

Your ref /

Our ref / 23RRG0495
Date / 31 July 2024
Sent by / Email

Giles / George

By Email: peter.bartlett@minterellison.com

Peter Bartlett
Minter Ellison
Level 20
Collins Arch
447 Collins Street
Melbourne VIC 3001

Dear Mr Bartlett

**MOIRA DEEMING v JOHN PESUTTO
FEDERAL COURT OF AUSTRALIA PROCEEDING: VID 1023/2023**

- 1 We refer to your letter of 5 July 2024 (**your letter**), in relation to Mrs Deeming's discovery provided on 28 June 2024.
- 2 Prior to responding to the matters you have raised in 'Annexure A' to your letter, we make the following general observations.
- 3 First, paragraph 2.2 of your letter states that Mr Pesutto's Defence filed on 29 January 2024 pleads, amongst other defences, 'a defence of substantial truth pursuant to s 25' of the *Defamation Act 2005* (Vic) (**the Act**). That is not correct. Mr Pesutto pleads a defence of contextual truth under s 26 of the Act (at [49]-[65]). No defence is pleaded under s 25.
- 4 Secondly, paragraph 2.2 of your letter refers to '89 particulars of truth' pleaded at 'Annexure A' to the Defence. We repeat paragraph 3 above. As we understand it, the particulars in Annexure A to the Defence are intended to support:
 - (a) Mr Pesutto's defence of honest opinion pleaded under 31 of the Act, in that they are intended to seek to prove the substantial truth of:
 - i. the material set out in [44.3(iii)] of the Defence (being the material said to have been set out in the Media Release);
 - ii. the material set out in [45.3(iii)] of the Defence (being the material said to have been set out in the 3AW Interview);
 - iii. the material set out in [46.3(iii)] of the Defence (being the material said to have been set out in the ABC Interview);
 - iv. the material set out in [47.3(iii)] of the Defence (being the material said to have been set out in the Press Conference); and
 - v. the material set out in [48.3(iii)] of the Defence (being the material said to have been set out in the Expulsion Motion and Dossier); and
 - (b) Mr Pesutto's defence of contextual truth pleaded under s 26 of the Act, in that they are intended to seek to prove the substantial truth of:
 - i. the 'Media Release Imputation' (see [50]);



- ii. the '3AW Imputations' (see [53]);
- iii. the 'ABC Imputation' (see [56]);
- iv. the 'Press Conference Imputations' (see [59]); and
- v. the 'Expulsion Motion Imputations' (see [63]).

5 At paragraph 2.3 of your letter, you say that the particulars in Annexure A of the Defence 'broadly relate' to the six matters referred to at subparagraphs 2.3(a)-(f) of your letter.

6 We agree that the particulars in Annexure A to the Defence could be said to 'broadly relate' to the matters to which you referred at subparagraphs 2.3(a) ('Ms Keen's extensive public associations with white nationalists and far-right extremists'), 2.3(b) ('Ms Jones' extensive public vile anti-trans activism and rhetoric'), 2.3(d) ('the Rally'), and 2.3(e) ('Mrs Deeming's level of involvement in organising and promoting the Rally') of your letter.

7 In relation to subparagraph 2.3(c) of your letter ('Mrs Deeming's relationship with and/or knowledge of Ms Keen and with Ms Jones, both prior to and after the Rally'), we do not agree that this is directly raised by Annexure A of the Defence. Annexure A of the Defence makes various allegations about Ms Keen and Ms Jones. It does not allege that Mrs Deeming had a 'relationship' with Ms Keen or Ms Jones. It also does not allege explicitly that Mrs Deeming had 'knowledge' of any of the matters relating to Ms Keen or Ms Jones which are particularised (other than allegations that certain of the matters relating to Ms Keen or Ms Jones were 'notorious'). Instead, what is alleged is that Mrs Deeming had 'associations' with Ms Keen and/or Ms Jones. But the scope of those 'associations' is limited by the pleading. The associations which are pleaded are as follows:

- (a) It is alleged at [20] that Mrs Deeming 'associated herself' with Ms Keen by the conduct referred to in [16]-[19] (which was specific conduct prior to the LWS Rally).
- (b) It is alleged at [33] that Mrs Deeming 'publicly associated herself' with Ms Jones by the particular conduct referred to at [33] – namely, 'co-hosting the Rally with Jones', 'speaking at the Rally with Ms Jones', and 'featuring in' the 'Video' (referred to at [36]-[39]).
- (c) It is alleged at [57] that Mrs Deeming 'associated herself' with Ms Keen and Ms Jones by the conduct described in Parts B and C'. The conduct pleaded in Parts B and C relate to conduct prior to the LWS Rally ([16]-[20]), conduct during the Rally ([21]-[27]), and the specific conduct after the LWS Rally which is pleaded at [28]-[56].

8 We do not agree that Mrs Deeming was or is required, under the 'Discovery Orders' (as defined at paragraph 1.1 of your letter), to discover documents which broadly relate to 'Mrs Deeming's relationship with and/or knowledge of Ms Keen and with Ms Jones, both prior to and after the Rally'. Rather, she is required to discover documents which are directly relevant to the particular issues which are raised by the pleading. That relevantly includes the alleged associations between her and Ms Keen and/or Ms Jones *which have been raised in the Defence*.

9 Similarly, in relation to subparagraph 2.3(f) of your letter ('Mrs Deeming's conduct after the Rally'), the Defence pleads specific alleged conduct of Mrs Deeming after the LWS Rally. Again, we do not agree that Mrs Deeming was or is required, under the Discovery Orders, to discover documents which broadly relate to all of her 'conduct after the Rally'. Rather, she is required to discover documents which are directly relevant to the particular issues which are raised by the pleading. That relevantly includes the alleged conduct of Mrs Deeming *which has been raised in the Defence*.

10 Thirdly, in relation to paragraph 2.5 of your letter, you seem to suggest that Mrs Deeming has 'caused harm to her reputation' and that this may be relevant to whether the publications sued upon have caused or are likely to cause serious harm to her reputation. We do not agree that any of the 'issues' you have raised at paragraph 2.5 of your letter could be relevant to whether Mrs Deeming will be found to have satisfied s 10A of the Act, and at any rate none of these issues are pleaded.



- 11 Fourthly, in relation to paragraph 2.6 of your letter, we agree that Mrs Deeming was required to discover documents that are directly relevant to the issues raised by her Statement of Claim including her particulars of aggravated damages. You give the example of Mrs Deeming's allegation (at [38.6(a)] of her Statement of Claim) that Mr Pesutto engaged in a 'calculated and purposeful media campaign'. We reject the suggestion that Mrs Deeming would, by reason of this claim, be required to discover 'documents recording or relating to her communications with the media'. Paragraph [38.6(a)] of the Statement of Claim refers to a campaign by Mr Pesutto (on 19 and 20 March 2023). This directly raises the question of Mr Pesutto's communications with journalists (which should have been discovered by Mr Pesutto); not any communications by Mrs Deeming to journalists.
- 12 In relation to 'Annexure A' to your letter:
- (a) In response to row 1 of your table, for the reasons we have given at paragraphs 8 and 9 above, we do not agree that 'all communications between Ms Keen and Mrs Deeming are discoverable'. Mrs Deeming has sought to discover all communications between herself and Ms Keen (of which, after a reasonable search, she is aware) which either relate to any of the allegations about Ms Keen which are pleaded or which relate to the LWS Rally. Having said that, prompted by your letter, Mrs Deeming has undertaken further searches as a result of which she is now aware of additional communications between herself and Ms Keen which should be discovered. We will provide a copy of these documents shortly, by way of a Supplementary List of Documents.
 - (b) In response to row 2 of your table, we took the approach of discovering documents which we had obtained in the course of our retainer with Mrs Deeming which fell within the scope of the Discovery Orders, on the basis that those documents might be said to be in Mrs Deeming's 'control' (as defined in Schedule 1 of the *Federal Court Rules* (2011) (Cth) (**FCR**)). It therefore does not follow that Document 113 'was provided by Ms Henderson to Mrs Deeming', as you suggest. At any rate, it is also not clear why 'communications relating to and surrounding the communication in which the screenshot was provided by Ms Henderson' would be discoverable. Document 113 itself fell within the scope of the Discovery Orders; it does not follow that any other communications relating to or surrounding that document would also be discoverable.
 - (c) In response to row 3 of your table, we will be including additional communications in Mrs Deeming's Supplementary List of Documents.
 - (d) In response to row 4 of your table, we do not agree with your suggestion that, '[t]o the extent Ms Jones and Mrs Deeming communicated at any point after 17 March 2023, those communications are...discoverable'. Mrs Deeming has sought to discover all communications between herself and Ms Jones (of which, after a reasonable search, she is aware) which either relate to any of the allegations about Ms Jones which are pleaded (including in relation to the 'Jones Tweet') or which relate to the LWS Rally. Having said that, prompted by your letter, Mrs Deeming has undertaken further searches as a result of which she is now aware of additional communications between herself and Ms Jones which should be discovered. We will provide a copy of these documents shortly, by way of a Supplementary List of Documents.
 - (e) In response to row 5 of your table, we repeat paragraph 12(a) above.
 - (f) In response to row 6 of your table, we will be including additional communications in Mrs Deeming's Supplementary List of Documents.
 - (g) In response to row 7 of your table, Mrs Deeming is not aware, after a reasonable search, of any additional documents which fall within the scope of the Discovery Orders which have not already been discovered.
 - (h) In response to row 8 of your table, we repeat paragraph 11 above.



Yours faithfully
GILES GEORGE

A handwritten signature in black ink, appearing to be 'P. George', written on a light-colored background.

Patrick George
Principal

