FEDERAL COURT OF AUSTRALIA

Tickle v Giggle for Girls Pty Ltd (No 2) [2024] FCA 960

File number:	NSD 1148 of 2022
Judgment of:	**BROMWICH J**
Date of judgment:	23 August 2024
Catchwords:	**HUMAN RIGHTS** – gender identity discrimination – s 5B and 22 of the *Sex Discrimination Act 1984* (Cth) (**SDA**) – where transgender woman excluded from a woman's only social media application – construction of "sex" in s 5 of the SDA – construction of s 5B of the SDA – construction of s 7D (special measures exception) of the SDA – whether respondents had engaged in direct or indirect gender identity discrimination – where applicant removed on visual inspection of a photograph submitted to the social media app in question – whether evidence established awareness of applicant's gender identity on the part of the respondents – whether respondents effected a policy of excluding transgender women – HELD: respondents had engaged in indirect gender identity discrimination against the applicant **CONSTITUTIONAL LAW** – whether s 22, to the extent it prohibits discrimination on the ground of gender identity, not supported by head of Commonwealth legislative power – external affairs power – corporations power – operation of s 9 on construction of provisions of the SDA – *Convention for the Elimination of All Forms of Discrimination Against Women* (1979) (**CEDAW**) – Art 26 of the *International Covenant on Civil and Political Rights* (1966) (**ICCPR**) – meaning of discrimination against women under CEDAW – whether gender identity is a status for the purposes of Art 26 of the ICCPR – whether Giggle for Girls Pty Ltd is a trading corporation – whether CEDAW and/or Art 26 of the ICCPR support the prohibition of gender identity discrimination in s 22 – HELD: s 22, to the extent that it prohibits discrimination on the ground of gender identity, supported by the external affairs power as an enactment of Art 26 of the ICCPR – s 22, to the extent that it prohibits discrimination on the ground of gender identity, also supported by the corporations power in application to the respondents as Giggle for Girls Pty Ltd is a trading corporation and the second respondent its officer

CONSTITUTIONAL LAW – whether s 24(4) of the *Births, Deaths and Marriages Registration Act 2003* (Qld) invalid for inconsistency with the SDA under s 109 of the *Constitution* – HELD: legislation not inconsistent

DAMAGES – limitation of s 46PO(3) on Court's jurisdiction to award remedies under s 46PO(4) of the *Australian Human Rights Act 1986* (Cth) – availability of aggravated damages for subsequent conduct in discrimination claims – HELD: declarations made and compensation awarded under s 46PO(4) *Australian Human Rights Act 1986* (Cth)

Legislation:

Constitution ss 51(xx), (xxix), 109, 122

Acts Interpretation Act 1901 (Cth) ss 15 (rep), 11B(1)

Australian Human Rights Commission Act 1986 (Cth) ss 46P, 46PH(1B)(b), 46PO(1), (3), (4), 46PV

Disability Discrimination Act 1992 (Cth)

Evidence Act 1995 (Cth) ss 41, 76, 79, 161(1)

Judiciary Act 1903 (Cth) s 78B

Federal Court of Australia Act 1976 (Cth) ss 21(1), 23

Sex Discrimination Act 1984 (Cth) ss 3, 4, 5, 5A, 5B, 5C, 7A, 7AA, 7B, 7C, 7D, 9(4), (10), (11), (13), 10(3), 11(3), 22, 28B(2), 94

Convention for the Elimination of All Forms of Discrimination Against Women (1979) Arts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

International Covenant on Civil and Political Rights (1966) Art 26

Optional Protocol to the Convention for the Elimination of All Forms of Discrimination Against Women (1999)

Vienna Convention on the Law of Treaties (1969) Arts 31, 32

Anti-Discrimination Act 1991 (Qld) ss 7(1)(f), 14(1)(b), 119

Births, Deaths and Marriages Registration Act 1996 (Vic) s 30A

Births, Deaths and Marriages Registration Act 2003 (Qld) s 24

Births, Deaths and Marriages Registration Act 2023 (Qld) s 142

Cases cited:

AB v Registrar of Births, Deaths and Marriages [2007] FCAFC 140; 162 FCR 528

Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo) [2010] ICJ Rep 639 at 664

Alexander v Home Office [1988] 1 WLR 968 at 975; [1988] 2 All ER 118

Attorney-General (Cth) v Kevin and Jennifer [2003] FamCA 94; 172 FLR 300

Cassell & Co Ltd v Broome [1972] AC 1027

Charles v Fuji Xerox Australia Pty Ltd [2000] FCA 1531; 105 FCR 573

Clarke v Nationwide News Pty Ltd [2012] FCA 307; 201 FCR 389

Commissioner of Stamps v Telegraph Investment Co Pty Ltd (1995) 184 CLR 453

Commonwealth v Tasmania [1983] HCA 21; 158 CLR 1 (*Tasmanian Dam Case*)

CRI026 v Republic of Nauru [2018] HCA 19; 92 ALJR 529

Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, ICJ Reports 2009, p. 213

Elliott v Nanda [2001] FCA 418; (2001) 111 FCR 240

Ewin v Vergara (No 3) [2013] FCA 1311; 307 ALR 576

Greenhalgh v National Australia Bank Ltd (1997) EOC ¶92-884

Grigor-Scott v Jones [2008] FCAFC 14; 168 FCR 450

Hall v A & A Sheiban Pty Ltd (1989) 20 FCR 217

Hanson v Burston [2022] FCA 1234

Houda v New South Wales [2005] NSWSC 1053

Hughes (t/as Beesley and Hughes Lawyers) v Hill [2020] FCAFC 126; 277 FCR 511

Human Rights and Equal Opportunity Commission v Mt Isa Mines Ltd (1993) 46 FCR 301

Jacomb v Australian Municipal Administrative Clerical and Services Union [2004] FCA 1250; 140 FCR 149

Jones v Toben [2002] FCA 1150; 71 ALD 629

LibertyWorks Inc v Commonwealth [2021] HCA 90; 274 CLR 1

McIntyre v Tully (1999) 90 IR 9

Poniatowska v Hickinbotham [2009] FCA 680

Purvis v New South Wales [2003] HCA 62; 217 CLR 92

Queensland v Commonwealth [1989] HCA 36; 167 CLR 232

R v Federal Court of Australia; Ex parte Western Australian National Football League (Inc) [1979] HCA 6;

143 CLR 190

R v JS [2007] NSWCCA 272; 230 FLR 276

Riley v Commonwealth [1985] HCA 82; 159 CLR 1

Secretary, Department of Social Security v SRA (1993) 43 FCR 299

Sklavos v Australasian College of Dermatologists [2017] FCAFC 128; 256 FCR 247

Taylor v August and Pemberton Pty Ltd [2023] FCA 1313

Tickle v Giggle for Girls Pty Ltd [2023] FCA 553

Triggell v Pheeny (1951) 82 CLR 497

United Firefighters Union of Australia v Country Fire Authority [2015] FCAFC 1; 228 FCR 497

Victoria v Commonwealth [1996] HCA 56; 187 CLR 416 (*Industrial Relations Act Case*)

Whittle v Paulette (1994) EOC ¶92-621

Work Health Authority v Outback Ballooning Pty Ltd [2019] HCA 2; 266 CLR 428

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CEDAW Committee, General Recommendation 28 on the core obligations of States Parties under article 2 of the CEDAW, UN Doc CEDAW/C/GC/28 (16 December 2010)

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CEDAW/C/GC/39 (31 October 2022)

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Human Rights Committee, *General Comment 18: Non-discrimination*, 37th sess (10 November 1989)

Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (29 March 2004)

Human Rights Committee, *Ivanov v Russian Federation*, Communication No. 2635/2015, UN Doc CCPR/C/131/D/2635/2015 (14 May 2021)

Human Rights Committee, *Mikhailova et al v Russian Federation*, Communications No. 2943/2017, UN Doc CCPR/C/134/D/2943/2017 (29 August 2022)

Human Rights Committee, *MZBM v Denmark*, Communication No. 2593/2015, UN Doc CCPR/C/119/D/2593/2015 (12 May 2017)

Human Rights Committee, *Nepomnyashchiy v Russian Federation*, Communication No. 2318/2013, UN Doc CCPR/C/123/D/2318/2013 (23 August 2018)

Human Rights Committee, *Savolaynen v Russian Federation*, Communication No. 2830/2016, UN Doc CCPR/C/135/D/2830/2016 (23 January 2023)

Human Rights Committee, *Toonen v Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992 (31 March 1994)

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Third Committee of the UN General Assembly, 16th sess, 1101st meeting, UN Doc A/C.3/SR.1101 (13 November 1961)

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Number of paragraphs:	283
Date of hearing:	9 – 11 April 2024
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Solicitor for the Respondents:	Alexander Rashidi Lawyers
Counsel for the Intervener:	Ms Z Heger and Ms Z Graus
Solicitor for the Intervener:	Australian Human Rights Commission

ORDERS

NSD 1148 of 2022

BETWEEN:	**ROXANNE TICKLE** Applicant
AND:	**GIGGLE FOR GIRLS PTY LTD** First Respondent
	SALLY GROVER Second Respondent
	SEX DISCRIMINATION COMMISSIONER Intervener

ORDER MADE BY:	**BROMWICH J**
DATE OF ORDER:	**23 AUGUST 2024**

THE COURT ORDERS THAT:

1. The parties confer and within 7 days provide to the chambers of Justice Bromwich an agreed draft, or competing drafts, of a declaration of contravention by way of indirect gender discrimination.
2. The first and second respondents pay to the applicant a sum of $10,000 within 60 days.
3. The respondents pay the applicant's costs.
4. The component of the costs awarded by order 3 which relate to the constitutional validity and statutory construction issues, be capped at $50,000, being the cap imposed in respect of those issues by order 3 made on 1 June 2023, for the reasons given in *Tickle v Giggle for Girls Pty Ltd* [2023] FCA 553.

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

REASONS FOR JUDGMENT

BROMWICH J:

PART 1: INTRODUCTION AND SUMMARY OF CONCLUSIONS

1 The applicant, Roxanne Tickle, by an originating application and amended statement of claim, sues the first respondent, **Giggle** for Girls Pty Ltd, and the second respondent, Sally (Sall) Grover, the founder and chief executive officer (**CEO**) of Giggle, for alleged unlawful gender identity discrimination in the provision of services, contrary to s 22 of the *Sex Discrimination Act 1984* (Cth) (**SDA**). These reasons refer to Giggle and Ms Grover collectively as the **respondents**.

2 The topic of the gender identity of a person, as distinct from the sex that a person had or was assigned at the time of birth, is one that Roxanne Tickle regards as straightforward and supported by the SDA and other legislation, as well as international law, including treaties to which Australia is a party. The respondents regard only sex at birth as being a valid basis on which a person may claim to be a man or woman. The respondents do not accept that a person's sex can be a matter for self-identification. Correspondingly, they do not accept either the validity or legitimacy of the gender identity discrimination provisions of the SDA. This Court is confined to determining, only to the extent necessary, the validity, meaning and application of the SDA, including in particular whether there has been a contravention of the proscriptions on gender identify discrimination.

3 Roxanne Tickle was of the male sex at the time of birth, but is now recognised by an official updated Queensland birth certificate, issued under the *Births, Deaths and Marriages Registration Act 2003* (Qld) (**Qld BDM Registration Act**), as being of the female sex. This followed from, and was predicated on, sexual reassignment surgery, being the term used in the Qld BDM Registration Act, which will be used in these reasons. Roxanne Tickle's updated birth certificate gives rise to an entitlement to be referred to by female pronouns. Accordingly, in these reasons I will refer to her as **Ms Tickle**.

4 The term *cisgender* features in Ms Tickle's amended statement of claim and appears in numerous places in these reasons, but does not appear in the SDA. As I noted in *Tickle v Giggle for Girls Pty Ltd* [2023] FCA 553 (***Tickle v Giggle No 1***) at [11], cisgender refers to a person whose gender corresponds to the sex registered for them at birth. That is to be contrasted with a person whose gender does not correspond with their sex as registered at birth, commonly

referred to as transgender. The respondents do not accept the legitimacy of the terms cisgender and transgender.

5 The gender identity discrimination asserted by Ms Tickle is in relation to the provision of services, alleging both direct discrimination as defined in s 5B(1) of the SDA, and indirect discrimination as defined in s 5B(2). The conduct said to constitute both direct and indirect discrimination arises from Ms Tickle being prevented by the respondents from using a mobile phone digital software application, commonly known as an App, marketed for social communication between women (the **Giggle App**). While both direct and indirect discrimination may be alleged in the alternative, only one of the two can ever succeed in relation to a given allegation of discrimination. While both are alleged, Ms Tickle confirmed at the hearing that her allegations of direct and indirect gender identity discrimination were advanced as alternatives.

6 Ms Tickle seeks declarations of contravention, damages (including aggravated damages), a published written apology and an order to allow Ms Tickle to access the Giggle App on the same terms offered to other female users. The claim for aggravated damages was not particularised, nor well evidenced. Ms Tickle's pleadings were not well drafted.

7 The distinction between direct and indirect discrimination in s 5B of the SDA is considered in some detail later in these reasons. It suffices at this stage to note that:

(a) direct discrimination is discrimination *by reason of* gender identity, whether it be that actual gender identity, or a characteristic that appertains to, or is generally imputed to, persons who have that gender identity;

(b) indirect discrimination is the imposition, or proposed imposition, of a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging a person relative to another person or persons who have a different gender identity.

8 The respondents do not deny that Ms Tickle was prevented from using the Giggle App. Instead, they challenge the constitutional validity of the gender identity discrimination provisions of the SDA inserted in 2013. That was principally achieved by the addition of the phrase "*gender identity*", defined in s 4, to the grounds for discrimination in the provision of goods or services in s 22, and the corresponding stipulation of what constitutes direct or indirect discrimination on the ground of gender identity as described in s 5B.

9 The respondents deny in any event that they engaged in any unlawful discrimination by way of either direct or indirect gender identity discrimination. The respondents deny that the applicant is entitled to any relief, and in the alternative contend that any damages awarded should be minimal. The respondents also challenge the validity of the provisions of the Qld BDM Registration Act that allow the change to a person's registered sex on the basis that those provisions are in conflict with the SDA and thus inoperative by reason of the operation of s 109 of the Constitution. As will be dealt with in detail later in this judgment, that challenge is misconceived and must fail.

10 I have concluded that the gender identity discrimination provisions in the SDA are valid because they are supported by s 51(xxix) of the Constitution (**external affairs power**) as an enactment of Australia's obligations under Art 26 of the *International Covenant on Civil and Political Rights* (1966) (**ICCPR**). Their application in the present case is also supported by the power in s 51(xx) of the Constitution (**corporations power**), by reason of Giggle being a trading corporation and Ms Grover, its officer.

11 The SDA according to its objects seeks to give effect to the *Convention for the Elimination of All Forms of Discrimination Against Women* (1979) (**CEDAW**), and the respondents argued that CEDAW does not and cannot support the gender identity discrimination provisions in the SDA. It has not been necessary to decide whether s 22, when read with s 5B, is generally supported by CEDAW, via the external affairs power. This is because the kind of discrimination that Ms Tickle complains about does not engage CEDAW in relation to the SDA any event, not being discrimination in favour of a man or men. It is well established that questions of constitutional validity should ordinarily only be determined if they properly arise on the case that has been brought: *LibertyWorks Inc v Commonwealth* [2021] HCA 90; 274 CLR 1 at [90].

12 For the reasons that follow, I have decided that the outcome of Ms Tickle's suit should be as follows:

(a) Ms Tickle's claim of direct discrimination fails, which was not really the case that she brought;

(b) Ms Tickle's claim of indirect discrimination succeeds, being the substance of the case that she did bring based on a condition being imposed for the use of the Giggle App that she was required by that condition to have the appearance of a cisgender woman;

(c) Ms Tickle is entitled to a declaration of contravention for indirect identity discrimination;

(d) Ms Tickle's claim for general damages succeeds, but her claim for separate and additional aggravated damages fails;

(e) the respondents must pay Ms Tickle compensation in the sum of $10,000;

(f) Ms Tickle's claim for an apology fails because it is futile and inappropriate to require an inevitably insincere apology to be made; and

(g) the respondents must pay Ms Tickle's costs;

(h) the costs in respect of the constitutional validity and statutory construction issues is limited to $50,000, being the cap imposed in respect of those issues by order 3 made on 1 June 2023, for the reasons given in *Tickle v Giggle No 1*, though I will allow either party to make an application for an alternate order within 14 days, or such further time as I may allow.

PART 2: OVERVIEW OF THE CASE

(a) Leave to the Sex Discrimination Commissioner to appear amicus curiae

13 Under s 46PV of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**), on 16 June and 8 August 2023 I granted leave to the Sex Discrimination **Commissioner** to appear as amicus curiae (that is, as a friend of the Court) and to make submissions on the following topics:

(a) the construction, meaning and scope of provisions of the SDA dealing with discrimination on the grounds of sex and gender identity;

(b) the construction, meaning and scope of provisions of the SDA dealing with special measures;

(c) the constitutional validity of the amendments to the SDA made by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) (the **2013 SDA Amendment)**, based on the respondents' amended notice under s 78B of the *Judiciary Act 1903* (Cth) dated 30 June 2023 (**amended s 78B notice**), understood by the Commissioner to be limited to the validity of s 5B in its application to s 22 of the SDA; and

(d) whether s 24(1) of the Qld BDM Registration Act is inconsistent with ss 5, 5B, 7B, 7D and 22 of the SDA by operation of s 109 of the Constitution, an issue also raised in the respondents' amended s 78B notice.

14 The Commissioner did not appear for or with either side in this proceeding, and was not a party to the proceeding. The Commissioner did not make any submission on the question of whether or not gender identity discrimination had in fact taken place. Rather, the Commissioner, via counsel, assisted the Court on key legal questions, especially in relation to the interpretation of the SDA and its constitutional validity. I was substantially assisted by counsel for the Commissioner.

15 Ms Tickle largely adopted the Commissioner's submissions on the above topics with little addition, while the respondents opposed them, but did not fully or even adequately address them. Not every aspect of the Commissioner's submissions needed to be considered, especially on the topic of reliance on CEDAW to support the gender identity discrimination provisions of the SDA, because of the nature of the Ms Tickle's case which did not allege any gender identity discrimination in favour of a man or men.

(b) Overview of the evidence

16 The essential facts as to what took place are largely not disputed, as briefly summarised below, and detailed further later in these reasons as necessary.

17 In about February 2021, Ms Tickle downloaded the Giggle App. The Giggle App had been marketed as being a means for women to communicate with one another in what was described as a digital women-only safe space. Ms Tickle undertook a registration process to gain access to the Giggle App, which including providing information and uploading a self-taken photograph of her face, commonly known as a **selfie**.

18 The photograph provided by Ms Tickle to Giggle was assessed by third-party artificial intelligence (**AI**) software, designed to distinguish between the facial appearance of men and women. The trial evidence from Ms Grover, which I accept, established that the AI software was deliberately set to less than its maximum reliability, so as to err on the side of inclusion of a user who identified as a woman rather than exclusion of a user because they were identified by the AI software as a man. If that AI software accepted the photograph, access was granted to the Giggle App. Ms Tickle gained access to the Giggle App.

19 In the period between February and sometime in September 2021, Ms Tickle had access to the Giggle App's features and used it to read content posted by other users. In September or early October 2021, Ms Tickle logged on to the Giggle App, but found that she could no longer post content or comment on other users' posts, or read comments on posts made by other users. That is, the functionality of the Giggle App had become limited for her as a user. When she attempted to purchase premium features on the Giggle App, she received a "*User Blocked*" message. Her attempts to contact Giggle via the in-App contact form received no response.

20 In October 2021, Ms Tickle sent a series of eight emails about being blocked to a general Giggle email address and Ms Grover. Ms Grover responded by replying to the first of those emails, requesting that Ms Tickle provide her phone number. That email from Ms Grover included, as part of her email signature block, a **mobile** telephone **number**. Ms Tickle provided a mobile number by reply email, but says she did not receive any response, an assertion that is only correct if this is understood as meaning that no subsequent conversation or email response took place, because her affidavit evidence states that she later missed a call from Ms Grover. In late October 2021, Ms Tickle tried to contact Ms Grover by SMS and two phone calls, at the number listed in Ms Grover's email signature. Other than the missed call, there was no response.

21 On 5 December 2021, Ms Tickle made a complaint to the AHRC under s 46P of the AHRC Act, naming both respondents, and asserting that, by being given limited access to the Giggle App, she was being discriminated against on the basis of her gender identity. The original complaint did not specify the provision of the SDA that she alleged had been breached.

22 On 20 January 2022, the AHRC sent a copy of the complaint to the respondents. On 3 March 2022, the respondents replied, declining to participate in AHRC conciliation processes.

23 The Giggle App enabled there to be a later examination by a Giggle staff member of any photographs submitted, assessed and accepted by the AI software for the purposes of user access. That staff member could reach a different conclusion as to whether a person was female, which could result in a user being denied access to the Giggle App. A substantial number of persons whose photographs were accepted by the AI software were subsequently examined and were denied user access to the Giggle App. Ms Grover's evidence was that a large number of men had attempted to access the Giggle App. However, given her belief as to what the word man means, it is unclear if this included transgender women, and if so, whether

this formed any part of the reason for denying access. This could have been tested or clarified in cross-examination, but was not.

24 It is most likely that Ms Tickle was denied user access to the Giggle App as a result of a general review process by a natural person of the AI acceptances of registration, rather than by reason of her being singled out. This was probably carried out by Ms Grover herself despite her having no specific recollection of having done so, but may have been done by someone else at Giggle, to the extent that such assistance was provided. Again, this could have been clarified in cross-examination, but it was not.

25 On 8 March 2022, the AHRC advised Ms Tickle that the respondents had declined to participate in conciliation. On 5 April 2022, a delegate of the President of the AHRC provided Ms Tickle with notice that the complaint was being terminated pursuant to s 46PH(1B)(b) of the AHRC Act, on the ground that they were satisfied that there was no reasonable prospect of the matter being settled by conciliation.

26 The making of the complaint to the AHRC and it being terminated enabled Ms Tickle to bring a gender identity discrimination proceeding in a designated Court, being either this Court or Div 2 of the Federal Circuit and Family Court of Australia (formerly the **Federal Circuit Court**, and for convenience referred to by that name): see s 46PO(1) of the AHRC Act.

27 Ms Tickle initially brought and then discontinued a proceeding in the Federal Circuit Court in the short period between June and July 2022, as explained in *Tickle v Giggle No 1* at [4]. She then commenced this proceeding in this Court in December 2022, and was granted an extension of time for the bringing of this second proceeding for the reasons given in *Tickle v Giggle No 1* at [5].

28 In August 2022, between the end of the first proceeding in the Federal Circuit Court in June to July 2022 and the commencement of the proceeding in this Court in December 2022, Giggle ceased to make the Giggle App available to anyone. The respondents asserted that this would remain the position unless and until their conduct was found to be lawful. That intention was not challenged. I therefore accept that to be the position, even if it might later change.

29 In her amended statement of claim, Ms Tickle alleges, and the respondents admit, the following background facts:

(a) Giggle is an Australian proprietary company, limited by shares, and is wholly owned by, and operated through, a holding company, WADD Holdings Pty Ltd. However, the

respondents deny that Giggle is a trading corporation or is subject to the SDA, including by reason of, relevantly, s 9(11) and (13), engaging the trading corporation aspect of the power in s 51(xx) of the Constitution. As foreshadowed, I ultimately found that Giggle was a trading corporation at the time of the conduct the subject of this proceeding.

(b) Ms Grover is the sole director and CEO of Giggle and was at all material times its controlling mind.

(c) Ms Grover uses the Twitter (now X) social media platform, with the username Sall Grover and handle @[redacted], and describes herself as the "*Founder and CEO of Giggle, a female social network*".

(d) At all relevant times, Giggle owned and operated the Giggle App.

30 The respondents principally deny any allegation of fact that describes Ms Tickle as a woman or any other allegation which directly or indirectly entails acceptance that this is so. I am satisfied that this reflects a genuinely held belief by Ms Grover and thus by Giggle, rather than reflecting any malice towards Ms Tickle, although manifested in the use of language that is unfortunate and unnecessary. However, that stance is not capable of meeting or denying the operation of the provisions proscribing gender identity discrimination if they are valid.

(c) Key provisions of the SDA

31 The key provisions of the SDA are as follows.

32 Section 4 defines gender identity:

> ***gender identity*** means the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth.

33 Section 5B describes the circumstances in which a person will discriminate against another person on the ground of gender identity, with sub-s (1) describing direct discrimination and sub-s (2) describing indirect discrimination:

> **5B Discrimination on the ground of gender identity**
>
> (1) For the purposes of this Act, a person (the ***discriminator***) discriminates against another person (the ***aggrieved person***) on the ground of the aggrieved person's gender identity if, by reason of:
>
> (a) the aggrieved person's gender identity; or
>
> (b) a characteristic that appertains generally to persons who have the same gender identity as the aggrieved person; or

(c) a characteristic that is generally imputed to persons who have the same gender identity as the aggrieved person;

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who has a different gender identity.

(2) For the purposes of this Act, a person (the ***discriminator***) discriminates against another person (the ***aggrieved person***) on the ground of the aggrieved person's gender identify if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who have the same gender identity as the aggrieved person.

(3) This section has effect subject to sections 7B and 7D.

34 The effect of s 8 is that conduct that occurred for more than one reason can still be caught as direct discrimination under s 5B(1), conduct will be "*by reason of*" a matter referred to in paras (a) to (c) if it was the only, or one of two or more reasons for that conduct, whether or not it was the dominant or substantial reason for that conduct.

35 Section 22 proscribes discrimination in the supply of goods and services on a number of grounds, including gender identity:

22 Goods, services and facilities

It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding:

(a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person;

(b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or

(c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.

36 Section 5B(3), reproduced above, provides that s 5B applies subject to ss 7B and 7D:

(a) Section 7B provides a reasonableness test in relation to conduct otherwise constituting indirect discrimination as defined by s 5B(2), whereby that conduct will not be discriminatory if the condition, requirement or practice is reasonable in the circumstances, considering the matters set out in s 7B(2):

(a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and

(b) the feasibility of overcoming or mitigating the disadvantage; and

(c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.

(b) Section 7C provides that the burden of proving reasonableness in the circumstances, for the purposes of s 7B, lies on the person who did the otherwise discriminating act.

(c) Section 7D allows persons to take special measures for the purpose of achieving specified kinds of "*substantive equality*", but only until equality is achieved: s 7D(4). These special measures are deemed not discriminatory under other provisions of the SDA by the operation of s 7D(2), provided that the sole, dominant or substantial purpose of the special measure is to achieve a form of substantive equality specified in s 7D(1): s 7D(3). The forms of substantive equality listed in s 7D(1) are:

> A person may take special measures for the purpose of achieving substantive equality between:
>
> (a) men and women; or
>
> (aa) people who have different sexual orientations; or
>
> (ab) people who have different gender identities; or
>
> (ac) people who are of intersex status and people who are not; or
>
> (b) people who have different marital or relationship statuses; or
>
> (c) women who are pregnant and people who are not pregnant; or
>
> (d) women who are potentially pregnant and people who are not potentially pregnant; or
>
> (e) women who are breastfeeding and people who are not breastfeeding; or
>
> (f) people with family responsibilities and people without family responsibilities.

37 The respondents' pleaded defence does not rely on s 7B. In closing submissions, their lead counsel made reference to reliance on the provision, but made no attempt to explain how it applied in this case, let alone any attempt to discharge the burden of establishing that was so required by s 7C. I am therefore unable to understand how it is even conceptually able to be advanced that the imposed condition was reasonable in the circumstances, let alone be satisfied that the burden of establishing that this was so has been discharged.

38 Because the Commonwealth Parliament has no direct head of power by which to implement anti-discrimination laws, the SDA relies upon a creative suite of powers to overcome this. Section 9 of the SDA has the evident purpose of ensuring the operative provisions are given

only that effect that is properly supported by a head of Commonwealth legislative power: *AB v Registrar of Births, Deaths and Marriages* [2007] FCAFC 140; 162 FCR 528 (***AB v Registrar of BDM***) at [76] (Kenny J, Gyles J agreeing). Section 9(4) provides that certain "*prescribed provisions*" in Div 3 of Part II and Part II of the Act are to "*have effect as provided by sub-section (3) of this section and the following provisions of this section and not otherwise."* Many of those following provisions refer to powers that have no application in the present case, such as the Territories power in s 122 of the Constitution and many others besides.

39 The heads of power pertinent to this proceeding are the trading corporations aspect of the corporations power in s 51(xx), and the external affairs power in s 51(xxix) of the Constitution, insofar as it is relied upon to implement international instruments, such as conventions, to which Australia is a party: see s 9(10) for the external affairs power, and s 9(11)-(14) for the corporations power. The respondents assert that neither of those heads of power can be relied upon to support the gender identity discrimination provisions of the SDA, which necessarily focusses on s 22 as the operative provision relied upon. The arguments both ways and their resolution are addressed at Part 5(a) below.

40 The legislative history of the provisions reproduced or summarised above, the construction of the legislated concept of gender identity in the context of that history, and the special measures exception to discrimination are considered in Part 3 of these reasons below.

(d) Pleadings

41 Ms Tickle's case, as pleaded in her amended statement of claim in aspects that did not change with the amendments, did not clearly or coherently distinguish between direct and indirect discrimination, instead confusing the two. In particular, Ms Tickle pleaded reliance on s 5B(1) (direct discrimination) by reference to being discriminated against "*on the basis of her gender identity*", rather than the words in s 5B(1) "*by reason of*" that identity, and then particularised the conduct by reference to an imposed condition, which is a feature of s 5B(2) (indirect discrimination). That is, the terms of the two different forms of discrimination were conflated. The asserted imposed condition is that a person must be a cisgender woman or be determined as having cisgendered female physical characteristics by Ms Grover on review of their photograph.

42 The pleading of indirect discrimination refers to the outcome of not being able to gain ordinary access to the Giggle App by reason of the imposed condition, and to disparaging conclusions

and exclusion based on appearance. The requirements of the imposed condition do not truly relate to indirect discrimination, referring to the adoption of a policy of direct discrimination instead.

43 None of these shortcomings were identified by the respondents and no objection was taken to the amended statement of claim until these issues were raised by the Court during closing submissions. When these pleading problems were pointed out in the course of closing submissions, senior counsel for Ms Tickle maintained claims of both direct and indirect discrimination, asserting that these were pleaded in the alternative, but the substance of the case advanced ultimately only really relied upon indirect discrimination.

44 As adverted to earlier in these reasons, the amended statement of claim uses the term cisgender, a word used in the community and in particular in discourse concerning gender identity, but not in the language of the SDA. As noted earlier in these reasons, the term cisgender refers to a person whose gender corresponds to the sex registered for them at birth: *Tickle v Giggle No 1* at [11]. That is to be contrasted with a person whose gender does not correspond with their sex as registered at birth, a status commonly described as transgender to reflect that difference, although Ms Tickle's preference is simply to describe herself as a woman without that qualification or explanation. By contrast, the respondents' defence uses the terms "*adult male human*" and "*adult female human*", adhering to the sex of a person as registered at birth, disregarding legislative language in the SDA to the contrary, and ignoring recognition of changes to sex pursuant to the Qld BDM Registration Act as a basis for being called female (or male) under the SDA.

45 The respondents object to the use of the terms cisgender and transgender. They anchor all the terminology they use to a person's sex at birth, contending the word "*man*" can only mean an adult human male, and the word "*woman*" can only mean an adult human female. They do not accept that this can ever change, contending that biology at birth permanently dictates the language that must be used to describe a person, irrespective of legislative departures from this stance. They assert that s 5 of the SDA, describing sex discrimination, precludes Ms Tickle bringing a case relying upon s 5B, describing gender identity discrimination, an argument to which I will return.

46 Doing the best that I can with the pleadings, given the deficiencies identified above, Ms Tickle alleges that:

(a) a condition was imposed by Giggle, on the instruction, or at the will, of Ms Grover – that is, she primarily makes a claim of indirect discrimination by the imposition of a condition;

(b) the condition was that, to be allowed ordinary access to the Giggle App, a user had to be a cisgendered female, or be determined as having cisgendered female physical characteristics by Ms Grover on a review of the selfie photograph provided by a prospective App user during the process of applying to use the Giggle App – this aspect of Ms Grover reviewing photographs at the registration stage, as opposed to a later review of the AI approvals, is not supported by the evidence;

(c) in breach of s 22 of the SDA, Giggle and/or Ms Grover discriminated against Ms Tickle on the basis of her gender identity by imposing that condition, excluding her from using and assessing the Giggle App which was otherwise available to cisgender women and by not responding to her requests for access;

(d) by the imposed condition, Ms Tickle was treated less favourably than cisgender women because she is a transgender woman – noting that this very pleading seems inherently not just a claim of indirect discrimination, but abandoning a claim of direct discrimination, and also noting that it has to be one or the other (or neither), but cannot be both at the same time as they are mutually exclusive: see *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128; 256 FCR 247 at [14]-[16] (Bromberg J, Griffiths and Bromwich JJ agreeing on this point), and the authorities there cited;

(e) imposing that condition constituted a breach of the prohibition of discrimination on the ground of gender identity in s 22 of the SDA, as the condition disadvantaged transgender women because they are not be able to gain ordinary access to the Giggle App and are vulnerable to disparaging conclusions and exclusion based on their appearance;

(f) unlike transgender women, cisgender women would not have their access to the Giggle App restricted, or their claim to be a woman questioned on the basis of their physical appearance by Giggle and/or Ms Grover, and either or both of them would have engaged with cisgender women and responded to their queries regarding exclusion from the Giggle App – again, apparently not advancing a claim of direct discrimination.

47 Ms Tickle points to two requirements that make up the imposed condition she alleges gave rise to indirect discrimination: the requirement that Giggle App users be cisgender women, and the

requirement that they appear, on examination of their photograph, to be cisgender women. The difficulty for the first requirement in the indirect discrimination claim is twofold:

(a) it more properly relates to a direct discrimination claim, requiring proof of both the existence and application of a policy of excluding transgender women; and

(b) more importantly, it does not engage with how she was actually removed from being able to use the Giggle App, which was on the examination of her selfie photograph only after she had been granted access.

48 Neither difficulty was averted to by the respondents. That leaves the second requirement, being the true thrust of Ms Tickle's indirect discrimination case, being that the respondents imposed a condition on users, on inspection of their photos by Ms Grover, that they appeared to be cisgender women.

49 The respondents' substantive case, drawn more from their submissions than their pleading which is largely an exercise in blanket denial, is that Ms Tickle was granted ordinary access to the Giggle App via the AI assessment process, and that she was removed from the Giggle App because she was an adult human male, the respondents rejecting altogether the use of the word woman to describe Ms Tickle. All of Ms Tickle's allegations summarised above are flatly denied in that context. Importantly, the respondents deny that they were aware of Ms Tickle's gender identity at the time she was removed from the Giggle App. As will be seen, this would be capable of being a complete answer to Ms Tickle's case of direct discrimination, but does not address Ms Tickle's case of indirect discrimination. To the contrary, as advanced by their pleaded defence and the way in which they ran their case, they have tended to help Ms Tickle to establish indirect discrimination.

50 It is apparent that a key dispute is not one of what has taken place, except on the periphery, but rather one of characterisation, with the respondents essentially taking issue with the very concept of gender identity. They appear to contend that a claim of gender identity discrimination can be answered by asserting that sex discrimination occurred, and that the kind of sex discrimination they engaged in is a special measures exception under s 7D of the SDA. That is manifested in part by the respondents' constitutional challenge to the validity of s 5B (really a challenge to the validity of s 22) as being beyond the legislative power of the Commonwealth, and in part by the interpretation they give to the operation of ss 5 and 5B of the SDA. That challenge, addressed below, is in part a reflection of the respondents having no real answer to the case of indirect discrimination on the undisputed and proven facts.

51 The parties' competing arguments as to the interpretation of ss 5 and 5B, as put in relation to the respondents' objection to competency, were summarised in *Tickle v Giggle No 1* at [15]-[17], and noted at [18] to be irreconcilable:

> [17] The applicant's response is to agree that for the purposes of s 5 of the SD Act, a person's sex is that of a man or a woman, and it is for that reason that the case is not framed by reference to s 5, noting that there is no barrier to a transgender woman being a woman for the purposes of sex discrimination. Rather, the applicant argues, the case alleges gender discrimination on the basis that the applicant is a transgender woman, not a cisgender woman. The case is instead brought under s 5B because the condition complained about is that it has allowed a transgender woman to be treated less favourably than a cisgender woman. The applicant alleges being removed from the App upon the basis of gender identity as a transgender woman, which does not, on that case, in any way pertain to the treatment of a man.
>
> [18] The difference between the applicant's case and the respondents' case is stark and wholly irreconcilable. One will ultimately be found to be right, and the other wrong. This is not the point at which that determination is to be made unless the applicant's case is manifestly untenable. The arguments for the respondents do not go so far as to convince me that is so, largely because the SD Act deliberately draws a distinction between sex discrimination and gender discrimination, for which the metes and bounds of the latter have not been tested. Nor can they be appropriately tested in the course of a relatively short interlocutory dispute.

52 The respondents' position on that issue was put more cogently and coherently at that interlocutory stage than at trial. Given that deficiency, I presume in their favour that their position remained unchanged in relation to the substantive hearing in this matter. They contend that Ms Tickle's case as pleaded, while purporting to engage the gender identity discrimination jurisdiction in s 5B of the SDA, is really directed to the definition of sex discrimination in s 5, and that the now amended statement of claim conflates sex and gender.

53 The respondents' position remains, as best as I was able to determine given the way in which it was presented, which failed to substantially engage with the real legal issues and facts in this case, that sex refers *only* to biological features which produce an immutable and binary position of man or woman, while gender identity is directed *only* to a person's individual identity as characterised by how a person signals their gender to others, referring to behavioural features, psychology and society. I similarly presume that Ms Tickle maintains her agreement with an aspect of that stance, as articulated in her submissions on the respondents' interlocutory notice of objection to competency (which was itself incompetent), being that, for the purposes of s 5 of the SDA, a person's sex is that of a man or a woman. It is for that reason that her case is not framed by reference to s 5, as her sex is now that of a woman. In the same submissions, she noted that there is no barrier to a transgender woman being a woman for the purposes of sex

discrimination claims (a point that seems to be correct, but does not require adjudication in these reasons).

54 Ms Tickle's position remains that she alleges gender identity discrimination on the specific basis that she is a transgender woman, and thus a woman. Her case is brought relying upon s 5B of the SDA, not s 5, because the discrimination complained of resulted in her, as a transgender woman, being treated less favourably than a cisgender woman. She alleges that being removed from the Giggle App on the basis of her gender identity as a transgender woman does not in any way pertain to the treatment of a man, which is the concern of s 5. It is therefore necessarily no part of her case that she was discriminated against as or compared to a man, a point of importance when it comes to the role of CEDAW in supporting the gender identity discrimination provisions in the way that she seeks to rely upon them, via the external affairs power in s 51(xxix) of the Constitution.

55 On the proper construction of s 5, the Commissioner submits, and I accept, the following propositions grounded in logic and long-standing authority. *First*, sex is not confined to being a biological concept referring to whether a person at birth had male or female physical traits, nor confined to being a binary concept, limited to the male or female sex, but rather takes a broader ordinary meaning, informed by its use, including in State and Territory legislation.

56 *Secondly*, and accordingly, sex can refer to a person being male, female, or another non-binary status and also encompasses the idea that a person's sex can be changed, citing *Secretary, Department of Social Security v* ***SRA*** (1993) 43 FCR 299 at 304-305 (Black CJ), 325 (Lockhart J), and 328 (Heerey J, agreeing with Black CJ and Lockhart J); noting that *SRA* was cited with approval by the Full Court of the Family Court in *Attorney-General (Cth) v* ***Kevin and Jennifer*** [2003] FamCA 94; 172 FLR 300 at [211]-[224], [374]-[375]; and referring also to *AB v Registrar of BDM* at [4] (Black CJ, dissenting, though not on this point).

57 *Thirdly*, for the purposes of the SDA, the determination of the sex of a person may take into account a range of factors, including biological and physical characteristics, legal recognition and how they present themselves and are recognised socially.

58 *Fourthly*, although the relevant portion of s 5 of the SDA was not altered by the 2013 SDA Amendment, it must be read in context of the changes that were made: ***Commissioner of Stamps*** *v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453, 463 (Brennan CJ, Dawson and Toohey JJ), 479 (McHugh and Gummow JJ); see also the discussion in Thomas Prince and

Perry Herzfeld, *Interpretation* (Thomson Reuters, 2nd ed, 2020) at 296 [11.60] and [11.70]. That is, the amended Act must be treated as a whole, with the text and provisions added and the text and provisions removed being able to have an effect on the meaning of the provisions that have not changed.

59 This accords with principle, noted by all five High Court justices in *Commissioner of Stamps* as being the modern approach almost 30 years ago. At the federal level this principle was also legislatively expressed in a declaratory way by s 15 of the *Acts Interpretation Act 1901* (Cth), noting s 15 was repealed in 2011, and is now s 11B(1). These changes made by the 2013 SDA Amendment do not require the Court to resort to inference or difficult points of construction. The changes were overt and deliberate. They included not just the introduction of the gender identity discrimination provisions, but also the change of all references to "*the opposite sex*" to "*a different sex*" and the repeal of the definitions of "*man*" and "*woman*" (which had referred to members of the male and female sex, respectively). Those amendments all point forcefully to an understanding of sex, as it is deployed in the SDA, that is changeable and not necessarily binary, contrary to the respondents' submissions.

60 That conclusion is fortified by the 2013 SDA Amendment's Explanatory Memorandum, which emphasises:

> These definitions are repealed in order to ensure that 'man' and 'woman' are not interpreted so narrowly as to exclude, for example, a transgender woman from accessing protections from discrimination on the basis of other attributes contained in the SDA.

61 Those observations were not merely aspirational, but accurately reflect the changes to the SDA that were made and therefore supports the interpretation that the Commissioner contends for: cf *R v JS* [2007] NSWCCA 272; 230 FLR 276 at [143]-[144].

62 I also accept the Commissioner's submission in substance to the effect that I do not need to determine the metes and bounds of the meaning of sex in these reasons. I need go no further than accept, as I do, that it is legally sufficient that Ms Tickle is recorded as female on her updated Queensland birth certificate for her to be, at law, of the female sex. This is in accordance with the Queensland provisions that were in place at the time of the alleged discrimination, being in substance the same in all the other States and the two Territories, with certain differences that do not presently need to be considered (such as New South Wales being the only jurisdiction that still requires sexual reassignment surgery as a requirement to change a person's registered sex): see s 24(4) of the Qld BDM Registration Act. This legislation in

Queensland, mirrored in like legislation nationwide, reinforces the view already established by the authorities cited above of *SRA*, *Kevin and Jennifer* and *AB v Registrar of BDM*, that in its contemporary ordinary meaning, sex is changeable.

63 The concept of sex has broadened further over the 30 years since *SRA*, especially by reason of the wide scope that now exists for legally changing the sex of a person on official birth records. The acceptance that Ms Tickle is correctly described as a woman, reinforcing her gender identity status for the purposes of this proceeding, and therefore for the purposes of bringing her present claim of gender identity discrimination, is legally unimpeachable.

64 The construction of s 5 proposed by the respondents is fundamentally at odds with the text, broader context and purpose of the SDA with the gender identity discrimination provisions added and the other changes made. The respondents' construction of s 5 cannot be accepted. The respondents' contention that Ms Tickle was discriminated against as a man misunderstands the concept of sex in s 5. I therefore reject the argument that her case is incorrectly pleaded as one of gender identity discrimination. I further consider the construction of s 5B later in these reasons, at Part 3(b).

PART 3: INTERPREATION OF KEY PROVISIONS OF THE SDA

(a) History of amendments to the SDA

65 Given their relevance to several questions that arise in this judgment, it is necessary to set out a brief history of certain key amendments to the SDA, being relevant to the interpretation and application of the key provisions summarised or reproduced in Part 2(c) of these reasons above.

66 The SDA was enacted in 1984, the year after Australia ratified CEDAW. At the time, the SDA prohibited discrimination on only three grounds: sex, marital status and pregnancy. Despite amendments, the SDA has retained its basic structure. Key among them, Pt I contained and still contains the operative definitions of terms used throughout the Act, including discrimination on the grounds of sex, marital status and pregnancy; and Pt II contained, and still contains, prohibitions of those forms of discrimination, as well as certain exceptions to their effect.

67 As noted above, s 4 used to contain a number of definitions of key terms that were repealed with the introduction of the gender identity discrimination provisions, including the removal of the following definitions of the words man and woman:

> "man" means a member of the male sex irrespective of age;

> "woman" means a member of the female sex irrespective of age.

68 The word sex was, and remains, undefined in the SDA.

69 Section 9(4) originally provided that certain **prescribed provisions** of Div 1, 2 and 3 of Pt II were to be given effect as provided by the other provisions in s 9. Section 22 is among the prescribed provisions. At the time of enactment, s 9(10), which referred to the external affairs power, provided that:

> if the Convention [CEDAW] is in force in relation to Australia, the prescribed provisions of Part II, and the provisions of Division 3 of Part II, have effect in relation to discrimination against women, to the extent that the provisions give effect to the Convention [CEDAW].

70 In 2011, amendments were made to section 9 to provide that the Act had a wider scope of constitutional support: *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth). This included expanding the number of international instruments referred to in s 9(10). Section 9(10) of the SDA now provides that the prescribed provisions have effect to the extent that they "*give effect to a relevant international instrument*". Section 4 defines "*relevant international instruments*" as several international instruments to which Australia is party, including CEDAW and the ICCPR. The combined effect of sub-ss 9(4) and (10) is that s 22 will be given effect to the extent that it implements Australia's obligations under relevant international instruments: *AB v Registrar of BDM* at [96] (Kenny J, Gyles J agreeing).

71 The 2013 SDA Amendment made several further changes to the SDA, expanding the kinds of prohibited discrimination to include discrimination on the grounds of sexual orientation, intersex status and, relevantly to the present proceeding, gender identity. These amendments inserted definitions of these new grounds of prohibited discrimination, and inserted references to those forms of discrimination in the prohibition provisions in Part II of the Act. The word "*gender*" was not defined, but a definition of "*gender identity*" was inserted into s 4 (excerpted at [32] above). Section 3 of the SDA was also amended to add these forms of prohibited discrimination to the list of kinds of discrimination whose elimination is an object of the SDA: s 3(b).

72 As already noted, this package of amendments removed the definitions of man and woman from section 4, in order to better support the purpose of the gender identity discrimination provisions: see above at [59].

73 Along with those amendments, references to the opposite sex were also replaced with references to a different sex. The Explanatory Memorandum notes that sex is not a binary concept, and that the new terminology was consistent with the protection of gender identity and intersex status, and so recognises that a person may be, or identify as, neither male nor female.

(b) Construction of gender identity and s 5B

74 As noted above, Ms Tickle treats it as straightforward that the term gender identity in the SDA can refer to a person's transgender identity and, accordingly, s 5B can refer to discrimination on the ground of being transgender. Gender identity is identified broadly in s 4, as encompassing a person's gender-related identity, appearance or mannerisms or other gender-related characteristics, with or without regard to the person's designated sex at birth. That definition is plainly capable of referring to a person's transgender identity, which refers to the position where a person's current gender differs from their assigned sex at birth. That conclusion is fortified by the Explanatory Memorandum to the 2013 SDA Amendment Bill at [12], which clarifies that the definition is intended to apply to transsexual and transgender persons, and such express language was not used only to ensure it was not read in a limited way. The corollary to that is that gender identity can also refer to a person's status as cisgender, which is relevant in identifying a comparator with a different gender identity for the purposes of indirect discrimination as described in s 5B(2). The definition appears broad enough to encompass other kinds and aspects of gender identification, though it is not necessary to consider that issue further in these reasons.

75 The respondents' arguments barely engaged with the construction of s 5B, insisting that direct discrimination *had* occurred, *not* on a proscribed basis, but rather on the basis of Ms Tickle's sex, which they consider to be synonymous with her assigned sex at birth. That is a defence akin to claiming, as the Commissioner put it in general argument, rather than this case specifically:

> I wasn't discriminating against that person on the basis of their gender identity. I discriminated against them on the basis of their biological conception.

76 As already outlined, the respondent's contention that Ms Tickle's claim was properly one of sex discrimination under s 5 misunderstands the meaning of the word "*sex*" in the SDA, and must be rejected. The gender identity discrimination provisions cannot be evaded by creating false distinctions that are not supported by any of the terms of the SDA, properly understood.

77 The respondents' argument is contrary to the express terms of s 5B as well. The words *by reason of* in s 5B(1) point to the requirement for a causal connection between a person's gender identity, or a characteristic that generally appertains or is imputed to persons of that gender identity, and the less favourable treatment by the alleged discriminator: *Human Rights and Equal Opportunity Commission v* ***Mt Isa Mines*** *Ltd* (1993) 46 FCR 301 at 322 (Lockhart J). It is not a "*but for*" test as this would be to improperly focus on the consequences for the complainant, rather than the "*real reason*" for the alleged discriminator's conduct: ***Purvis*** *v New South Wales* [2003] HCA 62; 217 CLR 92 at [166] (McHugh and Kirby JJ). Identifying whether the treatment occurred *by reason of* gender identity requires an examination of the relevant circumstances, but there is no requirement for a specific kind of intention or motive: *Mt Isa Mines* at 322. As Gummow, Hayne and Heydon JJ noted in *Purvis* in part of [236]:

> the central question will always be — why was the aggrieved person treated as he or she was? If the aggrieved person was treated less favourably was it "because of", "by reason of", that person's disability? Motive, purpose, effect may all bear on that question. But it would be a mistake to treat those words as substitutes for the statutory expression "because of".

78 It is implicit in s 5B(1) that the discriminator actually be aware of a person's gender identity, or the characteristic that generally appertains or is imputed to persons of the same gender identity. But that awareness is different from a requirement that a person have some additional belief about the legitimacy of that gender identity. In short, if it were established that the respondents had been aware of Ms Tickle's gender identity, but dismissed its legitimacy and for that reason excluded her from the Giggle App, her case of direct discrimination would likely have succeeded.

79 I should also note that Ms Tickle's direct discrimination case is pleaded as discrimination on the basis of her gender identity, not a characteristic imputed or appertaining to it. It follows that it is therefore necessary for her to establish that the respondents had knowledge of her gender identity.

80 Less attention was paid to s 5B(2) by both sides, despite it being the real thrust of Ms Tickle's case. Section 5B(2) provides that indirect gender identity discrimination involves the imposition of a condition, practice or requirement that has, or is likely to have, the effect of disadvantaging persons who have the same gender identity as the aggrieved person. The provision is largely directed to kinds of discrimination that are facially neutral, but have a discriminatory effect, intended or otherwise. It requires identification of a comparator group by which the disadvantage of persons who share a gender identity with the aggrieved person

can be compared. In this case, the comparator is self-evident: cisgender women. That enables the treatment of transgender women to be compared to the treatment of cisgender women by the application of the imposed condition as to appearance.

(c) The special measures exception to discrimination

81 Paragraph 1 of Art 4 of CEDAW provides:

> Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

82 Section 7D is the enactment of this part of CEDAW in 1995 as domestic law and, at the time it was inserted into the SDA, CEDAW was the only international instrument on which that Act relied as a source of Commonwealth legislative support. As such, construction of Art 4 of CEDAW was influential in relation to the construction of s 7D: see ***Jacomb*** *v Australian Municipal Administrative Clerical and Services Union* [2004] FCA 1250; 140 FCR 149 at [40]-[44]. Section 7D replaced the previous exception from discrimination created by s 33 for action taken to ensure "*equal opportunities*" for women, pregnant persons and people of a particular marital status, aligning the SDA's language more closely to that of Art 4.

83 While the SDA now relies upon a broader suite of international instruments, that source remains important for interpretive purposes, even if CEDAW itself is not, or cannot be, relied upon to support the gender identity discrimination provisions in this case due to the nature of the discrimination Ms Tickle alleges (see findings at Part 5(a)(i) below). The point of the special measures exception is to achieve not just the appearance of equality by treating people in the same way despite their lack of real equality in fact, but substantive equality to address underlying disparities. As Crennan J pointed out in *Jacomb*, at [44]:

> A "special measure" as referred to in s 7D, and as construed by reference not only to the ordinary meaning of words repeated from the Convention [CEDAW], but also by reference to the context, object and purpose of the Convention [CEDAW] is one which has as at least one of its purposes, achieving genuine equality between men and women. The phrase "special measure" is wide enough to include, what is known as, affirmative action. A special measure may on the face of it be discriminatory but to the extent that it has, as one of its purposes, overcoming discrimination, it is to be characterised as non-discriminatory. …

84 It follows from the express text of s 7D(1), that to be a special measure, the conduct in question must be done for the purpose of achieving substantial equality, or in the language of paragraph 1 of Art 4 of CEDAW, accelerating *de facto* equality; that is, equality in fact.

85 The respondents rely upon the very existence of the Giggle App as a special measure for the purpose of achieving substantive equality between men and women. That may well have been successful if a cisgender man had claimed s 5 sex discrimination by reason of being excluded from using that App, and the special measures exception did apply. But that is not the present situation. The respondents contend that a special measure will not amount to discrimination if it advances any of the other provisions in the nine paragraphs to s 7D(1), corresponding to the eight provisions describing different types of what would otherwise be discrimination listed in s 7D(2), being ss 5, 5A, 5B, 5C, 6, 7, 7AA and 7A. That is, the respondents contend that a special measure done for the purpose of achieving substantive equality between men and women will avoid, by operation of s 7D(2), being gender identity discrimination for the purposes of s 5B.

86 That contention is plainly untenable. It is obvious and logical to read s 7D(1) and 7D(2) together, so that a special measure falling within s 7D(1)(a) (discrimination between men and women) does not constitute discrimination only as described in s 5 (sex discrimination). Any other interpretation would be unworkable and nonsensical. It simply cannot be that a special measure of advancing substantive equality between men and women provides any shield from gender identity discrimination, any more than it would provide a shield against discrimination on any of the other grounds listed in s 7D(2). The respondents' contention must fail.

PART 4: EVIDENCE AND FACTUAL CONCLUSIONS

(a) Ms Tickle

87 Ms Tickle identifies, and is legally recognised, as a woman. She was male sex at birth, and since about June 2017 she has lived as a woman, which has been a gradual process of transitioning her gender including social, medical and legal components. She began to use the name Roxy Tickle and told friends, family and her workplace of her transition. She began taking testosterone blockers, oestrogen and progesterone with the effect, as she described, of inducing a second puberty, and changing most parts of her body. She began to use female changing rooms and started playing in a local women's hockey team. She began shopping from the women's side of clothing stores and began a process of removing her facial hair.

88 On 19 May 2018, the **Queensland Register** of Births, Deaths and Marriages reissued her birth certificate with the name she now uses. In October 2019, she underwent gender affirming surgery, specifically a labioplasty and vaginoplasty. On 18 September 2020, her birth certificate was again reissued by the Queensland Register, now with a female sex marker.

89 In 2021, she downloaded and registered with the Giggle App. Her subsequent exclusion from it gave rise to this proceeding, as detailed earlier in these reasons.

(b) Ms Grover

90 Ms Grover is the founder and CEO of Giggle. In her affidavit evidence, Ms Grover states she conceived the idea for the Giggle App following trauma therapy for sexual abuse she had experienced, where the value of a strong support network was emphasised to her, and discussions with her parents, where they agreed a women's only app would be valuable. Following further discussions about what such an app might entail, Ms Grover's father began learning how to develop one. The development process is discussed further below.

91 It was Ms Grover's father who found the AI system, **Kairos**, that offered a gender detection service by scanning photos of users (see further discussion at [101] below). In relation to the use of this AI in the Giggle App, Ms Grover stated in affidavit evidence:

> I believed the discovery of Kairos meant the endeavour to create an App exclusively for women would be possible, at the time I believed it was a perfect way to do it. I did not believe the process Al facial recognition was controversial because it was the digital equivalent of what human beings do every day in perceiving sex, in particular male sex.
>
> At this time, I had absolutely no idea that males could be considered to be women. I had not heard or read anything in the media or on social media about this issue. It had never occurred to me to check if men were considered women in law.
>
> …
>
> I did not consider the use of the word "gender" in the context of its "gender detection feature" to mean anything other than the detection of biological sex.

92 There is some inconsistency between this evidence and her account expressed in a blog post dated 19 July 2020 and titled "*I Guess I'm a Terf Then – part II*", which was admitted into evidence as an annexure to Ms Tickle's affidavit without objection. The term TERF in the title is an acronym for Trans Exclusionary Radical Feminist. In the blog, Ms Grover says that she had "*fought for trans women's rights during the early days of Giggle's development"* and that "*When other [Giggle] team members were saying "NO!" I was saying, "Come on! It's 2020! What are you thinking!?*" In the blog post, she clarifies that she had intended "*transitioned*" transgender women to be granted access to the Giggle App, but not "*self-ID only*" transgender women. It is not entirely clear what is meant by both terms, though I infer "*transitioned*" transgender women to mean those who have undertaken sexual reassignment surgery, and "*self-ID*" transgender women to refer to those who have not. As Ms Grover describes in the blog post, in around June 2020 Giggle had adopted a view that no transgender women should

be given access that Giggle App. Ms Grover's evidence was open to challenge on the basis of that apparent inconsistency, but this did not take place.

93 Ms Grover's views on sex and gender by the time of the trial were clear. In cross-examination, Ms Grover maintained her position that she views Ms Tickle as a biological male. In cross-examination, Ms Grover was asked whether she would accept as a woman a person who was assigned male at birth but has since transitioned genders medically, socially and legally by having gender reassignment surgery, dressing and making changes to their appearance that align with what is generally considered more female appearance, introducing and describing themselves as a woman and legally changing their birth certificate to have their sex recorded as female. Ms Grover confirmed that she would not view that person as a woman, and did not agree that in Australian society the natural and ordinary contemporary meaning of the word woman encompasses women who were assigned male at birth and have since transitioned legally to be women. Ms Grover made clear in cross-examination that she does not differentiate between people who were assigned male at birth, even if they have since transitioned to become transgender women, stating "*they're male people*".

94 Ms Grover estimated that, in 2020, she would have had approximately 45,000 Twitter followers. On that platform, since the commencement of these proceedings, she has frequently described Ms Tickle as a man. She has also made posts stating that a man wants access to a female space, and given interviews to various news outlets that Ms Tickle is a man who wants access to the Giggle App which is a female space. This evidence was given in a matter-of-fact manner, and I am satisfied reflected a genuinely held position, rather than a view expressed only to offend Ms Tickle. That is important in light of authority on the absence of bona fides being relevant to the question of aggravated damages.

(c) Giggle and the Giggle App

95 Giggle was incorporated on 8 March 2019. As noted above, Ms Grover's evidence is that the Giggle App was developed in 2019 with the help of her father. She further deposed to it being unofficially launched as a beta version in February 2020. Her evidence is that the Giggle App was originally conceived to be what she described as a women-only safe space on the internet, where women could search for roommates and employment opportunities, network, commune and engage in discussion. Its ambit was broadened during its initial development, with additional features added, which she described as allowing women to connect for emotional

support, freelance work, general friendship and much more. In her affidavit evidence, Ms Grover described her vision for the Giggle App:

> The vision was to create a little corner of the Internet where women from all over the world could have a refuge away from men. It could be for serious reasons, very superficial reasons, or very practical reasons. It would be a place without harassment, "mansplaining", "dick pics", stalking, and aggression, and other male patterned online behaviour. A place to vent and get advice from other women and find out what was happening in the real world in a female-only environment.
>
> During development, I would often say, "I want to ensure that women can have access to a female support network in the palm of their hand whenever they need it" and that is essentially what we were creating. The vision was an online women's refuge, so to speak. The vision was to have a positive impact on women's daily online and social media experience.

96 The Giggle App could only be used on smartphones, not computers. Ms Grover describes it as effectively a number of apps on one platform. The Giggle App allowed users to directly message each other, and also featured a lesbian dating platform which allowed users to create a profile and then swipe to match with other users before beginning a private conversation. It also included a feature called "*Giggle Talk*", which Ms Grover describes as a female-only Twitter, which was added to the beta app in 2021. Giggle Talk did not allow non-Giggle App users to view or create posts. Ms Tickle describes there also being a section of small groups which were called "*Giggles*". Users could join a Giggle to discuss topics of interest, such as cooking, travel or health. While it is not expressly explained what this feature entailed, in context it seems to be some kind of group texting facility, but nothing turns on this additional detail.

97 The Giggle App was free for users, with premium upgrades available for purchase which were described as allowing them to have greater control over their experience on the App. Ms Grover says that upgrades to use premium features cost $2-3 per month, though at some point in 2020 Giggle made those features available to users for free. These included a feature called Giggle Slide, which allowed users to message each other without matching with each other, and a feature called Giggle Invisible which allowed users to use the App anonymously (presumably to each other, and not to the App itself). Ms Grover's affidavit evidence states that the fees payable for premium features were charged "*by reason of the software upgrades that were required to produce them*" and that Giggle "*turned off*" payments for those features in 2020 onwards to allow users access to those features.

98 The beta version of the Giggle App was taken live on the Google Play and Apple App stores in February 2020, in order for testing to be undertaken. Its promotional materials described it

as a female social media and networking platform. Ms Grover's evidence was that, at that stage, only a small number of women were aware of its existence. However, soon after its release on 7 February 2020, the Giggle App received over 5,000 unwelcome user applications from people that Ms Grover determined to be male by inspection of their onboarding selfie photographs. She referred to what she called "*onslaught[s]*" like this occurring roughly every three weeks. The Giggle App also received numerous one-star reviews on the Google Play and Apple App stores. Ms Grover says that, at that early stage, multiple men had successfully created profiles on the Giggle App, as the Kairos AI software was not yet in place on the Giggle App. It is unclear whether the account creators Ms Grover describes as men or male included transgender women. The latter is certainly possible as she describes many of the users admitted would post messages to the effect of "*Kill TERFs*" and many of the one-star reviews object to the exclusion of transgender women, but this was not clarified in cross-examination. Ms Grover says that, on 8 February 2020, the decision was made to make the Giggle App available more broadly. By September 2021, the Giggle App had approximately 20,000 users.

99 The Giggle App's terms of use stated that "*[o]ur Platform allows females to connect with one another on the giggle app either in public or private spaces*"; that an account creator must be 16 years or older; and that "*[y]ou must be female*" to use it. The section called "*Acceptable use of our platform*" states that "*Giggle for Girls is a place where female users feel comfortable expressing themselves, sharing information, and communicating with one another*." The Termination section allows Giggle to suspend a user's account without notice if they are in breach of the terms.

100 It appears that the respondents had adopted early on an explicit policy of excluding transgender women from access to the Giggle App, as evidenced by Ms Grover's blog post dated 19 July 2020 titled "*I Guess I'm a Terf Then – part II*" (described at [92] above). The post states that, from around June 2020, Giggle had adopted a view that no transgender women should be given access to the Giggle App. There was no cross-examination to endeavour to adduce evidence that this was in fact a policy and that it was actually given effect to. The Court is left to speculate whether or not such a policy was implemented, including whether this was reflected in the exclusions from use that Ms Grover deposed to.

101 Registration for a Giggle App account required a potential user to provide a phone number and to then upload a selfie. Users did not have to provide any additional information, such as their date of birth or name, to create a profile, but could choose their own username. The uploaded

selfie would then be reviewed by an AI system provided by a third-party, Kairos, which was designed and used to determine if the person in the selfie appeared to be female or male. The AI system performed what was described as gender detection on user-submitted selfies, purportedly detecting the gender of each face with 94% accuracy. Ms Grover says that she selected that accuracy level as it reduced the chance of women being denied access to the App due to a poor-quality onboarding selfie, but still ensured most men attempting to join were rejected.

102 If the AI system determined that the person appeared female, it would grant them access to the Giggle App. If the potential user was rejected, a pop up would tell the potential user "*oops you have not been verified please try again*" and they would not receive access to the App or any of its functionality. Giggle would not receive a notification when a potential user was rejected by the AI system, but if their phone number was provided, the potential users' profile could be accessed by those at Giggle through a backend server called **Athena**. Ms Grover in cross-examination disagreed that the purpose of the Kairos AI was to determine if a person seeking to join the Giggle App was male or female, stating that the purpose of the AI was to "*aid us in gatekeeping and creating a female-only space*".

103 In addition to the AI screening, Ms Grover, and others running the Giggle App, reviewed the selfies uploaded by users who had been granted access to the app, receiving some kind of daily summary of these users' photographs. She says that this review process was undertaken on a shift basis by herself, her mother and a friend. Ms Grover described the purpose of this additional check as ensuring that men attempting to join the Giggle App had not bypassed the AI screening. Where, in these reviews, a man was identified, he would be blocked from using the Giggle App. On the available evidence, and given Ms Grover's pivotal role, it is more probable than not that, as a practical matter, Ms Grover herself was the one reviewing these images most of the time that the Giggle App was operational, notwithstanding the shift arrangement that she referred to. Again, this could have been clarified by cross-examination, but was not.

104 In her affidavit evidence, Ms Grover says that users who were not granted access by the AI would often email Giggle and Ms Grover could, by using their number, review their profile on Athena. She says Giggle's practice was, on reviewing the applicant's photo, to accept them if they appeared female, reject them if they appeared male, and ask them to submit another photo if their sex was ambiguous. In cross-examination, however, she said that emails received at a

particular Giggle email address were "*primarily from a flood of male abuse*", and they would at times receive hundreds or even thousands of emails from "*males*" which they routinely deleted or did not read as they could not have done so, presumably due to the sheer volume. The apparent inconsistency, or at least ambiguity in that evidence was not explored in cross-examination.

105 Ms Grover gave evidence that female users' issues would be dealt with through an in-App messaging system. Once a user had been blocked, however, any in-App communications made by them would not be received. As she put it, if an in-App communication were made by Ms Tickle after being blocked, the communication would not have been received by the Giggle team "*because the front end of the App was no longer connected to the backend of the App*".

106 The Giggle App was taken offline in August 2022. It was not operational or available for purchase on the Google Play or the Apple App stores at the time of the trial. Ms Grover gives a number of reasons for shutting down the Giggle App. Those reasons are relevant for the purpose of assessing the likelihood of that stance changing. The gist of Ms Grover's reasons was that, in July 2022, the App had received an inundation of users she describes as male, who had left one-star app reviews, and while she hoped that this manifestation of what she described as the "*culture wars*" would blow over, it did not.

107 Ms Grover's affidavit evidence states that until Giggle can be certain it is legal for the Giggle App to operate to the exclusion of all males which, she evidently considers to include Ms Tickle, the Giggle App will not be reopened. Ms Grover agreed in evidence that the Giggle App was, at the time of trial, being rebuilt, but did not recant from, nor was she challenged about, the intention not to resume the Giggle App unless a continuation of what had taken place before was found to be lawful. The practical effect of this is that if Ms Tickle succeeded in either of her claims of gender identity discrimination, then the Giggle App, Ms Grover and therefore Giggle were determined not to reinstate the Giggle App. This is relevant to the relief of restoration to the Giggle App sought by Ms Tickle.

(d) The removal of Ms Tickle from the Giggle App

(i) Background

108 On 14 and 15 January 2021, Ms Tickle interacted with Ms Grover for the first time on Twitter (the social media platform now known as X). The two expressed disagreement over female-only spaces, specifically in relation to the McIver's Ladies Baths, a women and children-only

baths in Coogee, Sydney. The interaction was on reasonably civil terms, the extract below being indicative of the tone of the entire exchange:

> **Sall Grover ([redacted Twitter handle]), 14 January 2021:** The McIver Ladies Baths "female children only" status should not be changed because of an onslaught of abuse. Please sign this petition so that women's hard won rights of female spaces continue in this beautiful space. [The post linked to a webpage on ipetitions.com titled "Petition Keep McIver's Ladies Baths Women & Children Only"]
>
> **Roxy Tickle ([redacted Twitter handle]), 14 January 2021:** Your tweet is a little misleading. Trans women, who are morally and legally women, have been going to the baths, without problem, for years. As trans women are legally women, should you wish to have trans women excluded from women's spaces you need to talk to the government.
>
> **Sall Grover ([redacted Twitter handle]), 15 January 2021:** They have been – because, as management said, transitioned trans women were welcome. But that wasn't good enough for the "activists". They want it to be self ID. That's what started this whole thing.
>
> **Roxy Tickle ([redacted Twitter handle]), 15 January 2021:** How do you define "transitioned" though? The law defines it as somebody that has commenced transitioning, not completed transitioning. I don't know if you have thought about it from our side, but it is actually terrifying to go swimming as a trans woman.
>
> **Sall Grover ([redacted Twitter handle]), 15 January 2021:** I have a lot of empathy for that, I really do. But changing the rules of female spaces isn't the answer. It's not right or fair. A lot of women enjoy female spaces because of the camaraderie & safety. I feel like trans women should have that with trans women, in these situations.

109 It was during or after the above interaction that Ms Tickle first heard that Ms Grover operated the Giggle App. Ms Grover's evidence is that she did not know Ms Tickle was the person that she interacted with on Twitter until she revisited her Twitter history after the AHRC complaint was made.

(ii) Ms Tickle's account creation and removal

110 Ms Tickle's evidence is that, in February 2021, she downloaded the Giggle App from the Apple App Store and completed the in-app registration process by providing her mobile phone number, selecting a username and taking a selfie. Ms Grover neither confirms nor challenges that evidence. It stands uncontradicted and accordingly I accept that this is what took place.

111 Ms Tickle's evidence is that the Giggle App notified her that her selfie would be assessed by Kairos AI and by a person from Giggle to determine if she was female. It is not clear what constituted this notification, but nothing turns on this, noting that of itself this is no more than the expression of an intention and is not evidence as to what actually happened, especially in relation to any assessment by a person. Ms Tickle's evidence is that the Kairos AI determined

that she was a woman and she was granted access to the Giggle App. I take this to be a statement of the fact that Ms Tickle was able to pass the AI filter, and an assertion or conclusion as to what this meant to her, namely being treated as a woman by the AI algorithm. Ms Grover's evidence is that she reviewed Ms Tickle's account at the time the AHRC complaint was made, when the Giggle App was still live, and saw that none of her profiles used the words "*trans woman*", "*trans*", "*gender identity*" or "*gender*".

112 There is no direct evidence that a review of Ms Tickle's selfie by a human ever in fact took place at the registration stage. Affidavit evidence of Ms Tickle stating that this took place was objected to and not admitted. Ms Tickle could not give this evidence as it was no more than a conclusion she drew, rather than a reflection of any actual knowledge that this indeed occurred. However, there is undisputed evidence that the AI aspect of the review was actually deployed. I accept that Ms Tickle's enrolment was successful by reason of the AI procedure that was applied, but I am unable to accept that the evidence establishes that it is more probable than not that there was any human intervention at that stage. Nothing turns on this qualification that has a bearing on the determination of any of the facts in issue.

113 Ms Tickle's evidence is that, in the months after setting up her account, she had periodically opened the Giggle App and read posts in the Giggle Talk section. She set up a profile in the Giggles section of the App, and joined a few different Giggles. However, she found that there were not many users to connect with and lost interest. This is important contemporaneous evidence, because of its inherently greater reliability as to Ms Tickle's true attitude towards being able to use the Giggle App, when it comes to any damages assessment, and because it is relevant to the real measure of detriment suffered by being deprived of access to the App.

114 Ms Grover's evidence is that she reviewed Ms Tickle's profile after the AHRC complaint was made and found that Ms Tickle had no interactions or connections with other Giggle App users, and had made no connections, posts or other contributions. There was no cross-examination challenging this evidence, and no evidence from Ms Tickle to the contrary, so I accept that this is what in fact occurred.

115 Ms Tickle's evidence is that, at some point between July and September 2021 (her AHRC complaint referring to September), she noticed that her access to the Giggle App had been restricted. She was able to read content that had been posted by others, but was not able to post content, comment on posts, nor read comments made by other users on posts, noting the unchallenged evidence in the preceding paragraph. It is Ms Tickle's belief, which is

foundational to her claim, that the respondents excluded her from the Giggle App because she is a transgender woman.

116 How the Giggle App blocking mechanism actually worked was not explored in cross-examination. I am left to conclude on the available evidence that when Ms Tickle's account was restricted, it was because her account had been blocked from the Giggle App. That is, I infer that the limited features Ms Tickle was able to access at this point were a consequence of that form of blocking.

117 Ms Grover gave evidence in cross-examination that she did not remember removing Ms Tickle from the Giggle App, and so was not sure of the exact date the removal occurred. There is some lack of clarity about this, because annexed to one of Ms Grover's affidavits is a tweet by Ms Tickle on 24 January (presumably in 2022) saying that she had only then been removed from the Giggle App, and then re-admitted to the App. Ms Grover denies that Ms Tickle still had access to the Giggle App at that time. I am unable to determine what in fact took place in relation to later access, but it does not have any material bearing on the conclusions I reach.

118 After noticing her account restriction, Ms Tickle tried to contact Giggle through its in-App contact form. Ms Tickle relied upon evidence of her in-App messages having been sent as evidence of them having been received, but evidence of sending does not necessarily equate to evidence of receiving. While there is a rebuttable presumption that this is so for electronic communications in s 161(1)(d) of the *Evidence Act 1995* (Cth), sufficient doubt has been raised by Ms Grover's evidence on this topic for the presumption not to apply: see the chapeau to s 161(1). Her evidence was that, after a user had been blocked, no in-App messages would be received by Giggle from that user: see [105] above. I am not otherwise satisfied that the in-App messages that Ms Tickle sent were in fact received, let alone that they were received by Ms Grover.

119 On 4 October 2021, Ms Tickle sent an email to Ms Grover's email address and an email address from Giggle that had sent her the initial welcome email after setting up an account. The following exchange occurred:

(a) **Ms Tickle (4 October 2021 at 1:11 pm)**

> Subject: Help Desk Request
>
> Hi Sall,
>
> I sent this message through your app a week ago and haven't received a response as yet. Sorry to disturb you, but would you mind passing it on to the

appropriate person please? I couldn't find any other way of contacting tech support.

Thanks in advance!

Cheers,

Roxy

(b) **Ms Grover (8 October 2021 at 10:32 pm):**

Hi Roxy,

I am so sorry for this!

Can you send me your phone number and I will personally look into it right now.

All the best,

sall

founder & CEO

www.joinagiggle.com

[Ms Grover's mobile phone number]

[Ms Grover's Twitter handle]

(c) **Ms Tickle (11 October 2021 at 10:58pm):**

Hi Sall,

Sorry for the delay!

I try and put my email away for the weekend and then I had a massive day at work today.

My phone number is [Ms Tickle's mobile phone number].

Thanks for your help.

Cheers,

Roxy.

120 Ms Tickle received no further response by email from Ms Grover. She sent six follow up emails to the same addresses. They are all polite in tone, and all to the effect that she is following up on her initial email and hopes that she was not blocked. She mentions that she can see other people's posts, but not the comments on such posts, and that she cannot pay for premium features. Ms Tickle also attempted to contact Ms Grover by telephone. In her email to Ms Grover on 29 October 2021, she mentions that she had called Ms Grover and did not get through. In her affidavit, Ms Tickle says that she missed a return call from Ms Grover's number on the morning of 30 October 2021. She sent the following text in reply:

> Hi Sall. Thanks for calling. Sorry I missed your call but Saturday is my proper-sleep-in and rest-all-day day! I actually didn't think you would be available on the weekend but I could make time to talk tomorrow if that suited you better than waiting til Tuesday? Cheers Roxy.

I accept, from that contemporaneous text message and Ms Tickle's evidence, that Ms Grover did attempt to call Ms Tickle at this time, but the call was not answered.

121 Ms Grover confirms that she received calls and texts from Ms Tickle in October 2021, which she did not keep. She recalls entering the phone number which Ms Tickle used to make those calls into Athena and viewing Ms Tickle's onboarding selfie. Ms Grover then called her father and told him that a man, who said that he was a Giggle App user and had been removed from the App, had called her. Ms Grover's father told her to block the phone number and ignore the telephone call and text she had received, which she did.

122 Ms Grover states in her affidavit evidence that she felt scared, threatened and harassed by the call and text, and feared that Ms Tickle might confront her in person. Ms Grover further states that she had no idea how Ms Tickle had obtained her personal mobile phone number, because as far as she was aware her mobile phone number was not publicly available. That is at best disingenuous. I find that Ms Tickle almost certainly obtained Ms Grover's phone number as a result of Ms Grover communicating it to her. That inference is inescapable because it was included in Ms Grover's email signature, which was included in the reply email Ms Grover sent to Ms Tickle on 8 October 2021.

123 While Ms Grover's affidavit evidence states that Ms Tickle had been removed from the Giggle App in October 2021, and had not regained access thereafter, Ms Grover acknowledged that it was possible Ms Tickle was removed earlier, but no later, and that she would not dispute a date of September 2021. Ms Grover, when informed in cross-examination that Ms Tickle had attempted to make contact with Giggle through the in-App contact form due to her lack of access to the App in September 2021, stated that this indicated she was likely blocked before that point as the block would have meant the in-App form was not operational. This accords with the finding to that effect made above.

124 The emails, phone calls and text message from Ms Tickle to Ms Grover occurred subsequent to Ms Tickle's account restriction, being the reason that she was making contact with Ms Grover. I therefore conclude that the removal must have occurred before the first email was sent on 4 October 2021, likely in September 2021 or alternatively in early October 2021.

125 In cross-examination, Ms Grover agreed that Ms Tickle would have been removed from the Giggle App when Ms Grover examined her photograph, with Ms Grover deciding from viewing of that photograph that Ms Tickle was not a woman and hence removing Ms Tickle. Ms Grover could not recall removing Ms Tickle specifically, but stated that it was her practice to review users' onboarding selfies and block anyone who appeared male to her. As I have found, at the time that Ms Tickle was removed from the Giggle App, Ms Grover was most likely responsible for the majority of the human reviews of user photos. It is most likely that it was not just that Ms Grover did the majority of those reviews, but the overwhelming majority, to the likely exclusion of any significant volume being done by anyone else. That probably accounts in part for Ms Grover's lack of any specific recollection of having done so in relation to Ms Tickle.

126 When asked about the reason for removing Ms Tickle on viewing her application photograph Ms Grover said "*the same as removing all males, yes*". As Ms Grover has otherwise in her evidence stated that she does not specifically remember removing Ms Tickle from the Giggle App, I take this answer to mean that Ms Grover believes she would have removed Ms Tickle with the intention of effecting the Giggle App's rule that it be female only. In other words, I accept Ms Grover's evidence that the likely reason for the applicant's removal from the Giggle App based upon her application selfie was not for the reason that Ms Tickle is a transgender woman, but rather because Ms Grover perceived the selfie to be a photograph of a male and would have removed Ms Tickle for that reason. This accords with the respondents' statement in their written submissions that Ms Tickle was excluded from the Giggle App by Ms Grover upon her visual perception of Ms Tickle's male sex. Ms Grover's evidence is that she did not look again at Ms Tickle's Giggle App selfie when she was contacted by Ms Tickle at a later date about her removal from the Giggle App. There is no reason to doubt that evidence.

127 There is an apparent inconsistency between Ms Tickle being allowed to use the Giggle App for some months before being blocked and the user review processes Ms Grover described, which was not addressed by either party. While nothing turns on this, it appears to me most likely that while the Kairos AI granted access to Ms Tickle on its review of her onboarding selfie in February 2021, Ms Grover did not herself review that selfie until much later in the year. While Ms Grover has explained that Giggle staff received a daily users report that showed them the onboarding selfies of those who had recently joined the Giggle App, Ms Grover has also stated that a large number of people, between 50 and 5,000 per day, were attempting to join the App. It is therefore possible, and even quite likely, that, even if Giggle staff were being sent these

reports daily, there was a backlog of these reports and that Giggle staff were not reviewing the reports as they came in. If Ms Grover was reviewing selfies from February 2021 in September 2021, and hence first saw Ms Tickle's onboarding selfie and subsequently blocked Ms Tickle at that time, this would explain why she was able to use the Giggle App for the intervening months before being blocked from the App.

128 In summary, I have made the following factual findings:

(a) Ms Tickle's inability to access certain features on the Giggle App was a consequence of her being blocked from that App;

(b) that block occurred when Ms Grover made a decision to remove Ms Tickle from the App after reviewing her onboarding selfie and concluding that she was male;

(c) that review and block occurred at some point before 4 October 2021, most likely in September 2021;

(d) Ms Tickle subsequently contacted Ms Grover about being denied access and provided her mobile phone number to Ms Grover; and

(e) Ms Grover also provided her mobile phone number to Ms Tickle by way of the signature block in her reply email to Ms Tickle.

(ii) Conclusions on gender identity discrimination

129 In light of the foregoing, I am unable to accept that any direct discrimination has been established, repeating the observations above that this was not really, in substance, the case that Ms Tickle advanced. The evidence did not establish that Ms Tickle was excluded from the Giggle App by reason of her gender identity, although it remains possible that this was the real but unproven reason. Rather, the evidence goes no further than establishing that her exclusion was likely to have been a byproduct of excluding those who were perceived as being men, by the use of visual criteria that failed to distinguish between cisgender men and transgender women.

130 Ms Grover embraced the fact that Giggle had a policy of excluding all people who were male sex at birth at the time Ms Tickle was removed, and this included, as Ms Grover made clear in oral evidence and her blog post quoted at [92] above, transgender women. A difficulty for Ms Tickle's direct discrimination case remains, however, the lack of clarity surrounding Ms Grover's specific decision to remove her from the Giggle App, including because of the failure to delve into this by effective cross-examination.

131 Ms Grover's evidence is that she cannot remember blocking Ms Tickle, but the decision would have been based only on Ms Tickle's selfie, and that she was reviewing large numbers of selfies quickly. Further, she gave evidence that she did not recall Ms Tickle from their earlier Twitter exchange, and that nothing on Ms Tickle's Giggle App profile pointed to her being a transgender woman. I am left to conclude that it is most likely she did not know that Ms Tickle was a transgender woman when she reviewed her selfie, and instead excluded her on the quick or reflexive decision that she appeared to Ms Grover to be a male. Of course, given Ms Grover's views, her decision almost certainly would have been the same had she been aware of Ms Tickle's gender identity. For Ms Grover, there is no legitimate distinction between transgender women and cisgender men. Denial in the legitimacy of that distinction would be no answer to a case of direct discrimination, if awareness of Ms Tickle's gender identity had been established. Nonetheless, the direct discrimination case must fail on the more basic evidential basis that it has not been established that Ms Grover was aware of Ms Tickle's gender identity at the time she blocked her from the Giggle App. The exclusion, therefore, was not proven to be by reason of Ms Tickle's gender identity.

132 It is conceptually possible for Ms Tickle to have been excluded from the Giggle App not due to direct gender identity discrimination, yet later be refused readmission to that App by reason of such direct discrimination. This could be the case if, after the initial exclusion, there was an intervening realisation of her gender identity by the respondents, and that new knowledge of her gender identity was the reason for denial of readmission. However, that claim of direct discrimination by reason of not being readmitted to use the Giggle App suffers from a shortfall of evidence establishing Ms Tickle's messages made the respondents aware of her gender identity, and that there was no response to Ms Tickle's inquiries *by reason of* her gender identity. There was also no evidence as to any actual decision not to readmit, nor any reason for non-readmission beyond the reason for exclusion in the first place, namely that Ms Grover considered Ms Tickle had the appearance of a cisgender man.

133 There is some evidence that might, with a measure of exploration in cross-examination, have supported an inference that Ms Grover had been made aware that Ms Tickle identified as a woman but, on review of her selfie, declined to readmit her. In her affidavit evidence, Ms Grover she said that users who had been refused access from the Giggle App would often email Giggle, and her practice had been to use the users' phone numbers to look up and review their selfies on Athena. She states that if the user appeared to be female they would be admitted, if they appeared male they would remain blocked, and if their sex was ambiguous they would be

asked to submit another photo. That is certainly what Ms Grover seemed to be suggesting would occur when she responded to Ms Tickle's initial email, asking for Ms Tickle's phone number so that she could personally look into it. It is certainly possible that Ms Grover had been put on notice that Ms Tickle identified as a woman by that email, and that she proceeded to review Ms Tickle's photo, choosing not to readmit her because she regarded Ms Tickle as male. However, the evidence before me is that she only reviewed the photo at a later stage, after Ms Tickle called her. There is no firm basis for me to infer that, at that stage, Ms Grover was aware of who Ms Tickle was or her gender identity. All of this might have been explored in a more effective cross-examination of Ms Grover, but it was not, and I am left with the facts established by the evidence that was adduced.

134 The situation and conclusion for indirect discrimination is the polar opposite, for much of the same reasons that the claim of direct discrimination fails. Ignorance of Ms Tickle's gender identity is no defence to the indirect discrimination claim; indeed, it is a significant part of the reason why her case succeeds. The imposed condition of needing to appear to be a cisgendered female in photos submitted to the Giggle App had the effect of disadvantaging transgender women who did not meet that condition, and in particular Ms Tickle. But this finding applies only to the act of excluding Ms Tickle from the Giggle App. It does not apply to her not being readmitted due to the paucity of evidence to explain this, or even to establish that any positive decision was made not to allow this to take place.

135 As to exclusion, ordinarily there is a need for a careful comparator exercise to be carried out, in order to identify how and why a condition, requirement or practice imposed or proposed to be imposed has or is likely to have the effect of disadvantaging the person indirectly discriminated against, or persons who have the same characteristics of the aggrieved person, here having the same gender identity as Ms Tickle, namely that of a transgender woman. This requirement must still be addressed, but on the way in which the evidence has unfolded and the competing arguments advanced, it is straightforward. That is because, in substance, as opposed to any pleading or argumentative form to the contrary, the existence of the condition and its effect is not disputed or otherwise in issue. It is not denied or otherwise in doubt that the basis for the exclusion of Ms Tickle was that she was perceived to have a male appearance, that is, she was perceived to have been male at birth. Indeed, this was the very essence of the respondents' case.

136 Nor do the respondents deny in this proceeding that the effect of this condition was that it would not just exclude men who were male sex at birth, but also transgender women too, including transgender women who are legally regarded as female. Indeed, it was not direct discrimination only because, on the evidence before me, it was not established that the respondents were aware that Ms Tickle was a woman, so that her gender identity was not established to be any part of the reason for her exclusion. The respondents not only did not deny this as a possible or likely outcome of the condition, but embraced it as being a legitimate and desirable thing to happen. They saw, and continue to see, nothing wrong in not drawing or attempting to draw this distinction.

(e) Other evidence relied upon by the respondents

137 The respondents relied upon expert evidence to support their arguments as to the meaning of the word "*woman*" in CEDAW and the SDA. They also read 14 affidavits from users of the Giggle App that they relied upon in relation to their submissions as to the application of the s 7D exemption. For the reasons below, none of this evidence was of any assistance to the respondents' case.

(i) Expert evidence

138 The respondents included three purported expert reports in the Court Book. Those reports are from Colin Wright, Helen Joyce and Kathleen Stock. Dr Wright and Dr Stock's reports were accepted as expert evidence without objection. None of Dr Wright, Dr Joyce or Dr Stock gave oral evidence at the hearing.

139 I did not accept Dr Joyce's report as expert evidence in this case, with both Ms Tickle and the respondents accepting that she lacked sufficient expertise for the exception to the opinion rule to apply: see *Evidence Act*, ss 76, 79. The respondents put forward a rather peculiar argument that this report went to a finding of legislative fact, which they contended to be whether the Giggle App could be regarded as a special measure under s 7D of the SDA, and they therefore sought to tender it not as evidence or submissions but some mysterious third category of document to which the Court could have regard. Such a finding as to whether the Giggle App is a special measure would clearly be one of fact. In any case, my earlier finding as to the construction of s 7D, and its inapplicability to the respondents' case, would render this asserted evidence of no moment. The report was ultimately relied upon by the respondents as their own submissions. As such, it went nowhere.

140 Dr Wright has a bachelor's degree in science, focussing on evolution, ecology and biodiversity from the University of California, Davis. Dr Wright also has a PhD in evolution, ecology and marine biology from the University of California, Santa Barbara and has served as a Postdoctoral Fellow at The Pennsylvania State University. At the time of making his report, Dr Wright had published 28 peer-reviewed scientific articles on animal behaviour and the biology of sex. A number of questions were addressed by Dr Wright in his expert report. Those included "*what is biological sex?*"; "*how many biological sexes are there?*"; "*what is a biological male?*"; and "*what is a biological female?*". Dr Wright also addressed questions regarding biological sex characteristics and their relationship to biological sex, whether humans can change biological sex, and how humans recognise biological sex in other humans. The final question Dr Wright addressed in his expert report was:

> based on your specialised knowledge, in your opinion is there a scientific explanation as to why Sally Grover determined that the image … the Applicant uploaded at onboarding to the App was an image depicting a male person.

141 While I have read Dr Wright's report, it does not assist me in deciding this case. It is not my role in forming a judgement about the issues in dispute, and the relevant law, to have regard to the evolutionary or biological definitions or features of human sex. That is because, as I have already found, the legal definition of a woman (or man) is not so confined. It is therefore outside my purview to consider, far less determine, the general nature of biological sex. The science behind that evidence is not, as far as it goes, in dispute. It is just that the issues in this case involve wider issues than biology.

142 Ms Tickle is a legal female, as reflected in her updated birth certificate issued under Queensland law. The discrimination complained of by Ms Tickle is on the basis of gender identity and not sex. Dr Wright's report does not address, or attempt to address, the concept of human gender identity. Yet that is what this case is all about, having regard to the proscription on gender identity discrimination in the SDA, legislated by the Commonwealth parliament.

143 Dr Stock's report in large part answers the question posed by the respondents to her, namely:

> from an ontological perspective, based on your specialised knowledge, in your opinion, is a woman a socially constitutive fact or convention into which any human can self-identify at their discretion?

144 I have read the report of Dr Stock, but again find it of no assistance in deciding this case, for much the same reasons as for Dr Wright's report. Ms Tickle has not only self-identified as a

woman, or a female, but has successfully undertaken steps to become entitled to refer to herself, legally, as female. Much of the report from Dr Stock deals with whether or not womanhood is a social or natural construct, falling clearly on the side of it being a natural construct, or natural fact, and not a social convention which a person can self-identify into. Any debate around the concept of woman, of womanhood, or gender more broadly as a natural, biological, or social construct falls well outside what I must, legally, determine in this case.

145 Turning now to the report of Dr Joyce, advanced by the respondents as a submission. Dr Joyce is the director of advocacy of an organisation called "*Sex Matters*", which she describes as a human-rights organisation concerned with clarity about sex in law and policy, based in the United Kingdom. Dr Joyce is also a journalist and author who has written on the topic of transgender identities and women's rights. She has a PhD in mathematics, but does not have any formal education or qualifications even in biology, let alone in gender, sex or law, being the topics which her report addresses. For the purposes of this proceeding, she is not an expert at all. She has no recognised expertise in any of the areas in which she expresses an opinion (or more relevantly, provides a submission). Thus, while Dr Joyce's submissions are in the form of an expert report, they have not been received as anything more than submissions. Dr Joyce was asked by the respondents to provide her opinion on:

> The importance of a biology-based definition of sex to human rights, especially women's rights;
>
> The importance to women's rights of being free to use sex-based language;
>
> The importance of single-sex spaces, including virtual and digital spaces, for women's participation in public life;
>
> Why allowing men (natal males) who identify as women into spaces (physical and digital) designated female-only is incompatible with women's human rights and women's ability to fully participation in public life.

146 The thrust of Dr Joyce's report, ultimately advanced as a submission, is that the concepts of male and female derive from reproductive anatomy, and the ordinary meaning of man is a male adult, and of female a female adult, and that it is not possible for a person to change sex. Dr Joyce refers to laws in other jurisdictions which allow a person to change their legal sex without having undergone any genital reconfiguration surgery. Those laws are not relevant to the case before me.

147 Dr Joyce also discusses why it is that women need women-only spaces, referring to the importance of single-sex spaces such as bathrooms for the protection of women and girls from sexual assault and harassment, as well as for women's privacy and dignity, mutual

organisation, aid and comfort. Dr Joyce argues that female-only spaces which are open to men, which on her definition includes transgender women, are no longer female-only. Joyce is strongly ideologically committed to the idea that transgender women do not exist, and that language should not be used, a stance that permeates her report. She is entitled to her opinion, but it is of no assistance to the respondents' case, or to this Court.

(ii) Lay evidence

148 Relying on the exception to the opinion rule for lay opinions, the respondents tendered 14 affidavits in support of their argument that the Giggle App was a special measure to promote equality within the meaning of s 7D. While the legitimacy of the application of this exception to the opinion rule may be doubted, I allowed these affidavits to be read in their entirety. None of the witnesses who made those affidavits provided oral evidence at the hearing. The affidavits broadly pertained to the importance of female-only spaces. Most of these witnesses made clear that, by "*female-only spaces*" they meant female-sex-from-birth-only spaces. Most, but not all, of the witnesses had been users of the Giggle App. Many of the affidavits related to different kinds of women's spaces that were not strictly relevant to the Giggle App. Given my rejection of the respondents' attempt to rely on s 5 and s 7D, turning on the construction of both provisions, it was not necessary to consider further any of these affidavits.

PART 5: CONSTITUTIONAL ISSUES

149 Having found that Ms Tickle's claim of indirect discrimination is made out, I turn to the respondents' two challenges to the constitutional validity of the provisions relied upon for Ms Tickle's case.

(a) Is s 22 beyond the scope of Commonwealth legislative power to the extent it prohibits discrimination on the ground of gender identity?

150 By their amended s 78B notice, the respondents raise two constitutional questions, the first being whether:

> s 5B of the Sex Discrimination Act 1984 (Cth) (SDA) is beyond the legislative power of the Commonwealth and ultra vires

The respondents submit the answer is "*yes*". The Commissioner defends the validity of s 5B and thereby the references to gender identity discrimination in s 22. Ms Tickle adopts the Commissioner's submissions without adding anything of substance to the argument.

151 Section 5B is a provision that defines what constitutes discrimination on the ground of gender identity. It is not itself a provision to which any constitutional head of power is directed. The concept of gender identity discrimination, so defined, is then used throughout the SDA, including in provisions proscribing this and other forms of discrimination. Section 5B therefore gives content to other parts of the Act which entail the exercise of legislative power to proscribe such discriminatory conduct. Sections 5 to 7A similarly define other forms of discrimination on the ground of sex, sexuality or intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding, and family responsibilities. Various provisions in Pt II of the SDA then prohibit discrimination on these grounds, including in work, education, the provision of goods, services and facilities, and so on. Ms Tickle relies on s 22, which prohibits several kinds of discrimination, including on the ground of gender identity, in the provision of goods, services and facilities.

152 The respondents mistakenly challenge the constitutional validity of s 5B, rather than s 22 to the extent that it prohibits discrimination on the ground of gender identity. The challenge therefore purports to have an impact on this aspect of the SDA as a whole. However, the specific question that properly arises on the facts in this case is whether s 22, read with s 5B, goes beyond Commonwealth legislative power to the extent that it prohibits discrimination on the ground of gender identity in the provision of services. It is appropriate to deal with the respondents' constitutional challenge on this basis, rather than take the available easy option of dismissing it as misconceived. The conclusion reached on that question necessarily has a parallel impact on other provisions that proscribe gender identity discrimination in other areas, which also apply the terms of s 5B to give content to those proscriptions.

153 Section 9 of the SDA, dealing with the application of that Act, is drafted with a view to the scope of, and limitations upon, Commonwealth legislative power: see, *AB v Registrar of BDM* at [7] (Black CJ, dissenting, although not on this point). Section 9(4) relevantly provides that "*the prescribed provisions of Part II … have effect as provided by … the following provisions of this section and not otherwise*". Section 22 is a "*prescribed provision*" of Pt II: s 9(1). Section 5B is in Pt I of the Act, so is not itself a prescribed provision to which s 9 is directed.

154 The "*following provisions*" in s 9 refer to various heads of constitutional power in the Constitution. Relevantly:

(a) section 9(10) provides that the prescribed provisions, which include s 22, are to be given effect to the extent that they give effect to a "*relevant international instrumen*t",

referencing the scope of the external affairs power in s 51(xxix) of the Constitution; and

(b) section 9(11) provides that the prescribed provision in Part II have effect "*in relation to discrimination by … a trading corporation formed within the limits of the Commonwealth, or by or in relation to a person in the course of the person's duties or purported duties as an officer or employee of such a corporation*", referencing the trading corporations aspect of the corporations power in s 51(xx) of the Constitution; and s 9(13) confirms that the provisions have effect to the extent such discrimination took place "*in the course of*" such a corporation's "*trading activities*".

155 The effect of s 9 is that the limits of Commonwealth legislative power affect the statutory construction of s 22, rather than the provision's validity: *AB v Registrar of BDM* at [96]-[97] (Kenny J, Gyles J agreeing). This requires some further explanation. The construction issue in relation to s 9 is that, if the meaning of the text to which it purports to apply a head of Commonwealth power, relevantly s 22 when read with s 5B, goes beyond the scope of that power, it will be taken to operate only to the extent that it falls within a head of power, not invalidating the provision entirely. The real issue is therefore not the meaning of s 9 per se, but the meaning of s 22 as affected by s 9.

156 The Commissioner contends that s 22 is supported by s 51(xx) and (xxix) of the Constitution, that is, the corporations and external affairs powers. Those submissions are adopted by Ms Tickle and only expanded upon further in relation to the assessment of whether Giggle is proven to be a trading corporation. In short, the respondents contend that CEDAW does not extend to gender, the ICCPR is too vague, and Giggle was not, on the evidence, a trading corporation. I consider each in turn.

(i) The external affairs power

157 The external affairs power supports legislation that is reasonably capable of being considered appropriate and adapted to implementing Australia's obligations under international instruments: *Commonwealth v Tasmania* [1983] HCA 21; 158 CLR 1 (***Tasmanian Dam Case***) at 259 (Deane J), see also at 130 (Mason J), 172 (Murphy J), 231 (Brennan J); *Victoria v Commonwealth* [1996] HCA 56; 187 CLR 416 (***Industrial Relations Act Case***) at 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). That, in turn, requires the Court to identify the nature of Australia's obligations under relevant international instruments, being a task of construing their terms.

158 The task of interpreting international instruments is one of identifying the construction the international community would accord them: ***CRI026*** *v Republic of Nauru* [2018] HCA 19; 92 ALJR 529 at [22]; citing *Queensland v Commonwealth* [1989] HCA 36; 167 CLR 232 at 240. The applicable principles include Arts 31 and 32 of the ***Vienna Convention*** *on the Law of Treaties* (1969), which codify relevant rules of customary international law: *CRI026* at [22]; see also *Riley v Commonwealth* [1985] HCA 82; 159 CLR 1 at 15 (Deane J). A treaty is to be interpreted in good faith, by giving its terms their ordinary meaning in their context, in light of its object and purpose: Art 31(1). Treaty terms are to be construed in light of the parties' common intention at the time of the treaty's conclusion: *Dispute regarding Navigational and Related Rights (**Costa Rica v. Nicaragua**)*, Judgment, ICJ Reports 2009, p. 213, 242 at [63]-[64].

159 Under Art 32 of the *Vienna Convention*, recourse can also be had to supplementary means of interpretation, including the treaty's preparatory works (called *travaux préparatoires*) to confirm the meaning identified in applying Art 31, or to determine the meaning where application of Art 31 leaves the meaning ambiguous or leads to a manifestly absurd or unreasonable result. Considerable weight must be given to convention committees' interpretative statements: *CRI026* at [22], citing the International Court of Justice's statement to the same effect in ***Ahmadou Sadio Diallo*** *(Republic of Guinea v. Democratic Republic of the Congo)* [2010] ICJ Rep 639 at 664 [66]. However, as a cautionary note, it is unclear as to how this approach fits in with Arts 31 and 32 of the *Vienna Convention*: see, Danae Azaria, "The Legal Significance of Expert Treaty Bodies Pronouncements for the Purpose of Interpretation of Treaties", *International Community Law Review* 22 (2020) 33-60, see especially discussion of *Ahmadou Sadio Diallo* at 40-41.

160 As noted above at [70], s 9(10) of the SDA provides that the prescribed provisions, which include s 22, have effect to the extent that they "*give effect to a relevant international instrumen*t"; and s 4 defines "*relevant international instruments*" to include CEDAW and the ICCPR. The combined effect of s 9(4) and (10) is that s 22 will be given effect to the extent that it implements Australia's obligations under relevant international instruments: *AB v Registrar of BDM* at [96] (Kenny J, Gyles J agreeing).

161 The Commissioner contends that s 22, read with s 5B, is supported by s 51(xxix) of the Constitution, as an enactment of Australia's obligations under CEDAW and, in the alternative, under Art 26 of the ICCPR. Ms Tickle adopts that submission; the respondents dispute it.

CEDAW

162 The Commissioner contends the word women in CEDAW includes transgender women. She argues, therefore, that s 22, read with s 5B, gives effect to Australia's obligations under CEDAW, and is therefore supported by the external affairs power. That submission is adopted by Ms Tickle. The respondents contend that s 5B (which, again, I beneficially take to be a reference to s 22 read with s 5B) is not an enactment of Australia's obligations under CEDAW to the extent that it protects persons who were not born of the female sex. On the construction they advance, CEDAW grants protections only to women, and the word women in CEDAW only means adults born of the female sex.

163 There is in fact an anterior question – not addressed by the respondents – as to whether CEDAW is exclusively concerned with discrimination that places women in a less favourable position than men, or whether it is also capable of addressing discrimination against a group of women that places them in a less favourable position than other women, here discrimination against transgender women, which places them in a less favourable position than cisgender women. For the reasons that follow, and without any assistance from the submissions by the respondents, I do not accept that CEDAW supports the prohibition on gender identity discrimination in s 22 in the way it is relied upon by the Ms Tickle here, namely, discrimination that placed her in the same position as men, not a less favourable one. I start by making several observations about the text of CEDAW.

164 As is evident from its name, the CEDAW is concerned with the elimination of discrimination against women. Article 1 defines discrimination against women, a concept deployed throughout the Convention, as

> any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

165 Notably, that definition is concerned with sex discrimination *against women*, not sex discrimination in general: *AB v Registrar of BDM* at [81] (Kenny J, Gyles J agreeing); Patricia Schulz, Ruth Halperin-Kaddari and Beate Rudolf, 'Introduction' in Patricia Schulz, Ruth Halperin-Kaddari, Beate Rudolf and Marsha A. Freeman (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol: A Commentary* (Oxford University Press, 2022, 2nd ed) 1, 13.

166 The words "*women*", "*men*" and "*sex*" are not defined within CEDAW. Neither of the words "*gender*" or "*gender identity*" appear within its text.

167 Article 4 of CEDAW makes clear and express that temporary special measures aimed at accelerating de facto equality between men and women are not considered to be discrimination. The most obvious manifestation of this is affirmative action. This exception is reflected in the carve out in s 7D of the SDA to the various prohibitions on sex discrimination in that Act.

168 Article 2 of CEDAW contains the substantive obligations of signatories to eliminate discrimination against women, as defined in Art 1, and to achieve equality of men and women at law. It reads:

> States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
>
> (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
>
> (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
>
> (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
>
> (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
>
> (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
>
> (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
>
> (g) To repeal all national penal provisions which constitute discrimination against women.

169 CEDAW then:

(a) provides in Art 3 that, in all fields signatories shall take:

> all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

(b) provides in Art 5 further obligations for signatories to take all appropriate measures to:

> modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women

and to ensure

> the recognition of the common responsibility of men and women in the upbringing and development of their children.

(c) refers in Articles 6-16 to specific areas where States are to take all appropriate measures to address discrimination against women and/or ensure equality between men and women, including in political and public life (Arts 7 and 8), education (Art 10), work (Art 11), healthcare (Arts 12 and 14(2)(a)), economic and social life (Art 13), law (Art 15) and in marriage (Art 16);

(d) creates in Art 11(2)(a) a specific obligation to prohibit

> dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status

being an obligation which is notable for the fact that it is addressed to a certain kind of sex-based discrimination rather deploying the general concept of discrimination against women.

170 Articles 17-22 of CEDAW establish an independent committee for the purpose of considering the progress made in the implementation of the Convention (the **CEDAW Committee**). Under the *Optional Protocol to CEDAW* (1999), which Australia acceded to in 2008, the Committee may receive communications from individuals or groups who claim their rights under the CEDAW have been violated. Where certain conditions are met, the Committee may consider the claim and communicate its views and recommendations to the affected state signatory. For completeness, Arts 23-30 of CEDAW are mechanical provisions related to its signing and operation.

171 The question of whether CEDAW creates obligations for signatories that go further than addressing discrimination against women as compared to men, and achieving formal equality between men and women, was considered by the Full Court of this Court in *AB v Registrar of BDM*. The Court was required to consider whether implementation of CEDAW could support a legislative prohibition of discrimination on the basis of marital status, where that discrimination affected men and women equally. The appellant in *AB v Registrar of BDM* had challenged a decision by the Victorian Registrar of Births, Deaths and Marriages to refuse to

change the sex marker on her birth certificate on the basis that only unmarried persons were allowed to make such applications, pursuant to s 30A of the *Births, Deaths and Marriages Registration Act 1996* (Vic) (**Registration Act**). She argued that the decision was a contravention of the prohibition of discrimination on the ground of marital status under s 22 of the SDA.

172 Kenny J, with whom Gyles J agreed, found that neither the text of CEDAW, nor its preparatory works, supported the view that it created an obligation to prohibit discrimination on the basis of marital status per se, "*or even as regards women where such discrimination does not involve less favourable treatment than men*": at [90]. Relevant to that finding were observations that the consequence was that, by operation of s 9(4) and (10), s 22 was to be construed as only prohibiting discrimination on the basis of marital status that resulted in less favourable treatment of women than men: *AB v Registrar of BDM* at [95]-[96]. So construed, the Registrar's decision was not a contravention of s 22, as s 30A of the Registration Act discriminated against married men and married women equally. Whether the reference to "*women*" in the CEDAW included transgender women does not appear to have been a direct issue in *AB v Registrar of BDM*, despite the appellant, born male, having transitioned by surgery to female.

173 Some care must be taken in relying on *AB v Registrar of BDM*, which emphasises specific language in the Convention and preparatory work related to discrimination on the ground of marital status: see in particular [14], [89], [91]. Nonetheless, Kenny J's conclusions as to the meaning of "*discrimination against women*" in CEDAW, which are the result of careful analysis of the Convention's text and preparatory work (see [81]-[90]), are equally applicable to determining the general nature of the obligation to prohibit such discrimination against women created by the Convention. At [88], her Honour records the burden of particular debates between States Parties as to whether the CEDAW should be directed to sex discrimination in general, or specifically to discrimination against women. The latter view prevailed upon the basis of the argument by the United Kingdom that this might result in CEDAW covering discrimination against men, making it clear that the focus was to remain on eliminating discrimination against women in favour of men.

174 The Commissioner submits that *AB v Registrar of BDM* is not binding on this Court due to subsequent amendment to s 9(10). At the time it was decided, s 9(10) provided that the prescribed provisions had "*effect in relation to discrimination against women, to the extent that*

the provisions give effect to the Convention" (meaning CEDAW). An amendment to s 9(10) in 2011 removed the reference to discrimination against women and included reference to a number of additional international instruments (as noted above at [70]): *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth) Sch Pt 1, items 10 and 24. This was done with the specific intention of broadening the reach of the constitutional support of the SDA so that it might effectively prohibit forms of discrimination affecting men, avoiding the limitation observed in *AB v Registrar of BDM*: Explanatory Memorandum, Sex Discrimination Amendment Bill 2010 [41] citing Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discriminating and promoting gender equality* (Report, December 2008), recommendation 7, see also [11.19]-[11.23]. While this renders the specific construction of s 9(10) adopted by the majority of the Full Court in *AB v Registrar of BDM* non-binding, or at least no longer relevant, it does not affect the authority of its statements on the proper construction of CEDAW, which remain binding, or at least, in light of the amendment, highly influential and capable of being applied.

175 Alternatively, the Commissioner submits that Kenny J's construction of CEDAW is not binding due to the contradictory, and (the suggestion is) more authoritative commentaries subsequently published by the CEDAW Committee. In these commentaries, the CEDAW Committee expresses support for "*intersectionality*" as a framework to understanding the scope of the obligations under Art 2, and encourages States Parties to take steps to address intersecting forms of discrimination experienced by women: see CEDAW Committee, **General Recommendation 28** on the core obligations of States Parties under article 2 of the CEDAW, UN Doc CEDAW/C/GC/28 (16 December 2010) at [18]; CEDAW Committee, General Recommendation No. 33 on women's access to justice, UN Doc CEDAW/C/GC/33 (3 August 2015) at [8]; CEDAW Committee, General Recommendation No 35 on gender-based violence against women, updating general recommendation No. 19, UN Doc CEDAW/C/GC/35 (26 July 2017) at [12]; CEDAW Committee, General recommendation No. 39 on the rights of Indigenous women and girls, UN Doc CEDAW/C/GC/39 (31 October 2022) at [22].

176 Even if I were to regard any such commentaries as permitting a departure from the reasoning of the Full Court in *AB v Registrar of BDM* that remains on point, I am not convinced that any of these commentaries go so far as to suggest, let alone support, a departure from the meaning of discrimination against women in CEDAW identified in that case. In General Recommendation 28 (at [18]), for example, the CEDAW Committee notes that "*discrimination of women based on sex and gender is inextricably linked with other factors that affect women"*

such as race, age and gender identity. It proceeds to explain that women may experience discrimination on the basis of these other factors "*to a different degree or in different ways to men*". States Parties must recognise and prohibit these "*intersecting forms of discrimination and their compounded negative impact on the women concerned*". This is properly read as an acknowledgement that women experience heightened forms of various kinds of discrimination as compared to men, and encouragement that States Parties address these compounded forms of discrimination. It does not go so far as suggesting that the CEDAW obliges States Parties to address discrimination as between different groups of women. General Recommendation 28 at [19] reinforces the signature importance of achieving equality with men, by reference to the topic of violence and its disproportionate effect on women.

177 The Commissioner also pointed to several country-specific guidances by the CEDAW Committee that variously celebrated as progress steps taken to address discrimination against transgender women, and condemned countries for failing to take steps to address violence and discrimination directed to this group: CEDAW Committee, Concluding observations on Russian Federation, UN Doc CEDAW/C/USR/CO/7 (16 August 2010) at [41] and UN Doc CEDAW/C/RUS/CO/9 (30 November 2021) at [46]-[47]. This included a statement directed to Australia that the CEDAW Committee welcomed the progress achieved by the 2013 SDA Amendment, specifically citing the introduction of the gender identity discrimination provisions: CEDAW Committee, Concluding Observations on the eighth periodic report of Australia, UN Doc CEDAW/C/AUS/CO/8 (25 July 2018) at [49(e)]. None of these statements made clear how an obligation to address gender identity discrimination that did not result in less favourable treatment than men could fit with the definition of discrimination against women in Article 1. The assistance of the guidances on this question was minimal, providing broad assertions that certain action related to transgender women aligned or did not align with CEDAW, without explaining why.

178 I consider the reasoning of the Full Court in *AB v Registrar of BDM* (per Kenny J, Gyles J agreeing), to be binding authority on the interpretation of this aspect of CEDAW, and correct in any event. On that interpretation, assuming rather than deciding for present purposes that CEDAW is capable of supporting discrimination against a transgender woman at all, CEDAW can go only as far as supporting a prohibition on discrimination on the ground of gender identity where a transgender woman is treated less favourably than a man or men, which is plainly not the case relied upon by Ms Tickle. To the contrary, her objection is to being treated the same as men, not less favourably than them. Except for specific protections for pregnant women,

CEDAW does not support a prohibition on such discrimination which results in a woman or a class or group of women, however widely the word "woman" is understood, being treated less favourably than another woman, or other classes or groups of women, which is precisely what Ms Tickle's case relies upon.

179 The obligation to prohibit discrimination against women created by CEDAW and defined in Art 1 is specifically a reference to discrimination that places women in a less favourable position than men. Section 22, read with s 5B, is therefore incapable of being an implementation of this obligation to the extent that it could be relied upon by persons alleging (as Ms Tickle does) that they have been discriminated by being treated in the same way as men.

180 The consequence is that it is not necessary to consider whether the argument made by the Commissioner, and adopted by Ms Tickle, that references to women in CEDAW includes transgender women is correct. I note that questions of constitutional validity should ordinarily only be determined if they properly arise on the case that has been brought: *LibertyWorks Inc v Commonwealth* [2021] HCA 90; 274 CLR 1 at [90]. It follows that the question of whether references to women in CEDAW include transgender women must be left for a case in which this squarely arises for determination. What matters is that CEDAW, by its text, does not in any event support the case that Ms Tickle brings against the respondents.

Art 26 of the ICCPR

181 I now turn to the question of whether the gender identity prohibition in s 22 is instead supported by Art 26 of the ICCPR. The ICCPR comprises 53 Articles in six parts. A wide range of fundamental rights sought to be protected are set out in 22 articles in Pt III, which includes, in Art 26, equal protection under the law without discrimination. A general observation may be made that the terms of many of the rights referred to are expressed in terms that are far from precise, the detail being left to the implementing State.

182 The Commissioner contends the gender identity prohibition is supported by Art 26 specifically, which provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

183 Two preliminary observations can be made of the text of Art 26. The first observation is that Art 26 creates twin obligations for States Parties to ensure formal equality of persons under the

law (the **equality obligation**), and to prohibit discrimination by operation of law (the **non-discrimination obligation**). No issue or dispute was raised in this proceeding that the non-discrimination obligation encompasses an obligation to address discrimination by private actors in the public sphere, as supported by commentaries of the Human Rights Committee, established under the ICCPR to supervise its progress, and the Convention's preparatory works: Human Rights Committee, *General Comment 18: Non-discrimination*, 37th sess (10 November 1989) at [12]; Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (29 March 2004) at [8]; Lord Lester and Sarah Joseph, "Obligations of Non-Discrimination", in *The International Covenant on Civil and Political Rights and United Kingdom Law*, David Harris and Sarah Joseph (eds) (Clarendon Press, 1995) 563, at 583 and fn 148, referring to views expressed by States Parties in the Third Committee of the UN General Assembly, 16th sess, 1098th meeting, UN Doc A/C.3/SR.1098 (9 November 1961) at [6] and [25]; Third Committee of the UN General Assembly, 16th sess, 1099th meeting, UN Doc A/C.3/SR.1099 (10 November 1961) at [2]; Third Committee of the UN General Assembly, 16th sess, 1101st meeting, UN Doc A/C.3/SR.1101 (13 November 1961) at [18] and [52].

184 The second observation is that Art 26 includes a non-exhaustive list of the sorts of personal characteristics protected by the dual equality and non-discrimination obligations. The non-exhaustive nature of that list is indicated by the words "*any ground such as*" preceding the listed characteristics, and the broad category of "*or other status*" at the end. That wording strongly indicates that Art 26 was intended to create an open-ended obligation to address kinds of discrimination that may change over time and or vary depending on the situations of States Parties: see, Human Rights Committee, *Toonen v Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) at [6.9]. Whether or not gender identity is a characteristic subject to the non-discrimination obligation under Art 26 is the subject of a dispute by Ms Tickle and the respondents, with the Commissioner's argument supporting Ms Tickle's position as a matter of construction.

185 It is convenient next to reproduce again the definition of gender identity in s 4 of the SDA, in order to understand the competing arguments that follow:

> ***gender identity*** means the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth.

186 The substance and crux of the respondents' argument is that gender identity, on this definition, is only a series of outward manifestations, not located in any status or notion of status. They submit it is therefore too nebulous a concept to pick out a "*political class*" which, they assert, is necessary to be covered by Art 26. In substance, this is a rather weak submission that this definition is too vague or malleable to be a status contemplated by Art 26. As the Commissioner contends in response, the above s 4 definition of gender identity is clear enough to be a workable definition, correctly noting that gender identity is not exclusively defined by outward manifestations in any event. Moreover, many of the other grounds of discrimination referred to in Art 26 are similarly malleable or vague. For example, the phrase "*political or other opinion*" is not a reference to some kind of immutable or biologically founded characteristic, but one that is capable of profound change across an individual's life. The scope of what is political and what is an opinion as opposed to an objective fact is not necessarily fixed either, but can evolve over time. Status is a concept within which categories may be difficult to define with precision, especially in the abstract.

187 That gender identity is an "*other status*" that is subject to the non-discrimination obligation in Art 26 is affirmed by several communications from the Human Rights Committee, which is empowered under the Convention's Optional Protocol to hear and provide views on allegations that States Parties have violated individuals' rights under the ICCPR: see Human Rights Committee, *G v Australia*, Communication No. 2172/2012, UN Doc CCPR/C/119/D/2172/20 12 (28 June 2017) at [7.2]; Human Rights Committee, *MZBM v Denmark*, Communication No. 2593/2015, UN Doc CCPR/C/119/D/2593/2015 (12 May 2017) at [6.6]; Human Rights Committee, *Nepomnyashchiy v Russian Federation*, Communication No. 2318/2013, UN Doc CCPR/C/123/D/2318/2013 (23 August 2018) at [7.3]; Human Rights Committee, *Ivanov v Russian Federation*, Communication No. 2635/2015, UN Doc CCPR/C/131/D/2635/2015 (14 May 2021) at [7.12]; Human Rights Committee, *Alekseev v Russian Federation*, Communication No. 2757/2016, UN Doc CCPR/C/130/D/2757/2016 (9 June 2021) at [9.14]; Human Rights Committee, *Mikhailova et al v Russian Federation*, Communications No. 2943/2017, UN Doc CCPR/C/134/D/2943/2017 (29 August 2022) at [9.12]; Human Rights Committee, *Savolaynen v Russian Federation*, Communication No. 2830/2016, UN Doc CCPR/C/135/D/2830/2016 (23 January 2023) at [7.15].

188 Article 26 creates an obligation for States Parties to prohibit discrimination on a number of grounds, which may readily extend to gender identity as being another status as substantial, yet potentially changeable, among those expressly and non-exhaustively listed of language,

religion, political or other opinion, or property. The prohibition on gender identity discrimination contained in s 22 of the SDA, read with s 5B, constitutes an implementation of that obligation. By operation s 9(4) and (10) of the SDA, this component of s 22 is to be read with that effect. The respondents' argument that s 22, read with s 5B, is not supported by a head of Commonwealth legislative power must therefore fail, because it is supported by the external affairs power in s 51(xxix) of the Constitution, implementing Art 26 of the ICCPR.

(ii) The trading corporations power

189 Additionally, I find for the reasons that follow that s 22 of the SDA, to the extent it prohibits discrimination on the ground of gender identity by trading corporations and their agents and employees, is an exercise of the Commonwealth's legislative power in relation to trading corporations contained in s 51(xx) of the Constitution. Section 22, read with s 5B is therefore valid upon that head of power as well. Pursuant to s 9(11) and (13), I read s 22 to have that effect. Section 22, read with s 5B, is capable of applying to the actions of Giggle and also to the actions of Ms Grover in her capacity as its director and CEO, if the Court is satisfied that Giggle was, at the relevant time, a trading corporation within the meaning of s 51(xx).

190 Whether Giggle was a trading corporation is a question of characterisation on the evidence before the Court. The question is whether Giggle's activities formed a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation: ***United Firefighters*** *Union of Australia v Country Fire Authority* [2015] FCAFC 1; 228 FCR 497 at [135] citing *R v Federal Court of Australia; Ex parte Western Australian National Football League (Inc)* [1979] HCA 6; 143 CLR 190 at 233 (Mason J). That it could be characterised in another way, carries on more extensive non-trading activities, or was incorporated for a primary purpose other than trading are not barriers to finding it was a trading corporation: *United Firefighters* at [136]-[137].

191 Several features of Giggle and its business during the relevant period are established on the evidence, especially of Ms Grover:

(a) the primary purpose of the Giggle App was to create a female-only online space;

(b) the Giggle App had offered users in-App purchases for premium upgrades for a fee of $2 – $3 per month;

(c) on Ms Grover's evidence, these fees covered just the cost of providing such services, however payments for these features were turned off from 2020 onwards;

(d) the Giggle App, at least in its beta stage, showed advertisements through Google Admob, which I infer to be a mobile telephone advertisement service. Ms Grover's evidence was that this was only done until Giggle could place its own content in those spaces as otherwise there would be blank space for advertisements on the Giggle App, which would "*distort the aesthetic of the App"*;

(e) due to the Giggle App's low rankings on Google Play and the Apple App Store, those advertisements produced little to no income;

(f) in Giggle's balance sheet for the financial year ending 30 June 2021, which also includes details from the financial year ending 30 June 2020, the total assets as at 30 June 2020 were $223,721 and at 30 June 2021 $380,450; and the net liabilities for each year were much higher, being $505,273 for the 2020 financial year and $676,337 for the 2021 financial year, with almost $300,000 negative equity in both financial years, which, in the context of the other features listed, is some indication of trading activity or activity in support of trading;

(g) the development costs for the Giggle App recorded in the balance sheet referenced above were $187,499 as at 30 June 2020 and $300,886 as at 30 June 2021, those amounts being recorded as a component of the company's fixed assets, being cumulative amounts, meaning that the development costs of the Giggle App over those two financial years was just shy of half a million dollars;

(h) profit and loss statements prepared by accountants for Giggle show that the company had the following trading profits in the following years:

  (i) financial year ending 30 June 2020: $14 from sales;

  (ii) financial year ending 30 June 2021: $637 from sales;

  (iii) financial year ending 30 June 2022: $12,673 from the sale of goods;

  (iv) financial year ending 30 June 2023: $449 from the sale of goods;

(i) the same profit and loss statements show that Giggle had a net loss in each of those financial years, noting that while this is after the key events, it reflects ongoing trading activity and thus continuity;

(j) Giggle had received loans from a company called WADD Holdings Pty Ltd, a company of which Ms Grover is a director, of $60,000 in the financial year ending 30 June 2019, and $479,477 in the financial year ending 30 June 2020, with Ms Grover's evidence

being that this money was an investment from family and friends, and was directed to the Giggle App's development;

(k) Ms Grover's description of the Giggle App, in her affidavit evidence, as delivering a service to the market that had not been provided to date points to a characterisation of Giggle as intending to be engaged in trade, in the context of other indicia indicating that this is what in fact took place, albeit to a modest degree;

(l) as Ms Grover accepted, one of Giggle's intentions was to provide those investors with a return, to the extent that was possible, while still pursuing the Giggle App's primary purpose of creating a female-only online space.

192 Ms Grover's evidence was that the trading profits for the years 2020 and 2021 were derived from in-App purchases, but was unable to explain the source of such profits in the 2022 and 2023 financial years. As the Giggle App was operational in the latter half of the 2022 calendar year, and therefore the 2023 financial year, the in-App purchases appear the obvious source of those profits. In any case, I readily infer from the trading profits arising from the sale of goods as expressly referred to in the profit and loss statements for the 2022 and 2023 financial years, that Giggle was engaged in the sale of some kind of goods in those periods, again evidence of trading continuity. Importantly, Ms Grover's evidence was not that the profit and loss statements, which were tendered as annexures to one of her affidavits, were incorrect, but that she was not across that level of detail of the Giggle's finances. What matters is that this income was received and there was no evidence to contradict its status as recorded in the financial records of the company of being income. On the basis of the profit and loss statements alone, I find that Giggle can properly be characterised as a trading corporation.

193 While I accept Ms Grover's evidence that the primary purpose of Giggle was to create a female-only online space through the Giggle App, that goal was not inconsistent with characterisation of Giggle as a trading corporation. I am unpersuaded by the respondents' emphasis on the fact that Giggle was not profitable, which would not necessarily be inconsistent with a characterisation as a trading corporation either. Even if profitability were such a requirement, however, I am satisfied on the evidence that *a purpose* of Giggle *was* to turn a profit through trading activities, if only to support the continued existence of the Giggle App to advance its stated primary purpose. That much was admitted by Ms Grover, who stated that a purpose of the Giggle App (even if a subordinate one) was to achieve a return on investment for its investors.

194 I also infer that Giggle was a trading corporation from the sheer amount of money that had been invested into the Giggle App's development, being around half a million dollars, given Ms Grover had intended to offer a return on investment.

195 The conclusion that Giggle was a trading corporation is one of applied commonsense, supported by logic and some awareness of how social media has worked since the emergence of platforms such as Facebook. Twin goals of profitability and creating spaces for human connection notoriously can be seen as a common feature of social media businesses, with long lead times before, sometimes, profits are actually made.

196 It follows that I find that Giggle was at all relevant times a trading corporation, such that the corporations power supports the application of the gender identity provisions for the purposes of the allegations that they were contravened by the respondents.

(b) Is s 24 of the *Births, Deaths and Marriages Registration Act 2003* (Qld) (Qld BDM Registration Act) invalid by reason of inconsistency with the SDA?

197 The respondents contend that that s 24 of the Qld BDM Registration Act is invalid by the operation of s 109 of the Constitution by reason of inconsistency with the SDA, a challenge that in substance is really directed to s 24(4). By their amended s 78B notice, the respondents contend that the legal construct of "*female*" that emerges from s 24 of the Qld BDM Registration Act directly clashes with the operation and or applies to a matter that is comprehensively regulated by and or applies, in this particular case, inconsistently with ss 5, 5B, 7B, 7D and 22 of SDA or their application.

198 The respondent's amended s 78B notice describes more fully the description of the nature of the Constitutional matter as being:

> Part 4 of the Births, Deaths and Marriages Registration Act 2003 (Qld) [Qld BDMR Registration Act] and in particular s 24(1) of the [Qld BDMR Registration Act], alters, impairs or detracts from the operation of ss 5, 5B, 7B, 7D and 22 of the SDA in a manner impermissibly inconsistent with the SDA, and is thereby inoperative, by reason of s 109 the Constitution.

199 Part 4 (ss 22 to 24) of the Qld BDM Registration Act, deals with changes to registered sex. The change to a person's sex after sexual reassignment surgery may be noted on the person's entry in the register of births: s 22. Equivalent recognition is given to a reassignment of sex entered into a register maintained under a corresponding law, defined to be the law of another State, provided the terms of s 23 have been complied with in relation to an application to note

a reassignment of sex: s 24(1)-(3). A person who has had such a reassignment under the Qld BDM Registration Act is, expressly, a person of the sex as reassigned: s 24(4).

200 For completeness, it should be noted that the Qld BDMR Registration Act was repealed after the hearing of this proceeding, though the substance of s 24(4) is preserved by the replacement Act: see *Births, Deaths and Marriages Registration Act 2023* (Qld) s 142. Though not relevant to the present case, the replacement Act has removed the requirement that a person undergo sexual reassignment surgery in order to have their sex changed on the births register: see ss 39-41, 47.

201 The contention of direct inconsistency has been found ordinarily to require a conclusion that the impugned provision – here, s 24(4) of the Qld BDM Registration Act – "*alters, impairs or detracts*" from the operation of a Commonwealth statute or part of such a statute, here the gender identity discrimination provisions of the SDA, by reason of there being a real conflict between the two: *Work Health Authority v Outback Ballooning Pty Ltd* [2019] HCA 2; 266 CLR 428 at [32] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); albeit subject to a different view that the distinct classification between direct and indirect is inherent or always possible, at [67], [70] (Gageler J), see also [105] (Edelman J). What ultimately matters is whether there is a *real conflict* between the Commonwealth law and the State law, with the latter being inoperative rather than invalid to the extent of the inconsistency.

202 The Commissioner advances the following contrary submissions and consequent propositions, which are adopted by Ms Tickle. I agree with and accept, and to an extent embellish, those submissions:

(a) The Qld BDM Registration Act and relevantly similar State and Territory legislation, which permit a person to change the record of their registered sex in this way, informs the ordinary meaning of the word sex as it appears in the SDA. Section 24 of the Qld BDM Registration Act does not detract from the operation of the SDA but rather informs the ordinary meaning of the words "*sex*", "*man*" and "*woman*".

(b) There is no direct inconsistency, because the SDA does not define the word sex, and also the prior definitions of "*man*" and "*woman*" in the SDA were repealed so that they could carry their ordinary meaning. I see no reason why State and Territory statute should not form part of the understanding of ordinary meaning. This does not render the SDA impotent in any way.

(c) There is also no indirect inconsistency. Even if the SDA does somehow create its own unique meaning of "*sex*" and "*woman*" which is independent from the operation of State and Territory laws, there is no indication that it was intended to define those concepts for all purposes beyond discrimination law, including as to how those concepts are used for the purposes of birth registers. The respondents do not identify how the SDA can be read in that way, nor how the Commonwealth Parliament would have power to impose its meaning outside its own fields of legislative competence in any event. Rather, the relevant subject matter of the SDA is discrimination on the grounds expressly specified – here gender identity – and no more. The Qld BDM Registration Act only addresses the register and the making of entries upon it; it does not in terms address the matters with which the gender identity discrimination provisions of the SDA are concerned and address, even if it may have an incidental impact upon them.

(d) The SDA is plainly not intended to be an exhaustive statement of the law of discrimination on the grounds it deals with, because ss 10 and 11, dealing respectively with the operation of State and Territory laws generally and the those which further the objects of relevant international instruments, expressly preserve the operation of certain State and Territory discrimination laws and work health and safety laws, provided they are capable of operating concurrently with the SDA: see in particular s 10(3) and s 11(3). While such provisions cannot cure direct inconsistency, they are relevant to the question of whether the SDA was intended to be an exhaustive statement of law on its subject matter.

(e) The respondents' challenge to the operation of s 24 – in particular s 24(4) – of the Qld BDM Registration Act entails a contention that the Ms Tickle's status as female on the Queensland births register should have no effect on whether she is of the female sex or a woman for the purposes of the SDA. That contention must be rejected. Provided that there is no inconsistency, and I have found there is none, I see no reason why State or Territory legislation should not inform the ordinary meaning of language.

203 The respondents' further submission that, in allowing legal recognition of sexual reassignment, the Qld BDM Registration Act altered, impaired or detracted from the SDA's asserted general purpose of protecting women's "*sex-based rights*" was of no assistance. If there was any such impairment or detraction, which has not been demonstrated, that was occasioned by the expansion of the SDA by the Commonwealth parliament to encompass gender identity discrimination.

204 By reason of the foregoing, I readily conclude that the two statutes can and do operate harmoniously. Section 24 of the Qld BDM Registration Act complements the gender identity discrimination provisions of the SDA, rather than conflicting with them. It follows that the respondents' challenge to the validity or application of s 24(4) of the Qld BDM Registration Act must fail.

PART 6: REMEDIES

205 Ms Tickle seeks the following relief:

(a) declarations that the respondents contravened s 22 of the SDA;

(b) $100,000 in general damages;

(c) $100,000 in aggravated damages;

(d) a published written apology from the respondents; and

(e) an order that Giggle reinstate Ms Tickle's access to the Giggle App on equal terms to other female users per its usual terms of trade.

206 Before I turn to address each remedy sought, it is necessary to consider the limits on this Court's jurisdiction to award that relief.

207 Ms Tickle's standing to make the present application in this Court arises from the AHRC's termination of her earlier complaint, and the notification of Ms Tickle of that termination: s 46PO(1) of the AHRC Act. As I decided in *Hanson v Burston* [2022] FCA 1234 at [44], however, that provision does not grant applicants an unfettered right to litigate. Rather, the unlawful discrimination alleged must meet the requirements of s 46PO(3), namely:

> The unlawful discrimination alleged in the application:
>
> (a) must be the same as (or the same in substance as) the unlawful discrimination that was the subject of the terminated complaint; or
>
> (b) must arise out of the same (or substantially the same) acts, omissions or practices that were the subject of the terminated complaint.

208 If this Court is satisfied that unlawful discrimination within the bounds of s 46PO(3) has taken place, it may make a variety of orders under s 46PO(4) of the AHRC Act, including the following:

> (a) an order declaring that the respondent has committed unlawful discrimination and directing the respondent not to repeat or continue such unlawful discrimination;
>
> (b) an order requiring a respondent to perform any reasonable act or course of

conduct to redress any loss or damage suffered by an applicant;

(c) an order requiring a respondent to employ or re-employ an applicant;

(d) an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent;

(e) an order requiring a respondent to vary the termination of a contract or agreement to redress any loss or damage suffered by an applicant;

(f) an order declaring that it would be inappropriate for any further action to be taken in the matter.

209 The readily apparent purpose of s 46PO(3) is to limit applications alleging unlawful discrimination to those that have been screened through the AHRC (*Grigor-Scott v Jones* [2008] FCAFC 14; 168 FCR 450 at [19], Emmett, Lander and Tracey JJ), as opposed to complaining to the AHRC being a mere technical requirement or stop off point for the initiation of proceedings. The significance of this jurisdictional limitation for this proceeding is that Ms Tickle's claim of aggravated damages relies in part on conduct of the respondents that occurred after she filed her complaint, namely that they refused to reinstate her access to the Giggle App in the face of her complaint to the Commissioner. It is difficult, if not impossible, to fit any of the remedies listed above for such conduct within the terms of s 46PO(3), as to do so would be inherently illogical, or even conceptually incoherent. Despite this, in considering a number of the remedies below, I have assumed that this problem does not arise.

210 Ms Tickle also relies on adverse public comments made by Ms Grover about her and, on their face, transgender women more generally, after her AHRC complaint and during the course of these proceedings before trial to ground a claim for aggravated damages. That claim is dealt with separately at Part 6(c)(iv) below. In that sense, her case had the flavour of a victimisation claim brought under s 94 of the SDA, which may be founded on a person subjecting another person to detriment for making a complaint or initiating a proceeding under the SDA or the AHRC Act: SDA s 94(2)(a) and (b). Section 94 constitutes a deliberate legislative step to address post-complaint conduct so as to dispense with the jurisdictional problem otherwise presented by the terms of s 46PO(3). In fact, Ms Tickle's originating application made reference to seeking a declaration that the respondents had contravened, among other things, s 94 of the SDA and therefore at least implicitly included a claim of victimisation. However, this was not reflected in either her original statement of claim, nor her amended statement of claim, as one of the remedies she was seeking. Nor did she make any submissions referring to

s 94. Accordingly, this is, deliberately, not a victimisation case, a characterisation that is of some importance to the basis for Ms Tickle's claim for aggravated damages, considered below.

211 Whether an application in this Court can rest on conduct that occurred after a complaint to the AHRC was made was considered by Katz J in *Charles v Fuji Xerox Australia Pty Ltd* [2000] FCA 1531; 105 FCR 573 (the AHRC and AHRC Act then being named as the Human Rights and Equal Opportunity Commission (**HREOC**) and the Human Rights and Equal Opportunity Commission Act (**HREOC Act**), respectively). Katz J considered whether conduct that occurred after a complaint had been made to the HREOC could found proceedings in this Court alleging unlawful discrimination under the *Disability Discrimination Act 1992* (Cth). His Honour concluded that such unlawful discrimination was beyond the scope of s 46PO(3): at [36]. I agree with that conclusion for the detailed and comprehensive reasons given by his Honour, which are therefore worth setting out in some detail in order to adopt them in full:

> [37] It appears to me that s 46PO(3) of the HREOCA [HREOC Act] is only incidentally concerned with those allegations of fact which can be made in an application under s 46PO(1) of the HREOCA; it is primarily concerned, not with such allegations, but rather with the legal character which those allegations of fact can be claimed to bear. In the two situations with which it deals, it permits an applicant in a proceeding before the Court to claim that the facts alleged against the respondent constitute unlawful discrimination of a different legal character than the unlawful discrimination which was claimed in the relevant terminated complaint.
>
> [38] Paragraph (a) of s 46PO(3) of the HREOCA proceeds on the basis that the allegations of fact being made in the proceeding before the Court are the same as those which were made in the relevant terminated complaint. The provision naturally permits the applicant to claim in the proceeding that those facts bear the same legal character as they were claimed in the complaint to bear. However, it goes further, permitting the applicant to claim in the proceeding as well that those facts bear a different legal character from that they were claimed in the complaint to bear, provided, however, that the legal character now being claimed is not different in substance from the legal character formerly being claimed.
>
> [39] Paragraph (b) of s 46PO(3) of the HREOCA, on the other hand, permits the applicant to allege in the proceeding before the Court different facts from those which were alleged in the relevant terminated complaint, provided, however, that the facts now being alleged are not different in substance from the facts formerly being alleged. It further permits the applicant to claim that the facts which are now being alleged bear a different legal character than the facts which were alleged in the complaint were claimed to bear, even if that legal character is different in substance from the legal character formerly being claimed, provided that that legal character "arise[s] out of" the facts which are now being alleged.
>
> [40] It is worth recording here that, although the Senate explanatory memorandum for the Bill which became the amending Act did not elaborate on the intended operation of the proposed s 46PO(3)(a) of the HREOCA, it did elaborate on the intended operation of the proposed s 46PO(3)(b) of the HREOCA, saying,
>
> "This second limb is intended to cover situations in which different instances

> of unlawful discrimination arise out of essentially the same factual circumstances. For example, an Asian woman may make a complaint to HREOC alleging that her dismissal from employment amounted to discrimination on the ground of her sex. On the basis of things said or done during the inquiry or conciliation process, the woman may form the view that her dismissal also amounted to discrimination on the ground of her race. If the complaint cannot be conciliated and is terminated, and the woman makes an application to the Federal Court in respect of the terminated complaint, this paragraph may permit her to allege racial discrimination in that application."
>
> It appears to me that the first limb of s 46PO(3) of the HREOCA was likely to have been intended to cover situations in which, for instance, a person makes a complaint to the Commission of the doing of an act constituting unlawful disability discrimination in employment, which complaint cannot be conciliated and is terminated, and the person then makes an application to this Court in respect of the terminated complaint, claiming instead, but on the basis of the same allegations of fact, unlawful disability discrimination in contract work: see s 17 of the DDA.

[41] On the construction which I give to s 46PO(3) of the HREOCA, it is apparent that par (a) thereof provides no warrant for an applicant in a proceeding in this Court to make any allegation of fact in the proceeding different from those which were made in the applicant's earlier complaint to the Commission. On the other hand, par (b) thereof does permit an applicant in a proceeding in this Court to make allegations of fact in the proceeding different to a certain extent from those which were made in the applicant's earlier complaint to the Commission. However, I find nothing, either in the language of par (b) itself or in the example of its operation given in the Senate explanatory memorandum, insofar as that example reveals a legislative intent regarding the operation of par (b), which would support a construction of the paragraph that permitted Mr Charles to allege in the present proceeding the doing by Fuji Xerox after [the date on which the HREOC complaint was made] of any act constituting unlawful disability discrimination in employment.

[42] I add that a construction of s 46PO(3) of the HREOCA which does not permit Mr Charles to allege in the present proceeding the doing by Fuji Xerox after 3 April 1999 [the date on which the HREOC complaint was made] of any act constituting unlawful disability discrimination in employment appears to me to be consistent with the policy of the HREOCA of ensuring that there exists an opportunity for the attempted conciliation of complaints before they are litigated: compare subss 46PF(1) and (4) of the HREOCA. (A similar policy of ensuring an opportunity for attempted conciliation in the first instance was also apparent in the DDA before its amendment by the amending Act.) I note in that connection the following exchange when the Opposition sought to amend in the House of Representatives, after its second reading, the Bill which became the amending Act. The Opposition spokesman moved (see HR Hansard, 11 March 1999, p 3754) an amendment whose effect he described as being "to enable complainants to amend a complaint before the Federal Court proceedings, even though that particular issue may not have been dealt with in the commission". The justification which he offered for the proposed amendment was as follows:

> "These matters of discrimination can be flexible in the sense that events can occur which are part of an ongoing process of discrimination but may not themselves have been pleaded or raised in the conciliation proceedings. So we say it is appropriate for a complainant to be able to amend the complaint after conciliation and before commencement in the Federal Court."
>
> The Government rejected that proposed amendment, the Attorney General

> saying (see HR Hansard, 11 March 1999, p 3755):
>
> > "The government disagrees that there should be a power to add further allegations of discrimination after a matter has been determined in the commission and prior to applying to the Federal Court. This is consistent with the policy of requiring discrimination complaints to go through the HREOC conciliation process."
>
> [43] I add further that a construction of s 46PO(3) of the HREOCA which does not permit Mr Charles to allege in the present proceeding the doing by Fuji Xerox, particularly after 11 May 2000 (the date on which the present proceeding was begun), of any act constituting unlawful disability discrimination in employment would also be consistent with a longstanding judicial approach to litigation. That approach is that a moving party is prevented from relying in a proceeding on a cause of action accruing after the commencement of the proceeding.

212 The jurisdictional limitation imposed by s 46PO(3) therefore works to limit any unlawful discrimination found by this Court to that arising from conduct preceding her complaint to the AHRC on 5 December 2021. Neither Ms Tickle nor the respondents provided submissions that addressed the s 46PO(3) limitation.

213 I turn now to each of the remedies sought by Ms Tickle.

(a) Declaration

214 This Court can make a binding declaration of unlawful discrimination under s 46PO(4) of the AHRC Act or s 21(1) of the *Federal Court of Australia Act 1976* (Cth). The respondents made no submission that a declaration should not be made if unlawful discrimination was found to have taken place.

215 In light of the above finding that indirect gender identity discrimination has taken place, I am satisfied that a declaration to that effect should be made. The respondents did not seem to suggest otherwise, although it is not altogether easy to be sure given the disjointed and somewhat incoherent way their case was run. However, the form of the declaration should be confined to the discriminatory conduct as alleged, not to the definition and other provisions also referred to in the originating application. The contravention was indirect gender identity discrimination by halting Ms Tickle's access to the Giggle App and thereby engaging in conduct proscribed by s 22 as described in s 5B(2) of the SDA. Subject to the parties providing joint or separate draft proposed terms for the declaration, I will make a declaration of contravention.

(b) General damages

216 The purpose of the Court's statutory power to award damages for any loss or damage suffered because of the conduct under s 46PO(4)(d) is to compensate the applicant, not punish the respondent: ***Wotton*** *v Queensland (No 5)* [2016] FCA 1457; 352 ALR 146 at [1600] (Mortimer J, as the Chief Justice then was). When it came to the question of general damages, the only dispute, if liability was established, was as to quantum. In closing oral submissions, Ms Tickle sought an award of $100,000, while the respondents sought only a nominal sum in the order of a few thousand dollars if a finding of contravention was made. Neither stance was the subject of much more than assertion. The loss was not properly quantified or otherwise explained by Ms Tickle, and the figures advanced by the respondents accorded with their view that even if the Court concluded that they had discriminated, they had not done anything that was really of a kind that warranted more than a nominal response. I am unable to accept either stance.

217 Ms Tickle has adduced no observational, medical or other expert evidence to quantify loss or damage. The only evidence she relies upon is contained in the following three short paragraphs of her affidavit:

> [38] The above events involving the Giggle App and Ms Grover have had a significant impact on my life. The respondents' unilateral decision that I am not a woman, and therefore cannot access the Giggle App, has upset me greatly and has resulted in me having to go to great lengths to prove that I am a woman. It has been exhausting and draining to do so.
>
> [39] Ms Grover's public statements about me and this case have been distressing, demoralising, embarrassing, draining and hurtful. This has led to individuals posting hateful comments towards me online and indirectly inciting others to do the same. Ms Grover's online posts reach large domestic and international audiences, which has led to the scale of online hate towards me being enormous. This has consumed my life outside of my work and sport, which has led to me experiencing constant anxiety and occasional suicidal thoughts.
>
> …
>
> [41] I have been regularly taking anti-anxiety medication since May 2020 to assist with managing the emotional aspects of my gender transition. Ms Grover's actions and the online hate I have received from her supporters, who are actively working towards stopping me from living as a woman, compounds my extant anxiety. I earnestly wish to wean myself off my anti-anxiety medication now that my gender transition is nearly complete, though I am fearful that my anxiety attacks will return if I do so, due to the stress and anxiety I have experienced from Ms Grover's actions and this legal case.

218 The whole of the evidence for loss or damage *because of* the unlawful discrimination is contained in [38] and [41]. Paragraph 39 pertains to Ms Tickle's claim for aggravated damages, made on the basis of comments by Ms Grover and her supporters subsequent to the filing of

this application, discussed further at Part 6(c)(iv) below. The loss or damage alleged fall in two broad categories: injured feelings (described in [38]) and exacerbation of a pre-existing psychiatric condition (described in [41]). It is appropriate to address each separately.

219 There is no evidence of loss or damage sufferance in any monetary sum, or in any non-monetary sum giving rise to a reasonable basis for equating or approximating it to that quantum. How the $100,000 proposed was arrived at was not explained. In my view such a large sum in the circumstances of this case called for detailed submissions. In the absence of such submissions, I am not satisfied that anything approaching that sum has even been attempted to be justified.

(i) Exacerbation of a pre-existing psychiatric condition

220 It is well established that damages may be awarded for psychiatric injury, including exacerbation of an existing condition. Ms Tickle's evidence at [41] of her affidavit is that she had started regularly taking unspecified anti-anxiety medication in May 2020, to assist with managing what she described as the emotional aspects of her gender transition. She does not say if she had been diagnosed with a psychiatric condition at that time and, if so, what that is, assuming that such evidence from her was admissible. She does not specify in any detail the kind of symptoms that led to a prescription of this medication, though later makes a reference to a fear that her anxiety attacks will return if she stops taking this medication, suggesting this has been a part of her previous experience. In short, the evidence is vague and makes it impossible to identify any starting point from which further harm can be adjudged.

221 Ms Tickle goes on to say that Ms Grover's actions and the online hate she has received from Ms Grover's supporters has compounded her extant anxiety. Two difficulties arise here. The first is that it is not possible to identify how, if at all, the unlawful discrimination contributed to this condition. Her description of Ms Grover's actions must refer, in the context of the affidavit's preceding paragraphs, to her public comments about Ms Tickle (which are part of the basis of her claim for aggravated damages) and the removal of Ms Tickle from the Giggle App. The difficulty for referring to both together is that, as I explain at [261]-[271] below, I do not accept that Ms Grover's comments about Ms Tickle can properly ground an award of aggravated damages. The second is that she also refers to online hate from persons she takes to be supporters of Ms Grover and again, as explained at [256]-[260] below, I cannot accept this can base an award of damages to be paid by the respondents.

222 In the final part of [41] of Ms Tickle's affidavit, she says that she wishes to halt her use of anti-anxiety medication, but fears that panic attacks will return due to the stress caused by Ms Grover's actions and this proceeding. Again, the reference to Ms Grover's actions must be read as a reference both to the removal of Ms Tickle from the Giggle App and Ms Grover's subsequent comments, the latter of which cannot ground an award of damages. It is similarly unclear whether the stress and anxiety that Ms Tickle has experienced from this proceeding refers to the actions taken by the respondents in the course of this proceeding, and if so which; or from the general stress attached to any legal proceeding. The latter cannot be grounds for aggravated damages. More fundamentally however, this is only evidence of her speculation as to the future effect of halting the use of anti-anxiety medication while experiencing stress and anxiety. It is not a loss or damage that has eventuated. Ms Tickle is not a doctor or otherwise an expert on the matter, and so accordingly I cannot give this self-assessment any real weight.

(ii) Injured feelings

223 The evidence of Ms Tickle's injured feelings is not similarly deficient. I accept that compensation may be awarded under s 46PO(4) for injured feelings, to adopt the term used by May LJ in *Alexander v Home Office* [1988] 1 WLR 968 at 975; [1988] 2 All ER 118 at 122: *Wotton* at [1622].

224 It is convenient to reproduce again the relevant portion of Ms Tickle's evidence, at [38] of her affidavit:

> The above events involving the Giggle App and Ms Grover have had a significant impact on my life. The respondents' unilateral decision that I am not a woman, and therefore cannot access the Giggle App, has upset me greatly and has resulted in me having to go to great lengths to prove that I am a woman. It has been exhausting and draining to do so.

225 Ms Tickle makes clear that the real injury from her exclusion from the Giggle App was the hurt of not being treated as a woman. As I have found, it is most probable that this arose from a reflexive decision by Ms Grover while reviewing Ms Tickle's selfie. Though it was not established in this case that the decision was made because of Ms Tickle's gender identity, the condition that users appear to be cisgendered women on Ms Grover's review of their photos did result in Ms Tickle being treated as a man. The imposed condition was not attuned to distinguish between these groups, therefore causing hurt to Ms Tickle's feelings.

226 The purpose of the prohibition on discrimination on the ground of gender identity discrimination is to address this kind of injury, among others. On Ms Tickle's evidence she

had made minimal use of the Giggle App before her removal: see [113] above. I accept Ms Grover's evidence (at [114] above) that Ms Tickle had made no interactions or connections with other Giggle App users, and had not made posts or contributions, especially in the absence of any evidence from Ms Tickle that she did so. The material impact of Ms Tickle being denied the Giggle App's services has therefore not been proven to be more than minimal. Her contemporaneous conduct, explained by her, is that she had given up using the Giggle App because she had found there were not many users to connect with at the time.

227 Despite that conclusion, the emotional effects of her gender identity being denied have some significance. She says that this has upset her greatly. However, I am unable to attribute responsibility to the respondents for her finding this, in her words, exhausting and draining, to have to go to great lengths to prove that she is a woman. Overall, Ms Tickle's evidence as to loss or damage is slight, if not minimal. It does not rise higher than a modest degree of hurt feelings. Taking all of these considerations into account, I find a sufficient basis has been established to make orders for a modest award of compensatory damages.

(iii) Conclusions as to general damages

228 Indirect gender identity discrimination has been established and is compensable, but I conclude that it was brought on a point of principle rather than due to any lasting hurt or disadvantage. Ms Tickle's evidence was that she was not really all that interested in actually using the Giggle App. Her evidence went no further than establishing that she wanted the continued ability to access the Giggle App, rather than having any express or implied intention to actually access it or otherwise use it.

229 As this seems to be the first gender identity discrimination case, there are no prior damage awards to use as any kind of yardstick as to what might be appropriate. I have had regard to the outcomes in a range of other kinds of discrimination cases identified by Mortimer CJ in ***Kaplan*** *v State of Victoria (No 8)* [2023] FCA 1092 at [1640]. However, that has not advanced things very much due to the absence of any yardstick basis for the assessment of an appropriate quantum of damages in this specific area. In the absence of any quantifying evidence, this was the widest and most unguided discretion to exercise, not unlike civil penalty imposition or criminal fine imposition for a new area of proscribed conduct.

230 The features of the conduct that took place have been considered in some detail in these reasons. I am left with an exercise akin to penalty or fine imposition of instinctive synthesis in which there is no single right or wrong figure, there being nothing precise such as proven

economic loss. I consider the amount suggested by the respondents to be far too low, and the figures suggested by Ms Tickle to be far too high. After some considerable thought and reflection, I have arrived at the figure of $10,000 in damages. As I note below, there is one limited basis upon which Ms Tickle's aggravated damages succeeds, but where the harm caused is relatively slight and difficult to quantify: see Part 6(c)(v). The award of damages also reflects that limited aspect of aggravated damages.

231 This award of $10,000 is more than a nominal sum, but remains modest to reflect the reality of what has taken place, the limited evidence that Ms Tickle chose to adduce and the narrow ambit of the harm that has been shown to have been caused. Given the novelty of this claim, I should note that this quantum does not reflect the potential seriousness of gender identity discrimination that might emerge in another case. This kind of discrimination is just as capable of being as harmful as all other kinds of discrimination listed in the SDA, and therefore of justifying substantial awards of damages. The quantum in this case reflects the case that was proven. Had the proven facts differed, or the case been focused or run differently, it is possible that a much higher quantum would have been justified.

(c) Aggravated damages

(i) Authority and principles

232 Next, I turn to the question of aggravated damages. This discussion, and the particular conduct then considered, proceeds upon the basis that conduct which aggravates the conduct falling within the scope of s 46PO(3) is itself within that provision even though it could not have been part of the complaint. Given the conclusions I reach about most aspects of this claim for the reasons given below, the soundness of this assumption does not have to be tested.

233 Again, Ms Tickle seeks $100,000, while the respondents oppose any award at all. This ends up turning on the absence of particulars pleaded, the dire shortage of evidence adduced, and the lack of any compelling argument being advanced of there being any relevant aggravation of the proven indirect gender identity discrimination conduct. Whether there was in fact any proper basis for an award of aggravated damages I will never know, because not even a faint glimmer of a proper basis for this was advanced. I am not persuaded that any proper basis for aggravated damages has been established.

234 It is well established that aggravated damages may be awarded under s 46PO(4)(d) as they are compensatory, not punitive, in nature: see ***Elliott v Nanda*** [2001] FCA 418; (2001) 111 FCR

240 at [179]-[184] (Moore J); *Clarke v Nationwide News Pty Ltd* [2012] FCA 307; 201 FCR 389 at [347], [349] (Barker J); ***Ewin v Vergara*** *(No 3)* [2013] FCA 1311; 307 ALR 576 at [676], [678] (Bromberg J); *Wotton* at [1737] (Mortimer J); *Hughes (t/as Beesley and Hughes Lawyers) v Hill* [2020] FCAFC 126; 277 FCR 511 (***Hughes v Hill)*** at [61]-[64] (Perram J, Reeves and Collier JJ agreeing); *Kaplan* at [1760]-[1763] (Mortimer CJ); ***Taylor*** *v August and Pemberton Pty Ltd* [2023] FCA 1313 at [523]-[524] (Katzmann J).

235 Ms Tickle seeks those additional damages on the basis of:

(a) the respondents' refusal to attend conciliation proceedings held by the AHRC;

(b) the respondents' refusal to reinstate Ms Tickle's access after becoming aware that she is a transgender woman following the AHRC complaint;

(c) a number of public comments made by Ms Grover about Ms Tickle since the filing of her AHRC complaint, amounting to "*a public campaign over two years of persistently belittling Ms Tickle*", which she claims also caused "*online hate*" from other persons towards her;

(d) the respondents' refusal to apologise to Ms Tickle; and

(e) the respondents' conduct at trial, including instructing counsel to plead that Ms Tickle is a man, and to refer to her with male pronouns in written and oral submissions, as well as Ms Grover laughing at a demeaning caricature of Ms Tickle while giving evidence.

236 Basis (d) was averted to in Ms Tickle's amended statement of claim, but was not pressed in her submissions, and there is no evidence of loss or damage that supports it. Basis (c) was not noted as a ground for aggravated damages in her originating application or amended statement of claim, though the respondents raised no objection to it being raised as a ground for aggravated damages in her closing oral submissions.

237 Aggravated damages have traditionally been awarded in tort for additional injured feelings of the applicant incurred by the way in which the respondent committed the tort: see, *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1124 (Lord Diplock). They have also been awarded in defamation proceedings on the basis of the way in which the respondent conducted themselves at trial, where that conduct was characterised as not being bona fide, justifiable or proper: ***Triggell*** *v Pheeny* (1951) 82 CLR 497 at 514 (Dixon, Williams, Webb and Kitto JJ). In *Triggell*, the High Court upheld a direction by the primary judge that the jury could consider whether the pressing of a defence of truth by the defendant was aggravating in circumstances

where it was open to the jury to conclude that the defendant did not honestly believe in that defence: *Triggell* at 515-516. Such a stance aggravates the impact of the false defamatory imputation, so is tied to the tortious conduct by that nexus. However, care must be taken in applying tort reasoning to a statutory cause of action.

238 Reasoning by analogy with tort, this Court has awarded aggravated damages in several discrimination cases on the basis of the way the respondent conducted themselves at trial, or in the lead up to trial, citing the requirements in *Triggell* at 514; see also *Taylor* at [524]-[525] and *Elliot v Nanda* at 297, [180], [182]. Further, *Hughes v Hill*, which does not cite *Triggell* directly, at [61] cites *Ewin v Vergara at* [678] and *Clarke v Nationwide News* at [349], both of which cite *Elliot v Nanda* at 297.

239 In *Elliott v Nanda*, Moore J was asked to consider whether aggravated damages were available for a respondent's failure to appear before a hearing of the complaint before the HREOC (as the AHRC was then named), where that failure had delayed resolution of the complaint by a considerable period, resulting in additional stress and mental anguish for the applicant: at [184]. His Honour was satisfied they were, ordering $5,000 in aggravated damages. In coming to this conclusion, Moore J relied on authority from *Triggell* at 514, described above, at [182]. His Honour also discussed the wide variety of matters which may ground the decision to award aggravated damages in anti-discrimination law cases, referring to a number of court and tribunal decisions:

(a) a Queensland Anti-Discrimination Tribunal decision, *Whittle v Paulette* (1994) EOC ¶92-621, to award $10,000 each to two complainants who had alleged sexual harassment on the part of the first respondent, in contravention of s 119 of the *Anti-Discrimination Act 1991* (Qld), where the Tribunal had noted that the first respondent was arrogant and aggressive in the witness box and insensitive to the effect of his treatment of the complainants: at 77,306;

(b) a HREOC decision, where a complainant had claimed aggravated damages in relation to her sexual harassment complaint on the basis that senior staff in her workplace had not taken her complaints seriously. There, the respondent had made several offers of settlement to the complainant, including payment of the costs to date of the proposed settlement, and the applicant had not been required to establish the facts of her alleged sexual harassment or the respondent's vicarious liability, with the Commission

concluding that it should not award aggravated damages: *Greenhalgh v National Australia Bank Ltd* (1997) EOC ¶92-884; and

(c) a decision of the Queensland Supreme Court to uphold an award of aggravated damages by the Queensland Anti-Discrimination Tribunal in an age discrimination case brought under ss 7(1)(f) and 14(1)(b) of the *Anti-Discrimination Act 1991* (Qld), on the basis that the defendant's method of cross-examination, which involved suggestions that the plaintiff was looking for money because he was out of work, where the applicant had suffered additional distress as a result of the defendant's method of cross-examination: *McIntyre v Tully* (1999) 90 IR 9 (Atkinson J).

240 In *Ewin v Vergara*, an extreme sexual harassment case brought under the SDA resulting in a large award of damages, the applicant sought aggravated damages, claiming that there was always going to be a component in a case like that in which general damages in the discretion would not sufficiently compensate "*the horror, the dislocation, the disruption of life, the smell of flashbacks, the suicide attempts, the change in lifestyle*": at [677]. Bromberg J considered that aggravated damages were compensatory in nature and therefore available under s 46PO(4)(d), and that they could be available in circumstances where a respondent had increased the hurt to the applicant through their conduct of proceedings: at [678]. However, his Honour found that the grounds on which aggravated damages were sought were already reflected in general damages awarded, declining to award aggravated damages on the basis it would amount to double dipping for the applicant: at [678]. It follows that even serious conduct causing substantial hurt will not necessarily result in the awarding of aggravated damages.

241 In *Wotton*, Mortimer J (as the Chief Justice then was) considered whether aggravated damages were available where contraventions of s 9(1) of the *Racial Discrimination Act 1957* (Cth) (**RDA**) had been made out. Her Honour noted that the weight of authority supported the view that awards of aggravated damages were available under s 46PO(4) as they serve a compensatory purpose (at [1737]), but dismissed the claim on bases that are not relevant to the current proceeding.

242 In Mortimer J's discussion of the availability of aggravated damages in *Wotton*, her Honour noted that in some cases, the aggravation comes not from conduct directly associated with or following on from the contravening conduct, but from subsequent conduct that has the same effect: [1733]. In oral submissions in this proceeding, Ms Tickle relied on that statement (as quoted in *Kaplan* at [1762]) as authority for the general proposition that courts may award an

applicant aggravated damages under s 46PO(4)(d) based on a respondent's conduct subsequent to the filing of an AHRC complaint. I do not read that statement in *Wotton* as going that far. The rest of the paragraph goes on to cite, as examples of the proposition, *Elliott v Nanda* (see above) and *Houda v New South Wales* [2005] NSWSC 1053, both cases in which aggravated damages were awarded on the basis of the way in which the respondents conducted their part of the proceeding. I read the statement above as going no further than either authority cited. That conclusion is fortified by the fact that the present question of whether aggravated damages were available for conduct subsequent to the AHRC complaint was not live in *Wotton*.

243 In *Hughes v Hill*, the Full Court upheld an award of aggravated damages by the primary judge in a sexual harassment claim: at [59] (Perram J, Reeves and Collier JJ agreeing). Aggravated damages had been awarded to reflect the additional harm from threats made by the appellant to prevent the respondent complaining of sexual harassment, and the manner in which he conducted his defence at trial, which included blaming the respondent for his conduct due to her manner of dress and alleging she had been sexually abused as a child in order to blacken her name: at [54]-[64].

244 In *Kaplan*, Mortimer CJ affirmed the proposition that aggravated damages were available under s 46PO(4) where racial discrimination under s 9(1) of the RDA had been made out: at [1759]-[1789]. The proceeding involved findings that a state school principal had failed to take steps to address high levels of antisemitic bullying. Aggravated damages were awarded to one of the applicants, a former student, for the school principal's failure to take steps to ensure his safety following an assault at a park, which was found to have increased the applicant's hurt: at [1787]-[1789], citing *New South Wales v* ***Ibbett*** [2006] HCA 57; 229 CLR 638 at [35]. The cited portion of *Ibbett*, for completeness, is authority for no more than the orthodox proposition that, where the conduct giving rise to a tort increases the hurt to the subject of the tort, aggravated damages may be available. *Kaplan* does not state whether the principal's failures were included in, or occurred after the lodging of, the complaint to the AHRC that gave rise to the proceeding.

245 *Taylor* involved successful claims by the applicant of sexual harassment and victimisation by the respondent, in contravention of ss 28B(2) and 94 of the SDA, as well as breach of the applicant's employment contract. Katzmann J considered that it was well established that s 46PO(4) empowered the Court to make awards of aggravated damages, citing *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217 at 23-40 (Lockhart J) and 282 (French J), *Ewin v Vergara*

and *Hughes v Hill*: at [526]. Her Honour noted that aggravated damages could be awarded to an applicant whose distress was made worse by the respondents' conduct after the wrongful act or acts are committed, and where that conduct was improper, unjustifiable or lacking in bona fides: at [524]-[525], citing *Triggell* at 514. Like Mortimer J's statement in *Wotton*, I read that statement as going no further than the authority cited, which provides only that an award of aggravated damages may be available for a respondent's conduct in the proceeding (which has already been taken into account in relation to general damages). That is fortified by the nature of the award of aggravated damages in that proceeding, which was made on the basis of the respondent's intimidatory and unjustified legal response to the applicant's AHRC complaint, which included a suggestion that the applicant had manipulated and been flirtatious with the respondent: at [537]-[539].

246 What is really notable about all of the cases discussed above is that they are a far cry from what has happened to Ms Tickle. As considered below, no real attempt was made to marry the conduct relied upon for aggravated damages to the conduct relied upon to establish unlawful discrimination. In light of that, two further observations may be made about awards of aggravated damages in discrimination proceedings.

247 The first observation is that aggravated damages are not an unbounded path to seeking compensation for all harmful conduct by the respondents that falls outside the proceeding that has been brought, even if peripherally related to them. There must be some kind of nexus between the unlawful discrimination and the further hurt arising from that discrimination for which the aggravated damages further compensates. That nexus will be clearest where the further hurt arises from the way in which the unlawful discrimination occurred.

248 The nexus may arise because the actions of the respondent at trial, or perhaps in relation to the conduct of proceedings (see *Taylor*, especially at [538]-[539]), cause further harm to the applicant. In *Taylor*, which involved sexual harassment and victimisation claims brought under the SDA, aggravated damages were awarded on the basis of improper, unjustifiable and non-bona fide accusations by the respondent against the complainant in the course of the trial and in letters from the respondent's solicitors to the complainant's solicitors: at [525], [538]-[539]; see also the Full Court's upholding of aggravated damages in similar circumstances in *Hughes v Hill* at [57]-[64]. Those accusations bear a clear link to the nature of the unlawful discrimination found.

249 The second observation is that it remains unclear how s 46PO(3), which requires unlawful discrimination alleged in applications to this Court to be the same as, or in substance the same as, those contained in the applicant's original complaint to the AHRC, affects the award of damages founded on conduct that occurred subsequently to the filing of the AHRC complaint. As noted above, the Court's power to award compensatory damages is statutory, created by s 46PO(4)(d) which allows an award of damages to be made only where the Court has found unlawful discrimination, as limited by s 46PO(3). None of the authorities in which aggravated damages have been awarded have addressed that question. Neither party provided submissions related to that question.

250 I draw from the authorities a number of minimum threshold requirements before the present claim for aggravated damages could be entertained. There would need to be:

(a) a compelling evidentiary basis for attributing the conduct said to give rise to the claim for aggravated damages to either or both respondents;

(b) a clear nexus between that conduct and this proceeding, which in turn must be tethered to the complaint to the AHRC which gives rise to this Court's jurisdiction; and

(c) clear evidence of separate or additional harm caused by that conduct.

251 In this case, none of those three criteria are met, any one of which failure would be fatal to the claim for aggravated damages. Moreover, as detailed below, the paucity of the evidence chosen to be advanced by Ms Tickle ended up making this proceeding a poor vehicle to question the outer bounds of the Court's power to award damages for subsequent conduct under s 46PO(4)(d). Each aspect of the claim for aggravated damages is addressed below.

(ii) Refusal to attend AHRC conciliation proceedings

252 No relevant part of Ms Tickle's affidavit, reproduced at [217] above and which is the only evidence of loss or damage suffered by her, makes any reference to harm caused by the respondents' refusal to attend AHRC conciliation proceedings. Proof of the necessary nexus has not even been attempted. There is no apparent basis on the evidence from which I can reasonably infer that the refusal caused any such loss or damage. Ms Tickle does not suggest in her evidence that such a basis exists. The respondents promptly indicated to the Commission that they were unwilling to participate in a conciliation proceeding, leading to the prompt institution of proceedings in the Federal Circuit Court by Ms Tickle.

253 These circumstances can readily be distinguished from the case in *Elliott v Nanda*, in which Moore J awarded damages on the basis of a respondent's failure to appear before a hearing of the complaint before the HREOC. That case, however, arose from the respondent's appeal of the HREOC's adverse findings against him. The logic of the award of aggravated damages was that he had failed to take earlier legitimate steps to contest the applicant's complaint, causing significant additional delay to the resolution of the complaint. Importantly, his Honour was satisfied that the delay had caused additional stress and mental anguish to the applicant: at [185]. The paucity of the evidence of loss means I am unable to make similar findings in the present case.

(iii) Refusal to reinstate Ms Tickle's access to the Giggle App

254 In the alternative, the applicant submits that the refusal to reinstate Ms Tickle's access after she filed her complaint grounds a claim of aggravated damages. However, no part of Ms Tickle's affidavit, being the only evidence of loss or damage, mentions that as a basis for the loss or damage she suffered. There is no factual basis for a finding on the evidence. It was a bare submission without evidentiary support.

(iv) Subsequent comments by Ms Grover and her supporters

255 Unlike grounds (a) and (b), Ms Tickle does refer to the comments made by Ms Grover and her supporters as causing her loss or damage: see [39]-[41] of her affidavit reproduced at [217] above.

Messages and posts by supporters

256 Ms Tickle annexes three messages sent to her on Facebook by a person or persons other than the respondents, as well as several posts about her on X and Facebook by other persons. Many of these messages and posts are plainly offensive. They go much further than expressing, in civil terms, a view on the relationship between sex and gender. Many are personal attacks on Ms Tickle, questioning her motivations for transitioning gender, her appearance and speculating on her smell and mental stability. Some include cartoon images that mock her appearance and include offensive jokes about her transition. Almost all such messages and posts refer to her as a man.

257 In her affidavit, Ms Tickle asserts, without any details or particulars, or other foundation, the conclusion that Ms Grover's public statements about herself and the case had led to and indirectly incited these communications. The difficulty with this bald assertion is that there is

no evidence capable of proving a sufficient nexus exists between these posts and the conduct of the respondents. There is no evidence, for example, that the respondents called for such comments to be sent, or said or did anything specific to cause that to happen. The link between the offensive public comments and the conduct of the respondents is tenuous at best. Ms Tickle does not point to any clear basis on which such a link can be inferred. I am unable to accept that this causal link has been established by mere assertion.

258 In a separate annexure, Ms Tickle also refers to an Etsy shopfront operated by an unknown person that sold merchandise in support of Giggle, including products such as T-shirts and mugs printed with the slogan Team Giggle, with nothing more, let alone anything overtly offensive. Ms Grover gave evidence that the profits from these Team Giggle products went to the crowdfunding for the respondents' legal team. The shopfront also included other products that, in the context of other products expressing support for Giggle, were likely referencing Ms Tickle or transgender people more generally. As they are offensive, I do not see any need to reproduce the messages or portrayals, as that may encourage further dissemination. One is worse than the rest in terms of offensiveness, but again I choose not to replicate it.

259 Ms Grover gave evidence that she was aware of the Team Giggle T-shirts that were sold, and the operator of the shopfront was a friend who had asked her permission to raise funds for the respondents' legal fees through selling Team Giggle products. Ms Grover said that she had purchased that Team Giggle T-shirt but had not further perused the store. She had posted on Twitter encouraging her supporters to buy the Team Giggle T-shirt, including a link to that product. She had also re-posted a post promoting other kinds of Team Giggle merchandise, also apparently including a link to the Team Giggle T-shirt product page.

260 I do not accept that the products printed only with Team Giggle and nothing more caused further hurt to the applicant. Certainly, there is no evidence to that effect from Ms Tickle. Their existence could not indicate anything further than what was already known to the applicant, which was that supporters of the respondents existed. The more offensive item lacked a sufficient nexus with the respondents' conduct. Ms Grover did not promote that product to her followers, and the suggestion that she is somehow responsible for it because she could have asked for the product to be taken down, perhaps with no effect, is a tenuous link. The other products in the shopfront might have been capable of causing further hurt to Ms Tickle, but again the selling of these products lacked a sufficient nexus with the conduct of

the respondents. Ms Grover did not promote such products, and it was not established by evidence that she even knew of their existence.

Posts by Ms Grover

261 Ms Tickle also refers to further harm caused by Ms Grover's comments about her and the proceeding, which are included as annexures to her affidavit. They can be grouped in two general categories: comments alleging the Ms Tickle harassed Ms Grover, and comments that Ms Tickle is a man. I note that she also annexed other posts by Ms Grover that discuss transgender women more generally with no reference to the present proceeding or Ms Tickle, but does not refer to these in the text of her affidavit. Given there is no evidence of any loss or damage that might have been caused by these posts, I do not discuss those further.

262 The first difficulty for this part of the claimed basis for aggravated damages is that the evidence of the loss or harm caused by Ms Grover's personal statements is difficult to distinguish from that caused by posts and messages of her supporters. Given the findings made above, that is a significant challenge for an award of aggravated damages. It is useful to restate the portions relied upon in turn and in full, and then address each.

263 Part of [39] of Ms Tickle's affidavit states:

> Ms Grover's online posts reach large domestic and international audiences, which has led to the scale of online hate towards me being enormous. This has consumed my life outside of my work and sport, which has led to me experiencing constant anxiety and occasional suicidal thoughts.

264 In the second sentence of [39], the word "*This*" must be read as referring to the scale of online hate, rather than Ms Grover's posts, as it refers to a singular object rather than a plural one. I find this portion of Ms Tickle's evidence to then be referring to the harm done by the posts made by persons other than Ms Grover, and therefore incapable of founding an award of damages.

265 Part of [41] of Ms Tickle's affidavit states:

> Ms Grover's actions and the online hate I have received from her supporters, who are actively working towards stopping me from living as a woman, compounds my extant anxiety.

266 In [41], the asserted cause of the compounding of Ms Tickle's extant anxiety is both Ms Grover's actions and those of persons Ms Tickle believes to be Ms Grover's supporters. It is not clear whether this refers to the decision to remove Ms Tickle from the Giggle App, the subsequent posts or her legal response to Ms Tickle's AHRC complaint. It is impossible to

identify the asserted cause of that harm. In any case, I find this portion of Ms Tickle's evidence insufficient to establish loss or damage, as it fails to indicate a baseline of her existing anxiety on which the harm done by the respondents' conduct could be measured.

267 The following sentence at [39] of Ms Tickle's affidavit is therefore the only evidence of the loss or damage caused by Ms Grover's statements to which I can afford any weight:

> Ms Grover's public statements about me and this case have been distressing, demoralising, embarrassing, draining and hurtful.

268 This brings us to the second difficulty for this basis: although the statements by Ms Grover that Ms Tickle is not a woman were hurtful, they were made bona fide. As has been made evident in the conduct of these proceedings, what the word "*woman*" means is deeply contested, and there must be scope in which persons can put forward an argument, both in proceedings and in their public discussion of them, where it is genuinely held and a legitimate part of their case. That is to be contrasted with the requirement set out in *Triggell* at 514, and accepted as applicable for awards of aggravated damages made under s 46OP(4)(d) based on subsequent conduct by respondents in relation to proceedings.

269 The meaning of "*woman*", and whether the applicant can be regarded as one, was a central plank of the respondents' case. Ms Grover is apparently deeply committed to her beliefs on this subject. Although that position was not vindicated in these findings, it would be an overstep by the Court in this context to award aggravated damages on the basis of comments about such beliefs, even though I accept Ms Tickle's evidence as to their effect on her.

270 These comments can be distinguished from allegations made by Ms Grover that Ms Tickle had harassed her, which Ms Grover had alluded to in Twitter posts and in an interview published by the *Weekend Australian Magazine.* Ms Grover also accepted in oral evidence that she had stated in other interviews that she had been harassed by the applicant and that she was afraid of her, although these statements were not referred to in Ms Tickle's affidavit. These statements were misleading to the extent to which they suggested that Ms Grover could really have no idea how Ms Tickle had received her mobile phone number. She had in fact provided it to Ms Tickle in an email exchange. Such an accusation was not a part of the respondents' case (and it would have been improper if it had been), and I would find it very difficult to consider these statements bona fide, given Ms Grover must have been aware that her mobile phone number was included in her email signature even if she had forgotten the specifics of her email exchange with Ms Tickle at the time she made the statements in question. Ms Grover

did not resile from those accusations in cross-examination, insisting that she did not know exactly how Ms Tickle had gotten her number. That was disingenuous.

271 These comments however, while hurtful and perhaps even defamatory of Ms Tickle to a limited degree, lacked a sufficient nexus with the unlawful discrimination found. They were in the nature of an attack on Ms Tickle's character, rather than arising from or as an extension of the indirect discrimination I have found occurred.

(v) Conduct at trial

272 There is one aspect of the aggravated damages claim, adverted to in the award of damages, but not otherwise addressed so far, that is sufficiently tied to the conduct of the proceedings to evade the limitations in s 46PO(3), and not to be without some evidentiary support. In Ms Tickle's closing submissions forceful submissions were made as to what was described by senior counsel as the persistent misgendering of Ms Tickle by the respondents, with their counsel referring in written and oral submissions to Ms Tickle with male pronouns, and by pleading that she was a man. Reference was also made to Ms Grover laughing, in the course of her oral evidence, at a demeaning caricature of Ms Tickle. Counsel submitted that this leads to the conclusion that the distress, embarrassment and hurt experienced by Ms Tickle, in being excluded from a women only space as a woman, has been amplified and compounded by this conduct.

273 As I have noted, the authorities establish that the conduct of a respondent at trial may establish the requisite nexus between the subsequent conduct and the applicant's claim in order to give rise to award of aggravated damages. The respondents' conduct in this case furthered the harm caused by the indirect discrimination found, namely in continuing to treat her as a man, though now with clear intent to do so.

274 The requirement remains, however, that such conduct not be bona fide: *Trigell* at 514; see discussion above at [237]-[238]. In this case, nothing indicates that the respondents are not expressing a genuine, if (as I accept) hurtful, belief that Ms Tickle is a man. No submissions were made by Ms Tickle's counsel to the contrary. While some of the ways in which the respondents expressed this belief could have been avoided, and in that sense were gratuitous, I am not satisfied that on a preponderance of the authorities that that is enough to found an award of aggravated damages.

275 I consider that this conduct falls in the wide berth that Courts must afford defendants in prosecuting their cases. That is not unbounded. The Court is obliged to disallow questions to witnesses that are offensive, humiliating, harassing, belittling, insulting, otherwise inappropriate or with no basis other than stereotype: *Evidence Act 1995* (Cth) s 41(1)(b), (c), (d). At the commencement of the trial, senior counsel for Ms Tickle had requested that the respondents not refer to her using male pronouns or titles in cross-examination. As it turned out, the respondents did not cross-examine her at all, but if they had, s 41(1) could have obliged me to constrain the ways in which they put questions to her.

276 That is not so for Ms Grover laughing in Court at the offensive caricature of Ms Tickle. Her explanation, that it was funny in the context of the courtroom, was obviously disingenuous. It was offensive and belittling, and had no legitimate place in the respondents prosecuting their case. Because I consider the harm that arose from this to be slight and difficult to quantify, however, I consider that this is best assessed as part of the overall award of damages, contributing to the amount to be awarded of $10,000. I should note that specific evidence of harm to applicants from respondents' conduct at trial is generally not necessary for this kind of damages, if for no other reason than it would be an undue burden to an applicant to put on further evidence of harm at the trial's end. In this case, I am willing to infer some limited degree of harm from the offensiveness of this confined aspect of Ms Grover's conduct.

(vi) Conclusion as to aggravated damages

277 In this case, none of the identified criteria for an award of aggravated damages described above in this section are met, save as to a limited aspect of the conduct of the trial by the respondents. Any failure would be fatal to the claim for aggravated damages, because:

(a) Part of the conduct upon which the claim for aggravated damages arises is that of persons other than the respondents, and no causal relationship between the respondents' conduct and this conduct was established.

(b) No sufficient nexus has been established between the conduct complained about and this proceeding. It is not enough that there is something that Ms Tickle finds offensive or hurtful. It has to be tied in some way to the gender identity discrimination case she has brought via the complaint to the AHRC, and specifically to the indirect discrimination case that succeeded. That case is about the imposition of a condition that had the effect of disadvantaging persons with a transgender woman gender identity, not to anti-transgender sentiment more generally. No real attempt was made to link the

two, let alone to link them in a way that ties the conduct to the proceeding so that the damages sought in this proceeding have been shown to be aggravated in some way. It has been advanced in substance as a general claim for hurt feelings arising from non-acceptance of her status as a transgender woman.

(c) The evidence of Ms Tickle makes a global claim for damages and does not sufficiently isolate the effect of this conduct, nor make it at all clear how it has increased the hurt she has suffered. There is an insufficient substratum of facts established by evidence to demonstrate the aggravation of loss asserted.

(d) An apology

278 Ms Tickle also seeks a published written apology from the respondents. It is well-recognised that s 46PO(4)(b) empowers the Court to order respondents to make an apology: *Wotton* at [1552]; see also *Kaplan* at [1791]-[1794]. Section 23 of the *Federal Court of Australia Act 1976* (Cth) provides an alternative basis for such orders: *Wotton* at [1552].

279 This Court has generally been reluctant to order apologies in discrimination cases where they would be unavoidably insincere: see *Kaplan* at [1796]-[1797]; *Wotton* at [1584] and the analysis of Mortimer J (as her Honour then was) of the authorities at [1553]-[1583]; *Jones v Toben* [2002] FCA 1150; 71 ALD 629 at [106]. That hesitation largely rests on the fact that the purpose of remedies under s 46PO(4) is to compensate the applicant: *Kaplan* at [1794]; *Wotton* at [1584]. An insincere apology would hold little if any benefit in rectifying the hurt to its recipient, while effectively punishing its maker by ordering them to say something they do not believe.

280 Courts have held apologies to be inappropriate where findings that discrimination has occurred are sufficient to recognise the harm done by the respondents: see *Poniatowska v Hickinbotham* [2009] FCA 680 at [324]-[325]. In *Kaplan*, for example, Mortimer CJ ordered an institutional apology by the State of Victoria for unlawful discrimination by a state school because it could be given sincerely and would be meaningful for the applicants: at [1796]. Her Honour declined, however, to order the principal of that school to apologise as such an apology would be insincere. The principal's evidence had made clear that he did not accept failings on his part, and that he did not believe he had acted unlawfully. In the circumstances, the Court's findings of fault were a sufficient vindication of the applicant's rights: at [1797].

281 The applicant's case for an apology to be ordered was sparse to say the least. It is plain that any apology given by Ms Grover, and any apology given by her on behalf of Giggle, would be through clenched teeth and utterly devoid of sincerity. She would be doing no more than *saying* she was sorry, but she would *not* in fact *be* sorry at all. She adheres to her sincerely held beliefs. It is not appropriate to order the giving of an apology in those circumstances and I therefore decline to do so.

(e) Reinstatement

282 The final relief sought is to order that Ms Tickle be given the same access to the Giggle App as is provided to other female users, upon Giggle's usual terms. That app has been shut down, and Ms Grover has expressed a clear intention not to reinstate it unless it is legal to exclude transgender women. Accordingly, at present, Ms Tickle already has the same access as other female users, being none at all. If the Giggle App had been in operation, I could well have ordered reinstatement. In the circumstances, however, it is not appropriate to make an order that is incapable of being complied with. Accordingly, I decline to grant this kind of relief.

PART 7: CONCLUSION

283 Although the applicant did not include seeking costs in her pleadings, costs was argued at the interlocutory hearing last year, and was plainly in the contemplation of both sides since before 1 June 2023. In those circumstances there is no reason way costs should not follow the final outcome of this proceeding. I will order that the respondents pay the applicants costs, but with a cap of $50,000 in relation to the constitutional validity and statutory construction issues, imposed by order 3 made on 1 June 2023.

I certify that the preceding two hundred and eighty-three (283) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Bromwich.

Associate:

Dated: 23 August 2024