Federal Court of Australia

Chau v Australian Broadcasting Corporation (No 3) [2021] FCA 44

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| File number(s): | NSD 1088 of 2017 |
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| Judgment of: | **RARES J** |
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| Date of judgment: | 2 February 2021 |
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| Catchwords: | **DEFAMATION –** national broadcast of television program said to convey defamatory imputations – where program, co-produced by the first and second media respondents and third respondent reporter made available for viewing online until trial – whether ordinary reasonable viewer of program would have understood imputations to be conveyed – whether disclaimers in program sufficient to dispel imputations of guilt **DAMAGES –** where applicant did not speak or understand English and did not see program but told about its stings – whether possible for applicant to recover compensatory damages for hurt feelings where he only read a translation sometime after broadcast or where he did not give evidence that he understood matter complained of to convey imputation**DAMAGES** – mitigation – where applicant had brought previous defamation proceedings relating to other publications carrying similar imputations which had resulted in an apology and award of damages respectively – whether effect of those outcomes mitigated any damage to applicant pursuant to s 38 of the *Defamation Act 2005* (NSW) by publication of the matter complained of **DAMAGES –** where applicant claimed aggravated damages by conduct of respondents including maintaining a truth defence, failing to apologise and continuing to make the program available online – whether conduct of respondents improper, unjustifiable or lacking in *bona fides* **INJUNCTION** – jurisdiction to grant injunction to restrain publication of defamatory matter – whether applicant had to have a legal proprietary right before Court had power to grant injunction – whether *Harbour Radio Pty Ltd v Wagner* [2019] 2 Qd R 468 plainly wrong – whether respondents should be prohibited from continuing to publish program online – whether damages a sufficient remedy – where respondents contended that program dealt with matters of ongoing public interest – where respondents proffered undertaking to publish a statement to readers of online version of the program noting that applicant had successfully brought defamation proceedings and giving hyperlink to judgment – where applicant would require leave of a court under s 23 of the *Defamation Act* to bring further proceedings if program remains online*Held:* verdict for applicant for $590,000 and injunction restraining publishers from conveying imputations found to have been conveyed |
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| Legislation: |  *Federal Court of Australia Act 1976* (Cth), ss 5 and 22*Defamation Act 2005* (NSW), ss 8, 23, 25, 34–39*Law Reform (Miscellaneous Provisions) Act 1946* (NSW), s 5*Common Law* *Procedure Act 1854* (UK) |
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| Cases cited: |  *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158*Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419*Andrews v John Fairfax & Sons Ltd* [1980] 2 NSWLR 225*Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175*Australian Broadcasting Corporation v Chau* [2019] HCA Trans 245*Australian Broadcasting Corporation v Chau Chak Wing* (2019) 271 FCR 632*Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199*Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57*Bauer Media Pty Ltd v Wilson* [2018] VSCA 68*Bonnard v Perryman* [1891] 2 Ch 269*Broome v Cassell & Co Ltd* [1972] AC 1027*Buchanan v Jennings* [2005] 1 AC 115*Cairns v Modi* [2013] 1 WLR 1015*Carpenders Park Pty Ltd as trustee of the Carpenders Park Pty Ltd Staff Superannuation Fund) v Sims Ltd* [2020] FCA 1681*Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44*Chau v Australian Broadcasting Corporation* [2019] FCA 1856*Chau v Fairfax Media Publications Pty Ltd* [2019] FCA 185*Coyne v Citizen Finance Ltd* (1991) 172 CLR 211*Dingle v Associated Newspapers Ltd* [1964] AC 371*Eatock v Bolt* (2011) 197 FCR 261*Edgington v Fitzmaurice* (1885) 29 Ch D 459*Farah Constructions Pty Ltd v Say Dee Pty Ltd* (2007) 230 CLR 89*Favell v Queensland Newspapers Pty Ltd* (2005) 221 ALR 186*Fitzgerald v Penn* (1954) 91 CLR 268*Gleaner Company Ltd v Abrahams* [2004] 1 AC 628*Harbour Radio Pty Ltd v Wagner* [2019] 2 Qd R 468*Hockey v Fairfax Media Publications Pty Ltd* (2015) 237 FCR 33*John Fairfax & Sons Ltd v Cojuangeo* (1988) 165 CLR 346*John Fairfax & Sons Ltd v Kelly* (1987) 8 NSWLR 131*Jones v Dunkel* (1959) 101 CLR 298*Jones v Skelton* (1963) 63 SR (NSW) 644*Kazal v Thunder Studios Inc (California)* (2017) 256 FCR 90*Lewis v Australian Capital Territory* (2020) 381 ALR 375*Ley v Hamilton* (1935) 153 LT 384*Lloyd v David Syme & Co Ltd* [1986] AC 350*Loutchansky v Times Newspapers Ltd (Nos 2–5)* [2002] QB 783*March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506*Mirror Newspapers Ltd v Harrison* (1982) 149 CLR 293*Montgomery v Thompson* [1891] AC 217*Nationwide News Pty Ltd v Rush* (2020) 380 ALR 432*Patrick Stevedores (No 2) Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1*Praed v Graham* (1889) 24 QBD 53*Readers Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500*Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327*Rush v Nationwide News Pty Ltd* *(No 9)* [2019] FCA 1383*Saxby v Easterbrook* (1877) 3 CPD 339*Stocker v Stocker* [2020] AC 593*The “Siskina”* [1979] AC 210*Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574*Tournier v National Provicial and Union Bank of England* [1924] 1 KB 461*Triggell v Pheeney* (1951) 82 CLR 497*Trkulja v Google LLC* (2018) 263 CLR 149*Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118*Veliu v Mazrekaj* [2007] 1 WLR 495*West Australian Newspapers Ltd v Elliott* (2008) 37 WAR 387*Wing v Australian Broadcasting Corporation* [2018] FCA 1340*XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Other Federal Jurisdiction |
|  |  |
| Number of paragraphs: | 196 |
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| Date of hearing: | 6–8 October 2020  |
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| Counsel for the Applicant: | Mr B McClintock SC with Mr M Richardson  |
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| Solicitor for the Applicant: | Mark O’Brien Legal |
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| Counsel for the Respondents: | Dr M Collins QC with Mr M Lewis |
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| Solicitor for the Respondents: | MinterEllison |
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| **Table of Corrections** |  |
|  |  |
| 16 March 2022 | In paragraph 194, “at [22]” has been replaced with “at [29]”.  |

ORDERS

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|  | NSD 1088 of 2017 |
|   |
| BETWEEN: | DR CHAU CHAK WINGApplicant |
| AND: | THE AUSTRALIAN BROADCASTING CORPORATIONFirst RespondentFAIRFAX MEDIA PUBLICATIONS PTY LIMITED ACN 003 357 720Second RespondentNICK MCKENZIEThird Respondent |

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| order made by: | RARES J |
| DATE OF ORDER: | 2 february 2021 |

THE COURT ORDERS THAT:

1. There be a verdict for the applicant in the sum of $590,000 (inclusive of pre-judgment interest).
2. The respondents by themselves, their servants and agents be restrained from publishing, making available online for download or otherwise, so much of the *Four Corners* program first broadcast by the first respondent on 5 June 2017 and subsequently made available for download, playing, streaming or otherwise being viewed on any website of, or controlled by, them or of any of them that conveys any one or more of the following imputations of and concerning the applicant, namely that:
	* he is a member of the Chinese Communist Party and of an advisory group to that party, the People's Political Consultative Conference (CPPCC), and, as such, carries out the work of a secret lobbying arm of the Chinese Communist Party, the United Front Work Department;
	* he donated enormous sums of money to Australian political parties as bribes intended to influence politicians to make decisions to advance the interests of the Republic of China, the Chinese government and the Chinese Communist Party;
	* he paid a $200,000 bribe to the President of the General Assembly of the United Nations, John Ashe; and
	* he was knowingly involved in a corrupt scheme to bribe the President of the General Assembly of the United Nations.
3. The respondents pay the applicant’s costs.
4. The applicant have leave to file and serve any application for an order to vary order 3 on or before 9 February 2021 together with any supporting affidavit and written submissions, not exceeding two pages.
5. The respondents file and service any evidence in opposition and written submissions, not exceeding two pages, on or before 16 February 2021.
6. The applicant file and serve any written submissions in reply, not exceeding one page, on or before 18 February 2021.
7. Any application made under order 4 be listed for argument on 25 February 2021.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

RARES J:

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| ***Imputation 3: Dr Chau donated enormous sums of money to Australian political parties as bribes intended to influence politicians to make decisions to advance the interests of the Republic of China, the Chinese government and the Chinese Communist Party*** | [52] |
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1. **Dr Chau** Chak Wing seeks damages for defamation against the Australian Broadcasting Corporation (**ABC**), **Fairfax** Media Publications Pty Ltd and Fairfax’s employee, Nick **McKenzie** (collectively the **publishers**), arising from the publication on and after 5 June 2017, of the ***Four Corners*** television **program** entitled “Power and Influence”, initially broadcast on ABC nationally and thereafter made available for viewing online on the ABC website.
2. Dr Chau was born in Guangdong province in the People’s Republic of China in 1949 and became an Australian citizen in about 1999. He came from a poor family and had no tertiary education. As he was growing up, he saw the value of a good education at a tertiary institution through the success in life of a person who had lived in his village and later obtained such an education. Dr Chau’s childhood ambition, which he has pursued with the benefit of his own business success, was to support education and educational institutions. In 2003 Dr Chau was awarded an honorary doctorate of humane letters by a college in the United States and, in 2014, the University of Technology Sydney awarded him another honorary degree. Dr Chau has contributed considerable sums over the years to educational institutions as well as to other causes, including Australia’s major political parties, being matters that the program explored.

## The issues

1. Dr Chau contends that the program conveyed six imputations that were very serious, false and defamatory. The publishers contest that the ordinary reasonable viewer of the program would have understood it to convey imputations of the degree of seriousness that Dr Chau alleges. This is a central issue between the parties. The other central issue is the assessment of any damages to which Dr Chau might be entitled. The publishers have no other substantive defence. That position came about as a result of my earlier decisions striking out a defence of justification (*Wing v Australian Broadcasting Corporation* [2018] FCA 1340, which the Full Court upheld in *Australian Broadcasting Corporation v Chau Chak Wing* (2019) 271 FCR 632) and my refusal to allow the publishers to amend that defence to add another plea of justification (*Chau v Australian Broadcasting Corporation* [2019] FCA 1856).
2. In these reasons I will *first*, describe the program, *secondly*, determine whether the imputations of which Dr Chau complains were conveyed, *thirdly*, make other findings of fact based on the evidence and *last*, deal with the legal issues and the damages to which Dr Chau is entitled.

# Liability

## The matters complained of

1. *Four Corners* is a flagship investigative journalism program that the ABC has broadcast, on a weekly basis, for over 45 years. The program went to air on national television at about 8.30pm on 5 June 2017 on the ABC 1 channel. The ABC republished it in broadcasts at other timeslots on the same channel at 10.00am on 6 June 2017 and 11.00pm on 7 June 2017. It also broadcast the program on its ABC News 24 channel at about 8.00pm on 10 June 2017. A total of 1,045,952 viewers saw the matter complained of on television (these **broadcasts** comprise the **first matter complained of**). There were 59,882 page views that led to 11,464 plays of the online video version of the matter complained of (the publication and making available for viewing online of the program comprise the **second matter complained of**). The online version was still available for viewing at the time of the hearing.
2. I have annexed the full transcript of the program to these reasons. What follows is a summary of the salient features in it that, in my opinion, bear on the meanings that the ordinary reasonable viewer would have understood the program to have conveyed about Dr Chau.
3. The matter complained of commences with a focus on spying, clandestine activities and interference by the Chinese government and **Chinese Communist Party** (or **CCP**), together with its proxies, to affect the integrity of the Australian political system. The opening words are spoken by the then Chairman of the Homeland Security Committee of the United States Congress, Representative Mike **McCaul**, who says “it’s almost like out of a spy novel”. Next, the presenter, Chris **Uhlmann**, sets the scene by describing the concern of the Australian Security Intelligence Organisation (**ASIO**) that espionage and foreign interference that were occurring on an unprecedented scale in Australia. Mr Uhlmann told viewers that, while ASIO had not identified the key suspect, *Four Corners* and Fairfax could. He then named the Chinese Communist Party and identified its targets as including universities and some of Australia’s leading politicians. He asserted that the *Four Corners* investigation “reveals that business leaders allied to Beijing are using millions in political donations to the major parties to buy access and influence, and in some cases to push policies that may be contrary to Australia’s national interests”.
4. The reporter, Mr McKenzie, begins on the same theme. He narrates that it is October 2015 and ASIO counter-espionage agents are breaking into a Canberra flat. This is portrayed against a mock re-enactment of the raid in the dead of night. The target is a Chinese woman whom ASIO suspects is involved in spying for the Chinese government. Professor Rory **Medcalf** emphasises the significance of the raid by stating that it required the authorisation of the Attorney-General and other parts of the Australian national security community. Prof Medcalf states that this would reflect “deep and real concern about Chinese espionage in Australia”. Mr McKenzie then reveals that the woman’s name is **Sheri Yan**. Mr McKenzie then asks Professor John **Fitzgerald** whether Ms Yan might be a Chinese intelligence operative of some sort. He replies that he understands that “she is very closely connected with some of the most powerful and influential families and networks in China”, adding “**Once you know that, you don’t need to know much more**”.
5. Mr McKenzie then reveals that Ms Yan’s husband, Roger **Uren**, was until 2001 an Assistant Secretary in the Australian Office of National Assessments, which is responsible for providing secret intelligence briefings to the Prime Minister. He states that in the raid ASIO seized computers and documents as well as discovering there classified Australian government files on the work of Chinese intelligence. He says that Mr Uren was being investigated because of the possible illegal removal of what Prof Medcalf describes as very significant and highly secret files. Mr McKenzie adds that, in the weeks before the raid, ASIO analysts had been tracking links between political donors in Australia and the Chinese Communist Party whose donations “provided access to the most powerful politicians in the land”.
6. Mr McKenzie says that the **Director-General** of ASIO, Duncan **Lewis**, was so worried that he organised meetings with the directors of the major political parties to warn them that the donors could compromise their parties. Prof Medcalf says that for the Director-General to take such a step is very unusual and “would reflect very real, very real concern”. Mr McKenzie continues that, when Mr Lewis briefed the party officials, he told them that the donors that ASIO was examining were breaking no laws but warned that their strong connections to the Chinese Communist Party meant that the donations might “come with strings attached”. Mr McKenzie adds that ASIO had also briefed the then Prime Minister, the Hon Tony Abbott MP. Peter **Jennings**, the executive director of the Australian Strategic Policy Institute, says that this type of “naked influence buying” is damaging to Australia’s political system.
7. Mr McKenzie states that ASIO had singled out two billionaire donors with especially close ties to the Chinese Communist Party, the first being “enigmatic property developer Dr Chau Chak Wing, a man who keeps a low profile except when it comes to his big donations”. A former CIA China expert, Peter **Mattis**, adds an air of mystery about Dr Chau by saying that he “sort of appeared out of nowhere” and that little was known about him before he made his entry into the Australian and Chinese business scene.
8. Next, the program depicts the then Governor-General, the Hon Sir Peter Cosgrove AK, at the opening of the Dr Chau Chak Wing building at the University of Technology Sydney (**UTS**). The building was designed by the internationally acclaimed architect, Frank **Gehry**.
9. The reporter emphasises Dr Chau’s wealth. He states that Dr Chau was “not content with having a building named after him” adding that he bought a six storey mansion for $70 million, which was Australia’s most expensive home purchase in 2015. Mr McKenzie asserts that Dr Chau’s money allowed him to “regularly rub shoulders with the great and good of Australian politics” and that he had donated more than $4 million to the major parties over the preceding decade. He states then that “the question that ASIO has been probing is what [Dr Chau] wants from his donations.”
10. The program then provides three different views from Prof Medcalf, Mr Mattis and the former Australian ambassador to China, Geoff **Raby**, on that topic. Prof Medcalf emphasises that it was uncertain whether the donations were driven or encouraged by the Chinese Communist Party or were independent actions that the donor thought would benefit him in China through his involvement in a change in the Australian political discourse. Mr McKenzie, at this point, emphasises that Dr Chau is an Australian citizen but adds “back in his homeland, China, he was also a member of a Communist Party advisory group known as a people’s political consultative conference or **CPPCC**”. He states that the CPPCC carries out the work of “an opaque lobbying arm of the Party” called the United Front Work Department. Prof Medcalf asserts that individuals like Dr Chau have “really deep and serious connections to the Chinese Communist Party” who, even if not subject to direction, would feel a sense of obligation or desire to make the right impression on the powers that be in China to demonstrate that they were being good members of the Party and pursuing its interests.
11. Mr Mattis reinforces that theme by adding that “with wealth comes responsibility, and that responsibility is to respond to the Party when they ask you to do a favour for them”. Mr Raby then posits that the reasons for the donations are mainly to do with the donor’s business interests in Australia and that making gifts reflects a traditional way of doing business in China. He says that most businessmen and developers who make donations crave prestige and status through being photographed next to politicians on both sides of politics to reflect their influence, position and image. He says that the donors see that this helps their business and gives their family respect consistently with “a traditional Chinese way of operating”.
12. Immediately after this, Mr McKenzie reveals that *Four Corners* had learnt that ASIO’s interest in Dr Chau arose partly from his association with Sheri Yan, whom he described as “an old friend”. Mr McKenzie reminds the viewer that it was Ms Yan whom ASIO suspected of spying and whose Canberra apartment the agency had raided (being a reference to the spy raid re-enacted at the beginning of the program). Next, Mr Mattis comments that Ms Yan was an Australian-Chinese businesswoman who had made her livelihood out of building connections between China and the outside world. He said that she provided a bridge between foreign businessmen and foreign government officials “who are trying to get things done in China or find their way among [its] bureaucratic and political landmines”. Mr McKenzie tells viewers that Dr Chau used Mr Yan “as a consultant, somebody able to open up the right doors”.
13. Mr Raby explains that Ms Yan was a dynamic person who speaks both languages perfectly and is well connected, although he does not know what her connections are. Mr Mattis says that her father was a People’s Liberation Army officer, adding “so she is connected to sort of the core of the CCP in a sense”. He says that no one could explain where her original connections, means of opening doors and money came from in China. Mr McKenzie adds that Ms Yan divides her time between New York, Beijing and Canberra and “moved with ease among the A listers”. He says that she was close to, among others, the President of the United Nations General Assembly, John **Ashe**.
14. The program depicts Ms Yan at a meeting while engaging in commentary as to how she and her husband networked together. Mr McKenzie says that Mr Uren’s previous work as a high-ranking Australian intelligence official with top security clearance meant that he was trusted in Canberra, but that “not everyone trusted Sheri Yan”. Prof Fitzgerald says that he had been advised by an old friend in Australia’s security establishment “to stay well clear of Sheri Yan” but that he was not entirely sure why.
15. The program then switches to a news clip of the Attorney for the Southern District of New York announcing, in October 2015, the arrest of Ms Yan as part of “yet another wide-ranging corruption scheme” that was simultaneously local, global and centred at the United Nations. Mr McKenzie says that the raid on Ms Yan’s Canberra apartment occurred at the same time as her arrest in United States, where she was accused of bribing the United Nations General Assembly President. Mr Raby says that he was very surprised and could not believe, when he had heard it, that she had been arrested.
16. The program then switches to the then Foreign Minister, the Hon Julie Bishop MP, being interviewed about Ms Yan’s arrest but giving no information on the subject other than that she had been briefed on it. The verbal part of the program then proceeds:

NICK MCKENZIE: One of the events that led to Sheri Yan's arrest unfolded at the luxury Imperial Springs Resort, **which is owned by none other than the Australian political donor Dr Chau Chak Wing. The FBI alleged Yan bribed the UN general assembly President to speak at the resort, at a conference hosted by Dr Chau. A sealed indictment from a New York Court against Sheri Yan refers to Dr Chau using a codename** – CC3. Sheri Yan was alleged to have told the UN President

FEMALE VOICE-OVER: [CC3's] office emailed me the invitation. **I will ask $200,000 for this trip**...

NICK MCKENZIE: A draft invitation sent to the United Nations president and **allegedly approved by Dr Chau** stated his desire to make the UN chief his "sincere friend in Guangdong Province”

MALE VOICE OVER: **And your friend here has the pleasure to offer you a permanent convention venue for the UN meeting ...**

NICK MCKENZIE: **The UN president’s bank account was then wired $200,000 by one of Dr Chau's companies**. Under US bribery law it was illegal for Ashe, as a UN official, to receive this payment. **There is no suggestion Dr Chau knew it was illegal**.

PETER MATTIS: **At least some of the money** that was **moving through Sheri Yan**, or that she was facilitating, **came from him**. And it doesn't mean that there was necessarily anything untoward about it, **but just the fact of large amounts of money being moved or paid to people because of introductions or the activities of Sheri Yan make it, make it somewhat suspect.** ...

NICK MCKENZIE: **Sheri Yan pleaded guilty to bribery charges and was jailed last year. Dr Chau has never been charged with any offence and denies any wrongdoing.** ASIO's interest in Sheri Yan is just one of many suspected foreign interference and intelligence cases being probed by Australian agencies, and which lead back to Beijing.

(emphasis added)

1. Prof Medcalf then states that ASIO and other agencies are “alive and alert to these issues” such as Ms Yan’s arrest. Mr McKenzie comments that concerns about the Chinese Communist Party interfering in Australian politics is growing in Washington, where senior officials believe that Australia is open to compromise, including through foreign donations. Then Mr McCaul states that, in his country, foreign money cannot be used lawfully in their elections so that foreign governments could not influence them. He says that he was surprised that Australia allows foreign contributions, particularly because a lot of those appeared to be coming from China which:

has a very strong influence in the region. They want to influence Australia. They want a stronger presence in Australia, and what better way to do that than to influence political figures through, through foreign contributions.

1. Mr McKenzie then explains that Mr McCaul had been a prosecutor at the United States Department of Justice and had investigated a scandal known as “China-gate” concerning Chinese spies funnelling donations into the Clinton Presidential campaign. A short clip of President Clinton welcoming a Chinese man is then interpolated into the broadcast with Mr McCaul’s opening line in the program “It’s almost like out of a spy novel”. He says that this had been the most interesting case he had ever prosecuted. The program repeats the sequence from its opening moments. Mr McCaul says that “these are very dangerous clandestine figures in Chinese intelligence and there was a concerted effort to, to influence our (ie. American) elections.” Mr McKenzie asserts that Mr McCaul warns that Australia is badly exposed, unless its laws are changed, because of the capacity of a foreign government to influence Australian elections. Mr McCaul says that China is the biggest offender in providing foreign contributions to influence elections.
2. The program then turns to the recent visit to Australia, in March 2017, of the Chinese **Premier**, **Li** Keqiang. Mr McKenzie states that the emboldened Chinese Communist Party is no longer prepared to hide its strength and bide its time. He tells viewers that there is a debate raging in Australia’s diplomatic and security community about why and to what extent China is seeking influence in Australian institutions. The program then depicts a demonstration in Canberra to welcome Premier Li, interviews with a student in the demonstration as well as with a student activist, Anthony Chang.
3. Mr McKenzie interviews a Sydney academic who is a fierce critic of the Chinese Communist Party’s interference in Australia, **Dr Feng** Chongyi. Mr McKenzie then tells viewers that, while Dr Feng was “trapped in China”, having been detained there for questioning, Premier Li was guest of honour at a Chinese community event held in the Sydney Town Hall and that Dr Chau was sitting at the head table opposite the Premier. He continued:

a couple of seats over from him was another Chinese billionaire **Huang** Xiangmo. Like Dr Chau, Mr Huang has come to the attention of ASIO. Mr Huang is the second donor named by ASIO in its secret warning to the Coalition and Labor about the danger of Chinese Communist Party interference in Australian politics.

1. The program then spends a considerable deal of time discussing Mr Huang and his activities, including his appearance at an event in Australia which Mr McKenzie presages by saying “In the right company, Mr Huang makes no secret of his devotion to the Chinese Communist Party”. The program shows Mr Huang, through an interpreter, saying:

We overseas Chinese unswervingly support the Chinese government’s position to defend our nation’s sovereignty and territorial integrity. **We support the development of the motherland always** and take on an important role in building one belt, one road.

(emphasis added)

1. In the course of this discussion, Mr McKenzie states that “an incident that occurred in June 2016 leaves little doubt that Mr Huang expects something in return for his donations”. Next, the program depicts the then Labor shadow Minister for Defence, Senator the Hon Stephen **Conroy**, setting out his party’s policy about the South China Sea and criticising the conduct of the Chinese Government there. Mr McKenzie refers to Mr Huang‘s promise to donate $400,000 to the Labor Party which he cancelled after Senator Conroy’s remarks and then says:

Just one day after Stephen Conroy's comments, Mr Huang appeared at a press conference alongside his Labor mate.

Contradicting his Party's position, Senator Dastyari told the Chinese media that Australia shouldn't meddle with China's activities in the South China Sea.

1. The program then depicts Labor’s Senator Sam **Dastyari** trying to explain how he earlier had contradicted Labor Party policy on the South China Sea while standing next to Mr Huang in a press conference on the day after Senator Conroy’s remarks. Soon after, Mr McKenzie tells viewers that Mr Huang had previously given $5000 to Senator Dastyari to pay a Labor Party legal bill. Mr McKenzie says that another Chinese donor had given Senator Dastyari $1600 to pay a travel bill before telling viewers that soon after, “the Senator fell on his sword”.
2. After spending about one third of the program’s running time dealing with Mr Huang, its conclusion discusses the involvement of the former Trade Minister, the Hon Andrew Robb, in his new role as an economic adviser to the Chinese company that recently before the program had acquired a 99-year lease of the Port of Darwin.
3. The program finishes after Prof Medcalf suggests that the political class in Australia needs to decide, in the interest of Australia’s independence and sovereignty, about restrictions on, and the limitation of, foreign influence in Australian decision-making. Mr Uhlmann leaves viewers with the following parting thoughts:

After being briefed on the 4 Corners-Fairfax investigation, the Attomey General sent us a statement revealing the Prime Minister has asked him to conduct a major inquiry into Australia's espionage and foreign interference laws.

Senator Brandis said, “the threat of political interference by foreign intelligence services is a problem of the highest order and it's getting worse.”

Senator Brandis says he will examine whether the espionage offences in the criminal code are adequate and expects to brief Cabinet on possible changes to the law before the end of the year. We will watch, with interest. Good night.

## The pleaded imputations

1. Dr Chau pleaded that the following six imputations arose from the publication of the matters complained of, namely that:
2. he betrayed his country, Australia, in order to serve the interests of a foreign power, China, and the Chinese Communist Party by engaging in espionage on their behalf;
3. he is a member of the Chinese Communist Party and of an advisory group to that party, the People's Political Consultative Conference (CPPCC), and, as such, carries out the work of a secret lobbying arm of the Chinese Communist Party, the United Front Work Department;
4. he donated enormous sums of money to Australian political parties as bribes intended to influence politicians to make decisions to advance the interests of the Republic of China, the Chinese government and the Chinese Communist Party;
5. he paid Sheri Yan, whom he knew to be a corrupt espionage agent of the Chinese government, in order to assist him in infiltrating the Australian Government on behalf of the Chinese Communist Party;
6. he paid a $200,000 bribe to the President of the General Assembly of the United Nations, John Ashe; and
7. he was knowingly involved in a corrupt scheme to bribe the President of the General Assembly of the United Nations.

## Were the imputations conveyed?

1. The tribunal of fact (be that a judge or jury) must undertake an objective evaluation in determining whether an ordinary reasonable viewer would have understood that the broadcast complained of (or its online publication) conveyed any particular defamatory imputation or meaning. The process necessarily is imperfect because by the time that the tribunal of fact must decide this question, the matter complained of will have been played several times, counsel will have emphasised factors of it that support the conclusion that favours their respective client and the debate will have focussed around the pleaded imputations as the formulation of the meanings that the publication would or would not have conveyed.
2. Moreover, the tribunal of fact must also put itself into the position of an ordinary reasonable viewer of the particular publication. This involves some mental agility. The degrees of meaning that a Shakespearean play will both be capable of conveying and that it actually conveys can depend on the education of the audience, its knowledge of Shakespeare and its ability to penetrate what is often the bard’s layers of meanings.
3. The exercise of ascertaining what meanings such a play conveys is likely to be on a different plane to the approach that the reader or viewer of a tabloid media publication will take in arriving at a meaning conveyed by such a publication. While there may be overlaps, it is unlikely that the audience of a Shakespearean play will have, or exhibit, the same characteristics as that of a tabloid media publication. Hence, the ordinary reasonable viewer is somewhat a chameleon creature whose characteristics and thought processes vary depending on the nature of the defamatory publication and the means of its communication to him or her. Nevertheless, such a person must be a reflection of members of the current society.
4. The cases have been concerned to formulate an objective, but reasonably adaptive, construct to encapsulate all of the characteristics of the ordinary reasonable viewer (or reader or listener, depending on the medium of publication). When almost all defamation actions in the nation’s four most populous States were tried by jury, Brennan J (with whom Gibbs CJ, Stephen, Murphy and Wilson JJ agreed), in *Readers Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 at 505–506, explained how jurors needed to approach their task in deciding whether a particular meaning was conveyed by a publication. He said (at 506):

Whether the alleged libel is established depends upon **the understanding of the hypothetical referees who are taken to have a uniform view of the meaning of the language used, and upon the standards, moral or social, by which they evaluate the imputation they understand to have been made. They are taken to share a moral or social standard by which to judge the defamatory character of that imputation** (*Byrne v. Deane* ([1937] I KB 818, at 833), being a standard common to society generally (*Miller v. David* ((1874) LR 9 CP 118); *Myroft v. Sleight* ((1921) 90 LJ KB 883); *Tolley v. J.S. Fry & Sons Ltd.* ([1930]1 K.B. 467, at 479).

(emphasis added)

1. In *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158 at 165–167, Hunt CJ at CL, with whom Mason P and Handley JA agreed, described the approach that a tribunal of fact should take in assessing whether a publication, and in particular a television broadcast, conveyed a particular defamatory imputation or meaning. Broadcasts are transient unlike the print media or online written publications. Of course, in today’s world a television broadcast, such as *Four Corners*, is also able to be recorded or streamed online (as it was by over 11,400 people) so that it can be replayed, or gone over, just as the printed word. However, replaying a broadcast that lasts over 45 minutes is not a usual activity of an ordinary reasonable viewer of television or internet downloads.
2. The essential characteristics of the “hypothetical referees” are that they are, *first*, ordinary members of the community, *secondly*, reasonable people and *thirdly*, the reflex of how such persons would have understood the publication complained of when and in the circumstances they saw, read or listened to it. And, as Lord Kerr of Tonaghmore JSC (with whom Lord Reed DPSC, Lady Black, Lord Briggs and Lord Kitchin agreed) held in *Stocker v Stocker* [2020] AC 593 at 605 [37]–[38], where a range of possible meanings presents itself, “the touchstone remains what would the ordinary reasonable reader consider the words to mean. Simply because it is theoretically possible to come up with a meaning which is not defamatory, the court is not impelled to select that meaning”. He identified that this requires a judge to step away from a lawyerly analysis and to put himself or herself in the position of the typical member of the audience of the publication in issue.
3. In *Trkulja v Google LLC* (2018) 263 CLR 149 at 160–161 [32], Kiefel CJ, Bell, Keane, Nettle and Gordon JJ said:

**that exercise is one in generosity not parsimony.** The question is not what the allegedly defamatory words or images in fact say or depict but **what a jury could reasonably think they convey to the ordinary reasonable person** (*Favell* (2005) 79 ALJR 1716 at 1721 [17]; 221 ALR 186 at 192 per Gleeson CJ, McHugh, Gummow and Heydon JJ); and it is often a matter of first impression. **The ordinary reasonable person is not a lawyer who examines the impugned publication over-zealously but someone who views the publication casually and is prone to a degree of loose thinking** (*Morgan v Odhams Press Ltd* [1971] 1 WLR 1239 at 1245; [1971] 2 All ER 1156 at 1162-1163 per Lord Reid). He or she may be taken to “read between the lines in the light of his general knowledge and experience of worldly affairs” (*Lewis* [1964] AC 234 at 258 per Lord Reid; *Favell* (2005) 79 ALJR 1716 at 1719–1720 [10]; 221 ALR 186 at 190 per Gleeson CJ, McHugh, Gummow and Heydon JJ), but **such a person also draws implications much more freely than a lawyer, especially derogatory implications** (*Lewis* [1964] AC 234 at 277 per Lord Devlin; *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519 at 573–574 [134] per Kirby J; Favell (2005) 79 ALJR 1716 at 1720 [11]; 221 ALR 186 at 190 per Gleeson CJ, McHugh, Gummow and Heydon JJ), and takes into account emphasis given by conspicuous headlines or captions (*Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 at 646 per Aickin J; *Rivkin* (2003) 77 ALJR 1657 at 1661–1662 [26]; 201 ALR 77 at 83 per McHugh J; at 1699 [187] per Callinan J; *Favell* (2005) 79 ALJR 1716 at 1719 [8]; 221 ALR 186 at 189 per Gleeson CJ, McHugh, Gummow and Heydon JJ). Hence, as Kirby J observed in *Chakravarti v Advertiser Newspapers Ltd* ((1998) 193 CLR 519 at 574 [134]), “[w]here words have been used which are imprecise, ambiguous or loose, **a very wide latitude will be ascribed to the ordinary person to draw imputations adverse to the subject**”.

(emphasis added)

1. In *Favell v Queensland Newspapers Pty Ltd* (2005) 221 ALR 186 at 190 [10]–[12], Gleeson CJ, McHugh, Gummow and Heydon JJ said in relation to the capacity of a publication to convey a meaning:

In determining what reasonable persons could understand the words complained of to mean, the court must keep in mind the statement of Lord Reid in *Lewis v Daily Telegraph Ltd*:[[1964] AC 234 at 258]

The ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs.

Lord Devlin pointed out, in *Lewis v Daily Telegraph Ltd*, [[1964]] AC at 277] that whereas, for a lawyer, an implication in a text must be necessary as well as reasonable, **ordinary readers draw implications much more freely, especially when they are derogatory**. That is an important reminder for judges. In words apposite to the present case, his Lordship said: [[1964] AC at 285]

It is not … correct to say as a matter of law that a statement of suspicion imputes guilt. It can be said as a matter of practice that it very often does so, because although suspicion of guilt is something different from proof of guilt**,** it is the broad impression conveyed by the libel that has to be considered and not the meaning of each word under analysis. **A man who wants to talk at large about smoke may have to pick his words very carefully if he wants to exclude the suggestion that there is also a fire; but it can be done. One always gets back to the fundamental question: what is the meaning that the words convey to the ordinary man: you cannot make a rule about that. They can convey a meaning of suspicion short of guilt; but loose talk about suspicion can very easily convey the impression that it is a suspicion that is well founded.**

A *mere* statement that a person is under investigation, or that a person has been charged, may not be enough to impute guilt. [Mirror Newspapers Ltd v Harrison (1982) 149 CLR 293] **If, however, it is accompanied by an account of the suspicious circumstances that have aroused the interest of the authorities, and that points towards a likelihood of guilt, then the position may be otherwise. There is an overlap between providing information and entertainment, and the publishing of information coupled with a derogatory implication may fall into both categories. It may be that a bare, factual, report that a house has burned down is less entertaining than a report spiced with an account of a suspicious circumstance.**

(emphasis added)

1. The ordinary reasonable viewer of *Four Corners* would be a person who was interested in watching a serious, well-researched, investigative 45 minute long program, usually, at 8.30pm on a Monday evening, which he or she would understand was intended to inform its audience about a serious matter of current public interest or concern. The ordinary reasonable viewer will watch and listen to the whole of the broadcast before forming a final conclusion as what it conveyed. However, he or she will form impressions about matters as the program progresses, especially about matters that it covered but did not return to later. Those impressions may well last and become the meaning(s) that the ordinary reasonable viewer retains as the meaning(s) that the program conveyed. The more striking or pungent an impression that a part of the program creates in or conveys to the mind of the viewer may be the meaning that he or she infers it was suggesting regardless of other, milder portions. As we know, emphasis, presentation, context, irony, sneers and other rhetorical devices can reinforce or negate a meaning that the same words said or read in isolation of the circumstances of their communication would have conveyed.
2. I now turn to consider whether each of the imputations was conveyed by the program.

### Imputation 1: Dr Chau betrayed his country, Australia, in order to serve the interests of a foreign power, China, and the Chinese Communist Party by engaging in espionage on their behalf

1. Dr Chau argued that imputation 1 would have been conveyed to the ordinary reasonable viewer because of the repetition of Mr McCaul’s saying “it’s almost like out of a spy novel” both in the opening line and part way through the matter complained of, the references in the opening sequences to ASIO’s warnings to the Australian political party officials, *Four Corners’* revelation that China was the subject of those warnings and Mr Uhlmann’s concluding statements about the need to change Australia’s espionage and foreign interference laws. He contended that the program created links between his allegedly close friendship and employment relationship with Ms Yan, whom the program stated explicitly was a Chinese spy, ASIO’s interest in Dr Chau having been piqued, partly through that association with Ms Yan, the references to the raid on her apartment in Canberra, what Prof Medcalf described as Dr Chau’s “deep and serious connections to the Chinese Communist Party” and his being an Australian citizen.
2. I reject Dr Chau’s argument. In my opinion, the ordinary reasonable viewer would not have understood the matter complained of to have conveyed imputation 1. That is because the program did not suggest that Dr Chau had engaged in any act of espionage or spying. The ordinary and natural meaning of “espionage” is the “practice of spying on others” (*Macquarie Dictionary online*) or “the practice of playing the spy, or of employing spies” (*Oxford English Dictionary online*). Spying means obtaining secret information or collecting intelligence. Those concepts are distinct from foreign interference, as the program noted.
3. The publishers accepted that the matter complained of gave rise to a reasonable suspicion that Dr Chau was being investigated for his activities in Australia and that he had connections to Ms Yan and her husband. But, as they correctly argued, there was no incident or other content in the matter complained of that the viewer reasonably could have perceived was suggesting that Dr Chau had engaged in any act of espionage.
4. The program’s suggestion of foreign interference in Australian political affairs did not direct the *reasonable* viewer’s perception of Dr Chau’s activities into the realm of spying. The program made clear to the viewer that ASIO’s investigations related to two major concerns: spying and foreign interference. The ordinary reasonable viewer would have been conscious that, although both kinds of activity were antithetical to Australia’s national interests, each was distinct from the other. The matter complained of portrayed Dr Chau as a person who made donations and engaged in high profile activities with universities and politicians. But, it did not convey that *he* was a spy or had done anything involving the obtaining of information or collection of intelligence to be used against Australia.
5. While the program drew a link between Dr Chau and Ms Yan, that link was to do with the allegedly corrupt invitation to Mr Ashe. The program did not convey that, even if it was saying that Ms Yan was a spy (because of matters such as the documents found in the raid on her Canberra apartment), Dr Chau engaged in anything more than Mr Jennings’ ascription of “naked influence buying”. The program said that ASIO was warning about Dr Chau’s activities and motives in making large donations and building up connections with persons of influence. While both spying and influence buying could evoke perceptions of some kind of clandestine activity in the mind of the ordinary reasonable viewer, in the context of the program he or she would still regard influence buying using such means as a separate exercise from engaging in espionage. The viewer would have understood Mr McCaul’s twice-repeated melodramatic description, “it’s almost like out of a spy novel” as being a reference to the secrecy involved in the behaviour of what he described as “dangerous clandestine figures in Chinese intelligence and…a concerted effort to… influence our elections” through foreign government contributions.
6. The ordinary reasonable viewer, taking the content of the program as a whole, would not have understood it to convey the meaning that Dr Chau engaged in obtaining secret information, collecting intelligence or any form of spying.

### Imputation 2: Dr Chau is a member of the Chinese Communist Party and of an advisory group to that party, the People's Political Consultative Conference (CPPCC), and, as such, carries out the work of a secret lobbying arm of the Chinese Communist Party, the United Front Work Department

1. The publishers argued that imputation 2 was strained, contrived and was not conveyed by the matter complained of. They contended that while Mr McKenzie had described Dr Chau as currently being Australian citizen, he immediately followed that by saying “back in his homeland, he was also a member of a Communist Party advisory group known as … CPPCC”. They submitted that the ordinary reasonable viewer would have understood that Dr Chau had been in Australia for at least a decade, being the period over which he had been making his donations to political parties, and that the reference to his past membership of the CPPCC “back in his homeland” was temporally significantly earlier than the discussion of his present connections to Australia. They argued that the program did not suggest that Dr Chau was currently a member, or had retained membership in Australia, of the CPPCC or the United Front Work Department. Moreover, they argued, even if conveyed, imputation 2 was not defamatory. That was because membership of the governing political party of a superpower or an advisory group to that party or the carrying out of unspecified work on behalf of a secret lobbying arm of that party would not have lowered the reputation Dr Chau in the minds of ordinary right-thinking people.
2. I reject the publishers’ arguments about imputation 2. The ordinary reasonable viewer would have understood Prof Medcalf to have been referring to Dr Chau when he said “individuals like that have really deep and serious connections to the Chinese Communist Party”. The focus of the program was on the links between the central figures, including Dr Chau and Mr Huang, whom it told the viewers ASIO suspected of foreign interference and, in the case of others like Ms Yan, also spying. As I have noted in dealing with imputation 1, the focus of the matter complained of in respect of Dr Chau was about the connection between his political donations and foreign interference in Australian politics from the Chinese State or its organs.
3. Moreover, Mr McKenzie had said earlier, when first introducing Dr Chau to viewers, that:

ASIO singled out two billionaire donors with especially close links to the Chinese Communist Party. The first was enigmatic property developer Dr Chau Chak Wing, a man who keeps a low profile except when it comes to his big donations.

1. Contrary to the publishers’ argument, the ordinary reasonable viewer was invited to listen to what apparently well-informed, authoritative persons said about Dr Chau in the program on the basis of that introduction. Mr McKenzie subsequently elaborated on Dr Chau’s links to the Communist Party and the Chinese State by informing viewers of his connection to the “opaque lobbying arm of the party called the United Front Work Department.” The ordinary reasonable viewer would have understood that to be a reference to the political lobbying or influencing in foreign countries, not in the one-party State that was China. Prof Medcalf’s remarks immediately following the introduction of that opaque lobbying arm, emphasised that the really deep and serious connections of Dr Chau with the Communist Party were in relation to his activities in Australia. The ordinary reasonable viewer would also have understood that the program was not complimenting, or expressing a Panglossian view, about Dr Chau for his donations, but rather was exposing to scrutiny his motivation for making them. In the context of the matter complained of, the ordinary reasonable viewer was led to an understanding that Dr Chau’s membership of the Communist Party, the United Front Work Department, the CPPCC and the secret lobbying were activities of an untoward, clandestine and sinister nature involving him assisting China in its foreign interference in Australian political affairs.
2. I also reject the publishers’ argument that imputation 2 was not defamatory. I am of opinion that an ordinary reasonable viewer would think the less of a person who was a member of a clandestine arm of a super power engaged in lobbying in Australia. The imputation suggests, in the context in which the program conveyed it, that Dr Chau had a secret agenda to pursue as a member of a surreptitious agency of a foreign power, China. The program told the viewer that ASIO had concerns about “a concerted campaign by the Chinese government and its proxies to infiltrate the Australian political process to promote its own interests”, being just the sort of activity a secret lobbying arm of the Government would undertake. The thrust of the defamatory meaning is that Dr Chau is not what he appears to be on the surface because of his membership of a secret foreign Government organisation that does clandestine lobbying for it in this country. The viewer would think Dr Chau was not transparent but acted surreptitiously in Australia in pursuing China’s interests. The fact of the secrecy in these lobbying activities would raise a concern in the mind of the ordinary reasonable viewer about its legitimacy and Dr Chau’s involvement in that conduct.

### Imputation 3: Dr Chau donated enormous sums of money to Australian political parties as bribes intended to influence politicians to make decisions to advance the interests of the Republic of China, the Chinese government and the Chinese Communist Party

1. The publishers argued that imputation 3 was not conveyed. In particular they relied on what White J had said in *Hockey v Fairfax Media Publications Pty Ltd* (2015) 237 FCR 33 at 55 [94], namely:

The word “bribe” does not have a precise meaning as it is capable of encompassing more than one form of dishonest conduct by, or in relation to, a public official. However, **I consider that the ordinary reasonable reader would understand that a bribe usually involves the elements of a payment to a public official personally or to someone else on the official’s behalf; a reasonably close relationship between the payment, on the one hand, and an expected decision or action by the public official, on the other; and the payment being made to secure or induce a benefit to the payer from the decisions or action in question**. The word bribe is not in ordinary understanding used to refer to the payments made by donors to political parties, or to political candidates, **which are unconnected** with any particular executive decision making, even if the motivation of the donors is to promote goodwill by the recipient towards themselves.

(emphasis added)

1. The publishers argued that there was no reason why the ordinary reasonable viewer would have understood the program to be conveying that Dr Chau’s donations of over $4 million to the major political parties during the preceding decade were, or could be understood, as bribes. They pointed to Mr Raby’s comments that payments by wealthy Chinese individuals were very much part of the way in which they do business and were calculated to enhance respect for the donor. They contended that it would be far-fetched for the ordinary reasonable viewer to consider that such donations were bribes.
2. I reject the publishers’ argument. The program commenced with Mr McCaul, Mr Jennings and Mr Uhlmann all emphasising Chinese attempts to influence elections and the political systems of other nations, including Australia. In Mr Jennings’ words, “naked influence buying is something which is damaging to Australia’s system”. So much so, that Mr Uhlmann had said in his introduction ASIO had warned that espionage and foreign interference were occurring in Australia on an unprecedented scale. He named the Chinese Communist Party as the perpetrator. He said that the program’s investigation “reveals that business leaders allied to Beijing are using millions in political donations to the major parties to buy access and influence, and in some cases to push policies that may be contrary to Australia’s national interests”.
3. The ordinary reasonable viewer would have been left in no doubt at the conclusion of the program that Dr Chau was one of the “business leaders allied to Beijing” to whom Mr Uhlmann referred. It told viewers that over the previous decade Dr Chau had donated more than $4 million to the major parties and he was one of “two billionaire donors with especially close ties to the Chinese Communist Party” whom “ASIO singled out”. The concept of buying access and influence falls within the natural and ordinary meaning of a “bribe”. The *Oxford English Dictionary* online defines “bribe” as: “a sum of money, gift, or other inducement which is given to another person in order to influence his or her behaviour, especially to persuade him or her to act in one’s favour”. The *Macquarie* Dictionary online defines “bribe” as “anything of value, as money or preferential treatment, privilege, etc, given or promised for corrupt behaviour in the performance of official public duty, anything given or serving to persuade or induce”. Of course, in *Hockey* 237 FCR 33, White J was dealing with a different publication and explaining how he had arrived at his findings about it, not laying down general propositions of law as to how an ordinary reasonable person would understand all publications.
4. Moreover, the matter complained of sought to draw a direct connection between Dr Chau’s invitation to John Ashe, as President of the United Nations General Assembly, and the payment of USD200,000 through Ms Yan’s communications to induce him to attend at the Imperial Springs Resort conference that Dr Chau organised. The program conveyed in graphic terms how Mr Huang, the other billionaire “with especially close links to the Chinese Communist Party”, had made perfectly clear that his foreshadowed donation to the Labor Party of $400,000 came at a price. That fact was reemphasised by the program drawing a connection with his payment of $5,000 to Senator Dastyari and the latter’s willingness to depart from the Labor Party’s policy on the South China Sea at an event when he spoke next to Mr Huang.
5. Mr McKenzie told viewers that “the question ASIO has been probing is what he (Dr Chau) wants from his donations” and that the Director-General of ASIO had warned the Australian party officials that those donations might come with strings attached. And, Mr McCaul explained why United States law expressly prohibited foreign money donations in relation to elections. He said, of Chinese influence in Australia: “what better way to do that than to influence political figures through … foreign contributions?”.
6. The ordinary reasonable viewer of the program would be drawn to the conclusion that because Dr Chau was a person who had “really deep and serious connections to the Chinese Communist Party” and was a focus of ASIO’s concerns, he had made his significant donations to Australia’s political parties in order to influence politicians to take, not just a favourable approach towards the interests of China, but rather to advance positively the interests of China. The viewer would have been led to understand that ASIO’s warnings to the Australian party officials were that Dr Chau’s donations came at a price, or with strings attached, just as Mr Huang had overtly demonstrated by withdrawing his promised $400,000 donation and paying Senator Dastyari $5,000 for an ALP legal bill. This is similar to the understanding of a “bribe” that White J described in *Hockey* 237 FCR at 55 [94].
7. In my opinion, imputation 3 conveyed that Dr Chau had made his political donations with the intention of corrupting the recipients to act other than in the way they should. On balance, I am satisfied that it is more likely than not that the ordinary reasonable viewer would have understood the matter complained of to be saying that this was the purpose for which Dr Chau made his donations. After all, the matter complained of emphasised the very significant sums of money being paid to political parties on both sides. Dr Chau’s purpose in making his donations, the ordinary reasonable viewer was led to think, must have been to persuade or influence, corruptly, both sides of politics to favour causes close to his heart, which the program made clear, were very much aligned to the interests of the Chinese government and the Chinese Communist Party.

### Imputation 4: Dr Chau paid Sheri Yan, whom he knew to be a corrupt espionage agent of the Chinese government, in order to assist him in infiltrating the Australian Government on behalf of the Chinese Communist Party

1. Dr Chau argued that the program conveyed imputation 4 because of its assertions of the closeness of his relationship to Ms Yan. That association was a reason for ASIO having an interest in him. The program characterised Ms Yan as a spy, including in the re-enactment of the ASIO raid on her home, the reference to the discovery there of classified documents on the work of Chinese intelligence and the investigation into her husband. Prof Fitzgerald described Ms Yan as being very closely connected with some of the most powerful and influential families and networks in China and declaimed: “Once you know that you don’t need to know much more”. Dr Chau also relied on the program’s discussion of the bribery case involving Ms Yan and Mr Ashe and in particular its portrayal that Dr Chau was working hand in glove with Ms Yan to bribe Mr Ashe as the President of the United Nations General Assembly.
2. I reject Dr Chau’s argument. There is nothing in the matter complained of to convey to the ordinary reasonable viewer that Dr Chau knew that Ms Yan was an espionage agent. As I noted in dealing with imputation 1, the matter complained of would have conveyed to the ordinary reasonable viewer that Dr Chau was involved in activities amounting to foreign interference in Australia’s domestic affairs, but not in espionage. The program did not suggest to the ordinary reasonable viewer that Dr Chau had any knowledge of the raid on Ms Yan’s house, ASIO’s suspicions about her being a spy or of any other activity on her part that could be described as spying. Nor did the program suggest that Dr Chau did or knew anything involving Ms Yan’s actions in Australia.
3. True it is that Dr Chau’s association with Ms Yan provoked ASIO’s interest in him, but there was nothing to suggest that Ms Yan did anything in Australia to assist Dr Chau in such a sinister activity as “infiltrating the Australian government on behalf of the Chinese Communist Party”. Such a meaning is strained and artificial. It does not convey what the ordinary reasonable viewer would have understood the program to be saying about Dr Chau’s knowledge of Ms Yan or her activities in relation to espionage. The matter complained of portrayed a direct link between Dr Chau and Ms Yan together bribing Mr Ashe. But the ordinary reasonable viewer would have understood the difference that the program was drawing between foreign interference, through payments of money, including bribes, and other activities amounting to espionage. The viewer may have asked himself or herself about the possible link between Mr Uren’s retention of secret documents, Ms Yan’s relationship to him and the Chinese State on the one hand and Dr Chau on the other. However, the program did not create a reasonable basis on which the viewer could understand it to convey that Dr Chau knew that Ms Yan was a spy or that he had enlisted her to undertake any activity in Australia.

### Imputations 5 and 6: Dr Chau paid a $200,000 bribe to the President of the General Assembly of the United Nations, John Ashe and was knowingly involved in a corrupt scheme to bribe the President of the General Assembly of the United Nations.

1. These two imputations can be considered together, as the parties’ arguments did. The publishers argued that neither imputation 5 nor 6 could be conveyed because there was nothing to suggest that Dr Chau knew the payment to Mr Ashe was a bribe. They contended that the program discussed Ms Yan’s guilty plea in the US proceeding in circumstances where Mr McKenzie expressly stated that there was no suggestion that Dr Chau knew that the payment was illegal, that he had never been charged with any offence and that he denied any wrongdoing. They pointed out that the indictment referred to Dr Chau, using the codename “CC3”, but did not suggest that he was implicated in the act of bribery. They contended that the ordinary reasonable viewer would have understood that the US authorities had determined not to pursue Dr Chau and therefore it would not be reasonable for the viewer to make the leap from there possibly being grounds for suspecting that Dr Chau had been involved in bribery, as a knowing participant, to the assertion that he was guilty of having acted as a principal. They argued that, in the context of the ordinary reasonable viewer’s awareness that *Four Corners* was a careful, long-running flagship current affairs program, he or she would have understood that the indictment and guilty plea of Ms Yan was the end point of that investigation and that the program was not leaving open the possibility of a further prosecution of Dr Chau.
2. I reject the publishers’ arguments. The discussion of the bribery case in the matter complained of commences with the statement by the United States Attorney for the Southern District of New York that there was a “wide-ranging corruption scheme”, involving one of Dr Chau’s companies, presumably (the ordinary reasonable viewer would think) at his direction, inviting Mr Ashe, in his capacity as President of the United Nations General Assembly, to Dr Chau’s resort to speak at a conference hosted by him. The viewer would infer that Dr Chau sent the invitation (the draft of which Mr McKenzie read out) seeking to make Mr Ashe his “sincere friend in Guangdong province” and was offering a permanent convention venue for United Nations meetings. The program’s interpolation that there was no suggestion that Dr Chau knew that it was illegal, under United States bribery law, to make a payment to Mr Ashe as a United Nations official, in its statement that Dr Chau had not been charged with any offence and denied any wrongdoing, would not detract from the overwhelming impression conveyed by the matter complained of. That impression was of Dr Chau being the moving force behind the payment which, on its face, was made corruptly to induce Mr Ashe to do something that he would not otherwise have done, namely go to the conference that Dr Chau was hosting. Moreover, the terms of the invitation, including the suggestion that the resort could be a permanent convention venue for United Nations meetings, could hardly be described (or understood by the viewer) as innocent, anodyne or unconnected with Dr Chau’s payment of a very large sum of money to the President of the General Assembly.
3. The ordinary reasonable viewer would not have regarded the statements that Dr Chau did not know that it was an offence under New York law to pay a United Nations official, or that he denied wrongdoing as simply suggesting a suspicion that Dr Chau’s payment was a bribe, or part of a corrupt scheme to bribe Mr Ashe, as opposed to an assertion of guilt. Mr McKenzie had stated earlier in the program “Dr Chau used Sheri Yan as a consultant, somebody able to open up the right doors”. He introduced Dr Chau’s involvement in the bribery case by telling the viewers that “one of the events that led to Sheri Yan’s arrest unfolded at the luxury Imperial Springs resort which is owned by none other than Australian political donor Dr Chau Chak Wing”. The use of the words “none other than” was calculated to suggest that it was no coincidence that Ms Yan and Dr Chau were involved in the events together. The detailed attention given to the bribery allegations in connection with Dr Chau’s involvement was calculated to lead the ordinary reasonable viewer to understand that the program was doing more than raising a mere suspicion that Dr Chau may have been involved in paying a bribe to Mr Ashe. The ordinary reasonable viewer was invited to conclude that there was more than simply suspicion attaching to Dr Chau’s actions in making the invitation to Mr Ashe to attend his resort, paying him USD200,000 to attend and offering the resort’s facilities to the United Nations for future conferences: *Trkulja* 263 CLR at 160–161 [32].
4. Rather, this was a case where the viewer was invited to put to one side the program’s disclaimers of Dr Chau’s guilt and to be drawn towards the conclusion expressed in each of imputations 5 and 6. This part of program would convey the impression that, as Lord Keith of Kinkel said in *Lloyd v David Syme & Co Ltd* [1986] AC 350 at 363G–H; (1985) 3 NSWLR 728 at 734 C–D, “the author is anxious to wound but fearful to strike too obviously”. Their Lordships cited their earlier decision in *Jones v Skelton* (1963) 63 SR (NSW) 644 at 651 as to how an ordinary reasonable reader (in that case) could understand the meaning that a publication conveyed, where Lord Morris of Borth-y-Gest said:

The reader, a jury might conclude, **was invited to adopt a suspicious approach and so to be guided to the real explanation of what had taken place – an explanation which the writer of the letter did not care or did not dare to express in direct terms**

(emphasis added)

1. Here, the account of the suspicious circumstances and Dr Chau’s involvement in the payment to Mr Ashe would have guided the ordinary reasonable viewer to think that the program was conveying that Dr Chau had paid the money as a bribe and that he knew that he was paying a United Nations official in a corrupt way. The matter complained of had told viewers that ASIO’s interest in Dr Chau arose partly from his association with “a woman described as an ‘older friend’”, namely Ms Yan, whom it said had pleaded guilty to bribing Mr Ashe to speak at Dr Chau’s resort and was jailed for doing so. It dramatised her arranging for Dr Chau to pay Mr Ashe and become “his sincere friend in Guangdong province”. No doubt, since the program did not state that Dr Chau was innocent of any wrongdoing, the publishers concluded that the ordinary reasonable viewer, in light of the disclaimers, would have considered that it was conveying, at least, that there were reasonable grounds to suspect that he had done what imputations 5 and 6 stated. But they did not stop there.
2. In my opinion, the ordinary reasonable viewer would not have taken the rose coloured glasses approach that the publishers suggest to this part of the program. The program linked Dr Chau and Ms Yan closely, including in particular the giving of the invitation to Mr Ashe to speak at the Imperial Springs resort. The viewer was invited to ask himself or herself why was Dr Chau offering Mr Ashe a permanent convention venue for United Nations meetings and paying him USD200,000 to speak at a conference there? And why did Ms Yan go to jail after pleading guilty to bribery charges involving the wide-ranging corruption scheme centred at the United Nations about which the program spent some detail and time, if all that it was conveying in relation to Dr Chau was seeking to raise only a reasonable suspicion that he was guilty, as the payer of the money and the giver of the invitation?: *Favell* 221 ALR at 190 [10]–[12]; *Lewis* [1964] AC at 285.
3. The ordinary reasonable viewer would have understood that, notwithstanding the program’s disclaimers (that there was no suggestion that Dr Chau knew that it was illegal under US law for Mr Ashe to receive the payment, that he had never been charged with any offence and that he denied any wrongdoing), in fact *Four Corners* was asserting that the payment was corrupt and a bribe. That is because *first*, Dr Chau’s payment was part and parcel of the very bribe for which Ms Yan had pleaded guilty and was imprisoned, and *secondly*, like Ms Yan, he knew that the purpose of the payment was to secure the United Nations’ General Assembly President’s attendance at the conference he was hosting and the prospect of its future use of the resort for its meetings.
4. I reject the publishers’ argument that the ordinary reasonable viewer would not draw a more anodyne inference than those in imputations 5 and 6 because he or she would be aware of the careful way in which *Four Corners* presented its programs and the significance of its disclaimers. The program’s reference to the use of a codename for Dr Chau in the indictment and the absence of any attempt by the US authorities to bring him to justice in that country after the long investigation by those authorities would not have caused the viewer to take a more benign view of Dr Chau’s conduct that made it somehow less culpable than Ms Yan’s. I am satisfied that those considerations did not overcome the impact on the ordinary reasonable viewer of the program’s portrayal of Ms Yan’s guilty plea, her prison sentence and Dr Chau’s direct connection to the payment to Mr Ashe which it told viewers was the bribe the subject of that plea and sentence. The program led the viewer to understand that Dr Chau’s payment to Mr Ashe in the circumstances it described was actually corrupt. The program sought to raise a great deal of smoke around Dr Chau’s activities and his motivations for making payments to Mr Ashe and other political figures. It emphasised that Ms Yan had pleaded guilty to and been jailed for bribery charges without any other context than that she had arranged with her “old friend”, Dr Chau, to pay Mr Ashe USD200,000: *Lewis* [1964] AC at 285.
5. The broad impression conveyed by the program, in my opinion, was that Dr Chau, acting through Ms Yan, had paid USD200,000 as a bribe to Mr Ashe and was knowingly involved in a corrupt scheme to do so. The ordinary reasonable viewer would have drawn the implication that the program was making the derogatory imputations 5 and 6: *Trkulja* 263 CLR at 160–161 [32]; *Favell* 221 ALR at 190 [10]–[12].

# The impact of the defamation on Dr Chau

## Dr Chau’s background

1. Dr Chau is married with three children, including his daughter **Winky**. In the 1990s, he founded the **Kingold** Group of companies in Guangdong, China. He is the proprietor and chairman of Kingold which conducts a wide variety of businesses including in investment, property, commerce, banking (through Guangdong Huaxing Bank), schooling (through a number of kindergartens, a primary school and secondary school in Guangdong) and publishing in Guangdong, and in Australia, *Australian New Express Daily*.
2. Winky was the managing director of *Australian News Express Daily*, which had ceased being printed but was still being published online when she gave evidence. She had been the ethnic policy advisor to successive Premiers of New South Wales from about 2004 to about 2008.
3. Dr Chau does not speak English and gave his evidence through an interpreter. As I noted above, Dr Chau has had a particular interest in promoting education. In about 2003, Dr Chau met Ross **Milbourne**, the Vice Chancellor of UTSfrom 2002 to 2014. Mr Milbourne gave evidence that on that occasion the two men discussed international education and UTS’ philosophy about this. From then Mr Milbourne met with Dr Chau about once a year until 2009.
4. Mr Milbourne said that, in 2009, UTS wished to appoint Mr Gehry to design its new business school. Dr Chau understood that UTS would struggle to raise funding for the program. He expressed interest in supporting it and discussed it with Mr Milbourne in Australia and at his residence in Guangzhou where he offered to donate $20 million to enable UTS to engage in Mr Milbourne’s words, “the world’s best architect”. Dr Chau also offered then to provide another $5 million in scholarships which Mr Milbourne said “really, was a surprise, that was quite an amazing offer which we hadn’t previously discussed”. Dr Chau said that his motivation for those donations of $20 million for the building and $5 million for the scholarships was that, as “an Australian citizen I should make more charitable contributions where I could to Australia”. UTS awarded Dr Chau an honorary degree in 2014.
5. In the event, Mr Gehry designed and UTS built and completed the Chau Chak Wing building. In 2015, his Excellency the Governor-General opened it along with Mr Milbourne (who had retired by this time) and Dr Chau. Other than at the opening, Mr Milbourne met Dr Chau only once more shortly after he retired.

## Dr Chau learns of the program

1. Dr Chau learnt about the matter complained of when his daughter, Winky,telephoned him soon after the broadcast. He did not see the program until it was played during the hearing. He obtained a translated transcript of the program shortly before the hearing. It was unclear whether this was the first written version of the transcript that he saw. After Winky saw the broadcast, having been alerted by a person who had seen a promotion for it, it left her in shock and surprised that it had defamed her father. She telephoned him after viewing it. Winky told him that the program had said that he had bribed Mr Ashe, that he was a very corrupt businessman, that his political donations were bribes, that his donations in Australia were made to serve the interests of China and the Chinese Communist Party and that he was a member of the Chinese Communist Party and the CPPCC.
2. Dr Chau was very distressed as soon as he heard Winky’s description of the program. In addition he said that she told him that the broadcast had “created a very big threat to me”. He felt that the content of the program “was completely made up”. He said:

I was in agony, and I couldn’t sleep for days, and I couldn’t eat well for days, and my blood pressure went very high, and I had to make a number of visits to the doctor, and I was in breakdown, and I lost many weight. **Over the years since it was aired I was on medication. I have been on medication. It was because the Four Corners program by ABC my body became this bad**. This program is still online, and it is not yet taken down.

(emphasis added)

1. Winky said that when she told her father about the program he was really emotional and hurt. She said that he could not understand why he had been so badly defamed and accused of being a spy and corrupt and that “he kept asking me why and he just couldn’t believe what has been said”.
2. Dr Chau only saw one or two translations of the transcript of the program before the trial and thus was reliant on what Winky and others told him about what it conveyed. Accordingly, in assessing any hurt to Dr Chau’s feelings by reason of the publication of the matter complained of, it is necessary to consider the information that he had about it and the extent to which the publishers can be held responsible for him receiving information to that effect.
3. Where defamatory matter is published in a language that a claimant does not speak fluently, or perhaps at all (such as Dr Chau), a natural and probable result of the publication is that others who understand and speak both languages will tell that person about it. A publisher cannot be responsible for a mistranslation or for a communication that inaccurately conveys its contents or thrust to the claimant. However, if the person who tells the claimant accurately informs the claimant of the sting, or an imputation that the publication conveys, such a communication is a natural and probable result of the original publication: *John Fairfax & Sons Ltd v Cojuangeo* (1988) 165 CLR 346 at 350 per Mason CJ, Wilson, Deane, Toohey and Gaudron JJ; *Kazal v Thunder Studios Inc (California)* (2017) 256 FCR 90 at 118–119 [53]–[54] per Besanko, Wigney and Bromwich JJ.
4. I find that on 5 June 2017 or very soon after the broadcast Winky accurately conveyed to her father the substance of imputations 2, 3, 5 and 6. Dr Chau said that each imputation was false. He was very distressed by the publishers making each of those imputations about him because “they were all made up, and all these made-up facts impacted hugely on my body as well as my business”. Although Dr Chau included in his answer that I have set out in [78] above the effect on him of all the imputations, including 1 and 4 (that I have found were not conveyed), I am satisfied that his overall reaction was not substantially affected by them. *First*, he did not mention anything about the subject matter of imputations 1 or 3 in recounting what Winky told him, namely that he had been accused of spying or engaging in espionage or that he knew Ms Yan was a spy. His distress and hurt feelings came substantially from his accurate understanding that his daughter had given him of the four imputations that I have found that the matter complained of conveyed and from the reactions of others to him about the program.
5. When asked what he felt about the program still being available online, he said that he felt a continuation of similar feelings that he had experienced since learning of the original broadcast, and:

What I felt is that I am a person who is very loyal to Australia, and it is my ongoing wish that the country of Australia becomes stronger and wealthier. And I have done so much for Australia. And I didn’t, **I don’t have any personal agenda, nor do I ask for anything back**. And such a degraded matter would happen to me.

(emphasis added)

1. Dr Chau said that many people who knew him called in June 2017 him after the broadcast to express their concerns. These included:
* **Wu** Yun who was in Guangdong. She informed him that the program was available on the internet in China and Hong Kong. That made him very distressed. She also said that many prospective purchasers of properties that Dr Chau’s group was selling had decided to withdraw their interest or cancel contracts.
* **Zhang** Xi Xien, the head of Guangdong Radio and Television. He asked Dr Chau if he knew of the broadcast. Mr Zhang told him the program had labelled him very corrupt and was doing great damage to his reputation. Dr Chau told him that he would take legal proceedings as soon as possible. Mr Zhang’s call also made Dr Chau feel very distressed.
* **Son** Hi, the Vice-Governor of Guangdong Province. He asked Dr Chau if he was aware of the program and told him to “settle this… well as soon as possible otherwise there will be very big impacts on my reputation” (which I infer was advice to take proceedings promptly to clear his name).
* **Xuang** Jun Fung, the head of the Guangdong Banking Regulation Authority. He told Dr Chau that the program was being reported all over the internet and that he had to move very quickly otherwise his banking business would be affected. Dr Chau said “He made it sound very serious”.
* **Jiang** Xi Feng, the president of Kingold and the person in charge of the group’s finances. She also told Dr Chau that he needed to resolve the matter quickly because of the likely damage to the group’s business and sales. She said that “this matter was circulating a lot in society”.
1. Winky said that in the days following the program’s broadcast she received at least 15 calls and messages from people who had known the family for a long time expressing shock, surprise and disbelief. These included an email from Jim Harrowell AM, a well-known solicitor, saying that his thoughts were very much with Dr Chau and the whole family. He wrote:

I thought the comments by Geoff Raby were very balanced but the story seemed to ignore the fact that your father and family are Australian citizens and have been for many years and have been very generous with financial support to many Australian organisations and in helping build bridges between Australia and China for the mutual benefit of both countries.

I am sure your family will be engaging expert media people to help manage this business it will be a challenge. Western media too often focus on negative stories about China when there are so many positive stories to be told.

## Dr Chau’s reputation

1. Mr Milbourne gave evidence that Dr Chau’s reputation was of his being a very generous, very honourable and very ethical man and that “He had a high reputation for integrity, no question”. He said that Dr Chau was also known for his keen interest in Australian-Chinese relations, especially in offering educational opportunities and scholarships.
2. Since 2003 David **Ellis** has been the director of museums and cultural engagement for the University of Sydney and responsible for its museums and art galleries. He first met Dr Chau in 2015, after learning in 2014 of his interest in funding a new museum for the University. At the meeting, Dr Chau confirmed that he would donate $15 million for the capital works to build a new museum. He said that, later, the University had offered to name the museum after Dr Chau. Subsequently, Mr Ellis met with Dr Chau on several occasions both in China and in Sydney. At the time of the trial, Mr Ellis said that the Chau Chak Wing Museum would open in about five weeks’ time.
3. Mr Ellis said that about 18 months before the broadcast, *The Sydney Morning Herald* website published an article headed “Are Chau Chak Wing’s circles of influence in Australia-China ties built on hot air?” (the **Fairfax** **website article** that I discuss more fully in [98] below). Mr Ellis said that before the publication of the Fairfax website article, Dr Chau was known as positively supportive of Australia-China relations. He said that after the Fairfax website article’s publication, there was a flurry of emails and phone calls asking whether the University was concerned about that article. He described those as “negative comments about ‘How could we accept funding from someone like Dr Chau?’ after the allegations were made against him”.
4. Mr Ellis also said that prior to the publication of the Fairfax website article, the University and he had made investigations of Dr Chau’s background, because they did so for all proposed benefactors. He said that those investigations showed that Dr Chau was known as a very generous, indeed, one of Australia’s most generous, philanthropists in the cultural and educational sphere. He also said that, however, Dr Chau was “known as a quiet giver… not on the radar as a philanthropist” and a private individual.
5. Mr Ellis said that, at the time of the *Four Corners* broadcast, the comments about the Fairfax website article had “not completely, but very much died away”. He saw the program when it was broadcast and said that after it he received several communications about Dr Chau raising the same issues again about how the University could accept funding from someone like Dr Chau, enquiring “what if the allegations are true?” and “what’s going on?” The effect at that time on Mr Ellis was that he was concerned. He attended a meeting of the Council of the Friends of Nicholson Museum at which comments were raised that the University had accepted money from, and was naming the new building after, Dr Chau.
6. The Hon Warwick **Smith**, a former member for Bass in the House of Representatives from 1984 to 1993 and 1996 to 1998 and, in the latter term, Minister for Family Services, also gave evidence. He was Australia’s first Telecommunications Ombudsman. At the time of the trial, Mr Smith was the chair of the International Engagement Committee of the Business Council of Australia, and a member of the Council itself, chairman of Ord Minnett and Australian Capital Equity Group, that had a substantial shareholding in the Seven West media group. He also had been chairman of the New South Wales board of the Australia and New Zealand Banking Group Ltd (**ANZ**), and of ANZ China, and was, for a long time, a board member of the Shanghai Daily News, a newspaper publisher in Shanghai.
7. Until February 2020, Mr Smith had been chairman of the Australia-China Business Council for the previous eight years. That organisation had succeeded the Australia-China Foundation. He said that the Council and Foundation were “basically Australia’s focus on soft diplomacy arrangements” between the two nations and were ‘attached’ to the Department of Foreign Affairs and Trade in administering education programs and cultural exchanges. Mr Smith said that the chairman of the Council (and Foundation) also chaired a community committee that assessed funding applications each year for presentation to Ministers.
8. Mr Smith first met Dr Chau about 20 years ago in connection with the Australian Government winning gas contracts in China. After this, over the years Mr Smith saw Dr Chau in China, Sydney and Canberra. Mr Smith saw Dr Chau in Guangzhou and at the Imperial Springs resort in connection with their common business dealings in media, banking and advertising. He looked at Dr Chau’s developments and went to two conferences about the media at the resort.
9. Before the broadcast of the program, Mr Smith said that in both his business and political work Dr Chau was known as an Australian citizen of long standing and always regarded in China and Australia as an important person who was constructive in all the endeavours in which he participated, including in building business links between the two countries. Mr Smith said that those interactions occurred with visiting Chinese delegations here or on visits by Prime Ministers and Premiers and others to Guangzhou, which he knew of and attended from his long term Chairman of the Australia-China Business Council. He said that Dr Chau was “based in integrity”, including in commercial dealings when his group applied for loans with ANZ and from his knowledge of Dr Chau during the ten years that Mr Smith had been associated with Macquarie Bank in China. He said that Dr Chau was regarded as a philanthropist and a man of good and unquestioned reputation.

## Earlier proceedings based on similar defamatory publications

1. In August 2016, Dr Chau brought defamation proceedings in this Court against **Nationwide** News Pty Ltd, the publisher of ***The Daily Telegraph*** and its sister company **News Life** Media Pty Ltd, which had published print and online articles on 16 October 2015 headlined “Billionaire developer embroiled in scandal” and “Australians caught up in United Nations bribery and money laundering scandal” (the **2015 articles**). He claimed that the 2015 articles conveyed imputations that he had “bribed Mr John Ashe; UN Ambassador from Antigua and Barbados” and “bribed Mr John Ashe; UN ambassador from Antigua and Barbados, $200k to attend and speak in his official capacity, in a private conference near Guangzhou, China”.
2. On 27 October 2016, Dr Chau, Nationwide and News Life agreed to settle those proceedings and subsequently entered into a deed of settlement and release. The settlement involved Nationwide and News Life agreeing to pay Dr Chau $65,000 and publishing the following apology (which occurred on 23 December 2016):

**Chau Chak Wing**

An article headlined "Billionaire Developer embroiled in scandal" in *The Daily Telegraph* [or News.com.au] on 16 October 2015 implied that Dr Chau Chak Wing was under investigation in the US over allegations he bribed a former president of the UN General Assembly. The Daily Telegraph acknowledges that such allegations are false and unreservedly apologises to Dr Chau Chak Wing for any hurt and embarrassment caused by the article.

1. Dr Chau said that he had agreed to accept $65,000 and the apology by Nationwide and News Life because “they were very proactive in their apology”.
2. Dr Chau also brought separate defamation proceedings against Fairfax and another journalist in respect of the online publication, also on 16 October 2015, of the Fairfax website article. After a trial, Wigney J found in his reasons published on 22 February 2019 that the Fairfax website article conveyed three imputations, namely that Dr Chau *first*, bribed the President of the United Nations General Assembly, Mr Ashe, *secondly*, had participated in a conspiracy to bribe the President of the General Assembly and *thirdly*, had acted in so seriously wrong a manner as to deserve extradition to the United States on criminal charges, including charges of bribery: *Chau v Fairfax Media Publications Pty Ltd* [2019] FCA 185 at [12], [75], [82] and [87]. The Fairfax website article remained online up to the time of his Honour’s judgment (at [366]).
3. His Honour considered that an award of general damages of $250,000 was appropriate but reduced it by $25,000 under s 38(1) of the *Defamation Act 2005* (NSW) to take into account the mitigating effect of the $65,000 settlement with Nationwide and News Life. His Honour found (at [359]):

The defamatory imputations in those proceedings were similar in many respects to the imputations in this proceeding. It may be accepted that a significant portion of that settlement sum represented or comprised compensation for the hurt to Dr Chau’s feelings and the damage to his reputation. It may equally be inferred, however, that **the *Daily Telegraph* and the online version of the Herald are quite different publications with different readerships in terms of demographics**. As s 38(1)(e) is to be applied in a broad way, it would appear to be relevant to have regard to the different circulation and readership of the two publications in assessing the extent to which Dr Chau has already received compensation for the same hurt or damage.

(emphasis added)

1. Wigney J also awarded a lump sum of $55,000 in lieu of pre-judgment interest for the damage done by the Fairfax website article. Counsel informed me that the Fairfax website article had been viewed by a total of about 12,000 people.
2. Dr Chau was upset by the Fairfax website article’s three imputations to the effect that he had bribed Mr Ashe because they were false, damaging and hurtful. He said, in cross-examination, that he felt that Wigney J’s award was just and fair. When asked if he considered that the judgment had cleared his name, he said, and I accept:

Only partly. The part that caused that caused bigger impacts was still unsettled. **Because the impact of the ABC and the Four Corners program was bigger. …It has been many years, and the loss of my reputation and in terms of finance, was huge**. And I’m taking medicines every day, even now. **Every time I remember this, I feel really distressed.**

(emphasis added)

1. He felt satisfied that Wigney J’s decision had been reported in Australia but did not agree that reporting had undone the damage of the *Four Corners* program.

# Damages

## The damage to Dr Chau’s reputation

1. The broadcasts of the program were viewed by over 1 million people. The online version is still available for accessing, streaming and viewing and, at the time of the trial, people were still doing so. Over the whole period between the first publication on 5 June 2017 and 20 September 2020, a total of 59,882 page views and 11,464 playings of the program occurred. This included 6,227 page views of the program’s webpage between 5 December 2018 and 20 September 2020 on the ABC’s website, 65% of which were views from Australia, and 1,638 playings of the program, 66% being playings by persons in Australia.
2. The evidence of Mr Milbourne, Mr Ellis and Mr Smith demonstrated that Dr Chau had a fine, unblemished and unquestioned reputation before the publication of the Fairfax website article and, before the publication of the matters complained of, that reputation had substantially recovered.
3. The broadcast of the program besmirched that reputation. Mr Ellis’ evidence about the concerns raised about the University of Sydney accepting Dr Chau’s money and naming the new museum after him, was a clear example of the very kind of damage that the imputations (that I have found) were calculated to convey.
4. The four imputations struck at the heart of Dr Chau’s good name for his integrity, philanthropy, and constructive contributions to developing a positive relationship between Australia and China. Dr Chau’s and his daughter’s evidence of the immediate impact of the program made clear how profoundly his reputation had been affected.
5. The Vice-Governor of his home province, Mr Son, had told Dr Chau of the need to “settle this” quickly. While Dr Chau did not expressly say that this conversation or the others after the broadcast that he recounted had caused a specific reaction, I am satisfied that these substantially contributed to the “agony” and distress that he described. After all, Dr Chau was a prominent and successful man both in Guangdong (and elsewhere in China) and Australia. It is a natural and human reaction to comments of the kind Dr Chau described from powerful and important figures in one’s life, such as those of the Vice-Governor, to feel distress and agony. I infer that Dr Chau’s reaction bespoke a sense of deep public humiliation, that the persons with whom he spoke after the broadcast, in one way or another, suggested that it had had, as was the case, a substantial and adverse impact on his reputation. As the publishers’ submissions were at pains to stress, *Four Corners* is known as a serious, investigative journalism program. Thus, what it said would be understood by viewers to be thoroughly researched and soundly based.
6. These characteristics of the program would cause the damage from the publication of false imputations, like the four I have found it conveyed, to be the more potent. For a man who mixed with Prime Ministers and Provincial Vice-Governors, leading bankers and businessmen to be publicly and falsely accused of bribery of the President of the General Assembly of the United Nations and of Australian political parties and to be a member of a clandestine arm of the Chinese Communist Party was calculated to inflict on Dr Chau, as I found it did, personal and public humiliation and disgrace. The imputations struck at the core of Dr Chau’s previously high reputation for integrity, philanthropy and the promotion of a positive relationship between Australia, of which he was a citizen, and China.
7. I am of opinion that the imputations conveyed that Dr Chau was, in effect, a fifth columnist, and a man who paid bribes to Australian political parties and to Mr Ashe. They were very damaging to Dr Chau’s reputation. They call for a significant award of damages.

## Compensatory damages – principles

1. In *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 60–61 Mason CJ, Deane, Dawson and Gaudron JJ said:

Specific economic loss and exemplary or punitive damages aside, there are three purposes to be served by damages awarded for defamation. The three purposes no doubt overlap considerably in reality and ensure that "the amount of a verdict is the product of a mixture of inextricable considerations" (*Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR at 150 per Windeyer J). **The three purposes are consolation for the personal distress and hurt caused to the appellant by the publication, reparation for the harm done to the appellant's personal and (if relevant) business reputation and vindication of the appellant's reputation** (*Carson* (1991) 24 NSWLR at 296-299). The first two purposes are frequently considered together and constitute consolation for the wrong done to the appellant (*Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR at 150; *Coyne* [*v Citizen Finance Ltd*] (1991) 172 CLR 211 at 216; *John Fairfax* & *Sons v Kelly* (1987) 8 NSWLR 131 at 142; *McCarey v Associated Newspapers Ltd [No.2]* [1965] 2 QB 86 at 107). **Vindication looks to the attitude of others to the appellant: the sum awarded must be at least the minimum necessary to signal to the public the vindication of the appellant's reputation.** "The gravity of the libel, the social standing of the parties and the availability of alternative remedies" are all relevant to assessing the quantum of damages necessary to vindicate the appellant (Fleming, *Law of Tom,* 8th ed. (1992), p. 595).

(emphasis added)

1. An injury to feelings can be proved by evidence of others, for as Bowen LJ famously remarked “the state of a man’s mind is as much a fact as the state of his digestion”: *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483. In *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419 at [1468]–[1469] Beazley, Giles and Santow JJA held that it is open for a court to award a claimant not only ordinary compensatory damages, but also aggravated damages, for injury to feelings for a publisher’s conduct that was improper, unjustifiable or lacking in *bona fides*, even though the claimant had not given evidence, provided that there was other admissible evidence to establish such an injury to his or her feelings. They cited with approval (at [1322]) the following passage from Lord Diplock’s speech in *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1125E–G:

The harm caused to the plaintiff by the publication of a libel upon him often lies more in his own feelings, **what he thinks other people are thinking of him, than in any actual change made manifest in their attitude towards him. A solatium for injured feelings**, however innocent the publication by the defendant may have been, **forms a large element in the damages** … even in cases where there are grounds for ‘aggravated damages’

(emphasis added)

1. I reject the publishers’ argument that the evidence of Dr Chau’s hurt to feelings should be treated cautiously, particularly having regard to their contention that he may not have seen a transcript of the program until a few weeks before he gave evidence and only viewed it for the first time when it was played at the beginning of the trial. *First*, Dr Chau did not speak English. Thus, viewing the program without a voiceover in his native tongue would have been meaningless to him. *Secondly*, it was inherent in the publication of the matter complained of that Dr Chau would hear about the impact on his reputation from those who saw it and could understand what it said. He has not claimed (and I am not awarding) any damages to his reputation from publications outside Australia, such as in China. However, he could and did claim damages for hurt to his feelings caused by persons who were in China and spoke to him about the publication while he was there. Thus, for example, he felt distressed when the head of Guangdong Radio and Television, Mr Zhang, told him that the program had done “huge damage” to his reputation by portraying him as corrupt. Dr Chau also received a call from Vice-Governor Son, who told Dr Chau to “settle this well as soon as possible, otherwise there will be very big impacts on my reputation”.
2. The cumulative effect of the calls that Dr Chau received and his understanding, based on what those persons and his daughter told him that the program conveyed, viewed together with his account of his initial and ongoing reaction to the imputations when put to him by his senior counsel, was profound. He was deeply upset that the publishers’ program had conveyed each of the imputations or meanings about him and that they were false. My understanding of his evidence is that he reacted immediately to what his daughter and the other persons in China had told him that it conveyed in the immediate aftermath of the broadcast on 5 June 2017. Those persons had captured its substantial stings. I have set out his reaction at [78] when his daughter told him what the program conveyed. I find that Dr Chau was still upset having to deal again in his oral evidence with what the matters complained of had said about him.
3. It is obviously difficult to assess the impact on, and reaction of, a person in Dr Chau’s position, who must give his evidence through an interpreter, to a defamatory publication in a foreign language, that he (or she) cannot view, hear or read, except in, and with the possible limitations of, translation.
4. The publishers contended that because Dr Chau had only recently seen a translation and more recently viewed the program for the first time when it was played in Court, that this adversely affected the amount of damages that he could claim. In my opinion, his daughter captured and recounted to Dr Chau, immediately after the broadcast, substantially accurately the stings of imputations 2, 3, 5 and 6 which I have found were conveyed. Winky’s communication of the stings of the program to her father occurred in words not materially different from the substance of the imputations that I have found were conveyed.
5. A claimant who complains of being defamed often has his or her feelings hurt by the sting, as opposed to the actual words of the publication, especially where, as here, it is a lengthy broadcast that could not be repeated word for word in English or in translation, even if limited to the still lengthy portions that conveyed the imputations. In *Tournier v National Provicial and Union Bank of England* [1924] 1 KB 461 at 478 and 487–488, Scrutton and Atkin LJJ, respectively, held that in order to prove the words complained of as a slander, it is sufficient for the claimant’s evidence to establish that the publisher “used, in substance, the words, or the material and defamatory part of the words complained of” or “though not the very words pleaded, were words substantially to the same effect”. As Atkin LJ said (at 488):

No slander of any complexity could ever be proved if the ipsissima verba of the pleading had to be established

1. Likewise, in *Buchanan v Jennings* [2005] 1 AC 115 at 122 [5], Lord Bingham of Cornhill (giving the judgment of the Privy Council consisting of himself, Lord Scott of Foscote, Lord Walker of Gestingthorpe, Baroness Hale of Richmond and Dame Sian Elias) said:

Where an oral statement is complained of, it is rarely possible (in the absence of a recording, a transcript or a very careful note) for a plaintiff to establish the precise words used by the defendant. **But the law does not demand a level of precision which is unattainable in practice**. The plaintiff must plead the words complained of, but **it is enough if the tribunal of fact is satisfied that those words accurately express the substance of what was said**.

(emphasis added)

1. While the Judicial Committee were not suggesting that a claimant could plead a slander by simply stating the imputations that the spoken words conveyed, they were cognisant of the need for the law to be responsive to the realities of human experience. Here, in order to claim damages for injury to feelings, Dr Chau did not need to view the program in a language that he did not understand until an accurate translation was available for him to read or hear. He could still be (and I find was) hurt by what it said in substance about him, as soon as he heard about it from Winky and others. A court must be able to receive evidence of a non-English speaking claimant’s hurt to feelings from a defamatory publication in a case like this based on what others tell him or her was the substance of what the publisher said. And, if that substance is accurately distilled into a sting or meaning or imputation complained of in the proceeding, that the claimant receives from a third party, and that the court finds the defamatory publication conveyed, there can be no reason in principle not to treat the hurt to the claimant’s feelings caused by that communication (ie. at a time before he or she reads, hears or views the matter complained of, in or with a translation) as evidence of “damage by the publication”.
2. In his celebrated judgment in *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 150–153 Windeyer J explained the nature of damages for the tort of defamation. These damages are now more limited by ss 34–39 of the *Defamation Act*. His Honour said, still appositely (at 150):

It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputa­tion. **He gets damages because he was injured in his reputation, that is simply because he was publicly defamed**. For this reason, compensation by damages operates in two ways-as a vindication of the plaintiff to the public and as consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recom­pense for harm measurable in money. The variety of the matters which, it has been held, may be considered in assessing damages for defamation must in many cases mean that **the amount of a verdict is the product of a mixture of inextricable considerations**.

(emphasis added)

1. In discussing what compensation can be awarded, including for the effect of aggravating or mitigating factors, Windeyer J said (at 151):

**That defamation may produce indignity and humiliation and that these can attract monetary compensation is no new doctrine**. It goes back to the early Middle Ages, to a time before the king's courts gave any remedy for defamation: see *Pollock* & *Maitland,* 2nd ed. (1923), vol. 2, pp. 536–538. In 1928 Higgins J. remarked that it" seems to be right so long as the theory stands that 'the jingling of the guinea helps the hurt that honour feels' ": *The Herald and Weekly Times Ltd.* v. *McGregor* ((1928) 41 CLR 254 at 272**). Insult,** **as well as injury to reputation, thus merits compensation**… **the satisfaction that the plaintiff gets is that the defendant has been made to pay for what he did**. Guineas got from the defendant jingle more pleasantly than would those given by a sympathetic friend.

(emphasis added)

1. And, Lord Hailsham of St Marylebone LC, in *Broome* [1972] AC at 1070D–1071H, discussed the subjective element in damages for defamation along with the overall purpose of the ultimate award of damages at common law. He explained that one purpose of the award is to put the claimant in the position where, “in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a by-stander of the baselessness of the charge” (at 1071C–D) before citing the passage from *Uren* 117 CLR at 150 set out at [119] above. The Lord Chancellor discussed the measure of the damages at common law for the tort of defamation, of course not constrained by ss 34–39 of the *Defamation Act*, and said that “the whole process of assessing damages where they are ‘at large’ is essentially a matter of impression and not addition” (at 1072G).
2. The *Defamation Act* now places a not insignificant constraint on the use of impression by requiring in s 34 that the court (being a judicial officer even if there is a jury (see s 22(3)) “ensure that there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded”. However, as Windeyer J explained in *Uren* 117 CLR at 151, harm can include a claimant’s feelings of indignation and humiliation, which, after all, are ordinary, and uniquely subjective in degree, human reactions to a perceived slight or unfair criticism.
3. Moreover, as Toohey J, with whom Dawson and McHugh JJ agreed, pointed out in *Coyne v Citizen Finance Ltd* (1991) 172 CLR 211 at 237–238, persistence in a defence of justification may increase ordinary compensatory damages because it affects the harm suffered. Toohey J distinguished how an early withdrawal of the defamatory statement ordinarily would serve to reduce the harm that the claimant suffered, whereas persistence in seeking to prove it true may increase the scope of the publication and the effect on those to whom it is published. And, often the claimant will be affected by the uncertainty of the litigation’s outcome. In addition, McHugh J said (172 CLR at 241):

The jury had the opportunity – which is denied to an appellate court – of assessing the true character, feelings and sensitivity of the plaintiff. In *Broome v. Cassell* & *Co.* ([1972] AC at 1125), Lord Diplock pointed out:

“**The harm caused to the plaintiff by the publication of a libel upon him often lies more in his own feelings, what he thinks other people are thinking of him**, than in any actual change made manifest in their attitude towards him.”

(emphasis added)

## Assessment of compensatory damages

1. Here, Dr Chau received calls from not only his daughter, Winky, but also very senior persons in China, including the Vice-Governor of his home province, that brought home to him very powerfully that his reputation had been significantly attacked in the broadcast. He described the contemporaneous and then ongoing physical and emotional reactions that he experienced that continued to affect him to the time of his giving evidence. He made no claim for any injury to his health. I have treated his unchallenged descriptions of “being in agony”, not sleeping or eating properly for days after he first learnt of the sting from his daughter, as well as his high blood pressure and weight loss, as lay descriptions of his feelings and perceived physical reactions to the hurt and emotional pain that he was suffering.
2. It is no small thing to be accused, falsely on the evidence before me, by two large media organisations on the national broadcaster’s flagship investigative journalism program, *Four Corners*, of bribing the President of the United Nations, of making donations in Australia as bribes to political parties to serve the interests of China and of being a member of the Chinese Communist Party and the CPPCC and that he carries out the work of the secret lobbying arm of that Party.
3. The publishers argued that Dr Chau did not give any evidence that he thought that the program conveyed imputation 3 or the terms of imputation 6, and that the hurt to his feelings could not have been affected because those meanings were not matters that he understood or considered that the matter complained of conveyed about him or which upset him. They contended that his “evidence does not identify any particular hurt to his feelings referable to the program (as opposed to what his daughter told him about the program)” that could assist meaningfully in the assessment of his damages.
4. I reject the publishers’ argument. Critically, s 8 of the *Defamation Act* provides (or confirms the common law position) that a person has a single cause of action for defamation in relation to each defamatory publication about him or her, regardless of whether it carries more than one defamatory imputation about the person. The purpose of a pleading identifying imputations or meanings allegedly conveyed by a publication is to crystallise the senses in which a claimant contends he or she has been defamed. Those meanings are not the cause of action, although they help to define the real complaint. But, as I have noted in [111] above, Beazley, Giles and Santow JJA held in *Marsden* [2002] NSWCA 419 at [1468]–[1469] that a claimant in a defamation action who has not given evidence can be awarded substantial damages for hurt to feelings if there is admissible evidence that can establish an injury to his or her feelings. There is no requirement in the *Defamation Act*, including in s 34, that a claimant must give evidence that establishes a precise congruence between his or her understanding of the meanings conveyed by a defamatory publication and those meanings pleaded as imputations or that the Court finds to have been conveyed. The concern of the present law of defamation, as stated in s 34, is to give a person defamed a remedy in an award of damages that has an appropriate and rational relationship between the amount of damages awarded and the harm that the claimant suffered.
5. It is hardly surprising or irrational, in a causation sense, that Dr Chau felt hurt on hearing from his daughter what she conveyed to him as the stings of the broadcast. Those stings were not the “ipsissima verba” or precise words of the broadcast, but they captured, in less precise terms, overall what I have found the matters complained of conveyed. The role of an imputation in the trial of a defamation action is to identify what the trier of fact must decide was or was not, in substance, conveyed to the ordinary reasonable viewer, reader, listener or audience member by the publication. The assessment of damages for the publication to this hypothetical audience member of those constructs of meaning, involves creating “a product of a mixture of inextricable considerations” (*Uren* 117 CLR at 150) and “a matter of impression not addition” (*Broome* [1972] AC at 1072G). So long as a claimant accurately understands the substance of what was said (being what an imputation, as a legal construct, seeks to do) even if it does not match with precision the pleaded imputation, he or she can (not must) establish that the publication was a common sense cause of the harm to his or her feelings from his or her understanding of the sting: *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 515 per Mason CJ. There, Mason CJ referred to what Dixon CJ, Fullagar and Kitto JJ had said in *Fitzgerald v Penn* (1954) 91 CLR 268 at 277 and 278, namely that “it is all ultimately a matter of common sense” and that in “truth the conception in question [ie. causation] is not susceptible of reduction to a satisfactory formula”.

### Should damages be assessed on the basis that these reasons will vindicate Dr Chau?

1. The publishers argued that the reasons that I give “can be expected to vindicate fully Dr Chau’s reputation”. They contended that if I found any of the imputations was conveyed, and given that there was no plea of truth, this was “not a case where the damages award needs to be calculated so as to ‘convince a bystander of the baselessness of the charge’ (*Broome* [1972] AC at 1071 per Lord Hailsham of St Marylebone LC)”.
2. I reject that argument as unsound in principle for the reasons given in *Dingle v Associated Newspapers Ltd* [1964] AC 371 by Lord Morton of Henryton (at 403–404) and Lord Denning (408–409) with whom Lord Radcliffe (at 400–401), Lord Cohen (at 407) and Lord Morris of Borth-y-gest (at 418–419) agreed (and see *Lewis v Australian Capital Territory* (2020) 381 ALR 375 at 421–422 [171]–[172] per Edelman J, with whose reasons on the issue of vindication, Kiefel CJ and Keane J agreed at 377 [22]). As Lord Morton said (at 404):

**Such a method of assessing damages would do less than justice to the plaintiff**, in my view, and it is based upon suppositions which may be unfounded. A judge cannot tell how widely his judgment will be reported and read, nor can he tell how far the plaintiff's general reputation will be improved by his complimentary remarks. A simple verdict of a jury in favour of the plaintiff will no doubt have a good effect on his reputation, **and it is surely impossible to set a monetary value upon the difference, if any, between the effect of a jury's finding and the effect of a judge's finding plus a compliment from him.**

(emphasis added)

1. An award of damages to vindicate a plaintiff’s reputation is compensatory of loss suffered and serves the purposes that Mason CJ, Deane, Dawson and Gaudron JJ identified in *Carson* 178 CLR at 60–61 (quoted in [110] above); see too *Lewis* 381 ALR at 421–422 [172].
2. Lord Judge CJ, Lord Neuberger of Abbotsbury PSC and Eady J suggested in *Cairns v Modi* [2013] 1 WLR 1015 at 1025 [32] that there will be occasions when the reasons for judgment will provide a sufficient vindication, but whether they did so “is always a fact-specific question”. Their Lordships did not give any examples or cite authority for that *obiter dictum*, although they said (at 1025 [30]–[32]), following *Dingle* [1964] AC 371, that there is no general principle for making any allowance in reduction of an award of damages based on the court’s reasons for finding for the claimant. As they also said (at [32]), correctly in my view:

It is more likely, as in so many cases, that the general public (or rather, interested “bystanders” who need to be convinced) will be concerned to discover what might be called the “headline” result. **What most people want to know, and that includes those who read the judgment closely,** as Mr Caldecott submitted, **is simply “how much did he get?”**

(emphasis added)

1. I agree. The ordinary reasonable viewer of the program and those to whom its imputations about Dr Chau were republished are not likely to spend hours reading these reasons and nor is anyone else except the present parties and their lawyers and any appellate court. The public are interested in what amount the Court awards, not the dross of legal reasons or, as Lord Macnaghten once remarked in another context: “Thirsty folk want beer, not explanations”: *Montgomery v Thompson* [1891] AC 217 at 225.

## Aggravated damages – principles

1. Aggravated damages are compensatory but can be assessed so as to increase an overall award of general damages where conduct of the defendant that has aggravated the harm to the claimant is improper, unjustifiable or lacking in *bona fides*: *Triggell v Pheeney* (1951) 82 CLR 497 per Dixon, Williams, Webb and Kitto JJ. The tribunal of fact, be that a judge or jury, can assess damages by taking into account the whole of the defendant’s conduct from the time of publication up to the time of the verdict: *Praed v Graham* (1889) 24 QBD 53 at 55 per Lord Esher MR; *Triggell* 82 CLR at 513–514. However, there is a distinction between a defendant persevering in a defence (which can increase ordinary compensatory damages: *Coyne* 172 CLR at 237–238) and conduct that is improper, unjustifiable or lacking in *bona fides*. After all, litigation often involves genuinely disputed facts or questions of law that both parties honestly, or reasonably, contest. The mere fact that one side wins and the other loses a forensic contest does not mean that the loser had no proper basis on which to engage in the contest. Thus, the assessment of whether a claimant can establish that his or her loss or damage have been increased (or aggravated) by the defendant’s conduct depends on whether that conduct was improper, unjustifiable or lacking in *bona fides*, rather than merely mistaken or did not lead to an outcome favourable to the defendant in the litigation.

## Claim for aggravated damages

1. Dr Chau alleged that he was entitled to an award of aggravated damages because, *first*, the publishers pursued their truth defences (the **truth defence issue**), *secondly*, the matter complained of has remained available online (the **continuing publication issue**) and *thirdly*, the publishers have failed to apologise (the **apology issue**). The publishers argued, as a threshold point, that no award of aggravated damages could be made unless each of them was responsible for the cause of the aggravation and then the amount awarded could be no more than that assessed against the publisher who made the least contribution to the aggravation (the **single award issue**).

### The single award issue

1. The publishers submitted that the positions of the ABC, on the one hand and, on the other, Fairfax and Mr McKenzie, were different in respect of the program being available online only on the ABC’s website. They asserted that the ABC controlled the content on its own website independently of Fairfax and Mr McKenzie. The publishers argued that even if the conduct of the ABC in keeping the program online were capable of supporting an award of aggravated damages, that could only be made against the ABC. They contended that this followed from Eady J’s decision in *Veliu v Mazrekaj* [2007] 1 WLR 495 at 499 [11], where he applied what Lord Hailsham LC and Lord Reid had suggested in respect of the unavailabilities of separate awards of exemplary damages in *Broome* [1972] AC at 1063 and 1090. Eady J held that the only available course was for the damages to be awarded against all defendants on the basis of the assessment of the conduct of the “lowest common denominator”. In other words, they submitted, because neither of Fairfax nor Mr McKenzie had acted to keep the program online, the ABC’s conduct could not be attributed to them and the joint liability for damages could not include any element based on any aggravation of damage for which the ABC alone was responsible.
2. I reject the publishers’ argument that it is not possible to make a separate award of aggravated damages against one of a number of tortfeasors. The decision of Eady J in *Veliu* [2007] 1 WLR at 499 [11] is in the teeth of *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 and *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574. In *XL Petroleum* 155 CLR at 460, Gibbs CJ (with whom Mason, Murphy and Wilson JJ agreed (at 464–465)) and at 470–471 Brennan J (with whom Mason J also agreed at 464) held that s 5(1) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) had abolished the common law rule that there was only one cause of action against joint tortfeasors and that only one judgment could be given against all of them, even if one or more had caused the plaintiff to suffer more or less damage or was liable to an award of exemplary damages. Each of Gibbs CJ (155 CLR at 46), Mason J (at 464) and Brennan J (at 467) held that the views of Lord Hailsham LC and Lord Reid in *Broome* [1972] AC 1027 did not accord with the law in Australia.
3. The common law rule that there must be unity in the cause of action against joint tortfeasors, had been abolished by statute in all Australian jurisdictions before 1996: *Thompson* 186 CLR at 584 per Brennan CJ, Dawson and Toohey JJ, 591 per Gaudron J and 613–614 per Gummow J. It follows that a separate award of aggravated damages can be made against the ABC if Dr Chau is entitled to rely on its conduct alone in leaving the matter complained of online as aggravating the damage he has suffered.

### The truth defence issue

1. The publishers contended that their original plea of justification was supported by the decision of the Court of Appeal of the Supreme Court of Western Australia in *West Australian Newspapers Ltd v Elliott* (2008) 37 WAR 387. Their Honours held that it was open to a defendant to rely on the existence of reasonable grounds for suspicion that a claimant was guilty (**variant imputations**) to support a plea of justification of the imputations of fact of which he or she complained. Thus, they submitted, since their decision to plead truth was supported by the decision of an intermediate appellate court, it could not be said that the plea based on that authority could aggravate damages.
2. That position only changed when I held on 31 August 2018 (*Wing* [2018] FCA 1340 at [43]) that *Elliott* 37 WAR 387 was plainly wrong and inconsistent with *Mirror Newspapers Ltd v Harrison* (1982) 149 CLR 293, and the Full Court affirmed that conclusion in *Chau* 271 FCR at 665 [98]. Even so, the publishers contended that in refusing special leave to appeal from the Full Court’s decision, Gageler and Gordon JJ had observed that, having regard to the pleadings and the manner in which the matter was argued before the Full Court, it was “not a suitable vehicle for the agitation of the point of general principle which the applicant[s] now seek[] to raise”: *Australian Broadcasting Corporation v Chau* [2019] HCA Trans 245.
3. The publishers argued that persisting in a *bona fide* defence cannot be a basis for an award of aggravated damages. And, they noted, they had not suggested at the trial anything to contradict Dr Chau’s evidence that his pleaded imputations were false.
4. I accept that the publishers had a reasonable and justifiable basis to rely on *Elliott* 37 WAR 387 to support a plea of truth based on there being reasonable grounds to suspect that Dr Chau was guilty of the pleaded imputations. However, the problem with their original attempts to plead justification was much more fundamental. I found in *Wing* [2018] FCA 1340, when refusing to allow that plea, that the particulars of truth of:
5. imputation 1 (which I have now found was not conveyed) relied on the publishers’ definition of “espionage”, which was embarrassing and the particulars given for it did not provide a basis to sustain even that meaning (at [83]–[91]). Besanko, Bromwich and Wheelahan JJ affirmed this finding in *Chau* 271 FCR at 686–687 [175]).
6. imputation 2 failed to specify any facts or circumstances to warrant an inference that Dr Chau (whom I erroneously called “Dr Wing” in those reasons) was a member of the Chinese Communist Party or the CPPCC or that he had acted in any way in relation to such alleged membership (at [95]–[98]; *Chau* 271 FCR at 689 [153]–[154], 680–681 [156]–[160], 687 [176]).
7. imputation 3 was not capable of being supported by the particulars because they did not identify any facts to support an actual or circumstantial case of Dr Chau paying donations to Australian political parties as bribes (at [101]; cf *Chau* 271 FCR at 687 [175]).
8. imputations 4, 5 and 6 (bearing in mind that I have found that imputation 4 was not conveyed) were not capable of being supported by the publishers’ reliance on the United States’ complaint against Ms Yan and her plea of guilty as summarised in their particulars 70–79 (at [78]–[79], [109]). As the Full Court said in *Chau* 271 FCR at 682 [162] (and see too at 687 [177]–[178], 688 [181]):

**What is remarkable about the allegations in paragraphs 70 to 79 of the respondents’ particulars is that, apart from the allegation in paragraph 73(c) that the applicant hosted a conference, there are no direct allegations of material fact made in relation to any conduct of the applicant**. Rather, the particulars allege as material facts: (1) allegations in court documents in a foreign court proceeding; (2) the hearing and outcome of a proceeding against Sheri Yan; and (3) statements made by Mr Hastie MP to the Federal Parliament. No material facts alleged in paragraphs 70 to 79, either alone or in combination, are capable of supporting the very serious allegations that are made in paragraph 80. **The respondents’ attempt to justify the applicant’s imputations 5(f), (g), and (h) is untenable**.

(emphasis added)

1. However, I accepted that the particulars could support the publishers’ variant imputations that there were reasonable grounds for suspicion of imputations 1, 2 and 3: *Wing* [2018] FCA 1340 at [100]. But, that left the particulars to support the variant and actual imputations 4, 5 and 6 bereft of any reasonable basis for the reasons that both I and the Full Court gave.
2. In those circumstances, I am satisfied that the publishers’ reliance on their pleas of justification of both the variant and actual imputations 4, 5 and 6 (even though, in the event, I have found that imputation 4 was not conveyed) was unjustifiable or as Besanko, Bromwich and Wheelahan JJ said “untenable”. This is the more so since Dr Chau had not been charged with any offence in the United States and the only evidence on which they relied was the sealed complaint against Ms Yan.
3. On 13 December 2019, when the High Court refused to grant special leave to appeal from the Full Court’s decision, the publishers must have realised that they could not seek to justify the very serious imputations if it were found that they had conveyed them. Not only had their first attempt failed, but, on 10 October 2019, I had refused to allow their further attempt to replead in *Chau* [2019] FCA 1856. As I noted there, the sealed complaint to which the program gave prominence had been filed on 5 October 2015, but it did not form the basis of Ms Yan’s guilty plea. She had entered her guilty plea to a **superseding information**, that was filed on 20 January 2016. It contained a sole count that did not involve any conduct relating to Dr Chau or the USD200,000 payment to Mr Ashe: *Chau* [2019] FCA 1856 at [6]–[7], [25]–[26]. I infer that the publishers were not aware of the superseding information until shortly before the hearing in October 2019 of their application to amend their defence.
4. I am of opinion that the publishers’ use of the mere fact of the sealed complaint and Ms Yan’s guilty plea (which, as later became clear, was to an allegation in the superseding information that had no connection with Dr Chau) to plead justification was an untenable basis on which to plead the truth of either the variant or actual imputations 4, 5 and 6 in the circumstances: *Chau* 271 FCR at 682 [162]. Arguments on those pleadings were dealt with publicly in open Court at the hearings before me in 2018 and 2019, as well as in the Full Court and the High Court in 2019. The publishers had a basis to contend that imputations 4, 5 and 6 were not conveyed and I have accepted their contention that imputation 4 was not. Even so, imputations 5 and 6 were always likely to be found to have been conveyed. All that Mr McKenzie said in attempting to qualify Dr Chau’s role in the bribe case, was that he had not been charged, denied any wrongdoing and that “there is no suggestion Dr Chau knew it was illegal”.
5. That alleged antidote conveyed both that Dr Chau knew that he was paying Mr Ashe in his official capacity and that Dr Chau’s “old friend” Ms Yan had pleaded guilty to bribing Mr Ashe with that payment and had been jailed for doing so. The program was stating unequivocally that the payment was a bribe. The ordinary reasonable viewer would be likely to be aware of the aphorism that “ignorance is no defence”. While the program conveyed, albeit from the publishers’ perspective, that Dr Chau did not *know* that it was illegal under US law to bribe a United Nations official by paying money from China, it did not state that Ms Yan knew that either. But the publishers adopted a position in the program that suggested that the effect of the sealed complaint was that, regardless of whether he knew that was illegal or not, Dr Chau was on equal footing with the guilty Ms Yan.
6. Accordingly, the basis on which the publishers relied for their plea of truth to imputations 5 and 6 (and, had it been relevant, imputation 4), was unjustifiable and that conduct aggravated the damage to Mr Chau’s feelings and his reputation.

### The continuing publication and apology issue

1. Dr Chau argued that the publishers’ conduct in leaving the matter complained of online was improper, unjustifiable or lacking in *bona fides*. The argument ran that was because of the cumulative effect of
	1. my pre-trial ruling on 18 August 2017 that the program was capable of conveying the six imputations that went to trial;
	2. my decision on 31 August 2018 to strike out the defence of truth that the Full Court affirmed on 2 August 2019, and the publishers’ failed further attempt to plead truth that I rejected on 10 October 2019;
	3. Wigney J’s decision in respect of the Fairfax website articles on 22 February 2019, that the Full Court affirmed on 19 March 2020; and
	4. the publishers’ unexplained abandonment on 8 July 2020 of their defence of qualified privilege (AWS17–19).
2. Dr Chau gave the following evidence in chief, which the publishers argued was non-responsive, in answer to how he felt about the facts that the program was still online and the lack of an apology:

DR CHAU: What I felt is that...**I am a person who is very loyal to Australia**, and it is my ongoing wish that the country of Australia becomes stronger and wealthier. **And I have done so much for Australia. And...I don’t have any personal agenda, nor do I ask for anything back. And such a degraded matter would happen to me**.

MR McCLINTOCK: Has Fairfax or the ABC, or, indeed, Mr McKenzie, ever made an apology to you, Dr Chau, for what they said in the Four Corners program?

DR CHAU: **I believe they should, and if I made up anything about them, I should apologise to them as well. And if I was in the wrong, I would apologise to the whole world if I had to.**

(emphasis added)

1. The publishers argued that Dr Chau was not asked in chief if he had sought an apology or was upset by their failure to apologise. They noted that he had not been asked in chief about whether he was aware that his solicitors had sought an apology that had been rebutted. They contended that this meant that they could not be found to have aggravated his damages by not apologising. In addition, they submitted that they were entitled to maintain the position that they defended at trial, namely that Dr Chau had pitched the imputations of which he complained too high and that the ordinary reasonable viewer would not have understood the program to have conveyed them. They argued that, relying on *Carson* 178 CLR at 66, a mere failure to apologise could not warrant an award of aggravated damages. They contended that none of their conduct on which Dr Chau relied in final address was improper, unjustifiable or lacking in *bona fides*.
2. Next, the publishers argued, the program concerned not only Dr Chau, but also other matters of public interest that themselves warranted it being kept available online. They contended that Dr Chau’s solicitors had not sought that the program be taken off the ABC’s website. In their closing written submissions, the publishers offered the following **undertaking** if I were to find in Dr Chau’s favour:

The ABC undertakes, however, that if the Court finds in Dr Chau’s favour, it will permanently post a statement on the second matter complained of (the website version of the program), for so long as it remains accessible, to the effect that Dr Chau successfully brought defamation proceedings in respect of the program and was awarded damages, and a link to the judgment of the Court. Such a course has been adopted in other cases; with the posted statement serving as an antidote that negates any defamatory stings found by the Court to have been conveyed by the original publication

1. I reject the publishers’ argument that Dr Chau’s answers above were non-responsive. I did not find that either answer was. In seeing and hearing Dr Chau give evidence through an interpreter, it was obvious that he was deeply distressed by the original broadcast and the continuing publication of the program online. The interposition of an interpreter and the differing cultural norms of interpersonal behaviour can affect how a statement by a person in one language with a particular culture may understand an interpreter’s rendition of something said in another language by a person from another cultural background. Nuances of each language and cultural response are likely to be lost, literally, in translation. Prior to those answers, Dr Chau had said that each of the six imputations was false and that their publication led to his being “in agony… in all these decades I have never done anything like this, whether or not it was in Australia, China or anywhere in the world. I would never do anything that was against the laws or rules”. Next, he responded to a question about how he felt that the publishers had pleaded that the imputations were true, saying:

**I was very distressed because the[y] were all made-up**, and all these made-up facts impacted hugely on my body as well as my business.

(emphasis added)

1. Immediately after that, Dr Chau gave the above evidence about his feelings concerning the publication remaining online and the lack of an apology. In this context, I am satisfied that his answers to the latter two questions were responsive. The imputations (and, pertinently, the four that I have found to have been conveyed) provided the springboard for what he said in evidence he was feeling, namely that he was being accused of acting against Australia’s interests (imputations 2 and 3) and illegally paying bribes (imputations 3, 5 and 6). I infer that the translation, “and such a degraded matter would happen to me” expressed his reaction to the totality of the program’s attack on, what he understood it to say was, *his* “degraded” behaviour, namely, the matters raised in the imputations which shortly before in his evidence he had said were false and “made up”. I find that he was the more distressed because the program had remained online up to the trial.
2. I also find that Dr Chau’s evidence about the lack of apology demonstrated his distress at the failure of the publishers to apologise. However, as the publishers contended, I have taken into account that Dr Chau did not give evidence that he had ever asked for an apology or about his feelings at the lack of a response.
3. Dr Chau did not give oral evidence that he had authorised his solicitors to seek, as they did on 22 June 2017, the publication of a prominent apology on *Four Corners* and in *The Sydney Morning Herald*, or of knowing that the ABC had refused to do so on 26 June 2017. However, his evidence that the publishers should have apologised to him and that, if he had made up allegations against them, he would have apologised, supports the inference that I draw that he was hurt by their failure to make what he believed was an appropriate response in the circumstances. That is particularly so in the context that immediately before giving that evidence, he had explained his great distress “because they were all made up”. That is, the publication of false imputations distressed him, as did the absence of an apology to correct those falsehoods: *Andrews v John Fairfax & Sons Ltd* [1980] 2 NSWLR 225 at 250 [74] per Glass JA, see too at 243 [48] per Hutley JA.
4. But, a mere failure to apologise, even coupled with the failed pleas of justification, cannot, by itself, be a further factor in aggravation. I am not satisfied that, in the circumstances, Dr Chau has established that the publishers’ failure to apologise was improper, unjustifiable or lacking in *bona fides*: *Carson* 178 CLR at 66.
5. However, the maintenance of the program online, despite the failure of the attempts to mount a truth defence, and the late and unexplained abandonment of the qualified privilege defence, was calculated to exacerbate the personal hurt and harm to reputation that Dr Chau suffered. Personal litigants are likely to feel, as Dr Chau did, the strain of litigation by the way in which it is conducted, including the occasioning of delay: *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 214 [101] per Gummow, Hayne, Crennan, Kiefel and Bell JJ: *Praed* 24 QBD at 55. Here, the unsuccessful challenges, some of which the Full Court found untenable, to my striking out of the original particulars of justification caused the loss of the original trial dates in April 2019. That left the program online for longer and increased the harm to Dr Chau.
6. In my opinion, for the reasons above, all of the publishers caused Dr Chau’s damage to be aggravated by their pleading and persistence in some of the failed defences of justification, because they did not and could not particularise any defence to the variant or actual imputations 4, 5 and 6 and in the abandoned defence of qualified privilege. I am also of opinion that leaving the program online for longer than it should have been there once the High Court refused special leave, and the delay in the trial, also aggravated his damage as a consequence.

## Assessment of damages

1. Importantly, s 34 requires an appropriate and rational relationship between the harm Dr Chau sustained and the amount of damages (both compensatory and aggravated) awarded. In *Nationwide News Pty Ltd v Rush* (2020) 380 ALR 432 at 526 [458]–[463], White, Gleeson and Wheelahan JJ held, following the decision of the Court of Appeal of the Supreme Court of Victoria in *Bauer Media Pty Ltd v Wilson* [2018] VSCA 68, that s 35(2) of the *Defamation Act* operates so that once a Court makes a finding that the circumstances of the publication of the matter complained of warrant an award of aggravated damages, the statutory cap fixed under s 35(1) does not apply at all to the assessment.
2. In arriving at a sum for ordinary compensatory damages in respect of publications such as the initial broadcast and its subsequent continuing availability online, a court should be particularly mindful of what Lord Atkin said in *Ley v Hamilton* (1935) 153 LT 384 at 386:

The libel was a gross imputation upon a man who had held high position in Australia whose character was unassailed…**It is precisely because the “real” damage cannot be ascertained and established that the damages are at large**. It is impossible to track the scandal, to know what quarters the poison may reach: it is impossible to weigh at all closely the compensation which will recompense a man or a woman for the insult offered or the pain of a false accusation. No doubt in newspaper libels juries take into account the vast circulations which are justly claimed in present times.

(emphasis added)

1. In *Gleaner Company Ltd v Abrahams* [2004] 1 AC 628 at 652 [71], Lord Hoffmann giving the advice of the Judicial Committee referred to Lord Hailsham LC’s observation in *Broome* [1972] AC at 1071, that, in case the allegations re-emerge, the damages must be large enough to proclaim the baselessness of the defamation. And as Hayne J observed in *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327 at 349 [67] the assignment of a monetary value to the personal distress and hurt that a defamation caused to a claimant and the harm done to his or her personal (and, where relevant, business) reputation, together with the amount needed to vindicate him or her translates those losses, that have no market value, into an amount of money.
2. I consider that I should make a modest discount from the amount I would otherwise have awarded by force of s 38(1)(c) and (d) based on Wigney J’s verdict and the earlier settlement in respect of the 2015 articles. Those sums related to previous publications to the effect of imputations 5 and 6. Wigney J’s verdict of $225,000 (or $280,000 including pre-judgment interest) took account of the settlement of $65,000 and the publication of a prompt apology for the 2015 articles. Dr Chau accepted that a substantial proportion of the 12,000 persons who read the Fairfax website article also viewed the program and that some of the damages that Wigney J awarded had provided some relief for Dr Chau in respect of those viewers.
3. However, the two matters complained of here (namely the broadcast and ongoing online publication) represent a partial reinforcement of the earlier defamations in the context that the program presented itself to a national audience as a serious investigation, repeating imputations 5 and 6 and adding new, very damaging meanings, namely imputations 2 and 3. Rather than the earlier recoveries mitigating the damage to Dr Chau, the publishers have rubbed fresh salt into the wound beginning 18 months after the wound was opened by the prior publications. The evidence of Mr Ellis and Mr Smith demonstrated that the effect of the 2015 articles and Fairfax website article was substantially spent by the time of the broadcast on 5 June 2017. Some of the emollient effect may have been because of Nationwide’s and New Life’s apology and settlement. The Fairfax website article was published to a very small online audience in comparison to the program and over one year before the program was first published.
4. Moreover, despite Wigney J’s verdict, and their knowledge of the settlement and apology for the 2015 article, the publishers have kept the program available online without any attempt to alert users of the ABC website of the apology or later verdict. They have given no evidence of any arrangement between them that would cause any distinction to be made between them as all responsible for the continuing online publication, as they were for the broadcast. Thus, there is no evidence that, for example, the ABC alone had the right to decide whether the program would be, or remain, available online or that Fairfax or Mr McKenzie could or could not require its removal. In the absence of evidence of arrangements between the publishers that Fairfax and Mr McKenzie had no rights to control the availability of the program online, I infer that each of them did have such a right: *Jones v Dunkel* (1959) 101 CLR 298. In addition, each had a *prima facie* copyright interest in the program.
5. I am of opinion that because of the aggravation that I have found, and discounting the effect of the previous recoveries by $35,000, the appropriate amount to award Dr Chau is $515,000 (or $550,000 before that discount).
6. Dr Chau is entitled to pre-judgment interest on this verdict: *John Fairfax & Sons Ltd v Kelly* (1987) 8 NSWLR 131 at 143E–G, per McHugh JA, with whom Kirby P agreed at 133A–B. McHugh JA observed that in many cases the award of damages will reflect an amount for continuing injury to feelings and reputation to the date of the verdict (at 143A–C). He also said that, except in special circumstances, “an award of damages in a defamation action has, or is to be treated as containing, no award for loss after verdict” (at 142F). Of course, his Honour was speaking of a time before the internet offered virtually ubiquitous availability of any published material online, such as the capacity to access the program online.
7. McHugh JA also discussed the interplay between the continuing impact of injury to feelings and reputation leading to an increase over time of damages for hurt to feelings and harm to reputation, on the one hand, and the likely reduction in the amount needed to vindicate the claimant, on the other. Damages in the former two categories usually increase the longer the period between the date of publication and verdict with the potential for a consequential reduction of the amount required for vindication. That is because of the cognate nature of the award in achieving each of the three purposes for which damages are awarded for defamation (at 143B–G).
8. McHugh JA said that, *prima facie*, a claimant is entitled to interest calculated “on the basis that the verdict represents loss spread over the period from the date of publication to the trial” and that this loss was to be calculated “to the extent that it is fair and proper” (at 144C, 143F–G): *Carson* 178 CLR at 60–61.
9. I am satisfied that Dr Chau’s injury to feelings has been significant and ongoing since he learned of the publication from Winky on about the date of the 5 June 2017 broadcast. Similarly, the injury to his reputation has been both substantial and continuous. The number of playings of the program since 5 June 2017 is similar to the whole readership of the website articles the subject of Wigney J’s verdict (albeit that only about two thirds occurred in Australia). And, even after that verdict about 1,000 people in Australia have downloaded and played the program. Obviously, Dr Chau was always entitled to a very significant sum of ordinary compensatory damages to vindicate his reputation, leaving aside any element of injury to his feelings, reputation and aggravated damages. The amount of pre-judgment interest at the Court’s usual rates (as provided in the Interest on Judgments Practice Note (GPN-INT)) on the whole award of $515,000 is about $97,400.
10. Balancing the various factors to which I have referred, I am of opinion that it will be fair and just to award a total of $75,000 as pre-judgment interest, resulting in a total award of $590,000.

# Injunctive relief

## The publishers’ submissions

1. The publishers argued that Dr Chau should not be granted injunctive relief prohibiting them from continuing to make the program available online in the circumstances. They contended that the program lasted 47 minutes of which less than 7.5 minutes had references to Dr Chau (RCS54; annex A). They submitted that it was common ground that the program as a whole dealt with legitimate subjects of public interest and that an injunction would chill freedom of speech in relation to those subjects with which it dealt that did not form the ground of any of Dr Chau’s complaints. And, they argued, the acceptance of their proffered undertaking would provide a sufficient antidote to any further harm that could occur to Dr Chau from a person viewing the program online in the future. The publishers relied on, among other authorities, *Loutchansky v Times Newspapers Ltd (Nos 2–5)* [2002] QB 783 at 817–818 [74] and *Eatock v Bolt* (2011) 197 FCR 261 at 365 [463]–[464] which held that it would be disproportionate to restrain the public access to online archive material, where the publisher could maintain a corrective notice of the kind proffered in the undertaking.

## Principles

1. In *Loutchansky* [2002] QB at 817–818 [74] Lord Phillips of Worth Matravers MR, Simon Brown and Tuckey LJJ said:

**Archive material is stale news** and **its publication cannot rank in importance with the dissemination of contemporary material**. Nor do we believe that the law of defamation need inhibit the responsible maintenance of archives. Where it is known that archive material is or may be defamatory, the attachment of an appropriate notice warning against treating it as the truth will normally remove any sting from the material.

(emphasis added)

1. In *Eatock* 197 FCR at 365 [463]–[464] Bromberg J adopted a similar approach. That was a case in which he found the applicants entitled to relief in respect of racial discrimination in newspaper articles. His Honour also considered that any attempt to restrict access to, and dissemination of, those articles would be likely to be circumvented because persons could seek access and obtain to them on internet sites other than the newspapers’ website.
2. More recently in *Harbour Radio Pty Ltd v Wagner* [2019] 2 Qd R 468 at 488–489 [51], Fraser JA, with whom Morrison JA and Burns J agreed, discussed the principles which affect the exercise of the court’s discretion to grant a final injunction. Fraser JA discussed the reasoning of Gummow and Hayne JJ in *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57 at 78–79 [55], 79 [57], 80 [59], 81 [61]–[62]. Fraser JA asserted that Gummow and Hayne JJ had concluded that “a court exercising equitable jurisdiction would restrain only repetition of what has been found to be libellous and then **only if it threatened damage to a plaintiff’s proprietary interest**”.
3. Gummow and Hayne JJ did not add a gloss that the claimant’s right had to comprise a proprietary interest. Rather, they affirmed that since the *Common Law* *Procedure Act 1854* (UK) and the decisions in *Saxby v Easterbrook* (1877) 3 CPD 339 and *Bonnard v Perryman* [1891] 2 Ch 269, it was settled that the *Judicature Acts* and their Australian analogues conferred jurisdiction to restrain publication of defamatory matter: *O’Neill* 227 CLR at 81 [62]–[64]. They noted in *O’Neill* 227 CLR at 81 [62] that the law as to the grant of an injunction to restrain a threatened or actual defamation has been settled since Lord Coleridge CJ delivered the judgment of himself, Lord Esher MR, Lindley, Brown and Lopes LJJ in *Bonnard* [1891] 2 Ch 269 at 283–284 when they held:

But the 79th and 82nd sections of the *Common Law Procedure Act*, 1854, undoubtedly conferred on the Courts of Common Law the power, if a fit case should arise, **to grant injunctions at any stage of a cause in all personal actions of contract or tort, with no limitation as to defamation**. This power was, by the *Judicature Act*, 1873, conferred upon the Chancery Division of the High Court, representing the old Courts of Equity…. and **we do not doubt, upon the true construction of the statutes and upon authority, that as matter of jurisdiction Mr. Justice North's order might lawfully be made**. But it is obvious that the subject-matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong. The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and, **unless an alleged libel is untrue, there is no wrong committed**; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. **Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed**; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions.

(emphasis added)

1. Lord Coleridge CJ did not qualify the jurisdictional basis for granting an injunction with any requirement that the legal or equitable right had to be proprietary in nature and nor did Gummow and Hayne JJ. Rather, as Lord Coleridge CJ said, the wrong that created jurisdiction to grant an injunction to restrain a defamatory publication was that it was untrue (the common law being the same as is now reflected in s 25 of the *Defamation Act*, namely that truth is a complete defence to an action in defamation).
2. In *Rush v Nationwide News Pty Ltd* *(No 9)* [2019] FCA 1383 Wigney J made a learned review of the authorities before *Wagner* [2019] 2 Qd R 468. He concluded that, ordinarily, there must be some risk or apprehension of republication of the defamatory imputations that is sufficient, having regard to the nature, the consequences if the risk or apprehension materialises into an actual republication and the harm or damage that the claimant would suffer if that occurred, before the court will grant a permanent injunction (at [27]–[29]). His Honour also considered that the potential for multiplicity of proceedings and (what I would describe as) the prophylactic effect of s 23 of the *Defamation Act* were relevant considerations in the exercise of the court's discretion (at [32]–[43]).
3. Wigney J also recognised that the grant of a permanent injunction is a discretionary remedy that, ordinarily, will be affected by consideration of equitable principles (at [44]–[46]). I would only observe that, as revealed by the historical analysis of Gummow and Hayne JJ in *O’Neill* 227 CLR 57, the source of the court's power to enjoin a defamatory publication was not found in the Chancery but in the statute book. The remedy is statutory, not equitable, and the statute does not condition the court’s discretion, as Lord Coleridge CJ explained (see [176] above).
4. As Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ said of this Court’s power to grant an injunction to restrain or correct ongoing tortious conduct in *Patrick Stevedores (No 2) Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 31 [33]:

A court whose jurisdiction is invoked in a conspiracy case has power to grant an injunction to prevent the completion or effecting of the conspiracy (*British Motor Trade Association v Salvadori* (1949) Ch 556; *Gulf Oil Ltd v Page* (1987) Ch 327; *Femis-Bank (Anguilla) Ltd v Lazar* (1991) Ch 391 at 397, 400). Where the acts contemplated by the conspirators have all occurred and the tort is complete, the remedy available to an injured plaintiff is ordinarily limited to the recovery of pecuniary damages (See *Deere v Guest* (1836) 1 My & Cr 516 [40 ER 473]). **But for over a century it has been established that "there is no rule which prevents the court from granting a mandatory injunction where the injury sought to be restrained has been completed before the commencement of the action"** (Kerr, *A Treatise on the Law and Practice of Injunctions,* 3rd ed (1888), P 50.). **Where the damage caused by tortious conduct is ongoing and is "extreme, or at all events very serious", a mandatory injunction may issue compelling the wrongdoer to prevent the occurrence of further damage** (Ch D 681 at 698; *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 at 810; [1974] 2 All ER 321 at 337; Joyce, *The Law of Injunctions*, 2nd ed (1872), vol I, p 439; *Daniell's Practice of the High Court of Chancery*, 8th ed (1914), vol 2, p 1400.).

(emphasis added)

1. In addition to the statutory power to grant an injunction to restrain a defamatory publication initially conferred on English courts of common law in 1854, a court of equity had power to grant injunctions in the auxiliary jurisdiction. That extends to two principal categories, namely to prevent a multiplicity of actions and to restrain the threatened infringement of a legal right (which extends beyond a proprietary right): Heydon, Leeming and Turner, *Meagher, Gummow & Lehane’s* *Equity: Doctrines and Remedies* (5th ed, LexisNexis Butterworths)at [21-025]. Thus, in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, Gaudron J at 231–232 [60] and Gummow and Hayne JJ (citing from Lord Diplock’s speech in *The “Siskina”* [1979] AC 210 at 256) at 240–241 [88]–[99], 209 [138]) noted that the remedy of an injunction is available to promote or assert a legal or equitable right. Gleeson CJ agreed with the statement of the principles by Gummow and Hayne JJ (at 217 [10]). Again, neither the High Court or Lord Diplock added any qualification as to the nature of the legal or equitable right or a requirement that it be proprietary in nature. Claimants’ counsel have reminded juries of Iago’s use of a good name to inflame, not only Othello, but hopefully their awards of damages. As Iago said (Shakespeare, *Othello:* Act III sc 3 lines 176–182):

Good name in man and woman, dear my lord,

Is the immediate jewel of their souls.

Who steals my purse steals trash. 'Tis something, nothing:

'Twas mine, ’tis his, and has been slave to thousands.

But he that filches from me my good name

**Robs me of that which not enriches him**

And makes me poor indeed.

(emphasis added)

1. An individual’s reputation and his or her right to protect it is not property. And, in a business context, reputation is not necessarily congruent with goodwill, although the two may overlap. Reputation, personal or business, is what others think of one. It cannot be bought or sold, but courts must place a value on damage done to it. If *Wagner* [2019] 2 Qd R at 488–489 [51] decided as a matter of its *ratio decidendi* that the claimant had to have a legal proprietary right at risk before the court had power to grant an injunction to restrain a defamatory publication, it was plainly wrong and should not be followed: *Farah Constructions Pty Ltd v Say Dee Pty Ltd* (2007) 230 CLR 89 at 151–152 [135] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ.
2. For these reasons, I am of opinion that the legal right to take proceedings in defamation for damage to reputation is sufficient to found jurisdiction in this Court under ss 5(2) and 22 of the *Federal Court of Australia Act 1976* (Cth).

## Consideration

1. The relevant legal wrong is, as I have found, that the program published untrue and seriously defamatory imputations about Dr Chau. The Court has jurisdiction to restrain the further publication of the program because, as the publishers have made clear, they intend to continue publishing it and so making those imputations that I have found to be false, seriously defamatory and otherwise indefensible.
2. Moreover, here, Dr Chau has been injured in his business reputation by imputations 2, 3, 5 and 6 both in Australia and China.
3. In my opinion, Dr Chau has not established a basis on which he could be entitled to an injunction in the wide terms claimed in his originating application, namely, an order that the second matter complained of, in its entirety, be taken off the ABC’s website and any other archive of the ABC. The program related to a far broader subject matter than issues concerning (or defaming) Dr Chau. The other issues were legitimate subjects of public interest that are of continuing relevance today.
4. However, that factor also demonstrates that the second matter complained of is not merely archival in nature. The evidence revealed that in the nearly two years to late September 2020, it was actively accessed by over 4,000 persons and that nearly 1,100 persons in Australia streamed, downloaded or viewed the program in that period.
5. The purpose of an injunction prohibiting a publisher from republishing or enabling republication of defamatory matter is to enable a claimant to have a remedy that is as effective as possible in protecting or asserting his, her or its legal right, especially one established by a verdict in the claimant’s favour. While it is possible that a determined searcher may be able to find a copy of the program on the internet at a website other than the ABC’s, Dr Chau is entitled to an effective vindication and remedy against the publishers, including the ABC. Here, the publishers, through the ABC, continue to make the program available online, where it is still being accessed, streamed and viewed by a not insubstantial number of persons not only in Australia, but also internationally. That is calculated to undermine the vindication of Dr Chau’s reputation. The mere placement of a statement on the website version of the program that Dr Chau successfully brought defamation proceedings in respect of the program and was awarded $590,000 damages, with a link to these reasons, would not be a sufficient antidote in all of the circumstances. That is especially since the program is not being accessed as a mere archive, but is being used because of the ongoing legitimate public interest in its other subjects.
6. Moreover, there is no evidence or other reason why the publishers cannot continue to make the portions of the program that are anodyne to Dr Chau available for viewing online or why they cannot edit it to remove the defamatory imputations.
7. Relevantly, s 8 of the *Defamation Act* creates a single cause of action for the publication of defamatory matter about a claimant, such as the matters complained of here by Dr Chau. Importantly, s 23 prohibits Dr Chau from bringing further proceedings against any of the publishers for damages in relation to the same or any other publication of the program except with leave of the Court in which he may institute such proceedings. In *Kelly* 8 NSWLR at 142F, McHugh JA said that ordinarily, an award of damages in a defamation action “is to be regarded as preventing any further injury to” the claimant. However, that was in an age unlike the present where the defamatory matter is still able to be, and is being, freely accessed by a not insubstantial number of viewers online.
8. Because of the continuing availability of the program online, the lack of jurisdiction to award damages for the future and the requirement in s 23 for leave to bring subsequent proceedings with the cost involved in doing so, damages are not an adequate remedy for Dr Chau here.
9. The purpose of an award of damages would be defeated if the publisher were free to continue to repeat, or make available for others to download and view, the defamatory matter while the claimant would need leave of a court under s 23 to bring fresh proceedings. The award must be sufficiently large to vindicate Dr Chau in the future (*Broome* [1972] AC at 1071C; *Kelly* 8 NSWLR at 142E–F), yet the legislature has put a cap on ordinary compensatory damages and a conditional prohibition, in s 23, on a claimant bringing fresh proceedings for republications subsequent to those the subject of the initial proceeding. Thus, the remedy of an injunction is an appropriate and effective means of enabling the court to prevent a further proceeding based on the ongoing availability of the defamatory imputations online.
10. Nor do I consider that the undertaking that the publishers proffered (see [151] above) is sufficient given the significant number of people who still access and view the program online because of the ongoing public interest in the parts of it that are not defamatory of Dr Chau. The persons who are likely to access the program in the future are not likely to use a link to, or spend hours reading, these reasons to see why Dr Chau was awarded damages: *Cairns* [2013] 1 WLR at 1025 [32].
11. The power and duty conferred on the Court in s 22 of the *Federal Court Act* is directed to ensuring that the Court disposes of each matter completely and finally so as to avoid multiplicity of proceedings: see *Carpenders Park Pty Ltd as trustee of the Carpenders Park Pty Ltd Staff Superannuation Fund) v Sims Ltd* [2020] FCA 1681 at [29] per Rares J and the cases there cited.
12. In my opinion, I should grant an injunction restraining the publishers from any further publication of each of the imputations 2, 3, 5 and 6. They have persisted, even after Wigney J’s verdict against Fairfax in keeping the unedited program online. To the extent that the program deals with other matters that the publishers consider are of public interest, they are free to edit it to remove the slurs that they have cast on Dr Chau. The ABC’s undertaking would not achieve a proper vindication. The publishers led no evidence of why there would be any difficulty in editing the program to remove its seriously defamatory content that conveyed imputations 2, 3, 5 and 6. Those sections of the broadcast were, in my opinion, central to its thrust and should not be allowed to remain available at the publishers’ will.

# Conclusion

1. Dr Chau is entitled to the following relief, *first*, a verdict, including pre-judgment interest, of $590,000, *secondly*, a permanent injunction restraining the publishers from publishing or making available online or otherwise so much of the program as conveys any of imputations 2, 3, 5 and 6, and *thirdly*, costs.

|  |
| --- |
| I certify that the preceding one hundred and ninety-six (196) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Rares. |

Associate:

Dated: 2 February 2021

**ANNEXURE A**

## Transcript – “Power and Influence”

## Monday 5 June 2017

MIKE MCCAUL, CHAIRMAN, HOMELAND SECURITY COMMITTEE: It's almost like out of a spy novel. These are very dangerous, clandestine figures in Chinese intelligence and, there was a concerted effort to, to influence our elections.

BILL CLINTON: Hi Johnny, how are you? Good to see you. How you doing?

PROF. JOHN FITZGERALD, THE FORD FOUNDATION, BEIJING, 2008 - 2013: Well, every government of course has an interest in promoting itself abroad. To extending its soft power. I guess what's different about China is the way in which it's run through these clandestine operations. It's just not out there and open. It's out to silence dissent.

PETER JENNINGS, EXECUTIVE DIRECTOR, AUSTRALIAN STRATEGIC POLICY INSTITUTE: I think that this type of, frankly, naked influence buying, is something, which is damaging to Australia's political system.

MIKE MCCAUL, CHAIRMAN, HOMELAND SECURITY COMMITTEE: The critical issue here is allowing a foreign government to influence your elections, and in this case, China, is the, the, the biggest offender.

CHRIS UHLMANN: For six months, the world has watched the unfolding story of how the Russian government and its agents sought to subvert the US election, and possibly helped deliver the presidency to Donald Trump.

Extraordinary though that story is, it is not unique. America is not the only democracy to have been targeted in this way, and Russia is not the only country accused of such subversion.

Just ten days ago, the head of Australia's peak intelligence agency ASIO warned that espionage and foreign interference are occurring here on an unprecedented scale, with the potential to cause serious harm to this nation's sovereignty, it's security and, he added, the integrity of our political system.

Duncan Lewis did not name the key suspect. But we can tonight - the Chinese Communist Party.

A joint investigation by a team of journalists from 4 Corners and Fairfax Media has exposed a concerted campaign by the Chinese government and its proxies to infiltrate the Australian political process to promote its own interests.

Its targets include our universities, local student and community groups, the Chinese language media, and - most disturbing of all - some of our nation's leading politicians.

This investigation reveals that business leaders allied to Beijing are using millions in political donations to the major parties to buy access and influence, and in some cases to push policies that may be contrary to Australia's national interests.

Nick McKenzie has the story.

NICK MCKENZIE, REPORTER: In the early hours of a cold morning in October 2015, a team of counter espionage officers breaks into a Canberra flat.

Their target is a Chinese born woman, who is married to a former high ranking Australian intelligence official.

ASIO suspects the woman is involved in spying for the Chinese Government.

PROF. RORY MEDCALF, NATIONAL SECURITY COLLEGE, ANU: For such an action to be taken you would assume that it would need the authorization of the Attorney General, it would need a warrant, and it would need essentially a decision involving many parts of the Australian National Security Community.

So it would reflect deep and real concern about Chinese espionage in Australia.

NICK MCKENZIE, REPORTER: The woman's name is Sheri Yan … a socialite with connections to the senior levels of government, here and abroad.

Did you think she might be a Chinese intelligence operative of some sort?

PROF. JOHN FITZGERALD, THE FORD FOUNDATION, BEIJING, 2008 - 2013: I understand that Sheri Yan is very closely connected with some of the most powerful and influential families and networks in China.

Once you know that you don't need to know much more.

NICK MCKENZIE: Yan's husband, Roger Uren, was until 2001 Assistant Secretary at Australia's Office of National Assessments, the agency which provides secret intelligence briefings to the Prime Minister.

During the raid, ASIO seized computers and documents.

They discovered classified Australian government files on the work of Chinese intelligence.

Uren is being investigated for the removal of these files, which may have been illegal.

PROF. RORY MEDCALF: This material is normally held very tightly held.

Presumably it relies on intelligence sources and methods, which can't be compromised.

It also could potentially reveal some of the deepest intelligence and analytical judgements of either Australia or indeed of Australia's allies and partners.

So it's material that has to be protected at all costs.

NICK MCKENZIE: In the weeks before the raid, ASIO analysts had been tracking links between political donors in Australia and the Chinese Communist Party.

The donations provided access to the most powerful politicians in the land.

ASIO chief Duncan Lewis was so worried, he organised meetings with the Directors of the Liberal and National parties, as well as the Federal Secretary of the ALP, to warn them that the donors could compromise the major parties.

NICK MCKENZIE: How unusual is it for a directed general of ASIO to take such a step?

PROF. RORY MEDCALF: Oh it's certainly unusual.

If that is indeed the case, it would reflect very real, very real concern.

NICK MCKENZIE: When he briefed the party officials, Lewis said the donors being examined by ASIO were breaking no laws.

But he warned their strong connections to the Chinese Communist Party meant their donations might come with strings attached.

ASIO briefed then Prime Minister Tony Abbott.

PETER JENNINGS, EXECUTIVE DIRECTOR, AUSTRALIAN STRATEGIC POLICY INSTITUTE: I think that this type of, frankly, naked influence buying, is something, which is damaging to Australia's political system.

I would far rather have a regime in place whereby we, the tax payer, pay for the cost of our elections than relying on parties to get donations from foreign sources, where ever they may come from.

Notably those foreign sources are primarily linked to Chinese business.

NICK MCKENZIE: ASIO singled out two billionaire donors with especially close ties to the Chinese Communist Party.

The first was enigmatic property developer Dr Chau Chak Wing, a man who keeps a low profile except when it comes to his big donations.

PETER MATTIS, FORMER CIA CHINA EXPERT: He sort of appeared out of nowhere.

There's very little in his biography that predates his appearance and his entry onto the Australian and China business scene.

NICK MCKENZIE, REPORTER: Dr Chau's extraordinary generosity has given him access to Australia's political elite.

Dr Chau donated $20 million dollars to build a Frank Gehry designed building at the University of Technology Sydney, which was opened by the Governor General in 2015.

At the unveiling of the Dr Chau Chak Wing building, the billionaire politely posed with the famous architect.

Not content with having a building named after him, Dr Chau splashed $70 million dollars on Australia's most expensive home in 2015.

A six story mega mansion he bought from James Packer.

Dr Chau's money allowed him to regularly rub shoulders with the great and good of Australian politics.

He's donated more than $4 million to the major parties over the past decade.

The question ASIO has been probing is what he wants from his donations?

PROF. RORY MEDCALF: We don't know whether donations are somehow driven, or centrally encouraged, by the Chinese Communist Party, or whether in fact you've got enthusiastic individuals freelancing to make donations that they think will resonate well when they report back to China, or if they report back to China that these donations were made, and that there is a change taking place in the Australian political discourse.

NICK MCKENZIE: Dr Chau is an Australian citizen.

Back in his homeland China, he was also a member of a communist party advisory group known as a people's political consultative conference or CPPCC.

This group carries out the work of an opaque lobbying arm of the Party called the United Front Work Department.

PROF. RORY MEDCALF: We have to assume that individuals like that have really deep, serious connections to the Chinese Communist Party.

Even if they're not receiving any kind of direction, they would feel some sense of obligation, or indeed some desire to make the right impression on the powers that be in China, to demonstrate that they're being good members of the party, that they're pursuing the party's interests.

PETER MATTIS: In a sense, you could say in Australia that with wealth comes responsibility, and that responsibility is to respond to the party when they ask you to do a favour for them.

GEOFF RABY, AUSTRALIAN AMBASSADOR TO CHINA, 2007 - 2011: Well I think it's mainly to do with their own business interests in Australia.

Also, it's very much in the nature of the way Chinese do business, making gifts.

And most of these business developers and sorts of people who are doing this, they crave the prestige and the status of being photographed standing next to politicians, on both sides of politics.

So, it's about their influence and status and image.

Which they see as helping their business first and foremost, giving their family respect.

It's very much a traditional Chinese way of operating.

NICK MCKENZIE: Four Corners has learned ASIO's interest in Dr Chau arose partly from his association with a woman described as an 'old friend - the socialite and lobbyist Sheri Yan.

It was Sheri Yan who ASIO suspected of spying and whose Canberra apartment the agency raided.

PETER MATTIS: Sheri Yan, or Yan Shiwei, is an Australian-Chinese businesswoman who's made her livelihood out of building connections between China and the outside world and acting as a go-between between foreign businessmen, foreign government officials who are trying to get things done in China, or find their way among the bureaucratic and political land mines that are there.

NICK MCKENZIE: Dr Chau used Sheri Yan as a consultant, somebody able to open up the right doors.

GEOFF RABY: She's a very active person.

Many people come through the place, through Beijing.

She's a, you know, dynamic, active person, speaks both languages perfectly, is charming, and comes from a well-connected background, which I don't know what those connections are, I only understand that's the case.

PETER MATTIS: It appears her father was a PLA officer at one point in the very early days, so she's connected to the core of the CCP in a sense.

No one can really explain where her original money, original connections, her original ways of opening the doors in China comes from.

NICK MCKENZIE: Sheri Yan divided her time between New York, Beijing and Canberra, and moved with ease among the A-listers.

Her contacts included high flying businessmen and Australia's former New York consul general Phil Scanlan.

She was also close to the President of the United Nations General Assembly, John Ashe.

PETER MATTIS, FORMER CIA CHINA EXPERT: Someone who knows how to work that landscape is useful not only for getting things done, not only for injecting Chinese perspectives into it, but also for being able to say, "Here are the players. Here are the people who are important.

"Here are their personal foibles."

NICK MCKENZIE, REPORTER: As Sheri Yan relentlessly networked, her husband Roger Uren was often proudly by her side.

Uren's previous work as a high ranking Australian intelligence official with top security clearance meant he was trusted in Canberra.

But not everyone trusted Sheri Yan.

PROF. JOHN FITZGERALD: In times, past I was advised to stay well clear of Sheri Yan.

NICK MCKENZIE: Why?

PROF. JOHN FITZGERALD: I'm not entirely sure why.

I was advised by an old friend in Australia's security establishment.

NICK MCKENZIE: To stay clear of Sheri Yan?

PROF. JOHN FITZGERALD: To stay clear of Sheri Yan.

NICK MCKENZIE: In October 2015, the Sheri Yan story took a sudden and dramatic twist in New York.

PREET BHARARA, NEW YORK ATTORNEY GENERAL: Today, together with our law enforcement partners, we expose yet another wide-ranging corruption scheme, one that is simultaneously local and global and it is centred at the United Nations.

NICK MCKENZIE: At the same time her Canberra apartment was being raided, Sheri Yan was arrested in the US, accused of bribing the UN general assembly president.

Yan's arrest stunned her associates, including former Australian ambassador Geoff Raby.

GEOFF RABY: Well I was obviously very surprised. I couldn't believe it when I heard it. But she had been out of Beijing largely for a couple of years.

JOURNALIST: Can I just ask if you are aware of Sheri Yin? She was arrested in the US last week for bribery allegations in the UN.

She is a bit of a mystery, it seems that she lives here in Canberra, or at least may be a dual citizen, but no one is quite sure.

Is it a consular case?

JULIE BISHOP, MINISTER FOR FOREIGN AFFAIRS: I have been briefed on the matter, it is a matter that the Department of Foreign Affairs and Trade is focussing on but I'm not going to go into individual cases at this point, but it is a matter upon which I've been briefed.

JOURNALIST: Can you say if she's an Australian-Chinese?

JULIE BISHOP, MINISTER FOR FOREIGN AFFAIRS: I'll leave that sort of detail to our consular staff.

It's a fairly complex issue, I don't want to compromise any of the investigations which are underway.

Thank you.

NICK MCKENZIE, REPORTER: One of the events that led to Sheri Yan's arrest unfolded at the luxury Imperial Springs Resort, which is owned by none other than the Australian political donor Dr Chau Chak Wing.

The FBI alleged Yan bribed the UN general assembly President to speak at the resort, at a conference hosted by Dr Chau.

A sealed indictment from a New York Court against Sheri Yan refers to Dr Chau using a codename - CC3.

Sheri Yan was alleged to have told the UN President

SHERI YAN: [CC3's] office emailed me with the invitation.

I will ask $200,000 for this trip...

NICK MCKENZIE: A draft invitation sent to the United Nations president and allegedly approved by Dr Chau stated his desire to make the UN chief his "sincere friend in Guangdong Province"

DRAFT INVITATION: And your friend here has the pleasure to offer you a permanent convention venue for the UN meetings...

NICK MCKENZIE: The UN president's bank account was then wired $200,000 by one of Dr Chau's companies.

Under US bribery law it was illegal for Ashe as UN official to receive this payment.

There is no suggestions Dr Chau knew it was illegal.

PETER MATTIS: At least some of the money that was moving through Sheri Yan, or that she was facilitating, came from him.

It doesn't mean that there was necessarily anything untoward about it, but just the fact of large amounts of money being moved or paid to people because of introductions or the activities of Sheri Yan make it, make it somewhat suspect.

NICK MCKENZIE: Sheri Yan pleaded guilty to bribery charges and was jailed last year.

Dr Chau has never been charged with any offence and denies any wrongdoing.

ASIO's interest in Sheri Yan is just one of many suspected foreign interference and intelligence cases being probed by Australia's agencies, and which lead back to Beijing.

PROF. RORY MEDCALF: it's fair to say that agencies like ASIO are really quite alive and alert to these issues.

The challenge for them is that their mandate is essentially to monitor, and to report to government what's happening.

They don't have a mandate, it's not clear who within the Australian system has a mandate to act on this information.

NICK MCKENZIE: In Washington, concerns about the Chinese Communist Party interfering in Australian politics is growing.

There, senior officials believe Australia is open to compromise, including through foreign donations.

MIKE MCCAUL, CHAIRMAN, HOMELAND SECURITY COMMITTEE: Well, you know, in the United States we prohibit that expressly.

I think there's a reason for that.

We don't want the influence of foreign money in our elections and foreign governments to influence our elections.

I think that's a wise policy.

Quite frankly, I was a bit surprised that Australia does allow foreign contributions, and if you look at the numbers, which I was privy to, a lot of these donations are coming from China.

China has a very strong influence in the region.

They want to influence Australia.

They want a stronger presence in Australia, and what better way to do that then to influence political figures through, through foreign contributions.

NICK MCKENZIE: Republican congressman Mike McCaul is chairman of the Homeland Security Committee.

In the 1990s while a prosecutor at the US Justice Department, he investigated a scandal known as 'China-gate'.

Chinese spies funnelled donations into the Clinton presidential campaign.

MIKE MCCAUL: It's almost like out of a spy novel.

I mean, it's the most interesting case I ever prosecuted.

These are very dangerous, clandestine figures in Chinese intelligence and there was a concerted effort to influence our elections.

NICK MCKENZIE: McCaul warns Australia is badly exposed, unless our laws are changed.

MIKE MCCAUL: The critical issue here is allowing a foreign government to influence your elections.

I think at a minimum, closing off foreign contributions from a foreign government to influence elections, and in this case, China is the biggest offender.

NICK MCKENZIE: Chinese Premier Li Keqiang's visit here in March came as Australia grapples with a shifting world order post the election of Donald Trump, and an emboldened Chinese Communist Party no longer content to hide its strength and bide its time.

In Australia's diplomatic and security community, debate is raging about why and to what extent the one-party state is seeking influence in Australian institutions.

In Canberra, local students were bussed in by the Chinese Embassy, to welcome Premier Li

NICK MCKENZIE: The young patriots drown out those there to protest against the Chinese government.

Lupin Lu is President of the Chinese students' association at the University of Canberra. She organised 200 of her classmates for the rally.

LUPIN LU, PRESIDENT, CHINESE STUDENTS AND SCHOLARS ASSOCIATION, UC: The Chinese Embassy, they support us or sponsor us by providing flags, food.

NICK MCKENZIE: The flags?

LUPIN LU: Yes.

NICK MCKENZIE: The food?

LUPIN LU: Transportation.

NICK MCKENZIE: Transportation.

LUPIN LU: And legal help as well, lawyer.

NICK MCKENZIE: For the event, for the day?

LUPIN LU: Yes, because there is politics involved.

Sometimes there may be conflict with the police.

NICK MCKENZIE: The Chinese government and its proxies monitor Chinese student associations at most Australian universities.

This oversight has a dark side.

Students organising anti-communist party protests may be reported to the Chinese Embassy.

LUPIN LU: I guess as the president of Chinese Students Scholars Association and as a Chinese, I would do this for the safety of other members, other students.

NICK MCKENZIE: You would tell the embassy that some students were organising a human rights protest, for instance?

LUPIN LU: Yes. I would definitely, just to keep all the students safe and to do it for China as well.

NICK MCKENZIE: Brisbane student and democracy activist Anthony Chang believes he is being monitored by the Chinese Government.

He fled China three years ago after he was arrested and interrogated for putting up posters supporting independence for Taiwan.

ANTHONY CHANG, STUDENT ACTIVIST: When they took me to the police station, I was still frightened.

I had my hands over my head, and I said, "I will absolutely obey you, just make sure you don't shoot me".

As you can see, I was scared of them.

NICK MCKENZIE: He didn't expect to come to the attention of the Chinese authorities, here too.

But after he spoke in Brisbane at this pro Hong Kong democracy rally, his parents back in China were visited by state security officials, who demanded their son cease his Australian activism.

ANTHONY CHANG: My parents, are very worried.

They are worried that it might affect them, for example their work.

They could lose their job.

They could be jail because of my activities.

NICK MCKENZIE: One of the fiercest critics of communist party interference in Australia is Sydney academic Dr Feng Chongyi.

While Premier Li was being feted in Australia, Dr Feng was back in China to meet with human rights lawyers - work he knew would draw attention.

DR FENG CHONGYI: We know that it's an open secret that we are, our telephone is tapped, we are followed everywhere but that is a routine that we have to accept if we want to work in China.

NICK MCKENZIE, REPORTER: But Dr Feng did not expect what happened next.

At his hotel in the city of Kunming, he was tracked down by agents from the Ministry of State Security.

Over the next 10 days he was subjected to intensive videotaped questioning … for up to 6 hours a day.

Many of the questions involved his activities in Sydney.

NICK MCKENZIE: They wanted to know about your democracy activism in Sydney.

DR FENG CHONGYI: In Sydney, yes that's right.

NICK MCKENZIE: They wanted to know about your associates in Sydney?

DR FENG CHONGYI: That's right.

NICK MCKENZIE: They knew about your family in Sydney?

DR FENG CHONGYI: That's right.

NICK MCKENZIE: They knew specific details about names?

DR FENG CHONGYI: Actually, for my family members they, they got everything.

They got everything.

NICK MCKENZIE: Dr Feng was accused of endangering state security.

Only after the intervention of the Turnbull government was he told he was finally free to return home to Sydney.

He believes he was targeted by the Chinese Communist Party as a warning to others in Australia not to challenge the party.

DR FENG CHONGYI, ASSOCIATE PROFESSOR, CHINA STUDIES, UTS: there are several messages they are sending on.

One is directly related to my work, that the academics better stay away from sensitive issues or sensitive topics, otherwise they can get you into deep trouble, detention or other punishment.

NICK MCKENZIE: While Dr Feng was trapped in China, back in Australia, Premier Li was the guest of honour at a Chinese community event held at the Sydney Town Hall.

Sitting at the head table opposite Premier Li was Dr Chau Chak Wing.

A couple of seats over from him was another Chinese billionaire - Huang Xiangmo.

Like Dr Chau, Mr Huang has come to the attention of ASIO.

Mr Huang is the second donor named by ASIO in its secret warning to the Coalition and Labor about the danger of Chinese Communist Party interference in Australian politics.

PROF. JOHN FITZGERALD: When we look at other business people contributing say to Australian political parties, we can go back through the company records and establish where that money came from.

In the case of Mr Huang it's not quite so clear.

NICK MCKENZIE: Mr Huang's rise is a classic rags to riches story.

From a poor rural family, he built his billion-dollar fortune as a property developer in provincial China.

Mr Huang arrived in Australia in 2011 in near total obscurity.

But that didn't last for long.

NICK MCKENZIE: Mr Huang, and his property development firm Yuhu, began donating millions of dollars to health and education initiatives, earning the praise of politicians from both parties

ANDREW ROBB, MINISTER FOR TRADE AND INVESTMENT, 2013 - 2016: I thought I'd just say a couple of words about Mr Huang.

I think it's important to get a sense of the man.

He is a man of many dimensions from what I've already been able to determine.

Thoughtful, he's a very thoughtful cerebral fellow.

He's a man who thinks, about life and about how we can improve it.

He's a man comfortable in his own skin, he's a man with a sense of humour which is a good thing.

He's a visionary.

NICK MCKENZIE: Mr Huang became a major political donor too.

Getting to know Tony Abbott - he gave $770,000 to the Liberals before the 2013 election.

A big chunk of that went to Julie Bishop's home state of Western Australia.

Mr Huang and his associates also gave to the Trade Minister Andrew Robb …. $100,000 to his campaign fundraising vehicle, as Robb signed off on the China Australia Free Trade deal.

And $1.8 million went towards an Australia China Research Institute. Mr Huang became its chairman, its director - former Foreign Minister Bob Carr.

PROF. JOHN FITZGERALD: First, he's seeking to establish his position, his status in the Chinese Australian community.

Secondly, I think he's trying to secure some standing for the Chinese Australian community with various Australian governments at state federal level and third through those community organisations, to secure outcomes that are favourable to the Chinese State Policy.

NICK MCKENZIE: In the right company, Mr Huang makes no secret of his devotion to the Chinese Communist Party.

At an event celebrating 66 years of one party rule in China, Mr Huang took to the stage

HAUGN XIANGMO: We overseas Chinese unswervingly support the Chinese Government's position to defend our nations sovereignty and territorial integrity.

We support the development of the motherland always, and take on an important role in building One Belt One Road.

NICK MCKENZIE: Mr Huang oversees a communist party aligned Council which supports Beijing's territorial claims over Taiwan, Hong Kong and the South China Sea.

It's called the Australian Council for the Promotion of the Peaceful Reunification of China, and Mr Huang is President.

DR FENG CHONGYI: That means he's a key member supported by the Chinese authorities including the Embassy or the consulate here.

That as I said is the most influential organisation or association in the Chinese diaspora community in Australia.

Whoever took the position as the head of that organisation means he can be identified as the leader, the most influential figure in the Chinese community.

Enjoys very high status.

NICK MCKENZIE: Mr Huang's Council is dedicated to pushing the Communist Party's interests in China and abroad.

PROF. JOHN FITZGERALD: Well every government of course has an interest in promoting itself abroad to extending its soft power.

I guess what's different about China is the way in which its run through these clandestine operations.

It's just not out there and open.

Secondly, it's really not out to win an argument, it's out to silence dissent and other countries generally don't operate that way.

They expect to win an argument on its strengths, not to silence all opposition.

The way the Chinese Government or Party through the United Front Department and the Overseas Chinese Bureau operates is effectively to control and silence dissent.

NICK MCKENZIE: Mr Huang chaperoned the top Communist Party official in charge of Overseas Chinese, and who was accompanying Premier Li on his Australian visit.

QUI YUANPING: Of course, as we say, "a mother always worries about her traveling child." To all our overseas Chinese, including students, you will always be an important member of the global Chinese family.

NICK MCKENZIE: Mr Huang has made something of an artform of juggling his Chinese Communist Party ties with his cultivation of Australian political figures.

DR FENG CHONGYI: Obviously, he has two identities.

One of course is a businessman, quite a smart businessman.

Then again, the other identity he's trying to be a political figure.

He does have his own political ambition.

NICK MCKENZIE: One of Mr Huang's advisors on the peaceful reunification Council is NSW Labor politician Ernest Wong.

A close ally and friend, the pair travelled to Taiwan together on Reunification Council business.

In November 2012, Mr Huang and two other reunification council members, donated half a million dollars to the NSW ALP.

Six months later, the ALP put Ernest Wong into the NSW Upper House seat formerly held by Labor's Eric Roozendaal.

Roozendaal went on to get a job with Mr Huang.

PROF. JOHN FITZGERALD: Well Mr Huang is very generous to all parties.

He could hardly be called partisan; he contributes to the Liberal Party as well as to the Labor Party.

He's also a very generous employer of former party operatives.

NICK MCKENZIE: Another of Mr Huang's political allies, and a fellow member of the Peaceful Reunification Council, is active ALP identity Simon Zhou.

Zhou was given the last place on the Labor party's senate ticket at last year's election, a month after two of his business associates donated $60,000 to the ALP.

Mr Huang was at the announcement.

HUANG XIUANGMO: As China's power keeps rising, the status of overseas Chinese is also rising.

Now Overseas Chinese realise that they need to make their voices heard in politics.

To safe guard Chinese interests, and let Australian society pay more attention to the Chinese.

This is a very good thing."

NICK MCKENZIE: Within Labor, Sam Dastyari was Mr Huang's key contact.

As the Party's NSW general secretary, and then as a Senator, Dastyari has welcomed hundreds of thousands of dollars in donations from Mr Huang.

SAM DASTYARI, LABOR SENATOR: A demonstration MR Huang of how highly you're respected, how much all of us respect you and the work you do.

NICK MCKENZIE: An incident that occurred in June 2016 leaves little doubt that Mr Huang expects something in return for his donations.

In the lead up to the federal election, he promised the ALP 400 thousand dollars in donations.

But then, at the National Press Club, Labor's defence spokesman Stephen Conroy criticised Beijing over its land grabs in the South China Sea, flagging the ALP would take a more aggressive approach in the disputed territory.

STEPHEN CONROY, LABOR DEFENCE SPOKESMAN: When it comes to regional security challenges like the south china sea the Turnbull government are sitting behind ambiguous language while refusing to be upfront with the Australian people.

By contrast, we believe our defence force should be able to conduct freedom of navigation operations consistent with international law.

NICK MCKENZIE: After this speech, Mr Huang reacted decisively to this apparent attack on one of the Chinese Communist Party's core policies.

Four Corners has learned, that Mr Huang called the ALP and told them that because of Conroy's comments, he was cancelling his promised $400,000 donation.

PROF. RORY MEDCALF: It's precisely the kind of example of economic inducement being turned into economic leverage or coercion.

In other words, it's a classic example of a benefit being provided, but then withheld as a way of punishment, and as a way of influencing Australian policy independence.

NICK MCKENZIE: Just one day after Stephen Conroy's comments, Mr Huang appeared at a press conference alongside his Labor mate.

Contradicting his Party's position, Senator Dastyari told the Chinese media that Australia shouldn't meddle with China's activities in the South China Sea.

When his comments were reported several weeks later, he tried to explain.

JOURNALIST: Why did you hold that press conference and make those comments on the south china sea?

SAM DASTYARI: This is a separate matter and I want to get to this.

I support the Labor Party position on the south china sea.

I support the Labor Party position. I support an international rules based system with international norms, where the rule of law is applied.

Now that has been my position.

That remains my position, that is the Labor Party position on the issue of the South China Sea.

JOURNALIST: Then why did you say that it's a matter for china?

SAM DASTYARI, LABOR SENATOR: Now, while I can't be held directly to words there were held at a press conference that I don't have a transcription of in front of me, now let me clear, I support the labor party position on this issue, no no no no no, Andrew, Andrew.

JOURNALIST: Why did you hold a press conference then?

NICK MCKENZIE: Amid the media storm, the press seized on Mr Huang's previous payment of $5000 to Senator Dastyari to pay an ALP legal bill.

Another Chinese donor had given him $1600 for a travel bill.

The senator fell on his sword.

SAM DASTYARI: So I am going to be making a short statement, and I won't be taking any questions.

This has been a difficult week and this afternoon I have made a difficult decision.

Today I spoke to my leader Bill Shorten and offered my resignation from the front bench, which he accepted.

NICK MCKENZIE: Last year Mr Huang sought more political help.

He had applied for Australian citizenship, but his application had stalled.

It was being secretly scrutinised by ASIO.

Mr Huang began lobbying his political contacts for assistance.

Four Corners has learned of one politician who agreed to help.

Labor Senator Sam Dastyari.

NICK MCKENZIE: Four corners has learned that after multiple requests from the billionaire donor, Dastyari's office called the immigration department to question the progress of Mr Huang's citizenship application.

In the lead up to the election, Dastyari's office made four separate approaches to the Department.

It's understood Senator Dastyari made two of these calls himself.

NICK MCKENZIE: In a statement, Mr Huang said he took strong objection to any suggestion he had linked his donations to any foreign policy outcome.

Mr Huang's citizenship application is still being reviewed by ASIO.

The signing of the China Australia Free Trade Agreement cemented our vital relationship with the world's new economic super power.

As Trade Minister, Andrew Robb spent years negotiating the deal.

His position brought him in contact with another Chinese billionaire - Ye Cheng, head of the Landbridge Group.

NICK MCKENZIE: Landbridge recently spent $506million to secure a 99-year lease for the Port of Darwin, a hugely controversial deal in light of the company's close ties to the Chinese Communist Party.

PETER JENNINGS: I think Chinese companies understand that if they can actually help to satisfy the strategic and political objectives of the communist party that will insure their prosperity.

It will give them access to cheap finance and it's something, which makes the senior leadership of those firms more prominent and successful in the context of Beijing politics.

NICK MCKENZIE: Before Last year's election, Andrew Robb stepped down from Government, and his final senior position as Australia's Special Envoy on Trade.

A few months later it was revealed he'd been appointed as an economic advisor to Landbridge.

JOURNALIST: And what about your own role at Landbridge because the Prime Minister said that he hadn't been notified?

ANDREW ROBB, FORMER TRADE MINSTER: No why should I? I'm sorry I've now left politics.

JOURNALIST: Well we've now got the Australian Defence Association and the opposition are jumping up and down.

Questions about ministerial conduct and that sort of thing.

ANDREW ROBB: Again, they're implying that I will act unethically and where's the evidence?

I mean, I've been a senior cabinet Minister, I know the responsibilities that I've got.

I've got no intention of breaching those responsibilities.

NICK MCKENZIE: Andrew Robb's confidential consulting deal can now be revealed.

Robb was on the Landbridge payroll from July 1 - the day before the election.

From that date, he's be paid $73,000 a month, or $880,000 a year, plus expenses.

Andrew Robb declined an interview, but told Four Corners he has acted in line with his obligations as former Trade Minister.

PETER JENNINGS: I respect as the Prime Minister said, Mr Robb has a right to go out and earn a living once he's left parliament but he was a cabinet minister for many years and I think now providing advice to the leadership of the Landbridge Group was possibly a step too far too quickly in terms of his departure from politics.

NICK MCKENZIE: Questions around how Australia and its leaders manage the relationship with China are central to the nation's most important foreign policy debate.

Australia must maintain its growing ties to its most important economic partner.

But we also must confront the fact that some of the interests and practices of the authoritarian one party state conflict with our own.

PROF. RORY MEDCALF: There's an awareness of a problem, but the agencies themselves don't have the mandate or the wherewithal to manage the problem.

All they can do is sound the alarm and alert the political class.

The political class needs to take a set of decisions in the interest of Australian sovereignty, in the interest of Australia's independence policy making, to restrict and limit foreign influence in Australian decision making.

CHRIS UHLMANN: After being briefed on the Four Corners-Fairfax investigation, the Attorney General sent us a statement revealing the Prime Minister has asked him to conduct a major inquiry into Australia's espionage and foreign interference laws.

Senator Brandis said, "the threat of political interference by foreign intelligence services is a problem of the highest order and it is getting worse."

Senator Brandis says he will examine whether the espionage offences in the criminal code are adequate and expects to brief Cabinet on possible changes to the law before the end of the year.

We will watch with interest. Good night