FEDERAL COURT OF AUSTRALIA

Greenwich v Latham [2024] FCA 1050

File number(s):	NSD 475 of 2023
Judgment of:	**O'CALLAGHAN J**
Date of judgment:	11 September 2024
Catchwords:	**DEFAMATION** – proceeding against a member of New South Wales Parliament brought by another member – imputations pleaded in respect of two impugned publications – consideration of whether imputations conveyed – first imputation made in "primary tweet" held to be conveyed – whether imputation defamatory – consideration of whether publication of defamatory matter about the applicant has caused, or is likely to cause, serious harm to his reputation within the meaning of s 10A(1) of the *Defamation Act 2005* (NSW) – serious harm found – defences of honest opinion pursuant to s 31 of the *Defamation Act 2005* (NSW) and common law qualified privilege (reply to attack) – where defences not made out – where applicant sought general damages for non-economic loss – where applicant sought aggravated damages – assessment of damages – where alleged unjustifiable conduct said to support award of aggravated damages – quantification of damages
Legislation:	*Defamation Act 2005* (NSW) ss 10A, 10A(1), 31, 31(1) *Defamation Act 2013* (UK) s 1
Cases cited:	*Amersi v Leslie* [2023] EWHC 1368 (KB) *Australian Broadcasting Corporation v Chau Chak Wing* (2019) 271 FCR 632 *Banks v Cadwalladr* [2023] 3 WLR 167 *Barilaro v Google LLC* [2022] FCA 650 *Barron v Vines* [2016] EWHC 1226 (QB) *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 *Bazzi v Dutton* (2022) 289 FCR 1 *Berkoff v Burchill* [1996] 4 All ER 1008 *Burton v Crowell Pub Co* 82 F (2d) 154 (1936) *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153

Economou v De Freitas [2017] EMLR 4; [2016] EWHC 1853 (QB)

Ettingshausen v Australian Consolidated Press Ltd (1991) NSWLR 443

Gould v Jordan (No 2) [2021] FCA 1289

Hanson v Burston [2023] FCAFC 124

Harbour Radio Pty Ltd v Trad (2012) 247 CLR 31

KSMC Holdings Pty Ltd t/a Hubba Bubba Childcare on Haig v Bowden (2020) 101 NSWLR 729

Lachaux v Independent Print Ltd [2020] AC 612

Lee v Wilson (1934) 51 CLR 276

Loveday v Sun Newspapers Ltd (1938) 59 CLR 503

Mirror Newspapers Ltd v World Hosts Pty Ltd (1979) 141 CLR 632

Monroe v Hopkins [2017] 4 WLR 68; [2017] EWHC 433 (QB)

Nationwide News Pty Ltd v Rush [2020] FCAFC 115; (2020) 380 ALR 432

Newman v Whittington [2022] NSWSC 249

Parmiter v Coupland (1840) 151 ER 340

Penton v Calwell (1945) 70 CLR 219

Radio 2UE Sydney Pty Ltd v Chesterton (2009) 238 CLR 460

Riley v Sivier [2023] EMLR 6; [2022] EWHC 2891 (KB)

Selkirk v Hocking (No 2) [2023] FCA 1085

Selkirk v Wyatt (2024) 302 FCR 541

Sivananthan v Vasikaran [2023] EMLR 7; [2022] EWHC 2938 (KB)

Stead v Fairfax Media Publications Pty Ltd [2021] FCA 15; (2021) 387 ALR 123

Stocker v Stocker [2020] AC 593

Sutcliffe v Pressdram Ltd [1991] 1 QB 153

Triggell v Pheeney (1951) 82 CLR 497

Trkulja v Google LLC (2018) 263 CLR 149

Wilson v Mendelsohn [2024] EWHC 821 (KB)

Zbyszko v New York American Inc (1930) 228 App Div 277

Neuberger J, *Antisemitism: what it is. what it isn't. why it matters* (Weidenfeld & Nicolson, 2019)

Division:	General Division
Registry:	New South Wales

National Practice Area:	Other Federal Jurisdiction
Number of paragraphs:	285
Date of hearing:	22–24 May 2024
Counsel for the Applicant:	M J Collins AM KC with S Jeliba
Solicitor for the Applicant:	Dowson Turco Lawyers
Counsel for the Respondent:	K Smark SC with B Dean
Solicitor for the Respondent:	BlackBay Lawyers

ORDERS

NSD 475 of 2023

BETWEEN:	**ALEXANDER GREENWICH** Applicant
AND:	**MARK WILLIAM LATHAM** Respondent

ORDER MADE BY:	**O'CALLAGHAN J**
DATE OF ORDER:	**11 SEPTEMBER 2024**

THE COURT ORDERS THAT:

1. The proceeding be adjourned to 9:30am on 25 September 2024 for the making of final orders.

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

REASONS FOR JUDGMENT

O'CALLAGHAN J

INTRODUCTION

1 The applicant, Mr Alexander Greenwich, has been the member for Sydney in the New South Wales (**NSW**) Legislative Assembly since 2012. He is an openly gay man, and it was an agreed fact that he "is an advocate for his constituents in Sydney, and others including the lesbian, gay, bisexual, transgender, queer/questioning, intersex and asexual (**LGBTQIA+**) community, families with children, women, people who are homeless, people in late stages of advance disease seeking assisted dying, people with disabilities and First Nations people." He was once also the convenor of Australian Marriage Equality.

2 The respondent, Mr Mark Latham, was formerly the member for Werriwa in the House of Representatives from 1994 to 2005. At that time, he was a member of the Australian Labour Party. He served as leader of the Federal Opposition from 2003 to 2005, when he resigned from Parliament after the 2004 election. In 2019, he was elected to the NSW Legislative Council as a member of Pauline Hanson's One Nation Party, and served as leader of that party in NSW until he was removed from that role and resigned from the party in August 2023. He now sits as an independent member of the NSW Legislative Council. It was an agreed fact that Mr Latham is a well-known Australian politician.

3 Mr Greenwich and Mr Latham may fairly be described as political opponents. They sit at different ends of the political spectrum and, until the events giving rise to this proceeding, had engaged with one another in regular (and at times, robust) public debate.

THE EVIDENCE RELIED UPON

4 Mr Greenwich read and relied upon:

(a) two affidavits affirmed by him on 28 February and 23 April 2024, respectively;

(b) the affidavit of Mr Victor Hoeld, Mr Greenwich's husband, affirmed 27 February 2024;

(c) the affidavit of Mr Alexander Graham, senior electorate officer in Mr Greenwich's electorate office, affirmed 20 February 2024;

(d) the affidavit of Ms Anne McCall, electorate officer in Mr Greenwich's electorate office, affirmed 20 February 2024;

(e) the affidavit of Senator Sarah Hanson-Young, Senator for South Australia and member of the Australian Greens party, affirmed 20 February 2024; and

(f) the affidavit of the Honourable Gregory Michael Piper, independent member for Lake Macquarie in the NSW Legislative Assembly, affirmed 22 February 2024.

5 Only Mr Greenwich was required for cross-examination.

6 Mr Latham did not give evidence.

7 Dr M J Collins AM KC appeared with Ms S Jeliba of counsel for Mr Greenwich. Mr K Smark SC appeared with Mr B Dean of counsel for Mr Latham.

THE FACTS

8 The series of events which have led to these proceedings were largely not a matter of dispute between the parties. They were set out in Mr Greenwich's first affidavit.

9 On 3 March 2023, the NSW Parliament entered "caretaker" mode, in advance of a state election called for Saturday, 25 March 2023.

10 Throughout February 2023, before the election was called, Mr Latham made a number of posts on social media relating to Mr Greenwich, exhibited to Mr Greenwich's first affidavit as Annexure AG-17. These included tweets posted by Mr Latham on his Twitter (now known as "X") account using the handle @RealMarkLatham, often containing a photograph of Mr Greenwich with a caption, such as:

> The green independent Alex Greenwich, pictured here on the right, is the MP Dominic Perrottet and the Liberal Party look to in making families policy, such as:
>
> 1. Gender fluidity teaching in schools
> 2. Banning parents, priests and counsellors from advising and trying to assist transgender children
> 3. Spending huge amounts of taxpayers money on the promotion of LGBTIQ
> 4. Reducing community clubs grants for local junior sport.
>
> How can anyone trust Greenwich and the NSW Liberals and Nationals with the future of their children?

The Belfield incident

11 On 21 March 2023, four days before the election, Mr Latham attended by invitation an event at the St Michael's Catholic Church in Belfield, a suburb approximately 15 kilometres west of Sydney. Mr Latham posted on social media that he attended the event at the church to speak

about "religious freedom, parental rights, school education and protecting [non-government] schools from Alphabet Activism and lawfare".

12 In the days leading up to that event, approximately 15 LGBTQIA+ protesters told the NSW Police of their intention to engage in a peaceful protest outside the church, while Mr Latham attended and spoke inside it.

13 What then, in fact, occurred outside the church, is not an issue in this case. But the media reporting and commentary about what happened is a crucial part of the background and surrounding context of the allegations made by Mr Greenwich in this proceeding, so it is necessary to set it out in a little detail.

14 Counsel for Mr Greenwich tendered an audiovisual recording and a transcript of a Seven News broadcast aired on 22 March 2023 regarding the events at the church.

15 At the beginning of the broadcast, Seven News reporter Chris Reason's voice is heard over film footage taken the night before outside of the church, stating:

> In the lead up to Easter, at a suburban Catholic church, emotions explode. Up to 300 men, many from a group called Christian Lives Matter, descending after word spread of 15 gay rights protesters assembled nearby St Michael's Belfield.

16 Footage was then shown of Superintendent Sheridan Waldau from the Campsie Police Station addressing the media. The relevant parts of the transcript of her address are as follows:

> Police: At 7pm last night, a violent confrontation occurred within Margaret Street at Belfield where a number of people were gathered for an event at a church. A group of protestors, about 10 people, were within the vicinity of Margaret Street, further along the street from where the church was, when a mob of about 250 people from the event rushed down the street. Police were present on the scene and were able to stand between the protestors and the mob of people. A number of projectiles were thrown at the police and at the members of the public but luckily nobody was seriously hurt as a result of that. With further police resources requested PAWS and OSG crews were also on scene and we were able to push the mob back. We were able to push the protesters into a police vehicle and remove them safely from the scene of the incident. It took about 30 minutes to get the incident under control and the group of people pushed back along Margaret Street and into the church grounds where an event was occurring. This was a very violent confrontation that occurred at an event which was supposed to be a peaceful protest was supposed to be occurring at. This incident will not be tolerated. This type of violence is not to be tolerated by New South Wales Police and we have commenced an investigation into the incident. So far there has been two persons charged as a result of the incident and we are reviewing numerous amounts of footage. We expect further charges to be laid today against a number of other

offenders. At this time is there any questions?

Reporter: … Should the police have been more prepared?

Police: The police were only notified of the event a few days prior. We worked with the event organisers and the protest group to ensure that this was going to be a peaceful event. We had no indication that there would be any violence at the incident. We did have a number of police resources on the scene and we had been at the scene since 5:00 p.m with the event to commence at 7:00 p.m. We did not expect 250 people to come from that event and have a violent confrontation in the street.

…

Police: At this stage we only know of one protest group that was present at the event or outside the event, a hundred metres down from where the church was. If there were other groups there, we don't know at this stage.

…

Police: At this stage we believe that the people who were involved in the violent confrontation were attending the event that was to be held at the church hall. We were told that there were between 500, there is roughly around 500 people expected to attend and those numbers coincide with the amount of people that were at the scene.

Reporter: What do police know about the group Christian Lives Matter?

Police: I'm not aware of anything. I can't comment on that at this stage.

…

Police: The protest group appeared to be peaceful and they were standing and were being shielded by the police. So all of the projectiles appear to come from the crowd that were at the event.

Reporter: …[W]hat types of projectiles they were?

Police: At this stage we believe it to be water bottles and some rocks that were thrown.

Reporter: How would you describe this sort of event and what's happened?

Police: This was nothing but a violent confrontation. These people were there to protest against, for their own beliefs, and there was an event occurring which they were there for to protest against. This was meant to be a very peaceful protest and unfortunately has turned into a very violent event.

…

Police: Police had been working with the event organisers and with the protest group for a number of days in relation to this. Part of that was in consult with Mr Latham. He was asked whether he wanted to speak after the violent confrontation had occurred and he decided that he still wished to do that, and we were there to make sure that no further incidents occurred.

…

Reporter: I just have one more thing to confirm, the projectiles being thrown, were they being thrown at police or at the protestors or both?

Police: With, well at this stage it appears that it was at both of them. The police were standing directly in front of the protest group to protect them, so.

Reporter: Sorry, just to clarify, you had spoken to Mr Latham before, there was evidence that we heard before that there was a significant response being prepared in response to these protests. Can you just walk us through why police didn't do more earlier?

Police: There was no indication that this was going to be a violent event at all. We had sufficient resources for the information that had been gathered. We had worked with the event organisers. We had worked with the protesters. It was only a very small group of protesters and the church had also spoken to their congregation and the people attending to ensure that no violence would occur. So what happened is very disappointing and we were able to gather quickly a number of police resources to ensure a sufficient response to the incident.

17 Mr Latham posted the following string of tweets on 21 March 2023, from about 6:05pm onwards, about the events in Belfield (each bullet point denoting a separate, subsequent tweet):

- How bad are these LGBTQ Alphabet protesters? I'm under police orders regarding access to my speaking event at a Sydney church tonight. A denial of democracy.
- Fancy stopping an election candidate, an MP of 15 years standing, from entering a church to talk about election issues! The new Rainbow [rainbow emoji] Fascism.
- It's unacceptable for anyone to blockade access to a church. I went in via the Belfield Bowling Club, away from the front street. The church hall I entered was full of women, a peaceful gathering, where, ultimately, I gave a speech about important election issues.
- Issues I spoke on were religious freedom, parental rights, school education and protecting non-Govt schools from Alphabet Activism and lawfare. The police told me there had been violence on the front street, so I thoroughly condemned that and urged everyone to disperse peacefully.
- To not give my speech, to go straight home, would have allowed the transgender protesters to cancel my free speech and democratic rights as an election candidate, things that are sacred to me and have been for 35 years in running for elections, local, Federal and State.
- I didn't see what happened on the front street, but I sincerely convey my best wishes to those injured and thank the police officers for their work.

  No one should take the law into their own hands. Violence at political events is wrong.
- We should sort out our differences peacefully at the ballot box as we are doing in NSW this Saturday.

  Any other approach is unacceptable and counter-productive in a democracy.

- Let’s be clear. I didn’t organise the event and nor did my party. I was invited along with three other speakers to talk at a pre-election public meeting at the St Michael’s Belfield Catholic Church.

  No different to several other meetings on religious and parental rights this year.

- The role of the NSW Police should be to protect and defend the rights of election candidates to participate freely in public meetings.

  A vital democratic right.

  Not to join the cancel culture movement.

  This is why I was surprised the Police commander said I should not speak.

- Then he said he would ensure I left the premises safely but I never saw him or his colleague again.

  I spoke to a large, engaged meeting in the church hall and played a role in ensuring everyone dispersed peacefully.

  Then I saw myself out and went home without incident at all.

- These transgender radical Leftwing protesters cannot continue to go around threatening to block public roads and access to a church, a place of worship.

  The law should deal with them.

  Their provocation triggered the wild scenes at Belfield.

  Enough is enough.

18 The following day, Mr Latham gave an interview to the media, which was aired as part of the Seven News Broadcast. The audiovisual recording and transcript of Mr Latham’s interview was in evidence. In that interview, Mr Latham said, among other things:

19 Mr Greenwich's unchallenged evidence was that he only became aware that Mr Latham was speaking at a church event in Belfield on about 21 March 2023. That evening he saw media articles reporting that "so-called 'Christian Lives Matter' followers had attacked LGBTQIA+ protestors outside the church where Mr Latham was speaking". (I should also add that there is no evidence to suggest that Mr Latham in fact had anything to do with the events outside the church either.)

20 On the morning of 22 March 2023, Olivia Ireland, a journalist at *The Sydney Morning Herald* newspaper sent Mr Greenwich a text message which read, "I'm covering the Belfield protest and was wondering if you wanted to chat/give a statement on the situation?"

21 Mr Greenwich then called Ms Ireland and asked her for "some context" in relation to her request. Mr Greenwich deposed that Ms Ireland had told him that Mr Latham had ignored police requests not to proceed with his speaking event the previous evening. Having been told that, Mr Greenwich said words to the following effect to Ms Ireland:

> Mark Latham is a disgusting human being and people who are considering voting for One Nation need to realise they are voting for an extremely hateful and dangerous individual who risks causing a great deal of damage to our state.
>
> Words and hate cause a great deal of damage, particularly when they're targeted at vulnerable minority groups.
>
> It really is incumbent on political leaders to call this out and to show support for the LGBTIQ + community.

22 I make no finding about whether Mr Latham in fact "ignored police requests". That was not an issue at the hearing and there is nothing to suggest that he did.

23 That same day, the *Sydney Morning Herald* published an online article by Ms Ireland about the Belfield incident headlined "Video shows LGBTQ protestors pleading for help outside Mark Latham event", which stated, among other things:

24 Also on 22 March 2023, a person called Susan Metcalfe (using the handle @susanamet), posted a link on Twitter to Ms Ireland's online article with a caption extracting a portion of Mr Greenwich's quote (the **Metcalfe tweet**). Below is a screenshot of the Metcalfe tweet:

25 That day, Mr Greenwich also recorded a video media statement about the Belfield incident in which he said, among other things, that "[f]or weeks, months and almost years, Mark Latham has been whipping these thugs into a violent frenzy". Parts of this media statement were broadcast by *Seven News*, *Nine News* and *Sky News*.

26 *The Sydney Morning Herald* published further articles on its website and in print on 22 March 2023 and 23 March 2023 respectively, headlined "'Time to rise': Christian activist charged after protest violence" and "Police keeping eye on militant religious groups after protests", both of which included Mr Greenwich's quotes to Ms Ireland.

27 On 23 March 2024, at about 10:21am, Mr Latham published the following tweets:

The primary tweet

28 The state election was duly held on 25 March 2023. Both Mr Greenwich and Mr Latham were re-elected.

29 Five days later, on 30 March 2023, Mr Latham posted a tweet at 10:13am as a reply to the Metcalfe tweet.

30 It is the first impugned publication. It was dubbed "the **primary tweet**". This is a screenshot of it:

31 Mr Greenwich became aware of the primary tweet soon after it was posted. He deposed that once he had seen it, he called Mr Latham's colleague and One Nation MP, Ms Tania Mihailuk, and asked her to get Mr Latham to take it down.

32 By about 12:30pm on the same day, the primary tweet had been deleted and removed from Mr Latham's Twitter account. As the screenshot shows, in the time that the primary tweet had remained online, it had been viewed at least 6,171 times.

33 In the time that it was online, Mr Latham also "liked" a series of tweets posted by Twitter users in reply to the primary tweet, including:

(a) "Exactamundo!!";

(b) "Gold!!!! Keep it up Mark as there is to many people asleep at the wheel..";

(c) "I could not have said it any better Mark [clapping, thumbs up emojis]";

(d) "Well, to me, that's disgusting - I choose not to think about that part when thinking of my gay friends who, just like all humans, have bad & good ones.";

(e) "Touche";

(f) "My first laugh-out-loud moment for today, thanks Mark [tilted laughing, crying emoji]";

(g) "Best come-back ever! [laughing, crying emoji]";

(h) "About time someone didn't hold back on what everyone really thinks about these grubs.";

(i) "Well said Mark.";

(j) "Why does it need a label, other than facts?";

(k) "Boom! There it is [smiling emoji], & it needs to be said";

(l) "I reckon that should be @Peter_Fitz tweet of the week #FitzToTW ... but I'm sure it won't be"; and

(m) "I think you're doing it wrong, Mark."

(Many of the social media posts and communications set out in these reasons were replete with typographical errors. They are reproduced in their original form.)

34 As Dr Collins put it in opening submissions, although the primary tweet was removed, by that time "the cat was out of the bag". Even after it was deleted, portions of the primary tweet were quoted in national online news media articles (which were annexed to Mr Greenwich's affidavit as Annexures AG-31 to AG-34), and screenshots of the original tweet were shared on social media.

35 For example, at 12:45pm on 30 March 2023, journalist Hugh Riminton (using the handle @hughriminton) posted on Twitter an image of a section of the primary tweet with the following caption (the **Riminton tweet**):

36 As the above screenshot records, as at about 28 February 2024, when Mr Greenwich affirmed his first affidavit, the Riminton tweet was still online, and had been viewed approximately 654,700 times.

37 Screenshots of tweets posted by Twitter users in reply to the Riminton tweet were annexed to Mr Greenwich's first affidavit and marked AG-30. Those reply tweets included, among others:

(a) "I see a normal man speaking his mind. Are your feelings hurt? [rolling eyes emoji]";

(b) "One thing Greenwich does behind closed doors, is look at his own portrait of Dorian Gray, for all those late term babies aborted, due to the bill he put forward in Parliament";

(c) "Contrary to unpopular belief, the majority of people also find this unusual, disgusting. Over 90% of people are heterosexual and a large majority of those are Christian. A fair percentage would find these acts depraved. The 'normalisation' of the acts of the 4% is quite unusual.";

(d) "So stating what gay sex is, is offensive? So why do we teach it to kids?";

(e) "Well he's really not wrong... [two shrug emojis]";

(f) "It's the truth";

(g) "@hughriminton most men ,>90%, of men think the same way as @RealMarkLatham.";

(h) "my only problem with this tweet is he took it down"; and

(i) "The Tweet is as vulgar as the act it describes."

38 On 31 March 2023, *Nine News Sydney* (using the handle @9NewsSyd) posted the following tweet including an excerpt from a broadcast regarding the primary tweet and NSW Premier Chris Minns' response:

39 Annexure AG-47 to Mr Greenwich's affidavit contained screenshots of a number of tweets posted by Twitter users in reply to *Nine News Sydney*'s tweet, which included (among others):

(a) "What mark latham said was the truth, why is everyone so offended? I'll tell you why, it's because deep down you all know it's a disgusting act but are too afraid to speak out";

(b) "I think your reporting is worse than what either of them said. You're piling on Mark for saying the truth about Alex, grub act";

(c) "Good on Mark Latham for his honesty, that's more that the current far leftist do…"; and

(d) "Where's the criticism of the defamatory tweet from Greenwich? While these sodomites keep ranting, real people will keep giving them hell."

40 On the evening of 30 March 2024, Mr Greenwich attended a work-related event at the Capella Hotel in Sydney with his husband, Mr Hoeld. He published a photograph of the two of them at the event on Twitter that same evening with the following caption:

> For those wondering how I'm doing after Latham's homophobic attacks today, I'm fine and I'm more motivated than ever to deliver long overdue LGBTIQA+ reforms…and I have the most handsome husband.

41 Tweets published by Twitter users in reply to this post were annexed to Mr Greenwich's first affidavit as Annexures AG-35 to AG-37. They included:

(a) "Daily reminder 86% of paedophiles describe themselves as homosexual or bisexual. These people need to be removed from all levels of polite society and government." (posted on 31 March 2023);

(b) "@RealMarkLatham did nothing wrong. Groomers out of government" (also posted on 31 March 2023); and

(c) "I just don't get the infatuation of stinky d!€k during sex [shrug emoji]" (posted on 2 April 2023).

42 Mr Greenwich's evidence was that he was "really shaken" by people approaching him at the Capella event and asking about the primary tweet "rather than [his] work as an elected representative." He deposed that when he and Mr Hoeld went home, he "burst into tears and cried for most of the night."

43 The following morning, Mr Greenwich and Mr Hoeld decided to leave Sydney and went to stay at a friend's house in Port Macquarie for the weekend.

44 Mr Greenwich was scheduled to appear on the *Channel 10* television program, *The Project* on the evening of 31 March, but cancelled his appearance due to the Port Macquarie trip. However, the host of *The Project*, Mr Hamish Macdonald, contacted Mr Greenwich that day and explained to him the importance of the interview, and that it would be conducted in a "gentle way" and would focus on LGBTQIA+ law reform. Mr Macdonald also told him that *The Project* was willing to send a cameraman to Port Macquarie.

45 Mr Greenwich deposed that:

> After speaking with Mr Macdonald, I agreed to do the interview from Port Macquarie. Despite feeling like I wanted to get away from the media, I had a competing feeling of wanting to use the media to advocate for the LGBTQ+ community and highlighting the need for law reform. I felt that I needed to put on a brave face publicly because that is what I had done in my time as a politician, especially in late 2017, during the Marriage Equality Postal Survey when there was significant public debate about LGBTQ+ rights and what I considered to be very hurtful and harmful misinformation spread about the LGBTQI+ community …

46 An audiovisual file and transcript of Mr Greenwich's appearance on "The Project" on 31 March 2023 were in evidence. The transcript was relevantly as follows:

.

47 Mr Greenwich also gave an interview to ABC News Breakfast and held a press conference on 31 March 2023, as he deposed, "in an attempt to address the Primary Tweet and stop further requests for comment from the media". Media organisations, including *The Guardian Australia, Nine News, ABC News, SBS, The Daily Mail Australia, Shepparton News, Riverine Herald, Sky News, The West Australian, Countrynews.com.au, Australian Racing Greyhound, News.com.au, Crikey, Port Stephens Examiner* and *The Canberra Times* published articles about the primary tweet (which were annexed to Mr Greenwich's first affidavit as Annexure AG-39).

48 Between 30 March 2023 and 31 March 2023, the primary tweet was also covered during news bulletins on national television networks including *Nine News*, *Seven News* and *Sky News*. Relevant audiovisual excerpts of these broadcasts were annexed to Mr Greenwich's first affidavit as exhibit AG-40.

49 In the *Sky News* program *The Bolt Report* broadcast on 30 March 2023, journalist Andrew Bolt expressed his condemnation of Mr Latham and the primary tweet, which Mr Bolt described as "so disgusting, so homophobic and so vile in a pornographic way, that [he could] not even hint at what [Mr Latham] said about a gay politician, Alex Greenwich". *The Bolt Report* then broadcast a video recorded by the Federal leader of One Nation, Senator Pauline Hanson, in which she responded "to the comments made today by Mark Latham on social media", and said, among other things, that she didn't "condone them and neither do [her] members of parliament or party associates" and that she thought the comments were "disgusting". Senator Hanson also stated that she had asked Mr Latham to apologise to the public.

50 Mr Latham did not do so. On 31 March 2023 at 9:31pm he posted the following tweet:

51 Tweets posted by various Twitter users in reply to this tweet were annexed to Mr Greenwich's first affidavit and marked Annexure AG-45. They included:

(a) "Good on ya mark, stick it right up 'em. Well, not literally! [turd emoji and laughing, crying emoji]";

(b) "Think the poo pirates have a health and safety issues. Thanks Mark for trying to clean that up.";

(c) "Look mate. The poofs say worse things in public. I have no issues with your comments. But don't give this lot room to cry wolf. That poo jabber was just trying bait you. Stay strong mate."; and

(d) "Why should you apologise mate, Alex won't and he's the one that said bullshit....you care about our kids futures he dont!!!!".

***The Daily Telegraph* quotes**

52 The next morning, on 1 April 2023, Mr Latham posted a further tweet:

53 That same day, Mr Latham provided a statement via text message to Linda Silmalis, a journalist at *The Daily Telegraph*.

54 It was common ground between the parties that Mr Latham no longer had a copy of Ms Silmalis' request to Mr Latham for a quote, and this was not in evidence. Mr Latham's text

message to Ms Silmalis, however, was obviously sent in response to some form of request or question, and was as follows:

> Sorry for not getting back to you. Here's my response:
>
> Sometimes, in public life, when they throw out insults, they come back at you harder and truer, so boohoo, Alex Greenwich. When he calls someone a disgusting human being for attending a meeting in a church hall, maybe attention will turn to some of his habits.
>
> Why delete the tweets? Greenwich goes into schools talking to kids about being gay. I didn't want to be accused of anything similar, leaving that kind of content on my socials.

55 This statement was referred to by the parties as "the **DT quotes**". I will adopt the same description.

56 The DT quotes were included by Ms Silmalis in an online article published by *The Daily Telegraph* on 1 April 2023 at 1:38pm with the headline "Mark Latham doubles down after outcry over his homophobic tweet".

57 The DT quotes were the second impugned publication.

58 The DT quotes were also reported in articles published by a number of other online mainstream media publications including *Sky News Australia*, *News.com.au*, *The Guardian* and *The Daily Mail Australia* (and which were annexed to Mr Greenwich's first affidavit as Annexures AG-52 to 55).

Events after the publications

59 Mr Greenwich instructed his lawyers to send a letter to Mr Latham on 19 April 2023, containing a concerns notice in accordance with the *Defamation Act 2005* (NSW) (the **Act**). By that letter, Mr Greenwich made an offer of settlement in which he sought, among other things, an apology from Mr Latham.

60 On 27 April 2023, *TNT Radio* broadcast an interview between Chris Smith, host of *The Chris Smith Show*, and Mr Latham. During the interview, Mr Latham stated, inter alia: "I told [Mr Greenwich] what I thought was disgusting and I speak for a lot of straight men, Chris, in saying that the idea of having anal sex with another man would make you vomit … The basic natural reality is that we don't go for anal sex with blokes and it's pukeworthy". A full transcript of the *TNT Radio* interview was annexed to Mr Greenwich's statement of claim as Schedule C, and an audio recording of the interview was annexed to Mr Greenwich's first affidavit and marked Exhibit AG-59.

61 Mr Latham posted a number of tweets promoting the *TNT Radio* interview. The interview was also reported in the news media in articles published on 27 and 28 April 2023, including by *The Daily Mail Australia*, *OUTinPerth*, *The Star Observer*, *The Guardian Australia* and *Q News*.

62 Also on 27 April 2023, Mr Latham "liked" a tweet posted by a Twitter user which said "Stick your apology up your ass".

63 On or about 28 April 2023, Mr Latham published a tweet which said "I must be wonderfully Deplorable if Chris Minns wants to cancel me but he's attending Kyle Sandilands wedding tomorrow, complete with organised crime figures and a convicted drug smuggler as best man!! Kyle has 'picked on' the disabled and Alphabet people even more than me [crying laughing emoji]".

64 On the same day, Mr Latham replied to this tweet with a comment which said "Where's Greenwich when you need him?"

65 On 2 May 2023, NSW politician Ms Abigail Boyd posted on Twitter a link to a *Sydney Morning Herald* article entitled, "NSW opposition leader vows to work with Latham despite homophobic slurs".

66 Also on 2 May 2023, Mr Latham posted a tweet in response to Ms Boyd's tweet which said "I'm very sorry for saying I hate the idea of having anal sex with another man. Has it become compulsory?"

67 On the same day, Mr Latham posted a second tweet in response to Ms Boyd's tweet which said "The Left has sexualised politics particularly through the predominance of LGBTQIAP+ issues. But of course, in the media double standard that applies, no one from the Right should ever participate in these debates and give their true opinion. We are lesser, disgusting human beings."

68 Later on 2 May 2023, Mr Latham "liked" comments in reply to first tweet in response to Ms Boyd, including the following:

(a) "Well done M.L.";

(b) "100% agree. So does most of society just quietly", enclosing a photograph of text which read:

> Put 100 women and 10 men on a deserted island. In 100 years, you will have

> a thriving community of men, women, boys, and girls. Now, put 100 trans women and 10 men on a deserted island. In 100 years you will find the skeletons of 110 men. Follow me for more science.

(c) "Good to see you telling the truth & sticking to your guns, mate. More politicians should try it [clapping hands emoji, thumbs up emoji]".

69 On 4 May 2023, Mr Latham posted a tweet which said "I can't win: I apologised here and now Alex Greenwich has referred this Tweet (and many others) to the NSW Anti-Discrimination Board for action. He's obsessed with petty litigation against me for disagreeing with him".

70 Also on or about 4 May 2023, Mr Latham posted a tweet which said "Ultimately this is the great Greenwich crime: disagreeing with an entitled European Prince. Lawfare instead of sorting it out in the parliament to which we have both been elected. Should I take out an AVO for harassment? [four crying, laughing emojis]".

71 On 17 May 2023, Mr Greenwich's lawyers received a response from Mr Latham's solicitors at that time. That letter said, among other things, that Mr Latham declined the settlement offer in Mr Greenwich's solicitors' letter of 19 April 2023.

The "torrent of abuse"

72 Immediately following the publication of the primary tweet and then the DT quotes, Mr Greenwich was subjected to what Dr Collins described, not unfairly, as an "utterly hateful torrent of abuse and vitriol".

73 Much of this was received through the "feedback" service on Mr Greenwich's website, which was then sent as a message to an "Electorate Office Sydney" email address. Other communications were sent directly as emails to that address. The electorate office also received several voicemail messages and letters. Messages were also sent to Mr Greenwich's Facebook account. Often the communications were sent anonymously or using a pseudonym.

74 During his opening and closing submissions, Dr Collins took me to many examples of such communications, which were exhibited to Mr Greenwich's first affidavit.

75 The tenor of the messages varied. Many of them were vile or offensive and, in some cases, confusing. Some were threatening. Others were, as Mr Smark accepted, deranged. Some were all those things combined.

76 Communications received by Mr Greenwich and his electorate office after publication of the primary tweet, included:

(a) An email received at 4:19pm on 30 March 2023: "You said Mark Latham was a 'disgusting human being'. Well, just be reminded Sodom and Gomorrah got torched by the Creator because of repugnant sodomites like you."

(b) An email received at 10:31pm on 30 March 2023: "Disagree with you guys and I would be called a bigot well that is not inclusive is it ? Everyone tolerant of the rainbow community but they definitely dont show the same tolerance Im normal boring one of the run but I cannot have my identity the rainbow people display self centered entitled immaturity that in my opinion is not the qualification for society they ALL FAIL maybe they should pay attention and gain the qualities and skills to be a part of society instead of ramming their differences??? down everyone else throat What a shame Latham told your truth."

(c) An email received at 6:31pm on 31 March 2023: "I saw you're calling for more 'protections' for lgbtq ... zwpu, whatever else, people. In other words you want to shut down freedom of expression, free speech, which is a globalist agenda just like the lgbtq agenda. Anyone that feels 'offended' for any little thing, especially coming from a political adversary will cry out. People need to stop being so pathetic, childish and jelly spined. More importantly this cancel culture and shutting down of speech because somebody feels upset, needs to end."

(d) An email received at 6:42pm on 31 March 2023:

> I understand that you are upset about what Mark Latham had to say to you in response to your article where you refer to Mark Latham as a "disgusting human being"
>
> Well Mr Greenich, what did you expect? Mark Latham reacted in kind, as would most!
>
> Just because you are LGBQTI does not give you license to "slang off" at others who do not share your beliefs and way of life. The LGBQTI do not have a universal license to abuse and degrade others without being subject to retaliation.
>
> Calling another person a "disgusting human being" is a pretty disgraceful, denigrating and hurtful accusation in the first instance.
>
> No surprise that it elicited a sharp, blunt and pointed response form Mark Latham.
>
> If you cannot handle the responses you get for shooting your mouth off, try keeping it zipped!

(e) An email received at 7:09pm on 31 March 2023: "If someone has a point of view you don't like or don't agree with, does that mean he/she should be denied the right to

express themself? You had the right to respond, saying he's 'not well' is insulting too like his comment might be. Does that mean your right to expires yourself should be removed?"

(f) An email received at 7:19pm on 31 March 2023: "Mark Latham just stated the facts".

(g) An email received at 11:20pm on 31 March 2023: "How funny the press ignores the LGBTQ shooter in Nashville. All quiet.….hmm".

(h) An email received at 1:31pm on 1 April 2023: "Your disgusting gay fucker with poo on your hands. Wake up to yourself and realize how fucked up you are."

77 Many communications, including emails and letters, were received after publication of the DT quotes, although it is obvious that a large number of them were still in significant part a response to the primary tweet. They included, among others:

(a) An email received at 4:12pm on 1 April 2023: "…Mark is speaking for REAL Australians, the people who are fed-up with everyone 'bowing-and-scraping' to dirty, filthy dung-punching POOFTERS, and dirty, filthy pussy-licking DYKES, and all the other FREAKS in our society !!!!".

(b) An email received at 11:33pm on 1 April 2023:

> Mr Greenwich If you kick a dog often enough it growls. Latham has railed against the abusive aggressive antics of you alphabet people. It's OK for people like you to payout on those who find your behaviour disgusting but your kind are responsible for killing 3 young children and 3 teachers in Nashville USA. Latham has a lot of supporters out here and though his social media post was inappropriate, I feel it was your kind who has no place in parliament and need help with your abnormal situation. We have all seen the disgusting attack on women's rights both here and in NZ and there is no way in the world I would vote for people like you in a fit. I am not homophobic, one of my family is gay but he doesn't carry on like the likes of you. You get help, you're the one who is abnormal.

(c) An email received at 7:43pm on 1 April 2023: "Just checking when you and your husband sounds disgusting doesn't it go shopping do you both have purses and hold hands. Texting you makes me want to throw up. Who is the male poo pusher of your relationship."

(d) An email received at 11:57am on 2 April 2023: "If you, Want to hand out crap, then learn to have it thrown at you ..You are an Abomination of Nature ..A few jeans short of a Wardrobe..".

(e) An email received at 11:04am on 3 April 2023:

> Congradulations to Mark Latham for telling the truth. He is protecting the integrity of women's sport from perverts who claim to be women. Just because a biological male wears a dress, lippy and high heels doesn't make him a biological woman. Women DO NOT want biological males entering their change rooms or toilets or competing against them in sport. it is just an excuse to leer, molest and rape biological women as has happened in the U.S. What part of that statement do you not understand? You must have a particular extreme hatred of women. Given that you are a sodomite - I guess that is understandable. No man should stick his dick up another man's anus. It's akin to sticking your dick into a sewerage pipe. God bless Mark Latham who is one of the few public figures who will support women against perverts. Israel Folau spoke the truth. Unrepentant sodomites will fry in hell like bacon …

(f) An email received at 12:22pm on 3 April 2023:

> Greenwich gets his jollies attacking Christians and women and can't stand a few home truths from Mark Latham. Greenwich says Latham is disgusting for defending women in a Church setting. Big and brave, Alex. Try that on Muslims, of course not, they fight back. Latham point out some biological truths about sodomy (albeit crassly) and poor little Alex gets his panties in a knot. What a grubby little two faced coward is Alex Greenwich for crying crocodile tears. If you don't like "truths" about your own depraved habits (yes that is what Rom. 1 calls it) being highlighted then show some respect for other people's beliefs. The Alphabet Mafia started by demanding respect, they now have shown their true colors demanding worship. Well, sorry, Satan is not worthy of worship or his useful idiots and their depraved acts. Boo hoo Alex! Cry me a river, you depraved grub!

(g) An email received at 9:13am on 4 April 2023: "Go back to where u were born and leave our Mark alone ,GRUB".

(h) An email received at 2:38pm on 1 May 2023:

> Mark Latham's comments are "disgusting", you say.
>
> So, how do you feel about gay sex, involving, as as usually does, contact with feces?
>
> Now, to most people, that really is disgusting.
>
> You'll be glad to hear that I'm reminded of you, Alex, every time I take a shit.

(i) An email received at 1:24pm on 4 May 2023: "You say that Mark Latham is so offensive. Has it ever occurred to you that you are many more times more offensive in the way you force your unnatural, immoral and unclean way of life onto the rest of the population."

(j) At around 1:48pm on 4 May 2023 a Facebook message which said: "Get fkd GROOMER!!!".

(k) An email received at 3:33pm on 5 May 2023:

> Dear Mr/Mrs? Greenwich, I just want to make a point regarding the dispute you are currently having with Mark Latham. It appears (correct me If I'm

> wrong) that you called him ‘a disgusting individual’ first, and Mark Latham’s response whilst disgusting, was not an attack on your character, merely an observation of factual nature not a value statement. I know a little about this as I once employed a gay young man and when he came to work, spent the first half an hour in the toilet cleaning himself out and clogging the bowl with toilet paper, much to the annoyance of his work colleagues who couldn’t get to use the bathroom. My point is this. Don’t dish out dirt on someone if you don’t want a hostile response! All the best with your cleaning efforts. I just hope it doesn’t take as long as the young gay fellow who worked for me.

(l) At 8:02pm on 8 May 2023, the following Facebook message:

> Where you born a disgusting pedophile,..do you know what horrors kids are going through because of pedophiles in power you sick bastard

(m) On about 9 May 2023, the following Facebook message:

> Stay away from our kids mate. We are here to protect the kids at all costs mate. This is a warning stay away from our kids

(n) An email received at 2:22pm on 11 May 2023:

> Dear Mr Greenwich,
>
> I am puzzled by the reaction from you and many other people to Latham’s tweet.
>
> How is a crude but accurate description of a particular sexual act “homophobic”?
>
> Any gay who identifies as a “top” regards anal penetration as normal behaviour. And gays are famous for promiscuity, e.g. Freddie Mercury. In the movie “Love Actually” from more than 20 years ago one of the characters asks another “How about a bit of buggery?”, clearly talking about the same activity.
>
> Whether one finds getting faeces on one’s body disgusting depends a great deal on the values of a person. Most parents who have spent a few years cleaning up infants are quite relaxed about that. In another recent movie Katherine Heigl supposedly had some on her face and hadn’t noticed. Straight males who take no part in child care obviously have a different view. That attitude is pretty ridiculous in my opinion.
>
> The only really offensive thing I can see in the tweet is the Implication that you are promiscuous (“some bloke”) rather than faithful to your partner.
>
> In public disputes, derision is often more effective than rage.
>
> Why didn’t you just laugh at him?

(o) An anonymous, handwritten letter received on about 16 May 2023 in the following terms:

> Poor pathetic Pedo Pooftah.
>
> Throwing you “blokes”!!! over cliffs was too good for you!
>
> Should be hung, drawn and quarted.
>
> Fucking Fairy Faggot!

> Horrible piece of shit.

(p) An anonymous, typed letter received on about 16 May 2023 in the following terms:

> Greenwich
>
> You piece of poofta shit
>
> You fucking alphabet cunt
>
> All you weirdo up the arse mongrels should be publically executed
>
> Fucking poofta cunt!!!

(q) At 5.15pm on 18 May 2023 a Facebook message which said:

> Your are dirty fucken poofter you should have been put down at birth I believe in poofter bashing and so is your fucken lawyer

(r) A voicemail left on about 18 May 2023 which said:

> Alex Greenwich, you are a disgusting human being and your actions are even more disgusting. How dare you represent Sydney. Are you fucking serious? Go bury your head in shame.

(s) A voicemail left on about 18 May 2023 which said:

> Oh hello Alex, or one of the little soy boys that may answer this, look at the recorded messages. I've just seen you on the TV. You dirty f'n fuckin' cunt. Listen, I've got one question for you and your little soy boys working in the office with you. One question. I bet your fathers are proud you are gay. You know they're fuckin' not. You fuckin' - yeah, you've got the word but- you fuckin' little soy boys.

(t) A voicemail left on about 19 May 2023 which said:

> Miss Greenwich, poofter, paedophile, piece of shit faggot cunt. Jump over the gap you cunt.

(u) A handwritten letter, contained in an envelope post-stamped 21 May 2023 and addressed to "Mr Sodomite Greenwich", which said:

> FAGGOT!!
>
> POOFTAH piece of Shit.
>
> Go MARK!!!!

(v) A voicemail left on about 10 September 2023 which said:

> Alex, you poor little faggot. 'Mark Latham made me cry'. Ya fucken piece of shit. Fuck off you cocksucker.

78 Mr Greenwich also received a letter at his parliamentary office on about 4 October 2023, the contents of which were so concerning to him that he gave the letter and a statement to a detective at a police station. Mr Greenwich deposed that he was later informed by the police

that the author of the letter had been charged with criminal offences. A personal violence order was also made against that person in order to protect Mr Greenwich.

Statements of public support for Mr Greenwich – agreed facts

79 The parties filed a statement of agreed facts. The following facts (among others) regarding statements of public support for Mr Greenwich were agreed.

80 As mentioned at [49] above, on 30 March 2023, Senator Pauline Hanson posted a video to the public in which she said:

> I am responding to the comments made by Mark Latham on social media. I want you to know that I don't condone them and neither do my members of parliament or party associates.
>
> I think they are disgusting.
>
> I've actually tried to ring Mark a couple of times, to no avail, and I have clearly sent a text message to him telling him my views and also I've asked him to give the people an apology.
>
> I will leave it at that. It is now over to Mark to answer the people.

81 On 30 March 2023, Penny Sharpe MLC said:

> I was physically sickened by that tweet.
>
> Homophobia is always unacceptable and there is never an excuse. Mr Latham should apologise to Alex Greenwich immediately.
>
> It's been a long time since I've seen something that awful said out loud in public, it really is completely unacceptable.
>
> People have been bullied over these issues over time. I've worked with families whose sons were murdered in the 70s and 80s through violence against gay men.
>
> This is a serious matter and it brings back a lot of terrible memories that really I thought we had gotten through.
>
> They shouldn't be listening to this kind of material, we love every person no matter who they are.
>
> It also doesn't reflect who New South Wales is, we've just had World Pride, this incredible celebration of inclusion and people really being able to be who they are.

82 On 30 March 2023, Jenny Leong MLA said:

> The hateful homophobic and transphobic bile that spews from former Labor leader turned One Nation MP Mark Latham demonstrates why no political party or independent representative should engage with him.
>
> Being an elected representative doesn't give him a free pass.
>
> The Greens are committed to working with all elected members of parliament across the political spectrum who show respect for equality and recognise that we all

collectively play a role in stamping out discrimination in our communities - One Nation clearly doesn't meet this baseline.

It is clear that all political parties, all independents elected to the new parliament need to take a stand and refuse to work with this toxic man.

The only reason One Nation gets any power in our democracy and our parliaments is because political parties and elected representatives continue to work with them.

83 On 30 March 2023, the Prime Minister, Mr Anthony Albanese, said:

I am concerned that with social media we seem to have a circumstance whereby people would say things through various applications they'd never say to someone face to face and we know that can be very hurtful and it can have drastic consequences.

84 On 30 March 2023, journalist Deborah Knight said:

Mark Latham's tweet is off the charts.

I won't repeat it, you can't, what he's written is something you would never say.

Mark Latham needs to take a good hard look in the mirror for posting stuff like this.

85 As mentioned at [49] above, on 30 March 2023, commentator Andrew Bolt said:

Now to the crisis in Pauline Hanson's One Nation. It's a crisis called Mark Latham. I would ask Mark Latham to come on tonight to explain what went wrong for him in the NSW election last weekend. He is the leader of One Nation there and he didn't do as well as [he] expected. But as you can see no Mark nor will there ever be.

Now I know … you know that we've had blow-ups before. I mean last year I called him out for his racist joke about Channel 9 journalist Sarah Abo. Latham hates criticism he accused me of many foul and false things and that was it with us even though I had supported him for quite a while. I didn't and you didn't expect him to come back on my show but he was the leader of One Nation in NSW and he was promoting some sensible policies at last week's election so I did ask him on to explain them and I told you that the voters and the policies were more important than my feelings. Now Latham did ask to come on again just before the election. I said fine we talk the elections again but never again.

Latham this morning put a tweet so disgusting that even he felt ashamed after a while and eventually deleted it but much too late. This tweet was so disgusting, so homophobic, so vile in a pornographic way that I cannot even hint about what he said about a gay politician Alex Greenwich. But it was the kind of thing a scumbag would write. A drunk one, except he wrote it not at night but at 10:30am this morning. Now what was going through his mind I do not know, but not for the first time I wonder if he has some issue that needs seeing to. Now Latham seems to have a self-destruct button and he is punching it far too often. Many former colleagues in Labor refuse to speak to him after he betrayed them in a seeming rage. Betrayed secrets and all sorts of things. There was also the Abo joke. There was a fight with a taxi driver whose arm was broken. And now this tweet which I don't think he will ever live down.

He will be a pariah and not just here at Sky. I wonder how he will be able to function effectively as a political leader who has earned the contempt of so many for his abuse, particularly the media. And this is a real problem for Pauline Hanson, the national One Nation leader. Latham taints her. She's tried to rein him in but now this. Doesn't Latham even know that Hanson's closest adviser for years, a really top bloke, is

himself gay. Hanson is of course furious. She doesn't trust herself to come on herself tonight in case she really explodes and makes things worse but she did record this response and send it to us.

…

We have also tried to contact Mark but also no response. Mark get treatment. You are such a clever man. You have so much to offer. When you are up you can be wonderful company and also kind but you seem to have a death wish. You crack and then say things that are so cruel and so vicious and now so homophobic that the one who is hurt most is you. Goodbye and good luck.

86 On 31 March 2023, the NSW Premier, Mr Minns, said:

I think that they're vile and shameful comments and I think he revealed himself to be a bigot. They have been directed at a member of parliament ... who is extraordinarily effective and manages to elevate the conversation and make major changes in the state.

One of the things that can't be forgotten is that comments like this, even though in and of themselves they're terrible, they unleash ghouls on people like Alex. It's not what we need in public life.

Members of the LGBTQI community are two and a half times more likely to require urgent medical attention due to mental health conditions and deserve the support of political leaders.

There should be an unambiguous and universal condemnation of these comments.

Mr Greenwich's evidence about the impact of the publications

87 Mr Greenwich deposed to the following matters in his affidavit, under the heading "Personal and Professional Impact":

Since the publication of the Primary Tweet and the DT Quotes, I have experienced for the first time in my professional life ongoing sexualised attacks based on the fact that I am openly homosexual. I consider that Mr Latham's comments sought to reduce my identity to a sex act and then imply I am a danger to children.

I continue to feel unsafe in my workplace after, as I have outlined above, I was regularly targeted throughout 2023 online, via mail, email and telephone with abusive language, homophobic taunts, and threats of violence.

Since publication of the Primary Tweet and DT Quotes, I also feel anxiety, a lack of confidence, and I have moments where I get overly emotional and begin crying. Mr Latham's comments have impacted my ability to attend large gatherings out of fear that people will ask me questions about Mr Latham, or engage in violence against me.

Aside from the impact on me, Mr Latham's comments and their aftermath have also significantly impacted the daily operations of my Electorate Office. I pride myself on providing my staff with a safe and supportive work environment. My Electorate Office has low staff turnover. Prior to becoming a politician, I worked in Human Resources at Winning Attitudes Pty Ltd. I have a Bachelor of Arts degree in Human Resources Management and Russian Studies. I take that experience and apply it to my management of my Electorate Office staff. No staff member in my Electorate Office has ever made a complaint about me or workplace conditions to Parliament. Since the Primary Tweet, staff in my Electorate Office have had to field the communications

referred to in paragraphs 128-129 above.

Following publication of the Primary Tweet and the DT Quotes, I heard my staff say to me on a number of occasions words to the effect:

> Staff: "I just took a really abusive call."
>
> …
>
> "I've just seen a horrible email."

I have also seen the reaction of my staff to these kinds of communication. Based on my observations of my staff in the Electorate Office, it appears to me there is a feeling of stress and anxiety in the Electorate Office, and that the energy of my staff has been diverted from helping constituents. I remain very concerned about the safety and wellbeing of my staff.

On about 3 April 2023, I directed my staff to close the Electorate Office for one week, meaning I directed my staff to keep the Electorate Office shopfront door locked during office hours. Usually, the shop front door is closed, but unlocked so constituents can come in to the Electorate Office off the street. I gave this direction because I was concerned about the safety of my staff. We had just started to receive the communications referred to in paragraph 128-129. I had a few staff members who were off, so we were down to two staff members at the Electorate Office. Initially one of my staff, Tammie Nardone, suggested we keep the door locked/closed, and I agreed. My concerns in respect of my staff's safety and wellbeing, after they had received hateful communications, were amplified in the context of there being fewer staff members present in the Electorate Office. Annexed and marked Annexure AG-152 at page 727 is a screenshot of our Electorate Office staff group WhatsApp chat.

I also believe that the publication of the Primary Tweet, the DT Quotes and the subsequent hateful communications have impacted my ability to be a good manager to my staff. That is because I am concerned that I am no longer able to provide my staff with a safe workplace. That is something I must consider in relation to my ongoing role in public office and public life.

The publication of the Primary Tweet, the DT Quotes and the subsequent hateful communications have also impacted my ability to do my job. I have been constantly stressed and distracted from my work. In 2023, I had to cancel work events because I struggled to face the public, I was afraid for my personal safety and didn't want to talk about the Primary Tweet, DT Quotes and Mark Latham. For example, I cancelled my attendance at an Out For Australia event on 14 April 2023. Annexed and marked Annexure AG-153 at page 730 is a copy of [my] text message to the event organiser.

Since publication of the Primary Tweet and DT Quotes, and since my Electorate Office began receiving violent, threatening and abusive communications, the NSW Parliament has had to provide my Electorate Office with additional resources and counselling support.

In about early April 2023, Surry Hills Police Station provided my Electorate Office with a direct contact person to report any concerning or threatening incidents. During a staff meeting with my Electorate Office staff in about early April 2023, when my Electorate Office first started receiving correspondence related to the Primary Tweet and DT Quotes, I directed my staff to forward any concerning or threatening correspondence to the police contact.

On about 19 April 2023, I attended Surry Hills police station and made a statement about the Primary Tweet and subsequent communication referred to in paragraph 121-

> 122. I recall one of the police officers advised that he would contact my office and organise a time for police to attend my office and provide staff new guidance on opening letters. I was not present for the demonstration. I believe this did occur because my staff advised me that it did occur.
>
> Since publication of the Primary Tweet, the DT Quotes, and since I have experienced the public reaction to those publications, I have, for the first time in public life, found myself craving anonymity.
>
> This has caused me to question my ability to continue in my political role for the first time in my career. I feel a lot of guilt that the publication of the Primary Tweet, the DT Quotes and the public reaction to those publications have impacted my family, especially my husband, Vic.
>
> I feel for the first time in public life that I am threatened, and those around me are being impacted by something I cannot control, my sexuality, and those who do not like homosexual people.

88 He also gave the following evidence about his political future.

> I believe that my ability to perform my political role, and my ability to be a confident and impactful policy maker in the NSW Parliament and for the LGBTQ+ community has been compromised as a consequence of the publication of the Primary Tweet, the DT Quotes and the public reaction. The personal, grotesque and hateful nature of Mr Latham's attacks against me in the Primary Tweet and the DT Quotes, and the attacks made by members of the public following Mr Latham's attacks, have made me feel emotionally, mentally, and physically unsafe in my role as a politician.
>
> My role as a politician gives me a sense of purpose and public service. Despite the importance of those matters to me, I have to now consider whether or not to continue in my political and public role as a direct result of the harm and hatred I have been subjected to as a result of Mr Latham's publication of the Primary Tweet and DT Quotes.

Other witnesses for Mr Greenwich about the impact of the publications

89 What follows is a summary of the unchallenged evidence of the other witnesses, led by Mr Greenwich on the question of the impact of the publications on him.

Mr Graham

90 Mr Graham is Mr Greenwich's Senior Electorate Officer. He gave evidence that before the publication of the primary tweet and DT Quotes, he had not experienced receiving so many hateful and threatening communications directed to Mr Greenwich, and the tone of the communications post-publication was worse. He also deposed that the public reaction to the publication of the matters complained of was so threatening that it necessitated the intervention of NSW Police and the implementation of a procedure to handle suspicious mail. It also resulted in access to the Electorate Office being closed down from time to time, including for a week in early April 2023.

91 Mr Graham also deposed that it was clear to him that Mr Greenwich had been deeply affected by the primary tweet and the abusive communications sent to the Electorate Office. He said that, when it came to discussions about the primary tweet, he observed Mr Greenwich to be withdrawn and deflated, in contrast to his "normal personality which is usually energetic and upbeat".

Ms McCall

92 Ms McCall works as an Electorate Officer at Mr Greenwich's electoral office in Sydney.

93 She is responsible for managing Mr Greenwich's diary, and deposed to having observed that after publication of the primary tweet, Mr Greenwich started to decline more invitations to attend events from colleagues, community organisations and the corporate sector.

94 She also gave evidence about the public reaction to the publication of the matters complained of, which necessitated the intervention of the NSW Police and the implementation of a procedure to handle suspicious mail in the electoral office.

Mr Hoeld

95 Mr Hoeld has been married to Mr Greenwich since 2012.

96 He deposed that he spoke to Mr Greenwich after publication of the primary tweet and heard that he was "audibly distressed, his voice was shaking and sounded different to his usual upbeat tone". He said that before the Capella event (see [40] above) Mr Greenwich told Mr Hoeld he was nervous. When they returned home, Mr Hoeld said:

> [Mr Greenwich] [broke] down like I had never seen before during the course of our relationship. I saw Alex sobbing in bed. I heard Alex say words to the effect, "I feel helpless" and "I feel attacked". It seemed like for the first time in our relationship, I was not able to comfort Alex. It was extremely distressing to me to watch Alex during that evening.

97 Mr Hoeld also deposed that in the immediate aftermath, Mr Greenwich was inundated with telephone communications and he appeared to become stressed and overwhelmed; that Mr Greenwich became uneasy and wished to leave events early and that he was upset and frustrated that people wanted to talk to him about the primary tweet instead of his work; and that despite members of the public expressing sympathy and kindness to Mr Greenwich after publication of the primary tweet, this seemed to make him uncomfortable and disempowered.

98 He also said that Mr Greenwich changed his routine and commenced getting up earlier in the morning, saying words to the effect, "I just want to start my day in peace and quiet and not talk to anyone about Latham".

99 Mr Greenwich read *The Daily Telegraph* article to Mr Hoeld. Mr Hoeld described the effect of the article (which contained the DT quotes) as effectively compounding Mr Greenwich's pain. He said that, he "could see that Alex was even more shaken, distressed, and withdrawn" than he was after the primary tweet.

100 After the publication of the matters complained of, Mr Greenwich and Mr Hoeld started to get out of Sydney as much as possible, and during an overseas holiday in mid-2023, Mr Greenwich told Mr Hoeld, "It's been nice not being called a groomer or paedophile for a whole week".

101 During the same holiday, Mr Hoeld deposed that Mr Greenwich told him that he was questioning whether he ought to continue in his political role.

Senator Hanson-Young

102 Senator Sarah Hanson-Young is a Senator for South Australia in the Parliament of Australia. She is a member of the Australian Greens political party and was first elected to the Senate in 2007.

103 She deposed that she has known Mr Greenwich for approximately 15 years and is a close friend.

104 Relevantly, she deposed as follows:

> On about 3 May 2023, I met up with Alex for dinner in Sydney. I recall that the conversation over dinner was largely consumed by discussion about Mark Latham's publications and the impact it was having on Alex and his family.
>
> During the dinner, I observed that Alex appeared visibly upset. He was subdued and was not his normal outgoing, happy self. I don't recall the exact words said, but I understood from our conversation that, as I had feared, Alex had become the subject of intense abuse, bullying, and threats from the public, including communications sent to him and his Electorate Office staff and online. I felt horrible that Alex was subject to this vitriol and that his personal life was being targeted. I also understood from our conversation that Alex was very upset about the impact on his husband, Victor.
>
> Since 3 May 2023 Alex and I have had regular catch up[s] because we are close friends. We have spoken a lot about this incident many times. But the impact on Alex of Mr Latham's publications is evident to me on each occasion I see Alex. My observation of Alex's discussions with me is that Alex feels under attack because he has been abused and harassed on social media, significantly, since the Primary Tweet and his electorate office has been sent a barrage of hate mail, hateful emails and hateful phone calls. Alex has often said to me that he feels that Mr Latham's conduct in publishing the Primary Tweet - and making follow up comments about the contents of the Primary

> Tweet, gave a licence for others to abuse and harass Alex. Alex has said to me repeatedly (and I agree) that he is a public figure and wants to demonstrate to Australians that this type of conduct from Mr Latham is not appropriate. My observations of Alex since the publication of the Primary Tweet and Mr Latham's follow up comments is that the publications have taken a personal toll on Alex because he is not only genuinely hurt by [the] nature of the publications, but the publications have given rise to hateful attacks directed at Alex, both online and through email, telephone and post.

The Hon Gregory Piper MP

105 Mr Gregory Piper is the member for Lake Macquarie in the NSW Legislative Assembly and a parliamentary colleague of both Mr Greenwich and Mr Latham.

106 He is an independent politician and was first elected to the NSW Parliament in 2007.

107 He has known Mr Greenwich since 2012 and they have become close colleagues.

108 Relevantly, he deposed as follows:

> In my experience, Alex is ordinarily a person who is on the front lines of public debate and often around divisive issues, and he has had people oppose him on many fronts. He is courageous and no stranger to political conflict.
>
> I recall feeling concerned for Alex when I first saw the Tweet, and I called him to check in right away. It seemed to me, by the tone of his voice, that Alex was rattled. He even admitted to being upset, saying words to the effect of "Greg, I am so upset about this." Alex did not come across with the usual confidence and positivity that I see as being his usual demeanour. He was, at the time, away, taking a break, which I understood to be a response to his distress. Alex seemed very distressed.
>
> Since the Tweet I recall seeing various posts and news reports about Mr Latham's responses to the criticism that followed. I also recall reports of Mr Latham speaking with Chris Smith on a radio show. Following the Tweet, Alex became more sensitive to external pressure. His general demeanour following the Tweet changed to a more flattened mood. I have spoken to Alex at length about these issues and I am concerned about his emotional health.
>
> Mr Latham's publications left a mark on Alex in a way that I have not observed from any other criticisms or attacks on Alex during his time in Parliament.

THE PLEADED CASE

109 By a statement of claim filed on 29 May 2023, Mr Greenwich pleaded (and Mr Latham in his defence denied) that the primary tweet:

(a) carried the imputation that he "engages in disgusting sexual activities"; and

(b) to persons who were aware of the Metcalfe tweet and knew that Mr Greenwich is a member of the NSW Parliament, carried by way of true innuendo the imputation that

he "is not a fit and proper person to be a member of the NSW Parliament because he engages in disgusting sexual activities".

110 Mr Latham denies that the first pleaded imputation, if carried, is defamatory.

111 He accepts that the second pleaded imputation is defamatory, if it is found to be carried.

112 Mr Greenwich also pleads that the DT quotes:

(a) carried the imputation that he "is a disgusting human being who goes into schools to groom children to become homosexual"; and

(b) to persons who knew that he is a member of the NSW Parliament, carried by way of true innuendo the imputation that "Mr Greenwich is not a fit and proper person to be a member of the NSW Parliament because he goes into schools to groom children to become homosexual".

113 Mr Latham accepts that if either of those pleaded imputations were carried, they are defamatory.

114 Section 10A of the Act requires Mr Greenwich to prove that the publication of each defamatory matter caused, or is likely to cause, serious harm to his reputation. He pleads (and Mr Latham denies) that he has established that proof.

115 Mr Latham pleads a number of positive defences — honest opinion under s 31 of the Act and common law qualified privilege (reply to attack) with respect to the primary tweet and the DT quotes, and a *Lange* qualified privilege defence and a public interest defence in respect of the DT quotes, which Mr Greenwich says are either not established or are defeated by malice, as the case may be.

116 Mr Greenwich seeks substantial damages, including aggravated damages, as well as injunctive relief.

117 It is fair to say that the principal focus of the trial was the primary tweet.

118 For the reasons that appear below, Mr Greenwich succeeds with respect to the main part of his case about the primary tweet, but not at all with respect to his case about the DT quotes (because the pleaded imputations were not carried).

THE PRIMARY TWEET: ARE THE MEANINGS CARRIED?

Applicable principles

119 Mr Greenwich bears the onus of proving, on the balance of probabilities, that the alleged defamatory imputations were conveyed. That is a question of fact.

120 The court is required to determine the meaning of the publications objectively, by reference to the standards of the hypothetical ordinary reasonable reader. The ordinary reasonable reader is (a) of fair, average intelligence, experience and education; (b) fair-minded; (c) neither perverse, morbid nor suspicious of mind, nor avid for scandal; (d) a person who does not live in an ivory tower, but can and does read between the lines in light of general knowledge and experience of worldly affairs; (e) a person who does not search for strained or forced meanings; and (f) a person who reads the entire matter complained of and considers the context as a whole. See, by way of example only, ***Hanson*** *v Burston* [2023] FCAFC 124 at [44] (Wigney, Wheelahan and Abraham JJ).

121 The Court must arrive at a single objective meaning, being that which an objective audience composed of ordinary decent persons should have collectively understood the matter to bear. The manner in which the publication was actually understood, and the publisher's intended meaning, is irrelevant to the question of meaning. See, eg, *Lee v Wilson* (1934) 51 CLR 276 at 288 (Dixon J); *Australian Broadcasting Corporation v Chau Chak Wing* (2019) 271 FCR 632 at 646–7 [32]–[33] (Besanko, Bromwich and Wheelahan JJ); *Hanson* at [46].

122 When it comes to interpreting social media posts, regard must be had to the impressionistic nature of the medium and over analysis is to be avoided.

123 In *Bazzi v Dutton* (2022) 289 FCR 1 at 9 [29], Rares and Rangiah JJ quoted the following passage from the judgment of Lord Kerr JSC in *Stocker v Stocker* [2020] AC 593 at 605–6 [41]–[43]:

> [41] The fact that this was a Facebook post is critical. The advent of the 21st century has brought with it a new class of reader: the social media user. The judge tasked with deciding how a Facebook post or a tweet on Twitter would be interpreted by a social media user must keep in mind the way in which such postings and tweets are made and read.
>
> [42] In *Monroe v Hopkins* [2017] 4 WLR 68, Warby J at para 35 said this about tweets posted on Twitter:
>
> > The most significant lessons to be drawn from the authorities as applied to a case of this kind seem to be the rather obvious ones, that this is a conversational medium; so it would be wrong to engage in

> elaborate analysis of a 140 character tweet; that an impressionistic approach is much more fitting and appropriate to the medium; but that this impressionistic approach must take account of the whole tweet and the context in which the ordinary reasonable reader would read that tweet. That context includes (a) matters of ordinary general knowledge; and (b) matters that were put before that reader via Twitter.
>
> [43] I agree with that, particularly the observation that it is wrong to engage in elaborate analysis of a tweet; it is likewise unwise to parse a Facebook posting for its theoretically or logically deducible meaning. The imperative is to ascertain how a typical (ie an ordinary reasonable) reader would interpret the message. That search should reflect the circumstance that this is a casual medium; it is in the nature of conversation rather than carefully chosen expression; and that it is pre-eminently one in which the reader reads and passes on.

124 In ***Trkulja*** *v Google LLC* (2018) 263 CLR 149 at 160–61 [32] Kiefel CJ, Bell, Keane, Nettle and Gordon JJ said that the exercise of ascertaining the meaning that a publication conveys:

> … 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 … 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 … He or she may be taken to read between the lines in the light of his general knowledge and experience of worldly affairs … but such a person also draws implications much more freely than a lawyer, especially derogatory implications … and takes into account emphasis given by conspicuous headlines or captions … Hence, … where 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.
>
> (Citations and internal quotations omitted)

Consideration

The first pleaded imputation: in its natural and ordinary meaning, the primary tweet meant and was understood to mean that "Mr Greenwich engages in disgusting sexual activities"

125 It will be recalled that in the primary tweet Mr Latham said, in response to the Metcalfe tweet which reproduced Mr Greenwich's accusation that he (Mr Latham) was, among other things, "disgusting":

> Disgusting? How does that compare to sticking your dick up a bloke's arse and covering it with shit?

126 Mr Latham submitted that the first pleaded imputation was not carried to the ordinary reasonable person for the following reasons:

(a) it includes the quote from Mr Greenwich, so the reason for referring to "disgusting" was that it echoed an attack on Mr Latham;

(b) Mr Greenwich's quote made clear the political context ("people who are considering voting for One Nation need to realise they are voting…");

(c) in that context, the primary tweet was about homosexual men generally, not the applicant — that is, its meaning was a retort, "if you say I'm disgusting, what about the sort of sexual conduct which gay men engage in?";

(d) some readers might have thought it was referring to Mr Greenwich personally, but that is not the more obvious reading in context; and

(e) further, Mr Greenwich was said to have "cast his imputation at too high a level of generality – it wasn't about 'disgusting sexual activities' generally (which would extend to lack of consent etc) but to homosexual sex, which was said to be disgusting.

127 In his closing submissions, Mr Smark submitted that the ordinary reasonable reader would therefore understand the meaning of the primary tweet as follows:

> Mr Latham is challenging the notion that he has engaged in disgusting conduct, and he's pointing to something else that he thinks is disgusting, and what he's saying he thinks is disgusting is the conduct of homosexual men having sex, and more specifically anal sex. He is not, in the context, saying that about Mr Greenwich personally.

128 I do not agree.

129 As Dr Collins put it in his closing address:

> It's a very short publication comprising only a few words with a meaning which is crystal clear, and it's not the meaning that our learned friend has submitted to your Honour. It is plainly not a tweet about homosexual sex. It's a tweet about a particular unhygienic sex act. It has got nothing to do with gender; nothing to do with sexuality. It's about – forgive me – sticking a dick up a person's arse so as to cover it with shit, and to suggest that that is to be equated to homosexual sex is something one would not expect to hear in one of His Majesty's courts in the third decade of the 21st century.

130 It seems to me that the primary tweet self-evidently refers to Mr Greenwich in particular, and that the first pleaded imputation is, as was submitted, its unambiguous and literal meaning.

131 In my view, the ordinary reasonable person would interpret the meaning of the primary tweet to be that Mr Greenwich — not homosexual men generally — engages in disgusting sexual activities.

132 Mr Latham's reference to "your dick" would be understood by the ordinary reasonable person to be a reference to Mr Greenwich's penis, not to homosexual men generally, because the primary tweet is a response to the Metcalfe tweet, which reproduced what Mr Greenwich was

quoted as saying about Mr Latham in *The Sydney Morning Herald*. Contrary to Mr Latham's submission, the "retort" that the ordinary reasonable reader would understand him to be making is: "if you say I'm disgusting, what about the sexual activities that *you* [Mr Greenwich] engage in?"

133 Further, the sex act described is, as Mr Greenwich submitted, "an act that any human could engage in, irrespective of gender" and "[t]here is nothing about it that is exclusive to homosexual men".

134 In his closing address, Dr Collins invited me to look at the question of whether the first pleaded imputation about the primary tweet was conveyed by supposing that the word "sheila" was substituted for "bloke". He put his submission this way:

> Could I invite your Honour to engage in this exercise. Substitute for the word "bloke" the word "sheila", the Australian vernacular for a woman, and imagine that this is a tweet by Mr Latham about a heterosexual male Member of Parliament. It would then read:
>
> > *Disgusting. How does that compare with sticking your dick up a sheila's ass* [sic] *and covering it with shit?*
>
> Now, no one would suggest that that was a tweet that carried a meaning of the kind our learned friends contend for about heterosexual sex generally. No one would contend, contrary to our learned friend's submissions, it would be a tweet about a class of people as opposed to the individual the subject of the disgraceful remark, and no one would suggest that an imputation of the kind we plead, that the person engages in disgusting sexual activities, was pitched at too high a level of generality. You simply wouldn't have that debate, nor would we have a debate, if one substitutes the word "sheila" for "bloke", about whether the tweet carried a defamatory meaning.
>
> … [T]o suggest that one would read it differently when one is in the context of an openly gay politician is an exercise in sophistry, which must have at its core a double standard, a prejudice, a stereotype. That's why we – when our learned friends say what the ordinary reasonable person takes from that tweet is some disapprobation of homosexual sexual activity, our learned friend pitches it at too high a level of generality.
>
> That's not what it says. It's about a particular act, a particular unhygienic act, based on nothing more than Mr Latham's presumptions about what Mr Greenwich does in the bedroom …

135 Dr Collins then referred to Mr Smark's concession made in his closing address that Mr Latham "had no basis to know what sort of sexual conduct Mr Greenwich himself engaged in or whether he engaged in sexual conduct at all". Dr Collins submitted that the concession was fatal to the defences pleaded by Mr Latham (which I deal with later), but in the context of the question of the meaning of the primary tweet, he submitted that the "thought experiment

exposes the fallacy in our learned friend's submissions about the way in which the ordinary reasonable person would read the primary tweet". He continued:

> [O]ne looks just at, "What would ordinary people understand Mr Latham to be saying?" divorced of what they might think about it – just what they understand him to be saying. Our learned friends say they would understand him to be saying, "Disgusting. Not as disgusting as homosexual sexual activity." We submit that's at far too high a level of generality, and it ignores the use of the word "disgusting", the use of the word of – the use of the words "shit", "dick" and "arse", all of which are connoting something well beyond homosexual sexual activity and are going to a particular sexual act which Mr Latham contends is disgusting, and which is disgusting.
>
> …
>
> It's disgusting, the idea that one would have sex in order to cover one's genitals with faecal matter, and it can be hard to say. We've all grappled with this, your Honour. One would not wrestle with this at all if it was a question of gender or if it was a question of race. There's something about sexuality which we are still grappling with as a community. It's why I reached for the thought experiment of substituting "sheila" for "bloke". When we substitute "sheila" for "bloke", none of us [is] in any doubt that it's conveying a defamatory meaning about the individual, not the group. It's not expressing something about heterosexual sex generally.

136 In my view, Dr Collins's "thought experiment" is helpful, and aids in understanding that an ordinary reasonable person would not be in any doubt that the primary tweet does not describe homosexual sexual activities generally – but, rather, was meant and understood to mean that Mr Greenwich engages in disgusting sexual activities. This, it seems to me, does not even involve in this instance ascribing to the ordinary person "a very wide latitude" to draw such an adverse imputation (cf *Trkulja* at 160–61 [32]). It is the literal meaning of the words.

The second pleaded imputation: in its natural and ordinary meaning, the primary tweet meant and was understood to mean that Mr Greenwich "is not a fit and proper person to be a member of the NSW Parliament because he engages in disgusting sexual activities"

137 The second pleaded imputation was not the subject of detailed oral submissions. Counsel for Mr Greenwich made this submission in their written closing submission:

> We submit that, to readers of the Primary Tweet aware that Mr Greenwich is a member of the NSW Parliament, and who had read the Metcalfe Tweet, the Primary Tweet carried by way of true innuendo the second pleaded imputation …
>
> The extrinsic facts relied upon by Mr Greenwich – that he is a member of the NSW Parliament, and the Metcalfe Tweet — are matters that the Court can infer will have been known by all or almost all readers of the Primary Tweet. The Primary Tweet was a response to the Metcalfe Tweet; readers only got to the Primary Tweet by having first seen the Metcalfe Tweet. Mr Greenwich has been a prominent member of the NSW Parliament since 2012.
>
> The Primary Tweet was a response by Mr Latham to Mr Greenwich's quote as reproduced in the Metcalfe Tweet. That quote was about Mr Latham's fitness for office

> ("*people who are considering voting for One Nation need to realise they are voting for an extremely hateful and dangerous individual…*"). A hateful and dangerous individual, axiomatically, is not a fit person to sit in a seat of democracy in this country.
>
> The Primary Tweet took Mr Greenwich's language ("*Mark Latham [is] a disgusting human being…*") and threw it back at him ("Disgusting? How does that compare…"). In so doing, Mr Latham will have been understood as questioning Mr Greenwich's own fitness for office.
>
> The Primary Tweet was a retort: "if you say I'm disgusting, what about the disgusting sexual activities that you engage in?"
>
> (Citations omitted).

138 The expression "true innuendo" means that an imputation is said to arise in circumstances where the words would have been read in conjunction with certain extrinsic facts. As Mason and Jacobs JJ explained in *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 at 641:

> When read in conjunction with extrinsic facts, words may, in the law of defamation, have some special or secondary meaning additional to, or different from, their natural and ordinary meaning. This special or secondary meaning is not one which the words, viewed in isolation, are capable of sustaining. It is one which a reader acquainted with the extrinsic facts will ascribe to the matter complained of by reason of his knowledge of those facts because he will understand the words in the light of those facts.

139 In my view, the second pleaded imputation is not conveyed. Even if the tweet is read in conjunction with the relevant extrinsic facts, it would not occur to the ordinary reasonable person, especially in circumstances where the words are contained in a tweet – which, the cases remind us, are assumed to be read by such a person in an impressionistic way. The process of interpretation sought to be attributed to the ordinary reasonable person by counsel for Mr Greenwich seems to me to be overly elaborate. As Mr Smark submitted, and I agree, the link upon which the true innuendo is sought to be founded is too tangential:

> [The second pleaded imputation] goes well beyond the context of the primary tweet, notwithstanding the references we've made to the political context. It may be the case that Mr Greenwich is saying don't vote for Mark Latham. It seems to be what he's saying. But it doesn't follow that when Mr Latham defends himself, he's saying that … Mr Greenwich is unfit to be a politician.
>
> It's probably not irrelevant that the tweet is after the election, but it's not the main point. The main point is that the connexion between the two topics is just tangential. What Mr Latham is saying is how dare you attack me? But that doesn't mean that he's imputing unfitness on the part of Mr Greenwich to serve. He's saying … you shouldn't be making these very strong attacks on me.

IS THE FIRST IMPUTATION IN THE PRIMARY TWEET DEFAMATORY?

140 The leading Australian case on the question of defamatory meaning is *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460.

141 In that case, the plurality (French CJ, Gummow, Kiefel and Bell JJ) said at 466–9 [1]–[7]:

> The common law recognises that people have an interest in their reputation and that their reputation may be damaged by the publication of defamatory matter about them to others. In *Uren v John Fairfax & Sons Ltd* Windeyer J explained that compensation for an injury to reputation operates as a vindication of the plaintiff to the public, as well as a consolation.
>
> Spencer Bower recognised the breadth of the term "reputation" as it applies to natural persons and gave as its meaning:
>
> > [T]he esteem in which he is held, or the goodwill entertained towards him, or the confidence reposed in him by other persons, whether in respect of his personal character, his private or domestic life, his public, social, professional, or business qualifications, qualities, competence, dealings, conduct, or status, or his financial credit …
>
> A person's reputation may therefore be said to be injured when the esteem in which that person is held by the community is diminished in some respect.
>
> Lord Atkin proposed such a general test in *Sim v Stretch*, namely that statements might be defamatory if "the words tend to lower the plaintiff in the estimation of right-thinking members of society generally". An earlier test asked whether the words were likely to injure the reputation of a plaintiff by exposing him (or her) to hatred, contempt or ridicule but it had come to be considered as too narrow. It was also accepted, as something of an exception to the requirement that there be damage to a plaintiff's reputation, that matter might be defamatory if it caused a plaintiff to be shunned or avoided, which is to say excluded from society.
>
> The common law test of defamatory matter propounded by Lord Atkin was applied in *Slatyer v Daily Telegraph Newspaper Co Ltd*, although Griffith CJ expressed some concern about the ambiguity of the expression "right thinking members of the community". The general test, stated as whether the published matter is likely to lead an ordinary reasonable person to think the less of a plaintiff, was confirmed by this court in *Mirror Newspapers Ltd v World Hosts Pty Ltd*, *Chakravarti v Advertiser Newspapers Ltd* and by Callinan and Heydon JJ in *John Fairfax Publications Pty Ltd v Gacic*. Gummow and Hayne JJ in John Fairfax referred to the likelihood that the imputations might cause "ordinary decent folk" in the community to think the less of the plaintiff.
>
> Putting aside Lord Atkin's additional requirement of being "right-thinking", the hypothetical audience, that is to say the referees of the issue of whether a person has been defamed, has been regarded as composed of ordinary reasonable people, whom Spencer Bower described as "of ordinary intelligence, experience, and education". Such persons have also been described as "not avid for scandal" and "fair-minded". They are expected to bring to the matter in question their general knowledge and experience of worldly affairs.
>
> In *Reader's Digest Services Pty Ltd v Lamb*, Brennan J explained that any standards to be applied by the hypothetical referees, to an assessment of the effect of imputations, are those of the general community:
>
> > "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 … being a standard common to society generally …"
>
> (Citations omitted)

142 Later in their reasons, their Honours said that "[t]he concept of 'reputation' in the law of defamation comprehends all aspects of a person's standing in the community", including upon their character or their business or professional reputation. They continued (at 477 [36]–[37]):

> It has been observed that phrases such as "business reputation" or "reputation for honesty" may sometimes obscure this fact. In principle therefore the general test for defamation should apply to an imputation concerning any aspect of a person's reputation. A conclusion as to whether injury to reputation has occurred is the answer to the question posed by the general test, whether it be stated as whether a person's standing in the community, or the estimation in which people hold that person, has been lowered or simply whether the imputation is likely to cause people to think the less of a plaintiff. An imputation which defames a person in their professional or business reputation does not have a different effect. It will cause people to think the less of that person in that aspect of their reputation. For any imputation to be actionable, whether it reflects upon a person's character or their business or professional reputation, the test must be satisfied.
>
> The reference in the general test, as stated in *Sim*, to a plaintiff being "lowered in the estimation" of the hypothetical referee does not imply the exercise of a moral judgment, on their part, about the plaintiff because of what is said about that person. It does not import particular standards, those of a moral or ethical nature, to the assessment of the imputations. It simply conveys a loss of standing in some respect.

143 It was common ground that a statement which exposes a plaintiff in a defamation proceeding to hatred, contempt or ridicule satisfies the general test, namely whether the published matter is likely to lead an ordinary reasonable person to think the less of a plaintiff, because it is comprehended within it.

144 Here, Mr Greenwich contended that the primary tweet caricatured him and exposed him to ridicule by "reducing him to a filthy sex act" that led to a loss of standing.

145 As long ago as 1840, Parke B said in *Parmiter v Coupland* (1840) 151 ER 340 at 342 that "[a] publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt or ridicule, is a libel".

146 As Dr Collins submitted, that statement acknowledges that a person may suffer a loss of standing when they are exposed to hatred, contempt or ridicule, "and that can often happen because a person is reduced to a form of reductionist caricature, someone to be reviled or pitied or laughed at".

147 A more recent case in which a plaintiff alleged that he had been exposed to hatred, ridicule or contempt is *Berkoff v Burchill* [1996] 4 All ER 1008.

148 Miss Julie Burchill was a journalist and writer who was retained to write articles about the cinema for *The Sunday Times* in London. Mr Steven Berkoff was a well-known actor, director and writer. He brought an action for damages for libel against Miss Burchill and the newspaper on the ground that in two articles written by Miss Burchill and published by the newspaper, statements were made which meant and were understood to mean that he was "hideously ugly" and therefore were defamatory, since they would tend to expose him to ridicule and/or would tend to cause other people to shun or avoid him.

149 In the first article, Miss Burchill wrote and the newspaper published a review of the film *The Age of Innocence*, writing: "… film directors, from Hitchcock to Berkoff, are notoriously hideous-looking people." Nine months later Miss Burchill reviewed the film *Frankenstein*. In this review, which the newspaper published, Miss Burchill described a character in the film called "the Creature". She wrote:

> The Creature is made as a vessel for Waldman's brain, and rejected in disgust when it comes out scarred and primeval. It's a very new look for the Creature—no bolts in the neck or flat-top hairdo—and I think it works; it's a lot like Stephen Berkoff, only marginally better-looking.

150 The judge at first instance held that the meaning of the words pleaded by the plaintiff was capable of being defamatory and he dismissed the defendants' application for the action to be dismissed. The defendants appealed, contending that the characteristic of the tort of defamation was injury to reputation and the fact that a statement might injure feelings or cause annoyance was irrelevant to the question whether it was defamatory.

151 Neill LJ and Phillips LJ (Millet LJ dissenting) dismissed the appeal. In his reasons, Neill LJ reviewed a number of old cases, including *Zbyszko v New York American Inc* (1930) 228 App Div 277.

152 Mr Zbyszko, who was a wrestler, complained of references to him in an article published by the defendant on the theory of evolution. The article contained a photograph of him in a wrestling pose and under it the words: "Stanislaus Zbyszko, the Wrestler, not Fundamentally Different from the Gorilla in Physique". In close proximity there was a photograph of a "hideous looking" gorilla. The plaintiff's action was struck out at first instance but reinstated on appeal, because the tendency of the article was to disgrace him and bring him into ridicule and contempt. Judge McAvoy said (at 413):

> Any written article is actionable … if it tends to expose the plaintiff to public contempt, ridicule, aversion, or disgrace, or induce an evil opinion of him in the minds of others

> and deprives him of their society. It is not necessary that words impute disgraceful conduct to the plaintiff. If they render him contemptible or ridiculous, he is equally entitled to redress.

153 In *Ettingshausen v Australian Consolidated Press Ltd* (1991) NSWLR 443, the plaintiff, a then well-known footballer, was shown in a photograph published in the defendant's magazine. The photograph was capable of being interpreted as showing his genitals. Hunt J held that the matter complained of was capable of conveying an imputation that the plaintiff is a person whose genitals have been exposed to the readers of the defendant's magazine, a publication with a widespread readership, and that imputation was capable of defaming the plaintiff.

154 In the course of his reasons, Hunt J referred to and quoted from a decision of Judge Learned Hand in *Burton v Crowell Pub Co* 82 F (2d) 154 (1936). In that case, Mr Burton, a widely known steeplechaser, agreed to pose for photographs to be used in advertisements for a cigarette company. One published photograph represented him coming from a race to be weighed in, carrying his saddle in front of him. A white girth was suspended from the saddle but, because of the angle at which the photograph was taken and because the photograph was slightly blurred at this point, the girth appeared to be attached to the plaintiff and not to the saddle. Judge Hand, for the court, described the effect of the photograph as "grotesque, monstrous and obscene". It was held that, because the matter complained of was calculated to expose Mr Burton to more than trivial ridicule, it was prima facie actionable, despite the fact that it asserted nothing about the plaintiff himself and notwithstanding that the impression which it conveyed (that the plaintiff had exposed his penis) was obviously an optical illusion. Relevantly, Judge Hand said:

> Had such a picture been deliberately produced, surely every right-minded person would agree that he would have had a genuine grievance; and the effect is the same whether it is deliberate or not. Such a caricature affects a man's reputation, if by that is meant his position in the minds of others; the association so established may be beyond repair; he may become known indefinitely as the absurd victim of this unhappy mischance. Literally, therefore, the injury falls within the accepted rubric; it exposes the sufferer to 'ridicule' and 'contempt'.

155 Dr Collins relied on that passage from Judge Hand's opinion as follows:

> And we submit that's what happened to Mr Greenwich here. By the reductionist caricature of Mr Greenwich, a Member of Parliament, to a sex act involving faeces, Mr Latham created a caricature which is apt to establish an association that damages Mr Greenwich's standing …

156 Mr Latham did not squarely confront the question of whether, assuming the first imputation of the primary tweet to be conveyed (that is, that Mr Greenwich engages in disgusting sexual

activities), it was defamatory. The submissions advanced on his behalf both in writing and orally proceeded on the assumption that the primary tweet went no further than saying that Mr Latham was "raising disgust at homosexual sex in response to himself being called disgusting" and that so understood, that would not make the ordinary reasonable person think any less of Mr Greenwich. Mr Smark put his submissions as follows:

> Having regard to the present standard of community attitudes, towards people's private sexual lives, if it's right to say, as we say it is, that an allegation that people are homosexual, or men are homosexual, or that a man or a group of men engage in homosexual intercourse, is not defamatory to ordinary reasonable people in 2024, or 2023 … then the question is – and we say the answer to that is that's correct, it's not – then what is relevantly different about the primary tweet – relevantly different? Can it be that the difference to the ordinary reasonable person who thinks what people do in their own bedroom is up to them, as long as no one's hurt and as long as there aren't children involved, can it be supposed that the type of homosexual intercourse makes a difference to the ordinary reasonable person?
>
> …
>
> But the context – the fact that the ordinary reasonable reader would see that Mr Latham is referring to – raising disgust at homosexual sex in response to him himself being called disgusting – how is that going to make people think less of Mr Greenwich?
>
> And we say the position is advanced by invoking the ridicule test, because they still – the ridicule mechanism still has to be brought within … the main test, and as we sought to illustrate by reference to the ridicule cases, that the mechanism – it's one thing to attempt to expose someone to ridicule, but to successfully ridicule someone in a way that carries a meaning that lowers them in the estimation of right-minded people is very challenging.

157 I do not accept those submissions, because, in my view, the ordinary reasonable person would not read the primary tweet as being limited to homosexual men generally, or that they would shrug off the tweet in the way Mr Smark suggests. In my view, the primary tweet exposed Mr Greenwich to hatred, contempt and ridicule for the reasons submitted by Dr Collins, and the ordinary reasonable person would think less of Mr Greenwich because the literal meaning of the tweet is that he engages in disgusting sexual activities.

158 For those reasons, I find that the first pleaded imputation is defamatory of Mr Greenwich.

HAS MR GREENWICH PROVED THAT PUBLICATION OF THE PRIMARY TWEET CAUSED OR IS LIKELY TO CAUSE SERIOUS HARM TO HIS REPUTATION?

The law

159 Section 10A(1) of the Act provides: "It is an element (the ***serious harm element***) of a cause of action for defamation that the publication of defamatory matter about a person has caused, or is likely to cause, serious harm to the reputation of the person".

160 Section 1 of the *Defamation Act 2013* (UK) is similar and relevantly provides: "A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant".

161 I mention the UK provision because a number of the English cases are useful in interpreting the Australian equivalents. See, by way of example only, *Selkirk v Hocking (No 2)* [2023] FCA 1085; and *Selkirk v Wyatt* (2024) 302 FCR 541.

162 Section 10A(1) of the Act places the onus upon an applicant (here, Mr Greenwich) to prove as a necessary element of the cause of action that the relevant publication has caused or is likely to cause serious harm to his reputation. See *Newman v Whittington* [2022] NSWSC 249 at [47] (Sackar J).

163 The question of whether a statement has caused or is likely to cause serious reputational harm is a matter of fact, which can be established only by reference to the impact which the statement is shown actually to have had. It depends on a combination of the inherent tendency of the words and their actual impact on those to whom they were communicated. As Lord Sumption (with whom Lords Kerr, Wilson, Hodge and Briggs JJSC agreed) explained in *Lachaux v Independent Print Ltd* [2020] AC 612 at 623–4 [14]:

> Secondly, section 1 necessarily means that a statement which would previously have been regarded as defamatory, because of its inherent tendency to cause some harm to reputation, is not to be so regarded unless it "has caused or is likely to cause" harm which is "serious". The reference to a situation where the statement "has caused" serious harm is to the consequences of the publication, and not the publication itself. It points to some historic harm, which is shown to have actually occurred. This is a proposition of fact which can be established only by reference to the impact which the statement is shown actually to have had. It depends on a combination of the inherent tendency of the words and their actual impact on those to whom they were communicated. The same must be true of the reference to harm which is "likely" to be caused. In this context, the phrase naturally refers to probable future harm. Ms Page QC, who argued Mr Lachaux's case with conspicuous skill and learning, challenged this. She submitted that "likely to cause" was a synonym for the inherent tendency which gives rise to the presumption of damage at common law. It meant, she said,

> harm which was liable to be caused given the tendency of the words. That argument was accepted in the Court of Appeal. She also submitted, by way of alternative, that if the phrase referred to the factual probabilities, it must have been directed to applications for pre-publication injunctions quia timet. Both of these suggestions seem to me to be rather artificial in a context which indicates that both past and future harm are being treated on the same footing, as functional equivalents. If past harm may be established as a fact, the legislator must have assumed that "likely" harm could be also.

164 It is important to bear in mind, for the reasons given by Lord Sumption in that passage, that respondents are responsible only for harm to an applicant's reputation caused by the effect of each statement they publish in the minds of the readership of that statement. See *Sivananthan v Vasikaran* [2023] EMLR 7; [2022] EWHC 2938 (KB) at [45] (Collins Rice J); *Amersi v Leslie* [2023] EWHC 1368 (KB) at [150] (Nicklin J).

165 Further, "a relevant and potentially significant factor when deciding whether publication has caused serious harm to reputation is the scale of publication or, putting it another way, the total number of publications". See, by way of example only, *Banks v Cadwalladr* [2023] 3 WLR 167 at 182 [52] (Warby LJ). But "it is not a numbers game", because very serious harm to a person's reputation can be caused by limited publication of a defamatory statement.

166 In *Wilson v Mendelsohn* [2024] EWHC 821 (KB), Richard Parkes KC (siting as a judge of the High Court) helpfully summarised a number of relevant principles from recently decided English cases as follows at [241]:

> (1) The 'harm' of defamation is the reputational damage caused in the minds of publishees, and may be (but does not have to be) established by evidencing specific instances of serious consequences suffered by a claimant as a result of the reputational harm.
>
> (2) Serious harm may be shown by general inferences of fact, drawn from a combination of evidence about the meaning of the words, the situation of the claimant, the circumstances of publication and the inherent probabilities. That brings into play the scale of publication (but serious harm is not simply a 'numbers game'), whether the statement complained of is likely to have come to the attention of anyone who knew the claimant, and the seriousness of the allegations complained of.
>
> (3) It is relevant to consider the risk of percolation of defamatory allegations, especially on social media. It may in such cases be very hard to identify unknown publishees who thought less well of a claimant.

167 Third party communications and comments posted online by those who have watched, heard or read the relevant publication can be evidence of reputational harm, to the extent they can be said to be a natural and probable consequence of the publication complained of. See *Economou v De Freitas* [2017] EMLR 4; [2016] EWHC 1853 (QB) at [129] (Warby J); ***Riley v Sivier***

[2023] EMLR 6; [2022] EWHC 2891 (KB) at [103] (Steyn J); ***Barron v Vines*** [2016] EWHC 1226 (QB) at [44]–[46] (Warby J).

168 As I will explain, one of Mr Smark's submissions on the question of serious harm in relation to what Dr Collins called the "maelstrom" of adverse reaction to the primary tweet set out in detail above, was that there was no reason to suppose that it reflected any widespread change in the views held by the particular people who made "adverse" comments directed at Mr Greenwich as a result of seeing the primary tweet.

169 In *Riley v Sivier*, the claimant was a television presenter and the defendant was a blogger. The case concerned an online article published on a website by the defendant the meaning of which had been determined at a trial of preliminary issues. The website was strongly left-wing and vociferously supportive of the then leader of the UK Labour Party, Mr Jeremy Corbyn MP. The claimant, on the other hand, had been highly critical of the notorious anti-Semitism in the Labour Party under Mr Corbyn, and of his leadership on that issue. (As to which, see generally Neuberger J, *Antisemitism: what it is. what it isn't. why it matters* (Weidenfeld & Nicolson, 2019) at pages 104–118).

170 Mr Sivier, the defendant blogger, contended that, those things being so, the claimant had no reputation among the readers of his article "because they had already made up their minds about the claimant before reading [it]". See *Riley v Sivier* at [111].

171 The words complained of in the article were held to contain, among other things, a statement of fact that the claimant had engaged upon, supported and encouraged a campaign of online abuse and harassment of a 16-year-old girl, conduct which had also incited her followers to make death threats towards her. All but one of Mr Sivier's defences had been struck out at a preliminary hearing. The principal issue before Steyn J was whether the article had caused or was likely to cause serious harm to the claimant's reputation.

172 Justice Steyn said as follows at [114]–[115]:

> The fact that the Website was, politically, strongly left-wing and vociferously supportive of the (then) leader of the Labour Party, Jeremy Corbyn MP, whereas the claimant had been highly critical of anti-Semitism in the Labour Party under Mr Corbyn, and of his leadership on that issue, probably means that a significant proportion of the readers of the Article would have regarded the claimant as someone to whom they were politically hostile. But this does not lead to the conclusion that the claimant's reputation could not be harmed in their eyes. As Warby J stated in *Monroe* at [71(8)]:
>
> > "… A person can have a low opinion of another and yet the other's reputation

> can be harmed by a fresh defamatory allegation. An example is provided by serious allegations made against a politician of a rival party. I have recently held that it does not follow from the fact that a publishee is a political opponent of the claimant, that they will think no worse of the claimant if told that he or she has covered up sexual abuse*: Barron v Collins* [2017] EWHC 162 (QB) at [56]. The same line of reasoning is applicable to the different facts of this case. As Mr Bennett puts it, if someone is hated for their sexuality or their left-wing views, that does not mean that they cannot be libelled by being accused of condoning the vandalisation of a war memorial. It can add to the list of reasons to revile her."
>
> The accusation of engaging upon, supporting and encouraging a campaign of online abuse and harassment of a 16-year old girl was a fresh allegation that would have made readers of the Article think worse of the claimant.

173 The parties in this case agreed that in an appropriate case, a claimant can also rely upon the likely "percolation" or grapevine effect of defamatory publications. As Steyn J noted in *Riley v Sivier* at [103] such effects have been "immeasurably enhanced by social media and modern methods of electronic communication".

174 The parties also agreed that when a court comes to the question of the reputational damage caused in the minds of publishees, and whether that harm is serious, the court is not limited to looking at the effect among ordinary, reasonable, right-thinking members of the community. The court looks at the actual effect, as Dr Collins put it, "no matter who it came from, including from the deranged". (I note that Mr Smark's concession to similar effect is at pages 116–17 of the transcript, although it is incorrectly attributed to Dr Collins.)

Consideration

175 Mr Smark contended that Mr Greenwich had not proved that the publication of the primary tweet has caused, or is likely to cause, serious harm to his reputation within the meaning of s 10A(1) of Act.

176 Mr Smark's first submission was that the "inherent seriousness" of the pleaded imputation on Mr Greenwich's reputation is low. Counsel asked rhetorically, "[o]ther than conveying Mr Latham's own sense of disgust about homosexual sex, why would the material cause people to think less of Mr Greenwich?"

177 That point can be dealt with immediately. The answer to the rhetorical question is that the primary tweet conveyed more than "Mr Latham's own sense of disgust about homosexual sex". As I have found, it conveyed that Mr Greenwich engages in disgusting sexual activities.

178 It was, relatedly, submitted that "the impact of the allegations in this case, in terms of their inherent tendency, is in direct contrast to allegations such as fraud, illegality, cruelty, betrayal or other allegations which might, in their inherent nature, be regarded as 'serious'". That may be so, but that is simply to recognise that there are different degrees of seriousness and different categories or subject matters of allegations.

179 The next issue was about the extent of publication.

180 Twitter recorded at least 6,171 "views" of the primary tweet, prior to the time Mr Latham deleted it, two hours and 20 minutes after it was first posted: see [32] above. Many of the comments in evidence, almost all of which were "supportive" of Mr Latham, were posted in response to the primary tweet itself: see [33] above.

181 Mr Riminton, who is a television journalist, reposted the primary tweet. It was viewed at least 654,700 times, and immediately provoked further comments "supportive" of Mr Latham. See [35] to [37] above.

182 Dr Collins submitted, and Mr Smark agreed, that it is "obvious" that "much of" the comments and messages relied on by Mr Greenwich were in a causal sense "a response to the primary tweet". It can be safely inferred that the comments and messages posted between 10:13am on 30 March 2023, when the primary tweet was posted, and 1:38pm on 1 April 2023, when *The Daily Telegraph* article was published, were caused by publication of the primary tweet, including because they responded directly to the primary tweet or referred to sex acts. They include:

(a) tweets posted in response to the primary tweet itself (set out at [33] above);

(b) tweets posted in response to the Riminton tweet (set out at [37] above);

(c) tweets posted in response to mainstream media reporting of the controversy (set out at [39] above); and

(d) feedback and emails to the online account of Mr Greenwich's Electorate Office on 30 and 31 March 2023 (set out at [76] above).

183 It was further submitted that many of the comments and messages received after 1:38pm on 1 April 2023 referred to sex acts, from which it may be inferred they were directly, causally connected to the primary tweet. They include the tweet set out at [41(c)] above dated 2 April 2023 and the communications set out at [77] above.

184 Dr Collins agreed that it cannot be excluded that the direct cause of the posting of some of those comments and messages may have been other media coverage, but the tweets referred to in [182] and [183] above undoubtedly constitute evidence that should be taken into account when assessing the question of serious harm. But in any event, as Warby J said in *Barron v Vines* at [48], having formed the view (at [47]) that he was not persuaded that it would be safe to conclude that any of the tweets relied on by the claimant probably flowed from the interview with the defendant that was sued on:

> It does not follow, of course, that there were no tweets or other social media comments or postings that did flow from the interview. Nor are social media or online postings necessary in order to infer as I do that, on the balance of probabilities, a broadcast making allegations of this kind did lead to "percolation" of those allegations beyond the immediate audience. The "hidden springs" still exist in the era of social media. It is not yet the case that all social interaction is visible online. People still speak to one another by telephone and face to face.

185 In light of Mr Smark's appropriate concession that it is obvious that much of the comments and messages relied on by Mr Greenwich were in a causal sense a response to the primary tweet, no purpose would be served in me trawling through them all, and expressing seriatim a view about which comment or message is or is not to be regarded as having been caused by the primary tweet.

186 In my view, there was no break in the chain of causation between the primary tweet and a preponderance of the communications. As Dr Collins said, and I agree:

> Now, we make the point … that, of course, it cannot be excluded that some of the messages to which I've taken your Honour, particularly those from the later period and particularly after the concerns notice, might have been only indirectly caused by the original tweet and then the comments in the Daily Telegraph, and that appears to be the case because some of them refer to the fact of Mr Greenwich taking action against Mr Latham. We say to your Honour that your Honour would take all of those matters into account as evidence of actual damage to a loss of standing to Mr Greenwich that is causally connected, in the ordinary tortious sense, to the original posts.
>
> … And we set out what we would submit your Honour ought to find by way of the chain of causation … all of which is entirely foreseeable. There's the original tweet. That then gives rise to foreseeable publicity. There's then the [DT] quotes which are causally connected to the original tweet. There's then the republication of those quotes in the Daily Telegraph, which was, of course, what Mr Latham intended, as agreed on the pleading. There's then foreseeable publicity arising out of the publication of the quotes. Mr Latham then "doubles down", in the language of some of the publicity about the controversy.

187 And it can also obviously enough be inferred that there was a "percolation" effect of the type referred to in the cases.

188 One might be forgiven for being lost for words to characterise many of the tweets and comments. Counsel opted for "despicable" at one point, but that is barely to do justice to the hate-filled venom that was unleashed, when, as the evidence disclosed, Mr Greenwich was described as:

> a "repugnant sodomite", "pathetic, childish and jelly spined", a "dirty, dung-punching POOFTER", a "FREAK in our society", a "disgusting gay fucker with poo on your hands", "fucked up", "abnormal", a "male poo pusher" who made the writer "want to throw up", "an Abomination of Nature", "a pompous little twat", a "dirty, filthy poofter", a "leftist moron", a "grubby little two faced coward" with "depraved habits", a "depraved grub", a "sodomite" who "will fry in hell like bacon", a "GRUB", a "disgusting poor excuse of a human being", "a snowflake and a virtue signalling, hate mongering, bigoted tosser", "disgusting" and someone the writer will think of "every time I take a shit", "ridiculous & childish", "a poor excuse low life unaustralian scumbag human being LGBTIQ freak", a "typical GRUB politician chasing the anal $$$$$$$$$$$", a "DISGUSTING human being", "unnatural, immoral and unclean", a "Fucking Fairy Faggot", a "Horrible piece of Shit", a "Fucking poofta cunt", a man with "depraved sexuality", a "FAGGOT POOFTAH piece of Shit", "a disgusting human being" who should "bury your head in shame", a "soy boy", a "dirty f*n fuckin' cunt", "Miss Greenwich, poofter, paedophile, piece of shit faggot cunt", a "poor little faggot" and a "fucken piece of shit", "a disgusting paedophile", "a sick bastard", "you paedophile", a "dirty fucken poofter" who "should have been put down at birth I believe in poofter bashing", "a defect from your parents having sex" and a "GROOMER".

189 Mr Latham submitted that there was no reason to suppose that these comments reflect any widespread change in the views held by those who made them. Put another way, Mr Latham contended that it seemed likely that these individuals were already adversely disposed to Mr Greenwich, and that no "distinct particular serious allegation" in the primary tweet would lead to an inference of reputational damage. But that submission, again, does not grapple with the fact that the primary tweet carried the imputation that Mr Greenwich engages in disgusting sexual activities. A person who was not inclined to like Mr Greenwich because they had staunch views against homosexuality or his politics, when confronted with a "fresh" allegation that he engaged in disgusting sexual activities would have made readers of the primary tweet think worse of him. Compare *Riley v Sivier* at [114]–[115]. As Warby J said in *Monroe v Hopkins* [2017] 4 WLR 68; [2017] EWHC 433 (QB), "[i]t can add to the list of reasons to revile [him]".

190 Mr Greenwich also relied on a number of other unchallenged factual matters in support of his case that the primary tweet has caused serious harm to his reputation, viz:

(a) the unchallenged evidence of Senior Electorate Officer, Mr Graham, was that prior to the time of the publication of the primary tweet (and DT Quotes), he had not

experienced receiving so many hateful and threatening communications directed to Mr Greenwich, and the tone of the communications post-publication was worse;

(b) the public reaction to the publication of the matters complained of was so threatening that it necessitated the intervention of NSW Police and the implementation of a procedure to handle suspicious mail;

(c) it resulted in access to the Electorate Office being closed down from time to time, including for a week from 3 April 2023.

191 The evidence of Mr Graham regarding (a) does bear upon Mr Greenwich's reputation, but factors (b) and (c) do not, however unfortunate they were.

192 Mr Smark made a few other points on the serious harm question, but they are, with great respect, without merit.

193 First, it was submitted that there is no evidence of any witness called that they in fact thought less of Mr Greenwich. But none of the cases suggest that the calling of such evidence is required.

194 Secondly, it was submitted that "there is no a priori reason why those already favourably disposed to Mr Greenwich would change that position by reason of the [p]rimary [t]weet". It is not at all clear to me what "a priori reason" counsel had in mind.

195 Thirdly, it was submitted that "there is positive evidence of sympathy and concern from people who approached Mr Greenwich". That evidence was contained in the agreed facts and is set out at [79] to [86] above. But that is not to the point. As was submitted on behalf of Mr Greenwich, "[t]hat submission amounts to little more than an assertion that the damage to Mr Greenwich could have been worse … but it does not erase the actual evidence of harm apparent from the terms of the comments and messages …"

196 As the epithets in [188] above make plain, the communications that Mr Greenwich received as a result of the primary tweet clearly indicate that he has suffered harm to his reputation because of its publication. That evidence, in combination with the inherent tendency of the imputation that he engages in disgusting sexual activities, the extent of the publication and the inferred "percolation" of it, means I am satisfied that the publication of the primary tweet has caused, or is likely to cause, serious harm to his reputation. For all those reasons, if I may adopt the turn of phrase used by Warby J in *Barron v Vines* at [69], it is very easy to infer from the

circumstances identified above that the serious harm threshold in s 10A(1) of the Act was crossed by the primary tweet.

DEFENCES TO THE PRIMARY TWEET

197 Mr Latham relies on two positive defences to the primary tweet — honest opinion and common law qualified privilege (reply to attack).

198 Taking each in turn.

Honest opinion

199 Section 31(1) of the Act provides it is a defence to the publication of defamatory matter if the defendant proves that—

(a) the matter was an expression of opinion of the defendant rather than a statement of fact, and

(b) the opinion related to a matter of public interest, and

(c) the opinion is based on proper material.

Expression of opinion or a statement of fact?

200 This is a question not easily answered.

201 Mr Latham submitted that "[t]he context, and the use of the term 'disgusting' clearly marks to the [ordinary reasonable person] that an opinion was being expressed".

202 Mr Latham relied on a list of agreed factual matters which, it was submitted, provided grounds for his honest opinion. The list was contained in Exhibit MFI R6, as follows:

> a. Greenwich's attack, as republished in the Metcalfe Tweet, and it was substantially true that Greenwich's attack occurred;
>
> b. On 21 March 2023, Latham was a speaker at St Michael's Church in Belfield for a community forum on religious freedom and parental rights (the Event), as recorded in the Online SMH Attack, hyperlinked to the Metcalfe Tweet, and this material is substantially true;
>
> c. A violent incident occurred at the Event when LGBTQ protesters were confronted by people outside St Michael's Church, as recorded in the Online SMH Attack, hyperlinked to the Metcalfe Tweet, and this material is substantially true;
>
> d. On 21 March 2023, Latham tweeted, "I didn't see what happened on the front street but I sincerely convey my best wishes to those injured and thank the police officers involved/or their work. No one should take the law into their own hands. Violence at political events is wrong", as recorded in the Online

SMH Attack, hyperlinked to the Metcalfe Tweet, and this material is substantially true;

e. Greenwich's attack as read in the Online SMH Attack, hyperlinked to the Metcalfe Tweet, blamed Latham for the violence that occurred at the Event, and it is substantially true that Greenwich's attack blamed Latham for the violence;

f. Latham was an NSW MLC and leader of the NSW One Nation party, material that was substantial true and on Latham's Twitter account, recorded in the Online SMH Attack, hyperlinked to the Metcalfe Tweet, and otherwise notorious or apparent in the context the Primary Tweet was published;

g. Greenwich was an independent NSW MLA, material that was substantially true, recorded in the Online SMH Attack hyperlinked to the Metcalfe Tweet, and otherwise notorious or apparent in the context the Primary Tweet was published;

h. Greenwich was advocating in support of the LGBTQIA+ community, as appears from his comments in the Online SMH Attack hyperlinked to the Metcalfe Tweet.

203 Mr Greenwich submitted:

> Where fact and comment are closely intermingled, particularly in a short publication, the publication is more likely to be understood by ordinary, reasonable readers as a statement of fact: *Hunt v Star Newspaper Co Ltd* [1908] 2 KB 309 at 319-20 (Fletcher Moulton LJ); *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245 at [42]–[43] (Gummow, Hayne and Heydon JJ).
>
> Mr Greenwich submits that ordinary, reasonable readers of the Primary Tweet are likely to have understood it as a statement of fact (that Mr Greenwich as a matter of fact sticks his dick up bloke's arses so as to cover it in shit), [rather] than an expression of opinion (that Mr Greenwich is disgusting because he sticks his dick up bloke's arses so as to cover it in shit). Little, however, ultimately turns on this characterisation in the present matter because the other two elements of the defence cannot be made out.

204 As I have said, it is not an easy question to answer, but I will assume in Mr Latham's favour that the matter contained in the primary tweet was an expression of his opinion, rather than of fact.

Was it a matter of public interest?

205 Mr Latham contended that the primary tweet was on a matter of public interest, having regard to the "context created by Mr Greenwich's comments published in the Sydney Morning Herald". Specifically, the pleaded public interest that the primary tweet opinion was alleged to relate to was "[Mr] Greenwich's attack, by a NSW MLA, on [Mr Latham], a NSW MLC to the effect that he was a disgusting human being, is a disgusting human being and an extremely hateful and dangerous individual who risks causing a great deal of damage to our state who was therefore unfit to serve as a NSW MLC".

206 That contention cannot be accepted, for the following reasons.

207 First, assuming that the primary tweet was an expression of opinion, then the opinion related to the assumed, private sexual practices of Mr Greenwich.

208 Secondly, as pleaded, the matter alleged to constitute the subject of public interest was the *context* in which Mr Latham published the primary tweet, rather than the matter the subject of his opinion (namely, the private sexual practices of Mr Greenwich). The latter is the enquiry dictated by the terms of s 31(1)(b).

209 Thirdly, publication of statements about the private sexual activities of others, including public figures, is not a matter of public interest, except where those activities are relevant to the performance of the person's public duties or where the person has themselves put those activities before the public (see *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153 at 167 (Hunt J)). Neither of those considerations apply here.

Is the opinion based on proper material?

210 To satisfy the proper material element in s 31(1)(c), Mr Latham must establish that his opinion was based on proper material in that it was, as required by s 31(5), based on material which is substantially true.

211 And he cannot do that, because as Dr Collins pithily put it in his closing address:

> On honest opinion, if there was an opinion, it was an opinion to the effect that, "Mr Greenwich is disgusting because he sticks his dick up a bloke's arse to cover it in shit." That could only be an honestly held opinion if Mr Latham, at the time he expressed it, had a proper factual foundation for believing that that's what Mr Greenwich does in the bedroom. And he doesn't, as Mr Smark correctly conceded …

212 The concession to which Dr Collins made reference was this at page 127 of the transcript:

> Mr Latham had no basis to know what sort of sexual conduct Mr Greenwich himself engaged in, or whether he engaged in sexual conduct at all.

213 In my view, the list of matters set out in Exhibit MFI R6, set out above, are therefore neither here nor there.

214 In any event, Mr Latham did not plead the defence properly. As Dr Collins submitted:

> If Mr Latham were going to defend this opinion, he would need to have pleaded and proved that at the time of the publication of the primary tweet, he knew, and it was true, that Mr Greenwich, in fact, engages in the act describing the tweet.

215 There was no such pleading.

Conclusion

216 The honest opinion defence thus fails.

Common law qualified privilege (reply to attack)

217 At common law, a defence of qualified privilege is available where a defendant publishes a reply to a defamatory attack by the plaintiff.

218 In his defence, Mr Latham pleaded the following matters in support of his defence of common law qualified privilege (reply to attack) in respect of the primary tweet:

> **Common Law Qualified Privilege Reply to Attack – Primary tweet**
>
> 38. On 22 March 2023, Greenwich had a telephone call with Olivia Ireland in which he said the following words attacking Latham (Greenwich's attack):
>
> > "Mark Latham is a disgusting human being and people who are considering voting for One Nation need to realise they are voting for an extremely hateful and dangerous individual who risks causing a great deal of damage to our state."
>
> 39. On 22 March 2023, Ms Ireland writing on the Sydney Morning Herald website republished Greenwich's attack in her article titled "Video shows LGBTQ protestors pleading for help outside Mark Latham event" (Online SMH attack).
>
> 40. On 22 March 2023, Susan Metcalfe republished Greenwich's attack on her account on the Twitter platform with the handle @susanamet attributed to Greenwich with a hyperlink to Ms Ireland's article, the Online SMH attack (Tweet attack).
>
> 41. On 22 March 2023, Greenwich provided to media outlets for republication a video press release, a transcript of which is annexed and marked "Schedule A" (Pre-recorded Attack) that, inter alia, further attacked Latham by claiming that "For weeks, months and almost years, Mark Latham has been whipping up these thugs into a violent frenzy". The Pre-recorded Attack, or parts thereof, were republished by 7News, Nine News and Sky News by television and online broadcasts to a public audience;
>
> 42. On 22 March 2023, Jordan Baker and Perry Duffin writing in the Sydney Morning Herald print edition republished Greenwich's attack in their article entitled "'Time to rise': Christian activist charged after protest violence" (Second Online SMH attack).
>
> 43. On 23 March 2023, Jordan Baker and Perry Duffin writing in the Sydney Morning Herald print edition republished Greenwich's attack in their article entitled "Police keeping eye on militant religious groups after protests" on page 7 of that edition (Print SMH attack).
>
> 44. On 30 March 2023, in direct reply to the Tweet attack republishing both Greenwich's attack and the Online SMH attack, Latham published the Primary Tweet, as a comment on that tweet, Latham posted the Primary Tweet.
>
> 45. Latham posted the Primary Tweet pursuant to a duty or interest to respond to the attack on his reputation that occurred in Greenwich's attack, the Online

SMH attack, the Second Online SMH attack, the Tweet attack and the Print SMH attack.

46. The Primary Tweet was posted to the identical public audience to which the Tweet attack was published, and was also made available to [the] same public audience as the Online SMH attack, Second Online SMH attack, Print SMH attack, and Pre-recorded Attack.

47. Given the wide public audience who had read or viewed one or more of the Greenwich attack, Tweet attack, Online SMH attack, Second Online SMH attack, Print SMH attack, and Pre-recorded Attack that affected the reputation of Latham each recipient or potential recipient of the Primary Tweet had a reciprocal interest to Latham in posting the Primary Tweet in reading the Primary Tweet.

48. Latham says that in the circumstances pleaded in paragraphs 38-47 of the Defence above he published the Primary Tweet on an occasion of qualified privilege.

219 Mr Latham's submission about the defence was as follows:

> In the present matter, Mr Greenwich had made a very strong attack on Mr Latham in the Sydney Morning Herald. The primary tweet directly referred to that attack, both by echoing it ("disgusting") and by quoting the Metcalfe Tweet. The reply made by Mr Latham, by way of the defence of the attack on him, pointed out to [the] public that what was "disgusting" was up for debate. Given the large readership of the Sydney Morning Herald, Mr Latham's use of a tweet which was online for only a few hours was proportionate in scope.
>
> In terms of malice, Mr Latham was using the occasion to attack the credibility of his attacker, which was a proper purpose. To defeat the defence it must be shown that an improper motive existed and it was the dominant reason for the publication: *Roberts v Bass* (2002) 212 CLR 1, at [104]. And honesty of purpose is presumed in favour of the publisher: *Roberts* at [96]. Harming the reputation of political opponents or candidates is not, per se, an improper purpose: see per Kirby J in *Roberts* at [171].

220 Justice White helpfully set out in extensive detail the relevant principles in relation to common law qualified privilege (reply to attack) in *Gould v Jordan (No 2)* [2021] FCA 1289 at [50]ff. The summary of those principles below is derived from part of what his Honour said in that case.

221 The common law recognises that the response to an attack on a person's reputation, interests or integrity may be an occasion of qualified privilege, provided that the defamatory response is sufficiently connected to the occasion of the privilege.

222 Such occasions exist:

(a) when both parties have an interest in the subject matter to which the impugned matter relates; and

(b) if the publication of the defamation is made in protection of the respondent's interest.

223 The privilege exists because of the interest of the public in hearing the response of the target to public criticisms. In ***Loveday v Sun Newspapers*** *Ltd* (1938) 59 CLR 503 at 511, Latham CJ said:

> An occasion is the subject of qualified privilege if both the plaintiff and the defendant have an interest in the subject matter to which the alleged libel relates and if the publication of the libel is made in protection of the defendant's interest … [I]t is plain that the plaintiff was interested in the administration by the Canterbury Municipal Council of the system of employing relief workers … The defendant Jay was the executive officer of the council which administered the relief system. He had an interest in defending his own reputation, as well as the reputation of his council, in relation to the administration of that system. If either Jay or the council were attacked in relation to that administration Jay was entitled to reply to the attack and the occasion would be privileged.

224 Justice Starke said at 515–16:

> A person attacked has both a right and an interest in repelling or refuting the attack, and the appeal to the public gives it a corresponding interest in the reply. Occasions of this kind are privileged and communications made in pursuance of a right or duty incident to them are privileged by the occasion … The privilege is not absolute: in case a person is attacked the answer must be relevant to the attack and must not be actuated by motives of personal spite or ill will independent of the occasion on which the communication was made …
>
> (Citations omitted)

225 Justice Dixon said at 518–19:

> The letter sent by the secretary of the unemployed relief council to the *Sun* newspaper for publication impugned the course taken with respect to the plaintiff by those administering relief work under the authority of the municipal council. Supposing that such an attack or criticism of something done under the council's administration has already been widely published, then for the publication of any relevant matter in reply undoubtedly a privilege would exist. The town clerk, as an appropriate officer of the municipality, would be entitled, upon that supposition, to a qualified privilege for the publication of any statements in answer tending to justify or explain the course taken, or remove or mitigate the effect of the attack or criticism. If the criticism had been addressed to the public at large and the communication had not been confined to specific individuals, the privilege would cover a publication of the answer in the newspapers or in any other manner that would reach the public generally.

226 In ***Penton v Calwell*** (1945) 70 CLR 219, Mr Calwell, a Minister of the Crown, had alleged in Parliament that *The Daily Telegraph* had defied a wartime censorship instruction in reporting the escape of Japanese prisoners at Cowra in 1944. The editor responded in an editorial calling Mr Calwell a liar, and inviting him to sue, which he duly did.

227 The editor in his defence pleaded qualified privilege on the basis that he was responding to attacks on himself, the publisher, the managing director and newspapers generally.

228 The strike out application was heard by Dixon J (as he then was), and it went on appeal, with the result that his Honour's order striking out the qualified privilege plea was varied to permit repleading.

229 The ultimate decision stands for the proposition, as the headnote in the Commonwealth Law Report says, that the newspaper's challenges to sue were no more than an invitation to take proceedings which would follow the normal course of defamation proceedings, and their inclusion in the article did not prevent the defendant from setting up, as a plea of qualified privilege, that the article was published by way of defence to attacks publicly made upon the defendant and those whose interests the defendant was entitled to protect.

230 In his judgment at first instance, Dixon J described the qualified privilege in the following terms (at 233):

> When the privilege of the occasion arises from the making by the plaintiff of some public attack upon the reputation or conduct of the defendant or upon some interest which he is entitled to protect, the purpose of the privilege is to enable the defendant on his part freely to submit his answer, whether it be strictly defensive or be by way of counter-attack, to the public to whom the plaintiff has appealed or before whom the plaintiff has attacked the defendant. The privilege is given to him so that he may with impunity bring to the minds of those before whom the attack was made any bona fide answer or retort by way of vindication which appears fairly warranted by the occasion.

231 Justice Dixon (at 233-234) also explained the basis for the privilege, as follows:

> The foundation of the privilege is the necessity of allowing the party attacked free scope to place his case before the body whose judgment the attacking party has sought to affect. In this instance, it is assumed to be the entire public. The purpose is to prevent the charges operating to his prejudice. It may be conceded that to impugn the truth of the charges contained in the attack and even the general veracity of the attacker may be a proper exercise of the privilege, if it be commensurate with the occasion. If that is a question submitted to or an argument used before the body to whom the attacker has appealed and it is done bona fide for the purpose of vindication, the law will not allow the liability of the party attacked to depend on the truth or otherwise of defamatory statements he so makes by way of defence.

232 Thus, the privilege enables those attacked to inform those whose judgment of them may be affected by the attack of their response to it in order that they may vindicate themselves.

233 The High Court did not disturb Dixon J's statements of the relevant principle. Latham CJ and Williams J said at 242–3:

> Statements which are made in self-defence are privileged when they are made in reply to attacks upon the character or conduct of the defendant, or in protection of an employer against attacks on the employer, or in protection of the proprietary interests of a defendant or his employer against attacks upon such interests. When a person has been attacked seriously and abusively, the terms of his reply are not measured in very

> nice scales, but excess in reply may so exceed a reasonable view of the necessities of the occasion as to provide evidence from which malice may be inferred.

234 In *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366, McHugh J said at 390 [65]:

> In determining whether the communication was made to discharge a duty or to protect or further an interest, the common law has drawn a distinction between statements replying to a request for information or responding to an attack and statements that are volunteered by the publisher. Where the defamatory communication responds to an attack on its publisher or some person connected with him or her, the common law has adopted a liberal approach to the question of duty or interest. Not only has it usually held that the publisher had a duty to respond or an interest in responding but, as a consequence, it has taken a very liberal view of what constitutes an "interest" in those who receive the response. In *Mowlds v Fergusson*, Dixon J said:
>
> > "Where the defamatory matter is published in self-defence or in defence or protection of an interest or by way of vindication against an imputation or attack, the conception of a corresponding duty or interest in the recipient must be very widely interpreted."
>
> (Citations omitted)

235 The defence was considered more recently in ***Harbour Radio*** *Pty Ltd v Trad* (2012) 247 CLR 31. In a speech at a "peace rally" made one week after the occurrence of the Cronulla riots, Mr Trad placed part of the blame for the riots on Radio Station 2GB. On the following day, the radio station broadcast a program containing several statements which were defamatory of Mr Trad. He sued for defamation. The appeal in the High Court concerned the availability of the defence of qualified privilege to the defamatory responses of the radio station to Mr Trad's criticisms.

236 Gummow, Hayne and Bell JJ held, at 48 [33], that the statement of principle by Dixon J at first instance in *Penton v Calwell* (set out above) should be accepted.

237 Their Honours emphasised that a response which impugns the truth of the charges contained in the attack and/or the general veracity of the attacker may be a proper exercise of the privilege, providing that it is commensurate with the occasion and is done bone fide for the purposes of the vindication. Their Honours also referred to the statement of Starke J in *Loveday v Sun Newspapers* that the privilege is not absolute and that the response by the person attacked "must be relevant to the attack and must not be actuated by motives of personal spite or ill will", at [34].

238 Gummow, Hayne and Bell JJ also explained that the defence of qualified privilege in response to an attack is one of the few circumstances in which the common law has recognised that a

defendant may have an interest or duty to publish defamatory statements to the general public: at [20]. As their Honours explained at [27] and [35]:

> [W]here the occasion is a response, by publication to the general public of defamatory matter, to a public attack upon the defendant by the plaintiff, the consideration of what is relevant to the attack requires particular care. The response must be commensurate with an occasion which is in an exceptional category … No doubt vigorous use of language has long been a characteristic of public debate in this country. But in the conduct of public affairs the law, in general, does not encourage persuasion by public vilification and by an abdication of reason …
>
> …
>
> That the matter complained of is sufficiently connected to the privileged occasion to attract the defence may appear upon any one of several considerations. The matter may be sufficiently connected with the content of the attack, or it may go to the credibility of the attack, or to the credibility of the person making that attack. Questions of degree inevitably will be presented.

239 The defence will be defeated if the applicant proves malice on the part of the respondent, in the form of spite, ill will, indirect or wrong motive not connected with the privilege: *Penton v Calwell* at 242–3; *Harbour Radio* at 47 [31].

240 The availability of the defence of qualified privilege and the requirement of proportionality or commensurateness which is a necessary element of the defence, is to be assessed objectively.

241 Mr Greenwich accepted that the primary tweet was a riposte to a reply to an attack, namely a riposte to the quote about Mr Latham that Mr Greenwich had provided to *The Sydney Morning Herald*. He also accepted that the manner of publication (being a tweet) was sufficiently proportionate by way of response (to the Metcalfe Tweet).

242 In my view, however, as was submitted, Mr Latham's reply was obviously not proportionate and commensurate to Mr Greenwich's attack.

243 The attack was strongly worded, to be sure, but it was essentially about politics and, in substance, urged electors not to vote for Mr Latham because of his views about LGBTQIA+ issues. Mr Latham's reply, on the other hand, was personal and not germane to any matter of politics contained in the attack. It was neither proportionate nor commensurate. As Mr Greenwich's pleaded in his Reply filed on 6 September 2023 as part of his particulars of malice (at [3(b)(vi)]):

> In publishing the [p]rimary [t]weet, Mr Latham used language that was disproportionate and not germane to the language used in any of the alleged attacks … which concerned Mr Latham's fitness for public office and had nothing whatsoever to do with graphic sexual activity.

244 If I am wrong about that, it is clear that the riposte was actuated by malice, in the sense that Mr Latham was "actuated by motives of personal spite or ill will". As Mr Greenwich pleaded in his Reply as part of his particulars of malice, Mr Latham must have known that what he said in the tweet was untrue because, as his counsel admitted at the hearing, he did not know anything about the private sexual activities of Mr Greenwich.

Conclusion

245 The common law qualified privilege defence thus fails.

THE DT QUOTES: ARE THE MEANINGS CARRIED?

246 I turn now to the DT quotes. Mr Latham accepted that if either of the pleaded imputations relating to the DT quotes were carried, they are defamatory. Thus, the only question to be resolved as to meaning in relation to the DT quotes is whether the pleaded imputations were, in fact, conveyed.

247 It will be recalled that Mr Greenwich pleaded that the DT quotes:

(a) carried the imputation that he "is a disgusting human being who goes into schools to groom children to become homosexual"; and

(b) to persons who knew that he is a member of the NSW Parliament, carried by way of true innuendo the imputation that "Mr Greenwich is not a fit and proper person to be a member of the NSW Parliament because he goes into schools to groom children to become homosexual".

248 It is helpful to set out again the impugned published words:

> Sorry for not getting back to you. Here's my response:
>
> Sometimes, in public life, when they throw out insults, they come back at you harder and truer, so boohoo, Alex Greenwich. When he calls someone a disgusting human being for attending a meeting in a church hall, maybe attention will turn to some of his habits.
>
> Why delete the tweets? Greenwich goes into schools talking to kids about being gay. I didn't want to be accused of anything similar, leaving that kind of content on my socials.

249 The pleaded imputations can be dealt with together. They both fail, because they both depend on the proposition that the DT quotes convey the meaning that Mr Greenwich goes into schools to groom children to become homosexual, and in my view that meaning is not carried.

250 Dr Collins submitted that the DT quotes "were pregnant with insinuation"' because Mr Greenwich had "habits" that needed to be the subject of attention; and that one of them was that Mr Greenwich "goes into schools talking to kids about being gay", which was then linked to Mr Latham's assertion that he had deleted the primary tweet because he "didn't want to be accused of anything similar".

251 It was submitted that Mr Latham's chose imprecise, ambiguous, and loose words to "leave the powerful impression that there is something very discreditable about Mr Greenwich's habit of going into schools to talk about kids being gay. His words invite the reader to adopt a suspicious approach".

252 In context, it was submitted "the ordinary, reasonable reader will have understood Mr Latham to be evoking the vile stereotype that gay men like Mr Greenwich are a danger to children; and that Mr Greenwich is a particular danger to children because he goes into schools to talk to kids about disgusting sexual acts; to lure them into becoming homosexual".

253 I do not accept those submissions.

254 In my view, it was correctly submitted on behalf of Mr Latham that an ordinary reasonable person would understand him to mean that he, Mr Latham, did not think it was right for people to go to schools to talk to students about sexual matters, and, consistently, given the sexually explicit nature of the primary tweet, he thought he should take it down in case young people might read it.

255 There is nothing which suggests that Mr Greenwich was grooming students, which is to say, as Mr Smark correctly put it, "softening them up with a view to their engaging in sexual activity (homosexual or otherwise)".

256 As Mr Smark put it, that is a strained meaning which the ordinary reasonable person would not draw.

DAMAGES

Damages for non-economic loss – applicable principles

257 There was no dispute about the applicable principles in relation to an award of damages for non-economic loss.

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

> 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. 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. The first two purposes are frequently considered together and constitute consolation for the wrong done to the appellant. 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.
>
> (Footnotes and internal quotations omitted)

259 And as Brennan J said in that case at 72:

> Damages by way of vindication of reputation are not added to the damages assessed under other heads. Although an award of damages operates as a vindication of the plaintiff to the public and as consolation to him for a wrong done … the dual operation of an award does not require cumulative components of damages. The same sum can operate as vindication, compensation and solatium, for the amount of a verdict is the product of a mixture of inextricable considerations. The amount assessed under other heads may itself be sufficient in aggregate to provide the vindication required. The extent of the overlap depends on the circumstances. But the award in total must be sufficient to satisfy the purposes for which damages for defamation are awarded: vindication of reputation, compensation for injury to reputation and solatium for injured feelings.
>
> (Footnotes and internal quotations omitted)

260 As Rares J said in *Barilaro v Google LLC* [2022] FCA 650 at [296]–[297]:

> … in assessing general damages the Court is entitled to look at the whole of the conduct of the publisher from the time of publication to the time of the verdict … the mode and extent of publication, the fact that the defamatory statement was never retracted, the fact that the publisher never offered an apology and the fact that the defamatory statement had been persisted in to the end … those factors might increase the area of publication, the effect of the defamatory publication on those who read, saw or heard it and its vitality and capability of causing (further) harm to the claimant.
>
> … the quantum of damages in a defamation action must be such that in case the libel, driven underground, emerges from its lurking place at some future date, he [the claimant] must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge. The award must also have regard to the grapevine effect of the publication complained of so as to ensure that the claimant recovers an appropriate amount of compensation …
>
> (Footnotes and internal quotations omitted)

261 Pursuant to s 34 of the Act, in awarding any damages, the court must ensure that there is an appropriate and rational relationship between the harm sustained by an applicant and the award.

262 The maximum damages amount for non-economic loss that may be awarded in defamation proceedings is currently $478,500. See s 35(1) and (3) of the Act.

263 The maximum amount may only be awarded "in a most serious case" (s 35(2)). The maximum amount may be exceeded where aggravated damages are warranted, but only to the extent of the amount of the aggravation (s 35(2A)).

Aggravated damages – applicable principles

264 Mr Greenwich seeks aggravated damages. Pursuant to s 35(2B) of the Act an award of aggravated damages, nowadays, is to be made separately to any award of damages for non-economic loss to which subsection (1) applies. (As to the common law position that prevailed before relevant amendments to the Act took effect on 1 July 2021, see *Nationwide News Pty Ltd v Rush* [2020] FCAFC 115; (2020) 380 ALR 432 at 505 [380] (White, Gleeson and Wheelahan JJ)).

265 Aggravated damages are compensatory, not punitive, and they are awarded "precisely because other conduct by the defendant[], which may or may not take the form of another libel, rubs salt in the wounds inflicted by the libel sued upon". See *Stead v Fairfax Media Publications Pty Ltd* [2021] FCA 15; (2021) 387 ALR 123 at 179 [273] (Lee J), approving *Sutcliffe v Pressdram Ltd* [1991] 1 QB 153 at 170 (Donaldson MR).

266 They are awarded to compensate an applicant where the respondent's conduct towards the applicant was improper, unjustifiable or lacking in bona fides and does in truth aggravate the applicant's hurt to feelings they have already suffered. See ***Triggell v Pheeney*** (1951) 82 CLR 497 at 514 (Dixon, Williams, Webb and Kitto JJ) ("the conduct of the defence may be taken into consideration not only as evidencing malice at the time of publication or afterwards, as, for instance, in filing a plea, but also as improperly aggravating the injury done to the plaintiff, if there is a lack of bona fides in the defendant's conduct or it is improper or unjustifiable"); *KSMC Holdings Pty Ltd t/a Hubba Bubba Childcare on Haig v Bowden* (2020) 101 NSWLR 729 at 760 [150] (Payne JA, Basten and White JJA agreeing) ("Aggravated damages are awarded where the defendant's conduct towards the plaintiff was improper, unjustifiable, or lacking in bona fides … Hence, failure to apologise … conducting proceedings in a certain manner, and continuing publication … may all result in an award of aggravated damages *if* such conduct was improper, unjustifiable, or lacking in bona fides").

267 Section 36 of the Act is headed "State of mind of defendant generally not relevant to awarding damages" and provides:

> In awarding damages for defamation, the court is to disregard the malice or other state of mind of the defendant at the time of the publication of the defamatory matter to which the proceedings relate or at any other time except to the extent that the malice or other state of mind affects the harm sustained by the plaintiff.

Submissions

268 In his closing address, Mr Smark accepted that "much of the evidence of hurt to feelings is entirely unchallenged, and it is completely apparent that Mr Greenwich was hurt in a significant way by the primary tweet in particular, but also, one assumes and the evidence is … by The Daily Telegraph article carrying the quotes". Mr Smark continued in relation to the hurt to feelings component of general damages as follows:

> The extent of assessment of that evidence – this is the hurt to feelings component – is really in quite a limited compass, and it really is the extent to which as time moved on, the continuing impact of the publications was disabling of, or continuingly really significantly impacting on Mr Greenwich, and your Honour has read what he has to say about that. We would say that it's an overall assessment, and your Honour would have regard to Mr Greenwich's evidence in the witness box, but your Honour would approach with caution his evidence that he was still, in effect, really weighing up whether he can go on being a politician; that was the substance of his affidavit evidence in paragraph 155, I think.
>
> Your Honour may recall yesterday I put the question to him a few times, and in respect of that part of his evidence, he came across as something of an advocate. That doesn't mean that he was being dishonest. He was being asked something that's inherently sort of evaluative, it's not a question of fact, so I'm not inviting your Honour to find that he was a dishonest witness. But I am inviting your Honour to approach his evidence of the extent of the disablement he experienced, particularly as time moved on from July last year onwards, with caution.
>
> And we would suggest that when one has a look at the evidence as to him continuing to be able to meet his responsibilities in a general sense, as both a parliamentarian and as an advocate, and the fact that he was apparently – and he accepted this – able to go out with his husband or with friends, and really the limited nature of evidence of how his life was before and there being a change, because that's what one's looking for, if he doesn't go out to lots of functions now, there's no evidence really that he used to go out to lots. He doesn't – I don't say this critically in any way, his evidence wasn't he was an extrovert party-loving person before this and now he's a recluse. That's not the tenor of his evidence at all. His evidence is that he has said no to some engagements, and he still or has felt uneasy going out to large gatherings. That's evidence of hurt to feelings – an impact – but we would say that it's something that has been not transitory, but recovering in the way that defamation plaintiffs often do – not always, but often do, and we would invite your Honour to approach hurt to feelings on that basis.

269 Mr Greenwich was cross-examined about the evidence he gave in his affidavit concerning his political future. The high point of it was that his evidence that he "[has] to now consider

whether or not to continue in [his] political and public role as a direct result of the harm and hatred [he has] been subjected to …"

270 His own counsel did not, in the end, place any reliance on what Mr Greenwich had said in that regard, so it is unnecessary to say anything about it. If it matters, I do not accept that Mr Greenwich is still weighing up whether to continue in his role as a politician.

271 He was also cross-examined about his evidence to the effect that the publications had impacted on his ability to attend large gatherings and his assertion that the impugned publications and the subsequent hateful communications impacted on his ability to do his job. He was shown a copy of his electronic diary (Exhibit R3), which, it must be said, did rather suggest that his activities had not significantly diminished at the relevant time. Further, Mr Smark tendered a document, marked as Exhibit R2, headed "Schedule of some events involving the Applicant from July 2023", which listed a series of political activities in which Mr Greenwich had been engaged from 30 July 2023 until 8 May 2024 and which showed that Mr Greenwich has continued to be involved in his role representing the people of his electorate and the causes important to him.

272 In relation to evidence of about Mr Greenwich's reputation, Mr Smark submitted that "there is virtually no evidence or no evidence of good reputation prior to the publications in this case". He continued:

> [T]he only evidence that could be considered to be good reputation evidence in all the affidavits, including the applicant's own affidavit, because applicants – people can put on evidence of their own reputation, if they choose to – is in Mr Piper's affidavit, paragraph 11, the last sentence:
>
> *Alex wouldn't have had success if he didn't have respect across the chamber.*
>
> That's unchallenged evidence that Mr Greenwich has respect across the chamber, the lower house of the New South Wales Parliament. It's not evidence of change of reputation. It's clearly Mr Piper's opinion as to his present reputation, although in fairness it probably goes back – it's probably evidence as to his reputation in that particular respect – that is, with other parliamentarians in New South Wales in the lower house – probably both before and after, to be fair. That's a very limited part of what the relevant reputation is of the plaintiff. It would be reputation with the public that would be most significant, although it's not irrelevant. We're not aware of any other evidence of good reputation. On the bad reputation side, we're not aware of any evidence at all.

273 Dr Collins put his case with respect to general damages in these terms:

> In the present matter, for the reasons developed above in relation to the serious harm element of the causes of action, the Court can be comfortably satisfied that Mr Greenwich has suffered serious damage to his reputation. The award of damages must

> provide reparation for that damage, and be sufficient to signal to the public the vindication to which Mr Greenwich is entitled.
>
> Further, the evidence established that the hurt and distress caused to Mr Greenwich by the publication of the matters complained of was very significant. He was, by reason of those publications, the victim of outrageous homophobic and abusive responses, death threats and scandalous slurs. They left him, for the reasons we have identified earlier, diminished, distressed [and] humiliated …

274 Counsel for Mr Greenwich submitted that an award of aggravated damages should be made, including for the following reasons in relation to the primary tweet.

(a) Mr Latham had no proper basis whatsoever for the publication of his "slur".

(b) His conduct was improper, unjustifiable and lacking in bona fides and obviously hurtful to Mr Greenwich.

(c) It is plain from the face of primary tweet that Mr Latham presented it in a demeaning, homophobic and over-sensationalised manner, which added to Mr Greenwich's hurt, and was improper, unjustifiable and lacking in bona fides.

(d) Mr Greenwich's solicitors sent to Mr Latham a concerns notice dated 19 April 2023, calling for a reasonable apology, which was rejected.

(e) Leaving aside the concerns notice, Mr Latham could have apologised to Mr Greenwich at any time. He has not done so, in circumstances where an apology is self-evidently called for.

(f) Mr Latham doubled down in his campaign against Mr Greenwich and "disingenuously and falsely asserted that he had apologised to [him]" (referring to Mr Latham's tweet of 2 May 2023 set out at [66] above, in response to Ms Boyd's tweet, and his tweet of 4 May 2023 set out at [69]).

(g) Mr Latham's conduct after the publication of the matters complained of being:

    (i) Mr Latham's "never apologise" tweet dated 31 March 2023 (at [50] above);

    (ii) Mr Latham's "normal people" tweet dated 1 April 2023 (at [52] above);

    (iii) Mr Latham's "like" of a tweet stating, "Stick your apology up you ass" (at [62] above);

    (iv) the *TNT Radio* interview (at [60] above), which was promoted, reported in the news, and the subject of social media posts by Mr Latham;

(v) Mr Latham's "Alphabet people" tweet dated 28 April 2023 (at [63] above);

(vi) Mr Latham's reply to the "Alphabet people" tweet dated 28 April 2023 (at [64] above);

(vii) Mr Latham's tweets in response to Abigail Boyd on 2 May 2023 (at [66] and [67], and Mr Latham's "likes" of replies to those tweets (at [68] above);

(viii) Mr Latham's "can't win" tweet dated 4 May 2023, which accused Mr Greenwich of being "obsessed with petty litigation against me for disagreeing with him" (at [69] above); and

(ix) Mr Latham's "AVO" tweet dated 4 May 2023, which called Mr Greenwich an "entitled European Prince", referred to "lawfare" and mocked Mr Greenwich, stating, "Should I take out an AVO for harassment?" (with crying, laughing emojis) (at [70] above).

275 It was also submitted that:

> A further matter of aggravation is the effect of [Mr Latham's written opening submissions] on Mr Greenwich. Mr Greenwich told the Court he was angered and saddened when he read Mr Latham's written opening submissions. He rationally explained, from his perspective as a gay man, why the submissions were so damaging when he read them (T42.11-17):
>
> > So the –the document seeks to accept that "covering your dick with shit" should be considered as homosexual sex. That – that makes my stomach churn. The document I read seeks to say that a reasonable person could assume that I go into schools to talk about sexual activity. I don't and I wouldn't. I read it as a continuation and a justification on the attack on me, the attack on my character, and the way in which people should see me. It – it – it saddened me. It angered me…

276 Mr Latham did not make any detailed submission by way of response to the submissions set out at [274] and [275].

Consideration of damages

277 In this case, for the reasons I have given, there is no doubt that as a result of the publication of the primary tweet, for which Mr Latham offered no genuine apology, Mr Greenwich suffered a loss of standing because he was exposed to ridicule and that he experienced a significant subjective hurt to feelings, aggravated by the foreseeable "maelstrom" described in detail above. It may well be that much of it was the product of people with deranged minds, as

counsel on both sides said, but that is hardly any solace to Mr Greenwich. The voicemail messages set out at [77] above were played in court. They were particularly menacing, and very disturbing.

278 As to Mr Smark's submission about Mr Greenwich's reputation (see [272] above), as he conceded, there is evidence of Mr Greenwich's good reputation "across the chamber". Further, it can be inferred that because Mr Greenwich has been re-elected on numerous occasions since 2012, he enjoys a good reputation among, at the very least, a majority of his constituents.

279 On the other hand, many people — including Senator Hanson and Mr Bolt (neither of whom could be described as political allies of Mr Greenwich in the ordinary course of things) — pilloried Mr Latham after the publication of the primary tweet; and, as I have already said, ultimately it was not contended (and I do not accept) that the harm done by the primary tweet was so serious that Mr Greenwich was in fact considering his political future, or that his ability to do his job was significantly affected by the aftermath of the defamation.

280 I also do not accept the submission that the content of counsel's written opening or the conduct of part of Mr Latham's defence (which is pleaded at paragraph 2 of Mr Greenwich's Reply) have increased the hurt and harm occasioned to him. Compare *Triggell v Pheeney* at 514. The allegations in paragraph 2 of the Reply were not mentioned in closing by Dr Collins, so I do not need to deal with them.

281 In any event, if I may say so with unfeigned respect, Mr Latham's counsel conducted the hearing of this proceeding impeccably; cross-examined only when there was a purpose in doing so; made a number of appropriate concessions; and did nothing relevantly to exacerbate the harm caused to Mr Greenwich by the publication of the primary tweet. As a result, a case that was originally set down for five days, finished in two and a half.

282 I do, however, consider that the conduct of Mr Latham as set out at [274] "rubbed salt in the wound" caused by the primary tweet, and is sufficient to warrant a modest award of aggravated damages to Mr Greenwich.

283 Weighing up all the factors, and doing my best to ensure that there is an appropriate and rational relationship between the harm sustained and the amount of damages awarded, I have concluded that the appropriate award of damages for non-economic loss is $100,000. I have also considered that aggravated damages in the sum of $40,000 should be awarded.

284 An order for interest, from the date of publication, will also be made.

DISPOSITION

285 I will stand the matter over for 14 days for the purpose of the parties bringing in orders to give effect to these reasons and to deal with any argument as to the grant of any injunctive relief, and as to interest and costs.

I certify that the preceding two hundred and eighty-five (285) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O'Callaghan.

Associate:

Dated: 11 September 2024