DEFAMATORY COMMENT ON THE JUDICIARY: *LANGE* QUALIFIED PRIVILEGE IN *POPOVIC V HERALD & WEEKLY TIMES*

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ABSTRACT

[213] In *Popovic v Herald & Weekly Times* the Supreme Court of Victoria, in awarding a magistrate defamed in the course of her duties almost $250,000, took the view that *Lange* qualified privilege will not generally apply to discussion of the judiciary. This article argues that Australia's constitutional protection for expression relating to politics and government should be extended to criticism of the judiciary, just as it is to criticism of other sections of government. What is more, statements of opinion should be distinguished from those of fact when it comes to applying the *Lange* test of reasonableness, particularly as regards the requirement that a response be sought and published. A defendant should not necessarily fail the reasonableness test due to lack of care as to how a publication might be interpreted.

[214] Proponents of Australia's constitutional protection for discussion of 'government and political matter' can draw further discouragement from the recent decision by the Supreme Court of Victoria to award a magistrate $246,500 for defamation.[2] This, Victoria's fourth largest defamation award,[3] marks yet another failure by the media to employ *Lange* qualified privilege. That defence, which arises out of the implied constitutional protection, applies to defamatory material reasonably published in the course of discussing government and political matter.[4] During its five year history the defence has scarcely succeeded.[5] In awarding record damages for a

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[2] *Popovic v Herald & Weekly Times Ltd (No 2)* [2002] VSC 220 (unreported, Bongiorno J, 6 June 2002).

[3] 'Defamation Table of Quantum: Victoria', *Gazette of Law and Journalism*, <http://www.lawpress.com.au/journalism.html> (Copy on file with author).

[4] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (High Court).

[5] The only case I am aware of where the defence succeeded was *Brander v Ryan* [2000] SASC 446 (unreported, Prior, Lander and Bleby JJ, 21 December 2000) [125] (Lander J) where imputations that Michael Brander, chairman of the political party Australian National Action, did not hold his political beliefs sincerely, does not have credible or genuine views in relation to the immigration debate and is motivated by juvenile attention seeking were held to be defamatory but protected by qualified privilege on the basis of *Lange*.

magistrate, the Victorian court has held that the defence will not extend to media criticism relating solely to the judicial arm of government.[6]

Many may have considered the extension of qualified privilege to discussion of the judiciary something of a lost cause ever since the High Court in *Lange* diluted the defence previously offered by its decision in *Theophanous v Herald & Weekly Times*.[7] In this article I suggest that this recent decision is not quite so fatal to attempts to apply qualified privilege to such media commentary as may first appear.

I argue instead that the most troubling aspect of this recent decision is its application of the *Lange* requirement of reasonableness in relation to publication. This case reveals in unusually stark terms the inadequacy of *Lange* as a fallback for commentators on legal affairs who are unable, through no fault of their own, to rely on one of the defences relating to expressions of honest opinion. It is in such cases that *Lange* should show special consideration.

My contentions shall include that just as defamation law generally grants greater licence to publishers when it comes to statements of opinion, as opposed to those of fact, opinion and fact should also be distinguished when it comes to applying the *Lange* test of reasonableness, particularly in regard to that test's requirement that a response to criticism should normally be sought and published. I shall also argue that a defendant should not necessarily fail the reasonableness test due to lack of care as to how a publication might be interpreted.

Popovic v Herald & Weekly Times: the facts

The recent award arose from a defamation action brought by Jelena Popovic, Deputy Chief Magistrate of the Magistrates' Court of Victoria, against Herald and Weekly Times Ltd, publishers of the Melbourne *Herald-Sun*, together with the paper's columnist, Andrew Bolt.[8] Bolt had used his column to accuse the magistrate of prejudging the prosecution of two protestors charged with burning the Indonesian

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[6] *Popovic v Herald & Weekly Times Ltd* [2002] VSC 174 (unreported, Bongiorno J, 21 May 2002) [33].

[7] *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104. See also *Stephens v WA Newspapers* (1994) 182 CLR 211.

[8] *Popovic v Herald and Weekly Times Ltd* [2002] VSC 174 (unreported, Bongiorno J, 21 May 2002).

consulate's flag. He also alleged that Popovic bullied the police prosecutor in that case and hugged two drug traffickers she let walk free.[9] Among the defences put forward by Bolt and his paper was that of *Lange* qualified privilege.

[215] The jury found the article to be defamatory of Popovic and untrue.[10] Even so, the jury determined that the conduct of the defendants in publishing the article was reasonable and that they were not actuated by malice.[11] It then fell to the trial judge, Bongiorno J, to determine whether *Lange* qualified privilege could apply.

For it do so, two broad requirements had to be met. First, Bolt's article must fall under the ambit of 'discussion of government or political matter' as protected by *Lange*.[12] Thus a key consideration was whether *Lange* covers censure of judicial officers, in the way it clearly encompasses criticism of those in the legislative and executive arms of government. Secondly, publication had to be reasonable in the circumstances.

Application of *Lange* to discussion of the judiciary

The obvious objection to including discussion of the judiciary within those matters protected by the constitutional right to freedom of expression is that the right arises from the doctrine of representative government enshrined in the Constitution.[13] In *Lange* the High Court emphasised that the constitutional provisions giving rise to the freedom are those that establish a system of representative and responsible government by which members of the legislature and executive are elected. The Court seemed to narrow the freedom to the extent that it is an 'indispensable element' of that system, and exists to enable 'the people to exercise a free and informed choice as

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[9] Andrew Bolt, 'We pay our magistrates good money to UPHOLD the laws', *The Herald-Sun* (Melbourne) 13 December 2000.

[10] The jury did not say what defamatory meaning it found was conveyed. The jury did determine that the defendants were not entitled to the protection extended to faithful and accurate reports of court proceedings by *Wrongs Act 1958* (Vic) s 4: *Popovic v Herald and Weekly Times Ltd* [2002] VSC 174 (unreported, Bongiorno J, 21 May 2002) [6].

[11] Ibid.

[12] Note that the type of matter protected by *Lange* and the type of material protected by the constitutional right that gives rise to the defence, namely the right to freedom of discussion on political and government matters, are not exactly co-extensive: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 571 and Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (2000) 98–100.

[13] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106. These cases found that the freedom arose particularly from ss 7 and 24 of the *Constitution.*

electors'.[14] Judges, of course, are not elected. Therefore, it might be argued, free debate of their conduct is not needed for electors to have 'a true choice with "an opportunity to gain an appreciation of the available alternatives"'.[15]

Thus Bongiorno J held that discussion of the judiciary will not normally be included in the freedom, relying primarily on *John Fairfax Publications Pty Ltd v Attorney-General (NSW)*, in which the New South Wales Court of Appeal held that the 'conduct of courts is not, of itself, a manifestation of any of the provisions relating to representative government upon which the freedom is based'.[16]

One means of countering this argument is by reference to *Lange*'s inclusion within the remit of 'political and government matter' issues relevant to constitutional referenda. Since it would be open to the people to amend those parts of the Constitution governing the judiciary, including the means by which they are selected and disciplined, then discussion relating to performance in judicial office might seem to fall within the bounds of information needed by an informed electorate.

Bongiorno J uses *John Fairfax Publications* to close this argument.[17] In that case Spigelman CJ objected that in theory any subject matter may be the subject of a constitutional amendment, which in turn would mean that virtually any subject might be of governmental or political character. The formulation [216] 'government or political matters' was intended to confine the scope of the freedom. The conclusion reached was that using the possibility of a constitutional referendum to link the freedom and the judiciary is 'altogether too tenuous'.[18]

Before using this precedent to conclude that criticism of the judiciary does not ordinarily give rise to an occasion of qualified privilege, Bongiorno J works his way through the landmark cases relating to the freedom. Principle among these are

[14] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560.
[15] Ibid, quoting *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 187 (Dawson J). For a fuller exposition of this argument, as well as those countering it, see Chesterman, above n 12, 61–3.
[16] (2000) 181 ALR 694, 709 (Spigelman CJ; Priestley JA concurring; Meagher JA dissenting).
[17] *Popovic v Herald and Weekly Times Ltd* [2002] VSC 174 (unreported, Bongiorno J, 21 May 2002) [33].
[18] (2000) 181 ALR 694, 710.5 (Priestley JA concurring; Meagher JA dissenting).

Nationwide News Pty Ltd v Wills,[19] one of the two cases that read the freedom into the Constitution in the first place, and *Theophanous*, which applied the freedom to the law of defamation.

Bongiorno J acknowledges that in *Nationwide News* Deane and Toohey JJ did not confine the freedom to discussion concerning elected representatives.[20] Indeed Deane and Toohey JJ explicitly included the judiciary: they described the right as including the freedom to communicate about all aspects of government of the Commonwealth, 'including the qualifications, conduct and performance of those entrusted (or who seek to be entrusted) with the exercise of any part of the legislative, executive *or judicial* powers of government'.[21] Bongiorno J counters this by pointing out that the Canadian case referred to by Deane and Toohey JJ to illustrate how a freedom of speech on government matters is inherent in Australia's representative government, *Re Alberta Legislation*,[22] does not refer to speech concerning the judiciary.[23]

As for *Theophanous*, Bongiorno cites Deane J as including discussion on judges within the freedom, but then says he was not joined in this by the other majority judges.[24] In fact the joint judgment of Mason CJ, Toohey and Gaudron JJ expresses no disapproval of Deane J's inclusion of discussion of the judiciary. On the contrary, and apparently overlooked by Bongiorno J, in giving an example of the type of discussion that might well fall within constitutional protection, the justices cite comment by a television entertainer on the legislative, executive *or judicial* process.[25] To this can be added the three judges' definition of 'political discussion' as including discussion of the conduct, policies or fitness for office of, inter alia, 'public officers'[26] and their approval of Eric Barendt's very broad definition of 'political speech' protected by the constitution as 'all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think

[19] (1992) 177 CLR 1.
[20] *Popovic v Herald and Weekly Times Ltd* [2002] VSC 174 (unreported, Bongiorno J, 21 May 2002) [16].
[21] (1992) 177 CLR 1, 74 (emphasis added).
[22] (1938) 2 DLR 81.
[23] *Popovic v Herald and Weekly Times Ltd* [2002] VSC 174 (unreported, Bongiorno J, 21 May 2002) [16].
[24] Ibid [20].
[25] (1994) 182 CLR 104, 123–4 (emphasis added).
[26] Ibid 124.

about'.[27] Unacknowledged by Bongiorno J is the clear and *explicit* inclusion by the majority in *Theophanous* of discussion of the judiciary as one of the forms of speech protected.

Assessing *Popovic* re the application of *Lange* to criticism of judiciary

In the event, Bongiorno J's decision that *Lange* qualified privilege should not generally apply to criticism of the judiciary can, and should be regarded as *obiter*. Bongiorno J thought that Bolt's article advocated the removal of the plaintiff from magisterial office.[28] As such he considered it discussion of [217] government or political matter, in as much as it is only the executive in the person of the Attorney General who can initiate the procedure which might result in a magistrate's removal from office. It followed that it was unnecessary to consider whether *Lange* qualified privilege could apply to discussion relating solely to the judiciary.

Even though it is *obiter*, Bongiorno J's opinion will no doubt discourage attempts to extend *Lange* qualified privilege to such material. This is to be regretted. First, *Popovic* leads to the perverse result that a defence is offered to strident criticism that imputes the need for the removal of a judge, when such a defence is not available to commentators who temper their comments. Secondly, it sits at odds with the general extension of qualified privilege to fair and accurate court reports, which arises from the importance placed on public discussion of judicial conduct. Thirdly, it inhibits systemic criticism of an arm of government whose maladies might be thought to be rarely exhibited through gross misconduct within its ranks, but rather through minor but insidious injustices.[29]

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[27] Ibid. Toohey J repeated his endorsement of this quotation in *Kruger v The Commonwealth* (1997) 190 CLR 1, 90–1 and added that nothing said in *Lange* diminished the scope of the implied constitutional freedom discussed in cases such as *Nationwide News*, *Australian Capital Television*, *Theophanous* or *Stephens* and that, on the contrary, *Lange* reinforced that freedom: ibid.

[28] *Popovic v Herald and Weekly Times Ltd* [2002] VSC 174 (unreported, Bongiorno J, 21 May 2002) [44].

[29] There are strong arguments for rejecting the category of 'political' altogether when it comes to privileging one category of communication over another in terms of freedom of expression: see eg Robert Post, 'The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and *Hustler Magazine v Falwell*' (1990) 103 *Harvard Law Review* 601, 670; Roy Baker, 'Extending Common Law Qualified Privilege to the Media: a Comparison of the Australian and English Approaches' (2002) 7.2 *Media & Arts Law Review* 87; Andrew T Kenyon, 'Defamation and Critique: Political Speech and *New York Times v Sullivan* in Australia and England' (2001) 25 *Melbourne University Law Review* 522. Such issues were considered recently by the NSW Attorney General's 'task force' on defamation law reform, which nevertheless rejected replacing *Lange* with a

Far more encouraging is the recent proposal of the New South Wales Attorney General's defamation law reform 'task force' (published just weeks after *Popovic*) to amend that state's statutory provision relating to qualified privilege, which does not limit the protection to discussion of political or government matters.[30] The proposal would emphasise that the fact that a person performs public functions or activities (which clearly includes judges in the conduct of their duties) is a factor to consider when determining whether criticism of that person's conduct is privileged.[31]

The *Lange* reasonableness test in *Popovic*

Lange qualified privilege failed the defence in *Popovic* because of the requirement that the publisher must prove reasonableness of conduct where reputations are defamed by widespread publications.[32] The only evidence on the issue tendered by the Defendants was that of Bolt, who maintained it was not his intention to convey the imputation that the magistrate should be dismissed from office,[33] even though that was the imputation Bongiorno found to be conveyed.[34]

Lange says reasonableness will depend on the circumstances, but generally defendants must show that at the time of publication they:

(1) had reasonable grounds for believing that the imputation was true;

(2) had taken proper steps, so far as they were reasonably open, to verify the accuracy of the material; and

(3) did not believe the imputation to be untrue.

Bolt and his publisher failed on this last aspect, as well as the additional requirement in *Lange* that the [218] defendant sought a response from the person defamed and published any response made, unless it was impracticable or unnecessary to do so.[35]

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public figure defence: *Defamation Law: Proposals For Reform In NSW, Report Of Attorney General's Task Force On Defamation Law Reform* (2002) 22.

[30] *Defamation Act 1974* (NSW) s 22.

[31] *Defamation Law: Proposals For Reform In NSW, Report Of Attorney General's Task Force On Defamation Law Reform* (2002) 22 and 30.

[32] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 574.

[33] *Popovic v Herald and Weekly Times Ltd* [2002] VSC 174 (unreported, Bongiorno J, 21 May 2002) [51].

[34] Ibid [44].

[35] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 574.

The defendant should not believe that the imputation is untrue

As regards the requirement that defendants should not believe the imputation to be untrue, Bongiorno J based his finding first on Bolt's testimony that at the time of publication he did not believe that the plaintiff had so misconducted herself as to warrant removal from office, the imputation the judge thought had been conveyed.[36] Secondly, Bongiorno J based his finding on his view that Bolt did not care whether the article conveyed the defamatory imputation or not. The judge concluded:

> Accordingly, his case on this aspect of reasonableness fails; in that there is no evidence either that he believed the imputation to be true (he says he didn't) or that he did not believe it was false (he didn't know and didn't care).[37]

With respect to Bongiorno J, there are several problems with this conclusion. First, the requirement that defendants show they did not believe the imputation to be untrue is not the same as requiring them to show that they believed the imputation to be true. The latter requirement is conspicuously absent from the list of reasonableness criteria set out in *Lange*.[38] Secondly, not believing an imputation to be true is not tantamount to believing it to be false. Thirdly, believing something to be false is not the same as not knowing or not caring whether something is false. In any event, the judge seems to be conflating two distinct issues. It is one thing not to care whether an imputation is true. It is quite another not to care whether it is conveyed (what might be called 'carelessness as to meaning'). Evidence of the second is not evidence of the first.

Bolt gave evidence that at the time of publication he did not believe the truth of the imputation said to have been conveyed.[39] Neither this nor any carelessness on his part as to meaning (which is not to say that I believe there was any) is evidence that he was indifferent as to its truth, the conclusion Bongiorno J seems to have drawn.

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[36] *Popovic v Herald and Weekly Times Ltd* [2002] VSC 174 (unreported, Bongiorno J, 21 May 2002) [54].

[37] Ibid [55].

[38] Note that the first reasonableness criterion set out in *Lange*, namely that defendants must show that at the time of publication they had reasonable grounds for believing that the imputation was true, is an objective test and does not require that the defendants actually had such a belief. They must simply show that there were reasonable grounds to establish such a belief, whether or not they actually shared it. See also Sally Walker, '*Lange v ABC*: The High Court Rethinks the "Constitutionalisation" of Defamation Law' (1998) 6 *Torts Law Journal* 9, 26.

[39] *Popovic v Herald and Weekly Times Ltd* [2002] VSC 174 (unreported, Bongiorno J, 21 May 2002) [54].

Writers might apply their minds to the issue of truth and be unable to decide one way or the other. They may prefer the matter to be determined by their readership, as suggested by Bolt's oral answer to the question whether he owed an apology if he had inadvertently conveyed the imputation he did not believe to be true:

> I'm not so sure about that, in the sense of this. If people gain the impression from what I'd written that they thought she should be sacked, then that's their point of view, they're entitled to it. And I won't apologise for them having that point of view.[40]

Carelessness as to truth

Neither carelessness as to meaning nor as to truth appear among the generalisations concerning [219] reasonableness itemised in *Lange*.[41] Of course *Lange* states that reasonableness depends on all the circumstances.[42] It is certainly open to Bongiorno J to hold that care as to meaning and/or truth are ingredient(s) of reasonableness, at least in these circumstances. Indeed it is difficult to characterise a publisher who is careless as to truth as reasonable in any circumstances.[43]

Carelessness as to meaning

Bongiorno J does not make it explicit that he intends carelessness as to meaning to be a factor under the *Lange* reasonableness test. On the contrary, there is every indication that he is limiting himself to the issues identified in *Lange*. Even so, if *Popovic* is to be taken as authority for considering carelessness as to meaning, the doctrine needs refining.

Surely a defendant should not fail reasonableness as a result of indifference regarding non-defamatory imputations. Even if only carelessness as to defamatory imputations is considered, there is a difference between not caring what defamatory imputation is

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[40] Ibid.

[41] Even so, any publisher who is careless as to truth might be hard pressed to satisfy *Lange's* second requirement of reasonableness, namely that the publisher took proper steps, so far as they were reasonably open, to verify the accuracy of the material.

[42] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 574.

[43] Evidence of indifference as to truth would normally be taken to be conclusive evidence of malice so as to defeat a defence of qualified privilege: *Horrocks v Lowe* [1975] AC 135, 149–50 (Lord Diplock). In the case of *Lange*, however, publishers will lose the defence only if plaintiffs can establish that they published the material for a purpose other than that of communicating government or political information or ideas: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 574. Lack of belief in truth is insufficient: Walker, above n 38, 27.

conveyed, and not caring whether a particular defamatory imputation is conveyed. It is hard to envisage circumstances in which it might be reasonable not to care what defamatory imputation is conveyed. But there is no suggestion from Bongiorno J that either Bolt or his newspaper fell into that category. Rather the judge is placing Bolt in the other group, namely those defendants who do not care whether a particular defamatory imputation is conveyed.

When writers believe a particular accusation to be untrue, or when they are uncertain as to whether it is true or note, they should take care not to suggest to their readership that they believe the allegation to be true. If they do not take such care, then they should fail under the *Lange* reasonableness test. But where the writer believes a particular imputation to be true, claims of reasonableness should not be rejected simply because the writer was careless as to whether that imputation is conveyed. Consider the journalist who decides not to give full vent to her true feelings. Surely she should not be penalised if she was not overly caring as to whether the full strength of her beliefs are unintentionally conveyed.

Failure to seek a response from the defamed

Bongiorno also considered Bolt and his paper unreasonable in that they offered no evidence of having sought a response from the plaintiff prior to publication. As Bongiorno comments, the requirement that this is done is not surprising:

> *Lange* qualified privilege permits defamatory material, even grossly defamatory material to be published about a plaintiff … That the person about whom the material is published be given an opportunity to confront that material and respond if he or she wishes is not a counsel of perfection. It is a necessary ingredient of the condition of reasonableness which the law places upon the privilege.[44]

I suggest that this should not always be so. The law already differentiates between statements of fact and those of opinion, granting additional protection to the latter. This policy should be extended to the [220] application of *Lange* qualified privilege.

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[44] *Popovic v Herald and Weekly Times Ltd* [2002] VSC 174 (unreported, Bongiorno J, 21 May 2002) [61].

Popovic provides an illustration of why this is the case. It is worth considering the character of Bolt's article and the defamatory imputation giving rise to such sizeable damages. Bolt set out various facts relating to the plaintiff's conduct, facts he presumably believed to be true (there is no indication to the contrary) and based on those facts imputed, according to the Court, that the plaintiff should be dismissed. Normally in such a case the commentator will be protected by one of the various Australian defences relating to opinion on matters of public interest.[45] For instance, the common law defence of fair comment will apply to statements of opinion, recognisable as such, on a matter of public interest, based on facts that are true or privileged and stated or indicated, and which is honestly held, objectively fair[46] and not actuated or distorted by malice.[47]

There was no finding against Bolt of malice.[48] Probably his comment defence failed first because the facts he was commenting on were not true, and secondly because the imputation conveyed was not his honest opinion. These are the two reasons why a comment defence is most likely to fail someone who in good faith expresses opinions on the judiciary: they unintentionally overstate their criticism or they base their opinion on an unreliable factual record.

Popovic renders it most unlikely that such commentators will be able to use *Lange*. First, if they are *bona fide* then they will have assumed their opinions defensible as comment, rendering *Lange* qualified privilege surplus. Secondly, as Bolt put it in his testimony:

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[45] *Defamation Act 1974* (NSW) ss 32–4 (defence of comment): *Defamation Act 1889* (Qld) s 14(1); *Defamation Act 1957* (Tas) s 14. The common law of fair comment operates in the ACT, Northern Territory, South Australia, Victoria and Western Australia. Western Australia and the Northern Territory also have a statutory defence: *Criminal Code* (WA) s 355, *Defamation Act* (NT) s 6A.

[46] The test of objective fairness asks whether any fair minded person could honestly (as opposed to correctly or reasonably) express that opinion on the proven facts: *Rocca v Manhire* (1992) 57 SASR 224, 229.

[47] For a fuller explanation of the common law defence of fair comment, as well as the other Australian defences relating to comment and honest opinion, see Michael Gillooly, *The Law of Defamation in Australia and New Zealand* (1998) ch 9.

[48] The jury established that neither defendant was actuated by malice in publishing the article: *Popovic v Herald and Weekly Times Ltd* [2002] VSC 174 (unreported, Bongiorno J, 21 May 2002) [6].

> [T]here is a view by, as I understand, held by many judges and magistrates in all the time I have known, that you don't ask them to account for what they just did in court. You don't go behind the scenes and say 'Hey, why did you do that?'[49]

This leads to the second perverse result of *Popovic*: *Lange* becomes more useful to the writer who either doubts the facts being commented on, or who foresees that they will convey criticism they neither intend nor believe in. Only those writers are likely to seek a judicial response, doing so perhaps cynically so as to meet *Lange's* reasonableness requirements, even though in fact their decision to publish in the face of their concerns puts their reasonableness in question.

Conclusion: investigative journalism v the 'opinion piece'

The television program that gave rise to *Lange* was an instance of investigative journalism.[50] *Lange* arises from the fallibility of factual reporting: that the most skilled and well intentioned journalism will occasionally result in facts being published that cannot be substantiated in court. The importance of discussion on government and politics has required that defamation's chilling effect be ameliorated in those areas of expression.

[221] It is a reasonable ethical expectation of journalists that, before publishing defamatory factual allegations, they should seek a response from the defamed.[51] This expectation goes beyond the law's requirements: it applies however preponderant the evidence supporting the allegation. Where the media doubt their ability to prove the truth of factual allegations in court, they may be sufficiently emboldened by *Lange* to publish. In such cases it would be doubly unconscionable for them not to first put the allegation to the person defamed. Thus when it comes to investigative journalism the *Lange* 'right of reply' is well founded.

In other circumstances, there is no ethical expectation that a response will be sought. Film and literature reviews are just two examples. Another is the genre of polemic legal commentary, whether academic or journalistic. Bolt's article fell into this

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[49] Ibid [54].

[50] *Four Corners*, Australian Broadcasting Corporation.

[51] See, for instance, the Australian Journalists' Association's *Code of Ethics*, cl 1: 'Do your utmost to give a fair opportunity for reply'.

category. As Bongiorno J put it, it was an 'opinion piece'.[52] That special treatment should be extended to legal commentators can be premised on more than our cultural and ethical expectations. The strong and clear policy reasons why the law extends additional protection to expressions of opinion apply *a fortiori* to opinions on an issue of such public importance as the performance of the judiciary.

A solution requires first that criticism of the judiciary be unambiguously brought within the sphere of discussion of government for the purposes of *Lange*. Secondly, statements of opinion on government which would normally be defensible as comment but for the fact they are not honestly held, and/or are not based on true or privileged facts, should be excluded from the requirement that a response be sought and published, provided the defence can show:

(1) that the statement of opinion appears as based on facts the defendant had reasonable grounds for believing to be true, and which facts the defendant took proper steps, so far as reasonably open, to verify, and which facts the defendant did not believe to be untrue; and
(2) in the case of statements of opinion that impute a meaning the defendant does not believe to be true, that the imputation was unintentional and the defendant was not careless as to whether it was imputed.[53]

Lange has no role is protecting journalists who are generally indifferent as to truth or imputed meaning. However, just as the best of investigative journalism can go wrong, so too can the most *bona fide* legal polemic, whether through use of unreliable factual records, or through the imprecision of communication. It is in those circumstances that *Lange* should operate, and the requirement that the judge being criticised should be asked for a response should not be allowed to render *Lange* qualified privilege a hollow defence.

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[52] *Popovic v Herald and Weekly Times Ltd* [2002] VSC 174 (unreported, Bongiorno J, 21 May 2002) [63].
[53] Michael Chesterman has suggested an alternative solution, namely extending the comment defences to cases where the commentator honestly believes, on reasonable grounds, the comment's factual substratum to be true: Chesterman, above n 12, 148. I suggest that my proposal for a different judicial application of the *Lange* reasonableness test is more easily achieved than extensive legislative reform together with such a fundamental reappraisal of the common law defence of fair comment.