Local Court
New South Wales

Case Name:	Stephanie Blanch -v – Kirralie Smith and Gender Awareness Australia Limited t/as Binary Australia
Hearing Date(s):	7 February 2025
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)* *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:	2024/78280

Judgment

1. These proceedings were commenced by the Plaintiff, Stephanie Blanch, initially by way of Summons filed 29 February 2024 and then by way of order of Magistrate Greenwood dated 21 March 2024, by Statement of Claim dated 18 April 2025 seeking against the First Defendant, Kiralee Smith and the Second Defendant, Binary Australia Pty Limited the following orders pursuant to section 108 of the *Anti-Discrimination Act 1977 (NSW) ("***the ADA***")*:
    a. Damages
    b. An order enjoining the First and Second Defendants from continuing or repeating future public acts identifying the Plaintiff
    c. An order that the First and Second Defendants 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 First and Second Defendants develop and implement a program or policy aimed at eliminating unlawful discrimination and transgender vilification in relation to any future public acts of the First and Second Defendant;
    e. An order that, in default of compliance with the orders referred to above within 2 months from the date the orders are made, the First and Second Defendant pay the Plaintiff damages pursuant to section 108(7) of the *Anti-Discrimination Act 1977 (NSW)* by way of compensation for failure to comply with the order.
2. I note that an Amended Statement of Claim was filed by consent on 7 February 2025, changing the name of the Second Defendant to Gender Awareness Australia Pty Limited. On that same day, the Defendants filed an Amended Defence in the name of Gender Awareness Pty Limited.
3. It is uncontroversial that the Plaintiff is a transgender woman. She was born a male and has lived solely as a woman since 2016.[1] She has had gender

[1] Paragraph 3, Exhibit 1

affirming surgery[2]. She has played for the Wingham Football Club ("**Wingham FC**") women's team since 2016[3].

4. The First Defendant is a director and spokesperson of the Second Defendant which is a corporation that trades as Binary Australia now known as Gender Awareness Australia Pty Limited.[4]

5. The Defendants conceded that since 19 January 2023 they have done the following[5]:

   a. On 19 January 2023, the First Defendant posted on Twitter a post stating:

      "*Men of mid coast NSW, can you get I touch with me please? I need your help. There is a bloke playing on the women's team in Wingham and many are upset about it. The federation is refusing to listen*"

   b. On 20 January 2023, the First Defendant wrote the January Article titled, "A bloke in a frock is playing women's soccer on the Mid North Coast" (the "**January Article**")

   c. On 20 January 2023, the Second Defendant posted the January Article on it's website underneath a photo of the Plaintiff's head cropped within a circular frame, and:

      i. Stated in the January Article:

         "*Wingham Football club on the Mid North Coast of NSW published these photos on their Facebook page in December 2022. The bloke in a frock was receiving an award for playing in the women's division.*

         ...

         The bloke in a frock can play either in the men's competition or a mixed competition, there is absolutely no need for him to play in a women's division.

         No one is saying he can't play. It is simply a matter of fairness, safety and dignity. He is male and does not belong in a female division. Women and girls deserve to have the option of a female only competition"

      ii. Included in the body of the article two photos of the Plaintiff being:

---

[2] Exhibit 1 at [8]
[3] Exhibit 1 at [7]
[4] Defence to Amended Statement of Claim at [1]
[5] Defence filed 24 July 2024 at [1] and [4(a)]

1. A photo of the Plaintiff standing beside her coach with her coach's face blurred out with yellow ink; and
2. A photo of the Plaintiff standing beside her teammates from her soccer team with all but her own face blurred out with yellow ink.

d. On 20 January 2023, the Second Defendant posted on Facebook a link to the January Article and:
   i. Included with its Facebook post an image of the Plaintiff's head cropped within a circular frame
   ii. Referred to the Plaintiff as a "bloke in a frock"
   iii. Named the Wingham FC; and
   iv. Referred to the Mid North Cost of NSW

e. On 20 January 2023, the First Defendant posted on Facebook and:
   i. Stated in the post:

   "*This bloke in a frock is being awarded a prize for playing in the women's competition in Wingham NSW*"

   ii. Included with the post the same image of the Plaintiff beside her coach that had been included in the January Article.

f. On 20 January 2023, the First Defendant posted to Twitter a copy of the same image of the Plaintiff and her teammates from her soccer team that had been included in the January Article;

g. On 20 January 2023, the first Defendant posted to Twitter and :
   i. Stated in the post:

   "*A bloke in a frock playing soccer in the women's comp doesn't make him a woman.*
   He's just a bloke in a frock.
   He can play in the men's or mixed competition, not female.
   Wingham NSW"

   ii. Included with the post the image of the Plaintiff beside her coach that had been included in the 223 Article.

h. On 23 January 2023, the First Defendant posted to Twitter and:
   i. Included with the post an embedded link to the January Article
   ii. Included an image of the Plaintiff
   iii. Referred to the Plaintiff as a bloke in a frock; and

iv. Referred to the Mid North Coast

i. On 8 February 2023, the First Defendant replied to a post on Twitter from Football Australia dated 6 February 2023 and:

i. Stated in her post:

"*you allow men who appropriate stereotypes of women to play as women. How is that an incentive for girls? Where is the fairness and dignity for girls?*"

ii. Included with her post the image of the Plaintiff beside her coach that had been included in the January Article

j. On 9 February 2023, The First Defendant posted on Facebook and:

i. Stated in the post:

"*Kirralie Smith doesn't recommend Northern NSW Football*
They allow males who appropriate stereotypes of females to play in womens teams. They ghost and gaslight anyone who complains"

ii. Included with the post the image of the Plaintiff beside her coach that had been included in the January Article.

k. On 9 February 2023, The First Defendant posted to Twitter and:

i. Stated in the post:

"*Please explain @FootballAUS why you insist on showing contempt toward women?*
Why can't the bloke who appropriates female stereotypes compete in the male team or a mixed/open team?
Why do you lie and claim he is a woman? Why do you bully & ghost women who object?
Wingham NSW"

ii. Included with the post the image of the Plaintiff beside her coach that had been included in the January Article

l. On 9 February 2023, The First Defendant posted on Facebook and:

i. Stated that:

"*Gutless wonders at Twitter just made me remove this post.*
The cowards at Football Australia refuse to answer our calls or emails about the bloke playing on a women's team in Wingham.
Misogyny at its finest"

ii. Included with the post the image of the Plaintiff beside her coach that had been included in the January Article; and

iii. Included in the post an image of a copy of a post to Twitter that had been posted on the same day.

m. On 13 February 2023, the First Defendant posted to Twitter and:

i. Stated in the post:

"*Twitter just made me remove the tweet about the bloke playing on the women's team in Wingham*"

ii. Included with the post the same image of the Plaintiff and her teammates from her soccer team that had been included in the January Article.

n. On 13 February 2023, the First Defendant posted to Twitter in response to a post from Our Game, and stated amongst other things:

"*Women's football is stuffed! @FootballAUS allow a man to play on the women's team in Wingham, NSW*"

o. On 13 February 2023, the First Defendant posted to Twitter in response to a post from Peter Filopoulos and:

i. Stated in the post:

"*How about you get your team to man up & answer some simple questions? What is a woman? Why have a women's comp if men can play in it?*"

ii. Included with the post a link to the January Article on the Second Defendants website; and

iii. Included with the post the same image of the Plaintiff's head cropped in a circular frame that had been included in the January Article

p. On 13 February 2023, the First Defendant posted to Twitter in response to a post from Paddy Steinfort and:

i. Stated in the post:

"*Can you get one of your cronies @FootballAUS to explain why women should have to deal with males in their female competition? What is the point of having a women's teams if men can play in them?*"

ii. Included with the post a link to the January Article on the Second Defendants website; and

iii. Included with the post the same image of the Plaintiff's head cropped in a circular frame that had been included in the January Article.

q. On 13 February 2023, the First Defendant posted to Twitter in response to a post from Football Australia and stated amongst other things:

"*Women's football is stuffed! @FootballAUS allow a man to play on the women's team in Wingham, NSW*"

r. On 13 February 2023, the First Defendant posted to Twitter in response to a post from Nathan Magill and:

i. Stated in the post amongst other things:

"*Can you find anyone at @FootballAUS who has the guts to answer these simple questions? What is a woman? And why have a woman's competition if men can play in it?*"

ii. Included with the post a link to the January Article on the Second Defendants website; and

iii. Included with the post the same image of the Plaintiff's head cropped in a circular frame that had been included in the January Article

s. On or around 14 February 2023, the First Defendant wrote the January Article titled "Soccer campaign for women and men who pretend to be women" ("**February 2023 Article**")

t. On or around 14 February 2023, the Second Defendant posted the February 2023 Article on its website, which stated amongst other things:

"*Football Australia refuses to engage with Binary, or with any members of North Coast NSW Football who have made complaints about a male player on the female team in Wingham*"

u. On 16 February 2023, the First Defendant posted to Twitter in response to a post from CommBank Matildas, and:

i. Stated in the post:

"*what is the incentive & protection is there for girls who want an opportunity to pay football wth females?*

Why have a female com if males can play in it? Why is @Football AUS so afraid to answer our questions?

What is a woman?"

ii. Included with the post a link to the January Article on the Second Defendants website; and

iii. Included with the post the same image of the Plaintiff's head cropped in a circular frame that had been included in the 2023 Article

v. On 16 February 2023, the First Defendant posted to Twitter in response to a post from SM Pete and:

i. Stated in the post:

"*So you follow stories others won't touch? Please explain why women should have to put up with men in their comp. Why should we have to put up with being ignored & gaslit by @FootballAUS*"

ii. Included with the post a link to the January Article on the Second Defendants website; and

iii. Included with the post the same image of the Plaintiff's head cropped in a circular frame that had been included in the 2023 Article

w. On 16 February 2023, the First Defendant posted to Twitter and:

i. Stated in the post:

"@TomRischbieth can you get anyone at @FootballAUS to man up and explain why women should be marginalized and gaslight into accepting the lie a man is woman?"

ii. Included with the post a link to the January Article on the Second Defendants website; and

iii. Included with the post the same image of the Plaintiff's head cropped in a circular frame that had been included in the 2023 Article

x. On 16 February 2023, the First Defendant posted to Twitter and:

i. Stated in the post:

"@Willhastie17 can you get anyone at @FootballAUS to explain why women are being ignored? What is the point of having women's comps if men can play in them?"

ii. Included with the post a link to the January Article on the Second Defendants website; and

iii. Included with the post the same image of the Plaintiff's head cropped in a circular frame that had been included in the 2023 Article

y. On 17 February 2023, the First Defendant posted to Twitter and:

i. Included in the post a picture indicating that the First Defendant had been blocked for breaching the Plaintiff's privacy; and

ii. Included with the post the image of the Plaintiff beside her coach that had been included in the 2023 Article

z. On 27 February 2023, the First Defendant attended the soccer grounds of the Taree Wildcats in Taree where:

i. The soccer rounds of the Taree Wildcats is and was a public sports ground

ii. The First Defendant was with approximately 7 or 8 men who all entered the soccer grounds

iii. The men were wearing brightly coloured wigs

iv. The First Defendant had arranged to and did film the men.

aa. On 27 March 2023 the First Defendant posted to Facebook the following:

"*I have cried a lot today. Last night I was contacted by people in Sydney. It is alleged two female soccer players were hospitalized 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, we simply want female se-based services and spaces. The trans can play according to biology or on a mixed or trans teams."

bb. On 27 March 2023 the First Defendant posted to Facebook the following:

"*Mat Mel we have tried at our local club where a bloke is playing on the women's team. We were bullied and threatened. Since then more than 12,000 emails have been sent to Mid Coast Football, Football NSW and Football Australia! They continue to hide, ignore or gaslight us!*"

6. The First Defendant also conceded that on 27 February 2023 she attended the soccer grounds of the Taree Wildcats in Taree with a group 7 or 8 Men who were all wearing brightly colored wigs and had arranged to and did film the men. However, I note that she denies that the men were wearing Wingham FC playing shirts or that it was intended for the men to represent the Plaintiff. ("**The gathering of men in wigs**")

7. The First and Second Defendants also conceded that they wrote a report which was provided to Football Australia on a confidential basis. The First Defendant in cross-examination stated she could not recall whether or not she she referred to the Plaintiff's pre-transition, previous or dead name[6] in the Report ("**the Report"**).

8. Finally, the First Defendant concedes that on 1 March 2023 she sent out a newsletter however I note the Defendants deny referring to Wingham FX or the Mid North Coast in the Newsletter ("**the Newsletter**")

9. The Defendants in my view conveniently classified some of the various acts which form the basis of these proceedings into three categories. I will adopt this approach and expand slightly for the purposes of analysis throughout this judgment. The acts of the Defendants can broadly be classified into four broad categories as follows:

    a. Firstly, the articles and newsletter written by the First Defendant and published on the Second Defendants website, namely the:

        i. January Article
        ii. February 2023 article
        iii. Newsletter dated 1 March 2023

        (the "**Articles**").

    b. Secondly, the various posts to Twitter and Facebook made by the Defendants between 20 January 2023 and 17 February 2023 which contained one or more of the following:

        i. A link to the January Article
        ii. Images of the Plaintiff
        iii. Statements referring to the Plaintiff as:

[6] Transcript dated 7 February 2025 pages 48.36 to 50.26

a. "a bloke in a frock"
b. A "bloke playing on the women's team in Wingham"
c. A "man" playing on women's team in Wingham NSW

(the "**Social media posts**")

c. Thirdly, the gathering of men in Wigs at the soccer ground of the Taree Wildcats on 27 February 2023; and
d. Finally, the report prepared by the First Defendant and sent to Football Australia.

10. The issue of whether transgender women should play on a women's sports team is an emotionally vexed one, but it is not the issue to be determined by the Court in these proceedings. The ultimate issue is whether the acts or conduct of the Defendants as particularised, amount to the unlawful vilification of the Plaintiff pursuant to section 38S of the ADA.

11. Accordingly, the substantive issues I need to determine are as follows:
    a. Is the Plaintiff a transgender person pursuant to section 38A of the *Anti-Discrimination Act*?
    b. Did the acts of the Defendants vilify the Plaintiff?
    c. Were the acts carried out reasonably and in good faith pursuant to section 38S(2)(c) of the *Anti Discrimination Act*?
    d. In the event that I am satisfied that any of the acts of the Defendants vilified the Plaintiff, is section 38S of the Act ultra vires of the Commonwealth Constitution for its disproportionate burden of the implied freedom of political communication?

I will deal with these issues in turn.

12. There were a number of interlocutory issues that also need to be determined by me namely:
    a. Does the Local Court have the power to deal with this claim?
    b. Are paragraphs 54 to 57 and 69-75 of Exhibit 1 admissible?

I will deal with these issues first.

DOES THE LOCAL COURT HAVE THE POWER TO DEAL WITH THIS CLAIM

13. The first issue raised by me at the commencement of the hearing was whether the Local Court has the power to deal with these proceedings.

14. It is clear that it does, for the following reasons:

a. On 22 March 2023, the Plaintiff filed an application with the Anti-Discrimination Board pursuant to section 38S of the Anti-Discrimination Act 1977.

b. On 11 August 2023, the President's delegate transferred the application from the Anti-Discrimination Board to NCAT pursuant to s93C(A) of the Anti-Discrimination Act 1977(NSW).

c. On 22 January 2024, Senior Member Andelman of NCAT determined and made an order that "The tribunal declines to deal with the application as it involves an exercise of Federal Jurisdiction"

d. Section 34B(1) states:

"A person with standing to make an original application or external appeal may, with the leave of an authorised court, make the application or appeal to the court instead of the Tribunal".

e. On 29 February 2024, the Plaintiff filed a Summons with the Local Court seeking leave to commence proceedings in the local Court pursuant to section 34B of the *Civil and Administrative Tribunal Act 2013*

f. The Local Court is an authorised court pursuant to section 34A of the *Civil and Administrative Tribunal Act 2013*

g. On 21 March 2024, Magistrate Greenwood granted leave for the Plaintiff to commence proceedings in the Local Court.

15. Accordingly, I am satisfied on balance that the Local Court has power to hear the claim.

ARE PARAGRAPHS 54 TO 57 and 69 TO 75 OF EXHIBIT 1 ADMISSIBLE?

16. Mr Maghabi, Counsel for the Defendants, took objection to paragraphs 54 to 57 inclusive and 69 to 75 inclusive of Exhibit 1 on the basis of relevance. He argued inter-alia that the test pursuant to section 38S of the ADA is an objective one and therefore it is not necessary to demonstrate that a person or persons were incited by the act or acts of the Plaintiff. It does not matter how somebody reacts to the Social Media Posts of the Defendant.

17. Furthermore, he also submitted there is "no legitimate connection between … what somebody does... by way of reaction, and whether or not the acts to which that first person was reacting- whether or not those acts are in fact inciting hatred, contempt, ridicule or otherwise"[7]

18. I note that he conceded that an APVO was made by the District Court where the Plaintiff is the person in need of protection against the First Defendant[8].

19. The fact that the test in determining whether or not an act is unlawful vilification is an objective one does not mean that the Court cannot take into account or must exclude evidence of the subjective responses to the acts particularised. The Plaintiff is not required to prove that a person or persons were incited by the public acts; it is enough that the act or acts are capable of inciting a person or persons. However, it does not mean that the responses of the audience are not relevant. Accordingly, the paragraphs are admitted into evidence.

IS THE PLAINTIFF A TRANSGENDER PERSON PURSUANT TO SECTION 38A OF THE ANTI DISCRIMINATION ACT?

20. Section 38A of the *Anti-Discrimination Act* defines a transgender person as 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".

21. It is the evidence of the Plaintiff that:

a. She was born male but identifies as a woman[9]

---

[7] Transcript 7 February 2025 page 19.28
[8] Transcript dated 7 February 2025 page 20.18
[9] Exhibit 1, at [2]-[10]

b. Since 2016 she has lived solely as a woman[10]

22. I note the evidence of the Plaintiff was admitted (once I had ruled on the various objections) and the Plaintiff was not required for cross examination.

23. It was the evidence of the First Defendant that:

a. On or around 19 December she became aware of the Plaintiff via a public Facebook page where she saw two photos which she describes as:

"*a man in a dress was being granted awards in the female senior team*"[11]

b. That "she assumed that the Plaintiff was a biological male ...though noted that the Plaintiff nonetheless was competing against biological females in the women's team"[12]

24. Accordingly, I am satisfied on balance that the Plaintiff is a transgender person pursuant to section 38A of the Anti-Discrimination Act as firstly, she identifies a member of the opposite sex by living as a member of the opposite sex since 2016 and also as she was thought to be a transgender person by the First Defendant.

DID THE ACTS OF THE DEFENDANTS VILIFY THE PLAINTIFF?

25. Section 38S of the ADA 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

[10] Exhibit 1 at [8]
[11] Exhibit 3 at [24]-[25]
[12] Exhibit 3 at [32]

(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."

26. Section 38R of the ADA 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.

27. There are four elements[13] to unlawful vilification, namely:

a. Firstly, a public act
b. Secondly, the act/s incite
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

28. Furthermore, it is an objective test[14], the focus is on the words used[15] by the act/s and the intention of the Defendants is irrelevant[16].

29. Accordingly, I need to determine with respect to each of category of the acts set out in paragraph 9 if they were firstly public acts, secondly the posts (or act) incites, thirdly that the incitement can cause hatred towards, serious

[13] Barry -v- Futter [2011] NSWADT 205 at [62]
[14] Kerslake -v- Sunol [2022] ACAT 40; BC202204295 at [73]
[15] Ibid
[16] Ibid

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"?

30. The Defendants initially denied "that any action, as pleaded against them or otherwise, meet the definition of "public act" as defined in and for the purposes of s.38R" of the ADA[17]

31. However, I note in their submissions filed 15 January 2025 the Defendants conceded that:

    a. The Articles[18] and the Newsletter[19]; and

    b. The Social Media posts[20]

    were public acts within the meaning of SECTION 38R(a) of the ADA. In my view pursuant to *Barry -v- Futter*[21] and *Lamb -v- Campbell*[22], I am satisfied that these acts were public acts as they were communications that were clearly done in public and observable to the public.

32. Accordingly, I only need to determine whether the:

    a. Gathering of men at the Taree Wildcats soccer ground; and

    b. The report prepared by the First and Second Defendants to Football Australia

    were public acts within the meaning of section 38R of the ADA.

33. In relation to the third category namely, the gathering of the men at the Taree Wildcats soccer ground on 27 February 2023, the evidence of the First Defendant can be summarised as follows:

    a) She attended the Wildcats soccer grounds with her husband, son and two daughters with several other people[23].

    b) The men in attendance were wearing brightly colored wigs[24] and

    c) it was a public space[25]

---

[17] Defence to amended Statement of Claim at [8]
[18] Defendants' submissions dated 15 January 2025 at [30] and [61]
[19] Ibid at [66]
[20] Ibid
[21] [2011] NSWADT 205 at [74]-[76]
[22] [2021] NSWCATAD 103 at [24]
[23] Exhibit 3 at [80]
[24] Ibid at [82]
[25] Ibid at [86]

34. Section 38R(b) defines a public act to include any conduct observable by the public, including the wearing or display of clothing, signs, flags, emblems and insignia.

35. It is clear from the evidence of the Plaintiff that the actions of the First Defendant and the group she was with was:

    a. in a public space; and

    b. observable by the public[26].

36. Moreover, her evidence which was not objected to was inter-alia that:

    c. That the gathering was observed by a number of her friends[27]; and

    d. She had seen photos and videos of the gathering[28]

36. Accordingly, I am satisfied on balance that the gathering at the Taree Wildcats soccer ground was a public act.

37. In relation to the fourth category namely, the report prepared by the First and Second Defendant to Football Australia, it was the evidence of the First Defendant inter-alia that:

    i. She authored a report which was prepared at the Football Australia Member's Protection office[29]

    ii. The report was "confidentially filed as an internal matter within Football Australia[30]

    iii. The report was not public instead it "constituted confidential information forwarded to Football Australia"[31]

38. The Plaintiff submits that the report which "entailed the distribution of material to a public organisation was a public act" for the purposes of section 38R[32].

39. There is no evidence before the Court to either the contents of the report or who received the report, beyond "within Football Australia."

40. The decision of the Equal Opportunity tribunal in *Barry v Futter*[33] considered whether a conversation between two people, whether or not it occurred in a public place, is a private communication as opposed to a "public act". In doing

---

[26] Exhibit 1 at [63]
[27] Ibid at [64]
[28] Ibid
[29] Exhibit 3 at [88]
[30] Ibid at [89]
[31] Ibid at [90]
[32] Plaintiff's submissions filed 5 December 2024 at [62]
[33] *[2011] NSWADT 205*

so it examined the history of the legislation and concluded that the construction it had adopted, namely, that it was not a public act was consistent/ supported by the Second Reading Speech which stated:

"Proposed section 20B of the bill defines the term "public act" for the purposes of the new division. "Public acts" includes spoken and written communications to the public, actions and gestures observable by the public, the wearing and displaying in public of signs and emblems and the distribution of matter to the public with knowledge that the matter vilifies a person or group on the ground of race. The conduct encompassed by the bill is intended to be limited to "public acts" and does not include private communications or other conduct in private".[34]

41. They also found support for their construction from the *Racial Discrimination Act 1975 (Cth)* and opined:

"Further support for this approach to the construction of " public act " and, in particular, that a private conversation even in a public place, should not be treated as falling within that expression is also provided by decisions under federal anti-discrimination legislation. The Racial Discrimination Act 1975 (Cth) contains an anti-vilification provision in s 18C which provides:

> *(1) It is unlawful for a person to do an act, otherwise than in private , if:*
> *(a)the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and*
> *(b)the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.*
> *(2) For the purposes of subsection (1), an act is taken not to be done in private if it:*
> *(a)causes words, sounds, images or writing to be communicated to the public; or*
> *(b)is done in a public place; or*
> *(c)is done in the sight or hearing of people who are in a public place.*
> *(3)In this section:*
> *" public place " includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.*

Instead of the requirement that there be a " public act " as found in the ADA, the federal legislation requires that the act be done "otherwise than in private " and s 18C(2) provides instances of when an act is to be taken not be done in private. Nonetheless, as the purposes of the ADA and the federal Act are essentially the same, the approach taken in application of

---

[34] *(NSW Parliament, Legislative Assembly 4 May 1989 Hansard p 7489)*

the federal Act can give some assistance, noting however the differences in language, in construing the ADA.

...

A private conversation does not become a public one merely because it takes place in a public street or in a place to which members of the public have a right to admission or access. Again, whether or not an act occurs "otherwise than in private" depends on the context of the situation and must be interpreted from the overall intention of the legislature in enacting Part IIA of the RDA. That purpose was to prohibit and provide a civil remedy for behaviour based on racial hatred and to prevent persons being threatened because of their particular racial, colour, national or ethnic origins.

The purpose of the vilification provisions of the ADA, which include vilification on transgender grounds, is to reduce the incidence of violence and abuse, whether physical or verbal, against certain persons or groups, without at the same time unduly restricting the rights of members of society to hold and express views including those which are unpopular or which some might find offensive. This consideration also supports construing " public act " in s 38S, in the light of s 38R, as applying to spoken communications to the public but not to private conversations or discussions even if they occur in a public place.

Accordingly, the Tribunal concludes that "public act " in s 38S, having regard to the provisions of s 38R, does not include a private conversation even if that conversation takes place in a public place. Whether a spoken communication amounts to a private conversation or a communication to the public will depend upon all the circumstances in which the communication occurs.

Whilst it is not possible to identify in advance all the types of circumstances that may be relevant in determining whether a communication by speaking is public or private, there are a number of factors that may indicate that the communication is to the public rather than a private communication and that might be relevant in the present case. First, where a speaker addresses an audience irrespective of whether there is any pre-existing relationship between the members of the audience and the speaker, the communication is more likely to be to the public. In that case, it is often appropriate to conclude that the speaker is addressing them in their capacities as members of the public and not because of their relationship. By way of contrast, speaking only to a family member, friend or acquaintance, fellow employee or co-participant in a joint activity, in that capacity, may be more likely to involve a private communication rather than a " public act ".

Secondly, the size of the audience may also indicate whether the communication is public or private. A speaker addressing a group of people is more likely to be communicating to the public than a speaker who is having a one on one conversation with another person.

Nonetheless, a person who speaks to a series of people individually and seeks to communicate essentially the same message may be seen as speaking to a wider audience and not just engaging in private conversations.

Thirdly, the nature of the communication, the intentions of the parties to the communication and the circumstances giving rise to it may also give some indication of whether the communication is properly characterised as a public communication or a private conversation."[35]

42. The circumstances before me do not involve a speaker and audience, but rather an author of a document and its recipient. As indicated, the report itself is not before the Court. Furthermore, there is no evidence to indicate who read the report and to whom it was disseminated beyond "Football Australia". At its highest, the evidence is inter-alia that:
    a. The First Defendant authored the report
    b. It was prepared at the Football Australia members office
    c. It was confidentially filed as an internal document
43. Applying the factors set out by Brown FM in *McLoed -v- Power*[36]:
    a. It is clear that the report was prepared for an audience of Football Australia. However, it is unclear who within the organization had read or had access to it;
    b. Secondly, the size of the audience is limited. As the First Defendant conceded in evidence, it is not a letter addressed to one person only. So therefore, I am satisfied it is a group, though a limited group
    c. Finally, I turn to the nature of the communication, the intention of the parties and the circumstances surrounding it. The evidence in this regard is the First Defendant authored the report at the offices of Football Australia. Without evidence of the contents of the Report I can not be satisfied on balance that it was anything but a private communication authored by the First Defendant for Football Australia.
44. Accordingly for the reasons set out in the preceding paragraph, I am <u>not</u> satisfied that the preparation of the report for Football Australia by the First Defendant was a public act.

---

[35] Barry -v- Futter [2011] NSWADT 205 at [69]-[75]
[36] (2003) 173 FLR 31

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

45. Pursuant to s 38S of the ADA, 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".

46. The test is an objective one[37].

47. Furthermore, it is not necessary:

    a. For a person or people to be incited by the act or acts; nor

    b. To show an intention to incite[38].

48. The 2019 decision of the Equal Opportunity Division of NCAT in *Riley v State of New South Wales (Department of Education)*[39] 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 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);*

---

[37] *Kerslake -v- Sunol [2022] ACAT 40 at [73]*

[38] *Sunol v Collier (No 2) [2012] NSWCA 44; (2012) 260 FLR 414, Bathurst CJ at [29]-[31] (Allsop P agreeing).*

[39] *[2019] NSWCATAD 223*

- *"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)."*[40]

49. Counsel for the Defendants, Mr Maghami, contends that neither the Articles, Newsletter or the Social Media Posts had the effect of inciting hatred, serious contempt for or severe ridicule of the Plaintiff. He argues that that they must be taken as a whole and in context as opposed to a selective reading of particular extracts.

50. In relation to the first category, namely, the Articles and Newsletter he submits inter alia that:

    a. Firstly, none of the Articles or the Newsletter makes express reference to the Plaintiff by name;
    b. Secondly, the substance of the Articles and Newsletter is directed to "the gender policies" of sport clubs and organisations, in particular Football Australia which the First Defendant opposes and merely seeks to "understand and challenge the gender policy which permits biological males to play sports against biological females". Much of the Articles and Newsletter recounts the First Defendant's attempts to engage with various representatives of the "club, associations and Football Australia". It is no more than "political communication" directed to Football Australia.
    c. Thirdly, without naming the Plaintiff, at its highest the First Defendant refers to the Plaintiff as a "male", "man" and "bloke in a frock" and "an adult male in a dress"
    d. Finally, there is no call to action, urging, rousing, command, request proposition or encouragement for the community to take any particular action in respect of the Plaintiff.

51. Mr Maghami argues that Bathurst CJ in *Sunol -v- Collier (No 2)*[41] (**"Sunol"**) proffers a "word of caution" stating:

---

[40] *Riley v State of New South Wales (Department of Education)* [2019] NSWCATAD 223 at [131]
[41] [2012] NSWCA 44

"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]"[42]

52. 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.*"[43]

53. In the 2021 decision of the Administrative and Equal Opportunity Division in *Lamb -v- Campbell*[44] citing *Margan -v-Manias*[45] 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>."[46]

54. The Defendants argue that the salient features and focus of the Articles and Newsletter were with respect to the policies of Football Australia and not the

---

[42] Ibid at [28]
[43] Ibid at [79]
[44] [2021] NSWCATAD 103
[45] [2015] NSWCA 38
[46] *Lamb -v- Campbell* [2021] NSWCATAD 103 at [34]-[36]

Plaintiff and that the language used is nothing more than "mere insults, invective or abuse" which do not impugn the legislation.

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

a. Her role as a spokesperson and political lobbyist for the Second Defendant is to be provocative[47];

b. In her style of advocacy, she must make her "point as a spokeswoman and political commentator and advocate- whether by Twitter and Facebook, or by any other means"[48]

c. That despite advocating against men playing in women's sporting teams and in particular in relation to the policy of Football Australia in this regard, she cannot recall if she had read the actual policy of Football Australia with respect to transgender women playing on a women's team.[49]

56. This is an appropriate point to consider the audience which the Articles and 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].*
>
> *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*

[47] Exhibit 3 at [16]
[48] Ibid at [17]
[49] Transcript date 7 February 2025 at page 43.43 -44.5

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".*[50]

57. 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. His Honour 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.
62Further, 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.[51]

58. The evidence of the First Defendant was unequivocal. She is a political lobbyist and advocates against transgender women playing in women's sports teams. Moreover, she and the Second Defendant, actively recruit such an audience which is evidenced by the following:

a. Her twitter post dated 19 January 2023, which stated:

[50] Sunol -v- Collier (no 2) [2012] NSWCA 44 at [32]-[34]
[51] Ibid at [61] and [62]

"*Men of mid coast NSW, can you get I touch with me please? I need your help. There is a bloke playing on the women's team in Wingham and many are upset about it. The federation is refusing to listen*"[52]

b. The January Article which asks people to "Keep in touch" and requests their details including their email address;
c. The February Article which also asks people to "Keep in touch"; and
d. The Newsletter which directs people to the Binary Australia website.

59. Accordingly, her social media audience and the audience of the second defendant are clearly people who are engaged with respect to these issues. 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 and/or Second Defendant.

60. I now turn to examine the various categories as set out in paragraph 9.

CATEGORY 1: THE ARTICLES AND NEWSLETTER

January Article

61. Despite not naming the Plaintiff, the January Article:
    a. Was titled "A bloke in a frock is playing soccer on the Mid North Coast"
    b. The first paragraph stated
    "*Wingham Football Club on the Mid North Coast of NSW published these photos on their facebook page in December 2022. The bloke in a frock was receiving an award for playing in the women's division.*"
    c. Included 3 separate photos of the Plaintiff including:
        i. image of the Plaintiff's head cropped in a circular frame
        ii. an image of the Plaintiff standing beside her coach with the coach's face blurred out with yellow ink.
        iii. An image of the Plaintiff standing beside her teammates from her soccer team with all but her own face blurred out with yellow ink;
    d. Named Wingham Football club twice and the community of Wingham;

[52] Exhibit 1 at [26]

e. Referred to the Plaintiff as "The bloke in a frock was receiving an award for playing in the women's division" and

f. Stated amongst other things:

i. "How can girls, women and families feel safe when they are not even permitted to question the presence of a man in their space or on the field?"

ii. Why should it be left up to girls who just want to play soccer for fun, to risk their safety…" and

iii. "Why should parents be put in the terrible situation of having to deal with an adult man in their daughter's bathroom"

62. In my view the focus of the January Article was clearly the Plaintiff. Her photo is situated above the title "A bloke in a frock is playing women's soccer on the Mid North Coast". Additionally, an additional two photos depict the Plaintiff with both her team and coach. Both these photos are prominent and take up almost an A4 page together.

63. Moreover, the January Article sought to evoke fear in the reader regarding the fact that the Plaintiff, who is described and referred to as a man/ male/ bloke is playing in a women's team (and transgender women playing in women's sport generally) by the following:

a. How can girls, women and families feel safe when they are not even permitted to question the presence of a man in their space or on the field?"

b. Why should it be left up to girls who just want to play soccer for fun, to risk their safety…" and

c. "Why should parents be put in the terrible situation of having to deal with an adult man in their daughter's bathroom"

64. Finally, I am not satisfied that the Defendants simply "misgendered" the Plaintiff in the January Article by referring to the Plaintiff as a "Bloke in a Frock", "the male appropriating womanhood at the Wingham Club" and "he". The statements referred to in the preceding paragraph together with the prominent placement of the photos of the Plaintiff creates a causal connection between the Plaintiff and the fear and safety matters raised, in the January Article.

65. Accordingly, I am satisfied on balance that the January Article had the capacity to encourage or spur others to harbour emotions of hatred towards, severe contempt for and or severe ridicule of the Plaintiff, on the grounds that the Plaintiff is transgender.

The February 2023 Article

66. The February 2023 Article, despite also not naming the Plaintiff did state the following:
    a. "Football Australia refuses to engage with Binary, or with any members of North Coast NSW Football who have made complaints about a male player on the female team in Wingham."
    b. "The peak soccer body ...refuses to hear complaints or engage with women and families who are concerned about a male playing soccer in the women's team at Wingham"
67. Unlike the January Article, the February 2023 Article did not contain any photos of the Plaintiff.
68. Read in isolation I am not satisfied that the February 2023 Article encouraged others to harbor emotions of hatred, severe contempt for or severe ridicule of the Plaintiff.

The Newsletter

69. Finally, the Newsletter stated the following, amongst other things:
    a. Was titled under a red flag "ACTION ALERT"
    b. The Newsletter went out under the title "Keep blokes out of women's sport!"
    c. "Like so many of you ...there's nothing I care about more than the wellbeing of my children. That's why I was so alarmed when I saw an adult male in a dress appear on the Facebook page of our local soccer club excepting an award"
    d. "But there's something you can do today to draw a line in the sand and tell Football Australia that enough is enough.... But you and I are about to teach them an important lesson"
70. It also did not feature photos of the Plaintiff, nor did it mention the town of Wingham or Wingham Football club.

71. Accordingly, when read in isolation, I am not satisfied on balance that the Newsletter encouraged others to harbour emotions of hatred towards, severe contempt for or severe ridicule of the Plaintiff.

CATEGORY 2: THE SOCIAL MEDIA POSTS

72. Mr Maghabi submitted in relation to the Social Media posts inter-alia that:

a. Each post made on Twitter and/or Facebook must be individually assessed under the Sunol test

b. A collective assessment of the social media posts is impermissible

c. It was the evidence of the First Defendant that by

"*resharing the article published in Binary, the image of the Plaintiff became the thumbnail image for the article that was reshared. The image was already online and available and I only reshared it*"[53]

Therefore, there was no "repeated effort to re-enclose the image of the Plaintiff"[54]

d. Simply resharing the January Article or the Plaintiff's publicly available image does not in itself impugn section 38S of the ADA and that the Court "must direct its attention solely to the substance of the social media posts i.e. the body of the Tweets and Posts made by the Defendant individually themselves"[55]

e. Moreover, "the Plaintiff's case does not disclose a single tweet or Facebook post, where the Defendants have tagged, positively identified or otherwise called for action against the Plaintiff"; and

f. The consistent misgendering of the Plaintiff in the Social Media Posts as "he", "male" and "bloke" does not "give rise to the level of incitement of vilification of the Plaintiff based on their transgender status"

g. That at no point can it be shown that the Defendants have made commentary directed at the Plaintiff, which is hateful, seriously contemptuous or severely ridiculing of them.[56]

---

[53] Exhibit 3 at [40]
[54] Defendants' Submissions filed 15 January 2025 at [72]
[55] Ibid at [75]
[56] Ibid at [86]

h. That the Defendants cannot be held responsible for the conduct of third parties online

73. 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)* [57] 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*

74. I have examined each of the Social Media Posts the subject of these proceedings. Each of them except the very first, which was sent by the Defendant at 9.27am on 19 January 2023, contained one or more of the following:

a. A link to the January 2023 Article
b. An image of the Plaintiff
c. Made statements referring to the Plaintiff as either:
    i. "a bloke in a frock"
    ii. A "bloke playing on the women's team in Wingham"
    iii. A "man" or "bloke" or "fella" or playing on the women's team in Wingham NSW
    iv. A "bloke who appropriates female stereotypes"

75. It defies logic that in determining if an individual tweet impugns section 38S of the ADA, it should be done by solely referencing the substance of the social media post and not the photo or articles attached to or included in the post, particularly if the photo can be viewed by person/s viewing the tweet or post. In my view the post/s should be taken as a whole.

76. Despite not naming the Plaintiff the Social Media Posts alluded to the Plaintiff and identified her by including:

a. A photo of her
b. Naming the Football team where she played and the town where she resided; and

[57] [2019] NSWCATAD 223 at [244]

c. Derided her by referring to referring to her as either a "man", a "bloke", a "bloke in a frock", a "bloke who appropriates female stereotypes"

77. Moreover, although it is not necessary for a person to be incited by the Act there is actual evidence before the Court that people were in fact incited by the social media posts for example:

a. A number of people shared the posts of the First Defendant and commented:

i. "Totally agree with Kirralie Smith. This loser was born male, is male, will die a male & identifying as anything else won't change the facts"[58]

ii. Responses to a Tweet from the First Defendant on 8 February 2023 which stated together with a photo of the Plaintiff and her coach "you allow men who appropriate stereotypes of women to play as women. How is that an incentive for girls? Where is the fairness and dignity for girls"[59]:

1. "dudes from a mile away"[60]
2. "That's two blokes"[61]

iii. Comments on posts by the First Defendant including:

1. "Surely the girl players have boyfriends, they should meet them in the carpark and give them a once over"[62]
2. "Seriously? That guy needs to take a look in the mirror. No amount of makeup is going to make that look female"[63]
3. "My god I am having breakfast when reading this and then I saw the picture now I feel sick" [64]
4. "Because IT might get ITS feelings hurt. So nobody is going to tell IT, IT can't pay with the woman (angry face emoji)"[65]

---

[58] Exhibit 1 at [52(b)]
[59] Ibid at [53]
[60] Ibid
[61] Ibid
[62] Ibid at annexure SB-35
[63] Ibid
[64] Ibid
[65] Ibid court book page 469

78. I also note that there is evidence before the Court that the Social Media Posts were shared, liked and often commented upon and those comments were also liked or commented upon.

79. An analysis of the evidence reveals that the First Defendant between 19 January 2023 and 27 March 2023 (approximately ten weeks) made 25 posts to Facebook and Twitter (this included replies to posts by third parties) which referred to or included at least one of the following:

    i. A link to the January 2023 Article
    ii. An image of the Plaintiff
    iii. Referred to a man playing on the women's team at Wingham
    iv. Made statements referring to the Plaintiff as either:
        1. "a bloke in a frock"
        2. A "bloke playing on the women's team in Wingham"
        3. A "man" or "bloke" or "fella" or playing on the women's team in Wingham NSW
        4. A "bloke who appropriates female stereotypes"

80. I note that some of the Social Media Posts made by the First Defendant, which included images of the Plaintiff, were interacted with, for example the:

    a. Facebook post dated 20 January 2023 at 9.41 am[66]:
        i. was shared 39 times
        ii. received 170 comments (though I note that the comments were not before the court)
        iii. 236 people had reacted to the post by way of emoji
    b. Tweet dated 20 January 2023 at 9.22am[67] :
        i. was viewed 60.2 thousand times
        ii. 199 retweets
        iii. 1,269 likes
    c. Tweet dated 30 January 2023[68]:
        i. received 12 comments (though I note that the comments were not before the court)
        ii. retweeted 8 times

[66] Exhibit 1 at [41(c)], Court Book page 374
[67] Ibid, Court Book page 376
[68] Ibid, at [41(e)], Court Book 378

iii. Liked 96 times

iv. Viewed 6,582 times

d. Tweet dated 9 February 2023 at 10.09am was viewed 1,399 times[69]

81. I accept that I do not know the dates when the screen shot of the posts referred to in the preceding paragraph were taken, nor does the information inform me as to whether the people interacting with the social media posts agreed or disagreed with the contents. It does, however, indicate that people were viewing and interacting with the posts made by the First Defendant and the number of the people were not insubstantial.

82. Accordingly, I am satisfied on balance that Social Media Posts (which are conceded to be public acts) which included one or more of the following:

a. A picture of the Plaintiff's face

b. A link to the January Article

c. Named the soccer club and its location where the Plaintiff played, namely Wingham; and

d. Referred to the Plaintiff by way of a "man", "bloke", "bloke in a dress"

were 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.

CATEGORY 3: GATHERING ON 27 FEBRUARY 2023

83. In relation to the gathering at the Taree Wildcats soccer ground on 27 February 2023, the evidence of the First Defendant can be summarised as follows:

a. She attended the Wildcats soccer grounds with her husband, son and two daughters with several other people[70].

b. The men in attendance were wearing brightly colored wigs[71] and white singlets

c. They were not wearing the uniform or jersey of Wingham FC;

d. It was a public space[72]

---

[69] Ibid paragraph 53(c) court book page 392
[70] Exhibit 3 paragraph 80
[71] Exhibit 3 paragraph 82
[72] Exhibit 3 paragraph 86

e. They attended the Taree grounds to film promotional clips for the Second Defendant's campaign against the Football Australia policy[73]

f. The video was never livestreamed or broadcast or released to the public[74].

84. It is the uncontested evidence of the Plaintiff that at the time of the gathering she had "pink and purple hair"[75].

85. There is no evidence before the Court in relation to what was said at the Gathering nor is the video in evidence.

86. Accordingly, although it is likely that the men wearing brightly coloured wigs were there for the sole purpose of representing the Plaintiff and the gathering was public, I cannot be satisfied that the Gathering was capable of inciting hatred towards, serious contempt for or severe ridicule of the Plaintiff.

CATEGORY 4 – THE REPORT TO FOOTBALL AUSTRALIA

87. As set out in paragraphs 37 to 44 of this decision I was not satisfied that the report authored by the First Defendant to Football Australia was a public act.

88. However, if I am wrong in this regard and it is found to have been a public act, I am not satisfied that the report was capable of inciting hatred towards, serious contempt for or severe ridicule of the Plaintiff for the following reasons:

a. Firstly, the report itself is not before the court and therefore I have no knowledge of its contents and what was stated in it; and

b. Secondly, the Report allegedly referred to the Plaintiff by her pre-transition name or "dead name". I note at its highest the evidence before the Court is that the First Defendant did not deny using the Plaintiff's dead name and she could not recall if she had used it in the Report[76].

In my view this is not enough to incite hatred towards, serious contempt for or severe ridicule of the Plaintiff.

---

[73] Ibid at [81]
[74] Ibid at [87]
[75] Exhibit at [67]
[76] Transcript dated 7 February 2025 at pages 48.36 – 50.26

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

89. I am satisfied that in each of the public acts namely the January Article and the Social Media Posts the First and Second Defendants:

a. Identified the Plaintiff by posting images of the Plaintiff and referring the the Plaintiff's football team;

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;

c. Referred to the Plaintiff as either:

i. "a bloke in a frock"

ii. "a bloke playing on the women's team at Wingham" or

iii. "a man" and

d. 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

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

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

91. Section 38S of the ADA 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.

92. The Defendant's closing submissions dated 27 May 2025, make numerous references to the "*established test in Sunol*".[77] I note that I received no further guidance from the Defendants' legal representatives regarding the "test in Sunol" beyond reference to paragraphs 25 to 40 in *Sunol*. I note that Bathurst CJ provided a useful conclusion / summary at paragraph 41, where his Honour 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.*
>
> *(f)For the act in question to be done in good faith, it must be engaged in bona fide and for the protected purpose*".

93. The Defendants submit that in applying "the *Sunol* test, the Court may only make a finding that the Defendant's conduct was in breach of the ADA and thereby unlawful if satisfied:

    a. *First* that the act is public;
    b. *Second*, 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
    c. *Third*, consider the act to be unreasonable, in bad faith and that no defence is available under section 38S(2)"[78]

94. It seems to me that the Defendants' closing submissions have sought to conflate the elements of the offence of unlawful vilification with the conclusions reached by Bathurst CJ as to the construction of s49ZT of the Act which is analogous to section 38S of the ADA.

95. Section 38S(2) is not technically a "defence" but a provision that clarifies the scope of section 38S(1), as stated by Allsop J in *Sunol* at [60]:

---

[77] Paragraphs 39, 42 and 46(a)
[78] Defendant's closing submissions at [39]

"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)".

96. Accordingly, in order to enliven section 38(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".

97. It was submitted by the Defendants that "the Plaintiff is unable to establish that either Mrs Smith or Binary were acting outside of the scope of their public advocacy in any respect".[79] In this regard, it appears that the Defendants have misconstrued who holds the burden of proof with respect to the exception as provided for by section 38(2)(c).

98. Bromberg J. in *Eatock -v- Bolt*[80], 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 section 38S of the ADA 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".

99. Furthermore, Section 104 of the ADA 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.

100. Accordingly, I am satisfied that Defendants bear the onus of establishing that the exception pursuant to section 38S(2) applies.

---

[79] Defendant's closing submissions at [52]

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

101. Having already found the First Category (namely the social media posts) and the January 2023 Article, 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 section 38S(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?

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

102. The Defendants argue that the public acts of the First and Second Defendant 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. They 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)[81], 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"[82]; 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"

[81] Defendants' submissions dated 27 May 2025 at [46]
[82] Ibid at [46(b)]

b. The "defences" are created on the basis that the preceding clause does not render unlawful anything that can be characterised as defensible by section 38S(2)(c)"[83]

c. The statutory test for enlivening of a defence under section 38S(2) is not one of proportionality.

103. Mr Maghami also contended that considering the matter or actions of the Defendants as a sustained course of conduct would be in clear disregard of the established test in *Sunol*[84].

104. Mr Gregory, Counsel for the Plaintiff did concede that that discussion around the issues namely the participation of transgender women in women's sport is a matter that would fit within the exception of section 38S(2)[85], however he stated that:

"it wasn't done reasonably, and it wasn't done in good faith. So, whilst we accept that discussions publicly around these issues are matters of academic research, religious or other purposes what happened here was not done reasonably, and it was not done in good faith…..what the Defendant's did was specifically identity the plaintiff, and use the plaintiff, essentially, as their kicking horse, to make their point around the participation of transgender women in sport"[86]

105. The First Defendant was steadfast in her evidence that the Social Media Posts and January Article were all done in good faith to "facilitate public debate and discourse on policy issues"[87].

106. The First Defendant also conceded in cross examination that:

a. She developed a template that people could use to write to Football Australia[88]

b. That template referred to Wingham, and also "a man who was playing in the women's team at Wingham"[89]

c. Thousands of people signed the template[90]

107. Furthermore, the First Defendant also gave evidence that:

---

[83] Ibid at [44]
[84] Defendants opening submissions filed 15 January 2025 at [23]
[85] Transcript dated 7 February 2025 page 5.47-50
[86] Ibid page 6.9-17
[87] Exhibit 3 at [67] and Transcript 7 February 2025 at 53.38-54.1
[88] Transcript at 52.18
[89] Ibid at 52.20-24
[90] Ibid at 52.37-39

a. That she used the Plaintiff as an example "because people don't believe you unless you show them" and not as a "sticking point"[91]
b. That she put up photos of the Plaintiff and used the Hashtag "Trans women are con men"[92]
c. That "in my advocacy...I don't think about the individual as such, I think about the policy that has allowed that individual...and he was just taking advantage of a bad policy, and I go after the policy and not the person"[93]
d. She did not know that the Plaintiff had been hurt by her actions[94]
e. It is her view that as the Plaintiff is not truthful about being a woman[95] she does not accept that the Plaintiff was hurt by her actions.

108. 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 section 38S(2)(C) of the ADA, and I accept that it was and is the aim of the Defendants to generate discussion in order to change the policy of Football NSW.

109. However, as conceded by the First Defendant in cross examination, the Defendants used the Plaintiff as an example to illustrate their position, namely by adding a photo or photos of the Plaintiff and referring to the Plaintiff as a "bloke", "man" and "bloke in a dress" and referring to the Plaintiff's club and team.

110. 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[96]; and
b. That the statutory test for the enlivening of a defence under section 38S(2) is not one of proportionality[97]; and

---

[91] Ibid at 32.10-15
[92] Ibid at 34.40
[93] Ibid at 36.15-19
[94] Ibid at 39.25-26
[95] Ibid at 45.3
[96] Defendants' closing submissions at [41] and [42]
[97] Ibid at 951]

c. I can only consider each act or social media post individually and not as a "course of conduct"[98];

111. 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*"[99].

112. 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 46 and 48 the test is an objective one and it is not necessary to show an intention to incite.

113. However, the intention of the Defendants in my view, has relevance when considering if the exception in section 38S(2)(c) is made out. As the intention facilitates an understanding of the acts and the context in which they arise.

114. I do <u>not</u> agree with the submission that the statutory test for enlivening the exception is not one of proportionality.

115. It was held by Bathurst CJ (with Allsop and Basten JA agreeing) in *Sunol* 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".[100]

116. In the 2006 Victorian Court of Appeal decision of *Catch the Fire Ministries Inc and Others -v- Islamic Council of Victoria Inc*[101] 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*

---

[98] Defendants' submissions filed 15 January 2025 at [23]
[99] Sunol -v- Collier (no 2) [2012] NSWCA 44 at [41]
[100] Ibid at [41(e)]
[101] (2006) 235 ALR 750

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.".[102]

117. I note that the preceding paragraph was cited with approval by Bathurst CJ in *Sunol*[103].

118. Allsop P, in considering the purpose s49ZT (which is in the same terms of section 38S of the ADA) opined:

"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

---

[102] Ibid at [92]- [93]

[103] Sunol-v- Collier (no2) at [40]

foreign, inimical or offensive to the system of government protected) will be made unlawful."[104]

119. 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 section 38S(2) of the ADA 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 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

---

[104] *Sunol -v-Collier(NO 2)* [2012] NSWCA 44 at [70]-[72]

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].[105]

120. Although the acts of the First and Second Defendant 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 January Article and the Social Media Posts (namely category 2) by including photographs of the Plaintiff, naming the team upon which the Plaintiff plays and referring to the Plaintiff as a "bloke in a frock", "a bloke playing in the women's team at Wingham", "a man", "bloke" or "fella" and "a bloke who appropriates female stereotypes" were using the Plaintiff as an example to illustrate its position and as a "sticking point", and in my view this was disproportionate to what was necessary and accordingly was <u>not</u> reasonable.

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

a. Upon observing the photo of the Plaintiff on the Wingham Facebook page she formed the view that the Plaintiff was male as he "had an Adams Apple"[106].

b. She used the Plaintiff as a case study or example for her advocacy, it was not directed personally at the Plaintiff[107]

c. She considers all transgender women to be lying about being women[108], and therefore all transgender women (including the Plaintiff) may be lying about other things[109]

d. That she considered the Plaintiff to be a liar[110]

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

"*I deal in evidence and facts, and the fact is that the plaintiff is male, and I will refer to him as a male*"[111]

---

[105] *Faruqi v Hanson* [2024] FCA 1264 at [293]-[296]
[106] Transcript dated 7 February 2025 at 32.23
[107] Defendants closing submissions at [59]
[108] Transcript dated 7 February 2025 at 41.14 and 41.27
[109] Ibid 41.17
[110] Ibid at 42.20 and 42.24-25
[111] Ibid at 29.22 -23

f. When asked about if she cared about how the Plaintiff might feel if she misgendered the plaintiff she replied:

"*I don't have a relationship with the plaintiff, so his feelings are not the core of my advocacy. It's truth*"[112]

g. 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"

122. Moreover, it was the evidence of the First Defendant that she "does not think about the individual as such"[113] and that she does not accept that "the Plaintiff was hurt by her actions"[114].

123. By making the focus of the January Article and the social media posts the Plaintiff (despite not actually naming her) in order to advocate for her position about transgender women on women's sports teams the acts were not about the policy but about the Plaintiff personally and her relationship with the team upon which played and had played for over 4 years without incident.

124. Accordingly, I am satisfied that the First and Second Defendants acted with careless disregard to the effect, namely the hurt that the Social Media Posts and January 2023 Article would have had on the Plaintiff and therefore lacked objective good faith.

125. Accordingly, I am not satisfied on balance that the First and Second Defendant have established that they acts were carried out reasonably and in good faith pursuant to section 38S(2)(c) of the ADA.

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

126. As a result of being satisfied that the social media posts and January Article were contrary to section 38S of the ADA, I now must determine the final issue raised by the Defendants namely whether section 38S of the ADA is

[112] Ibid at 29.29-30
[113] Ibid at 37.25 - 30
[114] Ibid at 40 – 41.8-9

unconstitutional because it places a disproportionate burden on political communications.

127. 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 Defendants.

128. I note that on 15 August 2025, prior to my handing down this decision, the Court of Appeal delivered judgment in *Smith -v- Blanch*[115]. 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 First Defendant[116]. The person in need of protection in the proceedings was the Plaintiff. In summary, the First 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 they wished to make submissions with respect to the Court of Appeal decision. Only the Attorney General who had intervened in the proceedings provided additional written submissions. No further submissions were made by either the Plaintiff or the Defendants, so I have only had regard to their opening and closing written submissions.

129. The Defendants submit 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 Internation Ltd -v- New South Wales* where Kiefel CJ and Keane J opined[117]:

[115] [2025] NSWCA 188
[116] Smith -v- Blanch [2024] NSWDC 631
[117] [2022] HCA 23; (2022) 277 CLR 537; (2022) 403 ALR 1 at [27]

"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 ADA may be applied to prohibit or restrict the Defendants who are respectively, a political spokeswoman and political advocacy organisation, from making further political communications in relation to the Plaintiff's public involvement in women's football competitions.[118]

b. The Defendants do not contend that the purposes of the ADA or the means adopted are "illegitimate".

c. With respect to whether the ADA is a proportionate response to its purpose, and applying the structured method of proportionality analysis adopted in *McLoy -v- New South Wales*[119], they contend:

   i. That there is no rational connection between the purpose of the Act and the means sought to achieve that purpose[120]. In particular they argue that in this case the purpose of protecting the Plaintiff is sought to be achieved by measure which seek to prohibit and/or restrict the Defendants in making political communications about the issue of transgender women playing on women's sport teams[121].

   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[122].

   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

[118] Defendant's submissions filed 15 January 2025 at [153]
[119] (2015) 257 CLR 178 at [194]-[195]
[120] Defendant's submissions filed 15 January 2025 at [161] citing Clubb -v- Edwards (2019) 267 CLR 171 at [84]
[121] Ibid at [160]
[122] Ibid at [162] – [164] citing Brown -v- Tasmania (2017) 261 CLR 328 at [139] and Comcare -v- Banerji (2019) 267 CLR 373 at [35]

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.[123]

iii. In Comcare -v- Banerji[124] 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"[125]

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 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"[126]

130. The constitutional basis for the implied freedom of communication on matters of politics and government is "well settled"[127]. 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

---

[123] Ibid at [165]-[166]
[124] (2019) 267 CLR 373 at [38]
[125] Ibid at [38]
[126] Defendant's submissions filed 15 January 2025 at [168]-[169].
[127] *LibertyWorks Inc v Commonwealth of Australia*|(2021) 274 CLR 1;(2021) 391 ALR 188

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".[128]

131. 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*"[129]

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*". [130]

132. This was also stated in the recent Court of Appeal decision *of Smith -v- Blanch*[131] where the court opined:

"*the implied freedom does not establish a personal right. A legislative burden on the freedom "is not to be understood as affecting a person's right or freedom to engage in political communication, but as affecting communication on those subjects more generally*""[132]

133. Accordingly, the Court must consider the operation and effect of sections 38R and 38S of the ADA more generally with the facts of this case being no more than an illustration or example of its operation[133].

134. The Court of Appeal in *Smith -v- Blanch*[134] 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.

---

[128] Ibid at [44]
[129] (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]
[130] Ibid
[131] [2025] NSWCA 188
[132] Ibid at [135] citing Unions NSW -v- State of NSW [2013] 252 CLR 530 at [36]
[133] *Farm Transparency International and Another v New South Wales* (2022) 403 ALR 1 at [27]
[134] [2025] NSWCA 188

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 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.[135]

135. As set out in paragraph 134, 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*[136] in turn.

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

136. 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."[137] and therefore to the extent that the ADA applies to public political communications it is a burden on the implied freedom.

---

[135] Ibid at [136]-[142]
[136] Ibid at [137]
[137] Defendants submissions filed 15 January 2025 [133]-[155]

137. In *Sunol*[138], Basten JA concluded that s49ZT of the ADA (which is in almost identical terms as section 38S) 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.[139]

138. 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[140].

139. The difficulty faced by the First and Second Defendants in respect of their constitutional argument is that in *Sunol* in dealing with an almost identical provision of the ADA (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.

---

[138] Sunol -v- Collier (No 2) At [86]
[139] Sunol -v- Collier (No 2) at [89]
[140] 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]

140. The Defendants do not deal with this difficulty in their submission nor seek to explain how *Sunol* can be distinguished.

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

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

142. As I am satisfied that the sections 38R and 38S of the ADA 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 Defendants do not contend that the purposes of the law or the means adopted are "illegitimate"[141]
   b. The object of sections 38R and 38S of the ADA is to prevent vilification of transgender persons. The purpose is discerned from the text of the statute and the second reading speech.

143. As Allsop P stated in *Sunol -v- Collier (No 2)*[142] :

"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"

144. Accordingly, I am satisfied that the object of sections 38R and 38S of the ADA are legitimate and I am of the view that pursuant to reasoning of Gaegler J. in *Clubb -v- Edwards*[143] that the purpose of section 38S is compelling as it gives

[141] Defendant's submissions filed 15 January 2025 at [156]
[142] Sunol -v- Collier (No 2) at [73]
[143] Clubb -v- Edwards 92019) 267 CLR 1 [196]

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?

145. 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.

146. In determining this issue, the High Court embraced "structured proportionality" as a helpful tool of analysis[144]. This involves considering whether sections 38R and 38S of the ADA are:

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

Are the relevant provisions suitable?

147. As set out in Mcloy -v- New South Wales[145] 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*"[146]

148. The Defendants argue that there is "no rational connection between the control and prohibition of mere political communication and the object of the statute"[147].

149. 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.

---

[144] AG submissions dated 22 January 2025
[145] (2015) 257 CLR 178
[146] Ibid at [80]
[147] Defendants' submissions dated at [161]

150. Furthermore, the "implied freedom is not a personal right; it is to be understood as a restriction upon legislative power"[148], 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[149].

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

Are the relevant provisions necessary?

152. 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"[150]

153. The onus is on the Defendants to identify the obvious and compelling legislative alternative. The Defendants in attempting to do so submit

a. The protection of persons from discrimination can and is accomplished without the need for the Act to have regard to political communications[151]; 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"[152]

154. 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.

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

---

[148]Clubb -v- Edwards(2019) 267 CLR 1 at [35]
[149] Ibid
[150] (2019) 267 CLR 373 at [35]
[151] Defendants submissions dated filed 15 January 2025 at [164]
[152] Ibid at [165]

"*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*"[153]

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

157. Accordingly I am satisfied that the provisions are necessary.

Are the provisions "adequate in the balance"?

158. 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*"[154]

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

"*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*"[155]

160. The Defendants argue 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"[156] 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"[157]

161. 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.

162. 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;

---

[153] (2021) 274 CLR 1 [254]
[154] Clubb -v- Edwards 92019) 267 CLR 1 at [72]
[155] (2015) 257 CLR 178 at [2]
[156] Defendants submissions dated filed 15 January 2025 at [169]
[157] Ibid

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

163. Accordingly, I am satisfied for all the reasons set out in paragraphs 136 to 162 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 First and Second Defendants unlawfully vilified the Plaintiff pursuant to section 38S of the *Anti Discrimination Act 1977 (NSW)* by the following acts:

    a. the Social Media Posts; and

    b. the January 2023 Article

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