

## NOTICE OF FILING

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### Important Information

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Form 33  
Rule 16.32

## Amended Defence

No. NSD 673 of 2022

Federal Court of Australia  
District Registry: New South Wales  
Division: General Division

### **LACHLAN KEITH MURDOCH**

Applicant

### **PRIVATE MEDIA PTY LTD and others**

Respondents

The First, Second and Third respondents (together, **the Respondents**), without admissions, adopt the defined terms used in the applicant's Statement of Claim (**SOC**) and say:

### **Factual background**

1. On 3 November 2020, the United States of America conducted its 59<sup>th</sup> Presidential Election (**2020 Presidential Election**).
2. Joseph R Biden won the 2020 Presidential Election.

### Particulars

- (a) President Biden won 51.3% of the popular vote;
- (b) President Biden received 306 electoral college votes reflecting that:
  - (i) he won the majority of votes in the following states and all of the electoral college votes from those states were cast in his favour: Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington and Wisconsin;
  - (ii) he won the majority of votes in the First Congressional District of Maine and 3 of Maine's 4 electoral college votes were proportionally assigned to him;
  - (iii) he won the majority of votes in the Second Congressional District of Nebraska and 1 of Nebraska's 5 electoral college votes was proportionally assigned to him.

3. Donald J Trump lost the 2020 Presidential Election.
4. The results of the 2020 Presidential Election were certified by the Congress of the United States of America on 7 January 2021 and President Biden was therefore elected the 46th President of the United States of America.
5. Mr Trump:
  - 5.1 refused to concede the 2020 Presidential Election; and
  - 5.2 alleged, ~~without any reasonable basis,~~ that it was “stolen” by reason of widespread voter fraud.
6. Fox News is the number one cable network in the United States of America and reaches approximately 200 million people per month.
  - 6A. Fox Corporation and News Corporation are each companies:
    - (a) operating global media conglomerates;
    - (b) controlled or primarily controlled by members of the Murdoch family, being the family of which Rupert Murdoch is the patriarch.
7. Fox News is operated, either directly or through a subsidiary, by Fox Corporation.
8. From around 7 November 2020, hosts and guests of Fox News repeatedly cast doubt on the outcome of the 2020 Presidential Election and directly or indirectly promoted on air:
  - 8.1 the allegations, ~~without reasonable basis,~~ of voter fraud made by Mr Trump;
  - 8.2 the false claim that President Biden had not legitimately won, and Mr Trump had not lost, the 2020 Presidential Election.
9. At no time to date have Rupert Murdoch, the Murdoch family generally as owners of Fox Corporation, or the applicant (**Lachlan Murdoch**), publicly repudiated the claims made by hosts and guests of Fox News alleged in the preceding paragraph.
10. On 6 January 2021, a group of supporters of Mr Trump violently stormed the Capitol in Washington, District of Columbia, whilst the Congress of the United States of America was in session, in an effort to stop the certification of President Biden's victory in the 2020 Presidential Election.
11. As a consequence of the violent insurrection referred to in the preceding paragraph:
  - 11.1 Members of the Congress of the United States of America were forced to flee in terror from the Capitol;
  - 11.2 the certification of the result of the 2020 Presidential Election was delayed to 7 January 2021.
12. Mark Meadows was the Chief of Staff to Mr Trump as at 6 January 2021.

13. On 28 June 2022, Cassidy Hutchinson, former senior aide to Mr Meadows, gave evidence at the public hearings of the United States House Select Committee on the 6 January riot.
14. Ms Hutchinson's evidence was relevantly to the effect that, on 6 January 2021, Mr Trump:
  - 14.1 was aware that his supporters proceeding to the Capitol building were armed and had violent intent;
  - 14.2 wanted to lead his supporters;
  - 14.3 had attempted to grab the steering wheel from his driver when the driver refused to take him to the Capitol.
15. Ms Hutchinson's evidence was given overnight or early in the morning Australian time.
16. Ms Hutchinson's evidence was widely discussed in the international media and was the immediate impetus for the publication the subject of this proceeding by the Respondents.
17. At around 8:00am on 29 June 2022:
  - 17.1 the second respondent (**Mr Keane**) reported to the third respondent (**Mr Fray**) that he had seen the evidence of Ms Hutchinson and that he should write about it;
  - 17.2 Mr Fray considered the story to be important to Australian and international audiences and given the high level of interest in the testimony, felt that expeditious publication was necessary to keep pace with the political news cycle;
  - 17.3 Mr Fray was aware that Australia had an editorial advantage given the time zone;
  - 17.4 Mr Fray agreed that Mr Keane should write about the story.
18. At the time Mr Keane wrote the article the subject of this proceeding, he:
  - 18.1 had extensive university qualifications in history, including a PhD;
  - 18.2 had extensive experience working in the Commonwealth Public Service on Australian media policy;

### **Particulars**

Mr Keane worked on the drafting, passage and implementation of media regulatory reforms in 2006, in his role as a public servant in then-Department of Communications, Information Technology and the Arts. This process involved extensive interaction with and exposure to media companies, including News Corp, and their senior representatives.

- 18.3 had extensive experience in and knowledge of modern American politics and the role of the media therein;
- 18.4 had written widely on modern American politics, including:
  - (a) "*The War on the Internet*", published as an e-book in 2012;

- (b) articles:
- (i) "Vale Robert McNamara", Crikey, 7 July 2009;
  - (ii) "Inside the hive-mind", Crikey, 27 January 2011;
  - (iii) "Keane: I confess – I'm a member of Anonymous", Crikey, 8 February 2011;
  - (iv) "The extraordinary hypocrisy of Hillary Clinton", Crikey, 17 February 2011;
  - (v) "Beware of what lurks beneath free trade agreements", Crikey, 14 November 2011;
  - (vi) "Bleich on copyright, net censorship and Q&A democracy", Crikey, 31 August 2012;
  - (vii) "Obama's surveillance state revealed in detail", Crikey, 7 June 2013;
  - (viii) "Fallout spreads from Obama's surveillance state", Crikey, 22 October 2013;
  - (ix) "The NSA's war on Google: a how-to in intelligence stupidity", Crikey, 31 October 2013;
  - (x) "Panel says curb NSA's worst excesses in wake of Snowden", Crikey, 19 December 2013;
  - (xi) "Yanks could draft legislation for Australian Parliament under TPP", Crikey, 24 October 2014;
  - (xii) "Trade deal a flop for America, says US government agency", Crikey, 19 May 2016;
  - (xiii) "Trump: it wasn't the economy, stupid – it was racism", Crikey, 10 November 2016;
  - (xiv) "US lays ground rules for Made in the NSA hack attacks", Crikey, 16 November 2017;
  - (xv) "Made in the NSA: how intelligence agencies gave us a global hack", Crikey, 15 May 2017;
  - (xvi) "Six things to know about 'AB' Culvahouse, Trump's man in Canberra", Crikey, 7 November 2018;
  - (xvii) "Pauline and the paranoid style in Australian politics", *Crikey*, 28 March 2019;

18.5 had previously written on Mr Trump and the role of Fox News in the United States, including:

- (a) books:

- (i) “*A Short History of Stupid*”, co-authored with Helen Razer, published in 2014. This book includes a chapter, authored by Mr Keane, about conspiracy theories in the United States and the history of US Media;
- (ii) “*The Mess We’re In*”, published in 2018. In this book, Mr Keane examined the recent political history of the United States, the United Kingdom and Australia, the contribution of neoliberalism to growing nationalism in those countries, and the role of the media in that process, including the role of Fox News and News Corp in that process;
- (iii) “*Lies and Falsehoods*”, published in 2021. This book included a chapter on the Trump presidency and a chapter on the role of media in the United States, focusing on the impact of Fox News and its right-wing radicalisation of its viewers. In commenting on Fox News, Mr Keane referenced peer-reviewed studies, including “*Bias in Cable News: Persuasion and Polarization*” by Gregory J. Martin and Ali Yurukoglu (2017) and “*The Fox News Effect: Media Bias and Voting*” by Stefano DellaVigna and Ethan Kaplan (2007);

(b) articles:

- (i) “No country for conservatives: how Trump and Johnson destroyed their parties”, Crikey, 3 November 2020;
- (ii) “The brutal truth: Trump was always going to be competitive”, Crikey, 4 November 2020;
- (iii) “Trump’s attempted coup draws a clear line: support democracy or don’t”, Crikey, 5 November 2020;
- (iv) “Joe Hockey and the price of selling out democracy”, Crikey, 6 November 2020;
- (v) “Next time, a smarter demagogue might find a way to win”, Crikey, 9 November 2020;
- (vi) “Sky News ban shows that Turnbull was right: News Corp threatens more than democracy”, Crikey, 2 August 2021;
- (vii) “Why 2016 will pollute the US and the world for decades”, Crikey, 27 June 2022;
- (viii) “The US Supreme Court, like Trump, goes beyond neoliberalism to nihilism”, Crikey, 1 July 2022;

18.6 had closely followed the events from the 2020 Presidential Election to the present day and, in particular, had reviewed vast amounts of media commentary concerned with the role of Fox in the January 6 riots, including but not limited to:

- (a) Brian Stetler, “‘Firehose of falsehood:’ How Trump is trying to confuse the public about the election outcome”, CNN, 30 November 2020

- (b) Oliver Darcy, "Right-wing media gathered the tinder. Trump just lit it on fire", CNN, 7 January 2021;
- (c) Christopher Warren, "One side of journalism normalised Trump, the other fed his base. Both were wrong", Crikey, 8 January 2021;
- (d) Alex Barker, "James Murdoch blasts US media for unleashing 'insidious forces'", The Financial Times, 16 January 2021;
- (e) Erik Wemple, "Never forget Fox News's promotion of the 'Big Lie'", The Washington Post, 19 January 2021;
- (f) Thomas Friedman, "President Donald J. Trump: The End", The New York Times, 19 January 2021;
- (g) Steven Strauss, "Taking the low road works. Democrats should try it to rein in Republican norm-busting", USA Today, 31 January 2021;
- (h) Justin Baragona, "How Fox News Primetime Jacked Up Trump's 'Big Lie'", The Daily Beast, 7 February 2021;
- (i) Max Boot, "Sadly, Fox News can't be impeached", The Washington Post, 9 February 2021;
- (j) Amanda Meade, "Kevin Rudd says Sky News is using Fox model to radicalise politics in Australia", The Guardian, 10 February 2021.
- (k) Amber Schultz, "'There is now a market for crazy': Turnbull slams Murdoch press at media diversity inquiry", Crikey, 12 April 2021;
- (l) Malcolm Turnbull, "Malcolm Turnbull speaking to the Senate Inquiry into Media Diversity in Australia", 12 April 2021;
- (m) Jack Shafer, "Will a Boycott Knock Tucker Off the Air? Don't Count on It", Politico, 21 April 2021;
- (n) Katharine Murphy, "Former US intelligence director backs Turnbull and Rudd's call for Murdoch media inquiry", The Guardian, 21 April 2021;
- (o) Charles Sykes, "Paul Ryan, It's Time for You to Stand Up to Fox", Politico, 4 May 2021;
- (p) Brian Stetler, "'We turned so far right we went crazy:' How Fox News was radicalized by its own viewers", CNN, 8 June 2021
- (q) Alex Shephard, "Brian Stetler on How the 2020 Election 'Radicalized' Fox News", New Republic, 10 June 2021
- (r) Brian Stetler, "How right-wing networks covered the January 6 hearing after months of soft-pedaling the Capitol attack", CNN, 28 July 2021;

- (s) Malcolm Turnbull, "Malcolm Turnbull on Murdoch, lies and the climate crisis: 'The same forces that enabled Trump are at work in Australia'", The Guardian, 18 October 2021;
- (t) James Risen, "In the Shadow of the Jan. 6 Hearings, Right-Wing Militancy Is on the Rise", The Intercept, 18 June 2022;
- (u) Farrah Tomazin, "'Furious' Trump knew Jan 6 protesters had weapons, fought Secret Service: aide", The Sydney Morning Herald, 20 June 2022;
- (v) Oliver Darcy, "Analysis: Trump's election lie becomes a big problem for MAGA Media", CNN, 22 June 2022;
- (w) Erik Larson and Mike Leonard, Bloomberg, "Fox News Parent Has to Face Defamation Suit Over Vote-Rigging Claims", Bloomberg, 22 June 2022;
- (x) Marshall Cohen, Zachary Cohen and Alex Rogers, "7 takeaways from Tuesday's shocking January 6 hearing", CNN, 28 June 2022;
- (y) Peta Fuller, "Donald Trump's temper and aggressive behaviour in lead up to Capitol riots revealed by Cassidy Hutchinson's testimony", ABC, 29 June 2022;
- (z) Steven Dennis, "Enraged Trump tried to hijack his own limo to drive to Capitol riots", The Australian Financial Review, 29 June 2022;
- (aa) Adam Gabbatt, "Extremist rhetoric from rightwing media and officials is 'intensifying', experts say", The Guardian, 2 July 2022;

18.7 was aware of the detail of the case that had been brought by Dominion against Fox News in connection with the network's claims of widespread voter fraud;

18.8 had read the substance of evidence given by Ms Hutchinson on 28 June 2022; and

18.9 was aware of the facts, matters and circumstances set out at [1]-[16]~~15~~ above.

19. Mr Keane:

19.1 included the reference to the Murdoch owned Fox News in the Article because he was comparing Trump's actions on January 6 to Richard Nixon's involvement in the Watergate scandal;

19.2 included the phrase "unindicted co-conspirator" as a reference to President Nixon, who was described by a grand jury as an "unindicted co-conspirator" in the conspiracy to cover up the Watergate burglary;

19.3 believed a key point of distinction between Presidents Nixon and Trump was that there was no media outlet like Fox in the 1970s;

19.4 was of the view that Fox has played an essential role in amplifying the division that Trump had caused and felt that any discussion of 6 January would be recklessly incomplete without an understanding of the media environment in the United States.



20. Both Mr Fray and Mr Keane firmly believed that:
- 20.1 the references to Mr Murdoch were a statement of Mr Keane's opinion, based on his knowledge of the extensive reportage of Fox News' involvement in the events leading up to Jan 6 and the Murdochs' role as the guiding minds of Fox's editorial strategy and programming;
  - 20.2 the references to the Murdochs to be self-evidently hyperbolic, using creative licence to pick up on the notorious identification of Nixon as the "unindicted co-conspirator" in Watergate and drawing a parallel to the January 6 riots;
  - 20.3 no one would read the words literally as suggesting that the Murdochs were guilty of criminal conspiracy or treason under US law.
21. Neither Mr Fray nor Mr Keane considered it necessary to contact Lachlan Murdoch for comment because he was not the target of the Article ("Murdoch" referring to the family or Fox News generally) and the Article was an opinion piece, not news reporting.
22. At the time of publication, the Respondents were conscious of the importance of freedom of expression in the discussion of matters of public interest.

#### **Applicant**

23. As to paragraph 1 of the SOC, the Respondents:
- 23.1 do not know and cannot admit whether Lachlan Murdoch is an Australian citizen;
  - 23.2 otherwise admit the allegations contained in paragraph 1.

#### **Respondents**

24. As to paragraph 2 of the SOC, the Respondents:
- 24.1 admit paragraph 2.1;
  - 24.2 do not admit paragraph 2.2;
  - 24.3 admit paragraphs 2.3 to 2.8.
25. The Respondents admit the allegations contained in paragraph 3 of the SOC.
26. The Respondents admit the allegations contained in paragraph 4 of the SOC.

#### **Article**

27. As to paragraph 5 of the SOC, the Respondents:
- 27.1 admit paragraphs 5.1 to 5.6;
  - 27.2 say that on the Crikey website, the Article was promoted as "unlocked" (that is, free for non-subscribers to read), and otherwise admit paragraph 5.7;

- 27.3 admit paragraphs 5.8 to 5.13;
- 27.4 do not admit paragraph 5.14;
- 27.5 deny paragraph 5.15;
- 27.6 deny paragraph 5.16;
- 27.7 deny paragraph 5.17;
- 27.8 admit paragraph 5.18;
- 27.9 admit paragraph 5.19;
- 27.10 do not admit paragraphs 5.20, 5.21, 5.22 and 5.23;
- 27.11 deny paragraph 5.24;
- 27.12 admit that the Sydney Morning Herald article was promoted on Will Hayward's LinkedIn profile and otherwise deny paragraph 5.25;
- 27.13 deny paragraph 5.26;
- 27.14 admit paragraph 5.27;
- 27.15 deny paragraph 5.28;
- 27.16 in answer to paragraph 5.29, admit that Private Media reposted the Article in the form alleged but otherwise deny paragraph 5.29;
- 27.17 admit paragraphs 5.30 and 5.31;
- 27.18 deny paragraph 5.32;
- 27.19 admit paragraphs 5.33 to 5.35;
- 27.20 as to paragraph 5.36, deny that as at 15 August the tweet had attracted 734 retweets and otherwise admit paragraph 5.36;
- 27.21 admit paragraphs 5.37 and 5.38;
- 27.22 do not admit paragraphs 5.39, 5.40 and 5.41;
- 27.23 as to paragraph 5.42, admit that an advertisement was published in the New York Times as alleged, but deny that it was written by Peter Fray;
- 27.24 admit paragraphs 5.43 to 5.44;
- 27.25 as to paragraph 5.45, the Respondents admit that the homepage of the Crikey website was dominated by articles about Lachlan Murdoch and the Article and:
- (a) deny paragraphs 5.45(a) and 5.45(b);

- (b) admit paragraph 5.45(c);
- (c) deny paragraphs 5.45(d) and 5.45(e);
- (d) admit paragraph 5.45(f);
- (e) deny paragraph 5.45(g);

27.26 admit paragraph 5.46;

27.27 admit paragraph 5.47;

27.28 admit paragraph 5.48;

27.29 do not admit paragraph 5.49;

27.30 admit paragraphs 5.50(a) to 5.50(l);

27.31 as to paragraph 5.51, admit that Private Media, Will Hayward and Bernard Keane retweeted articles from other media organisations but otherwise deny paragraph 5.51;

27.32 do not admit paragraphs 5.52 and 5.53;

27.33 admit paragraphs 5.54 to 5.58;

27.34 deny paragraph 5.59;

27.35 admit paragraph 5.60;

27.36 do not plead to paragraphs 5.61, 5.62 and 5.63 as they contain no allegations against the Respondents.

28. As to paragraph 6 of the SOC, the Respondents:

28.1 admit paragraphs 6.1 and 6.2;

28.2 does not admit paragraph 6.3;

28.3 admit paragraphs 6.4;

28.4 do not know and cannot admit paragraph 6.5;

28.5 admit paragraphs 6.6 to 6.11;

28.6 deny paragraph 6.12;

28.7 admit paragraph 6.13;

28.8 deny paragraph 6.14;

28.9 admit paragraph 6.15,

and otherwise:

28.10 do not admit that from 29 June 2022 to 15 August 2022, the Article was of and concerning Lachlan Murdoch; and

28.11 admit that from 15 August 2022 to date, the Article was of and concerning Lachlan Murdoch.

29. The Respondents deny paragraph 7 of the SOC as the Article, in its natural and ordinary meaning, was not capable of conveying or in fact conveyed any of the Imputations or any imputation not differing in substance.

### **Serious harm**

30. The Respondents deny the allegations in paragraph 8 of the SOC.

### **Concerns notice**

31. The Respondents admit paragraph 9 of the SOC.

32. The Respondents admit paragraphs 10 to 12 of the SOC.

33. As to paragraph 13 of the SOC, the Respondents say:

33.1 on 27 July 2022, by their solicitors Marque Lawyers, they made an **Offer of Amends**;

33.2 they rely on the Offer of Amends for its full effect; and

33.3 they otherwise deny paragraph 13 of the SOC.

34. The Respondents admit paragraphs 14 to 18.

### **Damages**

35. The Respondents deny paragraph 19 of the SOC.

36. The Respondents deny paragraph 20 of the SOC.

37. Further, if, which is denied, Lachlan Murdoch is found to be entitled to any damages as a result of publication of any of the Matters Complained Of, the Respondents will rely in mitigation of damages upon the following:

37.1 ~~the matters alleged in paragraphs [1]-[22] above;~~

37.2 the facts, matters and circumstances proven in support of the defences pleaded;

37.3 the bad reputation of Lachlan Murdoch amongst the Australian people in the sector of his reputation for his role as CEO co-Chair of News Corporation, Executive Chairman and CEO of Fox Corporation News, a global media conglomerate which published, inter alia, Fox News, a conservative media channel providing biased reporting in favour of conservative political positions and News International, an organisation that engaged in systemic unethical practices in investigative reporting;

37.4 the circumstances in which it is proved the Matters Complained Of were published;

37.5 such further matters as may be identified following discovery and interrogatories.

### **Injunctive relief**

38. The Respondents do not admit paragraph 21 of the SOC.
39. The Respondents do not admit paragraph 22 of the SOC.
40. The Respondents do not admit paragraph 23 of the SOC.
41. The Respondents do not admit paragraph 24 of the SOC.

### **Defence - Publication of matter in the public interest, s29A Defamation Act 2005**

42. ~~By reason of the matters set out at [1]-[22] above,~~ if the matter complained of is found to be defamatory in that it conveyed one or more of the Imputations, which is denied, the Respondents say ~~that~~:

42.1 the Article concerned the matters of public interest set out at [1]-[16] above, namely, Mr Trump's conduct in connection with the election of November 2020, the state of American democracy, the polarisation within American politics borne out by the events of January 6, and the media environment in which those events took place; and, more broadly, the influence on electors and representative government of the global media conglomerates (being News Corporation and Fox Corporation) controlled by members of the Murdoch family all of which were matters of public interest;

42.2 by reason of the matters set out at [17]-[22], above, they reasonably believed that the publication of the matter was in the public interest; and

42.3 in the premises, publication of the Article was therefore in the public interest and ~~therefore~~ defensible pursuant to s29A Defamation Act 2005 and its equivalents in the States and Territories.

### **Defence - Lange qualified privilege**

43. Further, and in the alternative, if the matter complained of is found to be defamatory in that it conveyed one or more of the Imputations, which is denied, the Respondents say:

43.1 ~~, in reliance on~~ By reason of the matters at paragraphs [1]-[16][23] and [42.1] above, say that the matter related to government and political matters that affect the people of Australia; and

43.2 by reason of the matters at [17]-[22] above, that the Respondents acted reasonably in publishing the matter; and

43.3 therefore the matter was published on an occasion of qualified privilege, being the implied Constitutional freedom of communication about governmental or political matters ("**Lange defence**").

43A. In the alternative to 43.3 above, the Respondents say that:

- (a) the concept of reasonableness must be adapted, or the requirement more strictly construed, so as to ensure that an inappropriate burden is not imposed on the implied freedom;
- (b) the imposition of a reasonableness criterion as part of the *Lange* defence is inappropriate and should be revisited.

**Defence – failure to accept reasonable offer of amends, s18 *Defamation Act 2005***

- 44. If the matter complained of is found to be defamatory in that it conveyed one or more of the Imputations, which is denied, the Respondents say that on 27 July 2022, by their solicitors Marque Lawyers, they made an offer of amends to Lachlan Murdoch pursuant to and conformable with s13 of the *Defamation Act 2005* (**Offer of Amends**).
- 45. The Offer of Amends was made as soon as reasonably practicable after they were given a concerns notice in respect of the matter (and, in any event, within the applicable period for an offer to make amends).
- 46. The Respondents were ready and willing, on acceptance of the Offer of Amends by Lachlan Murdoch to carry out the terms of the offer.
- 47. In all the circumstances, the Offer of Amends was reasonable.
- 48. On 29 July 2022, the Offer of Amends was rejected.
- 49. In the premises, the Respondents have a defence to the action pursuant to s18 *Defamation Act 2005*.

Date: ~~20 September~~ 1 November 2022



.....  
Signed by Michael Bradley  
Lawyer for the Respondents

This pleading was prepared by Michael Hodge KC and Clarissa Amato of Counsel.