23 August 2019

The Hon Christian Porter MP
Attorney-General
Parliament House
CANBERRA ACT 2600
By email: attorney@ag.gov.au, Tim.wellington@ag.gov.au

Dear Attorney-General,

Australia's Right to Know (ARTK) coalition of media companies writes to you regarding defamation law issues that arise specifically within the Federal jurisdiction. This letter follows a meeting attended by some members of ARTK with you and Minister Fletcher in late June regarding the overarching issue of media freedom.

You will recall during that meeting ARTK noted we are actively engaged with the Council of Attorneys-General review of the Model Defamation Provisions (**the CAG Defamation Review**) being led by NSW Attorney-General Mark Speakman. At that meeting we raised with you two material issues that we have raised in submissions to the CAG Defamation Review that pertain to the Federal jurisdiction, being the issue of the lack of juries in Federal Court defamation matters and the procedures of the Federal Court regarding defamation matters.

We undertook to write to you regarding these two important issues in the Federal jurisdiction, hence this correspondence. Details of those issues follow:

PRESUMPTION AGAINST JURIES IN THE FEDERAL COURT OF AUSTRALIA

The Model Defamation Provisions (MDP) were put in place to promote uniform defamation laws across Australia. While this was the intention, it is not the reality.

ARTK has serious concerns about jurisdictional inconsistency of the provisions and procedures regarding juries in defamation cases. With particular regard to the Federal jurisdiction, there is a presumption that juries will not play a role in defamation cases heard in the Federal Court.

In *Wing v Fairfax Media Publications Pty Limited* the Full Federal Court held that there is direct inconsistency between sections 39 and 40 of the *Federal Court of Australia Act 1979* (Cth) (**the Act**) (which provide for a presumption that civil trials are to be by a judge without a jury) and sections 21 and 22 of the MDP (under which any party in defamation proceedings may elect for the proceedings to be tried by a jury). The MDP provisions

cannot be binding on the Federal Court by reason of that inconsistency and are not relevant to the exercise of the discretion in section 40 to order a jury.

This situation is productive of forum shopping, as can be seen from the number of recent high profile cases being commenced in the Federal Court. No doubt, plaintiffs perceive their prospects of success as being greater before a judge sitting alone and issue in the Federal Court to avoid a jury.

ARTK considers that juries are best placed to act as the "ordinary reasonable reader" in defamation cases and to apply community standards appropriately and conscientiously. ARTK also holds a concern that a docket judge who has case managed all issues in a case throughout the interlocutory stages may find it difficult to step into the shoes of the ordinary reasonable reader in order to determine issues at trial, such as the actual meaning of a matter complained of given that the pleaded meanings may have become so entrenched during the course of the proceedings that this will be a difficult task. A jury, however, would hear imputations arguments for the first time at trial, and would therefore be in a similar position to the ordinary reasonable reader who forms a view as to the meaning of a publication when they read the newspaper or watch the television broadcast.

Accordingly, ARTK recommends that:

a) The Federal Government must become a signatory to the Intergovernmental Agreement for the MDP;
b) The Federal Government must amend the Act to incorporate sections 21 and 22 of the MDP. This is a more specific recommendation than that proposed in the CAG Defamation Review Discussion Paper – it was not included since CAG has no input into Commonwealth law. We believe this is necessary because it is important that the provisions and procedures be uniform across jurisdictions; and
c) The ACT and NT laws should also be amended to incorporate sections 21 and 22 of the MDP.

Such changes would ensure greater consistency across jurisdictions and extinguish any incentive/s for forum shopping. It would also meet the object of the MDP to promote uniform laws throughout Australia.

INCONSISTENCY REGARDING PROCEDURES IN THE FEDERAL COURT

Request for a Defamation Practice Note to ensure consistency

ARTK has serious concerns about jurisdictional inconsistency regarding the procedures followed by the Federal Court of Australia as opposed to other jurisdictions, particularly NSW where most defamation cases in Australia are heard.

On 18 July 2018, ARTK wrote to His Honour Chief Justice Allsop to respectfully request that the Federal Court consider introducing a Defamation Practice Note given the increase in the number of defamation proceedings being commenced in the Court in recent times.

We articulated that the introduction of a Defamation Practice Note would assist with providing certainty to the parties in proceedings, as well as to the case management judges, particularly with regard to the steps to be taken at the beginning of defamation proceedings. This would further the Federal Court's aim of achieving the quick, efficient and inexpensive resolution of disputes.

One issue of particular importance in defamation proceedings, which does not arise in the context of other litigation, is whether the publications complained of are capable of conveying the defamatory meanings or "imputations" pleaded by an applicant. While an imputation is no longer the cause of action in a defamation action[1], it is an essential particular of a defamation action. Many of the defences available in a defamation

[1] As was the case prior to the commencement of the Uniform Defamation Acts in 2006, for example the *Defamation Act 1974* (NSW), s 9(2).

action[2] turn upon the imputations pleaded. It is a matter for the applicant to select the imputations to be pleaded in a defamation action, and a common strategy is to pitch these at a high level so that defences are not available.

Given that the imputations inform the defences that may be pleaded, the scope of discovery and interrogatories available and the nature of the evidence to be adduced in a defamation action, it is important that where there is an argument available that the publication is not capable of conveying a pleaded imputation, this is dealt with at the very start of proceedings.

While it is currently open for respondents to apply to the Federal Court for such capacity arguments to be heard and determined as a separate question under r 30.01 of the *Federal Court Rules 2011* (Cth) (the **Rules**) or on a strike out basis under r 16.21 of the Rules, the attitude and approach to such applications has varied amongst the judges in different matters. We gave examples of those cases.

We noted the Federal Court's general preference to engage in as few interlocutory applications as is necessary for the just and efficient disposition of matters. However, we considered then – and still do – that a Practice Note which streamlines the process for determining capacity disputes at an early stage of defamation actions will achieve the Federal Court's overarching purpose to facilitate the just resolution of disputes as quickly, inexpensively and efficiently as possible[3]. This is achieved by narrowing the issues in dispute so that only the real issues are left before the Court for the remainder of the proceedings. We continue to be of the view that this will result in a more efficient use of the judicial and administrative resources of the Federal Court, dispose of the proceedings in a more timely manner and resolve disputes at a cost which is more proportionate to the importance and complexity of the matters in issue. This would also provide certainty for the parties and the case management judge in terms of the process to be followed in defamation matters.

In our experience, the costs incurred in running defamation matters in the Federal Court far exceed the costs incurred in other courts, including the NSW Supreme Court and the NSW District Court. We consider that the reasons for this include:

- many Federal Court judges are inexperienced in the area of defamation, which means that additional time needs to be spent at each stage in the proceedings to educate them on the law;
- the speed at the beginning of proceedings, precipitated by the requirement for respondents to file a defence within 28 days, results in more up-front costs for the parties and fewer early opportunities for informal resolution of the proceedings;
- the Federal Court's preference to minimise interlocutory disputes has the result that the issues in dispute are not appropriately narrowed, such that the scope of defences, evidence, discovery and interrogatories is wider than necessary and trials are longer and more complex than would otherwise be the case;
- the Federal Court's requirement to file formal applications for the determination of interlocutory disputes incur additional time and expense, as compared to other courts which have dispensed with such requirements (see, for example, paragraph 14 of the NSW District Court's defamation practice note[4]);
- the Federal Court's practice for formal case management hearings, at which counsel are expected to attend. Further, the lack of a dedicated defamation list means that all interlocutory matters are dealt with on separate days, which increases the overall time that judges are engaged in them as well as practitioners;
- the Federal Court's requirements in relation to evidence, including the filing of affidavits or exchange of outlines of evidence, which are not required in other courts including the NSW Supreme Court and the

[2] Most importantly, the defence of justification under s 25 of the Uniform Defamation Acts, which provide that it is a defence to the publication of defamatory matter if the defendant "proves that the defamatory imputations carried by the matter of which the plaintiff complains are substantially true".
[3] Sections 37M and 37N of the *Federal Court of Australia Act 1976* (Cth).
[4] http://www.districtcourt.justice.nsw.gov.au/Documents/Practice%20Note%20-%20Defamation%20(Civil).doc

NSW District Court. In such courts, evidence is adduced orally at trial without prior notice to the other party. Generally speaking, witness lists are not exchanged in advance;

- in general, judge alone civil trials are more expensive than jury trials – although it seems counterintuitive, the court and the parties try to run a jury trial simply and quickly.

For some time NSW has consistently had the largest volume of defamation actions. To that end we cited the well-functioning defamation practice notes of the NSW Supreme Court (SC CL 4 for the Defamation List) and NSW District Court in correspondence with the Federal Court.

Draft Defamation Practice Note

We are grateful to Justice White of the Federal Court for seeking engaging with ARTK in April 2019, seeking feedback on the Federal Court's Draft Defamation Practice note.

We responded on 29 May 2019, and re-state here, that the introduction of a Defamation Practice Note would assist with providing certainty to the parties in proceedings and the case management judges regarding the steps to be taken throughout defamation proceedings, particularly at the beginning.

ARTK particularly expanded on the importance of the Federal Court addressing issues with pleadings, including the capacity and form of imputations, 'up-front' to assist the court's case management emphasis on achieving the quick, efficient and inexpensive resolution of each matter.

To that end we provided detailed mark-ups to the Draft Defamation Practice Note. For convenience, our correspondence is **attached**, including the marked-up Draft Practice Note.

Accordingly, ARTK recommends that:

a) The Federal Government must become a signatory to the Intergovernmental Agreement for the MDP;
b) The Federal Government must amend the Act to incorporate sections 21 and 22 of the MDP; and
c) The Federal Court adopt our recommended amendments to the Draft Defamation Practice Note.

Such changes would ensure procedural consistency across jurisdictions and meet the object of the MDP to promote uniform laws throughout Australia.

We welcome engagement on these issues at your convenience.

Kind regards

Georgia-Kate Schubert
On behalf of Australia's Right to Know coalition of media companies

29 May 2019

Mr Rupert Burns
Judicial Registrar and National Coordinating Registrar (Defamation)
Victoria Registry
Federal Court of Australia
305 William St
MELBOURNE VIC 3000

By email: rupert.burns@fedcourt.gov.au, Assistant.BurnsR@fedcourt.gov.au

Dear Mr Burns,

Australia's Right to Know (**ARTK**) media coalition thanks Justice White for his correspondence of 6 May 2019 regarding the draft defamation practice note for the Federal Court of Australia (the **Court**). We write in response to Justice White's invitation for feedback on the draft practice note.

As you will be aware, ARTK wrote to the Chief Justice of the Federal Court in July 2018 to respectfully request that the Court consider introducing a practice note for defamation matters. We wrote then, and re-state here, that the introduction of a defamation practice note would assist with providing certainty to the parties in proceedings and the case management judges regarding the steps to be taken throughout defamation proceedings, particularly at the beginning.

ARTK particularly expanded on the importance of the Court addressing issues with pleadings, including the capacity and form of imputations, 'up-front' to assist the Court's case management emphasis on achieving the quick, efficient and inexpensive resolution of each matter.

The Draft Practice Note states [at 4.2], '*The key objective of case management is to reduce costs and delay so that the issues in contest are reduced; in relation to these issues, there is no greater factual investigation than the justice of the case requires; and the number of interlocutory applications and attendances is the minimum necessary for the just and efficient disposition of the action.*' With this in mind, we respectfully ask the Court to consider the ARTK recommended amendments (**ARTK amendments**) to the Draft Practice Note (at **Attachment A**) to achieve the objectives of the Court.

Below we outline reasons for the ARTK amendments to assist the Court.

Clauses 3.4 and 3.5

Clauses 3.4 and 3.5 of the ARTK amendments replace the original clause 3.4.

The parties to defamation proceedings in State and Territory courts are guided by court rules and practice notes when preparing court pleadings. In particular, Part 14 Division 6 and Part 15 Division 4 of the *Uniform Civil Procedure Rules 2005* (NSW) (**UCPR**) contain detailed requirements regarding the pleadings and particulars in defamation cases.

We have amended the draft practice note to incorporate the requirements for a statement of claim in defamation proceedings from rules 14.30, 15.19 and 15.20 of the UCPR. We consider that the inclusion of these requirements will give helpful assistance to applicants in defamation proceedings when preparing their pleadings, and to respondents in understanding the case they have to meet. This will also assist the Court by ensuring that pleadings in defamation cases are properly pleaded and particularised, and so the matters in issue are clear and able to be understood.

ARTK is of the view that the Court should also consider incorporating the requirements relating to defences (rules 14.31 to 14.40 and rules 15.21 to 15.30), replies (rule 15.31) and damages (rule 15.32), but notes that some of these simply restate the applicable legislation.

ARTK amendment to clauses 4.5 to 4.9

ARTK considers it is extremely important that the requirement to file a defence within 28 days be dispensed with for defamation proceedings to ensure consistency with other jurisdictions (to avoid forum shopping) and to provide procedural fairness to respondents to defamation actions. This will also discourage improper pleading practices by applicants, who may otherwise seek to rely on imputations which are not capable of being conveyed by the matters complained of, which is contrary to the "just, quick and cheap" ethos of the Court.

By listing the first case management hearing earlier than proposed (ie, 3-4 weeks after the filing of the application and statement of claim, as opposed to 5-6 weeks after that date) would enable any objections to the statement of claim (including any non-compliance with the pleading requirements in clauses 3.4 and 3.5; capacity and form issues with the imputations; abuse of process and proportionality issues) to be notified in correspondence and dealt with at the first case management hearing. ARTK agrees that such issues should ordinarily be dealt with under the Court's Rules relating to the adequacy of pleadings (r 16.21).

Where a party seeks that the Court determine at the start of proceedings whether imputations are in fact conveyed, rather than leaving this to be a trial issue, ARTK considers this should be dealt with by way of a separate trial under r 30.01 of the Court's Rules. Such a process would work in the Federal Court given that the docket judge is likely to determine all issues in the case, and would have the positive consequence that only imputations which are in fact conveyed by the matters complained of would be taken to trial, saving the time and cost of pleading unnecessary defences, and confining evidence, discovery, interrogatories and the trial itself to the real issues in dispute.

ARTK amendment (deletion) of clause 4.9 (which appears as clause 4.14 in ARTK's draft due to additional clauses being inserted)

This clause of the practice note stated that the Court's preference is that issues concerning the *capacity* of matters complained of to convey a pleaded meaning should not ordinarily be litigated at the interlocutory stage and should be left to trial.

ARTK considers this approach is inconsistent with the "just, quick and cheap" ethos of the Court, and encourages applicants to plead imputations which are not capable of being conveyed. While an imputation is no longer the cause of action in a defamation action, it is an essential particular of a defamation action. Many of the defences available in a defamation action turn upon the imputations pleaded. It is a matter for the applicant to select the imputations to be pleaded in a defamation action, and a common strategy is to pitch these at a high level so that defences are not available.

A respondent should only be required to plead a defence to imputations which are capable of being conveyed (or, as raised above, are in fact conveyed if this is something which the Court is minded to determine as a separate trial at an early stage in the proceedings), and only imputations which are capable of being conveyed (or in fact conveyed) should be taken to trial. Otherwise, the issues in dispute throughout the proceedings are broader than necessary, which adds to the length, cost and complexity of the proceedings. This is at odds with the case management imperatives in paragraph 8.5 of the Central Practice Note. Determining imputations at an early stage in the proceedings may narrow the scope of the defences, subpoenas, discovery, interrogatories, evidence and the trial itself.

ARTK also holds a concern that given the docket judge will determine all issues in the case, the pleaded meanings may become so entrenched that it will be difficult to step into the shoes of the ordinary reasonable reader in determining the actual meaning of a matter complained of at trial. This is particularly the case if the respondent has alternative pleadings in its defence i.e. where it says that the pleaded meanings were not conveyed, but if they were conveyed, then they were substantially true.

As we have expressed previously, and cemented by our active engagement in the review of the Draft Practice Note, ARTK believes this is an important tool for all parties including the judiciary, in defamation actions in the Federal Court. To that end ARTK would be happy to engage further with the Court regarding the further development and finalisation of the Draft Practice Note. Please feel free to contact me should that be an appropriate course.

Yours sincerely,

Georgia-Kate Schubert
On behalf of Australia's Right to Know media coalition

DEFAMATION PRACTICE NOTE (DEF-1)

[V4 2 5 19]

Defamation Sub-area Practice Note – Other Federal Jurisdiction NPA

1. INTRODUCTION

1.1 This Practice Note sets out the arrangements for the management of defamation cases within the National Court Framework ("**NCF**"). It:

(a) is to be read together with the:

- Central Practice Note (CPN-1), which sets out the fundamental principles concerning the NCF of the Federal Court and key principles of case management procedure. The Central Practice Note is an essential guide to practice in this Court in all proceedings; and
- the *Federal Court of Australia Act 1976* (Cth) ("**Federal Court Act**") and the *Federal Court Rules 2011* (Cth) ("**Federal Court Rules**");

(b) takes effect from the date it is issued and, to the extent practicable, applies to proceedings whether filed before, or after, the date of issue;

(c) sets out the arrangements for the management of defamation proceedings. It is intended to set out guiding principles for the conduct of these proceedings and is not intended to be applied inflexibly.

2. OVERVIEW, DEFINITION AND OPERATION OF THE DEFAMATION SUB-AREA

2.1 The Defamation Sub-area is a Sub-area within the Other Federal Jurisdiction NPA and covers all manner of defamation disputes within federal jurisdiction, including defamation cases that may arise under a law of the parliament (s 39B(1A)(c) of the *Judiciary Act 1903* (Cth)).

2.2 This area of the law involves the balancing of competing rights and interests: the protection of a person's reputation, on the one hand, and the protection of free speech, on the other.

2.3 The Defamation Sub-area is specialised in nature. The judges dealing with the work in the Sub-area are listed on the Court's website and cases will be allocated to this dedicated group of judges who have expertise in defamation matters.

3. COMMENCING PROCEEDINGS

3.1 Subject to the matters set out in the Central Practice Note and clarified below (see for example paragraph 4.5 regarding the timing of service of originating material), the Federal Court Rules and Forms apply to the commencement of proceedings in this NPA.

3.2 Due to the nature of defamation proceedings, any defamation proceeding should be commenced by filing an originating application (see r 8.01 of the Federal Court Rules) supported by a statement of claim, rather than by a concise statement.

3.3 The statement of claim must be carefully drafted so as to minimise the likelihood of disputes between the parties concerning the meaning and capacity of the pleaded imputations.

3.4 The statement of claim must contain the following:

(a) particulars of any publication on which the applicant relies to establish the cause of action, sufficient to enable the publication to be identified (referred to as a "matter complained of");

(b) particulars of any publication, circulation or distribution of each matter complained of or copy of each other publication on which the applicant relies on the question of damages, sufficient to enable the publication, circulation or distribution to be identified;

(c) if the applicant alleges that a matter complained of had a defamatory meaning other than its ordinary meaning--particulars of the facts and matters on which the plaintiff relies to establish that defamatory meaning, including:

(i) full and complete particulars of the facts and matters relied on to establish a true innuendo; and

(ii) by reference to name or class, the identity of those to whom those facts and matters were known;

(d) if the applicant is not named in a matter complained of--particulars of identification of the applicant together with the identity, by reference to names and addresses or class of persons, of those to whom any such particulars were known;

(e) particulars of the part or parts of a matter complained of relied on by the applicant in support of each pleaded imputation;

(f) if the applicant is a corporation, particulars of the facts, matters and circumstances on which the applicant relies to establish that the corporation is not precluded

from asserting a cause of action for defamation; and

(g) to the extent available at the time of filing the statement of claim:

(i) particulars of facts, matters and circumstances on which the applicant will rely in support of a claim for aggravated damages, and

(ii) particulars of any claim the applicant makes by way of special damages or any claim for general loss of business or custom.

3.5 Such of the following as is applicable must be filed and served with the statement of claim (or any amended statement of claim) and be referred to in the statement of claim or amended statement of claim:

(a) a copy of each matter complained of in the form (or as close to the form as practicable) in which it was published, including:

(i) an online publication or electronic communication in both digital form and printed form;

(ii) a video publication or broadcast in audio-visual form;

(iii) a verbal statement in audio form; and

(iv) a printed publication in print form – preferably in context, such as a legible photocopy of an entire page of a newspaper to show the position of the article in situ, and in the actual size and original colour; and

(b) a typescript of each matter complained of, with numbered paragraphs, in English.

Deleted: <#>Applicants should, when commencing proceedings or at least seven days before the first case management hearing, deliver to the Court and to the respondent(s) on request, the actual publication(s) in issue. The publications should be provided in such a manner that the Docket Judge can view the impugned matters in the form (or as close to the form as practicable) in which they were published (eg, an online or video publication provided in digital form, a verbal statement in audio form, and a printed publication in print form – preferably in context, such as the position of the article in a newspaper). When the impugned matter is in written form, a copy of the publication in actual size and in original colour should be provided, with the paragraphs of the relevant article, chapter or document numbered, for ease of common reference; and when in audio or audio visual form, a transcript with numbered paragraphs.¶

4. CASE MANAGEMENT

4.1 Parties and their representatives should familiarise themselves with the guiding case management information set out in Part 8 of the Central Practice Note. This Practice Note should always be read with the Central Practice Note.

4.2 Case management will have a strong emphasis on the quick, efficient and as inexpensive as practicable disposition of each matter (see Parts 7 and 8 of the Central Practice Note). The key objective of case management is to reduce costs and delay so that:

- the issues in contest are reduced;
- in relation to those issues, there is no greater factual investigation than the justice of the case requires; and

- the number of interlocutory applications and attendances is the minimum necessary for the just and efficient disposition of the action.

4.3 The Court recognises that proceedings in this Sub-area will vary in complexity and that different approaches to case management and alternative dispute resolution may be appropriate from time to time.

Case Management Hearings and Pleadings

4.4 Case management hearings are integral to case management. The aim of case management hearings is the early identification of issues in the proceedings and means for their resolution. The parties should prepare for the first case management hearing and subsequent case management hearings as noted in Part 8 of the Central Practice Note and below.

4.5 Ordinarily, the first case management hearing will take place approximately 3-4 weeks after the filing of the application and statement of claim. It is important that the application and statement of claim are served on the respondent(s) expeditiously (for example, within 3 business days).

4.6 A respondent in proceedings in this Sub-area is excused from the requirements in rr 16.32 and 16.45(3) of the Federal Court Rules), and does not need to file and serve a defence within 28 days of service of the statement of claim.

4.7 Prior to the first case management hearing:

(a) the respondent(s) should notify the applicant in writing:

(i) to the extent possible, whether the element of publication is admitted and, if so, the admitted scope of the publication and, if not, the reason why it is not; (ii) of any objection to the statement of claim, including any objection as to non-compliance with clauses 3.4 and 3.5 above, any objection that a matter complained of is not capable of conveying any of the imputations pleaded by the applicant or any application that all or part of the statement of claim be struck out under rule 16.21 of the Court's Rules;

(b) the applicant must respond in writing to any such objections, indicating as to each objection whether it is accepted or rejected (with brief reasons where appropriate); and

(c) the respondent must give notice in writing to the Associate to the Docket Judge of any objection maintained by the respondent. A formal interlocutory application is not required to be filed or served.

4.8 At the first case management hearing:

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<#>if so, the admitted scope of the publication; and¶

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(a) the parties will be expected to be ready to argue any objections to the statement of claim maintained by the defendant. Subject at all times to the discretion of the judge, such objections will ordinarily be dealt with under the Court's Rules relating to the adequacy of pleadings (see r 16.21), rather than by way of a separate trial under r 30.01. If a party seeks that the Court determine whether imputations in a statement of claim are in fact conveyed, such objections should be dealt with by way of a separate trial under r 30.01; and

(b) the defendant will be required to inform the Court whether the element of publication is admitted and, if so, the admitted scope of the publication and, if not, the reason why it is not.

4.9 Upon the determination of any objections to the statement of claim raised at the first case management hearing, the Court will make directions for the filing of a defence and any reply and will list the proceedings for a second case management hearing. It is important that the defence and any reply have been filed and served prior to the second case management hearing.

4.10 With respect to publication which is admitted, the respondent should, include in its defence a statement indicating the extent of its publication; for example:

(a) in the case of a print newspaper, the sales and readership figures for that newspaper in the relevant period;

(b) in the case of a digital newspaper, the number of visits to the matter complained of;

(c) in the case of a website, the number of visits to the matter complained of on the website;

(d) in the case of publications social media, the number of persons who follow the relevant social media account, the number of persons who interacted with the post via likes, shares or comments and the number of persons who accessed the article via a hyperlink;

(e) in the case of newspaper posters, the number and location of the posters;

(f) in the case of a radio publications, data concerning the listening audience for the publication; and

(g) in the case of publication by TV, the data indicating the viewing audience for the program,

4.11 At the second case management hearing, the parties should be in a position to:

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(a) address the Case Management Imperatives as set out in paragraph 8.5 of the Central Practice Note;

(b) provide to the Court appropriately tailored case management orders, by consent or otherwise;

(c) indicate the timing of the trial (including any need for an expedited or truncated hearing process), the parties' estimates of trial length and their available dates for trial.

4.12 Parties should expect that, at the second case management hearing, the Court will wish to have identified and timetabled the interlocutory steps in the proceeding for its efficient conduct so that, if appropriate, a final hearing date may be set.

4.13 No application for any further interlocutory step will be entertained unless the party seeking the order has given reasonable notice in writing to the opposing party and the Associate to the Docket Judge. Subject to the direction of the Docket Judge, any such application, whether by consent or otherwise, must be supported by an affidavit which succinctly states the reason the party content the order is necessary for the resolution of the real issues in dispute in the proceedings.

4.14

5. ALTERNATIVE DISPUTE RESOLUTION

5.1 Parties and their representatives should familiarise themselves with the guiding ADR information set out in Part 9 of the Central Practice Note.

5.2 Given the nature of defamation matters, the parties should expect that, save in exceptional circumstances, the Court will refer any defamation matter to mediation (including to a Registrar with specialist skills) at an appropriate, and preferably early, stage in the proceeding. The Court expects the parties to be prepared to address the referral of the proceeding to mediation, and the manner of the mediation at the first case management hearing. The parties should also consider what is necessary to facilitate the mediation.

6. DISCOVERY AND INTERROGATORIES

6.1 To the extent that discovery may be necessary within the Defamation Sub-area, parties should consider the guiding discovery information set out in Part 10 of the Central Practice Note before making any request for discovery. They should also consider whether requests for discovery should be deferred until after witness affidavits or outlines of evidence, if ordered, are filed and served.

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Deleted: Ordinarily it will be a judge sitting without a jury who will determine all issues in the case[1]. Accordingly, issues concerning the *capacity* of the pleaded matter to convey the pleaded meaning should not ordinarily be litigated at the interlocutory stage as they will be subsumed in the *actual meaning* issues to be determined at trial. When issues of this kind do need to be dealt with at the interlocutory stage, then, subject at all times to the discretion of the judge, they will ordinarily be dealt with under the Court's Rules relating to the adequacy of pleadings (see r 16.21), rather than by way of a separate trial under r 30.01.

6.2 The Court will not order any party to answer interrogatories except where, after considering the draft proposed interrogatories, the Docket Judge forms the view that they are necessary for the resolution of the real issues in dispute in the proceedings.

7. INTERLOCUTORY STEPS, EVIDENCE, PRE-TRIAL CASE MANAGEMENT HEARINGS

7.1 Parties and their representatives should familiarise themselves with the information in the Central Practice Note on these matters (see Parts 11 to 13).

7.2 Ordinarily evidence-in-chief is led orally. The parties should not assume that the Court will accept an agreement to the contrary reached by the parties under s 47(5) of the Federal Court Act. The parties should raise with the Court any agreement for the giving of evidence by affidavit in a timely way before the trial (and prior to the parties incurring the time and expense of preparing affidavit evidence).

7.3 When evidence-in-chief is to be led orally and outlines of evidence are to be exchanged, the outlines are to provide notice of the evidence to be given by the witness and, without the leave of the Court, are not to be the subject of cross-examination or be tendered as a prior statement of the witness.

7.4 As part of the preparation for trial, the parties should discuss between themselves, and suggest to the Court well before trial, any particular resources required to support the trial. This may include, for example, appropriate digital or other resources so as to be able to see and hear the publication in its original form (or as close to its original form as practicable).

8. COSTS

8.1 In addition to the matters regarding costs set out in the Central Practice Note and the Costs Practice Note, the parties are reminded of r 40.08 of the Federal Court Rules, which provides:

> ***40.08 Reduction in costs otherwise payable***
>
> *A party other than in a proceeding under the Admiralty Act 1988 may apply to the Court for an order that any costs and disbursements payable to another party in the proceeding be reduced by an amount to be specified by the Court if:*
>
> *(a) the applicant has claimed a money sum or damages and has been awarded a sum of less than $100 000; or*
>
> *(b) the proceeding (including a cross-claim) could more suitably have been brought in another court or tribunal.*

9. FURTHER PRACTICE INFORMATION AND RESOURCES

9.1 This Practice Note relates to all defamation matters. In addition, further practice and procedure information and resources for this NPA can be found on the Court's Other Federal Jurisdiction "homepage".

9.2 General queries concerning the practice arrangements in defamation matters should be raised, at first instance, with your local registry. If a registry officer is unable to answer your query, please ask to speak to the NCF Coordinator in your local registry. Contact details for your local registry are available on the Court's website.

J L B ALLSOP
Chief Justice

[DATE]