DISTORTING THE LAW OF DEFAMATION

THE HON JUSTICE PETER APPLEGARTH*

In *Theophanous v The Herald & Weekly Times Ltd*[1] and *Stephens v West Australian Newspapers Ltd*,[2] the High Court 'constitutionalised' the law of defamation. The '*Theophanous* defence' that it created was short-lived. In *Lange v Australian Broadcasting Corporation*[3] it was abandoned. *Lange* created in its place a special category of common law qualified privilege for communications about government and political matters. The achievement of Chief Justice Brennan in leading the Court in *Lange* to speak with one voice is remarkable. The Court delivered 'a concise, synthesising and conciliating judgment, which brought together the strands of the previous decisions'.[4] However, the legacy of *Lange* for the law of defamation is an uncertain and unstable defence that provides little practical protection for communications about matters of public interest.

The *Theophanous* defence arose because the common law defence of qualified privilege was perceived at the time to provide inadequate protection against liability for communications to the general public on matters of public interest. The seemingly obvious course of developing the common law was not chosen. Instead, a constitutional defence was created. The *Lange* defence that replaced it has the same threshold requirement that the communication be about 'government or political matters'. Uncertainty surrounds what this phrase means in practice. It is a narrower category than matters of public interest, but how narrow is it?

The *Lange* defence requires a defendant to prove that its conduct in making the publication was 'reasonable in all the circumstances of the case'. The High Court stated a general rule that a defendant's conduct in publishing defamatory matter 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'.[5] In practice, the defence provides very little protection for participants in public affairs and the media that report their statements. As the 2002 case of *Roberts v Bass*[6] shows, a defendant may do better relying instead upon the traditional defence of qualified privilege. If the defendant has a duty or interest in making the publication, and members of the general public have an interest in receiving information about the relevant subject, then an occasion of qualified privilege will exist. The substantial burden of proving 'malice' will be placed on the plaintiff. Unlike the *Lange* defence, a defendant relying upon the traditional defence of qualified privilege is not required to prove that its conduct was reasonable.

Nearly twenty years after the first Freedom of Speech cases were decided, defamation defences in Australia remain in a distorted shape as a result of the *Theophanous* adventure. This article argues that rather than repairing the *Lange* defence, it should be replaced. It should be replaced by a coherent defence of qualified privilege for communications about matters of public interest. Such a defence would not distinguish between communications about the ill-defined category of 'government and political matters' and other matters of public interest. A new common law defence of

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* Judge, Supreme Court of Queensland.

1 (1994) 182 CLR 104.

2 (1994) 182 CLR 211.

3 (1997) 189 CLR 520.

4 Nicholas Aroney, *Freedom of Speech in the Constitution* (1998) 17.

5 *Lange* (1997) 189 CLR 520, 574.

6 (2002) 212 CLR 1.

qualified privilege for Australia could look to developments in other common law jurisdictions, particularly the *Reynolds* defence that has developed in the United Kingdom.[7] The formulation of such a defence would confront difficult questions of legal policy about what a defendant must prove to attract such a defence, and what a plaintiff must prove to defeat it. Should a defendant be required to prove that its conduct was reasonable in all the circumstances? Is such a requirement too restrictive of the freedom of ordinary citizens to communicate with government and with each other about matters of public interest? Is such a requirement necessary to protect individuals, including participants in public affairs, from false defamatory communications, and to optimise the flow of accurate information about public affairs?

These and other questions will remain for judicial determination whilst the traditional defence of common law qualified privilege exists and defendants seek to rely on it in preference to a *Lange* defence.

I THE PATH TO *THEOPHANOUS* AND *STEPHENS*

A foundation for the *Theophanous* defence was that the common law defence of qualified privilege rarely protected communications to the general public. This probably was a correct assessment of the state of the common law during most of the twentieth century. But it does not reflect the state of the common law defence in earlier times, and does not accord with the general principle that underlies the defence of qualified privilege in a liberal democracy.

The common law has long-recognised that there are occasions upon which, on grounds of public policy and convenience, a person may make defamatory and untrue statements about another without incurring liability. These occasions of qualified privilege are founded on the principle that 'the common convenience and welfare of society'[8] is served by protecting statements that are honestly made to persons with an interest in receiving them. In 1859 Willes J observed 'In such cases no matter how harsh, hasty, untrue or libellous the publication would be but for the circumstances, the law declares it privileged because the amount of public inconvenience from the restrictions of freedom of speech would far out-balance that arising from the infliction of a private injury'.[9] In 1910 Griffith CJ described the privilege as being founded upon a 'community of interest' between the person who makes the communication and the person to whom it is made.[10]

At various times in the nineteenth century the common law accorded extensive protection to discussion on matters of public interest.[11] Times and judicial attitudes changed, and during the twentieth century mass communications were rarely able to attract the defence of qualified privilege. Only in special circumstances was a media defendant or other publisher found to be under a social or moral duty to communicate matter to the public. In principle the publication of defamatory matter by the media would be privileged where the matter was of general public interest and it was the duty of the defendant to communicate it to the general public. However, such occasions were rare. The edition of *Gatley on Libel and Slander* that was current at the time the Freedom of Speech Cases were decided explained:

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7 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.
8 *Toogood v Spyring* (1834) 1 Cr M & R 181, 193.
9 *Huntley v Ward* (1859) 6 CBNS 514, 517.
10 *Howe v Lees* (1910) 11 CLR 361, 369.
11 See the illuminating article 'The Law of Libel, as Applied to Public Discussion' (1863) 15 *The Law Magazine and Law Review*, 193-291.

> The mere fact that the matter published was of public interest or that it was published 'in the bona fide belief that it was in the public interest' to do so will not in itself render the occasion privileged.[12]

The occasions when participants in public life and the media that reported them could attract the defence of qualified privilege at common law included where the source of the allegation was the report of a public body, or where the media published the statement of a person who made a statement in discharge of that person's interest or duty to inform the general public about a matter.[13] However, the common law of qualified privilege was of little practical benefit to the media in reporting news and in the practice of investigative journalism. By the time *Theophanous* and *Stephens* arose for decision, courts in Australia and other common law jurisdictions applied the mantra that the common law defence of qualified privilege required a reciprocity between the duty of the publisher to communicate and the legitimate interest of the recipient to receive such information.[14] An occasion of qualified privilege may exist for publications to a limited number of readers, for example the publication of allegations of misconduct to an official body. However, no occasion of qualified privilege existed for the publication of such allegations to the general public.

A common law rule that requires critics of public officials to prove the truth of their allegations by admissible evidence is apt to encourage excessive self-censorship and dampen the robust nature of public debate about matters of public interest. Yet such a rule prevailed in Australia, and it took until 1964 for the rule to be displaced in the United States as a result of *New York Times v Sullivan*.[15] Justice Dixon (as he then was) in *Lang v Willis*[16] regarded as untenable the proposition that 'election speeches made to a large audience of unidentified persons are privileged because the speaker deals with matters in which electors have an interest'. By the mid-twentieth century, courts took a restrictive view of the occasions when a person has an interest or duty to publish defamatory matter to the general public. Yet the application of the principles that led to the creation of the defence of qualified privilege supported a broader view. Some recognition of this occurred where the defence of qualified privilege was found to apply to an election address.[17] *Toyne v Everingham*[18] illustrates the application of settled common law principles in a case in which the plaintiffs sued a federal MP who had attacked 'white advisers' in relation to the 'handover' of Ayers Rock to Aboriginal people. The publications were found to attract the defence. However, the defence of common law qualified privilege rarely succeeded in respect of communications to the general public.

By contrast, by the 1990s, the statutory defence of qualified privilege drafted by Sir Samuel Griffith in 1889, and which survived in 'Code States' such as Queensland, was successfully engaged by the media to defend the publication of robust, even spiteful, attacks on political figures.[19] Criticisms of public figures,[20] virulent attacks on abortionists[21] and allegations of crime and corruption against private citizens[22] also

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12 Philip Lewis, *Gatley on Libel and Slander* (8th ed, 1981) 565, [564].
13 These cases are summarised in *Stephens* (1994) 182 CLR 211, 247-250 (Brennan J) and 262-263 (McHugh J).
14 See the authorities collected in *Stephens* (1994) 182 CLR 211, 261, notes 87-89.
15 (1964) 376 US 254.
16 (1934) 52 CLR 637, 667 and 672 (Evatt J), and 656 (Stark J).
17 *Braddock v Bevins* [1948] 1 KB 580.
18 (1993) 91 NTR 1; cf *Anderson v Nationwide News Pty Ltd* (2001) 3 VR 619, 636-38.
19 *Calwell v Ipec Australia Ltd* (1975) 135 CLR 321.
20 *Sinclair v Bjelke-Petersen* [1984] 1 Qd R 484.
21 *Grundmann v Georgeson* [1996] QCA 189.
22 *Bellino v Australian Broadcasting Corporation* [1998] QCA 113.

were protected by the statutory qualified privilege that Griffith had drafted a century earlier. The common law provided no similar protection.

II THE ARGUMENTS IN *THEOPHANOUS* AND *STEPHENS*

The cases of *Theophanous* and *Stephens* originated in jurisdictions in which the law of defamation was governed by the common law: Victoria and Western Australia. They were heard together in September 1993, and I should disclose that I was junior counsel for the State of Queensland, which along with the other States and Territories and the Commonwealth intervened in those proceedings. I will not address the constitutional points that were decided. Other authors have addressed them. My concern is with the state of common law defamation defences before those decisions, and how they and *Lange* modified them.

In *Theophanous* the media defendant argued that the law of defamation had a substantial 'chilling effect on free debate of political and government matters and ultimately results in self-censorship'. It developed familiar arguments drawn from *New York Times Co v Sullivan*.[23] These include the argument that false statements are valuable because they bring about 'the clearer perception and livelier impression of truth, produced by its collision with error',[24] and that 'erroneous statement is inevitable in free debate and must be protected if the freedoms of expression are to have the 'breathing space' that they need to survive'.[25] The freedom guaranteed by the Commonwealth Constitution to publish material discussing government and political matters was said to be subject to a condition that a publication would not be actionable under the law of defamation unless the publication was made without any honest belief in its truth or with reckless disregard for the truth. The media defendant's alternative formulation of its preferred constitutional defence was that the condition be that the publication be without malice. Its further alternative was that the publication be reasonable in the circumstances. Its fallback position if the constitutional guarantee did not give rise to 'a constitutional defence', was that it gave rise to a defence of qualified privilege and that the Court should recognise that the common law defence of qualified privilege extended to publications discussing government and political matters.

The plaintiff contested that the Constitution conferred the private rights contended for. He also argued against the extension of the common law defence, arguing that the creation of such a defence may expose members of Parliament, particularly independents or minorities, to unwarranted and strenuous attack by powerful media interests, which could only be constrained by a plaintiff showing malice. The extension of the defence was said to be a disincentive to assume office and there was an interest in members of Parliament not being subjected to the chilling effect of public attack based on 'falsehoods promoted or permitted by powerful media interests'.

In *Stephens* the same contests arose in the context of an argument that a similar freedom to that implied by the Commonwealth Constitution should be implied from the terms of the Western Australian Constitution. The plaintiffs argued against any extension of the scope of common law qualified privilege.[26] A newspaper was said to have neither a duty nor a relevant interest in publishing false and defamatory statements or facts about

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23 (1964) 376 US 254.

24 This passage comes from John Stuart Mill's *On Liberty* which, along with John Milton's *Areopagitica*, was cited by Brennan J in *New York Times Co v Sullivan* (1964) 376 US 254, 279 (note 19).

25 *New York Times Co v Sullivan* (1964) 376 US 254, 271-2.

26 *Stephens* (1994) 182 CLR 211, 218-219.

any individual. Reference was made to the genius of the common law in resisting attempts by the media to extend the scope of common law qualified privilege. In a memorable reply to these arguments, D F Jackson QC for the newspaper company submitted:

> Your Honours, people sometimes speak of the genius of the common law but, if one speaks about genius in its application to the affairs of the world, genius is sometimes found to be flawed.[27]

The hearing ended on that note. The members of the Court were required to grapple with important issues of constitutional principle. So far as the law of defamation was concerned, if the Court was to change the law it had a choice. It could create a 'constitutional defence'. Alternatively, it could re-state the common law of qualified privilege to encourage freedom of communication.

III THE DECISIONS IN *THEOPHANOUS* AND *STEPHENS*

In October 1994 the Court by a narrow majority created a constitutional defence. One of the foundations upon which the defence was built was that the existing laws of defamation inhibited freedom of communication.[28] The common law defence of fair comment is only available for the expression of opinion and, then, only if the comment is based on facts that are notorious or truly stated. The common law defence of qualified privilege depended upon reciprocity of duty and interest and this was said to have the effect that the defence was usually not available where information was disseminated to the public generally. The need to prove truth often arose in practice. The common law significantly inhibited free communication and Mason CJ, Toohey and Gaudron JJ stated that the balance was 'tilted too far against free communication and the need to protect the efficacious working of representative democracy in government in favour of the protection of individual reputations'.[29]

Having reached this point, there was a seemingly obvious path open. It was to re-balance the common law of defamation by formulating a common law defence of qualified privilege that was more protective of the interests in freedom of communication. This path was not taken by the majority. Instead, it created a 'constitutional defence'. The elements of the constitutional defence required a defendant to establish, among other things, that the circumstances were such as to make it reasonable to publish the impugned material. Viewed institutionally, the Court created a defence that no democratically-elected Parliament could take away.

Having created a constitutional defence that was less protective of freedom of communication than the constitutional defence created by the US Supreme Court in *New York Times v Sullivan*, Mason CJ, Toohey and Gaudron JJ[30] addressed the defence of qualified privilege at common law. Their Honours thought that the availability of the constitutional defence meant that the common law defence of qualified privilege would have little, if any, practical significance in the discussion of political matters. However, the common law of qualified privilege had to be viewed in the light of the implied constitutional freedom. This required some consideration of the notion of reciprocal duty and interest. The public at large was said to have 'an interest in the discussion of political matters such that each and every person has an interest, of the kind contemplated by the

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27 See the transcript of argument (16 September 1993) 254.
28 *Theophanous* (1994) 182 CLR 104, 129-133.
29 *Theophanous* (1994) 182 CLR 104, 133.
30 With whom Deane J joined despite his more absolutist view.

common law, in communicating his or her views on those matters and each and every person has an interest in receiving information on those matters'. Such an interest existed at all times, not only when elections were called. It followed that 'the discussion of political matters is an occasion of qualified privilege'.[31] The common law did not conform to the constitutional freedom which required no more than that the person who publishes defamatory matter in the course of political discussion not know it to be false, not publish it recklessly and not publish it unreasonably.

The majority in *Theophanous* had earlier adopted an expansive definition of 'political discussion'. It included discussion of the conduct, policies or fitness for office of government, political parties, public bodies, public offices and those seeking public office. The concept also included discussion of 'the political views and public conduct of persons who are engaged in activities that have become the subject of political debate e.g. trade union leaders, Aboriginal political leaders, political and economic commentators'.[32] The concept was not exhausted by political publications and addresses that are calculated to influence choices. The majority adopted the view that political speech referred to 'all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about'.[33]

In *Stephens* the majority concluded that the freedom of communication about political matters implied in the Commonwealth Constitution and the freedom of communication about political matters implied in the Western Australian Constitution afforded a defamation defence if the conditions pronounced in *Theophanous* existed. So far as the common law defence of qualified privilege was concerned, in the light of the discussion in *Theophanous* the Court ruled that it was unnecessary to allege a duty on the part of the newspaper to publish the matter complained of to its readers.

The dissenting judgments of Brennan and McHugh JJ in *Theophanous* and *Stephens* deserve attention nearly 20 years after they were written, both in their exposition of the nature of the implied constitutional freedom to communicate about government and political matters and the possible development of the common law of qualified privilege. The dissenting judgments of Dawson J focus upon the existence of the implied freedom, and his Honour found it unnecessary to consider the scope of the defence of qualified privilege.

In *Stephens* Brennan J canvassed the availability of the defence of qualified privilege to the media to report allegations of misconduct. The general principles that govern the existence of an occasion of qualified privilege fell to be applied to varying forms of communications. Brennan J noted that the mass media may publish a fact defamatory of a plaintiff in any of three forms: as its own statement of fact, as a report of a statement made by a third party or as a letter to the editor or other communication from the contributor published as such. His Honour gave detailed consideration to the application of the defence in respect of each form. After considering 'the common law's characteristic ability to balance competing aspects of the public interest in the contemporary conditions of society', Brennan J concluded:

> It would be incongruous in today's conditions to deny the freedom of media to report an apparently responsible statement defamatory of a plaintiff in relation to the conduct of government, governmental institutions and political matters when the statement is made by a person who is reasonably believed to have particular knowledge of the defamatory fact, the report is fair and accurate and a reasonable response by the plaintiff, if available, is contemporaneously or promptly published.[34]

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31 *Theophanous* (1994) 182 CLR 104, 140.
32 *Theophanous* (1994) 182 CLR 104, 124.
33 *Theophanous* (1994) 182 CLR 104, 124, citing Eric Barendt, *Freedom of Speech* (1985) 152.
34 *Stephens* (1994) 182 CLR 211, 255.

McHugh J analysed the history of the defence of qualified privilege, and observed that 'the low quality and sensational nature of significant parts of the late 19th century and 20th century media have not been conducive to the extension of a defence that protects the publication of untrue defamatory material'.[35] However, those who administer the law of qualified privilege were required to adapt it to the varying conditions of society, and in this context McHugh J stated:

> In the last decade of the twentieth century, the quality of life and the freedom of the ordinary individual in Australia are highly dependent on the exercise of functions and powers vested in public representatives and officials by a vast legal and bureaucratic apparatus funded by public moneys. How, when, why and where those functions and powers are or are not exercised are matters that are of real and legitimate interest to every member of the community. Information concerning the exercise of those functions and powers is of vital concern to the community. So is the performance of the public representatives and officials who are invested with them. It follows in my opinion that the general public has a legitimate interest in receiving information concerning matters relevant to the exercise of public functions and powers vested in public representatives and officials. Moreover, a narrow view should not be taken of the matters about which the general public has an interest in receiving information. With the increasing integration of the social, economic and political life of Australia, it is difficult to contend that the exercise or failure to exercise public functions or powers at any particular level of government of administration, or in any part of the country, is not of relevant interest to the public of Australia generally. If this legitimate interest of the public is to be properly served, it must also follow that on occasions persons with special knowledge concerning the exercise of public functions or powers or the performance by public representatives or officials of their duties will have a corresponding duty or interest to communicate information concerning such functions, powers and performances to members of the general public.[36]

Accordingly, McHugh J considered that it was appropriate for the common law to declare that the existing categories of qualified privilege be extended to protect communications made to the general public by persons with special knowledge concerning the exercise of public functions or powers, or the performance of their duties by public representatives or officials invested with those functions and powers. He continued:

> The scientist who discovers that lack of governmental action is threatening the environment, the 'whistleblower' who observes the bureaucratic or ministerial 'cover up', and the investigative journalist who finds that grants of public money have been distributed contrary to the public interest are examples of persons who have special knowledge of matters affecting the exercise of public functions or powers or the performance of duties by public representatives or officials. If such persons, acting honestly, inform the general public of what they know about such matters, their publications will be made on an occasion of qualified privilege. The defence of qualified privilege will be available even if the information is subsequently proved to be incorrect.[37]

McHugh J recognised that if certain information was to reach the general public, it is often necessary for the person wishing to convey the information to use a media outlet. In such a case, the media had an ancillary privilege to publish in good faith apparently reliable information obtained from a person who has an apparent duty or interest in making the information available to the public.

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35 *Stephens* (1994) 182 CLR 211, 264.
36 *Stephens* (1994) 182 CLR 211, 264-265.
37 *Stephens* (1994) 182 CLR 211, 265.

IV *LANGE V AUSTRALIAN BROADCASTING CORPORATION*

The constitutional defence that was recognised in *Theophanous* and *Stephens* was the product of a narrow majority. Chief Justice Mason, Toohey and Gaudron JJ recognised such a defence and identified its conditions, including reasonableness. Justice Deane was 'quite unable to accept' that the freedom which the constitutional implication protects was subject to such conditions, and adopted a more expansive view.[38] Nevertheless, he was prepared to lend his support to the answers given by Mason CJ, Toohey and Gaudron JJ. By 1996 the Court's composition had changed following the retirement of Mason CJ and Deane J. In 1996 a defamation action brought by a former Prime Minister of New Zealand was removed into the High Court and Brennan CJ stated a case reserving questions of whether the *Theophanous* defence pleaded by the ABC was bad in law.

The decision in *Lange* is important for its affirmation of the freedom to communicate about government and political matters, and in its development of a two-stage test to determine whether the implied freedom has been infringed. My concern, however, is with its rejection of the *Theophanous* defence and its development of the common law of qualified privilege. The Court defined the critical question before it as whether 'the common law of defamation as it has traditionally been understood, and the New South Wales law of defamation in its statutory form, are reasonably appropriate and adapted to serve the legitimate end of protecting personal reputation without unnecessarily or unreasonably impairing the freedom of communication about government and political matters protected by the Constitution'.[39] It concluded that without the statutory defence of qualified privilege, it was clear enough that the law of defamation 'as it has traditionally been understood in New South Wales' would impose an undue burden on the required freedom of communication under the Constitution. This was because, apart from the statutory defence, the law as so understood 'arguably provides no appropriate defence for a person who mistakenly but honestly publishes government or political matter to a large audience'.[40] The common law doctrine of reciprocity of duty and interest and the fact that the common law had recognised a duty to publish defamatory matter to the general public only in exceptional cases meant that the common law, as previously expounded, imposed an unreasonable restraint on the freedom to communicate about government and political matters.

Contemporary social conditions required a broadening of the common law rules of qualified privilege. The Court adopted the passage that I have earlier quoted from McHugh J in *Stephens* explaining that the general public has a legitimate interest in receiving information about government and political matters. The common law of defamation needed to take account of these conditions. As a result, the Court declared that 'each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it'. As a consequence, the categories of qualified privilege were required to protect the communication made to the public on a government or political matter.[41]

The next question concerned the conditions upon which this extended category of common law qualified privilege should depend. The Court concluded that a requirement that the publisher act honestly and without malice was inappropriate. It selected a requirement that went beyond 'mere honesty'. A requirement of reasonableness of the

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38 *Theophanous* (1994) 182 CLR 104, 188.
39 *Lange* (1997) 189 CLR 520, 568.
40 *Lange* (1997) 189 CLR 520, 569-570.
41 *Lange* (1997) 189 CLR 520, 571.

kind contained in s 22 of the New South Wales *Defamation Act* was seen as 'reasonably appropriate and adapted to the protection of reputation and, thus, not inconsistent with the freedom of communication which the Constitution requires'. The Court concluded that reasonableness of conduct was also the appropriate criterion to apply when the occasion of the publication of defamatory matter was said to be an occasion of qualified privilege 'solely by reason of the relevance of the matters published to the discussion of government or political matters'. Reasonableness of conduct was an element for the judge to consider 'only when a publication concerning a government or political matter is made under circumstances that, under the English common law, would have failed to attract a defence of qualified privilege'.[42] The Court apparently did not intend it to apply to more limited publications, such as a complaint to a Minister concerning the administration of his or her department, or to mass communications which would attract a defence of qualified privilege 'under the English common law'.[43]

The achievement of Chief Justice Brennan in leading the Court to abandon the *Theophanous* defence and to create a new category of common law defence is remarkable. *Lange* was decided in 1997, the same year as the author of the leading judgment in *New York Times Co v Sullivan*, Justice William J Brennan, died. Commentators have remarked on the ability of William J Brennan to build majorities on the US Supreme Court. One wrote that his extraordinary influence:

> did not derive from Irish charm or some mysterious guile. It came from intellect, conviction, a strong tactical sense, an eye for the essentials rather than a wish list, and a relationship of good faith and confidence with his colleagues.[44]

The same can be said of the achievement of Chief Justice Brennan in leading the High Court of Australia to speak with one voice in *Lange*.

V WHAT ARE GOVERNMENT AND POLITICAL MATTERS?

Lange left for later decisions clarification of what constitutes a communication about a government or political matter. It will be recalled that the majority in *Theophanous* adopted an expansive view that the implied freedom applied to 'all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about'. In the several years that followed *Lange* trial judges and intermediate courts of appeal grappled with the scope of the communications to which the *Lange* defence applied. One area of contest was whether the defence extended to discussion about the conduct of judicial officers.[45] But this was not the only area of uncertainty. The decision in *Conservation Council (South Australia) v Chapman*[46] illustrates the scope for opinions reasonably to differ over whether certain communications are about government and political matters. That litigation arose out of the Hindmarsh Island Bridge controversy and the conduct of associated litigation. A majority concluded that an article about the use of litigation by the Chapmans did not fall within the defence, despite the fact that the publication was about freedom of speech. The relevant communication was not a communication about a government or political

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42 *Lange* (1997) 189 CLR 520, 572-3.

43 *Lange* (1997) 189 CLR 520, 573.

44 Anthony Lewis, 'The Most Skillful Liberal', *New York Review of Books* (7 April 2011), 58, available, <http://www.nybooks.com/articles/archives/2011/apr/07/most-skillful-liberal/>, 22 September 2011.

45 *Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1; *John Fairfax Publications Pty Ltd v O'Shane* [2005] NSWCA 164.

46 (2003) 87 SASR 62.

matter. Justice Gray reached the opposite conclusion. In *Rowan v Cornwall (No 5)*[47] a television program about a report tabled in State Parliament concerning the propriety with which government funds had been spent by a womens' shelter was held to be a matter of public interest, but not a communication on a 'government and political matter'.

The category of common law defence recognised in *Lange* does not depend upon the identity of the plaintiff. In this respect it differs from the public figure test developed in the United States. The *Lange* threshold requirement relates to the nature of the communication, namely one concerning government or political matters, not the identity of the plaintiff. Still, uncertainty surrounds the extent to which the *Lange* defence may be invoked in proceedings brought by an individual who has a peripheral role in government or political matters. For example, is the character or conduct of a trade union official or a mining company executive 'a government or political matter' because the union or mining company in question is engaged in debates over industrial laws or taxation? Is the character or conduct of a prosecutor or defence counsel in a case that raises important issues about the criminal justice system a government or political matter? These and other issues remain for resolution.

VI THE REQUIREMENT OF REASONABLENESS

In creating a special category of qualified privilege defence at common law for publications about government or political matters, the Court selected a requirement that the defendant prove that its conduct in making the publication was reasonable in the circumstances. It also stated that the new defence of qualified privilege in its application to communications about political matters would be defeated if the plaintiff proved that the publication was 'actuated by malice', and this was to be understood as signifying a publication that was not made for the purpose of communicating government or political information or ideas, but for some improper purpose.[48] Having regard to the separate matter of government and politics, the motive of causing political damage to the plaintiff or his or her political party could not be regarded as improper. Nor could the vigour of an attack or the pungency of a defamatory statement, without more, discharge the plaintiff's onus of proof on the issue of malice. The difficulty for a plaintiff in proving malice reflected well-entrenched common law principles for the defence of qualified privilege. The leading decision in *Horrocks v Lowe*[49] and cases such as *Sinclair v Bjelke-Petersen*[50] illustrate the difficulty which a plaintiff has in proving that a publication by a political opponent is 'actuated by malice'.

The practical problem for those relying upon a *Lange* defence is in proving that their conduct in publishing the defamatory matter was reasonable in the circumstances. While stating that the issue of reasonableness depended upon all the circumstances of the case, the Court in *Lange* stated the general rule that a defendant's conduct would not be reasonable unless it 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'.[51] Such a rule is well-adapted to a media defendant that publishes its own assertions of fact based upon inquiries and investigations, or that reports the allegations of an apparently reliable source who has special knowledge of the relevant subject matter. It provides far less protection to other

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47 (2002) 82 SASR 152, 342-345.
48 *Lange* (1997) 189 CLR 520, 574.
49 [1975] AC 135, 151.
50 [1984] 1 Qd R 484.
51 *Lange* (1997) 189 CLR 520, 574.

participants in public debate or a media organisation that fairly and accurately publishes their claims and comments. Many ordinary citizens who participate in public discussions about matters of public interest express themselves poorly, mix expressions of opinion with assertions of fact and take inadequate steps to verify the accuracy of their assertions. Passionate participants in public controversies say harsh things, often in haste. If they are unable or unwilling to prove the truth of their assertions by legally admissible evidence, then a defence that requires them to prove that they took proper steps to prove the accuracy of their assertions, and that their conduct in making the publication was otherwise reasonable in all the circumstances, may prove illusory. In a case in which the defamatory assertion is proven or assumed to be untrue, it is relatively easy for a plaintiff to identify additional reasonable steps that could have been taken to investigate the accuracy of the assertion, or to show how the publication in question might reasonably have been composed differently. For example, a plaintiff can point to additional information that might have been included, or a more reasonable form of words that might have been used. In summary, citizens who participate in robust public debate about matters of public interest often make unreasonable statements and encounter difficulty in proving that their conduct was reasonable in the circumstances.

Even for well-resourced media organisations, proof of reasonableness is not always easy. This was the experience in respect of the reasonableness requirement enacted in the New South Wales statutory qualified privilege defence in 1974. The limitations of the reasonableness criterion have been addressed elsewhere.[52] Its adoption in the *Lange* defence means that the defence provides limited practical protection for participants in public debate. As Brennan J wrote in *New York Times Co v Sullivan*, 'erroneous statement is inevitable in free debate'.[53] At least in theory, requiring a defendant to prove that its conduct in publishing defamatory matter was reasonable strikes an appropriate balance between the interest in reputation and the interest in freedom of communication. Also, in theory, such a negligence standard is apt to optimise the flow of accurate information about public affairs, and thereby enhance the public good. In practice, however, harsh retrospective assessments of the reasonableness of a publisher's conduct in making or reporting erroneous assertions make a reasonableness criterion less reasonable than it seems in theory.

The general rule stated in *Lange* is ill-adapted to cases in which the media reports the assertions of third parties which the media publisher does not believe to be true or may believe to be untrue. Yet the publication by the media of assertion and counter-assertion by participants in public debates is a critical function of the media in a liberal democracy. In many cases, a newspaper or broadcaster will believe an assertion by a public figure to be untrue, but have a legitimate interest or social duty in publishing such a statement in order to inform the general public about a matter or public interest.

Despite these considerations, and despite its origin in a comparable provision of the Griffith Code, s 22 of the *Defamation Act* 1974 (NSW) proved to be of little practical benefit to the media. In creating the *Theophanous* defence in 1994, a majority of the Court suggested that its reasonableness criterion might draw on case law in relation to s 22 of that Act. Cases such as *Morgan v John Fairfax & Sons Ltd*[54] formulated demanding requirements for a defendant to prove the statutory criterion of reasonableness, and these requirements were applied to the reasonableness criterion of the *Lange* defence. *John*

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52 P. D. T. Applegarth, 'When Reasonableness is Unreasonable', *Gazette of Law and Journalism*, 8 July 2005; Kim Gould, 'The More Things Change, The More They Stay the Same ... Or Do They?' (2007) 12 *Media and Arts Law Review* 29; Patrick George, 'Qualified Privilege – A Defence Too Qualified?' (2007) 30 *Australian Bar Review* 46.

53 (1964) 376 US 254, 271.

54 (1991) 23 NSWLR 374.

Fairfax Publications Pty Ltd v O'Shane[55] illustrates the difficulty encountered by a media defendant in proving that its conduct in publishing defamatory matter was reasonable in the circumstances.

VII THE *ROBERTS V BASS* BYPASS

The defendants in *Roberts v Bass*[56] published false and defamatory material during an election campaign about a State MP. They established at trial the required reciprocity between publisher and readers to establish the 'traditional' defence of qualified privilege, but that defence failed because the trial judge found that malice was proved. A *Lange* defence failed because the publication was not reasonable.

The matter reached the High Court on the issue of malice. The defendants succeeded before the High Court on the issue of malice, and thereby demonstrated that it is possible to succeed on the traditional defence and fail on the *Lange* defence. Members of the Court made observations about whether there were two separate qualified privilege defences available for communications about politics.

Chief Justice Gleeson decided the case on the basis that it had been conducted, namely that there are two categories of qualified privilege for communications to the general public about political matters. He remarked that why this should be so, as a matter of principle, was difficult to understand, but that the case was an unsuitable occasion for the development of the law.[57] Hayne J also considered that the manner in which the case had been conducted provided 'an artificial and flawed basis' for consideration of arguments about whether principles governing qualified privilege were engaged. His Honour questioned whether widespread publication about government or political matters, even if restricted to electors, could invoke the 'pre-*Lange* principles of qualified privilege'.[58] Callinan J confirmed his opinion that *Lange* and other authorities recognizing an implied freedom of political communication should be overruled.[59]

The majority addressed the relationship between 'the traditional defence of qualified privilege' and the law as developed in *Lange*. Justices Gaudron, McHugh and Gummow stated that 'the extended category of qualified privilege', with its additional condition of reasonableness, was only invoked for a publication that would otherwise have been held to be made to 'too wide an audience'. The issue of reasonableness only arose where a publication about a government or political matter failed to attract a defence of qualified privilege under traditional common law principles.[60] Justice Kirby adopted the same view, and noted that the publications under consideration had not been found to have been made to 'too wide an audience'. His Honour added that the *Lange* requirement of reasonableness did not arise, and were it otherwise, 'far from protecting freedom of speech in circumstances in which the Constitution applied, the common law would have added a new and general obligation to establish reasonableness of conduct, resulting in a potential reduction of privileged speech'.[61]

Roberts v Bass leaves open for debate the issue of whether there are two qualified privilege defences, or at least two separate categories of qualified privilege defence, in respect of communications about government and political matters. The majority's reconciliation of the two categories of defence leaves uncertain when, if ever, the

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55 (2005) Aust Torts Reports 81-789.
56 (2002) 212 CLR 1.
57 *Roberts* (2002) 212 CLR 1, 9-10.
58 *Roberts* (2002) 212 CLR 1, 77.
59 *Roberts* (2002) 212 CLR 1, 101-2.
60 *Roberts* (2002) 212 CLR 1, 27-8, citing *Lange* (1997) 189 CLR 520, 573.
61 *Roberts* (2002) 212 CLR 1, 59.

discussion of a government or political matter, such as the conduct of a sitting MP, will be made to 'too wide an audience'. *Roberts v Bass* permits resort to the traditional defence of qualified privilege in the case of a mass communication about government or politics where the publisher is unable or unwilling to prove the reasonableness of its conduct. If the common law declares that there exists an occasion of qualified privilege to communicate to the general public about such a subject, then the development of the *Lange* defence was seemingly unnecessary.

Roberts v Bass allows defendants to bypass the requirements of a *Lange* defence in cases in which they are unable or unwilling to prove the reasonableness of their conduct. They will do so where the recipients of the communication have a legitimate interest in receiving information about the subject matter. In the case of government and political matters, the general public has such an interest and, according to *Lange*, the media and others have a correlative duty to disseminate the information. In short, an occasion of qualified privilege exists, and if (as assumed) the publication is not made to 'too wide an audience' the publisher is not required to prove that its conduct in making the publication was reasonable.

This prompts the following questions. If the *Lange* defence can be bypassed, what is the point of retaining it? If, however, the *Lange* defence cannot be bypassed, and defamatory communications to the general public about government and political matters must satisfy the test of reasonableness, is the result a reduction in the protection given to political speech? These and other questions suggest that *Lange* 'did not mark the final chapter in the High Court's consideration of defamation law as it relates to political communication'.[62]

VIII OVERSEAS DEVELOPMENTS

In the period of nearly 20 years since the *Theophanous* defence was formulated the common law of qualified privilege has been developed in other jurisdictions to provide additional protection to the media and other participants in public affairs to discuss matters of public interest. The most significant development was the creation of the *Reynolds* defence by the House of Lords in 1999.[63] The House of Lords rejected any generic privilege for political speech, and developed instead the common law of qualified privilege in its application to mass communications. Lord Nicholls developed a non-exhaustive list of factors to be considered in deciding whether the defence applied. Early expectations that the *Reynolds* defence would provide extensive protection to the media and other participants in public debates were disappointed. However, the decision of the House of Lords in *Wall Street Journal Europe Sprl v Jameel*[64] re-enlivened the defence.

In 1998 the New Zealand Court of Appeal ruled that the defence of qualified privilege applied to generally-published statements about the actions and qualities of MPs and candidates for office that impacted on their capacity to meet their public responsibilities. There was no requirement of reasonable care for the defence to be invoked.[65] In 2000 the Court declined to alter its approach by following *Reynolds* so that the steps taken to verify the information fell within the inquiry of whether the occasion was privileged. Instead defendants who acted recklessly or did not exhibit 'the necessary

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62 Helen Chisholm, '"The Stuff of which Political Debate is Made": *Roberts v Bass*' (2003) 31 *Federal Law Review* 225, 242.

63 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

64 [2007] 1 AC 359.

65 *Lange v Atkinson* [1998] 3 NZLR 424.

responsibility' would lose the benefit of the defence under an expansive approach to misuse of the occasion.[66]

In 2001 the New South Wales Court of Appeal declined to follow *Reynolds*, concluding that it was bound by the narrower view of common law qualified privilege stated in *Lange*.[67]

The Supreme Court of Canada in 2009 followed the lead of the House of Lords in *Reynolds* by adopting a similar defence of 'responsible communication on matters of public interest'.[68]

I shall not survey the extent to which the common law of England has developed a protective defence of qualified privilege for mass communications. The relevant point is that the *Theophanous* defence that the High Court created, and the *Lange* defence that replaced it, rest on the assumption that the common law of qualified privilege rarely extended to protect mass communications. That assumption has been falsified by the development of the common law in other jurisdictions in the last decade.

In *Lange* the Court expressly assumed that a defendant would seek to rely upon the newly-created defence, and thereby be required to prove the reasonableness of its conduct, when a publication about government or political matters was made in circumstances that would fail to attract a defence of qualified privilege 'under the English common law'. The English common law, as developed by the House of Lords, now provides far more protection than it previously did for mass communications about matters of public interest. The intended scope for the *Lange* defence has thereby been reduced. The *Lange* defence, which was created because of the reluctance of 'the English common law' to extend the defence of qualified privilege to mass communications, has been superseded by developments in the English common law. A special category of common law defence created by Australia's highest court carried the seed of its own obsolescence. An Australian-made defence that was needed because of perceived limitations on the traditional common law of qualified privilege is no longer needed because a new model of common law qualified privilege defence has been developed overseas, and awaits importation into Australia.

IX SHOULD THE *LANGE* DEFENCE BE RETAINED?

A common law defence of qualified privilege that has been developed in the United Kingdom may not be suited to contemporary Australian conditions.[69] Is the *Reynolds* defence a better model than the *Lange* defence? That question prompts reflection on how the *Lange* defence came to be created, its perplexing relationship with the traditional defence of qualified privilege and its operation in practice.

The *Lange* defence arose because in *Theophanous* and *Stephens* the High Court created a constitutional defence, rather than simply develop the common law defence in its application to mass communications. *Lange* inherited a new category of defence based on communications about government and political matters and, by way of compromise, created a similar category of common law defence. Such a category is unnecessary in principle and problematic in practice. The implied constitutional freedom may support the expansion of the defence of qualified privilege. It does not necessitate the creation of

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66 *Lange v Atkinson* [2000] 3 NZLR 385.

67 *John Fairfax & Sons Ltd v Vilo* (2001) 52 NSWLR 373; see also *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419, [1160].

68 *Grant v Torstar Corp* [2009] SCC 61; *Quan v Cusson* [2009] SCC 62.

69 In *Lange v Atkinson* [2000] 1 NZLR 257, 263, the Privy Council remarked that 'different solutions may be reached in different jurisdictions without any faulty reasoning or misconception'.

a special category of defence for communications about government and political matters. The public interest in the robust discussion of government and political matters and the reporting of information about them might be accommodated by a common law defence of qualified privilege about matters of public interest. Such a development would avoid uncertainty about the scope of 'government and political matters', and align the common law of Australia with the law of qualified privilege in comparable common law jurisdictions.

The *Lange* defence arose out of cases in which media defendants were sued, and the general rule that *Lange* stated about reasonableness has the hallmarks of a media defence. The defence is of doubtful utility for ordinary citizens who communicate about matters of public interest, and partisan participants in public controversies. For the media, the *Lange* defence carries the baggage of the practically useless defence that was contained in s 22 of the *Defamation Act* 1974 (NSW). A series of decisions in the New South Wales Court of Appeal resulted in that statutory defence providing far less protection than the statutory defence that it replaced in 1974. As a result, the *Lange* defence provides a similar lack of protection.

Roberts v Bass left open reliance on the traditional defence of qualified privilege for a mass communication about government and political matters. If, however, the traditional defence of qualified privilege cannot be relied upon, and a defendant must prove the reasonableness of its conduct, then the *Lange* defence may result in less protection for communications about government and political matters than existed before its creation, or which presently exists in England. That would be an odd, and apparently unintended result, since *Lange* assumed that the new category of defence that it created would only be relied upon in circumstances in which the traditional defence was not available.

The *Lange* defence has not delivered any significant practical benefit to potential defendants. The reasonableness criterion was intended to tip the balance of the law in favour of freedom of communication. In practice, it has failed to do so. Those who wish to defend defamatory communications about matters of public interest may be better advised to plead and rely upon what the High Court in *Lange* described as 'the English common law', particularly as it has been developed by the House of Lords in the last decade.

The *Lange* defence has become something of a Galapagos Island defence. It was bypassed in *Roberts v Bass*, and it has been bypassed in the evolution of the common law in other jurisdictions. It was the perceived weakness of existing common law defences that justified the creation of the *Theophanous* defence and the *Lange* defence. The evolution of the common law in other jurisdictions calls into question the survival of the *Lange* defence in those changed circumstances. Can there be any sound justification for the retention of one set of rules for communications about government and political matters, and another set of rules for communications about matters of public interest?

The evolution of the common law in other jurisdictions might prompt the High Court to reconsider the continuation of the *Lange* defence and the development, in its place, of a coherent defence of qualified privilege at common law.

X THE COMMON LAW DEFENCE OF QUALIFIED PRIVILEGE FOR MASS COMMUNICATIONS

The coherent development of a common law defence of qualified privilege faces the same difficult policy choices that were articulated in the submissions in *Theophanous* and *Stephens* almost 20 years ago. Similar choices have been faced by courts in different constitutional settings. The arguments are familiar, whether invoked by the *New York Times*, the *Times* of London or a struggling local newspaper. In essence, the argument in favour of greater common law protection for participants in public affairs is that a

common law rule that requires a publisher to prove the truth of defamatory assertions of fact places an excessive burden on freedom of communication. The competing argument is that such a privilege, whether pitched at the *New York Times v Sullivan* standard, a recklessness standard, a reasonableness standard or some other standard, confers a privilege, and therefore power, upon already powerful media interests.

Any defence of common law qualified privilege for mass communications operates in a new communications environment. It might be shaped, like the *Reynolds* defence, for publishers who practice 'responsible journalism'. However, the beneficiaries of such a defence may extend beyond traditional media proprietors, with their deep pockets to meet a damages award and the plaintiff's legal costs if the defence fails. Therein lies a problem. Twenty years ago defendants in defamation cases could be roughly divided into two categories. The first were media defendants. The second were individuals who largely relied on the media to have their assertions and opinions reach a wide readership. In 1958 Diplock J, as he then was, told a jury that '[t]he basis of our public life is that the crank, the enthusiast, may say what he honestly thinks'.[70] Apart from assiduous pamphleteers, the only way a 'crank' could reach a wide readership at that time was through the media. Today, a crank with a computer and internet access is a potential global publisher. The law, including the common law of qualified privilege, must adapt to this new media environment.

As for traditional media organisations, the issues confronting the development of the common law remain largely the same as they were in 1964 when *New York Times v Sullivan* was decided or in 1994 when *Theophanous* and *Stephens* were decided. Even a well-resourced media defendant cannot consistently sustain the costs of damages awards and of defending defamation actions without an impact on the content of its communications. Media outlets are increasingly driven by financial returns to institutional shareholders rather than professional journalistic standards. Journalists are described by the senior executives of such organisations as '[c]ontent providers for advertising platforms'.[71] Potential damages awards and legal costs are apt to reduce the publication of defamatory statements about matters of public interest. Media outlets argue that this results in excessive self-censorship, and a decline in the flow of accurate information about public affairs. The competing argument is that the substantial cost of getting a story wrong spurs journalists to get their facts rights, and that the already too-powerful and largely unaccountable media do not deserve extra legal privileges.

XI THE TEMPER OF THE TIMES

A glance in the rear-view mirror informs us that the scope of defamation defences in a democracy is shaped by judicial perceptions of who the media are and the extent to which they exercise their power for good or for ill. The common law has not maintained a consistent line on the scope of qualified privilege for mass communications. Cases can be found in the nineteenth century in which the defence was available for defendants who reported to the general public about matters of public interest. In Australia during the twentieth century, the High Court adopted different stances at different times in relation to the protection which politicians should enjoy under the law of defamation. The restrictive view taken in *Lang v Willis*[72] in 1934 may be contrasted with the view taken in *Calwell v Ipec Australia Ltd* in 1975.[73] Arthur Calwell sued over a vitriolic article that

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70 *Silkin v Beaverbrook Newspapers Ltd* [1958] 1 WLR 743, 747.

71 Margaret Simons, 'Crises of Faith: The Future of Fairfax', *The Monthly* (February 2011), 30-39, 33.

72 (1934) 52 CLR 637.

73 (1975) 135 CLR 321.

imputed that he was disloyal to the leader of the opposition in conducting a rearguard action against the progressive policies that Gough Whitlam promoted. Justice Mason (as he then was), with whom the other members of the Court agreed, observed that it was beyond question, having regard to the national importance of the subject of the article, that 'the readers of the newspaper had such an interest in knowing the truth as to make the respondent's conduct in making the publication reasonable in the circumstances'.[74] The newspaper succeeded in its defence, without the need to call the author of the article and without any inquiry as to the defendant's belief in the truth of what was published. The defendant's conduct was held to be reasonable in the circumstances because the public had an interest in knowing the truth about the subject matter of the article.[75] The defendant did not have to satisfy the requirements of s 22 of the New South Wales *Defamation Act* or the requirements stated as a general rule in *Lange*. The Court was concerned with the pre-existing statutory qualified privilege defences which were said to reflect the common law. These included a statutory defence for the publication in good faith of defamatory matter 'for the public good'. Justice Jacobs stated:

> It is for the greatest public good that views on the political attitudes, including party loyalty, of members of the Houses of Parliament should be able to be expressed without inhibition. The public are entitled to the views on such a subject of political commentators, expert or inexpert. The views expressed, and the imputations thereby made, may be correct or incorrect, but the public has an interest in hearing them whatever they may be and it is for the public good that interest should not be stultified. If a commentator honestly believed that the plaintiff lacked loyalty to the then recently appointed leader he was entitled to say so without fear that his view might be incorrect and that he would be liable in damages for the imputation.[76]

The decision in *Calwell* reflected a commitment to free speech, long before the discovery of an implied freedom to communicate about government and political matters was discovered in the Constitution. Also, it was given at a high-point in public (and judicial) estimation of the role of the media. Investigative journalism that exposed the Watergate scandal had recently led to the resignation of President Nixon. Newspapers like the *National Times* practised a similar standard of investigative journalism in Australia.

Just as the general law has tended to contract or expand the defence of qualified privilege to match the temper of the times, individual judges change their view over time. In 1986 Justice McHugh supported the view that it is 'reasonable to publish allegations concerning the official conduct of public officials if an ordinary person considering all the circumstances would think that the allegations were probably true and needed to be investigated'. He argued that this proposition was open under s 22 of the *Defamation Act* (NSW) and, if adopted, 'the difference between First Amendment protection and the protection given by s 22 will be marginal'.[77] In 1993, during argument in *Theophanous* and *Stephens*, McHugh J questioned the arguments for an expansion of qualified privilege that were based on principles from the Enlightenment and philosophers like J. S. Mill who 'believed in the ability of reason to solve problems'. Justice McHugh remarked that these thinkers 'had confidence in the reasoning power of people to distinguish truth from falsehood, but the 20th century in particular has shown that is totally false'.[78] In his judgment in *Stephens*, his Honour stated that the low quality and

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74 *Calwell* (1975) 135 CLR 321, 331 (Mason J).

75 See also *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30, 42-43.

76 *Calwell* (1975) 135 CLR 321, 336 (Jacobs J).

77 The Honourable Mr Justice McHugh, 'First Amendment Freedom in the United States and Defamation Law in New South Wales' (1986) 1 (3) *Gazette of Law and Journalism* 11, 12.

78 See the transcript of argument (15 September 1993), 162.

sensational nature of significant parts of the media had not been conducive to the extension of the defence of qualified privilege.[79] Later, in *Bashford v Information Australia (Newsletters) Pty Ltd*, McHugh J strongly dissented from the majority's view that the common law defence of qualified privilege was available to a subscription magazine.[80]

Australian legislatures have left open the development of the common law of qualified privilege to meet contemporary conditions. The uniform *Defamation Act* that has been enacted in each State and Territory is not a code, and the common law defence of qualified privilege is available to supplement that Act's statutory defence of qualified privilege. In deciding future cases about the common law of qualified privilege the insightful judgments of Brennan J and McHugh J in *Theophanous* and *Stephens* deserve attention. So do overseas developments, particularly the development of the *Reynolds* defence in the United Kingdom.

The case for protecting journalists and editors has been articulated for centuries. In *R v Finnerty* the great Irish advocate John Philpot Curran made an impressive defence of the liberty of the press in 1797. He told a jury that '[t]he liberty of the press is inseparably twined with the liberty of the people. The press is the great public monitor; its duty is that of the historian and the witness'. He continued:

> [Mr Attorney-General] would have the press all fierceness to the people, and all sycophancy to power ... if you exercise the rigour of a censorship ... you will reduce the spirit of publication, and with it the press of this country, to what it for a long interval has been, the register of births, and fairs, and funerals, and the general abuse of the people and their friends.[81]

More than two hundred years later, judges and juries are called upon to decide defamation cases, and often do so with a jaundiced view of the quality of significant parts of the media and whether the media deserve additional legal protection.

A difficult issue facing courts is whether according greater protection by developing the common law of qualified privilege serves the public interest and the practice of responsible journalism or, instead, serves the further empowerment of irresponsible media organisations. These issues will remain for determination in this country, despite, or more precisely because of, the development of the *Lange* defence. That defence comes with its practical limitations for media defendants. Defendants who are unable to defend publications on the basis of a *Lange* defence will invite Australian courts to develop the common law in the same direction as the common law of overseas jurisdictions.

Courts are unlikely to create a broad defence of qualified privilege that confers additional power on tabloid television programs to practise what Curran described as 'the general abuse of the people and their friends'. The common law of Australia is unlikely to shape a broad privilege which is only defeated if the victim of media excess proves malice. The common law might define the scope of qualified privilege by rewarding those who practise responsible journalism, based on the kind of guidelines developed in *Reynolds* and *Jameel*, and deny the defence to those who do not. Rather than generally deny, or generally grant, the defence to the media, the common law might extend the defence to remnants of the old media and sections of the new media that observe the better traditions of journalism. The defence would not be a media defence. It would benefit some sections of the media, and thereby serve the public interest. It would reward responsible journalism, and thereby optimise the flow of accurate information about matters of public interest. It would reflect the principle that has long informed the defence of qualified privilege in its application to public affairs. That principle is that

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79 *Stephens* (1994) 182 CLR 211, 264 (McHugh J).

80 (2004) 218 CLR 366.

81 James Comyn, *Irish, Law: A Selection of Famous and Unusual Cases* (1983), 32-33.

'erroneous statement is inevitable in free debate and must be protected if the freedoms of expression are to have the 'breathing space' that they need to survive'.[82]

XII CONCLUSION

Chief Justice Cockburn is reported to have said that 'those who administer [the law of qualified privilege] must adapt it to the varying conditions of society'.[83] In developing the common law of qualified privilege in this country the High Court is likely to be asked to consider developments that have occurred in the common law in other jurisdictions since *Theophanous*, *Stephens* and *Lange* were decided. On such an occasion the question will arise as to whether the *Lange* defence should remain or be replaced by different common law rules for mass communications. The category of common law qualified privilege recognised in *Lange* has its origins in *Theophanous* and *Stephens* when the Court missed the opportunity to simply reformulate the common law of qualified privilege to meet the conditions of a modern, liberal democracy.

A defence of common law qualified privilege that is confined to communications about 'government and political matters' is uncertain and unnecessary. It is uncertain because the scope of 'government and political matters' is controversial and because, to date, decisions involving the *Lange* defence have failed to reflect the kind of commitment to robust public discussion found in cases such as *Calwell v Ipec Australia Ltd*. The *Lange* defence is unnecessary because, since it was created, the common law in comparable jurisdictions has developed in a coherent fashion to give appropriate protection to mass communications about matters of public interest. The *Lange* defence has distorted the common law of defamation by creating an unnecessary category of common law qualified privilege defence. It should be replaced by a more coherent defence of qualified privilege that can apply to mass communications about matters of public interest.

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82 *New York Times Co v Sullivan* (1964) 376 US 254, 271-2.

83 George Spencer Bower, *A Code of the Law of Actionable Defamation* (2nd ed, 1990) ix; cited in *Stephens* (1994) 182 CLR 211, 264 (McHugh J).