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# Political discussion as a defence to defamation: Lange v Australian Broadcasting Commission

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# Political Discussion as a Defence to Defamation: *Lange v Australian Broadcasting Commission*

**Commentary on a matter which has been removed to the High Court from the Supreme Court of New South Wales**

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(Disclosure note: Mr Burns was involved as a Summer Clerk with Minter Ellison in research pertaining to this case. The Editors.)

***Constitutional law - defamation - whether the "constitutional defence" articulated in Theophanous v Herald & Weekly Times Limited (1994) 182 CLR 104 should be the subject of an application for re-opening and re-consideration - whether the "constitutional defence" extends to political discussion generally - whether political discussion is an occasion of qualified privilege at common law***

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# Headings in this case note:



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## 1. Introduction

{1} *Lange v Australian Broadcasting Corporation* has been removed into the High Court from the Supreme Court of New South Wales so that the High Court can determine the answers to the following questions:

a. whether the 'constitutional defence' articulated in the orders of the Court in *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104 should be the subject of an application for reopening and reconsideration;
b. whether the 'constitutional defence' extends its protection to political discussion generally;
c. whether political discussion is an occasion of qualified privilege at common law.

{2} Each of these questions turns on issues of great consequence for both constitutional and defamation law in Australia. The Court will be required to examine a range of far-reaching curial and constitutional issues, including, when should the Court reopen its decisions; if it overrules a previous decision, should this apply retrospectively or prospectively; can a right implied from the Commonwealth Constitution directly affect private rights and obligations governed by the common law and/or State legislation; what is the validity and reach of constitutional implications generally; and, overarching all of these, the proper role of the High Court in the interpretation of the Constitutions of the Commonwealth and the States. These are matters of fundamental significance to the form and structure of the Australian legal system. It is not surprising that the case has generated much excitement, and leave to make submissions before the Court, either as an intervener, or as an amicus curiae, has been sought by the Attorneys-General of the Commonwealth and four of the States, as well as by half a dozen media and media-related organisations.

{3} In relation to the laws which govern defamation, the Court must decide whether the greater protection afforded to freedom of political communication by the 'constitutional defence' to an action for defamation strikes the best possible balance between freedom of expression and the protection of reputation. The striking of such a balance is, unavoidably, a matter of public policy. The Court will have to consider the substantive effects of existing laws of defamation on all Australians, both collectively and as individuals. Under these circumstances, there is a tension in the case between the examination of formal and somewhat abstract issues of constitutional interpretation, and the practical consequences of those examinations for defamation law and freedom of political communication in Australia.

{4} It is not the focus of this note to examine the constitutional issues involved in the case. These questions have been debated extensively by political, media and legal commentators. It may be that the High Court will abandon the methods of constitutional interpretation that led the majority in *Theophanous* to develop the 'constitutional defence' (hereafter the 'political communication defence'). That decision, however, will not determine the second area of inquiry, that is, whether the greater protection which the 'political communication defence' affords to freedom of communication on political matters is necessary for the effective functioning of Australian democratic political processes, and therefore strikes a better balance between freedom of expression and the protection of reputation than any of the alternative legal approaches. If it does strike a better balance, and it is submitted that it does, then even if the Court rejects the methods of constitutional interpretation that led to its development, the Court should preserve the 'political communication defence' under its jurisdiction to develop the common law in the interests of justice and according to contemporary values and

conditions (*Mabo v Queensland [No 2]* (1992) 175 CLR 1, 29-30 (Brennan J);*Trident General Insurance Co Ltd v McNeice Bros Pty Ltd* (1988) 165 CLR 107, 123 (Mason CJ)).

{5} Likewise, should the Court overrule the decision in *Stephens v Western Australian Newspapers Ltd* (1994) 182 CLR 211 that the implied freedom of political communication identified by the Court in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 operates to limit the exercise of State legislative power (*Stephens* 232, see also *Theophanous* 125-129), the legislature of any State or Territory could, and should, enact the 'political communication defence' as part of the law of defamation in that State or Territory.

{6} This note examines the constitutional aspects of the case only where they are of relevance to the substantive free speech issues which the Court must take into account in determining whether to preserve the 'political communication defence' as formulated in the joint judgment in *Theophanous*, regardless of whether the foundation for the defence is the Commonwealth or State Constitutions, the common law or statute. First, the facts of *Lange v Australian Broadcasting Corporation* will be set out. Next, the first and third questions submitted for the consideration of the Court will be analysed, together, from the perspective of the significance which these questions have for the law of defamation in Australia. The principal argument of this note is that the Court should overturn the expansion of qualified privilege from *Theophanous* and *Stephens*, thus affording the new 'political communication defence' the opportunity to operate as originally intended.

{7} Next, question (b) will be examined, that is, whether the 'political communication defence' extends its protection to political discussion generally. This question presumes that the Court will preserve the 'political communication defence'. However, even if it does not, but instead accepts the alternative argument that political discussion is an occasion of qualified privilege at common law, then the scope of political discussion will have to be determined for the purpose of defining the scope of the protection accorded by that qualified privilege. It will be submitted that the substantive issues regarding the scope of political discussion are the same for both the 'political communication' defence and for qualified privilege.

{8} It may be that this threshold issue of when impugned material is the kind of political discussion the protection of which is essential for the efficacious working of Australian democratic processes will prove to be the stumbling block for the defendant in *Lange*, given that the allegedly defamatory material in the case appears to deal entirely with political matters of another country. In relation to this point, it will be submitted, that for a publication to fall within the scope of 'political discussion' for the purposes of either the 'political communication defence', or the expanded form of qualified privilege, there must be a substantial link between the published material and a subject of significant political deliberation in Australia.

## 2. The facts

{9} In April 1990 the defendant broadcast on its 'Four Corners' program a report which had been broadcast the previous night in New Zealand on Television New Zealand's 'Frontline' program. The program alleged that the New Zealand Labour Party, then in government, had

come to be improperly under the influence of large business interests, as a result of those interests making large donations to New Zealand Labour's 1987 election campaign funds. The plaintiff was the Prime Minister of New Zealand at the relevant time referred to in the report. He contends, among other things, that the report conveyed the false and defamatory imputations that, as Prime Minister, he:

a. had permitted big business donors to dictate government policy, and had allowed public assets to be sold to some of those donors in repayment for their donations;
b. had abused, and was unfit to hold, public office in that he had permitted a debt incurred by his party in the election campaign to be written off by awarding a government contract to the creditor;
c. was corrupt and deceitful in that he had accepted gifts of shares and profits on share trading from a leading business figure, and had permitted that figure to set up a share trading account on his behalf, all in return for permitting the business figure to influence government policy in favour of business interests.

{10} The plaintiff further contends that the defendant was aware of the falsity of the statements made in the report, and the imputations arising from them, or at least was reckless as to the truth or falsity of the statements and imputations, as:

a. the plaintiff's solicitors had contacted the defendant on the day of the broadcast stating that much of the broadcast was false and defamatory; and
b. the defendant had added a preface to the New Zealand version of the program containing comments by the then current New Zealand Prime Minister that the material in the program was 'based on a series of big lies'.

{11} The program was introduced by one of the defendant's journalists. In his introduction the journalist drew parallels between the position of the New Zealand Labour Party as presented in the report and the relationships between the Australian Labour Party governments, both state and federal, and big business interests.

## 3. The decision in *Theophanous*

{12} The facts from the *Theophanous* case are by now well known, and for reasons of space they will not be recited in detail again here. At its simplest, the case concerned a defamation action brought against a newspaper by Mr Theophanous, a Commonwealth Member of Parliament and chair of a Parliamentary committee dealing with immigration matters. At a time when it was anticipated that a Federal election would soon be called, the newspaper had published a letter to the editor which purported to discuss Theophanous' views on immigration, and which suggested that he was incompetent and biased. In a joint judgment, Mason CJ, Toohey and Gaudron JJ, held that the implied freedom of political communication identified by the Court in *Nationwide News* and *Australian Capital Television* as a limitation on legislative and executive power also shapes and controls the common law (*Theophanous*, 126, see also Deane J at 178-9, who would have gone further and held that an absolute immunity existed from an action in respect of defamatory statements about the conduct or fitness for office of a member of Parliament or holder of a high Commonwealth office. For the purposes of the case, however, Deane J was prepared to adopt the orders proposed by the joint judgment.). Their Honours said (at 130) that the implied freedom, based as it was on

ensuring 'the efficacy of representative democracy, must extend to protect political discussion from exposure to onerous civil and criminal liability.'

{13} In its analysis of whether the existing law of defamation imposed too onerous a liability on freedom of political discussion, the joint judgment (at 133) concluded that the common law of defamation was balanced too far in favour of individual reputation over freedom of communication. In their assessment of what would be necessary to strike the right balance, their Honours considered the existing defences to an action for defamation, recent developments in English Law, and the position in the United States based on *New York Times Co v Sullivan* 376 US 254 (1964).

**(i) The existing common law defences**

{14} Under the common law prior to *Theophanous* three principal defences were available to a media organisation in an action for defamation: justification, fair comment and qualified privilege. Justification and fair comment both require the defendant to establish the truth of the alleged defamatory imputations or, in the case of the defence of comment, the truth of the facts on which the comment is based. The joint judgment pointed out (at 132) that these defences do not deter only false speech. Referring to *New York Times Co v Sullivan* (in the judgment of Brennan J at 279) their Honours said:

'It is often difficult to prove the truth of an alleged libel in all its particulars. And the necessity of proving truth as a defence may well deter a critic from voicing criticism, even if it is true, because of doubt whether it can be proved or fear of the expense of having to do so.'

{15} This 'chilling effect' was held (as it had been in *Sullivan*) to impose too great an inhibition on the exercise of political communication to be consistent with the constitutional imperative to protect the effective operation of representative democracy (at 131-33).

{16} The existing defence of qualified privilege at common law depended on the defendant establishing that it had a legal, social or moral duty to make the allegedly defamatory statement, and that the statement was made to a person having a corresponding duty or interest to receive it (*Adam v Ward* [1917] AC 309, *Horrocks v Lowe* [1975] AC 135). This reciprocity of duty and interest has restricted the operation of the defence where the information has been disseminated to the public at large, the rationale for this being that all members of the public will not have the requisite interest, a general curiosity being insufficient (see, e.g., *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749, 790-2). The protection afforded by qualified privilege is defeated if the plaintiff can establish that the impugned material was published with 'malice', meaning an improper motive or a lack of honest belief in the truth of the material (*Webb v Bloch* (1928) 41 CLR 331). In *Theophanous* (at 133) the joint judgment regarded the strictness of the requirement of reciprocity of duty and interest as, in practice, often effectively compelling a defendant to prove the truth of the material, thus imposing the same 'chilling effect' as the defences of justification and fair comment.

{17} The solution in *Sullivan* (at 279-80, 283) was to place an onus upon plaintiffs who are 'public officials' to prove that the false and defamatory material was published with 'actual malice', meaning knowledge of the falsity of the statement, or reckless disregard as to its truth or falsity. This onus has subsequently been held to apply to 'public figures' pursuing defamation actions against the media (*Curtis Publishing Co v Butts* 388 US 130 (1967)). This

test is based on the guarantee of freedom of speech contained in the First Amendment to the United States Constitution. The decision, and its offspring, have been the subject of heavy criticism in the United States (see, e.g., Epstein, 'Was *New York Times Co v Sullivan* Wrong?' (1986) 53 *University of Chicago Law Review* 782, Lewis, '*New York Times v Sullivan* Reconsidered' (1983) 83 *Columbia Law Review* 603). One of the chief criticisms is that, by placing the onus on the plaintiff to establish matters that are within the knowledge of the defendant, the rule from *Sullivan* had added to the length and cost of pre-trial discovery procedures, a deterrent for all but the most well-heeled plaintiff.

**(ii) The 'political communication defence' from *Theophanous***

{18} Upon consideration of the *Sullivan* test, the joint judgment in *Theophanous* (at 134 -7) rejected it as having the substantive effect of tilting the balance too far in favour of freedom of expression over the protection of individual reputation. Instead their Honours fashioned the 'political communication defence' to make the law of defamation in Australia consistent with the need to ensure the effective functioning of the Australian democratic polity. The defence operates where material is published discussing government and political matters (for the scope of which, see the discussion below); in these circumstances, a publisher has a defence where it can establish that;

i. it was unaware of the falsity of the material published;
ii. it did not publish the material recklessly, that is, not caring whether the material was true or false; and
iii. the publication was reasonable in the circumstances (*Theophanous*, 140-41).

{19} This new defence differs from the *Sullivan* position in two important respects:

1. The onus is on the *defendant* to establish the three elements of the defence.
2. Publication must be reasonable in the circumstances.

{20} One of the principal arguments for placing of the burden on the defendant to show that it took appropriate steps to check the accuracy of the material is simply that it is the defendant who knows what steps were, in fact, taken. The effect of this should be to reduce the costs of pre-trial discovery and the length of trials, thereby reducing the 'chilling effect' of defamation actions regarding material falling within the scope of political discussion. What constitutes appropriate steps to check accuracy in a given case will bear, first, on the second element of whether publication was reckless as to falsity, and, second, on the question of whether publication was reasonable in the circumstances. The joint judgment stated (at 137-39) that:

'Whether a publisher has acted reasonably must be a question of fact in every case. It will depend on the standards and expectations of the community as to whether the allegations needed to be investigated.'

{21} The reasonableness requirement means that false and defamatory material will not automatically be immune from an action for defamation simply because it falls within the scope of political discussion. For example, the standards and expectations of the community might require that a publication suggesting that a Member of Parliament was a paedophile (and therefore unfit to hold her or his office) be checked for accuracy almost to the point of certainty, given the potential destruction to her or his reputation. On the other hand, a suggestion that a Minister's awarding of a government contract to an organisation was

influenced by the organisation having made a substantial donation to the funds of the Minister's party might have less rigorous requirements as to accuracy, particularly if the awarding of the contract was at the Minister's discretion, and it is, therefore, practically impossible for the publisher to prove the absolute truth of the suggestion. In such a case, if a reasonable suspicion of improper influence exists, the public should be informed of it. In this way the 'political communication defence' compels the balancing of press freedom and responsible journalism.

**(iii) The expanded form of common law qualified privilege**

{22} The third question for the Court, whether political discussion is an occasion of qualified privilege at common law, arises because the joint judgment of Mason CJ, Toohey and Gaudron JJ in *Theophanous* reconsidered (at 140) the defence of common law qualified privilege in the light of the implied freedom of political communication and, consequently, expanded the scope of the defence to include the discussion of political matters (see also *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211, 234). Their Honours were of the view (*Theophanous*, 140) that the availability of the 'political communication defence' would mean that the expanded form of qualified privilege would be of minimal practical significance. It has become apparent that their Honours were mistaken in this view. In many, if not most, cases it will be easier for a defendant publisher to rely on the expanded form of qualified privilege, thus requiring the plaintiff to prove that the publication was actuated by malice, than to try to establish the elements of the 'political communication defence'. This defeats one of the principal virtues of the 'political communication defence', that is, the onus on the defendant to prove that it has adequately checked the accuracy of the material.

{23} Of the dozen submissions before the Court in *Lange*, all but one (the plaintiff's), argue that the Court should find that the publication of a matter of political discussion is made on an occasion of qualified privilege at common law. By comparison, the unique approach of the 'political communication defence' to the balancing of free speech and reputation receives scant attention. None of the submissions makes more than passing mention of either placing the burden of establishing the defence on the defendant, or of the introduction of a test of reasonableness into the law of defamation. Admittedly, this may reflect the view on the part of the submitting media organisations either that it is too hard to establish the elements of the 'political communication defence', and it is not worth saving, or, alternatively, that the method of constitutional interpretation in *Theophanous* underpinning the defence is likely to be rejected by the Court, and that the expanded form of qualified privilege gives greater protection to publishers anyway.

{24} Even discounting the submissions by the media, the submissions of the various Attorneys-General indicate a view that the alteration of the common law in *Theophanous* was too dramatic. The common law is expected to develop incrementally, in an orderly and logical fashion, not in leaps, particularly where the springboard is a method of constitutional interpretation that many find intolerably original. The single step of making political discussion a category of publication that is afforded common law qualified privilege seems more modest than the creation of a new and apparently more complex defence. And from a formal point of view this is probably correct. But from the perspective of the practical consequences for defamation law of expanding qualified privilege, the opposite is true. The expansion of qualified privilege is, in practice, a more radical development of the law of defamation than the 'political communication defence' because, like the decision in *Sullivan*, it would tilt the balance much further against the protection of reputation, by requiring the

Plaintiff to establish malice. Only the bravest or wealthiest of plaintiffs would be prepared to sue over false and defamatory material that fell within the scope of political discussion. It is submitted that the Court should overturn the expansion of qualified privilege from *Theophanous* and *Stephens*, thus affording the 'political communication defence' the opportunity to operate as originally intended by the majority in the 1994 decisions.

**(iv) Application to *Lange v Australian Broadcasting Corporation***

{25} Presuming, first, that the Court finds in favour of the preservation of either or both of the 'political communication defence' or the expanded form of qualified privilege, and, second, that the defamatory imputations conveyed by the impugned broadcast in *Lange* can neither be proven to be true, nor be held to be fair comment based on facts truly stated, the defendant must then establish that the subject matter of the broadcast constituted political discussion for the purposes of either the 'political communication defence' or the expanded form of qualified privilege. It is submitted that this is, in fact, an unlikely result (see 4.1 below). If the broadcast *was*, however, held to fall within the scope of political discussion for the purposes of the 'political communication defence', then the defendant will have to establish the three elements of the defence. Given that the program was broadcast the night after its first broadcast in New Zealand, the defendant will have had very little time to check the accuracy of the material for itself, and therefore have been largely reliant on the efforts of Television New Zealand. Whether a Court would find it sufficient to establish the three elements for the defendant to argue that the material came from what is presumably a reputable source may depend on the evidence that the defendant submits of any past dealings with Television New Zealand, of the knowledge the defendant had of the steps taken by Television New Zealand to check the accuracy of the material, and of any independent efforts the defendant made on its own behalf. The elements of the defence must *all* be established. Whether the defendant should have been alerted to the potential falsity of the material by its contacts with the plaintiff's solicitors, and with the Prime Minister of New Zealand, will bear on the elements of recklessness and reasonableness. In the defendant's favour is that even a *suggestion*, presuming that it is not completely without foundation, that a national leader has been improperly influenced, is the type of subject that the public ought to be informed about immediately. It is arguable that community expectations as to the degree of certainty that a publisher must hold before publishing such material can be less than absolute.

## 4. Does the 'constitutional defence' extend its protection to political discussion generally?

{26} This question essentially asks what is the scope of political discussion for the purposes of the 'political communication defence'? There are a number of ways of approaching this question. As noted above, the question presumes that the Court will preserve the defence. If it does, the definition of political discussion for the purpose of the defence must be anchored to the rationale for the defence, that is, to preserve the efficacious working of the political process as reflected in those sections of the Commonwealth Constitution that provide for a system of representative government. Even if the Court rejects the constitutional basis of the defence, but preserves the defence itself as a development of the common law, or, alternatively, expands qualified privilege as discussed above, the rationale underpinning what would then be a development of the common law differs only in form. To find for any of these possibilities, the Court must ultimately do so on the basis that there must be a free flow

of information and debate on political matters to enable Australian voters to participate effectively in the democratic process.

{27} It is impossible to limit this freedom, as McHugh J did in *ACTV* (at 227), to freedom of communication 'in relation to federal elections' alone, an approach which was rejected by a majority of the Court in both *ACTV* and *Theophanous*. As the Austrian legal philosopher, Ota Weinberger, has pointed out:

'The formal rules of voting and holding elections are not by themselves sufficient for granting the realisation of democratic ideals; they must be accompanied by an effective system of discourse about political and social questions, by transparency of public relations and by appropriate access to relevant information. ... democracy is not a place for rest but a system in vivid evolution and dependent on social discourses. It can be efficient and stable only if it is institutionalised in an open society.' (Weinberger, 'Information and Human Liberty' (1996) 9 (3) *Ratio Juris* 248)

{28} An alternative approach to the question of the proper scope of political discussion is to ask whether the concept for the purposes of the 'political communication defence' from *Theophanous*, being founded on an implied freedom from the Commonwealth Constitution, should apply only to matters of Commonwealth concern. In *Theophanous* the joint judgment (at 122) held that the interrelationship of Commonwealth and State powers, and the interaction between the various tiers of government in Australia made it unrealistic to confine the freedom to matters relating to the Commonwealth government. It is submitted that this pragmatic approach is correct. Again the same reasoning applies to any defence or immunity based on the need to ensure the effective functioning of Australian democratic processes.

{29} The other critical issue in relation to the question is: how are the parameters of political discussion to be determined so that it should not be 'a category of indeterminate reference' (*McGinty v Western Australia* (1996) 134 ALR 289, 374, Gummow J). Depending on one's perspective, the discussion of virtually any human activity may involve a correspondent political issue. In the joint judgment in *Theophanous* Mason CJ, Toohey and Gaudron JJ stated (at 123) that, while it was not '... possible to fix a limit to the range of matters' that would be relevant to parliamentary debate, nevertheless 'it should be possible to develop, by means of decisions in particular cases, an acceptable limit to the type of discussion which falls within the constitutional protection.'

{30} It can be seen from subsequent cases that the courts have already begun to develop a series of principles for the purpose of drawing that limit. For example, it is clear that discussion of the institutions and officials of the legislative, executive and judicial branches of government will, in general, constitute political discussion (*Williams v John Fairfax & Sons Ltd* (1994) A Def R 52,010 at 43, 075-6). In *Sporting Shooters' Association v Gun Control Australia* (1995) A Def R 52, 030 at 43,449-50 (County Court of Victoria) Shelton J held that the discussion of issues of public policy that are the subject of debate in the community *prima facie* will be political discussion. In the Supreme Court of New South Wales Allen J held that material need not be published in the context of a pre-existing and ongoing public debate to be afforded protection (*Hartley v Nationwide News Pty Ltd* (Unreported judgment of Allen J, 3 March 1995, No 12564 of 1990) ).

### (i) Application to *Lange v Australian Broadcasting Corporation*

{31} The submission for the defendant in *Lange* argues that, just as it is impossible to limit the application of the implied freedom of political discussion to Commonwealth matters, it is

also impossible to confine it to discussion of Australian domestic affairs. Australian political discussion, it is argued, extends to discussion of ideas, information and debate in relation to other countries, particularly countries (in this case New Zealand) with which Australia has close relations, and shares a similar political system. The submission for the Commonwealth Attorney-General arguably goes further, within the context of supporting the expansion of common law qualified privilege. The Commonwealth submission suggests that, as Australia has, actually or potentially, a political, social or economic relationship with any other nation, discussion of the affairs of that other nation is a legitimate subject of free discussion in Australia. A constitutionally based version of this argument would be expected to rely on the Commonwealth Government's external affairs power, under s 51 (xxix) of the Constitution.

{32} Several of the other submissions put the argument against such an internationalist approach. Simply put, it is: given that the purpose of any of the politically defined defences or immunities the Court could choose is the protection and maintenance of *Australian* democratic processes, the protected discussion must be of purely *Australian* governmental or political affairs. This argument, however, does not entirely answer the problem. For example, would this approach protect defamatory material concerning the abuse of human rights in another country in the context of arguing for a review of Australia's diplomatic relations with that country? The answer, it is submitted, may be found in obiter dicta in two judgments of the New South Wales Supreme Court.

{33} In *Baltinos v Australian Consolidated Press* (Unreported judgment of Sully J, Supreme Court of New South Wales, 21 July 1995) an article had been published alleging that the plaintiff, a migration agent, had exploited and defrauded immigrants, and had misappropriated funds belonging to an organisation assisting such immigrants. Sully J held that, although aspects of the material concerning immigration-related issues gave the piece a 'political resonance', the article was, in substance, 'a wide-ranging and sensational personal and professional denigration of the plaintiff', and not on a subject of political discussion.

{34} In *Rural and General Insurance Ltd v Australian Broadcasting Corporation* (Unreported judgment of Bryson J, Supreme Court of NSW, Equity Division, 15 June, 1995, No 2416 of 1995) a report on an investigative television program suggested that a company offering aviation insurance was dishonest and unscrupulous in its rejection of insurance claims. His Honour had this to say about the scope of 'political discussion':

'It was not contended that the present case falls within the implied constitutional guarantee; and in my opinion there is no basis on which it could be so regarded and the fact that insurance is a subject with respect to which the Commonwealth Parliament has power to make laws does not make it so.' (See also *Rural and General Insurance Ltd v Australian Broadcasting Corporation* (Unreported judgment of the Supreme Court of New South Wales, Court of Appeal, 19 June 1995, Kirby P, Clarke and Handley JJA, No CA 40360 of 1995, in the judgment of Kirby P) ).

{35} These remarks suggest, correctly, it is submitted, that the courts should look to the substance of the impugned material from a common sense point of view, and require that a substantial link between the material and a subject of political deliberation in Australia is capable of being reasonably inferred. On this basis, the defendant's case in *Lange* would fail on the ground that the impugned broadcast did not concern a matter of political discussion for the purposes of the law of defamation in Australia. That the defendant introduced the program with a superficial comparison between the Labour Governments of the two countries is too distant and insubstantial a link to a matter of Australian political discussion to change the way the broadcast is to be characterised.

## 5. Conclusion

{36} It is to be hoped that the constitutional issues raised by the case, as profound and fundamental as they are, do not obscure the ultimate question of when, and under what circumstances, the law should afford some kind of immunity, or allow some form of defence, to an action in respect of the publication of defamatory material. The correct approach to resolving this question has been proposed as being as follows:

'... the theory on which *immunity in general* is accorded to any publication of matter which turns out to have detracted from the personal reputation of an individual, is that ... the permanent, ultimate and general well-being of the community must stand before the occasional, immediate and particular interests of the individual. "The law, upon grounds of *public policy and convenience*, permits, under certain circumstances, the publication of slanderous matter, though it be injurious to another" Bayley J at p 270 of *M'Pherson v Daniels* (1829) 10 B & C 263.' (Spencer Bower, *The Law of Actionable Defamation* (1923, reprinted 1990) Appendix IX)

{37} From the perspective of the balance to be struck between the community's need for freedom of political speech as a necessary foundation of a system of representative government and the individual's interest in the protection of reputation, the formulation in *Theophanous* of the 'political communication defence' is a thoughtfully balanced and valuable addition to the law of defamation in Australia, regardless of whether the defence is based in a constitution, statute or the common law. The Court should preserve the defence, and give it the fullest opportunity to demonstrate its value by overturning the mistaken expansion in *Theophanous* of common law qualified privilege.