

**RETHINKING *DERBYSHIRE COUNTY COUNCIL v TIMES NEWSPAPERS*:  
THE STANDING OF GOVERNMENT BODIES TO SUE IN DEFAMATION**

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ABSTRACT

[43] In *Derbyshire County Council v Times Newspapers*, the House of Lords found that bodies performing government functions have no standing to sue in defamation. That decision has been followed by Australian courts. However, the expanded form of qualified privilege in relation to political matters, which has been introduced into the common law of Australia by the High Court in *Lange v The Australian Broadcasting Corporation*, provides a better basis upon which to protect freedom of political communication. This article will argue that, in determining whether a government body can succeed in an action for defamation, Australian courts should address the question whether the extended qualified privilege defence applies to the matter complained of, not whether the body has standing to sue.

[44] **Introduction**

Australian courts have followed the reasoning of the House of Lords in *Derbyshire County Council v Times Newspapers*<sup>2</sup> in holding that bodies performing government functions have no standing to sue in defamation. The express policy rationale behind the line of authority extending from *Derbyshire* is the importance of protecting freedom of political communication. However, the expanded form of qualified privilege in relation to political matters, which has been introduced into the common law of Australia by the High Court in *Lange v Australian Broadcasting Corporation*,<sup>3</sup> provides a better basis upon which to protect freedom of political communication. It is submitted that, in light of *Lange*, Australian courts should reconsider the application of *Derbyshire* in Australia.

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<sup>2</sup> [1993] AC 534.

<sup>3</sup> (1997) 189 CLR 520.

First, this article will examine the reasoning of the House of Lords in *Derbyshire*. In this regard, it will consider the position of *Derbyshire* in the development of the common law in relation to the standing of government bodies to sue in defamation.

Second, this article will address the application of *Derbyshire* in Australia. In particular, it will analyse the approach taken to government bodies in defamation matters by the New South Wales Court of Appeal in *Ballina Shire Council v Ringland*<sup>4</sup> and *New South Wales Aboriginal Land Council v Jones*.<sup>5</sup>

Third, this article will briefly examine the state of Australian law in relation to freedom of political communication subsequent to the High Court's decision in *Lange*. It will be argued that, while issues relating to the scope of communications to which the expanded qualified privilege will apply and the application of the requirement of reasonableness remain uncertain, *Lange* has significantly clarified the position of the Australian common law in respect of defamatory statements made in the context of political communications.

Fourth, this article will suggest a number of reasons why, in circumstances where government bodies have allegedly been defamed, courts should adopt the approach taken in *Lange* in preference to the approach taken in *Derbyshire*. In particular, it will assert that the test in *Lange* is better adapted to protecting freedom of political speech and that the scope of the application of *Derbyshire* is too uncertain. The latter problem, it will be argued, is exacerbated by the continuing trend toward non and semi-government bodies performing functions traditionally performed by governments.

The article will conclude that the proper question for Australian courts should be whether the expanded defence of qualified privilege can be relied on by a government body, not whether that body has standing to sue.<sup>6</sup>

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<sup>4</sup> (1994) 33 NSWLR 680.

<sup>5</sup> (1998) 43 NSWLR 300.

<sup>6</sup> In view of the House of Lords decision in *Reynolds v Times Newspapers* [1999] 4 All ER 609, a similar argument could be advanced in respect of the application of *Derbyshire* in England, however such an argument is beyond the scope of this article.

### **Derbyshire County Council v Times Newspapers**

In *Derbyshire* the House of Lords considered whether a local government authority, Derbyshire County Council, had standing to bring an action in defamation against Times Newspapers in respect of two articles published in *The Sunday Times* questioning the propriety of investments made by the Council of money in its superannuation fund. The court unanimously found that the Council did not have standing.

Lord Keith, who delivered the leading judgment, observed that there were only two reported English cases in which the issue had previously been considered. In the first case — *Mayor, Citizens and Aldermen of Manchester v Williams* — a divisional court found that the statement of claim relied on by a municipal corporation disclosed no cause of action for two reasons.<sup>7</sup> First, the libel complained of affected only the personal reputations of certain individuals and not the corporation's property. Second, the alleged imputations of bribery and corruption related to conduct which a corporation could not commit. [45] Although it is unlikely that either proposition remains good law,<sup>8</sup> it is noteworthy that the Court appears to assume that, had those grounds not been present, the municipal corporation would have had standing to sue.

The second case which considered whether a government body had standing to sue in defamation was *Bognor Regis Urban District Council v Campion*.<sup>9</sup> In that case, Bognor Regis Urban District Council brought an action against a Mr Campion in respect of statements contained in leaflets he had distributed which criticised the Council. Browne J found in favour of the Council, holding that

[j]ust as a trading corporation has a trading reputation which it is entitled to protect by bringing an action for defamation, so in my view the plaintiffs as a local government corporation have a 'governing' reputation which they are equally entitled to protect in the same way.<sup>10</sup>

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<sup>7</sup> [1891] 1 QB 94.

<sup>8</sup> See, eg, Browne J's criticisms of the decision in *Bognor Regis Urban District Council v Campion* [1972] 2 QB 169.

<sup>9</sup> [1972] 2 QB 169.

<sup>10</sup> *Ibid* 175.

Contrary to Lord Keith's observation that Browne J 'did not give any consideration to the question whether a local authority ... might not be in a special position as regards the right to take proceedings for defamation',<sup>11</sup> it appears that Browne J did address that question and answered it in the negative.

Prior to the decision in *Derbyshire*, therefore, it appears that the law in England gave government bodies standing to sue in defamation. Accordingly, in finding that 'under the common law of England a local authority does not have the right to maintain an action of damages for defamation',<sup>12</sup> *Derbyshire* marked a significant departure from established authority. The primary concern of the court in *Derbyshire* was that giving government bodies a right of action to sue in defamation would have the effect of 'chilling' discussion of political matters. Lord Keith found that:

It is of the highest public importance that a democratically elected government body, or indeed any government body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech.<sup>13</sup>

He subsequently stated the proposition in slightly broader terms, observing that 'not only is there no public interest favouring the rights of organs of government, whether central or local, to sue for libel ... it is contrary to the public interest'.<sup>14</sup>

In support of the above propositions, the court relied heavily on overseas authority in relation to the importance of public criticism to the proper functioning of a democratic government. For example, Lord Keith cited approvingly the statement of Chief Justice Thompson in the Supreme Court of Illinois that 'every citizen has a right to criticise an inefficient or corrupt government without fear of civil as well as criminal prosecution.'<sup>15</sup>

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<sup>11</sup> [1993] AC 534, 547.

<sup>12</sup> *Ibid* 550.

<sup>13</sup> *Ibid* 547.

<sup>14</sup> *Ibid* 549.

<sup>15</sup> *City of Chicago v Tribune Co* (1923) 139 NE 86, in [1993] AC 534, 548.

Similarly, in support of his assertion that allowing organs of government to sue in defamation was ‘contrary to the public interest’,<sup>16</sup> Lord Keith drew on the authority of the Supreme Court of South Africa which held that ‘considerations of fairness and convenience are, on balance, distinctly against the [46] recognition of a right in the Crown to sue the subject in a defamation action.’<sup>17</sup>

The Court also considered the nature of the reputation of a government body. First, Lord Keith restated the established proposition that trading corporations are entitled to sue in respect of defamatory matters that tend to damage them in the way of their business.<sup>18</sup> Second, he observed that the same rule could be applied to trade unions and charities.<sup>19</sup> However, he noted, ‘[t]here are ... features of a local authority which may be regarded as distinguishing it from other types of corporations, whether trading or non-trading’.<sup>20</sup>

Lord Keith also stated that the most important feature is that a local authority is a ‘government body’ and, further, that it is a ‘democratically elected body, the electoral process nowadays being conducted almost exclusively on party political lines’.<sup>21</sup>

This reasoning was subsequently developed and extended in his judgment. Having regard to the distinct features of local authorities (including departments of central government) and, in particular, that they would always be under the control of a particular political party, Lord Keith noted that ‘it is difficult to say that the local authority as such has any reputation of its own’.<sup>22</sup>

Rather than attaching to the local authority, Lord Keith asserted that any reputation alleged to reside in that local authority would ‘in the eyes of the public’<sup>23</sup> attach to the controlling political party.

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<sup>16</sup> [1993] AC 534, 549.

<sup>17</sup> *Die Spoorbond v South African Railways* 1946 AD 999, in [1993] AC 534, 549.

<sup>18</sup> [1993] AC 534, 547.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.* 550.

<sup>23</sup> *Ibid.*

By that reasoning, a local authority had no reputation to protect. Consequently, to the extent that a local authority could be said to have been defamed, that defamation would injure the reputation of the 'body of councillors which represents the controlling party, or ... the executives who carry on the day to day management of its affairs',<sup>24</sup> not the authority itself. Those councillors and executives would, Lord Keith added, be entitled to bring an action in respect of that defamation.

Therefore, based on a concern over the capacity of defamation law to 'chill' political discussion and on the distinct nature of the reputation that a government body has, the House of Lords held that government bodies have no standing to sue in defamation. Australian courts that have considered the issue have followed the House of Lord's decision for similar reasons.

### **Application of *Derbyshire* in Australia**

Two significant Australian decisions have applied the reasoning adopted by the House of Lords in *Derbyshire* in determining whether government bodies have standing to sue in defamation.

In *Ballina* the court considered whether the Council of the Shire of Ballina (the Council), a body incorporated under the *Local Government Act 1919* (NSW), had standing to sue a Mr Ringland in respect of statements relating to surreptitious disposal of sewage by the Council into the ocean. The statements were contained in a press release issued by him and were repeated, although subsequently retracted, in a local newspaper. The court handed down its decision on 25 May 1994, only 15 months after the House of Lord's decision in *Derbyshire*, and, by a majority of two to one, Mahoney JA dissenting, held that the Council had no standing to sue in defamation.

The Court observed that, while it was not bound to follow decisions of the House of Lords, in the absence of Australian authority, *Derbyshire* was strongly persuasive.<sup>25</sup> The majority were further persuaded to follow the reasoning of the House of Lords on the basis that to do so promoted consistency within [47] international human rights

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<sup>24</sup> Ibid.

<sup>25</sup> (1994) 33 NSWLR 680, 688 (Gleeson CJ), 699–700 (Kirby P), 715–16 (Mahoney JA).

law in respect of freedom of political communication.<sup>26</sup> It was desirable that the Australian common law accord with international norms.<sup>27</sup> The reasoning of the majority in *Ballina*, particularly that of Gleeson CJ, followed closely and relied heavily on that of the House of Lords in *Derbyshire*.

Gleeson CJ first considered the English cases of *Williams, Bognor Regis* and *Derbyshire*. On the basis of that consideration, he concluded that ‘the common law of England was, and always has been, that a local authority could not sue for damages for defamation.’<sup>28</sup> He then addressed the question of what reputation a local council whose members were popularly elected could have to protect. In this regard he reached a view similar to that of Lord Keith, finding that ‘[t]o treat government institutions as having a ‘governing reputation’ which the common law will protect against criticism on the part of its citizens is, to my mind, incongruous’<sup>29</sup> with the concept of democratically elected government. On that basis, he affirmed *Derbyshire* and held that Ballina Shire Council had no standing to sue in defamation.

Kirby P’s judgment, although differing in its emphasis, also broadly adopts the approach of the House of Lords in *Derbyshire*. It commences by enumerating a number of matters raised by Mahoney JA with which Kirby P agrees but then asserts the correctness of *Derbyshire* and concludes that a local authority may not sue in defamation.<sup>30</sup> Kirby P argued that this conclusion is justified because of the particular nature of Ballina Shire Council’s reputation — as Gleeson CJ and Lord Keith also noted. He asserted that ‘the Council’s reputation ... must depend upon the opinion of its citizens, earned or lost in the democratic political debate. That is so because of the very nature of such a body.’<sup>31</sup>

Mahoney JA handed down a strongly worded dissent. While elements of his dissent will be alluded to later in this article, it is useful to summarise his views. His greatest concern was that, while freedom of speech is a fundamental good, the ends to be achieved by that good ‘can effectively be achieved without removing all limits upon

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<sup>26</sup> Ibid 688 (Gleeson CJ), 709–10 (Kirby P).

<sup>27</sup> Ibid 688 (Gleeson CJ), 709 (Kirby P).

<sup>28</sup> Ibid 688.

<sup>29</sup> Ibid 691.

<sup>30</sup> Ibid 710.

the criticism of public authorities'.<sup>32</sup> In reaching this conclusion, he considered the role of defamation law and, in particular, its capacity to curb the media's significant, and otherwise unchecked, power to control the actions of those exercising public power. The consequence of adopting the reasoning in *Derbyshire*, he stated, is 'that the power of the media in respect of public authorities is to be uncontrolled.'<sup>33</sup>

The Court in *Derbyshire*, he concluded, did not give adequate consideration to the consequences of this abdication of control and, at least in respect of New South Wales, such abdication was unwarranted.<sup>34</sup>

In further support of his decision, Mahoney JA noted three grounds for not following *Derbyshire*. First, having regard to case law and the views of the New South Wales Law Reform Commission, as embodied in the final form of the *Defamation Act 1974* (NSW), the ratio of *Derbyshire* was inconsistent with the law of New South Wales.<sup>35</sup> Second, he took the view that the adoption of the ratio of *Derbyshire* into the law of New South Wales represented such a fundamental change to the balance of public power that it was appropriate that such a change be made by the legislature and not the courts.<sup>36</sup> Third, he noted the imprecision of Lord Keith's findings as to the types of bodies to which the rule against government bodies having standing to sue would apply. He observed that, if *Derbyshire* were to be followed literally, [48] 'the law of defamation will be withdrawn from the greater part of public administration'.<sup>37</sup>

Following the majority decision in *Ballina*, the court in *Jones*, by a majority of two to one, Meagher JA dissenting, held that the New South Wales Aboriginal Land Council, a body incorporated under the *Aboriginal Land Rights Act 1983* (NSW), had no standing to sue in defamation. Although the court unanimously endorsed *Ballina*,<sup>38</sup> it divided over the question of whether the Council was a body to which the ratio in *Ballina* applied.

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<sup>31</sup> Ibid 711.

<sup>32</sup> Ibid 721.

<sup>33</sup> Ibid 725.

<sup>34</sup> Ibid 727.

<sup>35</sup> Ibid 729–31.

<sup>36</sup> Ibid 731–3.

<sup>37</sup> Ibid 716.

<sup>38</sup> (1998) 43 NSWLR 300, 302 (Meagher JA), 310 (Handley JA).

Handley JA, with whom Powell JA agreed, found that the Council was a democratically elected body which performed a function within ‘a system of local government for Aboriginals’ and that, accordingly, the ratio of *Ballina* should be applied.<sup>39</sup> In contrast, Meagher JA took the view that ‘the election process only involves Aboriginals and is not democratic in the relevant sense’ and that ‘the Council is not government in the relevant sense’.<sup>40</sup> Accordingly, having determined that the Council was neither democratic nor government, he held that the ratio in *Ballina* was not applicable and that the Council had standing to sue.

In obiter, Meagher JA went on to suggest that the electoral nexus between the government body and the defendant may be relevant to whether the ratio in *Ballina* was applicable. He suggested that ‘the position may be different if the allegedly defamatory comments were made by an Aboriginal.’<sup>41</sup> Handley JA rejected this, observing that there was ‘no suggestion in *Ballina* that the principles it established depended on an electoral nexus between the critic and the plaintiff and *Derbyshire* is inconsistent with any such requirement’.<sup>42</sup>

However, Meagher JA’s obiter statements and the differing views adopted by the members of the court serve to highlight the uncertainty surrounding the application of *Derbyshire*, which will be discussed in greater detail below.

Perhaps the most significant aspect of Meagher JA’s dissenting judgment is his attempt to clarify the parameters of the application of *Derbyshire*. Although not explicit, it seems clear that Meagher JA was directly addressing Mahoney JA’s argument in *Ballina* that the words in which Lord Keith cast his judgment in *Derbyshire* were unreasonably broad. Meagher JA acknowledges that this breadth has led to some ‘confusion in the area’.<sup>43</sup> However, he asserts, the ratio of *Ballina*, as derived from *Derbyshire*, was not that no government bodies could sue in defamation but that ‘the statutory authority in that case could not sue for defamation.’<sup>44</sup> Accordingly, in Meagher JA’s view, *Derbyshire* has only been adopted into the law of

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<sup>39</sup> Ibid 310.

<sup>40</sup> Ibid 303.

<sup>41</sup> Ibid 304.

<sup>42</sup> Ibid 311.

<sup>43</sup> Ibid 302.

New South Wales on its narrowest interpretation. In this regard, Laurence Maher has observed that 'it is difficult to see how, logically, the immunity can be so confined'.<sup>45</sup>

The application of *Derbyshire* in Australia has not been restricted to New South Wales. In the Victorian Supreme Court, Hedigan J in *Mildura Aboriginal Corporation v Australian Broadcasting Corporation*<sup>46</sup> expressed his concerns over the standing of the Mildura Aboriginal Corporation (the Corporation), an association incorporated under the *Aboriginal Councils and Associations Act 1976* (Cth), to maintain an action for defamation. Referring to *Ballina* and *Jones* in argument, he stated that 'I think it's a paper thin case for the [Mildura Aboriginal Corporation] ... They are pretty formidable cases in [its] path.'<sup>47</sup> However, as [49] the jury in that case determined that the imputations against the Corporation were not made out, Hedigan J was not required to reach a final decision as to whether the Corporation had standing to sue.

Australian courts have not yet been asked to consider whether the argument that government bodies do not have standing to sue in defamation will apply to the broad range of bodies referred to by Lord Keith in *Derbyshire*. Clearly, however, the reasoning in *Derbyshire* as adopted in *Ballina*, at least in so far as it relates to democratically elected bodies performing government functions, is good law in Australia. Nevertheless, it is argued in this article that the High Court's decision in *Lange*, which was handed down after *Ballina* and before *Jones*, changed the Australian common law with respect to freedom of political speech in such a way that the application of the principles in *Derbyshire* should be reconsidered.

### **Lange and Freedom of Political Communication in Australia**

The unanimous judgment of the High Court in *Lange* significantly clarified Australian defamation law in relation to public discussion of political matters. It established that the common law defence of qualified privilege was available in respect of mass-media publications concerning government and political matters that affect the Australian people.

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<sup>44</sup> Ibid 303.

<sup>45</sup> Laurence W Maher, 'Defamation, Free Speech and Local Government Politics' (1995) 3 *Torts Law Journal* 131.

<sup>46</sup> (Unreported, Supreme Court of Victoria, Hedigan J, 15 March 2001).

<sup>47</sup> Ibid, transcript of proceedings, 6 March 2001, 655 (Copy on file with author).

Prior to *Lange*, a great deal of uncertainty surrounded the treatment of political discussion under Australian defamation law. In *Theophanous v Herald & Weekly Times Ltd*,<sup>48</sup> the court divided over whether the law of defamation in Australia was affected by an implied right of political communication in the Constitution.<sup>49</sup> Mason CJ, Toohey and Gaudron JJ found that the implied right of political communication embodied in the Constitution influenced the common law and, therefore, did affect the law of defamation.<sup>50</sup> They asserted that the implied right extended to ‘discussion of the conduct, policies or fitness for office of government, political parties, public bodies, public officers and those seeking public office’.<sup>51</sup>

Deane J, although not agreeing with Mason CJ, Toohey and Gaudron JJ in relation to the tests to be applied in determining whether the protection extended to a particular publication, endorsed their view, creating a majority.<sup>52</sup>

However, each of the judges forming the minority reached a different view in relation to the relevance and operation of the implied freedom of political communication. Broadly, McHugh and Brennan JJ agreed that the freedom, to the extent that it could be said to exist, was not a personal freedom<sup>53</sup> and did not affect the law of defamation.<sup>54</sup> Dawson J took the narrowest view of the freedom, characterising it as ‘minimal’ and also as not affecting the law of defamation.<sup>55</sup>

In view of the uncertainty that had preceded it, therefore, the High Court’s unanimous judgment in *Lange* represented a significant development in free speech jurisprudence in Australia. Chesterman has observed that, subsequent to *Lange*, ‘a set of principles to which all members of the Court subscribe now determines how defamation law, in

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<sup>48</sup> (1994) 182 CLR 104; at the same time, a judgment on broadly similar lines was handed down by the High Court in *Stephens v WA Newspapers* (1994) 182 CLR 211.

<sup>49</sup> That right having previously been identified by the High Court in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106.

<sup>50</sup> (1994) 182 CLR 104, 129.

<sup>51</sup> *Ibid* 124.

<sup>52</sup> *Ibid* 187–8.

<sup>53</sup> *Ibid* 206 (McHugh J), 149 (Brennan J).

<sup>54</sup> *Ibid* 202 (McHugh J), 163 (Brennan J).

<sup>55</sup> *Ibid* 191–2.

its application to public discussion of political matters, relates to the constitutional freedom'.<sup>56</sup>

[50] Relevantly, the Court in *Lange* declared that a common law defence of extended qualified privilege existed in respect of 'communications made to the public on a government or political matter.'<sup>57</sup> More specifically, that defence would be available in relation to government or political matters 'that affect the people of Australia.'<sup>58</sup> Without attempting to exhaustively define such matters, the Court indicated that they included discussion of matters 'at State or Territory level and even at local government level' and 'concerning the United Nations or other countries'.<sup>59</sup>

Finally, the Court noted, the defence will be defeated in two circumstances where:

- the plaintiff shows malice (of a particular sort) on the defendant's part; and
- the defendant cannot establish that their conduct in publishing the material complained of was reasonable.

While the Court observed that a determination of whether particular conduct was reasonable will 'depend upon all the circumstances of the case',<sup>60</sup> it set out some relevant criteria to be considered which suggest that a relatively high standard of conduct will be required from media defendants. Thus, Tobin and Sexton note that 'the mass media will find great difficulty in relying on the defence of common law qualified privilege established by the High Court'.<sup>61</sup>

Two significant points of note arise from the decision in *Lange*. First, the parameters of political speech to which the extended qualified privilege defence will apply remain uncertain. Nevertheless those parameters have been significantly clarified since *Theophanous* where, at its broadest, the joint judgment suggested political

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<sup>56</sup> Michael Chesterman, 'Privileges and Freedoms for Defamatory Political Speech' (1997) 19 *Adelaide Law Review* 155, 156.

<sup>57</sup> (1997) 189 CLR 520, 571.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.* 574.

<sup>61</sup> T K Tobin and M G Sexton, *Australian Defamation Law and Practice*, Butterworths (at 30-03-01) ¶16,065.

communication might embrace ‘all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about’.<sup>62</sup>

Second, the requirement of reasonableness places a significant, and perhaps unreasonable, burden on mass media defendants seeking to rely on the defence.

Despite the remaining uncertainty in relation to the scope of freedom of political communication in Australia and the difficulty defendants may have in meeting the criterion of reasonableness, *Lange* creates a background against which the reasoning in *Derbyshire* should no longer be treated as part of Australian law.

### **Rethinking the Standing of Government Bodies to Sue in Defamation**

The establishment of a defence of extended qualified privilege for public discussion of government and political matters in *Lange* provides a better basis upon which to protect freedom of speech in relation to government bodies than denying standing to sue. For a number of related reasons, the proper question for Australian courts should be one of qualified privilege, not of standing.

*Lange* significantly changed Australian law concerning freedom of political speech. At the time at which *Ballina* was decided, Australian law in relation to freedom of political communication was in a state of flux which, subsequent to *Lange*, has been substantially resolved. Specifically, the High Court has endorsed an approach to political speech which involves consideration of whether that speech, by its nature, should be immune from being impugned under defamation law.

Kirby P noted the level of uncertainty in this area of law at the time when *Ballina* was decided. His Honour commenced his judgment in that case by noting that consideration had been given to withholding the court’s opinion until the decisions in *Theophanous* and *Stephens* had been handed down.<sup>63</sup> However, he went on, having regard to the Court of Appeal’s own responsibilities, [51] it had been decided to not delay judgment in *Ballina*.<sup>64</sup>

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<sup>62</sup> (1994) 182 CLR 104, 124, quoting Eric Barendt, *Freedom of Speech* (1985).

<sup>63</sup> (1994) 33 NSWLR 680, 697.

<sup>64</sup> *Ibid.*

Kirby P also observed that '[i]n its exposition of the "free speech" implications of the Australian Constitution, the High Court of Australia has not yet made clear the extent to which such implications extend.'<sup>65</sup>

Significantly, he noted that 'it is not yet clear as to whether the constitutional right to free expression extends to the organs of every level of government in Australia, including local government.'<sup>66</sup>

We can speculate that, had Kirby P been confident that those 'free speech' implications, and, particularly, the extended defence of qualified privilege, would have been available to Ballina Shire Council, he would have felt less need to deny the Council standing to protect freedom of expression in relation to criticism of it.

Surprisingly, although *Lange* was decided shortly before *Jones*, *Lange* receives only one brief mention in the Court's judgment. Meagher JA refers to a passage from *Lange* as illustrative of the 'inconsistency between free speech and an action for defamation.'<sup>67</sup> Having regard to the significance of the *Lange* decision to the law relating to freedom of political speech in Australia, it is disappointing that, in a case addressing that very question, further consideration was not given to its relevance. Presumably, in view of the similarities between the questions posed in *Ballina* and *Jones*, and the precedential authority of *Ballina*, the court felt that there was no need to address that issue.

Regardless, the significance of *Lange* should not be ignored in determining whether a government authority can sue in defamation. Chesterman comments that, in relation to freedom of political speech, *Lange* 'reformulated the principles underpinning it ... [and] effected a major change to the common law of defamation'.<sup>68</sup>

Such a radical change requires reconsideration of related questions such as whether government bodies have standing to sue.

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<sup>65</sup> Ibid 701.

<sup>66</sup> Ibid.

<sup>67</sup> (1998) 43 NSWLR 300, 304.

### **Lange provides a better approach to protecting freedom of political speech**

Both *Lange* and *Derbyshire* seek to achieve the same express goal of protecting freedom of political communication. In *Lange* the court stated that ‘the common convenience and welfare of Australian society are advanced by discussion — the giving and receiving of information — about government and political matters.’<sup>69</sup>

The same sentiment was expressed in *Derbyshire* where Lord Keith observed that granting government authorities the right to sue ‘would place an undesirable fetter on freedom of speech.’<sup>70</sup> However, in concentrating on the nature of the speech complained of, rather than the status of the aggrieved body, the court in *Lange* adopted a test that is better adapted to protecting freedom of political speech.

It is generally accepted that the right to freedom of speech, like all rights, is not absolute. Accordingly, it is appropriate that any rule seeking to protect freedom of speech allows for some level of flexibility. Commenting on the nature of the freedom of political communication as it was defined in *Lange*, Chesterman observed that it ‘leaves scope for inhibitions on political communications to be imposed by rules of common law or statute in furtherance of a legitimate countervailing interest.’<sup>71</sup>

In contrast, *Derbyshire* allowed no such scope in respect of government bodies. One of Mahoney JA’s [52] strongest criticisms of *Derbyshire* in his dissenting judgment in *Ballina* was its failure to balance any such potential countervailing interests against the desire to protect freedom of political communication. He asserted that:

free speech is not a slogan, the articulation of which makes thought unnecessary. It is a value to be measured and weighed against other ends which the citizens of a society desire to achieve.<sup>72</sup>

The judgment in *Derbyshire* allows no scope for a government body, which can establish on the facts of a case that it has a valuable reputation of itself and that that

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<sup>68</sup> Chesterman, above n 56, 156.

<sup>69</sup> (1997) 189 CLR 520, 571.

<sup>70</sup> [1993] AC 534, 549.

<sup>71</sup> Chesterman, above n 56, 166.

<sup>72</sup> (1994) 33 NSWLR 680, 720.

reputation has been harmed, to bring an action for defamation in respect of a publication which has been made maliciously or with a reckless disregard for the truth. At best, the individuals comprising that authority, assuming they can establish that they have been identified for the purposes of defamation law, will be able to bring the action. However, those individuals would then bear the costs risks and consequences associated with the action.

It should be noted at this point that, although damages for defamation may not be available even in respect of proven, malicious harm to a government body's reputation, damages for the tort of malicious falsehood may. In *Ballina*, Gleeson CJ and Mahoney JA found that an action for malicious falsehood was available to the plaintiff and, at least for Gleeson CJ, the availability of such an action may have mitigated any doubts he had in relation to denying standing to sue for defamation. But, on the facts, Kirby P considered the suggestion of the availability of such an action to be 'ludicrous'.<sup>73</sup> The question was not considered in *Jones*.

Nevertheless, in failing to qualify the breadth of the protection granted to potential defendants in defamation proceedings brought by bodies performing government functions, *Derbyshire* went too far in seeking to protect freedom of political speech. The question, Mahoney JA said, 'is whether freedom of speech and the ends to be achieved by it can effectively be achieved without removing all limits upon criticism of public authorities'.<sup>74</sup>

Even prior to *Lange*, Mahoney JA was able to answer that question in the affirmative. Subsequent to the introduction of the extended defence of qualified privilege in *Lange*, it is clear that Australian courts are presented with a test under which they can protect freedom of speech without absolutely removing recourse to the protection of defamation law from government bodies.

In addition to being more flexible, the approach in *Lange* is better adapted to protecting freedom of political speech than the approach in *Derbyshire* because it more directly addresses the end sought to be achieved. The focus of a court's

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<sup>73</sup> Ibid 692–4 (Gleeson CJ), 733 (Mahoney JA) and 711 (Kirby P).

investigation, if it seeks to protect freedom of speech, should be the speech itself and not the person whom it is about. This was identified by counsel for Derbyshire County Council who, in argument, asserted that freedom of expression ought not be protected by ‘an arbitrary removal from certain plaintiffs of their rights, but ... by extension of existing common law defences.’<sup>75</sup>

Undeniably, most discussion of government authorities will be political in nature and will fall within the tests in both *Derbyshire* and *Lange*. Nevertheless, the efficacy of the respective approaches will be tested at their boundaries. As discussed below, the uncertainty surrounding the application of *Derbyshire*, particularly in relation to privatised and corporatised bodies, is such that a result that better protects freedom of political discussion, properly understood as a contingent right, will more often be obtained by adopting the approach in *Lange*.

### **Derbyshire is too uncertain in its application**

As noted above, both Meagher JA in *Jones* and, more strongly, Mahoney JA in *Ballina*, noted the [53] uncertainty of the application of *Derbyshire*. To some extent both *Jones* and *Ballina* attempted to resolve this uncertainty but the full scope of the House of Lord’s decision, and the extent to which it should be applied in Australia, remains unclear.

Lord Keith’s judgment in *Derbyshire* is notable for its breadth. Although specifically considering the question of whether a democratically elected county council had standing to sue in defamation, Lord Keith referred to a broad range of entities. At various points in his judgment, Lord Keith questions whether ‘a local authority, or any other body exercising government functions, might not be in a special position’ with regards to defamation and notes the importance that ‘any government body, should be open to uninhibited public criticism.’<sup>76</sup> Similarly, Lord Keith appears to suggest that *Derbyshire* may apply to ‘those ... responsible for public administration’,<sup>77</sup> a

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<sup>74</sup> Ibid 721.

<sup>75</sup> [1993] AC 534, 541.

<sup>76</sup> Ibid 547.

<sup>77</sup> Ibid 548, quoting *Hector v Attorney-General of Antigua and Barbuda* [1990] 2 AC 312, 318.

'department of central government',<sup>78</sup> including one that is a 'statutorily created corporation',<sup>79</sup> and 'organs of government, whether central or local'.<sup>80</sup>

Only Mahoney JA and Meagher JA, in their dissenting judgments in *Ballina* and *Jones* respectively, directly addressed the issue of the breadth of Lord Keith's judgment and they reached very different conclusions in relation to it. Mahoney JA was highly critical of the House of Lords' approach, noting that:

it is difficult to see in what was said by their Lordships, understood according to the terms of it, any limit upon those public authorities who, if the principle applies, are to be disqualified from claiming the protection of the law of defamation.<sup>81</sup>

In particular, he noted that the judgment 'can logically admit of, no distinction between the public authorities which are statutory corporations and those which are individuals exercising public powers.'<sup>82</sup>

In contrast, Meagher JA, as discussed above, adopted a pragmatic, but somewhat artificial, interpretation of *Derbyshire*, asserting that the broadest construction of the judgment 'is obviously not the ratio decidendi of the unanimous decision'.<sup>83</sup> Meagher JA's interpretation, although it solves the problem of accepting that *Derbyshire* is part of Australian law while placing reasonable limitations upon its application, is clearly inconsistent with the tenor of Lord Keith's judgment. For example, Kirby P accepted unquestioningly that the House of Lords 'held that, by the common law of England, no institution of central or local government (including a county council) had the right to maintain an action for damages for defamation.'<sup>84</sup>

Similarly, Mahoney JA indicated that a literal interpretation of the judgment was appropriate, observing that in Lord Keith's 'carefully formulated speech, the

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<sup>78</sup> Ibid 550.

<sup>79</sup> Ibid 548.

<sup>80</sup> Ibid 549.

<sup>81</sup> (1994) 33 NSWLR 680, 717.

<sup>82</sup> Ibid 718.

<sup>83</sup> (1998) 43 NSWLR 300, 303.

<sup>84</sup> (1994) 33 NSWLR 680, 697.

significance of the words ... is clear.’<sup>85</sup> Thus a great deal of uncertainty surrounds the question of which bodies will be prevented from bringing actions for defamation under the authority in *Derbyshire*.

In particular, three questions remain unanswered. First, will a non-democratically elected body that exercises a government function be able to sue for defamation? On a literal reading, *Derbyshire* appears to indicate that the question should be answered in the negative. However, Carter-Ruck observes that the answer is not clear and that subsequent judicial consideration in the United Kingdom has failed to resolve it.<sup>86</sup> [54] Gleeson CJ gave some consideration to the question in *Ballina*, where it was raised in argument.<sup>87</sup> However, as Ballina Shire Council’s members were popularly elected, the question, he asserted, was not relevant. In *Jones*, it is clear that the court considered that it was critical that the body be democratically elected for the rule in *Derbyshire* to apply.<sup>88</sup>

That question, which was answered in the negative by both Gleeson CJ in *Ballina*<sup>89</sup> and Lord Keith in *Derbyshire*,<sup>90</sup> is significant because of the increasing role that privatised and corporatised bodies are playing in administering functions previously performed by governments. Particularly over the past decade, we have come to live in what some commentators have coined the ‘new regulatory state’.<sup>91</sup> As a consequence of this delegation of government functions to bodies with varying degrees of independence from government control and integration into the broader party-political government structure, the boundaries between government and non-government entities have significantly blurred.

This change toward non and semi-government bodies carrying out functions traditionally performed by governments has raised a host of questions. Many of those questions relate to how those bodies should be treated in comparison to truly private

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<sup>85</sup> *Ibid* 717–8.

<sup>86</sup> Peter F Carter-Ruck and Harvey N A Starte, *Carter-Ruck on Libel and Slander* (5<sup>th</sup> edn, 1997) 75–6.

<sup>87</sup> (1994) 33 NSWLR 680, 684.

<sup>88</sup> (1998) 43 NSWLR 300, 303 (Meagher JA), 310 (Handley JA).

<sup>89</sup> (1994) 33 NSWLR 680, 690, considering *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533.

<sup>90</sup> [1993] AC 344, 548–50, considering *Die Spoorbond v South Africa Railways* 1946 AD 999.

<sup>91</sup> See for example, John Braithwaite, ‘Accountability and Governance under the New Regulatory State’ (1999) 58(1) *Australian Journal of Public Policy* 90.

entities. Particularly, whether, or the circumstances in which, those bodies should be able to sue in order to protect their corporate, trading reputation.

In answering this question, as was argued above, the inappropriateness of the test in *Derbyshire* when compared with its express policy objective is highlighted. The more independent from and less integrated into government that a body is, the less chance there is that criticism of that body will be speech of a political nature, the protection of which is justified under the banner of freedom of political communication. As the express rationale of the decisions in *Derbyshire*, *Ballina*, and *Jones* is to protect free speech, not to protect the body itself, it will often follow more logically to ask whether the criticism sought to be impugned is of a political nature rather than whether the body itself is an organ of government, particularly where that body is at the periphery of government.

Also, the less integrated a body is to a democratic government structure, the easier it will be for that body to identify and prove a valuable, commercial reputation. This is partly because it is harder to classify a non or semi-government body which performs a government function as embodying the 'sovereignty' of the people. That is, it cannot be said, or it can be said only to a lesser extent, that the body expresses or manifests the will and sentiment of the people through the operation of the democratic process. In such body bringing an action for defamation, therefore, it is more difficult to view, as Kirby P did in *Ballina*,<sup>92</sup> that action as being one against a person that the body ultimately represents.

Second (which is related to the first), is whether an electoral connection between the body seeking to sue and the publisher of the allegedly defamatory material is required? The question arose in obiter from Meagher JA's finding that a body that was elected by and represented the interests of its members only was 'not democratic in the relevant sense'.<sup>93</sup> It followed that the rule in *Derbyshire* could not apply to such a body unless, he suggested, that body could 'for the purposes of the law of defamation,

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<sup>92</sup> (1994) 38 NSWLR 680, 711

<sup>93</sup> (1998) 43 NSWLR 300, 303.

be regarded as a democratically elected body exercising government powers vis-à-vis the person alleged to have made the defamatory remarks'.<sup>94</sup>

However, also in *Jones*, Handley JA dismissed Meagher JA's analysis in this regard as not arising from *Ballina* and as being inconsistent with *Derbyshire* and this approach has not otherwise been considered.<sup>95</sup> [55] Accordingly, the question has not yet been definitively answered.

Third, is the rule in *Derbyshire* restricted to actions in respect of defamatory matter regarding a government body in its government and administrative functions? Again, the question was posed in obiter, this time by Gleeson CJ in *Ballina*, and the case law provides no answer to it. However, like the first question, the third question raises the issue of whether standing is the appropriate criterion against which to determine whether a government body should be able to succeed in an action for defamation. It is conceivable that a defamatory statement regarding a government body might have no bearing on its capacity to carry out its functions. In such a case, there may be no logical reason to deny that body standing to sue in respect of that matter under the principle of freedom of political speech.

The residual uncertainty remaining after *Lange* is less problematic than the uncertainty arising from *Derbyshire*. At least insofar as it relates to the extent of the obligations imposed by the requirement of reasonableness, a publisher can take steps to minimise the uncertainty surrounding the application of *Lange* by, for example, undertaking more extensive pre-publication enquiries. In contrast, the uncertainty arising from *Derbyshire* cannot be mitigated by a publisher's diligence.

## **Conclusion**

The High Court's decision in *Lange* has significantly clarified Australian defamation law as it relates to freedom of political speech. The fundamental change to defamation law that *Lange* introduced requires a reconsideration by Australian courts' of their approach to related issues such as the standing of government bodies to sue.

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<sup>94</sup> *Ibid* 304.

*Lange* provides a better approach than *Derbyshire* to the capacity of government bodies to sue in defamation. It is more flexible, in that it acknowledges that freedom of speech is not an absolute right. Also, it directly addresses the question of whether particular speech should, because of its relationship to government matters, be protected. In contrast, the inflexibility of and the uncertainty surrounding the application of the test in *Derbyshire* highlights *Derbyshire*'s failure to address the central issue of protecting freedom of political speech.

In determining whether a government body can succeed in an action for defamation, therefore, Australian courts should address the question of whether the extended qualified privilege defence applies to the matter complained of, not whether the body has standing to sue.

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<sup>95</sup> *Ibid* 311.