# The Metes and Bounds of the Federal Court's Jurisdiction in Defamation Matters - How Far Does it Extend?

**Ben Regattieri,** Lawyer, and **Marina Olsen,** Partner, Banki Haddock Fiora, consider the jurisdiction of the Federal Court to hear defamation matters.

While often glossed over or assumed to be satisfied by lawyers, the issue of jurisdiction is an important and necessary matter to consider before bringing, or when responding to, an action. The question must always be asked: does this Court have the power to adjudicate upon this dispute? Whether a Court has jurisdiction to hear a matter cannot be resolved or conferred by agreement between the parties, however as Griffith CJ explained more than 100 years ago, the "first duty of every judicial officer is to satisfy … [themselves] that … [they have] jurisdiction".[1]

The issue of federal jurisdiction in defamation actions, including cases involving a "pure" defamation claim (that is, one that exists without an ancillary cause of action or defence arising under a federal statute), has received extensive consideration in the last few years. This has particularly been the case since the influx of defamation cases into the Federal Court of Australia following the decision in *Crosby v Kelly*[2] in 2012. However, the stampede of applicants towards the Federal Court since then may also have induced some applicants (particularly those who are selfrepresented) to incorrectly assume that the Court always has jurisdiction over defamation matters.

In a recent judgment of Justice Lee in *Mulley v Hayes*,[3] his Honour summarised the main grounds upon which federal jurisdiction is enlivened in defamation claims, quoting his well-known, earlier survey of the area in *Oliver v Nine Network Australia Pty Ltd*.[4] Many are familiar with the *Crosby v Kelly* basis, where there has been publication (or alleged publication) in an Australian territory. However, it is worth remembering that there are other avenues available, particularly in the context of a claim involving multiple causes of action. Resort to these avenues is usually not required in mass media cases, as there will generally be national publication (including in a territory).

## Advantages of the Federal Court for applicants in defamation cases

Whilst not the focus of this article, it should be noted that most applicants consider the Federal Court a more favourable Court in which to sue than the traditional defamation Courts, being the Supreme Courts of the states and territories, and the various District Courts. One reason for this is the Court's default position that civil matters are not to be tried by a jury, and applicants' perception that they enjoy better prospects before a judge alone.

In *Chau Chak Wing v Fairfax Media Publications Pty Ltd*,[5] the media respondents were unsuccessful in bringing an application for the matter to be heard by a jury. The *Defamation Act 2005* (NSW) (**Defamation Act**) (and its analogues) makes it clear that parties have a right to have a defamation claim heard by a jury, with section 21 providing for the election for proceedings to be tried by a jury and section 22 outlining the roles of judges and juries in such proceedings. However, the Court in *Chau Chak Wing* confirmed (and the parties agreed) that those provisions are inconsistent with the *Federal Court Act 1976* (Cth) (**FCA**), section 39 of which sets out the Federal Court's default position that trials shall be heard by a judge unless the Court orders otherwise and section 40 of which provides that the Court may direct that a suit or an issue or fact be heard by a jury "in any suit in which the ends of justice appear to render it expedient to do so".

The *Chau Chak Wing* respondents accepted that the Defamation Act provisions are invalid to the extent of that inconsistency by reason of section 109 of the Constitution. However, they contended that, in exercising its discretion under section 40 of the FCA, the Court may have regard to sections 21 and 22 of the Defamation Act. This argument was rejected by the Full Court and, as such, respondents in Federal Court defamation cases must now seek to persuade a Court that orders should be made for a jury under the ordinary principles of section 40.

Although *Chau Chak Wing* has certainly made the prospect of a Federal Court defamation jury trial less likely, and no such trial has proceeded to date, Allsop CJ and Besanko stated in that case:

> *We note that we can envisage cases where there might be good reason to have a jury. For example, although not this case, there might*

1 *Oliver v Nine Network Australia Pty Ltd* [2019] FCA 583 (**Oliver**) citing *Federated Engine-Drivers and Firemen's Association of Australasia v The Broken Hill Proprietary Company Limited* (1911) 12 CLR 398, 415.

2 (2012) 203 FCR 451.

3 [2021] FCA 1111.

4 *Oliver* at [10]-[16].

5 (2017) 255 FCR 61 at [37].

> *be a case where there is a real issue as to whether changing community standards mean that the words considered defamatory of a person, say 30 years ago, would no longer be considered defamatory. There may be other circumstances and it is neither possible nor desirable for us to state in advance the cases that might call for an order for a jury.*[6]

In *Ra v Nationwide News Pty Ltd*,[7] which preceded *Chau Chak Wing* by several years, Justice Rares ordered the first ever jury trial in the Federal Court, however the matter settled at mediation before trial. In that case, Ms Ra, a brothel owner, sued the publisher of *The Daily Telegraph* for defamation and misleading or deceptive conduct under the *Trade Practices Act 1974* (Cth). Ms Ra pleaded several imputations and representations, which included that she was accused of a despicable crime of keeping foreign women as sex slaves in her brothel. Rares J reasoned that the matter before him raised "issues that very much involve giving effect to moral and social values of the community",[8] and therefore he was satisfied that a jury would be a better mode of trial than judge-alone.

More recently, in *Barilaro v Shanks-Markovina (No 3)*,[9] Rares J refused an application to have a defamation matter heard by a jury based on the complexities arising from having a case straddling two different versions of the Defamation Act (which was amended with effect from 1 July 2021), and the uncertainty created by the COVID pandemic. However, his Honour described the matter as "finely balanced", stating "perhaps with a simpler case it would be appropriate to make such an order".[10]

In the recent hearing for broadcaster Erin Molan's defamation proceedings against the *Daily Mail*, according to a report in *The Sydney Morning Herald* Justice Bromwich admitted that the prospect of him personally needing to decide what constitutes racism to a reasonable person was challenging given that, according to his Honour, he was an "older male white judge". Whilst no application for a jury was made, his Honour described the proceedings as "a particularly worthy case for a jury".[11]

Another reason applicants prefer the Federal Court is the efficiency and speed at which matters are resolved. The Court's docket system is arguably more efficient in the sense that it generally brings proceedings to a final resolution far more quickly than state Courts, appealing to those seeking rapid vindication.[12] The Federal Court's focus on minimising the interlocutory disputes that have traditionally been fought in defamation cases also shortens the time between commencement and disposition. Lee J stated in *Nationwide News Pty Limited v Rush*:[13]

> *The predilection for interlocutory disputation in this area of the law should not be encouraged by the ready grant of leave. To do otherwise would fail to pay sufficient heed to the warning of Jordan CJ that cases could be delayed "interminably" and "costs heaped up indefinitely" if a litigant could, in effect, transfer all exercises of discretion in interlocutory applications to the Full Court.*

On one view, the reluctance to hear interlocutory disputes and the practice of letting matters proceed rapidly to trial with minimal pre-trial skirmishes can be *less* effective in facilitating the just, quick and cheap resolution of proceedings. Defamation matters might proceed to final hearing, and to final judgment, only for the applicant to fail in making out the fundamental ingredients of their claim. This can have costs consequences for both an applicant (who might sue on multiple publications, but only succeed on some) and a respondent (who might spend significant sums seeking to defend imputations that are ultimately found not to have been conveyed). For example, in *Hockey v Fairfax Media Publications Pty Ltd*,[14] the applicant sued on multiple articles in *The Sydney Morning Herald*, *The Age* and *The Canberra Times* (published in print and electronic formats) but succeeded only in proving that a poster promoting one of the print articles, and two tweets, conveyed defamatory imputations.

## Federal Court jurisdiction generally

The starting point for the Federal Court's jurisdiction is to be found in section 39B(1A) of the *Judiciary Act 1903* (Cth) (**Judiciary Act**), which reads:

> *The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:*
>
> *(a) in which the Commonwealth is seeking an injunction or a declaration; or*
>
> *(b) arising under the Constitution, or involving its interpretation; or*
>
> *(c) arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.*

Since 1997, the Federal Court has been a Court of general federal civil jurisdiction, having moved beyond its status as a Court of limited specific jurisdiction. The conferral of this

6 At [45].
7 [2009] FCA 1308 (**Ra**).
8 Ra at [26].
9 [2021] FCA 1100.
10 At [51], [52].
11 Jenny Noyes, 'Judge in Molan defamation case "challenged" by racism definition', *The Sydney Morning Herald* (https://www.smh.com.au/national/nsw/judge-in-molan-defamation-case-challenged-by-racism-definition-20210930-p58w32.html).
12 See the Federal Court's *Central Practice Note: National Court Framework and Case Management (CPN-1)*, clause 7.1.
13 [2018] FCAFC 70 at [5].
14 [2015] FCA 652; 237 FCR 33.

general jurisdiction was effected by section 39B(1A)(c) above (discussed further below).

As noted above, in *Oliver*, Justice Lee usefully canvassed the key grounds upon which jurisdiction may be attracted in defamation cases:

- where the proceedings would be within the jurisdiction of the Australian Capital Territory or the Northern Territory Supreme Courts on the basis of publication within a territory;
- where there has been publication across multiple states so that the interaction between the choice of law provisions in the various state Defamation Acts potentially engages the "full faith and credit" provision in section 118 of the Constitution;
- where the publication involves the consideration of the implied constitutional freedom of communication on governmental and political matters;
- in any matter arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter; and
- where a right, duty or obligation in issue in the matter "owes its existence to federal law or depends upon federal law for its enforcement", including where the right claimed is in respect of a right or property that is the creation of federal law.

## Publication in a territory

*Crosby v Kelly* involved a claim for defamation regarding a publication alleged to have been published in the ACT, as well in other areas of Australia. The applicants, Lynton Crosby and Mark Textor, were directors of a political advisory firm and sued Michael Kelly, a member of the House of Representatives, for certain comments about them made by Mr Kelly on his Twitter account. The proceedings were commenced in the ACT registry of the Federal Court. The Full Court (Bennett, Perram and Robertson JJ) held that, once a claim of publication in the ACT is made, the Federal Court has jurisdiction over the matter. This is because the effect of section 9(3) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) is that the Federal Court has original jurisdiction over a proceeding that would be within the jurisdiction of the ACT or NT Supreme Courts.

The effect of *Crosby v Kelly* is that virtually all claims in respect of mass media publications are actionable in the Federal Court, because almost invariably they are published in the ACT or NT. However, all that is needed is a *bona fide* allegation of publication in a territory. If such an allegation is made, federal jurisdiction is attracted even if, upon consideration of the evidence, there is no proof of publication in a territory.[15] Similarly, federal jurisdiction remains "even if the non-colourable allegation was unnecessary to decide, abandoned, struck out, or otherwise rejected on the evidence adduced at trial".[16] As Allsop CJ stated in an article cited in *Oliver*,[17] "[once] a non-colourable assertion is made, that clothes the court with federal jurisdiction, which, once gained, is never lost". The concept of colourability is discussed further below.

As it turned out in *Oliver*, no evidence was adduced by the applicant to prove publication in a territory. As a consequence, the allegation failed for want of proof, "but this does not mean that federal jurisdiction, properly invoked upon the *bona fide* making of the allegation, somehow disappeared like a will-o'-the-wisp".[18]

## Publication across multiple states

As noted above, section 39B(1A)(b) of the Judiciary Act provides for federal jurisdiction in any matter "arising under the Constitution, or involving its interpretation". One of the lesser-known grounds by which federal jurisdiction may be attracted under this sub-section, as referred to by Lee J in *Oliver*,[19] is where there has been intranational publication, in other words one *between* states. In noting this line of argument, Lee J seemed to be promoting a concept similar to that described by Justice Rares in a paper presented in 2006 at the University of New South Wales.[20] In that paper, Rares J posited that, where an applicant sues upon an intranational publication, the interaction between the respective choice of law provisions of the Uniform Defamation Acts (**UDA**) on the one hand, and the "full faith and credit" provision of the Constitution on the other, may give rise to federal jurisdiction.

Where publications in more than one Australian jurisdictional area (in other words, each state[21]) are sued upon, the law of each place of publication will create a substantive right to sue on that publication in that jurisdiction, as confirmed in *Dow Jones & Co Inc v Gutnick*.[22] However, the choice of law provisions in the UDAs designate which law is to be applied in particular proceedings. For example, section 11(2) of the *Defamation Act 2005* (Cth) provides:

If there is a multiple publication of matter in more than one Australian jurisdictional area, the substantive law applicable in the Australian

15 *Oliver* at [17], citing *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212 at 219.

16 *Oliver* at [18].

17 (2002) 23 Aust Bar Rev 29 at 45, cited in *Oliver* at [17].

18 At [18].

19 At [15].

20 Rares, J, *"Uniform National Laws and the Federal Court of Australia"*, presented at the University of New South Wales law faculty "*Defamation & Media Law Update 2006*" seminar on 23 March 2006. Available at https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-rares/Rares-J-20060323.rtf.

21 See section 11(5) of the *Defamation Act 2005* (NSW) and its equivalents.

22 [2002] HCA 56; (2002) 210 CLR 575. Cited by Lee J in *Oliver* at [15].

jurisdictional area with which the harm occasioned by the publication as a whole has its closest connection must be applied in this jurisdiction to determine each cause of action for defamation based on the publication.

In such situations, although a cause of action might exist in multiple states, the states *without* the closest connection to the harm have determined to apply the law of another state (the state with the closest connection to the harm) and are, in effect, acquiescing to that other state. Section 118 of the Constitution provides that "[full] faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State". This provision is therefore engaged "so as to enable courts to recognise and apply the provisions of the various uniform Defamation Acts as modifications of the laws of each [state] and the common law of Australia".[23]

Rares J's analysis, as far as the authors are aware, has not been tested in any proceedings but raises interesting issues and certainly appears to have been embraced by Justice Lee in *Oliver*. In today's day and age, intranational publications almost invariably attract *Crosby v Kelly* jurisdiction, which would remove the need to run an argument that a matter arises under this limb.

## Implied freedom of political communication

The Federal Court will also have original jurisdiction to hear a "pure" defamation action where the publication somehow involves the application of the implied constitutional freedom of communication on governmental and political matters (as a matter arising under the Constitution pursuant to section 39B(1A)(b) of the Judiciary Act). The recognition of that freedom has its origin in the decision in *Lange v Australian Broadcasting Corporation*,[24] where the High Court delivered a unanimous joint judgment stating:

[Sections] 7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors. Those sections do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power.[25]

The *Lange* decision is generally raised as a form of non-statutory qualified privilege defence, as opposed to being relied upon by an applicant in their claim. In *Oliver*, Lee J confirmed that federal jurisdiction will be enlivened by the freedom being relied upon by a party, even if it is only raised by way of defence by a respondent.[26] Notably, in Christian Porter's case against the Australian Broadcasting Corporation, the respondents relied upon the implied freedom by way of constitutional defence but also contended that it should affect findings on identification and damages.

## Matters arising under a law of the Commonwealth

Section 39B(1A)(c) of the Judiciary Act provides for federal jurisdiction in any matter "arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter". In *Oliver*, Lee J noted that the introduction of this section marked the Parliament's extension of the Court's reach "to all controversies or 'matters' across all areas with respect to which the Parliament of the Commonwealth has made laws".[27] In this context, 'matter' means the "justiciable controversy between the actors involved, comprised of the substratum of facts representing or amounting to the dispute or controversy between them".[28] The concept of 'matter' is distinct from the cause of action and exists independently from the proceedings ultimately brought for determination.[29]

In *Rana v Google Inc*[30], the Full Court was faced with an appeal from a first instance decision dismissing Rana's case against Google for want of jurisdiction. Rana had pleaded, as against Google, contraventions of the Australian Consumer Law[31] (**ACL**), defamation and negligence. At first instance, the ACL claim was struck out, and the Court concluded that it lacked the jurisdiction to hear the defamation matter as there was no longer a core federal matter pleaded. However, on appeal, the Full Court disagreed. Chief Justice Allsop, together with Justices Besanko and White, found it could not be said that the ACL and the defamation claims were distinct and separate matters. While both claims were "less than coherently pleaded",[32] one could discern a common substratum of facts from which the claims arose. Further, while the ACL claim was embarrassing, this did not mean it was colourable. Once the Court had jurisdiction over the ACL claim, it had accrued jurisdiction over the nonfederal matter.

23 *Oliver* at [15].

24 (1997) 189 CLR 520.

25 At [540].

26 At [14].

27 At [13].

28 See *Oliver* at [12]; also see Allsop J (as the Chief Justice then was), 'Federal Jurisdiction and the Jurisdiction of the Federal Court of Australia in 2002' (2002) 23 *Australian Bar Review* 29.

29 *Fencott v Muller* (1983) 152 CLR 570 at 603-608; *Australian Securities and Investments Commission v Edensor Nominees Pty Limited* [2001] HCA 1; (2001) 204 CLR 559 at 584-585 [50], both cited in *Oliver* at [12].

30 [2017] FCAFC 156.

31 Schedule 2 to the *Competition and Consumer Act 2010* (Cth).

32 At [37].

*Rana* demonstrates the oft-stated principle in this area of the law that once a matter is within federal jurisdiction, the entire matter is within federal jurisdiction and, once gained, jurisdiction is not lost. This is still the case if the cause of action which brought the matter within federal jurisdiction is struck out with no leave to replead, leaving only the non-federal matters remaining.

### *A right, duty or obligation in issue in the matter owes its existence to federal law*

In *Oliver*, Lee J referred to the decision of *LNC Industries Limited v BMW (Australia) Limited,* where it was confirmed that a federal matter arises if a right, duty or obligation in issue in the matter "owes its existence to federal law or depends upon federal law for its enforcement".[33] This includes where the right claimed is in respect of a right or property that is the creation of federal law. The question whether the federal matter arises in this context does not depend upon the form of the relief sought. In *LNC Industries*, an example given is of a claim for damages for breach or specific performance of a contract. The claim for relief is of a kind which is available under state law, but if the contract is in respect of a right or property that is the creation of federal law, the claim arises under federal law. The subject matter of the contract in such a case exists because of the federal law.[34]

This limb is seen as merely an expansion (or, on another view, a subset) of the limb discussed directly above – that is, an expansion (or sub-set) of what it means for a matter to arise under a law of the Commonwealth.[35] Take, for example, a dispute arising in relation to the warranties given by the assignor/assignee under a contract effecting an assignment of copyright. Although the dispute does not arise under the *Copyright Act 1968* (Cth) in the literal sense, the right, duty or obligation in dispute arguably owes its existence to that Act.

Jurisdiction arose under this limb in *Mulley v Hayes*. There, Justice Lee was required to decide whether the Court had jurisdiction to hear proceedings that could not be characterised as "pure" defamation proceedings where the publications comprised two Facebook Messenger messages: the first sent in January 2020 from the respondent to the applicant (**January Message**); and the second sent in February 2020 from the respondent to the applicant's wife and later seen by the applicant (**February Message**). The separate question for determination, pursuant to 37P of the FCA, was whether federal jurisdiction had been properly invoked.

There was no publication in a territory (Mr Hayes' message was sent from Queensland to Mr Mulley's wife, presumably in New South Wales), and therefore the avenue of jurisdiction established in *Crosby v Kelly* was unavailable. However, Lee J ultimately found federal jurisdiction arising from a right, duty or obligation in issue owing its existence to federal law. The applicant originally pleaded four separate claims, but did not press two of them, leaving two causes of action remaining. One was for defamation in respect of the February Message (sent to the applicant's wife only) and alleged to carry an imputation that the applicant is a paedophile. The other claim was for damages "for alleged psychological injury caused by the January Message and the February Message".[36] Mr Mulley sought relief by way of common law damages based on a novel claim for tortious liability for harm caused by unlawful acts, being the sending of messages by Mr Hayes contrary to section 474.17 of the *Criminal Code 1995* (Cth) (which makes it a criminal offence to use a carriage service to menace, harass or cause offence).

To answer the question of jurisdiction, Lee J explored the case law post*LNC Industries*. His Honour found that the cause of action met the *LNC Industries* test – the applicant asserted that the respondent's conduct was unlawful because it constituted conduct contrary to a norm created by, and owing its existence to, a law of the Commonwealth. Therefore, his Honour reasoned, the "entire controversy out of which this fourth pleaded claim arises is one "arising under" a law of the Parliament".[37]

Lee J found that the other remaining claim, the defamation matter, was also within the Court's jurisdiction since it arose out of a common substratum of facts. The claim for unlawful conduct under the Commonwealth Code related to both messages, and the claim for defamation arose out of one of them. Lee J relied upon the judgment of *Hunt Australia Pty Ltd v Davidson's Arnhemland Safaris Pty Ltd* where Spender, Drummond and Kiefel JJ (as her Honour then was) stated:

> *In this case the defamation claim is not "a completely disparate claim constituting in substance a separate proceeding", nor is it "a non-federal matter which is completely separate and distinct from the matter which attracted federal jurisdiction". The claim for defamation arises out of the first letter in a series of correspondence … It is the dissemination of the requested response from the Minister which founds the federal claim. It was well open to the primary judge to conclude, "as a matter of impression and practical judgment", that there was a common substratum of facts, and that the non-federal defamation matter was not "completely separate and distinct" from the Trade Practices Act matter.*[38]

33 (1983) 151 CLR 575 at 581 Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ at [7] citing *Ex parte Barrett* (1945) 70 CLR 141, at p 154.
34 At [8].
35 Allsop, J, *An Introduction to the Jurisdiction of the Federal Court of Australia* (FCA) [2007] *FedJSchol* 15, available at http://www5.austlii.edu.au/au/journals/FedJSchol/2007/15.html.
36 At [17].
37 At [60].
38 [2000] FCA 1690; (2000) 179 ALR 738 at [30].

Therefore, where there is a common substratum of facts between a defamation matter and a matter that is within the Court's jurisdiction, the Federal Court will gain jurisdiction over the non-federal matter. An obvious example of this concept in practice is the one given in *Hunt Australia* – an alleged contravention of section 18 of the ACL (section 52 of the *Trade Practices Act 1974* (Cth) at the time *Hunt Australia* was decided) and a defamation claim in relation to the same publication.

However, even where a non-federal claim is brought within federal jurisdiction by reason of its association with a federal claim, that is not the end of the matter and the Federal Court can still be found *not* to have jurisdiction. In *Mulley v Hayes*, the respondent made a submission that the Commonwealth Code claim was "colourable", being a claim made for the "the improper purpose of 'fabricating' jurisdiction"[39] by making a claim with a federal issue for the purpose of bringing the nonfederal issue within the Federal Court's jurisdiction. A court will not have jurisdiction where there is such a finding.[40]

In considering the submission, Lee J discussed the principles relevant to allegations of colourability. His Honour noted that the weakness of a case may be relevant to the issue, but only to the extent that it can rationally inform an assessment as to whether the claim was advanced for an improper purpose to fabricate jurisdiction.[41] Additionally, a colourable claim is not the same as a weak or infirm claim.[42] While Mr Mulley had added the Commonwealth Code claim after Lee J has raised the issue of jurisdiction, it was never put to Mr Mulley that he had added this claim for an improper purpose, nor was there any cross-examination on the issue. In those circumstances, his Honour could not make a finding or draw an inference that Mr Mulley's claim attracting the jurisdiction of the Court was colourable or artificial.

### *Does corporate status attract federal jurisdiction?*

Although not necessary to decide, Lee J mused in *Oliver* that it might be arguable that federal jurisdiction is attracted under the 'right, duty or obligation' limb wherever a respondent is a corporation (which would obviously significantly expand federal jurisdiction) because the ability to sue a corporate entity arises under and depends upon a Commonwealth law:

> *Chapter 2B of the* Corporations Act 2001 *(Cth) provides for the basic features of a company. As is explained in Ford, Austin & Ramsay's Principles of Corporations Law (Lexis) at [4,050], the capacity of a company created under the Corporations Act, including its ability to be sued, is to be found in s 119 when it provides that a company on registration comes into existence as a body corporate. It is s 124(1) which gives the entity powers of a body corporate (as to a company registered before the commencement of the relevant Commonwealth law, being the Corporations Act, s 1378 provides that registration under earlier state law has effect as if it were registration under Pt 2A.2 of the Corporations Act). The ability to sue the respondent as an entity now arises under and depends upon a law of the Commonwealth.*[43]

On this view, the Court would always have jurisdiction in any claim in which the respondent is a corporation created under the *Corporations Act 2001* (Cth). It should be noted that alternative views have been expressed in other Federal Court cases.[44]

### Conclusion

Jurisdiction can be a complicated matter. As the cases make clear, it is important when bringing and defending a defamation claim in the Federal Court that it comes within one of the avenues of jurisdiction (helpfully set out by Lee J in *Oliver*). In most instances, mass media and online publications will attract *Crosby v Kelly*-type jurisdiction. However, the decision in *Mulley v Hayes* is a useful reminder that other avenues exist for invoking the Court's jurisdiction.

As a final note, it is worth considering the potential further expansion of the Court's jurisdiction in defamation cases if the Federal Government's recently released *Social Media (Anti-Trolling) Bill 2021*[45] is enacted. Firstly, the Bill empowers the Federal Court to grant 'end user disclosure orders' to uncover the identity of posters of anonymous comments on social media, and further any case relating to a social media post would likely involve a matter arising under a federal law (and therefore enliven federal jurisdiction under section 39B(1A)(c) of the Judiciary Act). That forum may well find itself flooded with 'backyarder' social media cases between individuals, or we may see an increase in such matters being heard in the Federal Circuit Court.[46]

39 At [70], citing *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212 at 219 per Bowen CJ, Morling and Beaumont JJ.

40 See *Tucker v McKee* [2021] FCA 828 at [37]-[38], where the Court did not have jurisdiction because a federal claim was found to be colourable.

41 At [73], citing *Qantas Airways Limited v Lustig* [2015] FCA 253; (2015) 228 FCR 148 (at 169 [88]):

42 *Macteldir Pty Ltd v Dimovski* [2005] FCA 1528.

43 At [16].

44 See *Seven Network v Cricket Australia* [2021] FCA 1031; 393 ALR 53 at [61]; although cf *Hafertepen v Network Ten Pty Limited* [2020] FCA 1456 at [44].

45 Exposure draft available at https://www.ag.gov.au/system/files/2021-11/social-media-anti-trolling-bill-2021-exposure-draft.PDF.

46 Defamation cases in Federal Circuit Court (now Federal Circuit and Family Court of Australia) are rare, but see discussion of the Court's jurisdiction in relation to defamation in *Sarina & Anor v O'Shannassy* [2019] FCCA 732.