

ASPECTS OF THE LAW OF DEFAMATION

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ASPECTS OF THE LAW OF DEFAMATION

INTRODUCTION

1. There have been a number of important developments in the law of defamation in recent times. They involve amendments to the Uniform Legislation and the cases which have addressed the amendments. I will proceed in this paper by reference to an example of the Uniform Legislation, being the *Defamation Act 2005* (NSW) (“the Act”). The Act was amended by the *Defamation Amendment Act 2020* (NSW) (“Amendment Act”) to introduce, as an element in a cause of action for defamation, what I will call the serious harm test. The Amendment Act also introduced as a defence to the publication of defamatory matter, a public interest defence. Both of those amendments have already given rise to important decisions by the Federal Court of Australia and the Supreme Courts of the States and Territories. Some of the issues attending those amendments appear to have been resolved at that level while others are yet to be resolved.
2. The formulation and pleading of the imputations said to be conveyed by defamatory matter are a critical aspect of a defamation case. The word, “*matter*” is defined in s 4 of the Act. There is a substantial body of law dealing with the circumstances in which an applicant may rely at trial and for the purposes of a verdict, on imputations which differ from those which he or she has pleaded. This issue is linked to the circumstances in which a respondent may plead and seek to justify alternative imputations to those pleaded by the applicant (“variant imputations”). I will examine this topic. Following that, I will address the serious harm test and the public interest defence and examine briefly the defence of contextual truth. I will then make one short point about the statutory cap on damages in s 35 of the Act.
3. Next, I will say something about the following matters:
 - 3.1. The order in which evidence may be adduced in a defamation action where the respondent pleads justification; and
 - 3.2. The privilege of a journalist in ss 126J and 126K of the *Evidence Act 1995* (Cth) (“Evidence Act”).
4. Finally, I will address the source of the Federal Court’s jurisdiction in defamation matters and the extent to which particular sections in the Act are picked up by s 79 of the *Judiciary Act 1903* (Cth) (“Judiciary Act”).
5. I will refer to the parties to a defamation action as the applicant and the respondent, except where I consider it appropriate to refer to plaintiff and defendant. The sections to which I will refer are attached to this paper.
6. I conclude this introduction by saying a brief word about the contents of this paper. The paper was prepared in connection with a one-hour presentation I gave to judges and practitioners in Adelaide. It was left to me to select the topics for the presentation. I have chosen the topics which I thought would be of current interest and relevance. It will be apparent to the reader that I have not referred to all of the relevant cases and that some of the topics are dealt with at no more than a general level.

THE IMPORTANCE OF THE IMPUTATIONS PLEADED BY THE APPLICANT

7. The importance in a defamation action of the imputations pleaded by an applicant is difficult to overstate. It has been said that they delimit the boundaries within which the action is to be fought and identify the field of inquiry at the trial (*Advertiser-News Weekend Publishing Co Ltd v Manock* [2005] SASC 82; 91 SASR 206 at [76] per Doyle CJ (Vanstone and White JJ agreeing)) (“Manock”).
8. The basic principles are that the respondent’s ability to plead and justify variant imputations is limited to, or reflects, the extent to which the applicant is able to rely on variant imputations at trial and for the purposes of a verdict. It is important to note at the outset that these principles are based on considerations of fairness and practicality. Fairness in this context means fairness to each party in understanding and addressing the case he or she has to meet. Practicality involves a consideration of the time and costs of the action, in litigating, for example, a false issue.
9. Before going any further, I will identify some basic principles of defamation law.
10. First, the initial task of a court in a defamation action is to determine the meaning of the words used in the alleged defamatory matter which has been published. In the case of a trial with a jury, the judge decides if the pleaded imputations are capable of being conveyed by the alleged defamatory matter and the jury decides whether they are in fact conveyed. Even if different sections of the public would interpret the words differently, a court applies an objective test in order to determine the one or single meaning of the words used. This has been referred to as the single meaning rule (*Trkulja v Google LLC* [2018] HCA 25; 263 CLR 149 at [30]-[35]) (“Trkulja”).
11. Secondly, an applicant may plead more than one imputation and, subject to any restrictions imposed by the rules of court of a particular jurisdiction, he or she may plead imputations in the alternative. An applicant may choose the imputations he or she relies on. In other words, even if it is arguable other imputations are conveyed by defamatory matter, the applicant is at liberty to sue on the imputations he or she chooses. An applicant is not bound to plead all the variations in seriousness of one particular matter. For example, an applicant may allege that a defamatory imputation conveyed by a matter is that he or she has engaged in criminal conduct of a particular nature. The applicant is not bound to allege in the alternative that there are reasonable grounds to suspect that he or she has engaged in that conduct or, in the further alternative, that there are grounds for an investigation into the applicant’s conduct. There is no limit to the number of defamatory imputations an applicant may plead. Where the applicant pleads a large number of defamatory imputations a court, although considering all the pleaded imputations, may be able to discern and proceed by reference to a more limited number of defamatory stings. In *Al Muderis v Nine Network Australia Pty Limited (Trial Judgment)* [2025] FCA 909 (“Al Muderis TJ”) the applicant pleaded 75 imputations. The trial judge (Justice Abraham) considered all the pleaded imputations but was able to proceed by reference to nine defamatory stings (at [239]).
12. Thirdly, it is important to note that a plea of partial justification is limited to a case where there are two or more separate distinct defamatory meanings and the defendant may justify any one of them. This is not a defence but may be relevant to damages (*Whelan v John Fairfax Publications Pty Ltd* [2002] NSWSC 1028; 56 NSWLR 89 at 108).

13. Finally, it is important to note that the Full Court of the Federal Court in *Australian Broadcasting Corporation v Wing* [2019] FCAFC 125; 271 FCR 632 at [98] (“Wing 2019”) said that it would not allow an untenable plea of justification of variant imputations to be advanced for a collateral purpose of adducing evidence in mitigation of damages.
14. Returning to the principles I referred to earlier, those principles have been expounded in a long line of cases which address the issues (see, for example, *Chakravarti v Advertiser Newspapers Ltd* [1998] HCA 37; 193 CLR 519 (“Chakravarti”); *Hore-Lacy v Cleary* [2007] VSCA 314; 18 VR 562; *Mond v The Age Company Ltd* [2025] FCA 442 (“Mond”)).
15. I have stated the relevant principles at a general level and I have referred to Doyle CJ’s observations on the important role of the imputations in fixing the boundaries of the trial.
16. An applicant may rely on a variant imputation, when it is a mere shade or nuance of meaning he or she has pleaded, provided the respondent suffers no prejudice, embarrassment or unfair disadvantage as a result. It follows from this that a respondent’s ability to plead variant imputations and seek to justify those variant imputations is limited to, or reflects, the applicant’s ability to rely on imputations other than the imputations he or she has pleaded. As I have said these principles are grounded in fairness and practicality.
17. Manock is a good illustration of the application of the relevant principles.
18. Dr Manock was a forensic pathologist and formerly was the Senior Director at the State Science Centre. The articles or matters concerning him were published in the Sunday Mail newspaper, a newspaper circulating in the State of South Australia. They were highly critical of Dr Manock’s work as a forensic pathologist. Some of the criticisms were of Dr Manock’s work in relation to murder trials. Other criticisms related to Dr Manock’s work more generally and in other areas, such as his evidence in relation to the causes of death of deceased persons which work was said to be inadequate and such as to produce unreliable results.
19. Dr Manock sued and pleaded imputations relating to and only relating to, his work in relation to murder trials. The newspaper denied the meanings and, in the alternative, pleaded justification. The newspaper also sought to plead variant imputations going beyond Dr Manock’s work in relation to murder trials.
20. The primary judge struck out the pleading of the variant imputations by the newspaper having regard to the principles referred to earlier.
21. Chief Justice Doyle analysed the relevant principles and endorsed the following propositions:
 - 21.1. The plaintiff can rely on meanings he or she has pleaded and meanings which are less injurious and not of a substantially different kind. The plaintiff may rely on meanings not pleaded where they are simply a variant of the meanings pleaded, or involve no more than a different nuance or shade of meaning; and

- 21.2. The defendant may only plead and seek to justify such alternative meanings as may be relied on by the plaintiff to obtain a verdict even though he or she has not pleaded them.
22. Wing 2019 is a recent decision of the Full Court of the Federal Court and is important in two respects. First, the case identifies the circumstances in which a respondent may plead and seek to justify imputations which differ from those alleged by the applicant and the related question of the circumstances in which an applicant may rely at trial and for the purposes of a verdict on imputations which differ from those he or she has pleaded. Secondly, the case addresses a particular application of the relevant principles in the context of a plea of criminal, civil or other misconduct and the ability of one or other of the parties to pursue a case in the alternative of reasonable suspicion or reasonable grounds to believe the party has engaged in such conduct.
23. In Wing 2019, the applicant alleged that imputations arising from the alleged defamatory matter included that he was a spy for the Chinese government, had been involved in an improper attempt to influence Australian politicians and had paid a bribe to the President of the General Assembly of the United Nations. Among other pleas, the respondents sought to plead variant imputations to the effect that there was reason to believe that the applicant had engaged in such conduct. The issue before the Court was whether the respondents should be permitted to plead the variant imputations. The Court identified the following principles. There is some overlap with what I have already said, but the case is helpful in that it consolidates a statement of the relevant principles in the one judgment.
24. First, general principles of pleading now invariably require that a respondent to a defamation proceeding is entitled to know what defamatory imputations are relied on by the applicant.
25. Secondly, it is open to an applicant in a defamation proceeding to choose upon what imputations he or she relies.
26. Thirdly, under modern pleading practice, the applicant's case will be shaped by the meanings alleged in the statement of claim, which will generally confine the questions of meaning for determination. The meanings alleged by the applicant may extend to meanings that are comprehended in, or are less injurious than, or are a mere shade or nuance of the pleaded meanings. Whether, and to what extent, an applicant may be permitted at trial to depart from the pleaded meanings will be resolved having regard to considerations of fairness and practical justice.
27. Fourth, whether the common law defence of justification or that in s 25 of the Act is in issue, the defence should respond to the applicant's case.
28. Fifth, a respondent may be permitted to plead and seek to justify an alternate meaning only if it is comprehended by, or it is a variant of one of the meanings relied on by the applicant. The reason for this approach is that the respondent's right is inextricably bound up with the extent to which an applicant may be allowed to depart from specific meanings alleged in the statement of claim. The respondent is limited to justifying a meaning upon which the plaintiff may rely at trial and for the purposes of a verdict.

29. Sixth, the parties in Wing 2019 accepted these principles. The issue in Wing 2019 was whether the respondents' variant imputations of the existence of reasonable grounds for belief were permissible variants of, and therefore responsive to, the applicant's pleaded meanings. The respondents argued that this issue should be answered in the affirmative because there is no bright line between an allegation of guilt and an allegation that there are reasonable grounds to support a belief of guilt, and that publications will often be capable simultaneously of conveying both allegations.
30. Seventh, as was noted earlier the respondents' right to plead and seek to justify variant imputations is linked to the applicant's right to obtain a verdict on variant imputations. Therefore, it is necessary to consider the applicant's right to obtain a verdict on variant imputations. The answer to those matters requires an examination of the pleadings and considerations of fairness and practical justice.
31. Eighth, the Court in Wing 2019 decided that the applicant would not be able to rely on the variant imputations pleaded by the respondent and it followed that the respondent could not plead and seek to justify the variant imputations. The Court decided that the variant imputations will not be an issue at the trial. The reasons for this conclusion are as follows.
- 31.1. In terms of meaning, the issue at trial is the single meaning that an objective audience composed of ordinary decent persons would have collectively understood the matter to bear. The Court in Wing 2019 said that this point was made by the High Court in Trkulja where the Court said (at [30]) that although reasonable minds may sometimes differ as to meaning, the question of whether words or images complained of are capable of conveying a pleaded defamatory imputation is a question of law which permits of only one correct answer. The fact that different people might have different views as to the meanings of a matter is irrelevant. This is not to gainsay that an applicant is able to plead more than one imputation and may plead imputations in the alternative.
- 31.2. The reasons of Brennan CJ and McHugh J in Chakravarti explain how prejudice, embarrassment or unfair disadvantage is linked to the extent an applicant may rely on variant imputations. There are slightly different expressions of the principle, but they all come back to the same concept. As Brennan CJ and McHugh J said an applicant may rely on variant imputations to the extent that they are no more than a different nuance of meaning or, oftentimes, merely a less serious defamation providing there is no unfair disadvantage to the respondent.
- 31.3. The case of Chakravarti does not stand for the proposition that there is a general principle that a plaintiff who alleges an imputation equating to guilt will be entitled to succeed at trial on a lesser imputation which equates to reason to believe, or reasonable suspicion. Whether an applicant is entitled to do so depends on the terms of the imputations and considerations of fairness.
32. Ninth, the fact that imputations of suspicion and guilt may cause similar harm, or that there is the capacity for both to be conveyed by the alleged defamatory matter, does not mean that one is a variant of the other. Whether an applicant alleging guilt is able to rely on reasonable grounds to believe or reasonable suspicion depends on the state

of the pleadings, considerations of fairness and whether there would be any unfair disadvantage to the respondent. Furthermore, it follows and must follow from the principles identified earlier that there is no general principle that where the applicant pleads imputations which amount to guilt, a respondent will be permitted to justify by alleging reasonable grounds to believe.

33. Tenth, the respondents cannot maintain pleas of justification of variant imputations that are bound to fail for the collateral purpose of adducing evidence of facts for the purpose of mitigating damage.
34. Eleventh, in Wing 2019 the reasons the respondents' variant imputations were struck out were as follows:
 - 34.1. The applicant's imputations were conceptually distinct from the respondents' "*reason to believe*" imputations;
 - 34.2. The fact that both the applicant's imputations and the respondents' variant imputations might arguably be conveyed by the publications did not undermine the distinction between them;
 - 34.3. Nor did the fact that the consequences of injury to reputation might be similar, seriously undermine the distinction; and
 - 34.4. The point upon which the applicant sought vindication was whether he engaged in the conduct that was the subject of his imputations, not whether there was reason to believe that he engaged in such conduct.
35. In summary, on the amended statement of claim in Wing 2019 there was no prospect that the applicant would be permitted to rely on the respondents' variant imputations. The respondents' variant imputations were not responsive to the applicant's claim. Furthermore, an untenable plea of justification of alternative imputations cannot be advanced for the collateral purpose of adducing evidence in mitigation of damage.

THE SERIOUS HARM TEST IN S 10A OF THE ACT

36. The serious harm test was introduced into the Act by the Amendment Act and commenced operation on 1 July 2021. The amendment applies to publications after that date. The triviality defence in s 33 of the Act was repealed by the Amendment Act. I note in passing that the triviality section provided for a defence, not a matter which is an element of the applicant's cause of action and involved a high bar for the respondent in that he or she was required to prove that the circumstances of the publication were such that the applicant was unlikely to suffer any harm.
37. The extrinsic material at the time the serious harm test was introduced suggests that the purpose of the test was to prevent trivial or frivolous defamation claims at the outset of a proceeding. Another observation in the material referred to "*significant concerns that defamation law is increasingly being used for trivial, spurious and vexatious backyard claims*". It seems to me that the reality is that the serious harm test has been given, and will be given, a much wider operation than merely preventing trivial or frivolous claims.

38. Section 10A was drafted having regard to s 1 of the *Defamation Act 2013* (UK). The two sections are similar but not identical. Section 10A provides that the serious harm requirement is an element of the cause of action for defamation, whereas s 1 of the UK Act provides that the serious harm requirement is part of the requirement that a statement be defamatory. This difference has been noted in the authorities, although I am not aware of any statement in the authorities about whether it results in any difference in the operation of the two sections.
39. The elements of s 10A(1) are as follows:
- 39.1. The publication of “*defamatory matter*”;
 - 39.2. The publication is “*about a person*”;
 - 39.3. The publication “*has caused or is likely to cause*”;
 - 39.4. “*serious harm*”.
40. The requirement identified in 3 above is a causation requirement. The phrase, “*likely to cause*”, was a reason Lord Sumption in *Lachaux v Independent Print Ltd* [2019] UKSC 27; [2020] AC 612 (“*Lachaux*”) concluded that s 1 of the UK Act required proof of actual harm. There are other issues related to the causation requirement. I will identify those issues, but not address them. They are as follows:
- 40.1. When, in terms of the point in time, does the “*likely to cause harm*” element come into play. Is it at the date of publication or the date the action is commenced or the date of the trial? and
 - 40.2. How does the serious harm element operate in the case of multiple publications by the same person or publications by others of similar matter?
41. Some cases which have addressed the serious harm test are *Lachaux*, *Peros v Nationwide News Pty Ltd (No 3)* [2024] QSC 192 (“*Peros*”), *Deeming v Pesutto (No 3)* [2024] FCA 1430 (“*Deeming*”), *Selkirk v Wyatt* [2024] FCAFC 48; 302 FCR 541 (“*Selkirk v Wyatt*”), *Singh v Singh* [2025] FCA 1531 (“*Singh*”), *Mond v The Age Company Pty Limited* [2025] FCA 442 (“*Mond*”) and *Latham v Greenwich* [2026] FCAFC 82; 316 FCR 30 (“*Latham*”). There are other cases, but I will concentrate on the cases I have identified.
42. It seems to me that the combined effect of the cases, other than *Latham*, which I will deal with separately, is as follows.
43. First, s 10A does not require the judge who determines the issue of serious harm to make a finding at the outset that binds the tribunal of fact at any trial about the precise defamatory imputation(s) that the publication conveyed. Section 10A contemplates that the serious harm element will be determined as soon as practicable before the trial of the proceeding, unless the judge is satisfied that there are special circumstances justifying the postponement of that determination. This may be contrasted with the position in the UK where typically the issues of meaning, reference to the claimant and special harm will be determined at the same time.

44. Secondly, s 10A refers to the publication of defamatory matter, not to the defamatory imputations, and therefore a judge determining the issue is not required to find that a certain imputation was conveyed. Even so, there is an issue as to how a judge should proceed where the imputations pleaded by the applicant are not admitted by the respondent. After all, the gravity of the imputations is a relevant factor in determining whether the serious harm test has been satisfied. The applicant may or may not establish the pleaded imputations at trial. He or she may establish less serious imputations. What approach does the court take to the pleaded imputations for the purposes of a serious harm hearing assuming (which is likely) that hearing is before the trial? As we saw earlier the serious harm hearing may take place after the pleadings have settled or even immediately after the applicant has filed his or her statement of claim.
45. One solution is to combine a serious harm hearing with a determination of meaning so that an assumption about meaning will not be necessary. However, that may not always be possible. For example, it may not be possible if the meaning issue is not ready for hearing or the argument itself about meaning will take an extended period of time. In theory, an applicant may argue that the meaning issue is inextricably linked to the serious harm element (see s 10A(6)(c)) and a special circumstance within s 10A(5) and therefore, a reason to postpone the serious harm hearing until the argument as to meaning is ready for hearing. The difficulty with this argument is that it could be put in almost every case and it seems to be contrary to the injunction in s 10A(5) to the court to determine the serious harm element as soon as practicable before the trial commences.
46. An assumption that the imputations are less serious than those pleaded by the applicant seems to be devoid of a logical basis and may cause unfairness to an applicant if, had the matter proceeded to trial, he or she proved the more serious imputations.
47. A solution which has been adopted in some of the authorities is to assume for the purpose of a serious harm hearing that the applicant will establish the imputations he or she has pleaded. This approach is subject to one important caveat. It would not, or at least may not, be appropriate to proceed on the assumption that the applicant will establish the pleaded meanings where the court is satisfied that the defamatory matter is simply not capable of conveying the pleaded meanings. Having said that, it is necessary to bear in mind, an observation of the High Court in *Trkulja* (at [30]) to the effect that because reasonable minds may differ as to meaning, it is only with great caution that a defamation pleading should be disallowed as incapable of bearing a defamatory imputation.
48. Thirdly, the view expressed by the Full Court of the Federal Court in *Selkirk v Wyatt* following *Lachaux* (per Lord Sumption at [20]), is that the effect of s 10A is to remove the presumption that the defamatory imputations have caused damage together with any presumption of a good reputation, if the latter presumption of good reputation is part of the common law. There is another view and that is that the presumption survives s 10A as to harm, but not serious harm. The difference is unlikely to be of any practical significance.
49. Fourth, in assessing whether the publication of the defamatory matter has caused or is likely to cause serious harm the court undertakes an exercise which is qualitative, not quantitative and involves an evaluation of the material.

50. Fifth, in the case of *Peros*, the judge identified some of the matters he considered were relevant to the determination of whether serious harm had been caused or is likely to be caused by the publication of defamatory matter. I will identify them without comment except where I think a comment may be of assistance.
- 50.1. The gravity of the defamation.
 - 50.2. The extent of publication. Evidence of serious harm is unlikely to be necessary where there is mass media publication of very serious defamatory allegations.
 - 50.3. By whom the defamatory matter is published and the identity of the recipients. For example, a defamatory publication which is apparently the product of an independent investigation to those who have an open mind about its veracity is more likely to have caused serious harm than the opposite situation.
 - 50.4. The form of the publication. A publication in permanent form is more likely to cause serious harm, than say, a spontaneous social media post.
 - 50.5. The state of the claimant's reputation before the publication. The fact that the claimant had a prior bad reputation is a relevant factor in determining whether he or she has suffered or is likely to suffer serious harm (Selkirk at [98]). However, there are a couple of points to note in this context. First, if a publication injures the claimant only in a certain sector, then the evidence of reputation must relate to that sector. Secondly, there is no onus on the applicant to prove a prior good reputation; the onus is on the respondent to prove a prior bad reputation if he or she seeks to rely on that matter.
 - 50.6. Proof of the cause of serious harm.
 - 50.7. Proof of serious harm may be by way of direct evidence or by inference or by both. There is no need to comment on proof of serious harm by direct proof. Serious harm can be established by inference, but one needs to be careful in this area. The inherent tendency of the words is unlikely to establish serious harm, otherwise, as Lord Sumption noted in *Lachaux*, it is difficult to see what difference the serious harm test has made to the existing law. Furthermore, although the meaning of the words will clearly be relevant to the impact of the publication, it is unlikely they will establish serious harm by themselves. There are many other factors to be taken into account. For example, even though the pleaded imputations are grave, the publication may be made only to a limited audience who are most unlikely to believe them in any event.
51. With respect, the Full Court of the Federal Court in *Latham* carefully examined the serious harm element in a cause of action in defamation. The Court made the following observations.
52. First, the serious harm test is not the triviality defence put in a different way. It is one thing to provide that a defendant has a defence where he or she can show that the circumstances of the publication were such that the plaintiff was unlikely to sustain

any harm (the triviality test) and another to provide that an element of the applicant's cause of action is proof that the publication of the defamatory matter has caused or is likely to cause serious harm to the applicant's reputation.

53. Secondly, the Court rejected the approach of Brereton JA in *Rader v Haines* [2022] NSWCA 198 of postulating a spectrum of harm and placing serious harm between substantial harm and grave harm. The Court said that the plain and ordinary meaning of the word “*serious*” should be applied and the Court may also have regard to the purpose of the section when construing the word. This is why the exercise is an evaluative one where precision will rarely be possible.
54. Thirdly, as is made clear in earlier authorities, serious harm may be established by direct evidence or inference or both. A non-exhaustive list of relevant factors in determining whether serious harm has been established by way of an inference is as follows:
 - 54.1. The gravity of the imputations;
 - 54.2. The extent of publication, any likely republication, and any likely “*grapevine effect*” or “*percolation*”.
 - 54.3. Whether there was a prompt apology, and the breadth of the audience to which any apology was published;
 - 54.4. The reputation of the publisher, that is, a publication by a generally reputable publisher that is represented as being reliable and the product of research may be more capable of causing serious harm than one by a publisher who is not so reputable;
 - 54.5. The medium of the publication, that is, a transient publication might cause less harm to reputation than one in print or which is available for viewing online for an extended period or indefinitely;
 - 54.6. The situation of the applicant, including the applicant's reputation in the relevant sector;
 - 54.7. The identity of the persons to whom the defamatory matter was published; and
 - 54.8. The inherent probabilities generally.
55. Fourth, the Full Court referred to the single meaning rule, that is, although in fact different groups may attribute different meanings to the defamatory matter, the court must arrive at a conclusion about a single meaning. The Court went on to say that because the serious harm element is concerned with actual harm and not presumed harm, it is not directed to harm suffered amongst a notional cohort of hypothetical ordinary reasonable readers. Nevertheless, where a finding of causation of serious harm as a result of widespread publication is a product of inference, the single meaning rule that the publication is found to bear is a sound starting point in determining, by reference to all the circumstances, the probable impact of the publication of the matter on those to whom it was published (at [66]).

56. Finally, the Full Court also pointed to the fact that the section talks in terms of serious harm being caused by the publication of defamatory matter; it is not phrased as “...*that the publication of a defamatory imputation or imputations about a person has caused or is likely to cause serious harm...*”. This observation by the Full Court seems to have been made to rebut any suggestion that a claimant must prove serious harm has been caused by each and every imputation. The Court said that s 10A was directed to the publication of defamatory matter, and not a defamatory meaning or imputation.

THE PUBLIC INTEREST DEFENCE IN S 29A OF THE ACT

57. Section 29A was introduced into the Act by the Amendment Act. The section came into operation on 1 July 2021 and it applies to the publication of defamatory matter after that date.
58. Section 29A makes provision for a defence to the publication of defamatory matter where two conditions are satisfied. First, the matter must concern an issue of public interest. Secondly, the defendant must have reasonably believed that the publication of the matter was in the public interest. I note in passing that the Amendment Act also introduced significant amendments to the defence of qualified privilege (see s 30 of the Act).
59. In the case of *Russell v Australian Broadcasting Corporation (No 3)* [2023] FCA 1223; 303 FCR 372 (“Russell”), Lee J examined s 29A in detail. His Honour undertook a historical survey of the defence of qualified privilege and outlined its development by statute in Australia. He referred to the very limited application of the defence of qualified privilege in the case of the publication of defamatory matter to the world at large and the limited effect the courts had given to s 22 of the *Defamation Act 1974* (NSW) which, his Honour said, was intended to broaden the scope and availability of the defence. His Honour also referred to the development of an extended category of qualified privilege in the case of communications on government or political matters (*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520).
60. Section 29A(1) provides for a defence to an action based on the publication of defamatory matter. As I have said, the word, “*matter*” is defined in s 4 of the Act. It is a broad definition and it includes articles, reports, advertisements, programmes, letters, notes, pictures and other means of communication.
61. That textual feature (ie., the way in which the word “*matter*” is used) has given rise to an issue which has been considered in the authorities. The defence is a defence to the publication of defamatory matter. The first condition is that the matter concerns an issue of public interest and the second condition is that the defendant had a reasonable belief that publication of the matter was in the public interest.
62. The issue which has arisen is as follows: is the respondent required to prove that he or she reasonably believed that the publication of the matter which conveyed the defamatory imputations was in the public interest, or is the respondent required to prove that the publication of the defamatory imputations was in the public interest? Justice Lee in *Russell* favoured the former construction (at [316]) following the earlier observations of Wigley J in *Murdoch v Private Media Pty Ltd* [2022] FCA 1275 (at [71]).

63. I turn now to s 29A(1)(a). Whether the matter concerns an issue of public interest is determined objectively and the subjective views of the publisher are irrelevant.
64. A short but helpful working definition of the concept of public interest was provided by Lord Bingham in the Court of Appeal in *Reynolds v Times Newspapers Ltd* [1998] 3 All ER 961 at 1004. The concept of the public interest includes “*matters relating to the public life of the community and those who take part in it*” and “*governance of public bodies, institutions and companies which give rise to a public interest in disclosure*”. Not included in the concept are “*matters which are personal and private, such that there is no public interest in their disclosure*” (see also *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183). Justice Lee referred to Lord Bingham’s formulation in Russell (at [319]).
65. In the case of Russell, the alleged defamatory matter concerned the applicant’s conduct as a soldier in Afghanistan. In deciding that the matter concerned an issue of public interest, Lee J referred to the fact that Australia’s involvement in Afghanistan was this country’s longest military campaign and that it had triggered significant and continuing investigations by public bodies into the commission of criminal offences under domestic and international law (at [343]).
66. In the case of Mond, Wheelahan J had before him matters concerning an internal dispute in Melbourne’s Orthodox Jewish community. In deciding that the alleged defamatory matter concerned an issue of public interest, Wheelahan J referred to an email sent by the applicant to the Congregation, an apology and the fact that the case concerned internal divisions within one of Melbourne’s largest Jewish congregations (at [479]).
67. In the case of Al Muderis, the applicant was an orthopaedic surgeon who had a high public profile which was favourable to him and the work he carried out. For example, he was interviewed on a number of television programmes. The alleged defamatory matters dealt with a significant cohort of patients who were unhappy and negatively impacted by the services the applicant had provided to them. Justice Abraham found that the matters concerned an issue of public interest.
68. Before leaving s 29A(1)(a) there is one further matter to note. In the case of Russell, Lee J said that there was not some sliding scale to the effect that the greater the degree of public interest means the greater allowance for error in the reporting of the issue. His Honour said that to embrace such a notion would distort and oversimplify the requirement to make a value judgment about whether the impugned publication was in the public interest by reference to all relevant circumstances. The extent of the public interest is relevant to making such allowances for editorial judgment as may be appropriate but does not overwhelm the evaluative assessment (at [347]).
69. I turn now to s 29A(1)(b) of the Act. The defendant must prove that he or she reasonably believed that the publication of the matter was in the public interest. This requirement contains a subjective element in that the defendant must have had a belief that the publication of the matter was in the public interest and an objective element in that the belief must have been a reasonable belief.
70. There are two issues which have arisen in the cases and are likely to arise in future cases. The circumstances which give rise to the issues are as follows. In order for a

defendant to avail himself or herself of the defence in s 29A of the Act that defendant must show that he or she (or it) had the reasonable belief in s 29A(1)(b). An applicant will often sue a media corporation and more than one journalist. The media corporation may raise the defence in s 29A of the Act. The media companies are “*defendants*” within s 29A of the Act. In order to succeed in establishing the defence, the corporation must show that it reasonably believed that the publication of the matter was in the public interest. In order to do that the corporation must show that a natural person(s) within the organisation held the relevant belief.

71. The issue is whose belief within the organisation is relevant and necessary for the purpose of establishing the relevant belief?
72. In a case where there are two or more journalists each must show that they held the relevant belief. Not infrequently, one of the journalists has done the bulk of the work or at least a substantial part of the work involved in the investigation and preparation of the relevant matter, and another journalist relies on that work at least to some extent. The question is whether the second journalist may rely on that work and yet still establish that he or she had a reasonable belief that the publication of the matter was in the public interest?
73. The first issue has been considered in the following cases: Russell, Mond and Al Muderis TJ.
74. In the case of Russell, Lee J said that the Australian Broadcasting Corporation (“ABC”) was a statutory corporation and the focus must be on its servants or agents responsible for the matter being published. On the facts, his Honour had before him evidence of the respective beliefs of the journalists and an investigations editor within the ABC. His Honour noted that the investigations editor gave evidence that the ultimate decision-maker was a Mr. Lyons who was not called to give evidence. His Honour referred to a submission by the applicant that the failure to call Mr Lyons should give rise to an inference that his evidence would not have assisted the ABC. His Honour described the submission as unrealistic. Mr Lyons had a very limited role which may be described as procedural rather than substantive. His Honour said that it was clear that the persons who were “*substantively responsible*” for the publications were the persons who gave evidence before him. As it happened, his Honour found that although the persons who gave evidence each had a belief that the publication of the matter was in the public interest, that belief was not reasonable in the circumstances. He said that the ABC did not have an objectively reasonable attributed belief that the publications in issue were in the public interest and the defence under s 29A was not made out.
75. In the case of Mond, one of the two journalists involved did not give evidence. Justice Wheelahan said that neither of the two media corporations involved called witnesses, such as editorial staff on the question of what state of belief is to be attributed to the corporate respondents. The journalist who did give evidence said that he had offered up the articles for publication, and they were then approved by the editors, so that the editors, in effect, agreed to publish them. In another context, the journalist identified his editors as the people who made the decision to publish. Justice Wheelahan said that given the journalist’s evidence that his role was effectively to offer up a draft column to his editors, who then made the decision to publish, he did not consider that the journalist’s evidence that he believed the publication of the relevant articles was

in the public interest to be sufficient to make a finding that the corporate respondents also had the requisite belief. His Honour said that the editors were a necessary step in the chain of causation leading to the decision to publish. His Honour said that the editors may not have had a reasonable belief that the publication was in the public interest. His Honour was prepared to infer that the evidence of the relevant editorial staff of the two newspaper corporations would not have assisted the corporations in establishing the requisite state of belief to be attributed to them.

76. This issue was addressed by Abraham J in the case of *Al Muderis TJ*. In that case, there were three corporate respondents and three journalists. The applicant submitted that the corporate respondents could not make out a defence under s 29A(1) because the persons responsible for the decision to publish the matters had not given evidence as to their respective states of mind for the purposes of the defence in s 29A. Her Honour rejected this submission. Her Honour said that there was an important distinction between a test which requires evidence from the “*ultimate decision maker*” and a test which requires evidence of the state of mind of those who were substantially responsible for the publication. I think that one may say this. There is no rule that only the state of mind of the ultimate decision-maker will be attributed to a corporate respondent. Depending on the precise facts, the state of mind of the person substantively responsible for the publication will be attributed to a corporate respondent. In making the decision in *Al Muderis* that the state of mind of the journalist could be treated as the state of mind of the relevant corporation, her Honour relied on the following matters:

- 76.1. The journalist was substantively responsible for the publication of the matters because she was so closely and relevantly connected with the publication of the matters;
- 76.2. The journalist drafted the matters and made changes to them over time;
- 76.3. The journalist later placed the draft into the company’s internal news production system; the draft was edited by the journalist and a number of editors over a period of 12 days; changes of substance were the product of decisions taken by the journalist in consultation with the person whom the applicant alleged was the ultimate decision maker; and with respect to a matter which was a video, the journalist had conceived the idea for the video, scripted it, provided a voiceover, appeared in it and oversaw its editing.

77. Turning to the second issue, that is, whether one journalist can rely at least to some extent on the work done by another journalist without disqualifying himself or herself from taking the benefit of the defence in s 29A, the answer is that it all depends on the facts of the case. Perhaps the most that can be said is that there is no general rule that one journalist cannot rely on the work done by another journalist. At the same time, it might be said that where a journalist wholly or substantially relies on the work of another journalist it is unlikely that the journalist who does so, will be able to make out the defence. It all depends on the facts of the case. It is easy to see why this is so. The question is from start to finish whether, assuming the subjective belief of the person, the belief was a reasonable belief having regard to the relevant factors, including those in s 29A(3). I refer to the case of *Russell* (at [387]) and the case of *Al Muderis* (at [2687]).

78. I turn now to the factors the court takes into account in deciding whether the defendant's belief was reasonable in the circumstances. Section 29A(2) provides that in determining whether the defence is established, the court must take into account all the circumstances of the case. Section 29A(3) sets out the nine factors the court may take into account to the extent the court considers them applicable in the circumstances and s 29A(4) provides that s 29A(3) does not require a court to take into account each factor referred to in s 29A(3).
79. The exercise involved in determining whether a belief was reasonable by reference to all the circumstances of the case and the nine factors referred to in s 29A(3) is an evaluative one, that is, it involves determining the significance and weight to be accorded to each factor or circumstance and then to form a judgment about the relevant question, namely whether the defendant's belief that the publication of the matter was in the public interest was a reasonable belief.
80. Leaving aside circumstances not identified in s 29A(3), the relevant factors are clearly identified in that subsection and any dispute is likely to be about their application to the facts. Subject to one comment, I do not propose to go through the details of particular cases.
81. The cases of Russell and Al Muderis TJ are instructive in this context and well worth reading. In each case the trial judge found that the relevant parties believed that the publication of the matter was in the public interest. In the case of Russell, Lee J found the belief was not reasonable whereas in the case of Al Muderis TJ Abraham J found that the belief was reasonable. The matters which led Lee J to his conclusion are summarised at [384] and explained in [359]-[405]. The matters which led to Abraham J's conclusion include the matters identified at [2699] and [2713].
82. One observation may be made. A journalist's sources, the verification of the information provided to the journalist, not stating matters too highly and giving the subject of the matter the opportunity to respond (both as a matter of fairness and to obtain information which may be relevant) are likely to be important in most cases.

CONTEXTUAL TRUTH

83. The defence of contextual truth is in s 26 of the Act. This defence may be relevant where a defendant proves that some of the imputations found to be conveyed are substantially true, but other imputations are not found to be substantially true. The question which may then arise is in what circumstances does the fact that some imputations have been found to be substantially true provide a defence with respect to the defamatory imputations not found to be substantially true.
84. The contextual imputations are defined in s 26 as the imputations carried by the matter which are substantially true. These imputations include the imputations of which the claimant complains. There is a defence with respect to the defamatory imputations also carried by the matter where those defamatory imputations do not further harm the reputation of the claimant because of the substantial truth of the contextual imputations.
85. The first point is that it is acceptable and indeed may be necessary to classify the imputations by reference to a particular class or subject matter. I mean by that a group of imputations may relate to a particular subject matter and in considering contextual

truth it is not an error to proceed in this way. A related point is that a person's reputation may have different "sectors" and the imputations found to be substantially true may relate to one sector of a claimant's reputation and those imputations not shown to be substantially true may relate to a different sector of the claimant's reputation. An example where this occurred is *O'Brien v Australian Broadcasting Corporation* [2017] NSWCA 338; 97 NSWLR 1 ("O'Brien") where some of the imputations impugned the claimant's competence and others impugned the claimant's honesty. The imputations which impugned the claimant's competence were shown to be substantially true whereas the imputations which impugned the claimant's honesty were not shown to be substantially true. Macfarlan JA (with whom Leeming JA agreed) said (at [224]):

"Whilst the appellant's reputation would have been substantially damaged by contextual imputation A, her honesty would not have been impugned by it. As the plaintiff's imputation (a) did impugn her honesty, I consider that that imputation further harmed her reputation beyond that caused by the substantially true contextual imputation".

86. In *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 41)* [2023] FCA 555; 417 ALR 267, I found that imputations of unlawful killings in Afghanistan were substantially true, whereas it had not been shown that the imputations relating to domestic violence and hypocrisy were substantially true. The applicant argued that his reputation had different sectors and he relied on *O'Brien*.
87. I rejected the applicant's argument and found that the defence of contextual truth was made out. My reasons are set out in *Roberts-Smith (No 41)* (at [2599]-[2607]).
88. A similar issue arose in *Al Muderis*. Justice Abraham made the point that when assessing whether as a result of the substantial truth of the contextual imputations, the defamatory imputations do not further harm the reputation of a claimant, the Court considers the facts, matters and circumstances relied upon to support the substantial truth of the contextual imputations rather than the terms of the imputations themselves.
89. The applicant argued that there were different sectors of his reputation and the imputations found to be substantially true related to his dishonesty or business practices, whereas the allegations not found to be substantially true related to his professional competence as a surgeon.
90. The respondents argued that the imputations of which the applicant complained concerned in one way or another his conduct as a surgeon. The respondents accepted the different sectors argument might have force if some of the imputations related to his conduct as a surgeon (as was the case) and others attacked his personal morality in his private life.
91. Her Honour said that the applicant's distinction was artificial. It failed to grapple with the facts, matters and circumstances relied on by the respondents to support the substantial truth of the imputations.
92. I will not attempt to explain her Honour's reasons in detail. It is sufficient to say that the respondents argued that the applicant's reputation would be swamped by the evidence in proving the substantial truth of the general imputations. Her Honour said

that although that must necessarily depend on an assessment of the imputations, as a general proposition, she agreed with the respondents' argument. The key consideration in her Honour's reasoning was that when one has regard to the facts, matters and circumstances relied on to support the findings of the contextual imputations, no further harm was caused to the applicant by the defamatory imputations, that is, those imputations not found to be substantially true.

THE STATUTORY CAP ON DAMAGES FOR NON-ECONOMIC LOSS WHICH MAY BE AWARDED IN DEFAMATION PROCEEDINGS

93. Section 35 of the Act imposes a statutory cap on damages for non-economic loss which a court may award in defamation proceedings. In 2005, the cap was \$250,000. It has been increased from time to time in accordance with the power in the section and is now \$443,000. Economic loss is not within the cap. Exemplary or punitive damages cannot be awarded for defamation. Aggravated damages may be awarded in a defamation action.
94. In order to understand the way in which s 35 now operates, it is necessary to consider how the section operated before the Amendment Act.
95. Before the Amendment Act, s 35 provided for a statutory cap, but enabled the court to award an amount above the cap "*if, and only if, the court is satisfied that the circumstances of the publication of the defamatory matter to which the proceedings relate are such as to warrant an award of aggravated damages*". An issue arose as to whether the statutory cap had any operation where a court found that aggravated damages should be awarded. In other words, was the correct construction of s 35 that the statutory cap applied and, if the court found that an award of aggravated damages was warranted, then they were awarded over and above the statutory cap (assuming the most serious case) or was the correct construction of s 35 that once the court decided that an award of aggravated damages was warranted, then the statutory cap became irrelevant? In *Bauer Media Pty Ltd v Wilson* [2018] VSCA 68, the Victorian Court of Appeal decided that the latter construction was the correct one. The Full Court of the Federal Court in *Nationwide News Pty Ltd v Rush* [2020] FCAFC 115; 380 ALR 432 at [412], [442]-[468] declined to take a different view. The appellant had not raised the point in the court below and the court was not convinced that the Victorian Court of Appeal was obviously wrong.
96. The position is now clear. The statutory cap applies irrespective of whether the circumstances warrant an award of aggravated damages. An award of aggravated damages is to be made separately to any award of non-economic loss. The maximum award of damages, that is the statutory cap, is to be awarded only in the most serious cases.

TWO OTHER MATTERS

The order in which evidence is to be adduced in a defamation action where the respondents plead a defence of justification

97. I turn now to the issue of the order in which evidence is, or may be adduced, in a defamation action where a respondent(s) pleads justification as a defence. In stating the issue in this way, I do not mean to suggest that there is a firm or general rule about how this issue is to be resolved in the absence of agreement between the parties.

Perhaps the issue will not arise very often, but if it does it is best that it be resolved at an early stage so that the parties and the court will know how the trial is likely to proceed and are able to prepare accordingly.

98. In deciding the order in which evidence is to be adduced, there are a number of factors which must be assessed and weighed including matters such as the party who bears the onus of proof on a particular issue, the difficulty for a party advancing evidence in support of a negative, the undesirability of a party splitting his or her case and the orderly and coherent presentation of the evidence, especially in a case tried with a jury. The overarching considerations are fairness and the just and efficient resolution of the action.
99. To illustrate the issue, if we take a defamation action where justification is pleaded as a defence and the onus of proof is taken as the determining factor, then the order of adducing evidence would be as follows. The applicant would go first on the issues where he or she bears the onus of proof. These issues include publication, meaning, defamatory meaning, the effect of publication on the applicant, evidence of the applicant's good reputation and evidence going to damages, including financial loss if relevant. The respondents would then call their evidence in response to the applicant's case to that point and their witnesses in support of their plea of justification. The applicant would then call his or her evidence in response to the respondents' justification case including not only his or her witnesses, but evidence from the applicant concerning that defence.
100. The issues that arise in the type of example I have given came before me in *Roberts-Smith v Fairfax Media Publications Pty Limited (No 13)* [2021] FCA 549 ("Roberts-Smith No 13"). In that case each party put forward a primary proposal as to the order in which the evidence should be adduced and an alternative proposal.
101. The applicant's primary proposal was as follows. First, the applicant would go first and he would give all of his evidence and be cross-examined on all the issues joined on the pleadings, including the justification defence. Secondly, the applicant would then call such other witnesses as he had to give evidence with respect to all the issues raised on the pleadings other than the justification defence. This evidence would include evidence relevant to his good reputation. Thirdly, the respondents would then present the whole of their case. Fourth, the applicant who by then had given his evidence in relation to the justification defence, would then call his witnesses relevant to the justification defence. Those witnesses would not be any of the witnesses called at the second stage. The applicant said that he would not be adducing any evidence of his good reputation (or evidence relevant to identification) from the soldiers who would give evidence relevant to the justification defence. As I understood it, this was done in order to avoid any suggestion that his proposal involved splitting his case with respect to the issue of his good reputation. Fifth and finally, any further evidence from the applicant himself was limited to what his counsel called, "*evidence truly in reply*". The applicant's alternative proposal was that he goes first and calls all of his evidence on all the issues joined on the pleadings.
102. The respondents' primary proposal was the same as the applicant's alternative proposal. The respondents' alternative proposal was that they, the respondents, go first on all issues joined on the pleadings and then the applicant follows with his evidence.

The respondents' proposals had the virtue of simplicity; either the applicant goes first on all issues, or they go first on all issues.

103. I decided that the applicant's primary proposal should be adopted. For a full account of the arguments and my reasons see *Roberts-Smith* (No 13).
104. At [55], I referred to the onus of proof, a party having to prove a negative, a party splitting his or her case and the seriousness of the allegations. I said that I did not consider it fair, just and efficient for a person to have to give evidence about such serious allegations before there was at least some evidence before the court in support of the allegations.

Journalist privilege relating to the identity of an informant

105. This topic raises important issues. On the one hand, a journalist investigating what appear to be significant matters of public interest will often seek information from sources who will only provide that information on the basis that they have a guarantee that their identities will not be disclosed. If this guarantee cannot be provided, the argument is that sources will "dry up" and matters which should be investigated are not investigated. On the other hand, a court hearing an action is best placed to reach a fair and proper decision if all relevant evidence is available to the parties and the court. This, as you will appreciate, is no more than a broad and general description of the competing considerations, but it is sufficient for present purposes.
106. The relevant provisions of the Evidence Act strike a very different balance between these competing considerations than did the common law.
107. Section 126K proceeds on the basis that there are dealings between a journalist and an informant. A "*journalist*" is defined in s 126J to mean a person who is engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be published in a news medium. An "*informant*" is defined in s 126J as a person who gives information to a journalist in the normal course of the journalist's work in the expectation that the information may be published in a news medium. A "*news medium*" is defined in s 126J as any medium for the dissemination to the public or a section of the public of news and observations on news.
108. Section 126K(1) is engaged where a journalist has promised an informant not to disclose the informant's identity. In those circumstances, neither the journalist nor his or her employer is compellable to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be ascertained. Section 126K(2) gives the court the power to order that subsection (1) does not apply.
109. I will deal with two authorities. The first deals only with subsection (1) and it is convenient to deal with that authority first.
110. In *Roberts-Smith v Fairfax Media Publications Pty Limited* (No 3) [2020] FCA 2 ("Roberts-Smith No 3") the respondents claimed journalist privilege over notes the journalists had made of their conversations with various informants. The applicant sought production of the notes made by the journalists some time before the trial. There was no dispute that the journalists had promised the informants not to disclose their identities. The applicant's argument was that he already knew the identity of the

informants. He had that knowledge because of the information contained in the defamatory matters, the pleadings and the outlines of evidence. It followed (so the argument proceeded) that there had already been disclosure of the identities of the various informants and, therefore, s 126K was not engaged. I reached the conclusion on the facts that the applicant had not established the proposition he advanced given the range of possible sources. For a full account of the arguments and my reasons, see Roberts-Smith (No 3).

111. The power of the Court in subsection (2) to order that subsection (1) not apply involves a weighing or balancing exercise between competing considerations. It is for the party seeking displacement of the privilege to satisfy the Court that the balance is in favour of disclosure. The task for the Court is an evaluative one. The party seeking displacement must identify the public interest in disclosure having regard to the issues to be determined in the action and persuade the Court that that factor outweighs:
 - 111.1. Any likely adverse effect of the disclosure on the informant or any other person; and
 - 111.2. The public interest in the communication of facts and opinion to the public by the news media and, accordingly also, the ability of the news media to access sources of facts.
112. Justice Bromwich considered the operation of s 126K in *Al Muderis v Nine Network Australia Pty Limited* [2023] FCA 1623 (“Al Muderis Privilege”). In that case Bromwich J was called upon to decide whether the journalist had made a promise to each of the informants not to disclose that informant’s identity. His Honour resolved that issue in favour of the journalist. His Honour then turned to consider whether an order displacing the privilege should be made under subsection (2).
113. His Honour referred to the competing considerations I identified earlier. He said there was both a public and private interest in parties to litigation having available to them all relevant information. This will give the court the best opportunity of reaching a fair and just solution in the litigation. As against that, the journalist privilege facilitates investigative journalism and advances the public interest in information being conveyed to the public in circumstances where that might not otherwise occur. The common law very much favoured the former consideration, and it was rare that a journalist could refuse to answer a question on the basis that it would disclose his or her source. Broadly stated, the common law position was that once a question was deemed relevant and necessary then the journalist was required to answer it even if it resulted in disclosure of his or her source. The common law position was effectively reversed by s 126K. Justice Bromwich noted the reversal in Al Muderis Privilege. His Honour did not need to decide whether the reversal was precise or exact. His Honour identified the party which bore the burden of persuasion as to particular issues in subsection (2). The applicant for disclosure bears the overall burden of establishing that the public interest in disclosure outweighs the public interest in non-disclosure and the likely adverse effect of disclosure on the informant. The applicant for disclosure has an evidential burden to establish facts and circumstances supporting disclosure and the journalist has an evidential burden of establishing facts and circumstances supporting non-disclosure.

114. In Roberts-Smith (No 3) there was no dispute that the journalists had made promises to the informants not to disclose their identities. As I have said, in *Al Muderis Privilege* that factual issue was in dispute and was carefully analysed by Bromwich J. I note that there may be disputes about whether what was said amounts to a promise or something less such as an indication or intimation, whether a promise was qualified or subject to conditions or the effect of a promise given part way through a series of conversations, rather than at the beginning.
115. In terms of any likely adverse effect of disclosure on the informant or any other person, self-evidently that may be established as an objective fact (as an established fact or matter). An informant or other person may have a fear of what might happen, but the evidence does not rise to the level of establishing the feared consequences as objective facts. For example, in *Al Muderis Privilege* some of the informants feared retribution should their identities be disclosed by way of defamation proceedings by the applicant, adverse comments to their respective employers and colleagues causing reputational damage and so on. Justice Bromwich was prepared to take this evidence into account, albeit he gave it limited weight.
116. I make two final points before leaving this topic.
117. First, Bromwich J in *Al Muderis Privilege* made the point (correctly in my view) that the focus of the concept of public interest in s 126K is not on the interest of non-disclosure in any particular case, but on the public interest at large in media communications to the public of facts and circumstances and in media access to information, which is advanced by not disclosing the identities of sources. On the other hand, the proven interest in non-disclosure may inform and elevate the public interest in non-disclosure, by giving content to the otherwise assumed impact on being able to publish, and for that purpose to obtain information, if confidentiality of sources is not able to be maintained.
118. Secondly, a source may give evidence in a subsequent trial. He or she may be asked if they have spoken to a journalist involved in the case. If they answer in the affirmative, there might then be a question as to whether the privilege no longer applies because the identity of the informant has been disclosed. I alluded to this point in Roberts-Smith No 3 (at [55]).

THE SOURCE OF THE FEDERAL COURT'S JURISDICTION IN DEFAMATION ACTIONS AND ISSUES RELATING TO THE OPERATION OF SECTION 79 OF THE JUDICIARY ACT

119. The Federal Court's jurisdiction in defamation actions was identified by the Full Court of the Federal Court in *Crosby v Kelly* [2012] FCAFC 96; 203 FCR 451. There is no need to set out the Court's reasoning in any detail; it is sufficient to say that the jurisdiction is based on a combination of s 9(3) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) and s 4(1) of the *Jurisdiction of Courts (Cross-vesting) Act 1993* (ACT). As most matters are now published Australia-wide the Federal Court has a broad jurisdiction in defamation actions. That jurisdiction is now well-established.
120. Justice Lee in *Oliver v Nine Network Australia Pty Ltd* [2019] FCA 583 suggested that there may be additional sources of the Federal Court's jurisdiction including where the implied freedom under the Commonwealth Constitution is raised in the defence,

the Full Faith and Credit section in the Constitution where publication takes place in more than one State and where a respondent to an action is a corporation.

121. It is worth noting at this point that there is a choice of law provision in the Act. Section 11 of the Act provides that where a matter is published wholly within a particular Australian jurisdictional area, that is, a State, Territory or the Commonwealth, the substantive law that is applicable in that area must be applied in New South Wales to determine any cause of action for defamation based on the publication. If there is a multiple publication of matter in more than one Australian jurisdictional area, then the substantive law applicable in the Australian jurisdictional area with which the harm occasioned by the publication as a whole has its closest connection must be applied in New South Wales to determine each cause of action for defamation based on the publication.
122. The Act is picked up by s 79 of the Judiciary Act and is to be applied by a court exercising federal jurisdiction. It is a Commonwealth surrogate law. Section 79 is subject to the qualification that a Commonwealth law does not otherwise provide. The operation of s 79 with respect to the Act has given rise to issues in three areas. The first matter is whether the sections in the Act dealing with juries are picked up by s 79 and are to be applied by a court exercising federal jurisdiction. The second matter is whether the sections in the Act dealing with costs are picked up by s 79 and are to be applied by a court exercising federal jurisdiction. The third matter is whether important procedural sections in the Act dealing with when a court is to determine whether the serious harm test is satisfied, are picked up by s 79 and are to be applied by a court exercising federal jurisdiction.
123. I turn to the first matter. The Act contains a number of sections dealing with the circumstances in which a defamation action is to be tried by jury and the issues which are to be determined by the jury. Section 21(1) of the Act provides that unless the court otherwise orders, a plaintiff or defendant in defamation proceedings may elect for the proceedings to be tried by jury. Section 21(1A) identifies circumstances in which a court may order that defamation proceedings not be tried by jury. The Court of Appeal in New South Wales had said that upon a proper exercise of the power of election, s 21 gives rise to a vested or accrued substantive right which may only be defeated by an order properly made by the court under the section. Section 22 and later sections identify the issues which are to be determined by jury and those to be determined by the judicial officer. There is no need to go through them. The *Federal Court of Australia Act 1976 (Cth)* (“FCA Act”) contains quite different provisions dealing with juries. Section 39 provides that in every suit in the Court, unless the Court or a Judge otherwise orders, the trial shall be by a Judge without a jury. Section 40 gives the Court or a Judge the power to direct the trial with a jury of the suit or an issue of fact, where “*the ends of justice appear to render it expedient to do so*”. In *Wing v Fairfax Media Publications Pty Ltd* [2017] FCAFC 191; 255 FCR 61 (“Wing 2017”) the respondents had issued an application for an order that a defamation action in the Federal Court be tried by jury. The Full Court of the Federal Court decided that ss 21 and 22 of the Act are not picked up by s 79 of the Judiciary Act because a Commonwealth law, namely, ss 39 and 40 of the FCA Act otherwise provided.
124. It is worth noting in this context that the Federal Court at first instance has considered when it may be appropriate for the Court to make an order under s 40 of the FCA Act that a defamation action be tried with a jury. I considered that issue in *Roosendaal v*

Fairfax Digital Australia and New Zealand Pty Ltd [2015] FCA 764; 232 FCR 487. In that case, the respondents sought an order under s 40 of the FCA Act that the issues in a defamation action, other than damages, be tried by a jury of twelve or, in the alternative four. The applicant opposed the making of the order. I refused to make the order. I will not delay on my reasons other than to say that although “*hard and fast*” rules were to be avoided, the normal mode of trial in the Federal Court is by a Judge without a jury, and that applied as much to defamation actions as it did to any other action in the Court. One observation might be made at this point. An issue of whether community standards have changed over a period of time such that a statement once considered defamatory is no longer considered defamatory may well be an ideal one for a jury.

125. I turn to the second matter. Section 40 of the Act contains provisions dealing with the costs in defamation actions. The section identifies the matters the court may have regard to in awarding costs and they include the way in which the parties have conducted their cases including any misuse by a party of its superior financial position to hinder the early resolution of the action. The section also identifies the circumstances in which indemnity costs may be awarded to the successful party. Section 43 of the FCA Act is the source of the Federal Court’s power to award costs and, as a general rule, costs are in the discretion of the Court (s 43(2)). Section 43(1) acknowledges that other Acts may contain different rules as to the orders the Court may make as to costs. The *Fair Work Act 2009* (Cth) is an example. Section 43(3) gives examples of particular orders the Court may make, but the examples do not in any way limit the general discretion.
126. The issue of whether s 40 of the Act was picked up by s 79 of the Judiciary Act having regard to s 43 of the FCA Act was addressed by Bromwich J in *Hayson v The Age Company Pty Ltd (No 3)* [2020] FCA 1163; 280 FCR 139. His Honour considered that the question was whether there was any statutory inconsistency between s 43 of the FCA Act and s 40 of the Act. His Honour considered that there was no statutory inconsistency. He relied on the fact that there were qualifications to the general discretion in s 43(2) and independently, on his view that s 43 was an enabling provision.
127. I turn to the third matter. The matter concerns certain procedural provisions in s 10A of the Act and the extent to which they are picked up by s 79 of the Judiciary Act.
128. The procedural provisions in s 10A of the Act are quite radical. Subsection (4) provides that the judicial officer may (whether on the application of a party or on the judicial officer’s own motion) determine whether the serious harm element is established at any time before the trial for the proceedings commences or during the trial and may make any orders the judicial officer considers appropriate concerning the determination of the issue. Subsection (5) provides that if a party applies for the serious harm element to be determined before the trial for the proceedings commences, the judicial officer is to determine the issue as soon as practicable before the trial commences unless there are special circumstances justifying the postponement of the determination to a later stage of the proceedings (including during the trial). Subsection (6) sets out matters the judicial officer may take into account in deciding whether there are special circumstances and they include the costs implications for the parties, the resources available to the court at the time and the extent to which establishing the serious harm element is linked to other issues for

determination during the trial for the proceedings. Subsection (7) should also be noted. It provides that the judicial officer may determine that the serious harm element is not established on the pleadings without the need for further evidence if satisfied that the pleaded particulars are insufficient to establish the element.

129. The issue which has arisen is whether some or all of these subsections are picked up by s 79 of the Judiciary Act. The FCA Act has extensive provisions relating to the case management of civil actions in the Court in Part VB of the FCA Act. They include s 37M (the overarching purpose of civil practice and procedure provisions); s 37N (the parties are to act consistently with the overarching purpose); and s 37P (the power of the court to give directions about procedure in a civil proceeding). In addition, s 38 provides that the practice and procedure of the Court shall be in accordance with the Rules of Court made under the Act. Do these provisions mean that a Commonwealth Act otherwise provides so that the procedural provisions in s 10A(5) and (6) are not picked up by s 79 of the Judiciary Act?
130. In a nutshell, the argument is as follows. The FCA Act gives the Federal Court wide powers in matters of practice and procedure (s 37P) and sets out the matters which the Court takes into account in exercising the powers (s 37M). Section 10A(5) deals with matters of practice and procedure, that is, the point at which the serious harm element is to be determined and, what I would describe as the criteria whereby the ordinary rule would be dispensed with, that is, “*special circumstances*”. Broadly, s 10A(5) may be described as a limit on the power the Court would otherwise have and the criteria by reference to which the Court would exercise that power. I note that if s 10A(5) is not picked up by s 79 of the Judiciary Act, then s 10A(6) has no work to do. Of course, none of this is to deny the fact that it is always open to a party to apply under the FCA Act and the Rules for an early hearing of the serious harm element (and meaning if that is appropriate).
131. The issue was considered by O’Callaghan J in *Selkirk v Hocking* [2023] FCA 432 (at [35]-[44]). His Honour said that whether subsections 10A(5) and (6) were picked up by s 79 of the Judiciary Act was not sufficiently clear and it was arguable that they were not. In those circumstances, his Honour exercised a power under the *Federal Court Rules 2011* (Cth) (“FCR”) and ordered that whether the serious harm test was satisfied be determined as a separate question.
132. In *Peros v Blackburn* [2024] FCA 177 (at [2]-[6]) Derrington J observed that subsection 10A(5) of the Act and rule 30.1 of the FCR appeared to be the complete antithesis of each other, although he did not need to decide the point because the application before him was made under r 30.1 of the FCR.
133. In *Russell v S3@Raw Pty Ltd (No 3)* [2024] FCA 991; 307 FCR 444 Meagher J said the better construction of the relevant provisions is that subsection 10A(5) was not picked up by s 79 of the Judiciary Act because a Commonwealth law, namely, s 37P of the FCA Act provided otherwise.
134. Subsections 10A(5) and (6) are important parts of the scheme established by s 10A and the sooner the issue is resolved by an appellate court the better.
135. I had for a time considered whether a similar point might be made about subsection (7). I must say I doubt it. This subsection gives the judicial officer the power to

determine the serious harm issue on the pleadings. It would seem to me to complement the Court's powers in the FCA Act rather than operate inconsistently with them.

136. Perhaps it goes without saying that subsection (7) confers a power, not an obligation, to proceed in the manner identified. Without more, it would not be an error to proceed in this way (*Selkirk v Wyatt* (at [57]-[58])). This was a case in which the Full Court said that the primary judge had not erred in deciding that he did not need to decide whether the article conveyed one or more of the alleged imputations. Equally, the judicial officer may decide that it is appropriate to hear evidence on a particular point or that it is appropriate in the circumstances to decide whether the article carried the pleaded imputations (*Singh v Singh* [2025] FCA 1531). At a practical level, it will be necessary for a judicial officer and the parties to be clear as to the issue to be finally determined, what evidence is to be allowed and to identify the power which forms the basis for the procedural orders under consideration. Some of the powers are in s 10A while others are in the FCA Act, such as the power to order that there be a trial of a separate question or an application by a party for summary judgment.

The Hon. A.J. Besanko K.C.

SCHEDULE OF LEGISLATIVE PROVISIONS

Defamation Act 2005 (NSW)

10A Serious harm element of cause of action for defamation

- (1) It is an element (the *serious harm element*) of a cause of action for defamation that the publication of defamatory matter about a person has caused, or is likely to cause, serious harm to the reputation of the person.
- (2) For the purposes of subsection (1), harm to the reputation of an excluded corporation is not serious harm unless it has caused, or is likely to cause, the corporation serious financial loss.
- (3) The judicial officer (and not the jury) in defamation proceedings is to determine whether the serious harm element is established.
- (4) Without limiting subsection (3), the judicial officer may (whether on the application of a party or on the judicial officer's own motion)—
 - (a) determine whether the serious harm element is established at any time before the trial for the proceedings commences or during the trial, and
 - (b) make any orders the judicial officer considers appropriate concerning the determination of the issue (including dismissing the proceedings if satisfied the element is not established).
- (5) If a party applies for the serious harm element to be determined before the trial for the proceedings commences, the judicial officer is to determine the issue as soon as practicable before the trial commences unless satisfied that there are special circumstances justifying the postponement of the determination to a later stage of the proceedings (including during the trial).
- (6) The matters a judicial officer may take into account in deciding whether there are special circumstances for the purposes of subsection (5) include (but are not limited to) the following—
 - (a) the cost implications for the parties,
 - (b) the resources available to the court at the time,
 - (c) the extent to which establishing the serious harm element is linked to other issues for determination during the trial for the proceedings.
- (7) Without limiting subsection (5), the judicial officer may determine the serious harm element is not established on the pleadings without the need for further evidence if satisfied that the pleaded particulars are insufficient to establish the element.
- (8) Nothing in this section limits the powers that a judicial officer may have apart from this section to dismiss defamation proceedings (whether before or after the trial commences).

11 Choice of law for defamation proceedings

- (1) If a matter is published wholly within a particular Australian jurisdictional area, the substantive law that is applicable in that area must be applied in this

jurisdiction to determine any cause of action for defamation based on the publication.

- (2) If there is a multiple publication of matter in more than one Australian jurisdictional area, the substantive law applicable in the Australian jurisdictional area with which the harm occasioned by the publication as a whole has its closest connection must be applied in this jurisdiction to determine each cause of action for defamation based on the publication.
- (3) In determining the Australian jurisdictional area with which the harm occasioned by a publication of matter has its closest connection, a court may take into account—
 - (a) the place at the time of publication where the plaintiff was ordinarily resident or, in the case of a corporation that may assert a cause of action for defamation, the place where the corporation had its principal place of business at that time, and
 - (b) the extent of publication in each relevant Australian jurisdictional area, and
 - (c) the extent of harm sustained by the plaintiff in each relevant Australian jurisdictional area, and
 - (d) any other matter that the court considers relevant.
- (4) For the purposes of this section, the ***substantive law*** applicable in an Australian jurisdictional area does not include any law prescribing rules for choice of law that differ from the rules prescribed by this section.
- (5) In this section—

Australian jurisdictional area means—

- (a) the geographical area of Australia that lies within the territorial limits of a particular State (including its coastal waters), but not including any territory, place or other area referred to in paragraph (c), or
- (b) the geographical area of Australia that lies within the territorial limits of a particular Territory (including its coastal waters), but not including any territory, place or other area referred to in paragraph (c), or
- (c) any territory, place or other geographical area of Australia over which the Commonwealth has legislative competence but over which no State or Territory has legislative competence.

geographical area of Australia includes—

- (a) the territorial sea of Australia, and
- (b) the external Territories of the Commonwealth.

multiple publication means publication by a particular person of the same, or substantially the same, matter in substantially the same form to 2 or more persons.

21 Election for defamation proceedings to be tried by jury

- (1) Unless the court orders otherwise, a plaintiff or defendant in defamation proceedings may elect for the proceedings to be tried by jury.
- (1A) Without limiting subsection (1), a court may order that defamation proceedings are not to be tried by jury if—
 - (a) the trial requires a prolonged examination of records, or
 - (b) the trial involves any technical, scientific or other issue that cannot be conveniently considered and resolved by a jury.
- (2) An election must be—
 - (a) made at the time and in the manner prescribed by the rules of court for the court in which the proceedings are to be tried, and
 - (b) accompanied by the fee (if any) prescribed by the regulations made under the [Civil Procedure Act 2005](#) for the requisition of a jury in that court.
- (3) An election may be revoked only—
 - (a) with the consent of all the parties to the proceedings, or
 - (b) if all the parties do not consent, with the leave of the court.
- (4) The court may, on the application of a party to the proceedings, grant leave for the purposes of subsection (3)(b) only if satisfied it is in the interests of justice for the election to be revoked.

22 Roles of judicial officers and juries in defamation proceedings

- (1) This section applies to defamation proceedings that are tried by jury.
- (2) The jury is to determine whether the defendant has published defamatory matter about the plaintiff and, if so, whether any defence raised by the defendant has been established.
- (3) If the jury finds that the defendant has published defamatory matter about the plaintiff and that no defence has been established, the judicial officer and not the jury is to determine the amount of damages (if any) that should be awarded to the plaintiff and all unresolved issues of fact and law relating to the determination of that amount.
- (4) If the proceedings relate to more than one cause of action for defamation, the jury must give a single verdict in relation to all causes of action on which the plaintiff relies unless the judicial officer orders otherwise.
- (5) Nothing in this section—
 - (a) affects any law or practice relating to special verdicts, or
 - (b) requires or permits a jury to determine any issue that, at general law, is an issue to be determined by the judicial officer, or
 - (c) requires or permits a jury to determine any issue that another provision of this Act requires a judicial officer to determine.

25 Defence of justification

It is a defence to the publication of defamatory matter if the defendant proves that the defamatory imputations carried by the matter of which the plaintiff complains are substantially true.

26 Defence of contextual truth

- (1) It is a defence to the publication of defamatory matter if the defendant proves that—
 - (a) the matter carried one or more imputations that are substantially true (*contextual imputations*), and
 - (b) any defamatory imputations of which the plaintiff complains that are not contextual imputations and are also carried by the matter do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations.
- (2) The contextual imputations on which the defendant may rely to establish the defence include imputations of which the plaintiff complains.

29A Defence of publication of matter concerning issue of public interest

- (1) It is a defence to the publication of defamatory matter if the defendant proves that—
 - (a) the matter concerns an issue of public interest, and
 - (b) the defendant reasonably believed that the publication of the matter was in the public interest.
 - (2) In determining whether the defence is established, a court must take into account all of the circumstances of the case.
 - (3) Without limiting subsection (2), the court may take into account the following factors to the extent the court considers them applicable in the circumstances—
 - (a) the seriousness of any defamatory imputation carried by the matter published,
 - (b) the extent to which the matter published distinguishes between suspicions, allegations and proven facts,
 - (c) the extent to which the matter published relates to the performance of the public functions or activities of the person,
 - (d) whether it was in the public interest in the circumstances for the matter to be published expeditiously,
 - (e) the sources of the information in the matter published, including the integrity of the sources,
 - (f) if a source of the information in the matter published is a person whose identity is being kept confidential, whether there is good reason for the
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- person's identity to be kept confidential (including, for example, to comply with an applicable professional code or standard),
 - (g) whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person,
 - (h) any other steps taken to verify the information in the matter published,
 - (i) the importance of freedom of expression in the discussion of issues of public interest.
- (4) Subsection (3) does not—
 - (a) require each factor referred to in the subsection to be taken into account, or
 - (b) limit the matters that the court may take into account.
- (5) Without affecting the application of section 22 to other defences, the jury (and not the judicial officer) in defamation proceedings tried by jury is to determine whether a defence under this section is established.

35 Damages for non-economic loss limited

- (1) The maximum amount of damages for non-economic loss that may be awarded in defamation proceedings is \$250,000 or any other amount adjusted in accordance with this section from time to time (the *maximum damages amount*) that is applicable at the time damages are awarded.
- (2) The maximum damages amount is to be awarded only in a most serious case.
- (2A) Subsection (1) does not limit the court's power to award aggravated damages if an award of aggravated damages is warranted in the circumstances.
- (2B) An award of aggravated damages is to be made separately to any award of damages for non-economic loss to which subsection (1) applies.
- (3) The Minister is, on or before 1 July 2006 and on or before 1 July in each succeeding year, to declare, by order published in the Gazette, the amount that is to apply, as from the date specified in the order, for the purposes of subsection (1).
- (4) The amount declared is to be the amount applicable under subsection (1) (or that amount as last adjusted under this section) adjusted by the percentage change in the amount estimated by the Australian Statistician of the average weekly total earnings of full-time adults in Australia over the 4 quarters preceding the date of the declaration for which those estimates are, at that date, available.
- (5) An amount declared for the time being under this section applies to the exclusion of the amount of \$250,000 or an amount previously adjusted under this section.
- (6) If the Australian Statistician fails or ceases to estimate the amount referred to in subsection (4), the amount declared is to be determined in accordance with the regulations.

- (7) In adjusting an amount to be declared for the purposes of subsection (1), the amount determined in accordance with subsection (4) is to be rounded to the nearest \$500.
- (8) A declaration made or published in the Gazette after 1 July in a year and specifying a date that is before the date it is made or published as the date from which the amount declared by the order is to apply has effect as from that specified date.

40 Costs in defamation proceedings

- (1) In awarding costs in defamation proceedings, the court may have regard to—
 - (a) the way in which the parties to the proceedings conducted their cases (including any misuse of a party's superior financial position to hinder the early resolution of the proceedings), and
 - (b) any other matters that the court considers relevant.
- (2) Without limiting subsection (1), a court must (unless the interests of justice require otherwise)—
 - (a) if defamation proceedings are successfully brought by a plaintiff and costs in the proceedings are to be awarded to the plaintiff—order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the defendant unreasonably failed to make a settlement offer or agree to a settlement offer proposed by the plaintiff, or
 - (b) if defamation proceedings are unsuccessfully brought by a plaintiff and costs in the proceedings are to be awarded to the defendant—order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the plaintiff unreasonably failed to accept a settlement offer made by the defendant.
- (3) In this section—

settlement offer means any offer to settle the proceedings made before the proceedings are determined, and includes an offer to make amends (whether made before or after the proceedings are commenced), that was a reasonable offer at the time it was made.

Evidence Act 1995 (Cth)

126J Definitions

- (1) In this Division:

informant means a person who gives information to a journalist in the normal course of the journalist's work in the expectation that the information may be published in a news medium.

journalist means a person who is engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be published in a news medium.

news medium means any medium for the dissemination to the public or a section of the public of news and observations on news.

126K Journalist privilege relating to identity of informant

- (1) If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be ascertained.
- (2) The court may, on the application of a party, order that subsection (1) is not to apply if it is satisfied that, having regard to the issues to be determined in that proceeding, the public interest in the disclosure of evidence of the identity of the informant outweighs:
 - (a) any likely adverse effect of the disclosure on the informant or any other person; and
 - (b) the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.
- (3) An order under subsection (2) may be made subject to such terms and conditions (if any) as the court thinks fit.

Judiciary Act 1903 (Cth)

79 State or Territory laws to govern where applicable

- (1) The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.
- (1A) For the purposes of subsection (1), a Court exercising federal jurisdiction in a proceeding is taken to be exercising federal jurisdiction in:
 - (a) if the laws of a State or Territory apply to a part of the proceeding because of subsection 68C(5)—that State or Territory; or
 - (b) if paragraph (a) does not apply:
 - (i) if the proceeding is transferred or remitted—the State or Territory to which the proceeding is transferred or remitted; and
 - (ii) otherwise—the State or Territory in which the proceeding is commenced;

except as otherwise provided by the Constitution or the laws of the Commonwealth.
- (2) A provision of this Act does not prevent a law of a State or Territory covered by subsection (3) from binding a court under this section in connection with a suit relating to the recovery of an amount paid in connection with a tax that a

law of a State or Territory invalidly purported to impose.

- (3) This subsection covers a law of a State or Territory that would be applicable to the suit if it did not involve federal jurisdiction, including, for example, a law doing any of the following:
 - (a) limiting the period for bringing the suit to recover the amount;
 - (b) requiring prior notice to be given to the person against whom the suit is brought;
 - (c) barring the suit on the grounds that the person bringing the suit has charged someone else for the amount.
- (4) For the purposes of subsection (2), some examples of an amount paid in connection with a tax are as follows:
 - (a) an amount paid as the tax;
 - (b) an amount of penalty for failure to pay the tax on time;
 - (c) an amount of penalty for failure to pay enough of the tax;
 - (d) an amount that is paid to a taxpayer by a customer of the taxpayer and is directly referable to the taxpayer's liability to the tax in connection with the taxpayer's dealings with the customer.

Federal Court of Australia Act 1976 (Cth)

37M The overarching purpose of civil practice and procedure provisions

- (1) The overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes:
 - (a) according to law; and
 - (b) as quickly, inexpensively and efficiently as possible.
 - (2) Without limiting the generality of subsection (1), the overarching purpose includes the following objectives:
 - (a) the just determination of all proceedings before the Court;
 - (b) the efficient use of the judicial and administrative resources available for the purposes of the Court;
 - (c) the efficient disposal of the Court's overall caseload;
 - (d) the disposal of all proceedings in a timely manner;
 - (e) the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.
 - (3) The civil practice and procedure provisions must be interpreted and applied, and any power conferred or duty imposed by them (including the power to make Rules of Court) must be exercised or carried out, in the way that best promotes the overarching purpose.
 - (4) The **civil practice and procedure provisions** are the following, so far as they apply in relation to civil proceedings:
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- (a) the Rules of Court made under this Act;
- (b) any other provision made by or under this Act or any other Act with respect to the practice and procedure of the Court.

37N Parties to act consistently with the overarching purpose

- (1) The parties to a civil proceeding before the Court must conduct the proceeding (including negotiations for settlement of the dispute to which the proceeding relates) in a way that is consistent with the overarching purpose.
- (2) A party's lawyer must, in the conduct of a civil proceeding before the Court (including negotiations for settlement) on the party's behalf:
 - (a) take account of the duty imposed on the party by subsection (1); and
 - (b) assist the party to comply with the duty.
- (3) The Court or a Judge may, for the purpose of enabling a party to comply with the duty imposed by subsection (1), require the party's lawyer to give the party an estimate of:
 - (a) the likely duration of the proceeding or part of the proceeding; and
 - (b) the likely amount of costs that the party will have to pay in connection with the proceeding or part of the proceeding, including:
 - (i) the costs that the lawyer will charge to the party; and
 - (ii) any other costs that the party will have to pay in the event that the party is unsuccessful in the proceeding or part of the proceeding.
- (4) In exercising the discretion to award costs in a civil proceeding, the Court or a Judge must take account of any failure to comply with the duty imposed by subsection (1) or (2).
- (5) If the Court or a Judge orders a lawyer to bear costs personally because of a failure to comply with the duty imposed by subsection (2), the lawyer must not recover the costs from his or her client.

37P Power of the Court to give directions about practice and procedure in a civil proceeding

- (1) This section applies in relation to a civil proceeding before the Court.
- (2) The Court or a Judge may give directions about the practice and procedure to be followed in relation to the proceeding, or any part of the proceeding.
- (3) Without limiting the generality of subsection (2), a direction may:
 - (a) require things to be done; or
 - (b) set time limits for the doing of anything, or the completion of any part of the proceeding; or
 - (c) limit the number of witnesses who may be called to give evidence, or the number of documents that may be tendered in evidence; or

- (d) provide for submissions to be made in writing; or
 - (e) limit the length of submissions (whether written or oral); or
 - (f) waive or vary any provision of the Rules of Court in their application to the proceeding; or
 - (g) revoke or vary an earlier direction.
- (4) In considering whether to give directions under subsection (2), the Court may also consider whether to make an order under subsection 53A(1).
 - (5) If a party fails to comply with a direction given by the Court or a Judge under subsection (2), the Court or Judge may make such order or direction as the Court or Judge thinks appropriate.
 - (6) In particular, the Court or Judge may do any of the following:
 - (a) dismiss the proceeding in whole or in part;
 - (b) strike out, amend or limit any part of a party's claim or defence;
 - (c) disallow or reject any evidence;
 - (d) award costs against a party;
 - (e) order that costs awarded against a party are to be assessed on an indemnity basis or otherwise.
 - (7) Subsections (5) and (6) do not affect any power that the Court or a Judge has apart from those subsections to deal with a party's failure to comply with a direction.

38 Practice and procedure

- (1) Subject to any provision made by or under this or any other Act with respect to practice and procedure, the practice and procedure of the Court shall be in accordance with Rules of Court made under this Act.
- (2) In so far as the provisions for the time being applicable in accordance with subsection (1) are insufficient, the Rules of the High Court, as in force for the time being, apply, *mutatis mutandis*, so far as they are capable of application and subject to any directions of the Court or a Judge, to the practice and procedure of the Court.
- (3) In this section, **practice and procedure** includes all matters in relation to which Rules of Court may be made under this Act.

39 Civil trials to be without jury

In every suit in the Court, unless the Court or a Judge otherwise orders, the trial shall be by a Judge without a jury.

40 Power of Court in civil proceedings to direct trial of issues with a jury

The Court or a Judge may, in any suit in which the ends of justice appear to render it expedient to do so, direct the trial with a jury of the suit or of an issue of fact, and may for that purpose make all such orders, issue all such writs and cause all such proceedings to be had and taken as the Court or Judge thinks necessary, and upon the finding of the jury the Court may give such decision and pronounce such judgment as the case requires.

43 Costs

- (1) The Court or a Judge has jurisdiction to award costs in all proceedings before the Court (including proceedings dismissed for want of jurisdiction) other than proceedings in respect of which this or any other Act provides that costs must not be awarded. This is subject to:
 - (a) subsection (1A); and
 - (aa) section 46PSA of the *Australian Human Rights Commission Act 1986*; and
 - (b) section 570 of the *Fair Work Act 2009*; and
 - (c) section 18 of the *Public Interest Disclosure Act 2013*.
- (1A) In a representative proceeding commenced under Part IVA or a proceeding of a representative character commenced under any other Act that authorises the commencement of a proceeding of that character, the Court or Judge may not award costs against a person on whose behalf the proceeding has been commenced (other than a party to the proceeding who is representing such a person) except as authorised by:
 - (a) in the case of a representative proceeding commenced under Part IVA—section 33Q or 33R; or
 - (b) in the case of a proceeding of a representative character commenced under another Act—any provision in that Act.
- (2) Except as provided by any other Act, the award of costs is in the discretion of the Court or Judge.
- (3) Without limiting the discretion of the Court or a Judge in relation to costs, the Court or Judge may do any of the following:
 - (a) make an award of costs at any stage in a proceeding, whether before, during or after any hearing or trial;
 - (b) make different awards of costs in relation to different parts of the proceeding;
 - (c) order the parties to bear costs in specified proportions;
 - (d) award a party costs in a specified sum;
 - (e) award costs in favour of or against a party whether or not the party is successful in the proceeding;
 - (f) order a party's lawyer to bear costs personally;
 - (g) order that costs awarded against a party are to be assessed on an

indemnity basis or otherwise;

- (h) do any of the following in proceedings in relation to discovery:
 - (i) order the party requesting discovery to pay in advance for some or all of the estimated costs of discovery;
 - (ii) order the party requesting discovery to give security for the payment of the cost of discovery;
 - (iii) make an order specifying the maximum cost that may be recovered for giving discovery or taking inspection.