

# GREENS LIST

BARRISTERS

## Defamation Act 2: Electric Boogaloo

Fundamental reform or a derivative sequel?

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### A quick refresher...

- ▶ Elements of the tort of defamation:
  - ▶ A “publication” (in the sense of communication of matter from one person to another)
  - ▶ That identifies a claimant (either on its face or by reference to “extrinsic facts”)
  - ▶ That is “defamatory” of the identified claimant (in that the publication “is likely to cause damage to the reputation of the plaintiff in the eyes of right-thinking members of the community in general”) - pleaded by way of “imputations”
  - ▶ [NEW] That has caused or is likely to cause “serious harm” to a claimant
  - ▶ 12 month limitation period - strictly applied
- ▶ Defences
  - ▶ Justification, qualified privilege, honest opinion, innocent dissemination
  - ▶ [NEW] “reportage” defence

## The new Act

- ▶ The amended Defamation Act came into force in Victoria, NSW, SA and Queensland on 1 July 2021
- ▶ Section 47 of the Victorian Act - only applies to publication of defamatory matter after the commencement of the amendments
- ▶ Conflict of laws - Tasmania, WA, ACT, NT yet to enact new provisions
- ▶ Substantive and procedural changes:
  - ▶ New rules relating to Concerns Notices
  - ▶ New “serious harm” test
  - ▶ Amendments to contextual truth and honest opinion defences
  - ▶ Amendments to “honest opinion” defence
  - ▶ New “reportage” defence
  - ▶ Changes to the “single publication” rule and application of limitation periods
  - ▶ Changes to the “cap” on damages
  - ▶ Changes to the entitlement of certain corporations to sue

## Concerns Notices

- ▶ New s 12A mandates that a Concerns Notice must be issued before proceedings can be commenced
- ▶ Previously, Concerns Notices were merely optional
- ▶ Plaintiffs will also be prohibited from commencing proceedings until 28 days after a publisher “was given” a Concerns Notice (s 12B(1)(c) and s 14(2)(b))
- ▶ Plaintiffs will also be prohibited from complaining of imputations that were not complained of in the Concerns Notice (s 12B(1)(b) and (2))
- ▶ Plaintiffs may seek leave to commence a proceeding despite not complying with s 12B (s 12B(3))
- ▶ Careful consideration needs to be given to the crafting of imputations at the Concerns Notice stage
- ▶ Section 5 of *Limitation of Actions Act 1958* now creates an automatic extension of time for Concerns Notices issued less than 58 days before the expiry of the 12-month limitation period

## Serious harm test

- ▶ Section 10A:
  - ▶ *It is an element (the serious harm element) of a cause of action for defamation that the publication of defamatory matter about a person has caused, or is likely to cause, serious harm to the reputation of the person.*
- ▶ Entirely new element to the tort in Australia
- ▶ Formerly, damages were available *per se* for proof of a breach of the tort
- ▶ Judicial guidance from England and Wales relevant:
  - ▶ *Lachaux v Independent Print Ltd and anor* [2019] 3 WLR 18
- ▶ Construction of the “serious harm” test in England and Wales only recently settled, putting into question earlier decisions on the question
- ▶ New procedural provisions (s 10A(4) and (5)) - issue may be decided before or at trial

## Amendments to contextual truth defence (s 26)

- ▶ Old s 26:
  - ▶ It is a defence to the publication of defamatory matter if the defendant proves that:
    - ▶ The matter carried, in addition to the defamatory imputations of which the plaintiff complains, one or more other imputations (contextual imputations) that are substantially true; and
    - ▶ The defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations.
- ▶ Prior to 2021 amendments, contextual truth was neutered by the NSW Court of Appeal in *Besser v Kermode* (2011) 81 NSWLR 157
- ▶ Old provision only permitted a defendant to plead and prove an imputation that arose “in addition to” an imputation pleaded by a Plaintiff
- ▶ Strict rules applied as to whether an imputation truly arose “in addition to” a Plaintiff’s pleaded imputation
- ▶ Plaintiffs could defeat the defence by “pleading back” a Defendant’s contextual imputation, so that it no longer arose “in addition to” the imputations pleaded by a Plaintiff

## Amendments to contextual truth defence (s 26) (continued)

- ▶ 2020 amendments fix this lacuna and, arguably, go further, giving the contextual truth defence substantial new power:
  - ▶ (1) It is a defence to the publication of defamatory matter if the defendant proves that—
    - ▶ (a) the matter carried one or more imputations that are substantially true (contextual imputations); and
    - ▶ (b) any defamatory imputations of which the plaintiff complains that are not contextual imputations and are also carried by the matter do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations.
  - ▶ (2) The contextual imputations on which the defendant may rely to establish the defence include imputations of which the plaintiff complains.

## Amendments to honest opinion - s 31

- ▶ Honest opinion a difficult defence to make out
- ▶ Made more difficult following *Herald & Weekly Times v Buckley* (2009) 21 VR 661
  - ▶ Any opinions conveyed by a publication had to be supported by “proper material”
  - ▶ Victorian Court of Appeal held that the “proper material” had to be “sufficiently indicated or notorious to enable persons to whom the defamatory matter is published to judge for themselves how far the opinion expressed in the comment is well founded” (at [76])
  - ▶ Further, the “proper material” must (in most cases) be capable of being justified on BOP (s 31(5)(b))
- ▶ 2020 amendments ameliorate the effect of *Buckley*, but only slightly

## New “reportage” defence - s 29A

- ▶ New s 29A is an attempt to incorporate the English “public interest” defence into Australian law (*Reynolds v Times Newspapers Ltd* (2001) 2 AC 127, codified in English 2013 Defamation Act in s 4):
  - ▶ 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.
- ▶ 2005 Act already tried to incorporate *Reynolds* into s 30 qualified privilege
  - ▶ However, statutory qualified privilege has received limited success and has never been successfully relied upon by media defendants
  - ▶ Statutory QP revolves around a concept of “reasonableness” of a publisher’s behaviour - difficult to prove
- ▶ Section 29A(3) creates a list of “non exhaustive” factors that a Court may consider when determining if the defence applies

## Changes to “single publication” rule

- ▶ Section 5A of *Limitation of Actions Act 1958* (Vic) changes former “multiple publication” rule to “single publication” rule
- ▶ Effect is to slightly change the impact of *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 433 for internet publications
- ▶ Prior to s 5A, new cause of action arose every time an online article was “published” to a third party (in the sense of being downloaded and read)
- ▶ New s 5A treats 12-month limitation period (or extended 3-year period if applicable) as starting from “the date of the first publication”
- ▶ “Date of first publication” is confusingly defined as “the date on which the matter was first uploaded for access or sent electronically to a recipient”

## Changes to the “cap” on damages

- ▶ Following *Bauer Media Pty Ltd and anor v Wilson* (2018) 56 VR 674, the Victorian Court of Appeal confirmed that the “cap” on damages set by s 35 (currently at \$432,500 as of 21 June 2021) did not represent a “scale” of damages to be awarded with regard to the seriousness of any individual case
- ▶ Court of Appeal also confirmed that there was no requirement in the 2005 Act for a judge to make separate awards of general and aggravated damages
- ▶ New s 35(2) and (2A) changes both of these conclusions:
  - ▶ (2) The maximum damages amount is to be awarded only in a most serious case.
  - ▶ (2A) An award of aggravated damages is to be made separately to any award of damages for non-economic loss to which subsection (1) applies.
- ▶ Amendments do not prevent awards of aggravated damages which would put a plaintiff over the “cap” from being made

## Changes to the entitlement of corporations to sue - s 9

- ▶ Under the 2005 Act, corporations lost the entitlement to sue for defamation except where they were an “excluded corporation”
  - ▶ Not-for-profit corporations
  - ▶ For-profit corporations with fewer than 10 full-time (or FTE) employees
- ▶ Since 2005 there have been a number of decisions whereby corporate Plaintiffs, who structure their businesses so as to use contractors rather than employees, were entitled to maintain claims for defamation
- ▶ Section 9 amends the definition of employee so as to include contractors
- ▶ Section 10A (serious harm test) is also harder for corporations - they must prove that a publication “has caused or is likely to cause the corporation serious financial loss”

# Questions and discussion