



A critique of the national, uniform defamation laws

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The national, uniform defamation laws that came into force across Australia at the beginning of 2006 introduced significant changes to the principles and practice of defamation law. This article analyses the major changes, both procedural and substantive. In doing so, it suggests that, while national consistency in defamation laws is highly desirable, uniformity should not be viewed as the sole goal of defamation law reform. It argues that the focus on the need for uniformity in the recent reform process meant that insufficient attention was given to the improvement of the substance of Australian defamation law. There remains, therefore, further scope for future reform.

1 Introduction

The introduction of national, uniform defamation laws (NUDL) was the most significant development in the history of Australian defamation law. Indeed, the enactment of these laws has meant that finally there is a body of law sufficiently coherent and identifiable to be designated ‘Australian defamation law’, as opposed to the plurality of eight different defamation laws that had applied across Australia for the preceding 150 years. Prior to 2006, the common law, largely unaffected by statute, applied in some jurisdictions, such as Victoria and Western Australia, whereas the common law was significantly affected by statute in other jurisdictions, such as New South Wales, or overtaken by codification in jurisdictions like Queensland and Tasmania.

This article provides a detailed analysis of the major changes brought about by the introduction of the NUDL. It canvasses the major substantive and procedural changes, including reforms to standing to sue for defamation, choice of law in defamation, limitation periods, the respective roles of judge and jury, as well as changes to available defences, the assessment of damages and provision for non-litigious resolution of defamation claims in the form of an ‘offer of amends’ regime. Among the most significant changes are the introduction of a statutory choice of law in defamation rule; the curtailment of corporations’ right to sue in defamation; the removal of the element of public interest or benefit as part of the defence of justification; and the capping of damages for defamation. Already, the case law discloses some actual and probable consequences of these changes. This article argues that uniformity is a positive development, eliminating, as it does, the needless complexity and the associated costs of having eight, substantively different, defamation laws for a country of approximately 20 million people. However, this article also argues that the reform process was unduly limited, pursuing uniformity as an end in itself, with insufficient attention being given to whether the resulting

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uniform legislation was optimal. While the NUDL are welcome, there remains scope for further, substantive reform to occur in the future.

2 How uniform are the NUDL?

The uniformity of the NUDL should not be overstated. There are still substantive and superficial differences, to varying degrees, among the states and territories.¹ In terms of the remaining, substantive differences, among the most notable are, for example, the fact that Tasmania did not legislate against the defamation of the dead.² More importantly, the states and territories diverge on the role of judge and jury in defamation proceedings.³ Given the differences that remain between the defamation legislation throughout Australia, it may be appropriate to describe the state of the laws as substantially or practically uniform, to the extent that such a description is not an oxymoron.

Nevertheless, the degree of consistency and the short period of time in which it was achieved are remarkable, especially when it is understood in the context of previous, abortive attempts to harmonise Australian defamation laws.⁴ The NUDL resulted from a threat by the then Commonwealth Attorney-General, Philip Ruddock, to pass a defamation 'code', which contained some aspects unpalatable to state and territory attorneys-general. This provided the impetus for the state and territory attorneys-general themselves to devise and enact their own defamation laws.

Although not strictly uniform, the new laws seek to facilitate greater uniformity⁵ and to eliminate 'forum shopping' by plaintiffs, at least within Australia.⁶ They seek to do this notably through the introduction of a statutory choice of law rule for publications within Australia.

1 For example, notwithstanding the intention that all states and territories pass a uniform defamation Act, the Australian Capital Territory elected to incorporate the provisions in the Civil Law (Wrongs) Act 2002 (ACT) (CLWA (ACT)) Ch 9. In addition, in South Australia and the Northern Territory, although there are separate Defamation Acts, the numbering of the provisions diverges from the numbering agreed on in the remaining jurisdictions. In Queensland and Tasmania, certain numbered provisions are not used and are expressly left blank in order to ensure uniformity in numbering, with the consequence that the substance of those omitted provisions has not been enacted. See, eg, Defamation Act 2005 (Qld) (DA (Qld)) s 43 (omission of provision relating to incriminating answers, documents or things); Defamation Act 2005 (Tas) (DA (Tas)) s 10 (omission of provision relating to defamation of the dead). Despite the intention to have a uniform commencement date for the new laws, both the territories had a later date than the states. The states had a commencement date of 1 January 2006: Defamation Act 2005 (NSW) (DA (NSW)) s 2; DA (Qld) s 2; Defamation Act 2005 (SA) (DA (SA)) s 2; DA (Tas) s 2 (on a date to be proclaimed, ultimately being 1 January 2006); Defamation Act 2005 (Vic) (DA (Vic)) s 2; Defamation Act 2005 (WA) (DA (WA)) s 2. The CLWA (ACT) Ch 9 commenced on 22 February 2006; the Defamation Act 2006 (NT) (DA (NT)) commenced on 26 April 2006.

2 See below text at 8 Defamation of the Dead.

3 See below 10 The respective roles of judge and jury in defamation proceedings.

4 For a useful overview of previous reform attempts, see A Kenyon, *Defamation: Comparative Law and Practice*, UCL Press, London, 2006, pp 362–4.

5 CLWA (ACT) s 115(a); DA (NT) s 2(a); DA (NSW) s 3(a); DA (Qld) s 3(a); DA (SA) s 3(a); DA (Tas) s 3(a); DA (Vic) s 3(a); DA (WA) s 3(a).

6 Australian Government Attorney-General's Department, *Revised outline of a possible national defamation law*, July 2004, p 29.

3 Choice of law in defamation

Prior to the introduction of the NUDL, the application of the choice of law in tort rule to defamation claims was a complex undertaking.⁷ In the last decade, the common law choice of law in tort rules had undergone a significant revision. For a long time, the settled choice of law in tort rule in Australia was the rule in *Phillips v Eyre*.⁸ Under the rule in *Phillips v Eyre*, a claim in respect of a tort committed outside the forum could be brought in a court of the forum if the claim was actionable under the law of the forum (the *lex fori*) and the law of the place of the wrong (the *lex loci delicti*). This required a consideration of at least two different systems of law. If the claim gave rise to civil liability under both systems of law, the claim could be brought in the court of the forum, in which case the prevailing view was that the *lex fori* applied to the determination of the claim.⁹

The rule in *Phillips v Eyre* therefore necessitated a consideration of at least two systems of law. However, a particular feature of defamation had the potential to introduce a greater number of defamation laws. The tort of defamation is committed wherever publication occurs, in the sense of there being a communication of defamatory matter to a person other than the plaintiff.¹⁰ Because defamatory matter can be widely disseminated across Australia by means of national newspapers and radio and television networks, as well as internet technologies, the potential for claims involving up to eight different defamation laws was real. An international publication further multiplied the number of defamation laws potentially engaged by a defamation claim.

In the course of two landmark judgments, the High Court of Australia, by majority, recast the choice of law in tort rule. In *John Pfeiffer Pty Ltd v Rogerson*,¹¹ the High Court abrogated the rule in *Phillips v Eyre* for torts committed within Australia, replacing it with the *lex loci delicti*. In *Regie Nationale des Usines Renault SA v Zhang*,¹² the court did likewise in respect of international torts. One of the principal aims of these reformulations of the rules governing choice of law in tort, stated in both of these cases, was to

7 See, eg, *Gorton v Australian Broadcasting Commission* (1973) 1 ACTR 6; 22 FLR 181; *Cawley v Australian Consolidated Press Ltd* [1981] 1 NSWLR 225.

8 (1870) LR 6 QB 1.

9 *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20 at 42 per Windeyer J; [1966] ALR 423; *Hartley v Venn* (1967) 10 FLR 151 (ACT SC) at 155–6 per Kerr J; *Kolsky v Mayne Nickless Ltd* [1970] 3 NSWLR 511 at 517 per curiam; *Walker v WA Pickles Pty Ltd* [1980] 2 NSWLR 281 at 289 per Glass JA; *Pozniak v Smith* (1982) 151 CLR 38 at 49–50 per Mason J; 41 ALR 353; *Gardner v Wallace* (1995) 184 CLR 95 at 98–9 per Dawson J; 132 ALR 323; *Nalpanitidis v Stark (No 2)* (1995) 65 SASR 454 at 473 per DeBelle J; 23 MVR 499; *Thompson v Hill* (1995) 38 NSWLR 714 at 741–2 per Clarke JA; 22 MVR 289; contra *Wilson v Natrass* (1995) 21 MVR 41 (Vic AD) at 51 per Ashley J; BC9503355. See also M Davies, ‘Exactly What is the Australian Choice of Law Rule in Torts Cases?’ (1996) 70 ALJ 711. As to the application of the rule in *Phillips v Eyre* in Australia, see generally *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; 172 ALR 625 at [20]–[58] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

10 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575; 194 ALR 433 at [25]–[28], [40]–[44] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

11 (2000) 203 CLR 503; 172 ALR 625.

12 (2002) 210 CLR 491; 187 ALR 1.

promote certainty and predictability in application and outcome.¹³ In the case of multistate defamation, the High Court's restatement of the choice of law in tort rule did not have this effect — a fact the court itself acknowledged in *Pfeiffer v Rogerson*.¹⁴ Applying the *lex loci delicti* as the choice of law in tort rule would still involve as many defamation laws as there are places of publication. Therefore, under both the rule in *Phillips v Eyre* and the *lex loci delicti*, multiple systems of defamation law would apply to the publication of a single matter and differential outcomes would be possible in respect of the publication of the same defamatory matter across borders, depending on the tests for liability and, more importantly, the requirements of the available defences.

The NUDL overcome the difficulties presented by the common law by introducing a statutory choice of law rule for defamation claims. Now, if defamatory matter is published in more than one Australian jurisdictional area,¹⁵ the law to be applied to the disposition of the whole claim is the law with which the harm occasioned by the publication has its closest connection.¹⁶ In order to determine the substantive law with the closest connection to the claim, the relevant provision directs the court to consider the plaintiff's place of residence or principal place of business at the time of publication and the extent of publication and the harm suffered by the plaintiff in each Australian jurisdictional area.¹⁷ The adoption of a statutory choice of law rule, along with the harmonisation of the substantive law of defamation in Australia, furthers the policy objective of eliminating opportunities for 'forum shopping' by plaintiffs, at least within Australia.¹⁸

However, given the territorial limitations of state and territory legislatures, the statutory choice of law rule only relates to the publication of defamatory matter within Australia. Consequently, it does not apply to the international publication of defamatory matter. The common law rule for international torts, the *lex loci delicti*, will continue to apply to cases involving the international publication of defamatory matter. Cases involving international publication of defamatory matter are not unknown in Australia. Indeed, there have been a number of such cases involving internet technologies.¹⁹ It is perhaps

13 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; 172 ALR 625 at [83]–[85] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ, [123] per Kirby J; *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491; 187 ALR 1 at [66] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

14 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; 172 ALR 625 at [81] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

15 As to the definition of the term 'jurisdictional area', see CLWA (ACT) s 123(5); DA (NT) s 10(5); DA (NSW) s 11(5); DA (Qld) s 11(5); DA (SA) s 11(5); DA (Tas) s 11(5); DA (Vic) s 11(5); DA (WA) s 11(5).

16 CLWA (ACT) s 123(2); DA (NT) s 11(2); DA (NSW) s 11(2); DA (Qld) s 11(2); DA (SA) s 11(2); DA (Tas) s 11(2); DA (Vic) s 11(2); DA (WA) s 11(2).

17 CLWA (ACT) s 123(3); DA (NT) s 11(3); DA (NSW) s 11(3); DA (Qld) s 11(3); DA (SA) s 11(3); DA (Tas) s 11(3); DA (Vic) s 11(3); DA (WA) s 11(3). Cf the Australian Law Reform Commission's (ALRC) earlier recommendation for the applicable law to be the law of the place of the plaintiff's residence: ALRC, *Choice of Law*, Report No 58, 1992, [6.57].

18 As to 'forum shopping' as a policy consideration underpinning the impetus towards the enactment of NUDL, see *Revised outline of a possible national defamation law*, above n 6, p 29.

19 See, eg, *Macquarie Bank Ltd v Berg* (1999) A Def R 53–035; [1999] NSWSC 526;

undesirable to have a different rule for intra-national and international defamation, but it would have been even more undesirable to have eight different defamation laws apply to intra-national defamation claims. The statutory choice of law rule is a practical and pragmatic reform.

One of the other features of the statutory choice of law rule is its exclusion of *renvoi*.²⁰ Until recently, it was generally accepted that *renvoi* had no operation in relation to choice of law in tort.²¹ However, the High Court of Australia, in *Neilson v Overseas Project Corporation of Victoria*,²² somewhat unexpectedly recognised the application of *renvoi* to choice of law in tort in a case involving personal injuries. Now, by virtue of the statutory choice of law rule, a reference to the substantive law of a jurisdictional area excludes a reference to any choice of law rule that differs from the statutory one.²³ Again, because of the territorial limitations on the legislative powers of the states and territories, the operation of this exclusion is limited to publication within Australia, allowing the prospect of *renvoi* in relation to international defamation claims. However, notwithstanding the different rules for intra-national and international cases, it also seems sensible and desirable to introduce as much certainty as possible, even if it is limited to one category of case.

4 The limitation period for defamation claims

Another feature of the NUDL is the introduction of a one-year limitation period within which defamation claims must ordinarily be brought.²⁴ In addition, there is the possibility of a court-ordered extension of the limitation period to a maximum of three years where the court is satisfied that it was not reasonable for the plaintiff to have commenced proceedings within the

BC9902857; *Cullen v White* [2003] WASC 153; BC200305956; *Markovic v White* [2004] NSWSC 37; BC200400260; *National Auto Glass Supplies (Australia) Pty Ltd v Nielsen & Moller Autoglass (NSW) Pty Ltd* [2007] FCA 1625; BC200709203.

20 Sir Lawrence Collins (Ed), *Dicey, Morris and Collins on the Conflict of Laws*, 14th ed, Vol 1, Sweet & Maxwell, London, 2006, [4-006]: 'The problem of *renvoi* arises whenever a rule of the conflict of laws refers to the "law" of a foreign country, but the conflict rule of the foreign country would have referred the question to the "law" of the first country or to the "law" of some third country.'

21 See, eg, *M'Elroy v M'Allister* 1949 SC 110 at 126 per Lord Russell; [1949] SLT 139.

22 (2005) 223 CLR 331; 221 ALR 213. For a range of views on this case, see R Mortensen, "'Troublesome and Obscure": The Renewal of *Renvoi* in Australia' (2006) 2 *Jnl of Private International Law* 1; M Davies, '*Neilson v Overseas Project Corporation of Victoria Ltd: Renvoi and Presumptions About Foreign Law*' (2006) 30 *MULR* 244; M Keyes, 'Foreign law in Australian courts: *Neilson v Overseas Projects Corporation of Victoria Ltd*' (2007) 15 *TLJ* 9.

23 CLWA (ACT) s 123(4); DA (NT) s 10(4); DA (NSW) s 11(4); DA (Qld) s 11(4); DA (SA) s 11(4); DA (Tas) s 11(4); DA (Vic) s 11(4); DA (WA) s 11(4).

24 Limitation Act 1985 (ACT) s 21B(1); Limitation Act 1981 (NT) s 12(1A); Limitation Act 1969 (NSW) s 14B; Limitation of Actions Act 1974 (Qld) s 10AA; Limitation of Actions Act 1936 (SA) s 37(1); DA (Tas) s 20A(1); Limitation of Actions Act 1958 (Vic) s 5(1AAA); Limitation Act 2005 (WA) s 15. The original proposal was for the limitation provision to be incorporated into the national, uniform defamation legislation: SCAG Working Group of State and Territory Officers, *Proposal for Uniform Defamation Laws*, July 2004, [4.6], Recommendation 8. See also *States and Territories Model Defamation Provisions* cl 12. However, this occurred only in Tasmania.

one-year limitation period.²⁵ This represents a substantial reduction from the limitation periods that previously applied to defamation claims. Before special limitation periods for defamation were introduced, defamation was treated in the same way as other claims in tort. The general limitation period for causes in action in tort was six years in the Australian Capital Territory, New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia and three years in the Northern Territory.²⁶

The suggestion that the limitation period for defamation claims be reduced to one year was mooted by the New South Wales Law Reform Commission (NSWLRC) in 1995,²⁷ although it was not acted on immediately by the legislature at that time. Again, in 2002, the Attorney-General's Taskforce on Defamation Law Reform endorsed the NSWLRC's proposal.²⁸ The proposal was subsequently enacted in New South Wales.²⁹ Several reasons were advanced to support a reduced limitation period for defamation claims. First, the tort of defamation is different from torts relating to personal injuries and property damage in that the tort of defamation is complete on publication and the damage done to the plaintiff's reputation occurs at that time in a way that is known to the plaintiff. By contrast, the damage in cases involving personal injuries and property damage may take longer to crystallise, thereby necessitating a longer limitation period. Secondly, a shorter limitation period for defamation claims would not prejudice plaintiffs, given that the majority of them commence their actions promptly after publication. Indeed, it was suggested that plaintiffs who were genuinely concerned about their reputations would be likely to commence proceedings promptly.³⁰

The reasons advanced by the NSWLRC for a reduced limitation period for defamation claims remain compelling. The one-year limitation period should facilitate the availability of effective remedies and the speedy resolution of defamation claims — two of the other stated objects of the NUDL — while the allowance of court-ordered extensions provides a satisfactory degree of flexibility and protection against injustice. Moreover, a longer limitation period for defamation would be incongruous with earlier tort law reforms, which reduced the limitation period for personal injury claims to three years in most jurisdictions.³¹

25 Limitation Act 1985 (ACT) s 21B(2); Limitation Act 1981 (NT) s 44A; Limitation Act 1969 (NSW) s 56A; Limitation of Actions Act 1974 (Qld) s 32A; Limitation of Actions Act 1936 (SA) s 37(2); DA (Tas) s 20A(2); Limitation of Actions Act 1958 (Vic) s 23B; Limitation Act 2005 (WA) s 40. For an example of a successful application for an extension of time within which to commence defamation proceedings, see *Grech v Illawarra Newspaper Holdings Pty Ltd t/as Illawarra Mercury* (2005) 2 DCLR (NSW) 169.

26 Limitation Act 1985 (ACT) s 11(1); Limitation Act 1969 (NSW) s 14(1)(a); Limitation of Actions Act 1974 (Qld) s 10(1)(a); Limitation of Actions Act 1936 (SA) s 35(c); Limitation Act 1974 (Tas) s 4(1)(a); Limitation of Actions Act 1958 (Vic) s 5(1)(a); Limitation Act 2005 (WA) s 13(1). As to the position in the Northern Territory, see Limitation Act 1981 (NT) s 12(1)(a).

27 NSWLRC, *Defamation*, Report No 75, 1995, Recommendation 37.

28 Attorney-General's Taskforce on Defamation Law Reform, *Defamation Law: Proposals for Reform in NSW*, September 2002, Recommendation 10.

29 Defamation Amendment Act 2002 (NSW) s 4 Sch 2.2.

30 NSWLRC, above n 27, [13.4].

31 See Limitation Act 1985 (ACT) s 16B; Limitation Act 1969 (NSW) s 18A; Limitation of

5 Abolition of the distinction between libel and slander

Another reform brought about by the NUDL was the abolition of the distinction between libel and slander.³² Now all claims in defamation presume damage, rather than requiring proof.³³ Broadly, slander is oral defamation and libel is defamation in a written or otherwise permanent form.³⁴ At common law, the distinction between libel and slander was important because libel was actionable without proof of special damage, whereas slander required such proof.³⁵ However, to complicate the position somewhat, there were four categories of slanderous imputations for which damage to reputation was also presumed, namely, imputations of criminality; imputations disparaging the plaintiff in his or her business, trade, office or profession; imputations of certain infectious or contagious diseases; and imputations of unchastity in women.³⁶ This different requirement as to the presumption of damage remained important in jurisdictions where the distinction between libel and slander had been maintained.³⁷ Prior to the introduction of the NUDL, this distinction had already been abolished in five jurisdictions.³⁸ The effect of the most recent reform was therefore to bring the position in South Australia, Victoria and Western Australia into line with the rest of the country.

The distinction between libel and slander has been subjected to criticism over a long period of time.³⁹ This is partly because of the practical difficulties in drawing such a distinction.⁴⁰ The application of this distinction to new and emerging technologies poses a particular problem. As recently as 2001, the

Actions Act 1974 (Qld) s 11; Limitation of Actions Act 1936 (SA) s 36; Limitation Act 1974 (Tas) s 5A; Limitation of Actions Act 1958 (Vic) s 5(1AA); Limitation Act 2005 (WA) s 14(1).

32 CLWA (ACT) s 119(1); DA (NT) s 6(1); DA (NSW) s 7(1); DA (Qld) s 7(1); DA (SA) s 7(1); DA (Tas) s 7(1); DA (Vic) s 7(1); DA (WA) s 7(1).

33 CLWA (ACT) s 119(2); DA (NT) s 6(2); DA (NSW) s 7(2); DA (Qld) s 7(2); DA (SA) s 7(2); DA (Tas) s 7(2); DA (Vic) s 7(2); DA (WA) s 7(2).

34 *Thorley v Lord Kerry* (1812) 4 Taunt 355 at 364–5; 128 ER 367 at 371 per Mansfield CJ; *Meldrum v Australian Broadcasting Company Ltd* [1932] VLR 425 at 435 per Mann J; *Mickelberg v 6PR Southern Cross Radio Pty Ltd* (2001) 24 WAR 187 at [20] per Hasluck J.

35 *Ratcliffe v Evans* [1892] 2 QB 524 at 530–1 per Bowen LJ; *Mickelberg v 6PR Southern Cross Radio Pty Ltd* (2001) 24 WAR 187 at [21] per Hasluck J.

36 *Mickelberg v 6PR Southern Cross Radio Pty Ltd* (2001) 24 WAR 187 at [22] per Hasluck J. See also P Milmo and W V H Rogers (Eds), *Gatley on Libel and Slander*, 10th ed, Sweet & Maxwell, London, 2004, [3.6].

37 See, eg, *Feo v Pioneer Concrete (Vic) Pty Ltd* [1999] 3 VR 417; *Uniflex (Australia) Pty Ltd v Hanneybel* [2001] WASC 138; BC200103033; *Middendorp Electric Co Pty Ltd v Sonneveld* [2001] VSC 312; BC200105100; *Clover Bond Pty Ltd v Carroll* [2004] WASC 216; BC200406936; *Robinson v Quinlivan* [2006] WASC 38; BC200601227 at [36]–[37] per Newnes M.

38 Defamation Act 1901 (ACT) s 3; Defamation Act 2001 (ACT) s 14; CLWA (ACT) s 57; Defamation Act 1938 (NT) s 2; Defamation Act 1974 (NSW) s 8; Defamation Act 1889 (Qld) s 5; Defamation Act 1957 (Tas) s 9.

39 *Thorley v Lord Kerry* (1812) 4 Taunt 355 at 364–5; 128 ER 367 at 371 per Mansfield CJ; *Meldrum v Australian Broadcasting Company Ltd* [1932] VLR 425 at 435 per Mann J. See also *Report of the Committee on Defamation* (Faulks Committee), HMSO, London, 1975, [80]–[82], [86]–[91]; Western Australia Defamation Law, *Committee Report on Reform to the Law of Defamation in Western Australia*, September 2003, [27], Recommendation 8.

40 Milmo and Rogers, above n 36, [3.8].

Supreme Court of Western Australia ruled that a simultaneous radio broadcast through a radio station's website was not in a permanent form and therefore was actionable as slander, not libel.⁴¹ The distinction between libel and slander is a historical anomaly, has no principled basis and introduces a needless complexity into defamation law. Its abolition across Australia is a positive development.

The real issue is not whether there should be a different requirement as to the presumption of damage between libel and slander, but whether there should be a presumption of damage in defamation, whether written or spoken, at all. The recent reforms did not address this issue. Defamation is a somewhat curious tort, in that it entered the common law as an action on the case, where damage is the gist of the action, but now that damage is presumed.⁴² There have been long-standing criticisms of this aspect of defamation law, which have gathered, rather than lessened, in force over time.⁴³ Recently, the House of Lords has considered the issue, in *Jameel v Wall Street Journal Europe SprL*,⁴⁴ holding that the common law presumption of damage to reputation for a corporation was not an unreasonable restraint on freedom of expression, protected under the *European Convention on Human Rights*, Art 10, and should not be abolished.⁴⁵ Notwithstanding this re-affirmation, the presumption of damage may prove to be one area in which defamation in principle diverges from defamation in practice and accordingly amenable to future review.

6 Criminal defamation

Although defamation is overwhelmingly treated as a tort in contemporary Australia, it is still possible for criminal proceedings for defamation to be brought in respect of a publication.⁴⁶ However, prosecutions for criminal libel have become increasingly rare.⁴⁷ The Commonwealth Attorney-General's report specifically preserved criminal defamation as an area for the states and territories to regulate themselves.⁴⁸ In the recent reform process, the states and

41 *Mickelberg v 6PR Southern Cross Radio Pty Ltd* (2001) 24 WAR 187 at [27]–[34] per Hasluck J (rev'd on other grounds: *Mickelberg v 6PR Southern Cross Radio Pty Ltd* [2002] WASCA 270; BC200205657 at [44] per Ipp J).

42 For a useful discussion of the historical development of the tort of defamation, see J H Baker, *An Introduction to English Legal History*, 4th ed, LexisNexis Butterworths, London, 2002, Ch 25.

43 See, eg, J C Courtney, 'Absurdities of the Law of Slander and Libel' (1902) 36 *American L Rev* 552 at 558–9. See also A Kundu, 'Defamation, reputation and the community: an analysis of the doctrine of presumed harm in defamation law' (2005) 10 *MALR* 53.

44 [2007] 1 AC 359; [2006] 4 All ER 1279.

45 *Ibid*, at [18]–[27] per Lord Bingham of Cornhill, [94]–[104] per Lord Hope of Craighead, [124]–[126] per Lord Scott of Foscote.

46 See generally *Spautz v Williams* [1983] 2 NSWLR 506; *Gypsy Fire v Truth Newspapers Pty Ltd* (1987) 9 NSWLR 382; *Waterhouse v Gilmore* (1988) 12 NSWLR 270; *Grassby v R* (1992) 62 A Crim R 351; BC9201671.

47 See *Byrnes v Barry* (2003) 151 ACTR 1; [2003] ACTSC 54; BC200303649. See also *R v Ratcliff* (2007) 250 LSJS 226; [2007] SASC 297; BC200706390. See further *Spautz v Williams* [1983] 2 NSWLR 506 at 528 per Hunt J; *Grassby v R* (1992) 62 A Crim R 351 (NSW CCA) at 355 per Gleeson CJ; BC9201671. As to the position in the United Kingdom, see Milmo and Rogers, above n 36, [22.14].

48 *Revised outline of a possible national defamation law*, above n 6, p 39.

territories produced a model provision on criminal defamation.⁴⁹ All jurisdictions, except the Northern Territory and Victoria,⁵⁰ adopted a version of the model provision.⁵¹ The principal features include the definition of the offence;⁵² the incorporation of defences in civil proceedings into lawful excuse for the purposes of criminal prosecutions;⁵³ the onus of proof being placed on the prosecution to negate lawful excuse;⁵⁴ the need for the consent of the Director of Public Prosecutions prior to the commencement of a prosecution;⁵⁵ and the respective roles of judge and jury in a criminal defamation trial.⁵⁶ Some minor differences, however, remain.⁵⁷

Notwithstanding the historical importance of criminal defamation and its contribution to the development of civil defamation,⁵⁸ criminal defamation is practically insignificant in contemporary Australian society. The fact that the NUDL did not fully harmonise the treatment of criminal defamation is not a major shortcoming. Indeed, it is arguable that criminal defamation should be abolished — a possibility which might be fruitfully explored in any future defamation law process.⁵⁹

7 Corporate plaintiffs

At common law, all natural persons and artificial entities, including partnerships and corporations, are generally entitled to sue in defamation to protect and vindicate their reputations. There are, however, some notable, albeit limited, exceptions, such as the inability of governmental bodies to sue

49 *States and Territories Model Defamation Provisions* cl 46.

50 As to the position in the Northern Territory, see Criminal Code (NT) ss 203–208. As to the position in Victoria, see Wrongs Act 1958 (Vic) Pt I.

51 Crimes Act 1900 (ACT) s 439; Crimes Act 1900 (NSW) s 529; Criminal Code Act 1899 (Qld) s 365; Criminal Law Consolidation Act 1935 (SA) s 257; Criminal Code Act 1924 (Tas) s 196; Criminal Code (WA) s 345.

52 Crimes Act 1900 (ACT) s 439(1); Crimes Act 1900 (NSW) s 529(3); Criminal Code Act 1899 (Qld) s 365(1); Criminal Law Consolidation Act 1935 (SA) s 257(1); Criminal Code Act 1924 (Tas) s 196(1); Criminal Code (WA) s 345(1).

53 Crimes Act 1900 (ACT) s 439(2); Crimes Act 1900 (NSW) s 529(4); Criminal Code Act 1899 (Qld) s 365(3); Criminal Law Consolidation Act 1935 (SA) s 257(2); Criminal Code Act 1924 (Tas) s 196(3); Criminal Code (WA) s 345(3).

54 Crimes Act 1900 (NSW) s 529(5); Criminal Code Act 1899 (Qld) s 365(4); Criminal Code Act 1924 (Tas) s 196(4); Criminal Code (WA) s 345(4).

55 Crimes Act 1900 (ACT) s 439(4); Crimes Act 1900 (NSW) s 529(7); Criminal Code Act 1899 (Qld) s 365(7); Criminal Law Consolidation Act 1935 (SA) s 257(4); Criminal Code Act 1924 (Tas) s 196(3); Criminal Code (WA) s 345(6).

56 Crimes Act 1900 (ACT) s 439(3); Crimes Act 1900 (NSW) s 529(6); Criminal Code Act 1899 (Qld) s 365(5), (6); Criminal Law Consolidation Act 1935 (SA) s 257(3); Criminal Code Act 1924 (Tas) s 196(5); Criminal Code (WA) s 345(5).

57 For instance, in the Australian Capital Territory, a person may be arrested, charged with or be remanded in custody or on bail before the Director of Public Prosecutions' consent has been given: Crimes Act 1900 (ACT) s 439(5). In Western Australia, there is a different penalty specifically prescribed for a summary conviction for criminal defamation: Criminal Code (WA) s 345(5).

58 Sir W Holdsworth, *A History of English Law*, 2nd ed, Methuen and Sweet & Maxwell, London, 1937, Vol VIII, pp 336–46.

59 To the extent that it has been considered in previous reform processes, the prevailing view appears to have favoured reform, rather than repeal. See, eg, Faulks Committee, above n 39, [444]–[448]; ALRC, *Unfair Publication: Defamation and Privacy*, ALRC 11, AGPS, Canberra, 1979, [203]–[205]; Western Australia Defamation Law, above n 39, [67].

in defamation in respect of their ‘governing’ reputations.⁶⁰ The NUDL effect an important and controversial change to standing to sue for defamation, in that they significantly curtail the right of corporations to sue.

At common law, a corporation could sue for defamation.⁶¹ However, as a corporation is an artificial entity, it does not have feelings; therefore, it could not recover damages for hurt to its feelings,⁶² a significant component of an award of compensatory damages for a natural person. It could recover damages only for injury to its reputation. As Lord Reid famously pointed out in *Lewis v Daily Telegraph Ltd*, a corporation could be injured only ‘in its pocket’.⁶³ A trading corporation, having only a trading reputation, can recover only damages which are economic in nature.⁶⁴ There is, however, no requirement that a corporation prove as special damage the economic harm it suffered as a consequence of the defamatory publication. Like a natural person, a corporation is entitled to the presumption of damage to reputation.⁶⁵

The NUDL remove the right of corporations to sue for defamation.⁶⁶ However, they create exceptions for non-profit corporations and small trading corporations (defined as those which employ fewer than 10 employees and are not related to other corporations).⁶⁷ It also specifically preserves the right of those individuals associated with corporations which are prevented from suing in defamation to sue in defamation in respect of damage to their personal reputations.⁶⁸

This provision replicates the terms of the Defamation Act 1974 (NSW) s 8A (repealed). That provision was introduced into the NSW legislation in 2002.⁶⁹ The taskforce which recommended the provision did so for a number of reasons. First, it considered that reputation — the central interest directly

60 *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534; [1993] 1 All ER 1011; *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680; *New South Wales Aboriginal Land Council v Jones* (1998) 43 NSWLR 300.

61 *Metropolitan Saloon Omnibus Co v Hawkins* (1859) 4 H & N 87 at 90 per Pollock CB; 157 ER 769; *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133 at 139 per Lord Esher MR, 141–3 per Lopes LJ, 148 per Kay LJ; [1891–4] All ER Rep 548; *Barnes & Co Ltd v Sharpe* (1910) 11 CLR 462 at 478–9 per O’Connor J, 485–6 per Higgins J; *Heytesbury Holdings Pty Ltd v City of Subiaco* (1998) 19 WAR 440 at 448 per Steytler J; *Jameel v Wall Street Journal Europe SprL* [2007] 1 AC 359; [2006] 4 All ER 1279 at [13]–[14] per Lord Bingham of Cornhill.

62 *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 262 per Lord Reid; [1963] 2 All ER 151.

63 [1964] AC 234 at 262; [1963] 2 All ER 151.

64 A corporation cannot recover damages for its ‘reputation as such’: *Australian Broadcasting Corporation v Comalco Ltd* (1986) 12 FCR 510 at 586–7 per Neaves J, 599–603 per Pincus J; 68 ALR 259; *Jameel v Wall Street Journal Europe SprL* [2007] 1 AC 359; [2006] 4 All ER 1279 at [95] per Lord Hope of Craighead; contra *Andrews v John Fairfax & Sons Ltd* [1980] 2 NSWLR 225 at 254–6 per Mahoney JA.

65 *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133 at 139 per Lord Esher MR, 143 per Lopes LJ, 148 per Kay LJ; *Jameel v Wall Street Europe SprL* [2007] 1 AC 359; [2006] 4 All ER 1279 at [18]–[27] per Lord Bingham of Cornhill.

66 CLWA (ACT) s 121(1); DA (NT) s 8(1); DA (NSW) s 9(1); DA (Qld) s 9(1); DA (SA) s 9(1); DA (Tas) s 9(1); DA (Vic) s 9(1); DA (WA) s 9(1).

67 CLWA (ACT) s 121(2); DA (NT) s 8(2); DA (NSW) s 9(2); DA (Qld) s 9(2); DA (SA) s 9(2); DA (Tas) s 9(2); DA (Vic) s 9(2); DA (WA) s 9(2).

68 CLWA (ACT) s 121(5); DA (NT) s 8(5); DA (NSW) s 9(5); DA (Qld) s 9(5); DA (SA) s 9(5); DA (Tas) s 9(5); DA (Vic) s 9(5); DA (WA) s 9(5). See also *Bargold Pty Ltd v Mirror Newspapers Ltd* [1981] 1 NSWLR 9 at 11 per Hunt J.

69 Defamation Amendment Act 2002 (NSW) s 3 Sch 1 cl 5.

protected by defamation law — was a purely personal right, an incident of human dignity. As such, defamation law should be available only to natural, not artificial, persons. Secondly, corporations already have recourse to a range of other causes of action, both at common law (such as injurious falsehood and passing off) and under statute (such as misleading or deceptive conduct in contravention of the Trade Practices Act 1974 (Cth) (TPA) s 52 and its analogous state and territory provisions). Thirdly, there was a concern that corporations could use defamation actions as a means of silencing protest against corporate conduct.⁷⁰ For these reasons, the taskforce recommended precluding corporations from suing in defamation. The SCAG Working Group agreed with the reasons given by the taskforce. It also observed that corporations, unlike individuals, often have the resources, opportunities and incentives (such as tax deductions) to engage in marketing, publicity and ‘reputation management’ as a means of protecting their reputation.⁷¹

The then Commonwealth Attorney-General, Philip Ruddock, opposed the restrictions on corporations’ right to sue for defamation. He argued that, even though the nature of a corporation’s reputation differed from that of an individual, it still possessed one. Because a corporation’s reputation could be attacked, it should be entitled to protect it through a defamation action. Secondly, it was an ‘unreasonable burden’ to expect a corporation to prove actual damage as a consequence of a defamatory publication, given the notorious difficulty of obtaining and establishing such proof. Thirdly, the threshold tests variously proposed — based on the number of employees, the level of annual turnover or the leave of the court⁷² — were arbitrary.⁷³ The Business Council of Australia was also a vigorous opponent of this aspect of the reforms. It argued that this reform undermined equality before the law, both in terms of access and standing. It further claimed that the proposal underestimated the importance of a good reputation to a company’s value. It denied that corporations used defamation laws irresponsibly.⁷⁴

Some of the criticisms of the form of the restrictions now imposed on the right of corporations to sue in defamation are well-placed. For example, the selection of the figure of 10 employees seems arbitrary. The figure appears to be derived from the NSW taskforce’s 2002 report,⁷⁵ which in turn derived it from the decision of the House of Lords in *Royal Bank of Scotland v Etridge (No 2)*.⁷⁶ More recent Australian figures would have been a sounder basis for this legislative provision.

However, the rationale for the restrictions is sound. Allowing corporations to sue for defamation is arguably too beneficial to them and the presumption of damage in defamation is an inappropriate advantage for corporations, when

⁷⁰ *Defamation Law: Proposals for Reform in NSW*, above n 28, Recommendation 8.

⁷¹ *Proposal for Uniform Defamation Laws*, above n 24, [4.5].

⁷² This was suggested in Western Australia Defamation Law, above n 24, [25], Recommendation 6, but was never implemented by the WA State Government.

⁷³ *Revised outline of a possible national defamation law*, above n 6, pp 38–9.

⁷⁴ H Morgan, ‘Attack on integrity lacks moral standing’, *Australian Financial Review*, 5 April 2005, p 63. Cf D Marr, ‘A law unto themselves, or so they hope’, *Sydney Morning Herald*, 14 April 2005, p 15.

⁷⁵ *Defamation Law: Proposals for Reform in NSW*, above n 28, p 13.

⁷⁶ [2002] 2 AC 773; [2001] 4 All ER 449 at [34] per Lord Nicholls of Birkenhead.

contrasted to the other causes of action available to them. This can be readily seen in the recent case of *Orion Pet Products Pty Ltd v Royal Society for the Prevention of Cruelty to Animals (Vic) Inc.*⁷⁷ In this case, the President of the RSPCA in Victoria, Dr Hugh Wirth, and other employees of the RSPCA were highly critical of electronic dog collars, manufactured and distributed by Orion Pet Products Pty Ltd and Innotek Australia Pty Ltd, essentially alleging on radio, on a website and in a newspaper interview that the devices were cruel, illegal and ineffective.⁷⁸ A dog wearing such a collar would receive an electric shock if it barked as a deterrent against further barking. Orion Pet Products and Innotek Australia sued the RSPCA and Wirth in the Federal Court of Australia, alleging misleading or deceptive conduct in contravention of the TPA ss 52 and 53, injurious falsehood and defamation. In relation to the misleading or deceptive conduct claim, Weinberg J held that, even though some of the representations were misleading or deceptive⁷⁹ and the RSPCA was a corporation for the purposes of the TPA s 4,⁸⁰ the representations were not made in the course of trade and commerce, but rather were made in furtherance of the RSPCA's educational and political objectives.⁸¹ In relation to the injurious falsehood claim, his Honour found that, although the statements were false,⁸² they were not made maliciously.⁸³ However, in relation to the defamation claim, he found that certain statements made by the RSPCA were defamatory⁸⁴ and that the pleaded defences — justification, the *Polly Peck* defence, fair comment and common law qualified privilege — all failed.⁸⁵ Weinberg J awarded \$85,000 damages plus interest for defamation.⁸⁶ This is not the only case in which a corporation has succeeded in defamation, but failed in relation to other causes of action available to it.⁸⁷

Already, since the introduction of the NUDL, there have been developments in corporations seeking to protect their reputations through these other causes of action. In late December 2006, department store David Jones Ltd commenced proceedings for misleading or deceptive conduct in the Federal Court of Australia against the 'think tank', the Australia Institute, and its director, Clive Hamilton, over a media release promoting a discussion paper the organisation produced on 'corporate paedophilia' and the sexualisation of children in advertising and marketing, alleging that David Jones engaged in such practices.⁸⁸ In mid-September 2007, the Gold Coast accounting software company, 2Clix Australia Pty Ltd, commenced proceedings in the Supreme

77 (2002) 120 FCR 191.

78 Ibid, at [9]–[26].

79 Ibid, at [141]–[143].

80 Ibid, at [171].

81 Ibid, at [191]–[194].

82 Ibid, at [203].

83 Ibid, at [206]–[224].

84 Ibid, at [254]–[255].

85 Ibid, at [258]–[277].

86 Ibid, at [298].

87 See also *National Auto Glass Supplies (Australia) Pty Ltd v Neilsen & Moller Autoglass (NSW) Pty Ltd (No 8)* [2007] FCA 1625; BC200709203 (defamation claim successful but misleading or deceptive conduct claim dismissed).

88 *David Jones Ltd v The Australia Institute Ltd* [2007] FCA 962; BC200705006 at [2]–[9] per Edmonds J.

Court of Queensland for injurious falsehood against Simon Wright over comments posted on Whirlpool, an internet user forum he established.⁸⁹ Later in the same month, French J of the Federal Court of Australia dismissed proceedings for misleading or deceptive conduct brought by controversial businessman, Alan Bond, and a diamond company with which he was associated, Lesotho Diamond Corporation plc, against Nationwide News Pty Ltd, News Digital Media Pty Ltd, journalist Paul Barry and editor Neil Breen over a story which appeared in *The Sunday Telegraph*. His Honour did so on the basis that the proceedings had no reasonable prospects of success, given that the publication was protected by the defence for a 'prescribed information provider' under the TPA s 65A.⁹⁰ These are but a few, high-profile and recent examples. Undoubtedly, this trend will continue as corporations adjust to being precluded from suing in defamation.

In *Orion Pet Products v RSPCA*, Weinberg J noted the 'marked resemblance' between defamation and injurious falsehood. However, his Honour also recorded the differences: damage to reputation in defamation is presumed, whereas actual loss must be proved in injurious falsehood; malice needs to be established in injurious falsehood, whereas there is strict liability in defamation. Importantly, Weinberg J distinguished defamation on the basis that it protects personal reputation, whereas he stated that injurious falsehood protected 'interests in the disposability of a person's property, products or business'.⁹¹ Apart from raising the question as to why a corporation should have the advantages of defamation when injurious falsehood is available to it, being a tort more adapted to and intended for the protection of economic interests, Weinberg J raises a more fundamental issue which has underscored the reform debate in Australia, namely the concept of reputation in defamation law. Reputation has been largely unexamined in defamation jurisprudence, despite the fact that it is the central legal interest protected by the tort of defamation.⁹² The debate about whether corporations should have the same right to reputation as natural persons or whether defamation should be concerned with purely personal reputations, rather than corporate ones, founders somewhat on the imprecise definition of reputation and the rationale

89 J Hogan, 'Claim threatens tech forum', *The Age*, 13 September 2007, p 3; R LeMay, '2Clix sues Whirlpool', *Australian Financial Review*, 13 September 2007, p 24; N Miller, 'Website whinge may set example', *The Age*, 18 September 2007, p 5. 2Clix discontinued its proceedings against Wright on 24 October 2007. It is now in liquidation and is being wound up: S Willoughby, 'Computer software company being wound up', *The Gold Coast Bulletin*, 13 November 2007, p 81.

90 *Bond v Barry* (2007) 73 IPR 490; ATPR 42–187; [2007] FCA 1484 at [45]–[46]. French J's decision was affirmed on appeal. See *Bond v Barry* (2008) 249 ALR 110; [2008] FCAFC 115; BC200804972. See also *ACCC v Seven Network Ltd* (2007) 244 ALR 343; ATPR 42–191; [2007] FCA 1505; BC200708519 at [105] per Bennett J; *Channel Seven Brisbane Pty Ltd v ACCC* (2008) 249 ALR 97; 77 IPR 150; [2008] FCAFC 114; BC200804971.

91 (2002) 120 FCR 191 at [198].

92 The seminal article in this area of law remains R C Post, 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) 74 *California L Rev* 691. The concept of reputation in defamation law has only recently become the subject of sustained interest in defamation scholarship. See now also D Rolph, 'Dirty Pictures: Defamation, Reputation and Nudity' (2006) 10 *Law Text Culture* 101; L McNamara, *Reputation and Defamation*, Oxford University Press, Oxford, 2007; D Rolph, *Reputation, Celebrity and Defamation Law*, Ashgate Press, Aldershot, 2008.

behind its legal protection. The preferable view is that the courts in the late nineteenth century, at the time when the limited liability company was emerging as an important form of business organisation, erred by simply extending the right to sue in defamation to corporations without adequately reflecting on the nature of corporate reputation and the desirability of allowing corporations to have recourse to defamation law. It is not every right and incident of a natural person that is automatically extended to a corporation. For instance, corporations do not have a right to rely on the privilege against self-incrimination⁹³ or against exposure to penalties.⁹⁴ It also seems clear that corporations do not have an enforceable right to privacy.⁹⁵ Likewise, it did not follow ineluctably that, because individuals could sue for defamation, corporations should be allowed to do so as well. The restriction of the right of corporations to sue for defamation under the NUDL is an appropriate development. It will be interesting to monitor the impact this reform has in the next few years.

8 Defamation of the dead

One of the surprisingly controversial aspects of the NUDL was the statutory restatement of the common law position that there can be no defamation of the dead. The common law rule is *actio personalis moritur cum persona* (a personal action dies with the plaintiff or the defendant).⁹⁶ Consequently, an action in defamation cannot be brought by or against, or maintained on behalf of, a deceased person.⁹⁷ In relation to most claims in tort, the common law rule has been overturned by legislation throughout Australia.⁹⁸ However, in all jurisdictions except Tasmania, the tort of defamation was expressly excluded, with the effect that the common law rule continues to apply to defamation claims.⁹⁹ The exclusion of defamation from the legislation allowing for the survival of causes of action in tort has been described as the 'last relic' of the common law rule.¹⁰⁰

93 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 507–8 per Mason CJ and Toohey J, 512–17 per Brennan J, 548–56 per McHugh J; 118 ALR 392.

94 *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543; 192 ALR 561 at [31] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

95 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; 185 ALR 1 at [129]–[131] per Gummow and Hayne JJ ([58] per Gaudron J, agreeing); cf at [43] per Gleeson CJ, [190]–[191] per Kirby J, [328] per Callinan J; contra *R v Broadcasting Standards Commission; Ex parte British Broadcasting Corporation* [2001] QB 885 at 897 per Lord Woolf MR, 899 per Hale LJ; cf 900–1 per Lord Mustill; [2000] 3 All ER 989 (leave to appeal to House of Lords refused: [2001] 1 WLR 550).

96 See, eg, *Hambly v Trott* (1776) 1 Cowp 371 at 374–6; 98 ER 1136 at 1138 per Lord Mansfield; *Swan v Williams (Demolition) Pty Ltd* (1987) 9 NSWLR 172 at 178 per Samuels JA. See also A M Dugdale and M A Jones (Eds), *Clerk and Lindsell on Torts*, 19th ed, Sweet & Maxwell, London, 2006, [29–75]; R P Balkin and J L R Davis, *Law of Torts*, 3rd ed, LexisNexis Butterworths, Chatswood (NSW), 2004, [11.53], [28.38].

97 See, eg, *Krahe v TCN Channel Nine Pty Ltd* (1986) 4 NSWLR 536 at 541 per Hunt J.

98 CLWA (ACT) s 15(1); Law Reform (Miscellaneous Provisions) Act 1956 (NT) s 5(1); Law Reform (Miscellaneous Provisions) Act 1944 (NSW) s 2(1); Succession Act 1981 (Qld) s 66(1); Survival of Causes of Action Act 1940 (SA) s 2(1); Administration and Probate Act 1958 (Vic) s 29(1); Law Reform (Miscellaneous Provisions) Act 1941 (WA) s 4(1).

99 CLWA (ACT) s 15(2); Law Reform (Miscellaneous Provisions) Act 1956 (NT) s 5(2); Law

The NUDL emphatically restate the common law position as to the defamation of the dead.¹⁰¹ However, the position remains different in Tasmania. In that jurisdiction, the tort of defamation has not been expressly excluded from the relevant legislative provision dealing with the survival of causes of action in tort,¹⁰² with the effect that claims in defamation survive the death of the plaintiff or the defendant. There was a view that, in Tasmania, it was possible to bring proceedings in relation to the reputation of a deceased person. However, there have been no reported cases to this effect.

The Defamation Act 2005 (Tas) deliberately omits any reference to the standing of deceased persons to sue for defamation. This was because the Legislative Council formed the view that defamation proceedings should survive the death of the plaintiff or the defendant and that deceased persons and their estates should have such standing to sue.¹⁰³ Whether, in fact, the omission of this provision had the effect intended by the Legislative Council is doubtful. Clearly, causes in action in defamation survive the death of either party; this is the effect of the Administration and Probate Act 1935 (Tas) s 27(1). However, the silence of the Defamation Act 2005 (Tas) in relation to the standing to sue in defamation on behalf of deceased persons surely means the common law position still prevails. The Legislative Council appears to have been under a misapprehension as to the effect of its decision to omit this aspect of the NUDL.¹⁰⁴

Over 25 years ago, the Australian Law Reform Commission (ALRC) proposed that representatives of deceased persons should have some legal recourse against publishers of posthumous defamation.¹⁰⁵ In the most recent reforms, this was adopted by the Commonwealth Attorney-General, who proposed that the representative or a family member of a deceased person should have standing to seek a correction order, a declaration or an injunction, but not damages, in respect of defamatory matter published about a deceased person.¹⁰⁶ (The proposal provided for a limitation period of three years — longer than the new limitation period for living plaintiffs.)¹⁰⁷ The principal arguments against such a proposal, identified but rejected, were that reputation was a purely personal interest, so that ‘the dead have none’; that there were evidentiary difficulties presented by the defamation of the dead, principally an inability to cross-examine the deceased person as to the impact of the publication; and the inhibition of historical writing. In relation to this last

Reform (Miscellaneous Provisions) Act 1944 (NSW) s 2(1); Succession Act 1981 (Qld) s 66(1); Survival of Causes of Action Act 1940 (SA) s 2(2); Administration and Probate Act 1935 (Tas) s 27; Administration and Probate Act 1958 (Vic) s 29(1); Law Reform (Miscellaneous Provisions) Act 1941 (WA) s 4(1).

100 Milmo and Rogers, above n 36, [8.12].

101 CLWA (ACT) s 122; DA (NT) s 9; DA (NSW) s 10; DA (Qld) s 10; DA (SA) s 10; DA (Vic) s 10; DA (WA) s 10.

102 Administration and Probate Act 1935 (Tas) s 27(1).

103 The debate in the Tasmanian Legislative Council can be found in Parliament of Tasmania, Legislative Council, *Hansard*, 29 November 2005, pp 108–18.

104 Parliament of Tasmania, House of Assembly, *Hansard*, 1 December 2005, pp 36–7 (Ms Jackson).

105 ALRC, *Unfair Publication*, above n 59, [99]–[107].

106 *Revised outline of a possible national defamation law*, above n 6, pp 12–13.

107 See above 4 The limitation period for defamation claims.

objection, the Commonwealth Attorney-General contended that ‘the evidence that historical writing will be curtailed is lacking’.¹⁰⁸

This is not strictly true. Investigative journalism and historical writing are already inhibited by defamation law. The ‘chilling effect’ of defamation law during the lifetime of a plaintiff is real and well-known and the sometimes marked change in tone and substance in discussions of the same plaintiff after his or her death can be readily observed. For example, during his lifetime, Australian media mogul, Kerry Packer, was not averse to suing for defamation.¹⁰⁹ Because of this, it was only after his death that various revelations or allegations — true or not — could be made.¹¹⁰ Similarly, during his lifetime, Abe Saffron, described by the *Sydney Morning Herald* as ‘the legendary Mr Sin’, was vigorous in defending his reputation by means of actual or threatened defamation proceedings.¹¹¹ A biography produced during his lifetime was criticised for being too sympathetic to Saffron.¹¹² In contrast, another biography, published after Saffron’s death in mid-September 2006, is

108 Revised outline of a possible national defamation law, above n 6, p 13.

109 See, eg, *Packer v Meagher* [1984] 3 NSWLR 486; *Packer v Australian Broadcasting Corporation* (1993) 116 FLR 306; *Packer v Australian Broadcasting Corporation* [2002] NSWSC 1030; BC200206558.

110 See, eg, K McClymont, ‘How Packer lavished property on a friend’, *Sydney Morning Herald*, 7 January 2006, p 1; C Overington, ‘Money and the mistress’, *The Australian*, 13 January 2006, p 9; G Stone, *Who Killed Channel 9?: The Death of Kerry Packer’s Mighty TV Dream Machine*, Pan McMillan, Sydney, 2007, pp 5–6; P Barry, *The Rise and Rise of Kerry Packer Uncut*, Bantam, Sydney, 2007, pp 522–36; S Markson and S Blake, ‘Ita’s volatile affair with lovesick Kerry Packer’, *The Sunday Telegraph*, 8 July 2007, pp 1, 9; M Ricketson, ‘Ex-mistress ran bordellos for Packer, biography reveals’, *Sydney Morning Herald*, 26 July 2007, p 7; P Dyke, ‘Mucca “the £10K hooker”’, *The Daily Star*, 22 April 2008, pp 6, 7; J May, ‘Packer was Mills’s sugar daddy, former escort claims’, *Sydney Morning Herald*, 24 April 2008, p 3; E Higgins, ‘Packer denies Mills was Kerry’s callgirl’, *The Australian*, 24 April 2008, p 3; T Savage, ‘Packer son fury at “escort” slur’, *The Daily Star*, 25 April 2008, p 36.

111 See, eg, *Saffron v John Fairfax Publications Pty Ltd* [2004] NSWCA 254; BC200404968. In late June 2005, the jury in a s 7A trial before Studdert J found Saffron had been defamed by a book entitled *TOUGH: 101 Australian Gangsters*, written by journalists, John Silvester and Andrew Rule. See Y C Kux, ‘Abe Saffron defamed by inclusion in “unique compendium of Australian villains”’ (2005) 165 *Gazette L & J* (30 June 2005), at <<http://www.tinyurl.com.au/x.php?1jri>> (password required for access). Saffron also sued *The Gold Coast Bulletin* over a clue to a crossword puzzle published in the 2 January 2004 edition. The clue — ‘Sydney underworld figure, nicknamed Mr Sin (3,7)’ — was revealed the following day as ‘Abe Saffron’. Counsel for Saffron, Clive Evatt, observed to the *Sydney Morning Herald* that the case ‘reads like a law school exam paper’. See M Pelly, ‘Abe Saffron down — and uttering cross words’, *Sydney Morning Herald*, 2 December 2004, p 25. In late July 2005, the jury at the s 7A trial before Wood CJ at CL found in Saffron’s favour. See Y C Kux, ‘Abe Saffron defamed by crossword puzzle’ (2005) 166 *Gazette L & J*, 28 July 2005, at <<http://www.tinyurl.com.au/x.php?1jri>> (password required for access). Neither of these cases had a hearing into defences and damages finalised prior to Saffron’s death. Saffron also threatened defamation proceedings against the City of Sydney Council, having taken exception to a proposed footpath plaque commemorating his role in Kings Cross history. The plaque was in the following terms: ‘Abe Saffron. Publican and nightclub owner from 1946. Convictions and court appearances from 1938. Friends in high places.’ See P Cornford, ‘Walk on mild side: Saffron out of step with council’, *Sydney Morning Herald*, 21 December 2004, p 3.

112 D McNab, *The Usual Suspect: The Life of Abe Saffron*, Pan McMillan, Sydney, 2005. See also G Mosel, ‘Inspid account of vivid subject matter’, *Courier-Mail*, 10 September 2005,

more critical of its subject.¹¹³ There are innumerable examples.

In relation to the other substantive reasons against allowing claims for the ‘defamation of the dead’, the issue is not whether or not a deceased person has a reputation. Clearly, reputation can live on after death. Rather, the issues are whether reputation should be a legal interest capable of protection after death and whether a representative or a family member should be allowed to use the legal system to seek to protect the deceased person’s reputation. To the extent that it is theorised, the right to reputation is treated as part of the innate dignity of the individual.¹¹⁴ Thus understood, that individual alone should properly have standing to protect and vindicate his or her reputation. Like the reform debates about the right of corporations to sue for defamation, the debates about the defamation of the dead also reveal the lack of analysis of the concept of reputation.

While the defamation of the dead was initially impossible as a matter of principle, legislative changes to allow the survival of causes of action in tort now make defamation an anomaly. Nevertheless, the preclusion of deceased persons and their representatives from suing in defamation can be supported as a matter of principle — turning on an acknowledgment that reputation is a purely personal interest of a living person — and, frankly, on pragmatic grounds as well; defamation laws significantly curtail discussion during a person’s life for the protection of reputation, so that, once he or she dies, it seems only fair that the balance shift decisively towards the protection of freedom of speech. The states and territories were right to resist this initiative.¹¹⁵ There was no need to create additional rights to sue in defamation.

9 The matter, not the imputation, as the cause of action

At common law, the publication of defamatory matter constitutes the cause of action.¹¹⁶ If the plaintiff relies on the natural and ordinary meaning of the matter, he or she is not required to particularise the meanings, even where there are multiple, distinct meanings arising out of the matter.¹¹⁷

One of the controversial aspects of the Defamation Act 1974 (NSW) was the replacement of the defamatory matter as the cause of action with each

M06; R Walsh, ‘It’s a crime to think any other way’, *Sydney Morning Herald*, 4 October 2005, p 11; J Dale, ‘The man who paid Sydney’s pipers’, *The Australian*, 16 September 2006, p 23.

113 T Reeves, *Mr Sin: The Abe Saffron Dossier*, Allen & Unwin, Crows Nest (NSW), 2007.

114 See, eg, *Rosenblatt v Baer* 383 US 75 at 92; 86 S Ct 669 at 679 (1966) per Stewart J; *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130; (1995) 126 DLR (4th) 129 at 159–63 per Cory J; *Lange v Atkinson* [1997] 2 NZLR 22 at 30–1 per Elias J; *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127; [1999] 4 All ER 609 at 201 per Lord Nicholls of Birkenhead. See also International Covenant on Civil and Political Rights Art 17; Universal Declaration of Human Rights Art 12; European Convention on Human Rights, Art 10(2); Human Rights Act 2004 (ACT) s 12; Charter of Human Rights and Responsibilities Act 2006 (Vic) s 13.

115 *Proposal for Uniform Defamation Laws*, above n 24, Recommendation 7.

116 *Chapman v Australian Broadcasting Corporation* (2000) 77 SASR 181 at [55] per Lander J.

117 *Packer v Mirror Newspapers Ltd* (1969) 90 WN (Pt 1) (NSW) 308 at 309–10 per Wallace P; *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519; 154 ALR 294 at [14] per

pleaded imputation.¹¹⁸ This reform resulted from the NSWLRC's 1971 report into defamation, where concern was expressed that the common law position was potentially unfair to defendants.¹¹⁹ In practice, making the imputation, not the matter, the cause of action arguably had the effect of increasing the prolixity of defamation pleadings.¹²⁰ If an imputation were not pleaded, a plaintiff could not obtain judgment based on that meaning as he or she had no cause of action in relation to it. It certainly had the effect of increasing interlocutory skirmishes about the pleaded imputations.¹²¹

The NUDL enact the common law position.¹²² Potentially defamatory 'matter' is defined inclusively, not exhaustively.¹²³ Reverting to the defamatory matter as the cause of action will, one hopes, have the effect of reducing prolixity of pleadings and should certainly minimise interlocutory skirmishes about pleaded meanings. However, the change will not be as significant as it might seem. Although there may be no obligation on the part of plaintiffs to particularise the meanings on which they rely, where they claim defamation based on the natural and ordinary meaning, there have been *dicta* in recent cases strongly encouraging the practice.¹²⁴ The benefits are clear: the issues are defined for the defendant and the trial judge; prejudice to the defendant and delay more generally are minimised or avoided; the defendant knows the case he or she has to meet and can therefore plead an appropriate defence; the defendant's, as well as the court's, resources are directed towards the real issues; and the 'just, quick and cheap resolution of the real issues in the proceedings',¹²⁵ characteristic of contemporary court procedures, is

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- Brennan CJ and McHugh J; *Random House Australia Pty Ltd v Abbott* (1999) 94 FCR 296; 167 ALR 224 at [25] per Beaumont J; *Chapman v Australian Broadcasting Corporation* (2000) 77 SASR 181 at [55] per Lander J.
- 118 Defamation Act 1974 (NSW) s 9(2) (repealed). See also Defamation Act 1889 (Qld) s 7 (repealed); Defamation Act 1957 (Tas) s 9 (repealed).
- 119 NSWLRC, *Report on Defamation*, Government Printer, Sydney, 1971, App D, [45]–[54].
- 120 See, eg, *John Fairfax Publications Pty Ltd v Rivkin* (2003) 201 ALR 77; [2003] HCA 50; BC200305159 at [83] per Kirby J. However, see also *Polly Peck (Holdings) plc v Trelford* [1986] QB 1000 at 1020 per O'Connor LJ; [1986] 2 All ER 84; *Burrows v Knightley* (1987) 10 NSWLR 651 at 654 per Hunt J; *Channel Seven Adelaide Pty Ltd v Manock* (2007) 231 CLR 245; 241 ALR 468 at [103]–[105] per Kirby J; Justice D Ipp, 'Themes in the law of torts' (2007) 81 ALJ 609 at 615.
- 121 See, eg, *Favell v Queensland Newspapers* (2005) 221 ALR 186; 79 ALJR 1716; [2005] HCA 52; BC200507180 at [20]–[21] per Kirby J. See also Hon Justice D Levine, 'Address at the Launch of the First Issue — The Courts and the Media 1999' (1999) 1 *UTS L Rev* 214 at 215–16; J Hartigan, 'Press Freedom Under Attack' (2004) 16(1) *Australian Press Council News* 1 at 3; A T Kenyon, 'Imputation or Publication: The Cause of Action in Defamation Law' (2004) 27 *UNSWLJ* 100 at 102.
- 122 CLWA (ACT) s 116; DA (NT) s 3; DA (NSW) s 4; DA (Qld) s 4(1) Sch 5; DA (SA) s 4; DA (Tas) s 4; DA (Vic) s 4; DA (WA) s 4.
- 123 It includes articles, reports and advertisements in newspapers and magazines, programmes and advertisements on radio, television and the internet, written documents and pictures, gestures and oral utterances. See CLWA (ACT) s 120; DA (NT) s 7; DA (NSW) s 8; DA (Qld) s 8; DA (SA) s 8; DA (Tas) s 8; DA (Vic) s 8; DA (WA) s 8.
- 124 *Random House Australia Pty Ltd v Abbott* (1999) 94 FCR 296; 167 ALR 224 at [25]–[27] per Beaumont J; *Chapman v Australian Broadcasting Corporation* (2000) 77 SASR 181 at [55] per Lander J; *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519; 154 ALR 294 at [15]–[18] per Brennan CJ and McHugh J. See also *Kerney v Optimus Holdings Pty Ltd* [1976] VR 399 at 401–2 per Menhennitt J.
- 125 See, eg, Civil Procedure Act 2005 (NSW) s 56(1).

thereby facilitated.¹²⁶ It is important always to bear in mind that the pleading of meanings in a defamation case is not, or should not, be an end in itself but rather a means to an end.¹²⁷ Viewed in this way, and in the context of recent judicial developments, having the defamatory matter, rather than the imputation, as the cause of action is an appropriate development.

10 The respective roles of judge and jury in defamation proceedings

Notwithstanding its declining role in most types of civil litigation, the jury in a defamation case still performs an important role, if not always in practice, then in principle.¹²⁸ This is perhaps due to the centrality of the construct of the ordinary, reasonable reader, which is cast in terms closer to laypersons than lawyers.¹²⁹ At common law, the jury in a defamation case was broadly responsible for determining questions of fact, which comprised whether or not the matter was defamatory of the plaintiff, issues of fact relating to the defences and importantly the assessment of any damages payable to the plaintiff.¹³⁰

Prior to the introduction of NUDL, the respective roles of judge and jury in defamation proceedings varied markedly across the states and territories, the common law in many instances having been altered by statute or rules of court. In some jurisdictions, such as Queensland, Tasmania, Victoria and Western Australia, a party could elect or apply to have a jury to determine all issues relating to liability, defences and damages. In other jurisdictions, such as the Australian Capital Territory and South Australia, juries had been abolished for all civil litigation, leaving judges sitting alone to determine defamation claims.¹³¹ Under the Defamation Act 1974 (NSW) s 7A, juries were empanelled to determine whether a matter complained of was defamatory and judges sitting alone then determined all issues relating to defences and damages.¹³²

The differences between the states and territories have been reduced by the introduction of the NUDL, though they have not been eliminated. In those

126 *Random House Australia Pty Ltd v Abbott* (1999) 94 FCR 296; 167 ALR 224 at [25]–[27] per Beaumont J; *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519; 154 ALR 294 at [15]–[18] per Brennan CJ and McHugh J.

127 *Random House Australia Pty Ltd v Abbott* (1999) 94 FCR 296; 167 ALR 224 at [27] per Beaumont J.

128 See, eg, *Hanrahan v Ainsworth* (1990) 22 NSWLR 73 at 88 per Kirby P; *Safeway Stores plc v Tate* [2001] QB 1120 at 1131 per Otton LJ; [2001] 4 All ER 193; *John Fairfax Publications Pty Ltd v Rivkin* (2003) 201 ALR 77; [2003] HCA 50; BC200305159 at [115] per Kirby J.

129 *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 277 per Lord Devlin; [1963] 2 All ER 151; *Farquhar v Bottom* [1980] 2 NSWLR 380 at 386 per Hunt J; *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158 at 165 per Hunt CJ at CL.

130 See, eg, *Broome v Agar* (1928) 138 LT 698 at 699–700 per Scrutton LJ; *Safeway Stores plc v Tate* [2001] QB 1120 at 1130 per Otton LJ; [2001] 4 All ER 193. See further Milmo and Rogers, above n 36, [34.1].

131 Supreme Court Act 1933 (ACT) s 22; Juries Act 1927 (SA) s 5.

132 For a useful overview of the role of the jury in defamation proceedings in the different Australian jurisdictions prior to the introduction of the NUDL, see *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57; 229 ALR 457 at [231]–[238] per Heydon J.

jurisdictions which still allow for a jury in a defamation trial, there is now a uniform approach. Either party may elect to have a jury.¹³³ If such an election is made, the jury is to determine the issues of liability¹³⁴ and defences and the judge sitting alone is to assess the damages.¹³⁵ This approach potentially expands the role of the jury in New South Wales, but potentially limits the role of the jury in other jurisdictions, such as Victoria. It also marks a departure in NSW defamation practice, as previously a jury was required in all defamation cases, save in certain exceptional circumstances.¹³⁶ In the two territories and South Australia, the new defamation provisions contain no reference to the possibility of trial by jury in defamation proceedings. Indeed, the Northern Territory used the occasion of the introduction of the NUDL to abolish juries in defamation cases.¹³⁷ In addition, there have been a number of recent cases brought in the Federal Court of Australia involving defamation.¹³⁸ Although its constituting legislation provides for trial by jury,¹³⁹ there has been no reported case of a jury being empanelled in a proceeding in the Federal Court.¹⁴⁰

The different approaches to the role of the jury in defamation claims which remain after the enactment of the NUDL are a concern. The avowed purpose of the legislation was to eliminate or reduce opportunities for ‘forum shopping’ by plaintiffs. The problem of ‘forum shopping’ was raised particularly in the context of the varying roles for juries in defamation claims.¹⁴¹ Whether a jurisdiction allows or does not allow a jury in a defamation case is a point of difference which may be an important factor in the plaintiff’s selection of forum. For instance, the recent experience of plaintiffs in s 7A jury trials in New South Wales, being largely inimical to them, may encourage plaintiffs to select a forum which makes no provision for a jury. This lack of uniformity about the role of juries in defamation litigation is unsatisfactory and should be revisited in any future reform process.

133 DA (NSW) s 21(1); DA (Qld) s 21(1); DA (Tas) s 21(1); DA (Vic) s 21(1); DA (WA) s 21(1).

134 DA (NSW) s 22(2); DA (Qld) s 22(2); DA (Tas) s 22(2); DA (Vic) s 22(2); DA (WA) s 22(2).

135 DA (NSW) s 22(3); DA (Qld) s 22(3); DA (Tas) s 22(3); DA (Vic) s 22(3); DA (WA) s 22(3).

136 Supreme Court Act 1970 (NSW) s 86 (repealed); District Court Act 1973 (NSW) s 76B (repealed).

137 Juries Act 1962 (NT) s 6A. In his second reading speech, the NT Minister for Justice and Attorney-General, Dr Peter Toyne, noted that there had been only one defamation case involving a jury in the Northern Territory in the last 30 years. See Legislative Assembly of the Northern Territory, *Hansard*, 22 February 2006.

138 See, eg, *Bahonko v Sterjov* (2007) 167 IR 43; [2007] FCA 1244; BC200706930; *National Auto Glass Supplies (Australia) Pty Ltd v Neilsen & Moller Autoglass (NSW) Pty Ltd (No 8)* [2007] FCA 1625; BC200709203.

139 In the Federal Court of Australia, a trial is generally conducted without a jury: Federal Court of Australia Act 1976 (Cth) s 39. However, the court can order a trial with a jury if it is expedient in the interests of justice: Federal Court of Australia Act 1976 (Cth) s 40. See also Federal Court Rules (Cth) O 31. As to the jurisdiction of the Federal Court of Australia over defamation claims, see Justice S Rares, ‘Defamation and media law update 2006: Uniform national laws and the Federal Court of Australia’ (2006) 28 *Aust Bar Rev* 1.

140 *Commonwealth Bank of Australia v Rigg* [2001] FCA 590; BC200102779 at [7] per Beaumont J. See also *Dinnison v Commonwealth of Australia* (2000) 106 FCR 418 at [19] per Whitlam J; *Gargan v Commonwealth Bank of Australia* [2004] FCA 641; BC200402879 at [6]–[7] per Hely J; *Draper v Official Trustee in Bankruptcy* (2006) 156 FCR 53; 236 ALR 499 at [63]–[68] per Mansfield J, [77] per Rares J, [120] per Besanko J.

141 *Revised outline of a possible national defamation law*, above n 6, pp 28–9.

There was a belief that the introduction of the NUDL brought an end to the ultimately unpopular s 7A split trial system in New South Wales.¹⁴² The highly artificial nature of the s 7A jury trial was arguably the cause of the recent spate of unreasonable jury verdicts in defamation cases in that jurisdiction.¹⁴³ However, in a recent case commenced in the Supreme Court of New South Wales under the NUDL but subsequently settled, James J is reported to have indicated to the parties that he might order a separate jury trial in relation to defamatory meaning, prior to a later trial in relation to defences and damages.¹⁴⁴ The s 7A split trial system did not originate with the statutory provision itself. In the course of two decisions in the early 1990s, prior to the enactment of the Defamation Act 1974 (NSW) s 7A, the NSW Court of Appeal had held that a trial judge had the power to order a separate trial on the defamatory meaning of the matter, prior to a hearing as to defences and damages, as an exercise of the trial judge's inherent power to conduct proceedings in the interests of justice.¹⁴⁵ It is also a concern if the s 7A split trial system were to be reintroduced in this way, given that the consensus was that this mode of defamation trial had been superseded. Any future reform process might usefully direct its attention not only to the role of the jury but also to the procedure at a jury trial in a defamation claim.

11 Defences for defamation

(a) Introduction

The NUDL effect significant changes in relation to the available defences to defamation. Importantly, the defences under the legislation are not codified, making a marked change for jurisdictions where defamation laws were formerly codified in whole (such as Queensland and Tasmania) or in part (such as in New South Wales in relation to the defence of fair comment).¹⁴⁶ The defences under the legislation now co-exist with the defences at common law.¹⁴⁷

142 See, eg, *John Fairfax Publications Pty Ltd v Gacic* (2007) 230 CLR 291; 235 ALR 402 at [34] per Gummow and Hayne JJ.

143 See, eg, *Cinevest Ltd v Yirandi Productions Pty Ltd* (2001) Aust Torts Reps 81–610; [2001] NSWCA 68; BC200101445; *Channel Seven Sydney Pty Ltd v Parras* (2002) Aust Torts Reps 81–675; [2002] NSWCA 202; BC200203727; *John Fairfax Publications Pty Ltd v Rivkin* (2003) 201 ALR 77; [2003] HCA 50; BC200305159; *Gorman v Barber* (2004) 61 NSWLR 543; *Jones v Sutton* (2004) 61 NSWLR 614; *Bennette v Cohen* (2005) 64 NSWLR 81; *John Fairfax Publications Pty Ltd v Gacic* (2007) 230 CLR 291; 235 ALR 402. See also D Rolph, 'Perverse jury verdicts in New South Wales defamation trials' (2003) 11 *TLJ* 28; D Rolph, 'Simple Questions, Difficult Juries: Perversity in Australian Defamation Trials After *John Fairfax Publications Pty Ltd v Rivkin*' (2004) 18(3) *CLQ* 9.

144 Y C Kux, 'First case under uniform Act settles' (2007) *Gazette L & J*, 30 October 2007, at <<http://www.tinyurl.com.au/x.php?1jrs>> (password required for access).

145 *Radio 2UE Sydney Pty Ltd v Parker* (1992) 29 NSWLR 448 at 473 per Clarke JA; *TCN Channel 9 Pty Ltd v Mahony* (1993) 32 NSWLR 397.

146 Defamation Act 1974 (NSW) s 29(1) (repealed).

147 CLWA (ACT) s 134; DA (NT) s 21; DA (NSW) s 24; DA (Qld) s 24; DA (SA) s 22; DA (Tas) s 24; DA (Vic) s 24; DA (WA) s 24.

(b) Justification

Perhaps the most controversial aspect of the changes to defamation defences was the enactment of truth alone as a complete defence.¹⁴⁸ At common law, the proof of the substantial truth of a matter amounts to justification and is a complete defence to defamation. The rationale is that no damage to the plaintiff's reputation occurs where one tells the truth about him or her. The plaintiff's undeservedly good reputation is merely reduced to its appropriate level.¹⁴⁹ As Windeyer J observed, 'the law does not protect the reputation a man has, but only the reputation he deserves'.¹⁵⁰

In Australia, prior to the introduction of the NUDL, there was a deep division about the defence of justification. In four jurisdictions — the Northern Territory, South Australia, Victoria and Western Australia — the common law position prevailed. In the other four jurisdictions, truth alone was not a complete defence. In addition, a defendant needed to establish public interest (in New South Wales)¹⁵¹ or public benefit (in the Australian Capital Territory, Queensland and Tasmania)¹⁵² in order to have a defence of justification. This element of the statutory defence of justification was long-standing — it was first introduced into NSW defamation law in 1847¹⁵³ — and there was resistance in certain quarters to its removal. It was thought that the public interest or benefit requirement provided a measure of indirect privacy protection and that its removal would allow media outlets to invade privacy with impunity.¹⁵⁴ Moreover, the division among the Australian jurisdictions as to the role of public interest or benefit in the defence of justification had been an obstacle to previous reform attempts.¹⁵⁵

There are a number of reasons why the removal of the public interest or benefit element from the defence of justification should not be of concern. The defence of justification tended to fail not because of an inability to prove public interest or benefit, but rather because proof of substantial truth was difficult. The test for public interest or benefit was broadly defined and flexibly applied. Therefore, the extent to which the public interest or benefit element acted as an effective, *de facto* privacy protection is questionable. There is a real issue to whether the defence of justification should in fact be used as a *de*

148 CLWA (ACT) s 135; DA (NT) s 22; DA (NSW) s 25; DA (Qld) s 25; DA (SA) s 23; DA (Tas) s 25; DA (Vic) s 25; DA (WA) s 25.

149 *Rofe v Smith's Newspapers Ltd* (1924) 25 SR (NSW) 4 at 21–2 per Street ACJ. See also P George, *Defamation Law in Australia*, LexisNexis Butterworths, Chatswood (NSW), 2006, [19.1].

150 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 150; [1967] ALR 25.

151 Defamation Act 1974 (NSW) s 15(2)(a) (repealed). The defence of justification could also be established if the imputation was substantially true and published on an occasion of qualified privilege: Defamation Act 1974 (NSW) s 15(2)(b) (repealed).

152 CLWA (ACT) s 59 (repealed); Defamation Act 1889 (Qld) s 15 (repealed); Defamation Act 1957 (Tas) s 15 (repealed).

153 As to the historical origins of this requirement in New South Wales, see P Mitchell, 'The Foundations of Australian Defamation Law' (2005) 28 *Syd L Rev* 477.

154 See, eg, Australian Capital Territory, Legislative Assembly, *Debates: Weekly Hansard*, 14 February 2006, pp 8–9, 12–13, 24–9; Queensland Parliament, Legislative Assembly, *Weekly Hansard*, 9 November 2005, pp 3867, 3871, 3874–5; Parliament of Tasmania, Legislative Council, *Hansard*, 29 November 2005, pp 98, 103, 119.

155 As to the history of previous reform attempts, see Kenyon, above n 4, pp 362–4.

facto privacy protection at all. Defamation is intended to protect reputation — broadly, what other people think of the plaintiff,¹⁵⁶ the plaintiff's public *persona* — not privacy. It is inappropriate to attempt to protect privacy indirectly through defamation. Privacy is a legal interest worthy of direct protection, a fact being recognised by courts, law reform bodies and legislatures in Australia and other common law countries.¹⁵⁷ It may be hoped that the removal of the public interest or benefit element from the defence of justification will provide further impetus — small but telling — for the development of direct privacy protection in Australian law. Whether or not it does have such an effect should not detract from the sound, principled change that has been made to the defence of justification in defamation law.¹⁵⁸

(c) Contextual truth

The NUDL also introduce a statutory defence of contextual truth.¹⁵⁹ At common law, if a matter contained several, distinct allegations, a plaintiff was able to select the ones about which he or she wished to complain and could rely only on them. A defendant could not justify the matter by proving the substantial truth of the imputations on which the plaintiff did not rely.¹⁶⁰ To allow a defendant to do so was thought to be unfair to the plaintiff.¹⁶¹ Equally, however, this rule of pleading could be unfair to the defendant. It was entirely open to the plaintiff to complain about minor (but false) allegations, while failing to complain about major (but true) allegations.

The Defamation Act 1974 (NSW) s 16 (now repealed) allowed a defendant to do precisely what the common law prohibited.¹⁶² Under this section, the defendant's 'contextual imputations' (being imputations not complained of by the plaintiff but conveyed in the same matter) and the plaintiff's imputations are evaluated against each other. The defendant has a complete defence if the false imputations do not substantially injure the plaintiff's reputation in light of the substantially true contextual imputations. A similar, less detailed statutory defence of contextual truth also existed in Tasmania prior to the introduction of the NUDL.¹⁶³ It is unclear whether the introduction of this defence nationally will be of great benefit to defendants. If the experience in

156 *Plato Films v Speidel* [1961] AC 1090 at 1138 per Lord Denning; [1961] 1 All ER 876.

157 See, eg, in relation to the position in Australia, *Grosse v Purvis* (2003) Aust Torts Reps 81–706; [2003] QDC 151 at [415]–[447] per Skoien DCJ; *Doe v Australian Broadcasting Corporation* [2007] VCC 281 at [146]–[164]. See also NSWLRC, *Invasion of Privacy*, Consultation Paper 1, Sydney, 2007; ALRC, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, Sydney, 2008 (3 vols).

158 For a more detailed discussion of this aspect of the NUDL, see D Rolph, 'Preparing for a Full-Scale Invasion? Truth, Privacy and Defamation' (2007) 25(3/4) *Communications LB* 5.

159 CLWA (ACT) s 136; DA (NT) s 23; DA (NSW) s 26; DA (Qld) s 26; DA (SA) s 24; DA (Tas) s 26; DA (Vic) s 26; DA (WA) s 26.

160 *Bremridge v Latimer* (1864) 10 LT 816 at 816 per Erle CJ, 816–17 per Willes J; *Watkin v Hall* (1868) LR 3 QB 396 at 402 per Blackburn J; *Polly Peck (Holdings) plc v Trelford* [1986] QB 1000 at 1032 per O'Connor LJ; [1986] 2 All ER 84; *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519; 154 ALR 294 at [8]–[13] per Brennan CJ and McHugh J.

161 *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519; 154 ALR 294 at [8]–[13] per Brennan CJ and McHugh J.

162 *Jones v John Fairfax Publications Pty Ltd* (2005) 67 NSWLR 434 at [51] per Simpson J.

163 Defamation Act 1957 (Tas) s 18 (repealed).

New South Wales under the predecessor provision provides any guidance, the statutory defence of contextual truth will be frequently pleaded but rarely successful.¹⁶⁴ Perhaps this is attributable to the complexity of the defence. (The removal of the element of public interest or benefit in New South Wales and Tasmania is not a substantial reduction in that complexity.) Perhaps this is attributable to the limited circumstances to which the defence is properly directed. It is not every defamation case where the plaintiff is highly selective about the imputations which he or she wishes to plead or not plead.

A potential benefit of the introduction of a statutory defence of contextual truth is that it may lead to the demise of the *Polly Peck* defence.¹⁶⁵ The *Polly Peck* defence allows a defendant to identify a 'common sting' between the plaintiff's pleaded imputations and the imputations it wishes to plead, at a higher level of abstraction, and then to justify that 'common sting', thereby establishing a complete defence.¹⁶⁶ It has been highly controversial in Australia. It was trenchantly criticised by Brennan CJ and McHugh J in their joint judgment in *Chakravarti v Advertiser Newspapers Ltd*.¹⁶⁷ However, there has not yet been a definitive ruling by the High Court on the status of the *Polly Peck* defence in Australian law.¹⁶⁸ A number of NSW judges have declared that the *Polly Peck* defence is not part of the common law of Australia.¹⁶⁹ However, in Australian jurisdictions, the *Polly Peck* defence does appear to exist, albeit in a somewhat attenuated form.¹⁷⁰ In *Caccavo v Daft*, Holt M held that the statutory defence of contextual truth and the common law *Polly Peck* defence could be pleaded concurrently under the national, uniform defamation legislation.¹⁷¹ However, like the statutory defence of contextual

164 See, eg, *John Fairfax Publications Pty Ltd v Jones* [2004] NSWCA 205; BC200403823 at [16]–[21] per Spigelman CJ, [113] per Ipp JA; *Woodham v John Fairfax Publications Pty Ltd* (2005) Aust Torts Reps 81–822; [2005] NSWSC 1204; BC200510618 at [27]–[49] per Nicholas J; *Hodge v TCN Channel Nine Pty Ltd* [2006] NSWSC 933; BC200611330 at [574]–[575] per Levine J; *John Fairfax Publications Pty Ltd v Zunter* [2006] NSWCA 227; BC200606250 at [37]–[40] per Handley JA; *Kriss v John Fairfax Publications Pty Ltd* (2007) Aust Torts Reps 81–902; [2007] NSWSC 830; BC200706180 at [45]–[51] per McClellan CJ at CL.

165 See, eg, *Woodham v John Fairfax Publications Pty Ltd* (2005) Aust Torts Reps 81–822; [2005] NSWSC 1204; BC200510618 at [26] per Nicholas J.

166 *Polly Peck (Holdings) plc v Trelford* [1986] QB 1000 at 1032 per O'Connor LJ; [1986] 2 All ER 84.

167 (1998) 193 CLR 519; 154 ALR 294 at [8]–[13].

168 Recently, in the High Court's decision in *Channel Seven Adelaide Pty Ltd v Manock* (2007) 231 CLR 245; 241 ALR 468 at [79] n 113, the joint judgment of Gummow, Hayne and Heydon JJ referred, with seeming endorsement, to the *dicta* of Brennan CJ and McHugh J in *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519; 154 ALR 294. The decision did not directly refer to *Polly Peck*.

169 *John Fairfax Publications Pty Ltd v Zunter* [2006] NSWCA 227; BC200606250 at [42] per Handley JA; *Hitchcock v John Fairfax Publications Pty Ltd* [2007] NSWSC 7; BC200700173 at [60] per Nicholas J.

170 As to the position in South Australia, see *Advertiser-News Weekend Publishing Co Ltd v Manock* (2005) 91 SASR 206 at [78]–[82] per Doyle CJ. As to the position in Victoria, see *David Syme & Co Ltd v Hore-Lacy* (2000) 1 VR 667; *Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1 at [302] per Gillard AJA. As to the position in Western Australia, see *Nationwide News Pty Ltd v Moodie* (2003) 28 WAR 314 at [11]–[15] per Anderson J, [58]–[61] per Steytler J, [85]–[88] per McLure J; *West Australian Newspapers Ltd v Elliott* (2008) 250 ALR 363; [2008] WASC 172 at [31] per Steytler P, [73]–[79] per McLure J.

171 *Caccavo v Daft* [2006] TASSC 36; BC200603805 at [14]–[15].

truth, the *Polly Peck* defence is frequently pleaded but rarely successful.¹⁷²

Drawing on his extensive empirical research on pleading practices in New South Wales, Victoria and the United Kingdom, Kenyon has argued that the *Polly Peck* defence, as well as the case with which it is often confused or allied, *Lucas-Box v News Group Newspapers Ltd*,¹⁷³ properly understood and applied, could in fact be useful in clarifying the parties' respective positions on the meaning of the matter.¹⁷⁴ However, the Australian experience thus far does not inspire confidence that the *Polly Peck* defence will be so deployed by practitioners. Given that the *Polly Peck* defence, properly understood, has a narrow scope of operation and has had comparatively little success in over two decades of pleading, it may be that the demise of this defence as part of Australian law is finally imminent.

(d) Absolute privilege

The NUDL also contain provisions dealing with defences in the nature of privilege. For instance, they restate and clarify the defence of absolute privilege. The defence of absolute privilege covers defamatory matter published in the course of parliamentary proceedings and Australian court and tribunal proceedings, as well as proceedings itemised in a schedule to the legislation.¹⁷⁵ Only New South Wales has in fact identified any bodies in its schedule.¹⁷⁶ These bodies are substantially similar to those identified in the repealed Defamation Act 1974 (NSW) Pt 3 Div 3.

The NUDL also provide a defence for the publication of public documents or a fair copy, summary or extract of a public document.¹⁷⁷ The term, 'public document', is defined broadly to include Australian and foreign parliamentary reports and papers; judgments, orders and determinations of Australian and foreign courts and tribunals in civil matters; documents issued by Australian and foreign government officers, employees and agencies; and any record required to be kept open for inspection by the public in Australia.¹⁷⁸ The NUDL further provide a defence for the publication of a fair report of a proceeding of public concern.¹⁷⁹ The term, 'proceeding of public concern', is similarly cast in broad terms to include public proceedings of Australian and foreign parliamentary bodies (including local government); international organisations; international, intergovernmental conferences; Australian and

172 *Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1 at [303] per Gillard AJA.

173 [1986] 1 All ER 177; [1986] 1 WLR 147.

174 A T Kenyon, 'Imputation or Publication: The Cause of Action in Defamation Law' (2004) 27 *UNSWLJ* 100 at 103–4; Kenyon, above n 4, pp 362–4; A T Kenyon, 'Perfecting *Polly Peck*: Defences of Truth and Opinion in Australian Defamation Practice' (2007) 29 *Syd L Rev* 651 at 682.

175 CLWA (ACT) s 137; DA (NT) s 24; DA (NSW) s 27; DA (Qld) s 27; DA (SA) s 25; DA (Tas) s 27; DA (Vic) s 27; DA (WA) s 27.

176 DA (NSW) Sch 1. The CLWA (ACT) s 137 and the DA (SA) s 25 omit entirely any reference to a schedule. See also DA (Qld) s 3(a), note.

177 CLWA (ACT) s 138; DA (NT) s 25; DA (NSW) s 28; DA (Qld) s 28; DA (SA) s 26; DA (Tas) s 28; DA (Vic) s 28; DA (WA) s 28.

178 CLWA (ACT) s 138(4); DA (NT) s 25(4); DA (NSW) s 28(4); DA (Qld) s 28(4); DA (SA) s 26(4); DA (Tas) s 28(4); DA (Vic) s 28(4); DA (WA) s 28(4).

179 CLWA (ACT) s 139; DA (NT) s 26; DA (NSW) s 29; DA (Qld) s 29; DA (SA) s 27; DA (Tas) s 29; DA (Vic) s 29; DA (WA) s 29.

foreign courts, tribunals and inquiries; Australian and foreign ombudsmen and law reform bodies; public meetings of shareholders of Australian public companies; public meetings on matters of public interest; and proceedings of learned societies, sports or recreation associations and trade associations in Australia relating to members and those subject, by contract, to the control of the association.¹⁸⁰ Both the defence of publication of public documents and the defence of fair report of proceedings of public concern can only be defeated if the plaintiff proves the matter was not published honestly for the purpose of either the information of the public or the advancement of education.¹⁸¹

(e) Qualified privilege

The most significant reform in relation to the defences of privilege under the NUDL is the introduction of a statutory defence of qualified privilege.¹⁸² The new provision is modelled on the Defamation Act 1974 (NSW) s 22. Unlike the common law defence of qualified privilege, which is founded on complete reciprocity of duty and interest between publisher and audience respectively,¹⁸³ the statutory defence of qualified privilege turns on the reasonableness of the publisher's conduct in the circumstances of publication. The statutory provision itself outlines, non-exhaustively, the factors relevant to an assessment of the reasonableness of the publisher's conduct, including the extent to which the matter published is of public interest or relates to the performance of public functions or activities; the seriousness of the defamatory imputation; the extent to which the matter published distinguishes between suspicions, allegations and proven facts; the need to publish expeditiously; the business environment of the publisher; the nature and quality of the sources of information; whether both sides of the story were sought and represented; and the steps taken to verify the matter published.¹⁸⁴ Although modelled on the NSW provision, this statutory defence is familiar to

180 CLWA (ACT) s 139(4); DA (NT) s 26(4); DA (NSW) s 29(4); DA (Qld) s 29(4); DA (SA) s 27(4); DA (Tas) s 29(4); DA (Vic) s 29(4); DA (WA) s 29(4).

181 CLWA (ACT) ss 138(3), 139(3); DA (NT) ss 25(3), 26(3); DA (NSW) ss 28(3), 29(3); DA (Qld) ss 28(3), 29(3); DA (SA) ss 26(3), 27(3); DA (Tas) ss 28(3), 29(3); DA (Vic) ss 28(3), 29(3); DA (WA) ss 28(3), 29(3).

182 CLWA (ACT) s 139A; DA (NT) s 27; DA (NSW) s 30; DA (Qld) s 30; DA (SA) s 28; DA (Tas) s 30; DA (Vic) s 30; DA (WA) s 30.

183 *Toogood v Spyring* (1834) 1 Cr M & R 181 at 193; 149 ER 1044 at 1049–50 per Parke B; *Stuart v Bell* [1891] 2 QB 341 at 348–50 per Lindley LJ; *Howe & McColough v Lees* (1910) 11 CLR 361 at 367–70 per Griffith CJ; *Adam v Ward* [1917] AC 309 at 334 per Lord Atkinson; *Watt v Longsdon* [1930] 1 KB 130 at 146–8 per Scrutton LJ; *Loveday v Sun Newspapers Ltd* (1938) 59 CLR 503 at 511 per Latham CJ; *Guise v Kowelis* (1947) 74 CLR 102 at 109–10 per Latham CJ, 113 per Starke J; *Horrocks v Lowe* [1975] AC 135 at 149 per Lord Diplock; [1974] 1 All ER 662; *Roberts v Bass* (2002) 212 CLR 1; 194 ALR 161 at [62] per Gaudron, McHugh and Gummow JJ.

184 CLWA (ACT) s 139A(3); DA (NT) s 27(3); DA (NSW) s 30(3); DA (Qld) s 30(3); DA (SA) s 28(3); DA (Tas) s 30(3); DA (Vic) s 30(3); DA (WA) s 30(3).

those in other Australian jurisdictions from its formative influence in the development of *Lange* qualified privilege¹⁸⁵ and the presence of analogous statutory defences.¹⁸⁶

However, the introduction of the statutory defence of qualified privilege as part of the NUDL is not necessarily a positive development. One of the reasons the Defamation Act 1974 (NSW) s 22 was introduced was because the requirements of the common law defence of qualified privilege made it unsuitable for use by media defendants.¹⁸⁷ Yet, the experience of media defendants relying on the Defamation Act 1974 (NSW) s 22 may be charitably described as underwhelming. A recent example illustrates this point. In *John Fairfax Publications Pty Ltd v Zunter*,¹⁸⁸ the *Sydney Morning Herald* published an article about the owner of a caravan park, John Zunter, alleging that he had lost control of his backburn, thereby contributing to bushfires in the vicinity of Nowra. The article arose from allegations made at a press briefing by firefighters. Prior to publication, the journalist unsuccessfully attempted to reach Zunter by road and by telephone. The photographer assigned to cover the bushfires did reach Zunter by river and provided him with the journalist's mobile telephone number, impressing on him the need to contact the journalist to tell his side of the story. Zunter contacted the journalist only the following day, by which time the story had been published.¹⁸⁹ Notwithstanding the efforts taken to obtain Zunter's side of the story, the NSW Court of Appeal unanimously found that John Fairfax Publications had failed to prove it had done 'nothing unreasonable' in relation to the publication of the story.¹⁹⁰ Moreover, Handley JA, giving the leading judgment on appeal, held that, as between publisher and plaintiff, the publisher should bear the risk.¹⁹¹ Given the rigorous, if not restrictive, application of the requirement of reasonableness in the context of the statutory defence of qualified privilege, being more akin to a counsel of excellence or perfection, rather than one of reasonableness, it is difficult to be optimistic about media defendants' prospects of success under this defence as part of the NUDL.¹⁹²

185 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 572–4 per curiam; 145 ALR 96.

186 Defamation Act 1889 (Qld) s 16 (repealed); Defamation Act 1957 (Tas) s 16 (repealed). Peter Applegarth SC suggested that the Queensland provision was a more effective defence than the NSW analogue and therefore should have been used as the model for the NUDL. See P Applegarth SC, 'When Is Reasonable Unreasonable?' (2005) 165 *Gazette L & J*, 8 July 2005, at <<http://www.tinyurl.com.au/x.php?1jvn>> (password required for access).

187 *Watt v Longsdon* [1930] 1 KB 130 at 147 per Scrutton LJ; *Loveday v Sun Newspapers Ltd* (1938) 59 CLR 503 at 513–14 per Latham CJ; *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749 at 775–9, 792 per curiam; *Roberts v Bass* (2002) 212 CLR 1; 194 ALR 161 at [67] per Gaudron, McHugh and Gummow JJ; *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366; 204 ALR 193 at [26] per Gleeson CJ, Hayne and Heydon JJ.

188 [2006] NSWCA 227; BC200606250.

189 As to the facts of the case, see *ibid.*, at [13]–[20] per Handley JA.

190 *Ibid.*, at [31] per Handley JA.

191 *Ibid.*, at [30].

192 For other recent cases of a media defendant's failure to establish a statutory defence of qualified privilege under the Defamation Act 1974 (NSW) s 22 (now repealed), see *John Fairfax Publications Pty Ltd v O'Shane* (2005) Aust Torts Reps 81–789; [2005] NSWCA

One notable addition to the statutory defence of qualified privilege under the NUDL, which was absent from the predecessor provision in the Defamation Act 1974 (NSW), is the inclusion of ‘the nature of the business environment in which the defendant operates’ as a consideration relevant to the assessment of the reasonableness of the publisher’s conduct.¹⁹³ Prior to its embodiment in statute, this was raised in *Rogers v Nationwide News Pty Ltd*.¹⁹⁴ In that case, Nationwide News sought to rely on ‘the circumstances in which daily newspapers are published’ as a factor relevant to its statutory defence of qualified privilege.¹⁹⁵ Dealing with this issue, Gleeson CJ and Gummow J observed that a court would need evidence before it could take this factor into proper consideration and could not simply take judicial notice of such circumstances.¹⁹⁶ Tellingly, however, their Honours intimated that, even if such evidence were before the court, it might not be accorded great weight. While Gleeson CJ and Gummow J acknowledged that ‘[t]he legitimate commercial interests of the respondents are entitled to due consideration’, their Honours further observed that ‘reasonableness is not determined solely, or even mainly, by those commercial interests’.¹⁹⁷ Given the prevailing judicial approach to the issue of reasonableness in the context of the statutory defence of qualified privilege in NSW defamation cases, the addition of this element is unlikely to alter publishers’ likelihood of success.

The intention of requiring media defendants to demonstrate the reasonableness of their conduct is motivated, in part, by the desire to promote ‘responsible journalism’. The media’s relative lack of success in relying on a statutory defence of qualified privilege in New South Wales may be contrasted with the emergence of a broad-based defence of ‘responsible journalism’ in the United Kingdom, derived from the common law defence of qualified privilege. In *Reynolds v Times Newspapers Ltd*,¹⁹⁸ the House of Lords rejected an extended defence for political expression, holding that there was no principled basis on which to distinguish between political and other forms of expression. Instead, their Lordships endorsed an approach which led to a more broadly based defence to protect ‘responsible journalism’.¹⁹⁹ In his speech, Lord Nicholls of Birkenhead identified a non-exhaustive list of 10 factors relevant to the assessment of whether the publisher had engaged in ‘responsible journalism’.²⁰⁰ It is strikingly similar to the list of factors relevant to the evaluation of the reasonableness of a publisher’s conduct under the statutory defence of qualified privilege. However, unlike the Defamation Act 1974 (NSW) s 22, the defence of ‘responsible journalism’ has had some

164; BC200503139; *Obeid v John Fairfax Publications Pty Ltd* (2006) 68 NSWLR 150. See generally K Gould, ‘The more things change, the more things stay the same . . . or do they?’ (2007) 12 *MALR* 29.

193 CLWA (ACT) s 139A(3)(f); DA (NT) s 27(3)(f); DA (NSW) s 30(3)(f); DA (Qld) s 30(3)(f); DA (SA) s 28(3)(f); DA (Tas) s 30(3)(f); DA (Vic) s 30(3)(f); DA (WA) s 30(3)(f).

194 (2003) 216 CLR 327; 201 ALR 1.

195 *Ibid.*, at [31] per Gleeson CJ and Gummow J.

196 *Ibid.*, at [31]–[32].

197 *Ibid.*, at [31]–[32].

198 [2001] 2 AC 127; [1999] 4 All ER 609.

199 *Ibid.*, at AC 204 per Lord Nicholls of Birkenhead.

200 *Ibid.*, at AC 205.

degree of success for publishers.²⁰¹ Notably, judges at high appellate level in the United Kingdom have warned trial judges to give effect to the spirit and intent of the defence of ‘responsible journalism’ and not to treat the list of relevant factors as a catalogue of obstacles to be overcome.²⁰² The comparative experience of these defences in Australia and the United Kingdom demonstrates that the disposition of judges plays an important role in the application of the law and the outcomes achieved, whether the source of the law is statutory provision or common law principle.

(f) Honest opinion and fair comment

The defence of fair comment (or ‘honest opinion’, as it is styled) is also reshaped under the NUDL.²⁰³ The statutory defence of honest opinion is modelled on the defence of fair comment under the Defamation Act 1974 (NSW) Pt 3 Div 7. It provides, in effect, three defences of honest opinion, each depending on the identity of the publisher of the comment and its relationship to the commentator. Where the defendant is the commentator, the defence can be defeated only if he or she did not honestly hold the opinion at the time the defamatory matter was published.²⁰⁴ Where the defendant publishes the comment of an employee or agent, the defence can be defeated only if the defendant did not believe that the employee or agent honestly held the opinion at the time the defamatory matter was published.²⁰⁵ Where the defendant publishes the comment of a person other than an employee or agent, styled comment of a ‘stranger’ under the predecessor provision,²⁰⁶ the defence can be defeated only if the defendant had reasonable grounds to believe that the commentator in question did not honestly hold the opinion at the time the defamatory matter was published.²⁰⁷ As with the common law defence of fair comment, the statutory defences of honest opinion are all founded on expressions of opinion, not statements of fact,²⁰⁸ relating to a matter of public

201 See, eg, *Bonnick v Morris* [2003] 1 AC 300; (2002) 12 BHRC 558 at [24] per curiam; *Jameel v Wall Street Journal Europe SprL (No 3)* [2007] 1 AC 359; [2006] 4 All ER 1279 at [88]–[89] per Lord Hoffmann, [137]–[144] per Lord Scott of Foscote, [146]–[151] per Baroness Hale of Richmond; *Roberts v Gable* [2008] QB 502.

202 See, eg, *Jameel v Wall Street Journal Europe SprL (No 3)* [2007] 1 AC 359; [2006] 4 All ER 1279 at [56]–[57] per Lord Hoffmann; *Seaga v Harper* [2008] 1 All ER 965 at [12] per curiam.

203 CLWA (ACT) s 139B; DA (NT) s 28; DA (NSW) s 31; DA (Qld) s 31; DA (SA) s 30; DA (Tas) s 31; DA (Vic) s 31; DA (WA) s 31.

204 CLWA (ACT) s 139B(1), 139B(4)(a); DA (NT) s 28(1), 28(4)(a); DA (NSW) s 31(1), 31(4)(a); DA (Qld) s 31(1), 31(4)(a); DA (SA) s 30(1), 30(4)(a); DA (Tas) s 31(1), 31(4)(a); DA (Vic) s 31(1), 31(4)(a); DA (WA) s 31(1), 31(4)(a).

205 CLWA (ACT) s 139B(2), 139B(4)(b); DA (NT) s 28(2), 28(4)(b); DA (NSW) s 31(1), 31(4)(a); DA (Qld) s 31(2), 31(4)(b); DA (SA) s 30(2), 30(4)(b); DA (Tas) s 31(2), 31(4)(b); DA (Vic) s 31(2), 31(4)(b); DA (WA) s 31(2), 31(4)(b).

206 Defamation Act 1974 (NSW) s 34 (repealed).

207 CLWA (ACT) s 139B(3), 139B(4)(c); DA (NT) s 28(3), 28(4)(c); DA (NSW) s 31(3), 31(4)(c); DA (Qld) s 31(3), 31(4)(c); DA (SA) s 30(3), 30(4)(c); DA (Tas) s 31(3), 31(4)(c); DA (Vic) s 31(3), 31(4)(c); DA (WA) s 31(3), 31(4)(c).

208 As to the common law requirement of an expression of opinion, rather than a statement of fact, see *Clarke v Norton* [1910] VLR 494 at 500 per Cussen J; *Kemsley v Foot* [1952] AC 345 at 356–7 per Lord Porter; [1952] 1 All ER 501; *O’Shaughnessy v Mirror Newspapers Ltd* (1970) 125 CLR 166 at 173 per Barwick CJ, McTiernan, Menzies and Owen JJ; [1971]

interest.²⁰⁹ In addition, the statutory defences of honest opinion require the opinion to be based on ‘proper material’, which is defined expansively.²¹⁰

Unlike the predecessor provisions under the Defamation Act 1974 (NSW) Pt 3 Div 7, the statutory defences of honest opinion under the NUDL do not codify the defence of comment, but co-exist with the common law defence of fair comment.²¹¹ However, the statutory defences of honest opinion appear to exclude malice as a form of discrediting conduct. At common law, a defence of fair comment can be defeated if the defendant was actuated by ‘malice’.²¹² However, under the statutory defences of honest opinion, the grounds on which these defences may be defeated are set out exhaustively and do not include ‘malice’ in the sense understood and applied at common law.²¹³

Although the NUDL allow both the statutory defences of honest opinion and the common law defence of fair comment to be raised by a defendant, both are beset with unnecessary complexity and are applied in such a way as to be adverse to the interests of the defendant. For instance, the complexity of the common law defence of fair comment is amply demonstrated by the recent High Court of Australia decision in *Channel Seven Adelaide Pty Ltd v Manock*.²¹⁴ In that case, the plaintiff, Dr Colin Manock, was a forensic pathologist. He brought defamation proceedings against Channel Seven Adelaide in the District Court of South Australia arising out of a promotion for an upcoming story on *Today Tonight*. The promotion comprised four sentences plus accompanying images. Channel Seven Adelaide raised a defence of fair comment.²¹⁵ It supported its defence by 10 pages of particulars. Understandably, Manock applied to have this defence struck out. This interlocutory application was appealed to the High Court.²¹⁶ There was self-evidently a gross disproportion between the substance of the dispute and the way in which this dispute was pleaded. Particularising the defence of fair comment in such detail, contesting the strike-out application to the highest

ALR 367; *Pervan v North Queensland Newspaper Co Ltd* (1993) 178 CLR 309 at 317–18 per Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ; 117 ALR 569; *Channel Seven Adelaide Pty Ltd v Manock* (2007) 231 CLR 245; 241 ALR 468 at [35]–[37] per Gummow, Hayne and Heydon JJ.

209 As to the common law requirement of a matter of public interest, see *Gardiner v John Fairfax & Sons Ltd* (1942) 42 SR (NSW) 171 at 173–4 per Jordan CJ; *London Artists Ltd v Little* [1969] 2 QB 375 at 391 per Lord Denning MR; [1969] 2 All ER 193; *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183 at 214–25 per Dawson, McHugh and Gummow JJ; 135 ALR 368.

210 CLWA (ACT) s 139B(5), 139B(6); DA (NT) s 28(5), 28(6); DA (NSW) s 31(5), 31(6); DA (Qld) s 31(5), 31(6); DA (SA) s 30(5), 30(6); DA (Tas) s 31(5), 31(6); DA (Vic) s 31(5), 31(6); DA (WA) s 31(5), 31(6).

211 The NUDL have no equivalent provision to the Defamation Act 1974 (NSW) s 29 (repealed).

212 *Thomas v Bradbury, Agnew & Co Ltd* [1906] 2 KB 627 at 640 per Collins MR; *Silkin v Beaverbrook Newspapers Ltd* [1958] 1 WLR 743 at 747 per Diplock J; [1958] 2 All ER 516; *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 at 170 per Lord Denning MR; [1968] 1 All ER 497; *Renouf v Federal Capital Press of Australia Ltd* (1977) 17 ACTR 35 at 53–4 per Blackburn J.

213 See also *Bickel v John Fairfax & Sons Ltd* [1981] 2 NSWLR 474 at 490–1 per Hunt J; *Bickel v John Fairfax & Sons Ltd* [1982] 1 NSWLR 498 at 502 per Samuels JA.

214 (2007) 232 CLR 245; 241 ALR 468.

215 *Ibid.*, at [14]–[16] per Gummow, Hayne and Heydon JJ.

216 *Ibid.*, at [24]–[30] per Gummow, Hayne and Heydon JJ.

appellate level and delaying a hearing on the merits hardly amounted to conduct designed to give effect to the right to comment. This case is an extreme example of common problems with the defence of fair comment: unnecessary prolixity in pleadings and frequent interlocutory skirmishes. This situation is unfortunate, given the importance the common law frequently claims for upholding the right to comment as an exercise of freedom of expression.

Just as the nationwide adoption of the statutory defence of qualified privilege is not necessarily an improvement to Australian defamation law,²¹⁷ the same observation can be made about the statutory defences of honest opinion. The defences of qualified privilege and fair comment are vitally important to the effective operation of Australian defamation law. Both defences should provide protection for important values, notably freedom of expression; promote desirable practices, such as responsible journalism; and balance against excessive protection of reputation. In their current, enacted forms, the defences of qualified privilege and fair comment do not operate efficaciously. They are particular aspects of defamation law that require further attention in any future reform process.

(g) Innocent dissemination

The NUDL also provide for a defence of innocent dissemination.²¹⁸ In doing so, they introduce a degree of clarity to confusing aspects of the common law defence. The statutory defence of innocent dissemination replicates the elements of the common law defence, requiring the defendant to prove that it published the defamatory matter in its capacity as, or as an employee or agent of, a 'subordinate distributor'; that 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 its part.²¹⁹

The refinement of the common law defence occurs in the statutory provision's definition of the key term, 'subordinate distributor', a concept which was problematic at common law. For the purposes of the statutory defence of innocent dissemination, a 'subordinate distributor' is a person who is not the first or primary distributor of the matter, who is not the author or the 'originator' of the matter and who does not exercise editorial control over the content or publication of the matter, prior to its initial publication.²²⁰ It further provides that a person is not a first or primary distributor of defamatory matter (and thereby precluded from relying on the defence of innocent dissemination) merely because the person is a bookseller, newsagent, librarian or a provider

217 As to the difficulties associated with the statutory defence of qualified privilege, see above 11(a) Qualified privilege.

218 CLWA (ACT) s 139C; DA (NT) s 29; DA (NSW) s 32; DA (Qld) s 32; DA (SA) s 30; DA (Tas) s 32; DA (Vic) s 32; DA (WA) s 32.

219 CLWA (ACT) s 139C(1); DA (NT) s 29(1); DA (NSW) s 32(1); DA (Qld) s 32(1); DA (SA) s 30(1); DA (Tas) s 32(1); DA (Vic) s 32(1); DA (WA) s 32(1). As to the elements of the common law defence of innocent dissemination, see *Vizetelly v Mudie's Select Library Ltd* [1900] 2 QB 170 at 180 per Romer LJ; *Emmens v Pottle* (1885) 16 QB 354 at 357 per Lord Esher MR; *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 592 per Gaudron J; 141 ALR 1.

220 CLWA (ACT) s 139C(2); DA (NT) s 29(2); DA (NSW) s 32(2); DA (Qld) s 32(2); DA (SA) s 30(2); DA (Tas) s 32(2); DA (Vic) s 32(2); DA (WA) s 32(2).

of postal services.²²¹ It also provides that a broadcaster of a live programme containing defamatory matter conveyed by a person over whom the broadcaster has no effective control is not a first or primary distributor of defamatory matter.²²² This is clearly directed, in part, towards overcoming the effect of the decision of the High Court of Australia in *Thompson v Australian Capital Television Pty Ltd*, where the court held that a television network which broadcast a breakfast television programme live into one jurisdiction, pursuant to a licence from the television network which actually made and broadcast the programme in another jurisdiction, was not a subordinate distributor, but a publisher itself, of the defamatory matter, and thus could not rely on the defence of innocent dissemination. The court reached this conclusion by reasoning that there was a risk of defamation, which the television network relaying the broadcast could have supervised and controlled, but elected not to do so.²²³

One of the limitations of the common law defence of innocent dissemination, evident in *Thompson v Australian Capital Television Pty Ltd*, is its difficulty in adapting to the challenges posed by new technologies. In this respect, the statutory defence represents an advance on the common law, not only in relation to its treatment of live radio and television broadcasts. In addition, the statutory defence of innocent dissemination extends to those involved in electronic publication. It states that providers of services for the 'processing, copying, distributing or selling of any electronic medium', operators or providers of equipment, systems or services 'by means of which the matter is retrieved, copied, distributed or made available in electronic form', as well as operators of, and access providers to, communications systems by which defamatory matter is transmitted or made available by a person over whom the operator or access provider has no effective control, are not first or primary distributors of the defamatory matter, thereby entitling them to rely on the defence of innocent dissemination.²²⁴ In practice, this would appear to mean that internet service providers and internet content hosts, for instance, could rely on the defence of innocent dissemination.²²⁵

The common law defence of innocent dissemination developed at a time when printers had to arrange composite boards physically, with the consequence that they could not claim not to have known about the

221 CLWA (ACT) s 139C(3)(a)–(d); DA (NT) s 29(3)(a)–(d); DA (NSW) s 32(3)(a)–(d); DA (Qld) s 32(3)(a)–(d); DA (SA) s 30(3)(a)–(d); DA (Tas) s 32(3)(a)–(d); DA (Vic) s 32(3)(a)–(d); DA (WA) s 32(3)(a)–(d).

222 CLWA (ACT) s 139C(3)(e); DA (NT) s 29(3)(e); DA (NSW) s 32(3)(e); DA (Qld) s 32(3)(e); DA (SA) s 30(3)(e); DA (Tas) s 32(3)(e); DA (Vic) s 32(3)(e); DA (WA) s 32(3)(e).

223 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 589–90 per Brennan CJ, Dawson and Toohey JJ, 617–20 per Gummow J; cf 593–4 per Gaudron J; 141 ALR 1.

224 CLWA (ACT) s 139C(3)(f)–(g); DA (NT) s 29(3)(f)–(g); DA (NSW) s 32(3)(f)–(g); DA (Qld) s 32(3)(f)–(g); DA (SA) s 30(3)(f)–(g); DA (Tas) s 32(3)(f)–(g); DA (Vic) s 32(3)(f)–(g); DA (WA) s 32(3)(f)–(g).

225 See, eg, *Godfrey v Demon Internet Ltd* [2001] QB 201 at 208–9 per Morland J; [1999] 4 All ER 342 (internet service provider which received and stored article and transmitted and facilitated transmission of article liable as publisher). However, see now also Broadcasting Services Act 1992 (Cth) Sch 5 cl 91.

defamatory matter they helped create.²²⁶ Modern media, such as radio, television and particularly internet technologies, have multiplied exponentially the number of publications and, more importantly, the opportunities for publication without knowledge of defamatory matter being conveyed. The liberalisation of the defence of innocent dissemination, to take into account technological developments, is a sound improvement brought about by the introduction of the NUDL.

(h) Triviality and unlikelihood of harm

The NUDL also introduce a defence of triviality.²²⁷ This substantially replicates the defence of unlikelihood of harm as it previously existed in New South Wales.²²⁸ There were also analogous provisions in the Australian Capital Territory, Queensland and Tasmania.²²⁹ The defence of triviality is founded on reputational damage being unlikely in the circumstances of publication. The circumstances of publication, not whether the plaintiff has a good or a bad reputation and not whether the defamatory imputations are sufficiently serious, form the central focus of this defence.²³⁰ Given the terms in which it is cast, this defence is of narrow application and limited utility. It will be most useful for a publication of limited circulation in a private context. It would rarely be available to media defendants because the widespread dissemination of a defamatory imputation is not unlikely to cause at least some harm to a plaintiff's reputation.²³¹

12 Remedies for defamation

(a) Introduction

The NUDL also effect significant changes to the available remedies, although not as extensive as envisaged in the preceding reform process. The most important changes relate to the damages payable for defamation. The new laws also introduce an offer of amends procedure to promote speedy, non-litigious settlements of claims. These will be examined in turn.

(b) Damages

Perhaps the most significant changes introduced by the NUDL relate to defamation damages. Damages remain the principal remedy for defamation. At common law, a successful defamation plaintiff may receive compensatory

226 See, eg, *McPhersons Ltd v Hickie* (1995) Aust Torts Reps 81–348 (NSW CA) at 62,498 per Priestley JA, 62,499 per Powell JA; BC9506540; *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 587 per Brennan CJ, Dawson and Toohey JJ; 141 ALR 1.

227 CLWA (ACT) s 139D; DA (NT) s 30; DA (NSW) s 33; DA (Qld) s 33; DA (SA) s 31; DA (Tas) s 33; DA (Vic) s 33; DA (WA) s 33.

228 Defamation Act 1974 (NSW) s 13 (repealed).

229 CLWA (ACT) s 126 (repealed); Defamation Act 1889 (Qld) s 20 (repealed); Defamation Act 1957 (Tas) s 9(2) (repealed).

230 *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749 at 800–1 per curiam; *Chappell v Mirror Newspapers Ltd* (1984) Aust Torts Reps 80–691 (NSW CA) at 68,947 per Moffitt P; *King and Mergen Holdings Pty Ltd v McKenzie* (1991) 24 NSWLR 305 at 310 per Mahoney JA; *Jones v Sutton* (2004) 61 NSWLR 614 at [11]–[34] per Beazley JA.

231 *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749 at 800 per curiam.

damages (encompassing damages for non-economic and economic loss), aggravated damages and exemplary damages. Ordinarily, the most significant component of an award of defamation damages is the head of compensatory damages for non-economic loss, covering damage to reputation and injury to feelings. Indeed, such damages are frequently the only damages awarded.²³² Defamation damages are expressed to be 'at large'; there is no limit to the quantum of damages which might be awarded.²³³ It is not only the fact of a verdict in favour of the plaintiff that is important. In order to vindicate the plaintiff's reputation, the quantum of damages also needs to be sufficient 'to convince a bystander of the baselessness of the charge' falsely made against the plaintiff.²³⁴ At common law, the jury assessed the damages payable to a successful plaintiff as it was thought that the jury was better able than the judge to represent the community and to reflect community attitudes.²³⁵

The NUDL have changed these common law principles significantly. In all jurisdictions now, there is no scope for the jury in the assessment of defamation damages. It is the function of the trial judge to assess defamation damages.²³⁶ The removal of the task of the assessment of damages from the jury, while retaining the jury for other aspects of a defamation trial, reflects the previous practice in New South Wales. Under the Defamation Act 1974 (NSW) s 7A(4) (now repealed), the judge, not the jury, was to assess damages. The reason this reform was originally introduced in New South Wales was the perception that juries were too generous to plaintiffs. The perception was informed by a series of high-profile cases, both in the United Kingdom and in Australia, where juries had awarded substantial sums to plaintiffs. For example, prominent rugby league footballer Andrew Ettingshausen was awarded \$350,000 damages by the jury at his first defamation trial, arising out of the publication of a naked photograph of him in a magazine, and solicitor Nicholas Carson received \$600,000 damages from the jury at his first defamation trial, arising out of two articles published in the *Sydney Morning Herald*. In a number of cases, including these two instances, appellate courts had to intervene to set aside jury verdicts on the ground that they were manifestly excessive.²³⁷ The perception that juries were too sympathetic to plaintiffs is questionable. It was arguably based on a number of high-profile cases, which attracted media attention, rather than the full spectrum of defamation cases, in many of which plaintiffs received modest awards of

232 *Rook v Fairrie* [1941] 1 KB 507 at 516 per Sir Wilfrid Greene MR; [1941] 1 All ER 297.

233 *Fielding v Variety Inc* [1967] 2 QB 841 at 850–1 per Lord Denning MR; [1967] 2 All ER 497; *Coyne v Citizen Finance Ltd* (1991) 172 CLR 211 at 228 per Toohey J; 99 ALR 252.

234 *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1071 per Lord Hailsham of Marylebone LC; [1972] 1 All ER 801.

235 *Davis v Shepstone* (1886) 11 App Case 187 at 191 (PC); *Bray v Ford* [1896] AC 44 at 50 per Lord Watson, 52 per Lord Herschell; *Youssouf v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581 at 584 per Scrutton LJ; *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1065 per Lord Hailsham of Marylebone LC; [1972] 1 All ER 801.

236 DA (NSW) s 22(3); DA (Qld) s 22(3); DA (Tas) s 22(3); DA (Vic) s 22(3); DA (WA) s 22(3). There are no juries in defamation cases in the Australian Capital Territory, the Northern Territory and South Australia.

237 *Australian Consolidated Press Ltd v Ettingshausen* (unreported, NSW CA, Gleeson CJ, Kirby P and Clarke JA, 13 October 1993, BC9302147); *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44; 113 ALR 577.

damages. In addition, the recent experience in New South Wales in relation to ‘perverse’ or unreasonable jury verdicts suggests that juries might have become less sympathetic, or even hostile, to some, if not all, defamation plaintiffs. Moreover, there are instances of judges assessing damages for defamation in New South Wales which are equally generous to plaintiffs as juries were and also liable to correction on appeal for being manifestly excessive. For example, Levine J originally awarded journalist Richard Sleeman \$400,000 damages for a newspaper item which claimed he was a dishonest journalist.²³⁸ The quantum of damages was reduced to \$250,000 on appeal.²³⁹ Adams J has recently awarded the head of the Australian Olympic Committee, John Coates, \$360,000 damages for a radio broadcast which claimed he was incompetent, engaged in a ‘cover-up’ and was a bully.²⁴⁰ Whether juries or judges are better placed to assess damages for defamation should remain a live question.

Another change introduced by the NUDL is that damages are no longer ‘at large’. The most significant component of defamation damages, damages for non-economic loss, is now capped. This is to reflect the restriction of damages for non-economic loss in personal injury cases, which occurred as part of the legislative reforms that were introduced across Australia from 2002 onwards.²⁴¹ Disparities between the levels of damages for non-economic loss in defamation and personal injuries cases had been an ongoing problem in both English and Australian law for several decades, both at common law and under statute. One of the reasons for the concern about manifestly excessive and other high awards of defamation damages is that they implicitly conveyed the impression that the law was more concerned with the protection of reputation than compensation for pain and suffering and other non-economic losses resulting from personal injuries. Prior to the introduction of the NUDL, the most recent attempt to compel courts to take into account the level of damages for non-economic loss in personal injury cases when assessing damages for defamation was contained in the Defamation Act 1974 (NSW) s 46A(2). This subsection was, however, effectively read down by the High Court of Australia in *Rogers v Nationwide News Pty Ltd*.²⁴² The court suggested that the requirement, contained in s 46A(1), that there be a rational relationship between the quantum of damages awarded and the harm suffered by the publication was the operative provision.²⁴³ The problem with s 46A(2), in its terms, was that it required a court only to consider the level of damages

238 *Sleeman v Nationwide News Pty Ltd* (2004) Aust Torts Reps 81–773; [2004] NSWSC 954; BC200406812.

239 *Nationwide News Pty Ltd v Sleeman* [2005] NSWCA 349; BC200507777.

240 *Coates v Harbour Radio Pty Ltd* (2008) Aust Torts Reps 81–943; [2008] NSWSC 292; BC200802209.

241 See, eg, Personal Injuries (Liabilities and Damages) Act 2003 (NT) ss 27 and 28; Civil Liability Act 2002 (NSW) ss 16 and 17; Civil Liability Act 2003 (Qld) ss 61 and 63; Civil Liability Act 1936 (SA) s 52; Civil Liability Act 2002 (Tas) s 27; Wrongs Act 1958 (Vic) ss 28G and 28H; Civil Liability Act 2002 (WA) ss 9 and 10.

242 (2003) 216 CLR 327; 201 ALR 184.

243 *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327; 201 ALR 184 at [71]–[76] per Hayne J, [134]–[136] per Callinan J, [178]–[187] per Heydon J. There is an equivalent provision under the NUDL. See now CLWA (ACT) s 139E; DA (NT) s 31; DA (NSW) s 34; DA (Qld) s 34; DA (SA) s 32; DA (Tas) s 34; DA (Vic) s 34; DA (WA) s 34.

in personal injury cases when assessing damages for defamation; it did not tell a court what it actually had to do. The consequence of this decision was that judges did not have regard to the level of damages for non-economic loss in personal injury cases and eventually parties no longer presented submissions on this issue.²⁴⁴

With the restriction of damages for non-economic loss in personal injury cases, there was the prospect that damages for defamation could exceed those in personal injury cases. To address this, the NUDL introduced a cap on damages for non-economic loss in defamation cases. The relevant provision is clearly modelled on the analogous provision for personal injury claims under the Civil Liability Act 2002 (NSW).

While the highest level of damages for non-economic loss in personal injury claims in New South Wales is set at \$350,000,²⁴⁵ the highest level of damages for non-economic loss in defamation claims across Australia is now set at \$250,000,²⁴⁶ indicating the relative value to be ascribed to these two types of claims. Again, clearly modelled on the analogous provision under the Civil Liability Act 2002 (NSW),²⁴⁷ the NUDL also provide a statutory mechanism for the annual indexation of the cap.²⁴⁸ Currently, the cap stands at \$280,500. It is important to note that it is only damages for defamation in the nature of non-economic loss which are capped. Damages for actual pecuniary losses caused by a defamatory publication are not subject to the statutory limit, although the cases in which such damages have been pleaded and recovered are relatively rare. The NUDL also expressly provide that aggravated damages — being compensatory damages awarded where the defendant's conduct exacerbates the harm suffered by the plaintiff in a way which is improper, unjustifiable or otherwise lacking in bona fides²⁴⁹ — are not subject to the statutory cap.²⁵⁰ However, the NUDL abolish the award of exemplary or punitive damages.²⁵¹ Prior to their introduction, exemplary damages were occasionally awarded for defamation (although they had already been abolished in New South Wales by virtue of the Defamation Act 1974 (NSW) s 46(3)(a)).²⁵²

244 See, eg, *Markovic v White* [2004] NSWSC 37; BC200400260 at [35] per Levine J; *Jamoo v Nationwide News Pty Ltd* [2004] NSWSC 126; BC200401597 at [56] per Nicholas J; *Bishop Mar Meelis Zaia v Chibo* [2005] NSWSC 917; BC200506800 at [34] per Nicholas J; *David v Chibo* [2006] NSWSC 1257; BC200609650 at [40] per Nicholas J.

245 Civil Liability Act 2002 (NSW) s 16(2). See also Personal Injuries (Liabilities and Damages) Act 2003 (NT) s 27(1)(a). See further Wrongs Act 1958 (Vic) s 28G.

246 CLWA (ACT) s 139F(1); DA (NT) s 32(1); DA (NSW) s 35(1); DA (Qld) s 35(1); DA (SA) s 33(1); DA (Tas) s 35(1); DA (Vic) s 35(1); DA (WA) s 35(1).

247 Civil Liability Act 2002 (NSW) s 17. See also Wrongs Act 1958 (Vic) s 28H; Personal Injuries (Liabilities and Damages) Act 2003 (NT) s 28.

248 CLWA (ACT) s 139F(3)–(9); DA (NT) s 32(3)–(8); DA (NSW) s 35(3)–(8); DA (Qld) s 35(3)–(8); DA (SA) s 33(3)–(8); DA (Tas) s 35(3)–(8); DA (Vic) s 33(3)–(8); DA (WA) s 35(3)–(8).

249 *Triggell v Pheaney* (1951) 82 CLR 497 at 514 per Dixon, Williams, Webb and Kitto JJ; [1951] ALR 453.

250 CLWA (ACT) s 139F(2); DA (NT) s 32(2); DA (NSW) s 35(2); DA (Qld) s 35(2); DA (SA) s 33(2); DA (Tas) s 35(2); DA (Vic) s 35(2); DA (WA) s 35(2).

251 CLWA (ACT) s 139H; DA (NT) s 34; DA (NSW) s 37; DA (Qld) s 37; DA (SA) s 35; DA (Tas) s 37; DA (Vic) s 37; DA (WA) s 37.

252 See, eg, *Shepherd v Walsh* [2001] QSC 358; BC200106237 (\$20,000 exemplary damages);

It is debatable whether the reforms in relation to damages will prove wholly beneficial. This is because this area of defamation law is fraught with an underlying, potentially irreconcilable tension. On the one hand, the capping of defamation damages is desirable in order to ensure some consistency between the level of damages for defamation and personal injury claims. The capping of damages for defamation appears to provide a concrete, pragmatic solution to the difficult question of what should be the precise nexus between damages for non-economic loss in defamation and personal injury cases. On the other hand, a significant effect of capping defamation damages is that it allows a defendant to know in advance the limits of its liability. So long as the defendant does not inflict economic loss or aggravate the harm caused by its publication of defamatory matter to the plaintiff, the defendant can be certain as to the maximum amount it would be forced to pay by way of damages and, in most instances, be confident that the level of damages will not reach that figure. The concern is that, by capping defamation damages, media outlets can merely make a commercial assessment of the risks associated with publication and, rather than modifying their conduct, may elect to absorb the costs of defamation litigation as part of their business costs. The capping of damages for non-economic loss, in addition to the abolition of exemplary damages, implicitly alters one of the guiding principles of the assessment of defamation damages: that it is legitimate to take into account not only what the plaintiff should receive but also what the defendant ought to pay.²⁵³

It is difficult to predict what impact the capping of defamation damages will have. There have already been two cases handed down under the NUDL. However, they do not provide a sufficient basis to assess how these new laws might apply. In both cases, the assessment of damages was the only issue. In *Martin v Bruce*,²⁵⁴ Gibson DCJ awarded the chief executive officer of a bowling club \$25,000 damages for a defamatory pamphlet published by a member of the club. In *Attrill v Christie*,²⁵⁵ Bell J awarded a man interested in 'holistic lifestyles' \$110,000 damages for remarks broadcast on a current affairs program which suggested he was a confidence trickster and devastated families through his occult practices. It will perhaps require a serious case of defamation to test the limits of the cap on damages.

(c) Offer of amends

The NUDL also introduce an offer of amends regime, a form of non-litigious dispute resolution peculiar to defamation cases.²⁵⁶ The provisions are modelled on those introduced in New South Wales in 2002.²⁵⁷ Under the offer of amends procedure, a publisher may make an offer to a person aggrieved by

Martin v Trustrum [2003] TASSC 22; BC200301924 (\$5000 exemplary damages); *Cullen v White* [2003] WASC 153; BC200305956 (\$25,000 exemplary damages).

253 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 151 per Windeyer J; [1967] ALR 25, citing with approval *Forsdike v Stone* (1868) LR 3 CP 607 at 611 per Willes J.

254 (2007) 6 DCLR (NSW) 157; [2007] NSWDC 264.

255 [2007] NSWSC 1386; BC200711465.

256 CLWA (ACT) s 124; DA (NT) s 11; DA (NSW) s 12; DA (Qld) s 12; DA (SA) s 12; DA (Tas) s 12; DA (Vic) s 12; DA (WA) s 12.

257 See Defamation Act 1974 (NSW) Pt 2A, introduced by Defamation Amendment Act 2002 (NSW) Sch 1 cl 6.

its publication of allegedly defamatory matter. The offer may relate to the defamatory matter as a whole or be limited to particular defamatory imputations contained within the matter.²⁵⁸ If the aggrieved person issues the publisher with a 'concerns notice', being a written document particularising the defamatory imputations the aggrieved person claims are conveyed by the defamatory matter, the publisher may make an offer within 28 days of the receipt of the notice. If the aggrieved person has commenced defamation proceedings against the publisher, the publisher may make an offer prior to its filing of a defence in those proceedings.²⁵⁹ A valid offer of amends must include, *inter alia*, an offer to publish a reasonable correction and may include an offer to publish an apology or to pay compensation. Although intended to be a non-litigious form of dispute resolution, an offer may include a clause authorising an arbitrator or a court to assess damages.²⁶⁰

An offer of amends may be withdrawn prior to its acceptance and may be renewed at a later date, either on the same or on different terms.²⁶¹ If an aggrieved person accepts an offer of amends, he or she cannot pursue a claim in defamation against the publisher in respect of the publication of the defamatory matter which has been the subject of the offer.²⁶² If an aggrieved person does not accept an offer of amends, the publisher may rely on the facts of its offer by way of defence in any defamation proceedings brought by the aggrieved person, so long as the offer was made as soon as practicable, the publisher was ready and willing to give effect to the terms of the offer and the offer was reasonable in all the circumstances.²⁶³ In assessing the reasonableness of the offer, a court is required to consider any correction or apology published prior to the trial, including the prominence of the correction or apology relative to the prominence of the original defamatory matter and the lapse of time between the publication of the original defamatory matter and the correction or apology, and may consider whether the aggrieved person refused to accept the offer because it was limited to certain imputations.²⁶⁴

It seems unlikely that the offer of amends procedure under the NUDL will be widely or frequently used. There were no documented cases of the use of the offer of amends procedure under the Defamation Act 1974 (NSW) in its almost three years of operation. The reasons for the reluctance to utilise the offer of amends procedure are unclear. It might be that the crucial role of corrections in the offer of amends procedure makes this regime unappealing to publishers. Publishers are generally resistant to proposals that require them to

258 CLWA (ACT) s 125; DA (NT) s 12; DA (NSW) s 13; DA (Qld) s 13; DA (SA) s 13; DA (Tas) s 13; DA (Vic) s 13; DA (WA) s 13.

259 CLWA (ACT) s 126; DA (NT) s 13; DA (NSW) s 14; DA (Qld) s 14; DA (SA) s 14; DA (Tas) s 14; DA (Vic) s 14; DA (WA) s 14.

260 As to the formal requirements of an offer of amends, see CLWA (ACT) s 127; DA (NT) s 14; DA (NSW) s 15; DA (Qld) s 15; DA (SA) s 15; DA (Tas) s 15; DA (Vic) s 15; DA (WA) s 15.

261 CLWA (ACT) s 128; DA (NT) s 15; DA (NSW) s 16; DA (Qld) s 16; DA (SA) s 16; DA (Tas) s 16; DA (Vic) s 16; DA (WA) s 16.

262 CLWA (ACT) s 129; DA (NT) s 16; DA (NSW) s 17; DA (Qld) s 17; DA (SA) s 17; DA (Tas) s 17; DA (Vic) s 17; DA (WA) s 17.

263 CLWA (ACT) s 130(1); DA (NT) s 17(1); DA (NSW) s 18(1); DA (Qld) s 18(1); DA (SA) s 18(1); DA (Tas) s 18(1); DA (Vic) s 18(1); DA (WA) s 18(1).

264 CLWA (ACT) s 130(2); DA (NT) s 17(2); DA (NSW) s 18(2); DA (Qld) s 18(2); DA (SA) s 18(2); DA (Tas) s 18(2); DA (Vic) s 18(2); DA (WA) s 18(2).

make corrections or apologies. Given that the offer of amends procedure is not mandated for defamation cases and that it remains open to the parties to reach a settlement in other ways and on other terms,²⁶⁵ it may be that publishers particularly prefer to resolve defamation disputes without resorting to litigation, but also without relying on the offer of amends procedure.

13 Further observations

Thus far, this article has concentrated on evaluating particular aspects of the NUDL. It is, however, possible to make some general observations about the current reforms and the scope for future developments. One of the shortcomings of the reform process leading to the NUDL was its heavy reliance on the Australian Law Reform Commission's 1979 report, *Unfair Publication: Defamation and Privacy*. The report is thorough and sound. However, it is over 25 years old. In the intervening decades between the report's release and the passage of the NUDL, there have been a number of significant developments in Australian defamation law. For instance, the implied freedom of political communication²⁶⁶ and the rapid development of internet technologies²⁶⁷ have posed challenges to the established principles of defamation law. The whole s 7A jury trial experiment in New South Wales also occurred in that time. In addition, there was a significant volume of case law. These developments were all worthy of detailed consideration.

The NUDL have several notable characteristics. One is the indelible mark of haste. This is understandable, given the process by which the legislation developed. The Commonwealth Attorney-General threatened to pass a defamation 'code' which contained some aspects unpalatable to the state and territory attorneys-general.²⁶⁸ This provided the state and territory attorneys-general with the impetus to devise and enact their own uniform defamation laws.²⁶⁹ This haste was not necessarily a bad thing. After several decades of considering but not implementing uniform defamation laws, the states and territories were galvanised into speedy action. The disadvantage of haste, however, is that the resulting legislation is not the product of detailed reflection and consideration. The haste with which the NUDL were developed and passed might be usefully contrasted with the detailed and protracted reform process surrounding the consideration of privacy by both the ALRC and the NSWLRC.²⁷⁰

The NUDL also bear the indelible mark of compromise. Again, this is not necessarily a bad thing. However, it must be noted that the compromise

265 CLWA (ACT) s 124(3); DA (NT) s 11(3); DA (NSW) s 12(3); DA (Qld) s 12(3); DA (SA) s 12(3); DA (Tas) s 12(3); DA (Vic) s 12(3); DA (WA) s 12(3).

266 See, eg, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; 108 ALR 681; *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106; 108 ALR 577. See especially *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; 145 ALR 96.

267 See, eg, *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575; 194 ALR 433.

268 *Revised outline of a possible national defamation law*, above n 6.

269 *Proposal for Uniform Defamation Laws*, above n 24.

270 The ALRC received its terms of reference on its inquiry into privacy on 30 January 2006. It issued its three-volume discussion paper in September 2007. See ALRC, *Review of Australian Privacy Law: Discussion Paper*, DP 72, Commonwealth of Australia, Canberra, 2007. It has now reported. See ALRC, above n 157. The NSWLRC received its terms of

strongly favoured (and was heavily influenced by) NSW defamation law. This is also understandable, in the sense that New South Wales is the largest defamation jurisdiction in Australia. Nevertheless, it is debatable whether this preference for NSW defamation law is desirable. NSW defamation law is not without its problems. For instance, the NUDL have introduced statutory variants of qualified privilege and fair comment across Australia when they have proved to be ineffective in New South Wales.²⁷¹ There is no reason to expect that these defences will become effective now that they have been exported to other jurisdictions.

The NUDL did not address a number of issues. Some were deemed inappropriate to deal with by legislation. For instance, there is no statutory test for what is defamatory. The common law tests, in all their variety, continue to apply.²⁷² Also, the NUDL do not deal with the tests for the grant of an interlocutory injunction to restrain the publication of defamatory matter. Again, the general law principles continue to apply.²⁷³ There are a number of matters which might have been addressed but were not. For instance, alternative remedies for defamation, such as rights of reply, apologies and court-ordered corrections, were canvassed by the Federal Attorney-General and, to a lesser extent, the state and territory attorneys-general,²⁷⁴ but they did not ultimately form part of the legislation. Although the NUDL aim to minimise reliance on litigation and its remedy, the award of damages,²⁷⁵ this is not reflected in the substantive provisions of the legislation. There is further scope for a review of options for non-litigious resolution of defamation disputes.

Another issue not adequately addressed in the NUDL is the use of juries in defamation proceedings. The current situation, which allows some jurisdictions to use juries, while others do not,²⁷⁶ may require revisiting in the future, in order to ensure true uniformity is achieved. In addition, some aspects of the reforms that have been introduced ought to be reviewed after a period of time in operation, in order to test their efficacy. For instance, both the impact of the restrictions on the right of corporations to sue for defamation²⁷⁷

reference on its inquiry into privacy on 11 April 2006. It issued its consultation paper in May 2007. See NSWLRC, *Invasion of Privacy*, Consultation Paper 1, Sydney, 2007. It is also expected to report by the end of 2008.

271 As to the statutory defence of qualified privilege, see above 11(e) Qualified privilege. As to the defence of fair comment and honest opinion, see above 11(f) Honest opinion and fair comment.

272 See, eg, *Parmiter v Coupland* (1840) 151 ER 340 at 342; 6 M & W 106 at 108 per Parke B; *Sim v Stretch* [1936] 2 All ER 1237 at 1240 per Lord Atkin; *Gardiner v John Fairfax & Sons Pty Ltd* (1942) 42 SR (NSW) 171 at 172 per Jordan CJ; *Youssouf v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581 at 587 per Slessor LJ; *Boyd v Mirror Newspapers Pty Ltd* [1980] 2 NSWLR 449 at 452–3 per Hunt J; *Ettingshausen v Australian Consolidated Press Ltd* (1991) 23 NSWLR 443 at 447–9 per Hunt J; *Berkoff v Burchill* [1996] 4 All ER 1008 at 1011–16 per Neill LJ.

273 See now *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57; 229 ALR 457.

274 Revised outline of a possible national defamation law, above n 6, pp 32–4; *Proposal for Uniform Defamation Laws*, above n 24, at 4.11.

275 CLWA (ACT) s 115(d); DA (NT) s 2(d); DA (NSW) s 3(d); DA (Qld) s 3(d); DA (SA) s 3(d); DA (Tas) s 3(d); DA (Vic) s 3(d); DA (WA) s 3(d).

276 See above 10 The respective roles of judge and jury in defamation proceedings.

277 See above 7 Corporate plaintiffs.

and the caps placed on defamation damages²⁷⁸ ought to be examined, in order to determine whether they are operating fairly and effectively. It is important to monitor all these reforms particularly, because, in previous reform attempts, changes have been introduced without full consideration of their potential impact and not uncommonly the results have been contrary to those anticipated. The s 7A jury trial experiment is a prominent example of this — a reform designed to reduce the time and cost associated with defamation litigation in fact resulted in an explosion in the time, cost and volume of defamation litigation.

Some challenges posed by defamation law will be more difficult to tackle and do not readily admit of a legislative solution. For instance, anyone who reads defamation cases will readily encounter the problem of prolix pleadings. It is characteristic not only of NSW defamation practice, where until recently the imputation was the cause of action, but also of other jurisdictions, where the matter itself has always been the cause of action. Related to this is the high volume of interlocutory proceedings, which in many cases significantly delay a hearing on the merits of the matter. This suggests that defamation practice needs to change, to accommodate the modern requirements of effective case management. It also suggests that there needs to be something of a cultural change in defamation practice in relation to pleading practices and interlocutory skirmishes, which should be addressed. This desirable and necessary change is difficult to effect by means of NUDL. Similarly, there is a problem of the application of principle, rather than the form of principle, in relation to defamation defences. For instance, the common law and statutory defences of qualified privilege and fair comment and honest opinion appear, on their terms, to be fair and appropriate. However, defendants find these defences notoriously difficult to establish in practice. This suggests that a change in judicial disposition when applying these principles and provisions perhaps needs to occur. This cannot be effected by legislation.

Considered as a whole, the NUDL embody a paradox. At once, they represent both a significant change, in the sense that they introduce uniformity where previously unjustifiable diversity existed, and superficial change, in the sense that, in substance, they do not represent a radical departure in important ways from defamation law. The substantive changes brought about by the NUDL are properly characterised as incremental. There is a case to be made for further and more substantial reform. If one were to design a body of law which sought to balance the protection of reputation against freedom of expression, one would not produce the system of defamation law that applies in Australia. Ipp JA has evocatively referred to it as ‘the Galapagos Islands Division of the law of torts’.²⁷⁹ It bears the hallmarks of historical accident, comparative neglect and piecemeal reform. What is required is more substantial, more fundamental rationalisation and reform. This will require more detailed consideration of the defects in Australian defamation law and the ways in which it can be improved. More than anything, this will require time. Perhaps now that substantive uniformity has been achieved, this complex but necessary reform process can begin.

²⁷⁸ See above 12(b) Damages.

²⁷⁹ Ipp, above n 120, at 614.

14 Conclusion

The NUDL are a significant development in Australian law and should be recognised as such. The attainment of substantial, if not complete, uniformity in such a short period of time is an impressive achievement. However, uniformity should not be viewed as an end in itself. There remains scope for further, much-needed reforms to the substance of Australia's defamation laws. Although now uniform, defamation law in Australia remains unnecessarily complex and arcane and, in many respects, inefficacious. It will also need to respond to the real and continuing challenges posed by rapidly developing technologies and the requirement of adequate and more direct protection of freedom of expression. Thus, the enactment of the NUDL should be viewed as the beginning, not the end, of an ongoing process of reform.