HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

GEOFFREY MARK ROBERTS & ANOR APPELLANTS

AND

RODNEY PIERS BASS RESPONDENT

Roberts v Bass [2002] HCA 57
12 December 2002
A37/2001

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Full Court of the Supreme Court of South Australia dated 8 September 2000 and in place thereof order that:*

   (a) the appeal to that Court is allowed with costs;

   (b) the judgment of the District Court of South Australia dated 24 March 2000 is set aside and in its place:

      (i) there be judgment for the second-named appellant, Kenneth Allan Case, with costs; and

      (ii) there be a new trial of the action against the first-named appellant, Geoffrey Mark Roberts, the costs of the first trial of the action against Mr Roberts to abide the result of the new trial.

On appeal from the Supreme Court of South Australia

Representation:

S M Littlemore QC with P A Heywood-Smith for the appellants (instructed by David Wilson)

D A Trim QC with N J T Swan and H M Heuzenroeder for the respondent (instructed by Lempriere Abbott McLeod)

Intervener:

R J Meadows QC, Solicitor-General for the State of Western Australia with R M Mitchell intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for the State of Western Australia)

CATCHWORDS

Roberts v Bass

Defamation – Defences – Qualified privilege – State election – Publication of electoral material – Reciprocity of interest – Proof of malice – Improper motive – Whether intention to cause political damage constitutes an improper motive – Relevance of honest belief in truth of statement – Relevance of reckless indifference to truth or falsity of published material – Relevance of knowledge of falsity of published material – Relationship of common law qualified privilege to extended qualified privilege as identified in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

Constitutional law (Cth) – Implied limitation upon laws restricting freedom of expression concerning governmental and political matters – Whether constitutional question arises having regard to issues before the State trial and appellate courts – Whether constitutional implication may be disregarded – Whether general common law relating to the occasion of qualified privilege is compatible with the Constitution – Whether general common law relating to malice is compatible with the Constitution – Whether common law needs to be developed to ensure compatibility – Ingredients of malice in the circumstances of the case – Whether malice established in communications published in a State electoral campaign.

Words and phrases – "malice".

1 GLEESON CJ. The appellants were found at trial to have injured the respondent by the publication of false and defamatory matter in the course of a State election in South Australia, and ordered to pay damages. The decision of the trial judge was upheld by the Full Court of the Supreme Court of South Australia, save to the extent that the amount of the damages awarded against the first appellant was increased[1].

2 The facts are set out in the reasons for judgment of Callinan J. The issues presented to this Court for decision have been influenced, and in some respects artificially shaped, by the manner in which the cases of the respective parties were conducted in the South Australian courts. In my view, that produces two consequences. First, the parties should be held to the cases they presented in the South Australian courts. Secondly, the present appeals provide an unsuitable occasion for the development of the law, assuming, in the light of the recent decision of this Court in *Lange v Australian Broadcasting Corporation*[2], that it requires further development.

3 The need for the common law to conform to the Constitution is difficult to reconcile with the co-existence of two significantly different tests for qualified privilege in the context of political debate: the first, the test for common law qualified privilege as recognised in *Braddock v Bevins*[3]; the second, the test formulated by this Court in *Lange*. However, the proceedings were conducted in the South Australian courts on that assumption. The trial judge did not coin the phrase "extended form of qualified privilege". He took that expression from the joint judgment of seven members of this Court in *Lange*. Although that judgment spoke of the "development of the common law"[4], it referred to the common law "categories of qualified privilege"[5], and declared that it should be recognised that those categories should be "extended" to take account of the interest that each member of the Australian community has in discussion about government and political matters[6].

4 If, as was the common assumption in the present litigation, there is one category of common law privilege relating to communications to thousands of

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1 *Roberts v Bass* (2000) 78 SASR 302.

2 (1997) 189 CLR 520.

3 [1948] 1 KB 580.

4 (1997) 189 CLR 520 at 566.

5 (1997) 189 CLR 520 at 571.

6 (1997) 189 CLR 520 at 571.

electors in the course of an election, of the kind recognised in *Braddock v Bevins*, and another category relating to communications to the general public about political matters, of the kind recognised in *Lange*, then it seems clear that there is a substantial difference between them. Why this should be so, as a matter of principle, is difficult to understand. The law of defamation, including the law as to qualified privilege, strikes a balance between competing interests. Those interests include the public interest in freedom of political debate, which is essential to the functioning of representative democracy. Why should the balance that applies when a newspaper with a wide circulation publishes an article about the Prime Minister, or the Leader of the Opposition, differ from the balance that applies when someone distributes throughout an electorate a pamphlet urging electors to vote against the sitting member?

5 One difference between what was described in *Lange* as the extended category of qualified privilege, and the pre-existing category of common law privilege, is that a requirement of reasonableness of conduct applies to the former, but not to the latter. Because of the way in which the present proceedings were conducted, it will be necessary to return to the subject of malice in relation to the pre-existing category. Neither irrationality, nor prejudice, constitute or establish malice. In *Lange*, it was said that the interest that members of the Australian community have in receiving information on government and political matters would be met sufficiently, in the case of widespread publication which would have failed to attract a common law defence of qualified privilege, by requiring the publisher to prove reasonableness of conduct. In the case of this "extended defence of qualified privilege in its application to communications with respect to political matters" the defence would also be defeated if the person defamed proves that the publication was actuated by common law malice[7].

6 In the present case, "the extended defence of qualified privilege" was held at trial to have been defeated by want of reasonableness in the conduct of both appellants. That issue was not pursued in the Full Court. The tactical reason for that is fairly plain. Notwithstanding the extensive distribution of the material in question (two of the publications were distributed to more than 12,000 letter boxes), the trial judge found that it was published on what was, at common law, an occasion of qualified privilege. In the Full Court, the respondent did not challenge that finding. The test of reasonableness, required for the "extended category", involves an added burden for a defendant. It suited both appellants to have the case decided on the basis that it was the pre-existing common law category of qualified privilege that was relevant. They both had findings of malice against them. Given that there was no challenge to the finding that the publications were made on an occasion of common law qualified privilege in the

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7 (1997) 189 CLR 520 at 574.

pre-existing category, if the appellants could displace the findings of malice they would succeed. If they could not displace the findings of malice, it was, no doubt, regarded as unlikely that they could displace the findings that their conduct was unreasonable. Thus, the battleground became the original or pre-existing category of common law qualified privilege. The respondent permitted that, by not challenging the trial judge's finding that the occasion of each publication fell within that category, and the appellants accepted that position, which involved a less onerous test for them.

7 On the assumption, accepted by the parties at trial and in the Full Court, that there remains a category of common law qualified privilege that can apply to publications to electors, even to more than 12,000 electors, which is governed by the law as expounded in *Braddock v Bevins*, and not *Lange*, and in the light of the trial judge's unchallenged finding that the publications presently in question were made on an occasion of qualified privilege, the focus of attention became the question of malice, or, as it was described in *Lange*[8], "common law malice".

8 The kind of malice that defeats a defence of qualified privilege at common law is bound up with the nature of the occasion that gives rise to the privilege.

9 In *Horrocks v Lowe*[9], Lord Diplock explained:

> "The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has … to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters in respect of which the law recognises that they have a duty to perform or an interest to protect in doing so. What is published in good faith on matters of these kinds is published on a privileged occasion. It is not actionable even though it be defamatory and turns out to be untrue. With some exceptions … the privilege is not absolute but qualified. It is lost if the occasion which gives rise to it is misused. For in all cases of qualified privilege there is some special reason of public policy why the law accords immunity from suit – the existence of some public or private duty, whether legal or moral, on the part of the maker of the defamatory statement which justifies his communicating it or of some interest of his own which he is entitled to protect by doing so. If he uses the occasion for some other reason he loses the protection of the privilege."

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8 (1997) 189 CLR 520 at 574.

9 [1975] AC 135 at 149.

10 The public interest was said to be in communicating "frankly and freely". His Lordship went on to point out that "express malice" is the term of art by which the law describes the motive of a person who "uses the occasion for some other reason". He said that, broadly speaking, it means malice in the popular sense of a desire to injure the person who is defamed. That is clear enough in most of the cases which attract a defence of qualified privilege. For example, if the privileged occasion is the making by A of a report to B about the character or conduct of C, in pursuance of a duty or interest, then if the dominant motive for the making of a defamatory statement in the report is a desire to injure C, that defeats the privilege. The occasion has been misused. In that context, an honest expression of opinion about C's character or conduct is the obverse of a statement made with the dominant motive of injuring C.

11 Such a contrast may not be available when the occasion of privilege is political debate or an electoral contest. Electors have an interest in receiving information and opinions concerning the merits of candidates for election. That interest was described by Lord Greene MR, delivering the judgment of the Court of Appeal in *Braddock v Bevins*[10], as an interest "to have what is honestly believed to be the truth communicated". The correlative duty was described as a duty to electors "to inform them honestly and without malice of any matters which may properly affect their choice in using their suffrages"[11]. At some points in the argument for the appellants, their embrace of *Braddock v Bevins* appeared to be less than whole-hearted. The meaning of the word "honestly" in those statements is clear enough. It is not to be overlooked. However, a motive, even a dominant motive, of damaging the electoral prospects of a candidate for election may be perfectly consistent with an honest expression of opinion, or an honest assertion of fact, about the candidate. Statements made with such a motive are the stuff of which political debate is made. In such a context, the popular meaning of malice, which Lord Diplock said is "broadly speaking" what it means for the law relating to qualified privilege, requires refinement. A motive of injuring a candidate by diminishing his or her prospects of election does not constitute malice; that would be repugnant to the very basis of the privilege in electoral contest.

12 At the same time, a motive of injuring a candidate's prospects of election by damaging his or her reputation is not a defence. It would be wrong to think that, because such a motive does not constitute malice, it negates malice. If it were so, electoral contests would for practical purposes constitute a defamation-free zone. The privilege would be virtually absolute, not qualified. And "the extended defence of qualified privilege" recognised in *Lange*, which was held to

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10 [1948] 1 KB 580 at 591.

11 [1948] 1 KB 580 at 591.

conform to the requirements of the Australian Constitution, would be but a pale reflection of the common law defence. The freedom of political speech inherent in the Constitution's concept of representative democracy would be much more limited than the freedom given by the common law in relation to the distribution of material to thousands of voters in an electorate.

13 As the facts of this case show, there is a large middle ground between the publication of political statements to "tens of thousands" contemplated by the judgment in *Lange*[12] and the limited publications said to be, "more often than not … to a single person"[13], referred to in the same judgment as exemplars of occasions that fall within the pre-existing category of common law qualified privilege. If publication to more than 12,000 voters is an occasion of pre-existing common law privilege, and the privilege is defeated only by malice, with no added test of reasonableness, a conclusion that the freedom of political speech necessitated by the Constitution gives rise to a privilege that can be defeated, not only by malice, but also by want of reasonableness, may appear surprising. Acting (with the reservations earlier expressed) upon the common assumption that there are two categories of qualified privilege in relation to political communications, and that the present cases can and should be decided according to the law that applies to the category that existed before *Lange*, the test of malice must be whether the matter in question was published for the purpose that was said in *Braddock v Bevins* to attract the privilege, that is to say, the honest expression of views about a candidate for election. The fact that such views might be wrong-headed, or prejudiced, or carelessly formed, or even irrational, would not constitute, or demonstrate, malice. But it would be inconsistent with the purpose of the privilege to use the occasion, not for the honest expression of views, but for the publication of defamatory matter, knowing it to be false, or not caring whether it was true or false. Recklessness is a word sometimes used to describe the last-mentioned state of mind; but it does not simply mean carelessness, even in a high degree. It means "indifference to its truth or falsity"[14].

14 As *Braddock v Bevins* makes clear, when, in the course of an election contest, political views damaging to the reputation of a candidate, deliberately intended to harm his or her prospects of election, are published, what attracts the qualified privilege is interest in the honest expression of views, no matter how strongly put, and no matter how unreasonable they may be. The purpose of the privilege is not to protect dishonesty, or to permit the communication of anything

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12 (1997) 189 CLR 520 at 572.

13 (1997) 189 CLR 520 at 572.

14 *Horrocks v Lowe* [1975] AC 135 at 153.

that is represented to be a view, whether or not it is in fact genuinely held. A statement made in the course of political debate in an election campaign does not become honest merely because it serves a purpose of damaging the reputation, and therefore the electoral prospects, of a candidate. The genuineness of a belief that it is in the public interest that a candidate should be defeated does not cast a mantle of honesty over anything and everything that may be said in order to achieve that objective. The end does not justify any means. A strongly held opinion that a member of Parliament should be voted out of office does not mean that anything said about the member with the object of persuading electors to a like opinion must be treated as honest, and that the use of the privileged occasion is necessarily proper.

15 It is evident, from parts of the reasoning of the trial judge and the Full Court, that it was argued on behalf of the appellants that it did not suffice to establish malice merely to show that they did not have a positive belief in the truth of the allegations of impropriety levelled at the respondent. As will appear, in the case of the first appellant, that argument was beside the point, and, in the case of the second appellant, the issue was not determinative of the outcome. It may be observed that mere absence of positive belief in the truth of what is published, if that be all there is to it, does not establish malice. However, lack of positive belief in the truth of a statement is a description that might be applied to different states of mind. Whether lack of belief is evidence of reckless indifference to truth or falsity, may depend upon the nature of what is said, and the occasion on which it is said. It may be, for example, that if a person publishes an allegation of serious impropriety or unfitness about another, in circumstances where community standards would recognise a moral obligation to make an attempt to ascertain the truth beforehand, and the person has no idea whether the allegation is true or false, it is open to conclude that the person is recklessly indifferent to the truth or falsity of the allegation, within the meaning of what was said in *Horrocks v Lowe*. That is a question of fact. But mere absence of a positive belief in the truth of what is said does not constitute malice. As I have indicated, in my view, having regard to the evidence and the findings of fact, this is not an issue that arises in relation to the appeal of the first appellant, but it is of some relevance to the appeal of the second appellant.

16 That is the background against which the findings of fact made in the South Australian courts must be examined. It is important, in that respect, to note the findings of the trial judge as to the defamatory imputations conveyed by the matter complained of, which were accepted in the Full Court, and are not the subject of the appeals to this Court.

17 In the case of the "Nauru Postcard", the trial judge said:

> "In my opinion, the ordinary and reasonable reader would interpret that postcard as meaning that:

(i) Their elected member was, at the expense of the taxpayer, enjoying a holiday;

(ii) The plaintiff's holiday at Nauru was for his own enjoyment, and not in the proper pursuit of his duties as a member of the seat of Florey;

(iii) The 'Clean Government Coalition' was a group whose aim was to ensure proper parliamentary behaviour and in this case the actions of the local member were not proper; and

(iv) the opening words 'This is the postcard your politician Sam Bass should have sent you …' [refer] to a course of action which the plaintiff, as their member, should have followed but deliberately refrained from doing so.

In summary it is an effective document implying that the elected member had embarked on a holiday at a paradise resort and in doing so had misused taxpayers' money and this fact was discovered by an organisation involved in 'Clean Government'. The publication was clearly aimed at disparaging the plaintiff's reputation, the aim being to lower the plaintiff in the estimation of his fellow constituents.

I therefore find that the words reflect on the integrity of the plaintiff and portray him as a member of parliament who has misused public moneys for his own personal benefit to the detriment of his constituents and, as such, are defamatory of the plaintiff."

18 The trial judge described the "Free Travel Times Pamphlet" as "an inflammatory document which clearly reflected on the integrity of the plaintiff … and contained [a] forged purported copy of his Frequent Flyer Activity Statement". As to the frontispiece, he said the reasonable and ordinary reader would take it that the respondent had been on holiday in Nauru at government expense and was the most travelled parliamentarian for the year and that, rather than attending to his electoral duties, he was content to lie in the sun in Nauru eating and drinking. The second page contained the forged mock-up of a frequent flyer points statement. The respondent had never been involved in a frequent flyer programme. As to the third page, it was held that the ordinary and reasonable reader would take it to mean that the respondent, in an underhanded way, had used his position as a member of Parliament to accrue frequent flyer points for his own use and for the use of members of his family. The final page portrayed the respondent as among the politicians who had blatantly misused parliamentary entitlements.

19 In the case of the "Orange Pamphlet" (which was the only publication in which the second appellant was involved) the trial judge found that it conveyed the following imputations:

"(a) That the plaintiff had spent $32,000.00 of taxpayers' money on overseas travel.

(b) That the plaintiff had spent $32,000.00 of taxpayers' money for overseas travel for the purpose of his own enjoyment and not for the proper purpose of such travel, namely to enhance the plaintiff's knowledge of issues relevant to the better performance of his role as a member of Parliament.

(c) That the plaintiff had taken numerous overseas trips for his own benefit and enjoyment at the taxpayers' expense.

(d) That the plaintiff had taken numerous overseas trips for his own benefit and enjoyment and not for the intended purpose of such trips, namely to enable him to better serve the interests of the Parliament of South Australia and the members of this electorate.

(e) Contrary to his responsibility as the member of Parliament for Florey failed to take appropriate steps to prevent clandestine arrangements being put in place in respect of the management of the Modbury Hospital, contrary to the interests of the members of the electorate of Florey and the public of South Australia generally.

(f) That the plaintiff had put the rights of those interested in the right to possess and utilise guns ahead of the safety of members of ordinary families.

(g) That the plaintiff had not spent sufficient time in his electorate to properly discharge his duties as the member of the seat of Florey.

(h) That the plaintiff was not spending sufficient time in the electorate of Florey to enable him to adequately fulfil his duties as the member for Florey.

(i) That if the plaintiff was elected to the member of Florey and then subsequently elected as Speaker of the House of Assembly then he would spend less time than the time that he was currently spending in the electorate."

20 The publication of the "Free Travel Times Pamphlet" attracted the intervention of the Electoral Commissioner, and ultimately the first appellant pleaded guilty to electoral offences in relation to it.

21 The trial judge found that the respondent was a man of the utmost integrity; that he adopted a highly ethical approach to his parliamentary activities; that he had not misused his travel or other entitlements; that his attendance at the Nauru conference was for parliamentary purposes; that there

was no basis for any criticism of his travel; that he was not a member of any frequent flyer scheme; and that his conduct in relation to the Modbury Hospital and firearms control provided no basis for criticism.

22 It is necessary to consider separately the appeal of each appellant.

The first appellant

23 The damages awarded against the first appellant, Mr Roberts, by the Full Court were $100,000. That was made up of $20,000 for the first publication, $35,000 for the second, and $45,000 for the third. The fact that the third publication, and to a substantial extent the second publication, occurred after, and notwithstanding, the intervention of the Electoral Commissioner was regarded as an aggravating factor.

24 As Martin J pointed out in the Full Court, the first appellant had, over a period of some months, engaged in a course of conduct that demonstrated ill-will towards the respondent.

25 The tone of the first appellant's attack on the respondent was set by his identifying himself, in the first of the presently relevant publications, as the representative of a so-called "Clean Government Coalition". The implications of a representation that the respondent had become the target of a group of campaigners for "clean government" were obvious, and coloured the accompanying material. This is reflected in the trial judge's finding as to the imputations.

26 The trial judge made the following finding about the conduct of Mr Roberts, and the light thrown upon his behaviour by what occurred after the intervention of the Electoral Commissioner:

> "One would consider bearing in mind the views of the Electoral Commissioner that he would take some care in the preparation of further material to be publicly circulated. However, his actions thereafter show almost a contempt about these matters. Mr Roberts continued with the preparation and circulation of approximately 12,650 election day handouts referring to 'numerous junkets at your expense including trips to the United Kingdom and Nauru', and, if elected 'Qualify to spend another $32,000 of taxpayers' money on overseas travel'. This is the action of a person whose aim is solely to remove Mr Bass from office in total ignorance of the true factual matters, or, for that matter having no care or concern whether the matters were true or false providing his aim was achieved."

27 Later, the trial judge said:

> "The evidence does, in my opinion, establish that [the appellants] published the defamatory material without 'considering or caring whether it be true or not'. On occasions during his evidence, [the first appellant] admitted to having prepared the publications in spite of his indifference to the truth of their content …
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> …
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> Evidence of [the first appellant's] conduct on other occasions may also be used to infer that the material was published for some improper motive … This is of particular significance in assessing the conduct of [the first appellant]. From the initial publication his actions were reckless without any enquiry as to the accuracy or otherwise of the published material. His failure to take any positive steps to stop the FTT pamphlet from being distributed or in any way concern himself with a retraction notwithstanding repeated requests from the Electoral Commissioner to do so, and his subsequent actions in preparing and distributing the election morning pamphlet, establishes, in my view, his malicious conduct."

28 In the Full Court, Prior J said that the first appellant "was properly identified as a person with an improper motive and no honest belief in the truth of what he published". As the passages quoted above show, if all that Prior J meant by that observation was that the first appellant did not have a positive belief in the truth of what he published, then the trial judge's findings went much further than that. Indeed, the evidence showed that part of what the first appellant published was actually fabricated by him. It may be doubted that Prior J intended such a limited meaning. The sentence was followed by a footnote reference to two cases, one of which was *Horrocks v Lowe*. The page references to that judgment include the passage earlier cited in these reasons, and they also include a passage in which Lord Diplock stated that recklessness meant indifference to truth or falsity, and was not to be equated with carelessness.

29 Williams J recorded that "[i]t was common ground between the parties that the publications took place on privileged occasions". He set out the findings of the trial judge, which I have already quoted, and said that, in his opinion, they were adequately supported by the evidence. He also noted the trial judge's finding that the first appellant published the defamatory matter without considering or caring whether it be true or not. He agreed with that finding. In that connection he referred to the first appellant's persistence in his conduct after a time when, whatever might have been the position earlier, he had been told that his allegations of impropriety lacked foundation.

30 Williams J cited the judgment of Hunt J in *Barbaro v Amalgamated Television Services Pty Ltd*[15], which, in turn, referred to *Horrocks v Lowe*. Relying on what had been said by Hunt J, Williams J rejected an argument advanced on behalf of the first appellant that a mere absence of honest belief in the truth of a published statement did not establish malice. It should be noted, however, that the findings of the trial judge, adopted by Williams J, went beyond a finding merely that the first appellant had no belief in the truth of what he published.

31 Martin J agreed that the first appellant "did not possess an honest belief in the truth of the published statements", and he also agreed with the trial judge that the first appellant acted with an improper motive. In explaining his reasons, he quoted what Lord Diplock said in *Horrocks v Lowe*. In the course of the quotation he emphasised the following statement[16]:

> "If [a defendant] publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true."

32 The findings made by the trial judge, and accepted by the Full Court, concerning the first appellant, which were amply supported by the evidence, clearly established malice. It is true that there are passages in the reasoning of the trial judge, and the members of the Full Court, probably influenced by what Hunt J said in *Barbaro*, which reflect a view that it would have been sufficient to constitute malice if all that appeared was that the first appellant lacked belief in the truth of what he published. To an extent, those passages appear to have been made by way of response to the argument of counsel for the appellant; but that argument was beside the point. It completely underestimated the factual strength of the case against the first appellant. He did not merely lack belief in the truth of what he published. He actually concocted some of it himself; and he was found to have been recklessly indifferent to the truth or falsity of the accusations of impropriety he levelled at the respondent.

33 On the concurrent findings of fact made against the first appellant, which have not been shown to be in error, a conclusion of malice was virtually inevitable.

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15 (1985) 1 NSWLR 30 at 50-51.

16 *Horrocks v Lowe* [1975] AC 135 at 150.

The second appellant

34 The position in relation to the second appellant, Mr Case, is more difficult. The damages awarded against him were $5,000.

35 He was one of a group of people who decided to "target" the respondent and seek to secure his electoral defeat because of their opposition to the privatisation of the Modbury Hospital, and their perception that the respondent supported privatisation. The second appellant's views on that subject were described by the trial judge as "passionate". There is nothing wrong with that. The judge also thought the group's opinion of the role of the respondent in relation to moves to privatise the hospital was unfair. So are many political opinions.

36 The second appellant, who was described as "intelligent and capable", had a limited involvement in the publications. He had nothing to do with the first two. As to the third, he turned up on election day at a polling booth to which he had earlier been allocated, planning to assist the respondent's political opponents. He was given copies of the third publication, the orange pamphlet, which he proceeded to distribute. His evidence was that there was nothing in the pamphlet that struck him as a cause for concern. Apart from what it said about the Modbury Hospital, which was the subject of particular interest to him, he had no knowledge of the matters alleged against the respondent, but was content to distribute the card as campaign material.

37 The trial judge found that the views of the second appellant were so strong "that he would adopt any means to achieve the aims of his group of removing Mr Bass from office". That can hardly have been meant to be taken literally. The judge also found that the second appellant published the defamatory material (that is to say, handed out the orange pamphlet) without considering or caring whether it be true or not. That finding was made in conjunction with the same finding against the first appellant, and was elaborated by reference to facts which related to the first appellant. Both appellants had common legal representation, and in a number of places in the judgment they are treated as being in much the same position. It is important not to allow the second appellant to be caught in the undertow of the powerful case against the first appellant.

38 In dealing with the *Lange* issue of reasonableness, the trial judge made a finding which appears also to have influenced his conclusion on malice. He criticised the second appellant for not making enquiries as to the truth of adverse material in the orange pamphlet, apart, of course, from the subject in which he was personally interested, that is to say, the Modbury Hospital. The first appellant actually knew of the falsity of some of that material, and was found to have been recklessly indifferent to the truth of the rest. As to the second appellant, the trial judge said:

> "Mr Case's whole rationale of his actions and view of the conduct of the plaintiff was totally flawed and governed mainly by the aim of 'targeting' the plaintiff. He made no enquiries but proceeded to hand out the … pamphlet not caring whether the stated matters were true or false."

39 Two observations may be made. First, "targeting" an election candidate is not improper. It is part of legitimate political struggle. Whether or not it goes beyond what is legitimate may depend on the methods employed. Secondly, the fact that a worker at a polling booth makes no enquiries about the truth of the contents of electoral propaganda does not necessarily indicate reckless indifference to the truth or falsity of the contents of the propaganda. It depends on the circumstances. If, for example, a worker at a polling booth is asked to distribute a pamphlet accusing a candidate of a serious crime, then failure to make further enquiries might well indicate indifference to the truth or falsity of the accusation. The allegations in the orange pamphlet are not in that category, and what they meant to the first appellant was very different from what they would be likely to have meant to the second appellant.

40 In the Full Court, Prior J, who said he agreed with both the other members of the Court, did not deal separately with the issue of malice in relation to the second appellant.

41 Williams J rightly rejected the idea that "targeting" the respondent was itself an improper purpose. He referred to the trial judge's finding that both appellants acted without considering or caring whether the published material was true or false. However, as has been noted, in this respect the facts relating to the second appellant were materially different from those relating to the first appellant, and the differences were not examined.

42 Martin J, on the other hand, made detailed reference to the different position of the second appellant. He said that, after anxious consideration, he concluded that the trial judge erred in finding that the second appellant possessed a dominant motive to injure the respondent. He then went on to consider whether the judge was correct in finding that the defence of qualified privilege also failed because Mr Case did not possess an honest belief in the statements or because he published the untrue defamatory matter "recklessly, without considering or caring whether it be true or not". He referred to Lord Diplock's warning that, in this context, recklessness does not mean mere carelessness. As to the first of the two alternatives, Martin J doubted that the evidence justified a finding that the second appellant did not possess the belief he claimed, which was that he looked at the card and thought it sounded right. However, he found it unnecessary to decide the issue. He said that the conclusion that the second appellant was "indifferent within the meaning of the test posed by Lord Diplock" was reasonably open. On that basis, he dismissed the appeal of the second appellant.

43 Thus, two members of the Full Court, (Williams J, with whom Prior J agreed), upheld the finding of malice against the second appellant on the basis of an acceptance of the trial judge's finding that he was recklessly indifferent to the truth or falsity of what he published.

44 In so far as the finding of malice rested on the trial judge's finding that the second appellant was recklessly indifferent to the truth or falsity of what he published, it was legally orthodox. However, the reasoning in support of the primary finding is open to criticism. First, it insufficiently distinguished the positions of the two appellants. Secondly, and more particularly, it made insufficient allowance for the practical position of a person who undertakes to distribute electoral propaganda at a polling booth on election day, and who ordinarily would not be expected to have the capacity to verify the accuracy of such propaganda. Thirdly, it appears to have been affected by an erroneous view that "targeting" a candidate is itself improper. Martin J, in reviewing the trial judge's decision, correctly rejected that approach, but did not appear to examine the way in which it affected the finding of indifference, which he upheld.

45 In my view, the evidence did not support the finding that the second appellant was recklessly indifferent to the truth or falsity of what he published. In the circumstances of the case, which include the nature of the activity in which he was engaged, and the contents of the orange pamphlet as they would reasonably have appeared to him, failure to make enquiries about the material other than that concerning the Modbury Hospital was not evidence of reckless indifference, and the mere fact that the second appellant did not have a positive belief in the truth of that material was therefore not evidence of malice.

Conclusion

46 The first appellant's appeal should be dismissed with costs.

47 The second appellant's appeal should be allowed with costs. The orders of the Full Court of the Supreme Court of South Australia should be set aside. It should be ordered that the second appellant's appeal to that Court be allowed with costs, that the orders against the second appellant made by the trial judge be set aside, and that there should be judgment for the second appellant in the action. The respondent should pay the costs of the second appellant of the trial, the appeal to the Full Court, and the appeal in this Court.

48 GAUDRON, McHUGH and GUMMOW JJ. By grant of special leave, Geoffrey Roberts and Kenneth Case appeal against an order of the Full Court of the Supreme Court of South Australia[17] dismissing their appeal against an award of damages for defamation made by the District Court of South Australia. The respondent, Rodney Bass, sued Roberts for defaming him in three publications issued during the course of an election campaign for the State seat of Florey in South Australia. Bass sued Case for defaming him in the third of these publications. The common law, and not South Australian statute law, provided the principles of defamation law applied by the District Court. When the publications were made, Bass was the Member for Florey and Roberts was an elector in that electorate and Case was an elector in the adjoining electorate. Roberts and Case were opposed to Bass being re-elected.

49 The principal issues in the appeal are whether the evidence justified various findings made by the trial judge and the members of the Full Court and, if so, whether they constituted malice for the purpose of the law of qualified privilege in the context of publications in an electoral contest. There is also an issue as to whether the parties can depart from the positions that they adopted in the Full Court on the question whether the publications were made on occasions of qualified privilege. In the Full Court, Bass did not appeal against the trial judge's finding that the occasions were privileged. In this Court he contends that the occasions were not privileged. In the Full Court, Roberts did not appeal, and Case did not press his appeal, against the trial judge's findings that the publications were not protected by the extended defence of qualified privilege recognised by this Court in *Lange v Australian Broadcasting Corporation*[18]. They now wish to rely on the extended defence of qualified privilege.

Proceedings in the District Court

50 In the District Court, Lowrie DCJ held that all three publications contained imputations that were defamatory of Bass. The first defamation was contained in a mock postcard – "the Nauru postcard" – that Roberts sent to all the households in the electorate. The trial judge found that words on the postcard reflected on the integrity of Bass and portrayed "him as a member of parliament who has misused public moneys for his own personal benefit to the detriment of his constituents".

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17 *Roberts and Case v Bass* (2000) 78 SASR 302.

18 (1997) 189 CLR 520.

51 The second defamation was contained in an election pamphlet that Roberts also sent to all households in the electorate – "the Free Travel Times pamphlet" – a document that purported to show a copy of Bass' Frequent Flyer Activity Statement with Ansett Airlines. Lowrie DCJ found that the Frequent Flyer Activity Statement was a forgery and that the pamphlet had a number of defamatory meanings. They included:

- that Bass, while attending a resort in Nauru, was neglecting his responsibilities to his constituents;
- that he had taken advantage of his position as a Member of Parliament to obtain a free holiday for his own purposes;
- that on numerous occasions he had used his position as a Member of Parliament to accrue Frequent Flyer Points for his own and for his family's use and benefit; and
- that he had taken overseas trips in the course of his parliamentary duties that were not taken in the interests of his constituents.

52 The third defamation was contained in a "How to Vote Card" – "the Orange pamphlet" – that was distributed at polling booths on election day. Roberts prepared the Orange pamphlet, and Case was one of those who distributed it on polling day. The trial judge found that it had the nine meanings alleged in the plaintiff's Statement of Claim. They included:

- that Bass had spent $32,000 of taxpayers' money for overseas travel for the purpose of his own enjoyment and not for the proper purpose of such travel;
- that he had taken numerous overseas trips for his own benefit and enjoyment at the taxpayers' expense;
- that, contrary to his responsibility as the Member for his electorate, he had failed to take appropriate steps to prevent clandestine arrangements being put in place in respect of the management of a hospital contrary to the interests of the electorate;
- that he had put the rights of those interested in possessing and using guns ahead of the safety of members of ordinary families;
- that he had not spent sufficient time in his electorate to properly discharge his duties as the Member for Florey; and

- that, if he was elected and subsequently elected as Speaker of the House of Assembly, he would spend less time than the time that he was currently spending in the electorate.

53 Lowrie DCJ found that, in publishing the documents, the main intention of Roberts and Case "was to injure [Bass] and to lower his estimation in his fellow persons by making them think less of him". His Honour found that various factors pointed "to a conclusive finding that the defendants intended to injure [Bass]". The learned trial judge also said:

> "The evidence does, in my opinion, establish that the defendants published the defamatory material without 'considering or caring whether it be true or not'."

54 His Honour said:

> "In summary, [Bass] submitted, and I have accepted, that the conduct of [Roberts] was tantamount to using any area of apparent criticism of [Bass] to injure his reputation and cause him to lose office. This purpose is not a proper motive. Furthermore, I am also of the view that [Case's] actions in the distribution of the [Orange] pamphlet on the day of the election was motivated by actual malice. The actions of [Case] were not as recklessly blatant as that of [Roberts]."

55 Lowrie DCJ said that Case's "dominant motive was to injure [Bass'] reputation and remove him from office and, as such, it was an improper motive". His Honour viewed the conduct of Case as malicious.

Appeal to the Full Court

56 The Full Court (Prior, Williams and Martin JJ) upheld the verdicts in favour of Bass. In doing so, the Full Court also upheld the findings of malice against Roberts and Case, although their Honours' reasoning for making those findings differed. Prior J said (footnote omitted)[19]:

> "It is plain from the findings made by the trial judge that neither appellant had an honest belief in the truth of what was published. Case was properly found to be recklessly indifferent to the truth or falsity of the material he published. Roberts was properly identified as a person with an improper motive and no honest belief in the truth of what he published."

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19 *Roberts and Case v Bass* (2000) 78 SASR 302 at 304-305 [2].

57 Williams J set out[20] various findings of the trial judge concerning malice. They included the finding that Roberts "could not possibly have believed the imputations to be true". They also included the finding that Case's whole rationale was "governed mainly by the aim of 'targetting' [Bass]" and that he had handed out the Orange pamphlet "not caring whether the stated matters were true or false".

58 Williams J then said[21]:

> "These are strong findings; in my opinion they are adequately supported by the evidence. Roberts was told that his allegations lacked foundation some eight days before polling day, but he persisted with the thrust of his allegations of impropriety. Case acknowledged that the plaintiff had been selected because he was a 'soft target'. He could not provide any basis for a belief in the allegations. I reject the submission made on the part of the appellants that they should be treated as having honest beliefs in the relevant respect."

59 Williams J also rejected the appellants' submission "insofar as it would imply that, in the present circumstances, a defence of qualified privilege can be available in the absence of the defendant's honest belief in the truth of the published statement"[22]. His Honour said, however, that upon the evidence he was "unable to identify any improper purpose attaching to the actions of either defendant and in this respect I would disagree with the conclusion of the trial judge"[23]. Williams J said[24] that the facts were "consistent with the defendants becoming over-enthusiastic in the support of their electoral cause". His Honour said that the appellants did "not appear to have any special desire to hurt the plaintiff otherwise than in terms of his prospects of re-election".

60 Martin J said[25] that "the evidence was sufficient to justify the conclusion reached by the learned trial judge that Mr Roberts possessed a dominant motive

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20 *Roberts and Case v Bass* (2000) 78 SASR 302 at 314 [32].

21 *Roberts and Case v Bass* (2000) 78 SASR 302 at 314 [33].

22 *Roberts and Case v Bass* (2000) 78 SASR 302 at 316 [41].

23 *Roberts and Case v Bass* (2000) 78 SASR 302 at 316 [43].

24 *Roberts and Case v Bass* (2000) 78 SASR 302 at 316 [44].

25 *Roberts and Case v Bass* (2000) 78 SASR 302 at 325-326 [82].

to injure the plaintiff". His Honour said that the evidence also justified the finding that Roberts had "engaged in a course of conduct over some months which was demonstrative of his ill-will toward the plaintiff". Although Martin J found that the primary concern of Case was to achieve the defeat of the plaintiff at the election, his Honour held that such a purpose "does not amount to malice that would defeat a claim of qualified privilege"[26]. Martin J also held "that the learned trial judge erred in concluding that Mr Case possessed a dominant motive to injure the plaintiff"[27]. Nevertheless, his Honour found that Case's defence of qualified privilege failed because he "did not possess an honest belief in the statements or because he published the untrue defamatory matter recklessly, without considering or caring whether it be true or not"[28].

61 Martin J said[29] that Case had claimed that the Orange pamphlet accorded with his views and knowledge, that he had looked at it and that he thought that it sounded right. However, his Honour said Case did not claim to believe that Bass had previously spent $32,000 of taxpayers' money on overseas travel. Case had placed a different interpretation upon a statement in the Orange pamphlet concerning the spending of $32,000. He had denied that the statement meant that Bass had previously spent $32,000 on overseas travel. In his view, it meant that Bass had previously been qualified to spend that amount on travel and, if elected, he would again qualify to spend the same amount on travel during the period of his tenure. Martin J said that, in the view of the trial judge and all members of the Full Court, Case's interpretation was incorrect. Accordingly, Case did not claim to believe in the truth of the statement as interpreted by the trial judge and the Full Court and was guilty of malice.

Qualified privilege

62 The common law protects a defamatory statement made on an occasion where one person has a duty or interest to make the statement and the recipient of the statement has a corresponding duty or interest to receive it[30]. Communications made on such occasions are privileged because their making

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26 *Roberts and Case v Bass* (2000) 78 SASR 302 at 335 [95].

27 *Roberts and Case v Bass* (2000) 78 SASR 302 at 336 [100].

28 *Roberts and Case v Bass* (2000) 78 SASR 302 at 336 [100].

29 *Roberts and Case v Bass* (2000) 78 SASR 302 at 337 [102].

30 *Adam v Ward* [1917] AC 309 at 334 per Lord Atkinson.

promotes the welfare of society[31]. But the privilege is qualified – hence the name qualified privilege – by the condition that the occasion must not be used for some purpose or motive foreign to the duty or interest that protects the making of the statement.

63 The learned trial judge found the occasion of each publication was privileged. In doing so, he applied the principles underlying the statement of the English Court of Appeal[32] "that statements contained in the election address of one candidate concerning the opposing candidate, provided they are relevant to the matters which the electors will have to consider in deciding which way they will cast their votes, are entitled to the protection of qualified privilege". However, his Honour held that the publications were not protected by the extended defence of qualified privilege recognised by this Court in *Lange*[33]. The learned trial judge did so because he found the conduct of Roberts and Case in publishing the defamatory matter was not reasonable.

Freedom of communication and the Constitution

64 In *Lange*, the Court unanimously held that freedom of communication on matters of government and politics is an indispensable incident of the system of representative government created by the Constitution[34]. The Court emphasised[35] that "[c]ommunications 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". Hence, this litigation is concerned with matters at the heart of the constitutional freedom of communication respecting political or government matters.

65 In *Lange*, the Court pointed out[36] that, although the constitutional freedom confers no rights on individuals, it invalidates any statutory rule that is

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

32 *Braddock v Bevins* [1948] 1 KB 580 at 590-591.

33 (1997) 189 CLR 520.

34 (1997) 189 CLR 520 at 559.

35 (1997) 189 CLR 520 at 560.

36 (1997) 189 CLR 520 at 560.

inconsistent with the freedom. It also requires that the rules of the common law conform with the Constitution, for "the common law in Australia cannot run counter to constitutional imperatives"[37]. It is necessary therefore to determine the extent to which, if at all, the common law rules concerning the traditional defence of qualified privilege applicable in this case are consistent with the constitutional freedom of communication.

66 In determining whether a rule of the common law is consistent with the constitutional freedom of communication, two questions have to be answered[38]. First, does the rule effectively burden the freedom? Second, if so, is the rule reasonably appropriate and adapted to serve a legitimate end compatible with the constitutionally prescribed system of representative and responsible government? If the answer to the second question is "no", the common law rule must yield to the constitutional norm, for the common law's impact on the freedom cannot be greater than that permitted by the constitutional norm.

67 In *Lange*, the Court held that the law of defamation effectively burdened the constitutional freedom[39] and that the law of qualified privilege, as traditionally understood, did not qualify that burden in a way that was consistent with the freedom in respect of governmental and political matters published to the general public. The publication complained of in *Lange* concerned a television programme broadcast across Australia. Under the common law as previously understood, the law of qualified privilege did not generally recognise an interest or duty to publish defamatory matter to the general public[40]. Hence, without that privilege, the common law imposed an unreasonable restraint upon the constitutional freedom[41]. That necessitated the development of the common law as expounded in the balance of the judgment of the Court.

68 Three points in particular should be noted concerning the development of the defence of qualified privilege in *Lange*. First, in extending the law of qualified privilege to protect publications concerning governmental and political

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37 (1997) 189 CLR 520 at 566.

38 (1997) 189 CLR 520 at 567.

39 (1997) 189 CLR 520 at 568.

40 (1997) 189 CLR 520 at 570. It might do so in exceptional circumstances: *Adam v Ward* [1917] AC 309; *Loveday v Sun Newspapers Ltd* (1938) 59 CLR 503.

41 (1997) 189 CLR 520 at 571.

matters to mass audiences, the Court imposed as a condition of the extended privilege that the publisher's conduct be reasonable. But the Court emphasised[42]:

> "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."

Second, in *Lange*[43], the Court held that, having regard to the subject matters of government and politics, the motive of causing political damage to the plaintiff or his or her party is not an improper motive that would destroy a defence of qualified privilege. The Court also held that the vigour of an attack or the pungency of a defamatory statement concerning such matters cannot, without more, discharge the plaintiff's onus on the issue of malice. Third, in some respects the Court's development of the law of qualified privilege extended beyond what was required for conformity with the constitutional norm[44].

69 The present case concerns publications relating to the record and policies of a candidate for election to State Parliament for the seat of Florey. They were directed to, and generally received by, a limited class of persons – the electors in the seat of Florey. As will appear, the traditional common law defence of qualified privilege protects such publications because the reciprocity of interest required for the traditional defence is present. As will also appear, given the decision in *Lange*, that privilege will not be lost because the publisher intends to cause political damage to the candidate or his or her party. Nor will the privilege be lost merely because of the vigour of an attack on a candidate for election to Parliament that is contained in a defamatory statement concerning the record and policies of the candidate. Without more, the vigour of the attack is not evidence

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42 (1997) 189 CLR 520 at 573. The reference to the English common law is to that inherited in Australia and understood aside from the requirements of the constitutional norm: cf *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 221 per Lord Cooke of Thorndon.

43 (1997) 189 CLR 520 at 574.

44 (1997) 189 CLR 520 at 571.

of improper motive. As pointed out below, the privilege will be lost only if it is used for a purpose other than that for which it is granted – in this case, the communicating of information, arguments, facts and opinions concerning Bass and his policies to the electors of Florey. Thus, although the common law rules of defamation make defamatory statements concerning a candidate for election actionable and impose a burden on an elector's freedom of communication, those rules also protect an elector who uses the occasion for the purpose that gives rise to the constitutional freedom. Hence the burden does not affect what is required to give effect to the constitutional freedom.

70 Accordingly, the second of the two questions posed in *Lange* is answered by saying that, in the present case, the common law rules governing traditional qualified privilege are reasonably appropriate and adapted to serve a legitimate end compatible with the constitutionally prescribed system of representative and responsible government.

71 As we have indicated, Bass did not appeal against the trial judge's finding that the occasions were privileged. And Roberts did not appeal, and Case did not press his appeal, against the trial judge's findings that the defence of extended qualified privilege did not protect the publications. All parties now wish to depart from the positions that they adopted in the Full Court. In our view, having conducted their cases in the manner that they did in the Full Court, they should not be allowed to depart from the courses they then adopted.

72 Moreover, the holding of the parties to their cases does not cause any injustice to any of the parties. At all stages, including in this Court, it has been assumed that the decision in *Braddock v Bevins*[45] gives effect to the common law of Australia. That assumption was correctly made. In any event, if that decision was contrary to the common law of this country, the common law rules would have to be amended to conform to the Constitution.

73 It is a serious mistake to think that *Lange* exhaustively defined the constitutional freedom's impact on the law of defamation. *Lange* dealt with publications to the general public by the general media concerning "government and political matters". It was not concerned with statements made by electors or candidates or those working for a candidate, during an election, to electors in a State electorate, concerning the record and suitability of a candidate for election to a State Parliament. Such statements are at the heart of the freedom of communication protected by the Constitution. They are published to a comparatively small audience, most of whom have an immediate and direct

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45 [1948] 1 KB 580 at 590-591.

interest in receiving information, arguments, facts and opinions concerning the candidates and their policies. In that context and constitutional framework, the application of traditional qualified privilege requires a holding that qualified privilege attaches to statements by electors, candidates and their helpers published to the electors of a State electorate on matters relevant to the record and suitability of candidates for the election. Nothing in *Lang v Willis*[46] generally, and nothing in the judgment of Dixon J in that case in particular, requires a contrary finding. All that Dixon J said[47] in *Lang* is that election speeches made to a large audience of unidentified persons are not privileged even though "the speaker deals with matters in which the electors have an interest". Those remarks were made nearly 60 years before this Court recognised the impact that the Constitution has on the law of defamation in respect of governmental and political matters. And the remarks were not directed to statements made by electors, candidates or their helpers to electors in a State electorate concerning the record and suitability of a candidate for election by those electors.

74 Roberts and Case, if held to their cases in the Full Court, will retain the advantage of a finding of qualified privilege. And they are entitled to rely on the impact that the constitutional freedom of communication has on the law of malice in respect of publications concerning political matters that are protected by conventional qualified privilege. As we have pointed out, intentionally causing political damage to the plaintiff or his or her party is not an improper motive where a statement on political matters is protected by conventional qualified privilege. Nor can the vigour of an attack or the pungency of a defamatory statement, without more, be evidence of improper motive in respect of such a statement.

Malice

75 An occasion of qualified privilege must not be used for a purpose or motive foreign to the duty or interest that protects the making of the statement. A purpose or motive that is foreign to the occasion *and* actuates the making of the statement is called express malice. The term "express malice" is used in contrast to presumed or implied malice that at common law arises on proof of a false and defamatory statement. Proof of express malice destroys qualified privilege. Accordingly, for the purpose of that privilege, express malice ("malice") is any improper motive or purpose that induces the defendant to use

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46 (1934) 52 CLR 637.

47 (1934) 52 CLR 637 at 667.

the occasion of qualified privilege to defame the plaintiff. In *Browne v Dunn*[48], Lord Herschell LC said that malice "means making use of the occasion for some indirect purpose". Early in the history of the law of qualified privilege – which did not come into the common law until the end of the 18th century – Lord Campbell CJ said that malice was "any indirect motive, other than a sense of duty"[49]. Similarly, in an action for slander of title, Parke B[50] said that "acting maliciously means acting from a bad motive". "If the occasion is privileged", said[51] Brett LJ, "it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason." In *Horrocks v Lowe*[52] – the leading English case on malice – Lord Diplock said:

> "So, the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial. The protection might, however, be illusory if the onus lay on him to prove that he was actuated solely by a sense of the relevant duty or a desire to protect the relevant interest. So he is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved. 'Express malice' is the term of art descriptive of such a motive."

76 Improper motive in making the defamatory publication must not be confused with the defendant's ill-will, knowledge of falsity, recklessness, lack of belief in the defamatory statement, bias, prejudice or any other motive than duty or interest for making the publication. If one of these matters is proved, it usually provides a premise for inferring that the defendant was *actuated by an improper* motive in making *the* publication. Indeed, proof that the defendant knew that a defamatory statement made on an occasion of qualified privilege was untrue is ordinarily conclusive evidence that the publication was actuated by an improper motive[53]. But, leaving aside the special case of knowledge of falsity, mere proof of the defendant's ill-will, prejudice, bias, recklessness, lack of belief

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48 (1893) 6 R 67 at 72.

49 *Dickson v Earl of Wilton* (1859) 1 F & F 419 at 427 [175 ER 790 at 793].

50 *Brook v Rawl* (1849) 19 LJ Ex 114 at 115.

51 *Clark v Molyneux* (1877) 3 QBD 237 at 246.

52 [1975] AC 135 at 149.

53 *Mowlds v Fergusson* (1939) 40 SR (NSW) 311 at 327 per Jordan CJ, Davidson and Halse Rogers JJ agreeing; *Horrocks v Lowe* [1975] AC 135 at 149-150 per Lord Diplock.

in truth or improper motive is not sufficient to establish malice. The evidence or the publication must also show some ground for concluding that the ill-will, lack of belief in the truth of the publication, recklessness, bias, prejudice or other motive existed on the privileged occasion *and* actuated the publication[54]. Even knowledge or a belief that the defamatory statement was false will not destroy the privilege, if the defendant was under a legal duty to make the communication[55]. In such cases, the truth of the defamation is not a matter that concerns the defendant, and provides no ground for inferring that the publication was actuated by an improper motive. Thus, a police officer who is bound to report statements concerning other officers to a superior will not lose the protection of the privilege even though he or she knows or believes that the statement is false and defamatory unless the officer falsified the information[56]. Conversely, even if the defendant believes that the defamatory statement is true, malice will be established by proof that the publication was actuated by a motive foreign to the privileged occasion[57]. That is because qualified privilege is, and can only be, destroyed by the existence of an improper motive that actuates the publication.

77 If the defendant knew the statement was untrue when he or she made it, it is almost invariably conclusive evidence of malice. That is because a defendant who knowingly publishes false and defamatory material almost certainly has some improper motive for doing so, despite the inability of the plaintiff to identify the motive[58]. In *Barbaro v Amalgamated Television Services Pty Ltd*[59],

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54 *Mowlds v Fergusson* (1939) 40 SR (NSW) 311 at 327-329 per Jordan CJ, Davidson and Halse Rogers JJ agreeing.

55 *Clark v Molyneux* (1877) 3 QBD 237 at 244 per Bramwell LJ; *Stuart v Bell* [1891] 2 QB 341 at 351 per Lindley LJ; *British Railway Traffic and Electric Co v The CRC Co and The London County Council* [1922] 2 KB 260 at 271 per McCardie J; *Mowlds v Fergusson* (1939) 40 SR (NSW) 311 at 318 per Jordan CJ, Davidson and Halse Rogers JJ agreeing; *Oldfield v Keogh* (1941) 41 SR (NSW) 206 at 213-214 per Jordan CJ, Halse Rogers and Street JJ agreeing.

56 *Mowlds v Fergusson* (1939) 40 SR (NSW) 311 at 335-336 per Jordan CJ, Davidson and Halse Rogers JJ agreeing.

57 *Watt v Longsdon* [1930] 1 KB 130 at 154-155 per Greer LJ.

58 *Clark v Molyneux* (1877) 3 QBD 237 at 247 per Brett LJ; *Mowlds v Fergusson* (1939) 40 SR (NSW) 311 at 329 per Jordan CJ, Davidson and Halse Rogers JJ agreeing.

59 (1985) 1 NSWLR 30 at 51.

Hunt J said that "[i]n some of the older authorities, an absence of honest belief on the part of the defendant is treated merely as some evidence of an indirect motive which alone is said to constitute express malice, but the better view, in my opinion, is to treat the two as different kinds of malice". His Honour cited no authority for this novel proposition. Some years later, in *Hanrahan v Ainsworth*[60], Clarke JA said that, since *Horrocks*, "it has been accepted that if it is proved that a person has made a defamatory statement without an honest belief in its truth or for a dominant improper purpose ... malice will be made out".

78 The knowledge and experience of Justice Hunt in defamation matters is well recognised. But with great respect to his Honour and Clarke JA, they erred in asserting that lack of honest belief defeated a defence of qualified privilege. There is no basis in principle or authority for treating knowledge of falsity or lack of honest belief as a separate head of, or equivalent to, malice. In the law of qualified privilege, the common law has always regarded malice as the publishing of defamatory material with an improper motive. Knowledge of falsity is "almost conclusive evidence" that the defendant had some improper motive in publishing the material and that it actuated the publication. That judges have treated knowledge of falsity as almost conclusive evidence of malice is no ground, however, for treating it as a separate head of, or equivalent to, malice. In some circumstances, lack of honest belief in what has been published may also give rise to the inference that the matter was published for a motive or purpose that is foreign to the occasion of qualified privilege. Nothing in Lord Diplock's speech in *Horrocks*[61] supports treating the defendant's knowledge or lack of belief as a separate head of, or equivalent to, malice. Indeed, Lord Diplock expressly said[62] that, if it is proved that the defendant did not believe that what he or she published was true, it was "generally conclusive evidence" of improper motive.

79 As we have said, malice means a motive for, or a purpose of, defaming the plaintiff that is inconsistent with the duty or interest that protects the occasion of the publication. It is the motive or purpose for which the occasion is used that is ultimately decisive, not the defendant's belief in the truth of the matter. As Cotton LJ said in *Clark v Molyneux*[63]:

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60 (1990) 22 NSWLR 73 at 102-103.

61 [1975] AC 135.

62 [1975] AC 135 at 149-150.

63 (1877) 3 QBD 237 at 249-250.

> "The question is not whether the defendant has done that which other men as men of the world would not have done, or whether the defendant acted in the belief that the statements he made were true, but whether he acted as he did from a desire to discharge his duty."

80 The conceptual difficulties with using lack of honest belief as equivalent to malice have increased since Rules of Court have required plaintiffs to plead the meanings on which they rely even when those meanings are the natural and ordinary meanings of the publication. When the author of a written or oral statement gives evidence, that person is invariably asked whether he or she intended to convey each of the pleaded meanings. If the author denies intending any of those meanings and the tribunal of fact finds that the publication had that meaning, the author is then said to have no honest belief in the defamatory meaning and, relying on *Barbaro*, that the privilege is destroyed. That is exactly what occurred in the present case in respect of Case. Martin J held that, because Case did not claim to believe in the truth of a statement as interpreted by the trial judge and the Full Court, he was guilty of malice.

81 In *Austin v Mirror Newspapers Ltd*[64], the Judicial Committee had to consider a similar problem in considering the issue of reasonableness under the statutory defence of qualified privilege given by s 22 of the *Defamation Act* 1974 (NSW). The Judicial Committee held, correctly in our opinion, that an author may have an honest belief in what he or she writes even though the author does not intend the writing to have one of the defamatory meanings found by the jury. Lord Griffiths, giving the Advice of the Committee, said[65]:

> "Although the answer to the interrogatory is evidence that can be used in an attempt to defeat a defence of comment it does not follow that it will necessarily defeat the defence of statutory qualified privilege. *Words are often capable of more than one meaning, and because the jury may attach to them a defamatory meaning which the writer did not intend, it does not follow that the writer did not honestly believe in the truth of what he wrote and reasonably intended a different meaning to be given to his language*. In this case Mr Casey gave evidence and said that he did honestly believe in the truth of what he wrote. The trial judge believed him and the answer to the interrogatory is a wholly insufficient basis to undermine the opinion of the trial judge which the Court of Appeal were free to accept." (Emphasis added)

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64 (1985) 3 NSWLR 354.

65 (1985) 3 NSWLR 354 at 362.

82 These remarks of Lord Griffiths apply where the issue is the malice of the defendant. The defence of qualified privilege would be dramatically curtailed if defendants had to intend and believe in the truth of every meaning that a judge or jury later gave to the publication. The privilege is not curtailed if lack of belief in a particular meaning is merely some evidence from which it may be inferred in some circumstances that the defendant was actuated by an improper motive. Nor is it curtailed if one applies the doctrinally sound view of Cotton LJ[66] that the question is not "whether the defendant acted in the belief that the statements he made were true, but whether he acted as he did from a desire to discharge his duty [or interest]".

83 In our opinion, neither lack of honest belief nor knowledge of falsity *ipso facto* destroys a defence of qualified privilege. But knowledge of falsity is "almost conclusive evidence" of improper motive, except where the defendant is under a legal duty to publish the defamation.

84 In exceptional cases, the sheer recklessness of the defendant in making the defamatory statement, may justify a finding of malice. In other cases, recklessness in combination with other factors may persuade the court that the publication was actuated by malice. In the law of qualified privilege, as in other areas of the law, the defendant's recklessness may be so gross as to constitute wilful blindness, which the law will treat as equivalent to knowledge. "When a person deliberately refrains from making inquiries because he prefers not to have the result, when he wilfully shuts his eyes for fear that he may learn the truth", said this Court in *R v Crabbe*[67], "he may for some purposes be treated as having the knowledge which he deliberately abstained from acquiring." In less extreme cases, recklessness, when present with other factors, may be cogent evidence that the defendant used the occasion for some improper motive. This is particularly so when the recklessness is associated with unreasoning prejudice on the part of the defendant. In *Royal Aquarium and Summer and Winter Garden Society v Parkinson*[68], Lord Esher MR said:

> "If a person charged with the duty of dealing with other people's rights and interests has allowed his mind to fall into such a state of unreasoning prejudice in regard to the subject-matter that he was reckless whether what

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66 *Clark v Molyneux* (1877) 3 QBD 237 at 249-250.

67 (1985) 156 CLR 464 at 470.

68 [1892] 1 QB 431 at 444.

> he stated was true or false, there would be evidence upon which a jury might say that he abused the occasion."

85 Fifteen years earlier, as Brett LJ, Lord Esher MR had said[69]:

> "[I]f it be proved that out of anger, or for some other wrong motive, the defendant has stated as true that which he does not know to be true, and he has stated it whether it is true or not, recklessly, by reason of his anger or other motive, the jury may infer that he used the occasion, not for the reason which justifies it, but for the gratification of his anger or other indirect motive."

86 In Lord Diplock's speech in *Horrocks*[70], there are passages that standing alone suggest mere recklessness or indifference to truth and falsity is sufficient to constitute malice. But we do not think that Lord Diplock was intending to change the law, as it was laid down by Lord Esher MR in the above quotations. In fact, in *Horrocks* Lord Diplock referred[71] to Lord Esher MR's judgments in these cases as correctly stating the law. Furthermore, Lord Diplock introduced his discussion of "recklessness" by saying[72] that, if the defendant "publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, *as in other branches of the law*, treated as if he knew it to be false" (emphasis added). This statement makes it clear that Lord Diplock was using the term "reckless" in the sense of "wilful blindness", as explained by this Court in *Crabbe*[73].

87 Further, mere lack of belief in the truth of the communication is not to be treated as if it was equivalent to knowledge of the falsity of the communication and therefore as almost conclusive proof of malice. The cases contain many statements to the effect that the privilege will be lost if the defendant did not honestly believe in the truth of a defamatory statement made on a privileged

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69 *Clark v Molyneux* (1877) 3 QBD 237 at 247.

70 [1975] AC 135.

71 [1975] AC 135 at 152.

72 [1975] AC 135 at 150.

73 (1985) 156 CLR 464 at 470.

occasion[74]. If those statements mean no more than that qualified privilege is lost when the defendant knows or believes the defamatory statement is false, they are in accord with settled principle and authority. But if they mean that the defendant loses the privilege unless he or she has a positive belief in the truth of the publication, it is not easy to reconcile them with basic principle. They are not reconcilable, for example, with the principle that recklessness as to the truth or falsity of a publication, short of wilful blindness, will not destroy an occasion of qualified privilege unless it appears that the recklessness is accompanied by some other state of mind. A person who is reckless as to whether the statement is true or false has no positive belief in the truth of the statement. Yet as the above statements of Lord Esher MR in *Royal Aquarium* and *Clark* show, recklessness, short of wilful blindness, is not enough to destroy the privilege. It must be accompanied by some other state of mind. Where that is so, the recklessness is evidence that the publication was actuated by the accompanying state of mind, be it anger, hatred, bias or unreasoning prejudice. As Jordan CJ pointed out in *Mowlds v Fergusson*[75]:

> "All that the *Royal Aquarium Case* decides is that if a defendant is proved to be affected by a particular prejudice and is proved to have made a defamatory statement on a privileged occasion, not to serve the legitimate purposes of the occasion but to indulge this prejudice, express malice is made out. In such a case, proof of the prejudice may serve both to explain how the defamatory statement came to be made, and also to justify the inference that it was made for the purpose of indulging the prejudice."

88 The proposition that the defendant must have a positive belief in the defamatory imputation is also difficult to apply to the case of a true innuendo. In many – perhaps the great majority of – such cases, an innocent statement is transformed into a defamatory statement by reason of external circumstances known to a recipient or recipients of the innocent statement but unknown to the publisher. If lack of belief in the truth of the defamatory statement defeated the privilege, the publisher would not be protected even though he or she honestly believed in the truth of the innocent statement.

89 The proposition that the defendant must have a positive belief in the defamatory imputation is also inconsistent with the proposition that malice is not

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74 *Horrocks v Lowe* [1975] AC 135 at 150 per Lord Diplock; *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30 at 51 per Hunt J; *Hanrahan v Ainsworth* (1990) 22 NSWLR 73 at 102-103 per Clarke JA.

75 (1939) 40 SR (NSW) 311 at 323.

proved merely because a person does not intend and therefore does not believe in a defamatory meaning found by the judge or jury[76]. As *Austin*[77] shows, a person may have an honest belief in what he or she publishes although he or she has no belief in the truth of a defamatory imputation that that person has published. Where malice is the issue, the case for holding that mere lack of belief is not equivalent to knowledge of falsity or malice is overwhelming. That is because the ultimate issue is always whether the publication was made for a purpose foreign to the duty or interest that protects the occasion of the publication, not whether the defendant believed the matter to be true.

90 Moreover, there are many statements in the cases that indicate that it is only knowledge or belief in the falsity of the defamatory statement that will ordinarily be treated as conclusive evidence of an improper motive. In *Jenoure v Delmege*[78], Lord Macnaghten, giving the Advice of the Judicial Committee, said:

> "The privilege would be worth very little if a person making a communication on a privileged occasion were to be required, in the first place, and as a condition of immunity, to prove affirmatively that he honestly believed the statement to be true. In such a case bona fides is always to be presumed."

This statement was made in the context of a decision that the trial judge had wrongly placed the onus on the defendant to prove that he believed the truth of the communication. But it also emphasises that the onus is on the plaintiff to show that the publication was actuated by an improper motive.

91 In *White v Mellin*[79] – an action for injurious falsehood – Lord Herschell LC, after referring to a statement by Lopes LJ that it was actionable to publish, maliciously and without lawful occasion, a false statement disparaging the goods of another, said that it would be necessary to show that the statement was intended to injure the plaintiff and was not published *bona fide* or was published with knowledge of its falsity. In *Shapiro v La Morta*[80] – another case of injurious falsehood – Lush J said that the publication of a statement which to

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76 *Austin v Mirror Newspapers Ltd* (1985) 3 NSWLR 354 at 362.

77 (1985) 3 NSWLR 354 at 362.

78 [1891] AC 73 at 79.

79 [1895] AC 154 at 160.

80 (1923) 40 TLR 39 at 41.

the defendant's "knowledge is false and calculated to injure is malicious". In the same case on appeal, Atkin LJ said that "a statement made by a man who knows that it is likely to injure and knows that it is false is made maliciously"[81]. In *Godfrey v Henderson*[82], Jordan CJ referred to the way that the plaintiff in that case might prove malice and said:

> "He might be able to establish that the defendant, in reflecting on the accuracy of his circular, was in fact animated by some particular illegitimate purpose ... or, without being able to put his finger on any improper purpose, *he might be able to show that the defamatory statement was, in whole or part, false to the defendant's knowledge.* If he could prove the latter, it would be open to a jury to find that the statement must have been made for some improper purpose." (Emphasis added)

92 In drafting his Defamation Code, Sir Samuel Griffith also took the view that to establish malice – lack of good faith under the Code – the plaintiff must show a belief in the untruth of the defamatory material.

93 In *Horrocks*, Lord Diplock spoke of both a positive belief and a lack of honest belief by the defendant in the truth of the defamation. But it is clear that he was referring to the defendant's knowledge of the falsity of the defamatory material or recklessness in publishing that amounted to wilful blindness. In a key passage that is frequently overlooked, Lord Diplock said (footnotes omitted)[83]:

> "So the judge was left with no other material on which to found an inference of malice except the contents of the speech itself, the circumstances in which it was made and, of course, the defendant's own evidence in the witness box. Where such is the case the test of malice is very simple. It was laid down by Lord Esher himself, as Brett LJ, in *Clark v Molyneux*. It is: has it been proved that the defendant did not honestly believe that what he said was true, *that is, was he either aware that it was not true or indifferent to its truth or falsity?* In *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* Lord Esher MR applied the self-same test." (Emphasis added)

94 Thus, when Lord Diplock applied the law of malice to the facts in *Horrocks* and defined honest belief, he made it clear that the plaintiff had to

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81 *Shapiro v La Morta* (1923) 40 TLR 201 at 203.

82 (1944) 44 SR (NSW) 447 at 452.

83 [1975] AC 135 at 152.

prove that the defendant was aware of the falsity of the publication or so wilfully blind to it that knowledge of its falsity was imputed to him.

95 An earlier passage in Lord Diplock's speech[84] also shows that by lack of honest belief, he meant knowledge of falsity:

> "If it be proved that he *did not believe that what he published was true* this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interests can justify a man in *telling deliberate and injurious falsehoods* about another, save in the exceptional case where a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person." (Emphasis added)

96 Statements in the cases to the effect that the defendant will lose the protection of the privilege unless he or she had an honest belief in the truth of what that person published must be understood in the light of two matters. First, honesty of purpose is presumed in favour of the defendant. It is for the plaintiff to prove that the defendant did not use the occasion honestly or, more accurately, for a proper purpose. Second, in many – perhaps most – cases, a defendant who has no belief in the truth of what he or she publishes will know or believe that it is untrue. It is understandable therefore that judges will often say that qualified privilege is destroyed when the defendant has no honest belief in the truth of the matter but really mean that it is destroyed when the defendant knew that the matter was false. Indeed, as the quotation that we have just set out shows, Lord Diplock does that very thing in *Horrocks*[85]. Lack of honest belief in the law of qualified privilege does not mean lack of belief; it means a belief that the matter is untrue.

97 Because honesty is presumed, the plaintiff has the onus of negativing it. That is to say, the plaintiff must prove that the defendant acted dishonestly by not using the occasion for its proper purpose. Unless that is kept in mind, there is a danger that reference to the honesty of a defendant will reverse the onus of proof. If the tribunal of fact rejects the defendant's evidence that he or she positively believed in the truth of what he or she published, it does not logically follow that the plaintiff has proved that the defendant did not believe in the truth of the publication or had an improper motive. Rejection of the defendant's evidence, combined with other evidence, may lead to the conclusion that the defendant had no belief in the truth of the publication or knew that it was false. But mere

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84 *Horrocks v Lowe* [1975] AC 135 at 149-150.

85 [1975] AC 135 at 149-150.

rejection of the defendant's evidence does not logically and automatically lead to any conclusion as to what his or her state of mind was. "[B]y destroying that evidence you do not prove its opposite."[86]

98 When the plaintiff proves that the defendant knew the defamatory matter was false or was reckless to the point of wilful blindness, it will constitute almost conclusive proof that the publication was actuated by malice. A deliberate defamatory falsehood "could not have been for a purpose warranted by any privilege; and hence it is unnecessary to determine what the exact purpose was in order to ascertain whether the privilege has been lost for the particular defamatory statement which has been proved to be wilfully false"[87]. When the plaintiff can only prove that the defendant lacked a belief in the truth of the defamatory material, however, it will be no more than evidence that may give rise with other evidence to an inference that the publication was actuated by malice.

99 In some cases, proof of lack of belief will not even be evidence from which an inference of malice can be drawn. Thus, the circumstances of the case may be such that the defendant is entitled to communicate defamatory matter even though he or she has no belief in its truth. In *Clark*[88], Bramwell LJ said "a person may honestly make on a particular occasion a defamatory statement without believing it to be true; because the statement may be of such a character that on that occasion it may be proper to communicate it to a particular person who ought to be informed of it". This passage was approved by Lindley LJ in *Stuart v Bell*[89] where the Court of Appeal held that the defendant had a social or moral, but not legal, duty to report to the plaintiff's employer that the plaintiff was suspected of stealing.

100 In a case like the present, persons handing out how-to-vote cards may honestly believe that they are informing the electorate of their candidate's views and may not themselves have thought about whether much or any of the content of the how-to-vote card is true. Such persons will not lose the protection of the occasion because they had no positive belief in the truth of any defamatory matter in the how-to-vote card. It is proper for them to communicate their

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86 *Hobbs v Tinling* [1929] 2 KB 1 at 21 per Scrutton LJ.

87 *Mowlds v Fergusson* (1939) 40 SR (NSW) 311 at 329 per Jordan CJ, Davidson and Halse Rogers JJ agreeing.

88 (1877) 3 QBD 237 at 244.

89 [1891] 2 QB 341 at 351.

candidate's views to voters, and they do not lose their protection because, although acting for the purpose of the privileged occasion, they had no positive belief in the truth of the defamatory matter.

101 If the common law did hold that lack of belief or lack of honest belief in the truth of the defamatory matter was equivalent to knowledge of falsity or malice, it would have to be developed in respect of electoral communications to accord with the freedom of communication in respect of political matters that the Constitution protects. Earlier in these reasons we explained that, in determining whether the common law rules concerning qualified privilege in respect of electoral communications are consistent with that freedom, *Lange*[90] requires two questions to be answered. First, do those rules effectively burden the constitutional implication of freedom of communication on political matters? Second, if so, are those rules reasonably appropriate and adapted to serve a legitimate end that is compatible with the constitutionally prescribed system of representative and responsible government?

102 The first question posed by *Lange* is answered affirmatively in cases like the present because the law of defamation by providing for damages for defamatory publications has a chilling effect on freedom of communication on political matters. The second question would have to be answered negatively if lack of belief or lack of honest belief in defamatory electoral material would destroy a defence of qualified privilege. The Australian electoral process works, and can only effectively work, with the help of the thousands of volunteers who at election time, and sometimes earlier, provide services to the candidates and political parties. Distributing election material in the form of posters, pamphlets and how-to-vote cards is one of the most important of those services. For the purpose of the law of defamation, these volunteers are publishers who are as legally responsible for the material they distribute as its author. In many cases, the volunteers although honestly believing that they are providing information on electoral matters to the voters in the electorate, have no positive belief in the truth of what they are distributing. Often enough, they are persons, brought in from outside the electorate, to assist a candidate or political party and are unfamiliar with the particular issues that concern the electorate. In many cases, they will be handing out material they have not even read. To hold such persons liable in damages for untrue defamatory statements in that material because they had no positive belief in their truth would be to impose a burden that is incompatible with the constitutional freedom of communication. If, contrary to our view, the common law made a positive belief in the truth of electoral statements a condition of the defence of qualified privilege, it would be inconsistent with the

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90 (1997) 189 CLR 520 at 567.

Constitution and would have to be developed to accord with the Constitution's requirements.

103 Carelessness of expression or carelessness in making a defamatory statement never provides a ground for inferring malice[91]. The law of qualified privilege requires the defendant to use the occasion honestly in the sense of using it for a proper purpose; but it imposes no requirement that the defendant use the occasion carefully. Even irrationality, stupidity or refusal to face facts concerning the plaintiff is not conclusive proof of malice[92] although in "an extreme" case it may be evidence of it[93]. And mere failure to make inquiries[94] or apologise[95] or correct the untruth when discovered[96] is not evidence of malice.

104 Finally, in considering whether the plaintiff has proved malice, it is necessary that the plaintiff not only prove that an improper motive existed but that it was the dominant reason for the publication. In *Godfrey*[97], Jordan CJ said:

> "It is of the utmost importance in the case of statements made on occasions of qualified privilege, that the privilege which the law casts around such statements should not be nullified by a readiness to treat as evidence of express malice destroying the privilege anything which does not definitely, and as a matter of commonsense, point to the actual existence of some express malice which was really operative in the making of the statement; and substantial evidence is required, not surmise

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91 *Clark v Molyneux* (1877) 3 QBD 237 at 244 per Bramwell LJ; *Moore v Canadian Pacific Steamship Co* [1945] 1 All ER 128 at 133 per Lynskey J.

92 *Clark v Molyneux* (1877) 3 QBD 237 at 249 per Cotton LJ; *Horrocks v Lowe* [1975] AC 135 at 150 per Lord Diplock.

93 *Turner v Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 All ER 449 at 463 per Lord Porter.

94 *Clark v Molyneux* (1877) 3 QBD 237 at 249 per Brett LJ.

95 *Horrocks v Lowe* [1975] AC 135 at 152 per Lord Diplock.

96 *Howe and McColough v Lees* (1910) 11 CLR 361 at 372 per Griffith CJ, Barton J agreeing.

97 (1944) 44 SR (NSW) 447 at 454.

or a mere *scintilla*: *Oldfield v Keogh*[98]. Any other approach to the subject would in substance destroy the doctrine of qualified privilege altogether."

The trial judge and the Full Court erred in their findings of malice

The trial judge

105 The learned trial judge, accepting the view of Hunt J in *Barbaro*[99], said that "an absence of a genuine belief in the truth of the defamatory statement" as well as improper motive constitutes malice. For the reasons that we have given, Lowrie DCJ erred in so doing. Neither the learned trial judge nor the members of the Full Court identified the nature of the duty or interest of the defendants and the recipients of the publication that gave rise to the qualified privilege. Without doing so, they could not correctly determine whether the publications were made for a purpose foreign to the occasion that gave them qualified privilege. As we have pointed out, the publications were protected by qualified privilege because they were publications made by an elector during an election, to electors in a State electorate, and by a person handing out how-to-vote cards, concerning the record and suitability of a candidate for election to a State Parliament. They put information, arguments, facts, and opinions concerning Bass, a candidate for election, and his policies. Neither defendant could be guilty of malice in respect of a publication unless he had used the occasion of publishing for some purpose foreign to the occasion. That is to say, used it for some purpose other than putting information, arguments, facts and opinions concerning Bass and his policies. It need hardly be said that proof that Roberts and Case put untrue matter to the electorate did not itself establish a purpose foreign to that occasion.

106 The learned trial judge found that the "main intention" of the defendants was "to injure [Bass] and to lower his estimation in his fellow persons by making them think less of him". His Honour said all three publications were part of a strategy designed to have this effect and "this is not a proper motive". Lowrie DCJ said that Roberts used "any area of apparent criticism of [Bass] to injure his reputation and cause him to lose office". His Honour went on to say that "[t]his purpose is not a proper motive". Lowrie DCJ also made similar findings against Case.

107 Publishing material with the intention of injuring a candidate's political reputation and causing him or her to lose office is central to the electoral and

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98 (1941) 41 SR (NSW) 206 at 214.

99 (1985) 1 NSWLR 30 at 50-51.

democratic process. There is nothing improper about publishing *relevant* material with such a motive as long as the defendant is using the occasion to express his or her views about a candidate for election. That purpose is not foreign to the occasion that gives qualified privilege to such publications. The Constitution's protection of freedom of communication on political and governmental matters would be of little effect if an elector was liable in damages because he or she had the motive of injuring the political reputation of a candidate for election to the legislature. The imputations made against Bass concerned the performance of his duties as a parliamentarian. The publications were aimed at lowering his reputation as a politician and parliamentarian. They were not directed to matters foreign to his political or parliamentary reputation. Roberts' and Case's motives in publishing the material, as identified by the trial judge, were not improper motives given the occasion of the publication. The learned trial judge erred in finding that Roberts and Case were guilty of malice because they sought to injure the reputation of Bass and cause him to lose office. Williams and Martin JJ were correct, therefore, in holding that the intention to defeat Bass at the election was not an improper purpose or motive.

108 The learned trial judge also held that the evidence established "that the defendants published the defamatory material without 'considering or caring whether it be true or not'". His Honour said that Roberts "admitted to having prepared the publications in spite of his indifference to the truth of their content". His Honour gave as an example that, "when asked whether it had occurred to him that [Bass] might not have been a member of the frequent flyer program in preparing the [Free Travel Times] pamphlet, [Roberts'] answer was that 'it was not something I drew my mind to'". But to hold this answer to be recklessness in any relevant sense would be to equate it with carelessness or failure to check material. Roberts' evidence shows that he did not seek independent confirmation for his beliefs, that he jumped to conclusions from inadequate material and that his reasoning was often illogical. But these matters are insufficient to justify a finding that he used the occasion for an improper purpose when he published the pamphlet. In *Horrocks*, Lord Diplock said[100]:

> "In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might cast doubt on the

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100 [1975] AC 135 at 150.

> validity of the conclusions they reach. But despite the imperfection of the mental process by which the belief is arrived at it may still be 'honest,' that is, a positive belief that the conclusions they have reached are true. The law demands no more."

109 Cases where recklessness alone will defeat an occasion of qualified privilege are likely to be rare. Usually, they will be cases where the defendant had or was given information which gave a reason for supposing that what the defendant intended to publish was false but the defendant nevertheless published the matter without further inquiry or investigation. Failure to inquire is not evidence of recklessness unless the defendant had some indication that what he or she was about to publish might not be true.

110 When the law concerning malice is properly understood, no basis exists for finding that Roberts published the defamatory material in the Nauru postcard or the Orange pamphlet without "considering or caring whether it be true or not". None of the matters referred to by counsel for Bass come close to establishing recklessness in the sense of wilful blindness. They show, for example, that Roberts concluded that Bass' trip to Nauru "was a holiday" and that his constituents were not going to benefit from him attending the Nauru Speakers' Conference. Having formed that view, Roberts made no "attempt to find out in more detail what was going to occur at the conference and what role Mr Bass would play at the conference". Nor did he "particularly care because it was typical of somebody who'd gone over the top in relation to their role and it was just yet another abrogation of responsibility to the constituents who were paying him". This evidence indicates that Roberts, having formed an adverse view about the nature of Bass' trip and representation of his constituents, leapt to a conclusion on inadequate evidence and thought that the details of what Bass was going to do on this "junket" were immaterial. Roberts' reasoning process is open to serious criticism and led him to an unfair conclusion concerning the nature of Bass' trip to Nauru. But no matter how irrational his reasoning might seem to a judge, it is unfortunately typical of "reasoning" that is often found in political discussions. If Roberts' conduct on this matter was held to constitute malice sufficient to destroy the privilege of communicating electoral material to voters, the freedom of communication protected by the Constitution would be little more than a grand idea of no practical importance.

111 After reading Roberts' evidence and the trial judge's discussion of it, and making full allowance for his Honour's advantage in seeing and hearing Roberts give evidence, we see no ground for concluding that Roberts was guilty of malice in distributing the Nauru postcard or the Orange pamphlet, if those documents are considered independently of the Free Travel Times pamphlet. There is no evidence on which it could be found that he was wilfully blind to the truth or falsity of their defamatory contents or published them for a purpose foreign to the

occasion. The actions of Roberts in respect of those documents were, as Williams J said in the Full Court, "consistent with [him] becoming over-enthusiastic in the support of [his] electoral cause"[101].

112 Roberts' conduct in publishing the Free Travel Times pamphlet is in a different category. First, he and his helpers fabricated Bass' Ansett Frequent Flyer Statement. Although the trial judge found that publication of this fabricated document also contained defamatory imputations, we doubt that this was so. But for present purposes, that is a matter of no moment. Knowingly publishing untrue non-defamatory statements to justify a defamatory statement will ordinarily be evidence that the defendant was using the occasion for an improper purpose. In *Mowlds*[102], Jordan CJ pointed out:

> "Now, the authorities show, if authority be needed, that evidence that a defamatory statement made on a privileged occasion was false to the knowledge of the person who made it is, save in certain exceptional circumstances, evidence that it must have been made for some improper purpose. We think also that evidence that a person on a privileged occasion, in the course of justifying a former line of conduct, has made statements defamatory of the plaintiff, and has also made statements which he knew to be untrue for the purpose of justification, supplies evidence that he was using the occasion for some improper purpose."

113 Thus, even if the Ansett Frequent Flyer Statement did not itself give rise to any defamatory imputations, Roberts' conduct in fabricating that statement to justify the other imputations in the Free Travel Times pamphlet supplies evidence from which it might be inferred that he used the occasion for an improper purpose. This evidence is further supported by the trial judge's finding that he allowed the Free Travel Times pamphlet to continue to be distributed after receiving a complaint from Bass' solicitors and the Electoral Commissioner.

114 Unfortunately, however, the trial judge did not determine whether the fabrication of the Ansett Frequent Flyer Statement and the continued distribution showed that Roberts was not using the occasion to provide the electors with information concerning Bass but was using it for some unidentified purpose, foreign to the occasion. Moreover, if the learned trial judge had found that Roberts was actuated by malice in respect of the Free Travel Times pamphlet, he might have been able to use that finding as evidence of malice in respect of the

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101 *Roberts and Case v Bass* (2000) 78 SASR 302 at 316 [44].

102 (1939) 40 SR (NSW) 311 at 327.

earlier and later publications. However, before doing so, the trial judge would have to have taken into account Chief Justice Jordan's warnings in *Mowlds*[103]:

> "Where, however, the 'express malice' relied on is not malice in the colloquial sense but malice in the technical sense of a desire to promote some object not warranted by the privileged occasion, it does not follow that the proof that the defendant desired to promote the object on some other occasion supplies evidence that he desired to promote it on the privileged occasion. There must be something which justifies the inference that the desire existed on the privileged occasion also and was then indulged. Much less would it be evidence of express malice on some particular privileged occasion that the defendant had been guilty of a different form of express malice on another privileged occasion in a case in which independent personal illwill was not established. Suppose, for example, that in a libel action it is complained that the defendant on each of two privileged occasions made a statement which was defamatory of the plaintiff but was *prima facie* covered by the privilege. No evidence is given of any personal animus against the plaintiff on either occasion. Evidence is, however, tendered which would justify the inference that on the first occasion the defendant made the statement for the illegitimate purpose of injuring a particular religion, and on the second occasion for the illegitimate purpose of discrediting a particular political doctrine. It is clear that this would supply evidence of the existence of express malice on each occasion. But the malice proved on each occasion would supply no evidence of malice on the other. In order that malice on one occasion may supply evidence of malice on another, the malice proved must be a desire to serve a purpose or to indulge a feeling which may fairly be inferred to have existed on the other occasion also and to have animated the defendant on that occasion also."

115 The learned trial judge also found that Case was "motivated by actual malice" although his actions "were not as recklessly blatant as that of" Roberts. His Honour said "that he was so imbued with the purported ideal of public ownership of the administration of the Modbury Hospital that there was a complete failure on his part to enquire into any relevant factual issues with the result that his reasoning on various topics was patently flawed". But failure to inquire is not evidence of malice or recklessness in publishing unless the publisher has been put on notice that his or her views may be wrong. In *Horrocks*, Lord Diplock pointed out[104] that "indifference to the truth of what he

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103 (1939) 40 SR (NSW) 311 at 328-329.

104 [1975] AC 135 at 150.

publishes is not to be equated with carelessness, impulsiveness or irrationality". Case's reasoning and conclusions fell short of what is to be expected of a judge, lawyer or scientist. But the evidence provides no ground for concluding that he was recklessly indifferent to the truth of what he published. On the contrary, he appears to have held a strong belief that the statements in the Orange pamphlet were true. His evidence indicates that he strongly believed that what was being said about Bass was justified. It is not to the point that his premises did not justify his conclusions or that he failed to inquire into the matter more deeply.

116 Counsel for Bass pointed to evidence of Case where he said that he had "no idea" and "didn't have a clue" how much Bass had spent on overseas travel. But these answers were given in a context where Case had said that what Bass had spent was not an issue for him. Case said:

> "The issue was that he was qualified to spend $32,000 as an MP in his previous time and he would be qualified again to spend it. I mean as I say, the issue of how much he actually spent I didn't have a clue. I just knew he'd been on numerous overseas trips. In fact, as it turns out, numerous trips."

117 Case's answers were related to what he claimed was the issue raised by the Orange pamphlet. The meaning that he put on the words "Qualify to spend another $32,000 of taxpayers' money on overseas travel" in that pamphlet was rejected by Lowrie DCJ and by the Full Court. But this does not mean that he believed that what he published was untrue or was recklessly indifferent to the truth in not having a "clue" as to what Bass had spent on overseas travel.

118 The various errors in the reasoning of the learned trial judge mean that his findings on malice cannot stand. Moreover, there was no evidence upon which the trial judge could find malice on the part of Case. Nor was there evidence that would support most of the findings of the trial judge in respect of Roberts. In so far as there was evidence of malice on the part of Roberts, the flaws in the learned trial judge's reasoning mean that the matter will have to go for a new trial unless the reasons of the Full Court have corrected those errors.

The Full Court

119 Unfortunately, many of the errors found in the judgment of the trial judge also affect the reasoning of the members of the Full Court. Prior J entirely accepted the findings of the trial judge on malice. Williams J also upheld most of these findings of Lowrie DCJ although he set aside one adverse finding by the learned trial judge. Consequently, their Honours' findings of malice must be set aside. Martin J also accepted important findings of the trial judge in respect of Roberts. Those findings also must be set aside. So must his Honour's findings

that Case lost the protection of qualified privilege because he "did not possess an honest belief in the statements or because he published the untrue defamatory matter recklessly, without considering or caring whether it be true or not"[105]. When the law of malice is correctly applied, there was no evidence upon which it could be found that Case was actuated to achieve any purpose foreign to the occasion.

Orders

120 The appeals should be allowed. The orders of the Full Court should be set aside. In lieu thereof, the appeal of Case to that Court should be allowed, the verdict of the trial judge should be set aside and a verdict entered in favour of Case. The appeal of Roberts to the Full Court should also be allowed, the verdict against him should be set aside and a new trial of the action against him should be ordered. The respondent should pay the costs of this appeal, the appeal to the Full Court and Case's costs in the District Court. Otherwise, the costs of the first trial should abide the result of the new trial.

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105 *Roberts and Case v Bass* (2000) 78 SASR 302 at 336 [100].

121 KIRBY J. In *Lange v Atkinson*[106], the Privy Council remarked upon the "high content of judicial policy in the solution of the issue raised by [the] appeal" which (as in this case) concerned the law of qualified privilege. Their Lordships observed that "different solutions may be reached in different jurisdictions without any faulty reasoning or misconception", having regard to the "necessary value judgment" involved in defining and applying the defence[107].

122 Nearly 70 years earlier, Evatt J in this Court affirmed that this area of the common law is guided by the "common convenience and welfare of society"[108]. Because what is regarded as "politic or right"[109] will depend upon "a close consideration of public policy or public expediency, including a careful weighing of the good and evil likely to flow from the recognition … of the defence of qualified privilege"[110], it is scarcely surprising that the scope of qualified privilege at common law and the occasions when it may be enjoyed and lost have varied significantly since the defence was first developed.

123 In Australia, as elsewhere, a number of considerations have affected such questions. They include the creation of a distinct society with its own values, the changing nature and technology of communications through which those values are commonly expressed[111] and the enactment of particular laws that respond to such changes[112]. Transcending all of these factors is the Constitution, establishing a particular kind of government for the nation. In the constitutional prescription are important implications about the conduct of the representative democracy, federal and State, for which the Constitution provides[113].

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106 [2000] 1 NZLR 257 (PC) at 263.

107 [2000] 1 NZLR 257 (PC) at 263 referring to *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221 at 241; [1969] 1 AC 590 at 644.

108 *Telegraph Newspaper Co Ltd v Bedford* (1934) 50 CLR 632 at 654-658 citing *Toogood v Spyring* (1834) 1 CM & R 181 at 193 [149 ER 1044 at 1050].

109 *Marlborough v Marlborough* [1901] 1 Ch 165 at 172 per Vaughan Williams LJ.

110 *Telegraph Newspaper Co Ltd v Bedford* (1934) 50 CLR 632 at 655 per Evatt J.

111 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 76 ALJR 1 at 37 [172]; 185 ALR 1 at 50; Australian Law Reform Commission, *Unfair Publication: Defamation and privacy*, Report No 11 (1979) at 23-25 [38]-[41].

112 eg *Broadcasting Services Act* 1992 (Cth), s 216B and Sched 5 ("Online services").

113 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. See also *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West*

(Footnote continues on next page)

124 The adaptation of the law of defamation to a constitutional text (and, in particular, of that part of that law that deals with qualified privilege and the associated issue of malice) is not a problem that has confronted judges in England or New Zealand, at least until recently[114]. In contrast, such an adjustment of the common law of defamation had long been recognised in the United States of America[115]. At least since the Canadian Charter of Rights and Freedoms[116], it has been recognised in Canada[117]. Until a decade ago, except in the most general way, it was not recognised as relevant in Australia[118]. Since that time, it has become apparent that freedom of communication concerning political or governmental matters is necessary if the Australian people, as electors, are to exercise a free and informed choice in the manner contemplated by the Constitution.

Australian Newspapers Ltd (1994) 182 CLR 211; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 76 ALJR 1; 185 ALR 1.

114 Decisions in England are now affected by the Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on 4 November 1950, ETS No 005, Art 10 incorporated into domestic law by the *Human Rights Act* 1998 (UK). See *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127. Decisions in New Zealand are affected by the *New Zealand Bill of Rights Act* 1990 (NZ) affirming New Zealand's commitment to the International Covenant on Civil and Political Rights done at New York on 19 December 1966, ATS 1980 No 23: see Burrows, "Freedom of the Press under the New Zealand Bill of Rights Act 1990", in Joseph (ed), *Essays on the Constitution* (1995) 286.

115 *New York Times Co v Sullivan* 376 US 254 at 285-286 (1964); *Gertz v Robert Welch Inc* 418 US 323 (1974); *Harte-Hanks Communications Inc v Connaughton* 491 US 657 at 685-687 (1989).

116 This forms Pt I of the *Constitution Act* 1982 (Can). A freedom of speech was recognised as early as 1960: see *Canadian Bill of Rights* 1960, c 44, s 1(d).

117 *Edmonton Journal v Alberta (Attorney General)* [1989] 2 SCR 1326; *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130. Public discussion of political concerns as an aspect of the Constitution was referred to in earlier cases such as *Re Alberta Statutes* [1938] SCR 100 at 132-133 per Duff CJ.

118 Before *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211. The implied constitutional freedom of political communication was foreshadowed by Murphy J in *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54 at 88.

125 It is against this background of evolving legal understandings that these appeals from the Full Court of the Supreme Court of South Australia[119] must be approached. In such changing circumstances, it is unsurprising that the parties, and the courts below, should have experienced a measure of difficulty in identifying the legal principles that were applicable to the case. The same problems have arisen in this Court. As I approach these appeals, this Court has the duty to clarify the applicable law – not only for the resolution of the present dispute but also to afford guidance for cases that will present similar questions in the future.

The facts

126 In *Chakravarti v Advertiser Newspapers Ltd*[120], I remarked that the law of defamation was unnecessarily complicated. The present case, reduced to its essentials, should have been relatively straightforward. Unfortunately, it did not prove to be so.

127 The dispute concerns the publication of three printed documents (the Nauru postcard; the pamphlet "Free Travel Times"; and the how to vote card). Each document concerned Mr Rodney Bass (the respondent), then a member of the South Australian Parliament, standing for re-election. Each of the publications was created by the first appellant, Mr Geoffrey Roberts. He authorised each for the purposes of the applicable South Australian electoral law[121].

128 The second appellant, Mr Kenneth Case, was connected directly only with the third publication, namely the how to vote card (or more accurately "how not to vote", because that card propounded on both sides the simple message "When you vote, put Sam Bass *last*"). Mr Case's function was to hand the card to electors as they came to cast their votes in the State general election held on 11 October 1997. In the result, Mr Bass was narrowly defeated. After the poll, Mr Roberts was prosecuted by the Electoral Commissioner for an offence against electoral law, by publishing electoral material that was factually false[122]. Eventually, he pleaded guilty to that offence. He was convicted and punished. These appeals concern the civil consequences of what occurred.

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119 *Roberts and Case v Bass* (2000) 78 SASR 302.

120 (1998) 193 CLR 519 at 561 [106].

121 *Electoral Act* 1985 (SA), ss 112 and 116.

122 *Electoral Act* 1985 (SA), s 113.

The issues

129 *Narrowing the contest*: Various contests raised by the appellants at trial and on appeal, such as the defence of fair comment and the defamatory meanings attributed to the words published, are not before this Court. Nor are we concerned with the so-called *Polly Peck*[123] principle or the fact that, in the case of the judgment against Mr Roberts, the damages were increased by the Full Court.

130 The excision of the foregoing matters confines the issue for our decision to the application of the defence of qualified privilege to the matters found to have been defamatory. Each of the publications having occurred in South Australia, it was common ground that the answer was to be found by elucidating the requirements of the common law. The proceedings were conducted on the footing that there was no relevant State legislation. However, in light of the Australian cases over the past decade, the common law with respect to qualified privilege must now, where relevant, be considered with close attention to the Constitution. The applicable legal principles mould themselves to the constitutional requirements. They may not be inconsistent with (nor impose an impermissible burden upon) the constitutional presuppositions[124]. Nor can they overlook the Constitution in a case to which it is relevant. In my opinion, in such a case, the Constitution, being the nation's supreme law, is not to be trifled with or ignored.

131 *The pleadings*: In order to understand the course that these proceedings took before they reached this Court, it is crucial to appreciate the way in which the freedom of communication concerning political or governmental matters, explained in *Lange v Australian Broadcasting Corporation*[125] and in earlier cases[126], was treated in relation to the appellants' defences of qualified privilege.

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123 *Polly Peck (Holdings) Plc v Trelford* [1986] QB 1000.

124 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-566; cf *Lipohar v The Queen* (1999) 200 CLR 485 at 557 [179]-[180]; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 534-535 [66]-[71], 557 [142]; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 76 ALJR 1 at 44 [206]-[210]; 185 ALR 1 at 60-61.

125 (1997) 189 CLR 520.

126 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

132 In their respective defences in the District Court, the appellants did not raise two separate defences, such as the so-called "traditional" or "ordinary" qualified privilege and "extended" or "constitutional" qualified privilege. They simply pleaded, in answer to the whole of Mr Bass' statement of claim, that the documentary publications complained of by him were "published on occasions of qualified privilege". Their defences went on to say that each publication was on "a matter concerning government and political matters affecting the electors … and the choice for electors at an election".

133 In his replies, Mr Bass pleaded that the defence was not available as the publications had been made with actual malice. Further, he pleaded that the appellants had no reasonable grounds for believing that the imputations complained of were true and had taken no proper steps to verify the accuracy of the imputations; that they well knew that the imputations were untrue; that they failed to take steps to seek a response from Mr Bass; and that they failed to publish a retraction.

134 *The trial*: At trial, on the issue of qualified privilege, the primary judge severed what he described as "the traditional head of qualified privilege"[127] from what he described as "the extended form of qualified privilege"[128]. In effect, he treated them as separate and "alternative" defences of qualified privilege. He first held that each of the publications complained of was made on a privileged occasion for the purposes of "traditional" qualified privilege[129]. However, he concluded that Mr Bass had established malice on the part of each of the appellants so that, according to the approach of the common law, their defences of "traditional" qualified privilege failed in respect of both appellants and each of the three publications.

135 Reflecting what he inferred to be reliance by the appellants on the principles established by *Lange*, the primary judge went on to deal with what he described as the "extended form of qualified privilege". He concluded that it could not, in the context of political and governmental discussion, be defeated merely because such discussion had the motive of causing political damage to an opponent[130]. He held that the "most important difference" between the "extended" privilege and "traditional" qualified privilege was that the former

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127 *Bass v Roberts & Case* unreported, District Court of South Australia, 24 March 2000 ("reasons of the primary judge") at [243] per Lowrie DCJ.

128 Reasons of the primary judge at [261].

129 Reasons of the primary judge at [249].

130 Reasons of the primary judge at [263].

required that the publication be "reasonable" in all of the circumstances[131]. By analysis of the facts surrounding each of the publications, and by findings that he made in relation to the conduct of each of the appellants, the primary judge decided that their actions had not been reasonable. Each of the appellants therefore failed at trial in their defences of qualified privilege.

136 *Common ground*: Although they had failed at trial, the appellants had at least succeeded in establishing that their respective publications had occurred on occasions of qualified privilege. Accordingly, when they appealed to the Full Court, it was natural that, in their joint notice of appeal, they should raise no challenge to the conclusion that they were each entitled to the benefit of qualified privilege.

137 Before the Full Court, Mr Bass did not file a notice of contention seeking to dispute the finding that the publications had occurred on occasions that attracted qualified privilege. His contest lay elsewhere, principally in connection with his argument that the qualified privilege had been lost by malice on the part of each of the appellants. Mr Bass did present a cross-appeal to the Full Court. However, this was confined to the issue of damages. It was common ground in the Full Court that all of the appellants' publications attracted qualified privilege, subject to that defence being lost by proof of malice[132].

138 Even in argument before this Court, no challenge was made on behalf of Mr Bass to the contention that each of the publications with which the appellants were concerned was made on an occasion of qualified privilege at common law as that privilege has hitherto been understood. Mr Bass repeatedly disavowed any challenge to that finding. His counsel declined to take up a suggestion that the audience to whom each of the publications in question had been made was too wide to attract "traditional" common law qualified privilege. That hypothesis had been raised with counsel upon the basis that the "essential"[133] reciprocity between a legal, social or moral duty or personal interest of the publisher and the corresponding interest of the audience to receive the publication might have been absent in the circumstances of the publications in this case.

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131 Reasons of the primary judge at [264].

132 *Roberts and Case v Bass* (2000) 78 SASR 302 at 315 [36] per Williams J, 322-323 [76] per Martin J.

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

The decision of the Full Court

139 In the Full Court, the judges divided in their treatment of the issue of qualified privilege. In his reasons, Prior J accepted the findings of the primary judge that Mr Roberts was a person with an improper motive and with no honest belief in the truth of what he had published. Mr Case "was properly found to be recklessly indifferent to the truth or falsity of the material he published"[134]. In these circumstances, Prior J concluded that the defence of qualified privilege failed on the footing that neither appellant had an honest belief in the truth of what was published. This represented an attempted finding that each appellant had, in law, acted with malice in publishing the documents complained of. It was not a finding that qualified privilege was unavailable to the occasions involved. Prior J also agreed that both "defences" of qualified privilege failed, but did not address the "extended" privilege, nor did he address the application of the Constitution to the common law of qualified privilege or the associated issue of malice.

140 The second judge in the Full Court, Williams J, likewise gave no separate explicit attention to the implications of the Constitution for the qualified privilege, which each of the appellants was entitled to invoke. However, he did note that, in relation to publications made in the context of an election, "an interest or duty of informing the electorate … of a candidate" is sufficient to found the privilege and that the motive of injuring Mr Bass' electoral prospects was not an improper one[135]. His Honour quoted the finding of the primary judge that the appellants "did not believe the imputations to be true"[136]. However, in his opinion, the establishment of an absence of honest belief was determinative of the presence of malice[137]. In relation to motive, he disagreed with the conclusions of the primary judge. So far as he was concerned, the facts were consistent with the appellants' becoming "over-enthusiastic in the support of their electoral cause". His Honour specifically rejected the conclusion that the appellants had any "special desire to hurt [Mr Bass] otherwise than in terms of his prospects of re-election"[138].

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134 *Roberts and Case v Bass* (2000) 78 SASR 302 at 304-305 [2].

135 *Roberts and Case v Bass* (2000) 78 SASR 302 at 316 [44].

136 In the text of the primary judge's reasons it appears as "untrue" but it was common ground that the word should be read as "true" and the Full Court so read that passage: *Roberts and Case v Bass* (2000) 78 SASR 302 at 314 [32].

137 *Roberts and Case v Bass* (2000) 78 SASR 302 at 316 [41].

138 *Roberts and Case v Bass* (2000) 78 SASR 302 at 316 [43]-[44].

141 The third judge in the Full Court, Martin J, also gave no attention to the significance of the Constitution for the content of qualified privilege at common law, invoked for the appellants. He agreed that the publications had occurred on occasions of privilege[139]. But in respect of Mr Roberts, he concluded that the finding of a dominant motive to injure Mr Bass was correct[140]. So far as Mr Case was concerned, he accepted that his primary intention had been to achieve the electoral defeat of Mr Bass. Such a purpose, Martin J held, "does not amount to malice that would defeat a claim of qualified privilege"[141]. Upon the basis of his analysis of the evidence, Martin J would not, therefore, have drawn the conclusion that Mr Case possessed "a dominant intention to injure" Mr Bass[142]. Nevertheless, he deferred to what he took to be the primary judge's advantages in judging that Mr Case lacked an honest belief in the truth of the how to vote card that he had handed to electors. He regarded as determinative for Mr Case's liability for defamation the fact that he had acted recklessly in publishing that document, indifferent to the truth or otherwise of its contents[143].

142 Clearly, the failure of the Full Court to deal with the constitutional consequences for qualified privilege at common law can be traced to an indication which the appellants' then counsel gave to that Court that the appellants did not pursue their appeal against the primary judge's rejection of the constitutional "defence"[144]. Yet the question remains whether, in discharging its function of finding, and applying, the relevant principles of the common law, notwithstanding the common ground of all of the parties and the concession for the appellants just mentioned, it was correct for the Full Court (any more than it would be for this Court) to ignore the impact of the Constitution upon the common law applicable to this case.

Courts cannot apply erroneous law by concession

143 *Inadmissibility of erroneous legal concessions*: Like the courts of South Australia, this Court is not in a position to accept an incorrect understanding of the law. It cannot accept an agreement of the parties that does not reflect the binding law of qualified privilege, moulded to the Constitution where it applies.

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139 *Roberts and Case v Bass* (2000) 78 SASR 302 at 322 [76].

140 *Roberts and Case v Bass* (2000) 78 SASR 302 at 325-326 [82].

141 *Roberts and Case v Bass* (2000) 78 SASR 302 at 335 [95].

142 *Roberts and Case v Bass* (2000) 78 SASR 302 at 336 [98].

143 *Roberts and Case v Bass* (2000) 78 SASR 302 at 337 [103].

144 See reasons of Callinan J at [272]-[273].

The Constitution cannot be ignored as a result of mistakes or misunderstandings of the parties or judges in earlier proceedings. Subject to law, parties can agree between themselves as they like. But if they invoke the courts of this country they cannot expect the courts to go along unquestioningly with their erroneous understandings of the law.

144 Given that there is but one common law in Australia and that it cannot be inconsistent with the constitutional text and structure, but adapts and moulds itself to that text and structure in circumstances to which the Constitution is applicable, it is impossible, at least after *Lange* and its companion decisions, to accept that any rule of the Australian common law as to qualified privilege stated before the significance of the Constitution in these matters was appreciated, can survive into contemporary expositions of the common law if it does not respect the constitutional norm whenever that norm is applicable to a matter complained of.

145 *Emergence of constitutional implications*: In his reasons, Callinan J[145] complains that the constitutional implication, detected in the cases culminating in *Lange*, took more than 90 years to be perceived. That is true. But it is the nature of the elucidation of a written constitution. It took more than 50 years for the implication relating to judicial power to be detected in the *Boilermakers' Case*[146]. It took nearly 100 years for the implication governing the independence of the State judiciary to be detected in *Kable v Director of Public Prosecutions (NSW)*[147]. Some implications, such as that of due process in judicial proceedings, are still in the course of evolution[148]. Others have only just begun their journey to acceptance[149].

146 If it takes years and diverse opinions in this Court to throw light on the requirements of the constitutional implication of free speech, that is not a reason to reject the duty to state the law as it stands. Inconvenience has never been a reason for refusing to give effect to the Constitution. If it had been, the *Bank*

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145 Reasons of Callinan J at [285].

146 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

147 (1996) 189 CLR 51.

148 *Leeth v The Commonwealth* (1992) 174 CLR 455. See Parker, "Protection of Judicial Process as an Implied Constitutional Principle", (1994) 16 *Adelaide Law Review* 341.

149 eg *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 363 [81]-[82], 372-373 [114]-[117] (judicial impartiality).

Nationalisation Case[150], the *Communist Party Case*[151] and the *Cross-Vesting Case*[152] would have been differently decided. When the Constitution speaks, this Court must give it effect. The fact that it causes some adjustments to the previous common law of qualified privilege or that it may take time to be fully elucidated is scarcely a reason for the Court to stay its hand. In the eye of the Constitution, which speaks to centuries, that is neither here nor there.

Addressing the constitutional implication

147 *The limited grant of special leave*: In a case raising highly technical questions, much evidence, multiple issues presented by separate defences, divisions of opinion in the Full Court and not a little uncertainty about the relevant law, it was almost inevitable that this Court would limit the grant of special leave so as to confine the appeals to issues of general importance. So it did.

148 The first ground upon which special leave was granted concerns the appeal by Mr Roberts. It asks whether the Full Court had wrongly held that the defence of qualified privilege was capable of being defeated by a dominant motive to injure Mr Bass "when the dominant motive attributable or capable of being attributable to [Mr] Roberts was no more than a desire to cause political electoral damage" to Mr Bass.

149 The second ground, relating to the appeal by Mr Case, concerns whether, once it was found by the Full Court that Mr Case did not publish the how to vote card pursuant to an improper motive, the Full Court had failed to consider whether the proper purpose of the publication was its dominant purpose (in which event any extraneous malice would be rendered irrelevant) or, alternatively, had applied an incorrect test as to the existence of actual malice "in a case involving the publication of political advertisements during an election campaign".

150 The third ground asks whether the Full Court misconceived its approach to the issue of "improper purpose" or "dominant motive" such as could defeat the defence of qualified privilege and whether it had failed to identify any motive or purpose that the appellants may have had, other than a desire "to cause political and electoral damage" to Mr Bass.

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150 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1; *The Commonwealth v Bank of NSW* (1949) 79 CLR 497; [1950] AC 235.

151 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

152 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

151 The fourth ground concerns the Full Court's reliance on the primary judge's findings about what the appellants may, or may not, have believed in a case where such assessment "must have been affected by the … judge's misconception as to what could or could not constitute an 'improper purpose'".

152 The fifth ground raises the question whether the Full Court should have proceeded on the basis that, to establish actual malice in a trial involving the publication of political advertisements during an election campaign, it was necessary for Mr Bass to prove malice "with convincing clarity" so that only false statements "made with a high degree of awareness of their probable falsity" would be sufficient to establish such malice.

153 There are three further grounds upon which special leave was granted. I pass them over to come to the last ground. It asserts that (with emphasis added) "[t]he Full Court in the application of the *appropriate test* should have found that neither Appellant had the requisite 'actual malice' to defeat the *identified* qualified privilege".

154 *Notification of the constitutional issue and argument*: In light of the foregoing grounds, and questions raised by the Court during the hearing of the special leave application, notices were given pursuant to s 78B of the *Judiciary Act* 1903 (Cth). Such notices signified that, in these appeals, a question arose under the Constitution or involving its interpretation. One of the law officers (the Attorney-General for Western Australia) intervened to present arguments concerning the implication "for the common law of defamation and qualified privilege" of the constitutional rule protecting freedom of communication on political and governmental matters.

155 It was not only the Attorney-General for Western Australia who made submissions on the Constitution. The written submissions of all the parties included, and much of the oral argument concerned, the consequences of the requirements and implications of the Constitution for the defence of qualified privilege and the related issue of malice[153]. Quite properly, these issues have been fully argued before this Court.

156 *Absence of procedural unfairness*: There is no risk of procedural unfairness in addressing the constitutional issues in these appeals[154]. At trial, no party before this Court was denied the opportunity to present evidence relevant to

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153 It was the subject of detailed oral submissions by the parties and intervener: see esp transcript of the proceedings in this Court at 13, 30-36, 41, 65, 67-71.

154 *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8.

the issues that this Court must now determine. During oral argument of these appeals, counsel for Mr Bass conceded, properly, that he was unable to point to any disadvantage suffered by his client in the consideration of the constitutional principles in the appeals, by virtue of the manner in which that question had been argued in the courts below. Mr Bass could not identify any disadvantage in the appeals taking a different, and larger, direction in this Court. That is a course that is not infrequently taken when matters come to this Court, with its particular constitutional perspectives[155]. In any case, it would be too mechanistic to hold that the parties, and particularly the appellants, having failed to advance the constitutional arguments in the Full Court, should now be fixed with the outcome in that Court, because it disposed of the case on the issues that the parties presented to it.

157 *A matter of general importance*: The resolution of the constitutional issue is also a matter of general legal importance. Those representing Mr Bass recognised the significance of clarifying the legal rule applicable in a case such as his. Indeed, counsel for Mr Bass raised the question whether, once the protection of qualified privilege is found to be "rooted in another source, namely the extended *Lange* privilege", the foundation for the "traditional qualified privilege" any longer exists in such a case. Reference was made, in this regard, to an observation in the United States courts following *New York Times Co v Sullivan*[156], that the constitutional protection of free speech there provided "gives at least as much protection as the common law privilege. Thus, in the context of a media defendant and public figure, there is no longer any need for the common law privilege"[157].

158 This last submission renders it imperative, in my view, that this Court should clarify the scope and operation of the "common law privilege" applicable to this case. The constitutional issues have been fully canvassed before this Court. The procedural requirements necessary to identify the "matter" before the Court are sufficiently covered both by the grounds of appeal upon which special leave was granted and by the notices given under the *Judiciary Act*. There is no suggestion of any res judicata or issue estoppel that would forbid consideration

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155 A recent similar example is *Solomons v District Court (NSW)* (2002) 76 ALJR 1601 at 1614 [65]-[67]; 192 ALR 217 at 234-235.

156 376 US 254 (1964).

157 *Nevada Independent Broadcasting Corp v Allen* 664 P 2d 337 at 344 fn 6 (Nev 1983).

of the matter[158]. This Court should therefore decide the appellants' respective appeals, so far as it may do so, applying the correct legal principles[159]. It is expedient and in the interests of justice for the Court to do so. This Court is engaged in the disposition of appeals as contemplated by the Constitution[160]. It is not involved in a game of legal charades.

Qualified privilege in a constitutional context

159 *Application to State elections*: Mr Bass did not contest that the principles stated in *Lange* (and the preceding cases) concerning the freedom of political communication, although derived from the *federal* Constitution, applied equally to political or governmental matters enabling the people to exercise a free and informed choice as electors in *State* elections. This was a proper concession. Indeed, the point was expressly contemplated by the joint reasons in *Lange*[161]. That being so, once a matter is one involving "discussion of government or politics at State or Territory level"[162], it is amenable to protection by qualified privilege, as that principle is affected by the implied constitutional freedom.

160 I do not doubt that, outside cases to which the Constitution applies, there will still be lively debates concerning the scope of qualified privilege at common law and the extent to which, in a particular matter, the element of reciprocity between the communicator and the receiver of the communication is established to give rise to the defence. However, fidelity to the Constitution, consistency in its application, and conformity to the Court's authority in *Lange* and in other cases, deny the co-existence of inconsistent principles once the circumstances attract the operation of the Constitution. Then, it is only possible to have one legal rule. That is the rule of the common law adapted to the Constitution. Any narrower, or other, common law rule cannot survive. Putting it quite bluntly, in

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158 cf *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 at 657, 674-676; *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 409-413, 422, 444, 453-454, 487, 500-501.

159 cf *Water Board v Moustakas* (1988) 180 CLR 491 at 497; *Banque Commerciale SA, en Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at 284; *Tyson v Brisbane Market Freight Brokers Pty Ltd* (1994) 68 ALJR 304 at 310-311; 120 ALR 1 at 11; *Iyer v Minister for Immigration and Multicultural Affairs* [2000] FCA 1788 at [16], [22].

160 Constitution, s 73(ii).

161 (1997) 189 CLR 520 at 571-572; cf *Levy v Victoria* (1997) 189 CLR 579 at 633.

162 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 571.

the context of a case such as the present, because of the Constitution, such a rule does not represent the common law at all.

161 *Limited relevance of reasonableness*: One issue should be clarified at the outset. At trial, and to some extent in this Court, the existence of a requirement of reasonableness was raised. This occurred in the context of a discussion of *Lange*, beginning with the statement of the primary judge that, in order for a publisher to rely on the "extended form of qualified privilege", he or she must prove that the publication was reasonable[163]. However, the requirement of reasonableness only arises when the privilege is invoked "to protect a publication that would otherwise be held to have been made to *too wide an audience*"[164]. There may indeed be difficulties in the application of this test. However, it was clearly and correctly held by the primary judge, and agreed with by the Full Court and the parties, that the publications the subject of these appeals were not made to "too wide an audience". Therefore, the *Lange* requirement of reasonableness does not arise in these appeals. It is not a requirement attaching to circumstances of qualified privilege here merely because of the relevance of the constitutional freedom of political communication. Were it otherwise, far from protecting the freedom of expression in circumstances to which the Constitution applied, the common law would have added a new and general obligation to establish reasonableness of conduct, resulting in a potential reduction of privileged speech. This would be contrary to the object of the elaboration of the constitutional implication as it affects the common law. The Constitution, in matters that it touches, enlarges free speech. It does not add to restrictions and burdens upon it.

162 *A two-stage approach*: The decision in *Lange* did not therefore establish a general requirement of reasonableness applicable to every situation of publication regarding governmental or political matters. However, it did clarify the way in which the constitutional freedom of such communication affects the law. If the common law, in this case the law of qualified privilege in defamation as it has hitherto been understood, would otherwise impair the constitutionally protected freedom, it must be developed in order to make it consistent with the constitutional implication. It cannot be incompatible with that implication. *Lange* clarified the approach that must be taken in order to determine any inconsistency. That approach asks two questions: (1) does the law burden the freedom of communication about governmental or political matters; and (2) if so, is the law "reasonably appropriate and adapted to serve a legitimate end the

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163 Reasons of the primary judge at [264].

164 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 573 (emphasis added).

fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of … government"[165].

163 *The threshold – reciprocity of interest*: It is undisputed that the law of defamation strives to achieve a balance between the protection of individual reputation and freedom of communication. In determining that balance, there is also a constitutional imperative to consider, that of ensuring that freedom of communication about governmental and political subjects is maintained. It is clear that the common law of defamation could otherwise burden the constitutional freedom. Thus, the determinative question is how that burden can be fashioned to be "reasonably appropriate and adapted" (or "proportionate") to the legitimate end of the protection of reputation, in order to ensure conformity with the Constitution. In these appeals, the aspect of the law of defamation that requires clarification, in order to ensure such validity, is the common law of qualified privilege and, specifically, the law of malice.

164 The threshold issue of reciprocity of interest was not contested in this Court, nor was it addressed in the Full Court. However, it does need some clarification. Electors have an interest in receiving information concerning a candidate in governmental elections. Although this has not always been explicitly founded in the constitutional prescription of representative government, that prescription confirms that such an interest and corresponding duty exists[166]. It follows that this Court cannot now return to, and consider as applicable to this case, the common law as stated, for example, in *Lang v Willis*[167] before the significance of the constitutional implication was appreciated.

165 It is difficult to be critical of the parties or the judges in the courts below for having failed to mention *Lang*. The scope of qualified privilege at common law, in the context of an election address, was only considered by one of the judges in the majority in that case, namely Evatt J[168]. The other judges who, with his Honour, took the view that qualified privilege at common law would not necessarily attach to the occasion of an electoral meeting, were in dissent[169]. To

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165 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567. The second test was also there stated by reference to the alternative formulation of the proportionality of the law in question to the constitutional requirement: see fn 272.

166 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 571.

167 (1934) 52 CLR 637.

168 *Lang v Willis* (1934) 52 CLR 637 at 672.

169 (1934) 52 CLR 637 at 656 per Starke J, 667 per Dixon J. Rich J did not address the issue except to say, at 650, that the relevant section of the *Defamation Act* 1912

(Footnote continues on next page)

ascertain the binding ratio decidendi of *Lang*, the opinions of the dissenting judges must be disregarded[170]. There is, therefore, no binding authority arising out of *Lang* relevant to the issue in these appeals.

166 The comments in *Lang* related to a situation described as publication to an "unidentified" audience, where it could not be shown that each recipient of the material had a relevant interest in the subject matter. In contrast, the publications in the present appeals were made, at the widest, to the residents of the relevant electorate, most of whom would, inferentially, have had an interest in the material and would, substantially, have been electors in the State election. This would be a sufficient basis for establishing reciprocity of interest, even if *Lange* had not gone so far as to affirm that "each member of the Australian community" has an interest in giving and receiving "information, opinions and arguments concerning government and political matters"[171].

167 Even before this Court's decision in *Lange*, views had been expressed in Australia and England that made the limited comments in *Lang* look decidedly old-fashioned and needlessly restrictive. Thus, in England, in *Braddock v Bevins*[172] (a decision to which the primary judge in this case referred) it was said to be "scarcely open to doubt" that statements made in an election address of a candidate concerning his opponent, provided they were relevant to the matters which the electors would have to consider in deciding which way they would cast their votes, were "entitled to the protection of qualified privilege"[173].

168 More recently, in Australia, in *Calwell v Ipec Australia Ltd*[174], Jacobs J remarked:

> "It is for the greatest public good that views on the political attitudes … of members of the Houses of Parliament should be able to be expressed without inhibition. The public are entitled to the views on such a subject

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(NSW) applicable to that case provided "a wider protection than that afforded by the doctrine of privilege at common law". However, he did not describe the scope of such privilege. McTiernan J, at 687, considered it unnecessary to address the issue of privilege.

170 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 417-418 [56].

171 (1997) 189 CLR 520 at 571.

172 [1948] 1 KB 580.

173 [1948] 1 KB 580 at 590.

174 (1975) 135 CLR 321 at 335-336.

> of political commentators, expert or inexpert. The views expressed, and the imputations thereby made, may be correct or incorrect, but the public has an interest in hearing them whatever they may be and it is for the public good that interest should not be stultified."

169 When one considers what was said in the series of decisions culminating in *Lange*, it becomes clear that the remarks in *Lang* must be viewed today as overtaken by later authority. *Lang* was not, as such, overruled in *Lange*, nor in the earlier decisions upon which *Lange* is based. This was because, on the subject of qualified privilege, there was no binding rule to occasion such an overruling[175]. However, *Lang* was mentioned in the joint reasons in *Lange*. It was referred to as a prelude to the paragraph that immediately followed in which this Court concluded that[176]:

> "[T]he 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' 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."

170 *Electoral opinions – the constitutional heartland*: Once it was plain that these proceedings concerned publications made in circumstances directly connected with the election of Mr Bass to a State Parliament[177] (and thereby involved "discussion of government or politics at State … level"[178]) it became highly artificial and probably impossible for the Full Court to consider the submissions of the parties without regard to the Constitution. In a real sense, these appeals concerned the very heartland of the matters of governmental and political concern enlivening the implications of the Constitution to which the decisions in *Lange* and the earlier cases referred. However, with every respect, the Full Court proceeded as if the Constitution were silent on the matters before it.

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175 cf *Minnesota Mining and Manufacturing Co v Beiersdorf (Australia) Ltd* (1980) 144 CLR 253 at 292.

176 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 570 (footnote omitted).

177 cf Constitution, s 107.

178 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 571.

171 The purpose of federal, State and Territory elections in Australia is to ensure the selection of a chosen candidate or candidates to hold public office. The purpose of those who support candidates for such elections is necessarily to harm their opponents, at least electorally. Often, if not invariably, this purpose will involve attempts to harm the *reputation* of an opponent. In the nature of political campaigns in Australia, it is unrealistic to expect the genteel conduct that may be appropriate to other circumstances of privileged communication. Political communication in Australia is often robust, exaggerated, angry, mixing fact and comment and commonly appealing to prejudice, fear and self-interest. In this country, a philosophical ideal that political discourse should be based only upon objective facts, noble ideas and temperate beliefs gives way to the reality of passionate and sometimes irrational and highly charged interchange. Communications in this field of discourse including in, but not limited to, the mass media, place emphasis upon brevity, hyperbole, entertainment, image and vivid expression[179]. The contemporary world of Australian politics has moved far from the meeting described in *Lang*. Yet, even such meetings were commonly pretty robust.

172 Because this is the real world in which elections are fought in Australia, any applicable legal rule concerning qualified privilege (and the related notion of malice) must be fashioned for cases such as the present to reflect such electoral realities. Otherwise, before or after the conduct of elections, attempts will be made to bring to courts of law, under the guise of legal claims, the very disputes that it was the purpose of the representative democracy, established by the Constitution, to commit to the decision of the electors. Instead of the merits of contesting candidates being decided by thousands of citizens in vigorous exchanges before the electorate, the contest will be presented for decision to a small number of jurors or to a single judge, and reviewed on appeal by courts of small numbers. Instead of the evaluation of electoral, political and governmental conduct, excesses and aspersions being left with the electors at the ballot box, these matters will be analysed, over many days, by judges solemnly weighing their own opinions about the perceived truth or falsity, fairness or injustice of the respective assertions. Instead of political enthusiasts feeling able to express their opinions passionately, they will become tongue-tied for fear of being dragged into complex and expensive litigation and obliged to explain and justify their statements and opinions. Instead of volunteers being willing to hand out how to vote cards on election day, the pool will dry up because it will become known that such people may later be subject to cross-examination in a court of law as to

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179 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 565; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 76 ALJR 1 at 46 [218]-[219], cf at 54-59 [258]-[277]; 185 ALR 1 at 62-63, 74-80.

the "research" they have undertaken about the truth or falsity of the documents that they have distributed[180].

173 *Conclusion – the Full Court erred*: These factors demonstrate once again the considerations that affect the legal status of communications in this country where they attract the operation of the Constitution. They illustrate the variety of matters that have to be taken into account in deciding whether a particular communication made in, or in relation to, a State election has occurred on an occasion of qualified privilege and whether any such privilege has been lost by proof of malice.

174 Unfortunately, these questions were not considered in that way by the Full Court. Misled by the parties, that Court dealt with the appeal as if *Lange* and the cases that had preceded it had not been written. Yet in my opinion, those authorities were crucial to determining the availability and scope of any qualified privilege and to deciding the circumstances in which any such privilege was lost[181].

175 The Full Court thus erred in its process of reasoning. However, it did not err in its conclusion that qualified privilege applied to each of the three communications in question in these appeals. Each was made on an occasion of qualified privilege, as the primary judge held and as Mr Bass conceded. This was so, ultimately, because the Constitution required that the common law of Australia extend such privilege to them. Whatever the general authorities of the common law here and overseas may otherwise say, they could not result in a conclusion, in a case such as this, that deprived such occasions of the defence of qualified privilege.

176 The applicable law in South Australia (without any relevant intrusion of statute) was not, therefore, fashioned because of a decision of English judges in *Braddock v Bevins*. It was defined by the influence of the Constitution on the common law of this country, protecting the heartland of electoral discussion of matters of government and politics in a State of the Commonwealth. It might be argued that, because of coincidental advances in the general common law of qualified privilege, it was ultimately unnecessary to invoke the Constitution to uphold the occasions in question as privileged. However, it is essential to understand how the Constitution affects the definition of the occasion of qualified privilege, and its scope, before turning to the related issue of malice. In

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180 "Research" is the word used by the primary judge: reasons of the primary judge at [256].

181 cf the position in Canada: *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130.

order to define the content of the applicable common law of malice, it is necessary first to appreciate the occasions to which qualified privilege attaches and the scope of that privilege. For both the privilege and the exception of malice, the constitutional setting in a case such as the present is critical.

Malice in a constitutional context

177 *Reconsideration by the High Court*: When this Court turns to apply the law correctly, can it be said that, in accordance with the common law as adapted to the Constitution, either or both of Mr Roberts and Mr Case lost the qualified privilege applicable to the occasions of their communications? Specifically, did they do so by reason of proof of malice on their parts? In this context does malice arise because of an absence of a genuine belief of the publisher in the contents of the matter complained of? In electoral communications is it necessary, as the courts below considered, for the person speaking or writing of a candidate to check the truth of everything that is said? Or would such a standard impose an undue restraint on the cut and thrust of electoral speech in Australia and thus represent a constitutionally impermissible burden on the freedom?

178 Although the Full Court did not address these questions in such terms, in my opinion this Court must do so if it is to decide these appeals in accordance with law. The Court may be assisted by the findings and reasons of the primary judge and the evidence adduced at trial, so far as it is undisputed. The question becomes whether those findings and reasons lead to the conclusion that the primary judge reached. If not, does the evidence (or lack of evidence) permit this Court to give effect to its own conclusions? Or must the cases be returned for retrial?

179 *Malice – the critical issue*: In this way, the real focus of these appeals becomes that of considering the common law of malice as it operates as a disqualifying factor in the law of qualified privilege. There are two elements to note. The first is the general rule that, if an improper purpose is the actuating motive for a publication, the qualified privilege otherwise attracted to it by the occasion of its making is destroyed. The second is the relevance of the state of mind of the publisher as to the truth or untruth of the contents of the published material and the way in which such a state of mind is to be found or inferred.

180 *Derivative malice*: There is one preliminary issue that should first be addressed. It involves a question that was not argued before this Court, but which is referred to in the reasons of Callinan J[182]. It concerns whether, notwithstanding any conclusion as to the individual liability of Mr Case, he was jointly responsible with Mr Roberts for the publication of the how to vote card

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182 Reasons of Callinan J at [306].

with which he was associated, and was thus infected by any malice affecting the conduct of Mr Roberts.

181 In the event of a conclusion of malice on the part of Mr Roberts, I would not be prepared to find against Mr Case on such a footing. In *Egger v Viscount Chelmsford*[183], Lord Denning MR expressed the opinion that where a plaintiff seeks to rely on malice to rebut a defence of qualified privilege, he or she must prove malice against each person who is charged with malice. The decision in *Smith v Streatfeild*[184] to the contrary, and remarks in *Adam v Ward*[185], were criticised by his Lordship as erroneous, on the footing that the correct view of the law is that each defendant is answerable severally for a joint publication and each is entitled to his or her own several defences. This was merely applying the basic rule that "[a] defendant is only affected by express malice if he himself was actuated by it"[186].

182 Lord Denning's opinion attracted the support of Harman LJ[187] and Davies LJ came to the same conclusion[188]. The last noted the opinion expressed in this Court by Knox CJ in *Webb v Bloch*[189], which had merely accepted the principle in *Smith v Streatfeild*. Compliance with English legal authority was the habit of those times. Harman LJ pointed out that a person was liable for the malice of their agents; that was a proposition beyond dispute. But otherwise, each person's malice must be judged individually. As a matter of legal principle, I find this reasoning compelling.

183 The evaluation of the alleged malice of the conduct of each publisher falls to be decided separately in the case of each claim for qualified privilege. Outside issues of agency, it would ordinarily be inconsistent with constitutionally protected communications about governmental and political matters for the common law to burden one individual with the legal consequences of the purpose and intent of another so that the first was deprived of the implied constitutional protection. In my opinion, there is no substance in the argument to the contrary.

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183 [1965] 1 QB 248 at 265.

184 [1913] 3 KB 764.

185 [1917] AC 309.

186 *Egger v Viscount Chelmsford* [1965] 1 QB 248 at 265.

187 *Egger v Viscount Chelmsford* [1965] 1 QB 248 at 266-267.

188 *Egger v Viscount Chelmsford* [1965] 1 QB 248 at 270-273.

189 (1928) 41 CLR 331 at 359.

184 *Improper motives*: It is clear that, at least in circumstances in which the constitutional freedom applies, such as the present case, an object to destroy the election prospects of a candidate is *not* an improper motive[190]. The primary judge, with whom Prior J and Martin J agreed in the Full Court, concluded that Mr Roberts possessed an improper motive. Although the primary judge concluded that Mr Roberts' motive went "beyond the mere desire to foil [Mr Bass'] prospects of re-election", that it extended to a desire to make people "think less of him"[191], the reputation that was the target of the publications was Mr Bass' reputation *as a politician*. I would therefore agree with the analysis in the joint reasons that the motive of Mr Roberts, in these constitutionally protected circumstances, fell within the protected motive of damaging a candidate's re-election prospects. It follows that, by the common law adapted to the Constitution, such a motive was not malice disqualifying Mr Roberts from a defence of qualified privilege otherwise available to him[192].

185 *State of mind as to truth or falsity*: The joint reasons have outlined the way in which the following issues are relevant to a defence of qualified privilege: the publisher's honest belief in the published material; recklessness in publishing without consideration for the truth or falsity of the material; and knowledge of the falsity of the published material. I am in general agreement with those reasons so far as they apply to the context of malice at common law in circumstances attracting the protection of the constitutional freedom of political communication. However, I would reserve the position of the common law outside such situations. That issue does not need to be decided in the present appeals.

Consequences for the appeal of Mr Case

186 *Malice and the how to vote card*: In respect of Mr Case, the only relevant communication is the how to vote card. He was not involved in the publication of the Nauru postcard or the "Free Travel Times" pamphlet. The evidence was that Mr Case had participated in a group that was upset with Mr Bass' performance as a member of the South Australian Parliament, most especially in relation to a proposal to privatise the management of a public hospital. Mr Case acknowledged that he was "quite passionate" about the issues connected with the hospital[193]. He was distressed that Mr Bass would not make arrangements for

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190 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 574.

191 Reasons of the primary judge at [254].

192 Joint reasons at [107].

193 *Roberts and Case v Bass* (2000) 78 SASR 302 at 326 [84].

him to meet the Minister for Health. It was in this context that Mr Case decided to "target" Mr Bass. However, this was all by way of background. The actual distribution of the how to vote card did not occur until polling day. Up until two days before that day, Mr Case had been overseas for some 10 or 11 days. On his return, Mr Case contacted the Modbury Hospital Action Group. He was allocated a polling booth within Mr Bass' electorate of Florey. Mr Case attended the booth on the morning of the election. It was common ground that it was then, for the first time, that he saw the two pamphlets that he was expected to distribute. The one that was the subject of Mr Bass' proceedings against Mr Case was the how to vote card. Mr Case agreed that he had read the card. He said that there was nothing in it that caused him concern. He distributed the card between approximately 8 am and 10 am on election day.

187 During the trial, Mr Case was examined, at length, concerning his beliefs about the truth or otherwise of the statements contained on the two sides of the how to vote card. He sought to explain, and even to support and justify, the factual assertions and opinions contained on the card. Arguably this was not necessary. He had neither printed nor authorised it. He had merely distributed it on election day. He had done so only to electors presenting at the polling booth that he had manned.

188 *Conclusion – no evidence of malice*: With all respect to the primary judge, it is unconvincing in these circumstances to suggest that Mr Case was obliged to check and verify the accuracy of the statements contained in the how to vote card before he could publish it on election day[194]. Such a requirement of the common law would not conform to the constitutionally protected entitlement to have, and express, opinions about candidates in any electoral campaign. The notion that, on the morning of the poll, Mr Case should have inquired of Mr Bass about the truth or otherwise of the words complained of on that card, or that he should have given Mr Bass an opportunity to answer the allegations before handing out the card, strikes me as having no relationship to the realities of the distribution of such materials in State general elections as these are conducted in Australia. Were the common law of malice to have such a consequence, thereby depriving a person such as Mr Case of the qualified privilege that otherwise attached to the occasion of the publication, it would be inconsistent with the freedom implied from the Constitution. For this reason the common law adapts itself to the constitutional norm. In the context of distributing electoral material such as the how to vote card, to distribute such material without first having checked the truth of its content or offering the person referred to in the material the opportunity to comment on and correct any errors, does not constitute malice.

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194 cf Rares, "No Comment: The Lost Defence", (2002) 76 *Australian Law Journal* 761 at 774.

189 It is necessary to test the conduct of Mr Case by reference to what it was feasible for him to do when he arrived at the polling booth and was presented with the how to vote card that was there waiting for him. The notion that he should there and then have undertaken "research", investigated the Hansard reports of the debates in the State Parliament, inquired into the exact amounts received by Mr Bass as travel allowances or otherwise taken responsibility for the contents of the card, strikes me as unrealistic and unreasonable. If such a standard were upheld by this Court as the legal requirement imposed upon the thousands of citizens, with varying degrees of involvement, knowledge and concern, who take part as volunteers on election days to hand out voting propaganda for competing candidates and political parties, a very significant restraint would be imposed on this form of civic political involvement. If each volunteer-distributor were personally liable for the truth of the contents of such political communications, the pool of volunteers (already sometimes hard to muster) would dry up. That would not be consistent with the proper conduct of parliamentary elections in Australia as envisaged by the Constitution.

190 The common law, informed by the Constitution, does not impose such an unrealistic standard. When qualified privilege at common law is found applicable to the occasion, the privilege is not lost by proof that a person distributing a how to vote card cannot subsequently support as true each and every statement of fact contained on the card. Although Mr Case had some prior association with the group for whom the how to vote card was produced, he was not personally responsible for its production nor for its contents. That responsibility (as the printed inscription on the card showed) was accepted by Mr Roberts.

191 This is not to say that every distribution before or on election day is exempt from the law of defamation. It is certainly not to embrace the public figure approach adopted in the United States, which has not been accepted in Australia[195]. Within the adjusted common law principle of qualified privilege and the associated law as to malice that limits the availability of that privilege, the primary judge's finding that Mr Case's actions had lost the privilege was erroneous. There was no evidence to sustain such a conclusion. Mr Case's appeal must therefore succeed.

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195 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 184-187. See also Australian Law Reform Commission, *Unfair Publication: Defamation and privacy*, Report No 11 (1979), Appendix F, "The American Public Figure Concept".

Consequences for the appeal of Mr Roberts

192 *Malice and the false publication*: The primary judge's conclusions concerning Mr Roberts were clearly influenced by the view that he took about the publication of "Free Travel Times"[196]. However broadly one accepted the scope of freedom of communications in electoral publications in the context of robust campaigning for and against a candidate in a State election, it would not, in my view, extend to the publication of a deliberately false document, known to be an untrue and damaging concoction, specifically created by the publisher to give an impression of verisimilitude as a basis for attacking the integrity of an electoral candidate. When the falsity of the document is actually known to the publisher, the defence of qualified privilege otherwise attracted by the common law and protected by the Constitution, would be lost. Publication in such circumstances would be affected by malice. To the extent that the common law so provided it would be compatible with the Constitution, which does not throw its protective cloak over deliberate and knowingly or recklessly false communications.

193 Not only was Mr Roberts personally responsible for the false frequent flyer activity statement presented as a true document in his publication "Free Travel Times", he continued (as the primary judge found) to cause that document to be published even after he had been told that he must desist. He did so in spite of the Electoral Commissioner's directives that he should withdraw it from publication and issue a retraction. Instead of doing this, Mr Roberts allowed the publication to be circulated right up to the election day. I would therefore be inclined to the view that the finding against Mr Roberts with respect to that document should stand.

194 *Malice and the other publications*: The positions of the Nauru postcard and of the how to vote card are much more disputable. In the context of electoral communications of the kind in question, addressed to those receiving them, I would not myself be inclined to consider that, in isolation from the others, either of those documents lost the qualified privilege of the occasion of their publication by reason of malice proved on the part of Mr Roberts. In this regard I agree in the analysis of the joint reasons as it applied to this case. However, the findings of the primary judge do not permit this Court to substitute its own conclusions in this regard. Regrettably, there must be a retrial at least in relation to those publications.

195 A rule of the common law that held persons such as Mr Case and Mr Roberts liable in damages for untrue defamatory statements in electoral material simply because those publishing such materials had no affirmative belief

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196 Reasons of the primary judge at [268].

in their truth would be one that imposed an impermissible burden on electoral communication. Such a burden would be incompatible with the constitutionally protected freedom of political communication. Even if the general common law otherwise made a positive belief in the truth of a statement a condition of the defence of qualified privilege (a question I do not need to decide in these appeals) it would be inconsistent with the Constitution to require that a publisher must have such a belief in an electoral context such as the present. No agreement of the parties that was different or contrary to this could be given effect to by this Court in disposing of these appeals. To do so would be to defy the constitutional prescription. We cannot be party to such a distortion of the law, for this Court's origin derives from, and its duty is owed to, the Constitution.

Conclusions and orders

196 In the result, I have reached a conclusion very similar to that in the joint reasons and generally on like grounds. I agree in the disposition of Mr Case's appeal as there proposed. So far as Mr Roberts' appeal is concerned, I agree that there must be a retrial, certainly with respect to the publication of the Nauru postcard and the how to vote card. This is necessary to allow specific findings to be made as to whether malice affected the qualified privilege attaching to those publications.

197 At first, I was inclined to order that the publication of the "Free Travel Times" pamphlet be treated in isolation from the other publications. The judgment entered in the Full Court against Mr Roberts in relation to that publication would not then be disturbed but there would be a retrial of Mr Roberts' liability in relation to the two remaining publications. That course would give effect to the decision in the trial of the action by Mr Bass against Mr Roberts to the fullest extent possible, consistent with the correct legal principles as I see them.

198 For three reasons, however, I have decided against that course. First, a conclusion as to the existence of malice with respect to one publication in a connected series can sometimes be relevant to the conclusion about whether malice has infected the other publications, so as to deprive them of the defence of qualified privilege[197]. It would therefore be preferable for the issue of malice on the part of Mr Roberts, as it concerns *all* of the publications in this case, to be decided in a retrial where the three publications are under scrutiny together.

199 Secondly, once it is decided that there must be a retrial with respect to two of the publications, to secure findings as to the existence or the absence of malice according to the correct principles, the urgency and utility of this Court's

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197 *Mowlds v Fergusson* (1939) 40 SR (NSW) 311 at 327-330.

substituting its own opinion about whether malice was proved in relation to the publication of "Free Travel Times" is greatly diminished. In the result, such findings could not obviate the necessity of the retrial that must be had.

200 Thirdly, although the Full Court increased the amount of the judgment in favour of Mr Bass in respect of the publication of each of the matters complained of against Mr Roberts, those judgments were part of a composite response to the entirety of the course of publication in which Mr Roberts had been engaged. Part of the aggregate judgment was obviously intended as a vindication for the entirety of the harm done to Mr Bass which could not be segmented precisely into separate sums, ignoring the impact of the whole. In these circumstances, it is not ultimately desirable (even if it is legally permissible) to enter judgment for Mr Bass upon part only of the causes of action for which he brought his proceedings.

201 It follows that, although (had it stood alone) I would otherwise have been inclined, in Mr Roberts' appeal, to dismiss the challenge to the finding of malice in respect of his publication of "Free Travel Times", which he knew to be false but continued to publish, I have come, in the end, to the conclusion that the proper course is to order that there be a retrial of Mr Bass' action against Mr Roberts. In that retrial, in the circumstances of this case, the law of qualified privilege and disqualifying malice to be applied is that explained in the joint reasons.

202 I therefore agree in the orders proposed in the joint reasons.

203 HAYNE J. In 1997, the respondent, Mr Bass, stood as a candidate for election to the seat of Florey in the House of Assembly in South Australia. Mr Bass was the sitting member, having been elected in 1993. The first appellant, Mr Roberts, authorised the publication, during the election campaign, of three documents – a picture postcard, a pamphlet of four pages and, on polling day, a how-to-vote card – all of which were directed to persuading voters not to vote for Mr Bass. Mr Roberts was not himself a candidate at the election and, in publishing what he did, he was not acting on behalf of any candidate or party. On polling day, the second appellant, Mr Case, handed out copies of the last of these documents – the how-to-vote card – which invited voters to "Put Sam Bass Last".

The proceedings

204 Mr Bass sued the appellants and others in the District Court of South Australia alleging that each of the three documents I have mentioned defamed him. Each of the appellants pleaded in his defence, among other things, that each document which he had published was published on an occasion of qualified privilege "and was a matter concerning government and political matters affecting the electors of Florey and the choice for electors at an election". In reply, Mr Bass pleaded that the defence of qualified privilege was not available, the publication in each case allegedly being made with actual malice, and without reasonable grounds for believing the imputations in the documents were true, without taking any proper steps to verify the accuracy of the imputations, and well knowing that the imputations were untrue.

205 The trial judge gave judgment for Mr Bass against both appellants. Judgment was entered against the first appellant for $64,800 (being $55,000 general and aggravated damages, $5,000 exemplary damages, and $4,800 interest) and against the second appellant for $5,400 (being $5,000 general damages, and $400 interest). On the appellants' appealing to the Full Court of the Supreme Court of South Australia, their appeal was dismissed, and the respondent's cross-appeal against the amount of damages assessed against the first appellant was allowed[198]. Those damages were reassessed at $100,000.

The facts and issues

206 The issues in this Court centre upon the availability of a defence of qualified privilege. Those issues arise in this way. Each of the documents published by the appellants was defamatory of Mr Bass. Each was found to convey to the reader (in effect) that Mr Bass had misused his position as a member of the House of Assembly by spending taxpayers' money on overseas travel not for the proper performance of his parliamentary duties but for his own

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198 *Roberts v Bass* (2000) 78 SASR 302.

benefit and enjoyment, or, through a frequent flyer scheme for the benefit of his family. The imputations conveyed by each document were found to be false. So, for example, the second document, the pamphlet, reproduced what appeared to be a copy of a form of statement issued to Mr Bass as a member of a frequent flyer scheme. This document, on which only the heading and Mr Bass's address were not obscured by an overprinted block reading "Bring the Frequent Flyer Back to Earth", was a concoction of the first appellant, Mr Roberts. Mr Bass was not a member of that, or any other, frequent flyer scheme. It is not necessary to set out the text of the documents or to notice their contents in more detail.

207 Each appellant published the document or documents which he did in order to bring about Mr Bass's electoral defeat. Each intended therefore, at least to that extent, to cause harm to Mr Bass by publishing the document or documents concerned.

208 The trial judge found that the appellants did not believe the imputations conveyed by the documents were true. In the case of the first appellant, Mr Roberts, the trial judge found that he "could not possibly have believed the imputations [in the documents] to be true".

209 Although the trial judge said that he held the same view of the second appellant, Mr Case, his reasons, taken as a whole, reveal that there were some differences in the appellants' states of mind. The trial judge found that Mr Case had made no inquiries about the accuracy of what was said in the how-to-vote card and that he had published it (by handing it out on election day) not caring whether the matters stated in it were true or false. That finding may be contrasted with the finding about Mr Roberts' state of mind, it being clear that after the second document (the pamphlet) was published, Mr Roberts had been asked both by the solicitors for Mr Bass, and by the State Electoral Commissioner, to withdraw the pamphlet from circulation. Both the solicitors and the Electoral Commissioner told Mr Roberts that the document contained false statements. The Electoral Commissioner asked Mr Roberts to publish a retraction which would state that Mr Bass was not a member of a frequent flyer scheme and retracting "[a]ny suggestion that Mr Bass used public money for private holidays". Mr Roberts did not do that. And on polling day he published the how-to-vote card which contained substantially the same imputations as those in the pamphlet which he had been told were false and had been asked to retract. Mr Roberts later pleaded guilty in a Magistrates Court to charges that, by publishing the pamphlet and the how-to-vote card, he had in each case published an electoral advertisement which contained statements purporting to be statements of fact that were inaccurate and misleading to a material extent.

Qualified privilege

210 On the appeal to this Court, argument focused only on whether the appellants should have succeeded in a defence of qualified privilege as that

defence was understood before the decision in *Lange v Australian Broadcasting Corporation*[199]. Thus the argument focused upon whether the appellants, in publishing documents found to be false and defamatory, had been motivated by what, at common law, amounted to malice. In particular, it was said that the central question was whether the appellants' purpose, in publishing what they did, was a purpose other than communicating to the electors of Florey their views about Mr Bass's suitability as a member of the House of Assembly.

211 The appeal to this Court took the course I have described because of what had happened in the courts below. At trial it was found that neither of the present appellants had acted reasonably. For that reason it was held that the principles described in *Lange* (often referred to as the extended defence of qualified privilege, in its application to communications with respect to political matters) afforded no defence to either appellant. The appellants did not pursue this issue in the Full Court.

212 At trial it was found that each of the publications was made on an occasion of qualified privilege as the principles governing that privilege were understood before *Lange*. In the Full Court the respondent did not contest that finding.

213 The consequence is that we are required to consider the issues on the assumptions that the principles enunciated in *Lange* cannot be engaged but the principles governing qualified privilege as they stood before *Lange* are engaged. For the reasons that follow, I consider that this provides an artificial and flawed basis for consideration of the arguments, but there is no choice except to deal with the matter on the basis which the parties have chosen. It is important to emphasise, however, that doing so leads to conclusions which may find no application in any case in which proper attention can be given to the relationship between the principles that were established in *Lange*, and the principles governing qualified privilege as they stood before the decision in that case.

214 To explain why that is so, it is necessary to begin by identifying the change in the common law that was made in *Lange*. Although it may be suggested that the Court's earlier decisions in *Theophanous v Herald & Weekly Times Ltd*[200] and *Stephens v West Australian Newspapers Ltd*[201] or *Australian Capital Television Pty Ltd v The Commonwealth*[202] and *Nationwide News Pty*

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199 (1997) 189 CLR 520.

200 (1994) 182 CLR 104.

201 (1994) 182 CLR 211.

202 (1992) 177 CLR 106.

Ltd v Wills[203] should be treated as the watershed, rather than *Lange*, it is convenient to proceed by reference to the joint reasons of the whole Court in *Lange*.

Occasions of qualified privilege

215 Before *Lange*, apart from a few exceptional cases[204], the common law categories of qualified privilege protected only occasions where defamatory matter was published to a limited number of recipients. As was pointed out in *Lange*[205], if a publication was made to a large audience, a claim of qualified privilege at common law was rejected unless, exceptionally, the members of the audience all had an interest in knowing the truth. Further, publication beyond what was reasonably sufficient for the occasion of qualified privilege was unprotected[206]. And, as again was pointed out in *Lange*[207], it was because privileged occasions are ordinarily occasions of limited publication, that honesty of purpose in the publisher was seen as the appropriate protection for individual reputation: "[a]s 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."

216 Each of the publications which gave rise to this matter was published to a large audience and was published in the context, and apparently for the purposes, of a political campaign directed against the re-election of Mr Bass. In *Lang v Willis*[208], three Justices considered whether election speeches made to large audiences of unidentified persons were occasions of qualified privilege. Two of those Justices (Starke and Dixon JJ) were in dissent and it is possible to discern some differences in the breadth of the proposition stated by each of the Justices who considered the question. Nonetheless, as noted in *Lange*[209], the better view is that their Honours rejected the proposition that such speeches were made on what was necessarily an occasion of qualified privilege, even if matters of

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203 (1992) 177 CLR 1.

204 cf *Adam v Ward* [1917] AC 309; *Loveday v Sun Newspapers Ltd* (1938) 59 CLR 503.

205 (1997) 189 CLR 520 at 572.

206 *Telegraph Newspaper Co Ltd v Bedford* (1934) 50 CLR 632.

207 (1997) 189 CLR 520 at 572.

208 (1934) 52 CLR 637 at 656 per Starke J, 667 per Dixon J, 672 per Evatt J.

209 (1997) 189 CLR 520 at 570.

general interest to electors were dealt with in the speeches. The breadth of the audience to whom such speeches were made was seen as denying the existence of that community of interest and reciprocity of duty and interest which lay at the heart of the then understanding of qualified privilege[210].

217 Two of the three publications of which complaint is made in this matter were made to an audience which included, but was not limited to, electors. The first two of the documents (the postcard and the pamphlet) were each published by delivering them to houses in the electorate, regardless of whether those who lived there were electors. It may be accepted, at least for the purposes of argument, that the postcard and the pamphlet were intended to influence electors. But it was inevitable, given the chosen method of distribution, that the documents would come into the hands of a wider audience. In this respect, the publications were no different from a publication made by advertisement in a local newspaper.

218 As the trial judge recognised in this matter, the fact that a publication may have come to the attention of persons other than those having a relevant interest in the subject-matter does not necessarily require the conclusion that the occasion was not privileged[211]. As Parke B said in *Toogood v Spyring*[212], "the simple fact that there has been some casual bye-stander [to the publication] cannot alter the nature of the transaction".

219 Those who were not electors had no relevant interest in the subject-matter of the publications and yet each publication was made to households in exactly the same way as any other piece of unsolicited advertising or literature distributed to all who live in a given geographic area and thus to persons who were not electors. The circumstances of the publication of the postcard and pamphlet may be contrasted with the circumstances considered by the English Court of Appeal in *Braddock v Bevins*[213]. There, a written election address, circulated *only* to electors, was held to be published on an occasion of qualified privilege.

220 The third publication in this matter (the publication of the how-to-vote card) has obvious similarities with the circumstances considered in *Braddock*. It was distributed by handing it to those who attended polling booths. It may,

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210 See, for example, *Loveday v Sun Newspapers Ltd* (1938) 59 CLR 503 at 511 per Latham CJ, 515 per Starke J, 523 per Dixon J.

211 See, for example, *Guise v Kouvelis* (1947) 74 CLR 102 at 120-122 per Dixon J.

212 (1834) 1 Cr M & R 181 at 193-194 [149 ER 1044 at 1050].

213 [1948] 1 KB 580.

therefore, very well have had a more limited publication than the earlier publications.

Publications to the public and to electors about political matters

221 *Lange* held that what had been understood, until then, to be the common law rule about qualified privilege failed to meet the constitutional requirement that "'the people' … 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"[214]. Accordingly, *Lange* held that the common law of defamation, and in particular the common law rules of qualified privilege, should be developed to reflect the requirements of the Constitution.

222 The development made in *Lange* had two related aspects. *Lange* extended the recognised categories of qualified privilege (to communications made to the public on government or political matters[215]) and required a different criterion of operation in that new category (reasonableness of conduct[216]). This criterion of reasonableness was said in *Lange*[217] to be "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" (emphasis added). That is, *Lange* held that communications of political matter to audiences in circumstances which would not fall within that earlier understanding of an occasion of qualified privilege could be privileged, but only if a different test was met. *Lange* did not hold that any different test was to be applied if the publication did fall within that earlier understanding of an occasion of qualified privilege.

223 It is important to notice that the decision in *Lange* proceeded from two premises, first, that each member of the Australian community has an interest in disseminating and receiving information, opinion and arguments concerning government and political matters that affect the people of Australia[218] but, second, that this interest did not suffice to found a claim to qualified privilege according to then understood principles. The interest which was identified was

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214 (1997) 189 CLR 520 at 571.

215 (1997) 189 CLR 520 at 573.

216 (1997) 189 CLR 520 at 573.

217 (1997) 189 CLR 520 at 573.

218 (1997) 189 CLR 520 at 571.

not restricted to the interest of electors or of federal electors in matters of federal politics. As was pointed out in *Lange*[219], discussion of matters concerning, for example, the United Nations, and discussion of government or politics at State, Territory or local government level could fall within the new or extended category of qualified privilege. And this new or extended category was a category the operation of which was not confined to publications to electors.

224 In these circumstances, there appears much to be said for the view that widespread publication about government or political matters, even if restricted to electors, should not be found to be a publication invoking the pre-*Lange* principles of qualified privilege. The better view may well be that a publication about government and political matters made to a large audience, even if it is drawn only from the body of electors, should fall for consideration on the same basis as publications made to both electors and others. A publication to electors generally, despite what was said in *Braddock*[220] about the common interest which electors have, might be thought not to be an occasion of qualified privilege as those occasions were understood at common law before *Lange*. That would be consistent with what was said in *Lang v Willis* and it would be consistent with the coherent development of the common law after *Lange*.

225 The development of the common law which *Lange* made was scarcely necessary if qualified privilege would be attracted to every case where the communication of political matter was said to have been *aimed* at electors generally or even where the communication was *made* only to those who, together, formed the body of electors. Further, and very importantly, to distinguish between the principles to be applied in cases where a how-to-vote card or other form of political advertising is handed to voters as they approach the polling booth, rather than published in the local newspaper or dropped in letterboxes in the electorate, would be to draw a distinction which would be very difficult to justify if it required the application of a different criterion of operation.

226 I am nonetheless precluded by the course that the proceedings have taken from having the benefit of argument on these questions. I mention the matters which I have only because, if I do not, the conclusions that are reached in dealing with the issues the parties have tendered may well be misunderstood. In particular, there is a risk that the conclusions reached in this Court may be thought to distort the proper development of the law relating to malice. To explain why that is so, it is necessary to notice some particular features of political communications.

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219 (1997) 189 CLR 520 at 571.

220 [1948] 1 KB 580 at 589-591.

227 All three kinds of communication I have identified (handing to voters, publishing in the local newspaper and dropping copies in letterboxes) are evidently aimed at persuading voters. In the nature of electoral contests, all will be intended to work some detriment to those whose candidacy is not favoured. All may seek to do so by any of a very diverse set of methods intended to persuade the reader – statements of what are said to be facts, statements of opinion, predictions of future conduct, reason, caricature, irony, sarcasm. The list might be extended without limit. While the platonic ideal may be that the political debate would be confined by reason, and thus be confined to a contest between ideas that can be held by reasonable persons, experience reveals that this is not always so. Not all political views would be regarded as falling within the range of ideas considered by the hypothetical right thinking members of society to be reasonably tenable. If these views are to be disseminated widely, and to be disseminated for the express purpose of inflicting detrimental consequences on electoral rivals, application of a test of honesty and absence of malice has obvious difficulties. These become more acute as the views being tested become more extreme and their holding more a matter of visceral and passionate conviction than analytical reason. It is precisely because what is said in a political campaign may not be founded in reason, yet be views that are sincerely and, in that sense, honestly held, that *Lange* required the focus to be shifted from the honesty of the publisher to the reasonableness of the publisher's conduct. Only by making that shift is account properly taken of the political nature of the subject-matter of the publication and the size of the audience to which it is published.

228 That is not to deny the significance of honesty. As was said in *Lange*[221], "[i]n 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." But ignorance of falsity and absence of recklessness will not always suffice to demonstrate that the publisher acted reasonably. And adopting a criterion of reasonableness of conduct avoids at least some of the difficulties that are presented in considering the honesty of purpose of a publisher of political matter.

229 Thus, even if *Lang v Willis* and *Lange* do not require that a publication made only to the body of electors was not an occasion of qualified privilege according to pre-*Lange* principles, there seems much to be said for the view that such a publication invokes only the extended rules about qualified privilege established in *Lange*, not the earlier common law rules. However, that is not the basis upon which the appeal has been conducted.

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221 (1997) 189 CLR 520 at 573.

230 On the bases that the parties have accepted, that each publication occurred on an occasion of qualified privilege according to principles understood before the decision in *Lange*, and that the central question is whether the appellants, in publishing the documents, were motivated by what, at common law, amounted to malice, I agree with the conclusions reached by Gleeson CJ. For the reasons his Honour gives, no error is shown in the conclusion reached in both courts below that the first appellant acted with malice. By contrast, and again for the reasons given by Gleeson CJ, the second appellant was not shown to have been recklessly indifferent to the truth or falsity of what he published.

231 I agree in the orders proposed by Gleeson CJ.

232 CALLINAN J. The principal issue raised by this appeal is whether the author and distributor of certain defamatory matter before and during an election, were entitled to defend claims for damages made against them by the person defamed on the basis of qualified privilege.

Facts

233 Before entering politics the respondent served with distinction as a police officer for 33 years: he had also served as secretary of the Police Association.

234 The respondent became a Member of the Parliament of South Australia. There he acted for a time as speaker of the House to which he was elected. He had travelled overseas, including to Nauru, at public expense but had not expended anything like $32,000 in doing so. Nor was he ever a "Frequent Flyer", entitled to accumulate mileage points to defray the cost of other flights. Such travel as he undertook was authorised by relevant parliamentary guidelines and was for parliamentary purposes.

235 Mr Bass had taken a close interest in legislation to control the use of firearms. In some respects, in his opinion, legislation proposed following mass murders at Port Arthur in Tasmania was an overreaction. In others, he thought the legislation lax and unnecessarily complex. For example, he gave uncontradicted evidence as follows:

> "[M]any of my amendments that were accepted by the Police Minister, made the Act a lot easier to understand, made it workable by the police, and an example is, under the definitions, they wish to have a definition of action, the registerable part of a firearm, which was absolute lunacy, which would have meant any person with a screw, spring or split washer at home, would have been in possession of an action of a firearm, and many of the parts that they were trying to define as a firearm were identifiable. It was my amendment, moved in the House and accepted by the Police Minister, that the frame be the definition of a firearm, because without the frame, you have no firearm. You can have all the other parts that they wish to have as a definition, and they haven't got a gun. So that amendment actually brought the legislation into a workable legislation so the police could take action. The frame, in most cases, also bears the registered number, or the number that the gun could be registered, and that was accepted throughout all those amendments in relation to that. Some of the amendments I also moved, would have made the legislation a lot safer, if they had been implemented and I just mention too, it was one of my amendments that the drinking of alcohol while you had a loaded firearm, would be an offence, and this was an amendment that was suggested by the firearms fraternity. So it would have meant if that amendment would have got up, no-one could have a loaded firearm within six hours of drinking alcohol. Another amendment that I put forward,

> which I might say was rejected by the parliament, would have seen legally qualified medical practitioners have a legal obligation to report to the Registrar of Firearms, any person he believed that was unstable that had firearms in his possession, the same with the clubs who sacked or expelled a member, whose possession of a firearm was a condition of being a member of a club, to make it an obligation that they notify the Registrar of Firearms immediately, and these amendments would have, in fact, increased the effectiveness of the legislation, and made it a lot safer for the families of South Australia."

236 On 13 October 1995 the respondent wrote a letter to the second appellant, stating that Healthscope (a company) had been operating the Modbury Hospital for eight months, that if the second appellant thought it appropriate he should contact the administration of the hospital direct with his concerns, and that if any further concerns then arose, he, the respondent would have them investigated by the proper authorities. The letter continued:

> "I understand you have already contacted the Health Minister and he has declined to meet personally with you and that you have been advised of the reason why. After reading the transcript of the Matthew Abraham Show which aired on 18 August 1995 I totally agree with the comments of the Minister.
>
> I understand the Minister has also invited your group to communicate in writing any concerns you have regarding the Modbury Hospital."

237 He then invited the second appellant to contact the Federal Minister for Health in relation to funding by the Commonwealth.

238 The second appellant was interested, passionately so, it might not unfairly be said, in the privatisation of the Modbury Hospital which was situated in an electorate adjoining the one in which he resided. The hospital did however receive patients from several electorates including the one of his residence. He was, as the evidence shows, intransigently opposed to the privatisation. The respondent, as appears from his letter, supported it. The second appellant's strong views can be gauged from his evidence as follows:

> "One was that Sam Bass had actively taken actions and spoken out against the interests of the group, which was to restore the Modbury Hospital to public hands. So we felt that as a local member in that district, that the interests of returning the Modbury Hospital to public hands would be best served by getting rid of Sam Bass. That was one reason. Another reason was that Sam Bass's record on the hospital issue was one that we could argue quite easily, because on two occasions he had refused to help us in the issue of the privatisation. So we could categorically go to the electorate and say that he wasn't doing what he should be doing as the

local member, and therefore you people out there shouldn't be voting him back in. That was in regard to the hospital. We were also aware that he tripped off overseas in the death knock of his term of office, when everybody was saying there is going to be election next week, or next month, or whatever, and in the face of all of the stuff about politicians going overseas, he went overseas. We just thought that was like jam on our toast. It would mean the public, and it was all over the place, that the public were already going to be against him on that issue, and there was that. And the third issue was in regard to the gun legislation where he actively opposed the Howard propositions and he was publicly known for doing that. So all we were doing was adding the Modbury Hospital action stuff to it, and we figured we would defeat him. That would benefit us in two ways. One is, we would get rid of a local member that was no good to us or, in fact, no good to the electorate, as we believe, and it would also bring greater attention to the Modbury Hospital issue, because we could claim that as a group that issue had been significant in defeating him and therefore if the Liberals got back into power, that would put more pressure on them to actually do something about the Modbury Hospital contract."

239 A general election was to be held on 11 October 1997. On or before that date the first appellant authorised and distributed three documents.

240 Having become aware of one of those documents, a pamphlet entitled "Free Travel Times" ("FTT") before the election, the respondent caused his solicitors, on 3 October 1997, to write to the first appellant to warn him that its contents were defamatory, and that it contravened s 113 of the *Electoral Act* 1985 (SA) [222]. The first appellant responded on 3 October 1997 with an undertaking

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222 "**Misleading advertising**

113. (1) This section applies to advertisements published by any means (including radio or television).

(2) A person who authorises, causes or permits the publication of an electoral advertisement (an ***advertiser***) is guilty of an offence if the advertisement contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent.

Maximum penalty: If the offender is a natural person – $1 250;
If the offender is a body corporate – $10 000.

(3) However, it is a defence to a charge of an offence against subsection (2) to establish that the defendant –

(a) took no part in determining the content of the advertisement; and

(Footnote continues on next page)

that he would take steps to stop the distribution of the FTT. The FTT was nevertheless distributed extensively to but not exclusively to a substantial number of the residences and business premises in the electorate of Florey. This was so despite the intervention of the Electoral Commissioner who sought a retraction of some, at least, of the material on the ground of its falsity. After the election, the first appellant pleaded guilty to two counts of publishing an electoral advertisement containing statements of purported facts that were inaccurate and misleading to a material extent.

241 The first document of which the respondent complained was a postcard. On the face of it was a reproduction of a photograph of a beachfront, palm-fringed hotel and the words, "Greetings from Nauru". The other side of the postcard bore these words:

(b) could not reasonably be expected to have known that the statement to which the charge relates was inaccurate and misleading.

(4) If the Electoral Commissioner is satisfied that an electoral advertisement contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent, the Electoral Commissioner may request the advertiser to do one or more of the following:

(a) withdraw the advertisement from further publication;

(b) publish a retraction in specified terms and a specified manner and form,

(and in proceedings for an offence against subsection (2) arising from the advertisement, the advertiser's response to a request under this subsection will be taken into account in assessing any penalty to which the advertiser may be liable).

(5) If the Supreme Court is satisfied beyond reasonable doubt on application by the Electoral Commissioner that an electoral advertisement contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent, the Court may order the advertiser to do one or more of the following:

(a) withdraw the advertisement from further publication;

(b) publish a retraction in specified terms and a specified manner and form."

"Dear Taxpayer,

This is the postcard your politician Sam Bass should have sent you from the Pacific island paradise where he is enjoying a winter break at your expense.

Geoff Roberts

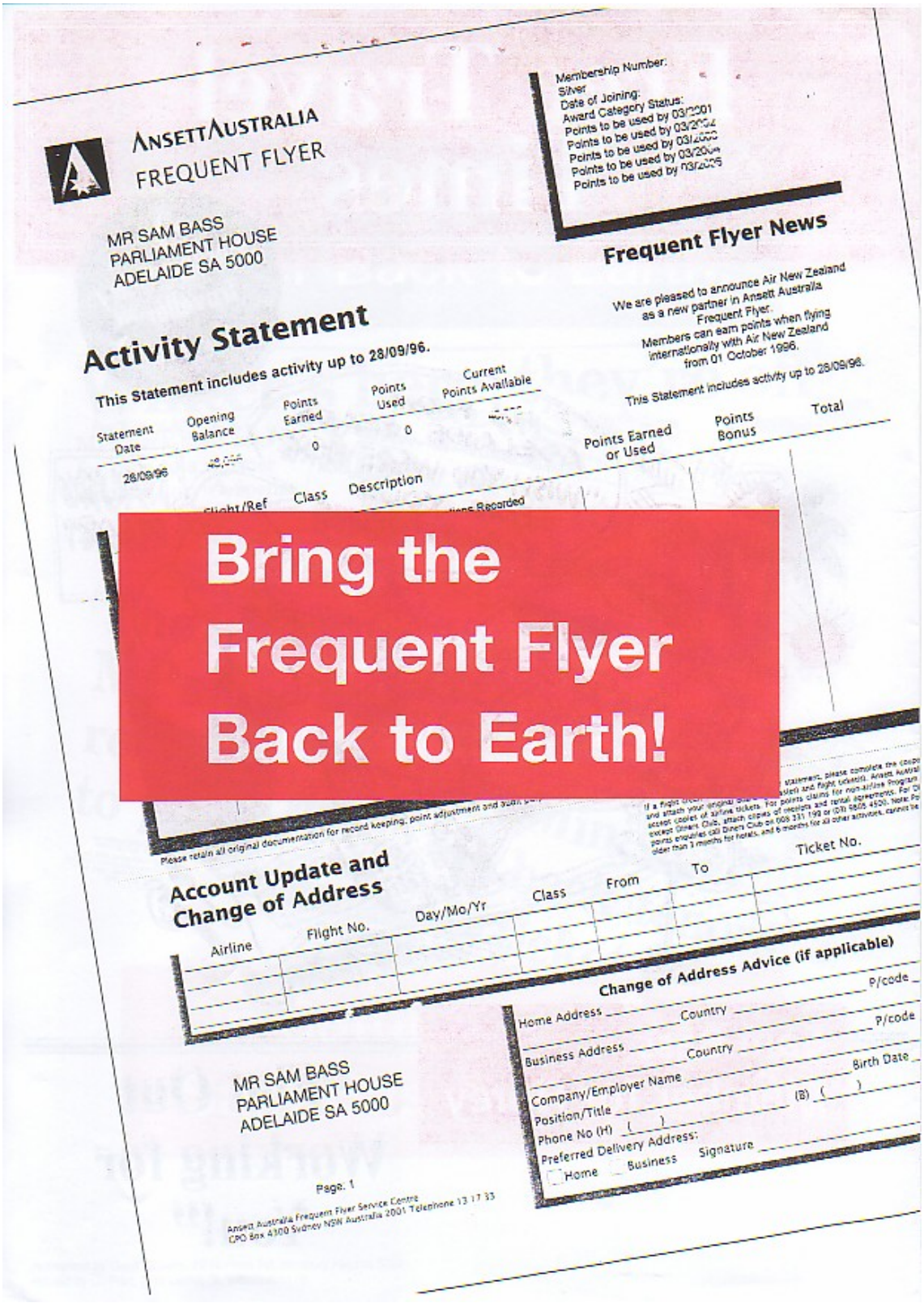
Clean Government Coalition

P.S. When you vote, put Sam Bass last."

242 The second document, the FTT contained printing in colour on A4 sized pages on each side and was headed "Free Travel Times". It showed a caricature of the respondent on the first page, and on the second, a completely false "Ansett Australia Frequent Flyer Activity Statement" in the name of Mr Bass. The third page was headed "How Sam Bass travelled the world and how taxpayers picked up the tab". It is a reasonable inference from the third page of the document, contrary to the facts, that each of the overseas destinations was reached after a separate and complete journey, rather than as a stopping place on another journey. For example, the so-called trip to Hong Kong was a stop-over lasting a night while the respondent was en route to London. On the back page there appeared the heading, "Bring the Frequent Flyer Back to Earth!" and a collage of various newspaper headlines about overseas travel by other Parliamentarians. One of the newspaper headlines stated "The bills MPs are refusing to pay", and another, "Minister pays back tenors ticket". There is no suggestion that the respondent misused his travel allowance or ever had occasion to reimburse the Treasury in respect of any money misspent. The caricature depicts the respondent at leisure, reclining, dressed only in bathing togs and sunglasses, in an exotic setting of palm trees, holding a drink in one hand, and an ice cream in the other, and being attended by a formally clad waiter holding a postcard. The words "Flat Out Working for You!" appear in large heavy print at the bottom of the page. The words "Parliamentary Traveller of the Year" and "Its [sic] from Adelaide … reads 'wish you were here' from your constituents" also appear.

243 Over the purported activity statement the words "Bring the Frequent Flyer Back to Earth!" appear in heavy print. I reproduce the four pages of the document:


Free Travel Times
P3
Parliamentary Traveller of the Year
ITS FROM ADELAIDE ...READS "WISH YOU WERE HERE" FROM YOUR CONSTITUENTS
NAURU RESORT
Sam Bass
Member for Florey
"Flat Out Working for You!"


ANSETT AUSTRALIA
FREQUENT FLYER
MR SAM BASS
PARLIAMENT HOUSE
ADELAIDE SA 5000
Membership Number:
Silver
Date of Joining:
Award Category Status:
Points to be used by 03/2001
Points to be used by 03/2002
Points to be used by 03/2003
Points to be used by 03/2004
Points to be used by 03/2005
Activity Statement
This Statement includes activity up to 28/09/96.
Statement Date
Opening Balance
Points Earned
Points Used
Current Points Available
28/09/96
0
0
Flight/Ref
Class
Description
Frequent Flyer News
We are pleased to announce Air New Zealand as a new partner in Ansett Australia Frequent Flyer.
Members can earn points when flying internationally with Air New Zealand from 01 October 1996.
This Statement includes activity up to 28/09/96.
Points Earned or Used
Points Bonus
Total
Bring the Frequent Flyer Back to Earth!
Please retain all original documentation for record keeping, point adjustment and audit
Account Update and Change of Address
Airline
Flight No.
Day/Mo/Yr
Class
From
To
Ticket No.
MR SAM BASS
PARLIAMENT HOUSE
ADELAIDE SA 5000
Change of Address Advice (if applicable)
Home Address
Country
P/code
Business Address
Country
P/code
Company/Employer Name
Position/Title
Birth Date
Phone No (H) ( )
(B) ( )
Preferred Delivery Address:
Home
Business
Signature
Page: 1
Ansett Australia Frequent Flyer Service Centre
GPO Box 4300 Sydney NSW Australia 2001 Telephone 13 17 33

How Sam Bass travelled the world and how taxpayers picked up the tab.

When you are a Member of Parliament you get a lot of privileges. No one knows this better than SAM BASS who has visited places around the world for free. The list below is only a sample of his travels.

The Remarkable Free Travels of Sam Bass

1996

Adelaide - Melbourne
Melbourne - Hong Kong
Hong Kong - London
London - Liverpool
Liverpool - London
London - Hong Kong
Hong Kong - Melbourne
Melbourne - Adelaide

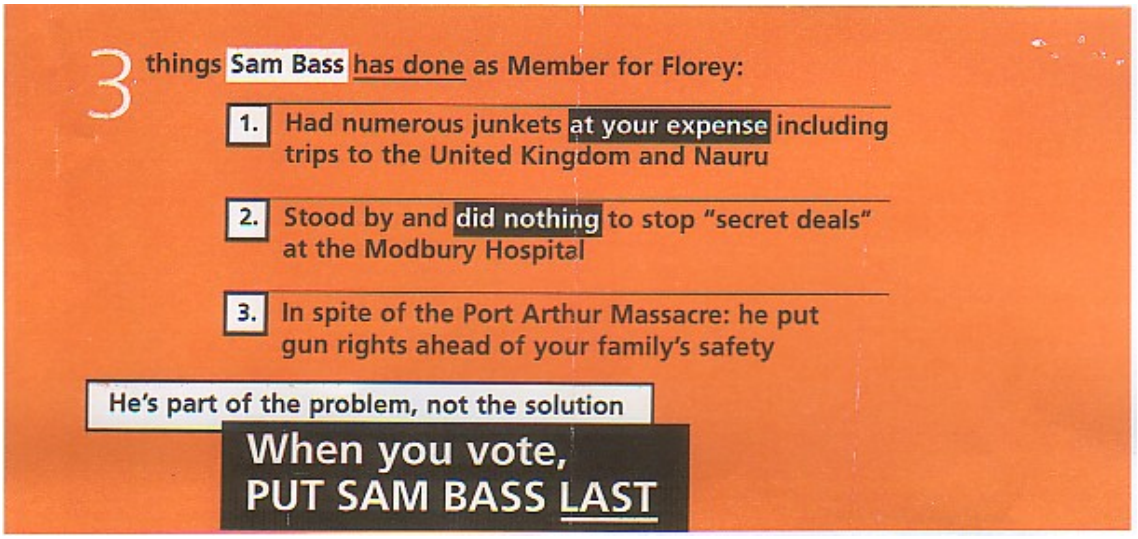
1997

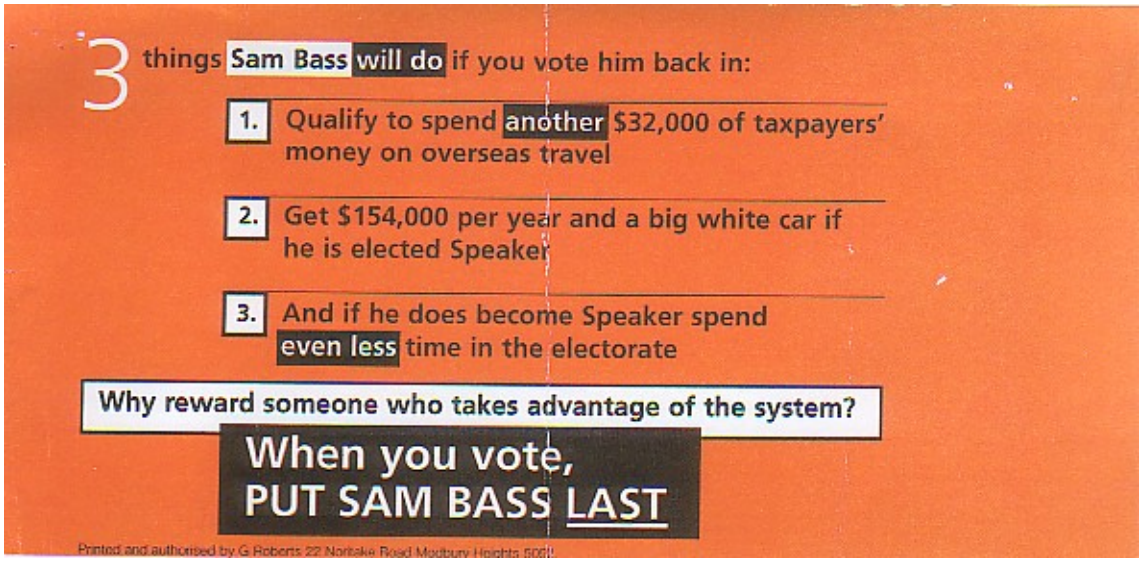
Adelaide - Melbourne
Melbourne - Brisbane
Brisbane - Nauru
Nauru - Brisbane
Brisbane - Melbourne
Melbourne - Adelaide

Of course, the number of Frequent Flyer points ticked up on these free trips used for other travel for himself or his family is not on the public record.

244 The first appellant also authorised and arranged for the distribution at polling booths on election day of an orange card approximately 21cm by 10cm

("PSBL"). On one side it was headed "3 things Sam Bass has done as Member for Florey". There followed allegations about his parliamentary activities. On the reverse side it was headed "3 things Sam Bass will do if you vote him back in" and contained further allegations about his future conduct. At the foot of the page, and highlighted, was the comment "When you vote, PUT SAM BASS LAST". I set out a copy of that document.





245 The second appellant handed out copies of the PSBL to electors on the day of the election after having been absent from South Australia until two days before it. He volunteered to an "action group" to distribute material critical of the respondent on polling day at a polling booth. This is his description of his preparations, reflections and actions with respect to the relevant material:

> "A. I was just told that if I turned up at the polling booth at 8 o'clock, all the gear would be there for me.

Q. Did you, in fact, attend the Ardtornish polling booth at or about 8 am on 11 October.

A. Yes.

Q. Did you locate a box.

A. Yes, there was a box there, just a cardboard box with all the stuff in it.

Q. What did it have in it.

A. It had the two pamphlets, our pamphlet which we produced and the 'Put Sam Bass Last' card.

Q. Could the witness be shown P4. Is that the document that you refer to.

A. That's right.

Q. The other document, being the document I think you had in front of you just a moment ago, which was [a pamphlet distributed by the Modbury Hospital Action Group]. Is that the other one that was in the box.

A. Yes.

Q. I take it you had seen [it] before.

A. Yes.

Q. Had you seen the other document, the orange document.

A. This one here. (INDICATES) No.

Q. When you saw it, did you read it.

A. Yes.

Q. Was there anything in it which caused you any concern.

A. No.

Q. What did you then proceed to do.

A. I just grabbed them and put them together as I handed them out.

Q. For how long did you stay at that polling booth that day.

A. My recollection is that I was there from 8 until 10 or thereabouts."

246 At no time did either appellant seek to obtain the respondent's views about his travels or any details of them from him. Neither had any knowledge of the actual details of his stance on laws for the control of firearms. In the event, the respondent was defeated at the election by about 520 votes.

The proceedings in the District Court

247 The respondent brought an action for defamation against a number of people, including the appellants in the District Court of South Australia. It is with the claim against the latter only that this Court is concerned.

248 The respondent pleaded that the FTT conveyed the following imputations:

"(a) That the [respondent] had corruptly used his position as a member of Parliament to obtain a holiday at Nauru for his own benefit.

(b) That the [respondent] whilst attending the Nauru Resort was neglecting his responsibilities to his constituents in the seat of Florey in the Parliament.

(c) That the [respondent] had taken advantage of his position as a member of Parliament to obtain a free holiday for his own purposes.

(d) That the [respondent] had used his position as the member of Parliament to accrue Frequent Flyer Points for his own use and for the use of the members of his family.

(e) That the [respondent] had on numerous occasions used his position as a member of Parliament to accrue Frequent Flyer Points for his own benefit and for the benefit of the members of his family.

(f) That overseas trips taken by the [respondent] in the course of his Parliamentary duties were in fact undertaken not in pursuit of his duties as a member of Parliament and the interests of his constituents in the seat of Florey but for his own interests and recreational pursuits."

249 The respondent pleaded these imputations in respect of the PSBL:

"(a) That the [respondent] had spent $32,000.00 of taxpayers' money on overseas travel.

(b) That the [respondent] had spent $32,000.00 of taxpayers' money for overseas travel for the purpose of his own enjoyment and not for

the proper purpose of such travel, namely to enhance the [respondent's] knowledge of issues relevant to the better performance of his role as a member of Parliament.

(c) That the [respondent] had taken numerous overseas trips for his own benefit and enjoyment at the taxpayers' expense.

(d) That the [respondent] had taken numerous overseas trips for his own benefit and enjoyment and not for the intended purpose of such trips, namely to enable him to better serve the interests of the Parliament of South Australia and the members of this electorate.

(e) Contrary to his responsibility as the member of Parliament for Florey failed to take appropriate steps to prevent clandestine arrangements being put in place in respect of the management of the Modbury Hospital, contrary to the interests of the members of the electorate of Florey and the public of South Australia generally.

(f) That the [respondent] had put the rights of those interested in the right to possess and utilise guns ahead of the safety of members of ordinary families.

(g) That the [respondent] had not spent sufficient time in his electorate to properly discharge his duties as the member of the seat of Florey.

(h) That the [respondent] was not spending sufficient time in the electorate of Florey to enable him to adequately fulfil his duties as the member for Florey.

(i) That if the [respondent] was elected to the member of Florey and then subsequently elected as Speaker of the House of Assembly then he would spend less time than the time that he was currently spending in the electorate."

250 And as to the meaning of the contents of the postcard the respondent pleaded these imputations:

"(a) That the [respondent] had taken a holiday trip to Nauru at the expense of the taxpayers of the seat of Florey.

(b) That the [respondent's] holiday at Nauru was for his own enjoyment, at the expense of the taxpayers of the seat of Florey, and not in the proper pursuit of his duties as a member of Parliament and as the member of the seat of Florey."

251 By his amended defence, the first appellant first denied that the imputations pleaded by the respondent were conveyed. He then asserted that some of the facts stated in the respective documents were true, including that the respondent had travelled overseas at the expense of taxpayers. He pleaded in the alternative that the words complained of were fair comment on a matter of public interest, the conduct of the respondent as a Member of Parliament and as a candidate for election. Other matters said to be true were that the respondent had enjoyed numerous "junkets" at public expense, including trips to the United Kingdom and Nauru, that he had stood by and done nothing to stop "secret deals" at the Modbury Hospital, that he had put gun rights ahead of the public's safety, and that he had enjoyed a winter break at taxpayers' expense.

252 The first appellant also set up defences of qualified privilege in respect of each of the three documents and the totality of them. That in so doing the first appellant was relying on a defence of common law qualified privilege ("conventional qualified privilege") and not any extended form of it of the kind referred to by this Court in *Lange v Australian Broadcasting Corporation*[223] appears from a particular which is common to the defence in respect of each of the publications: "[p]ublication was only made to persons who could be expected to be enrolled as electors". This view of the first appellant's pleading is reinforced by the emphasis placed upon reciprocity in par 24.10 of the amended defence which was as follows:

> "In the premises, the [first appellant] had an interest and the electors of Florey had a reciprocal and corresponding interest (or apparent interest) in the matters the subject of the documents and postcard. "

253 Paragraph 24.12 which sets up that the mode, manner and extent of publication were reasonable in the circumstances, does not appear to me to raise what I will refer to, for convenience, as the "*Lange* defence", because of its juxtaposition with par 24.5 and the absence of any other expression in the pleading to indicate reliance upon such a defence.

254 The respondent filed a reply denying several of the facts (including reasonableness of the appellants' conduct) alleged in the amended defence and that the words complained of were fair comment: and further alleging that the first appellant published the relevant matter with actual malice.

255 The respondent pleaded that malice should be inferred from the language used, the form of the documents, and these circumstances:

> "(b) The publication of FTT was made shortly prior to the election referred to in paragraph 2 of the Statement of Claim.

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223 (1997) 189 CLR 520.

(c) The depiction of the [respondent] in the caricature … was such as to lower the reputation of the [respondent] and hold him up to ridicule and contempt.

(d) The depiction of the [respondent] was such as to suggest excessive consumption and sloth on the part of the [respondent].

(e) The words and layout of the words 'Parliamentary traveller of the year' were such as to suggest that the [respondent] travelled more than any other parliamentarian when the [first appellant] had no basis for making such allegation and such allegation was not true.

(f) The words 'flat out working for you' in conjunction with the caricature was such as to suggest extreme sloth and failure to attend to his duty by the [respondent].

(g) The reference to 'frequent flyer' in association with the depiction of a false Ansett Australia Frequent Flyer Activity Statement when the [first appellant] had no basis for suggesting that the [respondent] was a member of Ansett Frequent Flyer and such was not in fact the case.

(h) The depiction of apparent newspaper cuttings on the final page of FTT in association with the identification of the [respondent] suggested such cuttings were relevant to the [respondent's] activities when the [first appellant] had no basis for such suggestion and such was not the case.

(i) The get up and layout of the FTT was such as to suggest a serious abuse by the [respondent] of his position as a member of Parliament when there was no basis for such suggestion and such was not the case.

(j) The failure of the [first appellant] to contact or seek the truth in relation to any travel of the [respondent] from the [respondent] prior to publication."

256 Additionally, the respondent contended that the first appellant had not acted reasonably, and had no reasonable basis for believing the matter published to be true.

257 The second appellant's defence with respect to the PSBL which he distributed on the day of the election was, in relevant respects, the same as the first appellant's defence and included an allegation identical to pars 11.5 and 24.12 of the first appellant's defence as well as one of the reasonableness of his conduct.

258 The respondent's action was heard by Lowrie DCJ without a jury. One of the witnesses at the trial was the Electoral Commissioner. He accepted that he could request, but not direct a retraction of electoral material. He had had much experience with respect to the distribution of such material. His request that a suitable retraction be distributed within three days was influenced by his past experience and knowledge that the period proposed was adequate[224].

259 The trial judge carefully reviewed the evidence of the parties. His Honour found that the publication which the Commissioner had requested be retracted had continued to be delivered after his request and that there was no attempt to publish any retraction[225]. Some time before polling day, his Honour found, the first appellant was well aware that the respondent was not a member of any frequent flyer club, had not taken any personal advantage of rights of travel on parliamentary business, and had never used public money for private purposes[226]. Notwithstanding this knowledge, the first appellant continued to prepare and circulate more than 12,000 pamphlets which referred to "numerous junkets at [the public] expense". His Honour was satisfied that the first appellant had neither care nor concern whether the matters stated were true or false providing that the first appellant's aims could be achieved[227].

260 As to the second appellant, his Honour was satisfied that he was prepared to adopt any means to achieve the aims of his group to remove the respondent from office. He took no steps to prove the accuracy or otherwise of the pamphlet he distributed on the day of the election[228]. His Honour considered the meaning to be given to the documents. He was satisfied that the postcard conveyed that the respondent "had embarked on a holiday at a paradise resort and in doing so had misused taxpayers' money"[229]: that the publication was clearly aimed at the disparagement of the respondent's reputation and reflected on his integrity, portraying him as a Member of Parliament who had misused public money.

261 The primary judge analysed the FTT to conclude that it conveyed similarly defamatory imputations, in stronger, if any, terms than the postcard, and

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224 *Bass v Roberts and Case* [2000] SADC 35 at [82]-[85].

225 *Bass v Roberts and Case* [2000] SADC 35 at [194].

226 *Bass v Roberts and Case* [2000] SADC 35 at [196].

227 *Bass v Roberts and Case* [2000] SADC 35 at [197].

228 *Bass v Roberts and Case* [2000] SADC 35 at [267].

229 *Bass v Roberts and Case* [2000] SADC 35 at [213].

that it was highly defamatory of the respondent[230]. His Honour then considered the meaning of the third document, the PSBL and held that it conveyed the nine imputations which the respondent had pleaded.

262 After rejecting the appellants' contentions that the publications were not defamatory, his Honour dealt with a defence of fair comment on a matter of public interest. He accepted that wide latitude should be allowed to the expression of even ignorant or prejudiced opinions if they were honestly held[231]. It was his opinion however that no fair-minded person could possibly attribute to the respondent the substance of the allegations that had been made against him in the documents. The facts upon which any comments were based were not true. Such comments as were made were misstated and distorted. Accordingly, the defence of fair comment failed.

263 The primary judge turned to the defence of qualified privilege. He was prepared to accept that the appellants had pleaded their case on alternative bases, conventional qualified privilege and its extended "*Lange*" form in respect of communications on government or political matters[232].

264 I would make two observations about his Honour's approach. That a communication is in respect of government and political matters may well be relevant to a defence of conventional qualified privilege if reciprocity of interest and the other conditions for its invocation are present. The decision in *Lange* would add nothing in that situation except that the Court may have suggested that the fact of a political contest might affect the meaning of malice as it had previously been understood in a traditional common law sense[233]. The second observation is that it is by no means clear on the appellants' pleadings that they did intend to raise a *Lange* defence. It may be, that in the course of evidence and submissions, it became apparent that they had so intended. For present purposes however, as will appear, it is relevant that the primary judge made all necessary findings with respect to, and gave full consideration to the availability or otherwise of a *Lange* defence[234].

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230 *Bass v Roberts and Case* [2000] SADC 35 at [222].

231 *Bass v Roberts and Case* [2000] SADC 35 at [234].

232 *Bass v Roberts and Case* [2000] SADC 35 at [242].

233 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567.

234 *Bass v Roberts and Case* [2000] SADC 35 at [242].

265 The defence of conventional qualified privilege failed. His Honour held that reciprocity, or sufficient reciprocity of interest had been demonstrated[235]. The occasion of each publication was therefore a privileged one[236]. But, his Honour also held, the respondent had established malice sufficient to defeat or rebut the plea of qualified privilege. In so deciding, his Honour was attentive to the fact, as *Lange* holds[237], that it might not be improper, and therefore not malicious, for a person to have a motive of causing political damage to a person or to that person's party in a case in which a defence based on that case is properly raised[238]. He next said that it was an open question whether, in a case of conventional qualified privilege, a motive of causing political damage might still, in some circumstances, constitute malice. It was unnecessary, however, for the trial judge to answer that question in this case because the appellants' "main intention was to injure the [respondent] and to lower his estimation in his fellow persons by making them think less of him." All three publications were part of a strategy designed to have this effect[239]. It was his opinion that the improper conduct of the appellants was compounded by, on the part of the first appellant, his indifference to the truth of the defamatory matter, and on the part of the second appellant, his indifference to the truth, by his abstention from doing any research or making any inquiries about its accuracy before he distributed it[240]. Other matters also gave rise to his Honour's inference of malice. One of these was the first appellant's failure to take positive steps to discontinue the distribution of the FTT and his failure to retract it. The actions of the second appellant, his Honour thought, might not have been as recklessly blatant as those of the first appellant, but nonetheless, the former's motive to injure the respondent's reputation and remove him from office was improper and malicious. He expressly found that "the [appellants'] dominant purpose went far beyond the mere desire to foil the [respondent's] prospects of re-election."

266 The primary judge next dealt at some length with the possibility of a *Lange* defence. He was alive to the relevant aspects of it. But, even so, he held, the defence was defeated and must be rejected in this case because the actions of the appellants were not reasonable ones. They made no attempt to check the accuracy of the material. Some of it they knew, or must have known to be false.

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235 *Bass v Roberts and Case* [2000] SADC 35 at [246].

236 *Bass v Roberts and Case* [2000] SADC 35 at [249].

237 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 574.

238 *Bass v Roberts and Case* [2000] SADC 35 at [252]-[254].

239 *Bass v Roberts and Case* [2000] SADC 35 at [254].

240 *Bass v Roberts and Case* [2000] SADC 35 at [256].

The respondent was given no opportunity to answer the allegations. The appellants did not, and could not possibly have believed, particularly in the case of the first appellant, the imputations to be true[241].

267 It is unnecessary to deal with a *Polly Peck*[242] defence which was also pleaded, because his Honour rejected it and it was not relied upon in this Court[243].

268 Compensatory damages in the sum of $55,000 and exemplary damages of $5,000 were awarded against the first appellant, and $5,000 by way of compensatory damages were awarded against the second appellant.

The appeal to the Full Court of the Supreme Court of South Australia

269 The appellants appealed to the Full Court of South Australia (Prior, Williams and Martin JJ). Neither before, nor during the hearing of the appeal, whether pursuant to r 95.05 of the Rules of the Supreme Court of South Australia[244] or otherwise, did the respondent contend that the occasion of each of the publications was not an occasion of conventional qualified privilege. Indeed, as I read his submissions and those of the appellants, the real issue upon which the parties joined was of "malice" or no.

270 The appellants jointly relied upon one notice of appeal. The first five grounds are essentially complaints about findings of fact made by the trial judge and the primary judge's conclusion that the documents were defamatory of the

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241 *Bass v Roberts and Case* [2000] SADC 35 at [261]-[271].

242 *Polly Peck (Holdings) plc v Trelford* [1986] QB 1000.

243 *Bass v Roberts and Case* [2000] SADC 35 at [277].

244 "**95.05** Where a respondent wishes to contend that the decision of the Judge or Tribunal appealed from should be affirmed on grounds other than those relied upon by that Court or tribunal, he shall not less than three clear days before the first day of the appeal sittings for which the appeal is set down:

(a) file a notice of his contention stating the grounds relied upon in support thereof;

(b) lodge at the Registry three copies of such evidence or documents as are relevant but not included in the appeal book;

(c) serve copies of the material lodged under this Rule, on each other party to the appeal."

respondent. The sixth ground is that the primary judge failed to identify and distinguish between fact and comment. The ensuing grounds amount to complaints about the primary judge's findings of motive and improper purpose and whether the appellants' conduct was capable of constituting "actual malice". There is a reference in the grounds to "the traditional plea of qualified privilege" and to the trial judge's finding "in respect to the extended defence of qualified privilege [that] the [second appellant] failed to act reasonably." It is not possible, in my opinion, sensibly to read the notice of appeal as raising as a ground, any alleged error on the part of the primary judge with respect to his Honour's finding, adverse to the first appellant that a *Lange* defence was not open to the first appellant. This appears clearly enough from the specific reference to "the extended defence" in relation to the second appellant who does appear to have sought to raise it at that stage, and the absence of any like reference on the part of the first appellant.

Lange defence abandoned

271 During the course of the appeal to the Full Court the appellants abandoned the defence of fair comment. They also abandoned, it seems to me, any possible reliance upon a *Lange* defence, even in relation to the second appellant, albeit that they may have done so on the basis of a misconception about their prospects of success on the defence of traditional qualified privilege.

272 Counsel for the appellants said this during argument in the Full Court:

> "[I]t became obvious to the appellant[s], when the respondent did not challenge his Honour's finding, that all three publications were the subject of qualified privilege, that it was unnecessary.
>
> …
>
> In 4.3 [presumably of the written submissions], we make the point that His Honour specifically found that the privilege, which existed, was the traditional *Toogood v Spyring* duty reciprocal duty of privilege. It was not the extended *Lange* privilege associated with publications in government on political matters. What his Honour found was that here the [appellants], having an interest in this election, published the materials only to electors in the electorate, and there was a reciprocal duty which existed, so it was the traditional common law qualified privilege that he was concerned with.
>
> The point that we make, in 4.3, is that as a result of that this court is not concerned with the issue of 'reasonableness'.
>
> The court will appreciate, as a result of the *Lange* decision, in respect of media publishers, they are now entitled to publish defamatory material to the world at large. In respect of when or what they address is a matter of

> government or political nature, but quite apart from having to run the traditional gauntlet of malice, they have, as well, to overcome the hurdle of reasonableness, and here we're not concerned with reasonableness."

273 Prior J queried the meaning of what the appellants' counsel had said. His Honour pointed out that the primary judge did deal with the *Lange* defence. In response, counsel for the appellants said this:

> "He does. I don't understand it would be subject of any challenge, I think he does it to cover all the bases.
>
> It was a live issue before him, because if his Honour had found, contrary to what he did find, that the publication was too wide, that the traditional qualified privilege didn't apply. Then there was a further argument that had to be put to him. In that circumstance he then had to address his mind to the extended privilege, and he, having found for the [appellants] on the first traditional qualified privilege, it wasn't really necessary for him to go ahead then to deal with the *Lange* privilege, but his Honour did, and no doubt for good reasons. That finding may have been the subject of challenge in this appeal court and then it would have been appropriate that the extended privilege had also been addressed by him. I don't think this court needs to be concerned about what his Honour says on the extended privilege on those pages."

274 The appeal failed. The cross-appeal succeeded with respect to the first appellant and was rejected so far as the second appellant was concerned. The respondent's compensatory damages were reassessed at $20,000 for the postcard, $35,000 for the FTT, and $45,000 for the PBSL distributed on the day of the election. The members of the Court divided on some issues.

275 Prior J said this[245]:

> "The published material was defamatory of the plaintiff having the defamatory meanings contended for and found made out at the trial. The defences of qualified privilege failed. It is plain from the findings made by the trial judge that neither appellant had an honest belief in the truth of what was published. *[The second appellant] was properly found to be recklessly indifferent to the truth or falsity of the material he published. [The first appellant] was properly identified as a person with an improper*

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245 *Roberts and Case v Bass* (2000) 78 SASR 302 at 304-305 [2].

motive and no honest belief in the truth of what he published[246]." (Emphasis added)

276 After setting out some of the trial judge's findings as to the first appellant's state of mind Williams J said this[247]:

"These are strong findings; in my opinion they are adequately supported by the evidence. [The first appellant] was told that his allegations lacked foundation some eight days before polling day, but he persisted with the thrust of his allegations of impropriety. [The second appellant] acknowledged that the plaintiff had been selected because he was a 'soft target'. He could not provide any basis for a belief in the allegations. *I reject the submission made on the part of the appellants that they should be treated as having honest beliefs in the relevant respect*." (Emphasis added)

277 His Honour made this finding about the motives of the appellants[248]:

"Upon the evidence *I am unable to identify any improper purpose attaching to the actions of either [appellant] and in this respect I would disagree with the conclusion of the trial judge*. The typical case of dominant improper purpose might be one where the defendant unnecessarily uses a privileged occasion simply to vent his spleen upon the plaintiff: see, for example, in *Angel v H H Bushell & Co Ltd*[249], where the defendant sought to gratify feelings of animosity arising out of a failed business transaction by reporting the facts to a business referee who had previously recommended the plaintiff as trustworthy. Another example of improper motive would be where the defendant is seeking to obtain some private advantage unconnected with the privilege[250].

The privilege for matter published in an election campaign is based upon an interest or duty of informing the electorate of the merit (or lack of merit) of a candidate and this privilege extends to statements made on behalf of other candidates. *In my view the facts are consistent with the*

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246 *Horrocks v Lowe* [1975] AC 135 at 149-150; *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30 at 50, 51.

247 *Roberts and Case v Bass* (2000) 78 SASR 302 at 314 [33].

248 *Roberts and Case v Bass* (2000) 78 SASR 302 at 316 [43]-[44].

249 [1968] 1 QB 813 (see especially at 831).

250 See *Horrocks v Lowe* [1975] AC 135 at 150.

> *[appellants] becoming over-enthusiastic in the support of their electoral cause. They do not appear to have any special desire to hurt the plaintiff otherwise than in terms of his prospects of re-election. The plaintiff bore the onus of proof on this matter: I would not uphold the trial judge's finding as to improper motive, although [the first appellant's] intransigence when faced with the true facts is not to his credit*." (Emphasis added)

278 The third member of the Court, Martin J expressed this view on the question of motive. After detailed reference to Lord Diplock's speech in *Horrocks v Lowe*[251] his Honour said[252]:

> "Applying those principles to the defence of qualified privilege advanced by [the first appellant], if the plaintiff proved that the dominant motive of [the first appellant] for the defamatory publications was a desire to injure the plaintiff, the defence failed. *In my opinion, the evidence was sufficient to justify the conclusion reached by the learned trial judge that [the first appellant] possessed a dominant motive to injure the plaintiff. [the first appellant] engaged in a course of conduct over some months which was demonstrative of his ill-will toward the plaintiff. His conduct when faced with requests by the Electoral Commissioner to correct his errors confirmed his ill-will as did the tenor and content of his evidence. In my opinion, therefore, in this respect the finding of the learned trial judge should be upheld*." (Emphasis added)

279 With respect to the second appellant Martin J was of the opinion that his primary concern was to achieve the defeat of the respondent at the election, and that his motives were not malicious. But his Honour held that the second appellant had been shown to be indifferent to the truth about the respondent and was therefore liable to him. He said[253]:

> "The professed beliefs of [the second appellant] as to other statements were based on inadequate evidence and were influenced by both his enthusiasm for the cause of the Modbury Hospital and his desire to see the plaintiff removed from office. Notwithstanding those inadequacies, I doubt that the evidence justified a finding that [the second appellant] did not possess those professed beliefs. However, it is not necessary to decide this issue. *The learned trial judge was satisfied that [the second appellant] was indifferent within the meaning of the test posed*

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251 [1975] AC 135 at 149.

252 *Roberts and Case v Bass* (2000) 78 SASR 302 at 325-326 [82].

253 *Roberts and Case v Bass* (2000) 78 SASR 302 at 337 [103]-[104].

by Lord Diplock. That conclusion was reasonably open on the evidence. *In particular, [the second appellant] was indifferent to the imputation in the statement that the plaintiff was of such a character that he placed more importance on the rights of persons with respect to firearms than the safety of the electors' families. Having reviewed the evidence, I am also satisfied that [the second appellant] was indifferent to the truth of the imputation apparent from the card viewed in its entirety that the plaintiff had engaged in discreditable conduct in the discharge of his parliamentary responsibilities.*

For these reasons, in my opinion the appeals by the [appellants] against the findings of liability should be dismissed." (Emphasis added)

The appeal to this Court

280 The appellants appeal to this Court from the dismissal of the appeals to the Full Court of the Supreme Court of South Australia.

281 In their joint notice of appeal to this Court, the appellants use two expressions, "dominant motive" and "express malice" to which later reference will be required. The notice of appeal does not, in terms, seek to raise a *Lange* defence. Having, at best, pleaded it obscurely at first instance, and having renounced any intention of seeking to show that the appellants acted reasonably during the appeal to the Full Court, they would not now, in any event, be entitled to rely upon it[254]. Nonetheless, in this Court, an attempt was made, as will appear, to invoke some aspects at least of what was said by this Court in *Lange*, notwithstanding that the primary judge's finding of unreasonableness on their part stands unchallenged, and in my opinion is unchallengeable.

282 The appellants' grounds of appeal include that the first appellant's dominant motive, to cause political and electoral damage to the respondent could not, in effect, be a malicious motive: that because Williams J and Martin J in the Full Court found that the second appellant did not publish pursuant to any improper purpose, their Honours should have, but failed to consider whether, the, or a "proper purpose" of his publication was the dominant purpose of the publication, in which event any "extraneous malice" would be rendered irrelevant; alternatively, in the case of the second appellant "extraneous malice" should be ignored or disregarded because the publication was of political advertisements during an election campaign.

283 The grounds of appeal also seek to set up that the Full Court failed to identify any motive other than a desire to cause political and electoral damage to

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254 *University of Wollongong v Metwally [No 2]* (1985) 59 ALJR 481; 60 ALR 68.

the respondent, and that the primary judge's assessment of improper purpose coloured his findings about the appellants' beliefs, and therefore provided an unreliable foundation for the conclusions of the Full Court. Other factual matters were raised, that during an election "actual malice" needs to be established with convincing clarity, and that false statements are unexceptionable unless made "with a high degree of awareness of their probable falsity". The appellants' notice of appeal further contends that there was a failure on the part of the Full Court to identify any false statements, and that one at least of the members of the Full Court, Martin J, treated the trial judge's finding of "actual malice" as an unreviewable finding of fact.

284 The thrust of the appellants' written submissions is that even in a case of conventional qualified privilege, the decision of this Court in *Lange* exerts an influence: that in some way "express malice" assumes a different form and complexion in a political context during an election campaign. Contrary to their express disavowal in the Full Court of reliance upon a *Lange* defence, the appellants tried to argue the reasonableness of their conduct, and indeed asked this Court to give them the benefit of "the extended *Lange* privilege". They also urged that "the implied Constitutional freedom of expression affect[ed] the matter", specifically that an appellate court's approach to express malice should be coloured by the existence of an implied constitutional freedom of expression.

Lange defence unavailable and untenable

285 With respect generally to the *Lange* defence I would adhere to the opinions I expressed in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[255]. It is unnecessary, however, for me to decide whether I am bound to, or should apply it, in this appeal for a number of reasons. But I would add this to what I said in *Lenah*. Freedom of speech is no more under threat today than it was when the Constitution was drafted. That situation owes nothing to *Lange*. It is a situation that has existed throughout at least the last 40 years. Indeed, if anything, the contrary is the case. This has explicitly recently been recognized in the United States and the United Kingdom by practitioners and academic observers of the art of journalism[256]. Australia is not unique in this

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255 (2001) 76 ALJR 1 at 71-72 [338]; 185 ALR 1 at 97.

256 Writing of the media and others in the *New Statesman* on 4 June 2001 the journalist John Lloyd deplored the relentless attacks to which politicians are being subjected today: "[t]hey do not consider … the truly radical thought that politicians assist rather than destroy the maintenance of civil society; that they are precious rather than disgusting individuals in a time of media dominance; that they defend rather than pollute the public sphere" ("The Scorn of the Literati", *New Statesman*, 4 June 2001 at 21-22).

respect. The same trends are readily apparent here. The expression "chilling effect [upon political discourse]" is no more than a metaphor, and, like many metaphors, an extravagantly inaccurate one. And, if proof be needed of the undesirability of the importation, after more than 90 years, into the Constitution of an hitherto undetected judicial implication, this case provides it. It will take years, years of uncertainty and diverse opinion for the Court to reach a settled view of the elements of the defence and the way in which it is to be applied. *Lange* certainly does not exhaustively define its impact on the law of defamation. I doubt whether any case, or series of cases will ever do so, and, as defamation is not a head of federal constitutional power, legislation can never be enacted to resolve the recurrent uncertainties to which it gives rise. Furthermore, as the Chief Justice in his reasons in this case points out[257], the need for the common law to conform to the Australian Constitution [and therefore, I would add, the need at all for a new form of constitutional defence] is difficult to reconcile with the co-existence of different tests for qualified privilege in the context of political debate.

286 The first reason why a *Lange* defence must fail, as I have already intimated, is that it is simply not available to the appellants because it was expressly abandoned. That the appellants may have done this because of a misconception about their prospects of success on appeal on a conventional qualified privilege defence, or that the reasonableness or otherwise of their conduct was, in their view, irrelevant to such a defence, cannot avail them on appeal. They are bound by their conduct of the appeal to the Full Court. The fact that the defence is a "constitutional defence" makes no difference. If it were otherwise, a party might be able to abandon and revive at will a particular defence as it appeared to that party to be expedient to do so from time to time. This was an ordinary piece of litigation between citizens. No party is bound to rely on every apparently available defence, whether it is a constitutional one or not.

287 On any view of the merits, the appellants' conduct was unreasonable. It should not be assumed, as the appellants appear to have done, that findings of conduct sufficient to defeat a defence of conventional qualified privilege will be irrelevant to any question of the reasonableness of publishers' conduct and vice versa. It is difficult to imagine how anybody could be thought to be acting reasonably who is moved to act by spite, recklessness, utter indifference to the truth, abstention from inquiry about it, or failure to warn or give notice to the subject of the defamatory matter, and, who commits an offence in, or in connexion with the publication of it. Conduct which is malicious so as to defeat a conventional qualified privilege defence, conduct which is in contumelious disregard of a plaintiff's rights so as to give rise to an award of exemplary

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257 Reasons of the Chief Justice at [3].

damages, and unreasonable conduct generally, whether relied on for the purposes of demolishing a *Lange* defence or otherwise are likely to have much in common. A defendant's conduct right up to the moment of verdict is not only relevant to the issues of both aggravated and exemplary damages, but also will usually throw light upon a publisher's motives, purposes and true intentions at the time of publication. The manner of conduct of the actual trial by a defendant is itself capable of providing a basis for a finding of malice in publication[258].

288 Something in addition needs to be said about recklessness generally and in the context of a *Lange* defence. With respect to the latter, nothing could be clearer than the Court's pronouncement[259] that it is for "the publisher to prove reasonableness of conduct." Negligence is simply a want of reasonable care. That would therefore defeat a constitutional defence. Recklessness, a type of excessive conduct beyond mere carelessness also undoubtedly must do so. And as the Court further said[260], "as a general rule, a defendant's conduct … 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." Recklessness is, and has always been available as providing a basis for a finding of malice.

Bases for findings of malice

289 What the appellants' submission also ignores, are the content and tone of the language used in the defamatory publications. The language itself, in some, indeed many cases may be sufficient to give rise to an inference of malice. In this case, the dogmatic, categorical, and unpleasant tone and content of each of the documents go at least some way towards establishing malice: taken with the other matters referred to by the primary judge they provide ample grounds for a firm conclusion about it.

290 Both in their submissions and in their grounds of appeal, the appellants refer to "express malice" or "actual malice". There is a reference to malice in the judgment of Lord Nicholls of Birkenhead NPJ in *Tse Wai Chun Paul v Cheng*. His Lordship said this of it[261]:

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258 *Australian Consolidated Press Ltd v Uren* (1966) 117 CLR 185 at 192 per McTiernan J. See also *The Herald and Weekly Times Ltd v McGregor* (1928) 41 CLR 254 at 267-268 per Isaacs J as to proof of state of mind.

259 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 574.

260 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 574.

261 [2001] EMLR 777 at 783 [23].

> "In ordinary usage malice carries connotations of spite and ill-will. This is not always so in legal usage. In legal usage malice sometimes bears its popular meaning, sometimes not. It is an imprecise term. Historically, even within the bounds of the law of defamation, malice has borne more than one meaning. Historically, defamation lay in publishing the words complained of 'falsely and maliciously'. In this context malice meant merely that publication had been a wrongful act, done intentionally and without lawful excuse[262]. This was sometimes called malice in law, as distinct from malice in fact. But even malice 'in fact', otherwise known as express malice or actual malice, may cover states of mind which are not malicious in the ordinary sense of the word. This is so in the context of the defence of qualified privilege. It is no wonder that Lord Bramwell described malice as 'that unfortunate word'[263]."

291 The modern common law need draw no distinction between malice and express or actual malice. Malice may include a variety of motives such as improper motive, dishonest purpose, indirect motive, collateral purpose, spite or ill-will, but not, necessarily, it may be said, the motive of damaging a candidate's political prospects. The qualifying words "actual" or "express" add nothing except uncertainty and should be avoided, particularly when, in practice, malice is usually to be inferred in greater or lesser degree from a combination of two or more of the matters capable of providing evidence of it.

292 The appellants used the terms "dominant purpose" and "dominant motive" in their submissions. Lord Nicholls in *Tse Wai Chun Paul v Cheng* also used those expressions throughout his judgment. The latter was used by Lord Diplock in *Horrocks v Lowe*[264]. Its use, also, in my respectful opinion, may mislead. The expression "absence of malice"[265] aptly captures the essential quality of *the*

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262 See Bayley J in *Bromage v Prosser* (1825) 4 B&C 247 at 255 [107 ER 1051 at 1054].

263 See *Abrath v North Eastern Railway Co* (1886) 11 App Cas 247 at 253.

264 [1975] AC 135 at 149, 150.

265 In the seventh edition (1974) of *Gatley on Libel and Slander*, the last edition before the decision of the House of Lords in *Horrocks v Lowe* [1975] AC 135, the expression "absence of malice" or "without malice" occurs repeatedly. For example: at pars 612; 807; 808 (with respect to an offer of amends under the *Defamation Act* 1952 (UK)); 1301 and 1330 ("absence of any malicious motive" on the question of mitigation of damages). After *Horrocks v Lowe* the expression "dominant motive" appears, presumably because of its use then by Lord Diplock (see for example par 16.3 in the ninth edition (1998) of *Gatley*). See also however the criticism of *Horrocks v Lowe* at par 16.6 of that edition. "Absence of malice" is

(Footnote continues on next page)

purpose or motive required of a defendant to enable him or her to enjoy the benefit of a defence of qualified privilege. In order to defeat a defence of qualified privilege therefore, it will suffice for the plaintiff to demonstrate that the publication was not made out of a non-malicious motive, or motives: the presence of *a* malicious motive will colour and inescapably taint the conduct of a publisher.

293 It follows that the appellants' submissions to the extent to which they rely upon a distinction between some lesser motive than a dominant motive, and a dominant motive, and between malice on the one hand, and express or actual malice on the other, are not well founded and do not advance the appeal. Even if they were useful and valid expressions, the appeal would fail, because of the factual findings which have been made against the appellants on the issue of conventional qualified privilege.

Appellants' grounds of appeal misconceived

294 In their written submissions the appellants put this:

> "The Appellants anticipated a cross-appeal on the common law finding, but none was forthcoming. In those circumstances the Appellants considered that there was no need for them to take on the additional onus of establishing reasonability[266]. They advised the Full Court accordingly and did not pursue their Appeal to the Full Court against the Trial Judge's rejection of the *Lange* defence."

295 Notwithstanding the appellants' abandonment of reasonableness in the Full Court, the absence of any reference to a *Lange* defence in the appellants' notice of appeal to this Court and the paragraph in the written submissions that I have just quoted, during oral submissions the appellants put this proposition:

> "[B]ut we say that, indeed, the appellants did establish reasonableness, that [sic] *Lange* defence was pleaded and pressed as an alternative and the

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the expression used with apparent approval in this Court, for example in *Smith's Newspapers Ltd v Becker* (1932) 47 CLR 279 at 291 per Rich J; *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 142 per Menzies J; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 243, 249 per Brennan J; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 133 per Mason CJ, Toohey and Gaudron JJ, 145 per Brennan J, 175 per Deane J and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 572 where the Court uses the expression "without malice".

266 *Makeig v Derwent* [2000] NSWCA 136.

> appellants asserted there was no obligation in material such as this to seek the response of a political opponent. That was not reasonable. That would never happen, to distinguish it from the situation a [sic] the mass medium."

296 The misconceptions continue. The primary judge's finding of unreasonableness did not depend simply upon the failure of the appellants to seek a response from the respondent. Their unreasonableness had many aspects: the content and tone of the published matter, in the case of the first appellant, the compilation of a false and highly damaging document, the frequent flyer statement in the respondent's name, the failure to make any genuine inquiries about its subject matter before its publication, the deliberate attempt to humiliate, and therefore to ridicule the respondent by depicting him as, in effect, an uncaring, dishonest sybarite luxuriating in a tropical paradise at public expense, and worst, persistence in the publication of false matter after his attention had been drawn to its falsity, and in doing so, committing a quasi-criminal offence which he admitted afterwards by pleading guilty, and for which he was punished.

297 It is also important to keep in mind that by the time the matter had reached the Full Court, the appellants had abandoned any claim of fair comment and made no attempt there or here to identify any such comment in the published material.

298 So far as the second appellant is concerned, to turn up as a volunteer on the day of the election, to distribute defamatory matter in the form of the PSBL without having made any inquiries about its accuracy at all, well knowing, as he must have done, that the respondent would dispute, to say the least, many of the purportedly factual allegations contained in it, to distribute the material in a claimed state of indifference as to its truth; and being determined, as the trial judge found, to oust the respondent from Parliament at the election, were collectively well capable of being regarded as unreasonableness and malice on the part of the second appellant, even if the last taken alone might not be. The ambiguous question that the second appellant was asked, presumably after deliberation by his counsel, and which evoked a negative response would do nothing to dispel the inference of malice available against the former:

> "Was there anything in [the card] which caused you any concern?"

299 It is necessary to deal with yet another misconception upon which the appellants' appeal was based. It is that a finding of malice and perhaps unreasonableness, is either a finding of law or a finding of mixed law and fact. A finding of malice is quintessentially a finding of fact. It stands in the same category as a finding whether a defamatory imputation is conveyed by a publication. Whether the evidence is capable of giving rise to a finding of malice is, just as, whether matter is capable of conveying a defamatory imputation, a question of law for a trial judge. But when a trial judge finds the relevant

capacities, then it is entirely a matter for the jury, or a judge sitting alone, to decide as a question of fact whether the capacities have been realized. Often, animosity, collateral purpose, intransigence and other elements of malice, or unreasonableness will appear peculiarly from the way in which a witness conducts himself or herself in giving evidence. A fact finder's advantages in relation to these matters will generally be very real ones.

Lange defence would fail if it were available

300 Even if it were available in this case, the *Lange* defence would inevitably fail for the reasons that I have stated.

Malice made out

301 What then remains? I would accept that the imminence of an election and the heat of the emotions to which politics give rise are not irrelevant to a determination whether a publisher's conduct or motive is malicious.

302 But the law of this country has not reached the stage of tolerating, for the purposes of deciding whether a defence of conventional qualified privilege will succeed, or countenancing blatant lies. The frequent flyer compilation in respect of the respondent was no more than a set of blatant lies, persisted in, even after an independent authority (the Electoral Commissioner) pointed out its falsity. On account of it, and without reference to other aspects of the first appellant's conduct, his defence of conventional qualified privilege had to fail.

303 Nor has the law of this country reached the stage of accepting utter indifference or recklessness (the two may be equated with each other) with respect to the truth or falsity of defamatory matter, as a basis for defending its publication, on the ground of conventional qualified privilege, even in an electoral situation. For the first appellant to seek to explain and justify an innocent state of mind on the basis that "[there was no]thing in [the PBSL] which caused [him] any concern" is to treat his obligation to act non-maliciously with contempt. There is no question on the whole of his evidence that he was prepared to go to practically any lengths to discredit the respondent.

304 In a political context, it may fairly readily be accepted that hasty words will be said, and actions taken. But urgency of itself cannot provide an excuse, because urgency, very often, including in political affairs, is no more than a self-imposed imperative. Take the situation of the second appellant. He had been out of South Australia for some time before the election. He volunteered to distribute what turned out to be defamatory matter at short notice, thereby depriving himself of any opportunity to verify its accuracy. The most cursory of inspections of the PSBL, which he distributed for some hours on the day of the election, should have put him on his guard. The first statement contained in it was clearly open to the interpretation that the respondent had already spent

$32,000 of taxpayers' money on overseas travel. There is no suggestion of any knowledge on the part of the second appellant as to the duration and dates that the respondent spent out of his electorate, or would, in the future, need to spend in his electorate, if he were to become the speaker. To say, as the PSBL asserted, that the respondent had had numerous junkets at the electorate's expense was not only false but also was founded upon no reasonable basis in fact known to the second appellant. The respondent's position on gun laws was, as will be the case with many political issues, incapable of being reduced to a simple proposition. If a person chooses to do so, then inevitably he or she will run the risk of both oversimplification and misrepresentation. As H L Mencken said[267], "there is always a well-known solution to every human problem – neat, plausible, and wrong." To say, as the PSBL did, that the respondent put gun rights ahead of the electorate's families' safety, in proximity to a reference to the tragic Port Arthur massacre, was to run a very high risk of misrepresentation, which the second respondent was prepared to, and did take.

305 There is no reason why this Court should do anything to encourage recklessness and misrepresentation as to factual matters simply because they occur in electoral contests. Invariably, the laws of this country require a reasonable period of notice of an election. The candidates are obliged to nominate well ahead of one. They know, and can expect that some hurtful things will be said about them, but their candidature does not provide an excuse for people to tell lies about them. There is always sufficient time for rivals and detractors to inform themselves about facts relevant to a candidate's political conduct and opinions. If the facts cannot be ascertained, whether because those who would misstate them have allowed themselves insufficient time to do so or otherwise, then they must face the risk of being answerable for those misstatements in defamation proceedings. There is no public interest in the purveying of falsehoods. It would be a sad day if elections were to provide an excuse for dishonesty. Free speech does not mean freedom to tell lies, or a holiday from the truth during an election campaign. To the contrary, honesty of purpose and language and the taking of reasonable care in the dissemination of material can only enhance the electoral process and good, responsible and representative government. The interest of electors is not in being misled, but in having "what is honestly believed to be the truth communicated"[268].

Other possible grounds of liability of the second appellant

306 In passing, I mention another basis upon which the second appellant might well have been held to have been malicious with respect to the PBSL although it

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267 Mencken, "The Divine Afflatus", in *Prejudices: Second Series*, (1920) 155 at 158.

268 *Braddock v Bevins* [1948] 1 KB 580 at 591 per Lord Greene MR.

was written and provided by the first appellant to the second appellant who only published it by distributing it. It is that any personal malice on the second appellant's part did not have to be proved against him in the circumstances. In *Webb v Bloch* Knox CJ said this of two defendants who participated in the publication of defamatory matter[269]:

> "It is unnecessary to consider whether the evidence establishes that they were personally guilty of malice, for they are jointly responsible with the defendants Bloch and Pratt for the publication of the libel and so joint tortfeasors with them; and in such a case the malice of one or more of the joint tortfeasors defeats the privilege of all those responsible in law for the publication of the defamatory matter (*Smith v Streatfeild*[270])."

307 I do not however reject the second appellant's appeal on that basis as no argument was addressed to the Court with respect to it.

308 In this case, the trial judge drew a clear distinction between the damage caused by the first appellant and the damage caused by the second appellant, a distinction which was not, in my opinion, ungenerous to the second appellant. The Full Court took the view that the damages awarded against the first appellant should be increased, thus further enlarging the difference between the respective awards. That the second appellant "targeted" the respondent may not itself have established malice, but it was certainly relevant to the question of it. The "targeting" taken with all of the other factors, self-imposed urgency, absence of any inquiry, capacity to read and understand the material being distributed, the content of that material, and the second appellant's long-standing antipathy to the respondent and what he stood for made a finding of malice against him irresistible. Even if, as I do not think could possibly be the case here, the second appellant had no opinion about the truth of the matter he was distributing, or was indifferent to its truth, he would still in any event be guilty of malice[271]. It is simply not possible for a disseminator of highly offensive defamatory matter to say credibly that he had no opinion about its reliability.

309 The conclusions that I have reached make it unnecessary for me to decide, assuming the point to be open to the respondent, which I very much doubt in view of the respondent's apparent acceptance of the contrary, whether the occasions of the publications were not ones of qualified privilege. If I were, however, required to decide the point, I would be very much inclined to agree

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269 (1928) 41 CLR 331 at 359; see also Isaacs J at 365-366; *Adam v Ward* [1917] AC 309 (*Egger v Viscount Chelmsford* [1965] 1 QB 248 contra).

270 [1913] 3 KB 764.

271 See *Gatley on Libel and Slander*, 7th ed (1974), par 722.

with the reasoning and conclusions of Hayne J with respect to it. *Lange* would, in my opinion, produce the consequence that conventional qualified privilege will only be available as a defence in circumstances in which reciprocity truly exists.

310 In my opinion, there was abundant evidence upon which the primary judge could find that the conduct of both appellants was malicious, in the sense in which that word is used in relation to conventional qualified privilege. The finding of fact, on malice, was not only open, but was also, in my opinion, inevitable for the reasons that I have stated.

311 I would dismiss the appeal with costs.