

MISLEADING CONDUCT AND ECONOMIC TORTS

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Abbreviations Key

Abbreviation	Meaning
P / D	Plaintiff (or applicant, in the Federal Court) / Defendant (or respondent)
TP	Third party
DA	<i>Defamation Act 2005</i> (Vic) (uniform legislation; the NSW Act is often cited in Federal Court cases and has the same section numbers)
ACL	<i>Australian Consumer Law</i> , being Schedule 2 to the <i>Competition and Consumer Act 2010</i> (Cth)
CCA	<i>Competition and Consumer Act 2010</i> (Cth)
ORP	Ordinary reasonable person (defamation), sometimes "ordinary reasonable reader/viewer/listener"
ORM of TA	Ordinary or reasonable member of the target audience (s 18 ACL)
QP	Qualified privilege
DOC	Duty of care
ACCC	Australian Competition and Consumer Commission
P / D	Plaintiff (or applicant, in the Federal Court) / Defendant (or respondent)
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Exam Approach

Problem questions in this unit usually give you a set of facts and ask you to advise a party about their rights and liabilities. Read the instructions carefully: many questions tell you which causes of action to consider (for example "consider defamation only" or "do not consider s 18"). If the question is open, work through the following checklist.

1. **Identify every statement or piece of conduct** that is potentially actionable, and who made it, to whom, and in what medium.
2. **Identify the potential plaintiffs.** Is P an individual, a large company, a small company, a not-for-profit, or a council? This decides whether defamation is even available (s 9 DA).
3. **Is the conduct "in trade or commerce"?** If yes, s 18 ACL (and possibly Part 3-1) is in play. If no (private sale, political speech, personal grudge), you are limited to the torts.
4. **Is the statement about P's reputation, P's goods or business, or a representation made directly to P?** This points you to defamation, injurious falsehood, or deceit/negligent misrepresentation respectively.
5. **Work through each cause of action element by element**, applying the facts. Do not skip elements that seem obvious: state them and briefly apply them.
6. **Consider defences** (defamation especially) and then **remedies**.
7. **Conclude** on each issue, and give an overall recommendation on the most promising cause of action.

Part 1: Defamation

Introduction and Framework

Defamation occurs where D publishes to a third party matter which identifies P and which lowers P's reputation in the eyes of the ordinary reasonable person. The tort protects personal, social, business and professional reputation. It does not protect against mere hurt feelings, embarrassment or invasion of privacy: the question is always whether the ORP would think less of P.

Key features:

- **Strict liability.** D need not intend to defame P, or even know P exists: *Cassidy v Daily Mirror Newspapers Ltd* [1929] 2 KB 331; *E Hulton & Co v Jones* [1910] AC 20. What D meant to say is irrelevant; the question is what the matter conveys.
- **Falsity is not an element.** P does not have to prove the matter is false. Truth is a defence which D must prove (s 25 DA).
- **Uniform law.** Each State and Territory enacted uniform defamation legislation from 1 January 2006. In Victoria: *Defamation Act 2005* (Vic). The Acts operate alongside the common law except to the extent they provide otherwise (s 6 DA).
- **Libel and slander abolished as a distinction.** Publication of defamatory matter of any kind is actionable without proof of special damage: s 7 DA.
- **"Matter"** is defined broadly (s 4 DA) to include articles, reports, advertisements, broadcasts, letters, pictures, gestures, oral utterances and any other thing by which information is communicated. Since the Stage 2 reforms, "digital matter" (matter published in electronic form by means of an online service) is also defined.
- **Single cause of action.** Publication of defamatory matter gives rise to one cause of action even if more than one imputation is carried: s 8 DA.

Order of analysis for a defamation problem

Step	Question	Authority
1	Does P have standing to sue?	ss 9, 10 DA
2	Does the matter convey a defamatory meaning (imputation)? (a) What meaning does the ORP take? (b) Is that meaning defamatory?	<i>Radio 2UE v Chesterton</i> (2009) 238 CLR 460
3	Does the matter identify P?	<i>Knupffer; Younan</i>
4	Was the matter published to at least one third party?	<i>Webb v Bloch; Voller</i>
5	Has the publication caused, or is it likely to cause, serious harm to P's reputation (for a corporation: serious financial loss)?	s 10A DA; <i>Latham v Greenwich</i>
6	Can D establish any defence ?	ss 25–32 DA and common law
7	What remedies are available?	ss 34–38 DA

Standing: Who can Sue?

Individuals

Any living individual may sue in respect of defamatory matter about them.

Deceased persons: no

No cause of action exists for the publication of defamatory matter about a deceased person, whether the matter was published before or after death: s 10 DA. Reputation is personal. Proceedings cannot be commenced or continued by or against the estate of a deceased person. However, a living family member may sue if the matter also defames them personally.

Public bodies and government: no

A public body (a local government body or other governmental or public authority constituted by or under a law of any country) cannot sue: s 9 DA (definition in s 9(6)). This reflects the common law position that elected bodies should be open to uninhibited public criticism: *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680. Individual councillors or officials who are personally defamed can still sue.

Corporations: restricted (s 9)

At common law any corporation could sue to protect its trading reputation. Concern that large corporations used defamation as a SLAPP ("strategic lawsuit against public participation") tool (the classic example being the "McLibel" case, *McDonald's Corporation v Steel & Morris* [1997] EWHC QB 366; see also *Chapman v Conservation Council of SA* [2002] SASC 4) led to s 9 DA.

A corporation has no cause of action for defamation unless it was an **excluded corporation** at the time of publication: s 9(1). A corporation is an excluded corporation if (s 9(2)):

8. the objects for which it is formed do not include obtaining financial gain for its members or corporators (i.e. a **not-for-profit**); or
9. it employs **fewer than 10 persons** and is not related to another corporation;

and, in either case, it is not a public body.

- "Employee" includes any individual (whether or not an independent contractor) engaged in the day-to-day operations of the corporation, other than as a volunteer, who is subject to the control and direction of the corporation: s 9(6). Part-time employees count as a fraction of a full-time equivalent: s 9(3).
- Section 9 does not affect the right of an individual associated with a corporation (e.g. a director or CEO) to sue if the same matter also defames them personally: s 9(5).
- Large corporations must instead rely on **injurious falsehood** (Part 2) or **s 18 ACL** (Part 3).

Element 1: The matter conveys a defamatory meaning

This element involves two distinct steps which must be addressed separately:

1. **What meaning(s) does the matter convey** to the ordinary reasonable person?
2. **Is that meaning defamatory**, in the sense that the ORP would think less of P?

The Ordinary Reasonable Person (ORP)

The ORP is the hypothetical referee used to determine both the meaning of the matter and whether that meaning is defamatory: *Lewis v Daily Telegraph Ltd* [1964] AC 234; *Trkulja v Google LLC* (2018) 263 CLR 149; *Favell v Queensland Newspapers Pty Ltd* (2005) 221 ALR 186. The ORP:

- is of fair, average intelligence and education, and applies general knowledge and experience of worldly affairs;

- is fair-minded, not perverse, morbid, suspicious of mind, or avid for scandal: *Farquhar v Bottom* [1980] 2 NSWLR 380;
- is not a lawyer and is prone to a degree of "loose thinking"; can "read between the lines" and draw inferences;
- reads the publication as a whole, in context, and with the degree of attention the medium invites;
- does not have specialised knowledge of the background (unless a true innuendo is pleaded);
- understands the difference between an allegation of guilt, reasonable grounds to suspect guilt, and a mere charge or investigation, though a report of a charge may still carry an imputation of suspicion: *Mirror Newspapers Ltd v Harrison* (1982) 149 CLR 293.

What D intended is irrelevant, as is how particular recipients actually understood the matter (except for true innuendo, below).

Step 1: Identifying the meanings conveyed

The meaning of the matter is the meaning that would be conveyed to the ORP, in the full context of the publication, and having regard to the mode and manner of publication.

Context: the whole publication

- The ORP considers the publication as a whole. A defamatory sting in one part may be neutralised by another part ("bane and antidote"), but only if the antidote is sufficiently prominent to be taken in by the ORP.
- For newspaper articles, the ORP is taken to read the article, not just the headline. However, a sensational headline on its own may convey a meaning to readers who do not read on; courts consider the likely reading behaviour for the medium. For social media posts, the ORP is taken to scroll quickly and impressionistically.
- In *Trkulja v Google LLC* (2018) 263 CLR 149, the High Court held that Google search results and autocomplete predictions (placing P's image and name among images of notorious Melbourne criminals) were capable of conveying defamatory imputations to an ordinary reasonable user.

Mode and manner of publication

- The ORP gives more careful attention to a book or a formal letter than to a fleeting television segment, a tabloid headline, or a tweet.
- The tone, visual presentation, juxtaposition with images, and use of sarcasm or humour all affect meaning.

Types of Meaning

Type	Description	Example / authority
Natural and ordinary (literal) meaning	What the words plainly say.	"X stole \$10,000 from the club."
Popular (false) innuendo	Implied meaning the ORP draws by reading between the lines, using general knowledge only. Still part of the natural and ordinary meaning.	<i>Bjelke-Petersen v Warburton</i> [1987] 2 Qd R 465: "hands in the till" conveyed corruption and dishonest appropriation.
Legal (true) innuendo	Meaning conveyed only to recipients with extrinsic knowledge of additional facts that give an otherwise harmless statement a defamatory sting. P must plead and prove the extrinsic facts and that the matter was	<i>Lewis v Daily Telegraph</i> : statement that a man was seen entering particular premises is harmless unless you know the premises are a brothel. <i>Radio 2UE</i>

	published to at least one person who knew them.	<i>v Chesterton</i> : test is whether an ORP possessed of that extrinsic knowledge would draw the defamatory meaning.
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The Single Meaning Rule

The court determines a single natural and ordinary meaning that the ORP would take from the matter, even if different real readers would understand it differently: *Slim v Daily Telegraph Ltd* [1968] 2 QB 157. P may plead several imputations, each of which must be found to be conveyed.

Pleading imputations

In practice P pleads specific imputations (e.g. "P is a thief"). The court asks whether each pleaded imputation is conveyed, and whether it differs in substance from what was actually conveyed.

Bazzi v Dutton [2022] FCAFC 84: then-Minister Peter Dutton sued over a tweet reading "Peter Dutton is a rape apologist" (linking to an article). At first instance he was awarded \$35,000. The Full Federal Court allowed the appeal: read in the context of the linked article, the tweet did not convey the pleaded imputation that Dutton excuses rape. The case illustrates that the pleaded imputation must actually be conveyed to the ORP in context, and that context (including linked material) can change the meaning of a short social media post.

Step 2: Is the meaning defamatory?

The test: would the imputation cause the ordinary reasonable person, applying general community standards, to think less of P? *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460. This is a single general test covering all aspects of reputation, including personal, business and professional reputation.

- The ORP shares the moral and social standards of the general community, not those of a section of it. If only a subgroup (e.g. a criminal gang) would think less of P, the matter is not defamatory.
- Standards are assessed at the **time of publication**: community values change (e.g. imputations of homosexuality are no longer defamatory in themselves).
- The imputation must generally **disparage** P, that is, attribute conduct or character for which P is responsible. P is not defamed by a comment about something they cannot control (race, disability, gender), because the ORP would not think less of them for it.

Exceptions where disparagement is not required:

10. Imputations that expose P to **ridicule** or make P look absurd: *Boyd v Mirror Newspapers Ltd* [1980] 2 NSWLR 449 (a footballer described as fat, slow and pathetic); *Ettingshausen v Australian Consolidated Press Ltd* (1991) 23 NSWLR 443 (a published photo exposing the plaintiff's genitals).
11. Imputations that would cause people to **shun or avoid** P, even though no moral blame attaches (e.g. that P has a contagious disease, is insane, or was a victim of a sexual assault).

Common defamatory imputations: criminality; association with criminals; dishonesty or deceit; hypocrisy; sexual misconduct; disloyalty; misconduct in office; professional incompetence; lacking qualifications for a job; cruelty; racism or bigotry.

Greenwich v Latham [2024] FCA 1050; appeal dismissed *Latham v Greenwich* [2026] FCAFC 82: a sexually explicit tweet by Mark Latham about fellow MP Alex Greenwich was held to convey imputations that Greenwich engages in disgusting sexual activities and is not a fit and proper person to be a member of parliament. D's argument that it merely referred to gay sex (which is not defamatory by modern standards) failed: the imputations went beyond sexuality to disgust

and unfitness. Greenwich was awarded \$140,000 (including aggravated damages). Useful for both steps of element 1 and for serious harm.

Element 2: The Matter identifies P

P can only sue if P is identified, or reasonably identifiable, as the person defamed.

- Where P is named or pictured, identification is straightforward.
- Where P is not named, the question is whether ordinary sensible readers with knowledge of the relevant circumstances would reasonably identify P as the person referred to. The standard of reasonableness required is "not high": *Younan v Nationwide News Pty Ltd* [2013] NSWCA 335 at [25].
- D's intention is irrelevant. D can be liable for defaming a person D did not know existed: *E Hulton & Co v Jones* [1910] AC 20 (fictional "Artemus Jones").
- A statement about a person with the same name as P can defame P if readers would reasonably understand it as referring to P: *Newstead v London Express Newspaper Ltd* [1940] 1 KB 377.

Identification by extrinsic facts

Where P can only be identified by readers with extrinsic knowledge, P must prove (*Younan*):

12. the matter was published to recipients who, on the basis of extrinsic facts known to them, understood it as referring to P; and
13. those recipients were ordinary sensible persons who could reasonably reach that conclusion.

See also *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239 (readers who had seen P with the woman referred to).

Group defamation

There are no special rules: a member of a defamed group can sue if the imputation would reasonably be understood as referring to them personally: *Knupffer v London Express Newspaper Ltd* [1944] AC 116.

This will occur where:

1. the plaintiff is **especially implicated** within the group (readers could single P out); or
2. the group is **small and determinate** so that the allegation reasonably refers to each member (e.g. "the three directors of X Pty Ltd are crooks", or a small named sports team). An allegation against "all lawyers" or "all politicians" identifies no one.

Element 3: Publication to a third party

There is no cause of action unless the matter is published to someone other than P.

1. **At least one third party.** Communication to P alone is not publication. It is enough that the matter is communicated to one person other than P.
2. **Spouses.** Communication by D to D's own spouse is not publication: *Wennhak v Morgan* (1888) 20 QBD 635. (A communication to P's spouse is publication.)
3. **Comprehensible form.** The matter must be received in a form the recipient understands (e.g. a letter in a language the recipient cannot read is not published to them). For internet material, publication occurs where and when the matter is downloaded and comprehended: *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.
4. **Inference.** Publication may be inferred from circumstances (e.g. a postcard, a mass-circulation newspaper, a public Facebook post with likes and comments).