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WHEN THE GAME IS NOT WORTH THE CANDLE: *PALMER V MCGOWAN [NO 5]* (2022) 404 ALR 621

'a man who chooses to enter the arena of politics
must expect to suffer hard words at times'[1]

I Introduction

The law on defamation balances 'the right to freedom of expression and the right to reputation'.[2] Recent defamation proceedings brought by billionaire and former politician Clive Palmer, against the Premier of Western Australia ('WA') Mark McGowan, demonstrated that 'a politician litigating about the barbs of a political adversary might be … a … futile exercise'.[3] Palmer, an 'indefatigable litigant',[4] commenced proceedings in the Federal Court of Australia alleging that McGowan defamed him by making certain comments during press conferences, including referring to Palmer as the 'enemy' of WA.[5] The proceedings were the subject of several interlocutory decisions,[6] and consumed considerable time and resources of the Court.[7] In a final judgment determining the proceedings, *Palmer v McGowan [No 5]* (2022) 404 ALR 621 ('*Palmer*'), Lee J found that Palmer and McGowan had each defamed the other.[8] However, the 'glaring disproportion between the damages awarded and the extent of legal expense'[9] demonstrated that '[t]he game ha[d] not been worth the candle'.[10]

This case note examines the proceedings in *Palmer* where Lee J's judgment should be treated as a warning to future litigants not to engage in costly defamation

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1 *Australian Consolidated Press Ltd v Uren* (1966) 117 CLR 185, 210 (Windeyer J).

2 *Palmer v McGowan [No 5]* (2022) 404 ALR 621, 627 [3] (Lee J) ('*Palmer*').

3 Ibid 626 [1].

4 Ibid 650 [122].

5 Ibid 632–3 [37]–[38], 735–45 Annexure B.

6 *Palmer v McGowan* [2021] FCA 430; *Palmer v McGowan [No 2]* (2022) 398 ALR 524; *Palmer v McGowan [No 3]* [2022] FCA 140; *Palmer v McGowan [No 4]* [2022] FCA 292.

7 *Palmer* (n 2) 730 [523].

8 See below Part III.

9 *Palmer* (n 2) 731 [526].

10 Ibid 730 [522].

proceedings which are a drain on judicial resources if they do not suffer real reputational damage. This is particularly so in the case of politicians, who must expect a degree of public criticism. Part IV considers recent amendments to model defamation laws which may be the new gatekeeper against indefatigable litigants, like Palmer, who are not deterred by the costs of litigation and potential adverse costs orders. A focus is also had upon Lee J's remarks regarding the qualified privilege defence developed in *Lange v Australian Broadcasting Corporation* ('*Lange*')[11] and the need for courts to revisit the defence given its current lack of utility.

II Factual Landscape

The proceedings in *Palmer* arose 'out of a prolonged and heated dispute between two political antagonists dealing … with matters best described as political'.[12] The 'prolonged and heated dispute'[13] occurred in the context of: (1) WA's border closure during the COVID-19 pandemic; and (2) the enactment of the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) ('*Iron Ore Amendment Act*').[14]

A *Western Australia's Border Closure*

In response to the COVID-19 pandemic, the WA Government issued directions that closed the WA border to everyone except exempt travellers.[15] The border closure was widely known and described as WA's 'hard border'.[16] Palmer and his wife applied to enter WA, but their applications were refused.[17] Palmer subsequently commenced proceedings in the High Court of Australia in *Palmer v Western Australia* ('Border Challenge'),[18] challenging the validity of the border closure under the *Australian*

11 (1997) 189 CLR 520 ('*Lange*').

12 *Palmer* (n 2) 627 [4].

13 Ibid.

14 Ibid 627 [5].

15 Ibid 627 [7].

16 See, eg: ibid 627 [5]; Hamish Hastie, 'WA's Hard Border Spans the Whole Country as McGowan Protects COVID-Free Christmas', *The Sydney Morning Herald* (online, 17 December 2021) <https://www.smh.com.au/national/wa-s-hard-border-spans-the-whole-country-as-mcgowan-protects-covid-free-christmas-20211217-p59ij2.html>.

17 *Palmer* (n 2) 627 [8].

18 (2021) 272 CLR 505 ('Border Challenge'). See generally Lorraine Finlay, 'WA Border Challenge: Why States, Not Courts, Need To Make the Hard Calls During Health Emergencies', *The Conversation* (online, 29 July 2020) <https://theconversation.com/wa-border-challenge-why-states-not-courts-need-to-make-the-hard-calls-during-health-emergencies-143541>.

Constitution. The High Court unanimously dismissed the Border Challenge, finding that the border closure did not breach s 92 of the *Australian Constitution*.[19]

B *The Enactment of the* Iron Ore Amendment Act

Separately, the *Iron Ore Amendment Act* was enacted by the WA Government in response to a long history of disputes with Mineralogy Pty Ltd, a company owned and controlled by Palmer.[20] The disputes related to an agreement entered into in December 2001,[21] ratified by the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA),[22] and had already been the subject of two arbitrations.[23] With preparations for a third arbitration underway,[24] McGowan and the Attorney-General of WA, John Quigley, 'were discussing the prospect of legislation as a means of dealing with the problem'.[25] The draft Bill was passed and assented 'with the speed of summer lightning',[26] which had the 'extraordinary' effect of terminating the arbitration agreements, nullifying previous awards, terminating the third arbitration, and granting immunity to the WA Government.[27]

III The Defamation Proceedings

Against that background, in August 2020, Palmer commenced proceedings for defamation against McGowan, claiming that McGowan made six defamatory publications between 31 July 2020 and 14 August 2020.[28] Five of these publications were words said by McGowan at press conferences, which were then subsequently republished on various media platforms.[29] In summary, these included McGowan: referring to Palmer as the 'enemy' of WA and Australia;[30] stating that Palmer coming

19 Border Challenge (n 18) 534 [80]–[82] (Kiefel CJ and Keane J), 559–60 [166] (Gageler J), 576–7 [210] (Gordon J), 607–8 [293] (Edelman J). See also Samuel Whittaker and Leah Triantafyllos, 'Clive Palmer, Section 92, and COVID-19: Where "Absolutely Free" Is Absolutely Not' (2021) 42(2) *Adelaide Law Review* 623.

20 *Palmer* (n 2) 628 [9], 628–31 [13]–[32].

21 Ibid 628 [13].

22 Ibid 628 [14].

23 Ibid 629 [19]–[22].

24 Ibid 629–30 [23]–[26].

25 Ibid 630 [27].

26 Ibid 630 [29].

27 Ibid 631 [31]. Palmer unsuccessfully sought a declaration that the *Iron Ore Amendment Act* was invalid or inoperative: *Mineralogy Pty Ltd v Western Australia* (2021) 393 ALR 551, 572 [93] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), 593 [166] (Edelman J); *Palmer v Western Australia* (2021) 394 ALR 1, 5 [10] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), 10 [27] (Edelman J).

28 *Palmer* (n 2) 632 [37].

29 Ibid 632–3 [38].

30 Ibid 640–1 [73], 736 Annexure B.

to WA to 'promote a dangerous drug', hydroxychloroquine, is not a good thing for WA;[31] stating that Palmer was 'very selfish to pursue' the Border Challenge;[32] and claiming that he was at 'war' with Palmer.[33] The sixth publication was a post McGowan made to Facebook, which (amongst other things), claimed that Palmer 'decided to just make his profits by taking $12,000 from every man, woman and child in' WA.[34]

McGowan filed a cross-claim, claiming that Palmer made nine defamatory publications.[35] The publications related to statements Palmer made in press conferences and media interviews, as well as a document published by Palmer which was republished on various media platforms.[36] In summary, these included Palmer: calling on the WA Government 'not to lie to the Western Australian people about threats that don't exist';[37] claiming that the *Iron Ore Amendment Act* gave the WA Government 'an exemption of criminal liability';[38] stating 'what crime did you commit Mark, that you want to be immune from? That's the question';[39] and claiming that 'McGowan's very close to China'.[40]

A *The Imputations*

Palmer pleaded 17 defamatory imputations arising out of the 6 publications, 8 of which Lee J found to have been conveyed.[41] McGowan pleaded 9 defamatory imputations, 5 of which Lee J found to have been conveyed.[42] Justice Lee found that '[a]s is evident from their terms, each of the imputations conveyed was defamatory'.[43] By way of summary, Lee J found the following imputations to be conveyed:

- Palmer is a threat and danger to the people of WA;[44]
- Palmer promotes a drug, hydroxychloroquine, 'which all the evidence establishes is dangerous';[45]

31 Ibid 642 [82], 739 Annexure B.
32 Ibid 643 [84], 741 Annexure B.
33 Ibid 643 [87], 742 Annexure B.
34 Ibid 632–3 [38], 746 Annexure C.
35 Ibid 632 [37].
36 Ibid 633–4 [42].
37 Ibid 747 Annexure D.
38 Ibid 748 Annexure E.
39 Ibid 759 Annexure G.
40 Ibid 649 [117], 761 Annexure H.
41 Ibid 634–5 [47].
42 Ibid 636 [48].
43 Ibid 636 [49].
44 Ibid 634–5 [47].
45 Ibid.

- Palmer selfishly uses money made in WA to harm Western Australians;[46]
- Palmer is prepared to bankrupt WA 'because he is unhappy with standard conditions';[47] and
- Palmer is 'so dangerous a person that legislation was required to stop him making a claim for damages against' WA.[48]

With respect to the cross-claim, the following imputations were found to be conveyed:

- McGowan lied to the people of WA in saying he acted on advice of the Chief Health Officer in closing the borders;[49]
- McGowan lied in saying that the health of Western Australians 'would be threatened if the borders did not remain closed';[50]
- McGowan lied 'about his justification for imposing travel bans';[51]
- McGowan 'corruptly attempted to cover up' his involvement in criminal acts;[52] and
- McGowan acted corruptly in seeking to 'confer upon himself criminal immunity'.[53]

B *Defences*

Both McGowan and Palmer advanced defences to the claim and cross-claim, respectively. Their defences relied on qualified privilege, and Palmer also attempted to argue that the imputations conveyed were substantially true. Ultimately, none of the defences were successful.

1 *McGowan's Defences*

McGowan relied on three versions of qualified privilege as a defence.[54] These were: (1) under common law; (2) under s 30 of the *Defamation Act 2005* (NSW) ('*Act*'); and (3) a species of qualified privilege concerned with political speech developed in *Lange* ('*Lange* defence').[55] The defence of qualified privilege 'extends the right to publish defamatory statements for the "common convenience and welfare of society"', 'regardless of their truth or falsity', but the privilege is *qualified* depending

46 Ibid.

47 Ibid.

48 Ibid.

49 Ibid 636 [48].

50 Ibid

51 Ibid.

52 Ibid.

53 Ibid.

54 Ibid 657 [159].

55 Ibid.

on 'whether the occasion is used for an improper purpose to injure the person concerned'.[56] In such cases, the privilege is lost.[57]

(a) Common Law Qualified Privilege

McGowan's common law defence was dismissed by Lee J as 'hopeless', given the established general principle that matters, reaching a wide audience, is generally incapable of satisfying the 'reciprocity' element of the defence.[58] To succeed in relying on the existence of reciprocal interests, McGowan had to satisfy the Court that: (1) his legitimate interests had been furthered or protected by the disclosure of the defamatory material; and (2) the recipient's interest in receiving the information was 'of so tangible a nature that for the common convenience and welfare of society it [was] expedient to protect it'.[59] McGowan argued that there was a reciprocity of interest between himself and 'members of the public'.[60] Given the relevant comments by McGowan were made at press conferences to media personnel, Lee J noted McGowan's argument required accepting that the media personnel served as conduits of information between McGowan and the public generally.[61]

McGowan argued the public had an 'interest' in receiving the published information as residents and enrolled electors in WA.[62] Justice Lee dismissed this argument, given there was no evidence that the media physically present at the press conferences, or those of the public to whom the republications reached, had such characteristics.[63] This was particularly so given that with current technology, the media's reach is arguably limitless. The fact that a topic is *interesting* or members of the public may be *interested* in an answer, was also considered not to equate with the public having a 'corresponding or reciprocal "interest"' in the published information.[64] Further, Lee J considered that publishing attacks on Palmer (including calling him

56 Patrick George, 'Qualified Privilege: A Defence Too Qualified?' (2007) 30(1) *Australian Bar Review* 46, 46. See also Andrew T Kenyon, '*Lange* and *Reynolds* Qualified Privilege: Australian and English Defamation Law and Practice' (2004) 28(2) *Melbourne University Law Review* 406, 407, 410.

57 George (n 56) 46.

58 *Palmer* (n 2) 657 [160]. The test for the common law defence was recognised in *Lange* to have been devised to apply to a limited publication (ie to a single person): *Lange* (n 11) 572 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

59 *Palmer* (n 2) 657 [162], quoting *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211, 261 (McHugh J).

60 *Palmer* (n 2) 658 [169].

61 Ibid.

62 Ibid 659 [175].

63 Ibid.

64 Ibid 660 [177].

an 'enemy of the State'), did not amount to McGowan '"furthering or protecting" any relevant "interest" of his own'.[65]

In rejecting McGowan's arguments and therefore dismissing the defence, Lee J also acknowledged the 'Gilbertian result' that could arise by permitting statements made to the media at press conferences to be protected by the qualified privilege, but the same protection not to be afforded to news services who disseminate such information.[66]

(b) Statutory Qualified Privilege

To succeed in the statutory qualified privilege defence under s 30 of the *Act*, McGowan was required to prove: (1) 'the recipient ha[d] an interest or apparent interest in having information on some subject';[67] (2) 'the matter [wa]s published … in the course of giving to the recipient information on that subject';[68] and (3) the publication of the 'matter [wa]s reasonable in the circumstances'.[69] Palmer accepted the first two requirements were met, leaving Lee J to determine whether McGowan's conduct 'was "reasonable in the circumstances"'.[70] The concept of 'reasonableness' in this context was assessed with regard to a non-exhaustive list of considerations under s 30(3) of the *Act*, and commentary by Wigney J in *Chau v Fairfax Media Publications Pty Ltd*.[71]

His Honour ultimately dismissed McGowan's reliance on the defence, finding McGowan did not discharge the onus of proving his conduct in publishing the matters was 'reasonable in the circumstances'.[72] In doing so, Lee J stressed the importance of not taking a 'checklist' approach to the assessment of reasonableness, where regard must be had to '*all of the circumstances* leading up to and surrounding the publication'.[73]

Relevant findings include that some of the assertions made by McGowan in respect of being at 'war' with Palmer and regarding him as 'the enemy of the State' did not have 'a sufficient factual basis'.[74] While McGowan justified his comments by

65 Ibid 660 [176].

66 Ibid 660 [178].

67 *Defamation Act 2005* (NSW) s 30(1)(a), as at 26 September 2019 ('*Act*').

68 Ibid s 30(1)(b).

69 Ibid s 30(1)(c).

70 *Palmer* (n 2) 661 [182], quoting *Act* (n 67) s 30(1)(c).

71 *Palmer* (n 2) 661–2 [183]–[184], citing *Chau v Fairfax Media Publications Pty Ltd* [2019] FCA 185, [109]–[116]. See also *Fairfax Media Publications Pty Ltd v Chau* [2020] FCAFC 48, [188]–[193] (Besanko, Bromwich and Wheelahan JJ).

72 *Palmer* (n 2) 664 [194], 665 [199].

73 Ibid 664–5 [195], citing *Austin v Mirror Newspapers Ltd* [1986] AC 299, 313 (Lord Griffiths for the Court) (emphasis in original).

74 *Palmer* (n 2) 665 [196].

referring to Palmer's claims in previous arbitrations,[75] Lee J found McGowan had insufficient and 'less than complete knowledge of critical aspects of the arbitration' to justify his publication of the matters.[76] Despite McGowan arguing for the reasonableness of his conduct to be assessed in light of the '"rough and tumble" of politics' with him and Palmer both being 'political and public figures',[77] Lee J considered this did not outweigh the unreasonable harshness of the attacks on Palmer 'couched as statements of fact' for 'maximum political effect'.[78]

(c) Lange *Defence*

The final defence pursued by McGowan was the constitutionally protected *Lange* defence — 'seen as an extension' of the common law qualified privilege defence.[79] The qualified privilege defence developed by the High Court in *Lange* affords a protection to publishers for 'the dissemination of information about government and political matters to the widest possible audience' consistent with the notion of representative democracy.[80] This was in response to the narrow approach under the common law where publications reaching a wide audience do not attract the privilege. Under the *Lange* defence, a defamatory statement would be protected so 'long as the publisher honestly and without malice uses the occasion for the purpose for which it is given', as is the case for the common law version.[81] Given the *Lange* defence applies to a wider audience and can therefore cause greater damage, the High Court held — with reference to the reasonableness requirement under s 22 of the now repealed *Defamation Act 1974* (NSW)[82] — that the publisher must also prove they acted reasonably.[83]

Subsequent to *Lange*, intermediate appellate courts have equated the notion of reasonableness under the *Lange* defence with s 30 of the *Act*.[84] Justice Lee noted

75 See above Part II(B).

76 *Palmer* (n 2) 665 [196]. Justice Lee did, however, still appreciate it being normal for McGowan, as Premier, to rely upon information he is briefed with rather than reading sources in full.

77 Ibid 662 [186].

78 Ibid 665 [197].

79 Ibid 666 [200]–[203]. See also *Lange* (n 11) 571.

80 *Palmer* (n 2) 666 [201].

81 Ibid 666 [203], quoting *Lange* (n 11) 572.

82 Similar to the current provision in s 30(1)(c) of the *Act*, the *Defamation Act 1974* (NSW) imposed the same obligation for conduct 'in publishing that matter is reasonable in the circumstances': *Defamation Act 1974* (NSW) s 22(1)(c), as enacted.

83 *Lange* (n 11) 572–3.

84 *Palmer* (n 2) 667 [207]. See, eg: *Poniatowska v Channel Seven Sydney Pty Ltd* (2019) 136 SASR 1, 109–10 [573] (Blue J); *John Fairfax Publications Pty Ltd v O'Shane* [2005] Aust Torts Reports ¶81-789, 67,466 [83] (Giles JA), 67,480 [227], 67,487 [308] (Young CJ in Eq). See also *Jensen v Nationwide News Pty Ltd [No 13]* [2019] WASC 451, [346]–[349] (Quinlan CJ).

this interpretation 'has been the subject of ongoing criticism' and 'has led to an often microscopic analysis of pre-publication conduct' burdening litigants.[85] Ultimately, McGowan was not able to succeed in the *Lange* defence because Lee J was 'bound to follow the law as it currently stands'[86] and had already found McGowan's conduct not to have been reasonable.[87]

Accepting Palmer's point that much of McGowan's arguments on the *Lange* defence were 'academic',[88] Lee J nonetheless discussed and to some extent critiqued the 'principled scope of the reasonableness requirement'.[89] In doing so, Lee J addressed how the statutory requirements for proving reasonableness are onerous[90] — where the supposedly 'non-exhaustive statutory checklists' under s 30(3) of the *Act* are limiting and have prevented assessing reasonableness with 'a broad and bespoke evaluative assessment' of all the circumstances.[91] By taking this approach, Lee J acknowledged the *Lange* defence has been 'denuded … of any real utility'.[92] This is explored further in Part IV(B) below.

2 *Palmer's Defences to the Cross-Claim*

In defending McGowan's cross-claim, Palmer argued: (1) substantial truth; (2) contextual truth; and (3) reply to attack.[93] Palmer attempted to prove that the imputations that McGowan lied in his justifications for imposing the hard border were substantially true.[94] This required Palmer to 'establish actual dishonesty', in that McGowan '*knowingly* misled the people of Western Australia by communicating to them facts that he did not believe to be true'.[95] Acknowledging that McGowan 'certainly pitched his public comments in emphatic terms', Lee J considered that 'there is a degree of artificiality in reflecting on public statements of this type with a fine-tooth comb', and further found that the evidence could not establish

85 *Palmer* (n 2) 667 [207].

86 Ibid 667 [209]. See also ibid 668 [212].

87 Ibid 670 [224]. See also the discussion of Lee J's reasonableness findings in Part III(B)(1)(b) above.

88 *Palmer* (n 2) 670 [223].

89 Ibid 668 [210].

90 Ibid 669 [219].

91 Ibid 669 [216]. The non-exhaustive checklist approach originated in *Morgan v John Fairfax & Sons Ltd [No 2]* (1991) 23 NSWLR 374, when Hunt AJA interpreted the statutory meaning of 'reasonable in the circumstances': at 387–8, discussed in *Palmer* (n 2) 668–9 [215].

92 *Palmer* (n 2) 670 [221].

93 Ibid 684 [275].

94 Ibid 684 [276].

95 Ibid 687 [299] (emphasis in original).

that McGowan subjectively knew that any of his statements were false.[96] Palmer's defences of contextual truth and reply to attack also failed.[97]

C *Damages*

Given that no defences to either claim succeeded, Lee J was required to consider damages to be awarded.[98] Central to this consideration was the fact that 'political figures … have well-entrenched perceptions as to their character and reputation',[99] and 'many *ordinary*, *reasonable people* will not be influenced, positively or negatively, by statements concerning a politician about whom they have already formed a view'.[100]

After finding only 'minor damage to reputation'[101] and therefore that there was 'little to vindicate',[102] Lee J concluded that 'no substantial damages should be awarded' to Palmer.[103] However, his Honour did accept that *some* damages should be awarded, and that this should be more than 'a purely nominal sum'.[104] Justice Lee ultimately awarded Palmer $5,000 in damages, which his Honour considered to have a 'rational relationship' with the 'very minor' harm suffered.[105]

With respect to McGowan, Lee J accepted that his 'evidence as to an aspect of the subjective hurt he suffered was compelling'.[106] However, as the Premier of WA, '[r]obust criticism is, and should be, part and parcel of the job'.[107] Justice Lee awarded McGowan $20,000 in damages.[108]

1 *Aggravated Damages*

Justice Lee refused to award aggravated damages to either party.[109] His Honour considered that aggravated damages 'can only be awarded where the relevant conduct

96 Ibid 687–8 [300].

97 Ibid 703 [372], 706 [394].

98 Ibid 712 [424].

99 Ibid 713–14 [433].

100 Ibid (emphasis in original), citing *Hanson-Young v Leyonhjelm [No 4]* [2019] FCA 1981, [78] (White J).

101 *Palmer* (n 2) 727 [502].

102 Ibid 727 [499], 727 [502].

103 Ibid 727 [502].

104 Ibid 729 [509].

105 Ibid 729 [515].

106 Ibid 729–30 [516].

107 Ibid.

108 Ibid.

109 Ibid 725 [491].

meets the threshold of being unjustified, improper or lacking in *bona fides*'.[110] Palmer's argument that he was subject to 'a relentless, repetitive and wide-ranging series of attacks by Mr McGowan' was dismissed by Lee J as simply a dispute between 'two political opponents during a period when they were clashing'.[111] His Honour also found that the same considerations applied to McGowan's cross-claim.[112]

IV Comment

Following a lengthy trial and at the end of a lengthy judgment, Lee J concluded that '[t]he game has not been worth the candle'.[113] His Honour was less than pleased with the proceedings that 'consumed considerable resources of the Commonwealth and … diverted Court time from resolving controversies of real importance to persons who have a pressing need to litigate'.[114] His Honour's remark that those who 'have chosen to be part of the hurly-burly of political life'[115] 'must expect a degree of public criticism, fair or unfair'[116] is a warning to future litigants. His Honour said:

> at a time when public resources devoted to courts are under strain, and judicial resources are stretched, one might think that only a *significant* interference or attack causing *real* reputational damage and *significant* hurt to feelings should be subject of an action for defamation by a political figure.[117]

Justice Lee's dissatisfaction with the conduct of the litigation is further evidenced by his Honour's motivation to make no order as to costs, likening the relationship between Palmer and McGowan to 'the feud between the houses of Montagues and Capulets' with 'a "plague on both … houses"'.[118] However, his Honour noted that McGowan's cross-claim was largely defensive in nature, and that he was 'dragged into Court' by Palmer 'who first picked up the cudgels'.[119] More importantly, McGowan made a without prejudice offer to settle the proceedings, which ultimately led Lee J to make an order that Palmer bear McGowan's costs with respect to the

110 Ibid 725 [490].

111 Ibid 725–6 [492]. See also ibid 627 [4].

112 Ibid 726 [493].

113 Ibid 730 [522].

114 Ibid 730 [523].

115 Ibid 626 [2].

116 Ibid 730 [524].

117 Ibid 730–1 [525] (emphasis added).

118 *Palmer v McGowan [No 6]* (2022) 405 ALR 462, 465 [20] ('*Palmer [No 6]*').

119 Ibid 465 [17]–[18], 465 [20].

cross-claim.[120] This was later revealed to be $425,700,[121] being only a portion of the total cost to WA taxpayers.[122]

As Lee J observed, '[t]he cost of the litigation was disproportionate to any benefit it was likely to produce',[123] with barrister representing McGowan, Bret Walker SC's daily charge of $25,000 exceeding the total award of damages to either party.[124] Whilst the exact figure of total costs to both parties is not known, McGowan — after promising to do so[125] — later revealed WA's net costs to be $2,021,665, after having recovered $445,700 from Palmer.[126] Previous estimations had the total bill at around $2 million,[127] but it can now be speculated that the total bill could be close to $5 million if Palmer's legal costs matched McGowan's. Palmer's status as a billionaire is well known.[128] This is not the first time Palmer proceeded with costly

120 Ibid 465 [19], 465–6 [21]–[23], 467 [34].

121 Mark McGowan, 'Clive Palmer Pays Costs as Ordered by Federal Court Order' (Media Statement, Government of Western Australia, 22 December 2022).

122 See below n 126.

123 *Palmer [No 6]* (n 118) 467 [31].

124 See, eg, Michael Pelly, 'Meet the High Court's Busiest Barrister', *The Australian Financial Review* (online, 13 January 2022) <https://www.afr.com/companies/professional-services/meet-the-high-court-s-busiest-barrister-20211215-p59ht7>.

125 Peter Law, 'Mark McGowan Promises To Reveal Clive Palmer Defamation Legal Bill after Verdict', *The West Australian* (online, 2 August 2022) <https://thewest.com.au/news/wa/mark-mcgowan-promises-to-reveal-clive-palmer-defamation-legal-bill-after-verdict-c-7727156>.

126 McGowan (n 121). The $445,700 includes the $20,000 awarded to McGowan by way of damages, with the remaining $425,700 representing McGowan's costs with respect to the cross-claim: Keane Bourke, 'Mark McGowan Reveals Clive Palmer's Defamation Action Legal Bill Cost WA Taxpayers More than $2 Million', *ABC News* (online, 22 December 2022) <https://www.abc.net.au/news/2022-12-22/mark-mcgowan-reveals-cost-of-clive-palmer-defamation-action/101802142>. See also Hamish Hastie, 'Taxpayers Slugged $2 Million for Palmer v McGowan Defamation Case', *The Sydney Morning Herald* (online, 22 December 2022) <https://www.smh.com.au/national/taxpayers-slugged-2-2-million-for-palmer-v-mcgowan-defamation-case-20221222-p5c8cv.html>.

127 See, eg, Justin Quill, 'Palmer Case Delivers Lessons for Judges, Politicians', *The Australian Financial Review* (online, 11 August 2022) <https://www.afr.com/politics/palmer-case-delivers-lessons-for-judges-politicians-20220809-p5b8g3?utm_medium=social&utm_campaign=nc&utm_source=Twitter&fbclid=IwAR1nGsQR60Ob4pkTNo27d-J5x5ZH4IX1pzlrOGTGMpQ0Rq6AqkWfSYufYW0#Echobox=1660199225>.

128 See, eg: 'Clive Palmer', *Forbes* (Web Page, 18 March 2023) <https://www.forbes.com/profile/clive-palmer/?sh=1eb755574a97>; Rachel Pannett, 'Clive Palmer, Mining Billionaire Dubbed "Australia's Trump," Stirs Up Election', *The Washington Post* (online, 20 May 2022) <https://www.washingtonpost.com/world/2022/05/20/clive-palmer-australia-election-independents/>; Kay Dibben, 'Billionaire Clive Palmer in Court in a Bid To Have Criminal Charges against Him Discontinued', *The Courier Mail* (online, 1 June 2022) <https://www.couriermail.com.au/

litigation to advance his beliefs and interests.[129] The cost of this litigation, including potential adverse costs orders, was unlikely to have been a deterrent, or even a consideration for Palmer.[130] In our view, these proceedings were correctly characterised by Lee J as one where Palmer and McGowan 'have taken advantage of the opportunities created by publication of the impugned matters to respond forcefully in public and … to advance themselves politically'.[131] Justice Lee's judgment should serve as the strongest of warnings to politicians and other public figures that such matters should not consume judicial resources.

A *The New Requirement for Serious Harm*

Justice Lee's judgment in *Palmer* is timely given new developments in Australian defamation laws. Following a review into Australia's model defamation laws, on 31 March 2021, the Attorneys-General agreed to commence the *Model Defamation Amendment Provisions 2020* ('*Amendment Provisions*')[132] on 1 July 2021 in most Australian jurisdictions.[133] Amongst other things, the *Amendment Provisions* introduced a new element of 'serious harm' to establish defamation.[134] The intention was 'to encourage the early resolution of defamation proceedings'.[135] The serious harm requirement of the *Amendment Provisions* has, as at the date of writing, been implemented in the Australian Capital Territory,[136] New South Wales,[137] Queensland,[138] South Australia,[139] Tasmania[140] and Victoria.[141] Other jurisdictions are expected to follow suit.[142]

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truecrimeaustralia/police-courts-qld/billionaire-clive-palmer-in-court-in-a-bid-to-have-criminal-charges-against-him-discontinued/news-story/ca8602f7d38b6efda165607d67fb9ef5>.

129 See above Part II(A). In addition, McGowan revealed that since 2020, Palmer had 'brought 13 other separate legal actions against the State of WA, or Ministers or officers of the State': McGowan (n 121).

130 See above nn 128–9.

131 *Palmer* (n 2) 714 [434].

132 Parliamentary Counsel's Committee, *Model Defamation Amendment Provisions 2020* (Explanatory Note, 27 July 2020) ('*Amendment Provisions*').

133 New South Wales Government Department of Communities and Justice, 'Review of Model Defamation Provisions', *NSW Department of Justice* (Web Page, 12 December 2022) <https://www.justice.nsw.gov.au/justicepolicy/Pages/lpclrd/lpclrd_consultation/review-model-defamation-provisions.aspx>.

134 *Amendment Provisions* (n 132) 3–4, sch 1 [6].

135 Ibid 4.

136 *Civil Law (Wrongs) Act 2002* (ACT) s 122A.

137 *Act* (n 67) s 10A.

138 *Defamation Act 2005* (Qld) s 10A.

139 *Defamation Act 2005* (SA) s 10A.

140 *Defamation Act 2005* (Tas) s 10A.

141 *Defamation Act 2005* (Vic) s 10A.

142 'Review of Model Defamation Provisions' (n 133).

The introduction of the serious harm element was welcomed by the legal industry.[143] However, during consultation, many groups expressed concern that the new provision did not specify the *stage* at which the element is to be considered. For example, the Bar Association of Queensland advocated for this to be able to be determined on a summary basis 'to empower courts to filter out trivial defamation claims at an early stage'.[144]

Court application of the new provisions has since provided clarification. In the first case considering the new provisions, *Newman v Whittington*,[145] Sackar J confirmed that the issue of serious harm is to be determined *before* trial, unless special circumstances exist.[146] In the first case where defamation proceedings were dismissed for failing to meet the serious harm threshold, *Zimmerman v Perkiss*[147] confirmed that failure to establish serious harm on the pleadings will lead to the claim being dismissed at the preliminary stage, before trial.[148] One may speculate that had the serious harm threshold applied to *Palmer*, the proceedings may never have seen 'the fluorescent lights of a courtroom'.[149]

In addition to being a gatekeeper against politicians using defamation proceedings as a political weapon, the new requirement for serious harm is also likely to have an impact on rising concerns regarding free speech, where public figures threaten litigation on commentators. A demonstrable example is *Dutton v Bazzi*,[150] where Peter Dutton commenced proceedings against refugee advocate Shane Bazzi over a tweet which said 'Peter Dutton is a rape apologist'.[151] Dutton succeeded at first

143 Bar Association of Queensland, Submission to Defamation Working Party of the Council of Attorneys-General, *Review of Model Defamation Provisions* (25 February 2020) [1], [4]; Law Council of Australia, Submission to Defamation Working Party of the Council of Attorneys-General, *Review of Model Defamation Provisions* (31 January 2020) 5; Law Society of New South Wales, Submission to Defamation Working Party of the Council of Attorneys-General, *Review of Model Defamation Provisions* (24 January 2020) recommendation 14. See also Quill (n 127).

144 Bar Association of Queensland, Submission to Defamation Working Party of the Council of Attorneys-General, *Review of Model Defamation Provisions* (25 February 2020) [5]. See also Law Society of New South Wales, Submission to Defamation Working Party of the Council of Attorneys-General, *Review of Model Defamation Provisions* (24 January 2020) recommendation 14. See generally Law Council of Australia, Submission to Defamation Working Party of the Council of Attorneys-General, *Review of Model Defamation Provisions* (31 January 2020) 5–6.

145 [2022] NSWSC 249.

146 Ibid [35].

147 [2022] NSWDC 448.

148 Ibid [154], [163]–[164].

149 Quill (n 127).

150 [2021] FCA 1474 (White J) ('*Bazzi*'). See also: *Dutton v Bazzi [No 2]* [2021] FCA 1560 (White J); *Bazzi v Dutton* (2022) 289 FCR 1 (Rares, Rangiah and Wigney JJ) ('*Bazzi (Appeal)*').

151 *Bazzi* (n 150) [1], [3].

instance,[152] but the decision was overturned on appeal where a Full Court of the Federal Court found the tweet did not convey the defamatory imputation that Dutton excuses rape.[153] Bazzi's legal fees were raised through crowdfunding, but the case still raised the concern for political discourse in Australia if politicians continue to use the threat of litigation against commentators.[154] For many, the mere threat of litigation may be enough to deter them from engaging in political discourse. Such an effect has significant implications for democratic debate. The introduction of the serious harm threshold thus improves the balance between the right to freedom of expression and the right to reputation, where cases of a trivial nature are dismissed at an early stage — thereby minimising the threat of costly and lengthy litigation.

B *The Redundant* Lange *Defence*

Palmer addressed the applicability of defamation laws in the realm of politics, and their intersection with the implied freedom of political communication.[155] In particular, Lee J's assessment of the *Lange* defence raises important issues as to the operation of the defence currently providing no practical utility to media personnel and politicians who seek to rely on it.[156] This may even extend to the public generally given the growth in 'self-publication' and the proliferation of online discussion about political matters.[157]

The *Lange* defence reshapes the existing common law defamation defence as a protection for representative government drawing upon the constitutionally protected implied freedom.[158] In doing so, as articulated by Lee J, the High Court sought to 'strike a balance between freedom of discussion of government and politics and [the] reasonable protection of the persons who may be involved … in the activities

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152 Ibid [239].

153 *Bazzi (Appeal)* (n 150) 14 [48]–[50] (Rares and Rangiah JJ), 20 [79] (Wigney J). Cf *Barilaro v Google LLC* [2022] FCA 650 (Rares J), where it was found that former Deputy Premier of New South Wales, John Barilaro, was subject to 'a relentless, racist, vilificatory, abusive and defamatory campaign' for over a year: at [1].

154 See especially Shane Bazzi, 'Peter Dutton Suing Me for Defamation Almost Ruined Me — And It Could Happen to Anyone', *The Guardian* (online, 8 October 2022) <https://www.theguardian.com/australia-news/commentisfree/2022/oct/08/peter-dutton-suing-me-for-defamation-almost-ruined-me-and-it-could-happen-to-anyone>.

155 See generally: *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 70–3, 75–6 (Deane and Toohey JJ); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 202–3 (McHugh J).

156 See Justice Peter Applegarth, 'Distorting the Law of Defamation' (2011) 30(1) *University of Queensland Law Journal* 99, 108–10.

157 See: ibid 108–9; Patrick Hall, 'Freeing Speech: Protecting the Modern Media Defendant through the Defence of Qualified Privilege' (2019) 23(2) *Media and Arts Law Review* 201, 203.

158 See: Hall (n 157) 218; Russell L Weaver and David F Partlett, 'Defamation, the Media, and Free Speech: Australia's Experiment with Expanded Qualified Privilege' (2004) 36(2) *George Washington International Law Review* 377, 386.

of government or politics'.[159] It would therefore seem entirely inconsistent for a defence that sought to be an 'extended category of qualified privilege'[160] to have its utility judicially constrained with a 'stringent reasonableness requirement'.[161] There is no surprise that the *Lange* defence has therefore been critiqued as 'uncertain'[162] with limitations that 'continue to plague the defence'[163] rendering it 'practically useless'.[164]

In the face of such controversy, Lee J remarks the importance of taking a 'step back from the body of law that has developed and consider[ing] the underlying principle the High Court was articulating'.[165] From doing so, as it currently stands, the non-functioning nature of the *Lange* defence prevents it from furthering '[t]he common convenience and welfare of Australian society' through the protection of political communication to the public.[166] In circumstances where trial courts are bound by the existing law, and special leave to reopen *Lange* was refused in 2004,[167] one can only wait like a sitting duck for either Parliament or the courts to decide they are ready to remedy the defective law.

V Conclusion

The decision in *Palmer* demonstrates the interplay of defamation law with political discourse and the implied freedom of political communication. In doing so, Lee J provided a justified critique of the *Lange* defence, where its narrow interpretation amounts to it currently being a barely usable defence. It is therefore no doubt overdue for the High Court (or Parliament) to revisit the *Lange* defence and restore its utility.

For many politicians, defamation law is a political weapon. Palmer is no exception. Accordingly, it is no surprise that the primary concern with *Palmer* was the diversion of court time when 'judicial resources are stretched'.[168] The proceedings

159 *Palmer* (n 2) 670 [222].

160 *Lange* (n 11) 573.

161 *Palmer* (n 2) 670 [222].

162 Weaver and Partlett (n 158) 428.

163 Hall (n 157) 217. The limitations include: the ongoing controversy surrounding the implied freedom that is the foundation of the defence; uncertainty regarding what constitutes 'government and political matters' for the purposes of the defence; and strict interpretation of the 'reasonableness requirement': at 218–21.

164 Ibid 221.

165 *Palmer* (n 2) 670 [222].

166 *Lange* (n 11) 571.

167 *Palmer* (n 2) 667 [209]. Justice Lee was unsurprised that no intervention occurred in *Palmer* given the special leave refusal. See Transcript of Proceedings, *The Herald Weekly Times Ltd v Popovic* [2004] HCATrans 180 (28 May 2004) 570–95 (Gummow J).

168 *Palmer* (n 2) 730 [523], 730–1 [525].

were brought in uncommon circumstances where a wealthy, 'indefatigable' litigant, who 'carried himself with the unmistakable aura of a man assured as to the correctness of his own opinions',[169] persisted with litigation which arguably should never have been brought. In fact, only a matter of months after Palmer was 'dressed down' by Lee J as '"unpersuasive and superficial" and as someone who "refused to make obvious concessions"',[170] Palmer yet again commenced proceedings in the Federal Court against WA and the Commonwealth, this time arguing that parts of the *Iron Ore Amendment Act* are invalid under the *Australian Constitution*.[171]

Whilst Palmer remains undeterred, there is hope that between Lee J's judgment in *Palmer* and the new requirement for serious harm in defamation actions, litigants who do not suffer *real* reputational damage will be discouraged from seeking recourse through the courts. With claims like *Palmer* now able to be dismissed at the preliminary stage, there is a better balance between the right to free speech and the right to reputation, particularly in the context of political discourse and democratic debate. Only time will tell how these changes will play out in the political arena.

169 Ibid 650 [122].

170 Max Mason, 'Clive Palmer Takes Mark McGowan's WA to Court. Again', *The Australian Financial Review* (online, 26 October 2022) <https://www.afr.com/rear-window/clive-palmer-takes-mark-mcgowan-s-wa-to-court-again-20221025-p5bstp>, quoting *Palmer* (n 2) 713 [432], 651 [131].

171 Mason (n 170); *Palmer v Western Australia* (Federal Court of Australia, NSD905/2022, commenced 20 October 2022). The proceedings are currently assigned to Justice Lee's docket.