Local Court
New South Wales

Case Name:	Riley Dennis -v – Kirralie Smith
Hearing Date(s):	14 April 2024
Date of Decision:	26 August 2025
Jurisdiction:	Civil
Before:	Deputy Chief Magistrate S. Freund
Catchwords:	Transgender vilification, Public Act,
Cases Cited:	*Barry V Futter [2011] NSWADT 205* *Brown -V-Tasmania (2017) 261 CLR 328* *Catch The Fire Ministries Inc and Others -v- Islamic Council of Victoria Inc (2006) 235 ALR 750* *Duan -v-Bridge [20124] NSWCATAD 349* *Clubb-V Edwards (2019) 267CLR 171* *Comcare -V- Banerji (2019) 267 CLR 373* *Eatock -v- Bolt and Another (2011) 283 ALR 505* *Farm Transparency International Ltd and Another-v- New South Wales (2022)403 ALR 1* *Faruqi V Hanson [2024] FCA 1264* *Jones -v- Toben [2002] FCA 1150* *Jones -v- Trad [2013] NSWCA 389* *Kerslake -V- Sunol [2022] ACAT 40* *Lamb -V- Campbell [2021] NSWCATAD 103* *Libertyworks Inc V Commonwealth of Australia (2021) 274 CLR 1 (2021) 391 ALR 188* *Riley V State Of New South Wales (Department of Education) [2019] NSWCATAD 223* *Margan -V-Manias [2015] NSWCA 38* *Mcleod V Power (2003) 173 FLR 31* *McLoy -v- New South Wales (2015) 257 CLR 178* *Smith -v- Blanch [2025] NSWCA 188* *Sunol -V- Collier (No 2) [2012] NSWCA 44*

Legislation Cited:	*Anti Discrimination Act 1977 (NSW)* *Civil and Administrative Tribunal Act 2013 (NSW)* *Crimes (Domestic and Personal Violence) Act 2007 (NSW)* *Judiciary Act 1903 (Cth)* *Racial Discrimination Act 1975 (Cth)*
Representation:	Plaintiff: Mr C. Gregory of Counsel instructed by Ruth Nocka, solicitor Dentons Australia Limited Defendant: Mr Maghami of Counsel instructed by Mr Kutasi solicitor of Solve Legal Attorney General – Mr Mr Moretti of Counsel instructed by Mr Bartley, Crown Solicitors office
File Number:	2024/220187

Judgment

1. These proceedings were commenced by the Plaintiff, Riley Dennis initially by way of Summons filed 14 June 2024 and then by way of order of Magistrate Greenwood dated 17 September 2024, a Statement of Claim dated 18 April 2025 seeking against the Defendant, Kiralee Smith the following orders pursuant to section 108 of the *Anti Discrimination Act 1977 (NSW)* ("**the Act**"):
    a. Damages;
    b. An order enjoining the Defendant from continuing or repeating any future public acts identifying the Plaintiff;
    c. An order that the Defendant publish an apology in respect of the conduct the subject of these proceedings, and remove any acts the subject of these proceedings from all public forums, including from all social media platforms;
    d. An order that the Defendant develop and implement a program or policy aimed at eliminating unlawful discrimination and transgender vilification in relation to any future public acts of the Defendant;
    e. An order that, in default of compliance with any of the orders referred to at (b) to (d) above, within 2 months from the date the orders are made, the Defendant pay the Plaintiff damages not exceeding $100,000 by way of compensation for failure to comply with the order or orders.
2. The proceedings are defended.
3. It is uncontroversial that the Plaintiff is a transgender woman[1] and the Defendant a "full time lobbyist and political spokeswoman"[2].
4. The Defendant concedes that between the period 27 March 2023 and 31 March 2023, she made the following social media posts:
    a. On 27 March 2023, the Defendant posted to Facebook stating[3]:

    "I have cried a lot today. Last night I was contacted by people in Sydney. It is alleged that two female soccer players were hospitalised over the weekend after being forced to play against a male appropriating womanhood. Trying to get hold of the video. Football Australia have received more than 2000 complaints about the men in teams such as Wingham FC and some Sydney first grade teams. No one is excluding trans,

[1] Exhibit 1 at [4]
[2] Exhibit 3 at [5]
[3] Ibid annexure RD-1

we simply want female sex-based services and spaces. The trans can play according to biology or on a mixed or trans team…".

b. On 27 March 2023, at 10:41am, the Defendant tweeted[4]:

"Far out! I go away for one week off grid and the world gets even madder. @ThePosieParker & friends assaulted in NZ. 2 female 1st grade soccer players in Sydney allegedly hospitalized after playing against a male in the women's division".

c. On 29 March 2023, at 9:53am, the Defendant posted to Twitter[5] and:

i. Stated in the post:

"Well, well, the top goal scorer after 3 rounds in the FNSW League One Women's First Grade is a male. How is that fair? That spot belongs to a woman. But @footballnsw refuses to define "woman" or explain why there's a woman's division if anyone is a woman".

ii. Included in the post a link to the FNSW Goal Scorers Leaderboard, which named the Plaintiff as the top goal scorer ("**the Leaderboard**").

Twitter user @FionaJaneMurray replied to the tweet stating: "*They have removed the table! Do you have a screenshot?*"[6].

On 29 March 2023 at 3:39pm, the Defendant replied[7]:

i. stating:

"*Fair dinkum they are ridiculous. You are correct, go there now and it is "table not found", here is the earlier screenshot that can easily be verified by looking at the team results*", and

ii. attached two screenshots of the Football NSW website, one of which named the Plaintiff.

d. On 29 March 2023 at 9:53am, the Defendant replied to the tweet[8] referred to in the preceding paragraph:

i. stating:

"*so they tell us #thisneverhappens: a male is top women's goal scorer for 1st grade football NSW*"; and

ii. tagged several organisations, media outlets and 'pro-women' activists, including @deves_katherine, @WomensForumAus,

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[4] Ibid at annexure RD-2
[5] Ibid at annexure RD-3
[6] Ibid at annexure RD-8
[7] Ibid
[8] Ibid at RD-3

@dailytelegraph, @clarissa_bye, @BenFordhamLive, @theAIS, @SkyNewsAust, @salltweets, @MoiraDeemingMP, @angijones, @KatKarena, @realDailyWire, @MattWalshBlog.

e. On 29 March 2023, a twitter user with the handle @tipplytina replied to the Defendant's tweet dated 29 March 2023 at 9.53am, with an image of Michelle Heyman of the Matilda's stating[9]:

"the leading women's goal scorer appears to be Michelle Heyman – a well known lesbian. Is she a biological male?".

On that same day Defendant replied twice:

i. Firstly, at 11am the Defendant stated:

"Look at FNSW League One Womens – 1st Grade" ; and

provided a link to the FNSW Goal Scorers Leaderboard, which named the Plaintiff as the top goal scorer; and

ii. Secondly at 11:01am, the Defendant posted a further reply stating:

"it's not the person you posted"[10]

iii. at 12.51pm the Defendant posted another reply stating: *"NSW Football have removed photos. Google however has plenty so do some of the football clubs that have played against him"* [11]

Thereafter, on 29 March 2023 at 9:55am, the Defendant replied to a tweet from Twitter user @TheCountessIE[12]:

i. stating:

"The top goal score position is held by a male in the NSW Women's League One First Grade for soccer", and

ii. A link to the Football NSW Goal Scorers Leaderboard, which named the Plaintiff as the top goal scorer.

f. On 29 March 2023 at 3:50pm, the Defendant posted on twitter[13]:

i. stating:

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[9] Ibid at annexure RD-5
[10] Ibid at annexure RD-6
[11] Ibid
[12] Ibid annexure RD-4
[13] Ibid at annexure RD-9

"Spot the difference? Why is @FootballNSW going to such great lengths to hide the evidence that a male player is top of the women's leaderboard?", and

ii. attached two screenshots of the Football NSW website, one of which named the Plaintiff.

g. On 29 March 2023 at 9:15pm, the Defendant tweeted in reply to a comment by Burnbot101 and Josh B and stated[14]:

"@FootballNSW @FootbalAUS cancel, ignore or bully players, parents and concerned citizens!

No one is allowed to complain or even raise concerns. Players suffer as a result.

Wait til you see footage that is coming!"

h. On 29 March 2023, the Defendant commented on a Facebook post by 'NSW NPL Banter Page':

i. stating:

"*It is in the Daily Telegraph today*"; and

ii. Posting a screenshot of the Football NSW leaderboard;

The screenshot contained the Plaintiff's name.

iii. Further stating:

- "*Top scorer is male*". I note the
- "*I have spent months trying to speak with officials at Football NSW about their policy to allow males to play as female. There are several in NSW. Our supporters have sent 12,000 emails and all Football NSW has done is bully us and silence us and vilify us*".
- "*We will keep exposing this nonsense until girls and women have a safe and fair playing field*".

i. On 30 March 2023 at 9:39am, the Defendant posted on twitter[15]:

i. stating:

"*Every other leaderboard is intact, but not the one that has a male playing in the female division*" and

ii. attached a screenshot of the Football NSW Goal Scorer's Leaderboard which showed the leaderboard was no longer available.

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[14] Ibid at annexure RD-10

[15] Ibid at annexure RD-12

j. On 30 March 2023 at 12:52pm, the Defendant replied to a response to the tweet referred to in the preceding paragraph[16], and

i. stated:

"*I got a screenshot before it mysteriously became unavailable*" and

ii. attached a screenshot of the FNSW Goal Scorer's Leaderboard which named the Plaintiff as the top goal scorer.

k. On 31 March 2023 at 7:37am, the Defendant tweeted and:

i. Stated:

"*The top goal scorer in the NSW Women's League One First grade soccer is male. Parents have told @dailytelegraph there have been injuries and it is unfair! Some will consider taking action. @FootballNSW fail to safeguard women and girls for the sake of men's feelings*!" ; and

ii. The tweet attached a screenshot of a Daily Mail article with the headline, 'Parent Fury at trans player in elite women's soccer comp'.

("**the Social Media Posts**")

5. These proceedings were commenced and heard after *Stephanie Blanch -v- Kiralee Smith and Gender Awareness Australia Pty Limited T/as Binary Australia Limited*[17]. As both proceedings involved the same Defendant and similar issues the parties agreed to my hearing both matters. I received detailed written submissions from all parties in both matters, and I am handing down both decisions on the same day.

6. The issue of whether transgender women should play on a women's sport team is an emotionally vexed one, but it is <u>not</u> the issue to be determined by me in these proceedings. The ultimate issue is whether the acts or conduct of the Defendant as particularised, amount to unlawful vilification of the Plaintiff pursuant to section 38S, of the Act.

7. Accordingly, the issues I need to determine are as follows:

a. Is the Plaintiff a transgender woman pursuant to section 38A of the Act?

b. Did the acts of the Defendant vilify the Plaintiff?

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[16] Ibid

[17] File number 2024/78280

c. Were the acts carried out reasonably and in good faith pursuant to section 38S(s)(c) of the Act?

d. In the event that I am satisfied that any of the acts of the Defendant vilified the Plaintiff, is section 38S of the Act ultra vires of the Commonwealth Constitution, for its disproportionate burden on the implied freedom of political communication?

I will deal with each of these issues in turn.

8. In order to determine the issues referred to the preceding paragraph it is convenient to classify the various "acts" of the two categories:

a. Firstly, the posts to facebook and twitter (now known as X) and comments to posts on these platforms made by the Defendant between the period 29 March 2023 and 31 March 2023 as set out in paragraph 4 above ("**the Social Media Posts**"); and

b. Secondly, the articles written by third parties where the Defendant is referenced and quoted, namely the:

I. Daily Mail article dated 31 March 2023[18]

II. Reduxx article dated 1 April 2023[19]

III. ABC news dated 1 April 2023[20]

IV. Daily Mail dated 3 April 2023[21]

V. News.com dated 3 April 2023[22]

VI. Daily Mail dated 4 April 2023[23]

VII. Daily Telegraph dated 4 April 2023[24]

VIII. Reduxx article dated 2 May 2023[25]

I will deal with these categories separately. When considering the issues to be determined

[18] Exhibit 1 annexure RD-15
[19] Ibid annexure RD - 16
[20] Ibid annexure RD - 17
[21] Ibid annexure RD-18
[22] Ibid annexure RD-19
[23] Ibid annexure RD-20
[24] Ibid annexure RD-21
[25] Ibid annexure RD 23

IS THE PLAINTIFF A TRANSGENDER WOMAN PURSUANT TO SECTION 38A OF THE ADA?

9. Section 38A of the Act defines a transgender person as a reference to a person

"..whether or not the person is a recognised transgender person –

(a) who identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex, or

(b) who has identified as a member of the opposite sex by living as a member of the opposite sex, or

(c) who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex,

and includes a reference to the person being thought of as a transgender person, whether the person is, or was, in fact a transgender person".

10. I note that the Defendant does not admit that the Plaintiff is a transgender female[26].

11. It is the evidence of the Plaintiff that:

    a. She is transgender[27]; and
    b. She has lived openly as a woman since 2015[28]

12. It was the evidence of the Defendant inter-alia that:

    a. After she became aware that the top goal scorer in women's Football NSW league was "male" she posted the link to the leaderboard[29];
    b. She researched the background of the Plaintiff and found out that she "openly admitted to being a self-identified 'transgender female'"[30]

13. Accordingly, I am satisfied on balance that the Plaintiff is a transgender person pursuant to section 38A of the Act as firstly, she identifies a member of the opposite sex by living as a member of the opposite sex since 2015 and secondly, she was thought to be a transgender person by the Defendant.

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[26] Defence filed 14 October 2024 at [2]
[27] Exhibit 1 paragraph 4
[28] Exhibit 1 paragraph 4
[29] Exhibit 1 paragraph 28;
[30] Ibid paragraph 29;

DID THE ACTS OF THE DEFENDANT VILIFY THE PLAINTIFF?

14. Section 38S of the Act makes transgender vilification unlawful. It states:

> ***38S Transgender vilification unlawful***
>
> *(1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of—*
>
> *(a) a person on the ground that the person is a transgender person, or*
>
> *(b) a group of persons on the ground that the members of the group are transgender persons.*
>
> *(2) Nothing in this section renders unlawful—*
>
> *(a) a fair report of a public act referred to in subsection (1), or*
>
> *(b) a communication or the distribution or dissemination of any matter on an occasion that would be subject to a defence of absolute privilege (whether under the Defamation Act 2005 or otherwise) in proceedings for defamation, or*
>
> *(c) a public act, done reasonably and in good faith, for academic, artistic, scientific, research or religious discussion or instruction purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter."*

15. Section 38R of the Act states:

> "*38R Definition*
>
> *In this Division—*
>
> ***public act includes—***
>
> *(a) any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material, or*
>
> *(b) any conduct (not being a form of communication referred to in paragraph (a)) observable by the public, including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia, or*
>
> *(c) the distribution or dissemination of any matter to the public with knowledge that the matter promotes or expresses hatred towards, serious contempt for, or severe ridicule of—*
>
> *(i) a person on the ground that the person is a transgender person, or*
>
> *(ii) a group of persons on the ground that the members of the group are transgender persons.*

16. There are four elements[31], in determining whether an act is determined to be unlawful vilification, namely:
    a. Firstly, there is a public act
    b. Secondly, the act/s incites
    c. Thirdly, the act/s incite hatred towards, serious contempt for, or severe ridicule of a person; and
    d. Finally, it is on the ground that the person is a transgender person
17. The test is an objective one[32] with the focus on the words used or actions taken[33] in the course of the act/s. The Defendant's intention is irrelevant[34].
18. Accordingly, I need to determine in relation to each category of the acts set out in paragraph 8 whether they were firstly public acts, secondly the posts (or act) incites, thirdly that the incitement can cause hatred towards, serious contempt for or severe ridicule of a person and finally it is on the ground that the person is a transgender person.

Were the acts "public acts"?

19. The Defendant conceded that the first category, namely the Social Media Posts she made between the period 29 March 2023 and 31 March 2023 were "public acts" as defined by s38R(a) of the Act, as "form of communication to the public"[35].
20. In relation to the second category the Defendant submits:

    "*the [plaintiff's] submissions either relies upon the erroneous assumption that a public act under s38S may be a broad course of action and effect over time, or fails to comprehend the distinction between the public acts of the Defendant and those of third party*"[36]

21. I assume that they argue that as the Defendant did not author or publish either the Daily Mail articles dated 31 March 2023, 3 April 2023[37], 4 April

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[31] Barry -v- Futter [2011] NSWADT 205 at [62]
[32] Kerslake -v- Sunol [2022] ACAT 40 at [73]
[33] Ibid
[34] Ibid
[35] Defendant's opening submissions at [36]
[36] Ibid at para 80
[37] Exhibit 1 annexure RD-18

2023[38] or the Reduxx article dated 1 April 2023 and that they are merely acts of third parties and therefore are not public acts attributable to the Defendant.

22. The evidence of the Defendant in relation to this issue can be summarised as follows:

    a. She makes her point as a spokeswoman and political commentator – whether by Twitter and Facebook, or other means in the public domain – to advocate the objectives of Binary around traditional gender definitions and protection particularly, of biological women and girls"[39]
    b. She was quoted in the Daily Mail article dated 31 March 2023, and it happened after "I had elsewhere expressed my opinion in other articles or through my political advocacy as a spokeswoman for Binary"[40]
    c. That she spoke to the Daily Mail in relation to the article dated 4 April[41];
    d. She cannot recall if they asked her if it was Riley Dennis who had injured players[42];
    e. That she did not author the daily mail article[43] nor publish it;
    f. She did not author the Reduxx article nor publish it[44];
    g. She gets a lot of media inquiries;
    h. On 4 April 2023, she gave comments to the media (after they called her)[45] and provided comments to the media[46] more generally;
    i. That she was quoted in the article dated 31 March 2023,

23. Section 38R of the Act does not specifically reference this scenario, namely where the Defendant gave interviews to the media and she was subsequently quoted in articles or publications that were neither authored or published by her.

24. It was held by Branson J in *Jones -v- Toben*[47] that the posting of material on a publicly available or accessible site was an act "not done in private" for the

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[38] Exhibit 1 annexure RD-20
[39] Exhibit 3 at [17]
[40] Exhibit 3 at [75]
[41] Transcript 14 April 2025 page 42.32-34
[42] Ibid at page 42.45-49
[43] Ibid page 43.29
[44] Exhibit 3 at [77]
[45] Ibid at [79]
[46] Ibid at [78]
[47] [2002] FCA 1150

purpose of the analogous vilification provisions of the Racial Discrimination Act 1975(Cth). Her Honour held:

"In my view, the placing of material, whether text, graphics, audio or video, on a website which is not password protected is an act which causes words, sounds, images or writing to be communicated to the public in the sense that they are communicated to any person who utilises a browser to gain access to that website.

I conclude that the placing of material on a website which is not password protected is an act which, for the purposes of the [Race Discrimination Act], is taken not to be done in private …

I further conclude that the act of placing text and graphics on a website which is not password protected is an act of publication, or perhaps more accurately an act which causes repeated publication, in that it allows individuals who access the website with a browser to read that text and see those graphics."[48]

25. In the more recent 2024 decision of *Duan -v- Bridge*[49], the Administrative and Equal opportunity Division of NCAT provided a summary of recent decisions as what acts were found to be public acts:

"There is no definition of the word "public" in the Anti-Discrimination Act. Questions have arisen as to the distinction between public and private acts and whether it covers instances where the person who is being vilified is alone with the villifier — that is, whether the public act must be observed by a third person or whether it is sufficient for the act to be observable.

The word "public" has been found to include the possibility of being overseen or overheard by the public, even if the act took place on private property, in the cases cited below.

In R v Ashley (1991) 77 NTR 27 at 30 it was held that public includes the possibility of being overheard by or visible to passersby, even if the act took place on private property.

…

In Anderson v Thompson [2001] NSWADT 11, the Tribunal held that abusive words spoken on the stairwell of a block of units constituted a form of communication to the public. Although there were no eyewitnesses, the words were spoken with such force they could be overheard by other residents.

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[48] Ibid at [73] – [75]
[49] [2024] NSWCATAD 349

In Haas v Hosking [2010] NSWADT 42, the Tribunal held that no 'public act' under s 20B was committed by the respondent when, in the context of a dispute about the boundary between rural properties owned by the respondent and the applicant, the respondent made statements allegedly constituting racial vilification in the presence of two witnesses. The Tribunal found at [77]–[78] that the statements were made in a private conversation in conversational tone and were not intended to be overheard by anybody.

..

Section 20B is an inclusive and non-exhaustive definition of a "public act". The first limb of the definition is in very broad terms "any form of communication to the public". The width of the definition is such that it would encompass the circumstances of this claim, as would the second limb, which is "any conduct observable to the public".[50]

26. In *Jones -v- Trad*[51] Mr Trad made a claim pursuant to section 20C of the Act that he was vilified on the grounds of race by Alan Jones and Harbour Radio Pty Limited. It was argued by Counsel for Mr Jones before the Tribunal at first instance and on appeal that broadcast was not a public act by Mr Jones because it was Harbour Radio, as the licensed broadcaster, who made the broadcast. They argued that "Mr Jones' role was to simply provide content for the broadcast and was simply to provide content for the broadcast and that Mr Jones had no capacity to communicate the content to the public in his own right"[52]

27. It was held by Ward JA (Emmet JA and Gleeson J agreeing) that:

"Section 20B(a) is in very broad terms ("any form of communication to the public"). It makes clear that a communication to the public for the purposes of s 20C may take one of a number of forms. Relevantly, it includes "speaking" as well as "broadcasting". Even if the concept of broadcasting in that section is limited to the technical act of making the radio transmission to the public by use of the necessary electronic equipment, whether that person be authorised by a statutory licence or not, rather than (as I consider would be more consistent with the ordinary usage of the word "broadcasting") including the conduct of someone publicly speaking via the medium of a licensed broadcaster's equipment, there is nothing in s 20C to suggest that there may not, in the course of the particular conduct of which complaint is made, be two separate contraventions.

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[50] Ibid at [56]-[67]
[51] [2013] NSWCA 389; BC201315412
[52] Jones v Trad [2013] NSWCA 389 at [32]

In the present case, Mr Jones spoke the offending words into a microphone or other sound transmission equipment for the purpose of those words being broadcast almost simultaneously to his radio audience. Harbour Radio, as is conceded by it, played a different role in the technical act of broadcasting Mr Jones' speech by way of radio transmission. The fact that, by reason of the technical act of making the radio transmission to the public, Harbour Radio was engaged in a public act when making the Sch A broadcast, does not in my view preclude a finding at the same time that Mr Jones was engaged in a separate public act in speaking the words for public broadcast.

This is consistent with the finding by the Tribunal in Western Aboriginal Legal Service Ltd v Jones [2000] NSWADT 102, that Mr Jones (there described as a primary participant in the publication) had performed a public act, as defined in s 20B(a), by communicating to the public "via the medium of broadcasting" on a particular radio station (at [133]). Similarly, in Burns v Radio 2UE Sydney Pty Ltd [2004] NSWADT 267, the Tribunal held (at [11]) that the relevant public act was committed not only by the entity holding the broadcasting licence but also by the two presenters concerned.

Although Ms Eastman suggested that a construction of s 20B(a) that encompassed Mr Jones' conduct in the present case would have the result that a speaker or author might be liable, many years after the speaking or writing of words offending the racial vilification provisions, simply because another person chose later to communicate those words to the public (with or without the consent of the speaker or author), each case must be considered on its own facts. Here, Mr Jones spoke the words in question that were almost immediately broadcast to his radio audience by Harbour Radio. Such a communication is in my view a public act within s 20B(a)."[53]

28. Emmett JA, after considering the relationship and in particular the Service Agreement between Mr Jones and Harbour Radio stated:

The question is whether, in the light of those arrangements, it can be said that Mr Jones, as distinct from Harbour Radio, engaged in any form of communication to the public, or in the distribution or dissemination of any matter to the public, by the transmission of the Broadcast.

....

There can be no doubt that the transmission of the Broadcast over radio station 2GB and the internet was conduct of Harbour Radio. ...

Mr Jones expected, with justification, that Harbour Radio would transmit to the public the content of the Broadcast, being the Program, within the meaning of the Service Agreement. In

[53] Ibid at [43] –[46]

fact, Harbour Radio transmitted the Broadcast within a very short time after Mr Jones spoke the words. Indeed, the Service Agreement contemplates a "live radio program". However, the Service Agreement contemplates that copyright in the Program would vest in Harbour Radio. The Program may be copied and retransmitted. On the construction accepted by the Appeal Panel, as contended for by Mr Trad, a speaker might be liable for an unlawful act many years after the words are spoken, simply because another person communicates a recording of those words to the public. That liability would arise even if the words were broadcast without the consent of the person. Thus, Mr Jones might be liable for an unlawful act in the distant future if Harbour Radio decided to transmit the Broadcast to the public again. While the words spoken by Mr Jones that are the subject of Mr Trad's complaint were broadcast very shortly after he spoke the words, if the construction accepted by the Appeal Panel and contended for by Mr Trad were to be accepted, s 20B would apply to any subsequent communication of the words spoken by Mr Jones.

On the other hand, the definition of public act in s 20B is an inclusive, non-exhaustive one, and the first limb of the definition is very wide. It is defined to include any form of communication to the public, which in turn is defined as including "speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and the playing of tapes or other recorded material". Thus, any form of communication to the public, in the sense of any type or kind or means of communicating, will satisfy the definition.

The width of the definition is such that the better view of it is that it would encompass the circumstances of the present case. That is to say, under the Service Agreement, Mr Jones has complete discretion and independence as to the content of the Program. He and Belford have a contractual right to require Harbour Radio to transmit the Program as a live Program between specified hours. Mr Jones knew, when he spoke the words that were transmitted as the Broadcast, that they would be transmitted to the public immediately, or at least no more than a matter of seconds after they were spoken. Mr Jones engaged in a public act in compiling and speaking the content of the Broadcast, knowing that it was to be transmitted almost immediately in the performance by Harbour Radio of its contractual obligations to him and to Belford under the Service Agreement.

The position may be different if the compiling and speaking of the content of a program was intended for subsequent transmission at the discretion of a licensed broadcaster. That is not the question presently before the court. The critical difference is that Mr Jones knew that the content of the Broadcast was to be transmitted almost instantaneously, because he had a contractual entitlement for that to happen.[54]

29. Finally, Section 37A of the *Discrimination Act 1991 (ACT)* states that:

Unlawful vilification

[54] Ibid at [164]- [173]

(1) It is unlawful for a person to incite hatred toward, revulsion of, serious contempt for, or severe ridicule of a person or group of people on the ground of any of the following, other than in private:

(a) disability;
(b) gender identity;
(c) HIV/AIDS status;
(d) race;
(e) religious conviction;
(f) sex characteristics;
(g) sexuality.

Examples—other than in private

1 screening recorded material at an event that is open to the public, even if privately organised
2 writing a publicly viewable post on social media
3 speaking in an interview intended to be broadcast or published
4 actions or gestures observable by the public
5 wearing or displaying clothes, signs or flags observable by the public

I note that unlike the Act, it specifically deems speaking in an interview intended to be broadcast or published as an act other than in private, that is a public act.

30. The Defendant describes herself in her evidence as the "founder of Gender Awareness Australia Limited"[55] which trades as "Binary Australia" and that she is a "full-time lobbyist and political spokeswoman"[56], of Binary Australia. She describes her role as:

"*I am tasked with advocating for policy change by public advocacy. This often requires me to give newpaper commentary, appear on mainstream media, write online articles and blog posts...*"

31. I am satisfied on the evidence before the Court, that the Defendant engaged with the media with the intention of having her message, comments and quotes shared and broadcast through the articles and/or news stories which were ultimately written and broadcast by others.

32. Accordingly, I am satisfied that although the Defendant did not author or publish either the Daily Mail and Reduxx articles, the act of speaking to the media and the authors of the articles and providing quotes for those articles satisfies me that making those comments to the media was a public act for the following reasons:

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[55] Exhibit 3 at [3]
[56] Ibid at [5]

a. Firstly, she spoke to the media / authors of the articles with the purpose of having her comments and views in relation to transgender women playing on women sports teams included in the articles;
b. Secondly, she was aware that the contents of the conversation she had with the media were to be published. I am satisfied that she knew that the conversation was to be broadcast / published to a wider audience; and
c. Finally, the proximity of her conversations with the media and the articles being published;

Were the acts capable of inciting hatred of, serious contempt for, or severe ridicule of the plaintiff?

33. Pursuant to s 38S of the Act, for a public act to be unlawful vilification it has to "incite hatred towards, serious contempt or severe ridicule of" a person on the ground that person is a transgender person.
34. The test is an objective one[57].
35. Furthermore, it is not necessary:
    a. For a person or people to be incited by the act or acts[58]; nor
    b. To show an intention to incite[59].
36. The 2019 decision of the Equal Opportunity Division of NCAT in *Riley v State of New South Wales (Department of Education)*[60] conveniently summarises the law with respect to the term incite:

"*The word "incite", when used in vilification provisions, has its ordinary natural meaning (being "to rouse, to stimulate, to urge, to spur on, to stir up, to animate" and it covers "words which command, request, propose, advise or encourage"): Sunol v Collier (No 2) [2012] NSWCA 44; (2012) 260 FLR 414, Bathurst CJ at [26]-[28].*

The words "hatred", "serious contempt" and "severe ridicule" are to be given their ordinary meaning: Kazak v John Fairfax Publications Limited [2000] NSWADT 77 at [40]; Ekermawi v Jones (No 3) [2014] NSWCATAD 58 at [33]. The applicants allege in their Further Amended Points of Claim that the public acts of Ms Head and Ms Bermingham incited severe ridicule

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[57] Kerslake -v- Sunol [2022] ACAT 40 at [73]
[58] *Sunol v Collier (No 2) [2012] NSWCA 44; (2012) 260 FLR 414, Bathurst CJ at [29]-[31] (Allsop P agreeing).*
[59] Ibid
[60] *[2019] NSWCATAD 223*

and severe (presumably they mean serious) contempt. In Kazak v John Fairfax Publications Limited [2000] NSWADT 77 at [40], the Tribunal set out the ordinary meaning of "serious", "contempt", "severe" and "ridicule", as defined in the Macquarie Dictionary and Oxford Dictionary:

- *""serious" means "important, grave" (Oxford); "weighty, important" (Macquarie);*

- *"contempt" means "the action of scorning or despising, the mental attitude in which something or someone is considered as worthless or of little account" (Oxford); the feeling with which one regards anything considered mean, vile, or worthless (Macquarie);*

- *"severe" means "rigorous, strict or harsh" (Oxford); "harsh, extreme" (Macquarie);*

- *"ridicule" means "subject to ridicule or mockery; make fun of, deride, laugh at" (Oxford); "words or actions intended to excite contemptuous laughter at a person or thing; derision" (Macquarie)."*[61]

37. Counsel for the Defendant, Mr Maghami contends that the Social Media Posts did not incite hatred, serious contempt for or severe ridicule of the Plaintiff. He also argues that that they must be taken as a whole and in context as opposed to a selective reading of particular extracts[62].

38. In relation to the Social Media Posts, the Defendant further submits that:
    a. the Plaintiff was never named in any of the Social Media Posts or communications between 27 March 2023 and 31 March 2023[63]
    b. the Plaintiff was a "well known "you-tuber" who has been a public advocate online on a number of political and social issues relating to both transgenderism, gender and faith"[64]
    c. The substance of the posts were both general in their nature and directed at the gender policies of Football Australia, they merely use the Plaintiff's public activities as an "example or case study" of the policy in action[65]
    d. The posts were not personally directed at the Plaintiff[66]

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[61] Ibid at [131]
[62] Ibid at [41]
[63] Defendant's opening submissions at [12(b)]
[64] Ibid at [12(c)]
[65] Ibid at [42(a)]
[66] Ibid

e. The posts or replies to posts are the "personal opinions, questions and reporting of public events" of and by the Defendant[67]

f. She only referenced the Plaintiff "vaguely as "male" or "man"" and it is language "consistent with the policy platform of the Defendant and traditional definitions of gender"[68]

g. There is no "call to action urging rousing command request proposition or encouragement to take any particular action in respect of the Plaintiff"[69]

h. There is no call to action against transgender persons in the community[70]

39. Finally, the Defendant argues that the Plaintiff's case taken at its highest "seems to repeatedly equate the alleged misgendering with the posts" by referencing the Plaintiff as a male or man as incitement under the Act[71].

40. In support of these submissions Mr Maghami refers to the comments of Bathurst CJ in *Sunol -v- Collier (No 2)*[72] ("***Sunol***") where he proffers a "word of caution" stating:

"Although it is clear from this review of the authorities that the word "incite" can cover a wide variety of conduct, it must be borne in mind that it is not sufficient to attract the operation of s 49ZT that the words simply express hatred, serious contempt for, or severe ridicule of a person on the grounds of homosexuality; the relevant public act must be one which could encourage or spur others to harbour such emotions: Burns v Dye supra at [20]; Burns v Laws (No 2) supra at [113]"[73]

41. I note that Basten JA agreed:

"*I agree with the construction of s 49ZT of the Anti-Discrimination Act 1977 (NSW) outlined by Bathurst CJ. The critical aspect of s 49ZT for present purposes is the requirement that to be unlawful the conduct must incite "hatred towards, serious contempt for, or severe ridicule of" persons within the protected class. Mere insults, invective or abuse will not engage the prohibition.*"[74]

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[67] Ibid
[68] Ibid at [42(d)]
[69] Ibid at [42(e)]
[70] Ibid
[71] Ibid at [43]
[72] [2012] NSWCA 44
[73] Ibid at [28]
[74] Ibid at [79]

42. In the 2021 decision of the Administrative and Equal Opportunity Division in *Lamb -v- Campbell*[75] citing *Margan -v-Manias*[76] held:

"*In Margan the Court of Appeal adopted the findings in Sunol No 2 and also noted that:*

1. *there can be no incitement in the absence of an audience (at 76);*
2. *the identification and nature of the audience are essential for the purpose of determining objectively whether an ordinary member of that audience would be likely to be incited by Mr Campbell's public act (at 78);*
3. *it is not necessary that any person actually be incited (at 12); and*
4. *it is necessary that the words used are capable of inciting hatred, serious contempt, or severe ridicule (at 11).*

In Sunol No 2 at [41(a)] the Court of Appeal found that incite means "to rouse, to stimulate, to urge, to spur on, to stir up or to animate and covers conduct involving commands, requests, proposals, actions or encouragement".

It is clear from the authorities above that inciting hatred, serious contempt, or severe ridicule involves more than merely expressing hatred, contempt or ridicule. It is necessary for the Tribunal to find that the words are capable of encouraging or spurring <u>others</u>."[77]

43. The Defendant argues that the salient features and focus of the Social Media Posts were with respect to the policies of Football Australia and not the Plaintiff and that the language used is nothing more than "mere insults, invective or abuse" which do not impugn the legislation.

44. This is an appropriate point to consider the audience, which the Social Media Posts were directed to or conveyed. In *Sunol*, Bathurst CJ opined:

The next issue of construction raised by the section is whether the public act required for a contravention of s 49ZT is one which would incite hatred, serious contempt for or severe ridicule in an "ordinary reasonable reader" or in a reasonable member, or an ordinary member, of the class to which the public act was directed. The first of the three alternatives is the one which has been consistently adopted by the Tribunal, following the test set out by the Court of Appeal in Amalgamated Television Services Pty Ltd v Marsden (1998) 43 NSWLR 158 at 165 that "the ordinary reasonable reader ... is a person of fair average intelligence, who is neither perverse nor morbid or suspicious of mind, nor avid for scandal. That person does not live in an ivory tower but can and does read between the lines in the light of that person's general knowledge and experience of worldly affairs": John Fairfax Publications Pty Ltd v Kazak supra at [13]-[14]; Veloskey v Karagiannakis supra at [26]; Burns v Cunningham supra at [69].

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[75] *[2021] NSWCATAD 103*
[76] *[2015] NSWCA 38*
[77] Lamb -v- Campbell at [34]-[36]

A different approach to the question was taken by the Court of Appeal of Victoria in Catch the Fire Ministries Inc supra. In that case Nettle JA took the view that for conduct to incite hatred it must reach a relevant audience. In those circumstances he said the question is to be answered having regard to the effect of the conduct on a reasonable member of the class of persons to whom it is directed (at [16]-[18]). Ashley JA and Neave JA on the other hand suggested the question should be decided by reference to an ordinary member of the class rather than a reasonable member (at [132], [157]-[158]).

I prefer the view of Ashley and Neave JJA. This is because the legislation is concerned with the incitement of hatred towards, serious contempt for, or serious ridicule of homosexuals. That, of my view, can be measured only be reference to ***an ordinary member of the class to whom the public act is directed****. To determine the issue by reference to a reasonable person without considering the particular class to whom the speech or public act is directed would, in my opinion, impose an undue restriction on the operation of the legislation.*[78]

45. Furthermore, Allsop J held that the audience against which the public act is to be assessed for the purposes of the section, may be very important to the individual case, and may well be intimately connected with the whole context of the public act. He states:

"Thus, in an emotionally charged public meeting where reason has been pushed aside by passion or hatred, it may be inappropriate to posit the standard of the "reasonable" member of the class which may be aptly described as a group of impassioned bigots. The question is ultimately one of fact in the context in which the act takes place. If the general public is being addressed, bearing in mind the approach conformable with Brown and Coco, the ordinary and reasonable members of the public may be appropriate to consider.

Further, satisfaction of s 49ZT(1) is not necessarily to be assumed or concluded by rude, indecorous, base or insulting language that reflects some dislike of, or opposition to, homosexuality. The section provides for an act to incite hatred, serious contempt, or severe ridicule. Fine linguistic distinctions should of course not be drawn which may deflect attention from the language of the statute. The words of the statute are to be applied with a recognition of the degree or quality of the act contemplated by the language. The act is to be assessed by reference to the context in which it takes place, including the audience or likely audience.[79]

46. The evidence of the Defendant is unequivocal. She is a political lobbyist and advocates against transgender women playing in women's sports teams. Her evidence regarding the Social Media Posts can be summarised as follows:

    a. The Social Media Posts are:

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[78] Sunol -v- Collier at [32]-[34]
[79] Ibid at [61] and [62]

"*intended to gravitate attention to (and create respectful debate about) promotion of traditional gender definitions and opposition to policies which blur or refuse the distinction…..Moreover they add to the ongoing public political discussion of the political issue around gender and sport*"[80]

b. Each post is intended to invoke public discussion[81]

c. She tagged in her posts various organisations and media outlets[82]

47. The evidence before the Court is that the Defendant:

a. tagged the following people and organisations in her reply to her post dated 29 March 2023 namely: @deves_katherine, @WomensForumAust, @dailytelegraph, @clarissa_bye, @BenFordhamLive, @theAIS, @SkyNews Aust, @saltweets, @MoiraDeemingMP, @angijones, @KatKarena, @realDailyWire, @MattWalshBlog[83]; and

b. replied to posts of like-minded people or organisations who were posting about transgender women playing on womens sports teams[84]

48. Accordingly, I am satisfied that the audience of the Social Media Posts are people or organisations who are engaged with respect to the issue of transgender women playing on women's sports teams. Therefore, I am satisfied that this audience is more likely than not to be roused stirred up or spurred on by the acts of the Defendant.

49. Mr Maghabi submitted that in relation to the Social Media Posts inter-alia that:

a. Each Social Media Post must be individually assessed under the *Sunol* test[85]

b. A collective assessment of the Social Media Posts is impermissible[86]

c. Several of the Social Media Posts contain references to or screenshots of the Football NSW Leaderboard which has the Plaintiff's name on it[87]

d. That the Social Media Posts should be considered as discreet acts, including both their writing and any image shared[88]

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[80] Exhibit 3 at [20]
[81] Ibid at [25]
[82] Ibid at [48]
[83] Exhibit 1 annexure RD-3
[84] Ibid annexures RD-4, RD-5, RD-10, RD-11,
[85] Defendant's opening submissions at [29] and [32]
[86] Ibid at [31]
[87] Ibid at [42(c)]
[88] Ibid at [61]

e. Simply resharing the screenshot of the Football NSW leaderboard which is a publicly available image does not in itself impugn s38S of the Act

f. The Leaderboard was public available information and was made available on the public website of Football NSW[89]

g. The sharing of the Leaderboard, "constitutes a contemporaneous statement of fact and reporting of the Plaintiff's public activities and could not be capable of constituting a breach of s38S" of the Act[90]

h. The consistent misgendering of the Plaintiff in the Social Media Posts as "he" and "male" and the use of pronouns and nouns does not "give rise to the level of incitement of vilification of the Plaintiff based on their transgender status"[91]

i. None of the Social Media Posts the subject of these proceedings, have tagged, positively identified, or called for action against the Plaintiff". The defendant is simply "voicing a political opinion directed at the policy of Football Australia or voicing opposition in respect of the same"[92]. Furthermore, at no point can it be shown that the Defendant has made commentary directed at the Plaintiff, which is hateful, seriously contemptuous or severely ridiculing of them.[93]

j. That the Defendant cannot be held responsible for the conduct of third parties online

50. In support of the submissions made in the preceding paragraph Mr Maghabi relies on the authority of *Riley -v- New South Wales (Dept of Education)* where the Tribunal found:

> "*We note, however, that making a racially offensive comment is not, without more, racial vilification, because it does not necessarily incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of race*[94]

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[89] Ibid at [63]
[90] Ibid at [64]
[91] Ibid at [43] and [58]
[92] Ibid at [55]
[93] Defendants opening submissions at [86]
[94] *Riley -v- New South Wales (Dept of Education) [2019] NSWCATAD 223; BC201909723 at [244]*

51. I have examined each of the Social Media Posts by the Defendant between 29 March 2023 and 31 March 2023, the subject of these proceedings and I observe the following:

a. The Social Media posts which are annexures to Exhibit 1 namely, RD-3, RD- 4, RD-5, RD-8, RD-11 and RD-14:

i. Attached a link or screenshot to the Leaderboard[95], where the top goal scorer on the Leaderboard was the Plaintiff, Riley Dennis; and

ii. Stated one or more of the following:

a) "the top goal scorer …in the FNSW League One Women's First Grade is a male"[96]

b) "a male is top women's goal scorer for 1st grad football in NSW"[97]

c) "The top goal scorer position is held by a male in the NSW Women's League One First Grade for Soccer"[98]

d) "Why is @FootballNSW going to such great lengths to hide the evidence that a male is tope of the women's leaderboard?"[99]

b. The comments made by the Defendant on the Facebook NSW Banter page[100] which included:

i. A screenshot of the Leaderboard which named the Plaintiff as the top goal scorer; and

ii. Stated "Top scorer is male"and

iii. Link to article titled "keep blokes out of women's sport"

c. The Social Media Post dated 31 March 2023[101]:

i. Stated:

"*the top goal scorer in the NSW Women's League one First grade soccer is male*

Parents have told @dailytelegraph there have been injuries and it is unfair! Some will consider taking legal action.

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[95] RD -3, RD-4, RD-5, RD-8, RD-11, RD-12, RD-14,
[96] RD-3,
[97] RD-3,
[98] RD-4
[99] RD-9
[100] Exhibit 1 at RD-11
[101] Ibid at RD-13

@FootballNSW fail to safeguard women and girls or the sake of men's feelings!"

ii. Attached a link to an article titled:

"*Parent fury at trans player in elite women's soccer comp*"

iii. The link also states:

"*Parents of girls playing in an elite female soccer league say allowing transgender women to play makes the game unsafe and unfair for their daughters*

SUBSCRIBE TO READ MORE"

52. As previously stated, it is not necessary for a person or persons to be incited by an act/s[102] however in this case, there is actual evidence before the Court that people were in fact incited by the Social Media Posts of the Defendant for example:

a. Response to the Defendant's Social Media Post on twitter dated 29 March 2023 by @FVMorthorpe which stated:

"*please tell me it's not every Lesbians worst nightmare @RileyJayDennis*?"[103]

b. Comments on the NSW Banter page[104] included:

i. "*apparently it identifies as 'he/she', 'non-binary' and is 'lesbian', I bet all the girls enjoy having this thing in their dressing room and the opposition must love it too; otherwise why is it happening?*"

ii. "*he is literally stealing women's accolades, staff that women have worked hard for*"

iii. "*Let's not play their charade and call them by their proper pronoun… him*"

c. Following the Social Media Posts made by the Defendant, @FraserDAnderson made several posts to twitter that referenced the Plaintiff namely:

i. On 17 May 2023, at 9.55am[105]:

"*Anyone going to Majors Bay reserve tomorrow at 3:00 PM to laugh at Justin "Riley" Dennis – 4th rate man and abuser of women and girls dash protest*

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[102] Veloskey -v- Karagiannakis [2002] NSWADTAP 18 at [26]
[103] Exhibit 1 annexure RD-14
[104] RD-11
[105] Ibid at annexure RD-28

loudly and thank @football NSW and @ footballAUS for hating women and don't forget... "be kind"!"

ii. On 21 May 2023 at 2.38am[106]:

"*This MAN Justin "Riley" Dennis with the permission of @FootballNSW and @FootballAUS will be trying to injure women and girls at majors Reserve, Concord, Sydney at 3pm today. Get out Justin you're not wanted and despised you pathetic joke*"

iii. On 24 May 2023 at 6.38pm[107]:

iv. "*Deceit is the paedophile's friend..."Riley" is Justine Dennis' dress up name..."*

53. The evidence before the Court which was tendered without objection was that @FraserDAnderson is an "active follower of the Defendant" and operates an anti-trans lobby group titled FairGameAU which was tagged by the Defendant in the Social Media Posts the subject of these proceedings.

54. I also note that there is evidence before the Court that the Defendant's Social Media Posts were viewed hundreds and in some cases thousands of times[108].

55. Accordingly, I am satisfied on the balance that the Social Media Posts which are set out in paragraph 4 were public acts capable of inciting serious contempt for – to mock, to incite hatred of and to severely ridicule the Plaintiff on the grounds that the Plaintiff is transgender.

56. I now turn to the articles written and published by third parties where the Defendant was quoted as set out in paragraph 8(b) above.

57. The third parties that published and wrote the articles are not a party to these proceedings, but it is of note that many of these articles:

a. Referred to the Plaintiff by name[109]

b. Contained references to and screenshots of the Leaderboard, which names the Plaintiff and her football club, Inter Lions FC[110]

c. Contained images of the Plaintiff and also images of the Plaintiff with her face blurred[111]

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[106] Ibid at annexure RD-29
[107] Ibid at RD-31
[108] See for example Exhibit 1 annexures RD-3, RD-4 and RD-8
[109] Exhibit 1 at annexure RD-29
[110] Ibid at annexures RD 15 to RD-21and RD-25
[111] Ibid at annexures RD – 15, RD-16, RD-18, RD-20 to 23 and RD-25

d. Referring to the Plaintiff's age[112] (which was at the time 30 years old); and
e. Referring to the Plaintiff as a "well known You Tube personality originally from the US"[113]

58. I am satisfied that the articles referred to in paragraphs 8(b) are public acts that are capable of inciting serious contempt for, and hatred of the Plaintiff. However, the Defendant was only quoted in these articles and therefore cannot be held responsible or liable for the contents of the articles.

Did the Social Media Posts incite on the basis that the Plaintiff is a transgender person?

59. I am satisfied that in each of the public acts namely the Defendant's Social Media Posts between 29 March 2023 and 31 March 2023, the Defendant:
    a. Identified the Plaintiff as a man or male and posted a link or screenshot of the Leaderboard which therefore named the Plaintiff and her football club, Inter Lions FC
    b. Identified the Plaintiff as a male who was seeking to live as a woman and was playing in a women's football team in the local women's football competition; and
    c. Focused the Social Media Posts on the Plaintiff because the Plaintiff was living as someone of the opposite sex, and as the Defendant considered the Plaintiff to be living or seeking to live as the opposite sex

60. Accordingly, I am satisfied that the vilification of the Plaintiff was on the basis that the Plaintiff was a transgender person.

[112] Ibid at annexures RD- 16, Rd-19, RD-21 and RD-22
[113] Ibid at annexure RD-19 and RD-21

WERE THE ACTS CARRIED OUT REASONABLY AND IN GOOD FAITH PURSUANT TO SECTION 38S(2)(C) OF THE ACT?

61. Section 38S(2) of the Act states:

"Nothing in this section renders unlawful—

(a) a fair report of a public act referred to in subsection (1), or

(b) a communication or the distribution or dissemination of any matter on an occasion that would be subject to a defence of absolute privilege (whether under the *Defamation Act 2005* or otherwise) in proceedings for defamation, or

(c) a public act, done reasonably and in good faith, for academic, artistic, scientific, research or religious discussion or instruction purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter"

62. The Defendant's closing submissions dated 7 July 2025, make numerous references to the "*Sunol* test".[114] I note that I received no further guidance from the Defendant's legal representatives regarding the *Sunol* test or the "test in *Sunol*" beyond reference to paragraphs 25 to 40 in *Sunol*. Though I note that Bathurst CJ provided a useful conclusion / summary at paragraph 41, where he states:

"*In these circumstances, s49ZT should be construed as follows:*

(a)Incite means to rouse, to stimulate, to urge, to spur on, to stir up or to animate and covers conduct involving commands, requests, proposals, actions or encouragement.

(b)It is not necessary for a contravention that a person actually be incited.

(c)It is not sufficient that the speech, conduct, or publication concerned conveys hatred towards, serious contempt for, or serious ridicule of homosexuals; it must be capable of inciting such emotions in an ordinary member of the class to whom it is directed.

(d)It is not necessary to establish an intention to incite.

(e)For the public act to be reasonable within the meaning of s 49ZT(2)(c) it must bear a rational relationship to the protected activity and not be disproportionate to what is necessary to carry it out.

[114] Paragraphs at [37], [40], and [44]

(f)For the act in question to be done in good faith, it must be engaged in bona fide and for the protected purpose".

63. The Defendant submits that in applying "the *Sunol* test, the Court may only make a finding that the Defendant's conduct was in breach of the Act and thereby unlawful if it is satisfied that:
    a. *Firstly,* that the act is public
    b. *Secondly*, the public act is one which would incite hatred, serious contempt for or severe ridicule in an ordinary member of the class to which the public act was directed; and
    c. *Thirdly*, the act is unreasonable, in bad faith and that no defence is available under s38S(2)"[115]

64. It seems to me that the Defendant's closing submissions have sought to conflate the elements of unlawful vilification with the conclusions reached by Bathurst CJ as to the construction of s49ZT of the Act which is analogous to s38S of the Act.

65. Section 38S(2) is not technically a "defence" but a provision that clarifies the scope of s38S(1), as stated by Allsop J in Sunol at [60]:
"The text of s 49ZT reflects an attempt by Parliament to weigh the policies of preventing vilification and permitting appropriate avenues of free speech. Subsections (1) and (2) should be read together as a coherent provision that makes certain public acts unlawful. Subsection (2) is not a defence; it is a provision which assists in the defining of what is unlawful. It attempts to ensure that certain conduct is not rendered unlawful by the operation of subs (1)".

66. Accordingly, in order to enliven s38(2)(c) the public act must be done "reasonably and in good faith" for specified purposes which are "in the public interest", which expressly include the "discussion or debate about and expositions of any act or matter".

67. The Defendant argued that:
    a. "*unless the Plaintiff can distinguish the impugned conduct of the Defendant from her public advocacy on the issue, that the Plaintiff's case (even taken at its highest) fails entirely based on s38(2)(c)*"[116]; and

[115] Defendant's closing submissions at [37]
[116] Defendant's closing submissions at [52]

b. *"even if the Plaintiff could satisfy the Court of the first two limbs of the test, they must still satisfy the court that s38S(2)(c) does not apply..."*[117]

In this regard, it appears that the Defendant has misconstrued who holds the burden of proof with respect to the exception as provided for by S38(2)(c).

68. Bromberg J. in *Eatock -v- Bolt*[118], in considering the issue of the burden of proof in relation to the exception as provided for in section 18D of the Racial Discrimination Act 1975(Cth) which is in similar terms to s38S of the Act opined:

" In Toben at [41] , Carr J recounted the approach that he had taken to the question of onus in McGlade and determined the s 18D issues raised by the appeal on the basis that the onus rested with the respondent.....it seems to me that I am bound by the decision of the Full Court in Toben to impose the onus of proof under s 18D upon the respondents".

69. Furthermore, Section 104 of the Act states:

104 Proof of exceptions

Where by any provision of this Act or the regulations conduct is excepted from conduct that is unlawful under this Act or the regulations or that is a contravention of this Act or the regulations, the onus of proving the exception in any proceedings before the Tribunal relating to a complaint lies on the respondent.

70. Accordingly, I am satisfied that Defendant bears the onus of establishing that the exception pursuant to section 38S(2) of the Act applies.

71. Having already found the Social Media Posts made by the Defendant as set out in paragraphs 4 are public acts that have the ability to incite hatred towards, serious contempt for and severe ridicule of the Plaintiff, I now must turn my mind to whether these acts fall within the exception set out in s38S(2)(c) namely, as enunciated by Bathurst CJ in *Sunol* namely:

a. Were the act/s reasonable?
    i. Do the acts bear a rational relationship to the protected activity? and
    ii. Are the acts disproportionate to what is necessary to carry out the protected purpose?

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[117] Ibid at [68]

[118] *Eatock -v- Bolt and Another* (2011) 283 ALR 505; [2011] FCA 1103 at [338]

b. Were the acts done in good faith, namely were they engaged in bona fide for the protected purpose?

72. The Defendant argues that the public acts were reasonable and in good faith and carried out for the purposes of their advocacy, regarding the participation of transgender women playing in women's sports teams. Accordingly, the acts were in the public interest and involved or contributed to the discussion or debate about the issue. The Defendant further submitted inter alia that:

a. Firstly, the Plaintiff conceded that public advocacy with respect of issues of gender equity and transgender sport participation would be a "particular purpose in the public interest" within the meaning of section 38(2)(c)[119], accordingly the:

i. "Court must consider as part of the *Sunol* test the ... intentions and purposes for which the Plaintiff engaged in such public acts before a finding of unlawful acts can be made"[120]; and

ii. "by consequence, if the Court were satisfied that any of the Defendant's acts met the test of the first and second limb, but nonetheless were done during their political advocacy and engagement in public discussion about issues of transgender sports participation in women's leagues the defence ...would be enlivened and no vilification could be found"[121]

b. The "defences" are created on the basis that the preceding clause does not render unlawful anything that can be characterized as defensible by s38S(s)(c)"[122]

c. The statutory test for enlivening of a "defence" under s38S(2) is not one of proportionality[123].

73. The Defendant also contended that considering her acts or actions as a sustained course of conduct would be in clear disregard of the established test in *Sunol*[124].

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[119] Plaintiff's opening address in *Blanch -v- Smith* file 2024/78280, Transcript 7 February 2025 at 5.47-50
[120] Defendant's closing submissions at [44(a)]
[121] Ibid at [44(b)]
[122] Ibid at [42]
[123] Ibid at [58]
[124] Defendant's opening submissions at [31]

74. The Defendant was steadfast in her evidence that the Social Media Posts were all done in good faith to facilitate public debate and discourse on policy issues as a spokeswoman for Binary. Her evidence in this regard can be summarised as follows:

a. The Social Media posts have always been in the context of the political campaign against the policies of Football Australia and was never personal or directed at the Plaintiff[125]

b. If she referred to the Plaintiff it was done as "a case study for the policy issue...Their identity is public and their activities in playing football is public"[126]

c. The Social Media Posts were directed at Football Australia and Football NSW[127]

d. By using the Plaintiff as a case study she is not dealing with the policies as an abstract. "Case studies, such as the presence of the Palintiff in a women's league, identifies and highlights the real-world absurdity of Football Australia's policy" and that is the only reason she referred to and commented on the public activities of the Plaintiff playing football[128]

e. She did not intend to incite any hatred vilification or contempt fo the plaintiff[129]

75. It is uncontroversial that debate and discussion about whether transgender women should be included or permitted to play in women's sport falls within the exception of s38S(2)(C) of the Act, and I accept that it was and is the aim of the Defendant to generate discussion in order to change the policy of Football NSW and Football Australia.

76. However, as conceded by the Defendant in her own evidence, the Defendant used the Plaintiff as an example or case study to illustrate her position (and that of Binary which is not a party to these proceedings), by referring to the Plaintiff as a male, highlighting the Plaintiff's position on the top goal scorer on the Leaderboard and referring to the Plaintiff's club and team.

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[125] Exhibit 3 at [85]
[126] Ibid at [87]
[127] Ibid at [88]
[128] Ibid at [89]
[129] Ibid at [90]

77. This is a convenient point to consider the Defendant's submissions that:

a. That it is incorrect that the "intention or purpose of the Defendant's acts can play no part in the Courts consideration of whether the acts vilified the Plaintiff[130]; and

b. That the statutory test for the enlivening of a defence under section 38S(2) is not one of proportionality[131]; and

c. I can only consider each act or social media post individually and not as a "course of conduct"[132];

78. Bathurst CJ in Sunol stated that:

"...

(c)It is not sufficient that the speech, conduct, or publication concerned conveys hatred towards, serious contempt for, or serious ridicule of homosexuals; it must be capable of inciting such emotions in an ordinary member of the class to whom it is directed.

(d)It is not necessary to establish an intention to incite.

(e)For the public act to be reasonable within the meaning of s 49ZT(2)(c) it must bear a rational relationship to the protected activity and not be disproportionate to what is necessary to carry it out.

(f)For the act in question to be done in good faith, it must be engaged in bona fide and for the protected purpose".[133]

79. In determining whether a public act is unlawful vilification it must "incite hatred towards, serious contempt or severe ridicule of" a person on the ground that a person is a transgender person. As set out in paragraphs 17, 34 and 35 the test is an objective one and it is not necessary to show an intention to incite.

80. However, the intention of the Defendant in my view, has relevance when considering if the exception in s38S(2)(c) is made out. As the intention facilitates an understanding of the act or acts and the context in which they arise.

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[130] Defendant's closing submissions dated 7 July 2025 at [39]-[40]
[131] Ibid at [58]
[132] Defendant's opening submissions filed 20 January 2025 at [31]
[133] Sunol v Collier (No 2)|(2012) 289 ALR 128 at [41]

81. I do not agree with the submission of the Defendant, that the statutory test for enlivening the exception is not one of proportionality, as it was held by Bathurst CJ (with Allsop and Basten JA agreeing) *in Sunol-v Collier (No 2)*[134] that:

"For the public act to be reasonable … it must bear a rational relationship to the protected activity and ***not be disproportionate*** to what is necessary to carry it out".[135]

82. In the 2006 Victorian Court of Appeal decision of *Catch the Fire Ministries Inc and Others -v- Islamic Council of Victoria Inc*[136] Nettle JA (Neeve J agreeing), stated:

"Having reached that point, I think that one should move next to the question of whether the defendant had engaged in the conduct reasonably and in good faith for the genuine religious purpose. According to ordinary acceptation, to engage in conduct bona fide for a specified purpose is to engage in it honestly and conscientiously for that purpose.In my view that appears to be the intent of s 11. The legislative requirement that the conduct be engaged in not only in good faith but also reasonably means that objective standards will be brought to bear in determining what is reasonable. Despite what has been held under s 18D of the Racial Discrimination Act, I see no reason to load objective criteria into the conception of good faith in s 11, or otherwise to treat it as involving more than a "broad subjective assessment" of the defendant's intentions. In my view, the (2006) 235 ALR 750 at 784 requirement that conduct have been engaged in bona fide for a genuine religious purpose within the meaning of s 11 will be established if it is shown that the defendant engaged in the conduct with the subjectively honest belief that it was necessary or desirable to achieve the genuine religious purpose

That then leaves the question of whether the conduct was engaged in reasonably for the genuine religious purpose, and plainly as I see it that does involve an objective analysis of what is reasonable and therefore calls for a determination according to the standards of the hypothetical reasonable person.".[137]

83. I note that the preceding paragraph was cited with approval by Bathurst CJ in *Sunol*[138].

84. Allsop P, in considering the purpose s49ZT (which is in the same terms of s38S of the Act) opined:

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[134] Ibid
[135] Ibid at [41(e)]
[136] (2006) 235 ALR 750
[137] Ibid at [92]- [93]
[138] Sunol-v- Collier (no2) at [40]

"The end which s 49ZT is adapted to serve is the discouragement of (by making unlawful) public acts that vilify members of the community because of their homosexuality. This is in order to reduce or remove the instances of public acts that may foster a climate or atmosphere in which violence may arise; and in order to promote tolerance and harmony in a society in which human rights, including those concerning sexuality, are respected. The balance struck in subs (1) and (2) is one that is reasonably appropriate and adapted to further this end.

The section operates in a manner that for an act that falls within subs (1) not to be unlawful it must fall within subs (2). Paragraph (2)(c) is centrally relevant. It is difficult to see how reading down to conform with the implied Constitutional freedom would permit all the types and kinds of acts and communications referred to by McHugh J to be encompassed within "reasonably and in good faith ... for ... purposes in the public interest". Undoubtedly a "purpose in the public interest" is wide enough to include communication in political and governmental matters and issues related thereto, here, sexuality and homosexuality. Further, one can accept that "reasonably and in good faith" are sufficiently elastic to encompass "trenchant, robust, passionate, indecorous even rancorous" communications: cf Coleman at 125 [330] (Heydon J), if one appreciates that the public act as defined in s 49ZS must be understood against the background of the implied freedom.

That said, there could be public acts that are communications of a political or governmental character that will not be reasonably expressed or in good faith which will be laden with emotion, calumny or invective. If these concern homosexuality and fall within s 49ZT(1) and do not fall within s 49ZT(2) a distinct type of communication capable of falling within the Constitutional protection (leaving to one side the point earlier made about communications foreign, inimical or offensive to the system of government protected) will be made unlawful."[139]

85. Finally, in the 2024 decision of *Faraqui -v- Hanson,* Stewart J. in considering section 18D(C) of the *Racial Discrimination Act* which is analogous in its terms to s38S(2) of the Act held:

"The requirement that the relevant act was done "reasonably and in good faith" in order to enjoy the protection offered by s 18D applies to each of the exemptions set out in its paragraphs.

As far as reasonableness is concerned, there must be "a rational relationship" between what is said or done and an activity in ss 18D(a)-(c) in the sense that it was said or done "for the purpose" of the activity and "in a manner calculated to advance the purpose": Bropho at [79]–[80]; Clarke at [119]–[120]. Further, what is said or done must not be "disproportionate to what is necessary to carry it [viz the activity in ss 18D(a)-(c)] out": Bropho at [79], [139]–[140]; Clarke at [122]; Eatock v Bolt at [349], [414], [439]. For example, being "gratuitously

[139] *Sunol -v-Collier (NO 2)* [2012] NSWCA 44; BC201201590 at para [70]-[72]

insulting or offensive" in relation to "a matter that is irrelevant" to the activity in ss 18D(a)–(c) may be unreasonable: Bropho at [81]; Clarke at [121].

Reasonableness in s 18D is ultimately an objective question: Bropho at [79]; Comcare v Martinez (No 2) [2013] FCA 439; 212 FCR 272 at [82] per Robertson J. It is "informed by the normative elements of ss 18C and 18D": Bropho at [79]. "[T]here may be more than one way of doing things 'reasonably'" and the question is "not whether it could have been done more reasonably or in a different way more acceptable to the Court": Bropho at [79]; Martinez at [82].

The requirement of "good faith" has an objective and a subjective element: Clarke at [133]; Eatock v Bolt at [346]–[348]. Subjective good faith requires "subjective honesty and legitimate purposes": Bropho at [96]. Conduct lacks subjective good faith if, for example, the respondent sought "consciously to further an ulterior purpose of racial vilification", "dishonesty or the knowing pursuit of an improper purpose": Bropho at [96], [101]. Objective good faith requires "a conscientious approach to the task of honouring the values asserted by the Act … assessed objectively": Bropho at [96], [101]–[102]. For example, taking a "conscientious approach to advancing the exercise of that freedom in a way that is designed to minimise the offence or insult, humiliation or intimidation suffered by people affected by it" may be objectively in good faith, whereas acting "carelessly disregarding or wilfully blind to its effect upon people who will be hurt by it or in such a way as to enhance that hurt" may lack objective good faith: Bropho at [102].[140]

86. Although the acts of the Defendant, namely the Social Media Posts do bear a rational relationship to the protected activity, namely, to promote the discussion and debate about transgender women playing on women's sports team, I am of the view that the hypothetical reasonable person would find that the Social Media posts by:

    a. including a link or screenshot to the Leaderboard (which identified the Plainitff and the team for which she played); and
    b. referring to the Plaintiff as "male" and the "top goal scorer" ; and
    c. using the Plaintiff as an example or case study to illustrate its position and as a "sticking point",

were disproportionate to what was necessary and accordingly was not reasonable pursuant to s38S(2)(c).

87. The evidence of the Defendant can be summarised as follows:

[140] Faruqi v Hanson [2024] FCA 1264 para [293]-[296]

a. She became aware of the Plaintiff around the time she publicized that "we'd discovered that there were several males playing in female teams" and she had received calls referring me to Riley Dennis being one of those players[141].

b. She did not name the Plaintiff in the Social Media Posts but:

"I left the job to Football NSW... so I did make the claim he's a male in a female soccer team, and then the evidence of that, or the receipts of that, is what Football NSW themselves have posted"[142]

c. She considers all transgender women to be lying about being women[143]

d. She refuses to refer to the Plaintiff by her preferred pronouns and stated:

"because he is a male and I've just sworn to tell the truth, so I am going to tell the truth"[144]

e. She could not recall whether or not she had read the policies of Football Australia or Football NSW and it was "meaningless to her if she had read them or not"

88. Moreover, it was the evidence of the Defendant that she "does not think about the individual as such" and that she does not accept that "the Plaintiff was hurt by her actions".

89. In my view the Defendant used her Social Media Posts to advocate for her position against transgender women playing on women's sports teams. In doing so she sought to focus on the Plaintiff as an example or case study. The Plaintiff was sufficiently identified in the posts (by reference to her being the top goal scorer in the women's league and the posting of the link or screenshot of the Leaderboard that named her and her team).

90. The evidence indicates that the Plaintiff had played with the Lions FC since late 2022. Prior to that the Plaintiff had played women's football on a community level in NSW since 2019[145] over 3 years without incident.

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[141] Transcript 14 April 2025 38.47 -39.1
[142] Ibid at 46.15 – 46.21
[143] Ibid at 38.4-38.9
[144] Ibid 37.28 -29
[145] Exhibit 1 at [6]

91. Accordingly, I am satisfied that the Defendant acted with careless disregard with respect to the effect the Social Media posts would have on the Plaintiff namely the hurt that the Social Media Posts would have had on the Plaintiff and therefore her actions lacked objective good faith.

92. Accordingly, I am not satisfied on balance that the Defendant has established that the acts as set out in paragraph 4 were carried out reasonably and in good faith pursuant to section 38S(2)(c) of the Act.

IS SECTION 38S OF THE ACT ULTRA VIRES OF THE COMMONWEALTH CONSTITUTION FOR ITS DISPROPORTIONATE BURDEN OF THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION?

93. As a result of being satisfied that the Social Media Posts were contrary to s38S of the Act and unlawfully vilified the Plaintiff, I now must determine the final issue raised by the Defendant, namely whether s38S of the Act is unconstitutional because it places a disproportionate burden on political communications.

94. The Attorney General of NSW intervened in the proceedings pursuant to s78A of the *Judiciary Act 1903 (Cth)*, solely with respect to the constitutional issue raised by the Defendant.

95. I note that on 15 August 2025, prior to my handing down this decision, the Court of Appeal delivered judgment in *Smith -v- Blanch*[146]. The judgment involved the same parties; however, the Court of Appeal was exercising its supervisory jurisdiction in relation to a decision of Wass SC DCJ to make an apprehended personal violence order against the Defendant[147]. The person in need of protection in the proceedings was the Plaintiff in this matter. In summary, the Defendant challenged the validity of the regime for making Apprehended personal violence orders under the *Crimes (Domestic and Personal Violence) Act 2007 (NSW)* on the basis that it infringed the implied freedom of political communication. Accordingly, I had the Chief Magistrates Office write to all parties asking them to let me know by close of business if

[146] [2025] NSWCA 188
[147] Smith -v- Blanch [2024] NSWDC 631

they wished to make submissions with respect to the Court of Appeal decision. Only the Attorney General who had intervened in the proceedings sought to provide additional written submissions. No further submissions were made by either the Plaintiff or the Defendant, so I have only had regard to their opening and closing written submissions.

96. The Defendant submits that section 38S of the ADA is ultra vires for the following reasons:

a. A law burdens communication about government or political matters if it restricts or burdens the content of political communications, or the time, place manner or conditions of their occurrence.

In support they rely on the 2022 High Court decision of *Farm Transparency International Ltd -v- New South Wales* where Kiefel CJ and Keane J opined[148]:

"*The question whether the freedom is burdened has regard to the legal and practical operation of the law. The question is not how it may operate in specific cases, which are but illustrations of its operation, but how the statutory provision affects the freedom more generally.*"

Accordingly, they argue that the Act may be applied to prohibit or restrict the Defendant who is, a political spokeswoman and who works for a political advocacy organisation, from making further political communications in relation to the Plaintiff's public involvement in women's football competitions.[149]

b. The Defendant does not contend that the purposes of the Act or the means adopted are "illegitimate".

c. With respect to whether the Act is a proportionate response to its purpose, and applying the structured method of proportionality analysis adopted in *McLoy -v- New South Wales*[150], they contend:

I. That there is no rational connection between the purpose of the Act and the means sought to achieve that purpose.

[148] [2022] HCA 23; (2022) 277 CLR 537; (2022) 403 ALR 1 at [27]
[149] Defendant's submissions at [135] and [153]
[150] (2015) 257 CLR 178 at [194]-[195]

In particular they argue that in this case the purpose of protecting the Plaintiff is sought to be achieved by measure which seeks to prohibit and/or restrict the Defendant in making political communications about the issue of transgender women playing on women's sport teams[151].

II. That there are alternate measures available which are equally practicable and at the same time less restrictive of the freedom and that these measures are obvious and compelling[152].

They contend that the protection of people from discrimination can be achieved without the need for the Act to have regard to or limit or burden political communications and that there are alternative measures available to NSW Parliament to proscribe only such specific conduct that is necessary to prevent discrimination. Therefore, it is unnecessary for the Act to have extended to cover political posts and commentary made by political lobby groups and their advocates online.[153]

III. In Comcare -v- Banerji[154] that:

"If a law presents as suitable and necessary in the senses described, it is regarded as adequate in its balance unless the benefit sought to be achieved by the law is manifestly outweighed by its adverse effect on the implied freedom"[155]

Accordingly, they submit that in circumstances, as is the case here, where the Act may be utilised to stifle and suppress political speech, on the basis that the speech may induce a third party to become uncomfortable, it is manifestly inadequate in its balance. Moreover, the use of the Act to control political communication would not only be "seriously contemptuous of the implied constitutional freedom, but it

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[151] Ibid at para 160
[152] Ibid at paragraphs 162 – 164 citing Brown -v- Tasmania (2017) 261 CLR 328 at [139] and Comcare -v- Banerji (2019) 267 CLR 373 at [35]
[153] Ibid at [165]-[166].
[154] (2019) 267 CLR 373 at [38]
[155] Ibid at [38]

would create an entirely disproportionate landscape for political dialogue – whereby mere political speech voiced in opposition to a particular group or topic, on a contentious cultural issue, would be subject to penalty, coercive review, and control by the Court"[156]

97. The constitutional basis for the implied freedom of communication on matters of politics and government is "well settled"[157]. The implied freedom is established by sections 7, 24, 64 and 128 of the Constitution. As recognized by Kiefel CJ, Keane and Gleeson JJ in *Libertyworks Inc v Commonwealth of Australia:*

"The constitutional basis for the implication in the Constitution of a freedom of communication on matters of politics and government is well settled46. The freedom is recognised as necessarily implied because the great underlying principle of the Constitution is that citizens are to share equally in political power47 and because it is only by a freedom to communicate on these matters that citizens may exercise a free and informed choice as electors48. It follows that a free flow of communication is necessary to the maintenance of the system of representative government for which the Constitution provides".[158]

98. It was held by Kiefel CJ, Bell and Keane JJ in *Clubb -v- Edwards* that:

"*the implied freedom is not a personal right; it is to be understood as a restriction upon legislative power*"[159]

The majority of the High Court also opined:

"*whether a statute impermissibly burdens the implied freedom is not to be answered by reference to whether it limits the freedom on the facts of a particular case, but rather by reference to its effect more generally*". [160]

99. Accordingly, the Court must consider the operation and effect of sections 38R and 38S of the Act more generally with the facts of this case being no more than an illustration or example of its operation[161].

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[156] Defendant's opening submissions at paragraph [120] [125].
[157] LibertyWorks Inc v Commonwealth of Australia|(2021) 274 CLR 1|(2021) 391 ALR 188
[158] Ibid at [44]
[159] (2019) 267 CLR 1 at [35]; LibertyWorks Inc v Commonwealth of Australia|(2021) 274 CLR 1(2021) 391 ALR 188 at [44]; Comcare -v- Banerji (2019) 267 CLR 373 at [20]
[160] Ibid
[161] Farm Transparency International Ltd and Another v New South Wales (2022) 403 ALR 1 at [27]

100. The Court of Appeal in *Smith -v- Blanch*[162] provides a convenient summary of the law in this regard (citations deleted):

"Like many constitutional requirements in Australia and elsewhere, the freedom is not absolute. It may be curtailed by laws which are directed to achieving competing objectives. The High Court has, from the beginning, recognised the need to allow for some such infringement of the freedom. That has resulted in the need to articulate some test or guide for what types of infringement are permissible; the freedom must not be unjustifiably burdened.

Assessing justification with respect to the implied freedom involves asking three questions. Those questions are as follows:

Does the impugned law effectively burden the freedom in its terms, operation or effect? If not, the inquiry ends; the law is valid.

If "yes" to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? If it is not, the law is invalid.

If "yes" to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

There has been some division in the High Court as to how the third question, which raises an issue of characterisation, is to be addressed. Over the last decade a majority of the Court had adopted what came to be labelled the "structured proportionality" test. That test involved addressing three further questions, articulated in McCloy at [2] as follows:

"There are three stages to the test – these are the inquiries as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses:

suitable – as having a rational connection to the purpose of the provision;

necessary – in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;

adequate in its balance – a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom." [emphasis in original, citations omitted]

The plurality in McCloy referred to proportionality being characterised "as an analytical tool rather than as a doctrine" (at [72]). It came to be applied by a majority of the Court

[162] [2025] NSWCA 188

as the primary tool employed in cases involving the implied freedom. In recent decisions of the High Court the position has evolved somewhat. In Farm Transparency Gordon J said that "the 'three-part test' of suitability, necessity and adequacy, applied by the plurality in McCloy v New South Wales, is a tool of analysis that may be of assistance", but it "is not always … necessary or appropriate to undertake all steps of that analysis" (at [172]). In Babet v Commonwealth [2025] HCA 21; (2025) 99 ALJR 883, Gageler CJ and Jagot J similarly said the following (at [49]), with the agreement of Gordon and Beech-Jones JJ (at [72] and [242] respectively):

"[In Lange] the Court recognised that the different formulations used to ascertain if the implied freedom had been infringed were immaterial to the legitimacy of the constitutional implication so that there was 'no need to distinguish' between those formulations. Structured proportionality can be a way of organising reasons and explaining the basis on which a conclusion is reached in a particular case as to whether a legislative provision is reasonably appropriate and adapted to advance a legitimate purpose that is consistent with the maintenance of the constitutionally prescribed system of government. The flexible application of all or any of the steps of structured proportionality is to be understood as a 'tool of analysis', express or ritual invocation of which is by no means necessary in every case." [citations omitted]

This view was echoed in Ravbar v Commonwealth [2025] HCA 25; (2025) 99 ALJR 1000 ("Ravbar"): at [29] (Gageler CJ), [343] (Jagot J) and [427] (Beech-Jones J); cf [218]-[225] (Edelman J) and [290]-[291] (Steward J). In that case Gleeson J noted, by reference to earlier authority, that the persuasive burden to justify any restriction of the implied freedom falls upon the party defending the law, but added that "the scope of that task is affected by the contentions" of the challenger (at [309]). Her Honour explained that in that case the parties had framed their argument by reference to the structured proportionality approach, and it had not been suggested that it was inapposite to the matter, so her Honour considered and applied that approach (at [309]-[316]; see similarly Beech-Jones J at [427]).

A further relevant issue here is that it repeatedly has been accepted that laws which burden the freedom in a direct as opposed to incidental way, or which regulate the content as opposed to the manner of communication, will be more difficult to justify: see eg Hogan v Hinch (2011) 243 CLR 506; [2011] HCA 4 at [95]-[96], and authority there cited; Wotton v State of Queensland (2012) 246 CLR 1; [2012] HCA 2 at [30]; as to content-neutrality note further eg Attorney-General (SA) v Corporation of City of Adelaide (2013) 249 CLR 1; [2013] HCA 3 at [46]; Clubb at [180]-[181]; O'Flaherty v City of Sydney Council (2014) 221 FCR 382; [2014] FCAFC 56 at [17]. Jagot J explained in Ravbar that recognition of that point was consistent with application of a structured proportionality approach:

"[344] Nor, of itself, is structured proportionality inconsistent with calibrating the degree of scrutiny to the purpose of the law and the means the law uses to achieve its purpose. There is a manifest difference between (on the one hand) a law the direct and immediate purpose of

which is to prohibit or restrict certain political communications which uses direct and immediate means to achieve the prohibition or restriction and (on the other hand) a law the direct and immediate purpose of which is to achieve some legitimate purpose compatible with our system of representative and responsible government which merely incidentally restricts freedom of political communication by some remote and indirect means. No doubt there will be laws between these two extremes but the calibration of the degree of scrutiny to the essential character of the law is an obvious available judicial technique to ensure that the freedom the courts protect is no more than is necessary to enable 'the effective operation of that system of representative and responsible government provided for by the Constitution'." [citations omitted]

In this context, for current purposes the appropriate approach to the third validity question can be summarised as follows. The ultimate issue is whether the burden on the implied freedom imposed by the law can be characterised as reasonably appropriate and adapted to achieving the identified legitimate end in a manner compatible with the constitutionally prescribed system of government. That involves considering whether the freedom is not unduly burdened such that the burden can be regarded as justified. The more significant the burden the greater the degree of justification required. The burden of proof and persuasion in this respect lies on the party defending the validity of the law. In assessing the issue it will often be relevant to ask whether the law can rationally be regarded as a suitable means to achieve the identified legitimate purpose; whether there is an alternative means available which in substance achieves that end in a materially less burdensome way; and whether the burden imposed is too great to be justified taking account of the extent of the burden, the nature of the purpose and the extent to which the measure achieves that purpose. These issues may have more or less significance in particular cases, including because of the nature of the law and the burden it imposes, along with the salient points focused upon by the parties[163].

101. As set out in the preceding paragraph , in determining the ultimate issue as to whether section 38S of the ADA is Ultra Vires of the Commonwealth Constitution, I will deal with each of the steps, as set out in the Court of Appeal decision in *Blanch -v- Smith*[164] in turn.

[163] Ibid at [136]-[142]
[164] Ibid at [137]

DO SECTIONS 38S and 38R OF THE ACT IMPOSE A BURDEN ON THE FREEDOM?

102. The Defendant's submitted that "the practical operation of the Act is to restrict and control the personal conduct of the Defendant for the purposes of preventing public vilification of individuals."[165] and therefore to the extent that the Act applies to public political communications it is a burden on the implied freedom.

103. In *Sunol*[166], Basten JA concluded that s49ZT of the Act (which is in almost identical terms as s38S) did not effectively burden the implied freedom. He opined that:

> *"the test is whether there is an "effective burden" on political discourse. That requires the court to ask to what extent, as a matter of practical reality, compliance with the impugned law will constrain political discourse. Thus, it is necessary to inquire whether prohibition of the conduct covered by s 49ZT, to the extent that it falls within the area of political discourse, will burden, rather than enhance, that discourse. Such a question does not relate to the effectiveness of political advocacy, nor to elements of civility; rather, it seeks to distinguish a rule which, by regulating the manner or content of communications diminishes, rather than enhances, participation and the free exchange of ideas. Conduct by which one faction monopolises a debate or, by rowdy behaviour, prevents the other faction being heard, burdens political discourse as effectively as a statutory prohibition on speaking. A law which prohibits such conduct may constrain the behaviour of the first faction, but not effectively burden political discourse; on the contrary, it may promote such discourse: see Coleman v Power at [256] (Kirby J)*
>
> ...
>
> *The purpose and likely effect of s 49ZT is to promote essential elements of the Constitutional system of government. These elements include the maintenance of a society in which all persons may participate as equals and express their views publicly, as well as at the ballot box, without fear of being the subject of public utterances inciting hatred towards, or serious contempt for, or severe ridicule of them as homosexuals: see Eatock v Bolt [2011] FCA 1103 ; 197 FCR 261 at [225]–[228] and [239] (Bromberg J). Such persons may need to endure hostility, abuse and insult, so long as it does not rise to the proscribed level. Such constraints as s 49ZT imposes on political discourse do not effectively burden, but rather promote such discourse.*[167]

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[165] Defendant's submissions at [120]-[152]
[166] Sunol -v- Collier (No 2) [2012] NSWCA 44; BC201201590 at [[86]
[167] Ibid at [89]

104. I note that judges of other States, consistent with the conclusion reached by Basten JA, in *Sunol* have held that anti vilification laws do not effectively burden the implied freedom[168].

105. The difficulty faced by the Defendant in respect of her constitutional argument is that in *Sunol* in dealing with an almost identical provision of the Act (namely, section 49ZT, which prohibits vilification of homosexual persons) was:

    a. Challenged on the basis that it infringed the implied freedom; and
    b. Was determined to be valid by a unanimous Court of Appeal.

106. The Defendant does not deal with this difficulty in their submission nor seek to explain how *Sunol* can be distinguished.

107. Accordingly, I am satisfied that sections 38R and 38S of the Act does not impose a burden on the implied freedom.

108. It follows therefore pursuant to recent Court of Appeal decision in *Blanch -v- Smith*[169] I do not need to turn my mind to whether the sections have a legitimate purpose or reasonably appropriate or adapted to advance their legitimate object.

DO SECTIONS 38R AND 38S OF THE ACT HAVE A LEGITIMATE PURPOSE?

109. As I am satisfied that the sections 38R and 38S of the Act impose no burden on the implied freedom I do not have to consider whether the sections have a legitimate purpose. However, for the sake of completeness (and if I am wrong with respect to the burden on the implied freedom) I note the following:

    a. The Defendant does not contend that the purposes of the law or the means adopted are "illegitimate"[170]
    b. The object of sections 38R and 38S of the Act is to prevent vilification of transgender persons. The purpose is discerned from the text of the statute and the second reading speech.

110. As Allsop P stated in *Sunol*[171] :

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[168] Per Catch the Fire Ministries Inc; Owen -v- Menzies [2012] QC; Durston -v- Anti Discrimination Tribunal (No2) [2018] TASSC 48 at [36] –[46], Cottrell -v- Ross [2019] VCC 2142 at [141]-[160]
[169] [2025] NSWCA 188
[170] Defendant's submissions at [141]- [152]
[171] Sunol -v- Collier (No 2) at [73]

"Certain subject matters are of a character that care needs to be taken in discussion of them in order that forces of anger, violence, alienation and discord are not fostered. Race, religion and sexuality may be seen as examples of such. Racial vilification of the kind with which the Federal Court dealt in Toben v Jones [2003] FCAFC 137 ; 129 FCR 515 is capable of arousing the most violent and disturbing passions in people. If it were to be carried on for political purposes it would make the effect on people no less drastic. Similar types of vilification can be contemplated directed to other racial groups, other religious groups or groups having different sexual orientations than what might be said to be "usual". A diverse society that seeks to maintain respectful and harmonious relations between racial and religious groups and that seeks to minimise violence and contemptuous behaviour directed towards minorities, including those based on sexual orientation, is entitled to require civility or reason and good faith in the discussion of certain topics"

111. Accordingly, I am satisfied that the object of sections 38R and 38S of the Act is legitimate and I am of the view that pursuant to reasoning of Gaegler J. in *Clubb -v- Edwards*[172] that the purpose of section 38S is compelling has it protections of a minority cohort "against unwanted or offensive communications".

ARE SECTIONS 38R AND 38S OF THE ADA REASONABLY APPROPRIATE AND ADAPTED TO ADVANCE THEIR LEGITIMATE OBJECT?

112. As previously indicated I do not really have to determine this issue as I have found that sections 38R and 38S do not effectively burden the freedom, but if I am wrong in that regard and as I am satisfied that the object of the sections is legitimate I will consider the final step namely whether the burden imposed on the implied freedom by the ADA is justified.

113. In determining this issue, the High Court embraced "structured proportionality" as a helpful tool of analysis[173]. This involves considering whether sections 38R and 38S of the ADA are:

    a. "suitable"?
    b. '"necessary"? and
    c. "adequate in their balance"

[172] Clubb -v- Edwards (2019) 267 CLR 1 [196]
[173] AG submissions dated 22 January 2025

Are the relevant provisions suitable?

114. As set out in *Mcloy -v- New South Wales*[174] there "*must be a rational connection between the provision in question and the statute's legitimate purpose, such that the statutes purpose can be furthered*"[175]

115. The Defendant argues that there is "no rational connection between the control and prohibition of mere political communication and the object of the statute"[176].

116. The object of sections 38R and 38S of the ADA are to protect people from vilification on the basis that they are or thought to be, transgender. The provisions seek to realise that purpose by imposing a prohibition on conduct capable of having a vilifying effect on people who are or thought to be transgender.

117. Furthermore, the "implied freedom is not a personal right; it is to be understood as a restriction upon legislative power"[177], the court must consider the operation and effect of the relevant provision not the how the legislation infringes the implied freedom in this particular case[178].

118. Accordingly, I am satisfied that there is a rational connection between sections 38R and 38S and the statues purpose.

Are the relevant provisions necessary?

119. It was held in Comcare -v- Banjeri that:

"Where, as here, a law has a significant purpose consistent with the system of representative and responsible government mandated by the Constitution and it is suitable for the achievement of that purpose in the sense described, such a law is not ordinarily to be regarded as lacking in necessity unless there is an obvious and compelling alternative which is equally practicable and available and would result in a significantly lesser burden on the implied freedom"[179]

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[174] (2015) 257 CLR 178
[175] Ibid at [80]
[176] Defendant's submissions dated at [161]
[177] Clubb -v- Edwards(2019) 267 CLR 1 at [35]
[178] Ibid
[179] (2019) 267 CLR 373 at [35]

120. The onus is on the Defendant to identify the obvious and compelling legislative alternative. The Defendant in attempting to do so submits:

a. The protection of persons from discrimination can and is accomplished without the need for the Act to have regard to political communications[180]; and

b. The alternative measures available to the NSW Parliament would have been to proscribe only such specific conduct as was necessary to prevent discrimination as opposed to pollical postings on Twitter and social media or online outlets"[181]

121. If government was to carve out all political communications from the scope of section 38S of the ADA it would result in the provision not achieving its legislative purpose to the same degree.

122. As stated by Edelman J in Farm Transparency International Ltd -v- New South Wales:

"the smaller the burden on the freedom of political communication the les likely it will be that an alternative would impose a significantly lesser burden"[182]

123. The burden imposed by sections 38R and 38S is so small that it requires no justification.

124. Accordingly, I am satisfied that the provisions are necessary.

Are the provisions "adequate in the balance"?

125. The final aspect requires consideration of whether the measure is adequate in its balance namely

"are the effects of the law – in terms of the benefits it seeks to achieve in the public interest and the extent of the burden on the implied freedom"[183]

126. As set out in *McCloy -v- New South Wales*:

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[180] Defendant's submissions at [155] – [162]
[181] Ibid at [165]
[182] (2021) 274 CLR 1 [254]
[183] Clubb -v- Edwards 92019) 267 CLR 1 at [72]

"This is a value judgment consistently with the limits of the judicial function describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom"[184]

127. The Defendant argues that the relevant provisions "may be used to stifle and suppress political speech on the basis that the speech may induce a third party to become uncomfortable"[185] they also contend that the ADA exposes "mere political speech voiced in opposition to a particular group or topie ...to penalty, coercive review and control by the court"[186]

128. The prohibition in section 38S(1) of the ADA is not engaged by speech that renders a person "uncomfortable"; conduct that amounts to vilification is much more serious.

129. I am satisfied that sections 38R and 38S of the ADA are adequate in their balance for the following reasons:

    a. The protection of transgender people from vilification is important;
    b. Numerous Australian jurisdictions have enacted laws prohibiting vilification on ground of gender identity; and
    c. The burden imposed on the implied freedom (if there is any at all – noting that I have found that there is none) is extremely small

130. Accordingly, I am satisfied for all the reasons set out in paragraphs 93 to 129 that sections 38R and 38S of the ADA are not invalid on the ground that they exceed the legislative power of the NSW Parliament by reason of the operation of the implied freedom of political communications contained in the Commonwealth Constitution.

DECISION AND ORDERS

1. For the reason set out in this decision I am satisfied that the Defendant unlawfully vilified the Plaintiff with respect to the Social Media Posts dated between 29 March 2023 and 31 March 2023 which:

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[184] (2015) 257 CLR 178 at [2]
[185] Defendant's opening submissions at [127]-[152]
[186] Ibid

a. Referred to the Plaintiff as a male or a man; and

b. Posted a link or a screenshot to the Leaderboard that referred to the Plaintiff by name and/ or her football club

2. Sections 38R and 38S of the *Anti Discrimination Act 1977 (NSW)* are not invalid on the grounds that they exceed the legislative power of the NSW Parliament by reason of the operation of the implied freedom of political communications contained in the Commonwealth Constitution.

3. I will hear the parties in relation to the orders sought by the Plaintiff pursuant to section 108 of the *Anti Discrimination Act 1977 (NSW)* and costs.

Deputy Chief Magistrate S. Freund

26 August 2025