

Defamation Guide

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From “Chapter 5: Responsibility for Government Action and Material”

pp 55 - 57

Defamation law will be relevant if material posted to the Platform by a Platform User is likely to injure another person’s reputation.

[5.33] Defamation is an area of law which is particularly important on the internet. The ease with which users can make statements or comments about other people online, and the relative anonymity that the internet provides occasionally leads to serious claims for damage to a person's reputation. Defamation is of particular interest to providers of internet services, because every person who is involved in the publication of a defamatory message can be liable for any damage that message causes.

[5.34] In the last few years, significant changes have been made to all defamation laws across Australia, which have resulted in largely standardised laws being established throughout all Australian jurisdictions. Under the new uniform Defamation Acts a plaintiff will have an action for defamation where they can establish that the defendant published a defamatory matter about them.⁶⁶

[5.35] Under these new laws, “published” includes publication over the internet.⁶⁷ Consequently, material uploaded by an organisation to a social networking site could give rise to an action for defamation, as long as it is found to satisfy one of the following three tests:

- 1) the material is likely to injure the reputation of the plaintiff by exposing them to ridicule, contempt or hatred;⁶⁸

⁶⁶ *Defamation Act 2005* (Qld) s 6; *Defamation Act 2005* (NSW) s 6; *Defamation Act 2005* (Vic) s 6; *Defamation Act 2005* (Tas) s 6; *Defamation Act 2005* (SA) s 6; *Defamation Act 2005* (WA) s 6; *Defamation Act 2006* (NT) s 5; *Civil Law (Wrongs) Act 2002* (ACT) s 118; Frances McGlone and Amanda Stickley, *Australian Torts Law* (2005) 379.

⁶⁷ *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

⁶⁸ *Ettingshausen v Australian Consolidated Press* (1991) 23 NSWLR 449.

- 2) the material is likely to make people shun or avoid them;⁶⁹ or
- 3) the material has the tendency to lower the plaintiff's reputation in the estimation of others.⁷⁰

[5.36] If an organisation is held to be the “publisher” of the material, it will be liable for the defamation. The exact meaning of the term ‘publisher’ in the online environment is currently uncertain, with no Australian cases and a number of conflicting international cases.⁷¹ However, in general it is interpreted broadly, where every person who contributes to the publication of a defamatory matter is potentially liable.⁷² The courts appear to determine the matter based primarily on how much control the person or entity in question has over the publication of the material. Significantly, in the context of providers of online services, omitting to remove or amend a defamatory matter that the service provider is aware of and that they have the ability to amend or remove will generally amount to a publication.⁷³

[5.37] There are defences to defamation that may apply to an organisation engaging in activities in any one of the Platforms. These are discussed in Chapter 6, which relates more specifically to risks caused by third party actions or material, at [6.09] – [6.13].

⁶⁹ *Henry v TVW Enterprises* [1990] WAR 475.

⁷⁰ McGlone and Stickley, above n 50, 380.

⁷¹ See *Bunt v Tilley & Ors* [2006] EWHC 407 and *Stratton Oakmont v Prodigy Services Co* 23 Media L Rep 1794 (NY, 1995).

⁷² *Webb v Bloch* (1928) 41 CLR 331.

⁷³ *Byrne v Deane* [1937] 2 All ER 204, 210 (Slessor LJ).

From “Chapter 6: Risks Caused by Third Party Actions and Material”

pp 68 - 71

Organisations may be liable for a defamatory statement made or defamatory material posted by a Platform User to a webspace that is controlled by them. Liability will arise where the organisation does not remove the material or does not limit that Platform User’s ability to enter the webspace and make defamatory statements (subject to any exceptions under US or Australian law for liability for defamation).

[6.9] If a Platform User makes a defamatory statement in a webspace, that User will generally be considered to be the “publisher” of the information for the purpose of any action for defamation and therefore will hold primary legal responsibility. However, any person who has the ability to limit access to the space or remove the material once it is posted, such as the Platform Provider (eg Yahoo, Google or Linden Lab) or the manager of the webspace (eg the organisation), could also potentially be held liable. After all, the manager of the space, like the editor of a newspaper, ultimately has the ability to allow people to enter and make statements. On the other hand, unlike a traditional editor, the manager of the space will not always have the ability to determine the content of statements made by users in the space before they are published.

[6.10] Under US law, it is likely that a party would be exempted from liability for defamatory comments posted by third parties to their webspace by the *Communications Decency Act* (US) 47 USC § 230 (1996) (CDA). The CDA states that ‘no provider or user of an interactive computer service shall be treated as the publisher or speaker of information provided by another information content provider’.⁹⁶ The operation of this provision was demonstrated in *Zeran v America Online Inc*,⁹⁷ in which the court held that AOL was not responsible for an anonymous post on one of its bulletin boards containing a person’s private home number. Recently, the Californian Supreme Court in *Barrett v Rosenthal*,⁹⁸ extended the reasoning in *Zeran*,⁹⁹ holding an internet user who posts material created by others to a website is immune from liability under the CDA as long as they make no change to the material. Under this decision, the CDA would apply even if government representatives

⁹⁶ *Communications Decency Act* (US) 47 USC § 230(c)(1) (1996).

⁹⁷ [1997] 129 F3d 327.

⁹⁸ 40 Cal 4th 33 (Cal Sup Ct, Nov 20, 2006).

⁹⁹ [1997] 129 F3d 327.

had posted the content—as long as the material originated with another party and they did not alter or in any other way endorse or add to the material.

[6.11] Under Australian law there are a number of defences to a charge of defamation, including justification,¹⁰⁰ contextual truth,¹⁰¹ absolute privilege,¹⁰² qualified privilege,¹⁰³ honest opinion,¹⁰⁴ innocent dissemination,¹⁰⁵ and triviality.¹⁰⁶ The defence most likely to provide protection for organisations in the circumstances described is the defence of innocent dissemination. This states that it is a defence to the publication of a defamatory matter if it is shown that:

- the defendant published the matter merely in the capacity, or as an employee or agent, of a subordinate distributor;
- the defendant neither knew, nor ought reasonably to have known the matter was defamatory; and
- the defendant's lack of knowledge was not due to any negligence on the part of the defendant.¹⁰⁷

[6.12] A person will constitute a subordinate distributor if the person:

- was not the first or primary distributor of the matter;

¹⁰⁰ Defamation Act 2005 (Qld) s 25; Defamation Act 2005 (NSW) s 25; Defamation Act 2005 (Vic) s 25; Defamation Act 2005 (Tas) s 25; Defamation Act 2005 (SA) s 23; Defamation Act 2005 (WA) s 25; Defamation Act 2006 (NT) s 22; Civil Law (Wrongs) Act 2002 (ACT) s 135.

¹⁰¹ Defamation Act 2005 (Qld) s 26; Defamation Act 2005 (NSW) s 26; Defamation Act 2005 (Vic) s 26; Defamation Act 2005 (Tas) s 26; Defamation Act 2005 (SA) s 24; Defamation Act 2005 (WA) s 26; Defamation Act 2006 (NT) s 23; Civil Law (Wrongs) Act 2002 (ACT) s 136.

¹⁰² Defamation Act 2005 (Qld) s 27; Defamation Act 2005 (NSW) s 27; Defamation Act 2005 (Vic) s 27; Defamation Act 2005 (Tas) s 27; Defamation Act 2005 (SA) s 25; Defamation Act 2005 (WA) s 27; Defamation Act 2006 (NT) s 24; Civil Law (Wrongs) Act 2002 (ACT) s 137.

¹⁰³ Defamation Act 2005 (Qld) s 30; Defamation Act 2005 (NSW) s 30; Defamation Act 2005 (Vic) s 30; Defamation Act 2005 (Tas) s 30; Defamation Act 2005 (SA) s 28; Defamation Act 2005 (WA) s 30; Defamation Act 2006 (NT) s 27; Civil Law (Wrongs) Act 2002 (ACT) s 139A.

¹⁰⁴ Defamation Act 2005 (Qld) s 31; Defamation Act 2005 (NSW) s 31; Defamation Act 2005 (Vic) s 31; Defamation Act 2005 (Tas) s 31; Defamation Act 2005 (SA) s 29; Defamation Act 2005 (WA) s 31; Defamation Act 2006 (NT) s 28; Civil Law (Wrongs) Act 2002 (ACT) s 139B.

¹⁰⁵ Defamation Act 2005 (Qld) s 32; Defamation Act 2005 (NSW) s 32; Defamation Act 2005 (Vic) s 32; Defamation Act 2005 (Tas) s 32; Defamation Act 2005 (SA) s 30; Defamation Act 2005 (WA) s 32; Defamation Act 2006 (NT) s 29; Civil Law (Wrongs) Act 2002 (ACT) s 139C.

¹⁰⁶ Defamation Act 2005 (Qld) s 33; Defamation Act 2005 (NSW) s 33; Defamation Act 2005 (Vic) s 33; Defamation Act 2005 (Tas) s 33; Defamation Act 2005 (SA) s 31; Defamation Act 2005 (WA) s 33; Defamation Act 2006 (NT) s 30; Civil Law (Wrongs) Act 2002 (ACT) s 139D.

¹⁰⁷ *Defamation Act 2005* (Qld) s 32(1).

- was not the author or originator of the matter; and
- 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.¹⁰⁸

[6.13] However, in *Thomson v Australian Capital Television Pty Ltd* (Thomson),¹⁰⁹ the High Court held that where a publisher has the ability to control and supervise the disseminated content, then the defence of innocent dissemination is not available.¹¹⁰ It is therefore important that organisations take all care possible, as an institutional policy, to ensure that:

- when they learn of defamatory statements, they immediately exercise what control they have (if any) over the author to prevent those statements from being published;
- they do not turn a blind eye or tacitly allow defamatory statements to be made; and
- they do not republish any defamatory material—this includes, for example, in screenshots or video captures of Second Life material.

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¹⁰⁸ *Defamation Act 2005* (Qld) s 32(2).

¹⁰⁹ (1996) 186 CLR 574.

¹¹⁰ *Thomson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574.