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Director
Legislation, Policy and Criminal Law Review
NSW Department of Justice and Attorney General
GPO Box 6
Sydney NSW 2001

Dear Director

Review of the *Defamation Act 2005* (NSW)

Free TV Australia represents all of Australia's commercial free-to-air television broadcasters. In 2011 commercial free-to-air television is the most popular source of entertainment and information for Australians, with our members providing nine channels of content across a broad range of genres, as well as rich online and mobile offerings, all at no cost to the public.

Free TV appreciates the opportunity to comment on the NSW *Defamation Act 2005*, and in particular whether its policy objectives remain valid and its terms appropriate for securing these objectives.

In general, Free TV's members are satisfied with the objectives of the *Defamation Act*. Free TV is particularly supportive of the Act's first two objectives:

- to enact provisions to promote uniform laws of defamation in Australia; and
- to ensure that the law of defamation does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance.

Free TV believes that these two objectives should be retained as the primary aims of the Act. It is vital to ensure that defamation laws do not unreasonably impact upon freedom of press, particularly in light of Australia's low level of protection for free speech in other regulatory forums. Meanwhile, any lack of uniformity in defamation laws across different States and Territories will inevitably lead to forum shopping, increasing the complexity and cost of proceedings and reducing equality in defamation law Australia-wide.

With respect to the terms of the Act and whether they and their operation remain appropriate for securing these objects, comments on specific provisions are provided below.

Contextual truth defence

It is urgent that the contextual truth defence in s26 of the Act be amended to address errors identified by Simpson J in *Kermode v Fairfax Media Publications Pty Ltd.*[1]

[1] [2010] NSWSC 852

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In this decision, Simpson J determined that while s26 was intended to replicate the previous contextual truth defence in s15 of the *Defamation Act 1974*, it failed to do so. Simpson J found that s26 places a limit on the defendant's ability to access the defence, such that where a plaintiff is granted leave to amend their claim to plead the defendant's contextual imputations as their own, the defendant is henceforth unable to rely on the contextual truth defence.

Simpson J noted in her judgment that this result is unjust for defendants and stated that the section should be redrafted to reflect the original intention - that is, to permit defendants to rely on a contextual truth defence in all appropriate circumstances.

The current confusion has also led to inconsistency in the application of the defence across different cases. For example, in *Ahmed v Nationwide News Pty Limited*[2] Bozic J denied the plaintiff's application to plead back the defendant's contextual imputations specifically because he felt it would result in significant injustice to the defendant post *Kermode*. This contrasts with Gibson J's decision in *Creighton v Nationwide News Pty Ltd (No. 2)*[3] to permit the plaintiff to plead back the defendant's contextual imputations on the basis that a conflict of judicial opinion over statutory interpretation was not a sufficiently exceptional circumstance to warrant striking out the plaintiff's application to amend their statement of claim.

It is therefore vital that s26 be redrafted as recommended by Simpson J as soon as possible. In particular, it is the use of the words "in addition to the defamatory imputations of which the plaintiff complains" that have been recognised as problematic and would benefit from redrafting.

Qualified privilege defence

The qualified privilege defence in s30 of the NSW Act, and more generally the Uniform Defamation Act, has long needed amending to clarify two matters - the definition of "reasonableness" and the effect of errors as to the existence of an occasion of privilege.

The need to amend the definition of "reasonableness" arises from the interpretation of this provision by the courts in cases such as *Morgan v Fairfax & Sons Ltd (No 2)*[4] and *John Fairfax Publications Pty Ltd v Zunter*.[5] Where the defence was originally intended to permit any honest and well intentioned speech, it is now restricted to "reasonable speech" as defined by a judge. This concept of "reasonableness" has been interpreted to place an unrealistic and unachievable standard upon journalists – one which is far more onerous than accepted community standards and which essentially renders the defence ineffective.

The current judicial interpretation is a result of the partial adoption of the test from the UK case of *Reynolds* v *Times Newspapers Ltd*,[6] and in particular the incomplete adoption of its list of factors for consideration. The wording of the defence should therefore be amended to:

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[2] [2010] NSWDC 268
[3] [2010] NSWDC 192
[4] (1991) 23 NSWLR 374
[5] [2006] NSWCA 227
[6] [2001] AC127

- clarify that the intention is to adopt the *Reynolds* test;
- more accurately reflect the *Reynolds* test, particularly with respect to considerations to be taken into account in determining whether conduct is reasonable; and
- make it clear that this is a question for the jury to determine.

Similarly, the court's restrictive interpretation of the defence in the case of *Aktas v Westpac Banking Corporation Limited*,[7] has led to the need for amendments to clarify whether a genuine mistake can exclude its application. In this decision, the court held that the privilege did not apply when a mistake had been made as to whether or not a communication was necessary. This goes against accepted precedent and has cast doubt on whether the defence applies to a wide variety of situations, such as the reporting of a crime, in which it is in the public interest for people to speak with candour even when mistaken.

This restrictive interpretation has the potential to cause a flood of claims in relation to communications which would previously have protected as qualified privilege. Free TV therefore argues that it is vital that the current provision be amended to make it clear that an error as to the occasion of privilege does not disqualify the defence.

Honest opinion (comment) defence

Free TV further feels that the common law comment defence, as expressed in the Uniform Defamation Act as the s31 "honest opinion" defence, has been interpreted by courts in an overly technical manner, restricting its application to only a very small subset of cases in a manner which is out of line with community expectations and behaviour.

The common law "fair comment" defence was originated as a permissive defence intended to allow any statement that is made honestly and without malice, however unreasonable or prejudiced. Such a defence is of growing importance in light of technological developments and the increasing publication of statements of opinion by the community through forums such as blogs, micro-blogs and community reviews. This should dictate the expansion of the provision to take account of new community norms.

In contrast, the courts are increasingly interpreting the defence in a more restricted manner, particularly in relation to its interaction with statements of fact (or "proper material" in s31). In *Channel Seven Adelaide v Manock*,[8] for example, the court held that a promotion for a television show did not contain sufficient factual information to allow the audience to assess the comment and satisfy the defence's requirements. This is despite the fact that the promotion was clearly only providing a brief summary of arguments to be provided in the program itself. Meanwhile, in *Fraser v Holmes*[9] the court concluded that statements made about an appellant's personal feelings constituted statements of fact not comment, therefore precluding the application of the defence. Similarly, in *The Herald and Weekly Times Pty Ltd*

[7] [2010] HCA 25
[8] [2010] SASCFC 59
[9] (2009) 253 ALR 538

and Another v Buckley[10] many of the pleaded defences of comment were struck out because they were "statements of fact," while one originally disallowed was reinstated. This inconsistent approach within a single case shows the difficulties an overly technical approach can place on a pleading of comment.

This restrictive and complex interpretation of the defence will eliminate its application in a wide range of circumstances, such as when the speaker may be ill-informed or an inexperience communicator, or where the publication itself is extremely short. This is clearly out of line with community expectations that comment may be made in reasonable circumstances, and widely divergent from community behaviour. Commentators of all persuasions, whether acting in a formal media capacity or as part of the informal culture of blogs and internet forums, should not have to resort to repetition of facts or expensive and time consuming legal advice before expressing an opinion. The high degree of technicality surrounding this defence therefore needs to be addressed.

Free TV endorses the Australia's Right Know Coalition's suggestion that the current defence be replaced with a more appropriate defence based on the approach taken in the Queensland code prior to the adoption of the uniform defamation reforms, and that further guidance on judicial interpretation be provided in the legislation or Explanatory Memorandum to encourage a more permissive application.

Trial by jury

Section 21 of the Act currently enshrines the right of parties to defamation proceedings to elect to have the matter tried by jury. Free TV is supportive of this as a fundamental right of parties to the proceedings which appropriately reflects the importance of community standards in deciding allegations of defamation.

Free TV is therefore very concerned with the recent judicial ruling in *Senator Fierravanti-Wells v Channel Seven Sydney Pty Ltd* [2010] NSWDC 143 (16 July 2010) which undermines this right. In *Fierravanti-Wells*, Levy of the District Court chose to overrule a joint agreement between the parties that the matter would be most appropriately be heard before a jury. He instead called for the parties to make submissions as to why the trial should be dealt with by a jury and, after hearing their reasons, exercised his power under s21(3) to order that the trial instead be heard by judge alone.

This sets a concerning precedent that it is for the court to decide of its own volition whether a case should be heard by a jury, even where the parties are in unanimous agreement on the matter. This inclination can also be seen in judgements by courts at the Federal level.

It is far preferable that it be left to the parties to decide how a matter should be heard, with the court only making an order to the contrary in response to an application from one of the parties to the proceedings. If the court is left to determine the issue, the invaluable role of the jury in deciding issues such as whether imputations arise that are defamatory or whether a defendant

[10] (2009) 21 VR 661

has successfully mounted a defence will almost certainly be lost to judicial predispositions as to jury competence.

Free TV therefore recommends that s21 be amended to make it clear that a judge's right to order that defamation proceedings not be tried by jury may not over rule a joint agreement of the parties to the contrary.

Cap on damages

Free TV recommends that the s35 cap on the award of damages under the Act be amended to ensure that it does not disadvantage defendants. Free TV further recommends that s23 of the Act be amended to ensure plaintiffs are unable to circumvent the intention of this cap by bringing multiple actions against different defendants.

Currently, the s35 cap is determined based on circumstances at the time of judicial determination (see, for example, *Davis v Nationwide News Pty Ltd* [2008] NSWSC 693). This results in any damages awarded against a defendant being based on matters which are out of their hands, such as when the plaintiff commences their action and the length of time the proceedings take to make their way through the courts. This is clearly an inequitable and unjust outcome, which could result in manipulation or gaming of the proceedings.

Free TV argues that the s35 cap should instead be based on circumstances at the time of publication of the material in question. This will ensure that plaintiff is not 'punished' by being asked to compensate the plaintiff for matters over which they have no control. The provision of interest on the judgement sum already provides sufficient justice for the plaintiff, ensuring they are compensated adequately without the need to provide access to a higher cap.

Furthermore, there is evidence of plaintiffs attempting to circumvent the s35 cap by bringing multiple proceedings against different parties (see, for example, *Fierravanti-Wells v Nationwide News Pty Ltd* [2010] NSWSC 648 and *Buckley v The Herald & Weekly Times Pty Ltd* [2009] VSCA 118). This is an unintended result of the wording of s23 of the Act, which only limits multiple proceedings as they relate to the same individual.

Free TV therefore proposes that s23 be amended to make it clear that where a person has brought defamation proceedings in relation to the publication of any matter, the person cannot bring further defamation proceedings for damages in relation to the same or a similar publication against the same **or another** defendant, except with the leave of the court.

Right to sue

Free TV supports the removal of the right of action for corporations and feels it has significantly benefited public debate. In light of this, Free TV feels this principle should also be extended to other artificial legal entities currently granted the right to sue as "excluded corporations" in s9, including including small companies and not-for-profits such as churches, universities and sporting bodies.

Many such entities have significant economic resources and are rightfully the subject of intense public scrutiny. Furthermore, as with other corporations currently, the individuals within the organisation would still have the right to sue, providing a defence to personal rights.

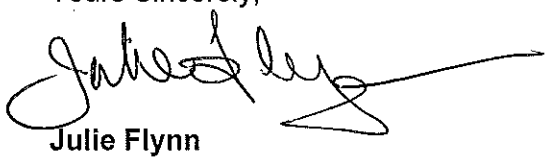
Free TV therefore proposes that the exception for, and all references to, "excluded corporations" be removed from s9.

Offer of amends

Finally, Free TV considers the inclusion of the Offer of Amends procedure at Division 1 of Part 3 of the Act has been very successful. This provision has been used extensively and effectively, and should be retained.

Thank you again for the opportunity to comment. If you have any questions or require further information, please do not hesitate to contact me.

Yours Sincerely,



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