High Court of Australia

Lange v Australian Broadcasting Corporation [1997] HCA 25; (1997) 189 CLR 520; (1997) 145 ALR 96; (1997) 71 ALJR 818 (8 July 1997)

HIGH COURT OF AUSTRALIA

BRENNAN CJ,

DAWSON, TOOHEY, GAUDRON, McHUGH, GUMMOW AND KIRBY JJ

DAVID RUSSELL LANGE PLAINTIFF

AND

AUSTRALIAN BROADCASTING

CORPORATION DEFENDANT

ORDER

1. The case stated should be answered as follows:

"1. Q. Is the defence pleaded in par 10 of the Defendant's Amended Defence bad in law?"

A. Yes.

"2. Q. Is the defence pleaded in par 6 of the Defendant's Amended Defence bad in law in respect of the publication complained of in New South Wales?"

A. No. But the particulars given do not bring the publication within that defence.

2. The matter is remitted to the Supreme Court of New South Wales to proceed therein in accordance with the answers to the questions.

3. The defendant pay the plaintiff's costs of the proceedings in the High Court including the costs of the removal of the matter under s 40 of the Judiciary Act 1903 (Cth).

4. The Commonwealth, New South Wales, Queensland, South Australia and Western Australia pay to the plaintiff and to the defendant a proportion of the costs incurred by each

of them to be taxed as between party and party in relation to the proceedings in the High Court other than the application to remove the matter under s 40 of the Judiciary Act 1903 (Cth), the proportion to be determined by the taxing officer by reference to the time by which the hearing of the matter before the Full Court was extended by submissions made on behalf of those interveners.

5. The corporations described as "the Fairfax interests", Nationwide News Pty Ltd, the Herald and Weekly Times Ltd, and the Seven Network Ltd pay to the plaintiff and to the defendant a proportion of the costs incurred by each of them to be taxed as between party and party in relation to the proceedings in the High Court other than the application to remove the matter under s 40 of the Judiciary Act 1903 (Cth), the proportion to be determined by the taxing officer by reference to the time by which the hearing of the matter before the Full Court was extended by submissions made on behalf of those interveners.

6. Any payment made to the plaintiff pursuant to par 4 or par 5 shall be made in relief of the defendant's obligation under par 3.

8 July 1997

FC 97/021

S 109/1996

Representation:

G O'L Reynolds with A S Bell for the plaintiff (instructed by Phillips Fox)

J J Spigelman QC with M G Sexton and S J Gageler for the defendant (instructed by Judith Walker, Australian Broadcasting Corporation)

Interveners:

G Griffith QC with S G E McLeish and G R Kennett intervening on behalf of the Attorney-General for the Commonwealth (instructed by the Australian Government Solicitor)

P A Keane QC with R W Campbell intervening on behalf of the Attorney-General for the State of Queensland (instructed by the Crown Solicitor for Queensland)

D Graham QC with B J Shaw QC and D G Collins intervening on behalf of the Attorney-General for the State of Victoria (instructed by the Victorian Government Solicitor)

R J Meadows QC with P D Quinlan intervening on behalf of the Attorney-General for the State of Western Australia (instructed by the Crown Solicitor for Western Australia) and on behalf of the Attorney-General for the Northern Territory (instructed by the Solicitor for the Northern Territory)

B M Selway QC with J Gill intervening on behalf of the Attorney-General for the State of South Australia (instructed by the Crown Solicitor for South Australia)

L S Katz SC with C J Birch intervening on behalf of the Attorney-General for the State of New South Wales (instructed by the Crown Solicitor for New South Wales)

D F Jackson QC with M A Dreyfus intervening on behalf of John Fairfax Publications Pty Limited, David Syme & Co Limited, Illawarra Newspapers Holdings Pty Limited, Newcastle Newspapers Pty Limited, Fairfax Community Newspapers Pty Limited and West Australian Newspapers Limited (instructed by Freehill Hollingdale & Page)

W H Nicholas QC intervening on behalf of Nationwide News Pty Ltd (instructed by Gallagher de Reszke)

R A Finkelstein QC intervening on behalf of The Herald and Weekly Times Limited (instructed by Arthur Robinson & Hedderwicks)

J T Gleeson intervening on behalf of the Seven Network Limited (instructed by Clayton Utz)

Amici Curiae:

D K Catterns QC with G J Williams amicus curiae on behalf of the Media, Entertainment and Arts Alliance (instructed by the Public Interest Advocacy Centre)

D E Flint amicus curiae on behalf of the Australian Press Council

CATCHWORDS

David Russell Lange v Australian Broadcasting Corporation

Constitutional law - Constitutional implication - Implication from text and structure of Constitution - System of representative and responsible government prescribed by Constitution - Implication of freedom of communication on government and political matters - Test for determining whether law infringes implication.

Constitutional law - Interpretation - Relationship between Constitution and common law.

Defamation - Defences - Qualified privilege - Extension of common law defence of qualified privilege - Reasonableness of publisher's conduct - Whether common law and statutory defences of qualified privilege reasonably appropriate and adapted to achieve protection of reputation.

Constitution of the Commonwealth, ss 1, 6, 7, 8, 13, 24, 25, 28, 49, 62, 64, 83, 128.

Defamation Act 1974 (NSW), ss 11, 22.

BRENNAN CJ, DAWSON, TOOHEY, GAUDRON, McHUGH, GUMMOW AND KIRBY JJ. The principal questions arising from this case stated by Brennan CJ are whether the Court should reconsider two decisions which hold that there is implied in the Constitution a defence

to the publication of defamatory matter relating to government and political matters and, if so, whether those decisions are correct.

The case stated arises out of a defamation action brought in the Supreme Court of New South Wales by Mr David Lange, a former Prime Minister of New Zealand, ("the plaintiff") against the Australian Broadcasting Corporation ("the defendant")[1].

The defendant has relied on the decisions of this Court in *Theophanous v Herald & Weekly Times Ltd*[2] and *Stephens v West Australian Newspapers Ltd*[3] to plead a defence against an action brought by the plaintiff in respect of matters published when he was a member of the New Zealand Parliament. Paragraph 10 of the Amended Defence initially alleged that the matter complained of was published:

"(a) pursuant to a freedom guaranteed by the Commonwealth Constitution to publish material:-

(i) in the course of discussion of government and political matters;

(ii) of and concerning members of the parliament and government of New Zealand which relates to the performance by such members of their duties as members of the parliament and government of New Zealand;

(iii) in relation to the suitability of persons for office as members of the parliament and government of New Zealand.

(b) (i) in the course of discussion of government and political matters;

(ii) of and concerning the plaintiff as a member of the parliament of New Zealand and as Prime Minister of New Zealand;

(iii) in respect of the plaintiff's suitability for office as a member of the parliament of New Zealand and as Prime Minister of New Zealand;

(iv) in respect of the plaintiff's performance, conduct and fitness for office as a member of the parliament of New Zealand and as Prime Minister of New Zealand;

(c) in circumstances such that:

(i) if the matter was false (which is not admitted) the defendant was unaware of its falsity;

(ii) the defendant did not publish the matter recklessly, that is, not caring whether the material was true or false;

(iii) the publication was reasonable

and, by reason of each of the matters aforesaid, the matter complained of is not actionable."

Subparagraphs (a)(ii), (iii), (b)(ii), (iii) and (iv) were subsequently abandoned by the defendant.

Paragraph 6 of the Amended Defence pleads a defence of common law qualified privilege. The particulars of this defence allege that the matters complained of related to subjects of public interest and political matters and that the defendant had a duty to publish the material to viewers who had a legitimate interest in the subjects of the matter complained of and a reciprocal interest in receiving information relating to those subjects. The subjects of public interest and political matters are particularised. They relate to political, social and economic matters occurring in New Zealand.

The plaintiff alleges that the defences are bad in law. He contends that neither the decision in *Theophanous* nor the decision in *Stephens* has any application to the discussion of the conduct of a member of the Parliament of New Zealand or the discussion of New Zealand government and political matters. He asserts that in any event both *Theophanous* and *Stephens* were wrongly decided and that this Court should examine the correctness of the decisions.

In addition to hearing submissions from the plaintiff and defendant, the Court also heard submissions as to the desirability of re-arguing the correctness of *Theophanous* and *Stephens* from a large number of parties who were given leave to intervene in the proceedings and from two parties who were given leave to put submissions as *amici curiae*. Concurrently, with the hearing of this case stated, the Court heard a demurrer in *Levy v The State of Victoria & Ors* where similar questions concerning the correctness of *Theophanous* and *Stephens* were raised.

Theophanous

In *Theophanous*[4], this Court by majority[5], in answering the first question reserved in a case stated, declared that:

"*There is implied in the Commonwealth Constitution a freedom to publish material:*

(a) discussing government and political matters;

(b) of and concerning members of the Parliament of the Commonwealth of Australia which relates to the performance by such members of their duties as members of the Parliament or parliamentary committees;

(c) in relation to the suitability of persons for office as members of the Parliament."

By the same majority, the Court answered[6] a second question reserved as follows:

"*In the light of the freedom implied in the Commonwealth Constitution, the publication will not be actionable under the law relating to defamation if the defendant establishes that:*

(a) it was unaware of the falsity of the material published;

(b) it did not publish the material recklessly, that is, not caring whether the material was true or false; and

(c) the publication was reasonable in the circumstances."

The answer by that majority to a third question reserved was a declaration[7] that:

"A publication that attracts the freedom implied in the Commonwealth Constitution can also be described as a publication on an occasion of qualified privilege. Whether a federal election is about to be called is not a relevant consideration."

In answer to a fourth question, the majority declared[8] that two paragraphs of the statement of defence to a defamation action brought by a federal member of Parliament were not bad in law. Those paragraphs stated[9]:

"11. In further answer to the whole of the Statement of Claim: (a) the words were published pursuant to a freedom guaranteed by the Commonwealth Constitution to publish material: (i) in the course of discussion of government and political matters; (ii) of and concerning members of the Parliament of the Commonwealth of Australia which relates to the performance by such members of their duties as members of the Parliament or parliamentary committees; (iii) in relation to the suitability of persons for office as members of the Parliament. (b) The publication of the words was: (i) in the course of discussion of government and political matters; (ii) of and concerning the plaintiff as a member of the House of Representatives and as Chairperson of the Joint Parliamentary Standing Committee on Migration Regulation and the Australian Labor Party's Federal Caucus Immigration Committee; (iii) in respect of the plaintiff's performance of his duties as a member and as Chairperson as aforesaid; (iv) in relation to the plaintiff's suitability for office as a member of Parliament; (v) without malice; (vi) reasonable in the circumstances; (vii) not made without an honest belief in the truth of the words or made with reckless disregard for the truth or untruth of the words; (viii) made at a time when it was publicly anticipated that a federal election was about to be called. (c) By reason of each of the matters aforesaid the said publication is not actionable. 12. Further and alternatively, by reason of the freedom guaranteed by the Commonwealth Constitution as aforesaid, the words were published on an occasion of qualified privilege."

Stephens

On the same day that judgment was delivered in *Theophanous*, the Court delivered judgment in *Stephens*. By the same majority, the Court held that defences based on the Constitution of the Commonwealth and the *Constitution Act* 1889 (WA) were good defences to an action brought by a State member of Parliament in respect of a publication that criticised an overseas trip being made by a six-member committee of the Legislative Council of Western Australia, of which the plaintiff was a member.

Reconsidering a previous decision of the Court

This Court is not bound by its previous decisions[10]. Nor has it laid down any particular rule or rules or set of factors for re-opening the correctness of its decisions. Nevertheless, the Court should reconsider a previous decision only with great caution and for strong reasons[11]. In *Hughes and Vale Pty Ltd v State of New South Wales*[12], Kitto J said that in constitutional cases "it is obviously undesirable that a question decided by the Court after full consideration should be re-opened without grave reason". However, it cannot be doubted that the Court will re-examine a decision if it involves a question of "vital constitutional importance"[13] and is "manifestly wrong"[14]. Errors in constitutional interpretation are not remediable by the legislature[15], and the Court's approach to constitutional matters is not necessarily the same as in matters concerning the common law or statutes. But these general statements concerning the occasions when the Court will reconsider one of its previous

decisions give little guidance in this case when the judgments and orders in *Theophanous* and *Stephens* are examined.

The principal reason why these general statements provide little guidance is that it is arguable that neither *Theophanous* nor *Stephens* contains a binding statement of constitutional principle. Both cases came before the Full Court of this Court on a case stated in which particular questions were reserved. The orders of the Full Court in each case consisted of answers to those questions. Of the seven Justices who heard *Theophanous*, Brennan, Dawson and McHugh JJ held that the defences pleaded in that case were bad in law. Mason CJ, Toohey and Gaudron JJ in a joint judgment held that the defences were good in law. With two qualifications, their judgment is reflected in the answers that the Court gave to the case stated. The first qualification is that the joint judgment[16], but not the answer of the Court, gives definition to the term "reasonable" which appears in Answer 2(c) of the case stated. The second qualification is that, while the conditions of the defence contained in pars (a), (b) and (c) of the answer to the first question in the case stated suggest that the paragraphs are alternatives, or that par (a) subsumes pars (b) and (c), the joint judgment focuses on the suitability of persons for office rather than the wider discussion of government and political matters.

Deane J, the seventh member of the Court in *Theophanous*, also held that the defences were good in law. However, he took a view of the scope of the freedom that was significantly different from that of Mason CJ, Toohey and Gaudron JJ. His Honour said[17]:

"I am quite unable to accept that the freedom which the constitutional implication protects is, at least in relation to statements about the official conduct or consequent suitability for office of holders of high government office, conditioned upon the ability of the citizen or other publisher to satisfy a court of matters such as absence of recklessness or reasonableness."

His Honour said[18] that the Constitution contained an implication which precluded the imposition of liability in damages under State defamation laws to the extent to which they would cover a publication such as that involved in that case.

Deane J also said[19] that, whilst the overall effect of the joint judgment and his judgment was that "the constitutional implication of political communication and discussion" precluded "an unqualified application of the defamation laws of Victoria to impose liability in damages in respect of political communications and discussion", there was disagreement within that majority as to "what flows from that conclusion for the purposes of the present case".

His Honour concluded[20] that "the appropriate course for me to follow is to lend my support for the answers which [Mason CJ, Toohey and Gaudron JJ] give to the questions reserved by the stated case". Although Deane J may have intended his concurrence with the answers in *Theophanous* to extend to the explanation of them in the joint judgment, the absence of an express agreement with the reasons in that judgment raises a question as to the extent to which he concurred with the terms of the answers. But, assuming that his Honour intended to agree with those answers as read in the light of the joint judgment, nevertheless the reasoning which gave rise to the answers in *Theophanous* had the direct support of only three of the seven Justices.

In *Stephens*, an identical division of opinion among the Justices occurred. Once again Deane J agreed with the answers proposed by Mason CJ, Toohey and Gaudron JJ in the case stated. He said[21]:

"In view of the division between the other members of the Court, it would, to that extent, be inappropriate for me to adhere to [my views] for the purposes of this case."

Accordingly his Honour expressed[22] his "concurrence in the answers which Mason CJ, Toohey and Gaudron JJ propose to the questions stated". In these circumstances, *Theophanous* and *Stephens* do not have the same authority which they would have if Deane J had agreed with the reasoning of Mason CJ, Toohey and Gaudron JJ in each case.

However, for the reasons set out below, *Theophanous* and *Stephens* should be accepted as deciding that in Australia the common law rules of defamation must conform to the requirements of the Constitution. Those cases should also be accepted as deciding that, at least by 1992[23], the constitutional implication precluded an unqualified application in Australia of the English common law of defamation in so far as it continued to provide no defence for the mistaken publication of defamatory matter concerning government and political matters to a wide audience. The full argument we heard in the present case and the illumination and insights gained from the subsequent cases of *McGinty v Western Australia*[24], *Langer v The Commonwealth*[25] and *Muldowney v South Australia*[26] now satisfy us, however, that some of the expressions and reasoning in the various judgments in *Theophanous* and *Stephens* should be further considered in order to settle both constitutional doctrine and the contemporary common law of Australia governing the defence of qualified privilege in actions of libel and slander.

Having regard to the foregoing discussion, the appropriate course is to examine the correctness of the defences pleaded in the present case as a matter of principle and not of authority. The starting point of that examination must be the terms of the Constitution illuminated by the assistance which is to be obtained from *Theophanous* and the other authorities[27] which have dealt with the question of "implied freedoms" under the Constitution.

Representative and responsible government

Sections 7 and 24 of the Constitution, read in context, require the members of the Senate and the House of Representatives to be directly chosen at periodic elections by the people of the States and of the Commonwealth respectively. This requirement embraces all that is necessary to effectuate[28] the free election of representatives at periodic elections. What is involved in the people directly choosing their representatives at periodic elections, however, can be understood only by reference to the system of representative and responsible government to which ss 7 and 24 and other sections of the Constitution give effect[29].

That the Constitution intended to provide for the institutions of representative and responsible government is made clear both by the Convention Debates and by the terms of the Constitution itself. Thus, at the Second Australasian Convention held in Adelaide in 1897, the Convention, on the motion of Mr Edmund Barton, resolved that the purpose of the Constitution was "to enlarge the powers of self-government of the people of Australia"[30].

Sections 1, 7, 8, 13, 24, 25, 28 and 30 of the Constitution give effect to the purpose of self-government by providing for the fundamental features of representative government. As Isaacs J put it[31]:

"[T]he Constitution is for the advancement of representative government".

Section 1 of the Constitution vests the legislative power of the Commonwealth in a Parliament "which shall consist of the Queen, a Senate, and a House of Representatives". Sections 7 and 24 relevantly provide:

"7 The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.

...

24 The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators."

Section 24 does not expressly refer to elections, but s 25 makes it plain that the House of Representatives is to be directly chosen by the people of the Commonwealth voting at elections. Other provisions of the Constitution ensure that there shall be periodic elections. Thus, under s 13, six years is the longest term that a senator can serve before his or her place becomes vacant. Similarly, by s 28, every House of Representatives is to continue for three years from the first meeting of the House and no longer. Sections 8 and 30 ensure that, in choosing senators and members of the House of Representatives, each elector shall vote only once. The effect of ss 1, 7, 8, 13, 24, 25, 28 and 30 therefore is to ensure that the Parliament of the Commonwealth will be representative of the people of the Commonwealth.

Other sections of the Constitution establish a formal relationship between the Executive Government and the Parliament and provide for a system of responsible ministerial government[32], a system of government which, "prior to the establishment of the Commonwealth of Australia in 1901 ... had become one of the central characteristics of our polity"[33]. Thus, s 6 of the Constitution requires that there be a session of the Parliament at least once in every year, so that 12 months shall not intervene between the last sitting in one session and the first sitting in the next. Section 83 ensures that the legislature controls supply. It does so by requiring parliamentary authority for the expenditure by the Executive Government of any fund or sum of money standing to the credit of the Crown in right of the Commonwealth, irrespective of source[34]. Sections 62 and 64 of the Constitution combine to provide for the executive power of the Commonwealth, which is vested in the Queen and exercisable by the Governor-General, to be exercised "on the initiative and advice"[35] of Ministers and limit to three months the period in which a Minister of State may hold office without being or becoming a senator or member of the House of Representatives. Section 49 of the Constitution, in dealing with the powers, privileges and immunities of the Senate and of the House of Representatives, secures the freedom of speech in debate which, in England, historically was a potent instrument by which the House of Commons defended its right to consider and express opinions on the conduct of affairs of State by the Sovereign and the Ministers, advisers and servants of the Crown[36]. Section 49 also provides the source of coercive authority for each chamber of the Parliament to summon witnesses, or to require the production of documents, under pain of punishment for contempt[37].

The requirement that the Parliament meet at least annually, the provision for control of supply by the legislature, the requirement that Ministers be members of the legislature, the privilege of freedom of speech in debate, and the power to coerce the provision of information provide the means for enforcing the responsibility of the Executive to the organs of representative government. In his *Notes on Australian Federation: Its Nature and Probable Effects*[38], Sir Samuel Griffith pointed out that the effect of responsible government "is that the actual government of the State is conducted by officers who enjoy the confidence of the people". That confidence is ultimately expressed or denied by the operation of the electoral process, and the attitudes of electors to the conduct of the Executive may be a significant determinant of the contemporary practice of responsible government[39].

Reference should also be made to s 128 which ensures that the Constitution shall not be altered except by a referendum passed by a majority of electors in the States and in those Territories with representation in the House of Representatives, taken together, and by the electors in a majority of States.

Freedom of communication

Freedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates by directing that the members of the House of Representatives and the Senate shall be "directly chosen by the people" of the Commonwealth and the States, respectively. At federation, representative government was understood to mean a system of government where the people in free elections elected their representatives to the legislative chamber which occupies the most powerful position in the political system[40]. As Birch points out[41], "it is the manner of choice of members of the legislative assembly, rather than their characteristics or their behaviour, which is generally taken to be the criterion of a representative form of government." However, to have a full understanding of the concept of representative government, Birch also states that[42]:

"we need to add that the chamber must occupy a powerful position in the political system and that the elections to it must be free, with all that this implies in the way of freedom of speech and political organization."

Communications concerning political or government matters between the electors and the elected representatives, between the electors and the candidates for election and between the electors themselves were central to the system of representative government, as it was understood at federation[43]. While the system of representative government for which the Constitution provides does not expressly mention freedom of communication, it can hardly be doubted, given the history of representative government and the holding of elections under that system in Australia prior to federation, that the elections for which the Constitution provides were intended to be free elections in the sense explained by Birch. Furthermore, because the choice given by ss 7 and 24 must be a true choice with "an opportunity to gain an appreciation of the available alternatives", as Dawson J pointed out in *Australian Capital Television Pty Ltd v The Commonwealth*[44], legislative power cannot support an absolute denial of access by the people to relevant information about the functioning of government in Australia and about the policies of political parties and candidates for election.

That being so, ss 7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters

which enables the people to exercise a free and informed choice as electors. Those sections do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power. As Deane J said in *Theophanous*[45], they are "a limitation or confinement of laws and powers [which] gives rise to a pro tanto immunity on the part of the citizen from being adversely affected by those laws or by the exercise of those powers rather than to a 'right' in the strict sense". In *Cunliffe v The Commonwealth*[46], Brennan J pointed out that the freedom confers no rights on individuals and, to the extent that the freedom rests upon implication, that implication defines the nature and extent of the freedom. His Honour said[47]:

"The implication is negative in nature: it invalidates laws and consequently creates an area of immunity from legal control, particularly from legislative control."

If the freedom is to effectively serve the purpose of ss 7 and 24 and related sections, it cannot be confined to the election period. Most of the matters necessary to enable "the people" to make an informed choice will occur during the period between the holding of one, and the calling of the next, election. If the freedom to receive and disseminate information were confined to election periods, the electors would be deprived of the greater part of the information necessary to make an effective choice at the election.

In addition, the presence of s 128, and of ss 6, 49, 62, 64 and 83, of the Constitution makes it impossible to confine the receipt and dissemination of information concerning government and political matters to an election period. Those sections give rise to implications of their own. Section 128, by directly involving electors in the States and in certain Territories in the process for amendment of the Constitution, necessarily implies a limitation on legislative and executive power to deny the electors access to information that might be relevant to the vote they cast in a referendum to amend the Constitution. Similarly, those provisions which prescribe the system of responsible government necessarily imply a limitation on legislative and executive power to deny the electors and their representatives information concerning the conduct of the executive branch of government throughout the life of a federal Parliament. Moreover, the conduct of the executive branch is not confined to Ministers and the public service. It includes the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the legislature. In *British Steel v Granada Television*[48], Lord Wilberforce said that it was by these reports that effect was given to "[t]he legitimate interest of the public" in knowing about the affairs of such bodies. Whatever the scope of the implications arising from responsible government and the amendment of the Constitution may be, those implications cannot be confined to election periods relating to the federal Parliament.

However, the freedom of communication which the Constitution protects is not absolute[49]. It is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution. The freedom of communication required by ss 7 and 24 and reinforced by the sections concerning responsible government and the amendment of the Constitution operates as a restriction on legislative power. However, the freedom will not invalidate a law enacted to satisfy some other legitimate end if the law satisfies two conditions. The first condition is that the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government or the procedure for submitting a proposed amendment to the Constitution to the informed decision of the people which the Constitution prescribes. The second is that the law is reasonably appropriate and adapted to achieving that legitimate object or end. Different

formulae have been used by members of this Court in other cases to express the test whether the freedom provided by the Constitution has been infringed. Some judges have expressed the test as whether the law is reasonably appropriate and adapted to the fulfilment of a legitimate purpose. Others have favoured different expressions, including proportionality. In the context of the questions raised by the case stated, there is no need to distinguish these concepts. For ease of expression, throughout these reasons we have used the formulation of reasonably appropriate and adapted.

The common law and the Constitution

A person who is defamed must find a legal remedy against those responsible for publishing defamatory matter either in the common law or in a statute which confers a right of action. The right to a remedy cannot be admitted, however, if its exercise would infringe upon the freedom to discuss government and political matters which the Constitution impliedly requires. It is necessary, therefore, to consider the relationship between the Constitution and the freedom of communication which it requires on the one hand and the common law and the statute law which govern the law of defamation on the other.

It is appropriate to begin with the Parliament at Westminster. To say of the United Kingdom that it has an "unwritten constitution" is to identify an amalgam of common law and statute and to contrast it with a written constitution which is rigid rather than fluid. The common law supplies elements of the British constitutional fabric. Sir Owen Dixon wrote[50]:

"The British conception of the complete supremacy of Parliament developed under the common law; it forms part of the common law and, indeed, it may be considered as deriving its authority from the common law rather than as giving authority to the common law. But, after all, the common law was the common law of England. It was not a law of nations. It developed no general doctrine that all legislatures by their very nature were supreme over the law."

With the establishment of the Commonwealth of Australia, as with that of the United States of America, it became necessary to accommodate basic common law concepts and techniques to a federal system of government embodied in a written and rigid constitution. The outcome in Australia differs from that in the United States. There is but one common law in Australia which is declared by this Court as the final court of appeal. In contrast to the position in the United States, the common law as it exists throughout the Australian States and Territories is not fragmented into different systems of jurisprudence, possessing different content and subject to different authoritative interpretations[51]. The distinction is important for the present case and may be illustrated as follows.

The First Amendment to the United States Constitution prohibits Congress from making any law abridging "the freedom of speech, or of the press". This privilege or immunity of citizens of the United States may not be abridged by the making or "the enforcement" by any State of "any law". That is the effect of the interpretation placed on the Fourteenth Amendment[52]. A civil lawsuit between private parties brought in a State court may involve the State court in the enforcement of a State rule of law which infringes the Fourteenth Amendment. If so, it is no answer that the law in question is the common law of the State, such as its defamation law[53]. The interaction in such cases between the United States Constitution and the State common laws has been said to produce "a constitutional privilege" against the enforcement of State common law[54].

This constitutional classification has also been used in the United States to support the existence of a federal action for damages arising from certain executive action in violation of "free-standing" constitutional rights, privileges or immunities[55]. On the other hand, in Australia, recovery of loss arising from conduct in excess of constitutional authority has been dealt with under the rubric of the common law, particularly the law of tort[56].

It makes little sense in Australia to adopt the United States doctrine so as to identify litigation between private parties over their common law rights and liabilities as involving "State law rights". Here, "[w]e act every day on the unexpressed assumption that the one common law surrounds us and applies where it has not been superseded by statute"[57]. Moreover, that one common law operates in the federal system established by the Constitution. The Constitution displaced, or rendered inapplicable, the English common law doctrine of the general competence and unqualified supremacy of the legislature. It placed upon the federal judicature the responsibility of deciding the limits of the respective powers of State and Commonwealth governments[58]. The Constitution, the federal, State and territorial laws, and the common law in Australia together constitute the law of this country and form "one system of jurisprudence"[59]. Covering cl 5 of the Constitution renders the Constitution "binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State". Within that single system of jurisprudence, the basic law of the Constitution provides the authority for the enactment of valid statute law and may have effect on the content of the common law.

Conversely, the Constitution itself is informed by the common law. This was explained extra-judicially by Sir Owen Dixon[60]:

"We do not of course treat the common law as a transcendental body of legal doctrine, but we do treat it as antecedent in operation to the constitutional instruments which first divided Australia into separate colonies and then united her in a federal Commonwealth. We therefore regard Australian law as a unit. Its content comprises besides legislation the general common law which it is the duty of the courts to ascertain as best they may. ... The anterior operation of the common law in Australia is not just a dogma of our legal system, an abstraction of our constitutional reasoning. It is a fact of legal history."

And in *Cheatle v The Queen*[61], this Court said:

"It is well settled that the interpretation of a constitution such as ours is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of the common law's history."

Under a legal system based on the common law, "everybody is free to do anything, subject only to the provisions of the law", so that one proceeds "upon an assumption of freedom of speech" and turns to the law "to discover the established exceptions to it"[62]. The common law torts of libel and slander are such exceptions. However, these torts do not inhibit the publication of defamatory matter unless the publication is unlawful - that is to say, not justified, protected or excused by any of the various defences to the publication of defamatory matter, including qualified privilege. The result is to confer upon defendants, who choose to plead and establish an appropriate defence[63], an immunity to action brought against them. In that way, they are protected by the law in respect of certain publications and freedom of communication is maintained.

The issue raised by the Constitution in relation to an action for defamation is whether the immunity conferred by the common law, as it has traditionally been perceived, or, where there is statute law on the subject the immunity conferred by statute, conforms with the freedom required by the Constitution. In 1901, when the Constitution of the Commonwealth took effect[64] and when the Judicial Committee was the ultimate Court in the judicial hierarchy, the English common law defined the scope of the torts of libel and slander. At that time, the balance that was struck by the common law between freedom of communication about government and political matters and the protection of personal reputation was thought to be consistent with the freedom that was essential and incidental to the holding of the elections and referenda for which the Constitution provided. Since 1901, the common law - now the common law of Australia - has had to be developed in response to changing conditions. The expansion of the franchise, the increase in literacy, the growth of modern political structures operating at both federal and State levels and the modern development in mass communications, especially the electronic media, now demand the striking of a different balance from that which was struck in 1901. To this question we shall presently return.

The factors which affect the development of the common law equally affect the scope of the freedom which is constitutionally required. "[T]he common convenience and welfare of society" is the criterion of the protection given to communications by the common law of qualified privilege[65]. Similarly, the content of the freedom to discuss government and political matters must be ascertained according to what is for the common convenience and welfare of society. That requires an examination of changing circumstances[66] and the need to strike a balance in those circumstances between absolute freedom of discussion of government and politics and the reasonable protection of the persons who may be involved, directly or incidentally, in the activities of government or politics.

Of necessity, the common law must conform with the Constitution. The development of the common law in Australia cannot run counter to constitutional imperatives[67]. The common law and the requirements of the Constitution cannot be at odds. The common law of libel and slander could not be developed inconsistently with the Constitution, for the common law's protection of personal reputation must admit as an exception that qualified freedom to discuss government and politics which is required by the Constitution.

In any particular case, the question whether a publication of defamatory matter is protected by the Constitution or is within a common law exception to actionable defamation yields the same answer. But the answer to the common law question has a different significance from the answer to the constitutional law question. The answer to the common law question prima facie defines the existence and scope of the personal right of the person defamed against the person who published the defamatory matter; the answer to the constitutional law question defines the area of immunity which cannot be infringed by a law of the Commonwealth, a law of a State or a law of those Territories whose residents are entitled to exercise the federal franchise. That is because the requirement of freedom of communication operates as a restriction on legislative power. Statutory regimes cannot trespass upon the constitutionally required freedom.

However, a statute which diminishes the rights or remedies of persons defamed and correspondingly enlarges the freedom to discuss government and political matters is not contrary to the constitutional implication. The common law rights of persons defamed may be diminished by statute but they cannot be enlarged so as to restrict the freedom required by the Constitution. Statutes which purport to define the law of defamation are construed, if possible,

conformably with the Constitution. But, if their provisions are intractably inconsistent with the Constitution, they must yield to the constitutional norm.

The common law may be developed to confer a head or heads of privilege in terms broader than those which conform to the constitutionally required freedom, but those terms cannot be any narrower. Laws made by Commonwealth or State Parliaments or the legislatures of self-governing territories which are otherwise within power may therefore extend a head of privilege, but they cannot derogate from the common law to produce a result which diminishes the extent of the immunity conferred by the Constitution.

Constitutional text and structure

Since *McGinty* it has been clear, if it was not clear before, that the Constitution gives effect to the institution of "representative government" only to the extent that the text and structure of the Constitution establish it[68]. In other words, to say that the Constitution gives effect to representative government is a shorthand way of saying that the Constitution provides for that form of representative government which is to be found in the relevant sections. Under the Constitution, the relevant question is not, "What is required by representative and responsible government?" It is, "What do the terms and structure of the Constitution prohibit, authorise or require?"

Moreover, although it is true that the requirement of freedom of communication is a consequence of the Constitution's system of representative and responsible government, it is the requirement and not a right of communication that is to be found in the Constitution. Unlike the First Amendment to the United States Constitution, which has been interpreted to confer private rights, our Constitution contains no express right of freedom of communication or expression. Within our legal system, communications are free only to the extent that they are left unburdened by laws that comply with the Constitution.

To the extent that the requirement of freedom of communication is an implication drawn from ss 7, 24, 64, 128 and related sections of the Constitution, the implication can validly extend only so far as is necessary to give effect to these sections. Although some statements in the earlier cases might be thought to suggest otherwise, when they are properly understood, they should be seen as purporting to give effect only to what is inherent in the text and structure of the Constitution.

The test for determining whether a law infringes the constitutional implication

When a law of a State or federal Parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by ss 7, 24, 64 or 128 of the Constitution, two questions must be answered before the validity of the law can be determined. First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect[69]? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people[70] (hereafter collectively "the system of government prescribed by the Constitution"). If the first question is answered "yes" and the second is answered "no", the law is invalid. In *ACTV*, for example, a majority of this Court held that a law seriously impeding discussion

during the course of a federal election was invalid because there were other less drastic means by which the objectives of the law could be achieved. And the common law rules, as they have traditionally been understood, must be examined by reference to the same considerations. If it is necessary, they must be developed to ensure that the protection given to personal reputation does not unnecessarily or unreasonably impair the freedom of communication about government and political matters which the Constitution requires.

The law of defamation

The law of defamation does not contain any rule that prohibits an elector from communicating with other electors concerning government or political matters relating to the Commonwealth. Nevertheless, in so far as the law of defamation requires electors and others to pay damages for the publication of communications concerning those matters or leads to the grant of injunctions against such publications, it effectively burdens the freedom of communication about those matters. That being so, the critical question in the present case is whether the common law of defamation as it has traditionally been understood, and the New South Wales law of defamation in its statutory form, are reasonably appropriate and adapted to serving the legitimate end of protecting personal reputation without unnecessarily or unreasonably impairing the freedom of communication about government and political matters protected by the Constitution.

The purpose of the law of defamation is to strike a balance between the right to reputation and freedom of speech[71]. It is not to be supposed that the protection of reputation is a purpose that is incompatible with the requirement of freedom of communication imposed by the Constitution[72]. The protection of the reputations of those who take part in the government and political life of this country from false and defamatory statements is conducive to the public good[73]. The constitutionally prescribed system of government does not require - to the contrary, it would be adversely affected by - an unqualified freedom to publish defamatory matter damaging the reputations of individuals involved in government or politics[74]. The question then is whether the common law of defamation, as it has traditionally been understood, and the statute law regulating the publication of defamatory matter are reasonably appropriate and adapted to the protection of reputation having regard to the requirement of freedom of communication about government and political matters required by the Constitution.

Theophanous and *Stephens* decided that in particular respects the law of defamation throughout Australia was incompatible with the requirement of freedom of communication imposed by the Constitution[75]. However, those cases did so without expressly determining whether the law of defamation in its common law and statutory emanations has developed to the point that it is reasonably appropriate and adapted to achieving a legitimate end that is compatible with the system of government prescribed by the Constitution. Because that is so, those cases ought not to be treated as conclusively determining that question, which should be examined afresh. In the present case, however, it is necessary to examine only the effect of the defamation law of New South Wales on government and political matters. This is because the argument in this Court was conducted on the footing that the plaintiff's action was to be determined solely by regard to the defamation law of that State.

In New South Wales, the principal defences to the publication of defamatory matter concerning government and political matters are truth in respect of a matter that is related to a matter of public interest or an occasion of qualified privilege, fair comment on a matter

relating to the public interest, fair report of parliamentary and similar proceedings, common law qualified privilege[76] and the statutory defence of qualified privilege contained in s 22 of the *Defamation Act* 1974 (NSW) ("the Defamation Act")[77]. Without the statutory defence of qualified privilege, it is clear enough that the law of defamation, as it has traditionally been understood in New South Wales, would impose an undue burden on the required freedom of communication under the Constitution. This is because, apart from the statutory defence, the law as so understood arguably provides no appropriate defence for a person who mistakenly but honestly publishes government or political matter to a large audience[78]. In *Lang v Willis*[79], this Court held that election speeches made to large audiences of unidentified persons are not necessarily privileged even if the speeches deal with matters of general interest to the electors. In that respect, the common law as hitherto understood in Australia has simply reflected the English common law.

The basis of this common law rule is that reciprocity of interest or duty is essential to a claim of qualified privilege at common law[80]. Only in exceptional cases has the common law recognised an interest or duty to publish defamatory matter to the general public[81]. However, the common law doctrine as expounded in Australia must now be seen as imposing an unreasonable restraint on that freedom of communication, especially communication concerning government and political matters, which "the common convenience and welfare of society"[82] now requires. Equally, the system of government prescribed by the Constitution would be impaired if a wider freedom for members of the public to give and to receive information concerning government and political matters were not recognised. The "varying conditions of society" of which Cockburn CJ spoke in *Wason v Walter*[83] now evoke a broadening of the common law rules of qualified privilege. As McHugh J pointed out in *Stephens*[84], that has come about in a number of ways:

"In the last decade of the twentieth century, the quality of life and the freedom of the ordinary individual in Australia are highly dependent on the exercise of functions and powers vested in public representatives and officials by a vast legal and bureaucratic apparatus funded by public moneys. How, when, why and where those functions and powers are or are not exercised are matters that are of real and legitimate interest to every member of the community. Information concerning the exercise of those functions and powers is of vital concern to the community. So is the performance of the public representatives and officials who are invested with them. It follows in my opinion that the general public has a legitimate interest in receiving information concerning matters relevant to the exercise of public functions and powers vested in public representatives and officials. Moreover, a narrow view should not be taken of the matters about which the general public has an interest in receiving information. With the increasing integration of the social, economic and political life of Australia, it is difficult to contend that the exercise or failure to exercise public functions or powers at any particular level of government or administration, or in any part of the country, is not of relevant interest to the public of Australia generally."

Because the Constitution requires "the people" to be able to communicate with each other with respect to matters that could affect their choice in federal elections or constitutional referenda or that could throw light on the performance of Ministers of State and the conduct of the executive branch of government, the common law rules concerning privileged communications, as understood before the decision in *Theophanous,* had reached the point where they failed to meet that requirement. However, the common law of defamation can and ought to be developed to take into account the varied conditions to which McHugh J referred.

The common law rules of qualified privilege will then properly reflect the requirements of ss 7, 24, 64, 128 and related sections of the Constitution.

Accordingly, this Court should now declare that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it. The common convenience and welfare of Australian society are advanced by discussion - the giving and receiving of information - about government and political matters. The interest that each member of the Australian community has in such a discussion extends the categories of qualified privilege. Consequently, those categories now must be recognised as protecting a communication made to the public on a government or political matter. It may be that, in some respects, the common law defence as so extended goes beyond what is required for the common law of defamation to be compatible with the freedom of communication required by the Constitution. For example, discussion of matters concerning the United Nations or other countries may be protected by the extended defence of qualified privilege, even if those discussions cannot illuminate the choice for electors at federal elections or in amending the Constitution or cannot throw light on the administration of federal government.

Similarly, discussion of government or politics at State or Territory level and even at local government level is amenable to protection by the extended category of qualified privilege, whether or not it bears on matters at the federal level. Of course, the discussion of matters at State, Territory or local level might bear on the choice that the people have to make in federal elections or in voting to amend the Constitution, and on their evaluation of the performance of federal Ministers and their departments. The existence of national political parties operating at federal, State, Territory and local government levels, the financial dependence of State, Territory and local governments on federal funding and policies, and the increasing integration of social, economic and political matters in Australia make this conclusion inevitable. Thus, the extended category of common law qualified privilege ensures conformity with the requirements of the Constitution. The real question is as to the conditions upon which this extended category of common law qualified privilege should depend.

At common law, once an occasion of qualified privilege is found to exist, the privilege traditionally protects a communication made on that occasion unless the plaintiff is actuated by malice in making the communication[85]. But, apart from a few exceptional cases[86], the common law categories of qualified privilege protect only occasions where defamatory matter is published to a limited number of recipients. If a publication is made to a large audience, a claim of qualified privilege at common law is rejected unless, exceptionally, the members of the audience all have an interest in knowing the truth. Publication beyond what was reasonably sufficient for the occasion of qualified privilege is unprotected[87]. Because privileged occasions are ordinarily occasions of limited publication - more often than not occasions of publication to a single person - the common law has seen honesty of purpose in the publisher as the appropriate protection for individual reputation. As long as the publisher honestly and without malice uses the occasion for the purpose for which it is given, that person escapes liability even though the publication is false and defamatory. But a test devised for situations where usually only one person receives the publication is unlikely to be appropriate when the publication is to tens of thousands, or more, of readers, listeners or viewers.

No doubt it is arguable that, because qualified privilege applies only when the communication is for the common convenience and welfare of society, a person publishing to tens of thousands should be able to do so under the same conditions as those that apply to any person publishing on an occasion of qualified privilege. But the damage that can be done when there are thousands of recipients of a communication is obviously so much greater than when there are only a few recipients. Because the damage from the former class of publication is likely to be so much greater than from the latter class, a requirement of reasonableness as contained in s 22 of the Defamation Act, which goes beyond mere honesty, is properly to be seen as reasonably appropriate and adapted to the protection of reputation and, thus, not inconsistent with the freedom of communication which the Constitution requires.

Reasonableness of conduct is the basic criterion in s 22 of the Defamation Act which gives a statutory defence of qualified privilege. It is a concept invoked in one of the defences of qualified protection under the Defamation Codes of Queensland and Tasmania[88]. And it was the test of reasonableness that was invoked in the joint judgment in *Theophanous*[89]. Given these considerations and given, also, that the requirement of honesty of purpose was developed in relation to more limited publications, reasonableness of conduct seems the appropriate criterion to apply when the occasion of the publication of defamatory matter is said to be an occasion of qualified privilege solely by reason of the relevance of the matter published to the discussion of government or political matters. But reasonableness of conduct is imported as an element only when the extended category of qualified privilege is invoked to protect a publication that would otherwise be held to have been made to too wide an audience. For example, reasonableness of conduct is not an element of that qualified privilege which protects a member of the public who makes a complaint to a Minister concerning the administration of his or her department. Reasonableness of conduct is an element for the judge to consider only when a publication concerning a government or political matter is made in circumstances that, under the English common law, would have failed to attract a defence of qualified privilege.

In *Theophanous*[90], the joint judgment also required the defendant to prove that it was unaware of the falsity of the matter published and that it did not publish the matter recklessly. That is a requirement that has little practical significance. The defendant must establish that its conduct in making the publication was reasonable in all the circumstances of the case. In all but exceptional cases, the proof of reasonableness will fail as a matter of fact unless the publisher establishes that it was unaware of the falsity of the matter and did not act recklessly in making the publication.

It may be that, if a statutory provision were to require the additional elements of want of knowledge of falsity and absence of recklessness, as required by *Theophanous*, it would not, on that account, infringe the freedom of communication which the Constitution requires. For present purposes, it is necessary only to state that their absence from s 22 of the Defamation Act cannot have the consequence that the provisions of that Act infringe the constitutional freedom. Moreover, these are not requirements of the common law, as it has traditionally been understood, and there is no reason why they should be engrafted on the expanded common law defence of qualified privilege.

Having regard to the interest that the members of the Australian community have in receiving information on government and political matters that affect them, the reputations of those defamed by widespread publications will be adequately protected by requiring the publisher to prove reasonableness of conduct. The protection of those reputations will be further

enhanced by the requirement that the defence will be defeated if the person defamed proves that the publication was actuated by common law malice to the extent that the elements of malice are not covered under the rubric of reasonableness. In the context of the extended defence of qualified privilege in its application to communications with respect to political matters, "actuated by malice" is to be understood as signifying a publication made not for the purpose of communicating government or political information or ideas, but for some improper purpose.

In *Theophanous*[91], the Court held that, once the publisher proved it was unaware of the falsity of the material, had not acted recklessly, and had acted reasonably, malice could not defeat the constitutional defence. But once the concept of actuating malice is understood in its application to government and political communications, in the sense indicated, we see no reason why a publisher who has used the occasion to give vent to its ill will or other improper motive should escape liability for the publication of false and defamatory statements. As we have explained, the existence of ill will or other improper motive will not itself defeat the privilege. The plaintiff must prove that the publication of the defamatory matter was *actuated* by that ill will or other improper motive[92]. Furthermore, having regard to the subject matter of government and politics, the motive of causing political damage to the plaintiff or his or her party cannot be regarded as improper. Nor can the vigour of an attack or the pungency of a defamatory statement, without more, discharge the plaintiff's onus of proof of this issue.

Whether the making of a publication was reasonable must depend upon all the circumstances of the case. But, as a general rule, a defendant's conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond[93].

Once the common law is developed in this manner, the New South Wales law of defamation cannot be said to place an undue burden on those communications that are necessary to give effect to the choice in federal elections given by ss 7 and 24 and the freedom of communication implied by those sections and ss 64 and 128 of the Constitution. It is true that the law of defamation in that State effectively places a burden on those communications although it does not prohibit them. Nevertheless, having regard to the necessity to protect reputation, the law of New South Wales goes no further than is reasonably appropriate and adapted to achieve the protection of reputation once it provides for the extended application of the law of qualified privilege. Moreover, even without the common law extension, s 22 of the Defamation Act ensures that the New South Wales law of defamation does not place an undue burden on communications falling within the protection of the Constitution. That is because s 22 protects matter published to any person where the recipient had an interest or apparent interest in having information on a subject, the matter was published in the course of giving information on that subject to the recipient, and the conduct of the publisher in publishing the matter was reasonable in the circumstances.

Other statutory defences

As already indicated, it is common ground that this matter is to be determined by reference to the law as it applies in New South Wales. However, the need to develop the common law to conform with the constitutional implication may require that defamation legislation in other States be re-evaluated. It is unnecessary in this case to consider whether, when so evaluated, that legislation is reasonably appropriate and adapted in the sense indicated and, if not, the extent to which it is invalid.

The pleaded defences

In so far as the Amended Defence in the present case rests on the claim that the defamatory matter was published pursuant to a freedom guaranteed by the Constitution of the Commonwealth, the defence fails. For the reasons that we have given, the Constitution itself confers no private right of defence and the New South Wales law of defamation action places no undue burden on the freedom of communication required by the Constitution. In so far as the Amended Defence relies on the common law of qualified privilege to defend the publication, different considerations apply. The argument with respect to that matter was made in the context of qualified privilege as it has been traditionally understood, albeit as modified in *Theophanous*. The argument was not made by reference to the expanded defence of qualified privilege which must now be recognised. Nor, of course, were particulars provided in that context. The particulars which have been provided do not, in our view, bring the publication within the extended defence.

By reason of matters of geography, history, and constitutional and trading arrangements, however, the discussion of matters concerning New Zealand may often affect or throw light on government or political matters in Australia. That being so, it may be that further and better particulars can be provided which bring the publications within the expanded defence. We express no view as to whether the publication can be brought within that defence, but the possibility should not be regarded as foreclosed by the orders that the Court now makes.

Orders

1. The case stated should be answered as follows:

"1. Q. Is the defence pleaded in par 10 of the Defendant's Amended Defence bad in law?"

A. Yes.

"2. Q. Is the defence pleaded in par 6 of the Defendant's Amended Defence bad in law in respect of the publication complained of in New South Wales?"

A. No. But the particulars given do not bring the publication within that defence.

2. The matter is remitted to the Supreme Court of New South Wales to proceed therein in accordance with the answers to the questions.

3. The defendant pay the plaintiff's costs of the proceedings in the High Court including the costs of the removal of the matter under s 40 of the *Judiciary Act* 1903 (Cth).

4. The Commonwealth, New South Wales, Queensland, South Australia and Western Australia pay to the plaintiff and to the defendant a proportion of the costs incurred by each of

them to be taxed as between party and party in relation to the proceedings in the High Court other than the application to remove the matter under s 40 of the *Judiciary Act* 1903 (Cth), the proportion to be determined by the taxing officer by reference to the time by which the hearing of the matter before the Full Court was extended by submissions made on behalf of those interveners.

5. The corporations described as "the Fairfax interests", Nationwide News Pty Ltd, the Herald and Weekly Times Ltd, and the Seven Network Ltd pay to the plaintiff and to the defendant a proportion of the costs incurred by each of them to be taxed as between party and party in relation to the proceedings in the High Court other than the application to remove the matter under s 40 of the *Judiciary Act* 1903 (Cth), the proportion to be determined by the taxing officer by reference to the time by which the hearing of the matter before the Full Court was extended by submissions made on behalf of those interveners.

6. Any payment made to the plaintiff pursuant to par 4 or par 5 shall be made in relief of the defendant's obligation under par 3.

[1] Section 5 of the *Australian Broadcasting Corporation Act* 1983 (Cth) continues under the name Australian Broadcasting Corporation the body corporate previously in existence under the name Australian Broadcasting Commission.

[2] [1994] HCA 46; (1994) 182 CLR 104.

[3] [1994] HCA 45; (1994) 182 CLR 211.

[4] [1994] HCA 46; (1994) 182 CLR 104 at 208.

[5] Mason CJ, Deane, Toohey and Gaudron JJ; Brennan, Dawson and McHugh JJ dissenting.

[6] [1994] HCA 46; (1994) 182 CLR 104 at 209.

[7] [1994] HCA 46; (1994) 182 CLR 104 at 209.

[8] [1994] HCA 46; (1994) 182 CLR 104 at 209.

[9] [1994] HCA 46; (1994) 182 CLR 104 at 106.

[10] *Baker v Campbell [1983] HCA 39;* (1983) 153 CLR 52 at 102; *Damjanovic & Sons Pty Ltd v The Commonwealth [1968] HCA 42;* (1968) 117 CLR 390 at 395-396; *Queensland v The Commonwealth [1977] HCA 60;* (1977) 139 CLR 585 at 610.

[11] *Hughes and Vale Pty Ltd v State of New South Wales [1953] HCA 14;* (1953) 87 CLR 49 at 102; *Queensland v The Commonwealth [1977] HCA 60;* (1977) 139 CLR 585 at 602, 620; *Jones v The Commonwealth* (1987) 61 ALJR 348 at 349; 71 ALR 497 at 498.

[12] [1953] HCA 14; (1953) 87 CLR 49 at 102. See also *H C Sleigh Ltd v South Australia [1977] HCA 2;* (1977) 136 CLR 475 at 501; *The Commonwealth v Hospital Contribution Fund [1982] HCA 13;* (1982) 150 CLR 49 at 56.

[13] *Queensland v The Commonwealth [1977] HCA 60;* (1977) 139 CLR 585 at 630. See also *The Commonwealth v Cigamatic Pty Ltd (in liq)* [1962] HCA 40; (1962) 108 CLR 372 at 377.

[14] *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia [1913] HCA 41;* (1913) 17 CLR 261 at 278-279; *The Tramways Case [No 1]* [1914] HCA 15; (1914) 18 CLR 54 at 58, 69, 83; but cf *Queensland v The Commonwealth [1977] HCA 60;* (1977) 139 CLR 585 at 621.

[15] *Queensland v The Commonwealth [1977] HCA 60;* (1977) 139 CLR 585 at 630; *Street v Queensland Bar Association [1989] HCA 53;* (1989) 168 CLR 461 at 588.

[16] [1994] HCA 46; (1994) 182 CLR 104 at 137.

[17] [1994] HCA 46; (1994) 182 CLR 104 at 188.

[18] [1994] HCA 46; (1994) 182 CLR 104 at 188.

[19] [1994] HCA 46; (1994) 182 CLR 104 at 187.

[20] [1994] HCA 46; (1994) 182 CLR 104 at 188.

[21] [1994] HCA 45; (1994) 182 CLR 211 at 257.

[22] [1994] HCA 45; (1994) 182 CLR 211 at 257.

[23] The year in which the articles, the subject of the proceedings in *Theophanous* and *Stephens*, were published.

[24] [1995] HCA 46; (1996) 186 CLR 140.

[25] [1995] HCA 52; (1996) 186 CLR 302.

[26] [1995] HCA 49; (1996) 186 CLR 352.

[27] *Nationwide News Pty Ltd v Wills [1992] HCA 46;* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth ("ACTV") [1992] HCA 45;* (1992) 177 CLR 106; *Theophanous* [1994] HCA 46; (1994) 182 CLR 104; *Stephens* [1994] HCA 45; (1994) 182 CLR 211; *Cunliffe v The Commonwealth [1994] HCA 44;* (1994) 182 CLR 272; *McGinty* [1995] HCA 46; (1996) 186 CLR 140; *Langer* [1995] HCA 52; (1996) 186 CLR 302; *Muldowney* [1995] HCA 49; (1996) 186 CLR 352.

[28] *Grannall v Marrickville Margarine Pty Ltd [1955] HCA 6;* (1955) 93 CLR 55 at 77.

[29] *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth [1975] HCA 53;* (1975) 135 CLR 1 at 56; *Nationwide News* [1992] HCA 46; (1992) 177 CLR 1 at 46-47, 70-72; *ACTV* [1992] HCA 45; (1992) 177 CLR 106 at 137, 184-185, 210, 229-230; *Theophanous* [1994] HCA 46; (1994) 182 CLR 104 at 146-147, 189-190, 195-197; *McGinty* [1995] HCA 46; (1996) 186 CLR 140 at 201-202.

[30] *Official Report of the National Australasian Convention Debates*, (Adelaide), (1897) at 17.

[31] *Federal Commissioner of Taxation v Munro [1926] HCA 58;* (1926) 38 CLR 153 at 178.

[32] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd [1920] HCA 54;* (1920) 28 CLR 129 at 147; *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan [1931] HCA 34;* (1931) 46 CLR 73 at 114; *R v Kirby; Ex parte Boilermakers' Society of Australia [1956] HCA 10;* (1956) 94 CLR 254 at 275; *New South Wales v The Commonwealth [1975] HCA 58;* (1975) 135 CLR 337 at 364-365. See also *FAI Insurances Ltd v Winneke [1982] HCA 26;* (1982) 151 CLR 342 at 364.

[33] *Dignan* [1931] HCA 34; (1931) 46 CLR 73 at 114.

[34] *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth [1993] HCA 12;* (1993) 176 CLR 555 at 572-573, 580-581, 590-591, 597-598.

[35] *Theodore v Duncan* [1919] AC 696 at 706.

[36] See Campbell, "Parliament and the Executive", in Zines (ed), *Commentaries on the Australian Constitution*, (1977) 88 at 91.

[37] See *R v Richards; Ex parte Fitzpatrick and Browne [1955] HCA 36;* (1955) 92 CLR 157.

[38] (1896) at 17.

[39] Reid and Forrest, *Australia's Commonwealth Parliament*, (1989) at 319, 337-339.

[40] Birch, *Representative and Responsible Government*, (1964) at 17; *ACTV* [1992] HCA 45; (1992) 177 CLR 106 at 230; *Theophanous* [1994] HCA 46; (1994) 182 CLR 104 at 200.

[41] *Representative and Responsible Government*, (1964) at 17.

[42] *Representative and Responsible Government*, (1964) at 17.

[43] *R v Smithers; Ex parte Benson [1912] HCA 92;* (1912) 16 CLR 99 at 108, 109-110; *Nationwide* [1992] HCA 46; (1992) 177 CLR 1 at 73; *ACTV* [1992] HCA 45; (1992) 177 CLR 106 at 232.

[44] [1992] HCA 45; (1992) 177 CLR 106 at 187.

[45] [1994] HCA 46; (1994) 182 CLR 104 at 168. See also 146-148.

[46] [1994] HCA 44; (1994) 182 CLR 272 at 326.

[47] [1994] HCA 44; (1994) 182 CLR 272 at 327.

[48] [1981] AC 1096 at 1168.

[49] *Nationwide* [1992] HCA 46; (1992) 177 CLR 1 at 51, 76-77, 94-95; *ACTV* [1992] HCA 45; (1992) 177 CLR 106 at 142-144, 159, 169, 217-218; *Theophanous* [1994] HCA 46; (1994) 182 CLR 104 at 126; *Stephens* [1994] HCA 45; (1994) 182 CLR 211 at 235; *Cunliffe* [1994] HCA 44; (1994) 182 CLR 272 at 336-337, 387; *Langer* [1995] HCA 52; (1996) 186 CLR 302 at 333-334.

[50] "Sources of Legal Authority", reprinted in *Jesting Pilate*, (1965) 198 at 199-200.

[51] cf *Black & White Taxi Co v Brown & Yellow Taxi Co* 276 US 518 at 533-534 (1928); *Erie Railroad Co v Tompkins* 304 US 64 at 78-79 (1938).

[52] *New York Times Co v Sullivan* 376 US 254 at 264-265 (1964); *Time Inc v Hill* 385 US 374 at 387-388, 409-410 (1967); *Time Inc v Firestone* 424 US 448 at 452-453 (1976); *Dun & Bradstreet Inc v Greenmoss Builders Inc* 472 US 749 at 755, 765-766 (1985); Tribe, *American Constitutional Law*, 2nd ed (1988) par 18-6.

[53] *New York Times Co v Sullivan* 376 US 254 at 265 (1964).

[54] *Gertz v Robert Welch Inc* 418 US 323 at 327, 330, 332, 342-343 (1974).

[55] *Bivens v Six Unknown Federal Narcotics Agents* 403 US 388 (1971).

[56] *Northern Territory v Mengel [1994] HCA 37;* (1995) 185 CLR 307 at 350-353, 372-373.

[57] Dixon, "The Common Law as an Ultimate Constitutional Foundation", (1957) 31 *Australian Law Journal* 240 at 241. See also *Western Australia v The Commonwealth* (*Native Title Act Case*) [1995] HCA 47; (1995) 183 CLR 373 at 487.

[58] *R v Kirby; Ex parte Boilermakers' Society of Australia [1956] HCA 10;* (1956) 94 CLR 254 at 267-268.

[59] *McArthur v Williams [1936] HCA 10;* (1936) 55 CLR 324 at 347; cf *Thompson v The Queen [1989] HCA 30;* (1989) 169 CLR 1 at 34-35.

[60] "Sources of Legal Authority", reprinted in *Jesting Pilate*, (1965) 198 at 199.

[61] [1993] HCA 44; (1993) 177 CLR 541 at 552. See also *Theophanous* [1994] HCA 46; (1994) 182 CLR 104 at 141-142.

[62] *A-G v Guardian Newspapers (No 2) [1988] UKHL 6;* [1990] 1 AC 109 at 283.

[63] cf as to waiver of the right or privilege with respect to trial by jury, which is conferred by s 80 of the Constitution, *Brown v The Queen [1986] HCA 11;* (1986) 160 CLR 171 at 180-182, 190-191, 195-196, 204-205, 214-215.

[64] Covering cl 3 of the Constitution.

[65] *Toogood v Spyring* (1834) 1 CM & R 181 at 193 [149 ER 1044 at 1050].

[66] *Jumbunna Coal Mine, NL v Victorian Coal Miners' Association [1908] HCA 87;* (1908) 6 CLR 309 at 367-368; *Australian National Airways Pty Ltd v The Commonwealth [1945] HCA 41;* (1945) 71 CLR 29 at 81.

[67] *Theophanous* [1994] HCA 46; (1994) 182 CLR 104 at 140.

[68] *McGinty* [1995] HCA 46; (1996) 186 CLR 140 at 168, 182-183, 231, 284-285.

[69] cf *Cunliffe* [1994] HCA 44; (1994) 182 CLR 272 at 337.

[70] *Cunliffe* [1994] HCA 44; (1994) 182 CLR 272 at 300, 324, 339, 387-388. In this context, there is little difference between the test of "reasonably appropriate and adapted" and the test of proportionality: see at 377, 396.

[71] *Theophanous* [1994] HCA 46; (1994) 182 CLR 104 at 131-132, 154-155, 178.

[72] *Theophanous* [1994] HCA 46; (1994) 182 CLR 104 at 153.

[73] *Theophanous* [1994] HCA 46; (1994) 182 CLR 104 at 192.

[74] *Theophanous* [1994] HCA 46; (1994) 182 CLR 104 at 192.

[75] *Theophanous* [1994] HCA 46; (1994) 182 CLR 104 at 136.

[76] Section 11 of the *Defamation Act* 1974 (NSW) states that the provision of a statutory defence "does not of itself vitiate, diminish or abrogate any defence or exclusion of liability available apart from this Act". As a result, the common law defence of qualified privilege still applies in New South Wales.

[77] Section 22 states:

"(1) Where, in respect of matter published to any person: (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 him information on that subject; and

(c) the conduct of the publisher in publishing that matter is reasonable in the circumstances,

there is a defence of qualified privilege for that publication.

(2) For the purposes of subsection (1), a person has an apparent interest in having information on some subject if, but only if, at the time of the publication in question, the publisher believes on reasonable grounds that that person has that interest.

(3) Where matter is published for reward in circumstances in which there would be a qualified privilege under subsection (1) for the publication if it were not for reward, there is a defence of qualified privilege for that publication notwithstanding that it is for reward."

[78] But see *Stephens* [1994] HCA 45; (1994) 182 CLR 211 at 242-251 per Brennan J.

[79] [1934] HCA 51; (1934) 52 CLR 637.

[80] *Adam v Ward* [1917] AC 309 at 334.

[81] *Duncombe v Daniell* (1837) 8 Car & P 222 [173 ER 470]; *Adam v Ward* [1917] AC 309; *Chapman v Ellesmere (Lord)* [1932] 2 KB 431; *Telegraph Newspaper Co Ltd v Bedford [1934] HCA 15;* (1934) 50 CLR 632; *Lang v Willis [1934] HCA 51;* (1934) 52 CLR 637; *Radio 2UE Sydney Pty Ltd v Parker* (1992) 29 NSWLR 448; *Stephens* [1994] HCA 45; (1994) 182 CLR 211 at 261.

[82] *Toogood v Spyring* (1834) 1 CM & R 181 at 193 [149 ER 1044 at 1050].

[83] (1868) LR 4 QB 73 at 93.

[84] [1994] HCA 45; (1994) 182 CLR 211 at 264.

[85] *Mowlds v Fergusson* (1939) 40 SR (NSW) 311 at 327-329; *Horrocks v Lowe* [1975] AC 135 at 149.

[86] For example: *Adam v Ward* [1917] AC 309; *Loveday v Sun Newspapers Ltd [1938] HCA 28;* (1938) 59 CLR 503.

[87] *Telegraph Newspaper Co Ltd v Bedford [1934] HCA 15;* (1934) 50 CLR 632.

[88] *The Criminal Code* (Q), s 377; *Defamation Act* 1957 (Tas), s 16.

[89] [1994] HCA 46; (1994) 182 CLR 104 at 136-137.

[90] [1994] HCA 46; (1994) 182 CLR 104 at 137.

[91] [1994] HCA 46; (1994) 182 CLR 104 at 137.

[92] *Mowlds v Fergusson* (1939) 40 SR (NSW) 311 at 327-329.

[93] *Stephens* [1994] HCA 45; (1994) 182 CLR 211 at 252-253.
