

AUSTRALIAN DEFAMATION UPDATE
DEFAMATION LAW REFORM IN NEW SOUTH WALES (AGAIN)

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Introduction

[113] Australian media outlets are increasingly national in reach and focus. Newsagents across the nation stock copies of the daily newspapers of each major capital city. Concentration of ownership and reliance on wire services means that the same content finds its way into different titles in different places. With rare exceptions, the same programs are broadcast in the same time slots on television stations around the country. Serious radio news and analysis and many talk-back programs are networked on a range of stations in different states and territories. Defamation, when it occurs, is thus often multi-jurisdictional. Reputational damage may not be confined within the boundaries of any one state or territory.

At the same time, pay television and the Internet have led to an explosion in the availability of global news and other information. The online services of international media outlets have become an important source of information for Australians. It has been reported that in the days leading up to the outbreak of hostilities in Iraq, for example, more Australians turned for political commentary to the UK site Guardian Unlimited and the site of American commentator Michael Moore than to any comparable Australian site.² When global media outlets and foreign online content providers defame persons with a reputation in Australia, they may find themselves [114] held to account in Australian courts, according to Australian standards.³

The heightened potential for multi-jurisdictional defamation and claims for reputational damage in multiple jurisdictions makes the need for Australia to develop uniform national defamation laws more urgent than ever. It is thus somewhat disheartening that New South Wales has elected to go it alone with defamation law reforms — again — reforms that will complicate further many defamation actions

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² 'Australians head overseas for politics web sites', *ZDNet Australia*, 21 March 2003, <<http://www.zdnet.com.au>>.

³ *Dow Jones & Company Inc v Gutnick* (2002) 194 ALR 433.

involving national and international publications, and that will be likely to set back further the prospects of reaching national consensus.⁴

The *Defamation Amendment Act 2002* (NSW) (the amending Act) effects a number of changes to the *Defamation Act 1974* (NSW). The amendments came into force on 17 February 2003, but do not apply to any defamatory imputation published before that date or proceedings concerning any such imputation, whether commenced before or after that date.⁵

The amendments implement a number of the recommendations of the New South Wales Attorney General's Task Force on Defamation Law Reform, which reported in July 2002.⁶

New Objects Provision

The amending Act inserts a new s 3 into the *Defamation Act 1974* (NSW). It provides that the objects of the Act are:

- (a) to provide effective and appropriate remedies for persons whose reputations are harmed by the publication of defamatory matter,
- (b) to ensure that the law of defamation does not place unreasonable limits on the publication and discussion of matters of public interest and importance,
- (c) to promote speedy and non-litigious methods of resolving disputes concerning the publication of defamatory matter,
- (d) to promote the resolution of proceedings for defamation before the courts in a timely manner and avoid protracted litigation.

The objects provision is unique to New South Wales. Its purpose is to 'send a clear message that the Defamation Act should not be interpreted in a way which

⁴ The ACT has also recently reformed its defamation laws: *Civil Law (Wrongs) Act 2002* (ACT) Chapter 5; see Matt Collins, 'New defamation law for the ACT' (2001) 6 *Media & Arts Law Review* 335.

⁵ *Defamation Act 1974* (NSW) Sch 3, Pt 4.

⁶ Attorney General's Task Force on Defamation Law Reform, *Defamation Law — Proposals for Reform in NSW* (2002).

unreasonably limits discussion on matters of public importance, and that litigation should be considered to be a dispute resolution method of last resort.’⁷

Objects clauses may be employed by courts as an aid to statutory interpretation, but cannot be used to cut down an operative provision expressed in clear and unambiguous language.⁸ Where an operative provision is ambiguous, however, and one interpretation would frustrate or defeat the objects of the statute while another interpretation would not, the latter interpretation is to be preferred.⁹

As well as having a potential educative effect as a statement of values, the new objects clause may be of use in interpreting the new ‘offer to make amends’ provisions and the statutory qualified privilege defence in s 22 of the *Defamation Act 1974* (NSW), each of which is discussed below.

[115] **Offer to Make Amends**

The new Pt 2A of the *Defamation Act 1974* (NSW) establishes a complicated mechanism which has as its object to encourage the early settlement of defamation disputes.¹⁰ The centrepiece of the mechanism is s 9D, which enables a publisher to make an ‘offer to make amends’ to an aggrieved person; that is, a person about whom the publisher has published matter that carries or may carry a defamatory imputation.¹¹

The new defence operates in addition to the existing defence of offer of amends in Pt 3, Div 8 of the *Defamation Act 1974* (NSW). That defence applies where, at the time of publication, a publisher exercised reasonable care in relation to the matter in question and its publication, did not intend the matter in question to be defamatory of the plaintiff, and did not know of circumstances by reason of which the matter in question was or might be defamatory of the plaintiff.¹² An offer under Pt 3, Div 8

⁷ New South Wales, *Parliamentary Debates*, Legislative Council, 5 December 2002 (Ian Macdonald, Parliamentary Secretary). See also Attorney General’s Task Force on Defamation Law Reform, above n 6, 2.

⁸ *Wacando v Commonwealth* (1981) 148 CLR 1, 15–16 (Gibbs CJ), 23 (Mason J).

⁹ See, eg, *Tickner v Bropho* (1993) 114 ALR 409, 417–19 (Black CJ), 433–4 (Lockhart J).

¹⁰ *Defamation Act 1974* (NSW) s 9A.

¹¹ *Defamation Act 1974* (NSW) s 9B.

¹² *Defamation Act 1974* (NSW) ss 36–45.

must be accompanied by a statutory declaration specifying the facts relied upon by the offeror to show that the words were published innocently.¹³ Because it applies only in relation to 'innocent' publications, and because of other complexities in its operation, the offer of amends defence has proved to be of limited practical use.¹⁴

New Pt 2A seeks to create a more comprehensive and useful regime for resolving defamation disputes without recourse to litigation. Under Pt 2A, a publisher may make an offer to make amends, which may relate to the matter in question generally, or to a particular defamatory imputation that the publisher accepts that the matter in question carries (a qualified offer).¹⁵ There is no requirement that the publisher acted 'innocently' in relation to the matter in question. The offer to make amends provision will be available even where a publisher has acted intentionally, recklessly or negligently.

There are a number of formal requirements for an offer to make amends under Pt 2A:

- it must be in writing;¹⁶
- it must be readily identifiable as an offer to make amends under s 9D;¹⁷
- it must include an offer to publish, or join in publishing, a reasonable correction or reasonable apology (if appropriate in the circumstances);¹⁸
- if material containing the matter has been given to someone else by the publisher or with the publisher's knowledge, it must include an offer to take, or join in taking, reasonable steps to tell the other person that the matter is or may be defamatory of the aggrieved person;¹⁹
- it must state whether it is a qualified offer and, if so, set out the defamatory imputation in relation to which it is made;²⁰ and [116]
- it must include an offer to pay the expenses reasonably incurred by the aggrieved person before the offer was made and the expenses reasonably incurred by the aggrieved person in considering the offer.²¹

¹³ *Defamation Act 1974* (NSW) s 38.

¹⁴ See, eg, Attorney General's Task Force on Defamation Law Reform, above n 6, 4; Michael Gillooly, *The Law of Defamation in Australia and New Zealand* (1998) 254.

¹⁵ *Defamation Act 1974* (NSW) s 9D(2).

¹⁶ *Defamation Act 1974* (NSW) s 9D(3)(a).

¹⁷ *Defamation Act 1974* (NSW) s 9D(3)(b).

¹⁸ *Defamation Act 1974* (NSW) s 9D(3)(c), (d).

¹⁹ *Defamation Act 1974* (NSW) s 9D(3)(e).

An offer to make amends may include particulars of any correction or apology made, or action taken, before the date of the offer.²² It may also include an offer to pay compensation for any economic or non-economic loss of the aggrieved person.²³ Such an offer may be in the form of:

- an offer to pay a stated amount;
- an offer to pay an amount to be agreed between the parties or decided by a court in default of agreement;
- an offer to pay an amount decided by a court; or
- an offer to enter into an arbitration agreement within the meaning of the *Commercial Arbitration Act 1984* (NSW) and to pay the amount decided by the arbitrator or, if an arbitration agreement is not made, the amount decided by a court.²⁴

Strict time limits apply to the making of offers to make amends. An offer may not be made after the earlier of: 28 days after the day the aggrieved person gives the publisher notice in writing informing the publisher that the matter in question is or may be defamatory of the person; or the service by the publisher of a defence in an action brought by the aggrieved person against the publisher in relation to the matter in question.²⁵ A 'renewed offer' may, however, be made within 14 days after the withdrawal of an earlier offer or at such other time as may be agreed between the publisher and the aggrieved person, if it represents a genuine attempt by the publisher to address matters of concern raised by the aggrieved person about the withdrawn offer.²⁶ In other words, there is limited scope for genuine negotiations to continue beyond the strict time limits imposed on the making of offers.

Where material is published by two or more persons, any one publisher may make an offer to make amends without affecting the liability of any other publisher.²⁷

²⁰ *Defamation Act 1974* (NSW) s 9D(3)(f).

²¹ *Defamation Act 1974* (NSW) s 9D(3)(g).

²² *Defamation Act 1974* (NSW) s 9D(3)(h).

²³ *Defamation Act 1974* (NSW) s 9D(3)(i).

²⁴ *Defamation Act 1974* (NSW) s 9D(4).

²⁵ *Defamation Act 1974* (NSW) s 9D(5).

²⁶ *Defamation Act 1974* (NSW) s 9D(11).

²⁷ *Defamation Act 1974* (NSW) s 9D(6).

Offers to make amends may be withdrawn before they are accepted,²⁸ renewed in the same or different terms,²⁹ and are taken to have been made without prejudice, unless the offer otherwise provides.³⁰

Section 9F gives the courts broad powers to enforce offers to make amends which have been accepted by aggrieved persons. The powers are exercisable by the Supreme Court or any other court in which the aggrieved person has brought defamation proceedings against the publisher in respect of the matter in question.³¹ Such a court may:

- order the publisher to pay the aggrieved person the expenses incurred by the aggrieved person in accepting and performing the agreement made by acceptance of the offer (the amends agreement), [117] assessed on an indemnity or some other basis,³²
- decide the amount of compensation payable to the aggrieved person, if performance of the amends agreement requires the court to decide such an amount;³³ and
- decide any question arising out of what must be done to perform an amends agreement on application of either party.³⁴

Where an offer to make amends is accepted and the publisher performs the amends agreement, including paying any compensation under the agreement, the aggrieved person cannot begin or continue an action for defamation against the publisher in relation to the matter in question.³⁵

Under new s 9G, if an offer to make amends is made but not accepted, it is a defence for defamation against the publisher in relation to the matter if the publisher made the offer 'as soon as practicable after becoming aware that the matter is or may be defamatory', the publisher was at any time before the trial ready and willing to perform the terms of the offer on acceptance by the aggrieved person, and in all the

²⁸ *Defamation Act 1974* (NSW) s 9D(7).

²⁹ *Defamation Act 1974* (NSW) s 9D(8), (9).

³⁰ *Defamation Act 1974* (NSW) s 9D(12).

³¹ *Defamation Act 1974* (NSW) s 9F(4).

³² *Defamation Act 1974* (NSW) s 9F(1)(a), (3).

³³ *Defamation Act 1974* (NSW) s 9F(1)(b).

³⁴ *Defamation Act 1974* (NSW) s 9F(2).

³⁵ *Defamation Act 1974* (NSW) s 9F(5).

circumstances the offer was reasonable.³⁶ In determining whether an offer to make amends is reasonable, the court must have regard to any correction or apology published before any trial arising out of the matter in question, including the extent to which the correction or apology is brought to the attention of the audience of the matter in question, having regard to the prominence given to the correction or apology in comparison to the prominence given to the matter in question as published, and the period that elapses between publication of the matter in question and publication of the correction and apology.

Part 2A is very similar in form and effect to Pt 5.2 of the *Civil Law (Wrongs) Act 2002* (ACT). The ACT provisions were discussed and criticised in an earlier Australian defamation update.³⁷ Some of those criticisms were taken into account by the Attorney General's Task Force on Defamation Law Reform in formulating its recommendations for New South Wales. The New South Wales provisions, for example, permit a publisher to include an offer to pay compensation in an offer to make amends in cases where the matter in question does not impute criminal behaviour.³⁸ There is no provision in New South Wales equivalent to s 54 of the *Civil Law (Wrongs) Act 2002* (ACT), which refers in an obscure way to the right of an aggrieved person to apply to the Supreme Court for an order to vindicate his or her reputation.

One significant problem with the offer to make amends provisions in the ACT has, however, been imported into Pt 2A of the *Defamation Act 1974* (NSW). Under the s 9G defence, the court is required to have regard, for the purpose of assessing whether an offer to make amends is reasonable, to any correction or apology published before trial, including the extent to which the correction or apology was brought to the attention of the audience of the matter in question.³⁹ Where a correction or apology has been published after delivery of an offer to make amends, however, it cannot logically be probative of the reasonableness of the offer. In such a case, s 9G illogically requires the court to take into account a publisher's conduct [118] after the

³⁶ *Defamation Act 1974* (NSW) s 9G.

³⁷ Collins, above n 4.

³⁸ Cf *Civil Law (Wrongs) Act 2002* (ACT) s 49(3)(j).

³⁹ *Defamation Act 1974* (NSW) ss 9G(c), 9E(1).

rejection of an offer to make amends in assessing the reasonableness of the offer itself.⁴⁰

A further oddity in the drafting of the s 9G defence is the requirement that the offer must be made 'as soon as practicable' after the publisher becomes aware that the matter is or may be defamatory. Part 2A already imposes strict time limits on the making of offers to make amends. Is it intended that a publisher who makes such an offer within the time permitted but delays making that offer by a few days while obtaining legal advice might lose the benefit of the defence? What about a publisher who promptly publishes a reasonable correction and apology after having allegedly defamatory material brought to its attention, but delays delivering an offer to make amends until shortly before filing a defence in a defamation action commenced by the aggrieved person? It is submitted that a better approach would have been to treat the promptness with which an offer to make amends is made as a matter relevant to whether the publisher's conduct was reasonable in the circumstances, rather than as a separate element of the s 9G defence.

Corporations

By new s 8A of the *Defamation Act 1974* (NSW), corporations employing fewer than ten persons and with no subsidiaries within the meaning of the *Corporations Act 2001* (Cth)⁴¹ at the time of publication of defamatory matter have no cause of action for defamation in respect of the publication of any defamatory imputation conveyed by that matter.⁴² 'Corporation' is defined for the purposes of s 8A to include 'any corporation constituted by or under an Act or any other law (whether or not for a governmental or other public purpose).'⁴³ The definition will thus apply to most statutory authorities, incorporated associations⁴⁴ and trade unions.⁴⁵

⁴⁰ Collins, above n 4, 337.

⁴¹ *Defamation Act 1974* (NSW) s 8A(3). By s 46(a) of the *Corporations Act 2001* (Cth), a body corporate is a subsidiary of another body corporate if the other body controls the composition of the first body's board, is in a position to cast or control the casting of more than one-half of the maximum number of votes that might be cast at a general meeting of the first body, or holds more than one-half of the issued share capital of the first body (excluding any part of that issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital). By s 46(b), a subsidiary of a subsidiary of a body corporate is a subsidiary of the body corporate.

⁴² *Defamation Act 1974* (NSW) s 8A(1).

⁴³ *Defamation Act 1974* (NSW) s 8A(4).

⁴⁴ *Associations Incorporation Act 1984* (NSW) s 15.

⁴⁵ See, eg, *Workplace Relations Act 1996* (Cth) s 192; *Industrial Relations Act 1996* (NSW) s 222.

Section 8A does not prevent an individual who is a member of a corporation from asserting or enforcing a cause of action in defamation in respect of the publication of any matter by means of which a defamatory imputation about the individual is made where that same publication also makes a defamatory imputation about the corporation.⁴⁶

In the second reading speech on the Defamation Amendment Bill 2002 in the Legislative Council, the Parliamentary Secretary said that the policy underlying this reform is that a 'corporation's interest in reputation ... is purely financial' and that when 'corporate bodies are defamed, there are other possible actions available to them such as the torts of injurious falsehood or passing off, as well as remedies under the Commonwealth Trade Practices Act for misleading and deceptive or unconscionable conduct.'⁴⁷ He went on to say that unlike most individuals, corporations 'frequently have the ability to engage in counter advertising and to run effective publicity campaigns to protect their public profile'.⁴⁸

[119] The exemption for corporations with fewer than 10 employees and no subsidiaries came about as a result of an opposition amendment to the Defamation Amendment Bill 2002 (NSW) supported by minor parties in the legislative council. The amendment was opposed by the government in the legislative council. The argument against the exemption was that where a small corporation is defamed, it is likely that an individual closely associated with the corporation will be identifiably defamed as well. In such cases, so the argument goes, the appropriate person to bring a defamation action for the purpose of vindicating his or her honour and reputation will be the individual, rather than the corporation.⁴⁹

The exemption results in an artificial distinction between corporations with fewer than ten employees and no subsidiaries, and all other corporations. Why should a corporation with ten part-time employees be precluded from maintaining a cause of action in defamation, while a corporation with nine full-time employees is not? Why

⁴⁶ *Defamation Act 1974* (NSW) s 8(2).

⁴⁷ New South Wales, *Parliamentary Debates*, above n 7. See also Attorney General's Task Force on Defamation Law Reform, above n 6, 13.

⁴⁸ *Ibid.*

should a corporation that engages one hundred independent contractors but no employees be able to sue for defamation, while a corporation with ten employees and no independent contractors may not?

Other anomalies may also arise because of the requirement that the size of a corporation be assessed at the time of publication. Suppose a corporation has a fluctuating workforce of between a handful and several hundred casual workers. Suppose that a defamatory imputation is published about the corporation in a magazine that is read by a large number of people over a period of days, weeks or months. Because a separate cause of action potentially accrues each time the article is published,⁵⁰ the corporation's ability to sue for defamation would depend on the number of employees it had on each occasion when it is alleged the article was read. It may be cumbersome, difficult or impossible to establish which causes of action the corporation is entitled to assert and enforce.

Statutory Qualified Privilege Defence

A statutory defence of qualified privilege applies under s 22 of the *Defamation Act 1974* (NSW) as an alternative to the common law. The statutory defence operates in respect of publications where:

- (a) the recipient has an interest or apparent interest in having information on some subject,
- (b) the matter is published to the recipient in the course of giving to the recipient information on that subject, and
- (c) the conduct of the publisher in publishing that matter is reasonable in the circumstances...⁵¹

Unlike common law qualified privilege, defendants seeking to rely on the statutory defence do not have to prove a duty or interest in making the defamatory publication. The circumstances in which a defence of qualified privilege under s 22 can arise are thus considerably broader than those under the common law.

⁴⁹ New South Wales, *Parliamentary Debates*, above n 7; Attorney General's Task Force on Defamation Law Reform, above n 6, 14.

⁵⁰ See, eg, *Dow Jones & Company Inc v Gutnick* (2002) 194 ALR 433, [124] (Kirby J).

⁵¹ *Defamation Act 1974* (NSW) s 22(1).

Recipients have an apparent interest in having information on some subject only if the publisher believes on reasonable grounds that they have that interest.⁵²

The authorities applying the s 22 defence have treated a number of factors as being relevant in determining whether the conduct of a publisher was reasonable [120] in the circumstances, including whether the publisher has an honest belief in the truth of the publication⁵³ and whether the publisher took steps to ascertain the true facts before publishing.⁵⁴ The manner and extent of publication and the connection between the subject and the defamatory imputation are also relevant.⁵⁵ In some circumstances it might be reasonable to publish, without endorsement, a defamatory statement made by another person, even where the publisher does not have a genuine belief in the truth of the publication.⁵⁶ The nature and quality of the allegations is relevant: the more trenchant and potentially damaging the attack, the higher the standard expected of the publisher.⁵⁷ The onus of proving reasonableness is on the defendant.⁵⁸

The Attorney General's Task Force on Defamation Law Reform observed that although the purpose of s 22 was to broaden the circumstances in which a defence of qualified privilege would be available, the reasonableness requirement 'has been interpreted so restrictively by the NSW courts that in effect, it requires publishers to prove that they believed in the truth of what was published.'⁵⁹ The Task Force recommended the enactment of a statutory set of factors to be considered by a court in

⁵² *Defamation Act 1974* (NSW) s 22(2).

⁵³ *Morgan v John Fairfax & Sons Ltd [No 2]* (1991) 23 NSWLR 374, 385–6; *Wright v Australian Broadcasting Commission* [1977] 1 NSWLR 697, 712; *Kaiser v George Laurens (NSW) Pty Ltd* [1982] 1 NSWLR 294, 298; *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30, 44; *Austin v Mirror Newspapers Ltd* (1985) 3 NSWLR 354, 362.

⁵⁴ *Wright v Australian Broadcasting Commission* [1977] 1 NSWLR 697, 700–1, 712; *Austin v Mirror Newspapers Ltd* (1985) 3 NSWLR 354, 361; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 572–5.

⁵⁵ *Wright v Australian Broadcasting Commission* [1977] 1 NSWLR 697, 712.

⁵⁶ *Makim v John Fairfax & Sons Ltd* [1990] Aust Defamation Reports 50,075, 40,526 (circumstances analogous to a common law duty to pass on such statements without endorsement).

⁵⁷ *Austin v Mirror Newspapers Ltd* (1985) 3 NSWLR 354, 363.

⁵⁸ See, eg, *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749, 797; *Wright v Australian Broadcasting Commission* [1977] 1 NSWLR 697, 700; *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30, 44.

⁵⁹ Attorney General's Task Force on Defamation Law Reform, above n 6, 24, citing among others, Sally Walker, 'Lange v ABC: The High Court rethinks the 'constitutionalisation' of defamation law' (1998) 6 *Torts Law Journal* 9.

determining whether a publication is protected by the s 22 statutory qualified privilege defence.⁶⁰

The Task Force's recommendation has been implemented. The amending Act inserts a new s 22(2A) containing a non-exhaustive list of matters which courts may take into account in determining whether the conduct of a publisher was reasonable in the circumstances for the purposes of the statutory defence. The matters are:

- (a) the extent to which the matter published is of public concern,
- (b) the extent to which the matter published concerns the performance of the public functions or activities of the person,
- (c) the seriousness of any defamatory imputation carried by the matter published,
- (d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts,
- (e) whether it was necessary in the circumstances for the matter to be published expeditiously,
- (f) the sources of the information in the matter published and the integrity of those sources,
- (g) whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the publisher to obtain and publish a response from the person,
- (h) any other steps taken to verify the information in the matter published.

These factors appear to derive from and closely resemble the list of factors which Lord Nicholls said ought to be taken into account by a court for the purpose of the expanded common law qualified [121] privilege defence which has applied in England since the House of Lords decision in *Reynolds v Times Newspapers Ltd.*⁶¹ In that case Lord Nicholls, with whom Lords Cooke and Hobhouse expressed full agreement, held that the common law defence of qualified privilege should be available to the press in relation to a broad range of publications concerning subjects of public concern. In assessing whether the defence should protect the press in a particular case, Lord Nicholls held that the full range of circumstances should be taken into account, including:

⁶⁰ Attorney General's Task Force on Defamation Law Reform, above n 6, 29–30.

⁶¹ [2001] 2 AC 127.

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. 2. The nature of the information, and the extent to which the subject-matter is a matter of public concern. 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. 4. The steps taken to verify the information. 5. The status of the information. The allegation may have already been the subject of an investigation which commands respect. 6. The urgency of the matter. News is often a perishable commodity. 7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. 8. Whether the article contained the gist of the plaintiff's side of the story. 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. 10. The circumstances of the publication, including the timing.⁶²

Reynolds v Times Newspapers Ltd has not been followed in New South Wales.⁶³ It may be, however, that there is now no practical distinction between the circumstances in which the *Reynolds* qualified privilege defence is available in England and the circumstances in which the s 22 statutory qualified privilege defence is available in New South Wales.⁶⁴ Notably, it now seems that the s 22 defence can be invoked even where a publisher did not have objective grounds for believing in the truth of the matter published.⁶⁵

District Court Actions

The amending Act amends the *District Court Act 1973* (NSW) by inserting new s 76B, which materially replicates s 86 of the *Supreme Court Act 1970* (NSW). It provides that defamation actions in the District Court in which there are issues of fact are to be tried with a jury.⁶⁶ The court may order that 'all or any issue of fact' [sic] be tried without a jury if any prolonged examination of documents or scientific or local

⁶² *Ibid* 205.

⁶³ *John Fairfax & Sons Ltd v Vilo* (2001) 52 NSWLR 373; *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419, [1160], [1169].

⁶⁴ Cf *Skalkos v Assaf* (2002) Aust Torts Reports 81-644, [34].

⁶⁵ Attorney General's Task Force on Defamation Law Reform, above n 6, 29.

⁶⁶ *District Court Act 1973* (NSW) s 76B(1).

investigation is required and cannot conveniently be made with a jury, or all parties consent to the order.⁶⁷

The effect of new s 76B will be to ensure consistency as to the availability of juries in District and Supreme Court defamation trials.⁶⁸

[122] **Damages and Costs**

Under new s 48A, courts must, unless the interests of justice require otherwise, order costs of and incidental to defamation proceedings to be assessed on an indemnity basis if the court is satisfied that an unsuccessful defendant unreasonably failed to make a settlement offer or agree to a settlement offer proposed by the plaintiff, or if an unsuccessful plaintiff unreasonably failed to accept a settlement offer made by the defendant.⁶⁹ 'Settlement offer' is defined as 'any genuine offer to settle the proceedings made before the proceedings are determined and includes an offer to make amends (whether made before or after the proceedings are commenced).'⁷⁰

By new s 48A(1), courts in all cases may, in awarding costs, have regard to the way in which the parties conducted their cases, including any misuse of a party's superior financial position to hinder the early resolution of the proceedings), whether the costs in the proceedings may exceed the quantum of damages to be awarded, and such other matters as the court considers relevant. It was envisaged that indemnity costs might be ordered in cases where, for example, a property developer commenced a defamation action against individuals or community groups to silence their opposition to proposed developments, or where a wealthy plaintiff pursued procedural avenues for the purpose of intimidating a defendant into settling.⁷¹

Limitation Period

The amending Act amends the *Limitation Act 1969* (NSW) by inserting new s 14B which has the effect of reducing the limitation period for defamation actions to one

⁶⁷ *District Court Act 1973* (NSW) s 76B(2).

⁶⁸ New South Wales, *Parliamentary Debates*, above n 7.

⁶⁹ *Defamation Act 1974* (NSW) s 48A(2).

⁷⁰ *Defamation Act 1974* (NSW) s 48A(3).

⁷¹ New South Wales, *Parliamentary Debates*, above n 7.

year from the date on which the defamatory matter was published.⁷² The limitation period was previously six years. The new limitation period applies to causes of action accruing on and after 17 February 2003.⁷³ The previous limitation period continues to apply in respect of causes of action accruing before 17 February 2003, and in cases where a plaintiff sues in respect of a number of causes of action arising out of the publication of the same, or substantially the same, matter on separate occasions, and one or more of the causes of action accrued before 17 February 2003.⁷⁴

In cases where the new limitation period applies, the court has a discretion to extend the limitation period for such period as it determines, but not beyond three years from the date of publication.⁷⁵ An application to extend the limitation period may be made even though the limitation period has already expired.⁷⁶ The court may reduce the costs payable to a successful plaintiff in a defamation action on account of the expense to which the defendant has been put because the action was commenced outside the original limitation period.⁷⁷

As material is published for the purposes of defamation law at the time when it is comprehended by the reader, listener or observer,⁷⁸ time begins to run for the purposes of s 14B of the *Limitation Act 1969* (NSW) at the time when defamatory material is read, heard or seen, rather than at the time when it is written or spoken. Defamatory material may therefore continue to be actionable many years after the date it was first published in New South Wales, provided that it can be proved that it has been read, heard or seen no [123] more than one year before the commencement of proceedings.⁷⁹

⁷² *Limitation Act 1969* (NSW) s 14B(3).

⁷³ *Limitation Act 1969* (NSW) s 14B(1).

⁷⁴ *Limitation Act 1969* (NSW) s 14B(2).

⁷⁵ *Limitation Act 1969* (NSW) s 56A.

⁷⁶ *Limitation Act 1969* (NSW) s 56D.

⁷⁷ *Limitation Act 1969* (NSW) s 56C.

⁷⁸ See, eg *Dow Jones & Company Inc v Gutnick* (2002) 194 ALR 433, [26] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

⁷⁹ See also, *Duke of Brunswick v Harmer* (1849) 14 QB 185; 117 ER 75; *Loutchansky v Times Newspapers Ltd (No 2)* [2002] QB 783.

Other Matters

A number of reforms to defamation law previously foreshadowed by the New South Wales Government or recommended by the Attorney General's Task Force on Defamation Law Reform have not been implemented.

The amending Act does not impose any limitation on damages for non-economic loss in defamation actions. The Government had previously announced that it would limit such damages to \$350 000. The Task Force had recommended that damages for non-economic loss in defamation actions be capped by reference to the maximum award for non-economic losses in personal injury cases.⁸⁰

The amending Act does not extend the fair reports form of the defence of qualified privilege to the publication of reports of media conferences given or media releases issued by or on behalf of public officials or public authorities in their official capacities. An extension to that effect proposed by the New South Wales Government was rejected by the opposition and minor parties in the Legislative Council.⁸¹

Towards Uniformity?

The New South Wales Attorney General's Task Force on Defamation Law Reform recognised the desirability of uniform national defamation laws and acknowledged that the reforms it proposed could only have any direct impact on New South Wales law. The Task Force hoped that its proposals 'could form the basis for discussion with the states and territories, with a view to a further attempt to bring about national reform.'⁸²

By unilaterally reforming its defamation laws, however, the New South Wales Parliament has, regrettably, added significantly to the complexity of Australia's defamation laws and may well have set back the cause of national uniformity.

Even before the passage of the amending Act, New South Wales defamation law differed in significant respects from that in other Australian jurisdictions. New South

⁸⁰ Attorney General's Task Force on Defamation Law Reform, above n 6, 37.

⁸¹ Ibid 34.

⁸² Ibid 37.

Wales is the only Australian jurisdiction that makes the imputation the cause of action, rather than the matter by which the imputation is conveyed.⁸³ It is the only jurisdiction to have abolished exemplary damages in defamation actions.⁸⁴ It is the only jurisdiction to conduct split trials.⁸⁵ The statutory qualified privilege defence in s 22 and the contextual truth defence in s 16 of the *Defamation Act 1974* (NSW) are unique to New South Wales. The defence of justification has been differently defined in New South Wales than in each other State and Territory.⁸⁶

[124] The amending Act has led to further divergence between New South Wales defamation law and the defamation laws of the other states and territories. Most importantly, no other Australian jurisdiction has limited the right of corporations to sue for defamation. The limitation period for defamation actions is now lower in New South Wales than in most other Australian jurisdictions.⁸⁷ The new offer to make amends defence has a counterpart only in the ACT.⁸⁸

⁸³ *Defamation Act 1974* (NSW) s 9.

⁸⁴ *Defamation Act 1974* (NSW) s 46(3)(a).

⁸⁵ In New South Wales, by reason of s 7A of the *Defamation Act 1974* (NSW), the jury generally determines whether the matter complained of is reasonably capable of carrying the imputation pleaded by the plaintiff and, if it is, whether the imputation is reasonably capable of bearing a defamatory meaning. If required, the judge then determines, in a later hearing, whether any defence raised by the defendant has been established and the amount of damages, if any, that should be awarded to the plaintiff.

⁸⁶ By s 15 of the *Defamation Act 1974* (NSW), the defence applies only where a defamatory imputation is a matter of substantial truth and relates to a matter of 'public interest' or is published under qualified privilege. In Queensland and Tasmania, a defence of justification only succeeds where defamatory matter is true, and it is for the public benefit that the publication complained of should be made: *Defamation Act 1889* (Qld) s 15; *Defamation Act 1957* (Tas) s 15(b). In Victoria, South Australia, Western Australia and the Northern Territory, truth *simpliciter* is a defence. Truth *simpliciter* may also be a defence in the ACT, despite s 59 of the *Civil Law (Wrongs) Act 2002* (ACT): see Collins, above n 4, 336.

⁸⁷ In Victoria, Queensland and Tasmania, the limitation period is six years from the date when the cause of action accrued: *Limitation of Actions Act 1958* (Vic) s 5(1)(a); *Limitation of Actions Act 1974* (Qld) s 10(1)(a); *Limitation Act 1974* (Tas) s 4(1)(a). In South Australia, the limitation period is six years for libel but two years for slander: *Limitation of Actions Act 1936* (SA) ss 35(c), 37. In Western Australia, the limitation period is six years for most libels, two years for most forms of slander and twelve months for libels published in newspapers: *Limitation Act 1935* (WA) ss 38(1)(a)(ii), 38(1)(c)(vi); *Newspaper Libel and Registration Act 1884 (Amendment Act 1888)* (WA) s 5. In the ACT, the usual limitation period is one year from the date on which the material was first published: *Limitation Act 1985* (ACT) s 21B(1). A three year limitation period applies in the Northern Territory from the date the cause of action first accrues: *Limitation Act 1981* (NT) s 12(1)(b).

⁸⁸ There is an offer of amends procedure in Tasmania, but it applies only to 'unintentional' defamation: *Defamation Act 1957* (Tas) s 17.

In *John Pfeiffer Pty Ltd v Rogerson*, the High Court reformed the common law choice of law rules for torts.⁸⁹ As a result of that decision, the *lex loci delicti* (law of the place of the tort) is the governing law in relation to all torts occurring in Australia which have an interstate element.⁹⁰ The *lex loci delicti* governs all substantive issues; that is, issues bearing upon 'the existence, extent or enforceability of remedies, rights and obligations'.⁹¹ The *lex fori* (law of the forum) governs only procedural matters; that is, matters concerning the mode or conduct of court proceedings.⁹²

One consequence of the decision in *John Pfeiffer Pty Ltd v Rogerson* is that any divergence in the substantive defamation laws of the various states and territories potentially complicates defamation actions involving matter published in more than one State or Territory. The reforms to New South Wales defamation law discussed in this update will have a complicating effect in at least four circumstances.

First, new s 8A of the *Defamation Act 1974* (NSW), which extinguishes the right of most corporations to assert or enforce a cause of action in defamation, is a substantive law. It will therefore operate in relation to causes of action in defamation accruing in New South Wales, but not the other Australian states and territories. The cause of action for defamation accrues in the place where defamatory matter is published; that is, read, heard or seen.⁹³

Suppose, for example, a major Australian corporation is defamed in a national television program broadcast from Sydney. In such a case, causes of action accrue in each place where the program is seen.⁹⁴ [125] If the corporation sues for defamation in New South Wales, s 8A will not prevent the corporation from recovering damages for publication of the program in each state and territory other than New South Wales.

⁸⁹ (2000) 203 CLR 503. See generally Matt Collins, 'Choice of law in defamation after *John Pfeiffer Pty Ltd v Rogerson*' (2001) 6 *Media & Arts Law Review* 171.

⁹⁰ (2000) 203 CLR 503, [87] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), [157] (Kirby J). The same test now applies to torts with an international element: *Regie National des Usines Renault SA v Zhang* (2002) 187 ALR 1.

⁹¹ (2000) 203 CLR 503, [102] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); see also [161] (Kirby J), [193]–[200] (Callinan J).

⁹² *Ibid* [99] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), [161] (Kirby J), [192] (Callinan J).

⁹³ See, eg, *Dow Jones & Company Inc v Gutnick* (2002) 194 ALR 433, [44], [48] (Gleeson CJ, McHugh, Gummow and Hayne JJ), [124] (Kirby J).

⁹⁴ See, eg, *Gorton v Australian Broadcasting Commission* (1973) 1 ACTR 6, 7.

If the corporation sues for defamation in any other Australian state or territory, it may claim damages in respect of publication in each state and territory other than New South Wales. Section 8A will therefore add a new level of complexity in defamation actions brought by corporations in such cases.

Secondly, limitation periods are substantive, rather than procedural.⁹⁵ The new limitation period for defamation actions in s 14B of the *Limitation Act 1969* (NSW) will thus only apply to causes of action accruing in New South Wales. Suppose, for example, a person wishes to sue in New South Wales in relation to a defamatory article that was published in a national newspaper five years ago. The limitation period for causes of action arising out of the article will have expired in New South Wales, Western Australia, the Australian Capital Territory and the Northern Territory, but not in Victoria, Queensland, Tasmania and South Australia.⁹⁶ In such a case, s 14B would not prevent the person from commencing and prosecuting a defamation action in New South Wales in relation to publication of the article occurring in Victoria, Queensland, Tasmania and South Australia. Section 14B would operate only in relation to claims made in respect of publication of the defamatory matter in New South Wales.

Thirdly, it is likely that the new substantive defence in s 9G of the *Defamation Act 1974* (NSW), which potentially applies where a plaintiff does not accept a reasonable offer to make amends, will also be limited in its application to causes of action accruing in New South Wales. Suppose a plaintiff sues in New South Wales in respect of a defamatory article appearing in a national magazine. Suppose further that the publisher promptly makes an offer to make amends that is reasonable in all the circumstances and remains ready and willing at all times to perform the terms of the offer. Suppose finally that the plaintiff rejects the offer. In such a case, the publisher may have a defence under s 9G of the *Defamation Act 1974* (NSW) in relation to

⁹⁵ (2000) 203 CLR 503, [100] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), [161] (Kirby J), [192]–[193] (Callinan J). This brought the common law into line with legislative provisions enacted to overcome the decision in *Stevens v Head* (1993) 176 CLR 433, namely the *Choice of Law (Limitation Periods) Act 1993* (NSW) s 5; *Choice of Law (Limitation Periods) Act 1993* (Vic) s 5; *Choice of Law (Limitation Periods) Act 1996* (Qld) s 5; *Limitation of Actions Act 1936* (SA) s 38A; *Choice of Law (Limitation Periods) Act 1994* (WA) s 5; *Limitation Act 1974* (Tas) s 32C; *Limitation Act 1985* (ACT) s 56; *Choice of Law (Limitation Periods) Act 1994* (NT) s 5.

⁹⁶ See above n 87.

publication of the article in New South Wales. Section 9G will not, however, afford any protection to the publisher in relation to publication of the article in the other states and territories of Australia. This limitation may severely restrict the utility of the new offer to make amends regime in cases involving national publications.

Finally, similar considerations will limit the utility of the expanded statutory qualified privilege defence in s 22 of the *Defamation Act 1974* (NSW). That defence can apply only to defamatory matter published in New South Wales. Where a plaintiff seeks damages in relation to publication occurring in another state or territory, the defendant will be restricted to relying on defences available under the law of that place in respect of publication occurring there.

The reforms to New South Wales defamation law discussed in this update are aimed at providing effective remedies to defamed persons, removing unreasonable limits on the publication and discussion of matters of public interest and importance, promoting speedy and non-litigious means of resolving disputes, and avoiding [126] protracted litigation. Because the reforms are necessarily confined to the law of New South Wales, they will not be likely to achieve any of those objectives in cases involving defamatory matter published in more than one Australian state or territory. To the contrary, in such cases, the New South Wales reforms complicate the national defamation law landscape in a way which is likely to retard the resolution of defamation disputes and prolong litigation.

What is needed in Australia is a further concerted attempt to unify national defamation laws, rather than endless tweaking of the laws of individual states and territories. Laudable though some of the New South Wales reforms are, they do little to advance that cause.