

# David Barrow CPA JD

63 / 135 Cardigan Street, Carlton VIC 3053

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## CONCERNS NOTICE

18 January 2016

### NSW District Court

via email: [communications@agd.nsw.gov.au](mailto:communications@agd.nsw.gov.au)

### NSW Department of Justice

via email: [communications@agd.nsw.gov.au](mailto:communications@agd.nsw.gov.au)

### Gazette of Law and Journalism

via email: [yvonnekux@glj.com.au](mailto:yvonnekux@glj.com.au) and [justinian@lawpress.com.au](mailto:justinian@lawpress.com.au)

### International Forum for Responsible Media (Inform)

via email: [informeditorial@gmail.com](mailto:informeditorial@gmail.com)

### Leanne O'Donnell

via email: [leanne@msslods.com](mailto:leanne@msslods.com)

### Crikey (Private Media Pty Ltd)

via email: [mcordell@crikey.com.au](mailto:mcordell@crikey.com.au) and [mrobin@crikey.com.au](mailto:mrobin@crikey.com.au)

### The Hon JUDGE JUDITH GIBSON

c/- Dr Ricky Lee *PhD LLM BA(IntSt)(Hons) LLB(Hons) GradDipCBL GDLP FCLA FANZCN ATIA MAICD*  
Managing Partner, Globalex Tax & Legal via email: [ricky.lee@globalexlegal.com](mailto:ricky.lee@globalexlegal.com)

**Dear All,**

I hope that we can all achieve non-litigious amends in these related matters.

I believe this can best be achieved by **The Hon. Judge Judith Gibson** of the NSW District Court making the effort to come to Melbourne for an in person mediation with me to make this all right.

This seems consistent with her Honour's own views in the [Hunt v Radio 2SM Pty Ltd \(No. 4\)](#)<sup>1</sup> defamation proceeding:

*One order I do propose to make is that the parties should go to mediation. Indeed that is a matter that, in my view, ought to be compulsory in every case where a defence of offer of amends is pleaded.*

As you may know, on 16 December 2015, I sent a Concerns Notice to Judge Gibson about the false statement published about me in her Honour's conference paper titled:

***"From McLibel to eLibel: Recent issues and recurrent problems in defamation law"***

In that paper, which Judge Gibson delivered to the March 2015 NSW State Legal Conference, her Honour **wrote falsely that I was bankrupt.**

In response to this I must say clearly: **I am not now, nor have I ever been bankrupt. Nor have bankruptcy proceedings ever been issued against me; nor do I expect that any will be.**

I am a CPA Accountant. Understandably, it is a requirement of my membership of CPA Australia that I must not be bankrupt.

As was quite foreseeable, Judge Gibson's 30 March 2015 **conference paper** was republished and referred to in further publications.

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<sup>1</sup> [2010] NSWDC 67 at [66] (per Judge Judith Gibson).

This occurred via a link [redacted] from Judge Gibson's own personal ([@Alesia148](#)) Twitter account in a tweet published 11:37am ADST [GMT 00:37am] 2 April 2015:

[redacted] [now deleted]



And also by the others of you to whom I am now addressing this further **Concerns Notice** – in at least the following ways:

**1. NSW District Court**

Via link [which is still active]:

[redacted]  
[redacted]  
[redacted]  
[redacted]

Via that same link in the NSW Department of Justice ([@NSWDstCt](#)) Twitter account in a tweet published 8:49am ADST 22 June 2015 [GMT 10:49pm 21 June 2015]:

[redacted]



## 2. NSW Department of Justice

The [@NSWDstCt](#) tweet (above) was also retweeted by the NSW Department of Justice ([@NSWJustice](#)):



## 3. Gazette of Law and Journalism

Via link:  (and online articles linking to this)

#### 4. International Forum for Responsible Media (Inform)

Via link: [REDACTED]

and the following online article linking to this:

"Australia: The media law year in review, defamation" by Peter Bartlett:

[REDACTED]  
[REDACTED]

#### 5. Leanne O'Donnell (Senior Lawyer; Policy Analyst; Consultant)

Via link: [REDACTED]

(1) in the following webpage:

[REDACTED]

and

(2) from the Leanne O'Donnell ([@MsLods](#)) Twitter account in a tweet published 1:10pm ADST [GMT 3:10am] 9 April 2015:

[REDACTED]



## 6. Crikey (Private Media Pty Ltd)

Via link: in the "March paper" hypertext

[REDACTED]

(1) on the 18 December 2015 "Tips and Rumours" Crikey webpage:

[REDACTED]

and

(2) in the "Tips and Rumours" section of the Crikey subscription email bulletin sent 18 December 2015 – to which I subsequently posted a reply on my own website:

<http://www.andrewboltparty.com/JudgeGibson/crikey>

The tweets I refer to (above) were further retweeted, favourited and liked by others, and as you can appreciate there is an unknown grapevine effect which spreads it all yet further.

Since 16 December 2015, it is true that through my own website and twitter account, I have also brought attention to Judge Gibson's **false statement that I am bankrupt** – however I have done so in a careful way which identifies the sting of the defamatory imputation in the context of the antidote of explaining why this imputation is false given that **I am not now nor have I ever been bankrupt** (which is a position that Judge Gibson clearly accepts).

On 23 December 2015 at 4:38pm ADST [GMT 05:38am], Judge Gibson tweeted the following attempted public correction to the whole situation by way of her Honour's personal ([@Alesia148](#)) Twitter account:



In this tweet, Judge Gibson writes incorrectly that the NSW State Legal Conference paper was presented on "30/6/15" – when it was actually presented on **30 March 2015**.

I also did not specifically agree to this form of the wording – which is ambiguous as to whether I "was" or "was not" a bankrupt in the past. This is an instance where the 140 character limit for a tweet requires careful drafting.

The tweet also includes a link to an updated version of her Honour's conference paper now downloadable (PDF) on the NSW District Court website:



The old version of the link, however, is still active as a downloadable (PDF) – and remains the destination for a number of other publications and republications:



The updated version of the conference paper includes the following (unsatisfactory) attempted public correction by Judge Gibson:

*[Correction: In an earlier version of this article, I said that David Barrow was bankrupt. Mr Barrow has been quoted publicly as stating that he would have to declare bankruptcy as a result of costs orders made against him in his unsuccessful proceedings against Andrew Bolt and the Herald & Weekly Times Pty Ltd. I accept that Mr Barrow has not in fact been made bankrupt.]*

Again, I did not agree to this form of the wording.

Further, Judge Gibson did not inform me (through her legal representative Dr Ricky Lee or otherwise) that either the (unsatisfactory) attempted public correction through the tweet or the updated version of the conference paper had been publicly posted. I was left to stumble across these myself some days later.

As for the wording of the attempted public correction in the updated conference paper that was unilaterally composed and published by Judge Gibson, well, no publication(s) for which I am said to have been "quoted publicly" are identified by her Honour.

However in Judge Gibson's 21 December 2015 Written Response (see <http://andrewboltparty.com/JudgeGibson>) to my 16 December 2015 [Open Letter](#), Dr Ricky Lee writes on Judge Gibson's behalf:

*[W]e are instructed that our client genuinely believed at the time of each publication that you were bankrupt, based upon statements attributed to you that appeared in an article on the Crikey website written by Myriam Robin to the effect that you "would have to declare bankruptcy" and make a fresh start, "able to earn a living albeit with a number of restrictions and a blighted credit history"*

This seems to refer to the article titled "Bolt defamation litigant loses case, will declare bankruptcy" attributed to media reporter Myriam Robin, published 3 December 2014 on the Crikey website:

[REDACTED]

Some points on this:

1. Nowhere in Myriam Robin's Crikey article does it say that I was bankrupt (which I am not nor have I ever been). There is simply no proper basis in the article for Judge Gibson to refer to me as a plaintiff "who is now" bankrupt.
2. There is no indication that Judge Gibson took any proper steps to determine if I was bankrupt, such as checking the National Personal Insolvency Index or an online search of Federal Circuit Court bankruptcy proceedings – or contacting me directly.
3. On 3 December 2014 (same day article published), I emailed Myriam Robin to notify her that I had posted some comments and corrections on my website concerning her Crikey article. Myriam then caused a link to be published to this response at the end of her article (which is still there today) and wrote to me on 4 December 2014 as follows:

*Hi David, I've added a link to your response to the bottom of the article. Sorry it's taken me so long to do so I've been flat out since yesterday and haven't had a proper chance until now. Sorry about any errors in the piece they weren't intentional. But I'm not a lawyer and find it hard sometimes when just going off a verdict transcript. Best of luck, and thanks for keeping me informed. Myriam*

Among other things, my response posted on my own website emphasised that I only faced bankruptcy *IF* my appeals to the 2 December 2014 decision of the trial judge Justice Terry Forrest were unsuccessful.

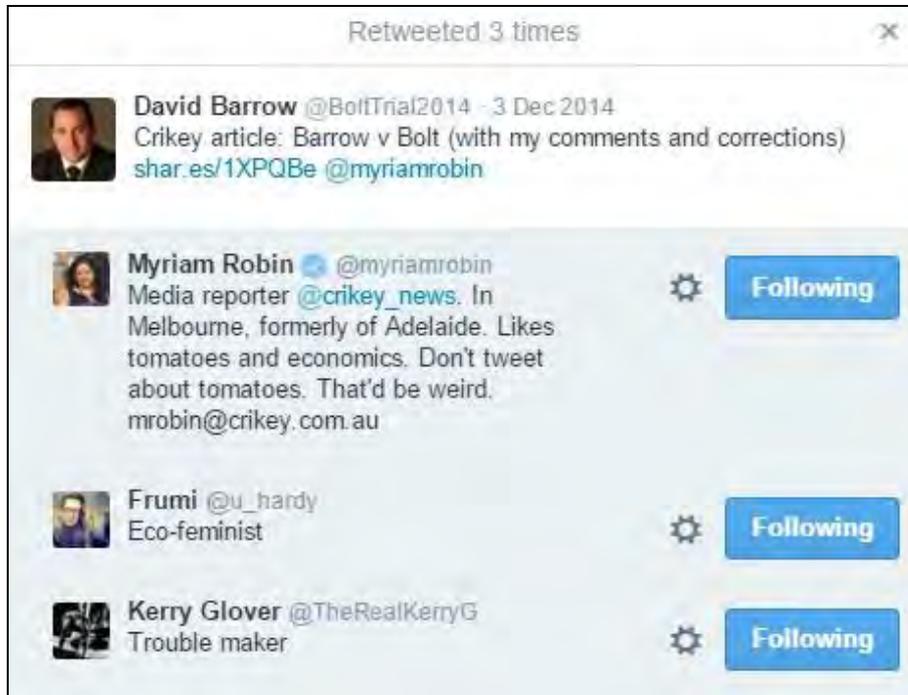
Those appeals were on foot all the way up until settlement with Andrew Bolt and the Herald and Weekly Times Pty Ltd (Herald Sun) defendants – and acted as an effective bankruptcy shield.

Inexplicably, Judge Gibson was also aware of my appeal application to the Court of Appeal during this time, writing about this in the LexisNexis Australian Defamation Law and Practice publication around May 2015 – and still not correcting her Honour's conference paper.

I have an archive copy of my response to Myriam's Crikey article, however I took it offline when my defamation case settlement with Andrew Bolt and the Herald Sun in December 2015. This was well after Judge Gibson first published the false statement that I was bankrupt in March 2015.

4. Further, on 3 December 2014, I tweeted about my comments and corrections, which Myriam kindly retweeted.

<https://twitter.com/BoltTrial2014/status/540016745541431297>



It is disappointing that Judge Gibson has not as yet satisfactorily joined with me to find a suitable wording for the corrections – or even inform me that her Honour's attempted public corrections would be or had been published to the world at large.

It is further disappointing that her Honour has not offered any apology.

Clearly, Judge Gibson's efforts so far have fallen short of a *Defamation Act 2005* (Vic) [section 15](#) and [section 18](#) offer of amends defence to defamation liability.

**But talk of defences to liability is the wrong way of going about making this all right.**

**We should be using our best endeavours to find alternatives to litigation – and a truly reasonable offer of amends is central to this, as is the proper, neutral forum of a mediation to craft and bind a joint solution.**

**Judge Gibson accepts making a false statement that I was bankrupt. Let's focus on fixing this – which is the right thing to do.**

Following the principles in *Webb v Block*<sup>2</sup>, Judge Gibson is a joint-tortfeasor in all the publications and republications that were foreseeable and accessory to her Honour's original 30 March 2015 conference paper. As such, it is natural and essential that Judge Gibson should be involved in making all of these matters right.

I propose that **Judge Gibson come to Melbourne** and we prepare for, attend and conclude a **mediation** on or before **Wednesday 10 February 2016**.

I am optimistic that Judge Gibson and I could find sensible non-litigious amends through **mediation** – in a reasonable way, comprehensively covering all of the publications, republications and the grapevine effect which have flowed from her Honour's conference paper.

If Judge Gibson will join me in person at this **mediation** then I would be pleased to **enliven the timing cover of a reasonable offer of amends defence**, that has now expired under the 28 day rule pursuant to [section 14](#) of the *Defamation Act 2005* (Vic) – with such an extension in timing to make amends to run right up until the conclusion of the mediation.

I look forward to Judge Gibson's response to this proposal.

And I also note that if Judge Gibson and I conclude a **mediation** – regardless of outcome – on or before **Wednesday 10 February 2016**, this would still provide all of you with time to make your own reasonable offer of amends defence within the 28 day rule as reckoned from the 18 January 2016 Concerns Notice that I am sending you all now.

As for **Next Steps for All**, I ask that you please remove from publication all of the links to any present form of Judge Gibson's conference paper, or alternatively, replace those links with the following temporary link to the following Notice on my website:

<http://www.andrewboltparty.com/JudgeGibson/Notice>

## **NOTICE**

***The Hon Judge Judith Gibson presented a conference paper at the March 2015 NSW State Legal Conference titled:***

***"From McLibel to eLibel: Recent issues and recurrent problems in defamation law"***

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<sup>2</sup> (1928) 41 CLR 331 at 363-5.

*In that paper, Judge Gibson wrote falsely that I was bankrupt.*

*To this I must say clearly: **I am not now, nor have I ever been bankrupt. Nor have bankruptcy proceedings ever been issued against me; nor do I expect that any will be.***

*It is hoped that non-litigious amends can be reached with Judge Gibson to make this all right – in a reasonable way, comprehensively covering all of the publications, republications and the grapevine effect which have flowed from her Honour's conference paper.*

*David C. Barrow*

I envisage that if the successful part of the corrections to an updated conference paper can be successfully crafted by Judge Gibson and myself through a **mediation**, then a new final link to this conference paper could be enabled. After which time we could all go peaceably our own ways.

And I remain firmly of the view that the whole situation remains one where Judge Gibson and I still have the potential to be a showcase of how non-litigious amends can be achieved in Australia.

Yours sincerely,



David C. Barrow

## ANNEXURE

As for Judge Gibson's coverage of my defamation litigation with Andrew Bolt and The Herald and Weekly Times Pty Ltd (the defendants) in the conference paper titled "**From McLibel to eLibel: Recent issues and recurrent problems in defamation law**":

### Page 7

Her Honour makes reference to [Barrow v Bolt & Anor \(Ruling No 3\) \[2014\] VSC 16](#) – which is an interlocutory appeal application for leave to amend reply particulars of malice and administer some further limited interrogatories.

It is unclear why Judge Gibson would refer to this interlocutory judgment as follows:

"Costs problems: *Sims v Jooste* [2014] WASC 373 (S) at [11] (special costs order made due to the increased difficulty of running a case against a litigant in person); *Bodenstein v Hope Street Urban Compassion* [2014] NSWDC 126 (costs of successful defence to claim by penniless litigant in person exceeded \$100,000); *Barrow v Bolt & Anor (Ruling No 3)* [2014] VSC 16 (costs against the litigant in person, agreed after judgment at \$500,000, were unrecoverable)."

Perhaps her Honour meant the actual [Barrow v Bolt & Anor \[2014\] VSC 599](#) trial judgment of Justice Terry Forrest. In any event, it was premature for Judge Gibson to say that the costs "were unrecoverable" while appeals were still on foot – which they were at the time of her Honour delivering the 30 March 2015 conference paper, and all the way up until settlement with Andrew Bolt and the Herald Sun – acting as an effective bankruptcy shield.

Further, it is also unclear why Judge Gibson would refer to this interlocutory judgment as follows:

"Trial difficulties: *Barrow v Bolt (Ruling No 3)* [2014] VSC 16 (one of a series of rulings in a trial where the plaintiff was a litigant in person)."

There was only one ruling at the final hearing. Other rulings were interlocutory. It is difficult to see why these would be described as "Trial difficulties" issues – either before or at the final hearing.

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In relation to the section 33 "Unlikelihood of harm" defence, Judge Gibson writes:

"However, the defence has had a surprising success in *Barrow v Bolt* [2014] VSC 599, where the plaintiff commenced proceedings for defamation for an intra-office email that Mr Andrew Bolt, a journalist, sent to the managing editor in relation to a complaint made by the plaintiff to the Australian Press Council. While the defendant succeeded on all defences (see the findings at [54] et seq.), the reasons for the s 33 defence are rewarding of study."

Well, the publication was not confined to an "intra-office email" – it was an email that was composed by Mr Andrew Bolt, sent to the managing editor of the Herald Sun **and then** sent to the **external** Australian Press Council. This is set out clearly in [2] and [3] of the judgment.

It is also incorrect to say: "...the defendant succeeded on all defences (see the findings at [54] et seq.,)..." Firstly, there are 2 defendants not the one defendant. Secondly, the defendants did not succeed on the section 18 defence of a reasonable offer of amends (see the findings at [73] – [80]).

These are careless errors by Judge Gibson.