

**CORPORATIONS, DEFAMATION AND GENERAL DAMAGES:
BACK TO FIRST PRINCIPLES**

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ABSTRACT

[135] If a corporation succeeds in a case of libel or slander actionable *per se*, as for a natural person, general damages are presumed and ‘at large’. However, unlike a natural person, it is unclear whether a corporation has a reputation beyond its business reputation and, if it does, whether it can sue in defamation to protect it. In light of the disagreement between the states and territories on the one hand, which seek to abolish the right of almost all corporations to sue in defamation, and the Commonwealth on the other, which seeks to preserve the right unchanged, this article proposes a middle course. It goes back to first principles and considers the rules that should apply to corporate defamation plaintiffs given the nature of the interest sought to be protected — a corporation’s reputation. It argues that because business reputation is completely described as a form of intangible property, where a corporation seeks general damages for injury to its business reputation, it should be required to prove those damages. It further argues that while non-trading corporations should be able to sue for injury to reputation other than business reputation, trading corporations should be unable to do so.

The right of corporations to sue in defamation to protect their business reputations is well established at common law.² The right of all but the smallest corporations to sue in defamation was abolished in New South Wales in 2003.³ The Western Australian Defamation Law Reform Committee recommended in the same [136] year that corporations other than non-profit corporations be required to seek leave of the court to sue in defamation.⁴ Finally, the Model Defamation Provisions, which were released in 2004 and are to serve as the basis for uniform state and territory defamation legislation, abolish the right of all but not-profit corporations to sue in defamation.⁵ On the other hand, in 2004, the Commonwealth Attorney-General proposed national defamation laws that preserve the right of corporations to sue in defamation.⁶

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² *South Hetton Coal Co Ltd v North Eastern News Association Ltd* [1894] 1 QB 133 (‘*South Hetton*’), applied by the High Court in *Barnes & Co Ltd v Sharpe* (1910) 11 CLR 462 (‘*Barnes*’). The complications presented by government corporations are excluded from consideration in this article: see *Derbyshire County Council v Times Newspapers* [1993] AC 534 (‘*Derbyshire*’); *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680; *New South Wales Aboriginal Land Council v Jones* (1998) 43 NSWLR 300.

³ *Defamation Act 1974* (NSW) s 8A (as of 17 February 2003).

⁴ Western Australian Defamation Law Reform Committee, *Western Australian Defamation Law* (2003) Recommendations 4, 6 <<http://www.lawpress.com.au/DefamationReport.pdf>>. See also [16]–[25].

⁵ Model Defamation Provisions s 9 <[http://www.lawlink.nsw.gov.au/lap.nsf/files/Model%20Defamation%20Provisions.pdf/\\$FILE/Model%20Defamation%20Provisions.pdf](http://www.lawlink.nsw.gov.au/lap.nsf/files/Model%20Defamation%20Provisions.pdf/$FILE/Model%20Defamation%20Provisions.pdf)>.

⁶ Commonwealth Attorney-General, *Revised Outline of a Possible National Defamation Law* (2004) 38–9 <[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/personal/5AF3DB5EDB149F99CA256EF5000A0292/\\$FILE/0+0+defamationV5+19+August.PDF](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/personal/5AF3DB5EDB149F99CA256EF5000A0292/$FILE/0+0+defamationV5+19+August.PDF)>.

Some progress towards a compromise appears to have been made at a meeting of state, territory and Commonwealth Attorneys-General on 21 March 2005.⁷ However, this followed something of a war of words between the Commonwealth Attorney-General — who hinted that the Commonwealth might override any state and territory legislation removing the right of corporations to sue — and the New South Wales Attorney-General — who threatened 'High Court challenges' to such a move.⁸ Using even stronger language, Hugh Morgan, president of the Business Council of Australia, recently described the states proposal as having no moral standing, being an abuse of process and finally being an abomination.⁹

The right of corporations to sue in defamation to protect their reputations is thus a point of sharp disagreement between the states and territories on the one hand and the Commonwealth on the other: the former wish to abolish the right in most cases; the latter wishes to preserve the right unchanged. However, even the states and territories have not suggested restricting the ability of corporations to protect their reputations indirectly in other ways, for example through actions for misleading or deceptive conduct contrary to s 52 of the *Trade Practices Act 1975* (Cth). Their concern is therefore not with the *right* of corporations to sue to protect their reputations, but rather with the way defamation allows them to *exercise* that right. However, because the debate has been between essentially wholesale abolition and wholesale preservation of the right, little attention has been given to the possibility of preserving the right but reforming the way in which it may be exercised.

This article seeks to remedy this lack of attention by examining how the doctrines of defamation should apply to corporations *if* they have a right to sue. It is submitted that reform of two of these doctrines puts the exercise of the right of corporations to sue in defamation on a more rational basis and therefore makes the right itself more palatable. The proposed reform thus offers a middle path between wholesale abolition and wholesale preservation.

[137] If a corporation succeeds in a case of libel or slander actionable *per se*, as for a natural person, general damages are presumed and 'at large'. However, unlike a natural person, it is unclear whether a corporation has a reputation beyond its business reputation and, if it does, whether it can sue in defamation to protect it. To determine whether these doctrines are appropriate, it is necessary to go back to first principles

⁷ Fergus Shiel, 'Lawyer Immunity Comes Under Siege', *The Age* (Melbourne), 22 March 2005, 4.

⁸ ABC Radio, 'Ruddock in Favour of Enabling Companies to Sue for Defamation', *AM*, 21 March 2005 <<http://www.abc.net.au/am/content/2005/s1327905.htm>>. If the Commonwealth were to enact such legislation in reliance on the corporations power (*Commonwealth Constitution* s 51(xx)), it would override any state or territory legislation to the contrary. State legislation inconsistent with Commonwealth legislation is invalid to the extent of the inconsistency: *Commonwealth Constitution* s 109. The legislative power of the self-governing territories is conferred by Commonwealth legislation empowered by s 122 of the *Commonwealth Constitution*. According to s 28 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth), Australian Capital Territory legislation inconsistent with Commonwealth legislation has no effect. The *Northern Territory (Self-Government) Act 1978* (Cth) contains no such provision. However, the same result has been held to follow from the doctrine of 'paramountcy', ie the inability 'of the subordinate legislature [of the Northern Territory] to enact laws or to cause laws to operate in a manner inconsistent with or repugnant to laws of the paramount [Commonwealth] legislature': *Attorney-General (NT) v Minister for Aboriginal Affairs* (1989) 90 ALR 59, 75 (Lockhart J).

⁹ Hugh Morgan, Attack on Integrity Lacks Moral Standing, *The Australian Financial Review* (Sydney), 5 April 2005, 63.

and 'examine thoroughly the essential nature of the interest which the tort of defamation seeks to protect'.¹⁰ It is insufficient to state simply that corporations are legal persons and are therefore entitled to the same protections as natural persons.¹¹ This is particularly so given the strong view of the states and territories that corporations and natural persons should be treated differently by defamation law. When analysis of the interest sought to be protected is undertaken, the conclusion may very well be that corporations should not enjoy a protection afforded to natural persons. For instance, corporations have no rights against self-incrimination.¹²

The second section, Protection of Business Reputation, considers the position of a corporation that seeks to protect its business reputation. It is submitted that in such cases, the interest sought to be protected is completely described as a form of intangible property and that consequently the corporation should be required to prove and particularise harm in order to recover general damages. The third section, Protection of Reputation Other Than Business Reputation, considers the position of a corporation that seeks to recover general damages for injury to its reputation other than business reputation. It is submitted that while non-trading corporations should be able to maintain such an action in a narrow class of cases, other corporations should not.

PROTECTION OF BUSINESS REPUTATION

The Traditional Position

It is clear that where a corporation's business reputation is impugned, it may sue in defamation. Thus in *Bargold Pty Ltd v Mirror Newspapers Ltd*,¹³ an investment company was able to sue in respect of a newspaper article that conveyed the imputation that it was financially unsound and likely to collapse. The imputation directly impugned the corporation's business reputation.

A corporation may also sue in respect of an imputation not directly related to its business that indirectly impugns its business reputation. Thus in *Heytesbury Holdings Pty Ltd v City of Subiaco*,¹⁴ a corporation was able to sue in respect of a press release that conveyed the imputation that it was not a good corporate citizen because it failed to pay rates. The Court said that the imputation could 'lower or [138] adversely affect

¹⁰ Alexandra Geal, 'Freedom of Speech and the Tort of Defamation' (1994) 2 *Tort Law Review* 11, 15. The need for detailed analysis stands in contrast to the terse statement of the Chief Justice of the United States Supreme Court before argument commenced in *Santa Clara County v Southern Pacific Railroad Co*, 118 US 394, 396 (Waite CJ) (1886): The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the *Constitution*, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.

¹¹ Cf Susan McCorquodale, 'Corporations' Right to Privacy in Canada and Australia: A Comparative Analysis' (2003) 15 *Bond Law Review* 102, 113–14; Greg Taylor and David Wright 'Australian Broadcasting Corp v Lenah Game Meats — Privacy, Injunctions and Possums: An Analysis of the High Court's Decision' (2002) 26 *Melbourne University Law Review* 707, 720–1.

¹² *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1992) 178 CLR 477, 504 (Mason CJ and Toohey J), 516 (Brennan J), 556 (McHugh J). This is also the position in the United States: *Hale v Henkel*, 201 US 43, 75–6 (1906) (Brown J); *United States v White*, 322 US 694, 698–700 (1944) (Murphy J); *Bellis v United States*, 417 US 85, 90–2 (1974) (Marshall J).

¹³ [1981] 1 NSWLR 9.

¹⁴ (1998) 19 WAR 440.

its trading or business reputation'.¹⁵ Similarly in *Barnes & Co Ltd v Sharpe*,¹⁶ the High Court held that corporations carrying on business as produce merchants could sue for allegations published in newspapers that they had conspired to prevent farmers from obtaining a fair price for their produce. Griffith CJ said that 'a defamatory statement ... that a trading company carries on its business in a dishonest or criminal manner is likely to injure its reputation in the way of its business.'¹⁷ Citing this view, in *Feo v Pioneer Concrete (Vic) Pty Ltd*,¹⁸ the Victorian Court of Appeal held that a corporation could sue for statements that its practices were 'riddled with corruption.'¹⁹

In summary, injury to a corporation's business reputation may be indirect and of varying nature. It could include: erosion of employee morale; detriment to the relationship between the corporation and its employees; detriment to the ability of the corporation to attract future employees; detriment to economic relationships with third parties, such as customers, banks or potential business partners; government investigation and regulation of the corporation; litigation against the corporation; and a decrease in the market value of the corporation's stock.²⁰

For libel and slander actionable *per se* of natural persons, some injury is presumed to flow from the defamation.²¹ No injury need be proved by the plaintiff in order to sue.²² Proof that no damage has occurred will not defeat the action. Indeed, more than nominal damages may be awarded even if it is conceded that no damage has occurred.²³

Compensation for the injury presumed to flow from the defamation is by an award of 'general damages'. The assessment of general damages is highly subjective, being 'essentially a matter of impression and not addition'²⁴ — they are 'at large'. The injury to be compensated is not limited to pecuniary loss.²⁵ The damages are awarded as consolation for the wrong done and to vindicate the plaintiff.²⁶ The damages to console the plaintiff consist of compensation for the injury to reputation as well as

¹⁵ Ibid 448 (Steytler J). See also *Brown & Williamson Tobacco Corp v Jacobson*, 713 F 2d 262 (7th Cir, 1983). A tobacco company could sue in defamation for a statement that it adopted an advertising strategy intended to cause minors to begin smoking cigarettes. The Court concluded that the statement could harm the company's business reputation because it pertained to corporate ethics and integrity.

¹⁶ (1910) 11 CLR 462.

¹⁷ Ibid 474.

¹⁸ [1999] 3 VR 417 ('Feo').

¹⁹ Ibid 418 (Winneke P).

²⁰ Norman Redlich, 'Corporate Defamation Symposium: The Publicly Held Corporation as Defamation Plaintiff' (1995) 39 *Saint Louis University Law Journal* 1167, 1168–9. See also *Derbyshire* [1993] AC 534, 547 (Lord Keith): [A] trading corporation is entitled to sue in respect of defamatory matters ... that go to credit such as might deter banks from lending to it, or to the conditions experienced by its employees which might impede the recruitment of the best-qualified workers, or make people reluctant to deal with it.

²¹ *Ratcliffe v Evans* [1892] 2 QB 524, 528 (Bowen LJ).

²² *Hobbs v C T Tinling & Co Ltd* [1929] 2 KB 1, 17 (Scrutton LJ).

²³ See *Selby Bridge v Sunday Telegraph Ltd* (1966) 197 EG 1077.

²⁴ *Cassell & Co Ltd v Broome* [1972] AC 1027, 1072 (Lord Hailsham).

²⁵ *Triggell v Pheeny* (1951) 82 CLR 497, 510 (Dixon, Williams, Webb and Kitto JJ).

²⁶ *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 60–1 (Mason CJ, Deane, Dawson and Gaudron JJ).

injury to feelings.²⁷ The amount of general damages may be increased by an award of ‘aggravated compensatory damages’ if improper conduct on the part of the defendant increases the injury suffered by the plaintiff.²⁸

General damages do not include compensation for ‘special damage’, ie actual loss or damage caused by the defamatory publication beyond that which is presumed.²⁹ For example, the loss of [139] employment or earning capacity may constitute special damage.³⁰ General damages also do not extend to ‘exemplary damages’, which are awarded ‘to punish the defendant for conduct showing a “conscious and contumelious” disregard for the plaintiff’s rights and to deter the defendant and others from like conduct in the future.’³¹

It is clear that in the case of corporations, some modifications are made to these doctrines. For example, a corporation cannot recover damages for injury to feelings as a ‘company cannot be injured in its feelings’.³² However, ‘if the case be one of libel (or slander actionable *per se*) — whether on a person, firm or a company — the law is that damages are at large. It is not necessary to prove any particular damage’.³³ Because slanders tending to harm the plaintiff’s business are slanders actionable *per se*,³⁴ it appears that any suit by a corporation for injury to its business reputation will involve a presumption of damages and an at large assessment of damages. In such an assessment, a corporation ‘is entitled to damages as a vindication of its reputation to the public.’³⁵

A corporation may thus obtain a large damages award without proving actual harm.³⁶ Thus in *Australian Broadcasting Corporation v Comalco Ltd*,³⁷ the Full Court of the Federal Court made an award of general damages of approximately \$100 000 despite no specific evidence being adduced by the plaintiff corporation showing that it suffered actual loss as a result of the defamatory publication.³⁸ Indeed, in *Selby*

²⁷ *Bickel v John Fairfax & Sons Ltd* [1981] 2 NSWLR 474, 473, 500 (Hunt J); aff’d [1982] 1 NSWLR 498.

²⁸ *Herald and Weekly Times Ltd v McGregor* (1928) 41 CLR 254, 263 (Knox CJ, Gavan Duffy and Starke JJ).

²⁹ *Coroneo v Kurri Kurri and South Maitland Amusement Co Ltd* (1934) 51 CLR 328, 340, 343 (Rich, Evatt and McTiernan JJ).

³⁰ *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519, 559 (Gaudron and Gummow JJ).

³¹ Butterworths, *Halsbury’s Laws of Australia*, 145 Defamation, ‘5 Remedies’ [145-2825]. These are equivalent to ‘punitive damages’ in the United States.

³² *Lewis v Daily Telegraph Ltd* [1964] AC 234, 262 (Lord Reid).

³³ *South Hetton* [1894] 1 QB 133, 139 (Lord Esher MR), applied in Australia in *Currabubula Holdings Pty Ltd v State Bank of New South Wales* [1999] Australian Torts Reports 81-511, 65 959 (Einstein J); rev’d on other grounds (2001) 51 NSWLR 399; *Bell v Kingsbay Pty Ltd* [2001] VSC 388, [100] (Gillard J); *Heytesbury Holdings Pty Ltd v City of Subiaco* (1998) 19 WAR 440, 464 (Steytler J).

³⁴ *D & L Caterers Ltd v D’Ajou* [1945] KB 364, 366 (Lord Goddard), 367 (du Parcq LJ); *Feo* [1999] 3 VR 417, 433 (Winneke P).

³⁵ *Bell v Kingsbay Pty Ltd* [2001] VSC 388, [113] (Gillard J).

³⁶ *Ibid* [104] (Gillard J); *contra South Hetton* [1894] 1 QB 133, 148 (Kay LJ).

³⁷ (1986) 12 FCR 510 (‘*Comalco*’).

³⁸ *Ibid* 587–8: Neaves J noted that ‘no evidence was adduced by Comalco to show any actual loss suffered by reason of the publication’. *Ibid* 604: Pincus J noted that ‘there seems to have been not a sentence of evidence to prove that any real damage, slight or large, had been done’. *Ibid* 587–9, 603–5: where, however, their Honours (Neaves & Pincus JJ) made a damages award of \$100 000, consisting of some small (although unclear) amount of special damages and general damages.

Bridge v Sunday Telegraph Ltd,³⁹ the plaintiff corporation was awarded more than nominal damages even though it conceded that no financial loss would be suffered by it as a result of the defamation; 'reasonable damages' were assessed at £500.

Criticism of the Traditional Position

It is submitted that when the nature of a corporation's business reputation is examined, it becomes clear that the traditional position is inappropriate.

In Robert Post's tripartite classification of 'reputation'⁴⁰ — as a type of intangible property constructed by the holder, as an incident of the holder's social status and as an element of human dignity — a [140] corporation's business reputation is entirely described as a type of intangible property.⁴¹ It is an 'intermediate good'⁴² traded by the corporation on the various markets in which it engages. A corporation relies on its business reputation (as well as other things) to secure employees, customers, creditors and business partners. The ultimate product of this trading activity is the achievement of the corporation's objects, most often the making of profit.⁴³ It is submitted that these considerations led Mahoney JA to describe a corporation's business reputation as 'an asset' in *Andrews v John Fairfax & Sons Ltd*.⁴⁴

Because a corporation's business reputation is entirely described as a tradable commodity, it may be given 'a value, not merely ideal, but capable of pecuniary admeasurement'.⁴⁵ This is not the case for the reputation of an individual: a complete description may require reference to social status and dignity. Benjamin Franklin's description of reputation 'in terms of the amount of "credit" a community would extend to a person, based on an estimate of his or her "good repute", "affluence", and "felicity"'⁴⁶ is a manifestly incomplete description for an individual, but a much more complete description for a corporation.

³⁹ (1966) 197 EG 1077. Although this is a case from the 1960s, it was cited with approval in 1998 by the Victorian Court of Appeal: see *Tsolakkis Nominees Pty Ltd v National Australia Bank Ltd* (Unreported, Victorian Court of Appeal, Brooking, Phillips and Batt JJA, 4 June 1998) 17 (Batt JA) ('*Tsolakkis*').

⁴⁰ See Robert C Post, 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) 74 *California Law Review* 691.

⁴¹ Cf Eric Barendt, 'What is the Point of Libel Law?' (1999) 52 *Current Legal Problems* 110, 115: 'The concept of reputation as property may explain ... why corporations can sue to protect their good name, an entitlement which is much harder to justify if reputation is considered in terms of personal honour or dignity.'

⁴² Cf Anthony D'Amato, 'Comment: Professor Posner's Lecture on Privacy' (1978) 12 *Georgia Law Review* 497, 500: 'Privacy to a corporation is only an intermediate good.' See also *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 257 (Gummow and Hayne JJ).

⁴³ The importance of its reputation was not lost on McDonald's when it sued regarding allegations that, *inter alia*, it perpetuated starvation in the Third World, contributed to destruction of rain forest and sold food that it knew could risk customer health. The trial took 313 days, becoming the longest trial in English history, and the first instance judgment ran to over 800 pages. McDonald's succeeded at trial in obtaining damages of £115 000, reduced to £76 000 on appeal to the English Court of Appeal. See *McDonald's Corporation v Steel* [1997] EWHC QB 366; *Steel v McDonald's Corporation* [1999] EWCA Civ 1144.

⁴⁴ [1980] 2 NSWLR 225 ('*Andrews*').

⁴⁵ T Starkie, *A Treatise on the Law of Slander, Libel, Scandalum Magnatum and False Rumours* (1826) xx, quoted in Post, above n 40, 694.

⁴⁶ B Bledstein, *The Culture of Professionalism* (1976) 134, quoted in Post, above n 40, 695.

It is submitted that a property conception of reputation is inconsistent with the presumption of damages and an at large assessment of damages. These features of defamation law relieve the plaintiff from the burden of proving actual harm. In part, they reflect a pragmatic concern that proving actual harm as a consequence of defamation is simply too difficult. Consideration of this pragmatic justification is deferred to the section, A Proposal for Reform.⁴⁷

In part, the presumption of damages and at large assessment of damages reflect the concern to compensate a plaintiff for loss of personal dignity, which clearly relates to a person's self-worth.⁴⁸ Such loss may be extremely difficult or impossible to prove: a plaintiff may find it exceedingly difficult to prove a decrease in his or her own opinion of himself or herself. However, concerns relating to the plaintiff's dignity are obviously entirely inappropriate where a corporation sues for injury to its business reputation.

Finally, the presumption of damages and an at large assessment of damages reflect a view that a person's reputation is so especially important that 'it is better to award the plaintiff recovery for an injury that probably occurred than to adopt an approach that could deny the plaintiff recovery for an injury that actually occurred.'⁴⁹ While this may be true for a natural person's reputation, given that a [141] corporation's reputation is described entirely as a form of intangible property, there is no reason why it should be considered differently from other analogous forms of property.

It is true that trespass to land is actionable without proof of damage⁵⁰ and that the mere interference with a person's right to exclusive possession and occupation may support an award of more than nominal damages.⁵¹ Such damages could be said to be at large since their assessment must essentially be a matter of impression. However, trespass to land protects *tangible* proprietary rights, ie those based upon possession, and therefore does not provide an analogy to the protection of reputation as *intangible* property.

It is also true that interference with intangible proprietary rights that founds an action in nuisance may support an award of more than nominal damages, based upon the annoyance, inconvenience and discomfort caused by the nuisance, without proof of damage.⁵² Again, these damages could be said to be at large. However, such cases concern rights connected with the enjoyment of land; while they may be intangible rights, they are grounded in land and for this reason do not provide an analogy to defamation.

⁴⁷ See below nn 69–76 and accompanying text.

⁴⁸ Arlen W Langvardt, 'A Principled Approach to Compensatory Damages in Corporate Defamation Cases' (1990) 27 *American Business Law Journal* 491, 515.

⁴⁹ *Ibid* 516.

⁵⁰ *Plenty v Dillon* (1991) 171 CLR 635, 639 (Mason CJ, Brennan and Toohey JJ). This is noted in Andrew Kenyon, 'Problems with Defamation Damages?' (1998) 24 *Monash University Law Review* 70, 90 fn 157.

⁵¹ *Plenty v Dillon* (1991) 171 CLR 635, 645 (Mason CJ, Brennan and Toohey JJ).

⁵² *Commonwealth v Murray* (1988) Aust Torts Reports, 80-207, 68 049–50 (Priestly JA).

The true analogy is with intangible property rights unrelated to land, such as patents.⁵³ Where a plaintiff seeks compensatory damages for infringement of its patent, it must demonstrate the damages required to restore it to the position in which it would have been had there been no infringement.⁵⁴ While mathematical precision is impossible, the plaintiff must show its loss in some way, such as loss of profits or royalties.⁵⁵ If the plaintiff cannot provide any rational basis for assessing damages, the court should arguably decline to make an award of more than nominal damages.⁵⁶

Given that the reputation of corporations may be viewed as an analogous form of intangible property, a corporation should be required to prove and particularise the damages required to compensate it. Thus, Mahoney JA said in *Andrews* that for a corporation to recover damages for injury to its business reputation 'the amount of injury must be appropriately established, and the tribunal must be appropriately satisfied of the extent of it.'⁵⁷

It is further submitted that an intangible property conception of reputation is inconsistent with an award of general damages to vindicate reputation. Providing such an award appears to be based on Post's conception of reputation as an incident of the holder's status: the defamatory comment diminishes that [142] status and an award of damages is needed to restore it.⁵⁸ Thus, the 'social standing of the parties' is relevant to the quantum of damages necessary to vindicate the plaintiff's reputation.⁵⁹ The award must be sufficient 'to convince a bystander of the baselessness of the charge'.⁶⁰

A corporation wishes the baselessness of the charge to be established because otherwise its future business might be affected. This could reduce its future profits and the value of its goodwill, which are both forms of injury to business reputation. In seeking 'vindication', a corporation is therefore really seeking compensation for

⁵³ See also *A G Spalding & Bros v A W Gamage Ltd (No 2)* (1918) 35 RPC 101 (trademarks); *Bailey v Namol Pty Ltd* (1994) 30 IPR 147 (copyright).

⁵⁴ *General Tire and Rubber Co v Firestone Tyre and Rubber Co Ltd* [1976] RPC 197, 212 (Lord Wilberforce).

⁵⁵ *Pearce v Paul Kingston Pty Ltd* (1992) 25 IPR 591, 592 (Ashley J)

⁵⁶ *Schindler Lifts Australia Pty Ltd v Debelak* (1989) 89 ALR 275, 319 (Pincus J); *Hanfstaengl v W H Smith & Sons* [1905] 1 Ch 519.

⁵⁷ *Andrews* [1980] 2 NSWLR 225, 256. Curiously, there also seems to be support for this view in the judgment of Pincus J in *Comalco* (1986) 12 FCR 510, notwithstanding his support of an award of general damages in the absence of evidence of actual loss: see above n 37, 600–4: where his Honour noted that one of the questions in the case was 'whether a company, which cannot prove injury of a monetary kind ... can sue for defamation' (emphasis added), thereby implying that normally the corporate plaintiff would be required to 'prove injury of a monetary kind'. In distinguishing exemplary damages from general damages, his Honour said that they are a species of 'damages [that] may be obtained in defamation suits which are not dependent upon proof of any loss' (emphasis added), thereby implying that general damages are 'dependent upon proof of ... loss'. However, His Honour concluded by stating that the absence of evidence of actual harm did not preclude making an award of general damages 'for the mere risk of financial harm'. Thus, despite some statements that are arguably inconsistent with the traditional approach, the view of Pincus J is ultimately consistent with that approach.

⁵⁸ Cf Eric Barendt, 'What is the Point of Libel Law?' (1999) 52 *Current Legal Problems* 110, 116.

⁵⁹ *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 61 (Mason CJ, Deane, Dawson and Gaudron JJ).

⁶⁰ *Broome v Cassell & Co Ltd* [1972] AC 1027, 1071 (Lord Hailsham LC).

injury to its business reputation. There is therefore no justification for a separate award of general damages to vindicate reputation.

In summary, an intangible property conception of reputation is inconsistent with the presumption of damages, an at large assessment of damages and awarding damages to vindicate the plaintiff's reputation.

Proposal for Reform

In light of these inconsistencies, it is submitted that a corporation should only be able to sue for general damages for injury to its business reputation where it can prove damage to that reputation caused by the defamation and it should only be compensated by an award of damages to that extent.⁶¹

For two reasons, it is misleading to describe the proposed reform as restricting a corporation's right to sue in defamation to those circumstances where it can prove special damage.⁶² First, the reform deals only with assessment of damages, not with actionability. A corporation unable to prove injury would still be able to take action, but could obtain only nominal damages. This is consistent with the approach for other causes of action protecting intangible property.⁶³ It would allow a corporation to seek exemplary damages even though it could not prove actual harm, which seems appropriate given that their purpose is punitive rather than compensatory.⁶⁴ Second, the standard of proof need not necessarily be that traditionally required for proof of special damage, namely that the damage be the 'direct and natural result' of the defamation.⁶⁵ The corporation would simply be required to prove the damage caused by the defamation in some rational way to the satisfaction of the court.

The reform would apply to corporations of all sizes because a corporation's reputation is completely described as intangible property, whatever its size.⁶⁶ It is true that the individuals associated with a small [143] corporation (such as its members and directors) might be perceived as one and the same as the corporation and that a

⁶¹ Cf J A Weir, '*Local Authority v Critical Ratepayer — A Suit in Defamation*' (1972) 30 *Cambridge Law Journal* 238, 240; Langvardt, above n 48, 528–31.

⁶² Cf United Kingdom, *Report of the Committee on Defamation*, Cmnd 5909 (March 1975) [333]; *Kay v Chesser* [1999] 3 VR 55, 58 (Ormiston JA) ('*Kay*'); *Feo* [1999] 3 VR 417, 433 (Winneke P).

⁶³ See above nn 52–55 and accompanying text. It is also consistent with the tort of passing off: *Henderson v Radio Corp Pty Ltd* [1960] SR (NSW) 576, 594. It is not consistent with the tort of injurious falsehood, for which failure to prove actual harm is fatal to the action: *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680, 694 (Gleeson CJ). At a superficial level, it could be argued that this distinction is justified because the interest protected by injurious falsehood, a person's business, is narrower than that protected by defamation, a person's reputation. However, given that the proposed reform applies where a corporation sues for injury to its business reputation, this distinction seems spurious. Although further exploration of this issue is beyond the scope of this article, it is tentatively submitted that the solution is simply to abandon the tort of injurious falsehood as anomalous.

⁶⁴ See further Langvardt, above n 48, 531–3.

⁶⁵ Butterworths, *Halsbury's Laws of Australia*, 145 Defamation, '5 Remedies' [145-2700]. In any case, the stringency of that standard has been relaxed at times. For example, a plaintiff may prove loss of business constituting special damage by showing a general decline in business rather than loss of any particular customer: *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519, 559 (Gaudron and Gummow JJ).

⁶⁶ Cf *Defamation Act 1974* (NSW) s 8A(3), which preserves the right of small corporations to sue in defamation in the face of a general abolition of the right of corporations to sue.

defamatory comment about the corporation could also defame them.⁶⁷ They are not affected by the reform: because their reputations may not be completely described as intangible property, the presumption of damages, an at large assessment of damages and damages for vindication remain appropriate. However, this does not provide a basis to exempt small corporations from the proposed reform. The corporation remains a separate entity⁶⁸ whose reputation is intangible property irrespective of the position of the individuals associated with it.⁶⁹

A similar reform to that proposed was rejected by the Faulks Committee on Defamation in the United Kingdom in 1975. The Committee felt that being required to prove special damage 'would be much too restrictive, since it is naturally very difficult for a plaintiff, whether corporate or personal, to prove actual financial damage specifically flowing from a defamation.'⁷⁰ This reflects the pragmatic justification of the presumption of damages and at large assessment of damages mentioned in the earlier section, Criticism of the Traditional Position.⁷¹

For three reasons, it is submitted that this is insufficient reason to dismiss the proposed reform. First, the difficulties of proof appear overstated. Proving actual damage to business reputation may be relatively easy for a corporation: 'For instance, an alleged libel concerning a bank's customer may cause the bank to lower the credit limit or raise the interest rate charged that customer.'⁷² Second, plaintiffs must already grapple with the difficulties of proof in cases in which they seek to protect their reputations indirectly through actions for damages for injurious falsehood,⁷³ passing off⁷⁴ or misleading or deceptive conduct contrary to s 52 of the *Trade Practices Act 1974* (Cth)⁷⁵ and its state equivalents.⁷⁶ These are also difficulties with which plaintiffs must grapple where they seek protection of analogous forms of intangible property such as patents.⁷⁷ Finally, the difficulties of proof are insufficient reason to preserve doctrines of defamation that are inconsistent with the reputation sought to be protected.

Endorsement and Retreat

Between 1998 and 1999, the Victorian Court of Appeal appeared to endorse and then retreat from the proposed reform. In *Tsolakkis Nominees Pty Ltd v National Australia*

⁶⁷ See eg, *General Motors Acceptance Corp v Howard*, 487 SW 2d 708 (Tex, 1972) (the individual who effectively controlled a corporation was allowed to recover damages for a defamatory statement about the corporation). See also Western Australian Defamation Law Reform Committee, *Western Australian Defamation Law* (2003) Recommendation 4 <<http://www.lawpress.com.au/DefamationReport.pdf>>; Model Defamation Provisions s 9(3) <[http://www.lawlink.nsw.gov.au/lap.nsf/files/Model%20Defamation%20Provisions.pdf/\\$FILE/Model%20Defamation%20Provisions.pdf](http://www.lawlink.nsw.gov.au/lap.nsf/files/Model%20Defamation%20Provisions.pdf/$FILE/Model%20Defamation%20Provisions.pdf)>

⁶⁸ *Salomon v Salomon & Co Ltd* [1897] AC 22.

⁶⁹ This point is developed more fully in Langvardt, above n 48, 526 fn 213.

⁷⁰ United Kingdom, *Report of the Committee on Defamation*, Cmnd 5909 (March 1975) [336].

⁷¹ See above n 46 and accompanying text.

⁷² *Dun & Bradstreet Inc v Greenmoss Builders Inc*, 472 US 749, 793 fn 16 (1985) (Brennan J).

⁷³ *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680, 694 (Gleeson CJ).

⁷⁴ *Henderson v Radio Corp Pty Ltd* [1960] SR (NSW) 576, 594.

⁷⁵ *Trade Practices Act 1974* (Cth) s 82.

⁷⁶ See eg, *Fair Trading Act 1999* (Vic) s 159.

⁷⁷ See above nn 52–55 and accompanying text.

Bank Ltd,⁷⁸ Batt JA (with whom the rest of the Court agreed) treated *Comalco*⁷⁹ as establishing that ‘the damages to be awarded are a [144] recompense for harm measurable in money or proved financial loss’.⁸⁰ According to Batt JA, on that view the plaintiff corporation was ‘not entitled to an award because no such harm or loss has been proved. No loss of custom, for instance, has been shown.’⁸¹ An award of nominal damages was not sought.⁸² Batt JA went on to conclude that even on the view that more than nominal damages are available without proof of loss, the corporation’s business reputation was too poor to be worthy of compensation.⁸³ With respect, Batt JA’s view of *Comalco* is difficult to reconcile with the award in that case of general damages in the absence of proof of actual loss.⁸⁴ Nevertheless, it appears to embody the substance of the reform proposed in the section, A Proposal for Reform.

Batt JA’s view was cited by the Court of Appeal in *Kay v Chesser*,⁸⁵ which was an appeal from an interlocutory decision refusing discovery of the financial records of a corporation suing in defamation. The first instance judge concluded that the assessment of damages was at large and that therefore the records were irrelevant. Ormiston JA (with whom the rest of the Court agreed) said that

damage to the reputation of [a] corporation is not at large but can only be assessed having regard to financial and commercial considerations by which a corporation’s reputation is ordinarily assessed.⁸⁶

Because the financial documents were clearly relevant to this assessment, the Court allowed the appeal and remitted the matter.

Ormiston JA’s view does not embody the substance of the proposed reform as plainly as that of Batt JA. It is unclear whether Ormiston JA viewed proof of damage as necessary, or whether he was simply of the view that evidence of damage is admissible and relevant. The fact that Ormiston JA quoted *Ingram v Lawson*⁸⁷ that ‘the plaintiff *can* give evidence of some particularity about the state and nature of his business, and changes which he alleges have been wrought in it by the defamation’⁸⁸ supports the latter view. So too does Ormiston JA’s rejection of the view that a corporation can only succeed if it proves special damage.⁸⁹

In *Feo v Pioneer Concrete (Vic) Pty Ltd*,⁹⁰ the Court of Appeal appeared finally to reject the proposed reform. Winneke P (with whom the rest of the Court agreed) said that it was ‘too late in the day to submit’ that corporations cannot sue without proof of special damage.⁹¹ Winneke P cited *Comalco* in support of the proposition that in assessing general damages, the assessment is ‘made on the material available to the court and the view which it forms of the loss likely to have been suffered by the

⁷⁸ (Unreported, Victorian Court of Appeal, Brooking, Phillips and Batt JJA, 4 June 1998).

⁷⁹ (1986) 12 FCR 510.

⁸⁰ *Ibid* 17.

⁸¹ *Ibid* 21.

⁸² *Ibid* 22.

⁸³ *Ibid* 21–2.

⁸⁴ See above n 37 and accompanying text.

⁸⁵ [1999] 3 VR 55.

⁸⁶ *Ibid* 58–9.

⁸⁷ (1840) 6 Bing (NC) 212; 133 ER 84.

⁸⁸ *Ibid* 133 ER 84, 85 (emphasis added), quoted in *Kay* [1999] 3 VR 55, 60 (Ormiston JA).

⁸⁹ *Kay* [1999] 3 VR 55, 58.

⁹⁰ [1999] 3 VR 417.

⁹¹ *Ibid* 433.

company'.⁹² This view of *Comalco* seems quite different to that taken by Batt JA in *Tsolakkis* and is, with respect, more consistent with the outcome in *Comalco*.

The Victorian Court of Appeal thus appears to have rejected the proposed reform conclusively. This is particularly so given that in *Feo*, Batt JA agreed with the judgment of Winneke P.⁹³ That was certainly the [145] view of Gillard J in the Supreme Court of Victoria in *Bell v Kingsbay Pty Ltd*,⁹⁴ who refused to strike out the statements of claim of two corporations that sued for damages for defamation without tendering proof of financial harm. Batt JA concluded: 'They are entitled to recover general damages, indeed of a substantial sum, even though they have not placed any evidence concerning their financial position before the Court.'⁹⁵

The Full Court of the Supreme Court of South Australia also appears to have taken this view. In *Selecta Homes and Building Co Pty Ltd v Advertiser-News Weekend Publishing Co Pty Ltd*,⁹⁶ Lander J (with whom Doyle CJ agreed) said that a corporation

did not need to prove any special damage but it was entitled to attempt to establish that it had suffered actual loss of income or earnings by reason of the defamation. If it could not make out actual loss it was still entitled to damages if the defamation was calculated to damage the appellant in its reputation in the way of its trade or business
...⁹⁷

It thus appears that the proposed reform must be by the legislature. The adoption of a national defamation law by agreement between the Commonwealth and the states and territories presents a perfect opportunity for such legislative action. Even if the states and territories fail to take that opportunity and instead legislate to abolish the right of corporations to sue in defamation entirely, the Commonwealth should give consideration to adopting the reform in any legislative resurrection of that right.

PROTECTION OF REPUTATION OTHER THAN BUSINESS REPUTATION

Trading Corporations

It is controversial whether a trading corporation can sue for injury to reputation other than business reputation and, if so, whether it can obtain general damages in such a suit.

In *Andrews*,⁹⁸ Mahoney JA said that as well as being able to recover damages for injury to its business reputation, a corporation could recover damages for injury to its 'reputation as such'.⁹⁹ By this Mahoney JA meant reputation beyond business reputation, referring in the case of an individual

to his standing, to the regard paid to him in the community. I do not mean that this is irrelevant to his income-earning capacity. But reputation in this sense ... may exist,

⁹² Ibid 434.

⁹³ Ibid.

⁹⁴ [2001] VSC 388.

⁹⁵ Ibid [114].

⁹⁶ (2001) 79 SASR 451.

⁹⁷ Ibid 458.

⁹⁸ [1980] 2 NSWLR 225.

⁹⁹ Ibid 254–6.

and damages may be awarded for injury done to it, even if the individual in question is not involved in any income-earning activity.¹⁰⁰

Mahoney JA said that damages for injury to reputation as such are at large:

The tribunal is allowed to award what, on proper community standards, is a proper solatium to a man whose reputation as such has been injured. In the assessment of that solatium, evidence of actual monetary loss is not essential and, in the strict sense, it may perhaps not be relevant.¹⁰¹

[146] Mahoney JA's view may gain support from *South Hetton Coal Co Ltd v North-Eastern News Association Ltd*.¹⁰² A mining company was able to sue in defamation in respect of a newspaper article conveying the imputation that it accommodated its miners in unsanitary housing. The case has sometimes been described as authority for the proposition that a trading corporation can sue in defamation for damages for something that does not affect it adversely in the way of its business.¹⁰³ However, *South Hetton* has subsequently been explained by the House of Lords in *Derbyshire County Council v Times Newspapers*¹⁰⁴ as a case in which the company's business reputation was injured because the imputation might 'make people reluctant to deal with it',¹⁰⁵ thus damaging goodwill.¹⁰⁶

Mahoney JA's view was criticised by a majority of the Full Court of the Federal Court in *Comalco*.¹⁰⁷ Pincus J noted that in the foundation High Court case for the proposition that corporations can sue in defamation, namely *Barnes*,¹⁰⁸ each of the judges referred to injury to the corporations' businesses.¹⁰⁹ Pincus J also referred to the United States view that '[l]ibels against a corporation are, therefore, confined to attacks which injure the property, the credit, the business of the corporation.'¹¹⁰ He left open the possibility that a trading corporation could sue for an injunction or declaration in respect of defamation causing it no financial loss.¹¹¹

Neaves J appeared to reject even this possibility, stating baldly that whatever was the case in respect of individuals and non-trading corporations, a trading corporation has no 'reputation distinct from its reputation in the way of its trade or business.'¹¹² This view is consistent with the statement by the House of Lords in *Derbyshire* that *South Hetton* is 'not ... authority for the view that a trading corporation can sue for something that does not affect it adversely in the way of its business.'¹¹³ The

¹⁰⁰ Ibid 254.

¹⁰¹ Ibid 255.

¹⁰² [1894] 1 QB 133.

¹⁰³ See *Bognor Regis Urban District Council v Campion* [1972] 2 QB 169, 177 (Browne J); United Kingdom, *Report of the Committee on Defamation*, Cmnd 5909 (March 1975) [335].

¹⁰⁴ [1993] AC 534.

¹⁰⁵ Ibid 547 (Lord Keith).

¹⁰⁶ See also Lord Cooke, 'Corporate Identity' (1998) 16 *Company and Securities Law Journal* 160, 164.

¹⁰⁷ (1986) 12 FCR 510.

¹⁰⁸ (1910) 11 CLR 462.

¹⁰⁹ *Comalco* (1986) 12 FCR 510, 600–1, quoting *Barnes* (1910) 11 CLR 462, 473–4 (Griffith CJ), 478–9 (O'Connor J), 485 (Higgins J).

¹¹⁰ *National Refining Co v Benzo Gas Motor Fuel Co* (1927) 20 F 2d 763, 766 (Booth J), quoted in *Comalco* (1986) 12 FCR 510, 601.

¹¹¹ *Comalco* (1986) 12 FCR 510, 603.

¹¹² Ibid 586.

¹¹³ [1993] AC 534, 547 (Lord Keith).

statement appears to cover all suits, rather than only those in which damages are sought.

It is submitted that the view of *Neaves J* is preferable: a trading corporation should not be able to sue for damages or any other remedy in respect of injury to reputation other than business reputation. It seems likely that in the vast majority of cases where a trading corporation seeks to do so, it is simply an indirect way to protect its business reputation. Suppose a trading corporation is accused of exaggerating the amount of money it gives to charity. The corporation might argue that this injures not its business reputation but its 'charitable reputation', that its claim is therefore not covered by the reform proposed earlier in *A Proposal for Reform*, and that it is consequently entitled to a presumption of damages and an at large assessment of damages. However, it is likely that the corporation is actually concerned that its business reputation will be damaged by, for example, loss of customers. The corporation should not be permitted to protect its business reputation indirectly in this way, thereby avoiding the need to prove harm caused by the defamation under the reform proposed in the section, *A Proposal for Reform*.

Indeed, on a conservative view of corporations law, any use of a corporation's funds that is not for the [147] purposes of advancing its business is inappropriate.¹¹⁴ On this view, a corporation should have no reputation other than its business reputation. Although this conservative view has been questioned,¹¹⁵ it is submitted that it should be applied in defamation. In light of the ability of defamation to stifle free speech,¹¹⁶ the courts should be wary of expanding its reach. This is particularly so regarding trading corporations whose ability and willingness to use defamation law to stifle free speech through Strategic Litigation Against Public Participation ('SLAPP') suits has been well documented.¹¹⁷

Non-Trading Corporations

A non-trading corporation may sue in defamation and recover general damages for injury to its reputation.¹¹⁸ However it is unclear whether the injury must be financial,

¹¹⁴ See eg, *Parke v Daily News Ltd* [1962] Ch 927. A corporation abandoned its loss-making newspaper publication business and made an *ex gratia* payment to the employees who were to be made redundant. The Court held that the payment was not for the benefit of the corporation and was therefore impermissible.

¹¹⁵ See eg, W T Allen, 'Our Schizophrenic Conception of the Business Corporation' (1992) 14 *Cardozo Law Review* 261.

¹¹⁶ 'The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech': *Derbyshire* [1993] AC 534, 547 (Lord Keith). See also Fiona Patfield, 'The Origins of a Company's Right to Sue for Defamation' (1994) 45 *Northern Ireland Legal Quarterly* 233, 251.

¹¹⁷ See eg, George Pring and Penelope Canan, *SLAPPs: Getting Sued for Speaking Out* (1996); George Pring and Penelope Canan, 'Strategic Lawsuits Against Public Participation: An Introduction for Bench, Bar and Bystanders' (1992) 12 *Bridgeport Law Review* 937; Chris Tollefson, 'Strategic Lawsuits against Public Participation: Developing a Canadian Response' [1994] *Canadian Bar Review* 200; Andrew Kenyon, 'Review Essay — Defamation and Critique: Political Speech and *New York Times v Sullivan* in Australia' (2001) 25 *Melbourne University Law Review* 522.

¹¹⁸ *National Union of General and Municipal Workers v Gillian* [1945] 2 All ER 593 ('*Gillian*'). This case concerned a trade union, not a non-trading corporation. However, the trade union was registered under English legislation that gave it essentially the qualities of a non-trading corporation for the purposes of the ability to sue in tort. Indeed, the case contains statements about non-trading corporations generally: see eg, *Gillian*, 605 (Uthwatt J). The case has therefore been taken to stand for

and therefore akin to injury to business reputation, or whether the reputation of non-trading corporations may be protected more broadly.

In *Comalco*,¹¹⁹ Neaves J restricted his remarks to trading corporations.¹²⁰ In contrast, Pincus J appeared to suggest non-trading corporations could only sue for damages in defamation for financial harm. Thus Pincus J referred to the fact that an incorporated charity, whose funds were provided by an initial endowment rather than contributions, would suffer no loss for which it could get damages if it were defamed.¹²¹

The approach of Pincus J seems to be that taken in *Development & Environmental Professionals' Association v John Fairfax Publications Pty Ltd*¹²² to the question of the ability of a trade union registered under the *Industrial Relations Act 1996* (Cth) — essentially a non-trading corporation — to sue for damages in defamation. Levine J struck out the union's statement of claim for failing to establish that the union had been financially harmed. This may be consistent with the first instance decision (upheld on appeal) in the foundation case for the right of non-trading corporations to sue, *National Union of General and Municipal Workers v Gillian*.¹²³ The case concerned the ability of a trade union registered under English [148] legislation to sue for damages in defamation. Birkett J held that the union could sue, and his view was affirmed on appeal to the English Court of Appeal. As noted in *Comalco*,¹²⁴ Birkett J drew attention to the fact that the trade union's property would be injured in that its membership and consequently subscription funds would be adversely affected.

However, the approach of the English Court of Appeal in *Gillian* seems not to require financial harm. The Court did not mention the injury to property that would be suffered by the trade union. Moreover, Uthwatt J made the sweeping statement that a non-trading corporation could sue regarding 'imputations on the conduct by it of its activities'.¹²⁵ In Canada, Saskatchewan Queen's Bench followed this broader approach in *Saskatchewan College of Physicians and Surgeons v Co-operative Commonwealth Federation Publishing and Printing Co Ltd*.¹²⁶ Membership of the College was required by law and therefore defamatory statements relating to it would not adversely affect its membership. Nevertheless, without any reference to financial harm, the Court held that the College could sue for defamatory statements relating 'to its conduct and the conduct of its council in the carrying out of its objects'.¹²⁷

In *Derbyshire*,¹²⁸ the House of Lords also appeared to adopt the broader approach. The Court said:

The trade union cases are understandable upon the view that defamatory matter may adversely affect the union's ability to keep its members or attract new ones *or to*

the proposition that non-trading corporations can sue for injury to reputation: see eg, Geal, above n 10, 12; Patfield, n 116, 250; Nicholas Mullany, "Governing Reputation" and Local Government Corporations' (1995) 111 *Law Quarterly Review* 206, 206.

¹¹⁹ (1986) 12 FCR 510.

¹²⁰ *Ibid* 586.

¹²¹ *Ibid* 602.

¹²² [2004] NSWSC 92.

¹²³ [1945] 2 All ER 593.

¹²⁴ (1986) 12 FCR 510, 601 (Pincus J).

¹²⁵ *Gillian* [1945] 2 All ER 593, 605.

¹²⁶ (1965) 51 DLR (2d) 442.

¹²⁷ *Ibid* 453 (Bence CJQB).

¹²⁸ [1993] AC 534.

*maintain a convincing attitude towards employers. Likewise in the case of a charitable organisation the effect may be to discourage subscribers or otherwise impair its ability to carry on its charitable objects.*¹²⁹

While the words that are not emphasised point to the need for financial harm, those that are emphasised point to the broader approach.

In Australia, *Church of Scientology Inc v Anderson*¹³⁰ appears to take the broader view. The Supreme Court of Western Australia held that the incorporated Church of Scientology could maintain an action in defamation based on injury to its 'religious reputation'.¹³¹ (Although the Full Court reversed the decision on the basis that the imputation in question was not defamatory, it made no comment on the ability of the Church of Scientology to sue.)¹³² General damages of \$1000 were awarded.¹³³

The reputation of non-trading corporations such as charities, religious institutions and pressure groups is incompletely described as property.¹³⁴ In one sense it could be said that the reputation of a charity is traded by it on the market for recipients of its charity, that of a religious institution on the market for followers of its religion and that of a pressure group on the market for adherents to its ideas. However, in each of these cases, there may often be no financial benefit to the corporation. As a result, injury to the reputation of the corporation may cause it no financial harm. Nevertheless, it may cause harm to the corporation's ability to carry out its objects because of the effect on the public's opinion of the [149] corporation.¹³⁵ This reflects Post's second conception of reputation in terms of social status.

In some circumstances, non-trading corporations may be able to point to financial harm suffered as a result of the defamation. For example, in *Church of Scientology of California Inc v Readers Digest Services*,¹³⁶ Hunt J pointed out that because the incorporated Church of Scientology had the right to acquire property to provide it with income or revenue, it had a business reputation in respect of such transactions.¹³⁷ But this may not always be the case, as shown by Pincus J's example of an incorporated charity whose funds are provided by an initial endowment.

It is submitted that non-trading corporations should be treated as an exception to the requirement of proving financial harm where what is asserted is injury to reputation other than business reputation. In such cases, general damages would be awarded to rectify the harm done to the corporation's ability to carry out its objects by vindicating

¹²⁹ Ibid 547 (Lord Keith) (emphasis added).

¹³⁰ [1980] WAR 71 ('Anderson').

¹³¹ Ibid 76 (Steytler J).

¹³² [1981] WAR 279.

¹³³ *Anderson* [1980] WAR 71, 83 (Steytler J). See also *Church of Scientology of Toronto v Globe and Mail Ltd* (1978) 84 DLR (3d) 239.

¹³⁴ Other examples of corporations that might have a claim to be non-trading corporations are associations for promoting worthy causes, voluntary associations, schools, private scholarship bodies and associations for the advancement of public welfare: cf Taylor and Wright, above n 11, 723.

¹³⁵ A German case dealing with the privacy of corporations concerned an allegation that an archbishop had not acted swiftly enough to deal with an alleged paedophilic priest: (1998) *Neue Juristische Wochenschrift-Rechtsprechungs-Report* 1175, cited in Taylor and Wright, above n 11, 724. The injury that such allegations could cause to the reputation of the church and the consequent weakening of its ability to carry out its objects are obvious.

¹³⁶ [1980] 1 NSWLR 344.

¹³⁷ Ibid 356. See also *Chinese Empire Reform Association v Chinese Daily Newspaper Publishing Co* (1907) 13 Brit Col R 141, 143 (Morrison J).

the corporation's reputation. It is a different need from that which may be asserted by a corporation that seeks 'vindication' of its business reputation as a circuitous means of seeking compensation for injury to its business reputation.¹³⁸ It cannot be satisfied by a compensatory award of damages because there is nothing to compensate. The quantum of the damages award needed would depend on the facts of the case, but often a small award — such as the \$1000 in *Anderson* — would suffice.

That non-trading corporations should be treated differently to trading corporations has been recognised in the Model Defamation Provisions. Although they generally abolish the right of corporations to sue in defamation, they preserve that right for non-profit corporations.¹³⁹ Similarly, it was recognised by the Western Australian Defamation Law Reform Committee, which recommended exempting non-profit corporations from the general requirement that corporations obtain leave of the court to sue in defamation.¹⁴⁰

However, courts should be wary of cases in which non-trading corporations assert injury to reputation other than business reputation. If the court is of the view that what is truly sought to be protected is business reputation, claims alleging injury to reputation other than business reputation should be struck out. The form of the pleadings alone should not enable a non-trading corporation to avoid the reform proposed in the section, *The Proposal to Reform*.

The exception would therefore be of strictly limited scope. This is particularly so given that 'non-trading companies have been less likely to regard it as being in their interest to sue in respect of defamations.'¹⁴¹ Moreover, there is little risk of non-trading corporations taking advantage of the exception to mount SLAPP suits as such suits are typically filed by large corporations to protect their economic interests.¹⁴²

[150] The exception might be difficult to apply in some cases. For example, where a trade union sues for damages in defamation, it would be difficult to determine to what extent it sought to protect its financial interests (such as membership fees) and to what extent it sought to protect its non-financial interests (such as status and the consequent ability to influence opinion). However, dealing with these difficulties seems preferable to precluding non-trading corporations without business reputations from protecting their reputations. This is particularly so given the valuable contributions made to society by many such non-trading corporations that would be threatened if they were unable to defend their reputations from attack.¹⁴³

¹³⁸ Cf above nn 57–59 and accompanying text.

¹³⁹ Model Defamation Provisions s 9 <[http://www.lawlink.nsw.gov.au/lap.nsf/files/Model%20Defamation%20Provisions.pdf/\\$FILE/Model%20Defamation%20Provisions.pdf](http://www.lawlink.nsw.gov.au/lap.nsf/files/Model%20Defamation%20Provisions.pdf/$FILE/Model%20Defamation%20Provisions.pdf)>.

¹⁴⁰ Western Australian Defamation Law Reform Committee, *Western Australian Defamation Law* (2003) Recommendations 4 <<http://www.lawpress.com.au/DefamationReport.pdf>>.

¹⁴¹ Patfield, n 116 248.

¹⁴² Pring and Canan, 'Strategic Lawsuits Against Public Participation', above n 117, 938.

¹⁴³ Cf *Gillian* [1945] 2 All ER 593, 604 (Scott LJ): the societal benefits of trade unionism would be threatened by 'disintegration of the union ... [It] must be able to protect itself against any form of attack calculated to arouse doubts and suspicions in the minds of members, and so to destroy the cohesion and will to act of the union.'

CONCLUSION

This article has sought to make sense of the doctrines governing the awarding of general damages to corporations that sue in defamation by going back to first principles and examining the interest sought to be protected. It has proposed that where a corporation seeks general damages for injury to its business reputation, it should be required to prove those damages, and that only non-trading corporations should be able to sue for injury to reputation other than business reputation.

This reform may provide a compromise position on the right of corporations to sue in defamation between that of the states and territories — essentially wholesale abolition — and the Commonwealth — wholesale preservation. If the states and territories were to adopt the Model Defamation Provisions and abolish the right of most corporations to sue in defamation over the objections of the Commonwealth, it is a reform that the Commonwealth should consider before reintroducing that right.

One of the great American texts on tort law begins its discussion of defamation by stating: 'It must be confessed at the beginning that there is a great deal of the law of defamation which makes no sense.'¹⁴⁴ While it does not begin to address the many other areas of defamation law that are in need of reform, the proposal outlined in this article addresses one of its most bizarre features: that profit-making entities such as trading corporations can recover supposedly compensatory damages for losses that may never have occurred.

¹⁴⁴ W Keeton et al, *Prosser & Keeton on the Law of Torts* (5th ed, 1984) 771.