

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 9/08/2018 2:37:52 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

### Details of Filing

Document Lodged:	Defence - Form 33 - Rule 16.32
File Number:	NSD2179/2017
File Title:	GEOFFREY ROY RUSH v NATIONWIDE NEWS PTY LIMITED & ANOR
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink, reading "Warwick Soden".

Dated: 10/08/2018 10:15:52 AM AEST

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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SECOND FURTHER AMENDED DEFENCE



## **Second Further Amended Defence to Statement of Claim**

**Filed pursuant to leave granted by Wigney J on 9 August 2018**

No. NSD2179 of 2017

Federal Court of Australia  
District Registry: New South Wales  
Division: General

### **Geoffrey Roy Rush**

Applicant

**Nationwide News Pty Limited** and another

Respondents

The Respondents rely upon the following facts and assertions in answer to the Statement of Claim filed by the Applicant on 8 December 2017 (the **Statement of Claim**):

1. The First Respondent admits paragraph 1 of the Statement of Claim.
2. The Second Respondent admits paragraph 2 of the Statement of Claim.
3. As to paragraph 3 of the Statement of Claim, the First Respondent:
  - (a) admits that on or about 30 November 2017 it published in New South Wales the words contained in Schedule A of the Statement of Claim (the **first matter complained of**);
  - (b) denies that it published the first matter complained of in any other State or Territory of Australia other than New South Wales; and
  - (c) otherwise denies the allegations contained in that paragraph.
4. As to paragraph 4 of the Statement of Claim, the Respondents deny that the first matter complained of, in its natural and ordinary meaning or otherwise:
  - (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 4 of the Statement of Claim; or

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- (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 4 of the Statement of Claim or any nuance thereof.
- 5. As to paragraph 5 of the Statement of Claim, the Respondents deny that the first matter complained of, with the aid of the extrinsic facts particularised at paragraph 5, or otherwise:
  - (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 5 of the Statement of Claim; or
  - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 5 of the Statement of Claim or any nuance thereof.
- 6. As to paragraph 6 of the Statement of Claim:
  - (a) the First Respondent admits that on or about 30 November 2017 it published the material contained in Schedule B of the Statement of Claim (the **second matter complained of**);
  - (b) the Second Respondent:
    - (i) admits that he was the author of the material set out in paragraphs 1-4 of page 1, paragraphs 1-15 of page 4 and paragraphs 4-9 of page 5 of the second matter complained of;
    - (ii) denies that he wrote or published the material set out in paragraphs 1-3 and 10-16 of page 5 of the second matter complained of or any other material contained in Schedule B including the headlines, sub-headlines and captions in the second matter complained of; and
  - (c) the Respondents otherwise deny the allegations contained in that paragraph.
- 7. In relation to paragraph 7 of the Statement of Claim, the Respondents deny that the second matter complained of, in its natural and ordinary meaning or otherwise:
  - (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 7 of the Statement of Claim; or
  - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 7 of the Statement of Claim or any nuance thereof.

8. In relation to paragraph 8 of the Statement of Claim, the Respondents deny that the second matter complained of, with the aid of the extrinsic facts particularised at paragraph 8, or otherwise:
  - (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 8 of the Statement of Claim; or
  - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 8 of the Statement of Claim or any nuance thereof.
  
9. As to paragraph 9 of the Statement of Claim:
  - (a) the First Respondent admits that on or about 1 December 2017 it published the material set out in Schedule C of the Statement of Claim (the **third matter complained of**);
  - (b) the Second Respondent:
    - (i) admits that he was the author of the material set out in paragraphs 1-5 of page 1, paragraphs 1-11 and 19-30 of page 4 and paragraphs 3-24 of page 5 of the third matter complained of;
    - (ii) denies that he wrote or published the material set out in paragraphs 12-18 and 31-41 of page 4 and paragraphs 1-2 of page 5 of the third matter complained of or any other material contained in Schedule C including the headlines, sub-headlines and captions in the third matter complained of; and
  - (c) the Respondents otherwise deny the allegations contained in that paragraph.
  
10. In relation to paragraph 10 of the Statement of Claim, the Respondents deny that the third matter complained of, in its natural and ordinary meaning or otherwise:
  - (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 10 of the Statement of Claim; or
  - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 10 of the Statement of Claim or any nuance thereof.

11. In relation to paragraph 11 of the Statement of Claim, the Respondents deny that the third matter complained of, with the aid of the extrinsic facts particularised at paragraph 11, or otherwise:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 11 of the Statement of Claim; or
  - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 11 of the Statement of Claim or any nuance thereof.
12. The Respondents deny paragraph 12 of the Statement of Claim.

### **DEFENCES**

13. Further and in the alternative, the Respondents say that insofar as, and to the extent that, it may be found that the first matter complained of, the second matter complained of and/or the third matter complained of (collectively, the **matters complained of**) were published of and concerning the Applicant and to be defamatory of him in their natural and ordinary meaning, or to be defamatory of him with the aid of extrinsic facts, or as bearing one or more of the imputations in paragraph 4, paragraph 5, paragraph 7, paragraph 8, paragraph 10 or paragraph 11 of the Statement of Claim (which is denied), but otherwise without admission, the Respondents rely on the following defences:

**(a) Justification – section 25 of the Defamation Act 2005 (NSW) (Defamation Act)**

- (i) Each of the imputations in sub-paragraphs 4(a), 4(b), 5(a), 5(b), 7(a), 7(b), 7(c), 7(d), 8(a), 8(b), 8(c), 8(d), 10(a), 10(b), 10(c), 10(d), 10(e), 10(f), 11(a), 11(b), 11(c), 11(d), 11(e) and 11(f) of the Statement of Claim are substantially true.

**~~(b) Qualified privilege – section 30 of the Defamation Act~~**

- ~~(i) Each of the matters complained of were published on an occasion of qualified privilege pursuant to section 30 of the Defamation Act.~~

## **PARTICULARS**

### **A. PARTICULARS OF TRUTH**

14. The Applicant is and was at all material times a famous Oscar-winning actor (with multiple Oscar nominations), including in Hollywood productions, and widely regarded as an acting legend. In around October 2015, the Applicant began rehearsals for the Sydney Theatre Company Limited's (**Sydney Theatre Company**) production of the play "King Lear", in which the Applicant played the role of King Lear (the **Production**). The role of King Lear's daughter, Cordelia, in the Production was played by Eryn Jean Norvill (the **Complainant**).
  
15. In around the third week of rehearsals for the Production, from about 26 to 30 October 2015, the Applicant and the Complainant were rehearsing the final scene of the play, in which Cordelia is dead and King Lear is grieving over her dead body. During rehearsals, the Applicant crouched down next to the Complainant acting as a father grieving the loss of his daughter's life. This scene is not blocked out (which means that there was no choreography mandated for the scene). Prior to this occasion when rehearsing this scene the Applicant had usually surveyed the Complainant's (as Cordelia's) dead body and then touched her in the scene on the face and arm reflective of a grieving father standing over his beloved and dead daughter. On this occasion the Complainant was lying on the floor on her back and she had her eyes closed when she heard people watching the rehearsal (which included members of the cast and the Sydney Theatre Company's direction team) laughing. When the Complainant opened her eyes she saw the Applicant hovering his hands over her torso and pretending to caress or stroke her upper torso. The Applicant then made groping gestures in the air with two cupped hands, which gestures were intended to simulate and did in fact simulate him groping and fondling the Complainant's breasts. In so conducting himself, the Applicant:
  - 15.1 intended to mock the Complainant for his own amusement and that of others and did in fact so mock her;
  
  - 15.2 intended to depict himself as engaging in the sexual molestation of the Complainant whilst she was lying prostrate and therefore vulnerable and did in fact so depict himself;
  
  - 15.3 intended to depict the Applicant as a sexual object and did in fact so depict her;

- 15.4 intended to project to members of the cast and to the Sydney Theatre Company's direction team that that depiction was a matter of humour and did in fact project that to them;
- 15.5 knew that, upon discovering the way in which he had conducted himself, the Complainant would be uncomfortable and embarrassed and that that discomfort and embarrassment related to her sexuality and his conduct did in fact make the Complainant feel uncomfortable and embarrassed in a way which related to her sexuality;
- 15.6 engaged in conduct of a kind in which only a pervert would engage;
- 15.7 engaged in sexually predatory behaviour.

The Applicant's state of mind as alleged above is to be inferred from the conduct in which he engaged (as alleged above) in the circumstances in which he engaged in that conduct (as alleged above). This is also to be inferred from the whole of the conduct alleged in paragraphs 15, 16, 17, 18, 19, 22 and 23.

- 16. During the rehearsal period (from about 12 October 2015 to 23 November 2015), the Applicant regularly made comments or jokes about the Complainant or her body which contained sexual innuendo. This conduct often occurred in the presence of members of the cast and crew. In so conducting himself, the Applicant:
  - 16.1 intended to mock the Complainant for his own amusement and that of others and did in fact so mock her;
  - 16.2 intended to depict the Applicant as a sexual object and did in fact so depict her;
  - 16.3 intended to project to members of the cast and to the Sydney Theatre Company's direction team that that depiction was a matter of humour and did in fact project that to them;
  - 16.4 knew that such conduct would make the Complainant feel uncomfortable and embarrassed and that that discomfort and embarrassment related to her sexuality and his conduct did in fact make the Complainant feel uncomfortable and embarrassed in a way which related to her sexuality;
  - 16.5 engaged in conduct of a kind in which only a pervert would engage.

The Applicant's state of mind as alleged above is to be inferred from the conduct in which he engaged (as alleged above) in the circumstances in which he engaged in

that conduct (as alleged above). This is also to be inferred from the whole of the conduct alleged in paragraphs 15, 16, 17, 18, 19, 22 and 23.

17. During rehearsal period the Applicant regularly (every few days) make lewd gestures in the Complainant's direction. On a number of occasions this comprised the Applicant looking at the Complainant, sticking his tongue out and licking his lips and using his hands to grope the air like he was fondling the Complainant's hips or breasts. In so conducting himself, the Applicant:
  - 17.1 intended to mock the Complainant for his own amusement and that of others and did in fact so mock her;
  - 17.2 intended to depict himself as engaging in the sexual molestation of the Complainant and did in fact so depict himself;
  - 17.3 intended to depict the Applicant as a sexual object and did in fact so depict her;
  - 17.4 knew that such conduct would make the Complainant feel uncomfortable and embarrassed and that that discomfort and embarrassment related to her sexuality and his conduct did in fact make the Complainant feel uncomfortable and embarrassed in a way which related to her sexuality and in fact made her feel overwhelmed;
  - 17.5 engaged in conduct of a kind in which only a pervert would engage;
  - 17.6 engaged in sexually predatory behaviour.

The Applicant's state of mind as alleged above is to be inferred from the conduct in which he engaged (as alleged above) in the circumstances in which he engaged in that conduct (as alleged above). This is also to be inferred from the whole of the conduct alleged in paragraphs 15, 16, 17, 18, 19, 22 and 23.

18. In around November 2015, in an interview with Elissa Blake of the Sydney Morning Herald the Applicant described having a "stage-door Johnny crush" on the Complainant. The phrase "stage-door Johnny" refers to a man who frequents a theatre for the purpose of courting an actress or chorus girl. In so conducting himself, the Applicant:
  - 18.1 intended to depict the Applicant as a sexual object rather than as a serious actress skilled in her craft and did in fact so depict her;



- 18.2 knew that such conduct would make the Complainant feel uncomfortable, embarrassed and compromised and his conduct did in fact make the Complainant feel uncomfortable, embarrassed and compromised.

The Applicant's state of mind as alleged above is to be inferred from the conduct in which he engaged (as alleged above) in the circumstances in which he engaged in that conduct (as alleged above). This is also to be inferred from the whole of the conduct alleged in paragraphs 15, 16, 17, 18, 19, 22 and 23.

19. In or around the period from 24 to 27 November 2015, during the performances in front of an audience before opening night (called previews), the Applicant and the Complainant were on stage acting the scene in which King Lear grieves over the body of his dead daughter, Cordelia. During that scene whilst playing dead on stage, the Applicant departed from the way in which the scene had previously been performed, in that the Applicant did not touch the Complainant's hand and face as had been repeatedly rehearsed but rather the Applicant moved his hand so that it traced down the Complainant's torso and across the side of her right breast. In so conducting himself, the Applicant:

- 19.1 acted without the consent of the Complainant and knew that to be so;
- 19.2 knew that, with an audience present, the Complainant could not practicably do anything to prevent him engaging in such conduct;
- 19.3 intended to treat the Applicant as a sexual object and did in fact so treat her;
- 19.4 knew that such conduct would make the Complainant feel uncomfortable and embarrassed and that that discomfort and embarrassment related to her sexuality and his conduct did in fact make the Complainant feel uncomfortable and embarrassed in a way which related to her sexuality;
- 19.5 knew that his conduct amounted to a violation of the Complainant's bodily integrity and sexual autonomy, as was the fact;
- 19.6 engaged in conduct of a kind in which only a pervert would engage;
- 19.7 engaged in sexually predatory behaviour.

The Applicant's state of mind as alleged above is to be inferred from the conduct in which he engaged (as alleged above) in the circumstances in which he engaged in that conduct (as alleged above). This is also to be inferred from the whole of the conduct alleged in paragraphs 15, 16, 17, 18, 19, 22 and 23.

20. During a cast meeting on the evening following the preview performance referred to in the preceding paragraph the director of the Production, Neil Armfield, gave the Applicant a 'note' (being an oral direction as to how a scene was to be performed), in substance that the Applicant should make the scene where he is grieving over Cordelia's dead body more "paternal" as it was becoming creepy and unclear. Mr Armfield further directed the Applicant not to stroke the Complainant's body but to place his hand lightly on the side of her face and arm instead.
21. Commencing from the time the Production started in the theatre during the technical production and preview weeks, the Complainant was required to stand on a chair backstage in the wings so that the Applicant could pick her up and carry her onto the stage playing the dead body of Cordelia in the last scene of the play. The action for the lift was mechanical and involved the Complainant standing on the chair with the Applicant standing beside her and waiting for their cue (Edgar's line '*Haste thee, for thy life!*'). Once the cue was heard the practice was that the Complainant would put her right arm around the Applicant's neck, the Applicant would hold both of his arms out in front of his body and the Complainant would sit in the Applicant's arms. The practice was that, while the Complainant was waiting in the wings, the Applicant would stand next to her and wait until the cue was heard.
22. On one occasion in or around the period between 14 and 26 December 2015, during the final weeks of the Production, the Complainant was standing on the chair in the prompt side wings (backstage and in the dark) ready to be carried by the Applicant on to stage for the final scene. The Applicant was standing next to her. Approximately one minute before the cue the Applicant placed his hand on the Complainant's lower back above her shirt. The Applicant then moved his hand from above her shirt to under her shirt and moved his hand along the waistline of the Complainant's jeans brushing across the skin of the Complainant's lower back. The Applicant's touch on the Complainant's skin was light in pressure, slow and (it is to be inferred from the nature of the conduct alleged above) deliberate and lasted for about 20 to 30 seconds. When the cue was given the Applicant stopped touching the Complainant's lower back, squeezed her hand and went into the mechanical action for the lift. In so conducting himself, the Applicant:
- 22.1 knew that, given that the two actors were about to go on stage and that sound readily carries in a theatre and that anything said by the Complainant might be overheard by the audience, the Complainant could not practicably do anything to prevent him engaging in such conduct;
- 22.2 intended to treat the Applicant as a sexual object and did in fact so treat her;

22.3 knew that such conduct would make the Complainant feel uncomfortable and embarrassed and that that discomfort and embarrassment related to her sexuality and his conduct did in fact make the Complainant feel uncomfortable and embarrassed in a way which related to her sexuality;

22.4 knew that his conduct amounted to a violation of the Complainant's bodily integrity and sexual autonomy, as was the fact;

22.5 engaged in conduct of a kind in which only a pervert would engage;

22.6 engaged in sexually predatory behaviour.

The Applicant's state of mind as alleged above is to be inferred from the conduct in which he engaged (as alleged above) in the circumstances in which he engaged in that conduct (as alleged above). This is also to be inferred from the whole of the conduct alleged in paragraphs 15, 16, 17, 18, 19, 22 and 23.

23. On one occasion in or around the period from 4 to 9 January 2016 during the last week of performance of the Production, the Complainant was standing on a chair waiting to be carried on stage for the same scene as that referred to immediately above. The Applicant started to touch her lower back again on top of her shirt, gently rubbing his fingers over the Complainant's lower back from right to left. In so conducting himself, the Applicant:

23.1 intended to treat the Applicant as a sexual object and did in fact so treat her;

23.2 knew that such conduct would make the Complainant feel uncomfortable and embarrassed and that that discomfort and embarrassment related to her sexuality and his conduct did in fact make the Complainant feel uncomfortable and embarrassed in a way which related to her sexuality;

23.3 knew that his conduct amounted to a violation of the Complainant's bodily integrity and sexual autonomy, as was the fact;

23.4 engaged in conduct of a kind in which only a pervert would engage;

23.5 engaged in sexually predatory behaviour.

The Applicant's state of mind as alleged above is to be inferred from the conduct in which he engaged (as alleged above) in the circumstances in which he engaged in that conduct (as alleged above). This is also to be inferred from the whole of the conduct alleged in paragraphs 15, 16, 17, 18, 19, 22 and 23.

24. On 10 June 2016 the Applicant sent a text message to the Complainant in which he stated that he thinks of her "more than is socially appropriate".
25. The conduct referred to in paragraphs 15 to 19 and 22 to 24 above was inappropriate, and scandalously so, in a workplace, namely the Sydney Theatre Company.
26. In or about April 2016, the Complainant made a complaint to the Sydney Theatre Company about the Applicant's conduct towards her during the Production.
27. Following the complaint, the Sydney Theatre Company decided that it would never work with the Applicant again.
28. The Respondents rely upon the following particulars in support of the substantial truth of the following imputations:
  - 28.1 As to the imputation set out in sub-paragraph 4(a) of the Statement of Claim ("*the applicant had engaged in scandalously inappropriate behaviour in the theatre*"): particulars 14 to 23 and 25 to 27 above.
  - 28.2 As to the imputation set out in sub-paragraphs 4(b) and 5(b) of the Statement of Claim ("*the applicant had behaved in inappropriate behaviour of a sexual nature in the theatre*"): particulars 14 to 23 and 25 to 27 above.
  - 28.3 As to the imputation set out in sub-paragraph 5(a) of the Statement of Claim ("*the applicant had committed sexual assault in the theatre*"): particulars 14, 19 and 20 above.
  - 28.4 As to the imputation set out in sub-paragraphs 7(a), 8(a), 10(e) and 11(e) of the Statement of Claim ("*the applicant is a pervert*"): particulars 14 to 24 and 26 to 27 above.
  - 28.5 As to the imputation set out in sub-paragraphs 7(b), 8(b), 10(b) and 11(b) of the Statement of Claim ("*the applicant behaved as a sexual predator while working on the Sydney Theatre Company's production of King Lear*"): particulars 14 to 23 and 26 to 27 above.
  - 28.6 As to the imputation set out in sub-paragraphs 7(c), 8(c), 10(c) and 11(c) of the Statement of Claim ("*the applicant engaged in inappropriate behaviour of a sexual nature while working on the Sydney Theatre Company's production of King Lear*"): particulars 14 to 23 and 25 to 27 above.

- 28.7 As to the imputation set out in sub-paragraphs 7(d) and 8(d) of the Statement of Claim ("The applicant, a famous actor, engaged in inappropriate behaviour against another person over several months while working on the Sydney Theatre Company's production of King Lear"): particulars 14 to 23 and 25 to 27 above.
- 28.8 As to the imputation set out in sub-paragraphs 10(a) and 11(a) of the Statement of Claim ("the applicant had committed sexual assault while working on the Sydney Theatre Company's production of King Lear"): particulars 14, 19 and 20 above.
- 28.9 As to the imputation set out in sub-paragraphs 10(d) and 11(d) of the Statement of Claim ("The applicant, an acting legend, had inappropriately touched an actress while working on the Sydney Theatre Company's production of King Lear"): particulars 14, 19 to 23 and 25 to 27 above.
- 28.10 As to the imputation set out in sub-paragraphs 10(f) and 11(f) of the Statement of Claim ("The applicant's conduct in inappropriately touching an actress during King Lear was so serious that the Sydney Theatre Company would never work with him again"): particulars 14, 19 to 23 and 25 to 27 above.

## **PARTICULARS OF QUALIFIED PRIVILEGE**

### **Background context to the publication of the matters complained of**

29.— In the months preceding the publication of the matters complained of:

- 29.1— There had been widespread reporting in Australia and internationally in relation to allegations of sexual misconduct, bullying and harassment in the entertainment industry which originated with allegations of misconduct by Harvey Weinstein, a powerful Hollywood movie producer and included allegations of misconduct by other men in the entertainment industry including, but not limited to, Kevin Spacey, Dustin Hoffman, Louis CK and Casey Affleck, as well as a report by the Media Entertainment & Arts Alliance Actors Equity into widespread sexual harassment in Australian theatre.
- 29.2— The reporting included allegations to the effect that the misconduct was known in the industry but covered up, silenced or protected.

29.3—The reporting gave rise to a movement commonly referred to as the #metoo movement which encouraged women who had been subject to sexual misconduct, bullying or harassment to speak out with a view to discouraging such conduct from occurring.

29.4—It was in the public interest for allegations of sexual misconduct, bullying and harassment to be reported to support other victims of such misconduct to speak out about such misconduct, with a view to discouraging such conduct from occurring.

29.5—The Applicant acknowledged, in a statement provided on 10 November 2017 to Rosemary Neill of *The Australian* following an enquiry to the effect of why an AACTA Award to Harvey Weinstein had not been withdrawn, that "many companies have, recently, rightfully condemned many examples of inappropriate behaviour and serious misconduct in the workplace. According to our constitution and by laws AACTA is currently addressing this grave situation with concern."

30.—The matters complained of were published in the background context set out in paragraph 29 above.

**Subjects of the matters complained of**

31.—Each of the first and second matters complained of related to the following subjects:

31.1—the alleged misconduct of the Applicant, an Oscar winning Australian actor;

31.2—the response of the Sydney Theatre Company to an allegation of misconduct by the Applicant;

31.3—the Applicant's response to the allegation;

**(First and Second Matter Subjects).**

32.—The third matter complained of related to the following subjects:

32.1—the First and Second Matter Subjects;

32.2—the alleged misconduct of the Applicant, an Oscar winning Australian actor, in inappropriately touching an actress (the Complainant) during the Sydney Theatre Company's production of *King Lear*;

32.3—the public support of the Complainant by Meyne Wyatt, an actor appeared with the Applicant and the Complainant in *King Lear*;

32.4—the public support of the Complainant by Brandon McClelland, an actor who had worked with the Complainant in another production and was working in the Sydney Theatre Company's production of *The Three Sisters* at the time of publication of the matters complained of;

**(Third Matter Subjects);**

**Interest and apparent interest—section 30(1)(a)**

33.—The recipients of the matters complained of had an interest in having information on the First and Second Matter Subjects and the Third Matter Subjects (collectively, the **Subjects**), because the Subjects were matters of proper and legitimate public interest.

34.—Alternatively, the recipients of the matters complained of had an apparent interest in having information on the Subjects, because at the time of publication of the matters complained of, the Respondents believed that the recipients of the matters complained of had an interest in having information on the Subjects, because the Respondents believed that the Subjects were matters of proper and legitimate public interest to readers of the matters complained of.

**Publication in the course of giving information of the Subjects—section 30(1)(b)**

35.—The matters complained of were published to recipients of the matters complained of in the course of giving them information on the Subjects.

**Reasonableness—section 30(1)(c)**

36.—The Respondents' conduct in publishing the matters complained of was reasonable in the circumstances, in that:

36.1—the matters complained of were published in the background context set out in paragraph 29 above;

**Section 30(3)(a)**

36.2—the matters complained of related to the Subjects;

**Section 30(3)(b)**

36.3—the matters complained of related to the alleged public activities of the Applicant whilst performing in the theatre;

**Section 30(3)(c)**

~~36.4—it was in the public interest in the circumstances for the matters published to be published expeditiously;~~

~~Section 30(3)(f)~~

~~36.5—in the nature of the business environment in which the Respondents operate, the Respondents are engaged in the business of providing information to the public;~~

~~Information and sources—section 30(3)(g)~~

~~36.6—prior to publishing the first and second matters complained of, the Respondents had the following information relevant to the subject matter of the matters complained of:~~

- ~~(a)—that a complaint had been made to the Sydney Theatre Company by the Complainant in substance that the Applicant had touched her genitals during the production of King Lear without her consent;~~
- ~~(a1)—that a complaint had been made to the Sydney Theatre Company by the Complainant that the Applicant had engaged in inappropriate behaviour;~~
- ~~(b)—that the complaint was received by the Sydney Theatre Company when the Applicant's engagement with the Sydney Theatre Company had ended;~~
- ~~(c)—that the Sydney Theatre Company had conducted an investigation into the complaint;~~
- ~~(d)—that the Sydney Theatre Company continued to work with the Complainant to minimise the risk of future instances of the alleged behaviour occurring in the workplace;~~
- ~~(e)—that the Complainant had requested at the time that her identity be withheld;~~
- ~~(f)—that the Applicant denied the allegation;~~
- ~~(f1)—that contained in the response from the Applicant's lawyers, HWL Ebsworth;~~
- ~~(g)—that the Applicant stated that he had not been approached by the Sydney Theatre Company or the Complainant, nor any representative~~



of either of them regarding the complaint, nor informed of the nature of the complaint or what it involves;

(h) ~~background information in relation to the Applicant comprising:~~

(i) ~~the Applicant was an Oscar winning actor, having won the Academy Award for Best Actor in 1996 for his role as David Helfgott in the movie Shine;~~

(ii) ~~the Applicant was nominated an Oscar:~~

(A) ~~in 1998 for in the Best Supporting Actor category for his role in Shakespeare in Love;~~

(B) ~~in 2000 for in the Best Actor category for his role in Quills;~~

(C) ~~in 2011 for in the Best Actor category for his role in The King's Speech;~~

(iii) ~~the Applicant has found fame being one of the few people to have won acting's triple crown—the Academy Award, the Primetime Emmy Award and the Tony Award;~~

(iv) ~~the Applicant was 66 years old and a married father of two;~~

(v) ~~the Applicant is a Melbourne resident;~~

(vi) ~~the Applicant was the President of the Australian Academy of Cinema Television and Arts;~~

(vii) ~~the Applicant was expected to attend the annual AACTA Awards at The Star Event Centre the following week;~~

(viii) ~~the Applicant has worked with the Sydney Theatre Company many times, both acting and directing productions like Uncle Vanya, Oleanna, The Importance of Being Ernest, You Can't Take It With You, King Lear and The Government Inspector;~~

(i) ~~that the local production of King Lear ran from November 2015 to January 2016 at the Roslyn Packer Theatre, and there were several months of rehearsals;~~

~~36.6A the sources of the information set out in the preceding paragraph were:~~

- (a) — ~~As to the information set out in sub-paragraph 36.6(a), actress Sarah Monahan;~~
- (b) — ~~As to the information set out in sub-paragraphs 36.6(a1)(b), (d) and (e), the Sydney Theatre Company, through its Public Relations Manager Katherine Stevenson;~~
- (c) — ~~As to the information set out in sub-paragraph 36.6(c), a confidential source connected with the Sydney Theatre Company (**Confidential Source 1**);~~
- (d) — ~~As to the information set out in sub-paragraphs 36.6(f), f(1) and (g), the Applicant, through his solicitor Nicholas Pullen of HWL Ebsworth;~~
- (e) — ~~As to the information set out in sub-paragraphs 36.6(h), (i), (v) and (vi), the general and background knowledge of the Second Respondent as a journalist reporting on the entertainment industry;~~
- (f) — ~~As to the information set out in sub-paragraphs 36.6(h)(vii), the general and background knowledge of the Second Respondent as he was scheduled to host an event at the AACTA Awards;~~
- (f) — ~~As to the information set out in sub-paragraphs 36.6(h)(ii), (iii) and (iv), searches conducted by the Second Respondent of the First Respondent's news archive service, CHP, and searches conducted by the Second Respondent of the Internet including other major news websites;~~
- (g) — ~~As to the information set out in sub-paragraph 36.6(h)(viii), Katherine Stevenson of the Sydney Theatre Company and searches of the Internet conducted by the Second Respondent;~~
- (h) — ~~As to the information set out in sub-paragraph 36.6(i), the information page relating to the Production that was at the time available on the website of the Sydney Theatre Company.~~

~~36.6B the information set out in sub-paragraphs 36.6(a1) to (i) was included in the second matter complained of.~~

~~36.6C the information set out in sub-paragraph 36.6(a) was not included in the second matter complained of.~~

36.7—prior to publishing the third matter complained of, the Respondents had the following information:

- (a)—that set out in paragraph 36.6;
- (b)—that the Sydney Theatre Company had prepared a report following its investigation of the complaint;
- (c)—that the Applicant had a conversation with Patrick McIntyre, the Executive Director of the Sydney Theatre Company, on about 9 or 10 November 2017 during which conversation the Applicant was told that a complaint had been made of inappropriate conduct but he was not told specific information regarding the nature of the complaint;
- (d)—that the Applicant had harassed the Complainant throughout the production of King Lear but that the alleged genital touching had only occurred during the final week of the production;
- (e)—that another board member of the Sydney Theatre Company had confirmed that the incident had occurred;
- (e1)—that the complaint made was about sexual harassment by the Applicant;
- (f)—that other members of the Sydney Theatre Company were aware of the Applicant's conduct and felt strongly about it;
- (g)—that further similar complaints have been made to the Sydney Theatre Company about the Applicant's conduct;
- (h)—that the Sydney Theatre Company had changed its HR policies and practices as a result of the complaint against the Applicant;
- (i)—that the Sydney Theatre Company had vowed to never work with the Applicant again;
- (j)—that Meyne Wyatt had published a Facebook post which stated "I was in the show. I believe whoever has come forward. It's time for Sydney Theatre Company and the industry in Australia and worldwide to make a stand on this behaviour!!! It's been going on for far too long! And this culture of protecting people in power has to stop";
- (k)—that Meyne Wyatt had worked on the production of King Lear;

- (l) — ~~that Brandon McClelland had published a Tweet which stated "It wasn't a misunderstanding. It wasn't a joke";~~
- (m) — ~~that Brandon McClelland had worked alongside the Complainant;~~
- (n) — ~~that Brandon McClelland was at the time working on the Sydney Theatre Company's production of The Three Sisters;~~
- (o) — ~~that the Applicant had been told by Mr McIntyre the identity of the Complainant;~~
- (p) — ~~that the Sydney Theatre Company STC stood by the Complainant's claims;~~
- (q) — ~~the background information about Meyne Wyatt in paragraphs 13 to 15 of Schedule C;~~
- (r) — ~~the background information about Brandon McClelland in paragraphs 16 to 18 of Schedule C;~~
- (s) — ~~that Brandon McClelland's tweet was reposted by several other Sydney actors;~~
- (t) — ~~the statement from the Applicant's management referred to in paragraphs 31 to 41 of Schedule C;~~
- (u) — ~~the statements made by Patrick McIntyre in paragraphs 1 to 8 of the second page of Schedule C;~~
- (v) — ~~the preliminary findings of an Actors Equity survey referred to in paragraph 9 of the second page of Schedule C;~~
- (w) — ~~the matters relating to Kevin Spacey in paragraphs 10 and 11 of the second page of Schedule C;~~
- (x) — ~~a statement issued by the Sydney Theatre Company STC on 30 November 2017 which contained the information set out at paragraphs 13, 14 and 15 of the third page of Schedule C;~~
- (y) — ~~that executives at the Sydney Theatre Company STC said that they wholeheartedly believed the claims of the Complainant and one of them said the words set out at paragraphs 21 to 23 of the third page of Schedule C;~~
- (z) — ~~that a high profile actor came forward to support the complainant.~~

36.7A the sources of the information set out in the preceding paragraph were:

- (a) — ~~As to the information set out in sub-paragraphs 36.7(b), (c), (d), (f), (i), (p) and (y), a confidential source connected with the Sydney Theatre Company (**Confidential Source 2**);~~
- (b) — ~~As to the information set out in sub-paragraphs 36.7(c), (h) (i), (o), (p), (u), (x) and (y), Sydney Theatre Company executive director, Patrick McIntyre;~~
- (c) — ~~As to the information set out in sub-paragraph 36.7(c) and (p), Confidential Source 1;~~
- (d) — ~~As to the information set out in sub-paragraphs 36.7(e) and (f), a confidential source connected with the Sydney Theatre Company (**Confidential Source 3**);~~
- (e) — ~~As to the information set out in sub-paragraphs 36.7(e1), (f) and (g), an email received by the Respondents on 30 November 2017 by a person claiming to have direct knowledge of the particular case;~~
- (g) — ~~As to the information set out in sub-paragraph 36.7(j) and (z), the Facebook page of Meyne Wyatt;~~
- (h) — ~~As to the information set out in sub-paragraph 36.7(k), the information page relating to the Production that was at the time available on the website of the Sydney Theatre Company;~~
- (i) — ~~As to the information set out in sub-paragraph 36.7(l) and (s), the Twitter feed of Brandon McClelland and others reposting his tweets;~~
- (j) — ~~As to the information set out in sub-paragraphs 36.7(m) and (n), information available on the internet in relation to the Sydney Theatre Company's production of The Three Sisters;~~
- (k) — ~~As to the information set out in sub-paragraphs 36.7(q) and (r) the information that was available on the internet through searches conducted by the Second Respondent;~~
- (l) — ~~As to the information set out in sub-paragraph 36.7(t), the Applicant, through his agent Ann Churchill Brown of Shanahan Management;~~
- (m) — ~~As to the information set out in sub-paragraph 36.7(v), searches conducted of the First Respondent's news archive service, CHP, and~~

~~searches conducted by the Second Respondent of the Internet including other major news websites;~~

~~(n) — As to the information set out in sub-paragraph (w), the background knowledge of the Second Respondent, searches conducted by the Second Respondent of the First Respondent's news archive service, CHP, and searches conducted by the Second Respondent of the Internet including other major news websites;~~

~~36.7B The information set out in sub-paragraphs 36.7(a), (c), (f) and (h) to (z) was included in the third matter complained of.~~

~~36.7C The information set out in sub-paragraph 36.7(b), (d), (e), (e1) and (g) was not included in the third matter complained of.~~

~~36.8 — the Respondents were reasonably satisfied about the sources of the information in the matters complained of and the integrity, authenticity and accuracy of those sources;~~

~~*Belief in truth and accuracy of the publication — (section 30(3)(j))*~~

~~36.9 — the Respondents believed what it published to be true;~~

~~*Steps taken to verify the information in the matters complained of — section 30(3)(i)*~~

~~36.10A prior to publishing the second matter complained the Second Respondent read the content of the second matter complained of, including the headline, to Katherine Stevenson of the Sydney Theatre Company for the purpose of it being relayed to the Complainant. Neither Ms Stevenson, nor the Complainant, informed the Respondents that anything in the article was inaccurate;~~

~~36.11 the Respondents took other steps to verify the information in the matters complained of;~~

~~*Section 30(3)(d)*~~

~~36.11A the Respondents were reasonably satisfied as to the fairness of the language and the manner in which the matters complained of were composed;~~

~~36.11B the Respondents made clear in each matter complained of that the allegations referred to in each matter complained of were unproven; [moved from 36.15]~~

~~36.12 the Respondents took reasonable care to distinguish in each matter complained of, and each matter complained of did in fact reasonably distinguish, between suspicions, allegations and proven facts;~~

~~*Contact with the Applicant and publishing his side of the story — section 30(3)(h)*~~

~~36.12A Prior to the publication of the first and second matters complained of the Respondents contacted the Applicant, through his agent Ann Churchill Brown of Shanahan Management, by sending an email which:~~

- ~~(a) — indicated that the enquiry related to a story running in *The Daily Telegraph* the next day;~~
- ~~(b) — indicated that the Second Respondent had been investigating an alleged incident of abuse by the Applicant during his time working on the Production;~~
- ~~(c) — set out the content of a statement from the Sydney Theatre Company;~~
- ~~(d) — identified the Complainant;~~
- ~~(e) — provided the Respondents' understanding of the Complainant's complaint;~~
- ~~(f) — indicated that the Respondents would not be naming the Complainant;~~
- ~~(g) — indicated the story was part of a broader investigation into a number of high profile people in the entertainment industry; and~~
- ~~(h) — requested an official response on behalf of the Applicant as soon as possible;~~

~~36.13 the Respondents, in the second matter complained of, reported the Applicant's side of the story by publishing that:~~

- ~~(a) — the Applicant "denies 'inappropriate behaviour' during Sydney stage show" (Schedule B, page 1, sub-headline);~~
- ~~(b) — the Applicant "denies complaint made in Sydney Theatre Shakespeare production" (Schedule B, pages 4 and 5, graphic at top of page);~~
- ~~(c) — the Applicant "vigorously denied the claims" (Schedule B, page 1, paragraph 2);~~

- (d) — the Applicant "vigorously denies the allegations and says the [Sydney Theatre Company] never told him of any allegations of wrong doing" (Schedule B, page 4, paragraph 2);
- (e) — the Applicant's lawyers had said that:
  - (i) — the Applicant had "not been approached by the Sydney Theatre Company, the alleged complainant nor any representative of either" (Schedule B, page 1, paragraph 3 and Schedule B, page 4, paragraph 11);
  - (ii) — the Applicant had not "been informed of the nature of the complaint and what it involves" (Schedule B, page 1, paragraph 3 and Schedule B, page 4, paragraph 12);
  - (iii) — the Applicant had not "been involved with the Sydney Theatre Company or its representatives for a period of more than 22 months" (Schedule B, page 4, paragraph 13);
  - (iv) — "if such a statement has been issued by the STC it is both irresponsible and highly damaging" (Schedule B, page 1, paragraph 4 and Schedule B, page 4, paragraph 14);
  - (v) — the Applicant "had never been involved in any 'inappropriate behaviour' and that his 'regard, actions and treatment of all people he has worked with has been impeccable beyond reproach'" (Schedule B, page 4, paragraph 10);
  - (vi) — "[the First Respondent's] understanding of what has occurred is, with the greatest respect, simply fishing and unfounded. It does not warrant comment except to say that it is false and untrue (Schedule B, page 4, paragraph 15 and page 5, paragraphs 2 and 4);

36.14 The Respondents, in the third matter complained of, reported the Applicant's side of the story by publishing:

- (f) — that the Applicant "denies 'touching'" (Schedule C, page 1, sub-headline);
- (g) — that the Applicant was continuing to "vehemently deny" the claims that he inappropriately touched a cast member during the production of



~~King Lear (Schedule C, page 1, paragraph 2 and page 4, paragraphs 4 and 20);~~

~~(h) — a statement made by the Applicant the previous day in relation to the allegations referred to in the article (Schedule C, page 4, paragraphs 28-30 and page 5, paragraphs 1 and 3-5);~~

~~(i) — a statement made by the Applicant's solicitor on behalf of the Applicant in relation to the allegations referred to in the article (Schedule C, page 5, paragraphs 6-9);~~


~~(j) — a statement made by the Applicant's management on behalf of the Applicant in relation to the allegations referred to in the article (Schedule C, page 4, paragraphs 31-41);~~

### **MITIGATION OF DAMAGES**

37. If (which is denied) the Applicant suffered any damage as a result of the publication of the matters complained of and/or the imputations pleaded in paragraphs 4, 5, 7, 8, 10 and 11 of the Statement of Claim, then the Respondents intend to rely upon the following facts and matters in mitigation of such damage:

- (a) the substantial truth of the imputations in sub-paragraphs 4(a), 4(b), 5(a), 5(b), 7(a), 7(b), 7(c), 7(d), 8(a), 8(b), 8(c), 8(d), 10(a), 10(b), 10(c), 10(d), 10(e), 10(f), 11(a), 11(b), 11(c), 11(d), 11(e) and 11(f) of the Statement of Claim (or so many of them as are established by the Respondents to be substantially true);
- (b) the facts, matters and circumstances proven in evidence in support of the defences pleaded in this Defence;
- (c) the circumstances in which it is proved the matters complained of were published;
- (d) the background context to which (b) to (c) above comprised.

Date: 9<sup>th</sup> August 2018

Handwritten signature in blue ink, appearing to read 'Robert Todd'.

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Signed by Robert James Todd  
Lawyer for the Respondents

This pleading was prepared by Robert James Todd and Nicholas James Perkins, lawyers, and settled by Tom Blackburn SC and Lyndelle Barnett of counsel.

## Certificate of lawyer

I Robert James Todd certify to the Court that, in relation to the defence filed on behalf of the Respondents, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date:

9<sup>th</sup> August 2018

Robert Todd.

Signed by Robert James Todd  
Lawyer for the Respondents

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[Form approved 01/08/2011]