THE EVOLUTION AND DEVOLUTION OF THE OFFER TO MAKE AMENDS REGIME IN AUSTRALIAN DEFAMATION LAW

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This article considers the development of the offer to make amends regime in Australian defamation law. It traces the evolution of the regime from the United Kingdom provisions that inspired piecemeal reform in Australia; to the 2005 model achieved by the so-called 'Uniform Defamation Acts'; to the model created by 2021 amendments to the Model Defamation Provisions, now in force throughout much of Australia, which has altered the balance of the 2005 regime. While much of this development manifested an increasing concern by legislators to encourage parties to defamation disputes to resolve their differences without litigation, the 2021 amendments are perhaps distinguishable. This article analyses the new regime, arguing that it may lead to the protraction of defamation disputes and undermine the objects of the Uniform Defamation Acts.

I INTRODUCTION

For most defamed persons, the best-case outcome of defamation litigation would be payment of a sum of money. Damages are the primary remedy for defamation, a tort which protects an individual's interest in their reputation.[1] General damages for defamation are said to serve three purposes: vindication of the plaintiff in the eyes of the public, consolation for the plaintiff's distress, and reparation for reputational harm.[2] If the defamation has caused measurable economic loss, then

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1 *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460, 466 [1] (French CJ, Gummow, Kiefel and Bell JJ).

2 See *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 60–1 (Mason CJ, Deane, Dawson and Gaudron JJ) ('*Carson*').

special damages aim to compensate;[3] and if the defendant has aggravated the reputational damage or hurt suffered by the plaintiff, then aggravated damages may also be awarded with the purpose of compensation.[4] While injunctions might be available in certain cases,[5] the overriding public interest in freedom of speech means that courts should rarely exercise their discretion to prohibit a publication or compel removal of published matter.[6]

For a plaintiff-judgment creditor awarded one or some of these remedies, the experience may be bittersweet. In many cases, perhaps what the plaintiff really wanted was a quick retraction of the defamation and an apology from the publisher. The extent to which an award of damages achieves its purposes is doubtful, particularly if the award receives minimal publicity and there is a lengthy period between the publication of the defamatory statement and the award.[7] In contrast, the prompt publication of an apology, correction or retraction is generally thought to achieve the goals of defamation law more effectively than damages alone.[8]

The value of a damages remedy is regularly disproportionate to the cost of taking a matter to trial, while leaving even the most successful plaintiffs dissatisfied.[9] Defamation cases often deserve the skillset of experienced practitioners with specialist expertise; success may be preceded by many months of significant legal costs. From either side of a defamation action, taking a matter through to judgment is not for the faint of heart.

Law reform commissions have made various proposals for the expansion of judicial remedies and the introduction of legal rules and procedures that encourage more timely and vindicatory responses to defamatory publications.[10] These proposals envisaged declaratory and coercive remedies playing a greater role than damages awards.[11] It remains the case, however, that Australian courts do not

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3 *De Kauwe v Cohen [No 4]* [2022] WASC 35, [1055]–[1057], [1108], [1134] (Le Miere J) ('*De Kauwe*'). See also *Ratcliffe v Evans* [1892] 2 QB 524, 528–9 (Bowen LJ).

4 *Nationwide News Pty Ltd v Rush* (2020) ALR 432, 517 [430] (White, Gleeson and Wheelahan JJ).

5 See the principles expressed in *Rush v Nationwide News Pty Ltd [No 9]* [2019] FCA 1383, [4]–[30] (Wigney J).

6 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, 72–3 [31]–[32] (Gleeson CJ and Crennan J) ('*ABC v O'Neill*').

7 John G Fleming, 'Retraction and Reply: Alternative Remedies for Defamation' (1978) 12(1) *University of British Columbia Law Review* 15, 15; see also Andrew Kenyon, 'Problems with Defamation Damages?' (1998) 24(1) *Monash Law Review* 70, 91.<https://doi.org/10.1093/acprof:oso/9780199204922.001.0001>.

8 *Robins v Kordowski* [2011] EWHC 1912 (QB), [82] (Tugendhat J); Fleming (n 7) 24; New South Wales Law Reform Commission, *Defamation* (Report No 75, September 1995) 75 [8.10] ('*NSWLRC 1995 Report*').

9 'The fact that the costs incurred are far in excess of the damages awarded is not an unusual feature of defamation litigation': *Armstrong v McIntosh [No 4]* [2020] WASC 31, [44] (Le Miere J) ('*Armstrong*').

10 See, eg, Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy* (Report No 11, 1979) 139–50; New South Wales Law Reform Commission, *Defamation* (Report No 11, 1971) 80 ('*NSWLRC 1971 Report*'); *NSWLRC 1995 Report* (n 8) 52–67; Australian Capital Territory Community Law Reform Committee, *Defamation* (Report No 10, 1995); Attorney-General's Task Force on Defamation Law Reform, *Defamation Law: Proposals for Reform in NSW* (Report, September 2002).

11 David Rolph, *Defamation Law* (Thomson Reuters, 2016) 350 [17.10]; Robyn Carroll and Cathy Graville, 'Meeting the Potential of Alternative Remedies in Australian Defamation Law' in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 312–13 <https://doi.org/10.22459/NDLA.09.2017>.

compel corrections or apologies through court orders.[12] A potential plaintiff who genuinely wants an apology is 'well-advised to negotiate one'.[13]

An important development, which is the subject of this article, is the statutory 'offer to make amends'. When the Australian states and territories substantially[14] harmonised their defamation law through the so-called 'Uniform Defamation Acts',[15] they included this mechanism to encourage parties to settle a defamation dispute quickly without trial and on terms that recognise the value of remedial actions other than the payment of damages.[16] In very broad terms,[17] an offer to make amends is a form of offer of compromise contemplated by the Uniform Defamation Acts, which is issued by a publisher of defamation to an aggrieved person, and which must include, among other things, an offer to publish a correction and to pay expenses reasonably incurred by the aggrieved person. An offer to make amends may include an offer by the publisher to apologise to the aggrieved person. The making of an offer to make amends may, in certain circumstances, provide a publisher with a defence to a cause of action in defamation.[18] Conversely, failure to make an offer to make amends may, in certain circumstances, result in significant costs consequences for an unsuccessful defendant.[19] The offer to make amends regime initially enacted by the Uniform Defamation Acts was thus intended to promote in particular two of the objects of the legislation:

> (c) to provide effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter, and
>
> (d) to promote speedy and non-litigious methods of resolving disputes about the publication of defamatory matter.[20]

In recent years Australia's offer to make amends regime has undergone significant change as part of 2020 changes to the Model Defamation Provisions underlying the Uniform Defamation Acts. At the time of writing, all Australian jurisdictions other than the Northern Territory ('NT') and Western Australia ('WA') have implemented legislation[21] giving effect to changes to the Uniform Defamation

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12 *Pingel v Toowoomba Newspapers Pty Ltd* [2010] QCA 175, [137]–[138] (Applegarth J) ('*Pingel*').

13 Ibid [138].

14 'The uniformity of the [Uniform Defamation Acts] should not be overstated': David Rolph, 'A Critique of the National, Uniform Defamation Laws' (2008) 16(3) *Torts Law Journal* 207, 208 ('A Critique').

15 *Civil Law (Wrongs) Act 2002* (ACT) ('*2002 Act (ACT)*'); *Defamation Act 2005* (NSW) ('*2005 Act* (NSW)'); *Defamation Act 2006* (NT); *Defamation Act 2005* (Qld); *Defamation Act 2005* (SA); *Defamation Act 2005* (Tas); *Defamation Act 2005* (Vic); *Defamation Act 2005* (WA) ('*2005 Act* (WA)'). The authors refer to the *2005 Act* (NSW) and *2005 Act* (WA) throughout this article by way of example. Amendments introduced under the *Defamation Amendment Act 2020* (NSW) are identified in the footnotes.

16 See, eg, *2005 Act* (NSW) (n 15) s 3(c)–(d); *2005 Act* (WA) (n 15) s 3(c)–(d); New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 September 2005, 17636 (Bob Debus, Attorney-General).

17 A more detailed outline of these provisions is provided in Part III below. See generally *2005 Act* (WA) (n 15) pt 3 div 1.

18 See, eg, *2005 Act* (NSW) (n 15) ss 17–18; *2005 Act* (WA) (n 15) ss 17–18.

19 See, eg, *2005 Act* (NSW) (n 15) s 40(2)(a); *2005 Act* (WA) (n 15) s 40(2)(a).

20 *2005 Act* (NSW) (n 15) ss 3(c)–(d); *2005 Act* (WA) (n 15) ss 3(c)–(d).

21 *Civil Law (Wrongs) Amendment Act 2021* (ACT); *Legislation Act 2001* (ACT) s 89(1); *Defamation Amendment Act 2020* (NSW); *Defamation (Model Provisions) and Other Legislation Amendment Act*

Acts agreed to by the Council of Attorneys-General ('CAG') in July 2020 (the '2021 Amendments').[22] The twin aims of this article are to trace the history of the offer to make amends provisions and to evaluate the recent changes effected by the 2021 Amendments.[23] In the pages that follow, it is argued that while the historical uniform regime was far from perfect, the offer to make amends regime produced by the 2021 Amendments undermines the objects of the Uniform Defamation Acts. The new regime may lead to the protraction of defamation disputes and disincentivise pre-publication moderation of defamatory matter in the mass media produced by frequent defamation defendants.

To better understand the current regime, Part II examines earlier offer to make amends provisions, including the United Kingdom ('UK') provisions on which early Australian equivalents were modelled. Part III outlines the key features of the offer to make amends regime under the Uniform Defamation Acts, which is still in force in the NT and WA. Part IV describes and critiques the changes effected by the 2021 Amendments. We conclude that the current offer to make amends regime now in force in much of Australia ought to be reconsidered with further law reform.

II THE EVOLUTION OF THE AUSTRALIAN OFFER TO MAKE AMENDS PROVISIONS

The Australian offer to make amends provisions have their genesis in English law reform of the mid-20th century, which inspired reforms in Australian jurisdictions prior to the harmonisation of Australian defamation law via the Uniform Defamation Acts. While the early development of offer to make amends regimes was motivated by a concern for the interests of 'innocent' defendants liable under principles of strict liability,[24] the picture that emerges from consideration of the evolution of these regimes is an increasing concern by legislators to encourage

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2021 (Qld); *Defamation (Miscellaneous) Amendment Act 2020* (SA); *Defamation Amendment Act 2021* (Tas); *Justice Legislation Amendment (Supporting Victims and Other Matters) Act 2020* (Vic).

22 Further, at the time of writing, a New South Wales-led 'Stage 2 Review of the Model Defamation Provisions' is engaging in a public consultation on further recommendations, which include a model whereby internet intermediaries like Google would benefit from an innocent dissemination process, subject to a simple complaints process. How that proposed process would interact with the regimes that are the subject of this article remains to be seen. See Department of Communities and Justice (NSW), 'Review of Model Defamation Provisions', *NSW Government Communities & Justice* (Web Page, August 2022) <https://web.archive.org/web/20221008103102/https://www.justice.nsw.gov.au/justicepolicy/Pages/lpclrd/lpclrd_consultation/review-model-defamation-provisions.aspx>.

23 Other aspects of the 2021 amendments are considered in James O'Hara, 'Defamation: Serious Harm and Contextual Truth' (2021) 95(5) *Australian Law Journal* 348; David Rolph, 'A Serious Harm Threshold for Australian Defamation Law' (2022) 51(2) *Australian Bar Review* 185 <https://doi.org/10.2139/ssrn.4154802>; Matthew Collins, 'The Reformulated Contextual Truth Defence: More Radical That First Appears' (2022) 50(2) *Federal Law Review* 206 <https://doi.org/10.1177/0067205X221087455>. See also Brendan Clift, 'The AG's Gambit: National Defamation Reform Enters Its Middlegame' (2021) 95(2) *Australian Law Journal* 88.

24 Strict liability for the tort of defamation is the common law of Australia, subject to statutory defences; see *Fairfax Media Publications Pty Ltd v Voller* (2021) 273 CLR 346, 355–6 [27] (Kiefel CJ, Keane and

parties to defamation disputes to resolve their differences without litigation, and tacit recognition that an apology and correction by the publisher of defamation may be the most appropriate remedial response to the publication.

A Addressing Strict Liability: The *Defamation Act 1952* (UK)

The first modern offer to make amends provisions were enacted under the *Defamation Act 1952* (UK), 15 & 16 Geo 6 & 1 Eliz 2, chapter 66 ('*1952 Act* (UK)').[25] A series of decisions[26] in the early 20th century provided the impetus for the *1952 Act* (UK).[27] These cases conclusively eliminated malice as part of the cause of action for defamation, marking the final transition to strict liability (leaving aside the element of publication).[28] Protecting 'innocent' defendants was the principal concern of the Porter Committee, which recommended the offer to make amends provisions under the *1952 Act* (UK).[29]

At the same time, the Porter Committee recognised that leaving a person whose reputation has been harmed without a remedy is also undesirable.[30] The resulting offer to make amends provisions was a compromise: if an offer to publish a 'sufficient apology' and 'suitable correction' was made and the plaintiff had not accepted that offer, then a defence would arise if the defendant proved that the words complained of were published innocently,[31] the offer was made as soon as practicable and the offer had not be withdrawn.[32] The offer did not envisage or require the payment of compensation.[33] Additionally, for the defence to arise, the defendant would also have to establish that the author (rather than the publisher) wrote the defamatory words 'without malice'.[34] Any question as to the steps to

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Gleeson JJ), 369 [77] (Gageler and Gordon JJ), 379 [111], 381–2 [116], 382 [118] (Edelman J), 397 [154] (Steward J).

25 The structure of these provisions can be loosely traced to the *Libel Act 1843,* 6 & 7 Vict, chapter 96 ('*Libel Act* (UK)'). However, in recommending the *Defamation Act 1952*, 15 & 16 Geo 6 & 1 Eliz 2, chapter 66 ('*1952 Act* (UK)'), the Porter Committee did not make reference to the *Libel Act* (UK): United Kingdom, *Report of the Committee on the Law of Defamation* (Cmd 7536, 1948) 16–20 [55]–[73] ('*Porter Committee Report*'). Rather, this connection appears to have been drawn in more recent years: see, eg, Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 9 December 1999, 4054–5 (Gary Humphries, Treasurer, Attorney-General and Minister for Justice and Community Safety).

26 See, eg, *Hulton & Co v Jones* [1910] AC 20 ('*Hulton*'); *Newstead v London Express Newspaper Ltd* [1940] 1 KB 377 ('*Newstead*'); *Cassidy v Daily Mirror Newspapers Ltd* [1929] 2 KB 331 ('*Cassidy*').

27 In recommending the offer to make amends provisions under the *1952 Act* (UK), the Porter Committee was primarily concerned with protecting 'innocent' defendants, using *Hulton* (n 26), *Newstead* (n 26) and *Cassidy* (n 26) as examples: *Porter Committee Report* (n 25) 16–17 [55]–[60].

28 Paul Mitchell, *The Making of the Modern Law of Defamation* (Hart Publishing, 2005) 109. As to the issue of publication, the defendant must intentionally or negligently *publish* the defamatory statement: Una Ni Raifeartaigh, 'Fault Issues and Libel Law: A Comparison between Irish, English and United States Law' (1991) 40(4) *International & Comparative Law Quarterly* 763, 768; James Goudkamp, *Tort Law Defences* (Bloomsbury Publishing, 2013) 55 [3.3.7].

29 *Porter Committee Report* (n 25) 16–17 [60].

30 Ibid 16 [59].

31 See *1952 Act* (UK) (n 25) ss 4(1)(b), (3)(a).

32 Ibid s 4(1)(b); see generally *Porter Committee Report* (n 25) 19 [70].

33 The Porter Committee thought that 'practical justice' would be done without the award of damages: *Porter Committee Report* (n 25) 17 [62].

34 *1952 Act* (UK) (n 25) s 4(6).

be taken in fulfilment of an accepted offer, in default of agreement between the parties, was to be referred to and determined by the High Court.[35]

Three explanations have been given as to why offer to make amends provisions under the *1952 Act* (UK) were rarely used.[36] First, the defendant bore the onus of proving their innocence.[37] The defence only applied to defendants who did not have knowledge of circumstances that 'might' be understood to be defamatory or identify the plaintiff.[38] Ascertaining whether the defendant (or its agents) had constructive knowledge of those circumstances was considered to be a complex and burdensome inquiry, discouraging the use of the provisions.[39] Secondly, requiring the defendant to prove the absence of malice of the author was 'unsound in principle' and 'quite impossible' in some circumstances, like an anonymous letter to the editor.[40] Finally, procedural requirements made the provisions 'cumbersome' and 'unworkable'.[41] An additional reason may be that defendants were reluctant to make an in principle offer to publish a 'sufficient apology' and 'suitable correction' where if the parties could not agree, the court retained a discretion to determine any question as to the steps to be taken (which arguably extended to the manner and form of publication).[42]

B Addressing Strict Liability in Australia: The *Defamation Act 1957* (Tas) and the *Defamation Act 1974* (NSW)

The *Defamation Act 1957* (Tas) ('*1957 Act* (Tas)') introduced offer to make amends provisions identical to the *1952 Act* (UK).[43] The *Defamation Act 1974* (NSW) ('*1974 Act* (NSW)') introduced provisions based on, but not identical to, the *1952 Act* (UK).[44] While the main objective of the *1974 Act* (NSW) was also

35 Ibid s 4(4)(a).

36 Supreme Court Procedure Committee, Supreme Court of Judicature, *Report on Practice and Procedure in Defamation* (Report, July 1991) 64–5 ('*Neill Committee Report*'); Douglas W Vick and Linda Macpherson, 'An Opportunity Lost: The United Kingdom's Failed Reform of Defamation Law' (1997) 49(3) *Federal Communications Law Journal* 621, 637. This has also been the experience in Nova Scotia, the only Canadian province to have enacted an offer to make amends provision, where the legislation is based on the unused 1952 United Kingdom ('UK') provisions: see Robyn Carroll and Jeff Berryman, 'Making Amends by Apologising for Defamatory Publications: Developments in the 21st Century', in Kit Barker, Ross Grantham and Karen Fairweather (eds), *Private Law in the 21st Century* (Hart Publishing, 2016) 479, 479–500.

37 *Neill Committee Report* (n 36) 64–5.

38 *1952 Act* (UK) (n 25) s 4(5); *Milne v Express Newspapers* [2002] EWHC 2564 (QB), 938 [37] (Eady J) ('*Milne*').

39 *Neill Committee Report* (n 36) 68.

40 United Kingdom, Report of the Committee on Defamation (Cmnd 5909, 1975) 77 [281], [284] ('*Faulks Committee Report*').

41 The defendant was required to provide an affidavit with the offer that set out their innocence, after which no evidence could subsequently be brought: *1952 Act* (UK) (n 25) s 4(2). Ensuring that the affidavit included all relevant evidence was time consuming and risked the offer not being made 'as soon as practicable after the defendant received notice' that the matter was defamatory: s 4(1)(b). This also discouraged speedy resolution: s 4(1)(b); *Neill Committee Report* (n 36) 65; *Faulks Committee Report* (n 40) 77 [281], [284]. Cf *NSWLRC 1995 Report* (n 8) [8.23].

42 *1952 Act* (UK) (n 25) ss 4(3)(a), 4(4).

43 *Defamation Act 1957* (Tas) s 17.

44 *NSWLRC 1971 Report* (n 10) 7 [38], 79 [212].

to narrow the scope of liability to protect 'innocent' defendants,[45] these provisions differed from the *1952 Act* (UK) and the *1957 Act* (Tas) in one key respect.

The *1974 Act* (NSW) stated that an offer of amends 'must' include an offer to publish a reasonable correction '(if any)' and a reasonable apology '(if any)'.[46] In determining whether any correction or apology is 'reasonable', regard was to be had to any correction or apology published.[47] *The 1974 Act* (NSW) also provided, where an offer to make amends is accepted, the court may determine any question as to the steps to be taken in performance of the agreement arising by acceptance of the offer.[48] This drafting appears to have emanated from the draft Defamation Bill proposed by the New South Wales ('NSW') Law Reform Commission in 1971.[49] The Commission noted that there were 'minor departures' from the English model (ie, the *1952 Act* (UK)).[50] It appears the *1974 Act* (NSW) envisaged a defendant making an in-principle offer to publish a reasonable correction and apology '(if any)',[51] with the court retaining a discretion to determine how (and presumably whether) they should be published in the event the parties could not agree.[52] This provision is significant because it indicated that in some cases an apology or correction may not be appropriate (eg, if a correction or apology had already been made).

It appears the provisions under both the *1974 Act* (NSW) and the *1957 Act* (Tas) were rarely used.[53] A number of suggestions have been made as to why these provisions were seemingly unpopular, including the mandatory inclusion of an apology[54] and the 'crucial role' of corrections,[55] as well as the same reasons that the *1952 Act* (UK) provisions were not used, which were outlined in the previous section.[56]

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45 See section 36 of the *Defamation Act 1974* (NSW) ('*1974 Act* (NSW)') which in substance defines when a publication is 'innocent' for the purposes of the division; *NSWLRC 1971 Report* (n 10) 7 [40]. The principle in *Hulton* was applied (somewhat begrudgingly) by the High Court of Australia in *Lee v Wilson* (1934) 51 CLR 276, 286 (Starke J), 294–5 (Dixon J), 298–9 (Evatt and McTiernan JJ).

46 *1974 Act* (NSW) (n 45) s 37(2)(b).

47 Ibid s 37(2)(c).

48 Ibid s 39.

49 *NSWLRC 1971 Report* (n 10) 37. See also New South Wales, *Parliamentary Debates*, Legislative Assembly, 27 February 1974, 809 (John Maddison).

50 *NSWLRC 1971 Report* (n 10) 80 [215].

51 *1974 Act* (NSW) (n 45) ss 37(2)(b)–(c).

52 Ibid s 39.

53 Australian Law Reform Commission (n 10) 48–9 [86]–[87]; *NSWLRC 1995 Report* (n 8) 79 [8.21] n 23; Australian Capital Territory Community Law Reform Committee (n 10) 18; Attorney-General (ACT), *Defamation Reform in the ACT* (September 1998) 7; Attorney-General's Task Force on Defamation Law Reform (n 10) 4.

54 Bridgette Styles, 'The Power of a Timely Apology' (2013) 51(7) *Law Society Journal* 24, 24. Referring to the *2002 Amendment Act* (NSW), Styles states that the defence remained unpopular as the requirement to offer to publish an apology 'effectively involved an admission of liability'.

55 Rolph states the reasons for reluctance to use are unclear and suggests that the 'crucial role' of corrections in the procedure may have made the 'regime unappealing to publishers': Rolph, 'A Critique' (n 14) 244.

56 Unlike the UK committees to consider the provisions, the New South Wales ('NSW') Law Reform Commission was not generally persuaded the procedural requirements were 'overly cumbersome and technical': *NSWLRC 1995 Report* (n 8) 79 [8.23].

C Further Reform in the United Kingdom: The *Defamation Act 1996* (UK)

In 1991, the Neill Committee reviewed the *1952 Act* (UK).[57] Following the Neill Committee's report, the current offer to make amends provisions in that jurisdiction were introduced by the *Defamation Act 1996* (UK) ('*1996 Act* (UK)').[58] Rather than being concerned about strict liability, the Neill Committee was motivated primarily by a desire to target 'manipulative or powerful claimants' who were regularly prepared to exploit large jury awards of damages.[59] The provisions only incidentally hoped to encourage a wider range of litigants to compromise.[60] With the increased willingness of the Court of Appeal to overturn excessive jury awards,[61] the concern over exploitative claimants has largely dissipated.[62] Thus, the principal function of the *1996 Act* (UK) became simply the 'speedy and economical resolution' of disputes.[63]

The *1996 Act* (UK) sought to address the defects under the *1952 Act* (UK) that had discouraged defendants from using the provisions. The requirement that the defendant prove the absence of malice on behalf of the author responsible for the defamatory words was omitted from the *1996 Act* (UK).[64] Further, procedural requirements in order to make a valid offer were relaxed.[65] Finally, the *1996 Act* (UK) imposed a less onerous fault element and shifted the onus of proof to the claimant.[66] In particular, the *1996 Act* (UK) provided that if the claimant does not accept an offer made by the defendant, the fact of the defendant having made it will be a defence, unless the claimant can establish the defendant 'knew or had reason to believe' the statement identified the claimant and was both false and defamatory.[67]

While these amendments were designed as incentives to defendants to use the provisions, the interests of claimants were also considered. The requirements to include an offer to make and publish both a 'suitable correction' and a 'sufficient

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57 See generally *Neill Committee Report* (n 36) 62–80. Although the Faulks Committee also reviewed the *1952 Act* (UK), its recommendations were not implemented: *Faulks Committee Report* (n 40) 76–9.

58 *Defamation Act 1996* (UK) c 31, ss 2–4 ('*1996 Act* (UK)'). However, see especially *Defamation and Malicious Publication (Scotland) Act 2021* (Scot). See also Richard Parkes and Godwin Busuttil (eds), *Gatley on Libel and Slander* (Sweet & Maxwell, 13th ed, 2022) 1091–2 [31-028] n 125; Matthew Collins, *Collins on Defamation* (Oxford University Press, 2014) 366 [18.03] n 5.

59 *Neill Committee Report* (n 36) 70; *Abu v MGN Ltd* [2002] EWHC 2345 (QB), [5]–[8] (Eady J) ('*Abu*').

60 *Abu* (n 59) [8] (Eady J).

61 The power to intervene has been heavily influenced by *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 10: *Rantzen v Mirror Group Newspapers* [1994] QB 670, 692 (Neill LJ).

62 *Abu* (n 59) [5]–[6] (Eady J).

63 Ibid [3] (Eady J).

64 This is consistent with the common law principle that one defendant's privilege could not be defeated by the malice of another: *Egger v Viscount Chelmsford* [1965] 1 QB 248, 268 (Davies LJ); *Faulks Committee Report* (n 40) 77 [284].

65 Notably, there was no longer a requirement to make an affidavit and the time limit for making an offer was changed to prior to serving a defence: *1996 Act* (UK) (n 58) s 2(5). The *1996 Act* (UK) adopted the recommendation of the Faulks Committee rather than the Neill Committee who recommended the retention of the affidavit: *Neill Committee Report* (n 36) 70–1. Cf *Faulks Committee Report* (n 40) 77.

66 See *Neill Committee Report* (n 36) 71–3.

67 *1996 Act* (UK) (n 58) ss 4(2)–(3); *Milne* (n 38) 940–1 [48]–[51] (Eady J).

apology' were retained.[68] Unlike the *1952 Act* (UK), in the event the parties could not agree on the steps to be taken by way of correction and apology, the *1996 Act* (UK) provided that the party making the offer 'may take such steps as he thinks appropriate, and may … make the correction and apology by a statement in open court … and give an undertaking … as to the manner of publication'.[69]

The *1996 Act* (UK) also made it mandatory to include an offer to pay 'such compensation (if any)', with the court retaining power to determine the amount of compensation (if any) if the parties could not agree.[70] The introduction of this requirement recognised that the prospect of a complete defence meant the absence of a monetary remedy would be unfair to the claimant,[71] particularly in circumstances where the court did not retain power to determine the steps to be taken by way of correction and apology. Another provision beneficial to the claimant made it impermissible for the defendant to rely on any other defence in addition to that arising under the provisions.[72] Arguably, this is consistent with the Neill Committee's desire to exclude defendants from the benefit of the provisions where they wish to maintain or revive their attack on the plaintiff's character.[73]

D Changing Course in Australia

1 Defamation Act 2001 (ACT)

In the decades following the passage of the *1957 Act* (Tas) and the *1974 Act* (NSW), a number of policy papers and law reform proposals considered the limited effectiveness of their offer to make amends provisions. Some proposals avoided the complexity of the provisions altogether by recommending alternative models, while others only suggested modest changes.[74] It was not until the *Defamation Act 2001* (ACT) ('*2001 Act* (ACT)') that any further legislation was enacted.[75] In doing so, as in the UK, the primary focus of the provisions shifted from targeting the perceived injustice of strict liability to encouraging the speedy resolution of

68 *1996 Act* (UK) (n 58) ss 2(4)(a)–(b).
69 Ibid s 3(4).
70 Ibid ss 2(4)(c), 3(5).
71 *Neill Committee Report* (n 36) 73–4.
72 *1996 Act* (UK) (n 58) s 4(4).
73 *Neill Committee Report* (n 36) 78–9.
74 For example, in 1979 the Australian Law Reform Commission proposed a model that would obviate the need for the offer to make amends provisions and provided that an 'innocent' publisher should only have to pay nominal damages if they publish a prompt and adequate correction once they have received notice of a defamatory publication: Australian Law Reform Commission (n 10) 49–50 [88]. Conversely, in 1995 the NSW Law Reform Commission decided not to adopt the recommendations of the *Neill Committee Report* and instead made modest amendments to deal with criticisms of the model under the *1974 Act* (NSW): *NSWLRC 1995 Report* (n 8) 79–80 [8.21]–[8.24].
75 The offer to make amends provisions in the *Defamation Act 2001* (ACT) ('*2001 Act* (ACT)') were subsequently relocated to the *2002 Act* (ACT): *2002 Act* (ACT) (n 15) pt 9.3. This legislation broadly followed the recommendations of the Australian Capital Territory Community Law Reform Committee (n 10) 18–19. See generally Attorney-General (ACT) (n 53); Explanatory Memorandum, Defamation Bill 1999 (ACT) 2.

disputes.[76] Rather than adopting the recommendations of the Neill Committee in the UK, however, the *2001 Act* (ACT) forged new ways to encourage use of the offer to make amends provisions.[77]

(a) Defence Based on Reasonableness of the Offer to Make Amends

The *2001 Act* (ACT) made the availability of the defence depend on the 'reasonableness' and timing of the offer, rather than a fault element.[78] This occurred despite concerns raised during the reform process about the potential severity of the defence, a lack of consultation with plaintiffs, and the anticipated bargaining power that would be given to media defendants.[79]

(b) Prescribed Terms

Initially, the Defamation Bill 1999 (ACT) proposed the offer to make amends provisions would not include any measure for compensation to be paid.[80] It was recognised, however, that there may be cases where a plaintiff may be deserving of monetary compensation but denied it under the provisions.[81] Thus, the *2001 Act* (ACT) made it an optional component of an offer to make amends to include an offer to pay compensation for economic loss or for harm to reputation if the defamatory matter imputes criminal behaviour.[82] This feature was particularly significant as it was the first to give the defendant discretion to determine whether certain components would be included in an offer.

In addition, the *2001 Act* (ACT) also included a requirement for the offer to make amends to include an offer to publish a 'reasonable correction (if any)' and

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76 This is evident from the first reading of the Bill in Parliament. The then Attorney-General discussed the significance of the new offer to make amends regime in the context of ameliorating the effect of delays in defamation litigation. The effect of strict liability was still a concern, but this was the subject of a new defence based on negligence: Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 9 December 1999, 4054–6 (Gary Humphries, Treasurer, Attorney-General and Minister for Justice and Community Safety); Defamation Bill 1999 (ACT) s 23.

77 Arguably, this could have been influenced by an earlier report of the New South Wales Law Reform Commission, who expressed reservations about adopting the *Neill Committee Report: NSWLRC 1995 Report* (n 8) 80 [8.24].

78 *2001 Act* (ACT) (n 75) s 10; Australian Capital Territory Community Law Reform Committee (n 10).

79 Standing Committee on Justice and Community Safety, Parliament of the Australian Capital Territory, *The Defamation Bill 1999* (Report No 14, May 2001) 35–8 [4.9]–[4.30], 40 [4.39] ('*Defamation Bill Report*'); Standing Committee on Justice and Community Safety (incorporating the duties of the Scrutiny of Bills and Subordinate Legislation Committee), Parliament of the Australian Capital Territory, *Scrutiny Report* (Report No 1, 8 February 2000) ('*Scrutiny Report*').

80 The Defamation Bill 1999 (ACT) originally proposed no compensation to be offered under the provisions, as advocated for by the Australian Press Council: *Defamation Bill Report* (n 79) 35 [4.9]–[4.10].

81 Even the government recognised that there may be cases where plaintiffs would be deserving of monetary compensation but denied it under the model: *Defamation Bill Report* (n 79) 39 [4.33].

82 *2001 Act* (ACT) (n 75) ss 6(3)(i)–(j); Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 30 August 2001, 3816 (Bill Stefaniak, Minister for Education and Attorney-General). Stefaniak moved the amendment to clause 6 of the Defamation Bill 1999 (ACT) to allow an offer to include compensation.

a 'reasonable apology (if any)',[83] with the court retaining discretion to decide any question as to what must be done in the event the parties could not agree.[84]

(c) A Plaintiff-Instituted Procedure

The *2001 Act* (ACT) also included a provision that allowed a plaintiff to apply for an order to vindicate his or her reputation, if an offer to make amends was not made or was not reasonable.[85] When the *2001 Act* (ACT) was repealed, the provision remained in the new legislation.[86] Extrinsic materials provide no clarification as to precisely what was to be included in a vindication order.[87] In *Lewincamp v ACP Magazines Ltd [No 2]*,[88] Besanko J noted that there was an absence of 'information … as to an appropriate order' and concluded that the provision did not envision a vindication statement to be included as an order of the court.[89] This would somewhat limit the vindicatory function of the order. Although the provisions contemplated a plaintiff applying for a vindication order without commencing an action, a court presumably would be reluctant to order a defendant to publish a correction or apology without first establishing that the matter was defamatory.[90] The vindication order provision was significant because it recognised the need to have a plaintiff-instituted court procedure other than a defamation claim where the defendant was unwilling to make an offer to make amends.

2 Defamation Amendment Act 2002 (NSW)

The *Defamation Amendment Act 2002* (NSW) ('*2002 Amendment Act* (NSW)') featured many aspects of the *2001 Act* (ACT).[91] There were three key differences. First, the *2002 Amendment Act* (NSW) mandated the inclusion of a reasonable correction and an apology 'if appropriate in the circumstances'.[92] This change in language suggests an attempt to clarify the earlier language in the *1974 Act* (NSW)

83 *2001 Act* (ACT) (n 75) ss 6(3)(c)–(d).
84 Ibid s 8(2).
85 *2001 Act* (ACT) (n 75) s 11(1).
86 *2002 Act* (ACT) (n 15) s 122.
87 See, eg, Explanatory Memorandum, Defamation Bill 1999 (ACT); *Defamation Bill Report* (n 79); *Scrutiny Report* (n 79). Rather, the provision was simply copied from the report *Defamation Reform in the ACT*: Attorney-General (ACT) (n 53) 6–8.
88 *Lewincamp v ACP Magazines Ltd [No 2]* [2008] ACTSC 73. This was the only recorded case to consider section 122 of the *2002 Act* (ACT) before it was repealed.
89 Ibid [12] (Besanko J).
90 In *Eyre v Nationwide News Pty Ltd* (1968) 13 FLR 180, the defendant had paid money to the court to settle the claim but continued to assert the imputation was true and that they were only trying to avoid the further costs and hazards of litigation. The plaintiff sought to make a statement in open court asserting the falsity of the publication. Gibbs J held that in those circumstances, it was necessary to resolve the disputed question as to the falsity of the imputation before the plaintiff could make their statement: 183–4.
91 Including an offer to pay a stated amount: see *1974 Act* (NSW) (n 45) s 9D(4)(a), as inserted by *Defamation Amendment Act 2002* (NSW) sch 1 [6] ('*2002 Amendment Act* (NSW)').
92 *1974 Act* (NSW) (n 45) ss 9D(3)(c)–(d), as inserted by *2002 Amendment Act* (NSW) (n 91) sch 1 [6].

and *2001 Act* (ACT), noted above. However, there was no indication as to when an apology or a correction would be 'appropriate'.[93]

Second, unlike the *2001 Act* (ACT), the defendant could offer to pay compensation 'for any economic or non-economic loss' of the plaintiff.[94] While this broadened the circumstances under which compensation could be offered, it remained within the defendant's discretion to determine whether compensation should be included in the offer (unlike, for example, under the *1996 Act* (UK) where an offer of compensation '(if any)' was mandatory, but the court retained the ability to determine whether it should be payable and if so, the amount, in the event the parties did not agree).[95]

Third, the provision enabling the plaintiff to seek a vindication order was not included in the *2002 Amendment Act* (NSW). No reasons were given as to why the NSW Attorney-General did not recommend adopting this aspect of the *2001 Act* (ACT).[96]

The offer to make amends regime in force in NSW after this legislation provided the basic blueprint for the Australia-wide regime that followed.

III THE AUSTRALIA-WIDE REGIME: THE 2005 OFFER TO MAKE AMENDS PROVISIONS

Between 2005 and 2006, the Australian states and territories introduced the Uniform Defamation Acts. The state and territory attorneys-general agreed to the final legislation hastily, following a threat by the then Commonwealth Attorney-General to pass a national defamation code.[97] The resulting offer to make amends provisions were largely based on the *1974 Act* (NSW) as amended by the *2002 Amendment Act* (NSW).[98] This part outlines key features of the offer to make amends regime initially achieved by the Uniform Defamation Acts (the '2005

93 Although the Legislative Council made this amendment, there was no discussion as to when an apology or correction would be appropriate: New South Wales, *Parliamentary Debates*, Legislative Council, 5 December 2002, 7772–88.

94 *1974 Act* (NSW) (n 45) s 9D(3)(i), as inserted by *2002 Amendment Act* (NSW) (n 91) sch 1 [6].

95 Parliamentary debates simply note that the publisher may decide to include compensation if appropriate: see, eg, New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 November 2002, 6559 (Anthony Paul Stewart, Parliamentary Secretary, on behalf of Bob Debus, Attorney-General); New South Wales, *Parliamentary Debates*, Legislative Council, 5 December 2002, 7773 (Ian McDonald, Parliamentary Secretary).

96 It was only mentioned in passing: Attorney-General's Task Force on Defamation Law Reform (n 10) 6.

97 Rolph, 'A Critique' (n 14) 208; see generally Commonwealth Attorney-General's Department (Cth), 'Revised Outline of a Possible National Defamation Law' (Outline, July 2004); Patrick George, *Defamation Law in Australia* (LexisNexis, 3rd ed, 2017) 88–9 [3.15].

98 The model provisions were approved by the Standing Committee of Attorneys-General on 21 March 2005: Explanatory Note, Model Defamation Provisions pt 3 div 1 ('Model Defamation Provisions Explanatory Note'); New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 September 2005, 17637 (Bob Debus, Attorney-General, Minister for the Environment, and Minister for the Arts).

Regime'), which is still in force in the NT and WA.[99] First, however, it considers the strategic options open to an aggrieved person within that framework.

A Options Open to an Aggrieved Person under the 2005 Regime

In order to view the offer to make amends provisions in context, it should be recognised that there are a number of choices available to a person who has been defamed who wishes to ventilate a grievance with a publisher of the defamatory matter.

Within the framework provided by the 2005 Regime,[100] in addition to commencing proceedings, an aggrieved person's options include informally negotiating with the publisher as well as making an open or without prejudice settlement offer, including one with reference to the *Calderbank* principle,[101] and/or in accordance with the relevant court rules.[102] With respect to the latter, order 24A of the *Rules of the Supreme Court 1971* (WA), for example, sets out the procedure for parties to make offers of compromise, which if not accepted, can give rise to indemnity costs if the judgment is less favourable (thereby encouraging parties to settle).[103] Analogous provisions are found in the *Uniform Civil Procedures Rules 2005* (NSW) part 20 division 4 ('*UCPR*') and equivalent provisions in rules of other jurisdictions.[104] These mechanisms are not limited to defendants or publishers: a plaintiff (ie, an aggrieved person) may also make an offer of compromise under the *UCPR* with respect to defamation litigation already on foot,[105] whereas the issue of whether or not to make amends falls on a publisher. In *Nationwide News Pty Ltd v Vass* ('*Nationwide v Vass*'),[106] McColl JA explained that the offer to make amends procedure under the 2005 Regime was separate from the offer of compromise provisions in the *UCPR* (such that an offer of compromise under the *UCPR* did not operate as a counteroffer to an offer to make amends).[107] In addition, as a 'creature of statute',[108] the operation of the offer to make amends regime is a function of the text, context and purpose of the underlying provisions,

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99 For convenience, relevant citations of provisions of the 2005 Regime are to the *2005 Act* (NSW) (n 15) prior to the 2021 Amendments and the *2005 Act* (WA) (n 15).

100 The following dispute resolution mechanisms are framed as alternatives: see *2005 Act* (NSW) (n 15) s 12; *2005 Act* (WA) (n 15) s 12.

101 Known as a '*Calderbank* offer': see Adrian Zuckerman et al, *Zuckerman on Australian Civil Procedure* (LexisNexis, 2018) 1055–62 [27.26]–[27.45]. The term derives from *Calderbank v Calderbank* [1976] Fam 93 ('*Calderbank*'). As regards to *Calderbank* offers in defamation disputes, see, eg, *Palmer v McGowan [No 6]* [2022] FCA 927 ('*Palmer v McGowan*'); *Murphy v Nationwide News Pty Ltd [No 2]* [2021] FCA 432 ('*Murphy v Nationwide*'); *De Kauwe* (n 3).

102 The Uniform Defamation Acts expressly state that the offer to make amends regimes do not prevent a publisher or aggrieved person from making or accepting a settlement offer other than in accordance with the division: see, eg, *2005 Act* (NSW) (n 15) s 12(3); *2005 Act* (WA) (n 15) s 12(3).

103 *Rules of the Supreme Court 1971* (WA) ord 24A, rr 10(5A), (7A).

104 See Bernard Cairns, *Australian Civil Procedure* (Lawbook, 12th ed, 2019) 554–67 [12.30]–[12.170].

105 See, eg, *Parke v Rubenstein* [2020] FCA 1466, [21] (Besanko J).

106 (2018) 98 NSWLR 672 ('*Nationwide v Vass*').

107 Ibid 698 [109], [112] (McColl JA).

108 Ibid 697 [104] (McColl JA).

and is not necessarily subject to the contract law principles that may govern other species of settlement agreement.[109]

Under the 2005 Regime, one option of a legally represented aggrieved person who believes they have been defamed is to issue a 'concerns notice' under the offer to make amends provisions, informing the publisher of the alleged defamatory imputations.[110] Under this regime, the prospect of an aggrieved person issuing a concerns notice is not certain; that is, a concerns notice is not mandatory.[111] An aggrieved person may simply commence proceedings. The advantage of issuing a concerns notice, from the perspective of the aggrieved person, is that it may prompt timely action by the publisher; upon receiving a concerns notice, the publisher may make an offer of amends until a defence is filed or 28 days has passed since service of the notice.[112] As explained below, if a concerns notice is issued, then a publisher only has a limited time in which to make a valid offer of amends. In theory, the combined effect of these provisions is to encourage the timely settlement of a defamation dispute, thus serving one of the express objects of the Uniform Defamation Acts.[113]

Where a concerns notice is provided, it must be in writing and inform the publisher of the defamatory imputations that the aggrieved person considers are or may be carried about the aggrieved person by the matter in question.[114] A lawyer's letter, in the form of a carefully crafted letter of demand, may satisfy the statutory definition.[115] A key feature of such a letter, which would distinguish it from other boilerplate letters of demand, is the necessary articulation of the putative defamatory imputations. However, other written documents may also satisfy the statutory definition. In *Zoef v Nationwide News Pty Ltd* ('*Zoef*'),[116] Gleeson JA held that a statement of claim of the District Court of New South Wales satisfying the *2005 Act* (NSW)'s definition could serve as a concerns notice for the purposes of the offer to make amends provisions.[117]

These various dispute resolution mechanisms are not unrelated. For example, an unsuccessful informal negotiation may be followed by an issue of a concerns notice by an aggrieved person, followed by an offer of amends from the publisher, then a settlement offer from the aggrieved person. A publisher may issue more than

109 Ibid 686 [49], 697–8 [104]–[110] (McColl JA).

110 See, eg, *2005 Act* (NSW) (n 15) s 14(2); *2005 Act* (WA) (n 15) s 14(2).

111 Explanatory Note, Model Defamation Amendment Provisions 2020 4 ('Explanatory Note Model Defamation Amendment Provisions').

112 See, eg, *2005 Act* (NSW) (n 15) s 14(1); *2005 Act* (WA) (n 15) s 14(1).

113 See *2005 Act* (NSW) (n 15) s 3(d); *2005 Act* (WA) (n 15) s 3(d).

114 See *2005 Act* (NSW) (n 15) s 14(2); *2005 Act* (WA) (n 15) s 14(2).

115 Crown Law, 'Defamation: What to Do if You Receive a 'Concerns Notice'', *Queensland Government* (Web Page) <https://www.crownlaw.qld.gov.au/about/news/defamation-what-to-do-if-you-recevie-aconcerns-notice>.

116 (2016) 92 NSWLR 570 ('*Zoef*').

117 Ibid 587 [92] (Gleeson JA, Ward JA agreeing at 572 [1], Payne JA agreeing at 599 [184]), affirmed in *Mohareb v Booth* [2020] NSWCA 49, [11] ('*Mohareb*'). Regarding this 'unusual principle' see Michael Douglas, 'A Statement of Claim Should Not Serve as a Concerns Notice', *Gazette of Law & Journalism* (online, 13 April 2020). The principle was modified by the 2021 amendments which are considered further below.

one offer of amends;[118] an offer of compromise can be issued by the aggrieved person in the interim. As Applegarth J observed in *Pingel v Toowoomba Newspapers Pty Ltd*,[119] although division 1 does not envisage a process of negotiation in its terms, in practice, 'offers to make amends and responses to them may form part of potentially complex without prejudice negotiations'.[120] In conducting these negotiations, the offer of amends system is regarded as 'an important early resolution procedure which should be used both fairly and effectively by parties to resolve litigation'.[121]

The options available to a plaintiff are further complicated by the plaintiff's choice of forum. If the plaintiff commences litigation in the Federal Court of Australia, then in application of section 79(1A)(b) of the *Judiciary Act 1903* (Cth) ('*Judiciary Act*'), the dispute settlement regimes effected by state law, including those under the Uniform Defamation Acts, are not applicable to the extent that federal law provides otherwise.[122] With regards to costs, the Federal Court has thus determined issues under the *Federal Court of Australia Act 1976* (Cth), where section 40 of the Uniform Defamation Acts (considered below) may provide for a different outcome following unreasonable rejection of an offer to compromise a defamation dispute.[123] Arguably, the same result should follow with respect to the interaction between the 'offers to settle' regime in part 25 of the *Federal Court Rules 2011* (Cth) ('*Federal Court Rules*') and the Uniform Defamation Acts,[124] to the extent that the former is inconsistent with the 2005 Regime.[125] The remainder of this article focuses on the position under the Uniform Defamation Acts, rather than under competing frameworks for alternative dispute resolution.

B Key Features of the 2005 Offer to Make Amends Regime

1 Concerns Notice Optional for an Aggrieved Person

Despite the various options available to the parties, an offer to make amends, issued by a publisher, is usually preceded by the issue of a concerns notice to the publisher from the aggrieved person. As noted above, the issue of a concerns notice is optional under the 2005 Regime.

The fact that the issue of a concerns notice is optional rather than mandatory[126] has its advantages and disadvantages. As to the former, it allows a defamed person

118 See, eg, *Zoef* (n 116) 576 [29] (Gleeson JA).
119 *Pingel* (n 12).
120 Ibid [103] (Applegarth J).
121 *Louise v Nationwide News Pty Ltd* [2015] NSWDC 63, [10] (Gibson DCJ).
122 See *Wing v Fairfax Media Publications Pty Limited* (2017) 255 FCR 61, 71 [27]–[28] (Allsop CJ and Besanko J), 75–6 [49] (Rares J agreeing) ('*Wing*'); Michael Douglas, 'Forum Shopping in Australian Defamation Litigation' (PhD Thesis, University of Sydney, 2022) 114–18 ('Forum Shopping'); See also William Gummow, 'The Law Applicable in Federal Jurisdiction' in John Griffiths and James Stellios (eds), *Current Issues in Australian Constitutional Law* (Federation Press, 2020) 104, 110–112.
123 *Palmer v McGowan* (n 101) [41] (Lee J); *Murphy v Nationwide* (n 101) [6] (Lee J). See also *Stead v Fairfax Media Publications Pty Ltd [No 2]* (2021) 386 ALR 237, 240–1 [13] (Lee J).
124 See *Palmer v McGowan* (n 101) [21] (Lee J).
125 For example, in respect of the time limit for accepting an offer under *Federal Court Rules 2011* (Cth) rule 25.14 ('*Federal Court Rules*').
126 Compare with the new regime considered in Part IV.

to pursue vindication as efficiently as possible in circumstances where the prospect of negotiated non-judicial dispute resolution is futile. Saving defamed persons solicitor–client costs makes defamation law, and a meaningful remedy, more accessible to persons without means. As to the latter, this feature means that certain defamation disputes may be ventilated in court even though they might have been resolved otherwise had the issue of a concerns notice been a compulsory first step. Ironically, even where alternative dispute resolution of a defamation dispute is not pointless, the immediate issue of an originating process without needing to take the time to issue a separate concerns notice may encourage a publisher to come to an agreed resolution more efficiently.

2 The Consequences of a Publisher's Offer to Make Amends

The structure of the 2005 Regime manifests an intention to encourage publishers of defamation to issue offers to make amends to aggrieved persons. It does so by providing publishers with strategic advantages in a defamation dispute, provided they comply with certain formalities in issuing an offer to make amends.

Under section 17(1) of the Uniform Defamation Acts if an aggrieved person accepts an offer to make amends and the publisher carries out its terms, the aggrieved person cannot 'assert, continue or enforce an action for defamation against the publisher in relation to the matter in question'.[127] This is the case even if the offer was limited to 'any particular defamatory imputations'.[128]

If an offer to make amends is made but is not accepted, the publisher will have a complete defence under section 18 of the Uniform Defamation Acts if three requirements are satisfied.[129] First, the offer must be made as soon as practicable. Second, the publisher must be ready and willing to carry out the terms of the offer at any time before the trial. Third, it must be shown that in all the circumstances the offer was 'reasonable',[130] which is consistent with the position under the *2002 Amendment Act* (NSW).[131] As McCallum J once opined, the defence creates 'a powerful incentive for defendants to make amends rather than to fight the cause'.[132] Her Honour also described the defence as a providing a 'draconian sanction' for a plaintiff's failure to accept an offer, and as giving the defendant the ability to 'stymy the litigious path to vindication of reputation'.[133] In another judgment, the provisions have been said by Fryberg J to confer 'substantial tactical advantages upon publishers with corresponding disadvantages to aggrieved persons'.[134] We consider these concerns are mitigated by two factors: first, a plaintiff is not bound to accept an offer and in the event an offer is not 'reasonable' (discussed below), the defence will not be established

127 *2005 Act* (NSW) (n 15) s 17(1); *2005 Act* (WA) (n 15) s 17(1).
128 Ibid; *Pingel* (n 12) [95] (Applegarth J).
129 *2005 Act* (NSW) (n 15) s 18; *2005 Act* (WA) (n 15) s 18.
130 *2005 Act* (NSW) (n 15) s 18(1) and *2005 Act* (WA) s 18(1).
131 The meaning of reasonableness is considered further below.
132 *Pedavoli v Fairfax Media Publications Pty Ltd* (2014) 324 ALR 166, 173 [34] (McCallum J) ('*Pedavoli*').
133 Ibid 173 [34]–[35] (McCallum J).
134 *Pingel* (n 12) [63] (Fryberg J).

and the cost consequences for the plaintiff will not apply; and second, the fact that timeliness is required of both parties in the process.

In keeping with the purpose of encouraging settlement of disputes, an offer to make amends is taken to be made without prejudice, unless the offer provides otherwise.[135] Further, evidence of any statement or admission made 'in connection with the making or acceptance' of an offer is precluded from being admissible other than in legal proceedings to determine costs, or to determine any issue arising or application under the offer to make amends provisions.[136]

3 Content of an Offer to Make Amends

An offer to make amends may be made in relation to 'the matter in question generally', or in relation to particular imputations carried by the matter in question.[137] If an offer to make amends is limited to particular defamatory imputations, then it must state and particularise the imputations to which the offer is limited.[138] It must include an offer to publish a reasonable correction of the relevant defamatory imputations.[139] The meaning of 'correction' was recently contemplated by the NSW Court of Appeal in *Massoud v Nationwide News Pty Ltd* ('*Massoud*').[140] Leeming JA explained, '[a] correction involves two elements: acknowledging that an error has been made and stating what the correct position is'.[141] In that case, Mr Massoud, a journalist, had been dismissed from his employment after he said to a junior colleague: 'If you weren't so young, I'd come up there and rip your head off and shit down your throat'. A number of media organisations reported on the situation, incorrectly stating that Massoud said he would 'slit' the throat of his colleague.[142] Defamation litigation against five media organisations was preceded by negotiations to settle within the framework of the 2005 Regime. One of the defendants, 2GB, had made an offer to make amends which included an offer to publish the following:

> A correction published below the headline of each of the Matters Complained Of that are online articles hosted by the Station, as follows:
>
> > 'Correction: Josh Massoud has denied threatening to "slit" the employee's throat. Rather, he says that he told the employee that "if you weren't so young, I'd rip off your head and shit down your neck". Massoud denies that these words were intended as a threat because it is "impossible, physiologically" to rip a person's head off or "shit down their neck".'[143]

135 *2005 Act* (NSW) (n 15) s 13(4); *2005 Act* (WA) (n 15) s 13(4).
136 *2005 Act* (NSW) (n 15) s 19; *2005 Act* (WA) (n 15) s 19.
137 *2005 Act* (NSW) (n 15) s 13(2); *2005 Act* (WA) (n 15) s 13(2).
138 *2005 Act* (NSW) (n 15) s 15(1)(c); *2005 Act* (WA) (n 15) s 15(1)(c).
139 *2005 Act* (NSW) (n 15) s 15(1)(d); *2005 Act* (WA) (n 15) s 15(1)(d).
140 [2022] NSWCA 150 ('*Massoud*').
141 Ibid [231] (Leeming JA).
142 See generally the evidence recounted by Gibson DCJ in *Massoud v Radio 2GB Sydney Pty Ltd* [2021] NSWDC 336 ('*Massoud NSWDC*').
143 *Massoud* (n 140) [221].

The Court of Appeal held that this did not amount to a 'correction' within the meaning of the applicable Act.[144] Leeming JA noted that, under the 2005 Regime, 'merely supplementing a defamatory publication with a further publication which falls short of acknowledging error is unlikely to amount to sufficient vindication so as to engage the purpose which underlies the defence'.[145]

If material containing the matter has been given to someone else by the publisher or with the publisher's knowledge, the offer to make amends must include an offer to take reasonable steps to tell the other person that the matter is or may be defamatory of the aggrieved person.[146] The offer to make amends must also include an offer to pay expenses reasonably incurred by the aggrieved person before the offer was made and in considering the offer.[147]

While these are the mandated aspects of an offer to make amends, an offer may also include other content. For example, an offer may include any other kind of offer to redress the harm including an offer to publish an apology.[148] In this respect, the 2005 Regime differs from the *2002 Amendment Act* (NSW): under the NSW regime, an apology was a prescribed component of an offer (although the court retained a discretion to determine it was not appropriate in the circumstances).[149] There is no publicly available record of how the Standing Committee of Attorneys-General, the predecessor to CAG, ultimately reached the conclusion that an apology should not be a mandatory component of the offer to make amends.[150] However, during the passage of the Defamation Bill 2005 (NSW), the then Attorney-General explained that the removal of an apology as a prescribed component was so that publishers would not be discouraged from using the provisions in situations where a 'publisher believes that the matter published was both truthful and fair but wishes to settle the case without an expensive hearing'.[151]

An offer to make amends may also include an offer to pay compensation for any economic or non-economic loss.[152] The optional character of the need to pay compensation continued the position under the *2002 Amendment Act* (NSW).[153] If the defendant chose to offer to pay compensation, it could be an offer to pay a

144 Ibid [238] (Leeming JA, Mitchelmore JA agreeing at [293], Simpson AJA agreeing at [294]).

145 Ibid [236] (Leeming JA).

146 *2005 Act* (NSW) (n 15) ss 15(1)(d)–(e); *2005 Act* (WA) (n 15) ss 15(1)(d)–(e). In *Pedavoli* (n 132), McCallum J held that the offer in question was invalid because it did not include an offer to take reasonable steps to tell the defendant's Twitter followers and its sister newspaper, *The Age*, that the defendant had 'given' the defamatory matter to them that was or may be defamatory: at 178–9.

147 *2005 Act* (NSW) (n 15) s 15(1)(f); *2005 Act* (WA) (n 15) s 15(1)(f). Cf *1974 Act* (NSW) (n 45) ss 9D(3)(c)–(d); 9F(2), as inserted by *2002 Amendment Act* (NSW) (n 92) sch 1 [6].

148 *Zoef* (n 116) 586 [81]–[84]; *Massoud NSWDC* (n 142) [560](d).

149 *1974 Act* (NSW) (n 45) s 9D(3)(d), as inserted by *2002 Amendment Act* (NSW) (n 91) sch 1 [6]. Cf *2005 Act* (NSW) (n 15) s 15(1)(g)(i); *2005 Act* (WA) (n 15) s 15(1)(g)(i).

150 See, eg, Standing Committee of Attorneys-General Working Group of State and Territory Officers, *Proposal for Uniform Defamation Laws* (July 2004); Model Defamation Provisions Explanatory Note (n 98) pt 3 div 1.

151 New South Wales, *Parliamentary Debates,* Legislative Assembly, 13 September 2005, 17637 (Bob Debus, Attorney-General, Minister for the Environment, and Minister for the Arts).

152 *2005 Act* (NSW) (n 15) ss 15(g)(i)–(ii); *2005 Act* (WA) (n 15) ss 15(g)(i)–(ii).

153 *1974 Act* (NSW) (n 45) s 9D(3)(i), as inserted by *2002 Amendment Act* (NSW) (n 91) sch 1 [6].

stated amount, an amount to be agreed or determined by a court or arbitrator.[154] In some cases an offer to pay compensation may not be appropriate, as was implied in *Nationwide v Vass*:[155]

> As explained by the authors of the [New South Wales 1995] Law Reform Commission Report on Defamation which recommended the adoption of Div 8, it proceeded 'on the view that, in the case of defamation which is unintentional and not careless, the defamed person is sufficiently vindicated by the publication of a correction or apology and that, if steps are taken to stop further dissemination of the defamatory matter and the costs and expenses of the defamed person are paid, he ought not to be entitled to damages'.

An offer of amends may also include a requirement that the aggrieved person execute a deed of settlement and release, as occurred in *Nationwide v Vass* (where the publisher was legally represented).[156]

4 Timeliness of an Offer to Make Amends

If a publisher is to obtain the statutory advantages of issuing an offer to make amends, the offer must be made before either a defence is served in an action commenced by an aggrieved person or within 28 days of the publisher receiving a concerns notice.[157] Upon receiving a concerns notice, the publisher can request further particulars thereby extending this 28-day period.[158] If the publisher makes an offer outside these time frames, then any attempt to rely on the defence will fail as the offer is treated as invalid.[159] A late offer can have costs consequences for an unsuccessful publisher-defendant, which are explored below.

5 Withdrawal of an Offer to Make Amends

A publisher may place various conditions on an offer to make amends,[160] including a time period during which the offer remains open. For example, in *Zoef*, a newspaper misidentified a man as a gun runner. The newspaper made an offer to make amends which provided that it was to remain open until the first day of trial 'unless withdrawn'.[161] The 2005 Regime expressly contemplates the withdrawal of an offer to make amends in section 16. An offer may be withdrawn and remade on the same or different terms.[162] If renewed, an offer must be remade within 14 days of the withdrawn offer, unless otherwise agreed between the parties.[163]

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154 *1974 Act* (NSW) (n 45) s 15(2).

155 *Nationwide v Vass* (n 106) 688 [57] (McColl JA), quoted in *Massoud* (n 140) [235] (Leeming JA).

156 *Nationwide v Vass* (n 106) 675–6 [7] (McColl JA).

157 *2005 Act* (NSW) (n 15) s 14(1); *2005 Act* (WA) (n 15) s 14(1).

158 *2005 Act* (NSW) (n 15) s 14(3); *2005 Act* (WA) (n 15) s 14(3).

159 *Barrow v Bolt* [2014] VSC 599, [75]–[80] (T Forrest J). The publisher failed to make an offer within 28 days of receiving a concerns notice and they did not extend this period by requesting further particulars.

160 'It is for the offeror to determine the manner of acceptance and also the circumstances in which an offer will come to an end. There is nothing in the Act which detracts from a publisher's ability to prescribe the manner of the acceptance or rejection of its offer': *Nationwide v Vass* (n 98) 709 [170] (Leeming JA).

161 *Zoef* (n 116) 586 [103].

162 *2005 Act* (NSW) (n 15) ss 16(2)–(3); *2005 Act* (WA) (n 15) ss 16(2)–(3).

163 *2005 Act* (NSW) (n 15) s 16(5)(b) and *2005 Act* (WA) (n 15) s 16(5)(b).

The withdrawal and recasting of an offer to make amends would make sense where an initial offer is not acceptable to an aggrieved person, and the publisher wishes to increase the value of the offer in order to avoid the prospect of litigation. Combined with the proposition that a statement of claim may serve as a concerns notice under the 2005 Regime, this mechanism means that each time a statement of claim is amended by changing the pleaded imputations, it may arguably serve as a fresh concerns notice.[164]

6 Costs Consequences

The Uniform Defamation Acts provide for significant costs consequences attaching to decisions made with respect to offers to make amends, which oblige parties to take a reasonable approach to settlement negotiations of defamation disputes.[165] The significance of those consequences is magnified by the fact that defamation damages awards may well not exceed a plaintiff's solicitor–client costs,[166] and that engaging legal representation with sufficient expertise to take a defamation matter to judgment may be an expensive endeavour.[167]

Where a publisher-defendant makes successful use of the defence in section 18,[168] it may result in severe costs consequences for the plaintiff. Under section 40, the plaintiff may be ordered to pay indemnity costs for having unreasonably failed to accept a reasonable 'settlement offer', which can include an offer to make amends.[169] Significantly, indemnity costs may be ordered for the whole of the proceedings, not just from the date the offer was made.[170]

The statutory language suggests that the court must make an indemnity award where those preconditions are satisfied, unless the unsuccessful plaintiff persuades

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164 See *The Sydney Cosmetic Specialist Clinic Pty Ltd v Hu [No 2]* [2021] NSWDC 98, [42] (Gibbs DCJ). Leave to appeal on other issues was revoked: *The Sydney Cosmetic Specialist Clinic Pty Ltd v Hu* [2022] NSWCA 1.

165 *Davis v Nationwide News Pty Ltd* [2008] NSWSC 946, [27] (McClellan CJ at CL); *Haddon v Forsyth [No 2]* [2011] NSWSC 693, [4] (Simpson J) ('*Haddon*'); *Benhayon v Rockett [No 9]* [2019] NSWSC 172, [48] (Lonergan J) ('*Benhayon*'); *Aaren Pty Ltd v Arya [No 2]* [2020] NSWDC 705, [45]–[46] (Abadee J).

166 *Armstrong* (n 9) [44] (Le Miere J). See also *Ramandious v Habashy [No 2]* [2015] NSWDC 146, [15] (Gibson DJC); *Ghosh v TCN Channel Nine Pty Ltd [No 4]* (2014) 19 DCLR (NSW) 62 [87], 64 [90](e) (Gibson DCJ); Kim Gould, 'Small Defamation Claims in Small Claims Jurisdictions: Worth Considering for the Sake of Proportionality?' (2018) 41(4) *University of New South Wales Law Journal* 1222, 1224 <https://doi.org/10.53637/MIAT6116>; Judith Gibson, 'The NSW Government Discussion Paper on Defamation Law Reform' (2019) 38(1) *Communications Law Bulletin* 1, 12. See, eg, *Palmer v McGowan* (n 101).

167 See, eg, Kishor Napier-Raman, 'High Stakes, Big Sums: The Economics of Christian Porter's Defamation Trial', *Crikey* (online, 22 March 2021) <https://www.crikey.com.au/2021/03/22/economics-christian-porters-defamation-trial/>; Kaitlyn Offer, 'Perth Lawyer Says Defamation Too Expensive for the General Public', *PerthNow* (online, 5 January 2015) <https://www.perthnow.com.au/news/wa/perth-lawyer-says-defamation-too-expensive-for-the-general-public-ng-63faec76511df7247bde2d7f3fb39bb0>.

168 See, eg, *2005 Act* (NSW) (n 15) s 18; *2005 Act* (WA) (n 15) s 18.

169 *2005 Act* (NSW) (n 15) s 40(2)–(3) and *2005 Act* (WA) (n 15) ss 40(2)–(3). This is the same inquiry as to whether an offer to make amends is 'reasonable' for the purposes of the defence under section 18(1): *Sleeman v Tuloch Pty Ltd [No 4]* [2013] NSWDC 111, [12] (Gibson DCJ) ('*Sleeman [No 4]*'). See further below.

170 *Haddon* (n 165) [4] (Simpson J).

the court that the interests of justice would require otherwise.[171] *Benhayon v Rockett [No 9]* is illustrative.[172] Longeran J described the outcome of the underlying dispute as follows: '[i]t was, for the defendant, a comprehensive victory and for the plaintiff, a comprehensive defeat'.[173] The plaintiff's failure to accept a settlement proposal of the defendant was characterised as 'unreasonable'; the plaintiff was ordered to 'pay the defendant's costs of and incidental to the proceedings on an indemnity basis'.[174]

Conversely, if the plaintiff is successful at trial, the defendant may have to pay indemnity costs for unreasonably failing to make a settlement offer or for failing to accept the plaintiff's settlement offer.[175] In *Armstrong v McIntosh [No 4]*,[176] for example, the defendant failed to make a reasonable settlement offer, and unreasonably failed to agree to settlement offers proposed by the plaintiff, resulting in an award of indemnity costs in the plaintiff's favour.[177] A publisher's failure to respond to a concerns notice at all is a factor likely to be taken into account in determining whether indemnity costs should be awarded.[178]

7 Assessing Reasonableness for the Purposes of the Defence, and Costs

Whether a defendant has a defence under section 18, and whether indemnity costs are payable pursuant to section 40, each turn on the concept of 'reasonableness'.[179] As for the defence, a defendant that made an offer to make amends has no protection unless the offer was, in all the circumstances, reasonable.[180] As for costs, whether indemnity costs are payable turns on whether a defendant unreasonably failed to make or agree to a settlement offer,[181] or whether a plaintiff unreasonably failed to accept a defendant's (reasonable) settlement offer.[182]

In determining whether the offer to make amends was reasonable, the court must have regard to any correction or apology published before trial, including the extent to which the correction or apology was brought to the attention of the audience of the defamatory statement.[183] This requires consideration of the prominence given to the correction or apology in comparison with the defamatory statement, and the period of time that elapsed between publication of the defamatory statement and

171 See *Hutley v Cosco [No 2]* [2021] NSWCA 335, [11] (Basten JA) ('*Hutley v Cosco [No 2]*').
172 *Benhayon* (n 165).
173 Ibid [7] (Lonergan J).
174 Ibid [39], [48] (Lonergan J).
175 That is, provided the defendant did not make another 'settlement offer': *2005 Act* (NSW) (n 15) ss 40(2)(a), (3) and (n 13) *2005 Act* (WA) (n 15) ss 40(2)(a), (3). There is no corresponding requirement for the plaintiff to have to pay indemnity costs if they fail to make a settlement offer.
176 *Armstrong* (n 9).
177 Ibid [63], [72], [74] [80] (Le Miere J).
178 The court may consider the way in which the parties conducted their cases as well as any other relevant matters: *2005 Act* (NSW) (n 15) s 40(1); *2005 Act* (WA) (n 15) s 40(1). See also Part III(B)(7).
179 *Sleeman [No 4]* (n 169) [12] (Gibson DCJ).
180 See, eg, *2005 Act* (NSW) (n 15) s 18(1)(c); *2005 Act* (WA) (n 15) s 18(1)(c).
181 *2005 Act* (NSW) (n 15) s 40(2)(a); *2005 Act* (WA) (n 15) s 40(2)(a).
182 *2005 Act* (NSW) (n 15) s 40(2)(b); *2005 Act* (WA) (n 15) s 40(2)(b); *Hutley v Cosco [No 2]* (n 171) [11] (Basten JA).
183 *2005 Act* (NSW) (n 15) s 18(2)(a); *2005 Act* (WA) (n 15) s 18(2)(a).

publication of the correction or apology.[184] The court may also have regard to any other matter it considers relevant.[185] Factors that have been considered include: the amount of compensation offered (if any);[186] the promptness with which the offer is made;[187] the likelihood of the proceedings being successful;[188] and the presence of a confidentiality clause as a term of the offer.[189] Further, the defence will fail if a mandatory component of the offer to make amends is omitted.[190]

The purposes underlying a defamation action, and in particular, the ends of vindication, should be kept in mind when considering whether a party to a defamation dispute has conducted themselves reasonably. Le Miere J made this point in *De Kauwe v Cohen [No 4]*,[191] in the context of assessing costs against the background of *Calderbank* offers that were not accepted.[192] His Honour explained that an offer to apologise 'is of paramount importance because it may be a means, other than proceeding to judgment, of vindicating the plaintiff's reputation.'[193] Commercial litigators unfamiliar with defamation law should tread carefully when assessing 'reasonableness' with the same lens they would view a prospective compromise of other kinds of commercial disputes under *Calderbank* principles. The reasonableness of a settlement offer for a defamation dispute may depend on more than the payment of money.

The meaning of 'reasonableness' in the context of section 40 of the Uniform Defamation Acts[194] was contemplated by the NSW Court of Appeal in *Hutley v Cosco [No 2]*.[195] The underlying dispute was between neighbours of a gentrified suburb,[196] one of whom said things about the other on a national current affairs program, which conveyed imputations of bullying, threats and harassment. The plaintiff was successful at first instance and obtained $300,000 damages, which was overturned on appeal.[197] Prior to the trial, the defendant had made a settlement offer that included an offer to pay $10,000, with no order as to costs. Basten JA considered that this offer 'was fairly described in the plaintiff's submissions as an invitation to capitulation and not a genuine offer of compromise. It was

184 *2005 Act* (NSW) (n 15) s 18(2)(a); *2005 Act* (WA) (n 15) s 18(2)(a).
185 *2005 Act* (NSW) (n 15) s 18(2)(b)(ii); *2005 Act* (WA) (n 15) s 18(2)(b)(ii).
186 See, eg, *Amanatidis v Darmos (Costs) [No 2]* [2011] VSC 216, [28] (Sifris J).
187 *Sleeman v Tuloch Pty Ltd [No 3]* [2013] NSWDC 92, [195] (Gibson DCJ).
188 *Zoef* (n 116) 585 [77]–[78] (Gleeson JA, Ward JA agreeing at 572 [1], Payne JA agreeing at 599 [184]).
189 *Ten Group Pty Ltd v Cornes* (2012) 114 SASR 46, 79 [118]–[120] (Gray J). Cf *Poniatowska v Channel Seven Sydney Pty Ltd [No 5]* [2017] SASC 32, [35]–[38] (Parker J), revd *Poniatowska v Channel Seven Sydney Pty Ltd* (2019) 136 SASR 1.
190 *Szanto v Melville* [2011] VSC 574, [169]–[170] (Kaye J). In this case, the offer failed to include an offer to make a reasonable correction.
191 *De Kauwe* (n 3).
192 Ibid [29]–[31] (Le Miere J).
193 Ibid [31].
194 The same approach to assessing 'reasonableness' is applied to section 40 as to the offers to make amends defence.
195 *Hutley v Cosco [No 2]* (n 171).
196 See *Cosco v Hutley [No 2]* [2020] NSWSC 893, [1]–[3] (Rotham J).
197 Ibid [390], revd *Hutley v Cosco* (2021) 104 NSWLR 421, 452 [153] (Basten JA, Macfarlan JA agreeing at 452 [154], White JA agreeing at 453 [156]).

not unreasonable for the plaintiff to reject it'.[198] The offer was later increased to $40,000. His Honour opined:

> While the sum offered was not insignificant, a successful claim in defamation, having regard to the medium of publication, namely a well-known television program which was likely to reach a wide audience, was capable of resulting in a judgment many times greater than the offer. Again, the fact that it included no amount on account of costs and involved no apology diminished its sufficiency. Further, it was accompanied by a draft deed requiring confidentiality of the proposed settlement, thus preventing the plaintiff using it in vindication of his claimed harm to reputation. While it may be wrong to dismiss the offer as other than a reasonable offer, it does not follow that the Court should be satisfied that the plaintiff was acting unreasonably in failing to accept it. The increase from the first offer was inadequate in the circumstances to justify an indemnity costs order.[199]

This case shows that reasonableness is properly assessed in the statutory context of the purposes of the Uniform Defamation Acts.[200] Vindication in the eyes of the public and consolation for distress, which may be achieved through public corrections and apologies, may be just as important as the compensation for reputational damage achieved through a payment of money.[201]

IV THE NEW REGIME: THE OFFER TO MAKE AMENDS PROVISIONS OF THE 2021 AMENDMENTS

This part comprises two sections. First, it describes key features of the offer to make amends provisions of the 2021 Amendments. Second, it offers a critique of the recent changes, arguing that the 2005 Regime better served the objects of the Uniform Defamation Acts.

A Key Features of the New Regime

The 2021 Amendments were underpinned by changes to the Model Defamation Provisions, described as the 'Model Defamation Amendment Provisions 2020'. As now recounted in the explanatory note to the Defamation Amendment Bill 2020 (NSW), the aims of the Model Defamation Amendment Provisions 2020 include the following:

> (d) to require a concerns notice to be given to the publisher of matter that is or may be defamatory before defamation proceedings may be commenced against the publisher in respect of the matter,
>
> (e) to make various amendments with respect to the form, content and timing for concerns notices and offers to make amends.[202]

198 *Hutley v Cosco [No 2]* (n 171) [13] (Basten JA).
199 Ibid [15].
200 See, eg, *2005 Act* (NSW) (n 15) s 3(c); *2005 Act* (WA) (n 15) s 3(c).
201 See *Carson* (n 2) 60–1 (Mason CJ, Deane, Dawson and Gaudron J).
202 Model Defamation Amendment Provisions Explanatory Note (n 111) 2.

1 Concerns Notice Mandatory

The 2021 Amendments have achieved the first-listed purpose by providing that defamation proceedings cannot be commenced unless the aggrieved person has given the proposed defendant a concerns notice in respect of the matter concerned.[203] In and of itself, this change is relatively unexceptional; requiring an aggrieved person to put a publisher on notice before commencing litigation could prompt the publisher to act and avoid the need for litigation altogether. The change becomes more significant when taken together with changes concerning the content of a concerns notice and the duration of the restraint on an aggrieved person from commencing litigation.

This change is also notable against the backdrop of the 'options open to an aggrieved person', recounted above.[204] Under the state law regime of the 2021 Amendments, an aggrieved person cannot commence proceedings unless they have issued a concerns notice and complied with the requirements described further below. One might argue that federal law provides differently, for the purposes of section 79 of the *Judiciary Act*, in that the *Federal Court Rules* provide that an applicant (ie, aggrieved person) must file a genuine steps statement when filing the process commencing their claim.[205] The rules refer to the *Civil Dispute Resolution Act 2011* (Cth), which in turn implies that certain proceedings may be of such urgency that they do not warrant the taking of genuine steps by the applicant to resolve the dispute with the respondent prior to commencement.[206] The text, context and purpose of the federal law 'provides otherwise' than state law. If this is right, then apart from forum shopping to avoid a jury trial,[207] a defamation plaintiff may also choose to sue in the Federal Court rather than a state supreme court to avoid the mandate to issue a concerns notice provided by the 2021 Amendments.

2 Prescribed Form of a Concerns Notice

The 2005 Regime is relatively light on detail as regards the content of a concerns notice. It merely provides that a concerns notice must be in writing, and inform the publisher of the 'imputations of concern': 'the defamatory imputations that the aggrieved person considers are or may be carried about the aggrieved person by the matter in question'.[208] In contrast, the 2021 Amendments are more prescriptive.[209] In addition to the matters captured by the 2005 Regime, under the new regime, a concerns notice must specify where the matter in question can be accessed;[210] inform the publisher of the serious harm that is caused, or is likely to

203 See, eg, *2005 Act* (NSW) (n 15) s 12A(1)(a)), inserted by *Defamation Amendment Act 2020* (NSW) sch 1, item 8. See, eg, *Barilaro v Google LLC* [2022] FCA 650, [378] (Rares J).
204 See Part III(A).
205 *Federal Court Rules* (n 125).
206 *Civil Dispute Resolution Act 2011* (Cth) s 6(2)(b)(i).
207 See *Wing* (n 122); see further Douglas, 'Forum Shopping' (n 122).
208 *2005 Act* (NSW) (n 15) ss 14(2)(a)–(b); *2005 Act* (WA) (n 15) ss 14(2)(a)–(b).
209 *2005 Act* (NSW) (n 15) s 12A, inserted by *Defamation Amendment Act 2020* (NSW) sch 1, item 8.
210 Ibid s 12A(1)(a)(ii), inserted by *Defamation Amendment Act 2020* (NSW) sch 1, item 8.

be caused, to the aggrieved person's reputation;[211] and in the case of an aggrieved excluded corporation, must inform the publisher of the serious financial loss[212] which, like 'serious harm' for an aggrieved natural person, is now an element of the cause of action.[213] If practicable, a copy of the matter in question must be provided to the publisher together with the concerns notice.[214]

The 2021 Amendments undo the holding in *Zoef*,[215] which was affirmed in *Mohareb v Booth*[216] and described above: that under the 2005 Regime, a statement of claim could serve as a concerns notice, at least under the *UCPR*.[217] The 2021 Amendments make explicit that 'a document that is required to be filed or lodged to commence defamation proceedings cannot be used as a concerns notice'.[218] This change arguably serves the broad object of the Uniform Defamation Act to promote non-litigious defamation dispute resolution.[219] Yet that same object is undermined by the following features of the new regime.

3 Aggrieved Person Locked into the Imputations on Their Concerns Notice

Under the 2005 Regime, a plaintiff need not sue upon the imputations they articulated in their concerns notice. Indeed, the imputations relied upon by defamation plaintiffs may often be quite different to those initially articulated. A concerns notice can be drafted and issued very quickly so as to minimise the spread of defamatory allegations on the 'grapevine';[220] infelicities in the expression of such a hastily-crafted concerns notice can later be corrected in the event that the dispute is not settled. The flexibility thus allows an aggrieved person to act quickly to seek vindication of their reputation by issuing a concerns notice. This may well reduce the damage caused by a defamatory publication. Moreover, pleaded imputations are regularly tightened as defamation litigation progresses, so as to avoid the sorts of interlocutory pleading disputes which are antithetical to contemporary judicial expectations regarding case management.[221]

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211 Ibid s 12A(1)(a)(iv), inserted by *Defamation Amendment Act 2020* (NSW) sch 1, item 8.

212 Ibid s 12A(1)(a)(v), inserted by *Defamation Amendment Act 2020* (NSW) sch 1, item 8.

213 See ibid s 10A(2), inserted by *Defamation Amendment Act 2020* (NSW) sch 1, item 6.

214 Ibid s 12A(1)(b), inserted by *Defamation Amendment Act 2020* (NSW) sch 1, item 8..

215 *Zoef* (n 116).

216 *Mohareb* (n 117).

217 In the Western Australian ('WA') Supreme Court, a defamation action might not be commenced by statement of claim; rather, it may be commenced by writ with concise indorsement: *Rules of the Supreme Court 1971* (WA) ord 4 r 1(a), ord 5, r 1, ord 6, r 3(b). Arguably, the construction of the 2005 Regime by the NSW Court of Appeal is inapposite to the procedural context of defamation litigation in WA.

218 *2005 Act* (NSW) (n 15) s 12A(2), inserted by *Defamation Amendment Act 2020* (NSW) sch 1, item 8.

219 *2005 Act* (NSW) (n 15) s 3(d).

220 The 'grapevine effect' is a term which has been used historically to explain the availability of general damages for defamation: *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388, 416 [88] (Gummow J). In the digital era, the term is also deployed to denote the spread of defamation via the internet and other technologies. See, eg, *Mickle v Farley* (2013) 18 DCLR (NSW) 51, 54 [21] (Elkaim DCJ) ('*Mickle*'); *Bauer Media Pty Ltd v Wilson [No 2]* (2018) 56 VR 674, 708–9 [166]–[168], 734 [259], [261], 748 [334], 750 [545], 759 [573], 760 [575] (Tate, Beach and Ashley JJA).

221 See the comments of Martin CJ in *Youlden Enterprises Pty Ltd v Health Solutions (WA) Pty Ltd* (2006) 33 WAR 1, 2 [2] (a pleading dispute but not a defamation case).

In contrast, under the new regime, an aggrieved person cannot commence defamation proceedings unless 'the imputations to be relied on by the person in the proposed proceedings were particularised in the concerns notice'.[222] Section 12B(2) goes on to clarify that this does not prevent the aggrieved person's reliance on: '(a) some, but not all, of the imputations particularised in a concerns notice, or (b) imputations that are substantially the same as those particularised in a concerns notice'.[223] Should the imputations fall outside the exceptions in section 12B(2), the plaintiff must satisfy the court that it is just and reasonable to grant leave to commence proceedings, or that commencing proceedings after the applicable period for an offer to make amends contravenes limitation law.[224]

The significance of this change to the 2005 Regime may not be appreciated by those who do not regularly practise in defamation litigation. From a plaintiff-lawyer's perspective, the stakes surrounding a concerns notice are now very high: a poorly drafted or otherwise imperfect notice could mean the aggrieved person may not commence action and ultimate failure of the aggrieved client's claim,[225] subject to the court granting leave.[226]

4 Aggrieved Person Must Wait Before Commencing Proceedings

Under the 2005 Regime, an aggrieved person is not precluded from immediately having a writ issued upon publication of defamatory matter. From their perspective, the benefit of such an aggressive approach is that it may encourage an immediate response from the publisher, halting the perhaps irreversible damage caused by the spread of defamatory matter. An immediate writ can also support an urgent application for an interlocutory injunction.[227]

Under the new regime, this 'snap writ' tactic is no longer available. The aggrieved person will not be able to commence proceedings unless 'the applicable period for an offer to make amends has elapsed'.[228] The applicable period is defined as either: (a) 28 days since the provision of the concerns notice to the publisher, or (b) in the event that the publisher has requested further particulars of the imputations in the concerns notice, and the aggrieved person has provided those particulars, 14 days since the publisher was provided with those further particulars.[229]

A publisher may issue a 'further particulars notice' in response to a concerns notice;[230] if that occurs, the aggrieved person *must* provide further particulars

222 *2005 Act* (NSW) (n 15) s 12B(1)(b), inserted by *Defamation Amendment Act 2020* (NSW) sch 1, item 9.
223 Ibid ss 12B(2)(a)–(b), inserted by *Defamation Amendment Act 2020* (NSW) sch 1, item 9.
224 Ibid s 12B(3), inserted by *Defamation Amendment Act 2020* (NSW) sch 1, item 9.
225 Or may be amenable to strike out.
226 With respect to a litigant in person, the problem is compounded: see, eg, *Raghubir v Nicolopoulos* [2022] NSWSC 386, [19] (Sackar J).
227 Although rarely granted, interlocutory injunctions are available to compel removal of defamatory matter: see generally *ABC v O'Neill* (n 4).
228 *2005 Act* (NSW) (n 15) s 12B(1)(c), inserted by *Defamation Amendment Act 2020* (NSW) sch 1, item 9.
229 *2005 Act* (NSW) (n 15) s 4 (definition of 'applicable period'), inserted by *Defamation Amendment Act 2020* (NSW) sch 1, item 1; *2005 Act* (NSW) (n 15) s 14(2), inserted by *Defamation Amendment Act 2020* (NSW) sch 1, item 1.
230 *2005 Act* (NSW) (n 15) s 4 (definition of 'further particulars notice'), inserted by *Defamation Amendment Act 2020* (NSW) sch 1, item 1.

within 14 days,[231] or the concerns notice is not valid.[232] The combined effect of these principles is that a savvy publisher may drag out the 'applicable period' by waiting until the 27th day to issue a 'further particulars notice', effectively extending the applicable period (in which proceedings cannot be commenced) to be a cumulative month-and-a-half.

5 A Reasonable Correction Is no Longer Required within an Offer to Make Amends

Under the 2005 Regime, an offer to make amends 'must include an offer to publish, or join in publishing, a reasonable correction of the matter in question or, if the offer is limited to any particular defamatory imputations, the imputations to which the offer is limited'.[233] The 2021 Amendments have altered the requirement of a reasonable correction by providing a publisher with alternative options. The equivalent provision provides that an offer to make amends: 'must include an offer to publish, or join in publishing, a reasonable correction of, *or a clarification of or additional information about*, the matter in question or, if the offer is limited to any particular defamatory imputations, the imputations to which the offer is limited'.[234]

As Leeming JA observed in *Massoud*,[235] the amendment has changed the practical operation in the section. Whereas the offer to make amends provided by 2GB in that case, recalled above, was not a 'correction' for the purposes of the 2005 Regime, it did involve an offer to publish 'additional information about' the matter which would be relevant for the purposes of the amended provisions.[236] A plaintiff who refuses an offer to make amends under the new regime on the basis that it does not include a reasonable correction faces the possibility of significant costs consequences and of the defendant successfully establishing a defence under section 18 (see Part III(B)(2) above). By contrast, under the 2005 Regime, the omission of an offer to publish a reasonable correction would mean that the offer did not meet the prescribed content requirements (and so the defence under section 18 could not apply). At the same time, the position of publishers to offer something other than a reasonable correction has been strengthened by the 2021 Amendments, it seems in recognition that there may be some instances where a correction is not appropriate. However, the balance of risk achieved by the 2005 Regime has been altered such that publishers have less of an incentive to make an offer to make amends of a kind that would be acceptable to an aggrieved person seeking vindication.

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231 *2005 Act* (NSW) (n 15) s 12A(4), inserted by *Defamation Amendment Act 2020* (NSW) sch 1, item 8.
232 *2005 Act* (NSW) (n 15) s 12A(5), inserted by *Defamation Amendment Act 2020* (NSW) sch 1, item 8.
233 *2005 Act* (WA) (n 15) s 15(1)(d).
234 *2005 Act* (NSW) (n 15) s 15(1)(d) (emphasis added), inserted by *Defamation Amendment Act 2020* (NSW) sch 1, item 13.
235 *Massoud* (n 140).
236 Ibid [233].

B Evaluating the Devolution of the Offer to Make Amends Regime

In the second reading speech of the Defamation Amendment Bill 2020 (NSW) which implemented the 2021 Amendments in that jurisdiction, Attorney-General Mark Speakman said that the bill would clarify 'the form, content and timing of concerns notices and offers to make amends'.[237] While it is true that the amendments clarify that a statement of claim may not serve as a concerns notice,[238] the 2021 Amendments do much more than 'clarify'. They distort the operation of the offer to make amends regime in a way that undermines the position of aggrieved persons and the objects of the Uniform Defamation Acts. They do so in at least four respects.[239]

First, the 2021 Amendments prevent aggrieved persons from litigating in circumstances of urgency. Such circumstances may arise where a foreshadowed publication could have a severe impact on a person's reputation; for example, where a journalist is seeking comment in a devastating story.[240] The 'snap writ' strategy mentioned above provides a sensible response for an aggrieved person where time is of the essence and stakes are high. It may result in a speedy settlement with a publisher – for example, by a publisher agreeing to diminish the sting of a contentious piece of text – which avoids the need for a protracted dispute in court. The new regime undermines the objective of promoting 'speedy' dispute resolution for defamation.[241]

Second, by causing aggrieved persons to delay before suing, the new regime increases the risk that a publisher will cause irreversible harm to an aggrieved person's reputation. The publications that are the subject of the new regime increasingly occur via the internet.[242] Notoriously, online matter has a tendency to spread through what is sometimes described as the 'grapevine effect'.[243] Causing an aggrieved person to delay before commencing litigation means there is a greater likelihood that the defamatory imputations will 'percolate through underground

237 New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 July 2020, 2866 (Mark Speakman, Attorney-General and Minister for the Prevention of Domestic Violence).

238 Cf *Zoef* (n 116); *Mohareb* (n 117).

239 The following is informed by submissions made in the context of the NSW-led law reform process, including: Sue Chrysanthou SC, Michael McHugh SC and Kieran Smarck SC, Letter to Department of Communities and Justice regarding 'Stage 1 Reforms to the Model Defamation Provisions, extracted in Appendix A to the Model Defamation Amendment Provisions 2022, Submission by Defamation Lawyers (7 September 2022) (unpublished, copy on file with authors); Bennett + Co, Submission to the Defamation Working Party, *Model Defamation Amendment Provisions 2020* (2020).

240 See, eg, the circumstances underlying the order in *Ajaka v Nine Network Pty Ltd [No 2]* [2022] NSWSC 765. Journalists had apparently sought comment on a *60 Minutes* story that was soon to go to air, which would have (and eventually did have) a significant impact on a plastic surgeon's reputation: Michael Douglas, 'Compelling Production of a Defamatory Draft' (2023) 97(5) *Australian Law Journal* 337.

241 *2005 Act* (NSW) (n 15) s 3(d).

242 See Judith Gibson, 'Identifying Defamation Law Reform Issues: A "Snapshot" View of Defamation Judgment Data' (2019) 23(1) *Media and Arts Law Review* 4.

243 *Mickle* (n 220) 54 [21] (Elkaim DCJ); *Polias v Ryall* [2014] NSWSC 1692, [95] (Rotham J); *DG Certifiers Pty Ltd v Hawksworth* [2018] QDC 88, [161] (Rosengren DCJ); *Wilson v Bauer Media Pty Ltd* [2017] VSC 521, [143]–[160] (Dixon J); Michael Douglas, '"Their Evil Lies in the Grapevine Effect": Assessment of Damages in Defamation by Social Media' (2015) 20(4) *Media and Arts Law Review* 367.

channels',[244] causing reputational damage that may become impossible to properly vindicate once public perceptions have been framed by the publisher's account of the plaintiff.[245] In these circumstances, and given the limited ability of damages awards to fully restore a plaintiff's reputation, the new regime risks undermining the object of providing 'effective and fair remedies' for aggrieved persons.[246]

Third, by 'locking in' a plaintiff to the imputations on their concerns notice subject to the leave of the court, an aggrieved person will be well advised to invest considerable resources to the task of drafting a concerns notice. Under the 2005 Regime, a concerns notice can be drafted quickly and inexpensively. Under the new regime, a rational plaintiff will prepare a comprehensive concerns notice that will transpose to a pleading and which will survive the rigours of interlocutory disputation.[247] This may require the services of senior counsel, whose hourly rates may quickly build to a solicitor–client costs bill for an aggrieved person that even a contrite publisher is unwilling to pay. Any significant increase in a plaintiff's pre-litigation costs further undermines the object of resolving disputes without litigation[248] while inhibiting access to the offer to make amends regime by persons without the means to litigate defamation.[249]

Fourth, it is arguable that by increasing the options for the terms of an offer to make amends beyond a 'reasonable correction' by a publisher, which can result in a compete defence under section 18, the new regime potentially makes publishers' offers to make amends less attractive to aggrieved persons and reduces the prospect of a settlement of the dispute outside of court.[250] The requirement to include an offer to publish a reasonable correction in circumstances where their publication has a correctable defect that has harmed a person's reputation could have been expressly retained in the amendments.

We do not dispute that other aspects of the 2021 Amendments may strike an appropriate balance between the competing interests and values underlying Australian defamation litigation. Our concern is that the new regime does not strike the right balance between aggrieved persons and publishers with respect to concerns notices and offers to make amends. Arguably, the new regime unduly advances the interests of for-profit media publishers at the expense of aggrieved persons, providing publishers with another tool with which to encourage impecunious plaintiffs to give up on legitimate claims before trial.

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244 *Slipper v British Broadcasting Corporation* [1991] 1 QB 283, 300 (Bingham LJ).

245 See, eg, the anchoring effect of the defamatory publication considered in *Rayney v Western Australia [No 9]* [2017] WASC 367.

246 *2005 Act* (NSW) (n 15) s 3(c).

247 See, eg, the precision of the imputations framed in the concerns notice preceding the case brought by Lachlan Murdoch, recounted in: 'The Lachlan Murdoch Letters in Full: Fox CEO Demands Crikey Apologise', *Crikey* (online, 22 August 2022) <https://www.crikey.com.au/2022/08/22/lachlan-murdoch-letters-in-full-1-2/>.

248 *2005 Act* (NSW) (n 15) s 3(d).

249 Ibid s 3(c).

250 Ibid s 3(d).

V CONCLUSION

This article has traced the development of the offer to make amends provisions in Australian defamation law. It has explained the features of the dispute settlement regime achieved by the Uniform Defamation Acts with reference to their origins in the UK, which inspired statutory reforms in some Australian jurisdictions in the 20th century. Over time, the offer to make amends regime has slowly transformed from being a procedure focused on alleviating strict liability to a regime primarily focused on quick dispute resolution. The remedial focus of the regime has shifted from apologies and corrections being the primary remedies to a mechanism where the defendant has the ability to make an offer without those remedies (albeit that this may impact the reasonableness of the offer).[251] The 2005 Regime encouraged parties to defamation disputes to use the offer to make amends regime to settle their differences outside of court while not precluding the option of litigation without a concerns notice. Our assessment of the successor offer to make amends regime in those jurisdictions that have implemented the 2021 Amendments is that the benefits and incentives for aggrieved persons to settle disputes inexpensively have been diminished, as has the incentive for media publishers to act speedily to address any damage from a defamatory matter. This undermines the ability of the Uniform Defamation Acts to achieve their objects. As the process of Australian defamation law reform rolls on seemingly *ad infinitum*, we recommend reconsideration by law reformers of the concerns raised in this article.

251 *2005 Act* (WA) (n 15) ss 40(2)–(3).