39A allows for a court to make an order against the digital intermediary after the plaintiff has obtained judgment against the poster. Although such a mechanism would be necessary if recommendation 3A proceeds, as presently drafted it is ineffective.

47. The first problem is the cost issue identified above. If the poster is impecunious, the plaintiff will be left with a large legal bill if he or she could afford to pay in the first place. Plaintiffs without significant disposable income would have no ability to pursue a remedy at all.

48. The second problem is that the digital intermediary, having obtained the benefit of being "*innocent*" and thus not liable for the defamatory post, is granted a right of audience to oppose the take down order after the plaintiff has spent significant costs pursuing the poster. The additional costs of a further court hearing and the delay occasioned by it (especially if the order was obtained urgently and on an interlocutory basis) is unfair to plaintiffs and serves no public interest.

49. The obligation to remove a defamatory post should be an issue of defeasance of the defence provided by proposed s31A under recommendation 3A. In other words, if the digital intermediary does not take the post down within 24 hours of receipt of a court order against the poster, it ought to lose the benefit of the defence.

Recommendations 1 and 2

50. These provisions are wholly unnecessary having regard to s235 of the *Online Safety Act* and recent High Court decisions. Further, any ambiguity about the protections afforded to caching and storage services should be addressed by amending the definition of subordinate distributor in s32 of the *Defamation Act*, rather than giving an immunity to such internet service providers. They are really just the internet versions of libraries and printers and should be treated the same way by the defamation laws.

51. The immunity from suit for search engines is wholly inappropriate and serves no public interest. Subject to the carve out now recognised by the High Court in *Defteros*, there should not be a blanket immunity. Search engines have been held to be liable for snippets, for example, once on notice of their defamatory content. There is no reason why this should change.

52. The dangers of granting a complete immunity (as opposed to an innocent dissemination defence) were explored when the Commonwealth sought to pass its Anti-Trolling legislation. Different factual scenarios cannot be predicted in advance, and seriously

defamatory content that is false or otherwise malicious could be left prominently displayed in internet search engine results of the plaintiff's name or business for all time.

53. The defence of innocent dissemination is the appropriate mechanism to deal with these issues fairly to both plaintiffs and internet giants who provide such services. No rationale has been advanced to justify the proposed immunities to this narrow and well resourced group. If the NSW Government is genuinely seeking a balance of rights between competing interests, on what basis is one interest given an immunity? That is not balance.

Recommendation 6

54. Each State and Territory Court and the Federal Court already has provisions empowering orders for preliminary discovery which apply to defamation. Those provisions have been effectively used over the last few years in relation to content on the internet.

55. Proposed s23A is redundant, unnecessary and would increase the costs of such applications for no apparent reasoned basis. Further, given it is inconsistent with the relevant provisions of the Federal Court Rules, it would likely not apply in that Court, again rendering defamation law not uniform.

Recommendation 7

56. Under the current defamation laws a publisher can defend a defamation claim if it offered to make amends as soon as reasonably practicable after being on notice of the defamatory content of a post. A necessary element to succeed in such a defence is the publication of a reasonable correction or clarification. This is essential because it publicly mitigates the harm of the defamatory post as soon as possible.

57. The rationale of the defence is that the publisher quickly takes steps to counteract or at least reduce the impact on the plaintiff's reputation of the defamatory publication.

58. Recommendation 7, in providing an offer to make amends defence in relation to digital matter without any reasonable correction or clarification, undermines the entire purpose of the defence. The word "amends" literally means correcting the harm that has been caused by the tort, not merely stopping the ongoing commission of it.

59. Remarkably, because proposed s15(1B) is not limited to online service providers, but instead extends to all digital matter (basically anything on the internet), it allows for a defence to <u>any person</u> who engages in a serious defamation online by the offer of the removal of the post without any steps to mitigate the harm already caused by the defamation.

60. Social media has been described in a recent judgment as the modern day version of the grapevine, by at least one defamation silk as "a virus" and plainly is intended and is successful in disseminating defamatory posts quickly. Allowing a defence to the poster, after the defamation has spread and found its mark by destroying the plaintiff's reputation by its mere deletion up to 14 days after the fact, is plainly unwarranted. Digital forensic experts known to those who practice in this area who consistently track the viral spread of defamatory digital matters measure maximum reach in hours and days, not weeks.

<u>Transitional provisions</u>

61. The transitional provisions for the Stage 1 reforms have already caused disputation and confusion because of the use of the word "publication" which is ambiguous in so far as the internet is concerned.

62. The proposed Stage 2 transitional provisions as presently drafted would compound these problems with additional unfairness by reason of the reference to the date of the commencement of the proceedings.

63. Any amendments should not apply to publications on the internet first posted before the commencement of such amendments. This reflects the clear and unambiguous transitional provision that applied when the *Defamation Act* 2005 commenced on 1 January 2006.

D. SUGGESTED CHANGES TO MODEL PROVISIONS

64. Each of the issues sought to be addressed by proposed sections 9A, 31A (both versions) and 39A can be fairly dealt with by amendments to s32 of the *Defamation Act*, for example as follows:

32 DEFENCE OF INNOCENT DISSEMINATION

(1) It is a defence to the publication of defamatory matter if the defendant proves that--

(a) the defendant published the matter merely in the capacity, or as an employee or agent, of a subordinate distributor, and

(a1) the defendant did not encourage, incite or edit the matter before it was published, and

(a2) the defendant did not promote or otherwise approve of the matter after it was published, and

(a3) the defendant did not republish the matter after it was published, and

(b) the defendant neither knew, nor ought reasonably to have known, that the matter was defamatory, and

(c) the defendant's lack of knowledge was not due to any negligence on the part of the defendant.

(1A) The defence in subsection (1) extends to a reasonable time after the defendant is on notice that the matter was defamatory, having regard to the circumstances of the case and including but not limited to:

(a) the manner that notice was given to the defendant, and

(b) the capability of the defendant to remove the matter from publication or circulation, and

(c) the resources of the defendant.

(2) For the purposes of subsection (1), a person is a **"subordinate distributor"** of defamatory matter if the person--

(a) was not the first or primary distributor of the matter, and

(b) was not the author or originator of the matter, and

(c) did not have any capacity to exercise editorial control over the content of the matter (or over the publication of the matter) before it was first published.

(3) Without limiting subsection (2) (a), a person is not the first or primary distributor of matter merely because the person was involved in the publication of the matter in the capacity of--

(a) a bookseller, newsagent or news-vendor, or

(b) a librarian, or

(c) a wholesaler or retailer of the matter, or

(d) a provider of postal or similar services by means of which the matter is published, or

(e) a broadcaster of a live programme (whether on television, radio or otherwise) containing the matter in circumstances in which the broadcaster has no effective control over the person who makes the statements that comprise the matter, or

(f) a provider of services consisting of--

(i) the processing, copying, distributing or selling of any electronic medium in or on which the matter is recorded, or

(ii) the operation of, or the provision of any equipment, system or service, by means of which the matter is retrieved, copied, distributed or made available in electronic form, or

(g) an operator of, or a provider of access to, a communications system by means of which the matter is transmitted, or made available, by another person over whom the operator or provider has no effective control, or

(h) a person who, on the instructions or at the direction of another person, prints or produces, reprints or reproduces or distributes the matter for or on behalf of that other person;

(i) an internet intermediary, being a person that facilitates the use of the internet and includes –

(i) search engines,

(ii) social media platforms,

(iii) internet caching, conduit or storage services, and

(iv) internet service providers;

(j) a person who operates an account on an internet social media platform on which third parties can comment or post material;

(k) a person who operates an internet site that provides a film, television, audio or visual on demand viewing service;

(l) a person who operates an internet review service;

(m) a person who operates an internet site that provides a service to facilitate public campaigns including surveys, petitions and crowd funding campaigns.

65. Amending s32 in such a manner would mean that all are equal before the law in relation to third party publications, on the internet and elsewhere. It reduces the costs of litigation by making the provisions far less complex and provides easier access to justice by curtailing the defence to one section. Further, it removes the complicated and costly requirement of a complaints mechanism that currently appears in the proposed model provisions and which, in reality, would be difficult to comply with for many persons and organisations.

66. Importantly it ensures a remedy for plaintiffs that is quick, inexpensive and effective in removing defamatory material from certain online platforms whose revenue is dependent on the repetition and spread of publication at high velocity.

67. It encourages the quick removal of blatantly false and defamatory third-party content by those who are not the authors of it from the digital platforms that spread them. Any such removal can hardly be viewed as 'censorship' in circumstances where the poster is able to defame at will elsewhere online.

68. Importantly this amendment would serve the community as a whole and the interests of justice by avoiding the need to engage in costly court processes which would take up court time and resources.

69. Such an approach strikes a fairer balance between important competing considerations than the proposed model provisions which appear to only benefit some, to the detriment of many.

E. CONCLUSIONS

70. The New South Wales Government should not prefer the interest of predominately American and Chinese corporations who profit in the hundreds of billions of dollars each year from the dissemination of defamatory content on their platforms over individual Australians irreparably harmed by false and defamatory content.

71. The law of defamation is already complex and expensive and should not be made more so by the provisions now proposed.

72. Any Stage 2 reforms that do proceed should also seek to rectify the obvious deficiencies in the Stage 1 reforms which have increased the cost and complexity of defamation litigation. This process should not be rushed, and should carefully reconsider those misconceived provisions.

73. If the defences recommended do proceed, they need significant redrafting which, if it occurs, should be the subject of further consultation with <u>all</u> stakeholders before any further steps towards legislating the changes are carried out.

74. Please contact Sue Chrysanthou [redacted] if you require any clarification or assistance in relation to the above matters.

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9 September 2022

APPENDIX A

Re: Stage 1 reforms to the Model Defamation Provisions

Background

1. Thank you for meeting with us in December 2021 and listening to the difficulties that have been encountered by us (and our colleagues and instructing solicitors) in relation to the amendments to the *Defamation Act* 2005 (NSW) (**Act**), made by the *Defamation Amendment Act 2020* (**Amending Act**), which commenced on 1 July 2021 (**Stage 1 Reforms**).

2. We set out in more detail below the matters that we raised with you during the meeting. We apologise for the delay in preparing this document, which inevitably occurred because of our busy practices and other commitments. We note that this is submitted in our personal capacities, given the recent changes to the office bearers at the New South Wales Bar Council.

Transitional provisions

3. We have observed that disputes have already arisen in relation to the interpretation of the transitional provisions of the Act, which provide that the 2020 amendments apply only in relation to the "publication of defamatory matter after the commencement of the amendment".

4. The original transitional provision in Schedule 4, Part 2 of the Act made it plain that the 2005 Act did not apply to publications which were published both before and after 1 January 2006 (the commencement date of the Act), or in other words, did not apply to publications first published before 1 January 2006.

5. The transitional provision as presently formulated in Schedule 4, Part 3 does not distinguish between publication and first publication. That has resulted in the possibility of different defences arising from publications first made before 1 July 2021, but continuing to be published on or after 1 July 2021. This cannot have been the intention.

6. The result has been to cause unnecessary disputation. See for example *Barilaro v Google LLC* [2022] FCA 650 at [195]-[196], [350]-[351], [376]-[381]. That is particularly the case given what would appear to be inconsistent and confusing

transitional provisions that apply to the changes to the *Limitation Act* 1995, caused by the *Amending Act*.

7. This is a matter that could be clarified by including the word "first" before the word "publication" in Schedule 4, Part 3, or to otherwise use the same wording as appears in Schedule 4, Part 2. It could also be corrected by way of regulatory amendment.

Serious financial harm to not for profit companies

8. Section 7(2) of the Act relevantly states that "*the publication of defamatory matter of any kind is actionable without proof of special damage*".

9. The new requirement under s 10A(2) of the Act, that excluded corporations prove that harm to reputation has caused, or is likely to cause serious financial loss, is directly inconsistent with s 7.

10. We understand the intention behind enabling certain charities and small companies to sue for defamation was because it was recognised that such companies could suffer harm to reputation by reason of the publication of defamatory matter without proof of special damage.

11. In the experience of the barristers and solicitors who practice in defamation, it is extremely rare that a charity, in particular, is able to demonstrate financial loss within the one year limitation period that applies to claims for defamation. The amendments effectively make it impossible for such organisations to sue.

12. The Second Reading Speech to the Amending Act noted that the provision was modelled on the United Kingdom *Defamation Act 2013*. That is not the case.

13. In the United Kingdom, all companies can sue for defamation – the restrictions found in the Act in relation to companies are not replicated in any other common law jurisdiction.

14. The requirement for serious financial loss in the United Kingdom only applies to trading companies. No explanation has ever been identified for extending that requirement to not-for-profit companies in the Stage 1 process.

15. Given the serious harm threshold was introduced to exclude trivial claims, it is difficult to see the basis for effectively excluding all claims brought by charities

whose right to sue to protect their reputations was specifically and deliberately preserved in the Act as originally enacted on 1 January 2006.

16. Section 10A(2) should be amended to only apply to "*trading companies*".

Concerns notices content

17. The Attorney General noted in his Second Reading Speech to the Amending Act that the changes to the concerns notice provisions in Part 3 of the Act were intended to address concerns about "*clarifying the dispute resolution mechanisms in the Act*" in order to encourage non-litigious dispute resolution and reduce the number of defamation actions which proceed to trial.

18. The practical effect of the new concerns notice provisions has been the opposite.

19. The changes do not appear to have any coherent basis and certainly do not seek to overcome any mischief recognised by practitioners in the field. It was very rare, prior to the amendments, for defamation proceedings to be commenced without a concerns notice being issued.

20. The effect of the changes is to disentitle a plaintiff from commencing otherwise properly brought proceedings if he or she has not issued a perfect concerns notice and to impose a mandatory 28 day period before proceedings can be commenced. This has had a number of impacts:

    a. An increase in pre-litigation costs and a decrease in settlements

    The Act now requires, as a mandatory pre-litigation step, the concerns notice to inform the publisher of the precise defamatory imputations that are alleged to arise from the publication and the serious harm that the publication is alleged to have caused at the time of preparing a concerns notice.

    This has meant a significant increase in pre-litigations costs and has caused delay in the commencement of proceedings where such delay can cause significant further harm to the plaintiff.

    Counsel are being briefed (including more often than not Senior Counsel) to prepare concerns notices at a cost in excess of $10,000 per notice. It is our experience that such letters could previously be prepared by solicitors at a

fraction of that cost. The additional expense is an obvious impediment to settlement.

The Concerns Notice effectively has to be as perfect as the full defamation pleading itself– an area well known for technical difficulties and now even riper for costly interlocutory disputation . There is really no rational basis for this sort of cost to be incurred at this point.

b. The inability to urgently commence proceedings

The provisions also do not allow for the commencement of urgent proceedings where a plaintiff seeks to prevent the publication of defamatory matter. It is impossible in those cases to issue a concerns notice that meets the requirements of s 12A of the Act. Counsel have been involved in cases where such claims could not be brought as a result of those requirements.

These new requirements for a concerns notice also makes it impossible to commence proceedings in a case where the entire matter complained of is not available to the plaintiff. In such cases, in the past, proceedings could be commenced and then amended after production of the full publication. That cannot now occur because of these provisions.

c. The risk of ongoing defamation

Counsel have experienced cases where concerns notices are issued the day of, or shortly after, publication of media articles. The media often do not respond <u>at all</u>, or respond in a dismissive way at the end of the 28 day period. High profile individuals who have been seriously defamed are left to sit and wait for 28 days while the publications continue to be read or viewed by hundreds of thousands of people. This process is not encouraging settlements and is merely exacerbating the impact of defamatory publications.

The delay has also allowed the media to continue to defame the plaintiff without restraint throughout the 28 day period – causing further, and often irreparable, harm.

d. The inability to commence proceedings until a defendant can be located

A recent decision in the Federal Court provides another example of why the amendments are problematic. In *Nettle v Cruse* [2021] FCA 935, the defendant could not be located and a concerns notice could not be issued to her. Proceedings were commenced in 2019 and substituted service orders obtained so that a judgment and injunctions could ultimately be made. This case could not have been commenced under the current regime. Without the name and verified address for service of a defendant (see further below) it can now be impossible for plaintiffs to commence proceedings.

e. The inability to amend imputations or to add new publications to existing proceedings

It is not clear whether a plaintiff can commence proceedings that comply with the concerns notice provisions and later amend his or imputations to include different imputations not in the original concerns notice. Even worse, some defendants continue to defame a plaintiff after the commencement of proceedings.

Before 1 July 2021, new publications could easily be added to the existing proceedings. Now, it would appear that separate concerns notices need to be issued, and 28 days elapse, before such amendments can be attempted. This is contrary to all case management principles, being a waste of time and costs.

f. Difficulties with provisions in relation to serious harm in concerns notices

Section 12A(1)(iv) requires a concerns notice to state what the prospective plaintiff "considers to be the serious harm to the person's reputation caused, or likely to be caused, by the publication". It is not clear what this requirement embraces; on one view it is directed to the nature of the harm, rather than particulars of all the matters which might be relied on as establishing it.

However s 12(3) permits a "further particulars notice" to be issued if the concerns notice "fails to particularise adequately" the information in question, answering which is mandatory, on pain of the notice being invalid: s 12(5).

Attention seems to be needed to the drafting of s 12 accordingly, so that the scope of s12A(1)(iv) can be more clearly understood, having regard to the consequences of failure to comply (potentially, the proceedings being improperly commenced).

g. The lack of court discretion leads to absurd outcomes

A plaintiff might serve a concerns notice but not technically comply with s 12A of the Act. For example, the notice might identify the article and annex it, but not include the URL as is required by the section. This would then require the plaintiff to issue a new concerns notice and wait for a further 28 days before commencing proceedings. The court has no discretion to rectify any defect in a concerns notice, however trivial. That outcome is absurd.

This is a real concern that will impact individuals, particularly in small claims. Counsel have encountered in their practices weekly examples of defective concerns notices prepared by solicitors, or opposing counsel. The defects are often minor, but would lead to non-compliance with s12A and the proceeding being necessarily struck out if commenced. The costs consequences to individual litigants are of significant concern and gainsay the very vice that the amendments were purportedly designed to manage.

h. Applicability in the Federal Court

Section 12A is arguably procedural and would not be enforceable in the Federal Court. Once proceedings are commenced and they attract Federal jurisdiction, the provisions are likely inconsistent with the Federal Court's power to conduct civil proceedings that relate to a matter within the Court's remit.

This dispute will be costly when it necessarily arises, in the same way that the procedural jury election provision in s21 of the Act caused many disputes and took up a lot of court time and costs and was ultimately found to be inconsistent with s40 of the *Federal Court of Australia Act*: see *Wing v Fairfax Media Publications Pty Limited* [2017] FCAFC 191; 255 FCR 61.

Similarly, there is an overwhelming view amongst Federal Court judges that s40 of the Act does not apply in the Federal Court because it is inconsistent with the Court's general discretion in relation to costs.

Given so many large cases are being brought in the Federal Court, this is a serious problem, that is inconsistent with uniformity.

21. Defamation cases are already notoriously expensive. The new concerns notice provisions now operate only serve to increase that expense.

22. These provisions have not only not met their objective, they have in fact exacerbated the problems they were intended to address, by over-complicating the pre-litigation process, discouraging settlements and increasing the cost of defamation claims. We recommend the repeal of s12A and 12B of the Act. This is overwhelming supported by our colleagues and instructing solicitors.

23. Alternatively, the Court should be given a general discretion to allow the commencement of proceedings irrespective of compliance with the concerns notice provisions where it is just and reasonable to do so.

Service

24. The methods of service for the giving of concerns notices and other documents in s 44 of the Act are arcane.

25. Although the provision refers to sending documents by email, that is only allowed in specified circumstances (where the person or body corporate has specified an email address for the giving or service of documents) that in reality, never arise.

26. A concerns notice should be able to be served by any method which is likely to draw the document to the attention of the publisher, including by email, by post, by instant message service or by text message.

27. This provision exacerbates the problems raised above in relation to the concerns notices, particularly for online content, because it prescribes impractical methods of service in circumstances where the publisher is often not known, and where verified postal or email addresses cannot be identified.

Conclusion

28. This paper was prepared in consultation with other legal practitioners who specialise in defamation and, as we understand, the views in it are widespread in the profession.

29. Should you have any questions, please contact Sue Chrysanthou SC at [redacted] or [redacted].

Yours sincerely

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