SUPREME COURT OF QUEENSLAND

CITATION:	*Flegg v Hallett* [2015] QSC 167
PARTIES:	**BRUCE STEPHEN FLEGG** (plaintiff) **v** **GRAEME NORMAN HALLETT** (defendant)
FILE NO/S:	No 11629 of 2012
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 June 2015
DELIVERED AT:	Brisbane
HEARING DATE:	15, 16, 17, 20, and 22 October, 20, 25, and 26 November 2015
JUDGE:	Peter Lyons J
ORDER:	**1. General damages are assessed at $275,000.** **2. Special damages are assessed at $500,000.**
CATCHWORDS:	DEFAMATION – STATEMENTS AMOUNTING TO DEFAMATION – PARTICULAR STATEMENTS – IMPUTATION – where the plaintiff was a government Minister and the defendant was his media adviser – where the plaintiff's son was a registered lobbyist under the *Integrity Act* – where the defendant made a conference announcement and later received a concerns notice which referred to s 14 of the *Defamation Act* – where, at a media conference and during a later radio interview on 13 November 2012, the defendant stated, amongst other things, that he had lost trust in the plaintiff, that the plaintiff had tabled an inaccurate lobbyists' register, and had opened himself to a charge of misleading a Parliamentary Committee – whether the defendant's statements at the media conference and the radio interview were capable of conveying, and did convey, to an ordinary reasonable audience member that the plaintiff committed a serious offence of misleading a Parliamentary Committee; was aware that the lobbyists' register was inaccurate when tabled; refused to correct the Committee's record; was lobbied by his son in breach of his son's employment contract; should be

dismissed as a Minister; and, that the lobbyists' register was grossly inaccurate, untrue, incorrect and had been doctored

DEFAMATION – STATEMENTS AMOUNTING TO DEFAMATION – IN GENERAL – where the plaintiff was a government Minister and the defendant was his media adviser – where the plaintiff's son was a registered lobbyist under the *Integrity Act* – where, at a media conference and, during a later radio interview on 13 November 2012, the defendant conveyed that the plaintiff tabled a grossly inaccurate and doctored lobbyists' register at a Parliamentary Committee meeting, and at the media conference, also conveyed that the plaintiff was aware that document was wrong – whether the defendant's statements were defamatory

DEFAMATION – PRIVILEGE – QUALIFIED PRIVILEGE – IN GENERAL – where the plaintiff was a government Minister and the defendant was his media adviser – where the plaintiff's son was a registered lobbyist under the *Integrity Act* – where the plaintiff informed the defendant on 12 November 2012 that the defendant would not continue in his position as the plaintiff's media adviser – where the defendant attempted to bargain with the Director of Government Media for redeployment within Government in exchange for not holding the media conference – where the defendant then made a conference announcement which included a statement that the plaintiff had dismissed him and so he was going to publicly disclose that the plaintiff was not a fit and proper person to be a Minister – where, at a media conference and during a later radio interview on 13 November 2012 the defendant conveyed, amongst other things, that the plaintiff was unfit for, and should be dismissed from, office; had lost the defendant's trust or confidence; tabled an incorrect lobbyists' register before a Parliamentary Committee; and refused to correct the Parliamentary Committee's record – whether the defendant's publications were made reasonably – whether the defendant had reasonable grounds for believing that each of the imputations was true – whether the defendant took proper steps to verify the accuracy of the imputations – whether the defendant was actuated by malice in making the publications – whether the defendant was motivated by a desire to damage the plaintiff's reputation, consequent on the defendant's dismissal

DEFAMATION – DAMAGES – GENERAL DAMAGES – ASSESSMENT – SPECIAL MATTERS TO BE CONSIDERED – AGGRAVATION – EXEMPLARY OR COMPENSATORY DAMAGES – where the defendant made

defamatory publications on three occasions: in a conference announcement, a media conference, and during a radio interview – where the defendant did not make proper enquiries as to the accuracy of the statements contained in those publications – where the defendant received a concerns notice after the first publication, and a further concerns notice after the second and third publication, all of which referred to s 14 of the *Defamation Act* – where the defendant did not apologise for the publications – where the publications were republished – where the defendant's publications were actuated by malice – whether the defendant's malice was known to the plaintiff and aggravated the harm sustained – whether the conference announcement exacerbated the damage caused to the plaintiff's reputation by the subsequent publications – whether the defendant's conduct, including during the trial, was lacking in bona fides, or improper or unjustifiable

DEFAMATION – DAMAGES – GENERAL DAMAGES – ASSESSMENT – IN GENERAL – where the defendant made defamatory publications on three occasions: in a conference announcement, a media conference, and during a radio interview – whether one sum should be awarded for three causes of action, including aggravated damages

DEFAMATION – DAMAGES – SPECIAL DAMAGES – where the defendant made defamatory publications on three occasions: in a conference announcement, a media conference, and during a radio interview – whether the plaintiff's resignation was caused by the defamatory publications –what allowance for contingencies should be made in the calculation of special damages

Acts Interpretation Act 1954 (Qld), s 14

Defamation Act 2002 (Qld), s 14, s 30, s 35, s 36, s39, s 40

Integrity Act 2009 (Qld), s 42, 49

Public Records Act 2002 (Qld), s 6, s 7

Andrews v John Fairfax & Sons Ltd [1980] 2 NSWLR 225, discussed.

Barrow v Bolt [2013] VSC 226, cited.

Broome v Cassell & Co Ltd [1972] AC 1027; [1972] UKHL 3, cited.

Carson v John Fairfax & Sons Ltd (1991) 24 NSWLR 259, cited.

Carson v John Fairfax & Sons Ltd (1993) 178 CLR 44; [1993] HCA 31, cited.

Cerutti & anor v Crestide Pty Ltd & anor [2014] QCA 33, cited.

Cornwall & ors v Rowan (2004) 90 SASR 269; [2004] SASC 384, cited.

Coyne v Citizen Finance Ltd (1991) 172 CLR 211; [1991] HCA 10, cited.

Favell v Queensland Newspapers Pty Ltd (2005) 79 ALJR 1716; [2005] HCA 52, applied.

Flegg v Hallett [2014] QSC 278, cited.

Gorton v ABC (1973) 1 ACTR 6; (1973) 22 FLR 181, applied.

Hall-Gibbs Mercantile Agency Ltd v Dun (1910) 12 CLR 84; [1910] HCA 66, cited.

Harbour Radio Pty Ltd & anor v John Tingle [2001] NSWCA 194, cited.

Jarratt v John Fairfax Publications Pty Ltd [2001] NSWSC 739, discussed.

Jones v Skelton [1964] NSWR 485; [1963] 1 WLR 1362, applied.

Konstantinidis v Foreign Media Pty Ltd [2004] NSWSC 835, discussed.

Lange v Australian Broadcasting Corporation (1997) 189 CLR 520; [1997] HCA 25, applied.

Lewis v Daily Telegraph Ltd [1964] AC 234; [1963] 1 QB 340, applied.

Mirror Newspapers Ltd v Jools (1985) 5 FCR 507; [1985] FCA 153, cited.

Mowlds v Ferguson (1939) 40 SR (NSW) 311; [1939] NSWStRp 43, cited.

Queensland Newspapers Pty Ltd v Palmer [2012] 2 Qd R 139; [2011] QCA 286, discussed.

Rigby v Associated News Papers Ltd [1969] 1 NSWR 729

Rookes v Barnard [1964] AC 1120, cited.

Spautz v Butterworth (1996) 41 NSWLR 1; [1997] Aust Tort Reports 81-415, cited.

Sungravure Pty Ltd v Middle East Airlines Airliban SAL (1975) 134 CLR 1; [1975] HCA 6, cited.

The Herald & Weekly Times Ltd v McGregor (1928) 41 CLR 254; [1928] HCA 36, cited.

Triggell v Pheeney (1951) 82 CLR 497; [1951] HCA 23, applied.

Trkulja v Yahoo! Inc LLC [2012] VSC 88, discussed.

Trkulka v Google Inc LLC [2012] VSC 533, discussed.

Waterhouse v Broadcasting Station 2GB Pty Ltd (1985) 1 NSWLR 58; [1985] Aust Torts Reports 80-728, cited.

COUNSEL:	N Ferrett with M May for the plaintiff S Keim SC with R Gordon for the defendant
SOLICITORS:	Cooper Grace Ward for the plaintiff Guest Lawyers for the defendant

[1] On 12 November 2012 the defendant announced to journalists that he would be holding a media conference (*conference announcement*). He held the conference the following day; and on the same day participated in a radio interview. The plaintiff has sued the defendant, alleging that on each of these occasions the defendant defamed him. In his Defence, the defendant has alleged that he has a defence of privilege at common law, each publication relating to government or political matters, in respect of which members of the Australian community have an interest, and the making of each publication by the defendant being reasonable. He has also relied on s 30 of the *Defamation Act* 2005 (Qld) (*the Act*).

Background

[2] For most of his adult life, the plaintiff has been a medical practitioner. He has been interested in politics for some time. In 2004 he was elected to the Parliament of Queensland for the electoral district of Moggill. Over the following years, he was a member of a number of Parliamentary committees. He was the Deputy Leader of the Parliamentary Liberal Party, and its spokesperson for health, transport and main roads and the environment, from 17 February 2004. Thereafter, he was shadow Minister for a number of departments. He became the leader of the Parliamentary Liberal Party on 7 August 2006, for a period of about 16 months.

[3] As a result of the election held on 24 March 2012, the Liberal National Party formed a government, with the plaintiff being appointed as Minister for Housing and Public Works on about 3 April 2012.

[4] In his earlier years the defendant worked as school teacher, and subsequently as a journalist. In about 1994 he commenced work as a media adviser and an electorate officer for a Liberal Party Senator for New South Wales. He worked in similar positions for a number of years. In 2006, he came to Queensland to assist with the Liberal Party election campaign. He then met the plaintiff, who provided him with accommodation in his home. He again stayed at the plaintiff's home when he came to assist in the Liberal Party campaign for the 2007 Federal election.

[5] Prior to the 2012 election, the defendant contacted the plaintiff, expressing interest in a position as a media adviser should the Liberal National Party be successful, and offering assistance in the election campaign. When the defendant came to Queensland to provide that assistance, he again stayed at the plaintiff's home. On about 3 April 2012, he commenced to act in the position of the plaintiff's media adviser.

[6] The plaintiff's son, Johnathon (*Mr Flegg*), holds Masters Degrees in public administration and public policy and has worked as a government adviser. In September

2011, he took up a position with a public relations consultancy, referred to as Rowland. He was registered as a lobbyist under the provisions of the *Integrity Act* 2009 (Qld).

[7] During the period of the plaintiff's ministry, a document referred to as a lobbyists' register was maintained by a member of the plaintiff's staff. It recorded details relating to contacts between people referred to as "Ministerial Officers", and registered lobbyists, identified by the name of the relevant company; though on occasion the name of the person who represented the lobbyist company also was recorded in the entry.

[8] On 18 October 2012, the plaintiff appeared before the Transport, Housing and Local Government Committee of the Legislative Assembly (*Committee*) at an estimates hearing. He was accompanied by his Chief of Staff, Fraser Stephen, the defendant, the Director-General of the Department of Housing and Public Works, and other departmental officers. At the hearing, the following exchange took place between Mr Bill Byrne MP, the Member of Parliament for the electoral district of Rockhampton, and the plaintiff:

> "**Mr BYRNE**: Forgive my inexperience, but I imagine that you would have a lobbyist register in your office, that those lobbyists are recorded — those who come and visit you.
>
> **Dr FLEGG:** I believe we have a very accurate lobbyist register.
>
> **Mr BYRNE:** I imagine you would have. Would you mind tabling that at some point in the future or taking the question on notice to table it?
>
> **Dr FLEGG:** I do not keep it personally. It is kept within the office. I will get back to you before the end of the committee. I do not have a problem with you seeing whom we have met with.
>
> **Mr BYRNE:** Thanks …"

[9] Subsequently, the following exchange took place between the Honourable Howard Hobbs MP, the Member for the electoral district of Warrego, who was Chair of the Committee, and the plaintiff:

> "**CHAIR:** … There was a question before about tabling the lobbyists register. Do you want to do that later on?
>
> **Dr FLEGG**: Yes, I have that here.
>
> **CHAIR**: Are you happy to table it? Leave granted."

[10] Subsequently, an extract from the lobbyists' register maintained by the plaintiff's staff was tendered[1]. A number of entries identify the registered lobbyist as Rowland, and in two cases Mr Flegg's name appeared, inaccurately, under the heading "Client of Lobbyist".

[11] On 31 October 2012, Daniel Hurst, a Brisbane journalist, sent an email to the defendant and his assistant, Mr Martin Kennedy. The email noted the references to Rowland and

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[1] Exhibit 1 Tab 1.

Mr Flegg; made further enquiries about the entries; and asked whether the plaintiff thought it appropriate for there to be contact between Mr Flegg in his professional capacity and the plaintiff and his office[2].

[12] Later that day, Mr Flegg was at Parliament House and went to the plaintiff's office. The defendant invited him to look at the email enquiry from Mr Hurst. Mr Flegg then offered to send the defendant a statement which Rowland had previously prepared, relating to dealings between Mr Flegg and the plaintiff's office. Mr Flegg sent that statement to the defendant at 2.51pm that day[3]. An amended version was sent by Mr Flegg to the defendant at 4.31pm on the same day[4].

[13] Later that evening, at about 7.20 pm, Mr Flegg sent to the defendant an email, the subject line of which was "List of emails to/from Ministerial and EO email addresses". "EO" was a reference to the plaintiff's electorate office. The email contained a list of emails consistent with the subject line; and included dates, times and what appears to be the reference line from each email (*Jonathon's list*)[5]. The defendant read the email that evening.

[14] A little earlier, at 7.05pm on the same day, the defendant had sent a response to Mr Hurst. It stated that the entries referring to Mr Flegg in the lobbyists' register did not result in meetings. The other entries referring to Rowland did not involve written representations or personal visits or phone calls from Mr Flegg. The plaintiff had requested his Chief of Staff to ensure all Ministerial staff had no professional contact with Mr Flegg[6].

[15] On 2 November 2012, Mr Hurst published an online article based on the response he had received from the defendant, which included a statement that the plaintiff had "banned his son (Mr Flegg) from lobbying his office"[7].

[16] There is some controversy about some of the events which occurred subsequently. However, in the meantime, on 1 November 2012, the Premier at the time read a statement in Parliament that the assessment of requests under the *Right to Information Act* 2009 (*RTI requests*) was in the hands of officials in each government department (rather than being under the control of a member of a Minister's staff)[8].

[17] On 2 November 2012 the Premier was asked, with reference to a report that the plaintiff had asked Mr Flegg "not to lobby his office", whether that was the result of any discussion between the Premier and the plaintiff. In his response, the Premier said that Mr Flegg was working for Rowland and had sought "to lobby his father" by arranging a meeting which did not take place; and the plaintiff gave instructions, before the Premier became aware of these matters, that that was inappropriate[9].

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2 Exhibit 1 Tab 3.
3 Exhibit 22.
4 Exhibit 23.
5 Exhibit 1 Tab 7.
6 Exhibit 1 Tab 3.
7 Exhibit 13.
8 Exhibit 17.
9 Exhibit 27.

[18] Subsequently the defendant went on leave. Before doing so, he did not discuss his leave plans with the plaintiff.

[19] While the defendant was on leave, Mr Stephen was dismissed from his position as the plaintiff's Chief of Staff. That appears to have been associated with the fact that, in relation to RTI requests, the arrangements within the plaintiff's ministerial office did not accord with the Premier's statement of 1 November 2012.

[20] The defendant returned from leave on Monday 12 November 2012. He had not made contact with the plaintiff while he was away. During the course of the day, the plaintiff received from the defendant a brief text message relating to press interest in Mr Stephen's departure[10].

[21] Around the middle of the day the plaintiff informed the defendant that the defendant would not continue in his position as the plaintiff's media adviser.

[22] Subsequently, the defendant had discussions with Mr Lee Anderson, who was the Director of Government Media Communications. The discussions included the possible redeployment of the defendant, thus continuing his employment with the State Government.

[23] The conference announcement was made later that day. It included the following statements:

> "I will be making certain disclosures that Dr Flegg is not a fit and proper person to be a Minister."
>
> and
>
> "Flegg has dismissed me so I am going to put all of this in the public record."

[24] The conference announcement attracted significant interest in the media[11].

[25] On the evening of 12 November 2012, the plaintiff's solicitors sent, by email, a letter to the defendant (*first concerns notice*)[12]. The letter referred to the conference announcement (and other statements), contending that they were defamatory. The letter called for an immediate written apology and retraction, and an undertaking not to publish any further defamatory material relating to the plaintiff. It included a threat to institute legal proceedings, unless the apology and undertaking were given. The letter described itself as a "concerns notice", and referred to ss 14 and 40 of the Act. The defendant read the concerns notice that night[13].

[26] The media conference commenced at about 8.30am on 13 November 2012. At the beginning of the conference, the defendant handed out to media representatives copies of

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10 Exhibit 14.
11 Exhibit 2 Tabs 1-3.
12 Exhibit 1 Tab 6.
13 T7-42/44.

the email of 31 October 2012, containing Jonathon's list[14]. A transcript of what was said at the media conference is Annexure A to the Statement of Claim (*TMC*). However, it is convenient to record the effect of some of the statements made by the defendant at the conference, as follows:

(a) The defendant did not trust the plaintiff;

(b) The plaintiff was not fit to hold the high office that he then held;

(c) The basis for those statements was that the lobbyists' register tabled on 18 October 2012 was "grossly inaccurate, misleading and fails to indicate a number of … contacts, or … encounters with registered lobbyists";

(d) The tabled lobbyists' register only refers to two contacts with Mr Flegg, a registered lobbyist, on 8 June;

(e) The plaintiff had ultimate responsibility for the accuracy of the lobbyists' register;

(f) Jonathon's list provided documentary proof that, virtually from the start of the plaintiff's Ministry, there was contact with Mr Flegg;

(g) It was inappropriate for Mr Flegg to be lobbying his father;

(h) The public are entitled to know that material provided to Parliament, or a Committee, "is accurate, true and correct, and not doctored, and not held back in terms of full disclosure and accountability…";

(i) The subject lines of some of the emails showed that they related to "meetings and confidential documents and issues related to the Minister for Housing and Public Works" (i.e., the plaintiff);

(j) There were in excess of 35 contacts for lobbying purposes between the plaintiff and his son that were not disclosed in the tabled extract of the lobbyists' register;

(k) Before the response was sent to Mr Hurst on 31 October 2012, Mr Stephen told the defendant that Mr Flegg had only been involved in lobbying activities with the plaintiff or his office on two occasions (though, after the response was sent, Mr Stephen told him there were probably six or seven such occasions);

(l) The statement made in the response to Mr Hurst, to the effect that the plaintiff had instructed that his staff were not to have dealings with Mr Flegg, was a lie;

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[14] T7-14/20-25.

(m) The defendant did not know whether Mr Stephen or the plaintiff was responsible for the lie;

(n) After Mr Hurst's article of 2 November 2012 the defendant advised the plaintiff to make full disclosure of lobbying contacts by Mr Flegg, as otherwise he was leaving himself open to a charge of misleading a committee of Parliament;

(o) The plaintiff's only response was that he was angry with the defendant, he was losing faith in him, and he might get rid of him;

(p) It was not possible to say whether Mr Flegg "(got) any favour" from his contacts with the plaintiff and his office;

(q) The plaintiff did not mislead the Estimates Committee by his oral testimony;

(r) The defendant would have released Jonathon's list, even if he had not been sacked;

(s) The defendant "beseeched" the plaintiff "to come clean" about the contacts by Mr Flegg;

(t) The plaintiff was not a fit and proper person to hold Ministerial office on the basis that he provided material for which he was ultimately responsible, and which was grossly inaccurate and not full and accountable;

(u) The plaintiff must have been aware that the document tabled at the Estimates Committee hearing was wrong as he had previously had various email contacts with Mr Flegg;

(v) The defendant had not had any discussions with Mr Anderson about wanting to keep a job in the Government;

(w) Between them, Mr Anderson and the defendant had decided to make the untrue statement that the plaintiff had banned contact with Mr Flegg as a lobbyist; this statement was "spin";

(x) The defendant was attending the media conference "to do full disclosure";

(y) The defendant "(stood) by every word I've said in relation to (these) matters";

(z) The lobbyists' register did not record a meeting on 12 October 2012, attended by the plaintiff and a large number of staff and public servants, where Mr Mal Brough made representations on behalf of a Mr Louis Bickle, relating to the construction of modular homes for Aboriginal and Torres Strait Islander people (the representations were unsuccessful);

(aa) Inappropriate contact between Mr Flegg and the plaintiff's Ministerial office continued up to 30 October 2012;

(bb) The plaintiff was happy with "spin" about lobbying activities involving Mr Flegg.

[27] Some of what has been summarised was repeated. A summary such as this does not accurately capture the full effect of the context in which information was conveyed. A number of other matters were also raised during the media conference, but there has been no suggestion that they are of present relevance.

[28] The next day, the plaintiff's solicitors sent a letter to the defendant (*second concerns notice*)[15]. The letter stated that it was apparent from the subject lines of the emails in Jonathon's list that they did not relate to departmental matters. The defendant did not have a basis for saying that the plaintiff knew, at the time when the lobbyists' register was provided to the Estimates Committee, or subsequently, that it was incorrect. There was no basis for asserting that the plaintiff had "doctored" the lobbyists' register provided to the Estimates Committee. The letter sought confirmation that the defendant would provide a written apology and retraction; otherwise the plaintiff would consider commencing proceedings against the defendant without further notice. The letter identified itself as a further concerns notice for the purpose of s 14 of the Act. The Statement of Claim alleged the giving of this notice on 13 November 2012, particularised as being by hand delivery to the defendant's premises, at 7.45pm on 13 November 2012. The allegation was admitted.

[29] On 13 November 2012, the defendant participated in a radio programme conducted between 3.00pm and 6.00pm on Radio 4BC. A transcript of what was said at the radio interview is Annexure B to the Statement of Claim. In the course of the interview, the defendant made a number of statements, which might be summarised as follows:

(a) The defendant did not assert that the plaintiff gave oral testimony at the Estimates Committee hearing which was wrong or false;

(b) The plaintiff was one of the persons responsible for the lobbyists' register;

(c) After Mr Hurst's enquiry, the defendant was told that there were no other contacts involving lobbying activity by Mr Flegg, than the two recorded on the lobbyists' register;

(d) The defendant later learned from Mr Stephen that there might have been five or six such contacts;

(e) Having been provided with Jonathon's list, the defendant made public at the press conference that day that there were over 35 such contacts;

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[15] Exhibit 1 Tab 8.

(f) The lobbyists' register provided to the Estimates Committee was "grossly wrong, grossly inaccurate";

(g) As soon as that became clear to the defendant, he "beseeched" the plaintiff to correct the record;

(h) The plaintiff "didn't like that idea … he bagged me and criticised me and said … he was losing faith in me";

(i) The defendant wanted to correct the record, but the plaintiff would not do that;

(j) "(Y)ou could say" that that was why the defendant had been sacked;

(k) Rowland was "pretty convinced" that Mr Flegg had been "lobbying with his father … for companies which he wasn't supposed to do under his contractual arrangements".

[30] On 13 November 2012, the Premier made a statement to Parliament[16]. It recorded the failure of the plaintiff's Ministerial office to comply with a communication from the Attorney-General to all Ministers of 13 May 2012, instructing Ministers to delegate their right to information decision-making powers to independent officers within the department. The Premier stated that some government staff had recently been dismissed because of non-compliance. Subsequently, the plaintiff made a statement to Parliament, referring to the Premier's statement[17]. He related the dismissal of Mr Stephen to the matter raised by the Premier. He also said that he had dismissed the defendant because he no longer had confidence in his ability to perform his duties. He said that the vast majority of emails in Jonathon's list were personal. He accepted that a number of the communications referred to by the defendant at the media conference "may have been communications that ought to have been recorded on the lobbyists register", and said that he would consult with the Integrity Commissioner as to whether the register should be amended. He also said that the defendant had produced "not one shred of credible evidence" in support of his allegation that the plaintiff was an unfit person to hold his Ministerial office, and that the defendant was "a vengeful, bitter ex-staffer who wanted to try to take revenge and try to harm his former employer". He invited the defendant to take his allegations "to the proper authorities".

[31] On 14 November 2012, the plaintiff resigned his commission as Minister for Housing and Public Works. He then made a statement to Parliament, relating to his resignation[18]. He said he had had the opportunity to retrieve emails that he had not seen before; the matters "were not matters that represented misdoing on the part of anyone" and did not reflect on any action that the plaintiff had taken personally; rather they were "sloppy administration" for which he would take responsibility. As a result "we have seen us as MPs, ministers and the institution of this parliament substantially damaged in the eyes of Queenslanders because of that failure to take responsibility". He stated that he was

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16 Exhibit 15.
17 Exhibit 15.
18 Exhibit 18.

tendering his resignation to the Premier, and was not prepared, even though the matters were as he had described them, to cause damage to the Government.

[32] At a press conference on 7 December 2012, the plaintiff stated he had issued these proceedings against the defendant[19]. He stated that the defendant's statements about him were false and that the defendant had produced no evidence to support them.

The pleaded cases

[33] For the statements made by the defendant in each of the conference announcement, the media conference and the radio interview, the plaintiff has alleged imputations, and that the defendant's statements were likely to damage his reputation in relation to the office of Minister for Housing and Public Works. He also alleged that the statements were re-published, the republications being caused by the defendant's statements and being a reasonably foreseeable, as well as the natural and probable, consequence of the defendant's conduct. The plaintiff alleged in respect of each of these occasions that republication was intended by the defendant. These allegations were admitted, save that the defendant denied that he intended republication of his statements made on the occasion of the conference announcement.

[34] The Statement of Claim alleged that the defendant did not apologise for, nor did he retract, any of the statements made on the three relevant occasions[20]. The Defence denied those allegations, on the basis that the defendant, by letter of 10 December 2012 from his solicitors to the plaintiff's solicitors, made an offer to make amends for the purposes of the Act, and the letter contained an offer to make a reasonable correction and apology[21]. The plaintiff's reply admitted that the letter was sent, but denied that it contained an offer to make a reasonable correction and apology, nor was it an offer to make amends pursuant to the provisions of the Act. The defendant did not file a further pleading[22].

[35] The plaintiff has claimed ordinary compensatory damages for defamation. He has also claimed aggravated damages on bases discussed later in these reasons.

[36] The plaintiff has also claimed special damages, consequent on his retirement as a Minister.[23] The particularised amount is lost salary in the sum of $330,269.77 from the date of the resignation until the end of the then current term of Parliament; and the sum of $758,034, being the present value of the reduction in the plaintiff's superannuation entitlements.

[37] The Defence denied a number of the imputations pleaded in the Statement of Claim[24]. The Defence denied that the statements made at the media conference and the statements made in the radio interview were likely to damage the plaintiff's reputation[25].

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19 Exhibit 19.
20 Statement of Claim, at para 31.
21 Defence, at para 14.
22 See r 168(1) of the Uniform Civil Procedure Rules 1999 (Qld) (*UCPR*).
23 Statement of Claim, at paras 38-40.
24 Defence, at paras 7 and 11.
25 Defence, at paras 10 and 13.

[38] The Defence raised defences of privilege at common law and under s 30 of the Act[26]. The substantive allegation in each case was that it was reasonable for the defendant to publish the statements. A number of factual matters were relied upon in the Defence in support of that contention[27]. The Reply denied the assertion that the publications were reasonable, contending that the facts alleged did not constitute a basis for this assertion. It was also contended that it was not reasonable for the defendant to publish the statements, without checking that the substance of the allegations was true, and without first seeking the plaintiff's comment on the substance of the statements. Moreover, if the defendant sought to ensure accountability, that could have been done by other means. The Reply denied that the defendant held, or reasonably held, the beliefs alleged in the Defence. In particular, it alleged that the defendant did not seek to obtain the content of the emails identified in Jonathon's list[28]. The Reply alleged that the defendant was actuated by malice[29].

The imputations

[39] The imputations alleged in the Statement of Claim in respect of the conference announcement were admitted.

[40] With respect to the media conference, the imputations alleged in paragraphs 18(h) and (i) of the Statement of Claim were admitted. Those alleged in paragraphs 18(a) to (e) were, in the defendant's written submissions said not to be contested in the trial. Accordingly I find that the statements of the defendant at the media conference carry those imputations. However the imputations alleged at paragraphs 18 (f) and (g) remain in issue.

[41] With respect to the radio interview, the imputation alleged at paragraph 26(d) of the Statement of Claim was admitted; and that in paragraph 26(a) was not contested in the trial. That alleged in paragraph 26(g) was not pressed[30]. Accordingly I find the imputations alleged in paragraphs 26(a) and (d). The imputations in issue in respect of the radio interview are those found in paragraph 26(b), (c), (e) and (f).

[42] The plaintiff's submissions pointed out that, conventionally, two questions arise with respect to an imputation. The first is whether the publication is capable of bearing the meaning pleaded by a plaintiff. The second is whether the publication actually bore that meaning. With respect to the first question, the plaintiff's written submission helpfully set out passages from the judgment of Boddice J in *Queensland Newspapers Pty Ltd v Palmer*[31] (*Palmer*). It is convenient to reproduce those passages:

> "[19] Whether words complained of are capable of conveying a defamatory meaning is a question of law. The mode or manner of publication is a material matter in determining what imputation is capable of being conveyed. In deciding whether a particular imputation is capable of being conveyed in the natural ordinary meaning of the words

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[26] Defence, at paras 17 and 19.
[27] Defence, at paras 17A and 19A.
[28] See generally para 5A of the Reply.
[29] Reply, at paras 4(b)(ix), 6(d), 7, 8.
[30] See plaintiff's Further Written Submissions dated 8 December 2014 (*3 Plaintiff*) [66]-[67]; T8-49/25-45.
[31] [2012] 2 Qd R 139 at [19]-[21]; the other members of the Court agreed with his Honour.

complained of, the question is whether it is reasonably so capable to the ordinary reasonable reader. The ordinary reasonable meaning of the matter complained of may be either the literal meaning of the published matter, or what is inferred from it. However, any strained, or forced, or utterly unreasonable interpretation must be rejected.

[20] The ordinary reasonable reader is a person of fair, average intelligence who is neither perverse nor morbid nor suspicious of mind nor avid of scandal. However, that person does not live in an ivory tower but can, and does, read between the lines in light of that person's general knowledge and experience of worldly affairs. The ordinary reasonable reader considers the publication as a whole, and tends to strike a balance between the most extreme meaning that the publication could have and the most innocent meaning. That person has regard to the content of the publication. Emphasis given by conspicuous headlines or captions is a legitimate matter the ordinary reasonable reader takes into account.

[21] Whilst the test of reasonableness guides a determination of whether the matter complained of is capable of conveying any of the pleaded imputations, a distinction must be drawn between what the ordinary reasonable reader (drawing on his or her own knowledge and experience of human affairs) could understand from what the defendant has said in the matter complained of, and the conclusion which the reader could reach by taking into account his or her own belief which has been excited by what was said. The approach to be taken must be the former, not the latter. (footnotes omitted)"

[43] The question whether a publication is capable of bearing a pleaded meaning is usually of greater importance in jury cases. It is a question of law, to be determined by the Judge. In the present case, there is no jury. The passages from his Honour's judgment are important because they identify the means by which a Court determines the outer markers of the range of meanings which might be attributed to a publication. Beyond that, however, the stated tests provide some guidance to the approach to be taken in determining whether the publication in fact bears the meaning alleged.

[44] Thus it seems to me that the following propositions are relevant for determining whether a publication bears an alleged meaning:-

(a) The question is, what meaning would the ordinary reasonable member of the audience take from the publication[32];

(b) The relevant meaning may be the literal meaning, an innuendo meaning, or both[33];

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[32] *Gorton v ABC* (1973) 1 ACTR 6 per Fox J at 12; cited in Australian Defamation Law and Practice (loose-leaf service, LexisNexis at [4100]).

[33] See The Laws of Australia (loose-leaf service, Westlaw AU) at [6.1.540]. There is no suggestion of a true innuendo meaning in the present case.

(c) The ordinary reasonable member of the audience is a person of fair, average intelligence who is neither perverse nor morbid nor suspicious of mind nor avid of scandal[34];

(d) The ordinary reasonable member of the audience "does not live in an ivory tower … So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs"[35];

(e) The publication must be considered as a whole[36];

(f) The manner and occasion of publication is relevant. With material published in a transient form (including orally), there is not (usually) an opportunity for reconsideration and cross-checking[37];

(g) It is sufficient that the alleged meaning is conveyed as a matter of broad impression. It is not necessary to show that the meaning is one which would result from a detailed analysis of the publication[38].

[45] These propositions, it seems to me, are of assistance in determining the meaning to be attributed to the defendant's statements. An imputation is any act or condition asserted of, or attributed to, a person[39]. The determination of the meaning of a statement is a necessary step in identifying any imputation, and determining whether any imputation is defamatory of the plaintiff. However, I take the ultimate factual questions to be identified by the following statements: "what is the meaning that the words convey(ed) to the ordinary man"[40]; and whether "reasonable persons would understand the words complained of in a defamatory sense"[41].

[46] The plaintiff's submissions relied upon the following statement from *Lewis*[42], in the context of discussing the broad impression conveyed by a publication:

> "A man who wants to talk at large about smoke may have to pick his words very carefully if he wants to exclude the suggestion that there is also a fire; but it can be done … (the words) can convey a meaning of suspicion short of guilt; but loose talk about suspicion can very easily convey the impression that it is a suspicion that is well founded."

[47] To that statement might be added the following statement from *Lewis*[43]

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34 See *Palmer* at [20].
35 *Lewis v Daily Telegraph Ltd* [1964] AC 234, at 258 (*Lewis*).
36 The Laws of Australia at [6.1.560].
37 Australian Defamation Law and Practice at [41.30].
38 Australian Defamation Law and Practice at [4100]-[4110].
39 See *Hall-Gibbs Mercantile Agency Ltd v Dun* (1910) 12 CLR 84 at 91 per Griffith CJ; and see *Sungravure Pty Ltd v Middle East Airlines* (1975) 134 CLR 1, at 10.
40 *Lewis* at 277; cited in *Favell* at [11].
41 *Jones v Skelton* [1964] NSWR 485, at 491; [1963] 1 WLR 1362, cited in *Favell v Queensland Newspapers* (2005) 79 ALJR 1716 (*Favell*) at [9].
42 *Lewis* at 285.
43 *Lewis* at 284.

> "When an imputation is made in a general way, the ordinary man is not likely to distinguish between hints and allegations, suspicion and guilt. It is the broad effect that counts …"

[48] However, his Lordship continued[44]

> "But if on the other hand the distinction (between suspicion and guilt) clearly emerges from the words used it cannot be ignored."

[49] The statements made in *Lewis* were made in the context of determining whether the published words were capable of bearing certain defamatory meanings[45]. Nevertheless, they seem to me to be relevant, in the way previously mentioned, to the question whether, as a matter of fact, the publications made by the defendant bear one or more of the alleged imputations.

[50] The first contested imputation attributed to what the defendant said at the media conference is that the plaintiff had committed a serious offence of misleading a committee of Parliament. For the defendant it was submitted that the publication did not amount to a statement to that effect. It was no more than a statement that someone might make such an allegation, or might have the plaintiff charged with that offence. Reliance was placed on a statement made late in the media conference in which the defendant said that he had "implored" the plaintiff to make the disclosure "so that he couldn't be accused of having… breached … serious parliamentary rules and misled the Committee, and, therefore, the House, putting himself in serious jeopardy."[46]

[51] For the plaintiff it was submitted that words relating to the plaintiff leaving himself open for a charge of misleading a Committee of Parliament[47], in effect took colour from other parts of the publication. Reference was made to the defendant's statement that he had lost trust and did not believe in the fidelity of the plaintiff; the defendant's statement that the tabled lobbyists' register was grossly inaccurate and misleading; that it was inappropriate for Mr Flegg "to be lobbying his father"; that the public had to know that what was provided to Parliament, or a Committee "is accurate, true and correct and is not doctored, and not held back in terms of full disclosure and accountability …"; when asked whether he believed the plaintiff had misled the Committee, the defendant referred to "two ways" and went on to say "not in terms of oral testimony"; that the plaintiff was ultimately responsible for having provided the Committee with material "which is grossly inaccurate and which is not full and accountable"; and, when asked whether the plaintiff was aware that the document tabled at the estimates hearing was wrong, he responded "… he must have been, because, as you can see from the documentation I've provided, he's had various email contacts with his son. So either he forgot that, or he didn't." The reference to documentation in the last quoted passage was to Jonathon's list.

[52] A statement that a person is "open for a charge", looked at in isolation, is ambiguous. It may amount to an assertion that there are grounds for bringing the charge. It may,

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[44] *Lewis* at 284.
[45] *Lewis* at 283.
[46] Submissions on behalf of the Defendant, Pleading and Legal Matters dated 24 November 2012 (*2 defendant*) , at [14]-[16]; TMC, p 13.
[47] TMC, pp 4-5.

however, amount to an assertion that the person is guilty of the charge. In my view, the context supports the latter view of the defendant's statement.

[53] It is convenient to refer first to the defendant's response to the question asked of him a little later, whether the plaintiff was aware that the document that was tabled at the Estimates Committee was wrong. The response was that "he must have been". That was followed by a reference to the documentation showing "various email contacts with his son", matters of which the plaintiff inevitably had personal knowledge. The impression which, in my view, the answer gave was that the plaintiff was aware the tabled lobbyists' register was wrong. The statement that the plaintiff "either … forgot that, or he didn't", with reference to the extent of his contacts with Mr Flegg, is, viewed in isolation, itself ambiguous. However the context makes clear which of the alternatives the defendant was propounding.

[54] Given that the document recorded contacts between Mr Flegg and the plaintiff, that conclusion is reinforced by a description of the document as being "grossly inaccurate". It is also confirmed by the defendant's response to the earlier question whether he believed that the plaintiff had misled the Estimates Committee, his response referring to "two ways", but only excluding one.

[55] In addition to that, the defendant said that he called on the plaintiff "to come clean"[48]. Statements to this effect suggest that the plaintiff had something to hide. The defendant's account of the plaintiff's response, which was to attack the defendant, carries with it some suggestion of an unwillingness by the plaintiff to acknowledge he had done the wrong thing. Additional colour is given by the defendant's statement that he was "trying to make change to wrongdoing…from within"[49]. Beyond that, the defendant's statements conveyed a general tenor of moral reprobation of the plaintiff, consistent with the allegation that the plaintiff had committed the offence of misleading Parliament.

[56] I am conscious that the defendant's publication on this occasion was oral. In that sense it was transient. However, it occurred at a media conference, in a context where it was likely that those attending would have some experience in listening carefully to and making notes of what was said, and were likely to have done so. They also had the benefit of a copy of Jonathon's list, which was provided in advance, and to which the defendant made reference from time to time. In those circumstances it seems to me some additional weight can be given to the balance of the publication beyond what would be the case if the publication had been made orally to the general community.

[57] Accordingly I find that the statements made by the defendant at the media conference carried the imputation that the plaintiff had committed a serious offence of misleading a Committee of the Parliament.

[58] The other contested imputation relating to the media conference was that the plaintiff had provided an important document to a Committee of Parliament that was grossly inaccurate, untrue, incorrect and had been doctored. The defendant's submissions make

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[48] TMC, p 5, four occasions; p 13, two occasions, where there was also a reference to making "a clean breast of this stuff".

[49] TMC, p 5.

clear that the issue is the alleged imputation that the document had been "doctored"[50]. The submission relies upon the words used, which were that the public "have to know that what is provided is accurate, true and correct, and not doctored".

[59] No explanation was given for the reference to a "doctored" document in this context. It is apparent from the transcript of the defendant's statements at the media conference that the defendant was alleging that the plaintiff had tabled at the hearing of the Estimates Committee a lobbyists' register which was grossly inaccurate and misleading, failing to record contact between Mr Flegg, on the one hand, and the plaintiff and the plaintiff's office on the other. In this passage, the defendant was explaining why he was holding a media conference to make statements critical of the plaintiff. As a matter of impression, it seems to me that the plaintiff's statement conveyed the view that the lobbyists' register had been "doctored".

[60] Accordingly, I conclude that the defendant's statements on this occasion conveyed the imputation that the plaintiff had provided an important document to a Committee of Parliament that was grossly inaccurate, untrue, incorrect and had been doctored.

[61] The first of the disputed imputations relating to the radio interview is an imputation that the plaintiff had refused to be up front and honest and to correct the record about misleading the Parliament and the Committee. The passage relied upon by the plaintiff is as follows[51]:

> "As you say, I've been around a long time and I think that that's the only way to play these things, when something has gone wrong like that – for whatever reason – is to be upfront and honest about it and to correct the record.
>
> He indicated that he didn't like that idea. In fact, he – he bagged me and criticised me …".

[62] The defendant submitted that the words used do not convey a refusal.

[63] In my view, the defendant's statements in the course of the radio interview were likely to convey to the ordinary reasonable listener that, in spite of being asked by the defendant to correct the record, the plaintiff refused to do so. That is apparent from the statement about the plaintiff's attitude to the request, and his attitude to the defendant, coupled with the absence of any suggestion that the plaintiff had in fact corrected the record, or was prepared to do so.

[64] The next disputed imputation relating to the radio interview is that the plaintiff had refused to correct the material provided to the Parliament and the Committee. This imputation is similar in content to that just discussed. The defendant's submissions are to the same effect. I reach the same conclusion.

[65] The next disputed imputation relating to the radio interview is that the plaintiff had allowed himself to be lobbied by his son in contravention of the contractual arrangements

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[50] 2 defendant at [18].

[51] Plaintiff's written submissions dated 26 November 2014 (*2 Plaintiff)*, at [237](b)(i)

between his son and Rowland. The plaintiff's submissions identify the basis for this as being the following passage[52]:

> "I don't know exactly what the content of the emails was, but I do know, as I think was also implied in the 3 o'clock news, through the Rowland company, that I think they're pretty convinced that the young gentleman concerned has been doing lobbying with his father and for companies which he wasn't supposed to do under his contractual arrangements with Rowland."

[66] For the defendant it was submitted that the passage makes no reference to the plaintiff, but speaks only of matters between Mr Flegg and Rowland. This passage followed a statement by the defendant that the lobbyists' register presented to the Committee, and thus to Parliament, was "egregiously wrong and grossly in error". The defendant sought to justify the assertion about the register, by reference to the view of Rowland that Mr Flegg had been engaged in lobbying "with his father", notwithstanding the contractual arrangements between Mr Flegg and Rowland. By implication the statement related to the plaintiff's conduct, as Mr Flegg's father and as the Minister, in permitting this to occur. Accordingly, I consider that this imputation is made out.

[67] The final disputed imputation from the radio interview is that the plaintiff was a person who ought to be dismissed as a Minister of the Crown. The plaintiff's submissions relied upon the following passage[53]:

> "Gary: Does Bruce Flegg survive this?
>
> Hallett: … the record was expunged, which is wrong in itself, you know. And, I mean, that can be – you know, that can – the people who expunged that record, need to be held to account as well. And I call on the Premier – he said today in Parliament that people who get things wrong have got to be brought to account in the LNP."

[68] For the defendant it was submitted that he did not express an opinion on the question whether the plaintiff should be dismissed as a Minister in this passage.

[69] The question and answer occurred not long after the allegation that the lobbyists' register which the plaintiff presented to the Estimates Committee was "egregiously wrong and grossly in error". The defendant's "call on the Premier", coupled with a reference to the Premier's statement that "people who get things wrong have got to be brought to account", in my view, demonstrate that the imputation is made out.

Were the publications defamatory?

[70] Of the imputations which I have found, the defendant submitted that those in paragraphs 18(g) and (h), and paragraph 26(a) of the Statement of Claim were not defamatory.

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[52] 2 Plaintiff, at para 237(d)(i).
[53] 2 Plaintiff, at para 237(e)(i).

[71] At common law, matter is defamatory of a person if it is likely to injure the reputation of that person by exposing the person to hatred, contempt or ridicule; or tends to lower the person in the estimation of members of the community of fair average intelligence; or if it tends to make people avoid the person[54].

[72] For the defendant, it was submitted that the imputations alleged in paragraphs 18(g) and (h) and in paragraph 26(a) of the Statement of Claim were not defamatory in that they did not convey any suggestion that the plaintiff was aware of the deficiencies in the register when he tabled it. That submission suggests that the admitted imputation that the plaintiff was aware the lobbyists' register was wrong related to some time other than when it was tabled. Why that should be so was not demonstrated. It appears to find some support in the defendant's statement that the plaintiff's oral testimony was not misleading. That however is undermined by the defendant's statement that the plaintiff "must have been" aware that the lobbyists' register tabled at the Committee hearing was wrong, on the basis that it was the plaintiff himself who had had email contacts with his son. In the context of the rest of the conference, particularly the references to the need for the plaintiff to "come clean" and related matters, and notwithstanding the statement about the plaintiff's oral testimony, it seems to me that the statement that the plaintiff "must have been aware" of the deficiencies in the register conveyed the impression he was aware of them when he tabled it. In any event, I do not accept the unstated premise that the imputations alleged in paragraphs 18(g) and 26(a) would only be defamatory if the plaintiff were aware that the register was inaccurate. It seems to me that it would damage the reputation of a person who is a Minister to say that that person tabled at a committee hearing an important document which was grossly inaccurate even if that person was unaware that that was so, particularly when the Minister was ultimately responsible for the document, and the errors related to contact with the Minister personally. Even if the allegation in paragraph 18(h) that the plaintiff was aware that the register was wrong related to his subsequent state of mind, that would be defamatory of the plaintiff, given that defendant elsewhere stated that the record had not been corrected.

[73] Accordingly, by reference to the imputations which I have found, I conclude that each of the relevant publications contained defamatory matter.

Defences

[74] It is convenient at this point to record something of the progress of the action. At an early stage, the defendant was represented by solicitors, at a time when he delivered his Amended Defence. He was then unrepresented for a substantial period of time. Not long before the commencement of the trial, he came to be represented by another firm of solicitors.

[75] The Amended Defence alleged defences of privilege at common law and by reference to s 30 of the *Defamation Act*. Limited allegations were made in support of these defences[55]. After the close of the plaintiff's case, the defendant was given leave to amend this

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[54] *The Laws of Australia* at [6.1.630]. There is some consistency between these tests and the test relied upon by the defendant, said to be based on *Sungravure Pty Ltd v Middle East Airlines* (1975) 134 CLR 1, 10; but as I read the passage referred to, it primarily explains the term "imputation", in the context of a statute which defines when an imputation is defamatory.

[55] See paras 17 and 19 of the Amended Defence.

Defence, resulting in his pleading further facts in support of each of these defences. It was common ground that in respect of each of these defences, a question of reasonableness was involved. The defendant pleaded a number of facts said to establish that his publications were made reasonably. Many of these were denied, and some not admitted.

[76] Some additional matters were alleged by the plaintiff in support of the denial of the reasonableness of the defendant's conduct in publishing the defamatory matter. In addition, the plaintiff alleged that the defendant was actuated by malice in making the publications. The plaintiff also pleaded, in response to these defences, that the defendant did not have reasonable grounds for believing that each of the imputations was true; the defendant did not take proper steps to verify the accuracy of the imputations, by obtaining and examining a copy of the emails in Jonathon's list; the defendant did not seek or publish a response from the plaintiff in respect of the imputations; and the defendant did not have information from which each of the imputations follows[56]. The plaintiff also alleged that the matters relied upon by the defendant did not constitute a basis for saying that the publications were made reasonably[57].

[77] One of the matters alleged in support of the defendant's allegation that the publications were reasonable, was an allegation that he believed the lobbyists' register was inaccurate in relation to contact between Mr Flegg and the plaintiff or persons employed in the plaintiff's Ministerial Office. In turn, in support of that allegation, the defendant alleged a belief as to what was required to be recorded in that register; and a belief that certain email contacts involving Mr Flegg[58] were required to be registered. There were then allegations that Mr Stephen told the defendant on the evening of 31 October 2012 that there were approximately six or seven contacts between the plaintiff's staff and Mr Flegg, rather than the two contacts recorded in the register, which the plaintiff appeared shortly afterwards to confirm; that in particular, the defendant formed a belief that emails in Jonathon's list under the subject heading "Viking Rentals" were required to be disclosed; that on the following day, the defendant said to Mr Stephen that the number of undisclosed contacts was more like 47; that shortly afterwards (again on 1 November 2012) the defendant had a conversation with Mr Flegg in the course of which Mr Flegg advised the defendant of the nature and subject matter of a number of the email contacts which appeared in Jonathon's list; and that on 2 November 2012, in a car journey (from the plaintiff's home to a restaurant at Spring Hill) the defendant told the plaintiff there were 47 contacts disclosed in Jonathon's list, and he urged the plaintiff to make full disclosure of them, the plaintiff not denying the number of contacts, but resisting the idea of disclosure. In addition to the resistance to disclosure already mentioned, the Further Amended Defence alleged that Mr Stephen, in the conversation on the evening of 1 November 2012, downgraded the importance of the non-disclosure, and discouraged the defendant's communications with Mr Anderson. The defendant alleged that his reading of Jonathon's list on 31 October identified a large number of emails which, from their description, appeared very likely to involve contacts which required disclosure in the lobbyists' register. Generally these allegations were put in issue.

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[56] See paras 4 and 6 of the Reply.
[57] Reply, at para 5A(a)(i) and 7A.
[58] Exhibits 3, 4 and 6.

The lobbyists' register

[78] At the heart of the defendant's statements relating to the plaintiff is the allegation that the lobbyists' register was misleading. It is apparent that the defendant was alleging the lobbyists' register was misleading by omission. Such an allegation carries with it an implied assertion that there was an identifiable standard for determining what is to be included in such a document, which was not met; such as that the plaintiff had an obligation to record certain things, but failed to do so.

[79] In this context, the submissions for the defendant referred to the *Public Records Act* 2002 (Qld) (*Records Act*). Under s 7(1)(a), a public authority must make and keep full and accurate records of its activities. The definition of "public authority" includes a Minister[59]. It was submitted that the lobbyists' register was one way of ensuring "that the full and accurate aspect of the obligation" was complied with.

[80] Section 6 of the *Records Act* defines a public record to include a Ministerial record. The expression "Ministerial record" is itself defined[60] to mean a record created or received by a Minister in the course of carrying out the Minister's portfolio responsibilities; but excludes records relating to the Minister's personal or party political activities, or a record the Minister holds in the Minister's capacity as a member of the Legislative Assembly. Although s 7 states the obligation of a public authority to make and keep records of its activities without reference to the expression "public record", the section itself is headed "Making and keeping of public records"[61]. It is apparent from this heading, and the fact that the obligation attaches to the activities of the public authority that the obligation is to keep records which come within the definition of a "Ministerial record". Thus a Minister has an obligation to make and keep a record of the Minister's activities in the course of carrying out portfolio responsibilities. In the context just discussed, the obligation would seem to be limited to activities conducted by a person in the person's capacity as a Minister. The Act does not itself specify that any particular form of record is to be created.

[81] It seems unlikely that s 7 should be read as creating an obligation for a Minister to cause a record to be made of a relevant activity of the Minister if such a record is provided to the Minister or his staff by someone else. Otherwise, it creates an obligation to create such a record. No doubt, a record created by a Minister of ministerial activities is required to be accurate. The scope of the obligation to create a "full" record is unclear. For example, it is unlikely to require a complete recording of any contact with any member of departmental staff. It is also unlikely that the section requires the creation of a record of a contact made by a person with a member of a Minister's staff, seeking an appointment with the Minister. That is because the mere making of an appointment is not itself an activity of a Minister in the course of the carrying out of the Minister's portfolio responsibilities.

[82] There was no evidence about the genesis of the lobbyists' register. The question asked of the plaintiff at the estimates hearing would suggest that it was a general, and perhaps

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59 See Schedule 2 of the *Records Act*.
60 See Schedule 2 of the *Records Act*.
61 See s 14 of the *Acts Interpretation Act* 1954 (Qld).

universal, practice for Ministers to maintain such a document; but the origin of the practice was unexplained. It seems unlikely to be directly attributable to the *Records Act*. That Act would require a system of recording all meetings associated with the carrying out of portfolio responsibilities; including relevant events which occurred at such meetings; whether or not lobbying activity was involved. Assuming recognition of the obligation, it is likely that a comprehensives system of recording such events would be maintained, perhaps by diary entry and/or some form of note. It seems to me, therefore, that this Act itself does not explain why the lobbyists' register was kept; or identify what it should have contained. At least, the defendant, on whom it seems to me the onus falls, has not demonstrated that the accuracy of the lobbyists' register is to be judged by reference to the *Records Act*; though, once the register was created, that Act would require its retention.

[83] Under s 7(1)(b) of the *Records Act*, a public authority must have regard to any relevant policy, standards and guidelines made by the archivist about the making and keeping of public records. The defendant's submissions referred to the Public Records Brief[62] (***Brief***), as being a relevant policy, standard or guideline made by the archivist about the making and keeping of public records. It was submitted that the Brief indicated the need to keep records of decisions and actions and additional contextual information, where necessary, to ensure the completeness of the record. This provided a legal background against which the accuracy of the lobbyists' register was to be considered.

[84] The Brief, after attempting to describe lobbying activity in terms which reflect provisions of the *Integrity Act*, points out the wide scope of the definition of "public record". The expression extends "(i)n the context of lobbyist interactions with government" to "information in any format that provides evidence of contact that has occurred between a government representative and a lobbyist". It notes the obligation to create and maintain records of decisions and actions, relating to "lobbyist interactions". The Brief is directed not only to contact with lobbyists who are required to be registered under the *Integrity Act*, but also to any individual who approaches or corresponds with a Government representative in an effort to influence State decision-making. The Brief also provides guidance about the period for which such records are to be retained; and about the destruction of original paper records where a digitised or scanned copy has been made.

[85] There is no doubt that Rowland was an entity that satisfied the definition of a lobbyist who is required to be registered in the lobbyists' register maintained by the Integrity Commissioner under the *Integrity Act*, as was Mr Flegg[63]. The Brief provided a reminder of the obligation created by the *Records Act* for the plaintiff to keep a record produced in any format, providing evidence of contact with such a lobbyist. It also provided a reminder of the need to create records of decisions and actions. In terms, it is not the source of an obligation to make a record of any contact of any kind between a Minister, or a member of the Minister's staff, on the one hand, and a registered lobbyist. While the Brief identified an obligation to create a record of decisions and actions, it did so with respect to any lobbyist interaction, whether or not the lobbyist was required to be registered under the *Integrity Act*. It did not specify any particular form for the creation of such a record.

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62 Exhibit 1 Tab 2.

63 See s 49 of the *Integrity Act*.

[86] While the lobbyists' register maintained for the plaintiff's Ministerial office provided a means, in part, for complying with the obligation to create a record of a decision or action associated with an interaction by a lobbyist, it is difficult to see how the accuracy of the register might be judged by reference to the Brief.

[87] The submissions for the plaintiff in this context referred to the provisions of the *Integrity Act*, and in particular the definition of a lobbying activity[64]. Section 42 is as follows:

> "**42 Meaning of *lobbying activity* and *contact***
>
> (1) ***Lobbying activity*** is –
>
> (a) contact with a government representative in an effort to influence State or local government decision-making, including –
>
> (i) the making or amendment of legislation; and
>
> (ii) the development or amendment of a government policy or program; and
>
> (iii) the awarding of a government contract or grant; and
>
> (iv) the allocation of funding; and
>
> (v) the making of a decision about planning or giving of a development approval under the *Sustainable Planning Act 2009*; or
>
> (b) contact with an Opposition representative in an effort to influence the Opposition's decision-making – including –
>
> (i) the making or amendment of legislation; and
>
> (ii) the development or amendment of a policy or program of the Opposition; and
>
> (iii) the Opposition's position or view in relation to State or local government decision-making, including, for example, the matters mentioned in paragraph (a)(i) to (v).
>
> (2) However, the following contact is not a lobbying activity –
>
> (a) contact with a committee of the Legislative Assembly or a local government;
>
> (b) contact with a member of the Legislative Assembly, or a councillor, in his or her capacity as a local representative on a constituency matter;
>
> (c) contact in respect to a call for submissions;
>
> (d) petitions or contact of a grassroots campaign nature in an attempt to influence a government policy or decision;
>
> (e) contact in response to a request for tender;
>
> (f) statements made in a public forum;

[64] See s 42 of the *Integrity Act*.

(g) responses to requests by government representatives for information;

(h) incidental meetings beyond the control of a government representative or Opposition representative;

Example –

A Minister speaks at a conference and has an unscheduled discussion with a lobbyist who is a conference participant.

(i) contact on non-business issues, including, for example, issues not relating to a client of the lobbyist or the lobbyists' sector;

(j) contact only for the purpose of making a statutory application

(3) ***Contact*** includes telephone contact, email contact, written mail contact and face-to-face meetings.

(4) In this section –

statutory application means an application under an Act that is considered and decided by a government representative under that Act.

Example –

an application for a licence, permit or other authority."

[88] For the plaintiff it was submitted that s 42 of the *Integrity Act* was relevant to determining what was required to be recorded in the lobbyists' register[65]. The correctness of that submission depends upon the purpose for which the lobbyists' register was created.

[89] In my view, the submissions of the parties did not identify some statutory or similar source which required the maintenance of the lobbyists' register, and set out what was to be recorded in it. To determine the accuracy of the lobbyists' register, it is necessary to consider what it purports to be. On its face, it is a register limited to the identification of contact between registered lobbyists, and a Ministerial officer; and the purpose and outcome of such contact. It is apparent from the document that it is only intended to do so when the contact is made by such a lobbyist on behalf of a client. Given the context provided by the *Integrity Act*, which is the source of the registration requirement, it seems to me that it was intended only to record contacts which satisfy the definition of "lobbying activity" in s 42 of the *Integrity Act*. Since such contacts might not always lead to any result, its scope may arguably be broader than the obligation referred to in the Brief to create a record of decisions and actions, related to lobbyist interactions.

[90] It would follow that the lobbyists' register was inaccurate if it failed to record contact between a registered lobbyist and the plaintiff or a Ministerial officer, which was a lobbying activity. There is nothing in the document which demonstrates it was intended to record the identity of every individual who represented a registered lobbyist company, and who made the contact.

The credibility of some of the witnesses

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[65] 2 Plaintiff, at paras 15 and 16.

[91] For the defendant, it was submitted that the plaintiff was very reluctant to accept any proposition not favourable to him. The plaintiff's view that the documents which became exhibit 8 were not required to be registered[66] was cited as an example. Reference was also made to the entry in the lobbyists' register for 1 May 2012, relating to a meeting arranged by Mr Flegg, where the name of the registered lobbyist is simply recorded as "Rowland Pty Ltd", the plaintiff describing the entry as having been "reasonably done"[67]. A third matter related to whether the contact evidenced by exhibit 6 should have been registered.

[92] Exhibit 8 recorded that Mr Flegg had forwarded to the plaintiff a letter from Clayton Utz Solicitors recommending legislative changes, because of difficulties that arose when landowners entered into agreements with tenants or purchasers to carry out building work. The plaintiff's evidence was that he declined to meet with the authors of the letter, and recommended they make a submission to a Parliamentary inquiry. When asked whether he accepted that the contact should have been recorded, his ultimate answer was "I can't record something I haven't looked at and I don't know what the contents of it are"[68].

[93] Assuming, for the purposes of considering the submission, that the contact should have been recorded by someone, the plaintiff's response might be regarded as not being a direct answer to the question, together with an exculpatory statement about his own conduct. It seems to me to provide very limited assistance on the question whether the plaintiff's evidence generally is to be believed.

[94] The submission based on the cross-examination about the entry in the lobbyists' register for 1 May 2012 conflated questions about the accuracy of the register, with the accuracy of the response given to Mr Hurst on 31 October 2012, though the cross-examination appeared to be directed only to the accuracy of the register. I am not able to draw anything from the plaintiff's answers in this cross-examination, which assists in assessing his credit.

[95] Exhibit 6 was an email from Mr Flegg to the plaintiff, expressing a favourable view of a potential appointee to a position as Deputy Director General, and attaching a copy of his curriculum vitae. In cross-examination, the plaintiff expressed the view that this contact was not required to be recorded in the lobbyists' register. When asked if he thought it was appropriate for Mr Flegg to be sending the email, he stated that he had no involvement in the appointment of people to such positions. In response to further questioning he said, "I don't believe that's a recommendation to me at all".

[96] The evidence does not identify the context in which Mr Flegg sent the email of 30 May 2012. In those circumstances, the plaintiff's view about whether the email constituted a recommendation is not inevitably wrong, particularly in the light of his evidence that he played no role in such appointments. The same is true of his evidence about whether the contact should have been recorded in the lobbyists' register. In my view, this evidence is of no assistance in determining the credibility of the plaintiff.

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66 See T2-25/29-38.
67 T1-79/44 to 1-80/10.
68 T2-24/8-9.

[97] It is self-evident that the plaintiff, like the defendant, has a significant interest in the outcome of these proceedings.

[98] A number of submissions were made on behalf of the plaintiff, about the defendant's credit. It is convenient to commence with some matters related to the media conference.

[99] In the course of the media conference, the defendant spoke about matters which occurred subsequent to the receipt of the email from Mr Hurst on 31 October 2012. The defendant said that he sought a response to the email (which enquired about the extent of contact between Mr Flegg and the plaintiff or the plaintiff's office), both from the plaintiff and from Mr Stephen; and received a response "Look, nothing to worry about here. No, that's it."[69] At the media conference, he also said he made an inquiry whether the register which had been tabled at the Estimates Committee hearing was correct, an inquiry which he made of Mr Stephen before responding to Mr Hurst, and was told "Yep, it's right"[70]. It was only after the response was sent to Mr Hurst that the defendant was told that there may have been six or seven contacts with Mr Flegg[71].

[100] In the defendant's oral evidence-in-chief he said that shortly after receiving Mr Hurst's email, he contacted Mr Stephen by telephone, and was told "There could've been six or seven different emails and contacts"[72]. The defendant gave evidence that Mr Stephen subsequently came over to the defendant's office "because of the seriousness of the issues that we were confronting", and the discussion with him included reference to the six or seven contacts previously mentioned, they being contacts involving Mr Flegg as a registered lobbyist, which the defendant described as a point of importance. The defendant's evidence was that he recommended "full openness and disclosure", Mr Stephen's reaction being that the defendant's concerns were "somewhat overblown"; and according to the defendant Mr Stephen put pressure on the defendant "to tidy this up and ensure that we don't have any trouble from it". The defendant gave evidence that he then stressed the seriousness of the matter to Mr Stephen, and said he would have to discuss it with Mr Anderson[73]. On the defendant's evidence, these events occurred before he returned to his home at about 8 o'clock that evening[74].

[101] When cross-examined about his statement at the media conference that Mr Stephen, with reference to the lobbyists' register, said, "Yep, it's right", the defendant said that Mr Stephen told him that "it is accurate to the extent that we were going to say at the time"[75]. When it was put to him that his answer at the press conference was a lie, he was prepared to admit that it did not record what happened but said he "may have been confused about that"[76].

[102] It seems to me difficult to accept that, if in truth the conversations with Mr Stephen referred to in the defendant's evidence-in-chief occurred, then the answer in the press

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[69] TMC p 2.
[70] TMC, at p 3.
[71] TMC, at p 3.
[72] T6-35/43-44.
[73] T6-38 to 6-39.
[74] T6-40/15.
[75] T7-31/45.
[76] T7-32/37.

conference was the product of confusion. On the defendant's evidence, there were two conversations with Mr Stephen on 31 October 2012, dealing with matters of importance in the context of the inquiries made by Mr Hurst, which the defendant regarded as concerning. The disparity between the defendant's evidence of his conversations with Mr Stephen, and his answer at the media conference, is marked. Only a short time had elapsed between these conversations and the press conference. I am not prepared to accept that the answer which the defendant gave at the press conference was a product of confusion. It involved more than a single answer to a question which might have taken the defendant by surprise. The difference between the defendant's evidence and his statements at the media conference about this matter gives rise to a serious concern about his credit. Either what the defendant said at the media conference was untrue; or his evidence in chief was wrong. In the latter case, it is unlikely that the defendant was simply mistaken.

[103] In the media conference, the defendant said that it was after the response was sent to Mr Hurst (on the evening of 31 October 2012) that Mr Stephen told him that there were some six or seven relevant contacts involving Mr Flegg[77]. In the cross-examination, it was suggested that the defendant's evidence was untruthful, the change in the sequence being intended to suggest that the plaintiff knew before the response to Mr Hurst, that it was untrue[78]. While the difference between the defendant's statement at the media conference, and his evidence, is some further reason for concern about the defendant's credit, there does not seem to me to be a sufficient basis for finding the motive suggested in the cross-examination.

[104] After the meeting with the plaintiff on 12 November 2012, at which, on the defendant's evidence, the plaintiff had told the defendant that he had lost confidence in him and that he would have to leave[79], the defendant gave evidence that he went to see Mr Anderson. In the course of that conversation he told Mr Anderson that he wanted "to discuss … the question of redeployment", there being a provision to this effect in his contract[80]. Subsequently, Mr Anderson telephoned him and told him, "There's no opportunity for redeployment. There's no vacancies …"[81]. The defendant responded by saying "… losing my position after 20 years of, you know, faithful and loyal service was something that I didn't think was particularly fair"[82].

[105] In the course of the media conference the defendant was asked whether he had said that he would not "go public with this if the Government offered (him) another job…"[83], which he denied. A short time after, he was asked whether he had any discussions with Mr Anderson "about wanting to keep a job in the Government." The defendant replied, "No, I didn't have any discussions."[84]

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77 TMC p 3.
78 T7-33 to 7-34.
79 T6-73/25.
80 T6-73/40.
81 T6-74/35.
82 T6-74/40.
83 TMC p 4.
84 TMC p 6.

[106] When cross-examined about this matter, he was asked whether his answer was "a straight-out lie", to which he initially said "That is not correct"; and then "It is a characterisation by me that I'm not proud of"; before ultimately accepting that his statement was a lie[85].

[107] A truthful answer on this topic in the press conference was likely to have been seen by the defendant as damaging to his credibility. His untruthful answer, in my view, does not reflect well on his credit generally.

[108] In addition, though not specifically mentioned in the plaintiff's submissions, there is a difficulty arising from the fact that the response to Mr Hurst stated that the plaintiff requested his Chief of Staff to ensure that all ministerial staff had no professional contacts with Mr Flegg. At the media conference the defendant said that that element of his response to Mr Hurst was a lie[86]. It follows that either the response to Mr Hurst, in this respect, contained a lie; or his statement at the media conference was itself untrue. On either view, this matter adds to the difficulties relating to the defendant's credit.

[109] The defendant gave evidence that from the time he first took up his position as the plaintiff's senior media adviser in April 2012, he was conscious of the need to record contacts between the plaintiff and his staff on the one hand, and Mr Flegg. Because of the relationship between the plaintiff and Mr Flegg, he considered that "there needed to be a very serious risk-averse approach taken"[87] which required "definite recording" involving contact with "the registered lobbyist", Mr Flegg[88]. In April and May 2012, he saw the communications which became exhibits 3, 4 and 6, at about the time they were sent. He was concerned that they should be entered into the lobbyists' register. That did not occur.

[110] The defendant also gave evidence that when he read Mr Hurst's email and learnt that only two contacts involving Mr Flegg appeared in the register, he was surprised[89]. That evening, the defendant spoke with the plaintiff. On the defendant's evidence, he said to the plaintiff there were six or seven contacts involving Mr Flegg which "were unconfirmed at this stage"[90], a point which the plaintiff "seemed to latch on to"[91], which the plaintiff said "can virtually make it go away"[92]. The defendant said that he responded by saying that because "things were unconfirmed" there was "some wriggle room"; and because these contacts were unconfirmed, a statement could be made that the lobbyists' register was "an accurate reflection of what happened"[93]; the "key" being that the contacts were "unverified, unconfirmed"[94].

[111] There is a serious mismatch between the plaintiff's evidence of his state of mind relating to exhibits 3, 4 and 6, and his surprise when he read Mr Hurst's email, on the one hand;

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[85] T7-37.
[86] TMC p 3.
[87] T6-26/42-43.
[88] T6-27/5.
[89] T6-34.
[90] T6-41/30.
[91] T6-41/43.
[92] T6-42/2
[93] T6-42/10-15
[94] T6-42/20.

and on the other, his justification given to the plaintiff for sending the response to Mr Hurst on the same day.

[112] Beyond that, it may be observed that the response to Mr Hurst was undoubtedly intended to convey that the lobbyists' register accurately recorded the contact involving Mr Flegg. If the defendant's evidence of his state of mind about exhibits 3, 4 and 6, and his surprise that Mr Flegg's name only appeared twice in the lobbyists' register, were to be accepted, that aspect of the response could also not be regarded as honest.

[113] It is unnecessary at this point to give further consideration to the remaining submissions relating to the defendant's credit. Some other matters relating to his credit are discussed later in these reasons. In my view, the matters which I have discussed are sufficient to lead me to approach the defendant's evidence with considerable scepticism, on matters supporting his case.

[114] No separate submission was made about the credibility of Mr Flegg. Nevertheless, in considering his evidence, I am conscious of his relationship with the plaintiff. I note, however, that when he gave evidence he did not display any animus against the defendant.

Factual matters relied upon for privilege defences

[115] Exhibit 3 was an email from Mr Flegg to the plaintiff, later sent by the plaintiff to Mr Stephen and the defendant. It was dated 12 April 2012, shortly after the election. It identified people who had apparently been appointed to the position of Chief of Staff for Ministers in the newly formed Government; with some additional brief information about a number of them. The defendant gave evidence that he was concerned by the fact that Mr Flegg had contacted the plaintiff, rather than the content of the email; and made reference to what he described as his "risk averse" approach to be taken in the circumstances[95]. The Defence alleged that the defendant was aware of this email and believed, at the time he became aware of the email (since he was a recipient, no doubt on about 12 April 2012), that it was a contact which was required to be recorded in the lobbyists' register; and in early June 2012, he expressed that view to the plaintiff and Mr Flegg. In the defendant's submissions, it was contended that the email was "part of an effort to influence Government decision-making"[96], when taken together with subsequent contacts. It was one of the matters relied upon for the defendant's contention that he had reasonable grounds for believing that the imputations were true.

[116] There are a series of difficulties with the defendant's position. There is nothing in the email which would suggest it was a contact made in an effort to influence Government decision-making. The defendant's evidence did not identify any basis for thinking that. His expressed concern was unrelated to any effort to influence Government decision-making. A suggestion that this email demonstrated the lobbyists' register to be inaccurate is inconsistent with the defendant's statements to the plaintiff that, as at 31 October 2012, the existence of contacts which should have been, but were not, recorded in the lobbyists' register, was unconfirmed. Moreover, the defendant made no reference to it in the three publications.

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[95] T6-27 to 6-28.

[96] Submissions of the Defendant dated 21 November 2014 (*1 Defendant)*, at [31].

[117] The defendant gave evidence that he discussed exhibit 3 (as well as exhibits 4 and 6) with the plaintiff, and also with Mr Flegg, in June 2012. His evidence-in-chief suggested that that occurred at Dr Flegg's home[97]. His concern was said to reflect his "risk averse" approach, rather than being directly based on an obligation to record these contacts in the lobbyists' register[98].When cross-examined about the alleged conversation with the defendant, Mr Flegg said that he did not recall the conversation[99]. Given Mr Flegg's position, and bearing in mind that he had not long before commenced his first substantially-remunerated employment, it seems to me likely that, if the conversation had occurred, he would recall it.

[118] Dr Flegg denied that a similar conversation occurred between him and Mr Hallett[100].

[119] My observations of the plaintiff and Mr Flegg in giving this evidence did not give me any reason to doubt their evidence.

[120] When the defendant gave evidence of his conversation with the plaintiff in early June, he said that he reminded the plaintiff that he had a reputation for being a trouble-prone and gaffe-prone Minister[101]. Apart from the fact that the plaintiff had only been a Minister for about two months by that time, it seems to me a somewhat unlikely statement for the defendant to have then made to the plaintiff. The defendant's evidence about what was said is given at a level of generality and in a form which would cast doubt on the evidence, but this is not a matter on which, by itself, I would place much weight. The evidence also included argumentative statements, which appeared directed to bolstering the defendant's credibility. I also bear in mind my earlier conclusions about the defendant's credibility.

[121] I reject the defendant's evidence of the conversation which he alleges occurred in June 2012.

[122] The defendant's evidence does not identify any requirement to record this email in the lobbyists' register. Accordingly, it does not provide a basis on which the defendant could have believed that the lobbyists' register was inaccurate.

[123] I do not accept that exhibit 3 was relevant to any belief of the defendant that the lobbyists' register was inaccurate; or that it supports the defendant's contention that he acted reasonably in publishing the three statements.

[124] Exhibit 4 is an email from the plaintiff to Mr Stephen dated 30 April 2012, with a copy to Mr Flegg. Reliance was placed on the subject line, as follows, "Fraser I would like one of our policy officers to look at housing co ops-jonathon will forward info". There was then what appears to be a reference to a statement by the Premier relating to the provision of low-cost housing. The plaintiff sent the email to the defendant a little later on the same day.

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97 T6-30.
98 T6-29 to 6-30.
99 T3-21/7.
100 T2-4 to 2-5.
101 T6-29/40.

[125] Exhibit 4 was relied upon in the Defence, in a manner similar to exhibit 3. The defendant's submissions contended that it reflected earlier contact between Mr Flegg and the plaintiff; and that it suggests there would be subsequent contact with Mr Flegg. It was submitted that the contact was an effort to influence Government policy on housing cooperatives and share houses. Subsequent emails showed that Mr Flegg had clients in the housing sector.

[126] The plaintiff's evidence was that Mr Flegg was not representing a client in relation to this email; rather, the Government "was trying to examine models of housing"; and because funding was not available for consultants, relevant information was being sought without pay, by inference, from people such as Mr Flegg[102]. Mr Flegg did not recall the email[103].

[127] The defendant's evidence related his concern about this email to his risk-averse approach, and his desire to see that the plaintiff's tenure be "smooth and trouble free as possible"[104]. His evidence did not associate the email with any identified effort to influence Government decision-making.

[128] On the defendant's evidence, exhibit 4 was one of the emails discussed in the June conversations with the plaintiff and Mr Flegg. I have already rejected that evidence.

[129] The evidence does not identify a basis for finding that exhibit 4 was contact made in an effort to influence Government decision making. I am not prepared to find that it was a lobbyist activity.

[130] Like exhibit 3, exhibit 4 was not referred to by the defendant in the three publications; and the significance the Defence would attribute to it is not consistent with defendant's evidence of his statements to the plaintiff on 31 October 2012.

[131] I do not accept that exhibit 4 was relevant to any belief of the defendant that the lobbyists' register was inaccurate. The evidence does not provide any basis for concluding that the contact evidenced by exhibit 4 supports the defendant's contention that it was reasonable for him to say that the lobbyists' register was inaccurate. Accordingly it does not support the privilege defences.

[132] Exhibit 6 was a series of emails. Relevantly, it included an email from Mr Flegg to the plaintiff, stating that a Chris Brooks was available as a possible Deputy Director-General and appeared to be well qualified. The email included Mr Brooks' curriculum vitae. Exhibit 6 was relied upon in the Defence, in a manner similar to exhibits 3 and 4.

[133] The email was sent by Mr Flegg to the defendant, at the same time as it was sent to the plaintiff. The defendant gave evidence that, when he received it, he was "deeply troubled by it"[105]. His explanation was that a person's appointment to a position could be seen as the result of the activity of the plaintiff's lobbyist son. Accordingly he wanted the email

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[102] T 1-70.
[103] T 3-20.
[104] T6-28/34-35
[105] T6-29/20.

recorded in the lobbyists' register[106]. On the defendant's evidence, this email, too was raised in the June conversations with the plaintiff and Mr Flegg, evidence which I have already rejected.

[134] The plaintiff gave evidence that he did not recall receiving exhibit 6; and he had no role in the making of the appointment referred to[107]. Mr Flegg gave evidence that he had never met Mr Brooks; that Mr Brooks was not a client of Rowland; and that Mr Flegg sent the CV at the request of his employer[108].

[135] By reference to the exclusion of contact on non-business issues, there is real reason to doubt whether this contact was a lobbyist activity, and accordingly should have been entered in the lobbyists' register. However the real question is whether it provided, or contributed to the provision of, a reasonable ground for the defendant's statements about the inaccuracy of the lobbyists' register, and consequently about the plaintiff.

[136] Reference has already been made to the evidence of the defendant that on 31 October 2012, he told the plaintiff that it was then unconfirmed that the lobbyists' register was inaccurate. Again, this conversation was not referred to in the three publications. For these reasons, and in view of my general observations about the defendant's credit, I am not prepared to accept that the defendant believed this email to be a lobbying activity, which had to be recorded in the lobbyists' register. It does not provide support for the privilege defences.

[137] Amongst the matters relied upon for the privilege defences were allegations that on 31 October 2012, Mr Stephen told the defendant that there had been six or seven contacts between the plaintiff's staff and Mr Flegg, rather than the two recorded in the lobbyists' register[109]; that subsequently on the same day, the defendant had a conversation with the plaintiff reporting what Mr Stephen had said, which the plaintiff appeared to confirm; and that, in the course of the conversation, the plaintiff suggested a response to Mr Hurst insisting there had only been the two contacts with Mr Flegg, disclosed in the register, and that instructions had been given, subsequently, to ban such contacts[110]. The Defence alleged that at about 6.00pm on 1 November 2012, the defendant had a conversation with Mr Stephen (after the receipt of Jonathon's list) in which the defendant said that the number of undisclosed contacts was more likely 47; and Mr Stephen downgraded the importance of the non-disclosure[111].

[138] As mentioned, the defendant gave evidence that he had had two discussions with Mr Stephen on 31 October 2012, before sending the reply to Mr Hurst, in which Mr Stephen said that there were some six or seven contacts involving Mr Flegg.

[139] Of his discussion with the plaintiff, the defendant said that the meeting occurred in the plaintiff's Ministerial Office at Parliament House. He informed the plaintiff of the email

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[106] T6-29.
[107] T2-4 to 2-5.
[108] T3-21 to 3-22.
[109] Defence para 17A(i); the allegation set out in paragraph 19A to the same effect, and will not be referred to separately.
[110] Defence para 17A(j).
[111] Defence para 17A(r).

from Mr Hurst. In the course of the ensuing discussion, the defendant gave the evidence previously mentioned, that he told the plaintiff that, according to Mr Stephen, there were six or seven contacts involving Mr Flegg, which were unconfirmed[112]. The defendant's evidence was that it was he who suggested that the response state that the lobbyists' register "was an accurate reflection of what happened", to which the plaintiff agreed[113].

[140] When cross-examined about this meeting, the plaintiff did not recall it, and said he was elsewhere. He said, of the suggestion that on the evening of 31 October 2012 the defendant told him that Mr Stephen said there were six or seven contacts involving Mr Flegg, that it was "absolutely untrue. Those words were never said."[114] The plaintiff denied other parts of the conversation, including that he proposed the form of the response. The plaintiff said that he was not involved in the preparation of the response to Mr Hurst. Rather, the defendant showed him the response after its terms had been agreed between the defendant and Mr Anderson, and the plaintiff did not object[115].

[141] The plaintiff's submissions place some weight on the fact that on different occasions, the defendant had nominated a different time of day for this conversation. I do not find that consideration of assistance in assessing this evidence.

[142] The defendant's account is inconsistent with his statement in the media conference that Mr Stephen told him of six or seven contacts after the response had been provided to Mr Hurst. The firmness of the plaintiff's rejection of the suggestion that he was told about Mr Stephen's statement on the evening of 31 October 2012 is to be contrasted with the plaintiff's response to a suggestion of something he said about Mr Flegg. The plaintiff said that he would not "totally dismiss" the prospect that he said something to that effect, but did not recall saying it "in this context"[116]. More generally, it will be apparent from my earlier observations that I would be reluctant to accept the evidence of the defendant in preference to the plaintiff. Accordingly, I am not prepared to accept the defendant's evidence of the alleged conversation with the plaintiff on the evening of 31 October 2012; and, in particular, that he told the plaintiff that Mr Stephen had said there were six or seven contacts with Mr Flegg; or that the plaintiff played a role in formulating the response to Mr Hurst.

[143] A question remains as to whether Mr Stephen made such a statement to the defendant. The defendant's statement at the media conference might be regarded as providing some support for this evidence; although the defendant there said that Mr Stephen gave this information at a later time. In his evidence-in-chief, Mr Flegg said that he telephoned the defendant in the week after 31 October 2012, and the defendant said "Things were extremely bad, and I – the situation was extremely bad. Jonathon you do not know how bad this is. All of this is going to end very badly …"[117]. Mr Flegg went on to say that he asked the defendant why he thought the situation was so bad "and he couldn't give me a particular answer"[118]. There may be some broad consistency between this evidence, of

[112] T6-41.
[113] T6-42.
[114] T2-43.
[115] T 2-44.
[116] T2-43.
[117] T3-9.
[118] T3-9.

what Mr Stephen told the defendant on 31 October 212; but it does not provide direct support for the defendant's evidence.

[144] I have already referred to matters which, in my view, reflect adversely on the defendant's credit. There is no independent corroboration of this evidence. It provided the platform for the defendant's evidence that he told the plaintiff what Mr Stephen had said on the evening of 31 October 2012. I have rejected that evidence. Equally I reject the defendant's evidence of his conversations with Mr Stephen on 31 October 2012, to the effect that Mr Stephen then said there were six or seven contacts involving Mr Flegg.

[145] My conclusions about these events alleged to have occurred on 31 October 2012 have consequences for the pleaded privilege defences.

[146] It is at this point convenient to refer to some matters relied upon in the defendant's submissions, but not alleged in the Defence. Exhibits 5, 7, 8, 9 and 10 were relied upon for a submission that the lobbyists' register was not "a very accurate lobbyists (sic) register" [119].

[147] Since the Defence does not refer to the communications evidenced by these exhibits, it seems to me unnecessary to deal with them. In case I am wrong, I shall make some brief observations.

[148] Exhibit 5 is a series of emails relating to a meeting between a Mr Eades, who was then director of Urban Economics at Price Waterhouse Coopers, and the plaintiff. Mr Flegg was the author of some of the emails. The lobbyists' register records a contact on 1 May 2012 between Rowland and Mr Stephen, to arrange a meeting between the plaintiff and Mr Eades. They were to meet on 8 May 2012. Of this entry, it is said that it was inaccurate, because it did not specifically identify the role of Mr Flegg. I do not accept that submission. An examination of the lobbyists' register shows that it was the general practice to identify the relevant company, rather than the individual, involved in the contact.

[149] Beyond that, I do not consider the arranging of a meeting with a Minister itself to be lobbying activity. While the subsequent meeting may itself be contact "in an effort to influence … Government decision-making", in my view the making of an appointment is not such contact. In any event what occurred at the meeting was not shown to be lobbying activity. The only evidence of what occurred was from the plaintiff, to the effect that Mr Eades "wanted to give a bit of general policy advice"[120]. While that may have been, or may have formed part of, an effort to influence Government decision making that is not inevitably the case. Mr Eades was taking up a position in another Government department; and it is conceivable that his advice was not directed to the making of any decision. Mr Eades was not himself a registered lobbyist, nor was he associated with Rowland or any registered lobbyist. Exhibit 6 does not provide a basis for finding that the lobbyists' register was not accurate.

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[119] 1 Defendant, at [69]
[120] T1-72/24-25.

[150] Exhibit 7 included an email from Mr Andrew Park of Rowland dated 18 September 2012, forwarding briefing notes intended for the plaintiff, for a meeting for 20 September 2012. It also included emails involving Mr Flegg of 11 September 2012, related to the meeting. For the defendant it was submitted that the contacts were, in broad terms recorded in the register; but the involvement of Mr Flegg was not. In my view, the lobbyists' register was not, in any relevant sense, inaccurate. Consistent with the usual form of the record, it identified Rowland as having made the contact to arrange the meeting.

[151] Exhibits 8 and 9 record contact between Mr Flegg and the plaintiff and members of his staff relating to amendments to the *Queensland Building Services Authority Act*. They included a letter from a firm of solicitors in support of such amendments[121]. The plaintiff's explanation for the fact that this was not registered was that he did not read the letter from the solicitors and did not meet with them, but referred them to an inquiry which was then being conducted[122]. In my view, the contact was nevertheless one which amounted to lobbying activity. On that basis, it seems to me that it should have been recorded in the lobbyists' register, though it is arguable that that was not required, as there was no relevant outcome.

[152] It follows that I consider that these exhibits provide very limited support for the contention that the lobbyists' register was not a very accurate document.

[153] The defendant has pleaded in support of the privilege defences that he sent the response to Mr Hurst on 31 October 2012, believing he would be able to persuade either the plaintiff or Mr Anderson to make full disclosure of the contacts involving Mr Flegg. I have not accepted the defendant's evidence that by this time he had been told by Mr Stephen that there was some six or seven such contacts. This version of events is, as previously noted, inconsistent with what the defendant said at the media conference. I have not accepted the defendant's evidence of his discussion with the plaintiff about the response to be given to Mr Hurst. There is no reason not to accept the plaintiff's evidence of this conversation. There is a degree of probability about the defendant's consulting Mr Anderson before sending the response to Mr Hurst. I accept that he did so. However, I do not accept that he sent the response, believing he would be able to persuade the plaintiff or Mr Anderson "to make full disclosure of the contacts by Jonathan Flegg"[123].

[154] On the basis of my findings, there is nothing to indicate that, at the time of his response to Mr Hurst, the defendant had in mind contacts involving Mr Flegg, other than those recorded in the lobbyists' register. Apart from the fact that, according to the defendant's statement at the media conference, the response which he sent on 31 October 2012 to Mr Hurst was, in part, false, there appears to me to be some considerable tension between his stated belief that he might be able to persuade the plaintiff to make full disclosure of additional contacts with Mr Flegg, and his pleaded case that about 40 minutes earlier, the plaintiff instructed him to send a response which insisted there had only been two such contacts.

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[121] Exhibit 9 includes a reference to another firm of solicitors (DLA Piper); but that appears to have been an error: T 2-27/25-28.

[122] T 2-26 to 2-27.

[123] Defence, at para 17A(l).

[155] There is no reason to doubt that the defendant read the email which included Jonathon's list on the evening of 31 October 2012. Similarly, I am prepared to accept his evidence that he noted reference to emails relating to "Viking Rentals"; and that he discussed them with Ms Cooper[124].

[156] The relevant emails were between Mr Flegg and the plaintiff's electorate office. The defendant gave evidence that when he examined Jonathon's list he discussed with his partner, who worked in the electorate office, these emails, and learnt that Vikings Rentals was seeking changes to legislation, which would affect its business[125]. There is no reason not to accept this evidence. Its relevance to the privilege defences will be considered later.

[157] The defendant pleaded that at approximately 6.45pm on 1 November 2012, he had a telephone conversation with Mr Flegg about the emails which appeared in Jonathon's list[126].

[158] The defendant gave evidence that he telephoned Mr Flegg from the Bellbowrie Shopping Centre, on his way home[127]. The defendant said that he did not look at the list in the course of this conversation. He said that emails relating to Mr Eades were discussed; and Mr Flegg told him that Price Waterhouse Coopers were a client of Rowland and there had been discussion about a report done by Price Waterhouse Coopers for the previous Government which they considered could be of assistance to the then current Government.

[159] It might first be observed that in his evidence-in-chief, Mr Flegg did not refer to such a conversation. On Mr Flegg's evidence, his contact with the defendant after 31 October 2012 was a different telephone call which he made to the defendant, it would seem, within the following week[128]; and some text messages[129]. In cross-examination, Mr Flegg could not recall a telephone call from the defendant at the Bellbowrie Shopping Centre[130]. He also said, when questioned about a telephone conversation in which the defendant was said to have asked about particular emails in the list, that he could "tell you firmly that never occurred"[131].

[160] In cross-examination, it was put to Mr Flegg that he told the defendant in the course of this conversation that Mr Eades was a client who had expertise in housing issues. Mr Flegg denied making such a statement, and said that Mr Eades had no expertise in such issues. Other matters related to his topic were put to Mr Flegg, but he maintained his denial of the conversation. Indeed, Mr Flegg took offence at one aspect of the

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[124] T6-48.
[125] T6-48 to 6-49.
[126] Defence, at para 17A(s).
[127] T6-55.
[128] T3-8/37-39..
[129] T 3-37/45.
[130] T3-37/38-43.
[131] T3-37/43.

conversation which was put to him[132]. This aspect of the conversation did not form part of the defendant's evidence[133].

[161] At this time, Mr Flegg was in a relationship with Ms Sarah Hauser, who was employed at Price Waterhouse Coopers. The suggestion to which Mr Flegg took offence was that, in the course of this conversation, he volunteered, "It was a good opportunity to show Sarah's boss that her partner could arrange a meeting when it was needed." At this time, Mr Flegg "was at home on full leave … with pay" as a result of the concerns about his contact with the plaintiff and it was Mr Flegg's aim "to see a resolution to the whole of this matter"[134]. In the circumstances, it seems to me extremely unlikely that Mr Flegg would have made such a statement. It is unlikely that this was put to Mr Flegg without careful instructions from the defendant. It is unlikely those instructions were the product of a mistaken recollection. The reaction of Mr Flegg on this occasion, as with his reaction to other parts of the cross-examination about this conversation, seemed to me to be unfeigned.

[162] The defendant's evidence then referred to discussion about contact in relation to Leightons, DLA Piper, Clayton Utz, Viking Industries[135], a contact with Ms Bourke of the plaintiff's Ministerial Office about a fact sheet to be used in the making of a submission, and a representative of the Commonwealth Bank. Mr Flegg was cross-examined extensively about the conversation alleged by the defendant, but maintained a firm denial to its occurrence.

[163] This evidence of the defendant is of considerable importance for the privilege defences. It appears to provide the primary foundation for the defendant's belief as to the extent of communications between Mr Flegg on the one hand and the plaintiff and the plaintiff's office on the other, which would amount to lobbying activity. There is an element of improbability about the defendant's evidence. Thus, in such an important matter, it does not seem particularly likely that the defendant, if he were carrying out a comprehensive review of the contacts on Jonathon's list, would do so by a telephone call from a shopping centre in the evening on his way home, rather than by requesting copies of emails which he thought might evidence such activity, or by a face-to-face meeting to go through the list of emails, or at least a telephone call where the defendant could consult the list and take notes. If the defendant thought there was an issue of serious concern, one of these courses seems to me to be far more likely. However this consideration is not decisive.

[164] I have already pointed out a difficulty relevant to the defendant's credit, arising from the cross-examination about contact relating to Mr Eades. I also note that in the cross-examination of Mr Flegg, it was put to him that the defendant said that he would go through the list "line by line", and the conversation proceeded accordingly[136]. This sits oddly with the defendant's account of the conversation, particularly since he did not have the list in front of him[137]. I have also earlier referred to difficulties about the defendant's credit generally. On the other hand, there was nothing in Mr Flegg's manner in the

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[132] T3-41/44.
[133] T6-58.
[134] T3-38.
[135] No doubt a reference to the business identified in Tab 7, Exhibit 1, as Viking Rentals.
[136] T 3-38 to 39.
[137] T 6-57/35.

witness box which led me to doubt the honesty of his evidence. His reactions to some of the questions seemed spontaneous and genuine.

[165] Accordingly, I reject the evidence of the defendant about this conversation, and accept the evidence of Mr Flegg that the conversation did not occur.

[166] In support of the privilege defences, the defendant alleged that at approximately 6.00pm on 1 November 2012, he had a conversation with Mr Stephen in which he advised that the number of undisclosed contacts (apparently involving lobbying activity) was more like 47; and Mr Stephen downgraded the importance of the matter and suggested that the defendant's communications to Mr Anderson were unwelcome[138].

[167] The defendant's evidence was consistent with the allegation[139], though he said that Mr Stephen "didn't see it as a major problem because only one journalist had been making enquiries about it". This occurred, on his evidence, prior to his conversation that evening with Mr Flegg. There is a difficulty about the number of contacts said to involve lobbying activity. No sensible basis was identified for the defendant's statement to Mr Stephen about this number. As the submissions for the plaintiff point out, the reaction attributed to Mr Stephen appears unlikely. For these reasons, and bearing in mind the difficulties already identified with the defendant's credibility, I do not accept this evidence.

[168] The Defence also alleged, in relation to the privilege defences, that on the morning of 2 November 2012, in a car journey to Spring Hill, the defendant told the plaintiff there were 47 lobbying contacts identified in Jonathon's list, and urged the plaintiff to make full disclosure of the contacts. It also alleged that the plaintiff did not deny the number of contacts, but resisted disclosure; and the defendant again urged the need for disclosure in a subsequent car trip from Spring Hill to a conference[140]. The defendant's evidence was broadly supportive of the pleaded allegations[141]. While the plaintiff appeared to accept that he and the defendant may have travelled together to Spring Hill on the morning of 2 November 2012, he denied the suggestion that the defendant said to him "there was a need to reveal the cover up of lobbyist encounters (presumably with Mr Flegg)"[142]. It was put to him that the defendant said that "the first story about very limited contact with Jonathon will not stand up to scrutiny" by Mr Hurst or other journalists[143], a proposition which the plaintiff denied. He also denied a suggestion that he said that the situation could "be toughed out"[144]. He denied that the defendant told him that there were 47 contacts involving Mr Flegg, identified in Jonathon's list[145]. He said that the defendant did not reveal that he had received Jonathon's list from Mr Flegg. The plaintiff also denied that on the trip from Spring Hill to the conference, the defendant made reference to how "full disclosures and coming clean" should be achieved[146].

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[138] Defence, at para 17A(r).
[139] T6-53.
[140] Defence para 17A(u).
[141] T6-61 to 6-63.
[142] T2-48/24-25.
[143] T2-49/6-8.
[144] T2-49/27.
[145] T2-50/1-5.
[146] T2-52/27-33.

[169] The plaintiff gave evidence that he did not get a copy of Jonathon's list until after the conference announcement[147]. Moreover, the plaintiff gave evidence that he first saw the list on or about 12 November 2012 (after the conference announcement); and he had not discussed it, or any of the emails listed in it, with the defendant[148]. Mr Flegg gave evidence that on 9 November 2012 the plaintiff and he had a telephone conversation in which the plaintiff said that the defendant was going to use Jonathon's list against him[149]. Although the evidence of the conversation should be accepted, the date given by Mr Flegg seems unlikely to be correct. The defendant was still away on leave at that time. There was no suggestion that the list might be used by the defendant adversely to the plaintiff until Monday 12 November 2012. On that basis, the evidence of the plaintiff and that of Mr Flegg would be consistent with the plaintiff's not having learnt of the list until about 12 November 2012, rather than on 2 November 2012.

[170] That seems to me to be consistent with the plaintiff's statements to Parliament on 13 and 14 November[150], and his statement to the Press on 7 December 2012[151]. In the first of the statements to Parliament, the plaintiff referred to "a list of email topics that (the defendant) has obtained from (Mr Flegg)". Shortly after, he said that he accepted that "a number may have been communications that ought to have been recorded on the lobbyist register". On 7 December 2012, he said that all of the defendant's allegations were false. His evidence was that after he obtained a copy of the list on about 12 November, he attempted to obtain copies of the emails and saw some of them[152].

[171] Given that Mr Hurst was making enquiries about contact between Mr Flegg and the plaintiff's office and the plaintiff, it seems to me unlikely that if the defendant raised issues about unrecorded lobbying activities by Mr Flegg on 2 November 2012, by reference to Jonathon's list, the plaintiff would have done nothing for ten days or more.

[172] Accordingly, I do not accept the defendant's evidence of the conversations he alleges occurred on 2 November 2012 with the plaintiff about lobbying activity involving Mr Flegg.

[173] The defendant has also pleaded that at approximately 2.00pm on 12 November 2012, after his employment had been terminated by the plaintiff, he spoke to Mr Anderson and said that the plaintiff was trying to silence him from making disclosures to Mr Anderson[153]. He also pleaded that at approximately 3.45pm that day, he spoke with Mr Anderson by telephone who advised him that there was no chance of the defendant obtaining redeployment[154]. The defendant then expressed his disappointment that he would not be able to assist on strategies "in the interests of coming clean about the failure to disclose the wrongdoing". The defendant also said that he "was left with no choice but to reveal what was going on and to expose the untruths, especially regarding the misleading of the Parliamentary Committee".

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147 T1-38.
148 T1-28.
149 T3-15 to 3-16.
150 Exhibits 15 and 18.
151 Exhibit 19.
152 T1-38.
153 Defence, at para 17A(y).
154 Defence, at para 17A(z).

[174] The defendant's evidence in relation to the first meeting was broadly consistent with the pleading, save that there was no reference to a statement that the plaintiff "was trying to silence" the defendant[155]. His evidence relating to the second conversation was that, when told that there were no opportunities for redeployment, he did not think that was particularly fair; and that he "was going to have to consult (his) conscience about what (he) was going to do"[156].

[175] There was nothing improbable about this evidence of the defendant. There was some consistency between it, and his subsequent conduct. There is some consistency between the defendant's evidence in cross-examination, and his evidence-in-chief, about the discussions with Mr Anderson[157].

[176] I am prepared to accept the defendant's evidence that on two occasions on the afternoon of 12 November 2012 he spoke with Mr Anderson, in the course of which he was told there was no opportunity for redeployment. He conceded in cross-examination, in effect, that on the second occasion he said to Mr Anderson that he was left with no choice but to reveal what had been going on[158], and I so find.

[177] The defendant alleged that on 8 November 2012 he spoke by telephone with Mr Scott Whitby, the Deputy to Mr Anderson, and said there were more like 47 non-disclosed contacts[159]. The defendant's evidence of this conversation generally accords with the pleading[160]. However, given my general concerns about the defendant's credit, and the fact that I have not accepted the defendant's evidence which might have provided a basis for his saying that there were a substantial number of contacts involving lobbying activity by Mr Flegg which were not recorded on the lobbyists' register, I do not accept this evidence from the defendant.

[178] Of the remaining facts alleged in support of these defences, some are not controversial. Some, as pleaded, are vague and provide little support for the defence[161].

[179] So far as the email contacts relating to Viking Rentals are concerned, there is scope for some debate as to whether they involved lobbying activity. That is because the principal of this business was a member of the plaintiff's electorate[162]. As the submissions for the plaintiff point out, a large number of constituent requests are likely to relate to changes to legislation[163].

[180] It follows from my findings that I do not accept that, at the time of the publications, the defendant believed that there were in excess of 35 contacts involving lobbying activity which had not been recorded in the lobbyists' register[164].

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155 T6-73 to 6-74.
156 T6-74 to 6-75.
157 T7-26 to 7-27.
158 T7-27.
159 Defence, at para 17A(w).
160 T6-70.
161 Defence, at paras 17A(o), (v).
162 T1-30.
163 2 Plaintiff, at para 116.
164 See TMC p 2.

Privilege defences considered

[181] The statutory defence is found in s 30 of the *Defamation Act* 2005, which is as follows

> **30 Defence of qualified privilege for provision of certain information**
>
> (1) There is a defence of qualified privilege for the publication of defamatory matter to a person (the ***recipient***) if the defendant proves that—
>
> (a) the recipient has an interest or apparent interest in having information on some subject; and
>
> (b) the matter is published to the recipient in the course of giving to the recipient information on that subject; and
>
> (c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.
>
> (2) For the purposes of subsection (1), a recipient has an apparent interest in having information on some subject if, and only if, at the time of the publication in question, the defendant believes on reasonable grounds that the recipient has that interest.
>
> (3) In determining for the purposes of subsection (1) whether the conduct of the defendant in publishing matter about a person is reasonable in the circumstances, a court may take into account—
>
> (a) the extent to which the matter published is of public interest; and
>
> (b) the extent to which the matter published relates to the performance of the public functions or activities of the person; and
>
> (c) the seriousness of any defamatory imputation carried by the matter published; and
>
> (d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts; and
>
> (e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously; and
>
> (f) the nature of the business environment in which the defendant operates; and
>
> (g) the sources of the information in the matter published and the integrity of those sources; and
>
> (h) 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; and
>
> (i) any other steps taken to verify the information in the matter published; and

(j) any other circumstances that the court considers relevant.

(4) For the avoidance of doubt, a defence of qualified privilege under subsection (1) is defeated if the plaintiff proves that the publication of the defamatory matter was actuated by malice.

(5) However, a defence of qualified privilege under subsection (1) is not defeated merely because the defamatory matter was published for reward."

[182] Although the matters raised by s 30(1)(a) and (b) of the *Defamation Act* are formally in issue on the pleadings, it is apparent from the plaintiff's submissions that the substantive contest relates to the reasonableness of the defendant's conduct, and whether the defendant was actuated by malice in making the publications.

[183] The common law defence relied upon by the defendant was articulated in *Lange v Australian Broadcasting Corporation*[165]. I take the following propositions from *Lange*:

1. A defence of qualified privilege is available in respect of a publication "concerning government and political matters that affect the people of Australia"[166].

2. The defendant must show that the defendant's conduct in making the publication was reasonable.

3. The defence will be defeated if the person defamed proves the publication was actuated by common law malice.

[184] The reference to the subject matter of a publication affecting the people of Australia is not a tight constraint. The Court pointed out that discussion of government or politics at local government level can come within the scope of the defence[167]. In the present case, no issue has been raised about the availability of the defence on this ground.

[185] The Court stated that the reasonableness of the defendant's conduct was an element of the defence, only in respect of a publication that would otherwise be held to have been made to too wide an audience, to attract a defence of qualified privilege under the general law[168]. Again, this matter does not require consideration in the present case, the defendant having accepted that he must demonstrate his conduct in making the publications was reasonable.

[186] The Court stated that the publisher is not required, as a matter of law, to establish that it was unaware of the falsity of the matter published, and did not act recklessly in making the publication; but pointed out that "(i)n all but exceptional cases" failure to do so will mean the publisher has failed to establish the reasonableness of its conduct[169]. With

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[165] (1997) 189 CLR 520, at 571-574.
[166] *Lange*, at 571.
[167] *Lange*, at p 571.
[168] *Lange*, at p 573.
[169] *Lange*, at p 573

reference to the proposition that the defence will fail if the plaintiff establishes that the publisher was actuated by malice in making the publication, the Court referred in *Lange*[170] to *Mowlds v Fergusson*[171]. In the passages referred to from *Mowlds*, Jordan CJ spoke of a defendant having "some particular disposition or inclination, or desire to serve some particular purpose" by which the defendant was actuated on the occasion of the publication[172]. His Honour also referred to the plaintiff establishing "a desire (on the part of the defendant) to promote some object not warranted by the privileged occasion"; which the defendant "desired to promote" on the occasion of the publication[173]. His Honour also referred to such a desire both existing, and being "indulged", on the privileged occasion[174]. Thus his Honour appears to have recognised that a publication will be actuated by malice if the publisher makes the publication out of "a desire on the part of the defendant to injure the plaintiff by reason of personal ill will" towards the plaintiff[175]; as well as for a purpose of promoting "some object not warranted by the privileged occasion"[176]. Like the High Court in *Lange*, his Honour seems to have proceeded on the basis that the authorised purpose and an unauthorised purpose are mutually exclusive,[177] referring to a case where the defendant "was actuated by a desire … to promote (an unauthorised purpose), and not to use the occasion for its legitimate purpose". His Honour also observed that when a publisher makes a defamatory statement, which he knows to be false, that shows (save in certain exceptional circumstances) that it was made for some improper purpose[178]; and it is unnecessary to identify that purpose. In *Lange*, notwithstanding their Honours' identification of the reasonableness of the defendant's conduct in making the publication as a matter of fact, dependant "upon all the circumstances of the case"[179], they went on to make the following observation:

> "But, as a general rule, a defendant's conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of the response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond[180]."

[187] In respect of the common law defence, and the statutory defence, the question of the reasonableness of the defendant's conduct is a question of fact. The matters relevant to this question referred to in the judgment in *Lange*, it seems to me, may be of assistance in determining whether the statutory defence is available[181]; and the matters referred to

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170 At p 574.
171 (1939) 40 SR (NSW) 311, at 327-329.
172 *Mowlds*, at p 328.
173 *Mowlds*, at p 328.
174 *Mowlds*, at p 328.
175 *Mowlds*, at p 328.
176 *Mowlds*, at pp 328-329.
177 *Mowlds*, at p 328.
178 *Mowlds*, at p 329.
179 *Lange*, at p 574.
180 *Lange*, at p 574 citing *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211, at 252-253.
181 See s 30(3)(j) of the Act.

in s 30(3) may likewise shed light on the availability of the common law defence. It has not been suggested in the present case that different considerations arise with regard to reasonableness, for either defence. Accordingly, I propose to consider them together.

[188] It will be apparent from my discussion of the factual matters raised by the defendant that I accept that he had some concern about the emails relating to Viking Rentals; and, by reference to the evidence of Mr Flegg, that he had some general concern about the extent to which Mr Flegg might have engaged in lobbying activity by means of his contact with the plaintiff and the plaintiff's office. Otherwise, I have not accepted the defendant's evidence of factual matters which might, in any substantial way, support his allegation that his conduct was reasonable.

[189] With respect to the emails relating to Viking Rentals, the defendant faces the difficulty when he took no step (other than is discussion with Ms Cooper) to determine whether such contact was lobbying activity for the purposes of the *Integrity Act*. The defendant appeared to have recognised that this might have been a "constituent matter", though he reached a contrary conclusion[182]. Given the seriousness of the imputation which he made against the plaintiff, it seems to me that the defendant's conduct in making allegations against the plaintiff based on the emails relating to Viking Rentals could not be judged as reasonable, without more. Moreover, the publications alleged far more extensive contact than that relating to Viking Rentals.

[190] Whatever may have been the genuineness of the defendant's concern about unrecorded lobbying activities at the time of the telephone conversation of which Mr Flegg gave evidence, it was not reasonable for him to make the publications without some further enquiry. It would have been necessary, for his conduct to be considered reasonable, for him to have obtained reliable information about the nature of the communications recorded in Jonathon's list, in order for him to determine whether they evidenced lobbying activity. A sensible way to do this would have been to obtain copies of any emails which might potentially demonstrate such activity. It would have also been necessary for him to take reasonable steps to identify the forms of conduct which constitute lobbying activity in Queensland, under the *Integrity Act*. That may have required a perusal of the Act, or the taking of advice from a lawyer or some other person with appropriate qualification. It would then have been necessary to apply his knowledge of the nature of lobbying activity, to the communications. None of that occurred.

[191] A serious difficulty for him, in establishing that his conduct was reasonable, was the defendant's failure to give the plaintiff advance knowledge of the allegations which the defendant intended to make, and the opportunity for the plaintiff to respond. For the defendant it was submitted that his earlier conversations with the plaintiff gave the plaintiff a sufficient opportunity to state his side of the story. However, I have not accepted the defendant's evidence about these conversations. This failure by the defendant assumes greater significance, in light of his failure promptly to ascertain the nature of the communications, and to enquire as to what types of communications might amount to lobbying activity.

[182] T 6-49/45.

[192] Ultimately, the defendant's allegations depended upon a judgment as to whether communication involving Mr Flegg amounted to lobbying activity. It is relevant to note, though less significant than matters previously discussed, that the publication identified inaccuracies in the lobbyists' register as matters of fact, rather than as reflecting a judgment by the defendant[183].

[193] Moreover, the defendant's persistence which the publications after receiving the first concerns notice, without taking some advice or making some further enquiry, tends to show that his conduct in respect of the second and third publications was not reasonable.

[194] Accordingly, I am not satisfied that the defendant's conduct, in making the publications, was reasonable.

[195] It will be apparent that I do not accept the defendant's submission that it was necessary to make the publications at the time that he did. More than three weeks had elapsed form the time when the lobbyists' register was tabled with the Committee; and some ten days had elapsed from the time when Mr Hurst published his article based on the response he had received from the defendant. Had the matter warranted urgent attention, the defendant could have carried out investigations promptly on the receipt by him of Jonathon's list.

[196] The more likely inference as to the defendant's choosing of the time in which to make the announcements was a desire to maximise the attention which would be attracted by his allegations. That, it seems to me, goes beyond conduct which might be justified simply by a need to "correct the record".

Malice

[197] The plaintiff submitted that the defendant's publications were actuated by ill will towards the plaintiff, arising from the fact that he had caused the defendant's employment to be terminated. The submissions relied upon a number of things, including the proximity of time between the termination of the plaintiff's employment and the making of the relevant publications; the defendant's anger when the plaintiff told him that his services were terminated; the defendant's evidence that he did not think that the termination was "particularly fair"[184]; and the defendant's evidence which showed he was trying to bargain with Mr Anderson for a job in exchange for not holding the media conference.

[198] For the defendant, it was submitted that there was no basis for concluding that the publications were actuated by ill will.

[199] I have previously concluded that the defendant failed to make proper enquiries to establish the true nature of the contacts involving Mr Flegg, and his failure to make enquiries as to what constituted lobbying activities. It seems to me that, in the circumstances of this case, these matters are relevant to the question of malice.

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[183] See s 30(3)(d).
[184] T6-74/42.

[200] The defendant's evidence of his conversations with Mr Anderson after learning of his termination on 12 November 2012 ultimately amounted to a statement by Mr Anderson that there was no position available for the defendant; a statement by the defendant that he would prefer to assist in developing a strategy for the disclosure of lobbying activity, as it were, while in Government employment; and a statement that otherwise he would have to consult his conscience[185]. Notwithstanding that the evidence in some way related the prospect of the defendant's taking some further step to the fact that he would not remain employed by the Government, it does not by itself provide a firm basis for concluding that the publications were in the nature of retaliation from a fact that the defendant was not given other employment. However, the defendant's subsequent conduct sheds a different light on these conversations.

[201] In the conference announcement, the defendant said that the plaintiff had dismissed him, "so I am going to put all of this in the public record". In the context of the conference announcement, the expression "all of this" would appear to relate to "certain disclosures that (the plaintiff) is not a fit and proper person to be a Minister". The conference announcement rather strongly suggests that the publications were a response to the dismissal. There is some echo of this in the opening remarks of the defendant at the media conference, where he linked the plaintiff's loss of "trust or confidence" in the defendant (which led to the defendant's loss of employment), with the defendant's loss of "trust and belief in the fidelity of" the plaintiff; in turn linked to the defendant's absence of belief that the plaintiff was "fit to hold the high office that he does".

[202] In addition, it seems to me that the very short time that had elapsed between the action of the plaintiff in relation to the termination of the defendant's employment, and the conference announcement, supports the view that the publications resulted from the defendant's dismissal.

[203] Moreover, the publications went well beyond the identification of errors in the lobbyists' register. They extended to allegations about the plaintiff's fitness for office, his trustworthiness, and the propriety of contacts between the plaintiff and Mr Flegg. Indeed, in the conference announcement there was at best an oblique reference to correcting the record. The real focus was the plaintiff's fitness for office.

[204] Taken together, these things lead me to conclude that, although the defendant may have had some genuine concern that the lobbyists' register was not accurate, a more significant motivation was a desire to damage the plaintiff's reputation, consequent on the defendant's dismissal. It follows that I do not accept the evidence of the defendant in passages referred to in written submissions as to his motivation for the publications. I therefore conclude that he was actuated by malice in making the publications.

Aggravated damages

[205] The Statement of Claim identified a number of grounds for allowing aggravated damages[186]. They may be summarised as follows:

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[185] T6-73 to 6-75.

[186] See Statement of Claim, at paras 35 and 36.

(a) The defendant knew or ought to have known that the imputations would cause persons to think less of and shun and avoid the plaintiff;

(b) The defendant knew or ought to have known the imputations were untrue;

(c) The defendant knew that the publication of the imputations would adversely affect the plaintiff's career;

(d) The conference announcement exacerbated the damage caused by the defendant's statements at the media conference;

(e) The defendant intended the publications to damage the plaintiff's reputation and career;

(f) The defendant published the imputations at the media conference and in the radio broadcast after receipt of the first concerns notice;

(g) The defendant knew of the plaintiff's political career and his appearance before the Committee;

(h) The defendant intended that matters published by him would be re-published;

(i) The publications were likely to damage the plaintiff's reputation in relation to his position as a Minister;

(j) The defendant has not apologised for, or retracted, any of the publications.

[206] The defendant responded to these allegations by repeating allegations that the imputations admitted elsewhere in the Defence were neither capable of damaging, nor likely to damage, the plaintiff's reputation; and the defendant did not believe the imputations to be untrue. There was a general repetition of "the reasons set out above in this Defence"[187] and an allegation that, at the time of each of the publications, the defendant believed that what was published was true, and that disclosure of the matters contained in those publications was in the public interest[188].

[207] Apart from propositions of law[189], the plaintiff's submissions in support of the claim for aggravated damages relied upon a number of matters which I shall attempt to summarise. One was the defendant's failure to verify the accuracy of his allegations and in particular to examine the emails in Jonathon's list. The second was that the defendant conducted a media campaign designed to cause maximum damage to the plaintiff's reputation. This resulted in the republication of things said by the defendant at the media conference. The plaintiff also relied upon the fact that the defendant filed documents obtained through a request under r 222 of the *UCPR*, resulting in their being available for inspection and

[187] Defence, at para 22.
[188] Defence, at paras 21 and 22.
[189] See Written Submissions, Legal Issues dated 24 November 2015, (*1 Plaintiff*), at paras 26-28.

ultimately being reported in the media. Reliance was placed on the defendant's description in his evidence of Mr Flegg as the "Minister's registered lobbyist son"; and his reference to matters likely to be embarrassing to the plaintiff, one example being referred to as "the O'Sullivan matter". Reliance was also placed on delay in the proceedings (including the late amendment of the Defence); and the defendant's application for a stay of the proceedings. Moreover, the defendant attempted to demonstrate that many of the contacts which Mr Flegg had with the plaintiff or the plaintiff's office were lobbying activities, though the basis for that course was questionable. It was submitted that the defendant thus effectively continued to make a representation that the plaintiff had failed to comply with his obligations in relation to the lobbyists' register.

[208] The plaintiff contended that aggravated damages might be awarded because the hurt to the plaintiff's feelings will be greater if the plaintiff knows the imputations to be false. The plaintiff's submissions also relied on the publications made by the defendant after the first concerns notice, and the fact that the defendant had not apologised for his statements[190].

[209] To the extent that the plaintiff relied upon matters based on the defendant's state of mind, the defendant submitted that these matters could not be taken into account by virtue of s 36 of the *Defamation Act*. It was also submitted for the defendant that he acted in good faith, and not out of a desire for revenge[191].

[210] Both parties submitted the proper course was to assess compensatory damages at a level which reflected aggravated damages (if they were to be awarded); rather than to make separate awards for aggravated damages and other compensatory damages.

[211] To place the claim for aggravated damages in context, it is convenient to commence with some propositions which might be regarded as basic. Leaving aside questions of economic loss and an award of exemplary damages (which is punitive), an award of damages for defamation serves a number of functions. One is to compensate the plaintiff for injury to the plaintiff's reputation. Another is to compensate the plaintiff for what I would refer to as injury to the plaintiff personally, principally for injury often described as injury to the plaintiff's feelings, though other expressions are sometimes used; but in an appropriate case including injury to the plaintiff's health[192]. A third is to vindicate the plaintiff's reputation in light of the defamation[193]. Vindication is explained by saying that a substantial award sends a message to the world that the defamatory imputation was untrue, though the message is indirect[194]. Although these three functions are conceptually distinct, they overlap[195]. It would seem to follow that where a substantial award is given for injury to feelings, and in particular for damage to reputation, that may be sufficient to demonstrate that the defamatory imputation was unfounded, and thus to vindicate the

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[190] See generally 2 Plaintiff, at paras 294-312.

[191] See Submissions of the Defendant on Matters Raised during Addresses dated 8 December 2014 (*3 Defendant*), at paras 10-15 and 16-26.

[192] See *Mirror Newspapers Ltd v Jools* (1985) 5 FCR 507. This and other authorities are discussed in *Australian Defamation Law and Practice* at [21,145].

[193] *Carson v John Fairfax & Sons Ltd* (1991) 24 NSWLR 259 (*Carson NSWLR*), at 296-299, cited with approval in *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, at 60.

[194] See *Gatley on Libel and Slander* (11th ed), at p [263].

[195] *Carson* NSWLR, at 299.

plaintiff's reputation. One author has noted[196] that vindicatory damages operate on the quantum of the award, by, where appropriate, increasing the amount under the established heads of damage in defamation to satisfy the requirement of vindication[197]. Nevertheless, vindication is logically distinct from the other matters, and remains a relevant consideration.

[212] Under s 35(2) of the *Defamation Act*, damages for non-economic loss may exceed the maximum damages amount (mentioned in s35(1) of the *Defamation Act*) 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". It is therefore a matter of some moment whether an award of aggravated damages is warranted.

[213] Particularly in the field of defamation, there are complexities in identifying the harm or injury which warrants an award of aggravated damages.

[214] Lord Devlin, in *Rookes v Barnard*[198] had said

> "… in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride."

[215] In *Broome v Cassell & Co*[199], Lord Diplock, having referred to Lord Devlin's speech in *Rooks*, described the heads of damages recoverable for torts where damages are "at large". The second head was,

> "Additional compensation for the injured feelings of the plaintiff where his injury resulting from the wrongful physical act is justifiably heightened by the manner or motivation for which the defendant did it. This Lord Devlin calls 'aggravated damages'."

[216] Since damages for defamation include compensation for injured feelings, unlike some other torts, that aspect of his Lordship's description does not explain the concept of aggravated damages in the context of defamation.

[217] In *Broome*[200] Lord Reid referred to the "wide bracket" within which an award of damages might fall, where the wrongful act caused mental distress or harm to reputation, and continued,

> "It has long be recognised that in determining what sum within that bracket should be awarded, a jury, or other tribunal, is entitled to have regard to the conduct of the defendant. He may have behaved in a high-handed, malicious,

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[196] Associate Professor Michael Tilbury, "Factors inflating damages awards" in P D Finn, *Essays on Damages* Lawbook Co Ltd 1992 pp 86 and 97.
[197] The author cited *John Fairfax & Sons Ltd v Kelly* (1987) 8 NSWLR 131, at 139.
[198] [1964] AC 1129, at 1221
[199] [1972] AC 1027, at 1124.
[200] At p 1085.

> insulting or oppressive manner in committing the tort or he or his counsel may at the trial have aggravated the injury by what they there said. That would justify going to the top of the bracket and awarding as damages the largest sum that could fairly be regarded as compensation."

[218] As I read this statement of his Lordship, in part it refers to the manner of commission of the tort itself, such as a defamatory publication, aggravating the injury to the plaintiff. It is conceptually possible to regard the injury to feelings and reputation in such a case as part of the harm caused by the defendant's wrongful act, which in the case of defamation is ordinarily compensable. However it is well established, as the language in the above-quoted passages indicates, that aspects of the defendant's conduct in committing the tort can support an award of aggravated damages.

[219] As was said in Gatley[201]

> "There are a number of problems with aggravated damages … first, it is difficult to draw a clear line between them and compensatory general damages, simply because the latter are anyway 'at large' and, in the case of claimants who are natural persons, contain an inbuilt element for injury to feelings."

[220] The problem was also noted by Lord Diplock in *Broome v Cassell & Co*.[202]

[221] Moreover, general compensatory damages for defamation are not limited to compensation for the harm immediately caused by the publication. In *The Herald & Weekly Times Ltd v McGregor*[203] it was said,

> "In point of law, the learned trial Judge would have been right if he had instructed the jury that in assessing damages they were entitled to take into consideration the mode and extent of the publication, that the defamatory statement was never retracted, that no apology was ever offered to the respondent, and that the statement had been persisted in to the end; because all these circumstances might in the opinion of the jury increase the area of publication and the effect of the libel on those who read it or who would thereafter read it, might extend its vitality and capability for causing injury to the plaintiff."

[222] Conduct of the kind described in *McGregor* does not necessarily provide a basis for an award of aggravated damages. In *Coyne v Citizen Finance Ltd*[204] Toohey J (with whom Dawson and McHugh JJ agreed) pointed out that a defendant's conduct after the initial publication may be relevant to the harm caused to the plaintiff. His Honour then said

> "But compensation for continuing harm is a component of normal compensatory damages and, in the absence of at least one of the factors

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[201] 11th ed at p [284].
[202] At 1125-1126; and see also *Spautz v Butterworth* (1996) 41 NSWLR 1, 15.
[203] (1928) 41 CLR 254, at 263, per Knox CJ, Gavin Duffy and Starke JJ.
[204] (1991) 172 CLR 211 at 237-238; and see *Harbour Radio Pty Ltd & anor v John Tingle* [2001] NSWCA 194, at [20]-[22]; *Cornwall & ors v Rowan* (2004) 90 SASR 269, at [805].

> mentioned in *Triggell v Pheeney*, does not warrant an award of aggravated damages to the plaintiff".

[223] In *Triggell v Pheeney*[205] it was held that the manner in which the defendant conducted the defence of a defamation action could be taken into consideration as improperly aggravating the injury to the plaintiff, "if there is a lack of bona fides in the defendant's conduct or it is improper or unjustifiable". This test has been applied more broadly to determine the availability of an award of aggravated damages.

[224] Thus, in *Spautz v Butterworth*[206], Clarke JA referred to the approach of courts in New South Wales "as permitting conduct by the defendant subsequent to publication to be taken into consideration on the issue of 'aggravated damages' in defamation cases only if that conduct was found by the jury to lack bona fides or otherwise to be improper or unjustifiable". His Honour then referred to the judgment of Toohey J in *Coyne*, before confirming the correctness of the approach of the New South Wales Courts. The other members of the Court (Priestley and Beazley JJA agreed with Clarke JA).

[225] In *Trkulja v Yahoo! Inc*[207] (*Yahoo*) Kaye J held, after reference to earlier decisions, that the conditions stated in *Triggell* must be satisfied in respect of conduct at the time of publication, if such conduct is to provide a basis for an award of aggravated damages.

[226] In *Waterhouse v Station 2GB Pty Ltd*[208], Hunt J said

> "Aggravated compensatory damages are usually awarded only in relation to the injury to the plaintiff's feelings … They are not, however, necessarily so limited and there may be conduct which has the effect of increasing the injury to the plaintiff's reputation as well." (citations omitted)

[227] The authors of *Australian Defamation Law and Practice* state this to be the better view[209]. That conclusion is consistent with the proposition that the extent and mode of publication is relevant to the aggravation of damages[210]. It might be noted that, in this passage, Hunt J was identifying conduct which might provide a basis for awarding aggravated damages. His Honour had already recognised that the conditions formulated in *Triggell* had to be satisfied before such damages could be awarded.

[228] It is convenient at this point to note some other statements of principle sometimes said to identify when aggravated damages might be awarded. Aggravated damages may be awarded where the conduct of the defendant aggravates the damage to a plaintiff's reputation which flows naturally from the publication[211]. Account can be taken of the mode and extent of the publication, the absence of a retraction or an apology, and the persistence in the publication "to the end", matters which might "increase the area of

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[205] (1951) 82 CLR 497, at 514.
[206] (1996) 41 NSWLR 1, at 17-18.
[207] [2012] VSC 88, at [51]-[55].
[208] (1985) 1 NSWLR 58, at 75.
[209] At [22,035]. See also *Ali v Nationwide News Pty Ltd* [2008] NSWCA 183, at [80].
[210] See Australian Defamation Law and Practice, at [22,065].
[211] See *Triggell v Pheeney*, at 513-514, where an analogy was drawn between aggravated damages for false imprisonment which has damaged a person's reputation, and aggravated damages for defamation.

publication and the effect of the libel on those who read it" or "might extend its vitality and capability of causing injury to the plaintiff"[212]. The conduct of the defence may be taken into consideration, as improperly aggravating the injury done to the plaintiff[213]. It seems to me that these matters generally relate to ordinary compensatory damages; though they would provide a basis for an award of aggravated damages if one of the conditions stated in *Triggell* is established.

[229] Moreover, some of the passages referred to earlier, and in particular that from Lord Reid's speech in *Broome*, are affected in Queensland by s 36 of the *Defamation Act*, which requires the Court to disregard the malice or other state of mind of the defendant at the time of publication, or at any other time, "except to the extent that the malice or other state of mind affects the harm sustained by the plaintiff." As was pointed out in *Cerutti & anor v Crestide Pty Ltd & anor*[214] (*Cerutti*), aggravated damages for hurt to the plaintiff's feelings on the ground of malice will only be awarded if a plaintiff is aware of the defendant's state of mind.

[230] It is self-evident that the purpose of the conference announcement was to attract attention to the media conference to be held the following day. Its effectiveness was heightened, in my view, by the fact that it referred to the making of "disclosures"; particularly when related to the assertion that the plaintiff was "not a fit and proper person to be a Minister". Subsequent print and online media publications show that it was effective[215]. Indeed, some went so far as to link the defendant's statements with the prospect that the plaintiff would not be permitted to continue as a Minister. Beyond its content, the fact that the conference announcement was made on the day prior to the media conference maximised the opportunity for media representatives to attend at the conference. In addition, the conference announcement, when it became the subject of media reports, was likely to have increased the interest of members of the public in what the defendant said at the media conference. Accordingly, in my view the conference announcement exacerbated the damages caused to the plaintiff's reputation by the statements made at the media conference. However, of itself that does not result in an award of aggravated damages.

[231] The plaintiff submitted that the defendant's conduct justified an award of aggravated damages, because of the defendant's knowledge of the plaintiff's position; because the defendant knew that the plaintiff would suffer great harm from the publications; and the defendant intended to cause such harm. The defendant submitted that his state of mind could not be taken into account in view of s 36 of the *Defamation Act*.

[232] The plaintiff's submissions sought to respond to this in two ways. One was by reliance on the judgment of Glass JA in *Andrews v John Fairfax & Sons Ltd*[216]. In my view, his Honour was there saying that where conduct which would establish an award of aggravated damages has been proven, it is unnecessary for a plaintiff to give evidence that in fact this augmented his sense of hurt, as that would be presumed. The passage was not directed to a submission that the plaintiff had not given evidence of knowledge that

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[212] *McGregor* (1928) 41 CLR 254, at 263, cited with approval in *Triggell,* at 513-514.
[213] *Triggell,* at 514.
[214] [2014] QCA 33, at [40].
[215] These are found in Exhibit 2.
[216] [1980] 2 NSWLR 225, at 249-250.

the defendant's conduct was reckless, or that he knew of a failure to apologise[217]. That does not meet the point made in *Cerutti*. Moreover, the plaintiff's knowledge of the defendant's state of mind is something likely to be peculiarly within the plaintiff's knowledge, and would ordinarily be expected to be the subject of evidence from the plaintiff.

[233] The second proposition advanced by the plaintiff, however, is a little different. It is that the defendant's conduct seeking to maximise the effect of his publications was motivated by malice, and had the effect of increasing the harm. It was submitted that in those circumstances, a consideration of malice was not excluded by s 36 of the *Defamation Act*, and accordingly an award of aggravated damages could be made.

[234] In my view, that is a proposition not addressed in *Cerutti*. There, the question was whether the plaintiff's hurt feelings were affected by knowledge that the defendant acted with a particular state of mind[218].

[235] I have already found that the defendant was actuated by malice in making the publications. I accept the submission that this led to the way in which the publications were made, and in particular to the use of the conference announcement to increase their effectiveness. Accordingly, it seems to me that an award of aggravated damages is justified on this basis.

[236] Beyond that, there is evidence that the plaintiff was aware of the defendant's motivation very shortly after the media conference. In his statement in Parliament on 13 November 2012[219], the plaintiff said of the defendant, "(t)he fact that he went to a media conference…shows quite clearly that this is a vengeful, bitter ex-staffer who wanted to try to take revenge and try to harm his former employer."

[237] As appears from *Andrews* the increased hurt may be presumed. It follows that, in any event, aggravated damages might be awarded by reason of the defendant's motivation[220].

[238] In the plaintiff's written submissions, reliance was placed on the conduct of the litigation. Although not pleaded, the plaintiff's reliance on this topic was not objected to by the defendant. That is not surprising, at least to the extent that it relates to the conduct of the trial.

[239] However, one of the matters relied upon is the filing by the defendant of documents said to have been obtained under r 222 of the UCPR. That rule permits a party to obtain copies of documents referred to in the pleading of another party. The documents were not identified. It may be assumed that the pleading which referred to them was filed. It was submitted that the documents worsened the impact of the defamatory statements on the plaintiff. Why that might be so is unclear. In any event, it seems to me that, for this conduct to constitute a basis for aggravated damages, it would be necessary to show, by

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[217] *Andrews*, at 249.
[218] See Cerutti at [40], [75].
[219] This is evidence of the plaintiff's state of mind: *R v Walton* (1989) 166 CLR 283, at 288, 300-302.
[220] A form of malice: see *Triggell* at 512.

reference to *Triggell*, that the defendant's conduct was lacking in bona fides, or improper or unjustifiable. This has not been shown with respect to the filing of the documents.

[240] The submissions for the plaintiff also relied upon delay in the conduct of the litigation. The only matters expressly referred to in the plaintiff's written submissions were the amendment of the Defence after the close of the plaintiff's case; and a stay application made by the defendant pending the outcome of criminal proceedings. Again, there is no basis for concluding that any of these things demonstrate a lack of bona fides in the defendant's conduct of the litigation, or that his conduct in respect of these matters was improper or unjustifiable. Accordingly, I do not accept that they are relevant to the question whether the award should include aggravated damages.

[241] The plaintiff's submissions rely on the attempt by the defendant to establish that lobbying activity occurred which was not recorded in the lobbyists' register[221]. It was submitted that this was a continuation of the allegation made by the defendant in the course of the publications, and thus aggravated the damage caused by them. It was also submitted that this was done on the basis of a "somewhat weak link to the question of reasonableness".

[242] It was necessary to consider whether the defendant could pursue this course at an earlier time in the trial. I then ruled that he could do so[222]. In the course of that ruling, I noted that the truth of the imputations was raised by the plaintiff in his Statement of Claim, in support of his claim for aggravated damages[223]. The defendant's defence of reasonable conduct in relation to the publications also raised a basis for challenging the accuracy of the lobbyists' register. In my view, it cannot be said that the defendant's conduct was lacking in bona fides, or improper or unjustifiable, in seeking to establish at the trial that there was lobbying activity involving Mr Flegg which was not included in the register.

[243] The plaintiff submitted that aggravated damages could be awarded because the plaintiff knew the imputations to be untrue. Reliance was placed on a passage from the judgment of Walsh JA in *Rigby v Associated Newspapers Ltd*[224]. That case was not concerned with the categorisation of damages as ordinary compensatory damages or aggravated compensatory damages. Rather it was concerned with the circumstances in which a plaintiff or defendant might lead evidence as to the truth or falsity of the defamatory imputation. Thus, in the passage referred to on behalf of the plaintiff, Walsh JA said

> "If this is correct, it is not easy to see why the question of truth or falsity cannot be considered also, even if it is irrelevant to actual loss of reputation, in order to determine the extent of the hurt to the plaintiff, which can be taken into account, not as a matter of damages, but (however illogically) as part of the damage done to the plaintiff … it seems reasonable to suppose that mental distress and hurt will ordinarily, although not always, be greater if a false libel is published than if the truth is published."

[244] It might first be observed that statements describing circumstances in which aggravated damages might be awarded usually relate to the conduct and state of mind of the

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[221] See 2 Plaintiff, at para 307(e).
[222] *Flegg v Hallett* [2014] QSC 278.
[223] See para 35(b) of the Statement of Claim.
[224] [1969] 1 NSWR 729, at 738.

defendant, and not to the state of mind of the plaintiff. The passage from the judgment of Walsh JA was recently discussed by Beach J in *Barrow v Bolt*[225]. His Honour held that the passage was not authority for the proposition that a plaintiff's mere knowledge that an imputation was false can (without more) entitle the plaintiff to an award of aggravated damages. His Honour regarded other cases relied upon for the submission also as not supporting it[226]; and concluded that aggravated damages were only available where there was some relevant conduct by the defendant which was lacking in bona fides or improper or unjustifiable[227].

[245] Like his Honour, I do not see the statement of Walsh JA as going so far as to establish that the plaintiff's knowledge that an imputation is untrue is sufficient to justify an award of aggravated damages. In jurisdictions where the substantial truth of the imputation is a defence[228], it is rather unlikely that a successful plaintiff would not know the imputation to be untrue. If the submission were correct, the limitation found in s 35 of the Act would rarely be effective. Accordingly, I do not accept that the plaintiff's knowledge that a defamatory imputation is untrue is a proper basis for an award of aggravated damages; though I accept it to be relevant in determining ordinary compensatory damages.

[246] The plaintiff's submissions did not identify specific references to passages of the evidence where the defendant referred to Mr Flegg as the "Minister's registered lobbyist son". There are a number to which I have given consideration[229]. In the context in which they appear, I am not satisfied that the references by the defendant to Mr Flegg as the Minister's, or the plaintiff's, lobbyist son (or registered lobbyist son) were designed to cause additional damage to the plaintiff, as was submitted. In the context of what the defendant was seeking to convey in his evidence (explaining why he was concerned about contact between the plaintiff and Mr Flegg), the expressions seemed to me to be appropriate.

[247] Again, no references were provided in respect of the submission that the defendant mentioned things "such as the O'Sullivan matter" as often as possible, whether relevant or not because they were politically embarrassing to the plaintiff. I have considered a number of such references.[230] On one occasion, in cross-examination, it was put to the defendant that his strategy that the plaintiff would ultimately disclose contacts in which Mr Flegg had carried out lobbying activities was a change of tack, in response to which he referred to the "Barry O'Sullivan affair" as demonstrating the need to admit mistakes. At one point the defendant was cross-examined about sending a dishonest response to Mr Hurst. In explaining his conduct he made reference to issues that "banked up over time" and made mention of the "O'Sullivan affair" as a matter which created difficulties in dealing with the media.[231] In my view, his purpose in referring to this matter was to explain his conduct at the time of the response to Mr Hurst. There was an occasion when the defendant's reference to this matter went beyond the response to the question asked

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[225] [2013] VSC 226, at [12]-[14].
[226] *Barrow*, at [15]-[20].
[227] *Barrow*, at [20].
[228] See s 25 of the *Defamation Act*.
[229] T6-26/45 to 27/2; T6-27/43 to 28/35 T6-29/23-30; T6-33/28-42 (which simply quotes passages from Mr Hurst's email, in evidence elsewhere); T6-38/31-44; T6-43/45 to 6-44; T6-48/26-28; T6-60/45 to 61/6 (quoting Exhibit 13); T6-63/1-12 (again referring to Exhibit 13); T7-7/41 to 8/2.
[230] T6-43/31-35; T6-46/16-24; T6-53/11-15; T6-54/14-17; T7-18/1-4; T7-22/14-29.
[231] T7-18/1-4.

of him[232]. His purpose in doing so, it seems to me, was to explain his conduct rather than to embarrass the plaintiff. Accordingly, I am not prepared to accept the submissions on behalf of the plaintiff that reference to this matter warrant an award of aggravated damages.

[248] With respect to an award of such damages because the defendant had proceeded with the media conference after the first concerns notice, the plaintiff's submissions relied on a passage from *Konstantinidis v Foreign Media Pty Ltd*[233]. In that case, after the publications on which the action was based, the solicitors for the plaintiffs sent a letter refuting the imputations. Nevertheless the first defendant made six further publications, not the subject of the action. As I read the passage, it is the making of the subsequent publications which demonstrated a "concerted campaign" against the plaintiff, and revealed a "vendetta" against him; thus justifying an award of aggravated damages.

[249] The plaintiff's submissions also relied upon a passage from *Jarratt v John Fairfax Publications Pty Limited*[234]. There, some months intervened between the second publication and the third publication on which the action was based. In that period, the plaintiff's solicitors wrote to the defendant pointing out "gross factual errors in the publications" and stating that the plaintiff had instructed them to commence defamation proceedings[235]. The defendant responded to the letter some time later, including a passage of which the Judge said "it is not apparent to me how any person of ordinary intelligence could honestly make this statement"[236]. Compensatory damages were "enhanced"[237]. While *Jarratt* demonstrates that circumstances including the sending of such a letter might provide a basis for an order of aggravated damages, the mere fact that a defendant made a publication after a letter such as the first concerns notice is not of itself sufficient.

[250] The first concerns notice was given for the purposes of s 14 of the *Defamation Act*. That section was not relied upon in support of the plaintiff's contention that the defendant's conduct justified an award of aggravated damages.

[251] The first concerns notice addressed what the plaintiff said in the conference announcement. That was that the defendant would be making certain disclosures to the effect that the plaintiff was not a fit and proper person to be a minister, and what was said to be another part of the conference announcement, not raised by the Statement of Claim. The first concerns notice relevantly amounted to an assertion to the contrary of what was said in the conference announcement and called for an apology as well as threatening proceedings. In my view, it is difficult to see how the defendant's persistence with the publications after receipt of the first concerns notice materially affected the hurt felt by the plaintiff, beyond that occasioned by the publications themselves. Likewise, it is difficult to see that it materially affected the damage done to the plaintiff's reputation. Accordingly, it seems to me that this conduct does not provide a basis for an award of aggravated damages.

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[232] T6-54/14-17.
[233] [2004] NSWSC 835, at [60].
[234] [2001] NSWSC 739, at [163].
[235] *Jarratt*, at [37].
[236] *Jarratt*, at [40]-[41].
[237] *Jarratt*, at [165].

[252] In *Andrews*[238], a case under the *Defamation Act* 1974 (NSW), which has substantial similarities with the Queensland Act, Hutley JA held that recklessness in making the publication is a ground for aggravated damages[239], though it must have affected the plaintiff, and to have aggravated the damages. Glass JA agreed, and said that aggravation of the plaintiff's injury could reasonably be accepted without need for the plaintiff to say so; but it was necessary to show that the defendant's conduct was improper or unjustifiable.[240] Mahoney JA also considered that the failure of the defendants to enquire into the facts before publication was a factor which could aggravate the damages because in fact it increased the hurt to the plaintiff.[241]

[253] I had previously rejected the defendant's evidence of the conversation with Mr Flegg, in relation to the entries on Jonathon's list. I accept that the defendant made the publications, without proper enquiry as to whether any communications recorded on that list amounted to lobbying activities, and accordingly as to whether they should have appeared on the lobbyists' register. Had the defendant made those enquiries, it seems unlikely that he would have made the allegations which are the subject of these proceedings. On this basis, it seems to me, it is appropriate to make some allowance for aggravated damages. I would add that I consider the defendant's failure to make those enquiries to be improper and unjustifiable.

[254] The failure to make an apology after the request also aggravates the damages.[242] The failure to apologise, in my view, aggravates both the damage to a plaintiff's reputation, and the hurt experienced by the plaintiff, because an apology would bring to an end the damage to the plaintiff's reputation, and the consequent hurt suffered by the plaintiff, by the defamatory publication. Enquiry by the defendant after the publication was likely to have established that an apology was called for. No circumstances was identified which justified the defendant's failure to do so. Accordingly, I conclude that his failure to apologise was improper and unjustifiable, and provides a further basis for an award of aggravated damages.

General damages

[255] Broadly speaking, in the conference announcement, the defendant alleged that the plaintiff was unfit to hold Ministerial office, and that there were disclosures to be made by the defendant in support of that allegation. In the media conference, the defendant repeated the unfitness allegation. He alleged that the plaintiff allowed himself to be inappropriately lobbied by his son. He alleged that the plaintiff had committed a serious offence, providing a document to a committee of Parliament that was grossly inaccurate and had been doctored; and when advised to rectify the situation he had refused to do so. In the radio interview the defendant had alleged that the plaintiff had provided material to a Parliamentary committee that was grossly inaccurate; he had refused to correct the record; he had sacked the defendant because the defendant wanted the plaintiff to correct material provided to the Parliamentary committee; the plaintiff had allowed himself to be lobbied by his son; and the plaintiff ought to be dismissed from his position as a Minister.

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238 [1980] 2 NSWLR 225.
239 *Andrews at* p 244.
240 *Andrews* at 250.
241 At p 264.
242 *Andrews* at 243, 250.

[256] The allegations, taken together, are serious, not only in relation to the plaintiff's political career, but also for him as a medical practitioner. However, the favourable findings of the Integrity Commissioner seem to me likely to have provided some vindication.

[257] In my view, the conference announcement, though relatively brief, was of some significance and caused damaged to the plaintiff's reputation. However the most significant publication was the media conference (though the damage to the plaintiff's reputation resulted mostly from subsequent republications of the plaintiff's allegations). While the radio interview in substance repeated a number of significant allegations made in the media conference, it did not materially extend their scope. It is likely that it reached some members of the public who may not have been aware, or fully aware, of the allegations made at the media conference. However it seems to me that the vast majority of members of the public who became aware of the defendant's allegations, did so as a result of the media conference.

[258] Under s 35 of the *Defamation Act*, there is a limit on the maximum amount of damages for non-economic loss that may be awarded in defamation proceedings. The relevant limit was $339,000 in November 2012[243] and is now $366,000[244]. However, that limit may be exceeded where an award of aggravated damages is warranted.

[259] Under s 39 of the *Defamation Act*, where a plaintiff is successful in establishing more than one cause of action for defamation, the judicial officer may assess damages in a single sum for all such causes of action. Both parties have submitted that this is an appropriate course to follow in the present case. I agree. The publications were proximate in time, and were inter-related.

[260] For the defendant, it was submitted that the publications should be considered in the context of earlier publicity associated with the dismissal of Mr Stephen; and the subsequent publication of emails referred to in Jonathon's list and a statement by the Premier.[245] The press report suggests that the Premier agreed with the defendant about the inaccuracy of the lobbyists' register. No basis was identified in the defendant's submissions for saying this was relevant to the amount to be awarded to the plaintiff. Absent a finding that the Premier's statement reflected the true position, a finding not made in these proceedings, it could in fact be regarded as a statement which resulted from the defendant's publications, and for that reason justifying some increase in the award. I do not accept that it provides a proper basis for a lower award than would otherwise be made.

[261] The defendant's submissions also relied upon the fact that the media conference commenced with a statement by the defendant to the effect that, just as the plaintiff had lost trust in the defendant, the defendant had lost trust in the plaintiff. I do not consider that this materially affects the significance of the imputations in the defendant's publications, or the hurt experienced by the plaintiff as a consequence of it.

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[243] Queensland Government Gazette no 333, 22 June 2012, p 362.
[244] Queensland Government Gazette no 366, 27 June 2014, p 464.
[245] Exhibit 2, tab 15.

[262] The plaintiff's submissions placed particularly reliance on the awards in *Yahoo!* and *Trkulja v Goggle Inc*[246] (*Google*). Yahoo had published on its website an article found to contain imputations that the plaintiff was so involved with crime in Melbourne that his rivals had hired a hit man to murder him; and that the plaintiff was such a significant figure in the Melbourne criminal underworld that events involving him were recorded on a website that chronicles crime in Melbourne. The article remained accessible on the website from January 2009 to December 2009. *Google* published the same article between 11 October 2009 and 31 December 2009 (or at least that was the period for which that plaintiff was entitled to recover damages). In the *Google* case, the only imputation found by the jury was that the plaintiff was so involved with crime in Melbourne that his rivals had hired a hit man to murder him. The plaintiff was a 61 year old migrant from Yugoslavia who had come to Australia at the age of 20. He featured regularly in the media, particularly in the ethnic media, using print and live media to promote singers and entertainers. In the early 1990s he had his own show on television which, for some 12 months, was the second highest rating show on Channel 31. Before the publications, he had had a very high reputation in the Yugoslav community. There was direct evidence of the fact that people came to shun him subsequent to the publications. He also suffered a depressive reaction. Neither award included aggravated damages.

[263] In *Yahoo* Kaye J said[247], with reference to damages,

> "… the evidence establishes that the material remained available to be accessed on the internet through the defendants' search engine, until the end of 2010. The fact that the material remained available through the defendants' search engine for such a period of time, without being removed, could only have served to increase the damage to the plaintiff's reputation throughout the community. In that respect, the publication had a more injurious effect, than if it had been made on the live media, or even in the print media. It was open to persons, who heard about the publication, to view it for themselves, and to confirm the contents and effect of it."

[264] In each case, the award took account of the other action. In *Yahoo*, general damages were assessed at $225,000; and in *Google*, at $200,000. In each case, vindication of the plaintiff's reputation was a particularly significant factor.

[265] Notwithstanding the seriousness of the imputations in the present case, those in *Yahoo* and in *Google* were plainly considerably more serious. The length of time for which the publications continued and the matter remained public, and the ease with which people could access the material at will, repeatedly if they wished, are also of significance.

[266] The other cases dealing with awards for damages to which I have been referred do not provide particular assistance. In the circumstances, I assess damages including aggravated damages, in the sum of $275,000.

Special damages

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[246] [2012] VSC 533.
[247] At [39].

[267] The plaintiff has claimed special damages being the difference between his Ministerial salary until the end of the then current term of Parliament; and the reduction in his superannuation entitlements resulting from his resignation as a Minister. The total amount claimed is $1,088,303.77.

[268] While the calculations relied upon for this claim are not in issue, the defendant submitted that the amounts should be treated as subject to substantial contingencies. The defendant also denied that the plaintiff's resignation was caused by the publication of the defendant's statements.

[269] Notwithstanding the plaintiff's statement in Parliament[248], the plaintiff accepted that it was open to the defendant to challenge the allegation that the plaintiff's resignation was caused by the defendant's publications. As will appear, it is unnecessary to examine further the correctness of this concession.

[270] The plaintiff gave evidence that he resigned to put an end to the criticism of the government associated with the defendant's claim, and because of his concern about the effect of the publicity on Mr Flegg[249]. No reason has been identified for not accepting this evidence. The circumstances themselves make the plaintiff's explanation likely. Accordingly I accept the plaintiff's evidence, and find that his resignation as a Minister was a consequence of the publications.

[271] I also accept that the uncertainties of political life justify a greater allowance for contingencies that might otherwise be the case. Accordingly, I assess special damages at $500,000.

Conclusion

[272] I find that on each of the three occasions referred to in the Statement of Claim, the defendant defamed the plaintiff. For the three publications taken together, I assess general damages at $275,000, and special damages at $500,000.

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[248] See Exhibit 18.
[249] T1-38 to 1-39.