

Two sides to every story? Protecting yourself against the mad and the bad

By Nathan Tetzlaff
Associate
Gaze Burt Lawyers

As a litigation and dispute resolution specialist I often hear that there are two sides to every story. While that is undoubtedly correct, it is certainly not fair to say that both sides always have equal merit. Indeed, in my experience one side to a dispute often doesn't have any merit whatsoever.

Case in point, the growing industry of review websites, and the availability of the internet soapbox to every Tom, Dick and Harriette with an opinion. Like most good ideas, the ability to use Yelp, Google, blogging or any number of similar services to review, rate and comment on businesses can have drawbacks. In particular the correct functioning of these review services is reliant on the reviewers acting in good faith, and having at least a minimum degree of sanity.

Unfortunately, in some cases a reviewer might overreact to some perceived slight or failure of service; in other cases giving a bad review is part of a campaign of harassment. In a few cases a bad review can be weaponised as a threat to try to obtain a discount. There is a lot of anecdotal evidence of restaurants being threatened with negative reviews if they don't comp a meal.

In the commercial context, when a significant proportion of consumers do a basic google search to decide between providers of similar goods and services, industrial scale campaigns for or against certain brands are not unusual. A variety of less-than-reputable organisations offer reviews of any kind in large quantities for a fee.

False reviews left on sites such as Yelp or Google are actually the easiest to deal with as these large companies have policies addressing this problem. While the policies don't always work as intended there is at least an effort to ensure that false reviews don't harm a business.

For advice and assistance in relation to defamation or the Harmful Digital Communications Act, contact Gaze Burt's litigation and dispute resolution team.



Nathan Tetzlaff
Associate

But what about the phenomena of a malicious or just plain unhinged individual persecuting a business for some perceived slight, without going through a third party, or in a way that a third party site cannot prevent?

Blogging and Facebook give anyone the ability to promote their opinions to a very wide audience. At the relatively harmless end of the scale this allows cranks and weirdos the ability to peddle whatever conspiracy theories or antisocial tripe they subscribe to; more worrying is where these forums provide a loudspeaker for calculating and potentially believable attacks on individuals or businesses. Can the law provide a remedy?

There are two main legal options. The first is the law of defamation, and the second is the Harmful Digital Communications Act.

Defamation

Defamation applies where somebody makes harmful statements about their victim to a third party. Publication on the web certainly meets this description, and the law of defamation will apply.

Truth and honest opinion are both defences to a defamation claim. If the person making the statement can show that it is true, or that it is genuinely believed what they were saying (based on a foundation of provable facts), the statement is not defamatory.

The biggest problem with defamation is that legal proceedings are always costly and usually inherently uncertain. This tends to disincentivise people from enforcing their rights even when a statement is pretty clearly defamatory. Additionally, anyone with a good grasp of language can issue a statement that, while technically true, is entirely misleading. People are very easily influenced and manipulated, and it is fairly easy for someone to mix truth, opinions, and feelings, while selectively omitting anything that does not fit the intended narrative, in such a way as to make anyone look extremely bad indeed. A well constructed hit-piece can reach thousands of people and cause enormous problems, all without being defamatory.

The Harmful Digital Communications Act

This is where the Harmful Digital Communications Act (“HDCA”) can help. Anyone who is at risk of harm as a result of a digital communication (including reviews, blogs or Facebook posts) can seek help from ‘Netsafe’, an organisation empowered by the government to investigate and try to resolve complaints.

If Netsafe is unable to help, a complainant can seek orders from the Court, which has wide powers to require a defendant to (among other things):

- Take down content;
- Post a correction; and/ or

- Allow a victim to post a right of reply.

The Court can also make suppression orders to prevent further publicity, and can require third parties (such as Facebook, or internet service providers) to provide information identifying anonymous people posting harmful material.

Whether a review, post or rant is 'true' is a factor that the Court would consider, but is only one factor alongside others, such as the general effect of the communication, and whether it is misleading.

So far the Court has used the HDCA to deal with revenge porn, and general harassment. This could easily be expanded to deal with fake reviews and harassment in a commercial context. Providing a broad range of pragmatic options, it appears that the HDCA is specifically intended to address some of the loopholes and difficulties traditionally encountered in relation to a defamation claim.

But is it worth fighting fake reviews or malicious blogs?

Thankfully, consumers are becoming increasingly aware of the problem of fake reviews and are unlikely to be put off by a few wild accusations or a couple of 1-star reviews.

Whether it's worth your time and effort to fight against a defamatory or harassing publication or series of fake reviews is also something to be carefully considered. Would your time be better spent focusing on your customers and providing the sorts of service that generate positive feedback and personal referrals instead? Also keep in mind the famed 'Streisand effect' describing a situation where fighting against negative publicity may have the effect of backfiring by drawing more attention to that negative publicity.

If you decide that you want to take a stand and fight back against the mad and the bad trying to harm your business there are options. We can assist you to assess the best one to suit your situation and help you through the process.

Disclaimer

This article is a broad overview for informative purposes only, and is not intended to be relied on as a substitute for individualised legal advice. Any reliance on any part of this article is strictly at an individual's own risk.