

19 May 2021

Review of Model Defamation Provisions  
C/o Policy, Reform and Legislation  
NSW Department of Communities and Justice

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## **Review of Model Defamation Provisions (Stage 2)**

ProductReview.com.au welcomes the opportunity to make submissions in relation to the Council of Attorneys-General's Review of Model Defamation Provisions (Stage 2).

### **1. ProductReview.com.au**

ProductReview.com.au is Australia's first and most comprehensive consumer opinion site. We provide a platform where people can rate and review services and products and the businesses that provide them. We provide our users with the tools to easily find the items they are interested in, read what others have said about them and share their own experiences.

We utilise a sophisticated content algorithm to assess reviews posted to our website. Reviews that do not meet the stringent requirements of our content algorithm are assessed by highly trained Moderation and Content assessors who personally determine whether the review is compliant. We have invested heavily in this technology and take pride in the ability it allows us to present only genuine reviews that reflect the opinions of real Australians and that meet community standards.

The reviews on our site help to drive public opinion to influence retailers and manufacturers to provide higher quality products and better service, and enable Australians to make better informed shopping choices. It is for this reason that we emphasise that the focus of reform to defamation law in Australia must be the facilitation of valid criticisms and opinions for publication and access online. Our service serves a crucial public interest and consumer protection function by helping to address the imbalance of information that exists between consumers and businesses by enabling consumers to publicly share their experiences.

### **2. Questions 3, 4: Categorisation of digital platforms**

ProductReview.com.au is not a typical digital platform because, although it provides a forum in which people can post reviews and comments, it does retain a degree of editorial control over that content in order to fulfil the functions and serve the need referred to above. Reviews are only published on our platform after passing through our algorithm. If a review is flagged as non-compliant our content moderation team will work personally with that individual to revise the content so that it meets our strict guidelines. However, it is ultimately up to that individual to edit their review. If the review still does not meet our guidelines, it will not be published.

Our platform also differs from social media platforms in that our content cannot be shared with other users within the platform, and we do not have feeds or timelines.

The ACCC's Digital Platforms Inquiry Final Report classifies digital platforms as:

- a) search engines;
- b) social media platforms; and
- c) digital content aggregation platforms.

ProductReview.com.au does not fall squarely into any of these categories. It is more akin to a forum administrator, which should be defined as the administrator of a website in which user-generated content is posted to discussion threads. On the basis of that definition, we agree that forum administrators should be considered as a separate category of digital platform because while they are generally able to screen posts prior to publication, they are not involved in the creation of content which is ultimately generated by their users.

### **3. Questions 7-13: Complaints to internet intermediaries and innocent dissemination**

Under the present regime, we are given very little choice as to how to respond to a complaint or concerns notice regarding a user review. Except in cases where it is obvious that a review is false or fake, the only way to limit or avoid liability is to remove the review altogether. As set out above, that has a clear chilling effect on genuine expressions of consumer opinion.

We are left in the untenable position of having to assess the merits of allegations of defamation or face liability as a publisher. That involves an assessment of whether the publication is of and concerning the complainant, whether the imputations are conveyed and are in fact defamatory, and whether any defences would be available to the originator – all of which are complex questions of law that the intermediary is not suited to answer. The alternative is to take a conservative approach and remove all content that is alleged by a complainant to be prima facie defamatory. ProductReview.com.au receives 9.5 million views each month because Australians know that it is an objective forum that they can trust. To put forum administrators in this position has an unintended chilling effect as they feel obliged to remove content that might not be defamatory as a matter of law in order to avoid the ongoing expense and opportunity costs associated with litigation. In the case of ProductReview.com.au the censoring of content not only affects our freedom of speech in general, but also specifically diminishes the public benefit that comes from valid criticism of consumer products.

In our experience, most complaints fail to identify or rely on any obviously false material or fake reviews. Instead, complaints claim that consumer opinions are “wrong”, or expressed in such a way as to render them defamatory. In other words, the complaint is made on the basis that the review is not written in a legally compliant form only. This is to be expected given that reviews are written by ordinary consumers and their substance is not amended by our staff. As noted above and at [3.124] of the Discussion Paper, if we are to properly manage our legal liability, those reviews will be removed from publication.

We would therefore recommend changes to the Part 3 of the MDPs to require any complaint to identify not only the imputations of concern, but also a factual basis for the concern, such as identifying factually incorrect content. This is not to suggest a reversal of any onus on the question of defences such as justification. Rather, it is to proscribe the content of any concerns notice in order to:

- (a) Assist us to assess any complaint and our risk of continuing to publish; and
- (b) More confidently continue to publish reviews where there is not error of fact identified at the complaints stage.

To this end, we support the adoption of at least that part of the UK process outlined at [3.192] in relation to the content of a complaints notice. The complaints notice should require the complainant to make a “good faith” declaration as suggested. Any failure to meet these requirements can then be notified by us in which case no further action should be required until a valid notice is made.

In any case, the law should be clarified to ensure that review sites such as ours are not liable for any defamatory material removed within a reasonable time or receiving a concerns/complaints notice.

#### **4. Conclusion**

ProductReview.com.au supports reform of the defamation laws in Australia. It is essential to provide protections for online intermediaries due to their unique features which differentiate them from traditional methods of communication. The law requires amendment to protect that role and to put in place better complaints mechanisms to avoid against the situation where unwarranted removal of content is the most commercially sensible option for our business.