

# FEDERAL COURT OF AUSTRALIA

## Hockey v Fairfax Media Publications Pty Limited [2015] FCA 652

Citation: Hockey v Fairfax Media Publications Pty Limited [2015] FCA 652

Parties: **JOSEPH BENEDICT HOCKEY v FAIRFAX MEDIA PUBLICATIONS PTY LIMITED ACN 003 357 720**

**JOSEPH BENEDICT HOCKEY v THE AGE COMPANY LIMITED ACN 004 262 702**

**JOSEPH BENEDICT HOCKEY v THE FEDERAL CAPITAL PRESS OF AUSTRALIA PTY LTD ACN 008 394 063**

File numbers:

NSD 489 of 2014

Judge: **WHITE J**

Date of judgment: 30 June 2015

Catchwords: **DEFAMATION** – multiple publications – whether pleaded imputations conveyed – meaning of “corruption” – consideration of multiple related publications by large media organisations in various formats – whether newspaper headlines, posters, or tweets should be considered in isolation from related newspaper articles

**DEFAMATION** – defences – qualified privilege – whether respondents’ conduct was reasonable – whether requirement of reasonableness applies to respondents’ conduct in publishing entire matter, or defamatory aspects of the matter only – whether objective truth of matters reported is relevant to reasonableness under *Defamation Act 2005* (NSW) and counterparts

**DEFAMATION** – defences – qualified privilege – whether respondents were actuated by malice – attribution of one employee’s malice – circumstance in which “innocent conduit” gives further expression of malice

**DEFAMATION** – remedies – assessment of damages

Legislation: *Commonwealth Electoral Act 1918* (Cth) Pt XX

*Defamation Act 1974 (NSW) s 22*  
*Defamation Act 2005 (NSW) ss 30*  
*Defamation Amendment Act 2002 (NSW)*

Cases cited:

*A v Ipec Australia Ltd* [1973] VR 39  
*Ali v Nationwide News Ltd* [2008] NSWCA 183  
*Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation* [1983] 1 NSWLR 1  
*Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158  
*Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419  
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*Austin v Mirror Newspapers Ltd* [1984] 2 NSWLR 383  
*Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30  
*Barrow v Bolt* [2013] VSC 226  
*Bashford v Information Australia (Newsletters) Pty Ltd* [2004] HCA 5; (2004) 218 CLR 366  
*Broome v Cassell & Co Ltd* [1972] AC 1027  
*Browne v Dunn* (1893) 6 R 67 (HL)  
*Carson v John Fairfax and Sons Ltd* (1993) 178 CLR 44  
*Charleston v News Group Newspapers Ltd* [1995] 2 AC 65  
*Crampton v Nugawela* (1996) 41 NSWLR 176  
*Cripps v Vakras* [2014] VSC 279  
*Cush v Dillon* [2011] HCA 30; (2011) 243 CLR 298  
*Drummoyne Municipal Council v Australian Broadcasting Corporation* (1990) 21 NSWLR 135  
*Egger v Viscount Chelmsford* [1965] 1 QB 248  
*Evatt v Nationwide News Pty Ltd* [1999] NSWCA 99  
*Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 230 CLR 89  
*Farquhar v Bottom* [1980] 2 NSWLR 380  
*Flood v Times Newspapers Ltd* [2012] UKSC 11; [2012] 2 AC 273  
*GKR Karate (UK) Ltd v Yorkshire Post Newspapers Ltd* [2000] 1 WLR 2571  
*Griffith v Australian Broadcasting Corporation* [2010] NSWCA 257  
*Herald and Weekly Times Ltd v McGregor* (1928) 41 CLR 254  
*Horrocks v Lowe* [1975] AC 135  
*Hughes v Mirror Newspapers Ltd* (1985) 3 NSWLR 504  
*Jameel v Wall Street Journal Europe Sprl* [2006] UKHL 44, [2007] 1 AC 359  
*John Fairfax & Sons Ltd v Hook* (1983) 72 FLR 190  
*John Fairfax & Sons Ltd v Vilo* (2001) 52 NSWLR 373  
*John Fairfax Publications Pty Ltd v Hitchcock* (2007) 70 NSWLR 484  
*John Fairfax Publications Pty Ltd v O'Shane (No 2)* [2005]

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*John Fairfax Publications Pty Ltd v Rivkin* [2003] HCA 50,  
(2003) 201 ALR 77  
*Jones v John Fairfax Publications Pty Ltd* [2002] NSWSC  
1210  
*Korean Times Pty Ltd v Pak* [2011] NSWCA 365  
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*Mirror Newspapers Ltd v Fitzpatrick* [1984] 1 NSWLR 643  
*Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141  
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*Morgan v John Fairfax and Sons Ltd (No 2)* (1991) 23  
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*Morgan v Odhams Press Ltd* [1971] 1 WLR 1239  
*Obeid v John Fairfax Publications Pty Ltd* [2006] NSWSC  
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*Purnell v BusinessF1 Magazine Ltd* [2007] EWCA Civ  
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*Radio 2UE Sydney Pty Ltd v Chesterton* [2009] HCA 16;  
(2009) 238 CLR 460  
*Rayney v Western Australia (No 2)* [2009] WASC 133  
*Readers Digest Services Pty Ltd v Lamb* (1982) 150 CLR  
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*Reynolds v Times Newspapers Ltd* [2001] 2 AC 127  
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*Rogers v Nationwide News Pty Ltd* [2003] HCA 52; (2003)  
216 CLR 327  
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*Triggell v Pheeney* (1951) 82 CLR 497  
*West v Mirror Newspapers Ltd* (unreported, New South  
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*World Hosts Pty Ltd v Mirror Newspapers Ltd* [1976] 1  
NSWLR 712  
*Wright v Australian Broadcasting Commission* (1977) 1  
NSWLR 697

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9-12, 16-17 March 2015

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Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 522

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**IN THE FEDERAL COURT OF AUSTRALIA  
NEW SOUTH WALES DISTRICT REGISTRY  
GENERAL DIVISION**

**NSD 489 of 2014**

**BETWEEN:               JOSEPH BENEDICT HOCKEY**  
**Applicant**

**AND:                     FAIRFAX MEDIA PUBLICATIONS PTY LIMITED**  
**ACN 003 357 720**  
**Respondent**

**JUDGE:                 WHITE J**

**DATE OF ORDER:     30 JUNE 2015**

**WHERE MADE:        ADELAIDE**

**THE COURT ORDERS THAT:**

1. The matter is adjourned to a date to be fixed by the Court for the hearing of submissions with respect to injunctions, interest, costs and the form of the orders appropriate to give effect to the Court's findings.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**IN THE FEDERAL COURT OF AUSTRALIA  
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**NSD 491 of 2014**

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**AND:                         THE AGE COMPANY LIMITED ACN 004 262 702**  
**Respondent**

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**PLACE: ADELAIDE**

**REASONS FOR JUDGMENT**

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<b>Introduction</b>	

1           On 5 May 2014, each of the Sydney Morning Herald (the SMH), The Age and The Canberra Times published articles regarding Mr Hockey, the Federal Treasurer. Mr Hockey is a member of the Liberal Party of Australia and the elected member for the seat of North

Sydney in the Australian Parliament. He has been the Federal Treasurer since 18 September 2013.

2           The articles said that Mr Hockey was providing “privileged access” to a “select group” in return for donations to the Liberal Party via a “secretive” fundraising body, the North Sydney Forum, whose activities were not disclosed fully to election funding authorities. Apart from the print version of The Canberra Times, each publication included prominently the words “Treasurer for Sale” or “Treasurer Hockey for Sale”.

3           Each of the SMH, The Age and The Canberra Times also published articles on their various online platforms. The online publications contained articles, or provided links to articles, with a similar content to the substantive part of the printed articles. Some, being “tweets”, comprised only the words “Treasurer for Sale” or “Treasurer Hockey for Sale”.

4           In addition, the SMH promoted its article with a poster, referred to sometimes as a “placard”, which included in large and bold font the words “Treasurer for Sale”.

5           In three actions heard together, Mr Hockey sues the respondents, the publishers of the SMH, The Age and The Canberra Times, for defamation. He alleges that the articles and the SMH poster conveyed some or all of the following defamatory imputations:

- (a) He accepted bribes paid to influence the decisions he made as Treasurer of the Commonwealth of Australia;
- (b) He was prepared to accept bribes paid to influence the decisions he made as Treasurer of the Commonwealth of Australia;
- (c) He corruptly solicited payments to influence his decisions as Treasurer of the Commonwealth of Australia;
- (d) He is corrupt in that he was prepared to accept payments to influence his decisions as Treasurer of the Commonwealth of Australia;
- (e) He corruptly sells privileged access to himself to a select group which includes business people and business lobbyists in return for donations to the Liberal Party;
- (f) He knowingly permitted a Liberal Party fundraising forum with which he was associated to accept money from the corrupt Obeid family.

6           Imputations (e) and (f) were pleaded in respect of some articles only. The imputation in para (a) was pleaded as the primary imputation. Those in (b) and (c) were pleaded in the alternative to (a) and those in (d), (e) and (f) were pleaded as alternatives to (b) and (c). Although Mr Hockey relied on each of the pleaded imputations, ultimately it was imputation (e) which was at the forefront of his submissions.

7           The respondents deny that the articles conveyed any of the pleaded imputations, and contend that the defence of qualified privilege at common law and under s 30 of the *Defamation Act 2005* (NSW) and its counterparts in each State and Territory is applicable in any event.

8           Mr Hockey disputes that any defence of qualified privilege is available and contends that, even if otherwise available, it is defeated because the respondents' publications were actuated by malice.

9           He claims damages, including aggravated damages, and injunctions to restrain the further publication of the offending articles.

10          For the reasons which follow, I uphold Mr Hockey's claim that the SMH poster and two matters published on Twitter by The Age with the words "Treasurer for Sale" and "Treasurer Hockey for Sale" were defamatory of him. I find that the respondents have not made out their claims of qualified privilege and find that, even if otherwise available, these defence would have been defeated in the case of the SMH articles and the SMH poster by the malice actuating their publication. I assess Mr Hockey's damages in respect of the publication of the SMH poster at \$120,000 and in the case of the two tweets by The Age at \$80,000.

11          I find that Mr Hockey's remaining claims have not been established.

### **The published articles**

12          Each article and the SMH poster will have to be considered separately. It is convenient to commence with the articles published in the printed versions of the SMH, The Age and The Canberra Times.

### ***The articles in the SMH***

13          Mr Hockey sues on a suite of articles published on pages one, six and seven of the SMH on 5 May 2014. These articles appear under headlines "Treasurer for Sale", "The price tag on Joe Hockey", and "Networking event referred to ICAC" respectively. For convenience, I will refer to them as the Nicholls article, the Kenny article and the Hartcher article.

14          The front page of the SMH on 5 May 2014 had a large photograph of Mr Hockey and adjacent to it a prominent headline: "Treasurer for Sale". Above that headline and

immediately below the SMH masthead, was an overline in white against a red background: “Exclusive: Joe Hockey’s secretive fund-raising body”.

15 Under the headline “Treasurer for Sale” and arranged side by side were three dot-pointed sub-headlines, in large font, albeit smaller than the principal headline. For convenience I will number these three dot-pointed headlines:

1. North Sydney Forum charges up to \$22,000 for access to Treasurer
2. VIP members remain secret, disclosing fee only as party donation
3. Forum took \$30,000 in donations from Obeid-linked company

16 The article which followed (the Nicholls article) was written by Sean Nicholls, the SMH’s State Political Editor and appeared under his by-line. It described the North Sydney Forum (the NSF) as “a campaign fund-raising body run by Mr Hockey’s North Sydney Federal Electoral Conference (FEC)”.

17 It was common ground at the trial that the references to “Obeid” in the sub-headline and in the various articles were, and would have been understood by readers to be, references to a former Minister in the New South Wales Government and to some members of his family and that, at the time of publication, the name “Obeid” had come to be associated in New South Wales and elsewhere with corruption.

18 The Nicholls article commenced on page one under the sub-headlines and continued on pages six and seven. It commenced with the following (I have numbered the paragraphs for convenience):

- (1) Treasurer Joe Hockey is offering privileged access to a select group including business people and industry lobbyists in return for tens of thousands of dollars in donations to the Liberal Party via a secretive fund-raising body whose activities are not fully disclosed to election funding authorities.
- (2) The Independent Commission Against Corruption is probing Liberal fund-raising bodies such as the Millennium Forum and questioning their influence on political favours in NSW.
- (3) Mr Hockey offers access to one of the country’s highest political offices in return for annual payments.
- (4) The donors are members of the North Sydney Forum, a campaign fundraising body run by Mr Hockey’s North Sydney Federal Electoral Conference (FEC). In return for annual fees of up to \$22,000, members are rewarded with “VIP” meetings with Mr Hockey, often in private boardrooms.
- (5) The North Sydney FEC officials who run the forum – which is an incorporated entity of the Liberal Party – say its membership lists and therefore the identities of its donors are “confidential”. Mr Hockey also says

details of who he is meeting and what is discussed are confidential.

19 The article then outlined some details of members of the NSF:

- (6) What little information is available reveals members of the forum include National Australia Bank and the influential Financial Services Council, whose chief executive is former NSW Liberal leader John Brogden.
- (7) The FSC's members, including financial advice and funds management firms, stand to benefit from the changes to the Future of Financial Advice (FOFA) laws being considered by the federal government, which would involve a winding back of consumer protections introduced by Labor. NAB would also benefit from the changes.
- (8) The chairman of the forum is John Hart, who is also the chief executive of Restaurant and Catering Australia – a hospitality industry lobby group whose members stand to benefit from a government-ordered Productivity Commission review of the Fair Work Act that is expected to examine penalty rates.
- (9) Mr Hart also sits on Prime Minister Tony Abbott's business advisory council.

20 The Nicholls article then referred to Australian Water Holdings Pty Ltd (AWH) as a former member and in doing so referred to Mr Obeid:

- (10) In March, it was revealed a former member of the North Sydney Forum was controversial infrastructure company Australian Water Holdings (AWH), which has been linked to the family of corrupt former Labor power-broker Eddie Obeid and is under investigation by the ICAC over its attempts to win lucrative government contracts.
- (11) When AWH's links to the Obeid family were revealed last year, the North Sydney FEC returned an \$11,000 forum membership fee and AWH's membership of the forum was ended. In March, the North Sydney FEC revealed it had returned another \$22,000 in membership fees from AWH, whose former chairman is Liberal Party senator and former assistant treasurer Arthur Sinodinos.
- (12) Senator Sinodinos stood aside as assistant treasurer in March, after giving evidence at the ICAC about AWH's attempts to win a billion-dollar contract with the NSW government. Before that, he was responsible for implementing the government's FOFA reforms.
- (13) During the three years AWH was a member of the forum, the company's chief executive was Liberal fund-raiser and former lobbyist Nick Di Girolamo, whose gift of a \$3000 bottle of Penfolds Grange Hermitage to Barry O'Farrell shortly after his March 2011 election win led to his resignation as premier last month, after he gave false evidence to the ICAC.
- (14) North Sydney Forum deputy chairman Robert Orrell said he was "sure" Mr Di Girolamo – a close friend of Eddie Obeid jnr, who was employed by AWH – had attended private boardroom meetings with Mr Hockey.
- (15) However, he was adamant Mr Obeid jnr did not attend any meetings.
- (16) The North Sydney Forum was established in May 2009, shortly after Mr Hockey became shadow treasurer in February, by Joseph Carrozzi, managing partner at professional services firm PriceWaterhouseCoopers.

- (17) Mr Carrozzi is also chairman of the Italian Chamber of Commerce and Industry in Australia and was a board member of the organisation when Mr Di Girolamo was its chairman.
- (18) He said he could not recall how AWH became a member of the forum but denied it was through this link. He said the chamber was not a forum member.

21 Part way through para (11), the SMH inserted a referral to its editorial on page 14 by a bold notation “Forum must come clean on donors”.

22 The Nicholls article then went on to convey information provided to Mr Nicholls by Mr Carrozzi and Mr Orrell:

- (19) Mr Carrozzi, who said he had known Mr Hockey for 20 years, said he was “honoured to be asked” to establish the forum, which was “essentially there to provide a network and insight for small businesses”.
- (20) “Members get an opportunity to sit down and chat with Joe. We’ve had other ministers, state and federal, participate as well”.
- (21) Mr Carrozzi said NSW Transport Minister Gladys Berejiklian and Premier Mike Baird – until recently treasurer – had participated in the forum’s functions for members.
- (22) Past forum members include wholesale distribution and marketing firm Metcash and business services group Servcorp, founded by long-time Liberal Party supporter Alf Moufarrige.
- (23) In 2008, it emerged Mr Moufarrige had given former Treasurer Peter Costello six bottles of Penfolds Grange – reportedly worth about \$3,000 in total – as a thank you gift for opening a Melbourne building.
- (24) Mr Carrozzi said Mr Hockey “sits down regularly” with members of the forum. Mr Di Girolamo “may have attended one or two” meetings with Mr Hockey but Mr Carrozzi stressed “he was certainly not a regular attendee”.
- (25) He said Mr Obeid jnr was “certainly not at any meetings I attended with Mr Hockey”.
- (26) Mr Orrell said the forum had had about 12 lunches each year, “typically in a member’s boardroom”.
- (27) “It’s genuinely an exchange of information” he said. “Joe just goes around the table and talks about issues”.

23 The Nicholls article then referred to the membership structure of the NSF, saying:

- (28) The North Sydney Forum membership structure offers “full membership” for an annual fee of \$5,500, for which members are entitled to five boardroom events.
- (29) The fee for corporate and business members is \$11,000 which offers an extra “VIP boardroom function” while private patrons paying \$22,000 enjoy the additional benefit of “10 boardroom events”.

24 The Nicholls article then reported a statement of Mr Orrell that “money raised by the [NSF] was often distributed to Liberal Party marginal seats” and continued:

- (31) However, the forum does not lodge its own disclosures to the NSW Election Funding Authority.
- (32) In its disclosures, the NSW division of the Liberal Party declares membership fees – regarded as donations for the purposes of the election funding act – but does not state they are for the North Sydney Forum. This practice masks who is donating directly to North Sydney Forum and the identity of its members.
- (33) A spokesman for NSW Election Funding Authority said: “There is no record of the North Sydney Forum in the EFA system”.
- (34) Occasionally members name the North Sydney Forum in their disclosures to the EFA but there is no requirement to do so.

25 The article then went on to assert that the structure of the NSF is similar to that of “vehicles” established by other Liberal MPs, saying:

- (35) The structure of the North Sydney Forum is based on that of similar vehicles established by other Liberal MPs, such as the Wentworth Forum, which was set up for Communications Minister Malcolm Turnbull in August 2007.
- (36) The Wentworth Forum was established by the former Federal Liberal Party Treasurer Michael Yabsley to raise funds for Mr Turnbull’s re-election to the eastern suburbs seat of Wentworth following a redistribution in 2004 that made it a less safe Liberal seat. It operated between August 2007 and late 2009 – for six months when Mr Turnbull was environment minister but primarily while he was shadow treasurer and then opposition leader – and gave members access to exclusive functions he attended. It also had a sliding scale of membership fees from \$5,500 to \$55,000.
- (37) The Wentworth Forum was based on the Millennium Forum, the Liberal Party’s main fundraising body, which was established by Mr Yabsley in the late 1990s to replicate corporate fundraising practices.
- (38) Millennium Forum members are regularly invited to events hosted by NSW and federal ministers.
- (39) Last week the chairman of the Millennium Forum, Paul Nicolaou, resigned after ICAC heard allegations it and another entity, the Free Enterprise Foundation, were used to disguise payments from prohibited donors including property donors to bankroll the Liberal Party’s campaign to win the 2011 NSW election.

26 Finally, the Nicholls article referred to questions which had been sent to the NSW Liberal Party and Mr Hockey:

- (40) Detailed questions were sent to the NSW Liberal Party about the North Sydney Forum, how it operates and why its membership is not disclosed to



authorities. A spokeswoman responded that the forum was “covered by the Australian Electoral Act with donations disclosed to the AEC in accordance with the law by the NSW Division of the party and funds are used for the work of the party”.

- (41) Questions were also sent to Mr Hockey inviting him to disclose details of his meetings with members. A spokeswoman responded: “Questions about the function and administration of the North Sydney Forum should be addressed to them. The Treasurer’s diary is confidential.”

27 Part way through para (40), the SMH inserted in bold an extract from the quoted statements of Mr Carrozzi set out earlier, as follows:

**“Members get an opportunity to sit down and chat with Joe.”**

Joseph Carrozzi, founder

28 The article concluded with the note “Do you know more?” and gave Mr Nicholls’ email address at Fairfax Media for any response.

29 As noted earlier, Mr Nicholls’ article ran over pages one, six and seven. The portion on page one ceased part-way through the paragraph numbered [10] above. The portions on pages six and seven comprised almost the whole of the bottom half of both pages and were under a prominent headline which ran across both pages:

Treasurer up for sale with secretive fund-raising forum that charges up to \$22,000 for membership and coveted access.

30 The front page of the SMH also contained an extract from its editorial on page 14 as follows:

This practice of politicians effectively selling access is a disquieting development in our political culture. It’s time for the North Sydney Forum to come clean about who are Mr Hockey’s financial backers and what they get for their largesse. It is too simplistic for Mr Hockey to claim he is somehow at arm’s length from the activities of the forum.

Mr Hockey does not sue on the editorial separately, but did rely on this extract.

31 The front page also contained a referral to an article by another journalist, Mr Kenny, (the Kenny article) which said:

**The price tag on Joe Hockey**

Mark Kenny, Analysis, Page 6

32 Pages six and seven had at their top headlines, described by Mr Goodsir, the Editor-in-Chief of the SMH, as “strap headlines”, stating, “NEWS | POLITICAL DONATIONS” and “POLITICAL DONATIONS | NEWS” respectively.

33 The Kenny article appeared under two headings on page six: first, one which was partly in blue print and partly in black print, “Campaign funds Fair go questioned”; and secondly, a prominent bold headline, “The price tag on Joe Hockey”. There then followed the word “analysis”, Mr Kenny’s by-line and his description as “Chief Political Correspondent”.

34 The Kenny article was as follows (again with the paragraphs numbered for convenience):

- (1) Nobody is suggesting Joe Hockey is corrupt. But it is increasingly clear the Treasurer is party to a process that is corrupting Australia’s democratic integrity.
- (2) As in the US, political representation increasingly turns on how much cash you have, and where you are prepared to direct it.
- (3) A week from now, the Treasurer will rise to the dispatch box in Canberra and deliver a federal budget, his first, and undoubtedly one of the most significant in many years. He will ask Australians to take a leap of faith: to take him on trust.
- (4) Trust that he is acting purely in the national interest; that the harsh medicine proscribed (sic) for pensioners and families is the correct formula for the economy; that the big end of town will match their sacrifice.
- (5) That trust must come under scrutiny in light of the revelation that Hockey’s centrality to the Government has become a commodity – a product to sell – in the ruthless search for more campaign funds.
- (6) Through vehicles such as the North Sydney Forum, the most senior public offices have been quietly privatised to be sold on as political access. It has been done in a way that is deliberately opaque, under the radar and disguised as something else. Rather than solicit donations from companies looking to curry favour or buy influence, the forum charges exorbitant annual “membership fees”, well in excess of the disclosure requirements under electoral donations rules.
- (7) Have no illusion, this is an entity created expressly to further the Liberal Party’s interests, to wit, the re-election of Joe Hockey. Hockey is not the personal recipient of any funds but it is hard to draw a total distinction between the forum’s interests and his own, given the former is dedicated to the re-election of the latter.
- (8) It is one of a number of vehicles used by MPs on both sides of politics for years. Former Treasurer Peter Costello’s Higgins 200 Club was reported to have \$900,000 in assets as recently as two years ago, long after he left politics.
- (9) Such vehicles are within the rules. But should they be? By marketing

Hockey's pivotal role in economic decision-making, the North Sydney Forum may be said to be offering something that is not really its to sell: gold-card entry to one of our highest public offices.

- (10) What these well-connected companies and industry groups such as the Financial Services Council and the National Australia Bank, have received as a return on their investment remains unclear.
- (11) But it's a legitimate question, given the financial services industry stands to gain from policy decisions favourable to them, such as the government's commitment to rolling back consumer protection and financial advice laws.
- (12) Politicians are fond of invoking the fair go as the quintessential Australian ethic. But it is hard to discern that fair go for voters when special access is being sold to the rich and powerful and the money used to run party political campaigns.

35           Pages six and seven also contained a number of graphics spread over the two pages. First, there was a large photograph of Mr Hockey. Secondly, there was an extract from the North Sydney Forum website homepage. That extract contained three photographs of Mr Hockey and, under the name North Sydney Forum, the words "Business and community leaders supporting Joe Hockey MP". It included the following words:

By joining the North Sydney Forum you will have the opportunity to participate in a regular program of events including boardroom lunches with Joe Hockey, focused on key policy areas that are nominated by Forum members.

36           The graphics on page six then set out another extract from the NSF website which detailed the NSF membership packages:

Membership level and benefits	Full member* \$5500 (incl GST)	Corporate/ business member \$11,000 (incl GST)	Private patron \$22,000 (incl GST)
Five boardroom events including one guest	●	●	
Ten boardroom events including one guest			●
End of year reception including one guest	●	●	●
Private VIP boardroom function		●	●
Policy forums and receptions including one guest	●	●	●
Membership of Friends of Joe	●	●	●
Two North Sydney business forums	●	●	●

\*not-for profit sector

37 On page seven, under the heading “Who’s Who”, the graphics had small photographs of Mr Hart, Mr Orrell, Mr Carrozzi, Mr Di Girolamo, Mr Obeid Jnr, Mr Brogden and Senator Sinodinos, with a short note about each.

38 The graphics then identified NAB and FSC as members of the Forum and Servcorp and Metcash as “One-time forum members”.

39 At the foot of the graphics and running over both pages six and seven were the words “How It Works” with the following three numbered steps set out side by side:

<b>1</b> Membership fees paid to North Sydney Forum as part of the North Sydney Federal Electoral Conference.	<b>2</b> NSW Liberal Party lodges a “consolidated disclosure” including fees to the Election Funding Authority.	<b>3</b> NSW Liberal Party distributes fees to other campaigns.
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40 Within the section on page six containing the continuation of Mr Nicholls’ article, the SMH set out seven questions which it had directed to the NSW Liberal Party and the Party’s response as follows:

**Questions for NSW Liberal Party**

1. Who are the current corporate and individual members of the North Sydney Forum? Can you please provide a breakdown of companies and individuals by membership class etc.
2. What is the total value of membership fees and donations to the forum since

it was established?

3. What information about forum membership fees is disclosed to the NSW Election Funding Authority or Australian Electoral Commission by the Liberal Party?
4. Does the Liberal Party provide the authority or commission with the names of the members of the forum? If not, why not?
5. Why does the Liberal Party not lodge a separate disclosure return for the forum?
6. How does the party determine where (ie which seats) funds raised through memberships and donations to the forum are distributed?
7. Will you please confirm that the membership and other funds are distributed to seats outside North Sydney and, if possible, provide a list of the seats to which funds have been directed.

**The response:**

“North Sydney Forum is a fund-raising body of North Sydney FEC, as such it reports to the FEC who in turn report to the NSW Liberal Party. It is covered by the Australian Electoral Act with donations disclosed to the AEC in accordance with the law by the NSW Division of the party and funds are used for the work of the party.”

41 Within the section on page seven, the SMH set out 12 questions which it had directed to Mr Hockey, together with the response provided by his office, as follows:

**Questions for Joe Hockey**

1. Who are the current members of the North Sydney Forum?
2. What role did you have in setting it up and why was it set up?
3. What is the extent of your involvement in forum administration?
4. How many VIP briefings/meetings did you grant forum members in [the] past 12 months? Where were they held, who attended, what was discussed?
5. How many of these have occurred since you became Treasurer?
6. How many other meetings did you grant forum members in [the] past 12 months? Where were they held, who attended, what was discussed?
7. How many of these have occurred since you became Treasurer?
8. What discussions have you had with forum member the Financial Services Council regarding the Future of Financial Advice legislation? Who else was present?
9. What discussions have you had with forum chairman John Hart regarding the review of the *Fair Work Act*? Who else was present?
10. How many forum-related meetings have you attended with Nick Di Girolamo?
11. How many forum-related meetings have you attended with Eddie Obeid jnr?
12. How many forum-related meetings have you attended with Arthur Sinodinos?

**The Response:**

“Questions about the function and administration of the North Sydney Forum should

be addressed to them. The Treasurer's diary is confidential."

42 Finally, page seven contained another article by Mr Nicholls under the headline "Networking event referred to ICAC" (the Hartcher article). It reported the referral to the Independent Commission Against Corruption in New South Wales (the ICAC) of a fundraising event organised by the Georges River Club at which Mr Hartcher had been guest of honour. At the time of the event, Mr Hartcher was a Minister in the New South Wales Government. The article reported on membership of the Georges River Club as follows (using paragraph numbering which reflects the location of the paragraphs in the article):

- (4) According to emails sent to prospective members, joining the Georges River Club offered "an investment that will open up opportunities and provide access to marketing possibilities that are normally out of reach for most businesses.
- (5) "Membership of the GRC can provide you with so much more, for example, the opportunity to share ideas with other business leaders, influence policy and decision makers and have sway with government."
- (6) Gold memberships were offered for \$5000, silver \$2,500 and bronze for \$1,000. The event was held shortly before the September 2012 local government elections at which Cr Daniel was elected.

The Hartcher article concluded with the following:

- (16) ICAC is investigating allegations Mr Hartcher and two other central coast MPs, Darren Webber and Chris Spence, solicited illegal donations for the Liberal Party through an alleged slush fund called Eightbyfive.
- (17) Mr Hartcher did not respond to a request for comment.

43 The Hartcher article did not contain any reference to Mr Hockey or to the NSF. Nevertheless, it was part of the publication on which Mr Hockey relied in his claims based on the print version of the SMH. The Hartcher article was not included in any of the other publications about which Mr Hockey complained.

44 Although Mr Hockey relied on the extract from the SMH's editorial appearing on page one, he did not otherwise complain of the editorial, and it is not necessary to refer to it in these reasons.

### ***The articles in The Age***

45 The Nicholls and Kenny articles were also published in The Age on 5 May 2014. Their content was the same as the articles published in the SMH, but the headlines and layout differed in some respects.

46 The Nicholls article commenced on page one opposite a prominent photo of Mr Hockey and continued on page four. It too appeared under a large bold headline “Treasurer for Sale”. That headline was beneath an overline “Exclusive Party donations linked to Hockey’s secret ‘forum’ ”. The word “Exclusive” appeared in yellow against a red background and the balance of the overline was white against a red background. Page one on The Age also contained three dot-pointed sub-headlines. These were arranged vertically and differed from those in the SMH, having been written by Mr Fuller, the Print Editor of The Age:

- Businesses, lobbyists pay for privileged access
- “Forum” chaired by hospitality industry lobbyist
- Australian Water Holdings made donations.

47 Page one also contained a cross reference to the Kenny article under the heading “Analysis Mark Kenny” with an extract from the Kenny article in bold:

This is an entity created expressly for the purpose of furthering the Liberal Party’s interests.

48 The continuation of the Nicholls article on page four was under a prominent bold headline “Businesses, lobbyists pay to get up close” which was, in turn, beneath an overline “Treasurer for sale Donations link”.

49 Immediately before the paragraph which in the Nicholls article in the SMH I have numbered 28, The Age included in bold an excerpt of the statement attributed to Mr Carrozzi “Members get an opportunity to sit down and chat with Joe”.

50 The bold headline to the Kenny article on page five was “Is Hockey’s ear on the auction block?”. That heading appeared under an overline “Cash for conversation”.

51 The graphics on pages four and five of The Age article were the same as those published in the SMH.

52 Page four of The Age also carried a small article under the heading “Pyne calls for donations ban on unions, companies”. The flavour of that article is seen in its first two paragraphs:

Senior coalition frontbencher Christopher Pyne has called for a ban on political donations from corporations and unions.

In a departure from Liberal Party policy, Mr Pyne told ABC TV on Sunday that only

individuals should be allowed to donate to political parties.

53 There are other minor differences between the SMH and The Age articles but it was not suggested that these were material.

### ***The Canberra Times***

54 The printed edition of The Canberra Times on 5 May 2014 also carried the Nicholls and Kenny articles. The Nicholls article had less prominence in The Canberra Times as it was one of five articles on, or commencing on, page one. It appeared under the headline “Paying their way: how a select group buys access to the Treasurer”. The page one article also contained a small photograph of Mr Hockey with an accompanying notation “Confidential: Joe Hockey offered privileged access in return for donations to a fund-raising forum”.

55 Unlike the SMH and The Age, The Canberra Times did not use the headline “Treasurer for Sale”. Nor did it carry an overline or any dot-pointed sub-headlines. Page one did contain a small and illegible excerpt of that part of the graphic concerning the membership packages opposite the following notation:

Inside

→ How it works

→ Analysis

Page 4

56 On page four, The Canberra Times carried the continuation of the Nicholls article under a headline “Paying their way: how a select group buys access”. The statement by Mr Carrozzi “Members get an opportunity to sit down and chat with Joe” was set out in bold part-way through the continuation of the Nicholls article on page four.

57 There was no separate headline to the Kenny article but the graphics, which appeared immediately above the Kenny article, followed a headline “There’s a price tag on influence and that’s not a fair go”.

### ***The SMH poster***

58 The SMH poster contained at its head the SMH masthead. This occupied approximately one quarter of the poster. Then followed the following words:



EXCLUSIVE  
TREASURER  
FOR SALE  
HERALD  
INVESTIGATION

59           The word “Exclusive” was in large red font against a white background. The words  
“Treasurer for Sale” were in slightly larger black font against a white background. The  
words “Herald Investigation” were in slightly smaller font and were in white against a black  
background.

60           Mr Cubby, the deputy print editor of the SMH, determined the content of the poster.  
His evidence as to the purpose of the poster, which was not contested by Mr Hockey (and  
indeed relied upon by him), was as follows:

[33]       Posters are short and to the point. The number of words in a poster will  
always be limited, as they need to have a font size that will be readable to a  
person driving by or walking across the other side of the road from, a  
newsagency.

### ***The online publications***

61           I will refer later to the publications in the various online platforms. I note at this stage  
that several contained links to the Nicholls article and the graphics, although the headlines  
and the format varied.

### **Defamatory meaning**

62           The respondents acknowledged that, if their publications conveyed the meanings  
pleaded by Mr Hockey, they were defamatory of him. The contest between the parties on this  
aspect of the matter was whether the publications did convey the pleaded imputations.

### ***General principles***

63           The principles to be applied in the determination of this issue are settled, having been  
stated in numerous authorities: *Radio 2UE Sydney Pty Ltd v Chesterton* [2009] HCA 16,  
(2009) 238 CLR 460 at [5]-[6]; *John Fairfax Publications Pty Ltd v Rivkin* [2003] HCA 50,  
(2003) 201 ALR 77 at [26]; *Readers Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 at  
505-6; *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158 at 164-5;  
*Farquhar v Bottom* [1980] 2 NSWLR 380 at 386-7; *Charleston v News Group Newspapers*

*Ltd* [1995] 2 AC 65 at 69-74. The question is whether ordinary reasonable readers would have understood the matters complained of in the defamatory senses pleaded. The ordinary reasonable meaning of a matter may be either its literal meaning or that which is implied or inferred by the matter. It includes inferences and conclusions which the ordinary reasonable person draws from the words used, taking into account the observation of Lord Reid in *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239 at 1245, that the reader may engage in a certain amount of “loose thinking”. Lord Reid went on to say:

The ordinary reader does not formulate reasons in his own mind: he gets a general impression and one can expect him to look at it again before coming to a conclusion and acting on it. But formulated reasons are very often an afterthought.

64 Ordinary reasonable readers are taken to be persons of ordinary intelligence, experience and education, who are neither perverse nor morbid nor suspicious of mind, nor avid for scandal. They do not live in ivory towers and can and do read between the lines in the light of their general knowledge and experience. They do not engage in over-elaborate analysis in search for hidden meanings, nor do they adopt a strained or forced interpretation. They are not lawyers and their capacity for implication may be greater than that of lawyers.

65 The ordinary reasonable reader does not look at the matter complained of in isolation but rather in the whole context in which it is published: *John Fairfax & Sons Ltd v Hook* (1983) 72 FLR 190 at 195. The context includes all the surrounding circumstances.

66 The ordinary reasonable person is taken to have read the whole of a newspaper article and not just the headline or the particular portions of which complaint is made: *A v Ipec Australia Ltd* [1973] VR 39; *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 at 646; *Charleston v News Group* at 71-3. As will be seen, this is an important consideration in the present case.

67 The more sensational an article in a newspaper, the less likely it is that the ordinary reasonable reader will read it with the degree of analytical care which may otherwise be given to a book and the less the degree of accuracy which may be expected by the reader: *Marsden* at 165. Conversely, the ordinary reasonable reader of a serious publication may be taken to read it more cautiously and critically, especially having regard to the opportunity to reflect on its contents.

68 Generally, courts do not take a narrow view of the meaning conveyed to reasonable readers by words which are imprecise, ambiguous, loose, fanciful or unusual: *Marsden* at 165.

69 In determining what is reasonable in any case, a distinction must be drawn between what ordinary reasonable readers (drawing on their own knowledge and experience of human affairs) could understand from what the publisher has said in the matter and the conclusion which the readers could reach by taking into account their own beliefs which have been excited by what was published. It is the former, and not the latter, which is pertinent.

70 In relation to the impact of headlines, McHugh J said in *John Fairfax Publications Pty Ltd v Rivkin* at [26]:

[26] ... A reasonable reader considers the publication as a whole. Such a reader tries to strike a balance between the most extreme meaning that the words could have and the most innocent meaning. The reasonable reader considers the context as well as the words alleged to be defamatory. If "[i]n one part of [the] publication, something disreputable to the plaintiff is stated, but that is removed by the conclusion; the bane and antidote must be taken together." But this does not mean that the reasonable reader does or must give equal weight to every part of the publication. The emphasis that the publisher supplies by inserting conspicuous headlines, headings and captions is a legitimate matter that readers do and are entitled to take into account. Contrary statements in an article do not automatically negate the effect of other defamatory statements in the article.

(Citations omitted)

71 Similarly, in *Mirror Newspapers v World Hosts* at 646, Aickin J noted that the emphasis by way of headline or other method given by a publisher is not to be ignored. To say that consideration must be given to the publication as a whole does not mean that the Court must give equal significance to each part of the publication.

72 The meaning which the respondents *intended* to convey by the words they published is irrelevant to the ascertainment of their natural and ordinary meaning. Even if they did not intend their words to defame Mr Hockey, they will still be liable if the ordinary reasonable reader understood them in that way. Similarly, evidence as to the actual understanding of the words by those who read them is immaterial.

73 The determination of the natural and ordinary meaning of words involves the application of the "single meaning" rule. This rule was explained by Diplock LJ in *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 at 173-5:

[When] words are published to the millions of readers of a popular newspaper, the chances are that if the words are reasonably capable of being understood as bearing more than one meaning, some readers will have understood them as bearing one of those meanings and some would have understood them as bearing others of those meanings. But none of this matters. *What does matter is what the adjudicator at the trial thinks is the one and only meaning that the readers as reasonable men should have collectively understood the words to bear.* That is “the natural and ordinary meaning” of words in an action for libel.

...

... The decision as to defamatory meanings which words are capable of bearing is reserved to the judge, and for this reason, and no other, is called a question of law. The decision as to *the* particular defamatory meaning within that category which the words do bear is reserved to the jury, and for this reason, and no other, is called a question of fact. But the recognition that there may be more than one meaning which reasonable men might understand words to bear does not absolve the jury from the duty of deciding upon one of those meanings as being the only “natural and ordinary meaning” of the words. Juries, in theory, must be unanimous upon every issue on which they have to adjudicate; and since the damages that they award must depend upon the defamatory meaning that they attribute to the words, they must all agree upon a single meaning as being the “right” meaning. And so the unexpressed major premise, that any particular combination of words can bear but a single “natural and ordinary meaning” which is “right”, survived the transfer from judge to jury of the function of adjudicating upon the meaning of words in civil actions for libel.

*But where an action for libel is tried by a judge alone without a jury, it is he who has to arrive at a single “right” meaning as “the natural and ordinary meaning” of the words complained of; and with the concentration of functions in a single adjudicator, the need for his distinguishing between meanings which words are capable of bearing and the choice of one “right” meaning which they do bear disappears.*

(Emphasis added)

See also *Charleston v News Group Newspapers Ltd* at 71-2; and *Ten Group Pty Ltd v Cornes* [2012] SASCF 99, (2012) 114 SASR 46 at [34], [47]-[50].

***Do the SMH printed articles convey the pleaded imputations?***

74 As noted earlier, the primary imputation pleaded by Mr Hockey to arise from the SMH printed articles is that he accepted bribes to influence decisions which he made as Treasurer of the Commonwealth of Australia. Although Mr Hockey did not abandon that imputation, or any of the other pleaded imputations, his case in relation to the SMH articles focused principally on alternative (e), namely, that he “corruptly sells privileged access to himself to a select group which includes business people and business lobbyists in return for donations to the Liberal Party”.

*The submissions of Mr Hockey*

75 Mr Hockey's counsel began by emphasising the headline "Treasurer for Sale". He submitted that the ordinary reasonable reader would understand that something which is for sale is something which can be bought. The headline was therefore reasonably understood as indicating that the Treasurer could be bought, which was tantamount to an allegation of corruption. The reader's understanding that this was so would have been confirmed by the overline appearing above the headline and, in particular, by the reference to a "secretive" fundraising body. Readers would have understood, counsel submitted, that they were being told that the fundraising body was secretive because there was something wrong about it.

76 Counsel submitted that ordinary reasonable readers would have understood that they were being told something significant. The presence of Mr Hockey's photograph, the headline and their location on the front page would, by themselves, have indicated that that was so. In these circumstances, it is to be expected, he submitted, that the headline would have had the effect of setting in the mind of ordinary reasonable readers the tone of the article and would have influenced their understanding of what followed.

77 Mr Hockey's counsel submitted that, far from the initial impression created by the headline and overline having been displaced by what followed, it was in significant respects reinforced. Readers' impression that the SMH was reporting that some sinister activity had occurred would have been confirmed by the first dot-pointed sub-headline which implied that NSF members were paying \$22,000 for access which was not available to others; by the name "Obeid" in the third dot-pointed sub-headline which "inject[ed] the concept of corruption" because the name Obeid is "synonymous with corruption"; by the references in the extract on page one from the editorial to politicians "selling access" being a "disquieting development", to "coming clean" and to what was received by Mr Hockey's "backers" in return for their "largesse", which implied that something untoward and secretive was going on; and by the bold notation on page one referring the reader to Mr Kenny's article "The price tag on Joe Hockey", which implied that Mr Hockey was receiving money personally.

78 Counsel placed particular emphasis on the first paragraph in the Nicholls article (which for convenience I will repeat):

Treasurer Joe Hockey is offering privileged access to a select group including business people and industry lobbyists in return for tens of thousands of dollars in donations to the Liberal Party via a secretive fund-raising body whose activities are not fully disclosed to election funding authorities.

In relation to this paragraph counsel submitted:

As I cross-examined the witnesses, your Honour, and put to them, that is a corrupt act. There can't be any doubt about it. If you said to someone, any person who was asked this question, "Look, the Federal Treasurer is offering select and privileged access in return for tens of thousands of dollars of donations to the Liberal Party", that is corruption. There's no question. There can be no question about it.

79            Thus, the submission was that the ordinary reasonable reader would have understood that the first paragraph, by itself, conveyed that Mr Hockey was acting corruptly in terms of pleaded imputation (e), by selling privileged access to himself to a select group, including business people and business lobbyists, in return for donations to the Liberal Party. Counsel had earlier described the type of corruption alleged as a form of "influence peddling". He submitted that the reference to the offer being to a select group, in return for donations to the Liberal Party via a "secretive" fundraising body implied to the ordinary reasonable reader improper conduct. That understanding was reinforced by the statement that the activities of the "secretive" fundraising body were not disclosed fully to election funding authorities, again implying something untoward.

80            Counsel submitted that the statement in para (2) of the Nicholls article that the ICAC is "probing" Liberal fundraising bodies such as the Millennium Forum and "questioning their influence" on "political favours" in New South Wales would have caused the ordinary and reasonable reader to draw a connection between the NSF and the bodies being investigated, and have made them think that the NSF itself may be the subject of investigation. The statement served in any event to show a link between Mr Hockey, on the one hand, and corruption, on the other. He submitted that the reader would also have understood the term "political favours" as another word for "corruption". This was made clear, he submitted, by para (3):

Mr Hockey offers access to one of the country's highest political offices in return for annual payments.

In relation to this paragraph, counsel also submitted:

Every reasonable person, everyone, ... would see that as an allegation of corruption. It can't be anything else. And if it were true that that was what my client was doing it would plainly be corrupt. Everyone would see it like that.

81           Thus, counsel submitted that, having read this far, the ordinary reasonable reader would have understood the SMH to be implying that Mr Hockey was acting corruptly.

82           Counsel referred to further aspects of the Nicholls article: the reference in para (4) to “VIP” meetings with Mr Hockey being provided “in return” for the annual fees; the claims of confidentiality in para (5) and to “what little information is available” in para (6) which, he submitted, was suggestive of there being something to hide; the reference in paras (7) and (8) to persons or entities who “stand to benefit” from legislative or regulatory changes contemplated by the Federal government (with the implication that these persons or entities were paying the money *because* they stood to benefit from the changes); the linking to the name Obeid and to AWH in nine paragraphs (paras (10)-(18)); and the linking in para (35) of the NSF with the Millennium Forum which was, in turn, linked in para (39) with an ICAC investigation. Counsel submitted that the ordinary reasonable reader was thereby invited to understand that activities of the NSF were in the same category.

83           Next, counsel drew attention to the heading running across the continuation of the Nicholls article on pages six and seven. He emphasised the expressions “Treasurer up for sale”, “secretive” and “coveted access”.

84           Counsel emphasised the references to the name Obeid in the third of the dot-pointed sub-headlines, in the body of the Nicholls article and in the graphics. He contended that these were both gratuitous and “eloquent” of corruption and contributed significantly to the understanding of the ordinary reasonable reader that corrupt conduct by Mr Hockey was being revealed to them.

85           In relation to the Kenny article, counsel emphasised the headline which conveyed to the ordinary reasonable reader that there was a price at which Mr Hockey could be bought.

86           Counsel submitted that, in this context, the ordinary reasonable reader would not have taken the opening sentence in the Kenny article (“Nobody is suggesting Joe Hockey is corrupt”) at face value. They would instead have understood that the SMH was saying exactly the opposite. In any event, given the force of the impression created by the time the reader reached the Kenny article, the reader would have ignored or discounted what Mr Kenny said in the first sentence. Counsel submitted that the conjunction “but” with which the second sentence of the article commenced also served to weaken the force of the first sentence.

87 Counsel emphasised in particular para (5) in the Kenny article, which would have conveyed to the reader, he submitted, that trust in Mr Hockey was questionable, as he was now “a product to sell” in the “ruthless search” for more campaign funds. Paragraph (6) also conveyed, counsel submitted, the same impression. He made a like submission with respect to the sentence in para (9) which referred to the marketing of Mr Hockey’s pivotal role in economic decision making, and by reference to paras (10) and (11) which referred to the sale of “special access” and to the uncertainty of the return which “well-connected companies and industry groups” had received “on their investment”.

88 Counsel also emphasised the photographs of Mr Di Girolamo and Mr Obeid. The former had been the chief executive officer of AWH, and the person who had given Mr O’Farrell, the former Premier of New South Wales, the \$3,000 bottle of Grange which had “brought [him] undone”, so that the mere mention of Mr Di Girolamo was suggestive of corruption. The reference to Mr Obeid Jnr had given “a specious glow of corruption” to what had been written about Mr Hockey.

***Relevant matters of context***

89 The ascertainment of the meaning which the SMH printed articles conveyed to ordinary reasonable readers should also take account of the circumstance that many such readers are likely, before reading the articles, to have seen the SMH poster. As will be seen later, I conclude that the SMH poster, considered by itself, did convey a defamatory imputation. It is accordingly appropriate to proceed on the basis that the content of the poster may have served to condition those who had seen the poster to expect that the SMH had unearthed a form of corrupt conduct by Mr Hockey.

90 Another relevant circumstance is that the SMH articles were published at a time when it can be taken that there was a heightened consciousness in New South Wales in particular about corruption arising from the receipt of benefits by public officials from persons who may benefit from their decisions. As already noted, it was common ground in the trial that the name Obeid had become identified with corruption following findings by the ICAC concerning activities of Mr Obeid, a former minister in the NSW State Government. On 8 April 2014, the SMH had reported evidence said to have been given to the ICAC by Mr Nicolaou, the Chief Executive of the Australian Hotels Association in New South Wales, that he had arranged a meeting for Mr Di Girolamo with Mr Newman, then Lord Mayor of Brisbane, on the basis that Mr Di Girolamo would make a donation of \$5,000 to



Mr Newman's re-election fund. Mr O'Farrell had resigned as Premier of New South Wales on 14 April 2014 (only three weeks before the SMH articles were published) following his acknowledgment that he had given incorrect evidence at the ICAC concerning his receipt of a bottle of Penfolds Grange. Senator Sinodinos had stood aside as Assistant Federal Treasurer on 19 March 2014 (only seven weeks before the SMH published the articles) following evidence at the ICAC as to activities of AWH at a time when he had been its chairman.

91 I record these matters only for the purpose of identifying a relevant part of the context in which the understanding of the ordinary reasonable reader is to be assessed. I am not to be taken as expressing any view as to the propriety or otherwise of the conduct of Mr Obeid, Mr Newman, Mr Di Girolamo, Mr O'Farrell, Senator Sinodinos or of AWH.

92 I consider that the heightened consciousness to which I have just referred is part of the context in which the understanding of the ordinary reasonable reader of the SMH articles is to be assessed because, by reason of these events, the ordinary reasonable reader may have been more ready to understand the SMH articles as conveying an imputation of corruption.

***Imputations (a) and (b)***

93 It is convenient to consider first the pleaded imputations (a) and (b) set out earlier. They are that Mr Hockey accepted, or was prepared to accept, *bribes* paid to influence decisions he made as Federal Treasurer. Putting to one side the tautological aspects of imputations in these terms, they are to the effect that Mr Hockey himself accepted, or was prepared to accept, payments of a particular character, namely, payments which were bribes made *for the purpose* of influencing decisions he made in his capacity as Treasurer.

94 The word "bribe" does not have a precise meaning as it is capable of encompassing more than one form of dishonest conduct by, or in relation to, a public official. However, I consider that the ordinary reasonable reader would understand that a bribe usually involves the elements of a payment to a public official personally or to someone else on the official's behalf; a reasonably close relationship between the payment, on the one hand, and an expected decision or action by the public official, on the other; and the payment being made to secure or induce a benefit to the payer from the decisions or action in question. The word bribe is not in ordinary understanding used to refer to the payments made by donors to political parties, or to political candidates, which are unconnected with any particular executive decision making, even if the motivation of the donors is to promote goodwill by the recipient towards themselves.

95 In these circumstances, the ordinary reasonable reader would not, in my view, have understood the SMH printed articles, read as a whole and in context, as conveying that Mr Hockey had accepted, or was prepared to accept, bribes to influence the decisions which he made as Treasurer. There is no suggestion of payments being made for the purpose of securing a benefit to the payer from a particular decision of Mr Hockey, or of any relationship between a payment and a particular decision. None of the three articles conveys in any way that Mr Hockey had accepted personally the payments in question. Nor is there any suggestion of payment being made to those close to Mr Hockey so that he obtained, indirectly, a private benefit. On the contrary, ordinary reasonable readers would have understood that the printed articles were referring to payments which were in the nature of political donations to the Liberal Party, albeit paid as membership fees to the NSF.

96 Apart from anything else, the articles make it plain that the payments are made to the NSF, and not to Mr Hockey personally. See paras (1), (4), (5) and (28)-(37) in the Nicholls article and paras (1), (6) and (9) in the Kenny article. The graphics on page six and seven make plain that the payments are made as membership fees of the NSF, that the NSW Liberal Party lodges a “consolidated disclosure” including the membership fees to the Election Funding Authority, and that the NSW Liberal Party then distributes the fees to other campaigns. This is not the stuff of bribes.

97 For these reasons I find that the articles in the printed SMH did not convey the pleaded imputations (a) and (b).

***Imputations (c) and (d)***

98 It is difficult to discern any material difference between pleaded imputation (d) and pleaded imputation (b). Counsel for Mr Hockey did not identify any such difference. I find that the SMH printed articles did not convey that imputation, for the same reasons as given in relation to pleaded imputations (a) and (b).

99 Counsel for the respondents submitted that pleaded imputation (c) was not conveyed. By this imputation, Mr Hockey alleged that the articles in the SMH conveyed that he “corruptly solicited payments to influence his decisions as Treasurer of the Commonwealth of Australia”. Counsel focused on the word “solicited”. He submitted that soliciting involves active conduct by which a person seeks, by entreaty, earnest or respectful request or endeavours, to obtain an outcome. Counsel submitted that there was nothing in the printed articles suggesting that Mr Hockey had sought any payment from anyone at all, whether in

the form of a membership to the NSF, a donation to the Liberal Party or a payment to influence his decisions.

100 This submission can be accepted only in part. Contrary to the submission of counsel, paras (1) and (3) of the Nicholls article stated expressly that Mr Hockey was *offering* access to persons in return for payments. In context, these were payments to the NSF. The extract from the editorial on page one contained a statement to like effect. The graphics on pages six and seven included an extract from the NSF website which, with three photographs of Mr Hockey, contained a statement in the nature of an overview of the benefits of joining the NSF.

101 I consider that these aspects of the articles conveyed to the ordinary reasonable reader that Mr Hockey was engaged in a form of encouragement of persons to join the NSF and to pay the fees which such membership entailed. The ordinary reasonable reader would understand that to be a form of soliciting.

102 However, I consider the respondents' submission that the articles do not convey any statement that Mr Hockey was soliciting payments "to influence his decisions as Treasurer" should be accepted. For the reasons already given, the articles make it plain that the fundraising is for the purposes of the Liberal Party or Mr Hockey's own election campaign, rather than any decision to be made by him in his capacity as Treasurer, and I consider that the ordinary reasonable reader would have understood them in that way.

103 For these reasons, I find that the ordinary reasonable reader would not have understood the printed articles in the SMH as conveying any of the pleaded imputations (c) and (d).

***Imputation (f)***

104 Mr Hockey's counsel did not make any discrete submissions with respect to pleaded imputation (f). That is the imputation that Mr Hockey "knowingly permitted a Liberal party fundraising forum with which he was associated to accept money from the corrupt Obeid family".

105 I find that the ordinary reasonable reader would not have understood this imputation to be conveyed. Although the Nicholls article in particular refers to the membership of AWH and said that it had been "linked to the family of corrupt former Labor power-broker Eddie Obeid" there is no statement at all that the NSF had accepted money from Mr Obeid or his

family. Further still, there is no suggestion at all in the articles that Mr Hockey had “knowingly permitted” the NSF to accept money from the Obeid family.

***Imputation (e)***

106 As noted earlier, although Mr Hockey did not formally abandon reliance on imputations (a)-(d) and (f), they were not at the forefront of his case as presented. Instead, his counsel focused on imputation (e). This is the imputation that Mr Hockey “corruptly sells privileged access to himself to a select group which includes business people and business lobbyists in return for donations to the Liberal Party”.

107 Counsel for the respondents submitted that ordinary reasonable readers would not have understood the print articles to be conveying either of those meanings. He submitted that the “clear message” conveyed by the printed articles was follows:

- (a) it is possible to obtain access to Mr Hockey in his capacity as Treasurer for the payment of a fee;
- (b) the fee is styled as a membership fee to join the NSF which, depending on the level of membership, provides exclusive members’ only access to Mr Hockey at various functions throughout the year;
- (c) the fee is, in reality, a political donation to the Liberal Party; and
- (d) it has not been possible to find out from electoral records, the NSF itself, or Mr Hockey, the identity of the NSF’s members.

108 The prominent headline “Treasurer for Sale” and “The price tag on Joe Hockey”, the overline on page one, the three dot-pointed sub-headlines on page one and the bold “tags” used in the course of the Nicholls article are important to the understanding of the ordinary reasonable reader, even when considered in the context of the article as a whole. Headlines are significant in attracting the attention of readers and in shaping their understanding of what follows. That is a principal reason for their use. They assist the reader to identify the gist of the article to which they relate. In the passage from *Rivkin* quoted earlier, McHugh J referred to the significance which the ordinary reasonable reader may attach to “conspicuous headlines, headings and captions”. Likewise, in *Mirror Newspapers* at 646, Aickin J noted the emphasis which can be conveyed by a headline.

109 The headline and opening paragraphs of an article are sometimes described in journalism as “valuable real estate” because of their capacity to inform the reader of the

essence of the article and to induce the reader to continue through the remainder of the article.

110           The respondents' submissions acknowledged that the headline "Treasurer for Sale" was "strong and eye-catching", but counsel submitted that it would nevertheless have been read and understood in its context. Important aspects of that context were the overline "Exclusive: Joe Hockey's secretive fundraising body" which appeared immediately above the prominent headline; the three dot-pointed sub-headlines; the opening paragraph of the Nicholls article; the remaining paragraphs on page one of the SMH; and the extract from the editorial which was printed on page one.

111           The respondents submitted that the reasonable reader would have understood from those passages in particular that the subject of the article was *access* to the Treasurer. That is because of the repeated mention of such access: in the first dot-pointed sub-headline, in paras (1) ("privileged access") and (3) ("access to one of the country's highest political offices in return for annual payments") of the Nicholls article; and in the extract from the editorial. Counsel also submitted that the headline to the continuation of the Nicholls article on pages six and seven of the SMH ("Treasurer up for sale with secretive fund-raising forum that charges up to \$22,000 for membership and coveted access") would have confirmed to the reasonable reader that the words "Treasurer for Sale" related to access to the Treasurer being used as a means of fundraising and not for payments to Mr Hockey personally. That understanding would have been confirmed to the reasonable reader, it was submitted, by the references in the Nicholls article to current and former members of the NSF and to the activities of the NSF as described in the statements attributed to Mr Carrozzi and Mr Orrell.

112           Next, the graphics outlining the respective membership levels and the benefits applicable to each level would have made it obvious to readers that the articles were about access to the Treasurer in return for what were, in effect, donations to the Liberal Party.

### ***Consideration***

113           The word "corrupt" and its cognates are capable of a variety of meanings when used in relation to those in public office. Account must be taken of this in considering what was conveyed to the ordinary reasonable reader. In *Drummoyne Municipal Council v Australian Broadcasting Corporation* (1990) 21 NSWLR 135 at 138, Gleeson CJ gave the following examples of the meaning of the word "corrupt" which, depending on context, may be applicable in a given case:

[I]t can mean that a person takes bribes, or that he abuses power entrusted to him, or that he improperly obtains private benefits from a public position.

Gleeson CJ went on to note that the range of possible meanings of the word “corrupt” when used in connection with public officials had been enlarged by the *Independent Commission Against Corruption Act 1988* (NSW) (the ICAC Act). It was not suggested in the present case that regard should be had to the statutory definitions or to the understanding of ordinary reasonable readers of corruption as defined in the ICAC Act.

114           The examples given by Gleeson CJ are helpful (but not definitive) in considering whether the SMH articles conveyed an imputation of corrupt conduct to the ordinary reasonable reader. The first two of the alternative meanings can be put to one side as being inapplicable in the context of pleaded imputation (e). It is the third alternative which requires consideration.

115           The ordinary reasonable reader would not regard every private benefit obtained by politicians and ministers from their office as being improper. Some such benefits are provided for expressly in the established entitlements; some can arise intrinsically from the office; and others are an accepted incident of the office. Ordinary reasonable readers are likely to think that politicians and ministers may obtain a range of private benefits from their office, which are unremarkable and do not involve any suggestion of corruption. On the other hand, ordinary reasonable readers are likely to regard some forms of attempts to obtain personal benefits from the exploitation of a politician’s office, or the influence it affords, as a form of corruption. In particular, ordinary reasonable readers are likely to regard a Minister, especially a Minister holding the high office of Treasurer, making access to him or her *conditional* on a donation to the Minister’s political party as both improper and a form of corrupt conduct. Between these extremes there is no doubt a range of conduct, some of which ordinary reasonable readers would regard as corrupt and some not.

116           The ordinary reasonable reader may be taken to have some understanding of political fundraising and the activities associated with it. They would understand that political parties do raise funds with which to conduct election campaigns and that the major parties have permanent directorates or secretariats which must be financed. They would understand that political parties adopt a variety of fundraising stratagems, but rely very much on donations from party members and supporters as well as others.

117 The ordinary reasonable reader would, in my opinion, be aware that it is common for parliamentarians and candidates for election to hold fundraising events at which the attraction for attendance is that a prominent Parliamentarian, a Minister, or even a Premier or Prime Minister will be guest speaker. It is the prospect of hearing this person speak, or meeting them afterwards as they mingle, as well perhaps as the attendee's own political allegiance, which is "exploited" in the promotion of these events. Mr Hockey annexed to his affidavit an apparent example of this kind of fundraising in the form of an article published in the SMH and The Age on 6 May 2014. The headline to the article in the SMH was "Lunch with Shorten for \$3,300: Labor offers business leaders exclusive access" and the headline in The Age "Meet Bill Shorten for just \$3,300". The opening paragraphs in this article were:

Labor is offering business leaders exclusive access to Opposition Leader Bill Shorten before the federal budget, but it comes at a high price – \$3,300 for a boardroom lunch.

...

An email from the Director of the Federal Labor Business Forum, Kate Dykes, urges would-be attendees to "avoid disappointment" as tickets to the Shorten event are strictly limited.

The high-priced fund-raiser is due to be held on Thursday at an undisclosed location in the Sydney CBD and is billed as a boardroom lunch with the Opposition Leader. The \$3,300 price is for non-members of the forum; for members the event will cost \$2,500.

118 Ordinary reasonable readers do not, in my opinion, regard such practices as corrupt, even though they understand that the guest speaker is obtaining a benefit for the candidate or their party from the "allure" of the office they hold. They are an accepted form of political fundraising.

119 I also consider that the ordinary reasonable readers would have some understanding of the requirement for public disclosure of public donations. They would also understand the rationale for the requirement of disclosure.

120 Against this background, I consider that some readers may reasonably have understood some of the initial passages in the SMH printed articles to be stating that Mr Hockey was making improper use of his important office as Treasurer by agreeing to see persons *if* they made a contribution to his own campaign funds or to the Liberal Party. They are likely to have understood from these particular paragraphs that the SMH was indicating that Mr Hockey was engaged in a form of corrupt conduct. The headline "Treasurer for Sale", the overline referring to a "secretive fundraising body" and the first, second and third

paragraphs of the Nicholls article in particular may have created an impression to that effect in the mind of some reasonable readers. The first and third paragraphs in the Nicholls article could, considered by themselves, be understood on one view as suggesting that it was Mr Hockey personally who was offering access to himself *in exchange for* payment or that Mr Hockey imposed, *as a condition* of his agreeing to see persons in his capacity as Treasurer, that they make donations to the Liberal Party. Alternatively, such readers could have understood the SMH to be saying that Mr Hockey was seeking to profit from his office by agreeing to see those who had made significant contributions towards his re-election. It is also pertinent that the second paragraph links Liberal Party fundraising bodies to possible corruption by its reference to the ICAC probe of the Millennium Forum, another Liberal Party fundraising body.

121 I also consider that para 4 of the Nicholls article, whether by itself or in conjunction with the paragraphs to which I have just referred, may have been understood by some ordinary reasonable readers as indicating that members of the NSF were entitled to one-on-one meetings with Mr Hockey. That too may have suggested to them that the articles were imputing corrupt conduct to Mr Hockey in his provision of privileged access.

122 Accordingly, I consider that some ordinary reasonable readers may have understood that the initial paragraphs in the SMH printed articles conveyed pleaded imputation (e). This is particularly so in respect of those who also saw the poster. There is therefore a reasonable basis for the submissions made on Mr Hockey's behalf in that respect as, apart from its inclusion of the word "corruptly", it is a close paraphrase of the first part of para (1) of the Nicholls article.

123 However, the articles have to be read as a whole, taking account of the influential effect of the headlines, the opening paragraphs just mentioned, the other prominent aspects and, for those who saw it, the poster. In my opinion, when ordinary reasonable readers read the articles as a whole, they would not have understood that they were being informed that Mr Hockey was engaged in a form of corrupt conduct of the kind just described. They would instead have understood that they were being told that he had adopted, or was a willing participant in, a form of political fund-raising in which the prospect of access to him was held out as the attraction to donors and that this practice allowed persons in business, those who advocated on their behalf, and those who could afford to pay a substantial sum as a political donation, access to him in that form which was unlikely to have been available to them



otherwise. They would have understood that they were being informed that this was secretive in that relatively little information was available as to those who were obtaining access by this means, what occurred when they did meet Mr Hockey, and the benefit they derived from their payments. Ordinary reasonable readers would also have understood that they were being informed about “access” to Mr Hockey being linked to political donations in a way which the SMH considered constituted a circumvention of the disclosure requirements in the electoral laws. They are likely to have understood that the making of substantial donations to political parties without the disclosure which the law requires could allow a circumstance in which influence and possibly corruption might occur.

124 I also consider that ordinary reasonable readers would have understood that they were being informed that Mr Hockey was engaging in a practice which the SMH regarded as undesirable and inappropriate.

125 However, ordinary reasonable readers would, in my opinion, have understood the distinction between conduct which may be undesirable or inappropriate, on the one hand, and conduct which is corrupt, on the other, and would not have regarded the articles as conveying that Mr Hockey’s conduct was corrupt, let alone that he was “peddling influence”. Instead, they would have understood the articles to be conveying that Mr Hockey was engaged in a non-corrupt form of fundraising which used the allure of his office.

126 A number of aspects of the articles indicate that this is an appropriate understanding of what they conveyed.

127 First, the ordinary reasonable reader would have quickly understood that the articles were not suggesting that Mr Hockey personally was receiving payments in return for access to him.

128 Secondly, readers would also have understood readily that the payments to which the articles referred were not payments which Mr Hockey imposed, or expected, as a condition of access to him, and that Mr Hockey did not provide access *in exchange* for payments in a corrupt sense.

129 Thirdly, readers would have appreciated that the payments being made were in effect donations to the Liberal Party.

130 Fourthly, ordinary reasonable readers would have considered that the form of fundraising involved was not dissimilar to forms of fundraising commonly adopted by

political parties and candidates. Mr Hockey's own case, as opened, was that the NSF was no different from many similar organisations operated on both sides of politics.

131 I referred earlier to the importance of the main headline and the overline. Regard must also be had to the three dot pointed sub-headlines, each of which was also prominent and made it plain that it was not Mr Hockey who was making a charge for access to him. The three dot-pointed sub-headlines refer expressly to the NSF and its activities. The extract of the SMH editorial on page one is also likely to have confirmed for ordinary reasonable readers that it was not Mr Hockey personally who was charging a fee for access to him.

132 Readers' understandings would have been confirmed by the balance of the Nicholls article which, in the main, concerns the NSF, its membership, the manner of the access to Mr Hockey provided by the NSF, the involvement of known members of the NSF, and the similarity of the NSF to other Liberal Party fundraising vehicles.

133 The articles make it plain that the payments which they discussed were not payments to Mr Hockey personally, or for his personal use, but payments which were in effect donations to the Liberal Party as an aspect of fundraising activities. In addition to the overline and the three dot-pointed sub-headlines, this character of the payments is also evident in the references to "donations to the Liberal Party via a secretive fund-raising body" (para (1)); "donors are members of the [NSF], a campaign fundraising body run by Mr Hockey's North Sydney Federal Electoral Conference" (para (4)); "the North Sydney FEC officials who run the forum – which is an incorporated entity of the Liberal Party" (para (5)); Mr Orrell's statement that "money raised by the [NSF] was often distributed to Liberal Party marginal seats" (para (30)); "the structure of the [NSF] is based on that of similar vehicles established by other Liberal MPs" (para (35)); and a spokesperson's statement that "donations [are] disclosed to the AEC in accordance with the law ... and funds are used for the work of the party" (para (40)).

134 In my opinion, Mr Uhlmann, the Print Editor of The Canberra Times, described accurately what was conveyed when he said of the articles: "[they] gave you an insight into how some of these things [fundraising] are done".

135 The Kenny article would have confirmed the understanding of the ordinary reasonable reader. It commences with the express statement "Nobody is suggesting Joe Hockey is corrupt" and then makes the distinction between conduct of that kind and conduct which

corrupts “Australia’s democratic integrity”. The ordinary reasonable reader would have well understood the distinction which was being made. The Kenny article does, as Mr Hockey’s counsel emphasised, appear under the headline “The price tag on Joe Hockey” but the ordinary reasonable reader would have understood that as a reference to the amount to be paid to the NSF in the expectation of access to Mr Hockey. Any impression that the “price tag” was a reference to an amount by which Mr Hockey’s judgement or discretion could be bought or that it was an indication of corruption would have been dispelled by the overall content of the articles, by the overline “Campaign funds Fair go questioned”, and by the first paragraph in the Kenny article.

136 As already noted, counsel for Mr Hockey submitted that the opening statement in the Kenny article did not have the effect of removing the imputation that Mr Hockey was acting corruptly. The respondents submitted that this submission overlooked the distinction to be drawn in this context between a *denial* of a defamatory allegation and an *express disclaimer* of such an allegation. However, their submission did not elaborate the nature of the distinction, nor did they refer to any authority bearing upon its relevance.

137 As already indicated, the SMH articles must be read as a whole. The opening paragraph to the Kenny article, whether it be a disclaimer or a denial, forms part of that whole. As such, it is not decisive, in the circumstances of this case, of whether pleaded imputation (e) was conveyed to ordinary reasonable readers. The relevant principles were stated by Hunt J in *Farquhar v Bottom* (1980) 2 NSWLR 380 at 387-8:

(33) I was urged on behalf of the defendants to construe the matter complained of as a whole, and to conclude that the bane created by the author’s assertion had been outweighed by the antidote of the defendants’ denial: ... The mere presence of a denial of a defamatory charge does not make the matter complained of as a whole incapable, nevertheless, of conveying the defamatory imputation so denied for, in such a situation, the reader is presented with two conflicting assertions, with the choice in accepting either ...

(34) There are cases, of course, in which the refutation is of such a nature that, taken as a whole, the matter complained is incapable of conveying the imputation refuted, for example, where the imputation arises by way of inference only, and the matter complained of itself contains an express disclaimer of any intention to convey such an imputation ... or where the refutation consists of a statement of fact destructive of the entire basis upon which the imputation relies ...

(35) But such cases are comparatively rare ...

138 Angas Parsons J said, succinctly, in *Savidge v News Ltd* [1932] SASR 240 at 245:

A contradiction of the assertion published, whether made by the newspaper on its own account, or on the authority of anyone else, does not limit the reader to the refutation and oblige him to disregard the assertion if, interpreting the document as a whole, the defamatory meaning charged could be made out as a reasonable, natural or necessary inference from the words used.

139           The opening paragraph to the Kenny article has to be assessed by reference to these principles. It is but one part of the material to be considered when assessing whether the SMH articles conveyed imputation (e). In particular, the opening sentence to the Kenny article may not be sufficient to remove the imputation if it is otherwise conveyed by the balance of the articles, including the balance of the Kenny article itself.

140           However, the Kenny article is, in my opinion, important in confirming what the ordinary reasonable reader would have understood on reading the SMH articles. Such readers would have understood the Kenny article as pointing up the issue of principle raised by the articles. That was whether a form of political fundraising, acknowledged in the Kenny article to be used on both sides of politics, which involves payment of substantial sums in anticipation of a form of regular access to a Minister and which is otherwise not generally available in that form, undermines confidence in the governmental process. The ordinary reasonable reader would, taking this article together with the Nicholls article, have understood that this is what was being conveyed.

141           In many respects, much of Mr Hockey's claim was based on a simple syllogism: politicians who can be bought are corrupt; the statement that Mr Hockey was for sale meant that he could be bought; therefore the SMH articles conveyed that Mr Hockey was corrupt. It is not axiomatic, in my opinion, that ordinary reasonable readers would have accepted that the first part of the syllogism (many are likely to have wanted to know the sense in which politicians can be bought). However, even if they did, I consider that such readers, reading the SMH articles as a whole and in context, would not have understood the SMH to be conveying the second element of the syllogism, because they would have understood that what was being conveyed was not that Mr Hockey, let alone his judgment or discretion, could be bought but that Mr Hockey and the NSF were using a method of political fundraising made attractive to donors by the prospect of regular access to Mr Hockey.

142           Put slightly differently, the ordinary reasonable reader would have understood on reading the articles as a whole that the SMH was reporting on a method by which access to Mr Hockey in his important role as Treasurer could be obtained by the payment of significant

sums, but not that Mr Hockey himself, or his judgment or discretion, could be bought. This was so despite the “strong and eye-catching” headline “Treasurer for Sale”.

143 As noted, Mr Hockey’s pleaded case also relies on the Hartcher article. Ultimately, that did not feature prominently in the submissions made on his behalf. I do not consider that it has the effect, by itself or in combination, of causing the other parts of the SMH to convey the defamatory imputations of which Mr Hockey complained. Its location alongside the Nicholls article and the Kenny article would be regarded by ordinary reasonable readers as no more than a matter of publisher’s convenience. That is to say, the grouping together of articles dealing with common subject matters or common themes. At its highest, it may have illustrated how the use of forums such as the NSF can give rise to undesirable practices.

144 Accordingly, in my opinion, Mr Hockey’s claims in respect of the printed SMH articles on 5 May 2014 fail.

145 I add that I would have reached this same conclusion even without regard to the Kenny article.

***Do The Age printed articles convey the pleaded imputations?***

146 Mr Hockey claimed that the printed articles in The Age conveyed the same defamatory imputations as did the printed articles in the SMH.

147 In my opinion, these claims fail for the same reasons which I have given in relation to the SMH.

148 As with the SMH, ordinary reasonable readers could have understood from the principal headline and the first few paragraphs of the Nicholls article, considered by themselves, that Mr Hockey personally was offering access to himself in his capacity as Treasurer in exchange for political donations. However, the reader would not have to read very far before appreciating that that was not what the articles were conveying and that their subject was a form of political fundraising through a forum which provided access to Mr Hockey as its principal attraction.

149 The three dot-pointed sub-headlines tend to make it more obvious that The Age was reporting on means of access to Mr Hockey, rather than on Mr Hockey selling himself or access.

150 Ordinary reasonable readers would not, in my opinion, have understood that the conduct described by the articles had the features with which corruption is normally associated: payments having a personal benefit, or being associated with particular decisions, being made with the intention of deriving some benefit for the recipient, or involving a form of improper exploitation of Mr Hockey's office. Nor would the ordinary reasonable reader have considered that the manner in which The Age articles reported that conduct as conveying an imputation that Mr Hockey was behaving corruptly. Mr Kenny's article, even taking into account the headlines beneath which it appeared, would have confirmed to them that The Age was not making an imputation of corruption.

151 As with the SMH, ordinary reasonable readers are likely to have understood The Age to be reporting that Mr Hockey was engaging in a form of commonly accepted political fundraising, although in circumstances involving a number of features which The Age considered undesirable. For the reasons given earlier, they are not likely to have regarded this form of political fundraising as corrupt.

152 Contrary to the submission of Mr Hockey's counsel, I do not regard the two headings to Mr Kenny's article as, by themselves, making allegations of corruption.

153 The impression of the ordinary reasonable reader that the subject of the articles was political donations would have been confirmed, in my opinion, by the headline to the Pyne article with which the subject articles were juxtaposed.

154 I observe that although the SMH poster was distributed to some outlets in Victoria (and presumably displayed by those outlets), its distribution was much less than in New South Wales. It is likely that relatively few of the readers of The Age also saw the SMH poster so that it could not have influenced the views of readers more generally of what was being conveyed.

***Do The Canberra Times printed articles convey the pleaded imputations?***

155 Mr Hockey pleaded that the articles in the printed Canberra Times conveyed the following defamatory imputations:

- (a) The applicant corruptly sells privileged access to himself to a select group which includes business people and business lobbyists in return for donations to the Liberal Party;
- (b) The applicant knowingly permitted a Liberal Party fundraising forum with which he was associated to accept money from the corrupt Obeid family.

These are imputations (e) and (f) pleaded in relation to the SMH and The Age articles.

156           The conclusion that the articles printed in The Canberra Times did not convey the defamatory imputations alleged can be reached even more confidently.

157           The Canberra Times did not carry the headline “Treasurer for Sale” on which the submissions for Mr Hockey placed much emphasis. Instead, its page one headline (“Paying their way: how a select group buys access to the Treasurer”) made it more obvious that the subject of the article was the means by which “a select group” was able to “buy access” to the Treasurer. It suggested that the focus of the article was on the conduct of the “select group” rather than improper conduct by Mr Hockey.

158           This impression would have been reinforced for the ordinary reasonable reader by the heading on page four “There’s a price tag on influence and that’s not a fair go”. That suggested that the articles were raising issues about “a fair go” which is not a concept used to describe corruption.

159           I note in addition that relatively few of the SMH posters were distributed in the ACT.

***The SMH poster***

160           In relation to the SMH poster, Mr Hockey pleaded that it conveyed imputations (a)-(d) inclusive.

161           The SMH distributed about 2,466 of the posters. Most, but not all, were distributed in New South Wales with the intention that they would be placed outside locations at which the SMH was for sale with a view to attracting the attention of passers-by and to inducing them to purchase the SMH. Although there was no direct evidence that this is so, I find that the posters were used in this way.

162           It was common ground that the meaning conveyed by the posters is to be assessed on the basis that they were a discrete publication. In *World Hosts Pty Ltd v Mirror Newspapers Ltd* [1976] 1 NSWLR 712 at 725, Glass JA said that “posters stand in a special position, for the obvious reason that they are published to many persons who do not read the newspaper itself”. Glass JA referred in this respect to the finding of the New South Wales Court of Appeal in *West v Mirror Newspapers Ltd* (unreported, 14 May 1973) that “a plaintiff may declare upon words published in a poster, and disregard the very considerable qualifications

placed upon those words by what appears in the newspaper”. See also *Sun Life Assurance Co of Canada v WH Smith and Son Ltd* (1933) 150 LT 211 at 212; *Pedavoli v Fairfax Media Publications Pty Ltd* [2014] NSWSC 1674 at [60].

163 The respondents accepted that at least some of the persons who saw the poster and who did not read the SMH print or website articles would reasonably have understood the poster to refer to Mr Hockey given the notoriety of the fact that he is the Federal Treasurer. Some may have understood instead that the articles were referring to the Treasurer in the New South Wales State Government but, for present purposes, that is immaterial.

164 Counsel for the respondents submitted that each of the pleaded imputations in relation to the poster presupposes that the ordinary reasonable reader would have reached “a concluded view”, from the poster alone, that the SMH was alleging bribery or corruption by Mr Hockey of a particular and precise kind, namely the acceptance of, or preparedness to accept, bribes or other payments in return for an influence on decisions taken by him in his capacity as Treasurer. He submitted that this presupposition was inappropriate. Counsel for Mr Hockey was critical of this submission, submitting that it was tantamount to a submission that the Court had to be satisfied that readers of the poster had believed the truth of what the poster conveyed in order for it to be defamatory, a proposition which is inconsistent with the authorities: see *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239 at 1246.

165 I did not understand the respondents’ submission to be to the effect for which counsel for Mr Hockey contended. Instead, the submission was part of a wider submission of the respondents that, in assessing the meaning conveyed by a newspaper poster, account should be taken of its overall effect and purpose. Thus the respondents submitted:

[3.25] The nature of a poster is that it promotes a main story the newspaper is running that day. As the ordinary reasonable reader knows, such posters are designed to catch the reader’s attention and to intrigue him or her about the subject matter of the corresponding article. He or she knows the publisher is attempting to entice them to read the article, and is not by the poster telling or purporting to tell them the whole story.

[3.26] The very nature of a poster is that it communicates to the reader that there is more to read, and therefore more to the story, than just the words on the poster. Thus the reader is intrigued, but is not in a position to reach a conclusion in his or her mind as to what the publisher is saying about the subject of the story. If the story has any impact at all on the mind of the reader, he or she, acting reasonably, will naturally suspend judgment until such time as he or she has read the corresponding article or articles.



166 One may accept that a poster has the effect for which counsel for the respondents  
contended but it would not be appropriate to conclude that its effect was confined in that way.

167 I consider that the poster in this case would have been understood by ordinary  
reasonable readers as conveying assertions of fact, in particular, that the SMH had carried out  
an investigation which had revealed matters indicating that Mr Hockey was “for sale” and  
that that day’s edition contained a report of what the investigation had uncovered. There was  
nothing in the poster to indicate that what was “for sale” was a form of access to Mr Hockey  
in the context of a means of commonly accepted political fundraising.

168 In the circumstance of the heightened consciousness of issues of corruption in New  
South Wales at the time, to which I referred earlier, some ordinary reasonable readers are  
likely to have understood that the poster was indicating that the SMH contained an article  
concerning corrupt conduct by Mr Hockey. The words “for sale” implied that that conduct  
involved the receipt by him of payment of an improper kind, or a willingness on  
Mr Hockey’s part to receive such payments. In context, the ordinary reasonable reader would  
have understood there to be an assertion that Mr Hockey was taking, or willing to take,  
payments which were influencing his decisions as Treasurer of the Commonwealth. That is  
to say, ordinary reasonable readers would have understood the poster, considered by itself, to  
be conveying imputations (c) and (d).

169 Those readers who later read the SMH article would, for the reasons given earlier,  
have appreciated that that was not what the SMH was in fact conveying. However, those  
who did not read the SMH article would not have had their initial understanding removed in  
this way.

170 I am not satisfied that the ordinary reasonable reader would have understood the  
poster to be conveying the more specific imputations (a) and (b), these being particularly  
egregious forms of improper conduct for a politician.

171 Another way of expressing my conclusion is to say that I accept the respondents’  
submissions that readers of the posters would have been intrigued and perhaps enticed to read  
further. However, I am satisfied that the interest excited by the poster prompting them to  
read further would have been their understanding that the SMH had uncovered a form of  
corrupt conduct in the form of imputation (c) and (d) and an interest to find out the details of  
that conduct.

172 Accordingly, I am satisfied that Mr Hockey's claims in respect of the SMH poster  
should be upheld in respect of imputations (c) and (d).

***The tablet apps***

173 Each of the SMH, The Age and The Canberra Times published by way of their  
respective tablet "apps" the Nicholls and Kenny articles. Subject to one qualification, each of  
these publications was in relevantly the same terms and they can conveniently be addressed  
together.

174 The content of the articles in this medium was identical to the print articles although  
the layout, being adapted to a form suitable for online access, was different.

175 The first "page" in these publications in the case of the SMH and The Age had a large  
photograph of Mr Hockey and adjacent to it a headline "Exclusive" and, under that headline,  
the headline "Treasurer for Sale". The three dot-pointed sub-headlines on the first page of  
the online article were the same as those in The Age printed articles, being:

- Business, lobbyists pay for privileged access
- Secret 'forum' chaired by hospitality industry lobbyist
- Australian Water Holdings made donations

176 The Canberra Times' version did not include this page.

177 The heading to the Nicholls article was "Treasurer for Sale: Joe Hockey offers  
privileged access". The heading to the Kenny article was also different from those in the  
print versions, being "Cash for a chat is corrupting our democratic integrity".

178 The graphics in the print articles were substantially reproduced in the website version,  
although they did not include the extract from the NSF website.

179 None of the parties suggested that the differences in format and content of the online  
articles were significant, and, accordingly, it is not necessary to note them further.

180 Mr Hockey pleaded that these publications conveyed the same defamatory  
imputations as did the print articles.

181 For the reasons which I have given in relation to the print articles, I reject each of  
those claims.

***The websites***

182 Each of the SMH, The Age and The Canberra Times published the Nicholls article on their respective websites.

183 Subject to one matter, the publications were relevantly identical and, again, it is convenient to consider them together. The one difference is that the SMH and The Canberra Times hyperlinks to the Nicholls article were as follows:

**Hockey's secretive fund-raising lobby**

A select group of 'VIPs' and lobbyists offered confidential access to the Treasurer

whereas the hyperlink to the Nicholls article on The Age website was:

**Treasurer Joe Hockey for Sale**

**Exclusive** Hockey grants privileged access in return for donations. Corrupting democracy

184 On clicking on these links, the reader was taken to the Nicholls article which appeared under the heading "Treasurer for Sale: Joe Hockey offers privileged access". The version of the Nicholls article published on the websites contained additional paragraphs after the paragraph which I have numbered (9). I will use the number (9) with a suffix in quoting these paragraphs:

- (9A) On Monday, Mr Abbott was asked if he was comfortable with Mr Hockey's fundraising activities during an interview with Channel Nine.
- (9B) Mr Abbott responded by saying while he had not read the article, "all political parties have to raise money".
- (9C) "Typically, you raise money by having events where senior members of the party go and obviously they meet people at these events," he said.
- (9D) "The alternative to fundraising in this time-honoured way, is taxpayer funding."
- (9E) Mr Abbott said that in the context of a "very tough" budget, the idea that taxpayers should fund political parties was "very, very odd".
- (9F) When asked if there should be a federal ICAC, Mr Abbott said that he thought that Canberra had a "pretty clean polity".
- (9G) "The thing is that we're going to keep the lobbyists out [of politics]. And the problem that ICAC is exposing is a problem of lobbying, essentially it's influence peddling ... and we're going to make sure that that has no place whatsoever federally."

The website article then had the heading "Australian Water Holdings" appearing before the paragraph which I have numbered (10).

185           The evidence did not indicate the circumstances in which these additional paragraphs  
were inserted. It is likely to have been later on 5 May 2014 as other evidence indicates that  
the statements attributed to Mr Abbott were made by him that morning on the Channel Nine  
Today Show.

186           In addition to the Nicholls article, the website articles contained the same graphics as  
were contained in the print version (although laid out differently).

187           Although there are indications that the Kenny article at least may also have been  
published on the websites, Mr Hockey has not sued separately on such a publication, or for  
that matter on any publication on the website of the Hartcher article, the questions addressed  
to the Liberal Party of New South Wales and Mr Hockey and their respective answers, or the  
extract from the SMH editorial.

188           Mr Hockey pleaded that the website versions conveyed the same imputations as did  
the print versions.

189           For the reasons given in relation to the printed articles, I reject those claims.

***SMH mobile electronic devices***

190           The SMH also published the Nicholls article on the version of its website optimised  
for mobile electronic devices. The article also appeared under the heading “Treasurer for  
Sale: Joe Hockey offers privileged access”. It incorporated part only of the graphics used in  
the print articles, being the portion containing the membership packages of the NSF as  
published on its website. It also incorporated the paragraphs (9A) to (9G) above.

191           Mr Hockey pleaded the same six imputations in relation to the publication on the  
mobile website.

192           For the reasons given earlier, I reject each of those claims.

***The Age mobile electronic devices***

193           The Age also published the Nicholls article by making it available on its mobile  
website. Access to the article was by way of hyperlink which was as follows:

**Treasurer for Sale: Joe Hockey offers privileged access**

**Sean Nicholls** | Treasurer Joe Hockey is granting privileged access to a select group  
of business leaders in return ...

The content of the publication on The Age mobile website was the same as the content in the counterpart publication by the SMH.

194 Mr Hockey pleaded that this publication conveyed the same defamatory implications. For the reasons given earlier, I reject those claims.

***The Age tweets***

195 Three of the matters sued upon by Mr Hockey were published on the Twitter account belonging to The Age (I will refer to these collectively as the “Twitter matters”). Mr Hockey’s pleading indicates that each of the Twitter matters was first published at about 1:11pm on 4 May 2014, that is, the day before the publication of the printed articles. The date 4 May also appears on the copy of the first Twitter matter which was tendered at the trial. This date and time is clearly a mistake as the other evidence in the trial indicates that all electronic publications were made in the early hours of Monday, 5 May 2014, after the finalisation of the printed articles.

196 The first of the Twitter matters was a “tweet” which, after a line identifying The Age’s Twitter account as the author, comprised only the words “Treasurer Hockey for sale” and a truncated hyperlink appearing as “theage.com.au/federal-politi...”. The evidence of Mr Holden, the editor of The Age, indicated that the hyperlink was to the “story” as it appeared on the website of The Age. Below the text of the tweet, alongside options to “Reply”, “Retweet”, and “Favorite”, was another hyperlink using the words “View Summary”.

197 The second Twitter matter was described in Mr Hockey’s pleading as a tweet containing a “summary” comprising the following words:

**Treasurer for Sale: Joe Hockey offers privileged access**

Treasurer Joe Hockey is granting privileged access to a select group of business leaders in return for political donations totalling hundreds of thousands of dollars each year.

198 This text appeared alongside a photo of Mr Hockey and above another hyperlink using the words “View on web”, which I infer also led to the “story” on The Age website.

199 The third Twitter matter was described as a “tweet and article”. As tendered, this matter was the same as the second Twitter matter described above, but in conjunction with a copy of the Nicholls article as it appeared on The Age website.

200 Counsel for both parties at the trial referred often to “tweets” in the plural. However, there are some features of the Twitter matters which point to them being aspects of the one tweet. First, Mr Hockey’s pleading indicates that each of the Twitter matters was published at the same date and time (though, as mentioned, the pleaded dates and times must be mistaken). Secondly, there is the hyperlink “View summary” appearing below the first bare tweet. Thirdly, the text of the summary in the second and third Twitter matters exceeds the 140-character limit which is usually imposed on tweets.

201 Experience suggests that when a user’s tweet contains a hyperlink, the Twitter website will itself generate and display automatically a summary of the external website to which it is linked. It may be that the second Twitter matter is simply the summary which the Twitter website would display when a user clicked the “View summary” hyperlink below the bare tweet, and that the third Twitter matter comprises that same summary in addition to the Nicholls article which would be reached via the “View on web” hyperlink.

202 These features may give rise to some questions which may have to be addressed at some stage in relation to defamations said to be caused by tweets. It may be that a distinction is to be drawn between the bare tweet submitted by a Twitter user, on the one hand, and those elements appearing on the Twitter website which are beyond the user’s control, on the other. There may be a question as to whether the Twitter account holder should be held to be the publisher of a summary which is generated automatically by the Twitter website. However, it is unnecessary to consider those questions in this case as, first, there was no direct evidence as to the relationship between the three Twitter matters and, secondly, The Age admitted that it was the publisher of each of the Twitter matters.

203 Having noted the above matters, it is appropriate to address each of the Twitter matters as pleaded.

204 There is a question as to whether the defamatory meaning of the first two Twitter matters is to be determined by reference to each matter considered by itself, or whether account should also be taken of the articles for which the matters gave a hyperlink.

205 Mr Hockey’s counsel submitted that a tweet should be regarded as a discrete publication and its defamatory meaning determined separately, in the same way that the meaning of a poster for a newspaper article is considered separately from the article to which it relates. That was so, he submitted, because the message which The Age’s Twitter

followers received on their iPad, tablet or mobile phone was the bare tweet and they saw the article only if they clicked on the hyperlink. Counsel referred to the evidence that, as at 5 May 2014, The Age had about 280,000 followers on its Twitter account and that some 789 only of these had that day downloaded the article headed “Treasurer for Sale: Joe Hockey offers privileged access”. This meant, counsel submitted, that of those who received the tweet, some 279,000 had not gone on to read the hyperlinked article, making it inappropriate to regard the tweet and the article as one publication.

206 In the passage in *Pedavoli* to which reference was made earlier, McCallum J rejected (in relation to a submission about the efficacy of an offer of amends) a submission to the effect that a tweet should be likened to a newspaper billboard. McCallum J said at [60]:

[60] ... [Counsel] submitted that Twitter should be regarded as being in the nature of a billboard outside a newsagent, serving as an advertisement for the newspaper. Although I was initially attracted to that argument, upon reflection I do not think it can be right. A billboard advertises the newspaper but it does not provide access to any part of it. Twitter provides access to particular articles by sending a link to followers of the relevant Twitter account. It is a way of disseminating material to a wider audience, an audience which is unlikely to overlap completely with those who buy or subscribe to the newspaper in other forms. It sends particular parts of the newspaper, chosen by the first defendant, into a different public forum, inviting comment.

McCallum J held accordingly that an offer of amends had to be made to all those who may have accessed the article in question by means of the Twitter account.

207 The reasoning of McCallum J in the context of an offer of amends does not, in my opinion, foreclose the question of whether the meaning conveyed by a tweet may be determined without reference to the article to which it provides a hyperlink. In my opinion, it is not necessary to resort to analogies with newspaper posters in order to conclude that it may. The greater ease by which the reader may obtain access to the article in question is not a reason for concluding that all readers of the tweet will exercise that access. Some may read the tweet without going further.

208 There is some force in the submission of counsel for the respondents to the effect that the ease with which followers of tweets may obtain access to the article suggests that, if the tweet had any impact on those reading it, they are likely to have used the hyperlink to read more. However, this is matter going to damages rather than to liability.

209 On this basis, I consider that the first bare tweet by The Age does convey the same defamatory meaning as did the SMH poster, namely, imputation (c) that “the applicant corruptly solicited payments to influence his decisions as Treasurer of the Commonwealth of Australia”. For the reasons given earlier, I do not accept that the first tweet conveyed imputations (a) and (b), and imputation (d) is not materially different from imputation (c).

210 In relation to the second Twitter matter, being the summary, Mr Hockey pleaded that it contained imputations (a)-(d) and, in addition, an imputation pleaded only in relation to this particular tweet, namely:

The application corruptly sells privileged access to himself to a select group of business leaders in return for political donations totalling hundreds of thousands of dollars each year.

As can be seen, this imputation replicates the terms of the summary, save for the insertion of the word “corruptly”.

211 In my opinion, the ordinary reasonable reader reading only the second Twitter matter would have understood it to be making an allegation in terms of the additional pleaded imputation. Such a reader would have understood the summary to be indicating that Mr Hockey was providing access of a privileged kind *in consideration for* substantial political donations and, further, that the privileged access was available only to a select group of business leaders. My reasons for that conclusion are similar to those given in relation to the SMH poster.

212 In my opinion, ordinary reasonable readers would have regarded that as corrupt conduct. Mr Hockey’s claims succeed in relation to the second Twitter matter.

213 However, in my opinion, Mr Hockey’s claims fail in relation to the third Twitter matter read in conjunction with the hyperlinked article. The initial understanding of the reader on reading the summary itself would, for the reasons just given, have been that Mr Hockey was engaging in corrupt conduct. However, when the reader read the Nicholls article, that understanding would have been dispelled. For the reasons given earlier, the ordinary reasonable reader would have understood that they were being informed about a form of political fundraising by an entity associated with Mr Hockey in which access to Mr Hockey was a principal attraction. The reader would have readily understood that it was not a case of Mr Hockey making access to him conditional upon a political donation being made, or of him imposing an expectation of payment, let alone that Mr Hockey was soliciting



payments having some relationship to the decisions he was to make as Treasurer. Mr Hockey's claims in respect of the third Twitter matter and associated article fail for the same reasons I have given in relation to the print versions of the Nicholls article.

### **Summary**

214 In summary, I am satisfied that Mr Hockey has made good his claims of defamatory meaning in relation to the SMH poster and the first two of The Age Twitter matters only. Each of his remaining claims fails.

### **Qualified privilege**

215 Both the common law and statute recognise a defence of qualified privilege when a publisher has an interest or duty, legal, social or moral, to make a statement and the recipient of the statement has a corresponding interest or duty to receive it. The following statement of the common law defence by Parke B in *Toogood v Spyring* (1834) 149 ER 1044 at 1050 was approved by the majority in *Bashford v Information Australia (Newsletters) Pty Ltd* [2004] HCA 5; (2004) 218 CLR 366 at [9]. The defence is available if the publication:

is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorised communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits.

216 In *Cush v Dillon* [2011] HCA 30; (2011) 243 CLR 298 at [12], French CJ, Crennan and Kiefel JJ said:

The defence of qualified privilege is based upon notions of public policy, that freedom of communication may in some circumstances assume more importance than an individual's right to the protection of his or her reputation. The question of whether the person making a defamatory statement was subject to some duty or was acting in the protection of some interest, in making the statement, is to be understood in this light.

217 The respondents contend that, in respect of any defamatory imputation the Court found proved, they have this defence. They relied upon three forms of qualified privilege: common law qualified privilege as recognised by the House of Lords in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127; the extended form of common law privilege recognised in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; and the statutory

defence of qualified privilege contained in s 30 of the *Defamation Act 2005* (NSW) and its counterparts in other States and Territories.

### **Common law qualified privilege**

218            Qualified privilege in the form discussed by the House of Lords in *Reynolds* need not be addressed in detail. The submission, as I understood it, was that the concept of “responsible journalism” discussed in *Reynolds* had the consequence that the defence was available to the mass media in a greater range of circumstances than has previously been recognised. However, the respondents recognised that the *Reynolds* defence has been held by the Court of Appeal in New South Wales not to form part of the common law of Australia, on grounds which include its inconsistency with the *Lange* defence: *John Fairfax and Sons Ltd v Vilo* (2001) 52 NSWLR 373; *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419 at [1165]-[1171]; *John Fairfax Publications Pty Ltd v Hitchcock* (2007) 70 NSWLR 484 at [63]; *Marshall v Megna* [2013] NSWCA 30 at [25], [174]; *Korean Times Pty Ltd v Pak* [2011] NSWCA 365 at [30]. Although the respondents wish to contend that these decisions are wrong, they recognised that, in accordance with the principle stated in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 230 CLR 89 at [135], it would be inappropriate for a first instance Court not to follow them.

219            The respondents did not ask the Court to make any additional findings of fact relevant to the so called *Reynolds* defence should it become necessary to agitate their contentions concerning it on appeal.

### **The s 30 defence of qualified privilege**

220            As the content of s 30 of the *Defamation Act 2005* (NSW) is identical to the provisions in the counterpart legislation in the various States and Territories, it is convenient to consider the respondents’ statutory defence by reference to s 30.

221            Section 30(1) affords a defence of qualified privilege for the publication of defamatory matter:

- (1) There is a defence of qualified privilege for the publication of defamatory matter to a person (the “**recipient**”) if the defendant proves that:
  - (a) The recipient has an interest or apparent interest in having information on some subject, and
  - (b) The matter is published to the recipient in the course of giving to the recipient information on that subject, and

- (c) The conduct of the defendant in publishing that matter is reasonable in the circumstances.

222 In his final submissions, counsel for Mr Hockey conceded that the respondents had proved elements (a) and (b) in s 30(1). That concession was appropriate given the statement of the High Court in *Lange* at 571:

[T]his Court should now declare that each member of the Australia community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it. The common convenience and welfare of Australian society are advanced by discussion – the giving and receiving of information – about government and political matters.

Counsel accepted that the impugned articles concerned “government and political matters”.

223 However, Mr Hockey did put in issue the element of reasonableness required by s 30(1)(c) and submitted that the defence was in any event defeated because the respondents had been actuated by malice (s 30(4)).

224 Section 30(3) contains an elaboration of the matters bearing upon the reasonableness of a defendant’s conduct for the purposes of s 30(1)(c). It provides:

- (3) In determining for the purposes of subsection (1) whether the conduct of the defendant in publishing matter about a person is reasonable in the circumstances, a court may take into account:
  - (a) the extent to which the matter published is of public interest, and
  - (b) the extent to which the matter published relates to the performance of the public functions or activities of the person, and
  - (c) the seriousness of any defamatory imputation carried by the matter published, and
  - (d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts, and
  - (e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously, and
  - (f) the nature of the business environment in which the defendant operates, and
  - (g) the sources of the information in the matter published and the integrity of those sources, and
  - (h) whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person, and
  - (i) any other steps taken to verify the information in the matter

- published, and
- (j) any other circumstances that the court considers relevant.

225 As can be seen, s 30(3) lists matters which a Court *may* take into account in determining the reasonableness of a defendant's conduct. The Court is not confined to those matters. Other relevant matters may include the manner and extent of publication, the degree of care exercised and any knowledge by the defendant that a defamatory meaning may be conveyed: *Austin v Mirror Newspapers Ltd* [1984] 2 NSWLR 383 at 390.

226 In the *Defamation Act 1974* (NSW) (the 1974 Act), the defence of qualified privilege was contained in s 22. The requirement in that section that a respondent's conduct in publishing the defamatory matter have been reasonable was discussed in a number of the authorities. Although s 22 did not contain a counterpart of s 30(3) until 2002 when it was amended by the *Defamation Amendment Act 2002* (NSW), some of the authorities concerning it remain pertinent.

227 In *Morgan v John Fairfax and Sons Ltd (No 2)* (1991) 23 NSWLR 374 at 387-8, Hunt A-JA identified a number of matters bearing upon the requirement of reasonableness in the former s 22(1)(c), which can be summarised as follows:

- (1) The conduct must have been reasonable in the circumstances to publish each imputation found to have been in fact conveyed by the matter of which complaint is made. The more serious the imputation conveyed, the greater the obligation upon the respondent to ensure that its conduct in relation to the publication was reasonable;
- (2) If the respondent intended to convey any imputation in fact conveyed, it must (subject to some limited exceptions) have believed in the truth of that imputation;
- (3) If the respondent did not intend to convey any particular imputation in fact conveyed, it must establish:
  - (a) subject (to the same exceptions) that it believed in the truth of each imputation which it did intend to convey; and
  - (b) that its conduct was nevertheless reasonable in the circumstances in relation to each imputation which it did not intend to convey but which was in fact conveyed;
- (4) The respondent must also establish:
  - (a) that, before publishing the matter of which complaint is made, it exercised reasonable care to ensure that it got its conclusions right, (when appropriate) by making proper inquiries and checking on the accuracy of its sources;
  - (b) that its conclusions (whether statements of fact or expressions of opinion) followed logically, fairly and reasonably from the

- information which it had obtained;
- (c) that the manner and extent of the publication did not exceed what was reasonably required in the circumstances; and
  - (d) that each imputation intended to be conveyed was relevant to the subject about which it is giving information to its readers.

Hunt A-JA acknowledged at 388 that these propositions were not intended as an exhaustive statement of the matters bearing upon reasonableness. I observe that the matters in (2) and (3) of Hunt A-JA's list are not included in the list contained in s 30(3) of the 2005 Act.

228 The matters listed in s 30(3) are not to be regarded as "a series of hurdles to be negotiated by a publisher before [it can] successfully rely on qualified privilege": *Jameel v Wall Street Journal Europe Sprl* [2006] UKHL 44, [2007] 1 AC 359 at [33] in relation to the matters identified in *Reynolds* as bearing on reasonableness. It is to be remembered that reasonableness "is not a concept that can be subjected to inflexible categorisation": *Rogers v Nationwide News Pty Ltd* [2003] HCA 52; (2003) 216 CLR 327 at [30]. I also accept the submission of the respondents that reasonableness should not be interpreted as requiring a counsel of perfection, given that the predicate on which it operates is that the imputations in question are not true and that the conduct of the defendant is accordingly not beyond criticism.

229 It will be necessary to address later the identification of the particular conduct which a defendant must prove to have been reasonable for the purposes of s 30(1)(c).

230 Strictly speaking, for the purposes of my decision it is necessary to make findings only concerning the reasonableness of the conduct of the SMH in publishing the SMH poster and of The Age in publishing the first two Twitter matters. However, having regard to the prospect of an appeal, I will also make findings on the hypothesis that, contrary to my view, the other forms of publication were also defamatory of Mr Hockey.

***The SMH poster and the first two Age Twitter matters***

231 It is convenient to address first the issue of reasonableness in relation to the SMH poster and the first two Twitter matters.

232 Mr Cubby, the SMH's Deputy Print Editor, had worked on preparing the Nicholls and Kenny articles for publication during the course of the day of 4 May 2014. He was the person who decided on the content of the SMH poster on 4 May. Mr Hockey's counsel was

critical of aspects of Mr Cubby's evidence, but I consider that his evidence was generally reliable and I accept it.

233 It is not clear when on 4 May the headline "Treasurer for Sale", which had been devised by Mr Goodsir, was first circulated among SMH staff as the headline for the Nicholls article. It was clearly in contemplation at 5:10pm when Mr Cubby was copied in on an email from Ms Davies (the SMH News Director for the day) to Mr Coleman (the Fairfax Media in-house lawyer). In that email, Ms Davies asked Mr Coleman to give final approval to publication of the Nicholls article, including the heading "Treasurer for Sale". Mr Coleman gave that approval. Whenever the headline was first circulated, I am satisfied that Mr Cubby knew, at the time he prepared the poster, that the Nicholls article would be published on page one of the SMH under the principal headline "Treasurer for Sale".

234 Mr Cubby had said that he liked the headline "Treasurer for Sale" as he thought that it conveyed the central point of the story, namely, that Mr Hockey was selling something, being his time, at a price. He decided that those words should form the principal part of the poster.

235 Mr Cubby considered that the poster should be short and to the point. He knew that the number of words was limited as the font size had to be such that the poster could be read by "a person driving by, or walking across the other side of the road from, a newsagency". He gave the following evidence concerning his reasoning:

[34] In this case, the poster was designed to get a potential reader to buy a copy of the newspaper and find out the story behind it all. To my mind, the poster as it was worded would invite the public to find out what the "Herald investigation" had unearthed and how the Treasurer was "for sale".

[35] I did not intend to convey any of the imputations relied upon by the Applicant as arising from the poster. It is my belief that given the limitations of the format, posters are, in accordance with well-established newspaper practices, not designed to lead readers to form definitive conclusions about the main story appearing in the newspaper that day, without having seen the story itself. I thought readers would react to the poster by, hopefully, being intrigued by it and prompted to access the whole article in some way and read it. I consider that the inclusion of the words "Herald investigation" alongside "Treasurer for Sale" would pique the interest of the reader and invite them to ask, "what is being investigated?"

236 The evidence as to the origins of the first two Age Twitter matters was limited. Mr Holden said that The Age has an "online team" which looks after tweets but that he had been unable to identify who in particular was responsible for the tweets in question. He said

however, that it was common for the main headline of a story as it appeared in print to constitute the tweet and that it was intended to draw users of Twitter to the article in question.

237           The respondents submitted that the reasonableness of their conduct in publishing the poster and the tweets turned on the reasonableness of their publication of the articles in the print and online versions. They submitted that, if it was reasonable to publish the articles, then it was also reasonable for them to have drawn the attention of readers to the articles by the poster and the tweets. The respondents sought to draw support for this submission from the imputations pleaded by Mr Hockey in respect of these publications, which they contended were a subset of those pleaded in respect of the articles.

238           I do not accept this submission. Even if the respondents' conduct in publishing the articles with their particular content was reasonable, it does not follow that it was also reasonable for them to publish a poster with a defamatory meaning to promote interest in them.

239           The respondents' submission that the imputations pleaded by Mr Hockey are a subset of those pleaded in respect of the articles is correct insofar as it concerns the poster and the first bare tweet. It is not however, correct in respect of the second Twitter matter as Mr Hockey pleaded a separate and distinct imputation in relation to that tweet. However, to my mind this is immaterial as the manner in which Mr Hockey later articulated the imputations on which he sues does not have any bearing on the reasonableness of the respondents' conduct at the time when they published the poster and the Twitter matters.

240           Finally, the respondents' submission fails to take account of the circumstance that the SMH and The Age must have known, at the time of publishing the poster and the Twitter matters respectively, that they would be seen and read by some persons who would not read the articles and whose understanding, accordingly, would be confined to that which was conveyed by the poster and the tweets themselves.

241           I accept that it is appropriate to take account of the fact that posters are a conventional means of promoting the sale of newspapers, and that ordinary reasonable readers may be taken to know that they comprise little more than a headline for the articles which they promote. The same can be said in respect of the bare tweets. I also accept that readers may understand that a purpose of newspaper posters is to pique their interest in the published articles.

242 For the reasons which I will give later, I accept that the manner in which Mr Hockey engaged in political fundraising by the NSF is a matter of public interest (s 30(3)(a)) and that the matters in the poster and on Twitter related to the performance of his public functions as Treasurer (subs (3)(b)). I also accept that it was reasonable for the respondents to seek to promote the reading of the articles.

243 However, I do not accept that it was reasonable for the respondents to do so in the way in which they did. There were readily available alternative formats of the poster by which the SMH could have promoted its articles. A poster which read “Hockey: donations and access. Herald investigation” may, for example, have been appropriate. A poster in that form would have had the same number of words as that actually published. However, the SMH did not have to confine its poster to six words. It could, for example, have promoted its article by a poster containing “Hockey: membership, donations and access: Herald investigation” or “Access to Treasurer can be bought, Herald investigation”. Exhibit A16, which was a photograph of the SMH poster outside one newsagency on 5 May 2014, contains examples of prominent and eye catching posters containing eight or more words.

244 Similarly, the 140 character limit on tweets would still have permitted alternative forms of eye catching promotion of the articles.

245 The ready availability of alternatives is an important consideration bearing on the reasonableness of the respondents’ conduct given the serious nature of the defamation conveyed by the poster and the Twitter matters.

246 Mr Cubby’s evidence indicates that he did not give consideration to the possibility that the poster, considered by itself, may be defamatory of Mr Hockey, or convey a meaning different from that conveyed by the articles which read as a whole. He appears to have focused solely on selecting a form of words which would “pique the interest” of readers.

247 I will refer later to inadequacies in the respondents’ steps to give Mr Hockey an opportunity to comment on the articles. Those inadequacies also serve to indicate the unreasonableness of the respondent’s conduct in publishing the poster and Twitter matters.

248 For these reasons, I consider that the SMH and The Age have not proved that their conduct in publishing the poster and the first and second Twitter matters, respectively, was reasonable.



***The reasonableness of the respondents' conduct in publishing the articles***

249 In order to address the parties' submissions concerning the reasonableness of the respondents' conduct in publishing the articles on the hypothesis that, contrary to my conclusion, the articles were defamatory, it is necessary to make findings concerning some background to, and the manner of preparation of, the articles. Some of these findings are also pertinent to Mr Hockey's contention that the publications were actuated by malice.

***The events of 19-21 March 2014***

250 The relevant events commenced with the earlier publication by the SMH and The Age of stories relating to Mr Hockey and in particular with a correction and retraction which the SMH and The Age had provided at Mr Hockey's insistence.

251 On 19 March 2014, the SMH published two articles containing statements of links between Mr Hockey and AWH. The first appeared on page one under the headline "Limos, horses and slush funds" and concerned the activities of AWH. Its fifth and sixth paragraphs were as follows:

Fairfax Media can reveal AWH donated a further \$10,000 to Treasurer Joe Hockey's campaign weeks before the 2010 federal election.

But the donation was returned in February 2013, after reports began to circulate about corruption concerns at AWH.

252 The second article, which was co-authored by Mr Kenny, appeared under the headline "AWH donated to Hockey committee" in the SMH and under the headline "Donation scandal spreads in Liberals" in The Age. The first five paragraphs of the article were as follows:

The Obeid-linked water company at the centre of conflict of interest allegations that are before [the ICAC] made multiple donations to the Liberal Party as it sought political favour, including a direct donation of \$10,000 to Joe Hockey's Federal electorate committee in 2010 – just weeks before the election that year.

The link is the first evidence tying [AWH] to the Treasurer and is revealed in the Australian Electoral Commission's Donor to Political Party Disclosure Return – Organisations report for the financial year 2010-2011.

The donation to the "North Sydney FEC" was by far the largest single donation to an electorate fund made by AWH, although another gift of \$10,000 was made to the National Party of Australia, based in Canberra, and a donation of \$30,000 was paid to the Liberal Party NSW Division in December 2010.

The donation to North Sydney FEC was paid back in February last year – \$11,000, which was \$10,000 plus GST – after reports began to circulate about corruption concerns at AWH.

The revelation is one of many previously unknown dealings by AWH as it attempted

to cement links with key political figures as it positioned to secure lucrative public contracts worth hundreds of millions of dollars with Sydney Water.

253           There were some differences in the content of the paragraphs concerning Mr Hockey in the respective publications, but it was not suggested that these were material.

254           On 20 March 2014, The Age reported the stepping aside of Senator Sinodinos from the position of Assistant Treasurer under a headline “Senator steps aside, to await ICAC hearing”. About three quarter way through the article, its author (Mr Kenny) reported:

Mr Shorten also called on Mr Abbott to explain what he knew about the matter.

That was fuelled by revelations by Fairfax Media that Treasurer Joe Hockey had returned a \$10,000 donation from AWH to his electoral committee a year ago, after reports of Obeid family ownership of part of AWH. However, it took until this week for \$75,000 donated by AWH to other parts of the Liberal Party to be refunded.

255           Then, on Friday, 21 March 2014, each of the SMH and The Age published an article co-written by Mr Kenny and Mr Nicholls under the headlines “Libs forced to repay more tainted cash from AWH” and “Hockey pays back \$22,000 linked to Obeid company” respectively.

256           Mr Kenny wrote the opening paragraphs of the article which, as published in the SMH, were as follows:

Treasurer Joe Hockey has repaid another \$22,000 of funds he received from the Obeid-linked Australian Water Holdings company since 2009.

The refund followed reports by Fairfax Media that he paid back \$11,000 more than a year ago to the firm after it attracted the attention of the NSW [ICAC].

Mr Hockey’s office confirmed on Thursday that a further \$22,000 had been repaid in so-called “membership fees” for a Liberal Party instrument in his North Sydney electorate known as the “North Sydney Forum”.

...

The stench of corruption surrounding multiple aspects of AWH, including claims of secret equity by the Obeid family, misappropriation of millions in public funds, and plans to corruptly obtain lucrative contracts with Sydney Water, has already cost Senator Sinodinos his ministerial post.

The revelation that yet more donations went from AWH to the Liberal Party suggests the full extent of the web of shadowy financial links between the company and senior Liberal and Labor figures has not yet fully been exposed.

There were some differences between the content of these paragraphs in the SMH and The Age versions but, again, it was not suggested that they were material.

257 The opening line of the article was incorrect. Mr Hockey had not himself “received”  
\$22,000 from AWH, nor had he himself “repaid” it.

258 Mr Hockey saw the online version of this article at about midnight on 21 March. He  
immediately contacted Ms Daley, his Press Secretary, telling her that the article reported that  
he had personally refunded monies to AWH, and that it should be corrected. Ms Daley told  
him that the newspapers would already have been printed but that she would telephone  
Mr Kenny to have the online articles corrected.

259 Ms Daley rang Mr Kenny at about 12:30am, waking him. I accept that their  
conversation included an exchange to the following effect:

Ms Daley: Joe is very angry. He is going ballistic because of the wording of  
the headline and the article. He says that the story is misleading  
and you need to correct it – it says that Joe received the money  
personally and has been forced to repay it. With all the current  
discussion about ICAC Joe believes the article says he was handed  
money and he has handed it back.

Mr Kenny: I don’t agree with that. That’s ridiculous – it doesn’t say that at all.  
It’s quite clear from the story that that is referring to the North  
Sydney Forum. Anyway, I’ll take a look at it.

260 Mr Kenny then re-read the article. He did not consider at that time that the article  
made the statements which Mr Hockey believed they did. Before he had done anything  
further, Ms Daley rang him again (at about 12:45am). Their conversation included the  
following exchange:

Ms Daley: If the article is not corrected, Joe will take it to the lawyers. We want  
a commitment to a correction being published.

Mr Kenny: I can’t give that. It’s a matter for the editors of the Sydney Morning  
Herald and The Age. That’s not a decision I can make. I will  
consider a change to the article itself to reflect what you’ve told me.

261 There were further calls from Ms Daley to Mr Kenny in which she pressed for a  
correction to be made immediately. Mr Kenny decided that it was best to accommodate  
Mr Hockey’s concerns. Accordingly, at about 1:00am he instructed the news desk to change  
the online version of the article so that it did not refer to Mr Hockey having repaid the  
money.

262 There then followed a series of text messages between Ms Daley and Mr Kenny  
commencing at 1:04am as follows:

- Mr Kenny: It has been changed to reflect what you told me.
- Ms Daley: Thanks – the headline in the home page is still saying “Hockey repays \$22,000” which needs to be changed. Is there any way now of correcting the print edition or will that have to be in Saturday’s Herald? Thanks very much.
- Mr Kenny: Too late for print. Have asked for headline to be changed. It was changed when I looked at it.
- Ms Daley: Great, thanks. The Treasurer wants confirmation from you in writing now that there will be a correction and apology to him in the March 24 edition.
- Mr Kenny: That as you know will be up to the editor. I will confirm in the morning.
- Ms Daley: Can you send me his number please?  
We will put out a statement on the story and, seeing as it has been corrected online, want to give you the benefit of saying it will be corrected and apologised for in the print editions.

263 Mr Kenny also had an exchange of text messages with Mr Goodsir, the Editor of the SMH, Mr Holden, the Editor of The Age and Mr Forbes, the News Director at The Age. This exchange commenced at 1:54am and concluded at about 2:00am:

- Mr Kenny: I have Hockey going nuts over my story on paying back AWH funds. He wants a commitment to a correction and an apology in Saturday’s paper. My yarn said he had paid back another \$22k. The money was paid by AWH to the North Sydney Forum – so not Hockey personally. He says story is defamatory. I have changed web copy but he wants to release a statement saying we were wrong and will correct and apologise. NSF is a Lib fundraising body for his electorate. He is right that it was not paid to him but is splitting hairs. I wrote first story on returning the \$10k and they never mentioned NSF or complained.
- Mr Holden: Like any normal human being he can wait till the morning for us to make a considered view.
- Mr Kenny: Thanks and sorry to wake you.
- Mr Holden: Have three yr old. Used to it!

264 Ms Daley telephoned Mr Goodsir at 2:15am. Her call went through to his voicemail.

265 At 3:04am on 21 March 2014, Ms Daley issued a media statement on Mr Hockey’s behalf under the heading “Fairfax Media wrong” which read (relevantly) as follows:

Fairfax Media reports claiming that I received money from Australian Water Holdings or repaid money to AWH are factually wrong.

I have never received any money from AWH.

I have never repaid money to AWH.

The membership fees AWH paid to a Liberal Party business and community organisation known as the North Sydney Forum were refunded for AWH membership from 2009 until early 2013.

I am advised that the North Sydney Forum cancelled AWH's membership and returned its membership fee of \$11,000 when allegations about AWH first became publically known in February 2013, more than one year ago.

I am further advised that subsequent to that \$22,000 was returned to AWH for membership fees paid prior to 2013 and paid since 2009.

Any suggestion that I was involved in either receiving membership fees from AWH or refunding membership fees to AWH is factually incorrect.

266 At 6:35am on 21 March 2014, Mr Goodsir sent a text to Ms Daley saying, "Hello. I will call you later at a reasonable hour to attend to your concerns". Ms Daley responded at approximately 6:45am saying "Thanks Darren. I appreciate it. We have put out a statement. If you give me your email, I will send it to you".

267 An exchange of text messages between Mr Goodsir, Mr Holden, Mr Kenny and Mr Forbes took place between 6:37am and about 9:15am, as follows:

Mr Goodsir: I got called at 2:15am by Hockey presser. They have a fucking hide!

Mr Holden: Read print story now. Simplest approach is to dig into NSF. Who's the chair, how was that person selected, what's his relationship with Hockey, does his wage come out of Hockey's electorate allowance or that of any admin staff working for NSF, how much money did it raise for Hockey? In that story you can run Hockey's claim he knew nothing though as members of the forum entitled to meet him he must have seen membership list. Beyond that, fuck him. The story was accurate at time of writing and there's a million defences to any defamation claim. Darren, you might have to out local reporter/photog onto chasing NSF chair.

Mr Forbes: Yes, it's effectively his fundraising body. Accurate but critical story the way to go, not apology.

Mr Kenny: Agree. Sorry about late text. His minder rang at 1:00am and then several times [after] that.

Mr Holden: No probs at all. Amazing they freeze us out and then think they have the relationship that allows them to call in the middle of the night.

Thinking further on this, who told you the money had been paid back? Hockey's people, the NSF? If Hockey's office, how did they know if he has nothing to do with it?

Mr Kenny: It was Hockey's office. And bearing in mind the previous story, they said it was more of the same ie another \$22k to be repaid on top of the first \$11k. It was first mention of NSF although ... his minder insisted she had mentioned it before which she had not.

Mr Forbes: I know you are off today Mark, but I think you need to file on this.

Mr Goodsir: Hi all. I have a different view on this matter. I feel pissed off they called me so early but I'm of a different view. Will speak soon to

Andrew.

Mr Forbes: Andrew is off doing a speech, happy to chat in the interim.

Mr Kenny: Yes understood.

As can be seen, the initial view was that the SMH and The Age should not provide an apology to Mr Hockey but should instead publish a “critical story”.

268 During the course of the day on 21 March, there were a series of telephone calls between Mr Hockey, Mr Hywood, the Chief Executive Officer of Fairfax Media Ltd and Mr Goodsir. There were some differences in the evidence as to the sequence of these calls. In my opinion, little turns on the correct sequence, but I find that it was as follows. In the early afternoon, Mr Hockey telephoned Mr Hywood. He said that he could not get a response for an apology from Mr Goodsir, that he had sought legal advice and that he wanted an apology. Shortly afterwards, Mr Hywood telephoned Mr Goodsir, telling him of the call from Mr Hockey, that Mr Hockey was very upset and that he was insistent that there be both a correction and an apology. Mr Hywood then telephoned Mr Hockey telling him that “I have got you an apology”.

269 At 2:33pm, Mr Goodsir sent Mr Hockey a text as follows:

Hi Treasurer. I am more than happy to discuss your concerns. I have a view to a statement in the newspaper tomorrow morning and a suitable annotation on the online versions and have been dealing with this since 2:15am this morning.

270 Mr Hockey telephoned Mr Goodsir at 2:37pm. Mr Goodsir did not answer that call but rang straight back, and a conversation to the following effect ensued:

Mr Goodsir: Hello Treasurer. I understand your concerns and I am in the process of completing a form of words that will address your grievances. I intend to suggest we run a correction in the newspaper, and on all our other platforms.

Mr Hockey: I would like an apology as well as a correction.

Mr Goodsir: Let me consider that. I know you have called Greg Hywood regarding the story which ran today. I’m not sure there was any real need for you to call Greg instead of me. I would have preferred it if you had called me in the first instance.

Mr Hockey: I called Greg as there were multiple Fairfax publications involved. I will have no hesitation in raising a legal action against Fairfax if this issue isn’t cleared up. You need to publish an apology. It needs to be an apology, not just a correction.

Mr Goodsir: I have the matter currently in hand, and I can’t see why we can’t be in a position to run an apology tomorrow. But let me get back to

you.

271 At the time, Mr Goodsir did not think that Mr Kenny's article would be understood as suggesting that Mr Hockey had personally received and repaid money. He decided nevertheless that Mr Hockey's complaint should be accommodated and that the articles should be corrected and an apology published. Mr Goodsir had to persuade Mr Holden to the same view.

272 Each of Mr Goodsir and Mr Holden then settled the terms of a correction and an "apology" which was published in the SMH and The Age on Saturday, 22 March 2014. The SMH version was as follows:

Yesterday's story, "Liberals forced to repay more tainted cash from AWH", should have made clear that any funds paid by Australian Water Holdings were paid to Joe Hockey's fund-raising and campaigning arm and were refunded by that same body. The Herald accepts Mr Hockey did not personally receive or refund any money from AWH. The Herald regrets the error.

The version published in The Age, while not identical, was substantially the same.

273 As noted earlier, Mr Forbes had requested Mr Kenny to prepare an article on 21 March 2014 concerning the NSF. Mr Kenny was not pleased about having this task because it distracted him from a personal matter. Nevertheless, Mr Kenny worked on the preparation of an article during the course of 21 March. At 4:20pm, Mr Kenny sent to Mr Nicholls and others a copy of an article in draft.

274 As part of his research Mr Kenny had looked at the NSF website. His article reported on some of the contents of the website, including the statement that:

By joining the North Sydney Forum, you will have the opportunity to participate in a regular program of events including boardroom lunches with Joe Hockey, focused on key policy areas that are nominated by Forum members.

Mr Kenny wrote that, despite Mr Hockey having sought to separate his role as MP and Liberal Frontbencher from day to day knowledge and activities of NSF, its website indicated that it was a fundraising and campaigning body dedicated exclusively to his re-election.

275 Mr Goodsir provided a copy of Mr Kenny's draft to Mr Holden by email at 5:29pm. His accompanying email message said:

Given where we are at, are we not better to have a red hot go at this issue next week, and really go for it – rather than going in with this over the phone more questions

than answers piece. After the day we've had, I ain't going to run this – but am more than keen to develop a North Sydney Forum plan for next week.

Thoughts?

276 Mr Goodsir and Mr Holden then had a telephone discussion in which they agreed to defer publication of Mr Kenny's proposed article and to undertake a detailed investigation of the NSF with a view to publishing an article at a later date.

277 Mr Goodsir said that, during the course of 21 March 2014, he had considered a number of matters bearing on a story concerning the NSF, including the NSF website, Mr Hockey's reaction to the story published that day and the interest generally in political donations. I will refer again to Mr Goodsir's evidence about these matters but note presently his evidence that he considered they warranted the SMH exploring the issue further. Mr Goodsir said that he discussed his approach with several of his colleagues during the course of 21 March, and that they had agreed generally with him. That was part of the consideration which led Mr Goodsir to recommend to Mr Holden that they not publish Mr Kenny's story the next day but await a more detailed investigation.

***The preparation of the Nicholls article***

278 On the late afternoon of Friday, 21 March 2014, Mr Goodsir instructed to Mr Nicholls "to drop everything and start digging into the NSF". This was an allocation of a significant resource given that Mr Nicholls was the SMH's State Political Editor. Amongst other things, it meant that Mr Nicholls would cease, for the time being, reporting on proceedings at the ICAC.

279 Mr Nicholls gave the following account of the instructions given to him by Mr Goodsir:

I have held the Hockey story over because I want you to have an in depth look at the North Sydney Forum. The level of anger from the Treasurer's office about today's story has got me really interested in this. I want you to devote some time to the operations of the North Sydney Forum. I think we should take a careful look into what it is and how it operates. I want to find out everybody who has ever donated to this forum and how much they have donated. I'm very interested in the relationship between the donors and the Treasurer. Who knows, we might end up with Eddie Obeid Jnr at a meeting with the Treasurer! Can you drop everything else and focus on this exclusively for the next week. I want someone from outside the Canberra press gallery to dig into this.



280 In an email later that same day to Mr Holden and others informing them of his instructions to Mr Nicholls, Mr Goodsir said:

Any suggestions welcome, but the open brief is we want to know everything about the NSF, how every dollar was raised and spent, and everyone who had anything remotely involved in this slush fund.

I am ordering screen grabs of the website now on the basis it could (and should) be reviewed by Hockey in the days and weeks ahead.

281 Mr Goodsir confirmed his brief to Mr Nicholls in an email on 24 March 2014:

Just to iterate your brief: good luck and go hard ... I might also draft Anne Davies into the mix – but will be guided by you in terms of whether or not you need assistance.

282 Most of Mr Nicholls investigative work was carried out in the week after 21 March.

283 On the afternoon of 21 March, Mr Nicholls spoke to a source within the Liberal Party in New South Wales, whom he described as confidential. That source told him that the NSF was administered by the North Sydney FEC and that the money had been repaid by the FEC to AWH. The source described Mr Orrell as Mr Hockey's "hand-picked guy" to run the NSF, and said that forums of that kind were used by Federal MPs to raise money for Federal elections.

284 Mr Nicholls then obtained Mr Orrell's telephone number by another means and telephoned him. He explained to Mr Orrell that he was researching for an article about political donations to the Mr Hockey and the NSF and asked if he could provide information about the NSF and how it operated. Mr Nicholls said, and I accept, that Mr Orrell responded with words to the following effect:

I am the Vice-Chairman of the North Sydney Forum. You should speak with Grant Lovett in Joe Hockey's office. He is very up to date with the structure. John Hart is the Chairman of the forum. If you want to call Grant Lovett, I can give you a number [number provided].

Mr Lovett swore an affidavit in the proceedings. He is Mr Hockey's Chief of Staff. There was no suggestion that he was a member of the NSF.

285 Mr Nicholls telephoned the number which he had been given for Mr Lovett. He was not put through to Mr Lovett. Instead, after he explained his purpose, the person to whom he spoke returned to the telephone and said words to the following effect:

I am advised that if you want information about the North Sydney Forum, you will need to contact them directly.

286 It is not necessary to record the details of all of Mr Nicholls investigations. Commencing on the weekend of 22-23 March 2014, he made internet searches of the websites of the NSF, the New South Wales Election Funding Authority, and ASIC. He identified the Australian business number for the NSF and made electronic searches using that number. On Monday, 24 March 2014, he made enquiries by email of the Election Funding Authority. By other searches he ascertained Mr Carrozzi's name. Mr Nicholls ascertained information about other entities entitled "Friends of Joe" and "Friends of Joe Hockey". He telephoned the contact telephone number on the NSF membership application form. The person who answered, giving her name as Marie, told him:

I am the Program Membership Coordinator for the North Sydney Forum. I don't think I can answer your questions. I suggest you speak to Grant Lovett, who is Mr Hockey's Chief of Staff.

287 Mr Nicholls ascertained a telephone number for Mr Hart, which he rang, leaving a message for Mr Hart to ring him back. Mr Hart did not do so.

288 However, Mr Orrell rang Mr Nicholls and provided the information attributed to him in the Nicholls article.

289 Subsequently, Mr Carrozzi answered one of Mr Nicholls' calls and provided information about the NSF. Mr Carrozzi provided further information in the second telephone call. Mr Nicholls incorporated information provided in these calls in the Nicholls article.

290 In order to obtain information about the NSF members, Mr Nicholls engaged in a laborious task of examining the Liberal Party's Disclosure Returns in order to ascertain amounts which matched the membership fees for NSF. When he found a match, he then engaged in more detailed research. Having found that NAB, Servcorp, Metcash and the FSC appeared to be, or to have been, members, he contacted each of those entities seeking information. Mr Nicholls made a number of other enquiries including of the Liberal Party itself and of confidential sources within the Liberal Party.

291 On 27 March 2014, Mr Goodsir asked Mr Nicholls to provide him with a short summary of his work so far which he wished to share with Mr Holden and others.

Mr Goodsir described himself in his email to Mr Nicholls at 9:17am as being “very excited” about Mr Nicholls’ work.

292 Mr Nicholls provided a briefing note later that same day, outlining the results of his research to that time. At the commencement of the summary he said:

The best angle at present I think is that the Treasurer is granting privileged and secret access to a select group of business people in return for their donations to his fundraising machine, the North Sydney Forum, in the form of annual membership fees.

293 Mr Goodsir responded by an email at 12:32pm that day. The substance of the email was as follows:

Fucking brilliant!

Looping in Andrew, Mark and Judith – but please let’s keep this tight as a drum for now ... Given what Andrew and I endured last week with Hockey, I want to have this nailed to the cross in more ways than one.

So let’s please keep things to this group for now.

Keep digging Sean ... I reckon we probably need to convene a session tomorrow to see where we are at ... (and yell out if you need some extra help?)

I have long dreamed (well, actually only since last Friday), of a headline that screams: Sloppy Joe!

I think we are not far off, but perhaps even more serious than that.

Well done so far.

294 Mr Holden also responded to Mr Nicholls shortly afterwards saying “Agree completely, great digging, Sean”.

295 Thereafter, Mr Nicholls continued his investigations although he said that he had completed them substantially by 27 March. Mr Nicholls explained that the lapse of time until the articles were published on 5 May was explained by revelations from the ICAC dominating the SMH news coverage, his taking of leave during the week commencing Monday, 14 April 2014, and Mr Goodsir being on leave from 18 April 2014 to 27 April 2014. In addition, the resignation of Mr O’Farrell as New South Wales Premier on 14 April 2014 and its sequelae led to Mr Nicholls and the SMH being preoccupied with those matters.

296 Mr Goodsir sent Mr Nicholls an email on 19 April 2014 regarding the proposed articles concerning Mr Hockey which said (relevantly):

I will be back on Mon 28 and want to be in a spot to launch our dirt on Hockey then.

This one ain't over yet!

297 During the week commencing 28 April, Mr Nicholls had a telephone conversation with Mr Goodsir, Mr Holden and Mr Forbes in which they discussed the finalisation of the Mr Nicholls article. Mr Nicholls then wrote the greater part of his article in one session towards the end of the week concluding on Friday, 2 May 2014.

298 After he had prepared the article, Mr Nicholls sent to Ms Daley at 1:28pm on 2 May 2014, the questions for Mr Hockey which were set out in the SMH article on 5 May 2014. He had earlier had the content of those questions approved by Mr Goodsir.

299 On 4 May 2014, Mr Nicholls sent the final form of his article to Lisa Davies, the News Director for the day at the SMH and the process of preparation of his article for publication commenced. This was before receipt of the response by Ms Daley to the questions to Mr Hockey, which occurred at 3:26pm. Mr Nicholls said that he did not regard that response as one "of any substance".

300 Despite the criticisms of Mr Nicholls' evidence by counsel for Mr Hockey, I regarded him as a reliable witness. I accept his evidence.

***The preparation of the Kenny article***

301 Mr Kenny was informed on the weekend of 22 and 23 March 2014 that his draft article had not been published. He was told that Mr Nicholls would be undertaking a more detailed investigation.

302 Mr Kenny's next significant involvement was on Friday, 2 May 2014 when he was asked by Ms Nixon, the State Editor of the SMH to prepare a "an analysis piece" to go with the Nicholls article. Mr Nicholls provided Mr Kenny with a draft of his article on 3 May. Mr Kenny said that in addition to the information provided in the Nicholls article:

I had long been aware of the practice engaged in by political parties of using whatever means are available to them, to the fullest extent possible within the rules, to raise funds (for example, the Higgins 200 Club, the Wentworth Forum), yet there was an institutional reluctance or sensitivity in discussing the topic. The information we had obtained in relation to the North Sydney Forum exemplified this. Such lack of openness naturally invites the media to examine the practice more closely, and the North Sydney Forum information presented an opportunity to do so.

303 Mr Kenny prepared an initial draft of his article on the morning of Sunday, 4 May 2014. However, he received a call from Mr Silkstone, the Deputy News Editor at The Age,

in the mid-afternoon asking him to redo the article because it “just doesn’t address the nub of the story soon enough and it needs to be tightened up”.

304 Mr Kenny then recast his article. He said:

I wanted to ... make clear that none of the material was making the suggestion that there was corruption on the part of the applicant in the ICAC (or criminal) sense. In other words, I thought that my language made it clear that there was no suggestion of bribery or personal profit. In part this was informed by the applicant’s reaction to the 21 March article. But I deliberately used the word to make the point that this fundraising process is one by which the integrity of the democratic process can be corrupted. I thought that the public needed to know about bodies which were operating in this way; that is, within the rules but without public scrutiny.

305 Mr Kenny then provided the article in the form in which it was published.

306 Counsel for the respondents accepted that Mr Kenny was generally a credible witness. Mr Kenny was mistaken about part of the conversation which he had with Ms Daley on 18 March 2014, but I considered his evidence otherwise to be both honest and reliable.

307 Against that background, I turn to particular matters bearing upon the reasonableness of the respondents’ conduct.

### ***Identifying the relevant conduct***

308 Section 30(1)(c) requires a defendant to prove that its conduct in publishing “that matter” is reasonable in the circumstances. “That matter” is plainly the “defamatory matter” to which reference is made in the opening line of s 30(1). There is a question as to whether this is to be understood as the matter containing the defamatory imputation, or the defamatory imputation itself.

309 In the passage from *Morgan v John Fairfax and Sons Ltd (No 2)* quoted earlier, Hunt A-JA, with whom Samuels JA agreed, held that it was the latter of these meanings, saying “the conduct must have been reasonable in the circumstances to publish each imputation found to have been in fact conveyed by the matter complained of”. This was approved by the Court of Appeal in New South Wales in *Evatt v Nationwide News Pty Ltd* [1999] NSWCA 99 at [18].

310 The decisions in *Morgan* and *Evatt* concerned s 22 of the 1974 Act. Section 22, as in force from 1974 until amended (relevantly) in 2002, was as follows:

### **22 Information**

- (1) Where, in respect of matter published to any person:
  - (a) the recipient has an interest or apparent interest in having information on some subject,
  - (b) the matter is published to the recipient in the course of giving to him information on that subject, and
  - (c) the conduct of the publisher in publishing that matter is reasonable in the circumstances,there is a defence of qualified privilege for that publication.
- (2) For the purposes of subsection (1), a person has an apparent interest in having information on some subject if, but only if, at the time of the publication in question, the publisher believes on reasonable grounds that that person has that interest.
- (3) Where matter is published for reward in circumstances in which there would be a qualified privilege under subsection (1) for the publication if it were not for reward, there is a defence of qualified privilege for that publication notwithstanding that it is for reward.

311 In *Griffith v Australian Broadcasting Corporation* [2010] NSWCA 257, Hodgson JA, with whom Basten JA and McClelland CJ at CL agreed, held, after referring to *Morgan and Evatt*, that what had to be shown to be reasonable under s 22(1)(c) was “the conduct of the publisher in publishing that matter, *in its character as making the imputation complained of*; not, in my opinion, the matter in all of its aspects” (emphasis added). Hodgson JA gave two reasons for that construction.

312 First, s 9(2) of the 1974 Act identified “the cause of action as being one in *respect of* the defamatory imputation *for* the publication of *the matter* that makes the imputation” (emphasis in the original).

313 Secondly, Hodgson JA relied on passages in *Wright v Australian Broadcasting Commission* (1977) 1 NSWLR 697, a decision which also concerned s 22 as originally enacted, in particular, the statement of Moffitt P (with whom Glass JA agreed) that “section 22(1)(c) requires that particular attention is paid as to [the] reasonableness of the conduct in relation to [the] publication of this particular matter, ie, that which carries the defamatory imputation”. In addition, Hodgson JA referred to a passage in the reasons of Reynolds JA (with whom Glass JA had also agreed).

314 The reasoning in *Morgan, Evatt* and *Griffith* does not necessarily govern the position under s 30 of the 2005 Act. There are several reasons why that is so.

315 First, as already noted, s 22 in the form considered in those authorities did not include any counterpart to s 30(3). It is appropriate to read s 30 as a whole in determining the subject matter of the conduct to which s 30(1)(c) refers so that regard should be had to subs (3).

316 Secondly, s 8 of the 2005 Act indicates that, in contrast to the position under the 1974 Act, a plaintiff has a single cause of action even if the publication about which complaint is made contains more than one defamatory imputation. Section 8 provides:

A person has a single cause of action for defamation in relation to the publication of defamatory matter about the person even if more than one defamatory imputation about the person is carried by the matter.

Counsel for the respondents submitted that s 8 is also pertinent because it draws a distinction between the publication of defamatory matter, on the one hand, and the defamatory imputation, on the other. Having regard to the principle that legislation should be taken to use the one term with a consistent meaning, he submitted that the term “defamatory matter” in s 30 should be construed in the same manner. Counsel noted that subs (3)(c) makes the same distinction.

317 It may also be pertinent that the opening line of subs (3) and subparas (a), (b), (c), (e), (g), (h) and (i) refer to “the matter” or “the matter published” as opposed to the “defamatory imputation”. The term “matter” is defined in s 4 of the 2005 Act to include “an article, report, advertisement or other thing communicated by means of a newspaper, magazine or other periodical”. That too tends to suggest that s 30(1)(c) is referring to the matter containing the defamatory imputation, and not just the defamatory imputation in that matter.

318 There is force in these submissions, but I do not consider that they should be accepted. In my opinion, the construction adopted in *Griffith* remains good law. That is to say, it is appropriate to understand the term “the publication of defamatory matter” in the opening line of s 30(1) as referring to a “matter”, as defined in s 4, *to the extent that it gives rise to a defamatory imputation or defamatory imputations* or, to use the phrase of Hodgson JA “in its character as making the imputation complained of”.

319 There is no indication that s 30(1) was intended to work a change in the existing law in this respect, especially as it is a close replication of the former s 22(1). If s 30(1)(c) is understood as referring to the matter containing the defamation in all its aspects, the focus of the evidence appropriate to discharge the defence would change significantly. So also would the focus of the evidence necessary to establish malice under s 30(4) as it too uses the term

“the publication of the defamatory matter”. It is not readily to be supposed that s 30 is intended to allow a defendant to avoid liability for a defamation by establishing that its conduct in publishing an article was, considered generally, reasonable even though its conduct in including a defamatory imputation in the article was unreasonable.

320 It is true that s 30 uses the term “defamatory matter” whereas s 22 in the 1974 Act did not. It would be simplistic however, to construe the term “defamatory matter” as being a matter in the defined sense which is also defamatory. Rather, the term “defamatory matter” appears to be used as a composite expression that is, as a term for the defamatory content of a matter whether it be a single imputation or multiple imputations. Accordingly, it is the respondents’ conduct in publishing those matters which s 30(1)(c) requires to have been reasonable.

***The objective truth of the matters in the Nicholls article***

321 Each of the defences of the respondents pleaded a number of matters in support of the claim that its conduct in publishing “the matter complained of” was reasonable. After pleading matters going to subparas (a), (b), (d), (g), (h) and (i) in s 30(3), each pleaded that the articles stated some 15 separate facts concerning the establishment, operation and activities of the NSF and asserted that each was a matter of “substantial truth”. In his final submissions, counsel for Mr Hockey accepted the truth of all but three of the 15 pleaded facts. The three exceptions were the assertion that AWH was linked to Mr Obeid, that Senator Sinodinos was a former Chairperson of AWH, and that Mr Di Girolamo had been the Chief Executive Officer of AWH at the time it was a member of the NSF.

322 Counsel for Mr Hockey maintained, however, that the objective truth of the admitted matters was irrelevant to the respondents’ defence of qualified privilege. He submitted that the truth or otherwise of the matters asserted in the articles did not bear on the reasonableness of the respondents’ conduct in publishing the articles.

323 Consistently with this stance, Mr Hockey’s counsel had objected to a number of questions put to Mr Hockey during the course of his cross-examination concerning the activities of the NSF. As the resolution of this objection involved the consideration of issues of principle not conducive to ready determination at the time and may have had the effect of disrupting Mr Hockey’s cross-examination, I indicated that I would receive the evidence and hear submissions as to its relevance during the course of the final submissions.



324 At the forefront of the submissions of Mr Hockey's counsel was the decision of Hunt J in *Makim v John Fairfax & Sons Ltd* (unreported, Supreme Court of New South Wales, 15 June 1990) concerning a plaintiff's claim that she had been defamed by statements that she had engaged in an adulterous relationship. The pleaded defamatory imputations were that such a relationship was contrary to the moral obligations of her marriage and that by having engaged in such a relationship for a long time she had deceived her husband. The decision concerned the relevance of interrogatories directed to establishing the objective truth of facts stated in the articles which formed no part of the pleaded imputations. The defendant sought to justify the relevance by reference, amongst other things, to its defence of qualified privilege under s 22 of the former *Defamation Act 1974* (NSW). Hunt J rejected the relevance of the interrogatories on that basis, saying:

As a matter of principle, the objective truth or falsity of what was said is irrelevant to the defence of qualified privilege. That defence (whether statutory or common law) proceeds upon the basis that the defendant was honestly mistaken in what he said ... What the defendant must establish in relation to the statutory defence is that he took all reasonable steps to ensure that he got his facts right – to ensure that the published statements were true ... The defendant does not have to establish that they were objectively true in fact, and proof of such objective truths does not assist the defendant to establish that the steps which he took to ensure that truth were reasonable.

...

Because the issue of reasonableness relates to the defendant's conduct (including his state of mind), that belief is usually judged in relation to the imputations which the defendant intended to convey rather than those found by the jury to have in fact been conveyed, but the reasonableness of the defendant's conduct in limiting (or in failing to limit) his published statement to those imputations so intended to be conveyed will also be in issue. ...

(Citations omitted)

Later, Hunt J said:

A person's belief in the truth of a particular fact is not established by showing that objectively the fact is true. That belief in the truth may be honestly held even though there is in fact objectively no truth at all in what was said. The defendant's belief may be one engendered by carelessness, impulsiveness or irrationality. The defendant may hold that belief after being swayed by strong prejudice, or he may be obstinate and pig-headed, or stupid and obtuse in coming to the conclusion which he did. But if he nevertheless had an honest belief in the truth of what he said, the defendant will have established that particular ingredient of the defence of statutory qualified privilege, however objectively false that statement may be ...

What the defendant is entitled to do is to establish the matters upon which his belief was based. This is not done in order to show that his belief was a reasonable one, or that it was a belief that was based upon reasonable grounds, for that is never the test of the existence or non-existence of an honest belief ... It is done simply to support

the existence of his honest belief, by demonstrating what was present to the defendant's mind at the time of the publication and what led to the existence of that belief on his part.

(Citations omitted)

As can be seen, Hunt J made the point emphatically that a person's belief in the truth of a particular fact is not established by showing that objectively the fact is true.

325           The approach of Hunt J in *Makim* was followed by Levine J in *Jones v John Fairfax Publications Pty Ltd* [2002] NSWSC 1210 at [59] and by Auxiliary Judge Anderson in *Rayney v Western Australia (No 2)* [2009] WASC 133 at [21]-[24]. In *Flood v Times Newspapers Ltd* [2012] UKSC 11; [2012] 2 AC 273 at [122], Lord Mance JSC described the truth of the material as a "neutral circumstance". See also *GKR Karate (UK) Ltd v Yorkshire Post Newspapers Ltd* [2000] 1 WLR 2571 at 2577.

326           Somewhat curiously, the initial position of the respondents in the final submissions was that Mr Hockey's acknowledgement of the truth of all but three of the 15 matters made it unnecessary for them to address the reserved issue of their relevance. This position overlooked the distinction between an acknowledgement of the truth of a fact on the one hand, and an acknowledgement of the relevance of the admitted fact to an issue in the trial, on the other.

327           Counsel for the respondents' ultimate position was that the evidence of Mr Hockey as well as the documentary evidence going to the truth of the matters reported in the articles concerning NSF's activities and of Mr Hockey's involvement was relevant in two ways. First, it helped to show the extent of the public interest for the purposes of subs (3)(a). Counsel submitted "it's one thing to have an intuition that the subject matter of a publication is a matter of public interest and concerns the public activities and functions of a person, but it's another to see the centrality of it by reference to the evidence". Secondly, counsel submitted that it went to establishing that the respondents' investigations had been thorough. Proof that the investigations had resulted in the ascertainment of objectively true facts helped establish that proposition and, accordingly, the evidence was relevant.

328           It is appropriate to keep in mind that what the respondents must establish under s 30(1)(c) is not the reasonableness of the publication itself, but the reasonableness of their *conduct* in the circumstances in publishing the defamatory matter, ie, the defamatory

imputations. *Prima facie*, this requires an objective assessment of the respondents' conduct at the time of publication in the circumstances then known.

329           Again, the authorities to which counsel for Mr Hockey referred are not necessarily determinative of the issues which arise under s 30 of the 2005 Act. That is because subs (3) appears to enlarge the range of matters to which the Court may have regard in determining the reasonableness of a defendant's conduct. In particular, it appears to indicate that courts may now have regard to matters going beyond the belief of the defendant in the truth of the defamatory imputation pleaded by a plaintiff, this being the principal consideration underpinning the reasoning of Hunt J in *Makim*. In addition to the listed matters, courts may have regard to any other matter which, considered objectively, may be relevant (subs (3)(j)).

330           If the Court may take these matters into account, the parties should be permitted to adduce evidence bearing on them. A defendant, in particular, should be able to put material before a court bearing upon its consideration of the matters enumerated in subs (3). As presently advised, I see no reason in principle why this may not, in some cases, include evidence establishing the objective truth of matters making out the defamatory imputation if, and to the extent to which, they bear on the court's evaluation of the s 30(3) matters. In some cases, evidence of the objective truth of some facts may have a material bearing upon the extent to which the "matter published" is in the public interest (subpara (a)), or on the extent to which the matter published relates to the performance of public functions or activities of the plaintiff (subpara (b)), or on the seriousness of the defamatory imputation carried by the matter published (subpara (c)). Evidence may possibly assist in the evaluation of a defendant's investigation and attempts at verification if it demonstrates that there was no further information to be ascertained.

331           Accordingly, in my opinion, the decision in *Makim*, while persuasive, is no longer decisive of the question of whether proof of the objective truth of facts comprising, or contributing to, a defamatory imputation is admissible in support of a defence of qualified privilege.

332           As will be seen, I consider (on the hypothesis upon which I am now proceeding) that the respondents had failed to establish that their conduct in publishing the articles was reasonable. That being so, it is on one view unnecessary for me to express a concluded view as to the admissibility of the evidence concerning the establishment and operations of the NSF. However, I did receive the evidence during the trial and indicated that I would hear

submissions concerning its admissibility as part of the final submissions. I therefore indicate my view that the cross-examination of the respondents of Mr Hockey on this topic and the tendered documentary material is relevant to the Court's consideration of the matters arising under subss (3)(a), (b) and (c). Accordingly, I propose to have regard to this material and will make some findings concerning it.

***Privileged access?***

333            Much of the cross-examination to which counsel for Mr Hockey objected related to the characterisation in the Nicholls article of the access of NSF members to Mr Hockey as "privileged access". It is appropriate to record that counsel for Mr Hockey had himself made it a positive part of Mr Hockey's case to contest that characterisation.

334            In opening Mr Hockey's case, his counsel likened the activities of the NSF to the activities involved in ordinary membership of a political party, by which members, having paid the annual membership fee, are entitled to attend regular party meetings and to meet and raise matters of concern with the local member. Counsel also likened the activities of the NSF to membership of the National Press Club which, by its regular lunches, provides a means of access by journalists to the guest speaker, who is commonly a politician. Counsel's submission in opening was that there was nothing "special" about the access to Mr Hockey obtained through membership of the NSF.

335            In his cross-examination, Mr Hockey disagreed with the proposition that members of the NSF gain "preferred access" to him, saying:

A:     You're dead wrong. In fact, I have travelled to different parts of the country and done functions for free. I speak at Rotary for free, I speak at Chambers of Commerce for free, I speak at ACOSS for free, I speak at Country Women's Associations for free. The list is long ... no one has preferred access to the Treasurer.

...

Q:     And that access – when you attend a private VIP function with the North Sydney Forum, that's access to which the ordinary person in the street can't obtain?

A:     Well they could.

Q:     By paying their \$22,000?

A:     No. They could be invited as a guest or they could actually be invited by me or others.

336 Mr Hockey's counsel also suggested to Mr Nicholls, Mr Kenny and Mr Goodsir in their cross-examinations that the access which members of the NSF gained to Mr Hockey was no more privileged than that of persons attending a meeting of a Rotary Club which he addressed, and in fact was not privileged at all. In Mr Nicholls' cross-examination, Mr Hockey's counsel seemed to suggest that a person who approaches Mr Hockey in the street has access to him which is similar to that of members of the NSF.

337 In his final submissions, counsel said that there was no difference between the access to Mr Hockey by a member of the NSF and the access to him by a member of a Country Women's Association (CWA) or a Chamber of Commerce when he addressed one of their meetings.

338 As I understood it, these submissions and this part of the cross-examinations by Mr Hockey's counsel were directed to the reasonableness of the respondents' conduct. The submission seemed to be that the description in the Nicholls article of the access to Mr Hockey as "privileged" was wrong. It was said in this circumstance that the articles were a "massive beat up", and that that (coupled with the respondents' failure to put their allegations squarely to Mr Hockey) was one reason why the respondents' case on reasonableness was "hopeless".

339 Having regard to the opening of Mr Hockey's case, the admissions in the closing submissions of Mr Hockey, and to Mr Hockey's own evidence, I make the following findings concerning the NSF. It is an unincorporated entity of the Liberal Party established in May 2009; lists of its members are not publicly available; its members have included, or include, business people, as well as the National Australia Bank, the Financial Services Council, Restaurant and Catering Australia, Servcorp, and Metcash; membership of the NSF costs \$5,500 per year for individuals, \$11,000 per year for corporate and business membership, and \$22,000 per year for membership as a private patron; membership of the NSF is promoted and sold on the basis that it is an opportunity to obtain access to Mr Hockey in his capacity as the Treasurer of Australia; members are entitled to, and do, attend NSF events at which Mr Hockey is present, including "VIP" meetings with him, some of which are attended by other Commonwealth and State Ministers; private patrons are entitled to attend up to 10 NSF events per year; AWH was a member of the NSF for a period of about three years; AWH's membership of the NSF was ended in 2013 and about \$33,000 in membership fees was returned to it in 2013 and early 2014; the NSF does not lodge its own disclosures with the

News South Wales Election Fund Authority; and money raised by the NSF is often distributed to Liberal Party marginal seats.

340 In addition, Mr Hockey's counsel accepted on his behalf that there are a number of other forums associated with the Liberal Party of Australia with structures similar to that of the NSF, including the Wentworth Forum, the Millennium Forum, the Higgins 200 Club, and the Free Enterprise Foundation.

341 Mr Hockey attends a number of events held by the NSF, but not all. The events he has attended included meetings in members' boardrooms, cocktail parties and functions held in hotels, restaurants and private homes, including the home of Mr David Murray, the Chairperson of the Future Fund.

342 The homepage of the NSF contains three separate photographs of Mr Hockey. The Forum describes itself as "Business and Community Leaders supporting Joe Hockey MP". Underneath a prominent photo of Mr Hockey, the website makes the following statement:

By the joining the North Sydney Forum you will have the opportunity to participate in a regular program of events including boardroom lunches with Joe Hockey, focused on key policy areas that are nominated by Forum members.

This formed part of the graphics published by each of the SMH, The Age and The Canberra Times.

343 The homepage of the NSF also attributed the following statement to Mr Hockey:

One of the challenges in the life of elected representatives is keeping in contact with business and community leaders. That is the task I have set for the NSF – deliver me a program of relevant and in touch policy dialogue whilst at the same time developing a sustainable financial base for us going into the next crucial Federal election.

344 Mr Hockey acknowledged that he had asked the NSF to keep him in contact with business and community leaders.

345 The membership application form on the NSF website commenced with a photograph of Mr Hockey and Mr Hart, its Chairman. It followed with the following statement from Mr Hart:

I am honoured to be the Chairman of the North Sydney Forum that has been established to develop a membership based network of business and community leaders, with a common purpose to exchange ideas and provide resources for

Joe Hockey. In this dynamic political environment it is vital for the business community to get actively involved and support Joe in his important work. The NS Business Forum supports that engagement through the local Q&A forums. We will of course continue our monthly events including the popular boardroom lunch series.

On behalf of Joe Hockey, I encourage you to join the North Sydney Forum and to offer your practical support for Joe Hockey.

346 On their face, these documents suggest a close relationship between Mr Hockey and the NSF. Mr Hockey said however, that the persons running the NSF kept him “very much at arm’s length from its activities”. However, in this context, it appears pertinent that Mr Orrell and later, Marie (the person who answered Mr Nicholls’ call to the telephone number on the NSF membership application form), referred his queries to Mr Lovett, in Mr Hockey’s office. It was also Mr Hockey’s office which issued the media statement concerning the repayments by NSF to AWH and dealt with journalists’ queries about those matters. This is suggestive of at least some close links between Mr Hockey and the NSF.

347 Mr Hockey gave evidence of his substantial activity in addressing community groups around Australia. It occupies a significant proportion of his time and means that many members of the community have the opportunity to hear him speak and to talk to him. I accept his evidence about these matters. I also accept that it is possible for persons to arrange to meet Mr Hockey to raise issues of concern with him. It is evident that Mr Hockey is active in making himself available in these ways.

348 I do not accept, however, the submission that the characterisation in the Nicholls article of the access of NSF members to Mr Hockey as being privileged was wrong or inappropriate. Even if one puts to one side the fact that membership of the NSF seems to be available to corporations and business entities as well as individuals, the access of its members appears, on its face, to be different in a number of respects from that of members of the organisations to which Mr Hockey referred. In contrast to the membership of the typical CWA or Rotary Club, membership of the NSF gives members the expectation and benefit of coming into contact with Mr Hockey regularly, on occasions when the numbers of other persons present are likely to be modest, on occasions when matters of policy will be the subject of dialogue, on occasions when they will have an opportunity for detailed discussion with Mr Hockey, when by reason of regularity or frequency of their contact, they will have the opportunity to develop some continuing rapport with him, and in circumstances in which it would be reasonable for the member to assume that Mr Hockey, knowing that the member has paid a substantial fee, will give close attention to their comments. The very fact that

membership of the NSF (with the substantial fees it entails) is promoted by reference to the access to Mr Hockey which membership affords tends to support the conclusion that forms of privileged or preferred access are being offered. It is evident that persons are encouraged to pay the substantial membership fees of the NSF *for the purpose* of being able to attend private functions at which Mr Hockey will be present.

349 I conclude that the access to Mr Hockey provided by the NSF is quite different from the occasional access obtained by an ordinary member of the CWA, Rotary, a member of a Chamber of Commerce and Industry, or for that matter the person in the street.

350 Counsel for Mr Hockey submitted that the character of the access to Mr Hockey was to be determined by its “quality” rather than the means by which it was obtained. I understood him to be referring to the nature of the interaction between Mr Hockey and those he meets. In this sense he submitted that the access to Mr Hockey by a NSF member at one of its meetings was not relevantly different from that of a person attending a CWA or Rotary Club meeting.

351 I do not accept this submission. It is unrealistic to regard the nature of the access to Mr Hockey as being determined only by the interaction which a person has with him once the access has been obtained. That interaction is only one element of the access. It is more realistic to have regard also to the means by which the access is obtained, the frequency with which it occurs, the places at which occurs, the privacy of the occasion on which it occurs and the nature of the event or function at which it occurs.

352 It would also be unrealistic to conclude that there is no relevant difference between the access of a member and a non-member because some non-members may possibly be invited to an NSF function by a member or by Mr Hockey himself. In those circumstances, the access of the non-member is entirely dependent on the discretion or goodwill of the member or Mr Hockey, whereas members have the entitlement to attend arising from their membership.

### ***Consideration of reasonableness***

353 Having regard to the evidence generally, and in particular to the matters to which I have just referred, I consider that the respondents have made good the contention that the matters reported in the articles were of considerable public interest and that they related to the performance of public functions or activities by Mr Hockey. I accept in this respect the



evidence of Mr Nicholls of his assessment of the public interest and accept that it is, considered objectively, a fair assessment of the public interest involved:

- [110] I consider that the information I had obtained established that the NSF provided privileged and exclusive access to the federal Treasurer, one of the most senior politicians in the country, in exchange for what was in substance a political donation to the Liberal Party. This, to my mind, raised a genuine question about whether forums such as the NSF were an acceptable way to raise political funds, even though it was legal and apparently a long-standing practice. I held this view because raising money through the NSF meant that the amount donated determined the level of access a person could have to the federal Treasurer, creating an inequality of access among electors despite the Treasurer holding a public position and his role being to govern for all electors. I came to the view that it meant that the Applicant was effectively selling his time as Treasurer which, on one view was public property, in order to benefit a private interest, namely the political party to which he belonged.
- [111] The information I had obtained also strongly suggested to me that there was a lack of transparency in the forum fund-raising method. My impression was that there was a lot of secrecy around what may or may not have been discussed in the meetings facilitated by the donations made by members which gave rise to a concern as to whether those discussions may have been affecting or influencing policy making by government. I also thought it was a key issue that it was very difficult to find out who was getting this access and that, as a result, one could not begin to ascertain or ask whether the access was in fact having any influence on government policy and decision making. Put simply, the public did not know and were not being told what was happening in these meetings between members of the NSF, who appeared to me to be principally business executives, and the Applicant. In addition, I understood from the information I had that the business representatives were not just business executives but lobbyists as well, whose business is to lobby government. ...
- [112] While the existence of the NSF was not difficult to ascertain, I had real difficulty identifying members of the NSF and therefore who was contributing funds to the Liberal Party through membership fees. This seemed to be an illustration of a gap in the disclosure laws with which I was familiar: all that a member needed to do was to record a contribution to the Liberal Party without disclosing that they were a member of the NSF. This meant it was difficult to determine which donors to the Liberal Party were members of the NSF and were getting exclusive access to the Applicant for their money.
- [113] In the context of the ICAC hearings I had been covering and following, where evidence was being presented as to the effect on government decision-making donations could have, I thought that the lack of transparency of the NSF raised a major issue about its legitimacy. This was because the lack of transparency left open the potential for improper influence. While there was no evidence of that in this case, and I did not set out to suggest otherwise, I thought that the potential for it to occur was an important issue to bring to public attention.

As I have said, I accept these paragraphs as a fair statement of the public interest involved.

354           The interest of the public in knowing the source and extent of political donations is recognised in Pt XX of the *Commonwealth Electoral Act 1918* (Cth). I also consider it plain that the public has an interest in knowing that some persons in Australia can obtain regular access to the person holding the important position of Treasurer of the Commonwealth by making a political donation.

355           It is in the respondents' favour that Mr Nicholls identified several of his sources in his article. It is not suggested that the statements which he attributed to those sources were not made by them. It is also pertinent that many of the sources upon which Mr Nicholls relied were reliable and reasonably viewed by the respondents as being of integrity. Mr Nicholls' research was detailed and not superficial.

356           It is also pertinent that each of the SMH and The Age had their publications approved by legal counsel: by Mr Coleman in the case of the SMH and by Mr Bartlett, an experienced media lawyer at Minter Ellison, in the case of The Age.

357           Despite these considerations, if I had held that the articles conveyed a defamatory meaning, I would not have been satisfied that the respondents had proved that their conduct in publishing the imputations was reasonable in the circumstances. A number of matters would have made that conclusion appropriate.

358           In the first place, on the hypothesis on which I am now proceeding, it is appropriate to proceed on the basis that the defamation would be regarded as serious. The respondents accepted that Mr Hockey had not acted corruptly and each of the witnesses said that they had not intended to convey the imputation that he was acting corruptly in the manner of any of the pleaded imputations. That may be so, but an assertion that the person acting in the high office of Federal Treasurer is *corruptly* selling privileged access to himself to a select group in return for donations would undoubtedly be a serious defamation. This consideration points up the need for considerable care to be taken before the conduct in publishing could be regarded as reasonable.

359           Secondly, there is the circumstance that the respondents would have published the articles conveying the defamatory imputation without adverting to the possibility that it may be defamatory. It is not necessary to consider in the circumstances of this case whether it is incumbent for respondents to consider every reasonably foreseeable alternative meaning of the words which they choose to use (cf *Obeid v John Fairfax Publications Pty Ltd* [2006]

NSWSC 1059; (2006) 69 NSWLR 150 at [70]-[75]). That is because of the obviousness of the possibility that the words “Treasurer for Sale” and the first paragraph in the Nicholls article may be construed by some ordinary reasonable readers as conveying an imputation of corruption. With the exception of Mr Kenny, none of the respondents’ witnesses adverted to this possibility at the time of publication. Nor is there evidence that any of them turned their minds to alternative meanings at all as a form of cross check of the reasonableness of the choice of words used in the headline and in the articles.

360 Thirdly, I consider that there were inadequacies in the steps taken by the respondents to obtain a response from Mr Hockey as to the subject matter of their articles. It is implicit in s 30(3)(h) that the persons who are to be the subject of an article be given a reasonable opportunity to provide their “side of the story”. This will usually require that subjects of a story be given reasonable notice of the proposed story insofar as it concerns them and a reasonable opportunity in which to give their account or response. To my mind, this is an important element in the assessment of reasonableness. It would be inappropriate for publishers to approach this step in a niggardly or formulaic manner.

361 Counsel for Mr Hockey likened the expectation on a publisher to give the subject of an article a reasonable opportunity to comment on a proposed story to the obligations imposed on a cross-examiner by rule in *Browne v Dunn* (1893) 6 R 67 (HL). That rule requires a cross-examiner to put to an opponent’s witnesses in cross-examination the nature of the case upon which it is proposed to rely in contradiction of their evidence. See *Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation* [1983] 1 NSWLR 1 at 16. The analogy is helpful, but not exact. The rationales for the two requirements may be similar but the content of the respective obligations are not identical.

362 The most obvious shortcoming in the questions put by Mr Nicholls to Mr Hockey is that none of the questions raised the question of payment, sale by Mr Hockey of his time, sale by Mr Hockey of access to him in return for political donations or knowledge by Mr Hockey of the payments made by individual NSF members. This was so despite the “angle” of the articles, almost from the time of their initial conception, being the payment of money in exchange for access. Mr Nicholls acknowledged that the fact that money was being paid was a “big part” of his story.

363 Counsel for Mr Hockey submitted that it would have been relatively straightforward for the respondents to have asked Mr Hockey questions such as:

We think the NSF website suggests the Treasurer gives privileged access in return for donations. Does he wish to comment? We're going to suggest he is for sale and selling access to his office. Again, does he wish to comment?

I consider that there is force in that submission and I accept it.

364 Counsel for Mr Hockey also noted that the respondents had not put to Mr Hockey the defamatory imputation which their counsel had acknowledged, in opening the respondents' case, was conveyed by the articles, namely:

[T]he Treasurer is party to a process that is damaging to Australia's democratic integrity, in that it involves providing privileged access to one of the most senior politicians in the country upon the making of donations to his political party in a manner that is obscured from full public scrutiny.

365 Mr Hockey has not sued on this imputation. Nevertheless, the circumstance that Mr Hockey was not asked for any response concerning it tends to confirm the inadequacy of the respondents' attempts to give Mr Hockey a reasonable opportunity to respond to the pleaded imputations.

366 Mr Nicholls said that the type of article he contemplated would have been "blindingly obvious" to any member of the media and to any political professional from the questions he had submitted to Mr Hockey. I understood him to be saying that each of Mr Hockey and Ms Daley would have understood that from his questions that he was contemplating a story stating that Mr Hockey was granted privileged access in exchange for donations of tens of thousands of dollars.

367 Counsel for the respondents sought to justify this view of Mr Nicholls, and the reasonableness of the questions more generally, by emphasising the context in which the questions were submitted. He referred first to the events of 21 March 2014 which at that time were recent and to the circumstance that Mr Hockey must have been well aware that membership fees totally \$33,000 had been returned to AWH. Secondly, counsel referred to Mr Hockey's evidence that he had learnt about two weeks before the questions were sent that the SMH was making further enquiries about him in relation to the NSF. Thirdly, counsel referred to Ms Daley's acknowledgement that the questions put her on notice that a story concerning the NSF was in preparation and would likely be published on 5 May. Fourthly, counsel submitted that it was evident from the questions as a whole that the proposed story concerned the NSF and Mr Hockey's role and involvement with its conception, functions,

activities and operations. Finally, counsel submitted that the content of the NSF website constituted a relevant part of the context.

368 One may accept each of these matters. However, it cannot reasonably be concluded, in my opinion, that it should have been obvious to Mr Hockey and Ms Daley that the SMH was contemplating a story asserting that Mr Hockey was offering privileged access to a select group in return for tens of thousands of dollars in donations to the Liberal Party, or that he was offering access to one of the country's highest political offices in return for annual payments, or that Mr Hockey was, in effect, for sale. It was one thing for Ms Daley and Mr Hockey to have appreciated that the SMH was planning a story about Mr Hockey and the NSF: it was another thing for them to be forewarned of the SMH's characterisation of Mr Hockey's involvement in the NSF and thereby given an opportunity to give his account of that involvement.

369 Counsel for Mr Hockey also noted that Mr Nicholls had not sent the questions to Ms Daley until 1:28pm on Friday, 2 May 2014 and had requested a response "by Sunday night at the very latest if it all possible". He submitted that this was an unreasonably short time, especially given that Mr Nicholls was aware that Mr Hockey was likely to be heavily engaged at the time in the finalisation of his first budget.

370 I am not prepared to find that this timing is evidence of unreasonableness. Neither Mr Hockey nor Ms Daley gave evidence that they regarded the requested time for response as being unreasonably short and Ms Daley did not seek further time for a response. In fact, Ms Daley's evidence seemed to be to the effect that that timeline allowed adequate time for the response. Further, Mr Nicholls had invited Ms Daley to telephone him if she had any queries regarding the request. Even without that, it had been open to Ms Daley to seek further time if either she or Mr Hockey considered that it was not possible for the request to be addressed in the requested timeframe.

371 I also do not accept the submission of Mr Hockey's counsel that Mr Nicholls' investigations were incomplete because he had not gone, or sought to go, to a meeting of the NSF so that he could observe first-hand the manner in which its meetings were conducted. It may be doubted that Mr Nicholls, as a journalist, would have been welcome at any such meeting but, even if he had been permitted to attend, his mere presence in his role as a journalist is likely to have affected the way in which the meeting was conducted. In relation

to the prospect that Mr Nicholls may have been admitted to the meeting, I keep in mind that his requests for details of the members of the NSF had been declined.

372           However, for the reasons already given, I am not satisfied that the respondents gave Mr Hockey reasonable notice of the matters which they intended to report in the articles, or a reasonable opportunity in which to respond. Given the seriousness of the defamatory imputation (on the hypothesis on which I am presently proceeding) this means that I am not satisfied that the conduct of the respondents in publishing the articles was reasonable in the circumstances. Accordingly, the respondents' defence of statutory qualified privilege would fail.

### **Common law – *Lange* qualified privilege**

373           As noted earlier, in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, the High Court recognised that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. This led the Court to hold that the categories of qualified privilege should be extended so as to protect communications made to the public on a government or political matter, at 571. The Court considered (at 572-573) that the common law limitation on the defence of qualified privilege to protect only occasions in which defamatory matter is published to a limited number of recipients was inappropriate in the case of the privilege in its extended form. The Court then concluded, at 573, that "reasonableness of conduct seems the appropriate criterion to apply when the occasion of the publication defamatory matter is said to be an occasion of qualified privilege solely by reason of the relevance of the matter published to the discussion of government or political matters". Later at 574, the Court said:

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

...

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

*unnecessary to give the plaintiff an opportunity to respond.*

(Citation omitted and emphasis added)

374 The emphasised passage points up the difficulty for the respondents. The shortcomings in the notice given to Mr Hockey and the opportunity for him to respond, identified earlier, mean that the respondents do not discharge the onus for the *Lange* form of qualified privilege to be available. It is not necessary to repeat the reasons concerning the shortcomings which I have given earlier.

### **Conclusion on qualified privilege**

375 For these reasons, I conclude that qualified privilege, in any of its forms, is not available as defence in respect of the publications which I have found to be defamatory. Further, if, contrary to the view I have taken concerning the remaining publications, they are defamatory, then the respondents have not established that any of the forms of qualified privilege are available to them in relation to those publications.

### **Malice**

376 Mr Hockey pleaded in answer to the respondents' claims of qualified privilege that each had been actuated by malice within the meaning of s 30(4) of the *Defamation Act* (and its counterparts) and at common law because each had published the matters about which he complained for the predominant purpose of harming him. Mr Hockey alleged, in particular, that each had borne personal spite and ill will towards him, that each had set out to publish an article which attacked him and was negative about him insofar as he was connected with the NSF, and that each had published the articles as a payback for his insistence on a correction and apology in respect of the articles published on 21 March 2014.

377 In the view I take of the matter, the issue of malice does not, strictly speaking, have to be addressed. Malice serves to defeat a claim of qualified privilege which would otherwise be available, and I have held that none of the respondents can avail itself of the defence. However, because of the prospect of appeal, it is appropriate to state some conclusions with respect to Mr Hockey's plea of malice.

### **Principles**

378 The principles to be applied are settled. The parties referred to *Roberts v Bass* [2002] HCA 57; (2002) 212 CLR 1 in which Gaudron, McHugh and Gummow JJ said:

[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 the occasion of qualified privilege to defame the plaintiff. ...

[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. But, leaving aside the special case of knowledge of falsity, mere proof of the defendant's ill-will, prejudice, bias, recklessness, lack of belief 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. ...

...

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

(Citations omitted and emphasis in the original)

379 In his reasons in *Roberts v Bass*, Gleeson CJ referred at [10] to the statement of Lord Diplock in *Horrocks v Lowe* [1975] AC 135 at 149 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", and means malice in the popular sense of a desire to injure the person who is defamed. Earlier, at [8] Gleeson CJ had said that the kind of malice which defeats a defence of qualified privilege at common law is bound up with the nature of the occasion which gives rise to the privilege.



380 As already noted, the occasion of qualified privilege in this case arises from the interest of the Australian community in disseminating and receiving information, opinions and arguments concerning government and political matters affecting the people of Australia.

381 A belief in the truth of what is published will not be sufficient to save the defence of qualified privilege if a respondent misuses the occasion for a purpose other than that for which the privilege is given – for example, if the respondent publishes the matter complained of in order to injure the applicant or some other person, or to vent spite or ill-will towards the applicant, or to obtain some private advantage unconnected with the privileged occasion upon which the publication is made: *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30 at 51.

382 In *Spautz v Williams* [1983] 2 NSWLR 506 at 520-1, Hunt J summarised many of the principles relating to the defeat of a defence of qualified privilege by malice. It is not necessary to repeat that summary presently, apart from noting that qualified privilege “should not be nullified by a readiness to treat as evidence of express malice anything which does not definitely, and as a matter of common sense, point to the actual existence of some express malice really operative in the making of the statement”.

383 In short, a respondent will be held to have been actuated by malice for the purposes of the defence of qualified privilege if the applicant establishes that it published a statement for some *dominant purpose or motive* other than that for which the privilege is given. The purpose or motive must be both foreign to the occasion of the privilege *and* actuate the making of the statement.

384 Account will have to be taken of the fact that Mr Hockey’s plea is made in relation to each of the three respondents, and that different employees were involved in the various mediums of publication of each.

### ***Overview***

385 The improper motive alleged in this case is said to be personal animus towards Mr Hockey.

386 This requires consideration of whose state of mind is to be attributed to the respondents in determining whether they were acting from motives of resentment or spite. Mr Hockey’s pleading was that the improper motive was held by Mr Goodsir, Mr Holden and Mr Kenny. This was repeated by his counsel in opening:

[I]t is clear from these communications – and this will be our case – that Mr Kenny, Mr Holden and Mr Goodsir formed an intention on 21 March 2014 to exact revenge on Mr Hockey for what they perceived to be a perverse and unreasonable response to the 21 March article.

In addition, other passages in the opening stated expressly that Mr Hockey’s claim was that each of Mr Goodsir, Mr Holden and Mr Kenny had had an improper motive, and described the publications as “an act of petty spite”.

387           The initial final submissions of counsel for Mr Hockey suggested that Mr Hockey relied for the claim of malice on the state of mind of Mr Cubby as well as that of Mr Goodsir, Mr Holden and Mr Kenny.

388           There was no suggestion at all to Mr Kenny in his cross-examination that he had been motivated by feelings of resentment or spite or a desire to obtain retribution. Nor for that matter was there any suggestion to Mr Nicholls, Mr Uhlmann (the Editor of The Canberra Times), Mr Fuller (the Print Editor of The Age) or Mr Cubby (the Deputy Print Editor for the SMH) that they had been resentful of Mr Hockey’s conduct following the article published on 21 March 2014 or that they had been motivated to exact a form of retribution on account of it or that they had been motivated by any other form of animus towards Mr Hockey.

389           Although Mr Holden was cross-examined about the events on 21 March 2014 and those which followed, the only question put to him in cross-examination concerning his motive for publishing the articles in The Age on 5 May was as follows:

Q:       ... I want to suggest to you that at least part of the motivation for publishing this story was payback to Mr Hockey for having to apologise to him on 21 March.

A:       No.

As can be seen, the proposition put to Mr Holden was only that payback had been “at least part” of the motivation for publication of the articles in The Age. Even had Mr Holden answered the question in the affirmative, it would not have been sufficient to establish malice because, as already seen, what must be established is that the improper purpose was the *dominant* purpose or motive for the publication.

390           Mr Holden was not questioned further on this topic. It seemed that counsel for Mr Hockey abandoned, in effect, the allegation of malice insofar as it involved Mr Holden.

391 Faced with the respondents' submission that neither Mr Kenny nor Mr Cubby had been cross-examined as to their motive in accordance with the plea of malice, and Mr Holden in only a limited way, counsel for Mr Hockey submitted that the relevant state of mind was that of Mr Goodsir and, accordingly, that it had not been necessary for him to cross-examine the other witnesses of the respondents on the topic. This was because of Mr Goodsir's evidence that he had accepted responsibility at the time for the preparation of all the articles for publication in each of the respondents' publications.

392 Thus, Mr Hockey's case on malice in respect of all forms of the publications rested ultimately on Mr Goodsir's state of mind. That did not mean of course that the evidence of the other witnesses was not relevant to an understanding of Mr Goodsir's motivation.

393 I mention that counsel for Mr Hockey also sought to rely on a statement said by Mr Hockey to have been made to him by Mr Hywood on 21 March 2014. However, this was not pleaded and there was no evidence indicating any involvement at all by Mr Hywood in the publications on 5 May 2014. Accordingly, it is not necessary to make findings relevant to this submission.

394 Given that the publications which I have found to carry the defamatory meaning are the SMH poster and the first two matters published on Twitter, Mr Hockey would have to establish that Mr Goodsir's motive was the cause of those publications in their defamatory form.

395 There are therefore two issues to be considered: whether Mr Goodsir had an improper purpose and, if so, whether that improper purpose is to be attributed to each of the three respondents in respect of each of their mediums of publication.

***Mr Goodsir's motive***

396 The case of malice which was put to Mr Goodsir in cross-examination focused first on the headline "Treasurer for Sale":

Q: [I]t clearly suggests, doesn't it, corruption on the part of my client?

A: No. I don't accept that and I've said that before.

Q: You chose those words, didn't you, to punish my client for the apology that you'd been forced to give him on 21 March 2014?

A: That's not correct.

Q: And also in your mind at the time was punishing him for the lack of access that he was giving to your newspapers, as opposed to others. That's correct,

isn't it?

A: No. That's not correct either.

Q: It was an act of spite on your part, wasn't it Mr Goodsir?

A: That's not correct.

Q: ... And an act of revenge? ... Do you agree with that or not?

A: No. I disagree with that.

397 Counsel then put to Mr Goodsir that there had been a causal relationship between the events on 21 March and the publications on 5 May:

Q: Mr Goodsir, if it had not been for the events on 21 March 2014, these articles would never have been published on 5 May, would they?

A: The events of 21 March certainly aroused my interest in undertaking more detailed enquiries into this matter. Which set in train the steps that eventually led to the publication of the complained of matter. Yes.

Q: You see, your principal reason for publishing this story was to get back at Mr Hockey, wasn't it?

A: Totally incorrect.

398 Earlier in his evidence, Mr Goodsir had explained his decision to instruct Mr Nicholls to conduct an in depth investigation of the NSF. He said that during the course of the day on 21 March 2014, he had noted that the NSF website indicated levels of access to Mr Hockey for payment of specific amounts of money. He considered at the time that this amounted to the provision of privileged access, in exchange for money, and not just to a local member of Parliament or an opposition spokesperson but to the Treasurer of Australia. Mr Goodsir also said that at the time he regarded Mr Hockey's reaction to the story published on 21 March as being out of proportion. This had made him think that there must be something more to the NSF which explained Mr Hockey's sensitivity. Finally, Mr Goodsir said that he considered that the issue of political donations was a matter of significant public interest and that that too warranted the SMH exploring the issue further. As noted earlier, Mr Goodsir said that, during the course of 21 March, he discussed these matters with several of his colleagues and that they had agreed generally with his approach. These had been some of the considerations which had led him to recommend to Mr Holden that they not publish Mr Kenny's story on 22 March 2014 but instead await the outcome of a more detailed investigation.

399 I considered that Mr Goodsir gave his evidence well and that generally it was reliable. However, despite his denials in the passages of the cross-examination set out above and his explanation of the nature of the causal relationship between the events of 21 March 2014 and

the publications on 5 May 2014, there is a good deal of contemporaneous evidence which indicates that he was intent on “getting back” at Mr Hockey. Several of Mr Goodsir’s answers in cross-examination about this evidence were not convincing and had the appearance of a present day rationalisation of his conduct at the time.

400 Mr Goodsir acknowledged that he had been upset and aggrieved at being woken by the texts from Mr Kenny and Mr Holden in the early hours of 21 March 2014 and then by the subsequent telephone call from Ms Daley at 2:15am. His statement at 6:37am on 21 March that Ms Daley had had “a fucking hide” in calling him at 2:15am and his later statement that he felt “pissed off” at having been called so early are indications of his feelings at that time. However, these appear to be no more than expressions of irritation at having his sleep disturbed and are not particularly indicative of animus.

401 It is more pertinent that, until Mr Hywood spoke to him on 22 March 2014, Mr Goodsir was not contemplating an apology to Mr Hockey at all, only the publication of a correction. Mr Goodsir denied that he had been told by Mr Hywood that he should publish an apology as well as a correction and there is no direct evidence to the contrary. I accept, however, Mr Hockey’s evidence that he was told by Mr Hywood that he (Mr Hywood) had obtained an apology for him. I think it likely that, even if Mr Hywood did not instruct Mr Goodsir to provide an apology, he made it plain that such was expected or would be appropriate, so that Mr Goodsir felt that his discretion about providing an apology was constrained. Mr Goodsir decided to act in accordance with Mr Hywood’s wishes. He said, and I accept, that he had to persuade Mr Holden to adopt that course.

402 In my opinion, the correction and apology published by the SMH and The Age on 22 March 2014 were not really an apology at all. As seen earlier, after making the correction, each of the SMH and The Age did no more than make a statement of regret. This was not an apology to Mr Hockey for the embarrassment, inconvenience or harm which the acknowledged error had done, or may have done to him. In my opinion, the so called “apology” had a begrudging quality about it. It is consistent with Mr Goodsir being resentful of having been required to provide it.

403 Mr Goodsir’s instruction to Mr Nicholls “to drop everything and start digging into the NSF” is also indicative of his state of mind. Mr Goodsir thereby caused a significant resource within the SMH to be dedicated to the investigation. It meant that Mr Nicholls, the SMH’s State Political Reporter, could not attend to other matters within his usual remit,

including attending at the ICAC hearings from which a number of newsworthy stories were emanating. Mr Goodsir was also prepared to “draft Anne Davies into the mix” to assist in the investigation. It is pertinent that Mr Goodsir specifically instructed Mr Nicholls to investigate “the relationship between the donors and the Treasurer” and seemed hopeful that the investigation would reveal a meeting between Mr Hockey and Mr Obeid Jnr. Mr Goodsir’s description of the NSF as a “slush fund” tends to suggest that he had already formed a pejorative view about it.

404           It is evident that Mr Nicholls understood that Mr Goodsir wished to “get at” Mr Hockey. So much is evident in the manner in which he commenced his 27 March summary to Mr Goodsir, namely, that “the best angle at present” is that “the Treasurer is granting privileged and secret access to a select group of business people in return for their donations to [the NSF] in the form of annual membership fees”. Mr Nicholls was not asked about his use of the words “the best angle” and, in particular, whether it reflected his understanding of Mr Goodsir’s expectation of him, but I draw the inference that he was well aware that Mr Goodsir was seeking material which would not only reveal the activities of the NSF but do so in a way which was damaging to Mr Hockey.

405           Mr Goodsir’s responding email at 12:32pm on 27 March is also revealing of his attitude. I refer in particular to the statement “given what Andrew and I endured last week with Hockey, I want to have this nailed to the cross in more ways than one”. In his cross-examination, Mr Goodsir said that he had used this expression to convey that Mr Nicholls’ investigation and article preparation should be “professionally undertaken, and that all the checks that we need to make in order to make this good journalism would be done”. He rejected the suggestion that it was Mr Hockey who he wished to have “nailed to the cross”. I did not regard Mr Goodsir’s evidence about this as convincing. I consider that, if he had meant the metaphor of “nailing” to convey little more than that the story should be thorough in the sense that all investigations should be made, all facts checked, and conclusions properly and reasonably drawn, it would have been much more natural for him to have said simply that he wished the story to be “nailed down”. Instead, he used terminology which is evocative of the infliction of pain. Its juxtaposition with the reference to what Mr Goodsir and Mr Holden had “endured” as a result of Mr Hockey’s actions suggests naturally that Mr Goodsir had in mind something of a reciprocal kind.

406 Mr Goodsir's focus on Mr Hockey personally is also seen in two further paragraphs in the same email, namely:

I have long dreamed (well actually only since last Friday), of a headline that screams: Sloppy Joe!

I think we are not far off, but perhaps even more serious than that.

In his cross-examination, Mr Goodsir said that these sentences had been "an attempt to be collegiate and slightly humorous" because the whole affair "could have been handled better", especially given that Mr Kenny's draft article of 21 March indicated that a lot of questions needed answering. Again, I regarded this explanation as unconvincing and do not accept it. I consider that these sentences also indicate Mr Goodsir's animus towards Mr Hockey and that what he had in mind were articles which, while addressing the issues of public interest which the soliciting of political donations in the manner adopted by the NSF and Mr Hockey had raised, would also constitute a personal attack on Mr Hockey.

407 I consider that Mr Goodsir's use of the terms "our dirt on Hockey" and "this one ain't over yet" in his email to Mr Nicholls on 19 April 2014 is confirmatory of this. In my opinion, the former was a reference to material which would be damaging to Mr Hockey, and the latter to the issues which had arisen between Mr Hockey and the SMH and The Age.

408 It is also pertinent, in my opinion, that although Mr Goodsir had information that the operations of the NSF were similar to those of a number of other fundraising entities associated with the Liberal Party, he did not direct parallel investigations of those entities or commission the preparation of articles concerning them. His focus from 21 March was on the NSF and Mr Hockey only. That focus is explained, in my opinion, by Mr Goodsir's animus towards Mr Hockey.

409 I am satisfied that Mr Goodsir was still motivated by this animus when he prepared the headline "Treasurer for Sale". It would, however, be a form of circular reasoning to infer from that conduct the existence of the animus.

410 Mr Goodsir gave the following evidence concerning his preparation of the headline "Treasurer for Sale":

[52] As regards the main headline, "Treasurer for Sale", I had been thinking about a working headline throughout the weeks of the project. I felt that the content of the NSF website amounted to an invitation to treat, because the message to potential NSF members was all along the lines that "here is an offering – here is something for sale". That led me to think of "Treasurer for

Sale”. I considered it a good headline – not just eye-catching but one which accurately reflected [the] story. I finalised my thinking about the headline on 4 May 2014, having regard to the content of the story as sent to me by Lisa Davies.

...

[54] I did not consider that “Treasurer for Sale” would convey that the applicant was guilty of corruption or bribery. It didn’t enter my mind that the headline could suggest that.

[55] Over 30 years of journalism, I do think deeply about what combinations of headlines, photos, graphics and so on could give rise to serious allegations such as corruption, but that was not something that I apprehended in respect of “Treasurer for Sale”. ...

[56] To me, the story (and the headline) was all about people willing to pay for access to see the Treasurer – and it followed that the headline was accurate and fair.

411 I am willing to accept this evidence, so far as it goes. However, I did not regard this evidence as stating completely Mr Goodsir’s motivation. In the light of the earlier evidence, I consider that he was, in addition, motivated by his animus towards Mr Hockey and that he sought a headline which would be hurtful of, or damaging to, Mr Hockey. This led him to overlook that Mr Nicholls’ article indicated that what could be obtained by a political donation in the form of membership of the NSF was access to Mr Hockey and not Mr Hockey’s judgment, or discretion, or influence and that Mr Hockey was not for sale at all. Mr Goodsir had lost objectivity. If it was not for his desire to get back at Mr Hockey, I consider it probable that he would have selected a less provocative headline.

412 It is commonly the case in human affairs that a person’s motives are multi-faceted. I consider that that is likely to be so in this case. As Editor in Chief, Mr Goodsir had an interest in publishing newsworthy articles on matters of public interest. It was reasonable for him to suppose that the manner of political fundraising by the NSF was a matter of public interest which it was appropriate to bring to the attention of the readership of the SMH. I accept that this was one of Mr Goodsir’s motives. However, I also consider that Mr Goodsir was very much motivated from 21 March 2014 by animus towards Mr Hockey, arising from Mr Hockey’s insistence on 21 March 2014 on a correction and apology, from Mr Hockey’s embarrassment of Mr Goodsir by going over his head to Mr Hywood, and from the fact that he had been compelled to publish not only a correction but a form of apology.

413 Was this animus a dominant motive or purpose other than the dissemination of information and opinions concerning government and political matters? In my opinion, it is



appropriate to conclude that, despite what Mr Goodsir said, his initial motive was, or was at least predominantly, “getting back” at Mr Hockey. That explains his allocation of a significant resource in the form of Mr Nicholls to the task and his statements in the week commencing 24 March.

414 I have considered whether Mr Goodsir’s motives may have developed over the period between 21 March and 4 May 2014 with the effect that his animus towards Mr Hockey became a less dominant motive and the publication of a story of evident public interest the more dominant motive. That possibility cannot be discounted altogether but I think it unlikely. Mr Goodsir’s use of the expressions “our dirt on Hockey” and “this one ain’t over yet” on 19 April is particularly revealing in this respect.

415 Exercising the caution which is appropriate before making a finding of this nature, I am satisfied that Mr Goodsir’s animus towards Mr Hockey had not abated by 4 May and that the publication of the printed articles in the SMH was predominantly actuated by that improper purpose.

#### ***Malice and the SMH***

416 There is no difficulty in attributing Mr Goodsir’s purpose to the SMH. This means that, had I regarded the printed articles and the website articles of the SMH as conveying a defamatory imputation, I would have found that the defence of qualified privilege, even if otherwise available, was defeated by his improper motive.

417 That makes it unnecessary to consider in detail the publications in the SMH after 5 May 2014 to which Mr Hockey also referred. It is sufficient to say that I do not regard them as evidence of malice in relation to the publication of the articles on 5 May 2014.

#### ***Malice and the SMH poster***

418 These conclusions are not sufficient by themselves for a finding of malice in relation to the SMH poster. It stands differently. *Prima facie*, it is Mr Cubby’s state of mind which is relevant in relation to the SMH poster. He is the person who devised the poster. There is no evidence that he did so in conjunction with Mr Goodsir, or that Mr Goodsir played any part (beyond devising the headline “Treasurer for Sale”) in the composition of the SMH poster. It was neither pleaded, nor suggested in cross-examination, that Mr Cubby had had an improper purpose in devising the poster. There is no evidence that he was even aware of the events of 21 March, or of Mr Goodsir’s feelings in consequence of those events. Mr Goodsir’s motive

cannot be attributed to Mr Cubby. The mere fact that he adopted the same words in the SMH headline in the words of the poster does not mean that he is to be “fixed” with Mr Goodsir’s state of mind in choosing those words. When there are co-publishers of a single publication, the purpose of each co-publisher must be considered separately: *Egger v Viscount Chelmsford* [1965] 1 QB 248; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 253-5. That principle should also be applied in this context with the effect that if the issue of malice in relation to the SMH poster is to be determined by reference only to Mr Cubby’s state of mind, Mr Hockey’s claim would fail for want of evidence that Mr Cubby had an improper purpose.

419           However, I consider that it is appropriate to have regard to Mr Goodsir’s purpose in considering whether the SMH poster was actuated by malice. In his evidence in chief contained in affidavit form, Mr Goodsir said that he had not consciously thought about the content of the poster but was not surprised that it used the words “Treasurer for Sale”. He said that it was not uncommon for the front page headline also to be the poster headline. In his cross-examination, however, Mr Goodsir accepted that he had known that the words “Treasurer for Sale” would “in all probability ... be picked up as the poster”.

420           In these circumstances, it would be artificial in my opinion for Mr Goodsir’s motive to be ignored in relation to the poster. On my findings, Mr Goodsir was actuated by an improper purpose when he prepared the headline. He knew at that time that it was very probable that the words he devised would be repeated in the poster. In those circumstances, Mr Cubby appears to have been an innocent conduit by which further expression was given to Mr Goodsir’s wrongful purpose.

421           Accordingly, had it been necessary to make the finding, I would have been satisfied that the publication of the SMH poster was also actuated by malice, even though that was not Mr Cubby’s purpose.

***Malice in relation to The Age and The Canberra Times***

422           Mr Hockey’s plea of malice in relation to The Age and The Canberra Times publications is more problematic. As noted earlier, counsel for Mr Hockey relied on the evidence of Mr Goodsir that he had regarded himself as accepting responsibility for the preparation of the articles in respect of the various Fairfax publications. Counsel referred in this respect to Mr Goodsir’s evidence that, in commissioning Mr Nicholls to undertake the investigation of NSF, he had been doing so “for Fairfax Media generally, and in particular,

for the SMH and The Age”. Counsel for Mr Hockey also referred to Mr Goodsir’s evidence concerning his involvement in the preparation of the articles for publication on the weekend of 3-4 May 2014:

... I wanted to be closely involved in the packaging and presentation of the story over the weekend, particularly given that I regarded my responsibility as extending beyond just the SMH. I knew that The Age would publish a story based heavily if not entirely on ours. I therefore considered that I was fulfilling a role for both papers.

423 Reference may also be made to Mr Goodsir’s evidence in respect of the online publication:

In accordance with Fairfax Media standard practice, the host masthead for a story takes responsibility for the online assembly of the story, and accordingly where (for example) the SMH, The Age and The Canberra Times websites all feature the same article, the webpages on those websites on which the particular article appears will be extremely similar in appearance and presentation, but will appear as an article of the masthead on whose website it appears. There are usually differences between how the article is featured on the homepage of each masthead, as each masthead will take responsibility for the presentation of the story on its own websites.

424 Mr Goodsir also accepted in his cross-examination that he had “prime editorial responsibility” for the stories concerning Mr Hockey published on 5 May 2014 in each of the SMH, The Age and The Canberra Times.

425 I accept Mr Goodsir’s evidence on these matters. It was consistent with other evidence indicating a sharing of resources between the SMH, The Age and The Canberra Times and reliance by The Age and The Canberra Times on the SMH and its staff carrying out appropriate research in relation to Sydney-based stories.

426 However, the evidence falls short, in my opinion, of indicating that decisions concerning publication of the articles in The Age and The Canberra Times were not made independently of Mr Goodsir. The evidence indicates to the contrary. Mr Holden, the Editor in Chief of The Age, participated in a telephone conference about the proposed story with Mr Goodsir, Mr Nicholls, Ms Whelan (the SMH News Director) and Mr Forbes late in the week ending 2 May. During that conversation, Mr Nicholls outlined the nature of the story and how he had obtained the information. Mr Holden satisfied himself that Mr Nicholls had “completed substantial checks on the accuracy of his story, and that we could have confidence in its content”. Further, Mr Holden discussed the headline “Treasurer for Sale” with Mr Fuller, The Age Print Editor on Sunday, 4 May 2014 and made a decision regarding

the use of that headline. He told Mr Fuller that he considered it appropriate for The Age to be consistent with the SMH, given that the SMH had had the carriage of the story.

427 Mr Fuller gave evidence of the process he followed in relation to the articles on 4 May 2014. He said that he was impressed by the Nicholls article and did not consider that there was any matter requiring him to suggest alterations. He reviewed the NSF website himself and the questions Mr Nicholls had put to Mr Hockey and to the New South Wales branch of the Liberal Party. Mr Fuller said that it was his decision to run with the headline and that he had complete independence in that respect. Mr Fuller did not refer in his evidence to the discussion which he had with Mr Holden about the use of the headline.

428 An indication that The Age made an independent decision is that Mr Fuller had the Nicholls and Kenny articles reviewed by Mr Bartlett, a media lawyer at Minter Ellison who were retained by The Age to provide pre-publication legal advice. Mr Bartlett approved the proposed publication without modification.

429 Another indication of the independent decision-making made at The Age is that Mr Fuller did not use the three dot-pointed sub-headlines which were used in the SMH. He devised different dot-pointed sub-headlines for The Age so as to make clear what was meant by the principal headline "Treasurer for Sale".

430 I regarded Mr Fuller's evidence as honest and reliable and accept what he said about these matters.

431 There was no evidence at all about the purpose of the person or persons responsible for The Age Twitter account.

432 The Canberra Times also exercised an independent judgment about publishing the articles. Mr Uhlmann was the Page Editor of The Canberra Times who made the relevant decisions on 4 May 2014 about publishing the articles. I regarded Mr Uhlmann's evidence as honest and reliable. Mr Uhlmann deposed to the arrangements for sharing of content between the various Fairfax organisations. He said that upon seeing the Nicholls article on of the afternoon of 4 May 2014, "it was obvious to me that it was one for The Canberra Times to run also, and that it should run on our front page". Mr Uhlmann said that that was because the story concerned the federal Treasurer and because he considered the Canberra readership to be very interested in federal politics and issues concerning the operation of democracy in Australia.

433 Mr Uhlmann decided, however, not to replicate the SMH's headline. He said, and I accept:

I personally did not like that headline much. I tend to prefer a more conservative approach when it comes to headlines for stories such as these as that suits the style of The Canberra Times. I also was concerned that the length of that headline would not suit the broadsheet layout of The Canberra Times.

Accordingly, Mr Uhlmann used a different headline, namely, "Paying their way: how a select group buys access to the Treasurer".

434 There is no indication at all that Mr Uhlmann was actuated by any improper purpose, or that he was even aware of Mr Goodsir's motives. Those motives cannot be attributed to him.

435 In these circumstances, I would not have been satisfied that Mr Hockey had established malice in relation to the publications by The Age and The Canberra Times.

436 Mr Hockey's counsel put an alternative submission as to malice. This was to the effect that the respondents had deliberately delayed the publication of the Nicholls and Kenny articles until a week or so before the federal budget because they were aware that this would be a particularly busy time for Mr Hockey and, inferentially, because they wished to harm him at that time. This is a particularly serious allegation. Because of that, it should, in my opinion, have been pleaded and it was not. However, I accept that, even in the absence of a pleading, the existence of such a purpose could form part of the evidence of proof of the malice in fact alleged by Mr Hockey.

437 In my opinion, the submission should be rejected. The evidence does not support it. Whether or not the articles could have been finalised and published sooner is not to the point: the evidence simply does not support the conclusion that the timing of the publications occurred with a view to maximising or to inflicting further damage on Mr Hockey.

438 In view of the terms of counsel's opening, to which I referred earlier, it is appropriate that I record my satisfaction that none of Mr Nicholls, Mr Kenny or Mr Cubby was actuated by malice. The evidence indicates that they acted responsibly. The effective abandonment by Mr Hockey of his claim of malice by Mr Holden means that a like finding is appropriate in his case also.

## **Damages**

439 On my findings, Mr Hockey is entitled to damages in respect of the defamatory imputations in the SMH poster and in the first two of The Age Twitter matters.

440 An assessment of damages for defamation serves three purposes: consolation for personal distress and hurt; reparation for damage to the applicant's reputation (including if relevant the applicant's business reputation); and vindication of reputation: *Carson v John Fairfax and Sons Ltd* (1993) 178 CLR 44 at 60. The first two purposes are often considered together and constitute consolation for the wrong done to the applicant, whereas vindication looks to the attitude of others. The sum awarded must be at least the minimum necessary to signal to the public the vindication of the applicant's reputation: *Carson* at 61.

441 A number of provisions in the *Defamation Act 2005* (NSW) and its counterparts are pertinent to the assessment. It is sufficient to refer to the New South Wales Act only. Section 34 requires that the Court ensure that there is "an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded".

442 Under s 35, the cap on the damages which may be awarded for non-economic loss, as adjusted pursuant to subss (3)-(7), is presently \$366,000. The cap may be exceeded "if, and only if, the Court is satisfied that the circumstances of the publication of the defamatory matter to which the proceedings relate are such as to warrant an award of aggravated damages" (s 35(2)).

443 The damages are to be assessed separately in relation to the SMH poster and The Age Twitter matters. The cap of \$366,000 applies separately in relation to each of the proceedings concerning those publications.

444 By s 36, "the court is to disregard the malice or other state of mind of the defendant at the time of the publication of the defamatory matter to which the proceedings relate or at any other time except to the extent that the malice or other state of mind affects the harm sustained by the plaintiff".

445 Section 38(1)(d) provides, in effect, that the Court may take into account in mitigation that an applicant has brought proceedings for damages for defamation in relation to the publication of another matter having the same meaning or effect as the defamatory matter.

The evident purpose of s 38(1)(d) is the avoidance of “doubling-up” in awards of damages. The respondents contend, correctly, that s 38(1)(d) is applicable in the present case.

446 The parties referred to several of the leading cases containing the principles to be applied in the assessment of damages and, in addition, to *Ali v Nationwide News Ltd* [2008] NSWCA 183 at [70]-[78] and to *Cripps v Vakras* [2014] VSC 279 at [549]-[563] in which the principles have been summarised recently. Drawing on the various authorities to which counsel referred, the following principles can be identified as being particularly pertinent to the assessments in the present case:

- (a) Damage to reputation need not be proved as it is presumed: *Bristow v Adams* [2012] NSWCA 166 at [20]-[31];
- (b) Damages for injured feelings, however innocent the publication by the defendant may have been, form a large element in the assessment. The harm caused to applicants by defamatory material often lies more in their own feelings about what others are thinking of them than in any actual change manifest in the attitude of others towards them: *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1125;
- (c) A person publishing defamatory imputations must take applicants as they find them. Accordingly, it is appropriate to have regard to the individual sensitivities of an applicant;
- (d) The level of damages should reflect the high value which the law places upon reputation and, in particular, upon the reputation of those whose work and life depends upon their honesty, integrity and judgment: *Crampton v Nugawela* (1996) 41 NSWLR 176 at 195, applied in *John Fairfax Publications Pty Ltd v O’Shane (No 2)* [2005] NSWCA 291 at [3];
- (e) The circumstance that a respondent has not provided any apology is pertinent: *Herald and Weekly Times Ltd v McGregor* (1928) 41 CLR 254 at 263;
- (f) Aggravated damages are a form of compensatory damages. They are not awarded to punish a respondent. Exemplary or punitive damages for defamation cannot be awarded: *Defamation Act 2005* (NSW) s 37;
- (g) An award of aggravated damages may be made if a respondent has acted in a manner which demonstrates a lack of *bona fides* or in a manner which is improper or unjustifiable: *Triggell v Pheaney* (1951) 82 CLR 497 at 514. Conduct with those characteristics will be such as to increase the harm which the defamation has caused

or may be supposed to have caused: *Mirror Newspapers Ltd v Fitzpatrick* [1984] 1 NSWLR 643 at 653;

- (h) The failure to publish a retraction or an apology may make an award of aggravated damages appropriate if it amounts to a continuing assertion of the defamatory imputations: *Carson* at 78 per Brennan J;
- (i) In awarding aggravated damages, the Court is still compensating applicants for the loss actually suffered by them as a result of the defamation but, in doing so, it may adopt the highest level of damages open as compensatory damages: *Cassell* at 1085.

### ***The extent of publication***

447 Earlier in these reasons I noted that the SMH had distributed around 2,466 of the posters for placement outside locations at which the SMH was for sale. Most of the locations were in New South Wales. The majority of the locations were in metropolitan areas at which it is reasonable to suppose that they were seen by greater numbers. Some 400 posters were sent to locations in Queensland, some 68 to the ACT, some 59 to Victoria, some 53 to South Australia, some 28 to Western Australia, 9 to the Northern Territory and 1 to Tasmania. It is reasonable to suppose that the SMH was for sale at each of the locations to which the SMH poster was sent. There was no suggestion that more than one copy of the poster had been displayed at any individual location.

448 An answer to an interrogatory administered by Mr Hockey indicated that, at 5 May 2014, the estimated national readership of the SMH was 772,000. There is no State or Territory breakdown of that readership available.

449 It is reasonable to suppose, and I find, that the SMH poster was seen and read by many more than those who read the SMH articles in their printed form. That is because the posters, by their nature, would have been seen by many passers-by who did not purchase the SMH or otherwise have access to it. It is not possible to be precise as to the numbers who saw the SMH poster and who did not read the SMH printed articles, but it is reasonable to suppose that it well exceeded 1,000,000 people and probably twice that number. It is possible that some of those viewed the subject articles online and thereby, on my findings, had the understanding which they derived from the SMH poster corrected. However, the numbers in this category are relatively modest. The estimated number of users of the SMH tablet app as at 5 May 2014 was only 45,513 and it cannot be expected that all of those



accessed the articles online. Approximately 52,000 persons accessed the articles via the standard and mobile versions of the SMH website.

450 Accordingly, it is appropriate to conclude that there would have been a very large number of people who saw the SMH poster and whose understanding of what it conveyed was not affected by other publications.

451 In relation to the Twitter matters, I referred earlier to the evidence that, while The Age had some 280,000 followers on its Twitter account, only some 789 of these downloaded the article headed “Treasurer for Sale: Joe Hockey offers privileged access” on 5 May 2014. Counsel for Mr Hockey submitted that it could be inferred from this that approximately 279,000 had read the tweets but had not had the understanding conveyed by them corrected by a later reading of the articles.

452 This submission has some attraction, but I do not consider that it should be accepted without qualification. Many, if not most, Twitter users receive daily large numbers of tweets. It is unrealistic to suppose that they read every tweet. Ordinary experience suggests that many do not read all the tweets they receive and, of those who do, many will glance at a tweet only fleetingly to see if it contains anything to attract their interest. That may, for example, be because they are interested only in tweets dealing with a particular subject matter or particular subject matters. Readers of this kind do not “take in” the subject matter of every tweet. It should not be supposed therefore that the tweets were read and understood in the same way as was the SMH poster.

453 A second consideration is the ease of the means by which those seeing the Twitter matters could access the articles. This should not be ignored. It would have been a simple matter for readers to click on the hyperlink included in the tweets. It seems probable that many of those on whom the bare tweets had an impact would have gone on to read the hyperlinked articles or, perhaps, have accessed them by other means. Such readers would therefore have had their initial understanding removed.

454 Nevertheless, I accept that it is appropriate to proceed on the basis that there would have been a large number of persons, perhaps in the tens of thousands, who read the bare tweets and who did not read further.

*Findings of fact bearing on the assessments*

455 Mr Hockey has been the member for North Sydney in the Australian Parliament since 1996. Before his election, he worked from time to time as a banking and finance lawyer with a prominent national firm, as a Senior Policy Advisor to the New South Wales Treasurer and, later, as Director of Policy for Mr Fahey, then Premier of New South Wales. From 1998 to 2001, Mr Hockey was the Minister for Financial Services and Regulation; between 2001 and 2004 he was Minister for Small Business and Tourism; from 2004 to 2006 he was Minister for Human Services and, in January 2007, he was elevated to the Cabinet upon his appointment as Minister for Employment and Workplace Relations and Minister assisting the Prime Minister for the Public Service. In the period between 2007 and September 2013, when the Liberal-National Coalition was in opposition, Mr Hockey was variously Shadow Minister for Health and Aging and Manager of Opposition Business in the House of Representatives, Shadow Minister for Finance, and Shadow Treasurer. He became the Federal Treasurer on the election of the Coalition on 18 September 2013.

456 The evidence indicates that Mr Hockey is a person of integrity. That finding would not be made any more emphatic by the inclusion of an adjective.

457 Mr Hockey was first alerted to the respondents' publications shortly after midnight on 4 May 2014 as a result of a telephone call from Ms Daley, his Press Secretary. She read to him the headline "Treasurer for Sale" and other parts of the articles published in the SMH. Mr Hockey then read parts of the articles online on the websites of the SMH, The Age and The Canberra Times.

458 Mr Hockey described his reaction to the publication of the articles as being one of complete surprise, shock, anger, disbelief, disappointment and concern as to the impact they would have on his family. He regarded the articles as conveying the suggestion that he was "on the take" and therefore as accusing him of being corrupt. He said that the articles went to "the heart of my integrity – they were about my character and my honesty". He also thought that the articles were a form of "payback" for his insistence on a correction and apology in respect of the articles published on 21 March 2014.

459 Mr Hockey said that he either observed personally, or was informed, that the SMH and The Age articles were the subject of television and radio commentary on the morning of 5 May 2014.

460 Mr Hockey described the suggestion that he had personally and corruptly benefited from payments made to influence his decisions as Treasurer as being “immensely hurtful and upsetting”. He continued:

[60] My reputation is one of the most important things to me. I feel as if the matters complained of were deliberately published during the week of the budget so as to cause me maximum disruption to my budget preparation work. They were designed to cause hurt and pain, which they did. I also feel hurt because of the apology published in respect of the Sydney Morning Herald article by Mark Kenny and Sean Nicholls on 20 March 2014. I feel that because I obtained that apology, Mr Kenny and Mr Nicholls sought to get back at me by publishing the matters complained of which they wrote about me. I also believe that journalists at the Sydney Morning Herald were annoyed at me because there were no organised leaks provided to the Sydney Morning Herald or The Age in the days leading up to the budget.

...

[62] As a result of the publication of the matters complained of, I feared for the safety of my family because of the emotive nature of the allegation that I was “for sale”. It exposed my family to ridicule and given what I knew was in the Budget, I was very concerned for the safety and reputation of my family.

[63] I have no doubt that as a result of publication of the matters complained of, there will be many readers who will believe the allegations made against me. There also will be many readers who will have doubt as to whether or not the allegations are true. It suggests that the decisions that were announced in the Budget were driven by money and support that I had received from members of the North Sydney Forum rather than the national interest. This causes me significant hurt.

461 The distress which Mr Hockey experienced was exacerbated by the fact that he was to deliver his first budget as Federal Treasurer on 13 May 2014. This meant that in the week commencing 5 May 2014, he was heavily preoccupied with matters relating to the final preparation of the budget and its presentation and yet was diverted by having to deal with matters arising from the publications about which he complains.

462 Mr Hockey went on to say that he continues to be upset about the allegation and has sought to restore his reputation by bringing the present proceedings.

463 I accept Mr Hockey’s evidence about these matters.

464 Mr Hockey led evidence in affidavit form from a number of witnesses. These were Mr Burnes (the owner and Chief Executive Officer of AOT Group Pty Ltd (a travel company) and the former State Treasurer of the Victorian Division of the Liberal Party who has known Mr Hockey since 1999), Mr Fahey (the former Premier of New South Wales), Mr Francis (a tennis centre operator who is also responsible for a charitable foundation

supported in a significant way by Mr Hockey), Mr Hawke (the former Prime Minister), Mr Lovett (Mr Hockey's Chief of Staff), and Ms Daley, his Press Secretary. Apart from Ms Daley none of these persons was required for cross-examination. I accept their evidence.

465 It is not necessary to outline the evidence of these witnesses in detail. It is sufficient to say that I accept that their evidence establishes that Mr Hockey has a reputation among those with whom he works and mixes for honesty, integrity, decency and genuineness.

466 The upsetting effect on Mr Hockey of the articles was apparent to many of the witnesses. Several have noticed that he has become more subdued and pensive since 5 May 2014. It is significant that Mr Hockey had been affected in this way because he is accustomed as a politician to being the subject of criticism, including robust criticism. He has not been affected in the way which he now reports by the criticisms in the past.

467 On the same day as the publication, Mr Hockey's solicitors sent to Mr Hywood, and copied to others including Mr Holden and Mr Goodsir, an email demanding a retraction and apology in each of the SMH, The Age and The Canberra Times in respect of the Nicholls article and the Kenny article. Mr Coleman, the In-house Counsel of Fairfax Media Ltd provided an initial response later that same day. Mr Hockey's solicitors renewed the demand for the apologies by an email to Mr Coleman on 6 May and, on this occasion, included a like demand in respect of the SMH poster. By letter dated 6 May 2014, Mr Coleman, on behalf of Fairfax Media, declined to provide apologies but said "if Mr Hockey wants to respond to the articles in an article suitable for publication, the various publications would be interested in publishing it". Mr Hockey did not take up that invitation. These proceedings were commenced on 20 May 2014.

***Identifying the causes of hurt and harm***

468 The findings so far reflect the evidence given in relation to all the publications on which Mr Hockey sued. However, on my findings, Mr Hockey is entitled to damages only in respect of the hurt and harm caused by the SMH poster and the first two Twitter matters.

469 Mr Hockey's evidence did not distinguish between the effect on him of the printed and online articles in the SMH, The Age and The Canberra Times, on the one hand, and the SMH poster and the two Twitter matters, on the other. It would be inappropriate to attribute the whole of the hurt and harm of Mr Hockey to the latter publications. Mr Hockey's evidence indicates that much of the hurt and harm in respect of which he seeks compensation

is attributable to the publications which I have found not to be defamatory. I refer in particular to Mr Hockey's evidence that it was "the articles" which offended him because they went to the heart of his integrity; that with advance notice he would have sought to have the articles corrected; that it was the reading of "the articles" which made him think they were a form of "payback"; that it was the availability of the printed articles which led him to avoid eye contact with others on the morning of 5 May 2014 when having his morning cup of coffee; and that it was the front pages of the SMH and The Age which he had seen displayed on televisions that morning and which were the subject of public discussion.

470 I also note that Mr Hockey said that part of his hurt arose because of his belief that Mr Nicholls and Mr Kenny had been seeking to get back at him, yet, on my findings that was not the case.

471 Other than in limited respects, the case presented on Mr Hockey's behalf did not seek to distinguish between the effect on him caused by the SMH poster and the first two Twitter matters, on the one hand, and the remaining publications. Mr Hockey did not make any attempt to establish that he had suffered separate and distinct damage as a result of the conduct of any individual respondent, nor did he submit that the damage he had suffered varied according to the medium of publication.

472 Mr Hockey did not say that he had himself seen the SMH poster. He said only that he was "aware" that the SMH had sought to promote its sales by the posters. His wife informed him of the content of the poster later on 5 May.

473 Mr Hockey deposed in relation to the SMH poster:

[50] The placards were very damaging to my reputation, in particular because they were placed in my own electorate and near where I lived. They caused enormous hurt to me because I knew that they would be seen by my family and friends. Any person walking or driving past the placards would see the words "Treasurer for Sale" and take that to mean that I, as the Treasurer of Australia, was corrupt. I am hurt that the Sydney Morning Herald clearly [was] trying to sell more newspapers at the expense of my reputation. It is beyond belief that the Sydney Morning Herald could have acted so brazenly against me.

474 The evidence did not establish that Mr Hockey had himself seen The Age Twitter matters: only that he is "aware" of them.

475 Mr Hockey also spoke of the effect of the phrase "Treasurer for Sale":

[61] I am particularly hurt by the use of the phrase “Treasurer for Sale” in various of the matters complained of, which is offensive and repugnant. At no stage was I ever asked to respond to a question by the respondents as to whether or not I was “for sale”, and obviously had I been asked, I would have responded that I am not for sale.

476 It is the effects of the publication of the words “Treasurer for Sale” in the SMH poster and on Twitter for which Mr Hockey is to be compensated.

***Damage to reputation***

477 In addition to relying on the presumption of damage to reputation, Mr Hockey adduced evidence of damage which had in fact occurred. Evidence is admissible for this purpose: *Mirror Newspapers v Fitzpatrick* at 657 and 665; *Hughes v Mirror Newspapers Ltd* (1985) 3 NSWLR 504 at 510-512. Mr Lovett, Mr Hockey’s Chief of Staff annexed to his affidavit some of the negative emails which Mr Hockey’s office had received after the publications on 5 May 2014. Exhibit A61 comprised a number of negative emails and messages received by the respondent following the publication. Mr Hockey tendered other material as well, including a tweet from the former Prime Minister, Mr Fraser, indicating negative views about him in the light of the articles.

478 In some respects, the utility of this material is limited. First, the negative reactions to Mr Hockey appear to arise from the articles which I have found were not defamatory, and not identifiably from the SMH poster or the first two Twitter matters. It is possible that reader reactions were in part informed by these particular publications but it is much more likely that they were informed by the publications which I have found not to be defamatory.

479 Secondly, many of the communications from readers do not indicate that they understood any of the publications as conveying any of the imputations alleged by Mr Hockey in the three proceedings.

480 Thirdly, it is appropriate to keep in mind that many of those providing the communications upon which both Mr Hockey and the respondents relied are likely to have had firm views about Mr Hockey, whether favourable or unfavourable, even before 5 May 2014. That is an ordinary incident of political life. This being so, it is probable that in many cases the various publications on 5 May did not cause any material alteration of the readers’ views about Mr Hockey. I accept in this respect the following submission by the respondents:

It is a fact of life for any prominent politician for a major party that, at any given time, a very significant proportion of the Australian community will have already made up their minds about him or her, whether positively or negatively, and will not have their views shifted by any particular news item. Some will dismiss whatever they read on the basis that it does not accord with their views or because they assume a bias on the part of the item; others will read items in a manner that reinforces their existing views. These matters tend against a contention that the matters complained of will have had any significant, or lasting, impact upon the reputation of the applicant in the eyes of the Australian community.

481 I do not regard these matters as indicating that Mr Hockey has not suffered any damage to reputation. Merely because the views of some may not have shifted does not mean that the estimation of others may not have diminished, or that the adverse views held by some may not have become more entrenched. However, I accept that these are matters of which account must be taken in assessing the extent of the loss.

482 An important consideration bearing upon the element of reparation for damage to reputation is that Mr Hockey does not appear to have suffered any diminution of reputation among his parliamentary and ministerial colleagues arising from the publications. He continues as the Federal Treasurer. There is no evidence of any suggestion that he should step aside because of the matters revealed in the publications or while some investigation of his conduct is undertaken.

***Respondents' submission concerning hurt and distress***

483 The respondents submitted that the damages should incorporate only a modest component on account of the hurt to Mr Hockey's feelings. Their first submission was that Mr Hockey's evidence concerning his hurt feelings should not be accepted at face value.

484 The respondents referred to evidence from Mr Hockey that he had "barely" read the matters of which he complained and had not focused on every single word or graphic. In my opinion, this paraphrase of Mr Hockey's evidence does not accurately convey the gist of what he said, but even if it does, it does not undermine Mr Hockey's evidence of his reaction to the articles. I would regard it as understandable that Mr Hockey, once having formed the perception that the articles contained material of a hurtful nature, would not have focused on every word or graphic or have wished to read the articles closely.

485 Next, the respondents referred to apparent inconsistent conduct by Mr Hockey. This concerned the omission of Mr Hockey to take any action concerning the NSF, despite his evidence that he regarded its conduct in attributing words to him, and making promises

concerning him, as “massively overplayed”, “inaccurate”, “clearly misleading” and “of grave concern to him”. The submission of the respondents, as I understood it, was to the effect that the weight which might otherwise be attached to Mr Hockey’s claims of being upset by the subject articles should be tempered by the circumstance that, although using similar language to describe other matters which he claimed to be incorrect, he had failed to take action in relation to those matters.

486 In order to understand this submission, it is necessary to refer to some of Mr Hockey’s evidence, including his evidence about the establishment of the NSF in April 2009:

Q: It was your idea, wasn’t it, in conjunction with the President of the North Sydney Federal Electorate Conference?

A: At the time, Dr Collins, there was no Chamber of Commerce in North Sydney and I was very keen to set up a Chamber of Commerce and I discussed it with Robert Orrell, who was a small businessman, and said that there was a need to set up a chamber of sorts, a business networking group in the local area.

Q: Yes. Now, Mr Orrell, he was already the President of the Federal Electorate Conference in your electorate?

A: He may have been at the time. Yes.

Q: And he had been your Campaign Director at the time of your first election to the Federal Parliament?

A: From memory, yes.

...

Q: But it wasn’t a Chamber of Commerce in the ordinary sense, was it, Treasurer, because the intention was always that membership fees would become donations to the Liberal Party?

A: Well, that was a decision of Mr Orrell.

...

Q: I just want to suggest to you that the entire purpose of the forum was to capitalise upon your personal franchise and fundraising ability?

A: Well you will need to ask the people that set it up.

Q: Yes. Well, are you saying you didn’t have that understanding?

A: I would have worked with my Conference to establish it. But there were many other forms of fundraising around at the time.

487 Mr Hockey was cross-examined about the contents of the homepage on the NSF website. He said that it was wrong for the homepage to say that the NSF “is vitally important to Joe’s ongoing success and the development of effective Coalition policy”, and that its statement that “the exchange of ideas and policy input is needed to help build the financial resources to support Joe going into the future” was “massively overplayed”. Mr Hockey was



cross-examined about an email concerning an NSF lunch held on 7 March 2014 in the private dining room at ARIA. The email included the tag line describing the NSF as “Business and community leaders supporting Joe Hockey MP”. Mr Hockey said this was not an accurate description of the NSF, and that it would have been more accurate to say “Business and community leaders supporting the Liberal Party” and that the NSF was “a forum for the exchange of ideas”.

488            Later, Mr Hockey was cross-examined about the NSF membership application form which included the statement from its Chairman, Mr Hart, that the NSF “has been established to develop a membership-based network of businesses and community leaders with a common purpose to exchange ideas and provide resources for Joe Hockey”. Mr Hockey said that, despite these passages, “the original purpose was to establish a business networking forum. And the Liberal Party was running it, and in turn, if they obviously were interested in making it a fundraising vehicle as well, that’s up to them”.

489            The membership application form issued by the NSF provided an alternative for persons who did not wish to join it, in the following terms “Sorry, I am unable to join the North Sydney Forum, but please accept my donation to assist Joe Hockey”. Mr Hockey said that insofar as the statement referred to him, it was “clearly misleading” and “a matter of grave concern” to him.

490            Mr Hockey then gave the following evidence in relation to the NSF membership form:

Q:     Now it’s a matter of concern to you, isn’t it, that this form is so gravely misleading?

A:     Well, it is. As I understand it, it entirely is, yes.

Q:     After these articles were published, Treasurer, did you not conduct any investigation into the operations of the NSF, and what it was doing by reference to your name?

A:     Well, no, because I’ve been working as Treasurer of Australia, doing my job for the people of Australia, and in relation to the articles themselves, after consulting with my lawyers, the – well, I can’t say what the advice was, can I, your Honour, but, you know, it is patently clear that the claims made against me, from my perspective, were defamatory.

491            As I have indicated, the respondents’ submission seemed to be that Mr Hockey’s description of his hurt should not be accepted at face value because of his failure to take

action to correct the NSF material which he considered to be “misleading” and “massively overplayed”.

492 I am not prepared to act on this submission. I had the firm impression that Mr Hockey sought in his cross-examination to distance himself, to an extent, from the both establishment and the operations of the NSF. In particular, it was very apparent that Mr Hockey sought to distance himself from the fundraising activities of the NSF. The answers of Mr Hockey on which counsel for the respondents relied have to be viewed in that context. I am not satisfied therefore that they provide a firm foundation for a finding of inconsistent conduct which would undermine Mr Hockey’s evidence about the effect on him personally of the subject publications.

493 The third aspect of the respondents’ submissions on this topic, related to the political context in which the publications were made. The respondents submitted that the Court should take account of the fact that the publications occurred in an environment in which it is commonplace for political discourse to be marked by robust and vilificatory language. The respondents tendered evidence of Mr Hockey himself using such language in relation to his political opponents, referring to their “lies”, to them being “shrill and hysterical”, to them being “hypocrites” and to being “a disgrace”. Mr Hockey admitted in his cross-examination that “robust language is part and parcel of life in a robust democracy”, that there are in this country “constant heated debates about both policy and personality”, and that he gives as good as he gets when it comes to criticism of his political opponents. The respondents did not contend that the circumstance that the publications occurred in such an environment meant that Mr Hockey’s reputation had not been damaged, only that the degree of damage he had suffered would have been tempered by the understanding of readers of the way in which political discourse is carried out.

494 I do not regard this as a significant consideration. It is one thing for the public to have become accustomed to robust and vituperative language from politicians: their expectations as to the manner of discourse by those who report and comment on political and governmental matters, especially by responsible newspapers such as the SMH and The Age, is another.

495 The respondents said expressly that they did not seek an adverse finding as to Mr Hockey’s credit. They submitted nevertheless that there were aspects of his evidence which were “unsatisfactory” and which should be “approached with caution”.

496 I do not consider it necessary to canvass the matters upon which the respondents relied in support of this submission in any detail. It is fair to say that there were some aspects of Mr Hockey's evidence which were not entirely satisfactory. However, it is commonly the case that some aspects of a witness' evidence can be shown to be unreliable, or given in an unsatisfactory manner, without this undermining the reliability of the witness' evidence more generally. It was obvious in this case that Mr Hockey did have difficulty at times in recognising that the way in which questions should be answered in a courtroom differs from that to which he may be accustomed in the political environment. However, I did not regard that circumstance, or the other criticisms which the respondents made of his evidence, as undermining the reliability of his evidence concerning the hurt which the publications have caused him.

497 There remains the fact, however, that much of Mr Hockey's hurt and distress was said by him to result from publications which I have found were not defamatory.

### ***Vindication***

498 The respondents submitted that this was not a case in which the damages should be assessed so as to afford a complete vindication to Mr Hockey. They drew attention to the substantial publicity which the trial itself had received and which the Court can expect its judgment will receive. They submitted that, in that circumstance, the Court's judgment, to the extent that it upholds Mr Hockey's claims, will provide a substantial public vindication of his reputation and, accordingly, that this is not a case in which the damages should be assessed so as "to convince a bystander of the baselessness of the charge": *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1071.

499 It was obvious that this trial attracted substantial public interest. That was evident in the attendance in the public gallery and in the substantial media coverage of the trial. I accept that the Court could proceed on the basis that, having regard in particular to the prominent position held by Mr Hockey, its judgment is also likely to receive substantial publicity.

500 Should this circumstance operate as a modifying factor on the assessment of damages? In England, in *Associated Newspapers Ltd v Dingle* [1964] AC 371, the House of Lords rejected a submission to this effect: at 400-1, 404, 407, 408-9 and 419. Lord Morton said (at 404):

Such a method of assessing damages would do less than justice to the plaintiff, in my view, and it is based upon suppositions which may be unfounded. A judge cannot

tell how widely his judgment will be reported and read, nor can he tell how far the plaintiff's general reputation will be improved by his complimentary remarks. A simple verdict of a jury in favour of the plaintiff will no doubt have a good effect on his reputation, and it is surely impossible to set a monetary value upon the difference, if any, between the effect of a jury's finding and the effect of a judge's finding plus a compliment from him.

501           The decision of the Court of Appeal in *Purnell v BusinessF1 Magazine Ltd* [2007] EWCA Civ 744; [2008] 1 WLR 1 may suggest some softening of this view, at least when there has been a prior judgment rejecting a plea of justification. However, I consider that the approach in *Dingle* should be applied. First, damages are the principal means by which the Court speaks to provide vindication. Secondly, although the outcome of the cases may well attract considerable publicity, it may be doubted that members of the public generally will read these reasons. It is more likely that they will have regard to the "headline judgment" constituted by the awards. Thirdly, it would be undesirable to introduce, in effect, two tiers of damages for defamation: the first when the case is tried by a judge alone and reasons published, and the other when the case is tried by jury and no reasons published.

***Aggravated damages***

502           In the case of the SMH, the pleaded particulars of aggravated damages were as follows:

- (a)    The publication by the respondent of a grossly defamatory placard in order to increase sales of the Sydney Morning Herald at the expense of the applicant's reputation;
- (b)    The continued publication by the respondent of the third matter complained of on the internet despite the respondent being put on notice as to the defamatory nature of the matter;
- (c)    The applicant's knowledge of the falsity of the imputations;
- (d)    The over sensational, extravagant and unfair presentation of the matters complained of indicating an intent to injure the applicant;
- (e)    The failure to apologise to the applicant in terms reasonably requested by way of letter dated 5 May 2014.

503           Although not identically expressed, the particulars of aggravated damages pleaded in the case of the publications by The Age were essentially the same as those contained in (b)-(e).

504           In my opinion, with one exception, none of these matters warrants the awards including aggravated damages. Particular (a) is, in relation to the publication of the SMH

poster, no more than a plea of the same matter for which damages are to be awarded. Aggravated damages are included to compensate an applicant for the *additional* hurt or injury to reputation brought about by conduct of the publisher *over and above* that caused by the publication itself.

505 In relation to (b), the continued publication of the articles on the internet cannot, in the light of my findings, aggravate the conduct of the SMH in publishing the SMH poster. Particular (c) refers to the applicant's own knowledge of the falsity of the imputations, but is not in and of itself an aggravating circumstance: *Barrow v Bolt* [2013] VSC 226 at [23]. Particular (d) seems more directed to the printed articles rather than the SMH poster.

506 The failure to apologise is an aggravating factor. On my findings, the refusal of the SMH and The Age to provide apologies was justified in relation to most of the publications, but it was, nevertheless, open to them to recognise their wrong in relation to the SMH poster and the Twitter matters respectively, and they did not do so.

507 I do not attach significance to the fact that Mr Hockey did not take up the invitation to provide his own responsive article. That course would be more adapted to a circumstance in which publication of the other side of a story would be appropriate. It is not a substitute for an apology recognising the wrong done by that which has already been published.

508 Similar considerations apply in relation to the Twitter matters.

509 In his oral submissions, counsel for Mr Hockey submitted that other matters warranted an award of aggravated damages. The first was Mr Hockey's belief that the articles had been published as a form of "payback" to him. However, damages are not being awarded for the articles.

510 Next, counsel for Mr Hockey referred to aspects of the manner of the conduct of the respondents' defences. He submitted that the plea of statutory qualified privilege in relation to the publication of the SMH poster and the first two Twitter matters was "hopeless". The precise manner in which this could, if so, warrant aggravated damages was not articulated but, in any event, I do not regard the respondents' defences of qualified privilege as warranting the epithet "hopeless".

511 Next, counsel for Mr Hockey submitted that the respondents' conduct in seeking to establish the truth of the some of the matters bearing upon the establishment and operation of the NSF was such as to warrant aggravated damages. Counsel contended that the

respondents “well knew” that their assertion of the relevance of these matters was incorrect. He submitted that the respondents had relied on an “illegitimate pleading” so as to justify an entitlement to cross-examine Mr Hockey, and to “embarrass and further smear him” in circumstances in which they knew that the imputations were not true. Counsel went further, submitting that the respondents’ cross-examination of Mr Hockey was “improper, unjustifiable and lacking in *bona fides*”. The claim included a submission that the cross-examination had been conducted for an improper purpose, namely, to embarrass Mr Hockey. Counsel elaborated these submissions (which were tantamount to allegations of unprofessional conduct by the respondents’ legal representatives) in a way which it is not necessary to repeat.

512 I reject these submissions. It should go without saying that allegations of improper conduct of the kind which counsel, on behalf of Mr Hockey, imputed to the respondents’ counsel and solicitors should not be made lightly. Counsel should ensure that such submissions have a proper basis. Such a basis will seldom exist when there is more than one view reasonably open as to the law bearing on the admissibility of the evidence in question. That is this case. As already noted, I have found that much of the cross-examination of the respondents’ counsel which was impugned as part of this submission, did go to relevant matters. Even if the view which I have adopted is wrong, it would not be appropriate to conclude that the position of the respondents did not have a reasonable basis.

513 I also add that it is evident that counsel for Mr Hockey was, with respect to him, acting under a misapprehension in his submission as to the relevance of the impugned cross-examination. Counsel overlooked that it was not until s 22 was amended with effect from 2002 that it was couched in terms relevantly identical to the present s 30. In fact, counsel put to the Court wrongly that s 22 of the 1974 Act which was considered by Hunt J in *Makim v John Fairfax* and on which he relied was in relevantly the same terms as the present s 30 of the 2005 Act. For the reasons already given, the differences between s 22 as originally enacted and s 30 are material, and, in my opinion, made the attacks by counsel on the conduct of the respondents’ case inappropriate.

514 Accordingly, I reject the submission that aggravated damages are warranted on this account.

### ***Assessment***

515 I have found that each of the SMH poster and the first two Twitter matters conveyed pleaded imputations (c) and (d). I accept the submission of counsel for Mr Hockey that a defamatory allegation of corruption by a politician is a serious defamation. The damages should reflect that seriousness. The defamatory imputations in this case are not the most serious form of defamation of this kind, however, as allegations that Mr Hockey had taken bribes, or was prepared to take bribes, in his office as Treasurer would be even more serious.

516 The assessments must take account of the various factors which I have identified. It is not a scientific exercise and there is no single “right” result. The significance of each of the individual factors which I have mentioned varies from case to case. In these cases, compensation for the hurt done to Mr Hockey is a particularly important consideration but the other two purposes are also pertinent. The awards cannot compensate Mr Hockey for all the hurt which he has experienced, because much of it results from publications which I have found not to be defamatory. Mr Hockey would have suffered that hurt and any loss of reputation involved independently of the publication of the SMH poster and the first two Twitter matters. As noted earlier, it is not possible to identify the hurt or damage occasioned by each publication. Inevitably therefore, there is some arbitrariness in the awards.

517 I consider that an award of \$120,000 is appropriate in respect of the SMH poster and an award of \$80,000 in respect of the two matters published on Twitter by The Age. The second of these awards is less than would otherwise have been the case so as to avoid double compensation of Mr Hockey and because I consider that they are likely to have been read and “taken in” by fewer persons than in the case of the SMH poster. Given the relationships between the respondents, I do not believe that the separation out of the awards in this way will cause injustice between them.

### **Injunctions**

518 In each action, Mr Hockey also seeks relief by way of injunction restraining future publication of the defamatory imputations.

519 In their final submissions, the parties asked that this aspect of Mr Hockey’s claims for relief be deferred until after the Court had published its findings, in order that their submissions could be directed to the matters found to be defamatory. Accordingly, I will hear from the parties further with respect to the claims for injunctions.

**Summary**

520 In summary, I uphold Mr Hockey's claims only with respect to the publication of the SMH poster and the first two matters published on Twitter by The Age. I award damages of \$120,000 and \$80,000 respectively in relation to those claims.

521 Mr Hockey's claims with respect to the other publications which were the subject of the respective proceedings are dismissed.

522 I will hear from the parties with respect to injunctions, interest and costs and as to the form of the orders which are appropriate in the light of these findings.

I certify that the preceding five hundred and twenty-two (522) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice White.

Associate:

Dated: 30 June 2015