

## DEFAMATION ACTIONS AND AUSTRALIAN POLITICS

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### I INTRODUCTION

In recent years, politicians have been frequent participants in Australian defamation litigation.<sup>1</sup> Attorney-General Christian Porter's recent claim against the Australian Broadcasting Corporation ('ABC') and journalist Louise Milligan<sup>2</sup> is a notable example of the weaponisation of defamation in Australian politics.

This brief article reviews prominent examples of where politicians have commenced or threatened defamation proceedings. The focus is on cases in which politicians are plaintiffs, although some cases mentioned below also involve politician defendants.<sup>3</sup> The article considers whether the trend of politicians litigating defamation is desirable, and how it will be affected by the amendment of the Uniform Defamation Acts<sup>4</sup> once the Model Defamation Amendment Provisions 2020<sup>5</sup> are implemented. It begins by considering the value of politicians' reputations, which defamation law may protect.

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1 The phenomenon is not just a recent one. In the 20<sup>th</sup> century, a number of prominent Australian politicians, including Bob Hawke and Joh Bjelke-Petersen, were parties to defamation litigation: see, eg, *Hawke v Tamworth Newspaper Co Ltd* [1983] 1 NSWLR 699; *Bjelke-Petersen v Warburton* [1987] 2 Qd R 465.

2 '*Christian Porter v ABC*', *Federal Circuit Court* (Web Page, 1 June 2021)

<<https://www.fedcourt.gov.au/services/access-to-files-and-transcripts/online-files/porter-v-abc>>.

3 *Leyonhjelm v Hanson-Young* (2021) 387 ALR 384; *Palmer v Turnbull* [2019] 1 Qd R 286. See also *Rann v Olsen* (2000) 76 SASR 450; *Crosby v Kelly* (2012) 203 FCR 451; *Faruqi v Latham* [2018] FCA 1328.

4 *Civil Law (Wrongs) Act 2002* (ACT); *Defamation Act 2006* (NT); *Defamation Act 2005* (Qld); *Defamation Act 2005* (SA); *Defamation Act 2005* (Tas); *Defamation Act 2005* (Vic); *Defamation Act 2005* (WA) ('Uniform Defamation Acts').

5 Explanatory Note, Model Defamation Amendment Provisions 2020

<[https://www.pcc.gov.au/uniform/2020/Model\\_Defamation\\_Amendment\\_Provisions\\_2020.pdf](https://www.pcc.gov.au/uniform/2020/Model_Defamation_Amendment_Provisions_2020.pdf)>.

## II POLITICIANS' REPUTATIONS

'Reputation' is a multi-faceted concept at the heart of defamation law.<sup>6</sup> The value of a person's reputation is bound up with their honour and dignity,<sup>7</sup> and their standing in society.<sup>8</sup> Australian defamation law protects the value of a person's interest in their reputation by providing that publication of matter about a person that damages their reputation, is actionable.<sup>9</sup> If reputation is what society generally thinks of a person,<sup>10</sup> then every one of us who is part of the community has a reputation. Politicians are no different.

Politicians' reputations may be different to those of 'regular people' in some respects. First, a politician derives an income from their reputation in a way that many (but not all) individuals do not. While impact on a person's employment may sound in special damages that would be unavailable to a person whose employment was not affected by defamation,<sup>11</sup> the High Court has confirmed that the general test for defamation applies to professional and non-professional reputations alike.<sup>12</sup>

Second, politicians' reputations are bound up with their work in political institutions. We judge politicians by their ability to deliver on promises, their integrity, and how their expressed values align with their lived values.<sup>13</sup> Our system of representative government depends on politicians' accountability to the public. Thus, some criticism of public officials is to be expected or even welcomed. Arguably, the public is less likely to take a derogatory comment about a politician to heart; people understand that politicians will be criticised no matter what.<sup>14</sup>

However, insofar that Australian law protects freedom of speech in order to keep leaders accountable, its focus is on the subject matter rather than the person.<sup>15</sup> The freedom of political communication implied in the *Commonwealth Constitution* is narrowly confined to certain political speech. The so-called '*Lange*

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6 Eric Barendt, 'What Is the Point of Libel Law' (1999) 52(1) *Current Legal Problems* 110, 112; David Rolph, *Reputation, Celebrity and Defamation Law* (Routledge, 2016) 3–6. The following passage adapts ideas considered in Michael Douglas, 'Defamation as an Economic Tort' in John Eldridge, Michael Douglas and Claudia Carr (eds), *Economic Torts and Economic Wrongs* (Hart Publishing, 2021).

7 Robert C Post, 'The Social Foundations of Defamation Law: Reputation and the *Constitution*' (1986) 74(3) *California Law Review* 691, 693; *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 201 (Lord Nicholls).

8 *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460, 468 [8] (French CJ, Gummow, Kiefel and Bell JJ).

9 *Ibid* 466 [1].

10 Or reputation is what 'right-thinking members of society generally' think of a person: *Sim v Stretch* [1936] 2 All ER 1237, 1240 (Lord Atkin).

11 See, eg, *Rayney v Western Australia [No 9]* [2017] WASC 367.

12 *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460.

13 See, eg, *Jensen v Nationwide News Pty Ltd [No 13]* [2019] WASC 451: a conservative politician was defamed by an imputation that he was devoid of the family values expected of a Member of Parliament.

14 See *Gorton v Australian Broadcasting Commission* (1973) 22 FLR 181, 189 (Fox J).

15 Patricia Loughlan, Barbara McDonald and Robert van Krieken, *Celebrity and the Law* (Federation Press, 2010) 75.

qualified privilege'<sup>16</sup> underpinned by that freedom is narrow in its operation,<sup>17</sup> as some of the cases below illustrate.

Third, putting aside their financial incentives, politicians may have a stronger incentive to sue over defamation than other would-be plaintiffs. Perception is critical to a politician maintaining their standing in the system and grip on power. Several Australian politicians have resigned in the wake of allegations of impropriety.<sup>18</sup> Although truth provides the foundation of a justification defence for a person publishing an allegation of impropriety,<sup>19</sup> the mere threat of defamation litigation may be enough to sway some to believe that any allegations were unfounded. The mention of defamation by a politician can signal to the electorate that damaging publications are merely 'fake news'. The frequency of defamation litigation involving politicians shows that many perceive defamation law as providing a powerful political weapon.<sup>20</sup>

### III CASES WON BY POLITICIANS

There are numerous examples of politicians succeeding in defamation proceedings in Australian courts.<sup>21</sup> Some of these cases have developed the law.<sup>22</sup> *Uren v John Fairfax & Sons Pty Ltd* ('*Uren*'),<sup>23</sup> for example, was a case significant enough to warrant inclusion in Rolph's *Landmark Cases in Defamation Law*.<sup>24</sup> Tom Uren, a federal Labor member, sued for publications concerning his relationship with Ivan Skripov, a 'Red Spy' (ie, KGB officer) in the midst of the Cold War. Liability was agreed; the jury looked at the assessment of quantum of damages. The High Court departed from previous English authority<sup>25</sup> concerning limits on exemplary damages, favouring the Australian position that allowed punitive awards for a defendant's contumelious disregard for the plaintiff's rights. The case was long before the *Australia Acts*; the High Court's decision was

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16 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*').

17 See generally David Rolph, *Defamation Law* (Thomas Reuters, 2015) 237–41.

18 For example, not so long ago, a NSW Premier resigned over some wine: 'NSW Premier Barry O'Farrell to Resign over "Massive Memory Fail" at ICAC', *ABC News* (online, 16 April 2014) <<https://www.abc.net.au/news/2014-04-16/nsw-premier-barry-ofarrell-to-resign-over-icac-grange-wine/5393478>>.

19 See, eg, *Defamation Act 2005* (NSW) s 25.

20 Erwin Chemerinsky, 'Keynote Address: Fake News, Weaponized Defamation and the First Amendment' (2018) 47(2) *Southwestern Law Review* 291.

21 As recounted in *Hanson-Young v Leyonhjelm (No 4)* [2019] FCA 981, [77]: *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 ('*Uren*'); *Gorton v Australian Broadcasting Commission* (1973) 22 FLR 181; *Costello v Random House Australia Pty Ltd* (1999) 137 ACTR 1; *Conlon v Advertiser-News Weekend Publishing Co Pty Ltd* (2008) 256 LSJS 457; *Hockey v Fairfax Media Publications Pty Ltd* (2015) 237 FCR 33 ('*Hockey*'); *Mirabella v Price* [2018] VCC 650. Politicians are not universally successful as defamation plaintiffs: see, eg, *Kennett v Nationwide News Pty Ltd* (Supreme Court of Victoria, Ashley J, 11 March 1999).

22 Although *Lange* is a notable 'political' example on point, Mr Lange was a politician from New Zealand.

23 (1966) 117 CLR 118.

24 Mark Lunney, '*Uren v John Fairfax & Sons Pty Ltd* (1966)' in David Rolph (ed), *Landmark Cases in Defamation Law* (Hart, 2019) 151.

25 *Rookes v Barnard* [1964] AC 1129.

followed by a further appeal to the Privy Council. The Privy Council affirmed that it was open to the High Court to develop Australian defamation law in a manner divergent to the development in England and Wales, and that the High Court did not err in its reasoning on exemplary damages.<sup>26</sup> These days, exemplary damages are not available for defamation in Australian law,<sup>27</sup> which has continued to depart from English law with respect to defamation.<sup>28</sup>

*Uren* involved '[a]n infamous personal attack, which the jury could think was nothing but a concoction, [which] was featured upon the front page of the defendant's paper under banner headlines and advertised on television for no purpose other than to induce people to buy the paper'.<sup>29</sup> Another such headline was a focus of Joe Hockey's claim against the publisher of *The Sydney Morning Herald* ('SMH'), *The Age*, and *The Canberra Times*. In *Hockey v Fairfax Media Publications Pty Ltd* ('Hockey'),<sup>30</sup> a federal Liberal member and then-Treasurer sued over publications concerning Hockey's participation in the 'North Sydney Forum', a group that reportedly provided 'privileged access' to events featuring the Treasurer in return for donations to the Liberal Party.<sup>31</sup>

The litigation was representative of a very different era to that of *Uren*'s claim. In *Hockey*, the Federal Court considered the meaning of tweets linking to online newspaper articles. It did so 10 years after the introduction of the Uniform Defamation Acts. Interestingly, the Court held that the articles themselves were not defamatory, however, the headline – 'Treasurer for Sale' – was defamatory when read in isolation. The Court held that an ordinary, reasonable Twitter user would have seen the tweet of that headline and not necessarily read the linked article, in the same way that a person reading a billboard advertising that headline would not necessarily read the article to which it referred. The tweet linking the article was a defamatory publication, but the article itself – containing the same headline – was not. Hockey lost on the article but succeeded on the tweets; the outcome was not a clear vindication of his reputation.<sup>32</sup> The 'Treasurer for Sale' headline may have 'induced people to buy the paper', but it was the publishers' downfall.

The motives of the journalists behind the story were also considered. The publishers relied on varieties of qualified privilege, which turned on reasonableness and an absence of malice. It was held that the publishers had 'not made out their claims of qualified privilege and ... even if otherwise available, these defences would have been defeated in the case of the SMH articles and the SMH poster by the malice actuating their publication'.<sup>33</sup> There was bad blood between Hockey and Fairfax staff. It was held, '[i]f it was not for his desire to get

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26 *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221.

27 See, eg, *Defamation Act 2005* (NSW) s 37.

28 Especially since the enactment of the *Defamation Act 2013* (UK); see also Matthew Collins, *Collins on Defamation* (Oxford University Press, 2014) 16–7.

29 *Uren* (1966) 117 CLR 118, 142 (Menzies J).

30 (2015) 237 FCR 33.

31 *Ibid* 37 [2] (White J).

32 As demonstrated by the costs order, where Hockey was awarded only a fraction of his costs on a party-party basis: *Hockey v Fairfax Media Publications Pty Ltd* (No 2) (2015) 237 FCR 127.

33 *Hockey* (2015) 237 FCR 33, 38 [10] (White J).

back at Mr Hockey, I consider it probable that he would have selected a less provocative headline'.<sup>34</sup> Ultimately, the issue of malice was marginal; but it could have been otherwise had Hockey succeeded on the claim with respect to the substantive article.

Arguably, *Hockey* highlights a strength of Australian defamation law: it provides an important check on media organisations which, if unconstrained, may abandon any pretence of neutrality and wield their influence to achieve political goals.<sup>35</sup> Defamation law is at its most potent when a publisher strays from the truth for political ends. A recent example of that: *Leyonhjelm v Hanson-Young*.<sup>36</sup>

Greens Senator Sarah Hanson-Young is at the opposite end of the political spectrum to the Liberal Democrat and former Senator, David Leyonhjelm. On 13 June 2018, during the hearing of a Senate motion, the then-senators directed interjections at one another, neither of which were recorded in Hansard. It was agreed that Leyonhjelm said 'you should stop shagging men, Sarah',<sup>37</sup> apparently because he believed Hanson-Young had said 'all men are rapists' or something to that effect.<sup>38</sup> The nastiness escalated, at least on the part of Leyonhjelm, who then made further comments about Hanson-Young in a media release and in media interviews. Hanson-Young commenced defamation proceedings in the Federal Court relying on the publications made outside of Parliament.

The matter came to trial after some interlocutory squabbles,<sup>39</sup> by which point Leyonhjelm ran some interesting defences.<sup>40</sup> Notably, he averred the imputations particularised by Hanson-Young as being carried by the matter while arguing that they were not defamatory.<sup>41</sup> That argument relied on the view that 'robust' exchange of criticism between political opponents is just part of politics. The trial judge, White J, quoted<sup>42</sup> from another High Court case involving Tom Uren: *Australian Consolidated Press Ltd v Uren*.<sup>43</sup> There, Windeyer J said, 'a man who chooses to enter the arena of politics must expect to suffer hard words at times'.<sup>44</sup> Menzies J said, '[p]olitical differences not infrequently find public expression in unrefined figures of speech and language'.<sup>45</sup> Yet White J rejected Leyonhjelm's argument, holding that while 'it is commonplace in political discourse for

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34 Ibid 108 [411].

35 The Government's response to Kevin Rudd's petition for a Royal Commission into media diversity and responsibility shows that perhaps defamation law's check on media power is warranted: see Andrew Tillett, 'Rudd Revels in Prosecution of Murdoch', *Financial Review* (online, 19 February 2021) <<https://www.afr.com/politics/federal/rudd-revels-in-prosecution-of-murdoch-20210219-p57426>>.

36 (2021) 387 ALR 384.

37 Ibid 386 [4] (Rares J).

38 Ibid 386 [5].

39 Including a failed application to strike out the statement of claim: *Hanson-Young v Leyonhjelm* [2018] FCA 1688.

40 One not considered here for the sake of space, which united the otherwise split Full Court of the Federal Court, was parliamentary privilege. The Full Court agreed the defence was not available: *Leyonhjelm v Hanson-Young* (2021) 387 ALR 384.

41 *Hanson-Young v Leyonhjelm (No 4)* [2019] FCA 1981, [8] (White J).

42 Ibid [71].

43 (1966) 117 CLR 185.

44 Ibid 210.

45 Ibid 195.

denigratory remarks to be made by one politician about another', a politician's reputation may still be diminished in the minds of ordinary, reasonable people.<sup>46</sup> Thus, the law still protects politicians' reputations.

Defences of justification<sup>47</sup> and qualified privilege<sup>48</sup> also failed. As to the latter, the focus was on the statutory defence available under the Uniform Defamation Acts.<sup>49</sup> The defence fails unless the conduct of the defendant in publishing the matter was reasonable in the circumstances.<sup>50</sup> The former Senator had not acted reasonably because he could not state with any accuracy the words spoken by Hanson-Young on which he relied in subsequently criticising her.<sup>51</sup> The Court thus punished Leyonhjelm for making a strawman out of Hanson-Young's position.

There are other forms of qualified privilege at common law, as adapted to the *Commonwealth Constitution* via the hybrid defence from *Lange v Australian Broadcasting Corporation* ('*Lange*').<sup>52</sup> Those cousin defences are defeated by malice on the part of the publisher.<sup>53</sup> In obiter, White J opined that Leyonhjelm had made the publications maliciously, in that he had published them to a mass audience with the intention of shaming his political opponent,<sup>54</sup> going 'well beyond what was necessary for an appropriate response to the applicant's statement in the Senate'.<sup>55</sup> So if Leyonhjelm were to otherwise have had a qualified privilege defence at common law, or with appeal to *Lange*, he would have failed.

On appeal, the issues included whether the trial judge was correct to reject the statutory qualified privilege defence and to hold that Leyonhjelm was actuated by malice.<sup>56</sup> These issues divided the Court. In dissent, Rares J sided with Leyonhjelm. In separate sets of reasons, Abraham J and Wigney J disagreed. Their findings on reasonableness were expressed in stark terms. Wigney J's dicta are worth repeating at length:

Simply put, Mr Leyonhjelm launched a full-scale personal attack on Senator Hanson-Young's character and integrity on the most flimsy of pretences: that she was supposed to have said something the effect of which was self-evidently absurd, but in circumstances where he plainly was not, and could not have been, certain or even confident about exactly what she had said. That attack was manifestly crass, offensive and obviously sexist. It employed boys'-own locker-room gossip and innuendo – of the most dubious provenance – to shame, ridicule and embarrass Senator Hanson-Young before the public at large. That attack went well beyond what was reasonably required to defend or justify the statement that he had made in Parliament. It was one thing for Mr Leyonhjelm to claim that his interjection during the debate was intended to expose what he considered to be the absurdity and hypocrisy of Senator Hanson-Young's interjection; it was another thing altogether

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46 *Hanson-Young v Leyonhjelm* (No 4) [2019] FCA 1981, [74]–[75].

47 *Ibid* [179] (White J).

48 *Ibid* [234].

49 Here, *Defamation Act 2005* (NSW) s 30.

50 *Ibid* s 30(1)(c).

51 *Hanson-Young v Leyonhjelm* (No 4) [2019] FCA 1981, [211] (White J).

52 Rolph describes the common law and *Lange* qualified privilege defences as defences and a half: see generally David Rolph, *Defamation Law* (Thomas Reuters, 2015) 217–49.

53 *Roberts v Bass* (2002) 212 CLR 1; *Lange* (1997) 189 CLR 520, 574. See also Patrick George, *Defamation Law in Australia* (LexisNexis, 3<sup>rd</sup> ed, 2017) 435–42.

54 *Hanson-Young v Leyonhjelm* (No 4) [2019] FCA 1981, [228] (White J).

55 *Ibid* [232].

56 See *Leyonhjelm v Hanson-Young* (2021) 387 ALR 384, 397 [19] (Rares J).

to exploit the occasion by making what amounted to little more than a crude and demeaning attack on Senator Hanson-Young's private life.

Perhaps more significantly, as the primary judge found, the offensive personal attack was also made in circumstances where any reasonable person, including a politician, would, before launching such a belittling personal attack, take at least some steps to check, with Senator Hanson-Young or anyone else, that Senator Hanson-Young had in fact made the absurd claim that he supposedly believed she had made in Parliament. To use the language of the legislation, Mr Leyonhjelm made no attempt to get Senator Hanson-Young's 'side of the story', let alone provide her response, and effectively took no steps to verify the critical fact that supposedly provided the basis for his attack ... It is difficult to avoid the conclusion that he did nothing in that regard because he was determined, in any event, to use the occasion to vent his ill-will and personally belittle and embarrass someone towards whom he was obviously hostile.<sup>57</sup>

His Honour continued, '[t]he fact that Mr Leyonhjelm was a politician and that the target of his personal attack was his political opponent does not somehow convert or transform what was manifestly unreasonable conduct into reasonable conduct'.<sup>58</sup> Then came the crescendo:

even in the context of political discourse, if that is how Mr Leyonhjelm's self-justifying blatherings in the media could accurately be characterised, there must be a line beyond which needlessly and gratuitously offensive and boorish statements about the personal life of one's political opponents can be considered to be unreasonable. That line was clearly crossed in this case.<sup>59</sup>

Leyonhjelm's case illustrates that we unfortunately live in an era of political incivility. Long gone are the days where a minister would stand aside over a teddy bear or a colour television set.<sup>60</sup> The language of 'fake news' and 'alternative facts' has emboldened certain politicians to perpetrate falsehoods, and level nonsensical allegations against their opponents, for selfish ends.<sup>61</sup> This is not just limited to the land of Trump. Australia has its own pale shadow of Trump in Clive Palmer.<sup>62</sup>

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57 Ibid 455 [298]–[299].

58 Ibid 455 [300].

59 Ibid 455 [301].

60 See Tony Wright, 'Ministerial Responsibility in Canberra Appears to Have All but Decayed to No Responsibility', *The Sydney Morning Herald* (online, 20 February 2019) <<https://www.smh.com.au/politics/federal/ministerial-responsibility-in-canberra-appears-to-have-all-but-decayed-to-no-responsibility-20190219-p50yul.html>>.

61 See, eg, Yochai Benkler et al, 'Mail-In Voter Fraud: Anatomy of a Disinformation Campaign', *Berkman Klein Center for Internet & Society at Harvard University* (Web Page, 21 October 2020) <<https://cyber.harvard.edu/publication/2020/Mail-in-Voter-Fraud-Disinformation-2020>>. See generally, Andrea Butler, 'Protecting the Democratic Role of the Press: A Legal Solution to Fake News' (2018) 96(2) *Washington University Law Review* 419; Annie C Hundley, 'Fake News and the First Amendment: How False Political Speech Kills the Marketplace of Ideas' (2017) 92(2) *Tulane Law Review* 497.

62 Described as an 'Aussie Trump' in Andrew Heathcote and Ed Johnson, 'The Brash Billionaire Who Wants to Make Australia Great Again', *Bloomberg* (online, 26 April 2019) <<https://www.bloomberg.com/news/articles/2019-04-25/the-brash-billionaire-who-wants-to-make-australia-great-again>>.

#### IV CASES THREATENED OR COMMENCED BY POLITICIANS

Palmer is a serial defamation ‘threatener’<sup>63</sup> and infrequent defamation judgment creditor. The former Member of Parliament for the seat of Fairfax, who once described litigation as ‘his hobby’,<sup>64</sup> no doubt understands that threatening defamation action can be an effective political tool even where it does not result in the issue of a writ or the achievement of a judgment sum.<sup>65</sup> Defamation threats can have a chilling effect on critical speech.<sup>66</sup>

Palmer has sued political opponents, including then-Prime Minister Malcolm Turnbull<sup>67</sup> and more recently, Western Australia (‘WA’) Premier Mark McGowan.<sup>68</sup> In recent months, the latter has exchanged strong words with Palmer through the media. McGowan has criticised Palmer’s failed constitutional challenge to WA’s COVID-19 border policies,<sup>69</sup> among other things,<sup>70</sup> while Palmer has allegedly compared McGowan to Hitler.<sup>71</sup> One of McGowan’s criticisms was that Palmer merely wanted to challenge the border closure to spruik his ‘massive supply’ of the discredited COVID-19 treatment, hydroxychloroquine,<sup>72</sup> in WA.<sup>73</sup> When Palmer commenced proceedings against McGowan, the Premier counterclaimed in defamation. If Palmer’s move was to

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- 63 See, eg, Palmer’s threats against the man behind the YouTube account, ‘friendlyjordies’: ‘Clive Palmer: Australia Ex-MP Threatens YouTuber over “Dense Humpty” Video’, *BBC News* (online, 25 September 2019) <<https://www.bbc.com/news/world-australia-49820738>>.
- 64 Paul Millar, ‘Clive Palmer’s Taking You to Court, and It Doesn’t Matter if He Wins’, *Crikey* (online, 6 November 2014) <<https://www.crikey.com.au/2014/11/06/clive-palmers-taking-you-to-court-and-it-doesnt-matter-if-he-wins/>>.
- 65 For an example of a threat without commencing litigation, see the conduct of Prime Minister Scott Morrison’s staff in describing commentary by Waleed Aly on the Christchurch massacre as ‘defamatory’: see Michael Douglas, ‘Politicians Suing for Defamation Is Usually a Bad Idea: Here’s Why’, *Inform* (Blog Post, 29 March 2019) <<https://inform.org/2019/03/29/politicians-suing-for-defamation-is-usually-a-bad-idea-heres-why-michael-douglas/>>.
- 66 See, eg, Chris Dent and Andrew T Kenyon, ‘Defamation Law’s Chilling Effect: A Comparative Content Analysis of Australian and US Newspapers’ (2004) 9 *Media & Arts Law Review* 89. See also the discussion in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 131–3 (Mason CJ, Toohey and Gaudron JJ).
- 67 See *Palmer v Turnbull* [2019] 1 Qd R 286. The case later settled.
- 68 See also Palmer’s action against former Labor MP Cathy O’Toole: Tracey Ferrier, ‘Palmer Sues Political Rival for Defamation’, *The West Australian* (online, 21 August 2018) <<https://thewest.com.au/politics/palmer-sues-political-rival-for-defamation-ng-s-1885844>>.
- 69 *Palmer v Western Australia* [2021] HCA 5.
- 70 See generally Joanna Menagh, ‘Clive Palmer Defamation Action Alleges Mark McGowan Brought “Ridicule and Contempt”’, *ABC News* (online, 1 September 2020) <[abc.net.au/news/2020-09-01/clive-palmer-defamation-claim-says-mark-mcgowan-brought-ridicule/12616826](http://abc.net.au/news/2020-09-01/clive-palmer-defamation-claim-says-mark-mcgowan-brought-ridicule/12616826)>.
- 71 Garrett Mundy, Jacob Kagi and Eliza Laschon, ‘WA Premier Mark McGowan Sues Queensland Businessman Clive Palmer for Defamation’, *ABC News* (online, 23 September 2020) <<https://www.abc.net.au/news/2020-09-23/mark-mcgowan-takes-legal-action-against-clive-palmer/12691798>>.
- 72 ‘WHO Panel Issues Strong Advice against Hydroxychloroquine for COVID-19’, *Reuters* (online, 2 March 2021) <[reuters.com/article/us-health-coronavirus-hydroxychloroquine-idUSKCN2AU00H](https://reuters.com/article/us-health-coronavirus-hydroxychloroquine-idUSKCN2AU00H)>.
- 73 Nathan Hondros, ‘McGowan: Palmer Just Wants to Spruik “Massive Supply” of Hydroxychloroquine in WA’, *WA Today* (online, 3 August 2020) <<https://www.watoday.com.au/national/western-australia/mcgowan-palmer-just-wants-to-spruik-massive-supply-of-hydroxychloroquine-in-wa-20200803-p55i2p.html>>.

cause political damage to McGowan, it did not work; it may have even rallied Western Australians behind Labor in the lead up to their resounding March 2021 election victory.<sup>74</sup>

At the time of writing, *Palmer v McGowan* is ongoing and before the Federal Court. So is Attorney-General Christian Porter's case against the ABC and Louise Milligan.

That these cases are before the Federal Court rather than a state court is no coincidence. Following a 2017 judgment of the Full Court,<sup>75</sup> the Federal Court applies the position concerning juries in sections 39 and 40 of the *Federal Court of Australia Act 1976* (Cth) rather than the provision in the Uniform Defamation Acts which allows a defamation litigant to elect to have a jury.<sup>76</sup> This means that while a jury is very unlikely in a defamation trial in the Federal Court,<sup>77</sup> it is a frequent occurrence in a traditional defamation forum, like a state supreme court.<sup>78</sup> It is thus a sound strategic choice for a plaintiff to a defamation claim, who believes that he or she would have better prospects of success without a jury, to commence litigation in the Federal Court rather than a state court. Perhaps Porter has been advised of such a strategy.<sup>79</sup> However, in this case, that strategy comes at a political cost: it exposes Porter to criticism for hypocrisy. Part of the irony of Porter's case is that in his capacity to Attorney-General, he has advocated for law reform to combat exactly this sort of Federal Court forum shopping.<sup>80</sup>

While Porter's defamation claim will embolden some critics and repel some undecideds, in the context of the political environment he was facing, it was perhaps the only path forward in order to salvage his political career. The case is a paradigm example of how politicians use defamation litigation in contemporary Australian politics: to attack opponents while appealing to the base. The media reporting of Porter's defamation claim may rally certain members of the public to

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74 See Jane Norman, 'Labor's Landslide Victory Win Shows Liberal Party on Brink of Extinction in WA', *ABC News* (online, 15 March 2021) <<https://www.abc.net.au/news/2021-03-15/wa-election-federal-implications-voting/13239076>>.

75 *Wing v Fairfax Publications Pty Ltd* (2017) 255 FCR 61 ('*Wing*').

76 See, eg, *Defamation Act 2005* (NSW) s 21.

77 'Usually, it will be a judge sitting without a jury who will determine all issues in the case': Federal Court of Australia, *Defamation Practice Note (DEF-1) – Other Federal Jurisdiction NPA National Practice Area*, 12 November 2019 [4.10]. Further, Chief Justice Allsop once said: 'We don't have the jury trials that the supreme courts are having problems with and we are hearing as many cases as we prudently can – and ramping up that number': Michael Pelly, 'Chief Justice Predicts More "Effective" Courts, Cheaper Justice', *Financial Review* (online, 8 May 2020) <<https://www.afr.com/companies/professional-services/chief-justice-predicts-more-effective-courts-cheaper-justice-20200506-p54qjh>>.

78 See *Shields v Williams* [2019] FCA 413.

79 The Federal Court could still order a trial by jury. In *Wing*, Allsop CJ and Besanko J of the Full Court opined, 'we can envisage cases where there might be good reason to have a jury. For example ... there might be a case where there is a real issue as to whether changing community standards mean that the words considered defamatory of a person, say 30 years ago, would no longer be considered defamatory. There may be other circumstances and it is neither possible nor desirable for us to state in advance the cases that might call for an order for a jury': *Wing* (2017) 255 FCR 61, 75 [45].

80 Fergus Hunter, 'Attorney-General Backs Defamation Shake-Up to Curb Celebrity "Forum Shopping"', *The Sydney Morning Herald* (online, 9 December 2019) <[smh.com.au/politics/federal/attorney-general-backs-defamation-shake-up-to-curb-celebrity-forum-shopping-20191205-p53h2v.html](https://www.smh.com.au/politics/federal/attorney-general-backs-defamation-shake-up-to-curb-celebrity-forum-shopping-20191205-p53h2v.html)>.

a certain account of the truth;<sup>81</sup> an account that is compatible with his political ambition.

## V LOOKING FORWARD

The *ABC News* article that underpins Porter's claim does not identify the Attorney-General by name or title.<sup>82</sup> Nor does it adopt allegations levelled against him in a letter sent to Prime Minister Scott Morrison. It merely reports on what the letter levelled against a 'Cabinet Minister'.

The words of the piece were obviously carefully chosen and 'legalled' by the ABC's in-house lawyers. They would have been chosen mindful of the dictum of Lord Devlin in *Lewis v The Daily Telegraph*:<sup>83</sup> '[a] man who wants to talk at large about smoke may have to pick his words very carefully if he wants to exclude the suggestion that there is also a fire; but it can be done'.<sup>84</sup> While the respondents may have a justification for the imputation that there was 'smoke', they will have a more difficult time justifying 'fire'. The imputations pleaded in Porter's statement of claim, which is freely available online,<sup>85</sup> show that the respondents are being called to justify the allegation that Porter *did* terrible things, not simply that 'others allege Porter did terrible things'.

In the future, how can a media organisation like the ABC possibly report on serious allegations made against Australian politicians without fear of facing defamation litigation? In short, it can't. However, forthcoming changes to the Uniform Defamation Acts, underpinned by the Model Defamation Amendment Provisions 2020,<sup>86</sup> will provide some further protection to those who engage in

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81 For an example of such rallying, see Andrew Bolt, 'What the ABC Hid about the Christian Porter "Rape"', *Herald Sun* (online, 15 March 2021) <<https://www.heraldsun.com.au/blogs/andrew-bolt/what-the-abc-hid-about-the-christian-porter-rape/news-story/b7c4e7e33ba9ea270723ca27d1c440e8>>.

82 Louise Milligan, 'Scott Morrison, Senators and AFP Told of Historical Rape Allegation against Cabinet Minister', *ABC News* (online, 26 February 2021) <<https://www.abc.net.au/news/2021-02-26/pm-senators-afp-told-historical-rape-allegation-cabinet-minister/13197248>>.

83 [1964] AC 234, 285.

84 See *Chau v Australian Broadcasting Corporation [No 3]* (2021) 386 ALR 36, 47–48 [38] (Rares J).

85 See '*Christian Porter v ABC*', *Federal Circuit Court* (Web Page, 1 June 2021) <<https://www.fedcourt.gov.au/services/access-to-files-and-transcripts/online-files/porter-v-abc>>.

86 Explanatory Note, Model Defamation Amendment Provisions 2020 <[https://www.pcc.gov.au/uniform/2020/Model\\_Defamation\\_Amendment\\_Provisions\\_2020.pdf](https://www.pcc.gov.au/uniform/2020/Model_Defamation_Amendment_Provisions_2020.pdf)>.

public interest journalism.<sup>87</sup> A new defence<sup>88</sup> of ‘publication of matter concerning an issue of public interest’ in a proposed section 29A provides that:

- (1) It is a defence to the publication of defamatory matter if the defendant proves that:
  - (a) the matter concerns an issue of public interest, and
  - (b) the defendant reasonably believed that the publication of the matter was in the public interest.

The defence to the ‘reasonable belief’ of the publisher, and thus editorial judgment, will be of great assistance to respondents in cases like Porter’s claim against the ABC and Milligan. Section 29A(3) sets out a list of non-exhaustive factors which the court may take into account in considering the defence, including ‘the extent to which the matter published distinguishes between suspicions, allegations and proven facts’ (at (b)), and ‘the importance of freedom of expression in the discussion of issues of public interest’ (at (a)). It is hard to conceive of reporting that would be *more* in the public interest than the article on which Porter has sued, published just days before the Government announced an investigation into workplace culture and responses to sexual harassment and assault at Parliament House.<sup>89</sup> The public response to the March 2021 ‘March 4 Justice’ shows that many thousands of Australians would believe that the ABC’s reporting was in the public interest.<sup>90</sup>

Porter’s case demonstrates the great tension at the intersection of defamation actions and Australian politics. As was said in *Lange*, our system of government ‘would be adversely affected by ... an unqualified freedom to publish defamatory matter damaging the reputations of individuals involved in government or politics’.<sup>91</sup> But in qualifying that freedom, defamation law provides politicians with the weapons to wage war on those who oppose their ambitions.

Some would argue that cases brought by Australian politicians demonstrate fundamental flaws in the law. For example, Dr Matt Collins AM QC has

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87 Some aspects of those amendments, like the introduction of a statutory serious harm threshold, were modelled on provisions in the *Defamation Act 2013* (UK). Those UK provisions have had a mixed reception and were disappointing to some: see Alastair Mullis and Andrew Scott, ‘Tilting at Windmills: The *Defamation Act 2013*’ (2014) 77(1) *Modern Law Review* 87; Charlie Sewell, ‘More Serious Harm than Good? An Empirical Observation and Analysis of the Effects of the Serious Harm Requirement in Section 1(1) of the *Defamation Act 2013*’ (2020) 12(1) *Journal of Media Law* 47; Matthew Collins, ‘Reflections on the *Defamation Act 2013*, One Year after Royal Assent’, *Inform* (Blog Post, 25 April 2014) <<https://inform.org/2014/04/25/reflections-on-the-defamation-act-2013-one-year-after-royal-assent-matthew-collins/>>.

88 Historical proposals for what became this new defence were modelled on UK law; the amendment that is forthcoming is distinguishable. On the defences in the UK, see Eric Barendt, ‘*Reynolds* Revived and Replaced’ (2017) 9(1) *Journal of Media Law* 1.

89 Katina Curtis, ‘Kate Jenkins to Lead Investigation of Parliament Workplace Culture’, *The Sydney Morning Herald* (online, 5 March 2021) <<https://www.smh.com.au/politics/federal/kate-jenkins-to-lead-investigation-of-parliament-workplace-culture-20210305-p57834.html>>.

90 See Camilla Nelson, ‘“What Are You Afraid of ScoMo?”: Australian Women Are Angry – And the Morrison Government Needs to Listen’, *The Conversation* (online, 15 March 2021) <<https://theconversation.com/what-are-you-afraid-of-scomomo-australian-women-are-angry-and-the-morrison-government-needs-to-listen-157134>>.

91 *Lange* (1997) 189 CLR 520, 568.

persuasively argued that Australia is the ‘defamation capital of the world’.<sup>92</sup> Our law differs from that of comparable jurisdictions, like the United Kingdom, in several pro-plaintiff respects.<sup>93</sup> Where plaintiffs are politicians, pro-plaintiff defamation law may chill legitimate commentary. In a mass society, political commentary is essential: it informs electors and thus enhances our representative democracy. Arguably, electors have a right to be informed on matters relevant to their participation in democracy; defamation actions may inhibit that right.

However, in my view, the tension between defamation and Australian politics ought not be resolved by further changes to the Uniform Defamation Acts. To remove the possibility of a defamation action by an Australian politician would be a step too far; they have a human right to respect for their reputation.<sup>94</sup> The *Lange* qualified privilege defence has not lived up to its promise, but the incoming statutory defence of ‘publication of matter concerning an issue of public interest’ will likely remedy the situation, making life far more difficult for future politician plaintiffs. Moreover, the implied freedom of political communication may yet impact the application of the common law of defamation in cases brought by politicians, separately from *Lange* qualified privilege. In their defence to Porter’s claim, the Respondents pleaded that the implied freedom should affect findings on both identification and damages, apart from the impact of the implied freedom on qualified privilege.<sup>95</sup> In my view, accepting defences<sup>96</sup> along these lines would be a sensible development of the common law of defamation: it would adapt the cause of action to the requirements of the text and structure of the *Commonwealth Constitution*.

Ideally, our leaders would just be reasonable. Politicians should exercise self-restraint and manifest the civility for which, by litigating, they seemingly call. They should refrain from suing over matters that constitute genuine political discourse. If politicians go too far in what they see as holding their critics to account, then electors should hold them accountable at the ballot box.

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92 Matt Collins, ‘Nothing to Write Home about: Australia the Defamation Capital of the World’ (Speech, National Press Club, Canberra, 4 September 2019).

93 See Matthew Collins, *Collins on Defamation* (Oxford University Press, 2014) 16–20 [1.62]–[1.77]; David Rolph, *Defamation Law* (Thomas Reuters, 2015) 9–10 [2.10].

94 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17.

95 See Christian Porter, ‘Defence’, *Christian Porter v Australian Broadcasting Corporation* NSD206/2021 (Submission, 7 May 2021) [15]  
<[https://www.fedcourt.gov.au/\\_data/assets/pdf\\_file/0020/84512/Defence-7-May-2021.pdf](https://www.fedcourt.gov.au/_data/assets/pdf_file/0020/84512/Defence-7-May-2021.pdf)>.

96 Here, the term ‘defence’ is used in the sense of a pleading in response to a cause of action.