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Details of Filing

Document Lodged:	Outline of Submissions
File Number:	NSD912/2020
File Title:	CLIVE FREDERICK PALMER v MARK MCGOWAN
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

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Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Federal Court of Australia
District Registry: New South Wales
Division: General **NSD 912 of 2020**

McGOWAN'S OUTLINE OF CLOSING SUBMISSIONS

A. INTRODUCTION

1. These are the final submissions for Mr McGowan on issues remaining open for final determination in both Mr Palmer's claim against him (the **Originating application**) and his cross claim against Mr Palmer (the **Cross-Claim**). These submissions include matters in response Mr Palmer's Outline of Closing Submissions filed on 25 March 2022 (**PS**).

2. Save as is set out at [14] below, all issues as framed in the Amended Factual and Legal Issues for Determination filed on 19 November 2021 (**Issues**) (CB A pp98-111) remain open for final determination**.**

B. PLEADINGS, LISTS OF ISSUES AND AGREED FACTS

Pleadings and particulars

3. The pleadings and particulars in the Originating application are the:

   a. Amended Statement of Claim filed 28 May 2021 (**ASOC**) (CB A pp1-11);

   b. Further Amended Defence filed 25 June 2021 (**FAD**) (CB A pp12-23);

   c. Reply filed 1 October 2020 (**Reply**) (CB A pp24-28);

   d. Further and better particulars provided by letter from Mr Palmer's solicitors dated 22 December 2021 (CB A pp29-33).

4. The pleadings and particulars in the Cross-Claim are the:

   a. Further Amended Statement of Cross-Claim filed in Court on 15 February 2022 (**FASOCC**) (which supersedes the Amended Statement of Cross-Claim at CB A pp34-59);

   b. Further Amended Defence to Cross-Claim filed 12 November 2021 (**FADCC**) (CB A pp60-91);

   c. Reply to Amended Defence to Cross-Claim filed 11 June 2021 (**Cross-Claim Reply**) (CB A pp92-96);

   d. Further and better particulars provided by letter from Mr McGowan's solicitors dated 24 December 2021 (CB A p97);

   e. Further and better particulars provided by letter from Mr McGowan's solicitors dated 10 February 2022.

List of issues

5. The agreed factual and legal issues falling for final determination in the proceedings are set out in the Amended Factual and Legal Issues for Determination (**Issues**) filed on 19 November 2021 (CB A pp98-111).

Agreed Background Facts

6. The agreed facts are captured in the Agreed Background Facts (**ABF**) filed on 6 December 2021 (Ex A: CB A pp112-122).

C. EVIDENCE

7. The Court heard submissions and evidence over the course of 5 days between 14 to 16 February 2022 and 7 and 9 March 2022.

8. The affidavit and oral evidence for Mr Palmer consists of:

   a. two affidavits sworn by him on 27 January 2021 (CB D pp1682-1716 (**First Palmer Affidavit**), CB D pp1717-1719 (**Second Palmer Affidavit**)); and

   b. a third affidavit sworn by him on 9 June 2021 (CB D pp1727-1732) (**Palmer Reply Affidavit**),

   (read subject to limitations pursuant to section 136 of the *Evidence Act 1995* (Cth) (**Evidence Act**) that the evidence adduced be limited to the facts in issue other than (a) the subjective reaction of Mr Palmer to the defamatory publications in issue in the Originating application and (b) the subjective reaction of Mr Palmer on matters relevant to his claim for aggravated damages: T.194.20-45 and T.195.0-5);

   c. viva voce evidence in chief given by him on 16 February 2022 (T.197.31-T.210.09);

   d. evidence given by him under cross-examination on 16 February 2022 (T.210.11-T.283.45);

   e. evidence given by him under re-examination also on 16 February 2022 (T.284.30-T.287.44);

   f. an affidavit from Anna Alexandrova Palmer sworn 27 January 2021 (CB D pp1720-1726) (**Mrs Palmer Affidavit**) (no cross-examination); and

   g. an affidavit from Domenic Vincent Martino sworn 21 January 2021, other than the fourth sentence of paragraph [11] which was not read (CB D pp1677-1681)

(**Martino Affidavit**) (no oral evidence).

9. The affidavit and oral evidence for Mr McGowan consisted of:

   a. affidavit of Mr McGowan sworn 26 March 2021 (CB D pp1736-1763) (**McGowan Affidavit**) (save for [35], the words: "Save for the first sentence of the third matter complained of which I did not say" in [37] and [83] which were not read). The remainder of the affidavit was read subject to limitations pursuant to section 136 of the Evidence Act that the evidence adduced be limited to the facts in issue other than (a) the subjective reaction of Mr McGowan to the defamatory publications in issue in the Cross-Claim and (b) the subjective reaction of Mr McGowan on matters relevant to his claim for aggravated damages (T.295.40-45 and T.296.0-5);

   b. viva voce evidence in chief given by him on 7 March 2022 (T.297.39-T.315.45);

   c. evidence given by him under cross-examination on 7 and 9 March 2022 (T.316.00-T.500.15);

   d. an affidavit of John Robert Quigley sworn 25 March 2021 (CB D pp1733-1735) (**Quigley Affidavit**) (read subject to limitations pursuant to section 136 of the Evidence Act that the evidence adduced at [7] of the affidavit be limited to proving Mr Quigley's understanding, knowledge, belief or reliance, and not the truth of that assertion: T.500.35-45 and T.501.0-5); and

   e. evidence given by Mr Quigley under cross-examination on 9 March 2022 (T.501.26-T.539.21) (no re-examination). Mr Quigley is due to give further evidence on 8 April 2022.

10. Each of the affidavits for Mr McGowan were read subject to the limitations and objections set out in the objections schedule provided by way of email to His Honour's Associate on 6 March 2022 by the solicitors for Mr Palmer (**MFI 5**).

11. On 9 March 2022, the matter was adjourned part heard (see paragraph 1 of the Orders of Justice Lee dated 9 March 2022), to resume at 4.30pm on a date in the week commencing 28 March 2022 for documentary tender, at which the State of Western Australia has liberty to appear if necessary (see: T.541.5-T.542.13 and T.542.30-T.543.17).

12. Documentary tender has not yet been completed.

D. ISSUES OF FACT FINALLY DETERMINED ON 16 FEBRUARY 2022

13. On 14 and 15 February 2022, his Honour heard submissions on publication and meaning on both the Originating application and the Cross-Claim as framed at:

    a. Issues I.A.[1], CB A p98;

    b. Issues I.A.[2.1]-[2.6], CB A pp98-100; and

    c. Issues II.A [10], CB A pp102-103.

14. On 16 February 2022, his Honour finally determined the following issues:

> *2. Pursuant to s 37P(2) of the Federal Court of Australia Act 1976 (Cth) (**FCAA**) and r 30.02 of the Federal Court Rules 2011 (Cth) (**FCR**), the Court determine separately and before any other issue in the proceeding, and on a final basis, the following issues:*
>
> > *a. whether any of the imputations pleaded by Mr Palmer in the amended statement of claim was conveyed; and*
> >
> > *b. whether any of the imputations pleaded by Mr McGowan in the further amended cross claim was conveyed.*
>
> *3. In accordance with Order 2, the answer to the question as to whether any of the imputations pleaded by Mr Palmer or Mr McGowan was conveyed is provided by specifying such imputations in the Annexure to this order.*
>
> (Orders made 16 February 2022)

15. See: Annexure to those orders: "Imputations conveyed".

16. What constitutes the defamatory "matter" as sued on in the Originating application, as framed at Issues I.A.[1], CB A p98 remains open for final determination. As to that see section F below.

E. MR PALMER'S CREDIBILITY

Proposed credit finding

17. Based on the matters outlined below, and upon a review of the entirety of Mr Palmer's oral evidence (T.197.25-T.287.44), the Court is asked to find that Mr Palmer was not a credible witness and, accordingly, to give no weight to his evidence on any disputed matter, unless it is: (a) corroborated by and consistent with a contemporaneous document; or (b) against his own interest.

Inherently incredible answers

18. Mr Palmer asserted, including in response to questions from the bench, that upon reading the Amending Act he had a genuine fear for his physical safety, the safety of his employees in Western Australia and his family. Mr Palmer went so far as to claim (including by references to James Bond's 'licence to kill') that he regarded the Amending Act as "*a statute that authorised Mark McGowan to kill Clive Palmer*" (see T.207.30, T.233.15, T.233.38, T.233.45, T.248.15).

19. Mr Palmer's attempt to explain what part of the bill that became the Amending Act led him to this apparent conclusion was both evasive and confusing (T.234.15-T.243.11).

20. Mr Palmer gave other answers which were also inherently incredible, including:

    a. that despite Mr Palmer's companies pursuing the damages arbitration and claiming approximately $27 billion in that arbitration, a possible outcome of the mediation was an agreement whereby Mr Palmer's companies would get no money (and indeed that Mr Palmer "*...hoped we could mediate them without any figures at all for the benefit of the people of Western Australia. That's why we went into mediation*") (T.220.39-T.221.47) but may get "*other changes in legislation that would protect our company from the incursion of the Chinese government on our tenements*" (T.221.1-21); and

    b. his belief that Western Australia was *literally* at war with him ("*I also just was amazed that he said he was at war with me, because I didn't think that West Australia had the power to declare war on anyone, let alone on a citizen*.") (T.203.15).

Refusing to make obvious concessions

21. Mr Palmer refused to concede that the Facebook post comprising the sixth matter complained of by Mr Palmer (Ex 5: CB C p1458) was part of Mr McGowan's justification for the Amending Act, despite this being obvious to any reasonable reader on the face of the Facebook post (for example "*I want to take a moment to clear up the facts about what the laws we have just passed mean*"). On at least 9 occasions during his cross-examination Mr Palmer refused to make this obvious concession (T.210.27, T.210.42, T.211.16, T.211.32, T.211.36, T.214.27, T.216.42, T.217.25, T.217.30).

22. Mr Palmer repeatedly refused to accept that $30 billion was a reasonable approximation

of the amount claimed in the arbitrations from the State of Western Australia by companies that he controlled (see T.220.08-231.10) only to then accept (at T.220.21-24) that he knew that "*in the arbitration the figure was 27 billion, I think, 500 million. That was the actual figure*". Further, Mr Palmer's sworn interrogatories state that the Amended Statement of Issues Facts and Contention in the arbitration dated 28 May 2020 (CB C pp461-553) stated the quantifications and calculations by Mineralogy and International Minerals of their damages, and Mr Palmer confirms that it was his signature on that document (MFI2 p241).

23. Other examples of Mr Palmer refusing to make obvious concessions include:

    a. Mr Palmer's refusal under cross-examination to concede that it was his views that were expressed in the advertisements referred to in line 1 of the Facebook post (Ex 5: CB C p1458), such as the advertisement titled "Cover Up" (Ex 8: CB C p1438): see T.212.7-T.214.10 (despite the fact that he swore at paragraphs 130 to 134 the First Palmer Affidavit (CB D pp1711-1712) that he prepared the "Cover Up" advertisement and that it contained his views); and

    b. his refusal to concede that various publications within MFI 2 were very critical of Mr McGowan (see for example [T.270.36-272.40, MFI2 p283], [T.273.7-275.9, MFI2 p288], [T.275.14-42, MFI2 p289], [T.276.1-277.22, MFI2 p291] [T277.26-278.39, MFI2 pp292-295] [T.282.42-283.1-5, MFI2 pp245-282, 298-304]).

Contradicting answers to interrogatories

24. Mr Palmer's oral evidence also directly contradicted aspects of his sworn interrogatories in respect of the material he relied upon in asserting that Mr McGowan had lied about health advice:

    a. In his answers to interrogatories at 3A Mr Palmer listed the following as the documents relevant to the allegation (MFI 2 p219):

        i. Outline of Expert Evidence of Dr Andrew Robertson dated 24 June 2020 and filed in the HCA Border Proceedings (defined below) (CB C pp564-589);

        ii. Supplementary Report by Dr Andrew Robertson dated 3 July 2020 and filed in those proceedings (CB C pp590-595); and

        iii. the transcript of the hearing in those proceedings on 27 July 2020 (CB C

pp628-724).

b. this position was at first confirmed in Mr Palmer's oral evidence (T.251.30);

c. when confronted with the proposition that none of the documents listed supported Mr Palmer's accusation that Mr McGowan had lied, Mr Palmer subsequently claimed that there was (or at least might have been) something else, apart from those three sources. In particular, Mr Palmer asserted that other reports of the Chief Health Officer (which Mr Palmer suggested are referred to in the transcript of the border proceeding) may have supported his accusation of lying (although he did not know whether he had received those documents, and had no recollection of whether he had seen them) (T.266.18-T.267.15); and

d. Mr Palmer subsequently insisted on leaving open the possibility that there was "*a wider band of material*" upon which he relied, despite having no recollection of any such material and despite that position being directly inconsistent with his sworn interrogatories (T.268.4-17).

Evasive, unresponsive and argumentative demeanour

25. Mr Palmer's answers were often evasive and unresponsive. See for example:

a. T.214.45;

b. T.218.35;

c. T.232.22-34;

d. T.260.31-45; and

e. T.262.30-45.

26. Mr Palmer was also at times argumentative including at T.216.33-35 ("*Well, have a look at the transcript. Pull it up*."), T.261.18-36 (including "*I said all the words in paragraph 3 and 2, if you listen*") and T.236.23 ("*Well, do you want me to give an explanation… or interrogate me as I do it*").

F. WITNESSES FOR MR MCGOWAN

Mr McGowan

27. The Court should reject Mr Palmer's submissions as to Mr McGowan's credibility and instead find that Mr McGowan was a witness of truth.

28. The examples advanced by Mr Palmer in this respect are factually wrong, selectively referenced, decontextualised and, in one case, reliant on a single hearsay media report to which objection will be taken unless subjected to a s.136 *Evidence Act* (Cth) direction.

29. Once these matters are taken into account, Palmer's continued characterisation of Mr McGowan as "a liar" is revealed to be entirely without foundation (see for example at PS [547]-[548]).

30. Specific aspects of Mr McGowan's evidence relied upon by Mr Palmer are addressed below.

Mr McGowan's evidence as to the health advice in respect of border closure [PS, 98] to [99]

31. Mr Palmer submits that Mr McGowan misrepresented what the health advice had been as at 2 April 2020, June-July 2020 and October 2020 (see PS [98]-[99]). That submission should be rejected. The proper characterisation of the health advice and Mr McGowan's statements about them is addressed in detail at [338] to [351] below. The following submissions focus on Mr Palmer's attack on Mr McGowan's credit in relation to that issue.

32. It is to be emphasised that both the email advice of 29 March 2020 (CB C pp349-50) and the report dated 3 July 2020 (CB C p 591) contained advice that closing the border would slow the spread of COVID-19.

33. Mr McGowan's public statements about the border closure were consistent with that advice. By way of example, the press release on 2 April 2020 (CB C p382) stated:

> *"The McGowan Government has taken the extraordinary, but necessary step to place a hard border closure on the State of Western Australia, to* ***further protect the community from the COVID-19 pandemic****."* (emphasis added)

34. The meaning of "necessary" in the Oxford English Dictionary is something that needs to be done in order to achieve the desired result or effect. Any reasonable person reading the press release would interpret it consistently with the medical advice that had been received by that time: Mr McGowan had concluded on the basis of the advice that it was necessary to close the borders in order to protect the community from the spread of COVID-19. No reasonable person would reach the contrary view – implicit in Mr Palmer's submissions – that simply by reason of Mr McGowan's use of the word

"necessary" he meant that he had abdicated to his medical advisers the decision as to whether the borders would be closed. The public statements relied upon by Mr Palmer do not say that nor can they reasonably be interpreted as such. The conclusion that Mr McGowan did not misrepresent the medical advice is reinforced by Mr McGowan's unchallenged evidence as to the oral advice that he received (confirmed by Dr Robertson at CB C p692).

35. Further, the submission by Mr Palmer (at PS [99] and particularly PS [520] - [521]) that Mr McGowan's claim that the health advice was to close and maintain a closed border in the period April to August 2020 was knowingly untruthful is also without foundation.

36. At PS [508]-[509], Mr Palmer extracts a single sentence of the penultimate paragraph from that advice (which spans two pages in total). The advice also contains the following statements:

    a. at CB C p588, 612: "**The implementation of border controls** at both the international and state levels, along with public health, mass gathering and social distancing measures, **continues to be highly effective in controlling the COVID-19 outbreak in Western Australia.** On 20 May 2020, I advised the Premier that, until community spread is eliminated in the two affected jurisdictions (New South Wales and Victoria)…**opening of the interstate borders was not recommended**…If the community spread had been controlled, relaxation of the interstate borders could then have been considered after the introduction and assessment of the impact of Phase 5…Western Australia's decision to require self-quarantine following interstate travel on 24 March 2020…**and close the interstate border**… on 05 April 2020, along with the Closure and Restriction Directions, have **remained highly effective in reducing interstate cases and eliminating community spread**…; [emphasis added] and

    b. at CB C p589, 613: "With continued COVID-19 outbreaks and community spread in two jurisdictions, primarily in Victoria, the risk of introduction across an interstate border remains and, at least from Victoria, has increased…Closure remains an effective mechanism in reducing the introduction of disease in several jurisdictions…Until community spread is eliminated in the affected jurisdictions, which will require at least a month to confirm… or reduced to such low levels as to pose a minimal risk, such as in New South Wales, where rapid containment

measures have prevented further spread, opening of the interstate borders is not recommended."

37. It is plain from the above that the health advice of Dr Robertson during the relevant period was that implementing the closed border to WA was highly effective in controlling the spread of, and further protecting the community from, COVID-19, and that the recommendation was that those restrictions be maintained. The existence of a possibility of opening the borders to low-risk jurisdictions - which *"could be considered"* and *"would require further assessment"* (CB C pp589, 613) - does not contradict the overriding recommendation (referred to multiple times in his advice as set out above) that WA should maintain its closed border, which is the advice that Mr McGowan relayed to the public. This is consistent with comments attributed to Dr Robertson during the Standing Committee inquiry at CB C 1566, where he is quoted as saying that, *"...further exemptions could be considered…that would be dependent on our confidence with the border arrangements in those states"* as well as in his oral evidence before Rangiah J (see for example at CB C p714.7-15) but, in any event, Dr Robertson's hearsay evidence has no real relevance to the assessment by this Court as to what his written advice, in fact, meant.

38. Mr Palmer's submissions at PS [523] and PS [525]-[526], in support of the proposition that the evidence given by Mr McGowan regarding the health advice in October 2020 was untruthful, are also without foundation. Having been taken to a number of media reports criticising Mr McGowan's alleged "different public tack" (see eg at T.354) in this regard, Mr McGowan explained the context of those comments:

> *"The reason for the border was health reasons, very clearly, but others were arguing it be opened for economic reasons and I was explaining that* ***their*** *motivation was an economic reason and then because of the consternation, I suppose, I re-emphasises what our health advice was; that the border was there for health reasons"* (T.355.14-18). (emphasis added)

Other allegations as to untruthful evidence (PS [98] to [107])

39. The submission that Mr McGowan was untruthful about the car ramming into the power pole outside his family home should also be rejected. First, Mr McGowan gave unchallenged evidence that the advice from the Police at the time of the incident was that it was a deliberate act by an anti-vaxxer, and that the woman in question screamed anti-

vax sentiments at his children and then ran away off into the darkness (T.392.26-33). The only basis for the attack on McGowan's credibility in this respect is a hearsay, media report of a statement by a police officer. This aspect of the attack on McGowan's credibility should be rejected in the absence of any compelling admissible evidence that McGowan was lying.

40. As regards the suggestion (PS [103]) that Mr McGowan was untruthful concerning the validity of the provisions in the Amending Act relating to criminal immunity, Mr McGowan explained what he meant (at T308.31-33) by his earlier statement during his evidence in chief. He explained at T396.4 - "*I was referring to the entire bill.*" No further questions were asked.

41. As regards the submission that Mr McGowan untruthfully claimed that his cross-claim was part of his defence, the following matters are relevant to that issue:

    a. Mr McGowan spent 7 years as a naval lawyer, not a civil litigator;

    b. whilst jurists will understand that there lies a difference between a defence and a counter-claim or a cross-claim, they are often found in the same pleading, and indeed a counter-claim is a matter of procedure which provides machinery for a defendant to assert a claim against a plaintiff;

    c. even experienced lawyers may consider them as "part and parcel" of the same case (see CB C p1524); and

    d. cross-claims may properly be and regularly are filed for defensive forensic purposes even if they do not allege matters that strictly arise by way of legal defence to the primary claims and, in that sense, are apt to be described as defensive or part of the cross-claimant's overall defence to the litigation.

42. There was nothing untruthful about Mr McGowan's testimony. It was his honestly held view that the cross-claim formed part of his defence.

43. Mr Palmer criticises Mr McGowan for not being candid about his answers to questions about costs following the event. Mr McGowan was correct - costs are always discretionary and whether or not the unsuccessful party pays the successful party's costs can be influenced by a range of factors including a party's conduct, for example, in taking genuine steps as required by s.6 of the *Civil Dispute Resolution Act 2011*. In any event, Mr McGowan testified that he was not familiar with the general rule that costs follow the

event. This is not surprising given Mr McGowan's legal experience was confined to military law.

44. Finally, the submission that Mr McGowan's evidence on the topic of the government's decision to indemnify Mr McGowan for his legal costs arising from this proceeding reflected poorly on his credit should be rejected.

45. There is a long-standing policy in Western Australia (from 10 July 1990) dealing with this topic. Consistent with that determination, Mr McGowan is entitled to have expenses incurred in these legal proceedings met by the State. Specifically, the determination provides:

    a. (as to proceedings against Ministers): where the conduct of the Minister or officer was in good faith and reasonable, and in the discharge of official responsibilities, the State will meet legal costs incurred in defending the action and any other liabilities incurred (including costs of other parties and damages) (at 4(b)); and

    b. (as to proceedings commenced by Ministers): in special circumstances, the Cabinet might authorise the commencement of an action and provide an indemnity as to legal costs, for example, where the prime motive for taking the proceedings is to make clear the truth concerning particular Government decisions (at 4(b)).

Asserted refusal to make obvious concessions and/or resort to linguistic nit-picking (PS, [108] to [112]

46. Only two examples are given as to Mr McGowan's alleged "nit-picking" or failure to make concessions.

47. As regards the email advice of 29 March 2020, from the commencement of his testimony about this topic Mr McGowan acknowledged that the word *"necessary"* did not appear in that document (T.332.44-46 - T.333.1). There was, and has been no linguistic nit-picking by Mr McGowan about the words in that document.

48. Mr McGowan's evidence as to the oral advice was truthful. Mr McGowan said from the outset that there was some written advice and there was some oral advice (see T.330.1-2). That is corroborated by Dr Andy Robertson in his Supplementary Report dated 3 July 2020 at paragraph 3 (CB C p591) and in his oral testimony before this Honourable Court on 27 July 2020 (CB C p692). The absence of oral advice was not proved by Mr Palmer nor was it even put to Mr McGowan that he was lying about it.

49. Mr Palmer's submission that *"when asked whether an arbitral award in favour of the Palmer companies delivered in the run up to the election would have adversely impacted him politically, McGowan repeatedly (viz. five times) dodged the question*", is misguided. There was no dodging of the question at all. The question was framed and re-framed in an attempt to obtain a concession that the introduction of the Amending Act was politically motivated. The clear evidence which emerged from that exchange was (see T.471.1-36 and T.473.1-T.476.3):

    a. the arbitral results were based upon decisions of his predecessor from the opposing political party;

    b. McGowan agreed with the decisions of his predecessor;

    c. McGowan would have been running for office in an environment where there had been a terrible result;

    d. this would have been suboptimal for the State;

    e. McGowan was not politically motivated when dealing with the arbitrations and potential $30 billion claim; and

    f. had Palmer got an arbitration result in his favour, it probably would have been worse for the Liberal Party.

50. The exchange all emerged over a short cross examination. There was no element of dodging questions.

Mr Quigley

51. As regards Mr Palmer's good faith in mediation submission, simply because one party is not prepared to offer any monetary compensation does not mean that party has failed to comply with an obligation to mediate in good faith. The State would have participated in a mediation if the Amending Act had not passed. In this regard, there are numerous other ways a dispute may be resolved without monetary compensation being paid, such as variations to contractual terms. Further, it is well established that mediating in good faith does not require a participant to act in the interests of the other party, and it may also act having regard to self-interest.

52. The submission that Mr Quigley was "dishonest or slippery" by disclosing the quantum of the nearly $30 billion arbitration claim in Parliament is rejected. Members of

Parliament enjoy certain privileges. There is nothing dishonest or slippery about a parliamentarian speaking freely in Parliament and informing the people about a significant damages claim against the State that the people would have ultimately borne the brunt of.

53. Additional matters relevant to Mr Quigley's credit may be addressed following the re-examination, and any further cross-examination, of Mr Quigley. However, it is sufficient to say that none of Mr Quigley's evidence provides any support for Mr Palmer's case that Mr McGowan and Mr Quigley participated in the Attack Plan as addressed further below in detail.

G. ORIGINATING APPLICATION: PUBLICATION AND MEANING

Matters complained of

54. Mr Palmer sues on five oral publications, or "matters", being certain words spoken by Mr McGowan at a series of press conferences between 31 July 2020 and 7 August 2020 (**First-Fifth matters**).

55. The sixth matter complained of is a post published on Mr McGowan's Facebook page on 14 August 2020 (Ex A: ABF [23], CB A p115). There is no issue as to the publication or the bounds of the sixth matter complained of.

56. As to the First-Fifth matters, the issue falling for determination on publication is:

> Whether Mr Palmer has established that each of the first to fifth matters complained of were published in the form pleaded. (Issues I.A.[1], CB A p98)

57. The answer to Issue I.A.[1] is no, for the reasons set out below.

First-Fifth matters

58. In relation to the First-Fifth matters complained of, the parties have agreed certain facts:

First matter complained of (Ex 1: video at CB USB 85 and 85A; transcript at CB C 933-933C).

59. On 31 July 2020, between 11.30am-12.30pm (AWST), Mr McGowan attended a press conference at the Australian Maritime Complex in Henderson, Western Australia (**the 31 July press conference**) (ABF [17], CB A pp114-116).

60. At the 31 July press conference, Mr McGowan spoke words of and concerning Mr Palmer

to representatives of the media who were in attendance, including the following:

> *"Let Mr Palmer fight his own fights. Let him fight his own fights. I'm happy to have a blue with Mr Palmer. He's the enemy of West Australia. He's the enemy of the State. I think he's the enemy of Australia."*

Second matter complained of (Ex 1: video at CB USB 85 and 85A; transcript at CB C 933-933C).

61. At the 31 July press conference, Mr McGowan spoke words of and concerning Mr Palmer to representatives of the media who were in attendance, including the following:

> *"Mr Palmer is the enemy of the State. He is the enemy of Western Australia. He has shown over his time that he is only focused on himself. He is not focused on the health or the wellbeing of people in this state. I'd urge people to take no notice of whatever letters he might publish."*
>
> (Ex A: ABF [19], CB A p114)

Third matter complained of (Ex 2: video at CB USB 102; transcript at CB C 1001-1001B).

62. On 3 August 2020, Mr McGowan attended a press conference at Belmont City College in Belmont, Western Australia (**3 August press conference**). At the 3 August press conference, Mr McGowan spoke words of and concerning Mr Palmer to representatives of the media who were in attendance, including the following:

> *"Look, just so you know, he wanted to come to Western Australia to promote Hydroxychloroquine to the people of the State as some sort of cure for COVID. All the evidence is not only is it not a cure, it's actually dangerous. Him coming to Western Australia to promote a dangerous drug I don't think was a good thing for our State and I'm pleased the Police rejected him".*
>
> (Ex A: ABF [20], CB A p114)

Fourth matter complained of (Ex 3: video at CB USB 109; transcript CB C 1017).

63. On 5 August 2020, Mr McGowan attended a press conference at the workshop of Hoffman Engineering in Bassendean, Western Australia (**5 August press conference**). At the 5 August press conference, Mr McGowan spoke words of and concerning Mr Palmer to representatives of the media who were in attendance, including the following:

"Mr Palmer is very selfish to pursue this High Court action. He uses money generated in Western Australia, through Western Australian mining projects, to try and bring down our borders and damage the health of West Australians. It's very very selfish".

(Ex A: ABF [21], CB A pp114-115)

Fifth matter complained of (Ex 4: video at CB USB 120; transcript CB C 1049-1049E).

64. On 7 August 2020, Mr McGowan attended a press conference in the media room at the Parliamentary offices in Perth, Western Australia (**7 August press conference**). At the 7 August press conference, Mr McGowan spoke words of and concerning Mr Palmer to representatives of the media who were in attendance, including the following:

"As I said, we're in a war with Clive Palmer. And it's a war we intend to win".

(Ex A: ABF [22], CB A p115)

65. There remains a dispute as to as to how much of what was said at the press conferences constitutes the relevant matter (Issues 1.A.[1], CB A p98).

66. As to that, Mr McGowan relies on Respondent's Opening Submissions (**ROS**) [36] to [40] and [53] to [96], oral submissions made by Mr McGowan's counsel at trial (T.64-T.78, T.88-T.91, T.99-T.129), and the email sent by the solicitors for Mr McGowan to his Honour's Associate on 11 March 2022 containing copies of the transcripts of the First-Fifth matters in which it is identified what each party's position is as to the scope of the "matter" in each case (and where there are areas of agreement in relation to this issue).

Imputations held conveyed

67. The imputations found to be conveyed in relation to the matters in the Originating application are set out below (see orders made 16 February 2022 and [14] above).

68. First matter complained of - words spoken by Mr McGowan at a media briefing at 11.30am to 12.30pm AWST at the Australian Maritime Complex in Henderson, Western Australia ("the 31 July press conference") (Ex 1: footage at CB USB 85 and 85A; transcript at CB C 933-933C).

[3(d)] The Applicant represents a threat to the people of Western Australia and is dangerous to them

[3(e)] The Applicant represents a threat to the people of Australia and is dangerous to them.

69. Second matter complained of - words spoken by Mr McGowan at the 31 July press conference (Ex 1: video at CB USB 85 and 85A; transcript at CB C 933).

[5(b)] The Applicant represents a threat to the people of Australia and is dangerous to them.

70. Third matter complained of - words spoken by Mr McGowan on 3 August 2020 at a press conference at Belmont City College in Belmont, Western Australia (Ex 2: video at CB USB 102; transcript at CB C 1001-1001B).

[7(a)] The Applicant promotes a drug which all the evidence establishes is dangerous.

71. Fourth matter complained of - words spoken by Mr McGowan on 5 August 2020, at a press conference at the workshop of Hoffman Engineering in Bassendean, Western Australia (Ex 3: video at CB USB 109; transcript CB C 1017).

[9(b)] The Applicant selfishly uses money he has made in Western Australia to harm West Australians.

72. Fifth matter complained of - words spoken by Mr McGowan at a press conference on 7 August 2020 at the Parliamentary offices in Perth, Western Australia (Ex 4: video at CB USB 120; transcript CB C 1049-1049E).

[11(b)] The Applicant represents a threat to Australians and is dangerous to them.

73. Sixth matter complained of - Facebook post uploaded by Mr McGowan's staff to Mark McGowan MP Facebook page at 6.12pm on 14 August 2020 (Ex 5: CB C 1458).

[13(b)] The Applicant is prepared to bankrupt a state merely because he is unhappy with standard conditions set on a project by the state government that apply to all mining projects. (lines [8] - [13])

[13(c)] The Applicant is so dangerous a person that legislation was required to stop him making a claim for damages against the State of Western Australia. (lines [8] - [16])

Principles – publication of "the matter"

74. The cause of action for defamation is the publication of defamatory matter: s8 of the Act.

The statutory defences of justification (s25), contextual truth (s26), absolute privilege (s28), fair report (s29), qualified privilege (s30), honest opinion (s31) and innocent dissemination (s32) are all defences referable to "the matter", that is, the cause of action.

75. Section 4 of the Act defines "matter" as:

    a. an article, report, advertisement or other thing communicated by means of a newspaper, magazine or other periodical, and

    b. a program, report, advertisement or other thing communicated by means of television, radio, the Internet or any other form of electronic communication, and

    c. a letter, note or other writing, and

    d. a picture, gesture or oral utterance, and

    e. any other thing by means of which something may be communicated to a person.

76. In the case of transient publications such as radio or television broadcasts, an issue arises as to whether a plaintiff is entitled to plead only certain parts of a broader matter as a self-standing matter, from which the defamatory imputations are said to be conveyed. In those circumstances, the precise delineation of a publication will not always be clear. As noted by Simpson J in *Phelps v Nationwide News Pty Limited* (***Phelps***) [2001] NSWSC 130 at [10], there is no categorical test for determining the boundaries of any particular publication. Her Honour observed at [21]-[22] that while a plaintiff has the option of defining the boundaries of the matter, subject to limitations, such as where the plaintiff elects to proceed as though individual parts of a matter were each a separate publication, in circumstances where that view is not reasonably open (or where unfairness amounting to abuse of process would result).

77. In *Beran v John Fairfax Publications Pty Ltd* (***Beran***) [2004] NSWCA 107 at [54]-[56], her Honour McColl JA approved *Phelps*. In that case, her Honour held that the primary judge had not erred in requiring two (written) publications to be pleaded as one because they were inseparably linked with each qualifying the other. It was therefore incumbent upon the appellant to include within his pleading every passage which materially altered or qualified the complexion of the imputations of which he complained.

78. Distilling the authorities, these are guiding principles on defining the boundaries of a "matter":

a. A plaintiff is obliged to plead all of the broadcast capable of materially altering or qualifying the complexion of the imputations pleaded: *Beran* at [54]-[56]; *Age Corporation Ltd v Beran* (***Age v Beran***) [2005] NSWCA 289 at [42] per Hodgson JA, Beazley JA and Brownie AJA agreeing at [1] and [55], respectively; *Australian Broadcasting Corporation v Obeid* (***Obeid***) (2006) 66 NSWLR 605 at [69] per Tobias JA, Hodgson and Ipp JJA agreeing at [1] and [10], respectively. See also *Dank v Cronulla Sutherland District Rugby League Football Club Ltd* [2014] NSWCA 288 at [123] to [124] (Ward JA, Emmett and Gleeson JJA agreeing at [156] and [158], respectively).

b. In the case of a radio broadcast, the question is whether the matter selected by the plaintiff is capable of constituting the whole of the context from which a body of ordinary reasonable listeners would be concerned to determine the meaning of what was broadcast. If that is the only view reasonably open or if reasonable minds could differ as to whether it was so capable then, it is open to the plaintiff to plead the matter complained of in that way: *Phelps* at [22]; *Age v Beran* at [42]; *Obeid* at [69].

c. Determining whether the matter selected by the plaintiff constitutes the whole of the relevant context to which the ordinary reasonable reader would have regard depends on the circumstances of the particular publication. In some cases the various matters are clearly linked by indicators of unity such as subject matter and timing, such that they should be properly considered one matter, see: *Phelps; Sandilands v Channel 7 Pty Ltd* [2005] NSWSC 1250; *Westaway v Jones* (Unreported, 20 August 1993, Levine J); *Beran*. In other circumstances, those indications of unity between the matters will be absent: see, *Obeid* at [59], [62]–[66].

Submissions on publication and meaning

79. As to publication, applying the principles to the present case, the Court would have no difficulty in finding it clear that Mr Palmer has cast the First-Ffifth matters too narrowly and is obliged to rely on the broader extract from the relevant press conference as pleaded by Mr McGowan.

80. Broadly, while Mr McGowan admits that the words chosen by Mr Palmer as constituting the "matter" were spoken by him during the relevant media briefing, he says that those words represent an artificially small fraction of the words spoken by Mr McGowan during

the relevant media briefing. Mr McGowan says that the principles dictate that the "matter" ought to constitute a broader extract of the press conference.

81. As is developed below, it is plain that the passages pleaded by Mr Palmer are linked to the broader extract such that it materially alters or qualifies the complexion of the pleaded imputations.

82. The ordinary reasonable listener or reader in this case would be taken to have an understanding of the following worldy affairs: COVID-19 is a pandemic, that there are border closures in Australia, that Mr McGowan is a politician and Mr Palmer is a politician and billionaire. The Court will have regard to the fact that the First-Fifth matters complained of were transitory publications which would typically only be heard by the listener once. Unlike written publications, they are not available to be pored over by the reader.

First and second matters: 31 July 2020 press conference, Australian Maritime Complex, Henderson, Western Australia

83. A transcript of a 5 minute extract of the 31 July press conference appears at Ex 1: CB C p933-933C. All line number references below are to that transcript. An audio file of the 31 July press conference, to which the timestamps on this transcript refer, is contained in the USB drive provided to the Court, with the file name "*86. (MM1) 1MCO MCGOWAN PAPALIA 31 July 2020*". The videos in evidence is at Ex 1, CB USB 85 and 85A - the versions of the transcript sent to his Honour's Associate on 11 March 2022 contain in red text timestamps refereable to those videos, however the timestamps refererred to below are to the original CB version of the transcript (the timestamps in black).

84. The press conference ran for around 29 minutes. Mr McGowan says the first and second "matter" is properly constituted by the 5 minute extract commencing at 14:29 and concluding at around 20:00 (lines 1-94). That was the section of the press conference during which the Western Australian Government's response to Covid-19 and Mr Palmer's High Court action to bring down the hard border between WA and the Eastern States was discussed, beginning with the question from a reporter about Mr Palmer at 14:29 (lines 1-2). The balance of the conference concerned matters unrelated to Mr Palmer (a major new infrastructure project at the Australian Maritime Complex) and so would not form part of the "matter".

85. The passages in bold type in the transcript represent the first and second matters as

pleaded by Mr Palmer. The first matter appears at 16.55, line 35. The second matter appears at 14.37, line 3. Contrary to Mr Palmer's pleading, the two matters were spoken on the one occasion, and in reverse order.

86. Viewed in their context, it is plain that the first and second matters as pleaded are intrinsically linked, both temporally and in terms of subject matter.

87. Further, even when taken together, the first and second matters as pleaded constitute 33 seconds. The discussion of matters concerning Mr Palmer went for 5 minutes. The matters as pleaded are artificially stripped from the context in which they were spoken, including because on both occasions Mr McGowan spoke in response to a question from a reporter. It is untenable to suggest that the ordinary reasonable listener would hear 33 seconds of a 5 minute exchange whilst remaining deaf to the rest. It is out of step with the principle that the ordinary reasonable listener considers the entire publication.

Third matter complained of, 3 August 2020 press conference, Belmont City College, Belmont, Western Australia

88. A transcript of a 5-minute extract of the 3 August press conference appears at Ex 2: CB C pp1001-1001B. All line number references below are to that transcript. An audio file of part of the 3 August press conference, to which the timestamps on this transcript refer, is contained in the USB drive provided to the Court, with the file name "*103b. (MM1) 3MCO August 3 2020 Part 2"*. The video in evidence is at Ex 2, CB USB 102 - the version of the transcript sent to his Honour's Associate on 11 March 2022 contain in red text timestamps refereable to this video, however the timestamps refererred to below are to the original CB version of the transcript (the timestamps in black). [

89. The 3 August press conference ran for around 13 minutes. Mr McGowan says the third "matter" is properly constituted by the 5-minute extract commencing at 7.08 and concluding at around 12.13 (transcript 1-86). That was the section of the press conference during which Mr Palmer's unsuccessful attempt to enter Western Australia and Mr Palmer's subsequent High Court action to bring down the hard border between WA and the Eastern States was discussed, beginning with the question from a reporter at 7:08 (lines 1-2). For that reason, it contains the context to which the ordinary reasonable listener would be taken to have regard.

90. The passage in bold type in the transcript represents the third matter as pleaded by Mr Palmer at 9.15, lines 32-37:

"…look, just so you know, he wanted to come to Western Australia to promote Hydroxychloroquine to the people of the State as some sort of cure for COVID. All the evidence is not only is it not a cure, it's actually dangerous. Him coming to Western Australia to promote a dangerous drug I don't think was a good thing for our State and I'm pleased the Police rejected him".

91. The matter begins at in the middle of a sentence. It is a 25 second extract of a 5 minute discussion within a 13 minute press conference. It is shorn of context, including the questions to which Mr McGowan was responding. Mr Palmer is not identified in the third matter as pleaded because Mr McGowan uses only the pronouns *"he"* and *"him".* Those four factors demonstrate the artificiality of Mr Palmer's approach.

Fourth matter complained of, 5 August press conference, Hoffman Engineering Workshop, Bassendean, Western Australia

92. A transcript of a 10 minute extract of the 5 August press conference appears at Ex 3: CB C pp1017-1017A. All line number references below are to that transcript. An audio file of the 5 August press conference, to which the timestamps on this transcript refer, is contained in the USB drive provided to the Court, with the file name "*110. (MM1) 4MCO MCGOWAN SAFFIOTI -5 August 2020"*. The video in evidence is at Ex 3, CB USB 109 - the version of the transcript sent to his Honour's Associate on 11 March 2022 contain in red text timestamps refereable to that video, however the timestamps refererred to below are to the original CB version of the transcript (the timestamps in black).

93. The entire 5 August press conference ran for around 29 minutes. Mr McGowan says the fourth "matter" is properly constituted by the 10 minute extract commencing at 14.09 and concluding at around 24.27 (lines 1-47). That was the section of the press conference during which Mr Palmer's High Court action to bring down the hard border between WA and the Eastern States was discussed, beginning with the question from a reporter at 14:09 (lines 1-2). For that reason, it contains the context to which the ordinary reasonable listener would be taken to have regard.

94. The passages in bold type in the transcript represent the fourth matter as pleaded by Mr Palmer at 23.07, lines 29-33:

"Mr Palmer is very selfish to pursue this High Court action. He uses money generated in Western Australia through West Australian mining projects to try and bring down our borders and damage the health of West Australians. It's very, very

selfish".

95. As with the third matter complained of, the fourth matter as pleaded begins at in the middle of a sentence. It is an 18 second extract of a 10 minute discussion within a 35 minute press conference. It excludes the relevant context, including the questions to which Mr McGowan was responding, including reporters' reference to Mr Palmer's tweets alleging that Mr McGowan was a dictator (15.07, lines 14-15).

Fifth matter complained of, 7 August press conference, media room, Parliamentary offices in Perth, Western Australia

96. A transcript of a 24 minute extract of the 7 August press conference appears at Ex 4: CB C pp1049-1049E. All line number references below are to that transcript. An audio visual file of the 7 August press conference, to which the time stamps on this transcript refer, is contained on the USB drive provided to the Court, with the file name "*120. Fifth Matter complained of by Palmer"* (also part of Exhibit 4).

97. The passages in bold type in the transcript represent the fifth matter as pleaded by Mr Palmer 13.55, lines 41-42:

"As I said, we're in a war with Clive Palmer. And it's a war we intend to win".

98. The entire 7 August press conference ran for around 35 minutes. Mr McGowan says the fifth "matter" is properly constituted by the 24-minute extract commencing at 10.50 and concluding at around 34.28 (lines 1-171). That was the section of the press conference during which Mr Palmer's High Court action to bring down the hard border between WA and the Eastern States was discussed, beginning at 10:50 (lines 1-2). For that reason, it contains the context to which the ordinary reasonable listener would be taken to have regard.

99. The fifth matter as pleaded is a single sentence. It is around a 1 second extract of a 20-minute discussion within a 35-minute press conference. It excludes the relevant context, including the questions to which Mr McGowan was responding. Taken in isolation, the matter says that there is a battle between Mr McGowan (and "we", the unspecified allies) and Mr Palmer, which Mr McGowan intends to win.

Sixth matter complained of, post published on Mr McGowan's Facebook page on 14 August 2020.

100. The sixth matter complained of appears at Ex 5: CB C p1458. There is no dispute as to

the form in which that matter was published.

H. QUALIFIED PRIVILEGE: RELEVANT BACKGROUND FACTS

101. The matters complained of in Mr Palmer's case were published by Mr McGowan during press conferences which were held during the COVID-19 pandemic and predominantly responded to questions from reporters. The press conferences generally concerned the State's response to the pandemic in terms of the health response and the economic response. More particularly the parts of the press conferences which comprise the First-Fifth matters complained of concerned the Applicant's application seeking to invalidate the *Quarantine (Closing the Border) Directions* (WA), the Commonwealth's involvement in those proceedings, and action taken by the Applicant in response to the pandemic such as publishing letters and seeking to promote a controversial treatment.

102. The sixth matter complained of explained to the recipients of the sixth matter complained of the rationale for the Amending Act, which had been passed the previous evening.

103. In that connection, the following facts are agreed between the parties.

Covid 19 pandemic, border closures and Amending Act

104. On 11 March 2020, the World Health Organisation declared the outbreak of COVID-19 a pandemic (Ex A: ABF [31], CB A p117).

105. On 5 April 2020, the Police Commissioner for the State of Western Australia, Christopher Dawson, pursuant to ss 61, 67, 70 and 72A of the *Emergency Management Act 2005* (WA) (**Emergency Management Act**) directed the closure of the Western Australian border save for certain exempt travellers, through the *Quarantine (Closing the Border) Directions* (WA) (**the Border Directions**) (Ex A: ABF [32], CB A p117).

106. On or around 18 May 2020, by an application prepared by Mr Palmer's pilot, Mr Palmer and his wife, Anna Palmer, made an application to enter Western Australia. On or around 20 May 2020, both applications were refused (Ex A: ABF [33], CB A p117).

107. On 20 May 2020, Mr Palmer, by his solicitor Mr Jonathan Shaw, sent a letter to Mr McGowan and Mr Dawson, the Commissioner for Police for the State of WA, objecting to the refusal of the applications (Ex A: ABF [34] CB A p117).

108. On 20 May 2020, Mr Palmer, by his solicitor Mr Jonathan Shaw, was invited by the State Solicitor's Office to apply for a general travel exemption to enter Western Australia. Mr

Palmer did not make that application (Ex A: ABF [35], CB A p117).

109. On 25 May 2020, Mr Palmer and Mineralogy Pty Ltd (**Mineralogy**) commenced proceedings in the High Court of Australia against the State of Western Australia and the Police Commissioner seeking a declaration that the Emergency Management Act and/or the Border Directions were invalid on the basis they contravened s 92 of the Australian Constitution (**the HCA Border Proceedings**) (Ex A: ABF [36], CB A p117).

110. At all material times, the State of Western Australia and the Police Commissioner were defending the HCA Border Proceedings (Ex A: ABF [37], CB A p117).

111. On 12 June 2020, the Attorney General of the Commonwealth of Australia filed a Notice of Intervention in the HCA Border Proceedings, supporting the position of Mr Palmer and Mineralogy (Ex A: ABF [38], CB A p117).

112. On 16 June 2020, the HCA Border Proceedings were remitted to the Federal Court for the determination of relevant facts (**the Federal Court Border Proceedings**) (Ex A: ABF [39], CB A p117).

113. On or about 27 July 2020 Dr Andrew Robertson, Chief Health Officer for WA gave evidence in the Federal Court Border Proceedings (Ex A: ABF [40], CB p117).

114. On 31 July 2020, Mr Palmer held a press conference (first matter complained of in the Cross-Claim (Ex A: ABF [24], CB A pp115-116)).

115. On 31 July 2020 between 11.30am and 12.30pm AWST, Mr McGowan held a press conference (the first and second matters complained of) (Ex A: ABF [17]-[19], CB A p114).

116. On around 3 August 2020, Mr McGowan was notified by the Prime Minister, Scott Morrison, that the Commonwealth of Australia was going to withdraw its Notice of Intervention in the HCA Border Proceedings (Ex A: ABF [41], CB A pp117-118).

117. On 3 August 2020, Mr McGowan held a press conference (the third matter complained of) (Ex A: ABF [20], CB A p114).

118. On 5 August 2020, Mr McGowan held a press conference (fourth matter complained of) (Ex A: ABF [21], CB A pp114-115).

119. On 7 August 2020, Mr McGowan held a press conference (fifth matter complained of) (Ex A: ABF [22], CB A p115).

120. On 11 August 2020, the Amending Act was introduced to the legislative assembly at approximately 5pm (Ex A: ABF [54], CB A p118).

121. On 12 August 2020, Mr Palmer held a press conference (second matter complained of in the Cross Claim) (Ex A: ABF [26], CB A p116).

122. On 13 August 2020, Mr Palmer published the *"Cover Up"* letter in the *West Australian* newspaper, Facebook, Twitter, Google and by post (third – seventh matters complained of in the Cross-Claim (Ex A: ABF [28], CB A p116).

123. On 13 August 2020, the Amending Act passed the Legislative Council at approximately 10.35pm and was assented to by the Western Australian Governor at 11.15pm (Ex A: ABF [58]-[59], CB A pp118-119).

124. On 14 August 2020, Mr Palmer was interviewed by Hamish McDonald on the ABC's "RN Breakfast" radio program (the eighth matter complained of in the Cross-Claim) (Ex A: ABF [29], CB A p116).

125. On 14 August 2020, at 6.02pm Mr McGowan published the sixth matter complained of (Ex A: ABF [23], CB A p116).

126. On 16 August 2020, Mr Palmer commenced the Primary Claim.

127. On 25 August 2020, the Federal Court Border Proceedings were determined (Ex A: ABF [42], CB A p118).

128. On 1 September 2020, Mr Palmer was interviewed by Sky News journalist Peter Gleeson (ninth matter complained of in the Cross-Claim) (Ex A: ABF [30], CB A p117).

129. On 6 November 2020, the HCA Border Proceedings were dismissed (Ex A: ABF [43], CB A p118).

I. COMMON LAW QUALIFIED PRIVILEGE

130. The issues falling for determination on common law qualified privilege are:

    a. Whether Mr McGowan has established that each of the matters complained of was published on an occasion of qualified privilege at common law.

    b. If so, whether Mr McGowan has established that each communication was germane or relevant to the protected occasion.

(Issues I.B.[3], CB A p100)

131. For the reasons set out below, the answer to both (a) and (b) is yes.

Principles – common law qualified privilege

Reciprocity of duty and interest

132. The defence of common law qualified privilege is concerned with communications where there is a reciprocity of duty or interest. That is, there must be a legal, social or moral duty or interest on the part of the publisher in giving information on a subject, and a corresponding duty or interest on the part of the recipients of the communication of receiving the information on the subject.

133. An occasion of qualified privilege arises when "the interests of society in general require that a communication made under such circumstances to the particular person should be protected": *Howe and McCulloch v Lees* (1910) 11 CLR 361 at 368-369 per Griffith CJ.

134. Evatt J in *Telegraph Newspaper Co Ltd v Bedford* (1934) 50 CLR 632 at 657 (***Bedford***) pointed out that the "guiding principle" of reciprocal duty or interest, which is necessarily broad and general, is based solely on public utility.

135. Referring to the judgment of Evatt J in *Bedford*, Brennan J said in *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 242:

> When a publication is said to have been made in discharge of a social or moral duty, the occasion is privileged only if it be in 'the interest of the community', 'for the welfare of society' or 'for the good of society in general' - these phrases being synonyms for Parke B's [in *Toogood v Spyring* (1834) 149 ER 1044 at 1050] 'for the common convenience and welfare of society' (*Bedford* at 656, 662).

136. In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (***Lange***), the High Court held that "*each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia*", the *"duty to disseminate such information is simply the correlative of the interest in receiving it*": *Lange* at 571. The subject matter of the communication thereby created the necessary duty and interest correlation.

137. As the majority in *Bashford v Information Australia (Newsletters) Pty Limited* (2004) 218

CLR 366 at [139] affirmed (citing Dixon J in *Guise v Kouvelis* (1947) 74 CLR 102 at [116]), the duty and interest correlative is a question of fact and degree in each case:

> [T]he very width of the principles governing qualified privilege for defamation makes it more necessary, in deciding how they apply, to make a close scrutiny of the circumstances of the case, of the situation of the parties, of the relations of all concerned and of the events leading up to and surrounding the publication.

138. A successful defence of qualified privilege at common law depends upon satisfaction of three conditions:

    a. that the communication was published on a privileged occasion;

    b. that the communication was related to the occasion; and

    c. that there was no malice in the publication:

    Aktas v Westpac Banking Corporation Ltd (2010) 241 CLR 79 at [55]; *Wraydeh v Fairfax Media Publications Pty Limited; Wraydeh v Nationwide News Pty Limited* (***Wraydeh*)** [2021] NSWCA 153 at [39].

139. In determining whether an occasion is privileged, attention is directed to the commonality of interest in the subject matter of the communication, not the precise terms of the communication.

140. In *Adam v Ward* [1917] AC 309 at 320-321, Earl Loreburn observed that a privileged occasion "*does not necessarily protect all that is said or written on that occasion"* and that anything *"not relevant and pertinent"* to the discharge of the duty or the safeguarding of the interest which creates the privilege will not be protected.

141. As to whether the communication exceeded the protected occasion, the authorities caution against restricting the communication within narrow limits, *Toogood v Spyring* (1834) 149 ER 1044 at 1050; *Cush v Dillon* (2011) 243 CLR 298 at [22].

142. In *Wraydeh* the Court of Appeal rejected the argument that the test was one of necessity, stating as follows at [64]:

> The correct test has been variously expressed as "not relevant and pertinent"; "beyond what was germane and reasonably appropriate"; "not truly referable to the particular right or duty which … is the foundation of the privilege"; "within the scope of the privilege attaching to the occasion", "not extraneous to the occasion"; (all from Adam v Ward); "capable of serving the purpose of the occasion"

(Mowlds); “whether the defendant has fairly and properly conducted himself in the exercise of [the privilege]” (Bashford); and, most simply, “relevant to the occasion” (Bellino). None goes so far as to impose necessity as the test for satisfaction of the second Heydon J criterion.

143. Mr Palmer asserts that the plea of common law qualified privilege is doomed because there will "almost never" be reciprocity of duty and interest between a speaker and the press contingent at a media briefing (Applicant's Outline of Opening Submissions filed 1 February 2022 (**AS**) [54]). In light of the principles set out in [133] to [142] above, and as recognised in Mr Palmer's submissions ("*almost* never"), there are occasions when such a reciprocity of duty and interest will exist as between a speaker and press contingent, and it is necessary to have regard to all the circumstances of the particular case.

Submissions as to *(a) Whether Mr McGowan has established that each of the matters complained of was published on an occasion of qualified privilege at common law.*

First to Fifth Matters complained of – Press conferences

144. Each of the First-Fifth matters complained of by Mr Palmer are comments made by Mr McGowan at media briefings, to those physically present at the relevant press conferences. These are the relevant publications sued on by Mr Palmer. To the extent that any republications are relied upon, they are relied upon as to damages only.

145. It is common ground that the relevant publications are the words spoken to those physically present at the press-conferences. In this regard, the facts agreed by the parties for each of the First-Fifth matters complained of, include the words "At the [*relevant date*] press conference, Mr McGowan spoke words of and concerning Mr Palmer to representatives of the media who were in attendance, including the following [*words*]…" (Ex: A: ABF [18], [19], [20], [21], [22], CB A pp114-115).

146. However, the Applicant's written opening submissions (AS [54] final sentence) and opening address by his Senior Counsel at (T.31.19-27) mischaracterise the First-Fifth matters. In the course of oral opening submissions, Mr Gray, Senior Counsel for Mr Palmer, departed from the pleaded case in respect of the First-Fifth matters complained of by referring to the audience of the mass media republications in the context of Mr McGowan's common law qualified privilege defence, rather than the pleaded audience of "reporters and/or persons holding sound or camera equipment". In this regard, Mr Gray

incorrectly submitted in relation to the matters sued upon by Mr Palmer that "all of the publications were disseminated through the mass media to these very large audiences" (T.31.19-27).

147. That is inconsistent with the publications as pleaded by Mr Palmer, and as agreed by the parties in the ABF.

148. In the course of oral opening submissions, Mr Walker, Senior Counsel for Mr McGowan, expressly rejected the suggestion made in opening by Mr Gray to the effect that the First-Fifth matters complained of by Mr Palmer were mass media publications, drawing attention to fact that the First-Fifth matters are pleaded as being published to "reporters and/or persons holding sound and camera equipment…", and that republication is relied on as to damages only (T.45.11-17). See also T.43.16-23 and generally T.45.11-T.46.11.

Sixth Matter complained of – Facebook Post

149. As to the sixth matter complained of, notwithstanding that it was published to a larger audience which Mr McGowan accepts puts it in a different category than the press-conferences, given the subject matter of the Facebook post was a matter of obvious public interest, Mr McGowan submits that the relevant reciprocity or community of interest exists in relation to the sixth matter complained of.

The interest and duty correlative

150. Mr Palmer accepts:

a. the *"interest"* and *"apparent interest"* elements of the s30 statutory defence are satisfied (AS [56]); and

b. that each of the matters involved discussion of *"government and political matters",* for the purposes of the Lange defence ([AS 56]).

151. It is therefore difficult to see how Mr Palmer can be heard against the proposition that there exists in this case a reciprocity of duty and interest between the speaker and the assembled press contingent at a media briefing. Mr Palmer's submission at PS [224] (to the effect that there was no evidence that the audience of the first to fifth matters complained of by Palmer were persons who were enrolled as electors in WA and resident in WA) should be rejected. There is no dispute that the WA borders were closed (subject to exempt travellers) to the rest of Australia from 5 April 2020 (Ex A: ABF, [32], CB A p117) to at least August 2020. It follows then that during the time when each of the First-

Fifth matters complained of by Palmer occurred (being 31 July 2020 to 7 August 2020) it is far more likely than not that most, if not all, of those present at the relevant press conferences were enrolled as electors of or resident in WA given the status of the WA border closure at that time.

152. A response to a question asked by someone with a legitimate interest in knowing the answer will generally be privileged: see eg, *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15; Gatley (12th Ed) [14.24].

153. Where, as here, the publication alleged is only to the person who asked the question and other assembled journalists participating in the same press conference, the Court should find the existence of a community of interest so as to support Mr McGowan's defence of qualified privilege (Mr Palmer has not sought to rely on the republication of these remarks, cf eg *Sims v Wran* [1984] NSWLR 317, in which Hunt J addressed pleading requirements for the same at 320).

154. That a press conference is an occasion with the potential to attract the defence of qualified privilege is uncontroversial (see, e.g, *Sands v State of South Australia* (2015) 122 SASR 195, [2015] 292-293, [435]). That persons other than the individual who asked the specific question that Mr McGowan answered in making the publication(s) complained of were in attendance is also of no material consequence – those persons also had an interest in generally receiving Mr McGowan's answers to questions, and more generally "if *strict* reciprocity were essential, society and its business could not be conducted, as others without a direct interest in the communication are regularly employed in helping to make the communication and it would be impossible to communicate if every defamatory communication had to be [so confined]": Gatley (12th Ed), [14.69]. In *Hopewell v Kennedy* [1904] OJ No 11 the Ontario High Court of Justice considered oral statements made at a public meeting in the presence of reporters where the plaintiff had not made any communication or appeal to the wider public (but remarks where nevertheless published) – Teezel J did not suggest that the presence of those reporters detracted from the potential availability of the privilege.

J. LANGE QUALIFIED PRIVILEGE

Issue for determination

155. Mr McGowan says that the first to sixth matters complained of were all published on an occasion attracting the "extended qualified privilege defence" or "constitutional defence"

to the tort of defamation, recognised in *Lange* (FAD [14](c), CB A p17).

156. In that connection, the following issues fall for determination:

    a. Whether Mr McGowan has established that each of the matters complained of concerned the discussion of government or political matters.

    b. If so, whether Mr McGowan has established that his conduct in publishing each of the matters complained of was reasonable in the circumstances.

    (Issues I.B.[4], CB A p100)

157. As to (a), it is accepted that the matters involved discussion of *"government and political matters"*, for the purposes of the *Lange* defence (AS [56]). The answer to (a) is therefore "yes".

158. For reasons set out below, the answer to (b) is yes (assuming the latter is a requirement of the defence).

159. It is convenient to set out the principles.

Principles – *Lange* qualified privilege

Overview

160. In *Lange,* the High Court recognised a defence of extended common law qualified privilege where the publication concerned the discussion of government or political matters to a broader audience than would ordinarily have satisfied the duty/interest correlation required by qualified privilege at common law. In that connection, the Court considered that a freedom to communicate on such matters was as an indispensable incident of the system of representative and responsible government that the Constitution creates. Below is a summary of the propositions in *Lange.*

161. *First,* freedom of communication on matters of government and politics is an "*indispensable incident of that system of representative government which the Constitution creates by directing that members of the House of Representatives and Senate shall be 'directly chosen by the people' of the Commonwealth and the States, respectively"*: *Lange* at 559.

162. *Secondly,* it follows that ss7 and 24 and the related sections of the Constitution "*necessarily protect that freedom of communication between the people concerning*

political or government matters which enables the people to exercise a free and informed choice as electors": *Lange* at 560. Relevantly, for present purposes, the freedom extends to communications "*that could throw light on the performance of ministers of State and the conduct of the executive branch of government*": *Lange* at 571.

163. *Thirdly*, the implied freedom of communication is not absolute, but rather is limited to "*what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution*": *Lange* at 561.

164. *Fourthly*, more specifically, in the context of legislation, the freedom will not invalidate a law enacted to satisfy some other legitimate end of the law, if the legislation satisfies two conditions: (a) "*the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government, or the procedure for submitting a proposed amendment to the Constitution to the informed decision of the people which the Constitution prescribes*"; and (b) the law is "*reasonably appropriate and adapted to achieving that legitimate object or end*": *Lange* at 561 and 562.

165. *Fifthly,* the Court in *Lange* held that "*the common law rules … must be examined by reference to the same considerations. If it is necessary, they must be developed to ensure that the protection given to personal reputation does not unnecessarily or unreasonably impair the freedom of communication about government and political matters which the Constitution requires*": *Lange* at 568. This reflects the proposition that, "*[o]f necessity, the common law must conform with the Constitution*": *Lange* at 566, and that more specifically the law common law of defamation "*could not be developed inconsistently with the Constitution, for the common law's protection of personal reputation must admit as an exception that qualified freedom to discuss government and politics which is required by the Constitution*": *Lange* at 566.

166. *Sixthly,* turning to the compatibility of the law of defamation with the constitutional imperative, it is well settled that the "*protection of reputation*" is a purpose that is compatible with the requirement of freedom of communication imposed by the Constitution, as the "*constitutionally prescribed system of government does not require … an unqualified freedom to publish defamatory matter damaging the reputations of individuals involved in government or politics*": *Lange* at 568.

167. *Seventhly*, because "*each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia*", the *"duty to disseminate such information is simply the correlative of the interest in receiving it*": *Lange* at 571. It follows that the traditional common law defence of qualified privilege (which is premised on a correlation of duty and interest in publication and receipt) must be extended to protect "*a communication made to the public on a government or political matter*": *Lange* at 571.

168. *Eighthly*, because a mass-publication is likely to do greater damage to reputation than a communication to "*only a few recipients*", a "*requirement of reasonableness … which goes beyond mere honesty, is properly seen as reasonably appropriate and adapted to the protection of reputation and, thus, not inconsistent with the freedom of communication which the Constitution requires*": *Lange* at 572-573. As to reasonableness, see [170] and following, below.

169. *Finally*, therefore, the common law "interest and duty" form of qualified privilege was held to protect widely disseminated publications discussing government and political matters, provided that the publication was reasonable and not actuated by "*common law malice*": In this context, "*actuated by malice*" is to be understood as "*signifying a publication made not for the purpose of communicating government or political information or ideas, but for some improper purpose*": *Lange* at 574. The existence of ill will or improper motive is not enough; the publication must have been *actuated* by the ill will or other improper motive. Further, the motive of causing political damage to the plaintiff or his or her party cannot be regarded as improper without more.

Reasonableness

170. There are three potential approaches to reasonableness in the present case.

171. *First*, the reasonableness criterion does not apply in circumstances where the breadth of the communication is such that it would satisfy the duty and interest correlative of common law qualified privilege. That approach is consistent with and derives support from *Lange.* In *Lange,* reasonableness was added as an extra requirement because a *mass media publication* is likely to do greater damage to reputation than a communication to "*only a few recipients*", a "*requirement of reasonableness … which goes beyond mere honesty, is properly seen as reasonably appropriate and adapted to the protection of*

reputation and, thus, not inconsistent with the freedom of communication which the Constitution requires": *Lange* at 572-573.

172. Importantly, at 573, the Court held: "*reasonableness of conduct is imported as an element **only** when the extended category of qualified privilege is invoked to protect a publication that would otherwise be held to have been made to too wide an audience. For example, reasonableness of conduct is not an element of that qualified privilege which protects a member of the public who makes a complaint to a Minister concerning the administration of his or her department. Reasonableness of conduct is an element for the judge to consider **only when a publication concerning a government or political matter is made in circumstances that, under the English common law, would have failed to attract a defence of qualified privilege**".* (emphasis added).

173. In the present case, the First-Fifth matters complained of were published to a small group of reporters and sound engineers. The sixth had a broader reach, but was not a mass media publication in the relevant sense.

174. It is accepted that intermediate appellate Courts have held that there is no "*category of qualified privilege … based on the public interest in the dissemination of opinions about governmental or political matters shorn of any condition of exercise of reasonableness": Marshall v Megna* [2013] NSWCA 30 at [25] (Allsop P), [174] (Beazley JA); for an earlier discussion, see also *John Fairfax Publications Pty Ltd v O'Shane* Aust Tort Reports 81-789; [2005] NSWCA 164 at [73], [80] per Giles JA. However, *Lange* accommodates eschewing the reasonableness requirement on the facts of this case.

175. *Second,* the concept of "*reasonableness*" must be attenuated, or the requirement more strictly construed, so as to ensure that an inappropriate burden is not imposed on the implied freedom.

176. Unfortunately, the criterion of "*reasonableness*" in the *Lange* defence has been interpreted as picking up judicial interpretations of "*reasonableness*" under s 22 of the *Defamation Act 1974* (NSW) and, more recently, s 30 of the *Defamation Act 2005* (NSW) (**Act**): see for example *John Fairfax Publications Pty Ltd v O'Shane* (2005) Aust Tort Reports 81-789; [2005] NSWCA 164, per Giles JA at [83]; per Young CJ in Eq at [227], [308] ("*reasonableness [in Lange] applies in much the same way as it applies to a defence of qualified privilege under s 22 of the Act*"). This has lead to an often microscopic

analysis of pre-publication conduct, which has become a considerable burden, both for litigants and decision makers.

177. In that connection, the "*reasonableness*" requirement of the *Lange* defence has been the subject of ongoing criticism. As Applegarth J has observed, writing extra-judicially: "*it is relatively easy for a plaintiff to identify additional reasonable steps that could have been taken to investigate the accuracy of the assertion, or to show how the publication in question might reasonably have been composed differently. For example, a plaintiff can point to additional information that might have been included, or a more reasonable form of words that might have been used.*" His Honour concludes that the adoption of the reasonableness criterion in *Lange* "*means that the defence provides limited practical protection for participants in public debate*" *('Distorting the Law of Defamation'* (2011) 30(1) University of Queensland Law Journal 99 at 109).

178. The appropriate course is to approach the concept of reasonableness more flexibly.

179. Reasonableness is not a concept that can be subjected to 'inflexible categorization', *Rogers v Nationwide News Pty Ltd* (***Rogers***) (2003) 216 CLR 327 at [30] (Gleeson CJ and Gummow J). In *Lange* (at 574) the court said that a publication will generally be reasonable where the publisher had reasonable grounds for believing any defamatory imputations to be true and took such steps as were appropriate to verify the accuracy of those imputations, including by publishing response from the defamed person, unless to do so was impracticable or unnecessary. Ultimately, however, the Court held that reaosnableness "*must depend upon all of the circumstances of the case*" (*Lange* at 574).

180. *Thirdly*, should neither of the contentions above be accepted, it may be said that imposition of a "*reasonableness*" criterion as part of the *Lange* defence is inappropriate and should be revisited (necessitating the issue of a notice under s78B of the Judiciary Act, which the Respondents have issued). Special leave to reopen *Lange* to remove the reasonableness requirement was refused in *The Herald & Weekly Times Ltd v Popovic* [2004] HCATrans 180). See also *Leyonhjelm v Hanson-Young* [2021] FCAFC 22 per Wigney J at [288]. It is accepted that the Court is therefore bound.

181. The basis on which the reasonableness criterion of *Lange* ought be reopened is set out below.

182. *First*, the conceptual foundation for the imposition of a "*reasonableness*" criterion may be questioned. In *Lange*, the Court drew the "*reasonableness*" requirement from s22 of

the *Defamation Act 1974* (NSW), noting that such a requirement was also included in the statutory defences contained in the Defamation codes of Queensland and Tasmania, as well as being included in the "constitutional defence" discussed in the joint judgment in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 (***Theophanous***): see at 572-573. However, the statutory defences relied upon by the High Court do not create a qualified privilege by reference to the implied freedom of political communication. Further, the form of "*constitutional defence*" approved by the majority in *Theophanous* was overturned in *Lange* (see at 525-527). In those circumstances there is no apparent connection between a publisher acting "*reasonably*" and their entitlement to rely upon a qualified privilege based on the implied freedom in defending defamation proceedings. The concept of "*reasonableness*" has been transplanted from a wholly different context and lacks a conceptual connection to the interaction between the interest in protecting reputation and the implied freedom. In those circumstances, it could not be said that a "*reasonableness*" criterion is a necessary feature of the so-called constitutional defence.

183. *Secondly*, the conclusion in *Lange* that requiring a publisher to act reasonably is "*reasonably appropriate and adapted to the protection of reputation and, thus, not inconsistent with the freedom of communication*" (at 572-573) may be doubted for the following reasons:

    a. as the New Zealand Court of Appeal rhetorically asked in *Lange v Atkinson* [1998] 3 NZLR 424 at 469 per Richardson P, Henry, Keith and Blanchard JJ (re-affirmed in *Lange v Atkinson (No 2)* [2000] 3 NZLR 385), "*[t]he basis of the qualified privilege is that the recipient has a legitimate interest to receive information assumed to be false. How can that interest differ simply because the author has failed to take care to ensure that the information is true?*" There is no basis upon which to conclude that an inappropriate burden on the freedom of political communication by reason of a false defamatory statement becomes appropriate by reason of a lack of reasonableness on the part of the publisher. The need for the public to learn of the content of the publication as an aspect of the constitutionally mandated system of democratically elected government does not shift by reason of the reasonableness of the conduct of the publisher. Nor does a defendant's interest in maintaining their reputation somehow shift by reason of the degree of reasonableness of the publisher's conduct. In those circumstances, it cannot be said that imposing a requirement of reasonableness is not inconsistent with the implied

freedom. It may well be inconsistent, depending on the circumstances of the case.

b. relatedly, as the United States Supreme Court observed in *New York Times Co Ltd v Sullivan* 376 U.S. 254 (1964) at 279 per Brennan J (writing for the Court), false statements are of significant importance in political debate, because they bring about "*the clearer perception and livelier impression of truth, produced by its collision with error*". As Brennan J concluded at 271-272, "*erroneous statement is inevitable in free debate and must be protected if the freedoms of expression are to have the 'breathing space' that they need … to survive"*. It follows that it is far from clear that it is appropriate to restrict a communication that engages the implied freedom, on the basis that a publisher acted unreasonably in making the communication; once the freedom is engaged, the better view may be, by reference to *Sullivan,* that any restriction on such a communication imposes an undue burden on the freedom, at least in circumstances where the publication is not actuated by malice. It should be noted that Gageler J has recently approved reliance on First Amendment scholarship in this area: see in *Clubb v Edwards* (2019) 267 CLR 171 at [178]-[179].

c. as the plurality of the New Zealand Court of Appeal further observed in *Lange v Atkinson* at 470, "*any such reasonableness requirement would essentially make the statutory restatement of malice redundant*". The same has proved to be true in the context of the extended qualified privilege recognised in *Lange*. In practice, particulars relied upon in support of a claim of reasonableness by a publisher are, if not accepted by the Court, then relied upon by the plaintiff in support of an allegation of malice in seeking aggravated damages.

d. "*reasonableness*" may impose an inappropriate burden on the freedom of political communication, *depending* on the circumstances (and in particular the content of the communication), and therefore ought not be a criterion of making out the extended qualified privilege defence. Instead, a publisher's reasonableness – or otherwise – may be relevant (a) in the first instance to the question of malice; and (b) if unreasonableness does not rise to the level of malice, to the question of whether or not aggravated damages should be awarded.

Submissions on reasonableness

184. To the extent that the reasonableness criterion does apply in respect of the *Lange* qualified privilege defence, Mr McGowan relies on the evidence and submissions concerning

reasonableness in the statutory qualified privilege defence, as set out at paragraphs 204 to 220 below.

K. STATUTORY QUALIFIED PRIVILEGE

Issues for determination

185. The following issues fall for determination:

a. Whether Mr McGowan has established that the recipients of each of the matters complained of had an interest or apparent interest in having information on some subject, and the matter was published to the recipient in the course of giving to the recipient information on that subject.

b. If so, whether Mr McGowan has established that his conduct in publishing each of the matters complained of was reasonable in the circumstances.

(Issues I.B [5], CB A p100)

186. As to (a): The "interest" and "apparent interest" elements are conceded (AS [56]).

187. As to (b), reasonableness, for the reasons set out below, the answer is "yes".

188. It is first convenient to set out the principles.

Principles - Statutory qualified privilege

189. Section 30(1) of the Act provides a defence of qualified privilege for the publication of defamatory matter if the Respondent establishes:

a. the recipient has an interest or apparent interest in having information on some subject;

b. the matter is published to the recipient in the course of giving to the recipient information on that subject; and

c. the conduct of the respondent in publishing that matter is reasonable in the circumstances.

190. For the purpose of the defence a recipient has an apparent interest in having information on some subject if, and only if, at the time of the publication in question, the respondent believes on reasonable grounds that the recipient has that interest: sub-section 30(2).

191. Sub-section 30(3) provides a non-exhaustive list of matters the Court may take into

account in considering whether the respondent's conduct was reasonable in the circumstances. The matters in section 30(3) are not to be regarded as a series of hurdles to be negotiated by a publisher before it can establish a defence of qualified privilege: *Hockey v Fairfax Media Publications Pty Ltd* (2015) 237 FCR 33 (***Hockey***) at [228].

Submissions on s30 reasonableness

192. Section 30(3)(a) invites consideration of the "extent to which the matter published is of public interest". Mr Palmer's public profile and business interests were such that this does not appear to be in dispute (see similarly e.g. *Chau v Fairfax Media Publications Pty Ltd* [2019] FCA 185 at [312] (***Chau First Instance***)).

193. Sections 30(3)(b) and 30(3)(f) similarly require consideration of "*extent to which the matter published relates to the performance of the public functions or activities of the person*" and the "*nature of the business environment in which the defendant operates*". Both Mr Palmer and Mr McGowan's public roles are central to considerations around the reasonableness of the publication of the matters complained of.

194. Section 30(3)(c) concerns the seriousness of any defamatory imputation carried. In "*most cases, the more serious the imputation that is conveyed, the greater the obligation upon the respondent to ensure that its conduct in relation to the publication was reasonable*" (*Chau First Instance*, [109]).

195. Section 30(3)(d) concerns the extent to which the publication "*distinguishes between suspicions, allegations and proven facts*". The matters complained of did not use language that was, for example: "*imprecise, ambiguous and loose… sensational and derisory [or] not the language of mere allegation or suspicion, but rather the language of assertion or uncontroverted fact*" (*Chau First Instance,* [77], see also [315]). Where Mr McGowan was expressing an opinion or belief only, this was clear.

196. Section 30(3)(e) concerns whether it was in the public interest for the "*matter published to be published expeditiously*". That was the case in relation to each of the matters complained of. Mr McGowan responded to questions posed to him in his capacity as Premier and it was in the public interest for him to do so in a direct fashion. It is not a circumstance where he was driven, for example, "*by competitive or commercial pressures and the desire to scoop, or not be scooped*" (cf *Chau First Instance*, [316]).

197. Section 30(3)(g) concerns the integrity of any sources of information cited (and does not

arise).

198. Section 30(3)(h) concerns *"whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person".*

199. There are circumstances in which seeking comment will not be appropriate or possible. For example, in *Feldman v Polaris Media Pty Ltd* (2020) 102 NSWLR 733; [2020] NSWCA 56, White JA accepted that it would have been inappropriate to seek comment from a person under cross-examination (at 754, [104]). Separately at 763, [156] Emmett AJA accepted that there had in fact been an opportunity for comment, and Simpson AJA at 779, [250] generally found no error in the first-instance decision. In *Enders v Erbas & Associates Pty Ltd* [2014] NSWCA 70 there is discussion of where a publication does not contain or purport to contain "*the substance of the plaintiff's side of the story*" but a second responsive publication is contemplated – ie, the second of two situations contemplated by the provision (see [84] – [93]). In such circumstances, it may be reasonable not to seek a response before publishing (as was accepted in that case at [94]).

200. In *Herron v HarperCollins Publishers Australia Pty Ltd (No 3)* [2020] FCA 1687, Jagot J summarised at [767]:

> The applicants submitted that because the respondents made no attempt to obtain and publish a response from the applicants, the respondents' case on reasonableness should fail. However, I note that the statement of principle in *Lange*, cited above, is not expressed in such absolute terms. *Austin v Mirror Newspapers Ltd* (1985) 3 NSWLR 354 (*Austin*) at 364–365, on which the applicants relied, does not express a statement of general principle. Similarly, *John Fairfax Publications Pty Ltd v Zunter* [2006] NSWCA 227 (*Zunter*) at [30] says only that a "publisher who publishes serious allegations as fact without having checked with the person concerned is taking the risk that they cannot be justified". *Hockey* at [373]–[374] cites *Lange*… and otherwise turns on its own facts. In other words, the relevant principle is that stated in *Lange* …

201. In *Lange*, at page 574, the Court referred to the need to take "proper steps, *so far as they were reasonably open*, to verify the accuracy of the material" (emphasis added). It was not reasonably open to Mr McGowan, in the context of answering questions posed to him in his capacity as Premier during a press conference, to seek to consult Mr Palmer prior to responding to those questions. To do so would have been highly impracticable (cf, e.g., *Stoltenberg v Bolton* (2020) 380 ALR 145;[2020] NSWCA 45, 185, [204] per Gleeson JA).

202. Section 30(3)(i) concerns the other steps taken to verify the information (and similarly does not arise). Finally, s 30(3)(j) generally invites consideration of any other circumstances considered relevant.

203. As above, the indicia in s 30(3) do not form a "checklist". It is, however, significant that these considerations so firmly support a conclusion that Mr McGowan's publications were reasonable.

L. EVIDENCE OF REASONABLENESS

204. The following evidence is relevant to reasonableness.

Political and public figures

205. Mr Palmer is the Chairman and Registered Officer of the United Australia Party. Between 2013 and 2016 Mr Palmer was a Member of the House of Representatives of the 44th Parliament of Australia (Ex A: ABF [6] and [8], CB A pp112-113).

206. Mr McGowan is the Premier of Western Australia, having held that office since 17 March 2017. Since 2012 Mr McGowan has been the elected leader of the State Parliamentary Labor Party in Western Australia. Mr McGowan currently holds, and has held previously a number of ministerial positions in the Western Australian government (Ex A: ABF [10], [15] and [16], CB A p113).

Immediate responses to questions asked at press conferences

207. Save for the sixth matter complained of, each matter complained of was an immediate response to questions raised by reporters at press conferences which had been called to discuss other matters. Save as mentioned in b below, there is no evidence that Mr McGowan had prior notice that the questions would be asked:

a. The first and second matters complained of arose during a press conference on 31 July to announce major infrastructure and planning projects (McGowan Affidavit [15], CB D p1742). Mr McGowan had not rehearsed the words complained of (T.380.45) and indicated that "*a lot of what happens in press conferences springs to your mind at the time*" (T.382.20);

b. The third matter complained of arose during a press conference on 3 August 2020 to announce that the State Government was investing into schools, including the building of new schools and school improvements (McGowan Affidavit [34] CB D

pp1746-1747). Mr McGowan indicated that "*perhaps*" he was told before the press conference that he was going to be asked why Mr Palmer had sought to come to Western Australia in May 2020 (T.367.1 and T.367.17);

c. The fourth matter complained of arose in response to questions asked during a press conference on 5 August 2020 to announce a series of initiatives to boost local manufacturing opportunities and create jobs (McGowan Affidavit [45], CB D p1749); and

d. The fifth matter complained of arose in response to questions asked at a press conference to provide a COVID-19 update to Western Australians after a National Cabinet meeting (McGowan Affidavit [54], CB D p1751).

Context of COVID-19 and HCA Border Proceedings

208. The context of the unprecedented COVID-19 pandemic and Mr Palmer's challenge to Western Australia's border closures are highly relevant in assessing reasonableness. Agreed facts regarding Western Australia's border closures and the border proceedings are found at Ex A: ABF [31]-[43], CB A p117and [104] to [116] above.

209. Mr McGowan considered this was a matter of paramount public interest to people of Western Australia, and Australians more broadly (McGowan Affidavit [24] - [26], CB D pp1744-1745), see also:

a. T.375.1 ("*It was pretty extraordinary times*");

b. T.376.15 ("*Well it was a very, very heated and stressful time*");

c. T.411.2 ("…*serious threat to the State*…").

210. Mr McGowan also considered that Mr Palmer's challenge to the validity of Western Australia's strategy of closing its borders had potential ramifications for other States and Territories in that it may have resulted in the steps taken to close their borders also being invalidated (McGowan Affidavit [26], CB D p1745).

211. Mr McGowan believed Mr Palmer's public challenge to Western Australia's position regarding its borders, including his High Court proceedings, was a form of retribution against Mr McGowan and the WA government due to previous issues, including in relation to the CITIC Pacific mining project. He also believed that Mr Palmer likely had commercial imperatives for his position. Further, from around 2 August 2020, Mr

McGowan believed that Mr Palmer's and Mineralogy's counsel's attendance at the hearing of the Damages Arbitration in WA was a driver for the bringing of the border proceedings (McGowan Interrogatories, CB C pp1663-1664, 1667).

Arbitration Claim

212. That Mr Palmer was pursuing a claim against the State of Western Australia seeking damages of approximately $27 billion is also important context when assessing reasonableness.

213. Mr McGowan became aware of the approximate quantum of the damages claim in March 2020 (McGowan Affidavit [76], CB D p1756).

214. If the Mineralogy Parties were to succeed in their damages claim anywhere close to the amount sought then this would have had serious financial consequences for the State and its ability to adequately fund critical State services such as health and education (McGowan Affidavit [64(d)], CB D p1754 and [77], CB D p1756, McGowan Interrogatories, CB C pp1669 and 1670).

215. As a result, Mr McGowan considered it to be a matter of great concern for the people of Western Australia:

    a. McGowan Affidavit [64] and [77], CB D pp1753, 1754, 1756;

    b. T.309.22 (…"*to protect the State from a $30 billion potential liability which was an extraordinary amount of money and incredibly threatening to the future and the health of the State of Western Australia*");

    c. T.464.6 ("…*there was essentially two options. One is to leave it in the hands of the arbitrator and the fate of the State remains there, or we took action*" (emphasis added);

    d. T.474.18 ("*My concern was to save the tax payers of Western Australia from financial ruin*"); and

    e. T.499.39 ("*Now, ordinarily, you would never pass laws that are retrospective in nature apart from the most extraordinary of circumstances, and these were extraordinary circumstances*").

216. Mr Palmer asserts that some 'unreasonableness' is demonstrated by the fact that Mr McGowan did not believe he had read the State Agreement, the 2014 and 2019 arbitral

awards or the Palmer companies' claim for damages, and that this means that he had "an utter absence of factual basis" in respect of the first second, fifth and sixth matters [PS 262]. Although Mr McGowan had not himself read these specific documents the evidence shows he had been briefed: see for example McGowan Affidavit paragraphs 31, 32 and 76 (CB D 1746 and 1756) and T.427.23 - T.428.21. It is perfectly reasonable, and entirely normal, for a Premier to rely upon the information he is briefed with rather than reading all source documents in full. The submission that it was unreasonable for him to publish the first, second, fifth and sixth matters without first reading those 'source' documents, should be rejected. Mr Palmer's submission that the same conduct bespeaks malice ([PS [361] and [362]) ought be similarly rejected.

Hydroxychloroquine

217. Mr McGowan had consulted with the Chief Health Officer and the Director General of the Department of Health and had received very clear advice that hydroxychloroquine was dangerous when used as a purported treatment or cure for COVID-19 (McGowan Affidavit [39], CB D p1748; T.368.14-29, T.369.17-19, T.370.22, T.398.12-19).

218. Mr McGowan could not recall exactly when he spoke with the Chief Health Officer and the Director General of the Department of Health, other than it was some time prior to the 3 August 2020 press conference and it was at the time when the issue was "*current in the press*" (T.368.25), "*it was current… in the public conversation*" (T.368.32, T.370.11 -31) and "*an issue of public currency*" (T.370.20).

219. Mr McGowan was also aware of increasing numbers of negative media reports regarding hydroxychloroquine, including reports that it was harmful for COVID-19 patients (McGowan Affidavit [41], CB D p1748). See also T.364.24.

Submissions on s 30 reasonableness

220. Upon an analysis of all the circumstances, including those set out in paragraphs 205 to 219 above, Mr McGowan's conduct in publishing each of the matters complained of was clearly reasonable in the circumstances. In summary, by reference to the subsections of section 30(3):

    a. all matters the subject of Mr McGowan's publications were of utmost public interest, being matters concerning the health of Western Australians during a global pandemic and claims against the state for amounts that he considered would have

serious financial consequences for the state. That they form part of an exchange between two public figures is also relevant to their public interest (s30(3)(a));

b. as regards s 30(3)(b) and (f), all matters the subject of Mr McGowan's publications related to the performance of his public functions. The environment in which both Mr McGowan and Mr Palmer operate, being prominent politicians involved in the known "rough and tumble" of politics, is also relevant ;

c. the imputations conveyed were not so serious as to render Mr McGowan's actions unreasonable (s30(3)(c));

d. where Mr McGowan was expressing an opinion or belief only, this was clear (s30(3)(d)). Mr McGowan is being asked by media about his views (for example "*what's your reaction to that*") (Ex 1: CB C p933 (line 2)) and the reasonable listener would understand that. On a number of occsions he also expressly indicates that it is his opinion that is being expressed "***I think** he's the enemy of Australia*" (Ex 1: CB C p934 (lines 37-38)) and "… ***I don't think** was a good thing for our State*" (emphasis added) (Ex 2: CB C p1001A (lines 35-36));

e. as stated above, in respect of each of the First-Fifth matters complained of Mr McGowan responded to questions posed during press conferences to him in his capacity as Premier. It was in the public interest for him to respond in a direct fashion (and expeditiously). Similarly, as regards the sixth matter complained of, this was in response to advertisements that had just started being run by Mr Palmer and concerned legislation that had just been passed ("*If you're turned a radio on or opened the paper this morning you've probably already caught Mr Palmer's ads*") (Ex 5: CB C p1458 [lines 18-19]). It was clearly in the public interest that the information be published expeditiously (s30(3)(e)).

g. as regards the First-Fifth matters complained of, it was not appropriate or possible to seek Mr Palmer's comment prior to answering the question of the media during a press conference (s30(3)(h)). As to the sixth matter complained of, given the public interest in publishing that information expeditiously, and that Mr Palmer's views had already been expressed by Mr Palmer in his advertisements (and were well known), it was not reasonable or necessary to seek his comment prior to publication of the Facebook post;

h. the question of other steps taken to verify the information does not arise in these

circumstances (s30(3)(i)); and

i. as regards 30(3)(j) in respect of any other circumstances considered relevant, Mr McGowan relies upon all of the surrounding circumstances, including those referred to at to paragraphs 205 to 219 above.

M. MALICE

Issue for determination

221. In reply to Mr McGowan's defences of qualified privilege, Mr Palmer alleges that Mr McGowan was actuated by malice in publishing the matters complained of. The following issues fall for determination (Issues I.C [6] CB A pp100-102):

Malice: whether Mr Palmer has established that Mr McGowan published each of the matters complained of for an improper purpose, that is, to hurt and harm Mr Palmer and his business, to damage his reputation, and to discredit him while at the same time improving Mr McGowan's own political and electoral position.

As relevant to the question of whether the improper purpose may be inferred, whether Mr Palmer has established:

(a) That Mr McGowan and his Attorney-General developed a strategy of deliberately distressing, provoking and distracting Mr Palmer, which strategy involved Mr McGowan taking repeated "jabs" at Mr Palmer by making statements of and concerning Mr Palmer with the use of insulting and intemperate language (Attack Plan).

(b) That the Attack Plan had the features set out in particular 2(b) of the Reply.

(c) That Mr McGowan had knowledge of the falsity of the allegations within the matters complained of giving rise to the imputations, or alternatively was recklessly indifferent to the falsity of the allegations. Specifically, whether that knowledge of falsity or reckless indifference is established by:

(i) Mr McGowan's conduct in making defamatory publications about Mr Palmer, including the fourth, fifth and sixth matters complained of, after Mr Palmer's solicitors sent a letter on 4 August 2020; and

(ii) Mr McGowan's conduct in publishing the sixth matter complained of after Mr Palmer's solicitors sent a further letter on 10 August 2020.

(d) That Mr McGowan failed to contact Mr Palmer, or put any of the allegations to him, or give him any opportunity to respond to any of the allegations.

(e) That Mr McGowan adopted extreme and sensational language including for instance the use of words such as "enemy", "dangerous", "war" and "unthinkable".

(f) That Mr McGowan failed or refused to apologise to Mr Palmer, despite the fact that Mr Palmer's solicitors, Sophocles Lawyers, sent a letter seeking such an apology on or about 4 August 2020.

(g) That Mr McGowan persisted in making further insulting and derogatory statements of and concerning Mr Palmer of a kind calculated to expose Mr Palmer to further hatred, ridicule and contempt and to increase the indignity already suffered by Mr Palmer, the loss and damage to Mr Palmer's reputation and the injury to Mr Palmer's feelings, including:

(i) a statement on or about 2 August 2020 that the Applicant is "Australia's greatest egomaniac"; and

(ii) a statement on or about 2 August 2020 that the applicant is "an Olympic scale narcissist".

222. Mr McGowan submits the answer to each of the questions in Issues I.C[6]. above is "no".

Principles – malice

223. It is useful to set out some of the applicable principles on malice as they apply in the present context.

224. Malice calls for proof of an improper purpose, being the dominant motive actuating the publication: *Roberts v Bass* (***Roberts***) (2002) 212 CLR 1 at 37–41 [91]–[104] per Gaudron, McHugh and Gummow JJ; *Gross v Weston* (***Gross***) (2007) 69 NSWLR 279, Hunt AJA at [52] (Handley and McColl JJA agreeing); *Dye v Commonwealth Securities Ltd* (No 2) [2010] FCAFC 118 (***Dye***) at [109]-[110] (Marshall, Rares and Flick JJ); *Born Brands Pty Ltd v Nine Network Australia Pty Ltd* (***Born Brands***) (2014) 88 NSWLR 421 Basten JA at [90] (Meagher JA and Tobias AJA agreeing).

225. There are various ways in which an improper motive might be made out in a given case, depending on the nature of the tort and the particular circumstances of each case. In each case, however, the focus is on whether the relevant matters said to constitute malice make out the relevant improper motive.

226. *First*, as is well established, proof of knowledge of falsity is a means by which an improper motive may be established, usually conclusively: *Roberts* at [77] (Gaudron, McHugh and Gummow JJ); *Dye* at [111]. In circumstances where knowledge of falsity alone is relied on, then it is not generally necessary to identify the improper motive as there can be no proper motive in those circumstances unless the defendant has a duty to publish the matter complained of: *Gross* at [52](6).

227. *Secondly,* short of knowledge of falsity, reckless indifference may also be sufficient to prove improper motive in exceptional circumstances or in combination with other factors. In *Roberts* at [84] Gaudron, McHugh and Gummow JJ said:

> In exceptional cases, the sheer recklessness of the defendant in making the defamatory statement, may justify a finding of malice. In other cases, recklessness in combination with other factors may persuade the court that the publication was actuated by malice. In the law of qualified privilege, as in other areas of the law, the defendant's recklessness may be so gross as to constitute wilful blindness, which the law will treat as equivalent to knowledge.

228. In *Gross,* Hunt AJA said at [52] (Handley and McColl JJA agreeing):

> In my opinion, the joint judgment in *Roberts v Bass* is authority for the following propositions relevant to the present appeal:
>
> (1) Except where the defendant was under a legal duty to publish the matter complained of, the defendant's knowledge that it was false is ordinarily conclusive evidence that the publication was actuated by an improper motive.
>
> (2) Recklessness in the publication of the matter complained of does not establish knowledge of its falsity unless it amounts to wilful blindness on the part of the defendant which the law equates with knowledge.
>
> (3) Recklessness — when present with other evidence — may nevertheless be relevant to whether the defendant had an improper motive which actuated the publication.
>
> (4) If a plaintiff's case rises no higher than evidence that the defendant did not have a positive belief in the truth of what he published, there is no evidence that its publication was actuated by an improper motive.
>
> (5) The absence of a positive belief in the truth of what was published may nevertheless be relevant — with other evidence — to whether the defendant's improper motive actuated the publication, but it will not establish that fact by itself.
>
> (6) Where the plaintiff relies on the defendant's knowledge of the falsity of the matter complained of to establish an improper motive, it is unnecessary to identify that improper motive, as there can be no proper motive in those circumstances unless the defendant has a duty to publish the matter complained of.

229. Following *Roberts,* in *Born Brands,* the New South Wales Court of Appeal held that there was no error in the primary judge's conclusion that, even if the defendants' omission to contact the plaintiffs to request comment before the relevant broadcast went to air was

careless, this would not have amounted to malice for the purposes of a claim in injurious falsehood, observing at [90]-[95] per Basten JA (Meagher JA and Tobias AJA agreeing):

> The circumstances of the news broadcast were not such as to demand a comment from the manufacturer or distributor of similar devices in Australia. Even if such a step had been desirable, failure to take that step did not constitute recklessness as to the truth or falsity of the statements made and certainly did not constitute recklessness of a kind warranting an inference of malice on the part of the respondents.

230. *Thirdly*, a mere lack of a positive belief in the truth of the the communication is not to be treated as if it were equivalent to knowledge of falsity and, therefore, malice. As the plurality in *Roberts* explained [at 97]:

> Because honesty is presumed, the plaintiff has the onus of negativing it. That is to say, the plaintiff must prove that the defendant acted dishonestly by not using the occasion for its proper purpose. Unless that is kept in mind, there is a danger that reference to the honesty of a defendant will reverse the onus of proof. If the tribunal of fact rejects the defendant's evidence that he or she positively believed in the truth of what he or she published, it does not logically follow that the plaintiff has proved that the defendant did not believe in the truth of the publication or had an improper motive. Rejection of the defendant's evidence, combined with other evidence, may lead to the conclusion that the defendant had no belief in the truth of the publication or knew that it was false. But mere rejection of the defendant's evidence does not logically and automatically lead to any conclusion as to what his or her state of mind was. "[B]y destroying that evidence you do not prove its opposite."

231. See also *Gross* at [52].

232. In *Dye* the Full Federal Court (Marshall, Rares and Flick JJ), in the course of holding that the plaintiff should have been granted leave to amend her pleadings to include a claim for injurious falsehood, stated at [111]:

> Her Honour said that there was nothing in this material to suggest malice. … The emails may or may not establish malice when considered, with other evidence of what the persons in CommSec responsible for the publication and for the decision to dismiss Ms Dye's claims as unsubstantiated, knew, believed and intended by the publications. As Gaudron, McHugh and Gummow JJ said in *Roberts* 212 CLR at 39 [98]:
>
> > When the plaintiff proves that the defendant knew the defamatory matter was false or was reckless to the point of wilful blindness, it will constitute almost conclusive proof that the publication was actuated by malice. A deliberate defamatory falsehood "could not have been for a purpose warranted by any privilege; and hence it is unnecessary to determine what the exact purpose was in order to ascertain whether the privilege has been lost for the particular

> defamatory statement which has been proved to be wilfully false" (Mowlds v Fergusson (1939) 40 SR (NSW) 311 at 329 per Jordan CJ, Davidson and Halse Rogers JJ agreeing). When the plaintiff can only prove that the defendant lacked a belief in the truth of the defamatory material, however, it will be no more than evidence that may give rise with other evidence to an inference that the publication was actuated by malice. (emphasis added)

233. In circumstances where various allegations of dishonesty constitute the platform of facts from which the inference of improper motive is to be inferred, it is necessary to say something about the standard of proof.

234. *S*ection 140 of the Evidence Act provides that:

> (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
>
> (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
>
> (a) the nature of the cause of action or defence, and
> (b) the nature of the subject-matter of the proceeding, and
> (c) the gravity of the matters alleged.

235. Allegations of dishonesty call for strict and cogent proof: *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; (1992) 67 ALJR 170 at 170-171 (per Mason CJ, Brennan, Deane and Gaudron JJ). Of course, that requirement does not change the standard of proof, rather, it reflects a judicial approach that a court should "not lightly" make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.

Has Mr Palmer established that Mr McGowan was actuated by malice?

236. In response to Mr Palmer's submission that Mr McGowan was actuated by malice and thereby not entitled to rely on qualified privilege (PS [324] to [394]), Mr McGowan submits as follows.

Alleged knowledge of falsity, or absence of belief in the truth of the matter sued upon (PS, [327] to [362])

237. Mr Palmer submits at (PS [327]) that Mr McGowan knew that what Mr McGowan said about the six matters upon which Palmer sues were false or that McGowan did not believe they were true. Plainly, that is a submission as to Mr McGowan's subjective state of

mind. Mr Palmer bears the onus of proof. It is a heavy onus given that Mr Palmer alleges actual dishonesty.

238. In large part, Mr Palmer's argument boils down to an assertion that the nature of the language used by Mr McGowan was such that he could not have believed the matters sued upon to be true or, alternatively, that he was actuated by malice in the relevant sense. In doing so, Mr Palmer focuses on graphic words used by Mr McGowan (e.g. *"enemy of the State"*) that are not part of the imputations held to be conveyed by the matters complained of by Mr Palmer. He does this notwithstanding that Mr Palmer seeks to prove that Mr McGowan believed the matters to be false or, alternatively, did not believe them to be true. While Mr McGowan, of course, acknowledges that the actual language used by him is not irrelevant to the question of whether he was actuated by malice when making the statements giving rise to the matters complained of, to the extent that Mr Palmer alleges that Mr McGowan did not believe the truth of the matters sued upon, close focus must be placed on the imputations found to have been conveyed by those matters and Mr McGowan's state of mind in respect of them. The imputations found to have been conveyed (imputations 3(d) and (e), 5(b) and 11(b)) are in terms of Palmer representing a *"threat"* to the people of Western Australia or Australia and *"dangerous to them"*.

239. It is first necessary to examine Mr McGowan's beliefs as to Mr Palmer and the actions he had taken that, in Mr McGowan's view, were directly opposed to the interests of the State to the extent that he could appropriately be characterised as a *"threat"* or *"dangerous"*.

240. Mr McGowan's evidence is that he did, in fact, consider Mr Palmer to be the *"enemy"* of the State and of Australia because (McGowan Affidavit [24] to [32], [40] and [52], CB D p1744-6; T.408-10; T.443.20):

    a. Mr Palmer was opposed to Western Australia in the HCA Border Proceedings by which Mr Palmer sought to bring down Western Australia's border restrictions which formed part of the State's response to the COVID-19 pandemic;

    b. the pandemic was of paramount importance to Mr McGowan and his government especially as case numbers were, in mid-2020 (when the relevant statements were

made) climbing in Victoria and the Emergency Management Team was meeting almost daily;

c. the border controls the subject of the HCA Border Proceedings were therefore, in Mr McGowan's view, *"absolutely necessary for protecting Western Australians from COVID-19"* and, if they came down, the health and safety of Western Australians would be put at risk. The HCA Border proceedings could thereby *"harm the health and wellbeing of Western Australians"*;

d. success on the part of Mr Palmer in the HCA Border Proceedings would obstruct the ability of States other than Western Australia to impose their own border restrictions such that Mr Palmer was, in Mr McGowan's view, acting contrary to the interests not merely of Western Australians but Australians generally;

e. Mr McGowan believed that Mr Palmer was bringing those proceedings for his own benefit rather than for any altruistic reasons and funding them with money earned from Palmer's interest in the Sino-Iron project in the Pilbara region of Western Australia; and

f. as a discrete reason, the Damages Claim – in which Mr Palmer's interests were directly opposed to those of the State – put the financial wellbeing of Western Australia at risk. The importance of this factor to Mr McGowan should not be underestimated. His evidence was that the thought of the State being made to pay Mr Palmer $30 billion made him feel "*more than sick*" (T.443.20).

241. Mr McGowan's evidence as to his belief in the importance of the Western Australia border controls and the potential detriment to Western Australia were the Damages Claim to be upheld should be accepted. It was not seriously challenged. It is entirely consistent with the message conveyed by his press conference on 31 July 2020 (Ex 1: CB C pp933-933B), namely that Mr McGowan considered Western Australia to have achieved *"wonderful outcomes"* in both a health and an economic sense through its border policies, and that "*we're in a pandemic, we're trying to protect people, we're trying to keep people safe"* and that his government would not be deterred from those goals by Mr Palmer's constitutional challenge to its border policies. As to the medical advice received by Mr McGowan in relation to the need for border restrictions, see [339] to [351] below.

242. The evidence set out above generally refutes most aspects of Mr Palmer's arguments as to malice on Mr McGowan's part. In short, the language used by Mr McGowan does not indicate that he did not believe the truth of his statements or was otherwise actuated by malice in the sense necessary to disentitle him to reliance on the defence of qualified privilege. Rather, it reflects his strong and genuinely held beliefs as to the importance of the border controls imposed by his government in protecting Western Australia from the spread of COVID-19, the fact that Mr Palmer's opposition to those border controls in the public domain and through the HCA Border Proceedings was, in Mr McGowan's view, directly contrary to the interests of public health in Western Australia, and the fact that Mr McGowan considered Mr Palmer's claim for damages to amount to an attempt to ruin Western Australia, being a State that had very substantially contributed to Mr Palmer's wealth through his interest in the Sino-Iron project.

243. Mr Palmer's submissions are addressed more specifically in the following paragraphs.

<u>The first, second and fifth matters: imputations 3(d) and (e), 5(b) and 11(b) (PS [328] to [341])</u>

244. As stated at PS [328] each of the first, second and fifth matters have been found to carry an imputation to the effect of *"Palmer represents a threat to the people of Western Australia/Australia and is dangerous to them".* Mr McGowan's evidence summarised above establishes that Mr McGowan very much considered Mr Palmer to be a threat to Western Australia and of Australians generally both because the HCA Border Proceedings posed a risk to the safety of the population and because the Damages Claim, if successful, would very seriously damage the financial wellbeing of the State and its inhabitants.

245. In the face of this evidence of Mr McGowan's state of mind, Mr Palmer is driven (PS, [329]) to the following extreme position: that only the lowest villains of history such as Stalin, Hitler or Putin can honestly be characterised as a threat or danger to or enemy of a State. That bare assertion fails to grapple at all with the facts of this case and, in any event, is incorrect. Nothing in Mr McGowan's evidence (including his cross examination on the topic at T.408-9) suggested that he intended to portray Mr Palmer as morally commensurate to a tyrant of historic proportions and thereby was speaking maliciously. The imputations conveyed are apt to describe a person taking legal action against the State believed by the speaker to jeopardise public health and finances: such a person may

honestly be described as a *"threat"* to the State or *"dangerous to"* its population. And, in any event, it is abundantly clear that expressions such as *"enemy of the State"* used in the present context were intended figuratively and overwhelmingly likely to have been interpreted as such (*cf.* PS, [330]).

246. Underlying Mr Palmer's submissions in this respect is an attempt by him to characterise the steps he took in the HCA Border Proceedings and the Damages Claim as reasonable: see especially PS, [331] to [332]. His real complaint, properly analysed, is that in light of the reasonableness he perceives in his own position, it was unfair or wrong for McGowan to characterise him as a threat or a danger. However, that is beside the point for present purposes where only Mr McGowan's state of mind is relevant.

The third matter: imputation 7(a)

247. The third matter complained of has been found to convey the imputation that "*Mr Palmer promotes a drug which all the evidence establishes is dangerous*". Mr McGowan's evidence as to his knowledge regarding hydroxychloroquine is summarised at [217] to [219] above.

248. In light of the state of this knowledge, Mr Palmer's submission that Mr McGowan knew this imputation to be false at the time he spoke it (3 August 2020) cannot succeed. On the basis of the advice he had received from the Chief Health Officer and the Director General of the Department of Health (including that "*both of them shuddered and recoiled in horror*" in respect of the use of hydroxychloroquine to treat COVID-19 (T.368.27)), and consistent with the media reports he was aware of, Mr McGowan believed that all the evidence established that hydroxychloroquine was dangerous when used as a purported treatment or cure for COVID-19.

249. The stated purpose of Mr Palmer's attempt to enter Western Australia on 20 May 2020 was to "*progress*" the purposes set out in the letter from Mr Palmer's solicitors dated 20 May 2020 (CB C p426). Mr Palmer's foundation was said to be seeking to "*develop a treatment for COVID-19*" (CB C p425) and involved in activities related to donation, funding and support in respect of the use of hydroxychloroquine as a purported treatment or cure for COVID-19. What exactly it was that Mr Palmer was intending to do in Western Australia in order to "progress" those purposes is not stated in the letter. The letter from Mr Palmer's solicitors was brought to Mr McGowan's attention

(T.359.46). Mr McGowan accordingly knew that Mr Palmer was 'promoting' hydroxychloroquine, in the sense that he was actively supporting its potential use as a treatment or cure for COVID-19.

250. Mr Palmer's submissions appear to proceed from the basis that because Mr Palmer proposed to *donate* funds, other support and doses of hydroxychloroquine, this means he was not "promoting" it (see PS [350] - [354]). To "promote" is readily understood to simply mean to "*further the development, progress, or establishment of (a thing); encourage, help forward or support actively (a cause, process etc)*" (Shorter Oxford English Dictionary, 6th ed, 2007). Mr Palmer was clearly promoting hydroxychloroquine in this sense, and clearly Mr McGowan did not lie when he observed as much.

The sixth matter: imputations 13(b) and (c) (PS [357] to [362])

251. Mr McGowan's evidence was that he believed the statements in the sixth matter to be true (McGowan Affidavit [64], CB D p1753-4). In short, he believed that the Damages Claim, having an approximate quantum of $30 billion, would, if successful, ruin the State and result in a liability of about $12,000 *per capita* of population. These are matters of arithmetic. Nor is it controversial that Mr Palmer chose not to proceed with the BSIOP proposal with the conditions attached to it after the 2014 award was rendered. The statements in the Facebook post to the effect that the Amending Act was not about stopping Mr Palmer from pursuing the BSIOP Proposal *at all* are readily understandable on the basis that it was open to Mr Palmer to accept the conditionality and proceed with the BSIOP proposal. There was no evidence to suggest that Mr McGowan did not believe that to be the case nor was that even put to him.

252. The substance of Mr Palmer's complaint appears therefore to be that the conditions were unreasonable and that the unreasonableness was the real reason that the BSIOP proposal did not proceed. Again, Mr Palmer's state of mind as to the reasonableness or otherwise of the conditions is not to the point for present purposes. Mr McGowan's unsurprising evidence was that he understood that different mining projects had different conditions applied to them and, in that sense, the conditionality of any project was unique to it (T.429.05-.12). There is no evidence that he believed that the conditions imposed by Barnett were unreasonable much less that he believed that any such unreasonableness was the true cause of Mr Palmer's decision not to proceed with the project. To the contrary, Mr McGowan's evidence was that he did not know that the third arbitration involved a

challenge by Mr Palmer to the unreasonableness of the conditions (T.428.25), which evidence was not challenged.

253. In light of these matters, there is no evidentiary foundation for Mr Palmer's submission that Mr McGowan knew or was reckless as to whether the sixth matter was false on the basis that the true cause of Mr Palmer's decision not to proceed was the existence of unreasonable conditions as opposed to, as Mr McGowan said in his Facebook post, Mr Palmer's decision not to accept them. Nor does any failure by Mr McGowan to have read the State Agreement or the awards (*cf* PS, [361]) amount to relevant knowledge or recklessness in this respect much less evidence of malice.

<u>The so-called "Attack Plan", including the Amending Act (PS, [363] to [365])</u>

254. The submissions at PS, [363] to [365] seek to deploy the so-called "*Attack Plan*" as evidence of malice so as to defeat Mr McGowan's qualified privilege defence in respect of the first to fifth and possibly sixth matters.

255. As Mr McGowan understands the argument, it amounts to an allegation that Mr McGowan and Mr Quigley conspired maliciously to direct insults under cover of qualified privileged in public fora at Mr Palmer that were sufficiently vile and provocative as to cause Mr Palmer and his lawyers to become so preoccupied with preparing defamation proceedings that they would, in turn, forget to register an arbitral award asserted by Mr Palmer to have a value to him exceeding $30 billion (see especially PS, [73] to [75]).

256. The allegation is both serious and fanciful. It would require a strong evidentiary foundation in order to be accepted by the Court. There is, in fact, no evidence at all in support of the proposition that Mr McGowan was a knowing party to the alleged, so-called "*Attack Plan*".

257. The evidentiary centrepiece of Mr Palmer's argument is the radio interview given by Mr Quigley on 13 August 2020. While it may be so obvious as to go without saying, it should nevertheless be emphasised that Mr Quigley's words do not, without more, prove Mr McGowan's state of mind in any respect. Mr Palmer has adduced no compelling evidence that McGowan intended to participate in a conspiracy of the nature described above. The evidence given at the transcript referred to at PS, [364] (i.e. T.421.37-422.15) simply does not support the proposition that Mr McGowan intended to participate in any strategy

whereby he would insult Mr Palmer so as to distract him and his lawyers from registering the award. These passages merely acknowledge that the Amending Act was prepared in secret and in a relatively short timeframe ("*the strategy of constructing the legislation and introducing it to Parliament"* (T.422.10) and "*to get the legislation through as quickly as possible"* (T.422.20)). There is no concession as to delivering insults to distract Palmer from registering the award - far from it. In fact, Mr McGowan denied the existence of the "*Attack Plan*" as alleged (McGowan Affidavit [66] CB D 1754) (which denial was not seriously challenged in cross-examination notwithstanding the seriousness of the submission now made) and disavowed Quigley's description of what occurred (T.417.42-418.31).

258. His evidence was that the only relevant strategy – or by analogy chess game or boxing match – was *"[t]he strategy of constructing the legislation and introducing it to Parliament"* (T.422.08-.11). And it is telling that Mr Palmer can point to no documentary evidence at all in support of his allegation that McGowan was aware of any "*Attack Plan*" in the terms pleaded despite the fact Mr McGowan and the State have provided extensive discovery, and Mr Quigley has produced documents pursuant to a subpoena, including private text messages. This lacuna in Mr Palmer's evidence is enough to dispose of Mr Palmer's submission based on the so-called "*Attack Plan*" in its entirety. Finally, the implicit submission at PS, [76] that something said by Senior Counsel for Western Australia is somehow relevant as an admission is both wrong and mischaracterises what he said, being "… *this planning was done in secret. It was introduced in a way that was meant to have it legislated in minimum time. It has been – it was designed in such a way so as to stop arbitral awards being registered*" (T.484.12-.15). That is on all fours with McGowan's submissions above.

259. Further, even if one were to assume *arguendo* that Mr McGowan was (notwithstanding the submission above) a knowing party to the plan described by Mr Quigley in the radio interview, that plan does not amount to an "*Attack Plan*" whereby Palmer was to be distracted by insults from registering his award. In the interview Mr Quigley expressed his view that the Amending Act had been conceived and prepared secretly and then announced at a time when it was not practically possible for Palmer to register the award. That has no relevance at all to Mr McGowan's motivations in respect of the first to sixth matters nor to any other issue arising in this litigation. And there is nothing remotely inappropriate or malicious about legislation in the nature of the Amending Act being

prepared confidentially nor released at a time calculated to prevent Mr Palmer from registering the award that was the basis of the Damages Claim. It was plainly in the State's interests that this should occur. The insinuation at PS, [60] to [68] that this conduct was in some way nefarious or malicious should be rejected.

260. The part of the interview that Mr Palmer appears to contend evinces malice on the part of Mr McGowan – and even then on the unproved assumption that Mr Quigley's views were shared by Mr McGowan – is the statement that *"McGowan has been jab, jabbing away with insults, his lawyers have been busying themselves, were sending us back reams of defamation writs, when they should have been looking at the man game of file – of registering the arbitration."*

261. As Mr McGowan understands Mr Palmer's argument, this passage is supposed to prove that Mr McGowan was deliberately insulting Mr Palmer so as to induce him and his lawyers to prepare a defamation suit rather than register the award. But the passage does not reveal anything about even Mr Quigley's understanding of Mr McGowan's intentions much less what Mr McGowan's intentions, in fact, were. In reality, this passage – which is the high-point of Mr Palmer's case in relation to the so-called "*Attack Plan*" – goes no further than expressing Mr Quigley's view that the true cause of Mr Palmer's failure to register the award was that his lawyers were focussed on preparing a defamation suit rather than the registration process. It does not suggest that even Mr Quigley believed that this outcome was deliberate or pre-meditated on his and Mr McGowan's part.

262. There is therefore absolutely no foundation for the submission at PS, [75] that McGowan deliberately directed insults at Mr Palmer was part of a campaign to induce a defamation action that occupied Mr Palmer's lawyers so completely that they forgot to take the step of registering an award that Mr Palmer contends should ultimately yield him damages of about $30 billion.

<u>Failure to inquire of Mr Palmer and refusal to apologise (PS, [366] to [369])</u>

263. There is a considerable air of unreality involved in Mr Palmer's submissions that relevant malice ought to be attributed to Mr McGowan by reason of his failure to inquire of Mr Palmer or apologise in relation to the matters complained of.

264. They all arose in a context in which Mr McGowan and Mr Palmer were directly at odds in serious disputes concerning Mr McGowan's government's policies regarding border

control and Mr Palmer's asserted entitlement to damages payable by the State in excess of $30 billion. Mr McGowan considered these matters to be extremely important. Each man had been highly critical of the other in public.

265. Any failure to inquire or absence of apology in that contexts should be given no real weight in assessing the existence of relevant malice on Mr McGowan's part. Rather, that matter is to be assessed having regard to his state of mind in respect of the disputes between Mr Palmer's interests and the State, namely the HCA Border Proceedings and the Damages Claim, which is addressed above. The reality is that Mr McGowan honestly believed that the position taken by Mr Palmer in each set of proceedings posed a serious threat to the public health and finances of the State and was therefore motivated to make the statements about which Mr Palmer complains. It is utterly unrealistic to expect Mr McGowan to have made any inquiries of Mr Palmer prior to those statements nor to apologise afterwards. There is simply no basis to conclude (nor for Mr McGowan to have concluded) that any prior inquiries would have yielded anything productive. And given the strength of Mr McGowan's beliefs as to the actions taken by Mr Palmer against the interests of Western Australia, nothing meaningful can be inferred from the absence of any apology other than a continued belief on Mr McGowan's part that the statements made by him were accurate.

Alleged foreign motive (PS, [370] to [374])

266. The foreign motives alleged at PS, [370] to [374] go beyond the motives pleaded and particularised by Mr Palmer: (Mr Palmer's Reply, [2(b)] CB A p25-7; Letter from Sophocles Lawyers to Clayton Utz dated 22 December 2021, [3] to [50] CB A pp30-1). In particular, it is not pleaded or particularised that Mr McGowan was actuated by a desire to persuade Mr Palmer to drop the High Court challenge (*cf* PS, [371]).

267. In any event, this and the other allegedly improper motives attributed by Mr Palmer to Mr McGowan are not, in fact, improper in the sense required to displace Mr McGowan's reliance on the defence of qualified privilege (nor at all). To the extent that the matters were motivated by Mr McGowan's natural desire that Mr Palmer drop the High Court Border Proceedings, that was not improper given Mr McGowan's view of the public interest in maintaining the border restrictions. The same reasoning applies to the extent that Mr McGowan was motivated by avoiding liability to the State arising from Mr Palmer's arbitral claim (*cf.* PS, [374]) given his attitude as set out above to that claim and

its potential consequences for Western Australia. Any absence of disclosure of confidential information relating to the arbitration itself – such as its quantum – could hardly mean that Mr McGowan's expression of his genuine views of Mr Palmer and his claim was motivated by any impropriety. Nor were these instances of Mr McGowan simply *"giving vent to his private spleen"* at Mr Palmer's expense so as to deprive Mr McGowan of his defence of qualified privilege (PS, [374]). Rather, the subject-matter of each of the matters complained were topics of undoubted public interest, especially in the context of the HCA Border Proceedings and the Damages Claim and about which Mr McGowan held genuine and legitimate views reflected in the words he used.

Premeditated and no intention to convey imputations (PS, [376] to [376])

268. These are minor matters in the present context having little, if any, real relevance. If Mr McGowan is otherwise entitled to rely on the defence of qualified privilege for the reasons advanced above, his understanding of the terms in which an imputation would be framed by the Court or any premeditation by him as to the matters complained of are not such as to displace that entitlement.

Alleged extreme language (PS, [377] to [382])

269. The words used by Mr McGowan and relied upon by Palmer in this respect (e.g. *"enemy", "war", "selfish", "enemy of the State"*) reflected Mr McGowan's state of mind as to Mr Palmer's position in the HCA Border Proceedings and the Arbitration. The evidence of Mr McGowan's views as to these matters is set out above. Mr McGowan took those matters seriously. They were not disproportionate in the context, which included attempts by Mr Palmer to dismantle border controls that Mr McGowan considered important to public health and to obtain damages from the State in excess of $30 billion. Further, as regards the sixth matter complained of, it is also of note that on 13 August 2020 Mr Palmer's companies had filed a proceeding seeking to (inter alia) injunct Parliament from passing the Amendment Bill [**QUD 257/2020 in respect of which the originating application and concise statement are proposed to be tendered**]. Mr McGowan was aware of the numerous actions which had been brought by Mr Palmer against him and his government (T.312.44) and it should be inferred that he was aware of that proceeding. The use of the relevant language by Mr McGowan does not found a finding that he was actuated by malice but is rather evidence of the seriousness of the threat that Mr

McGowan considered Mr Palmer posed to the State in relation to both the spread of COVID-19 and the Damages Claim. It really serves to illustrate Mr McGowan's genuine belief in the importance of the public interest to which the matters related, including the HCA Border Proceedings and the Damages Claim.

Alleged spite, ill-will, persisted in over time (PS, [383] to [394])

270. The heavy reliance placed by Mr Palmer on the SMS exchange of 23 May 2020 (PS, [383] to [386]) is misplaced. The criticism appears to be that, in a private exchange that was never intended to be disseminated, Mr McGowan failed to deliver some kind of dressing-down via SMS to Mr Quigley and therefore ought to be attributed with a degree of malice towards Mr Palmer sufficient to disentitle him to any reliance on the defence of qualified privilege. That submission should be rejected. It was not put to Mr McGowan that he should have called Mr Quigley to account for his adverse language about Palmer nor was it put to him that his failure to do so was motivated by malice towards Palmer (see T.464.43 - 468.12). Potential alternative explanations include that Mr McGowan was busy, considered messages sent privately to be unlikely to cause harm in the real world and/or assumed that Mr Quigley was attempting humour and did not take the messages seriously (as to which see T.447.4-.28). It also should not be overlooked that in some instances, such as the use by Mr Quigley of *"BFL"*, Mr McGowan simply thought that Quigley was joking (T.447.4-.28).

271. Beyond that, to a large extent the submissions at PS, [387] to [394] are answered by the matters set out in [269] above. Mr McGowan plainly held a strong adverse view of Mr Palmer. However, that view was informed by Mr Palmer's position, which was directly opposed to what Mr McGowan considered to be the State's interests in the HCA Border Proceedings and in respect of his Damages Claim. These are matters that Mr McGowan considered to be important and in respect of which Palmer constituted a danger to the public health and finances of Western Australia. It would be incorrect to decontextualise the language used by Mr McGowan by ignoring the basis for his opinion of Mr Palmer and instead (as Palmer does) simply asserting that he was motivated by mere *"spite and ill-will"* about Mr Palmer generally (PS, [383]). The more likely inference – amply supported by the evidence referred to at [238] above – is that Mr McGowan was motivated in his use of language about Mr Palmer by the importance that McGowan attributed to reducing the spread of COVID-19 and protecting the financial security of

the State against the Damages Claim and the fact that Mr Palmer stood in direct opposition to both of those endeavours. In other words, the language was not motivated by malice in the relevant sense but instead by the strength of Mr McGowan's conviction that the interests of Western Australia were being jeopardised by Mr Palmer.

N. RELIEF

Issues for determination

272. The following issues fall for determination:

> ***Damages:***
>
> (a) If an entitlement to an award of damages is established, the amount of damages to be awarded to Mr Palmer.
>
> (b) Whether the circumstances warrant an award of aggravated damages.
>
> ***Injunctive relief*:** whether Mr Palmer has established that a permanent injunction should be granted.
>
> ***Costs and interest***.
>
> (Issues I.D [7], CB A p102)

273. The principles on general damages, aggravated damages and injunctive relief are set out at [447] - [466] below.

274. As to permanent injunctive relief, the ordinary course is to determine any issue of permanent injunctive relief following delivery of judgment.

275. Mr McGowan's submissions in relation to Mr Palmer's entitlement to relief in the event Mr Palmer is successful on liability, are set out below.

Relief - the evidence

276. Relevantly to the question of the relief to which Mr Palmer is entitled if successful on liability:

a. There is almost no evidence of injury to Mr Palmer's reputation or hurt to feelings arising from the matters complained of;

b. There is no basis for an award of aggravated damages; and

c. There is no basis for the award of permanent injunctive relief.

Almost no evidence of injury to reputation or hurt to feelings

277. Mr Palmer's evidence indicates that the cause of his distress was the Amending Act – not any of the matters complained of – and he admits this to be the case PS [657].

278. He not only recalled including in his affidavit that he was, in his own mind, "*a resilient person and able to treat some criticism as water off a duck's back*" but also gave oral evidence that "I think it's truth": T.199.25-28. That is also an appropriate characterisation of Mr Palmer's demeanour in giving evidence which was consistent with the attitude of a thick-skinned and tough, seasoned businessman and politician.

279. As is well established, compensatory damages in defamation serve purposes of consolation for personal distress, reparation of harm done to reputation, and vindication of reputation: *Carson v John Fairfax & Sons* (1993) 178 CLR 44 at 50-51; see also *Stead v Fairfax Media Publications Pty Ltd* [2021] FCA 15 at [238].

280. The Court is required to ensure that there is an "*appropriate and rational relationship*" between harm sustained and any damages: s34 the Act. This is a "*necessarily bespoke exercise… True comparability is difficult magic, except very roughly*": *Stead v Fairfax Media Publications Pty Ltd* [2021] FCA 15, [231].

281. The "*political environment in which*" the matters complained of in the present matter were published is a relevant consideration: *Hanson-Young v Leyonhjelm* (No 4) [2019] FCA 1981, [353].

282. Mr Palmer's evidence did not establish that the matters complained of (as distinct from the Amending Act) "*had any practical effect on the way those about him interacted with him, or that he had received negative comments from others which were referrable*" to the same: as in *Dutton v Bazzi* [2021] FCA 1474, [195]. (While Mr Palmer is of course correct to say at PS [402] that damage to reputation is often presumed, this very limited evidence on this topic is relevant to any assessment of quantum).

283. The evidence similarly indicates no real damage to his professional reputation. Instead, it was the Amending Act which, on Mr Palmer's evidence: "*meant that was known to the whole world they had effectively destroyed my companies and myself as a citizen, and they had established so much sovereign risk that practically, in a commercial way, that would stop any project from proceeding. No bank, no joint venture partner would ever deal with us again about our assets. That was just the commercial reality*": T203.42-47.

It is not the case where there was, for example, any evidence of significant impact upon his business interests (cf, eg, *Nettle v Cruse* [2021] FCA 935, [53]).

284. As to hurt to Mr Palmer's feelings, the Court should also feel an "*actual persuasion*" of the occurrence or existence of a fact: *Stead v Fairfax Media Publications Pty Ltd* (2021) 387 ALR 123, [2021] FCA 15 at [243]; see also *Oliver v Nine Network Australia Pty Ltd* [2019] FCA 583 at [83]: "*Given the wholly subjective nature of hurt to feelings, a static and clinical mode of adduction of evidence is less useful than observing a witness explain his feelings in person*."

285. It was the Amending Act that was "*sort of like a sayonara for me and my companies in Western Australia*" (T.204.6-8). It was the Amending Act that was, to Mr Palmer's mind, "*contrary to the rule of law*" (T.208.4-5). It was after reading the Amending Act that Mr Palmer claimed he had a fear for his physical safety (T.208.15-16). After being specifically asked by his Senior Counsel about "*Mr McGowan's various attacks*" (at T.208.47-T209.1), Mr Palmer responded by reiterating that "*the Act's powers are very broad*" (T.209.4).

286. Mr Palmer "*hadn't seen all of the publications*" until his "*PR guy*" showed him various media including commentary on Twitter and a video of "*people in a nightclub singing*" – ultimately, his reaction was that: "*It's very hard to, you know, stay controlled when you – when there has been this level of violence against you legislatively*" (T.209.39-46).

287. As to the first and second matters complained of, the transcript extracts included at PS [442] capture no significant hurt to his feelings – Mr Palmer "*didn't think it was called for*" (T.198.36), was "*upset that the comment was made by someone in such high office as a premier of a state*" (T.199.4-4), and while he appreciated that "*you mightn't get any accolades*" for acquiring a large volume of hydroxychloroquine, "*I couldn't understand how they would say you didn't care about people*" (T.199.22-23). None of this evidence indicates any serious hurt to Mr Palmer's feelings at all.

288. In relation to the words "He is not focused on the health or wellbeing of people in the state" in the second matter complained of, Mr Palmer's evidence was that that "*I hadn't been considering that at all. You know, I had been – I was more shocked by the first one*" (T.199.12-13).

289. As to the third matter complained of, Mr Palmer's evidence barely rises beyond the suggestion that perceived criticisms were "*unfair*" (T.200.42). The letter referred to at PS

[448] (which appears at CB C p1004) made a number of allegations against Mr McGowan (not limited to defamation) and purported to be non-exhaustive (CB C p1005). It is of no significance that Mr McGowan did not provide the specific apology sought at that time (CB p1005), or that Mr McGowan otherwise generally continued his participation in public life, including the making of the subsequent matters complained of.

290. As to the fourth matter complained of, Mr Palmer's evidence again rose only as high as him stating that he felt matters were being "*unfairly dealt with*" (T.202.43). Mr Palmer's efforts to now characterise his evidence as "*given in an understated way*" (PS [452]) is not in accordance with what transpired in the courtroom.

291. As to the fifth matter complained of, Mr Palmer's evidence was limited to his broader reaction to the Amending Act. He considered it generally "*very dangerous for Australia if people can be threatened or coerced from going to a court for a determination*" (T.203.10-11), and proceeded to describe his litigation strategy at the time: "*whatever happens , we must – we must continue our case"* (T.203.12-13). Again, this does not support hurt to feelings from the matter complained of.

292. As to the sixth matter complained of, Mr Palmer's evidence at T.203.40-204.8 once again made plain that the true source of Mr Palmers' distress was the Amending Act, for reasons Mr Palmer himself explained.

293. The limited evidence of Mr Martino (at CB D p1680, [20]) and Mr Palmer's wife (at CB D p1720, [23]) does not provide any further basis for concluding that Mr Palmer suffered any significant hurt to feelings arising from the matters complained of.

294. In view of the above, if Mr Palmer succeeds in any aspects of his claim, damages would be expected to be on the lower end of the scale.

295. Any award of damages should also be bounded by the extent of publication that has been pleaded and established by evidence: see Ex A, ABF at [67] – [70] (CB C p120-121).

296. The very general reference to the "grapevine effect" at [410]-[411] of PS does not overcome an absence of additional evidence. As Gummow J continued in *Palmer Bruyn & Parker v Parsons* (2001) 208 CLR 388, at 416 [89] (in the passage from which Mr Palmer at [410] extracts the opening sentences):

> "The 'grapevine effect' does not operate in all cases so as to establish that any republication is the 'natural and probable' result of the original publication. That was

meant by Heydon JA, when his Honour referred to the appellant's submissions being put 'as though the grapevine effect was some doctrine of the law, or phenomenon of life, operating independently of evidence'. As Heydon JA correctly identified, the appellant can point to no evidence that the 'grapevine effect' operated in this case."

No basis for an award of aggravated damages

297. There is no basis for an award of aggravated damages. As is well established, despite the "*laser-like focus on seeking aggravated damages*" in defamation practice (as distinct from the mainstream law of torts), these do not form a separate head of damage and "*can only be awarded where the relevant conduct meets the threshold of being unjustified, improper or lacking in bona fides": Murphy v Nationwide News Pty Ltd* [2021] FCA 381, [100]-[101].

298. None of the conduct, properly analysed, reaches this threshold (as in M*urphy v Nationwide News Pty Ltd* [2021] FCA 381, [104]).

299. It is pertinent that, as above, Mr Palmer's evidence supports a finding of very little, if any, hurt and distress arising from the matters complained of. There is no basis for concluding on the evidence that Mr Palmer became "*reclusive*" (PS [459]), and as above the political environment in which the matters complained of were published is relevant in considering them.

300. As above, the letter requesting an apology that appears at CB C p1004 was cast in very wide fashion. The letter at CB C p1066 also covered broad terrain. Mr McGowan's decision not to make an expansive public apology – as a public figure who had received very general summaries of the allegations against him by Mr Palmer – provides no support for disapplying the statutory cap (cf PS [415]).

301. See further [239] to [253] herein as to the the proper context for the submissions made by Mr Palmer as to Mr McGowan's language in the matters complained of by Mr Palmer and his failure to apologise to Mr Palmer.

No basis for the award of permanent injunctive relief

302. Permanent injunctions restraining repetition of publication of matters found to be defamatory are not made as a matter of course: *Dutton v Bazzi* [2021] FCA 1474, [236]; *Hockey v Fairfax Media Publications Pty Ltd* (No 2) (2015) 237 FCR 127, 130-131, [15].

303. The "*right of free speech is a fundamental right which, subject to certain statutory and*

other exceptions, should generally not be interfered with or restricted": *Rush v Nationwide News* (No 9) [2019] FCA 1383, [11] (referring to *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, 125, [72]). As McCallum J noted in *Carolan v Fairfax Media Publications Pty Ltd* (No 7) [2017] NSWSC 351 in considering (and declining to grant) a permanent injunction, "*I do not think it can be said, without qualification – that the restraint of speech – even indefensible speech – necessarily or ordinarily serves the public interest*": [13]. More broadly, the "*public interest is offended by any court-imposed restraint that is not reasonably necessary in the circumstances*": *Carolan v Fairfax Media Publications Pty Ltd* (No 7) [2017] NSWSC 351, [15].

304. Mr McGowan is the elected leader of a State. The bulk of Mr Palmer's distress arose not from any of the matters complained of but from the lawful passage of legislation (even if Mr McGowan's argument in relation to the characterisation of Mr Palmer's distress were not accepted, much of the exchange between the two occurred against that backdrop). Mr McGowan has made "*no overt threat to repeat*" the matters complained of: *Carolan v Fairfax Media Publications Pty Ltd* (No 7) [2017] NSWSC 351, [55]. The fact that Mr McGowan has defended these proceedings is not a relevant consideration: *Dutton v Bazzi* [2021] FCA 1474, [237].

305. It would not be appropriate for this Court to order final, permanent injunctive relief where, as here, facts as to relevant matters of context and the availability of defences are liable to change in the future, especially where the topics are in the political sphere. What is liable to be restrained at the time of judgment in these proceedings may not be defamatory in the future or may attract qualified privilege and it is therefore impossible presently to assess the encroachment into free speech that any permanent injunction might have in the future. It is submitted that is a powerful reason against the grant of final injunctive relief against Mr McGowan in this case even if he is unsuccessful on all other issues.

306. Further, the existing statements are readily accessible on the internet and in public media records and will remain so regardless of any prohibitive injunctions made by the Court in respect of future speech (such that the grant of this relief would have very limited utility).

307. If the Court finds for Mr Palmer and were minded to consider the grant of any injunction, Mr McGowan would seek an opportunity to be heard on this issue after delivery (and with the benefit) of reasons, as occurred eg in *Carolan v Fairfax Media Publications Pty*

Ltd (No 7) [2017] NSWSC 351.

O. THE CROSS-CLAIM - PUBLICATION AND MEANING

The matters complained of and imputations

308. Neither publication nor the identity of the Cross-Claim matters are in in dispute (Ex A: ABF [24]-[30], CB A pp115-117).

309. Defamatory meaning has also been determined – see [14] above.

310. As to the parts of the Cross-Claim matters which convey the imputations now held to have been conveyed, Mr McGowan relies on the ROS at [241]-[262] and the oral submissions on 14 and 15 February 2022 (T.48.20-T.54.15; T.129.30 -T.137.5; T.138.30-T.170.45).

The First Cross-Claim Matter

311. The First Cross-Claim matter consists of words spoken by Mr Palmer on or around 31 July 2020 at a press conference at Tank Street, Brisbane (**31 July 2020 Palmer Press Conference**) (Ex 6: video at CB USB 84A and transcript at CB C p931A).

312. The imputations found to be conveyed are:

> *[3(a)] As Premier, Mr McGowan lied to the people of Western Australia when he said that he had acted upon the advice of the Chief Medical Officer in closing the borders.*
>
> *[3(b)] As Premier, Mr McGowan lied to the people of Western Australia when he told them their health would be threatened if the borders did not remain closed.*

313. It is agreed that was a natural and probable consequence that the words spoken by Mr Palmer at the 31 July 2020 Palmer Press Conference would be republished by some of those present (Ex A: ABF [25], CB A p115).

Second matter complained of

314. The Second Cross Claim matter consists of words spoken by Mr Palmer on or around 12 August 2020 at a press conference in Paradise Point on the Gold Coast (**12 August 2020 Palmer press conference**) (Ex 7: video at CB USB 137; transcript CB C pp1200-1200A).

315. The imputations held to be conveyed are:

> *[5(b)] As Premier, Mr McGowan lied to the people of Western Australia about his justification for imposing travel bans.*

316. It was a natural and probable consequence that the words spoken by Mr Palmer at the 12

August 2020 Palmer press conference would be republished by some of those present.

Third-seventh Cross-Claim matters

317. The third to seventh cross-claim matters and Mr Palmer's conduct in publishing them (which is admitted), are set out below.

318. Mr Palmer:

(a) wrote and signed a letter containing the words set out in Attachment 3 of the FASOCC (**third matter complained of**) (Ex 8: line numbered version at CB C p1436);

(b) caused the letter entitled "Cover Up" and which contained the words set out in Attachment 4 to the FASOCC to be provided to *The West Australian* with the intention it be published in that newspaper (**fourth matter complained of**) (Ex 8: CB C p1438);

(c) had a Facebook account which on 13 August 2020 had available for download a copy of the letter containing the words set out in Attachment 5 to the FASOCC (**fifth matter complained of**) (Ex 8: CB C pp1439-1441);

(d) had a Twitter account which on 13 August 2020 had available for download a copy of the letter containing the words set out in Attachment 6 to the FASOCC (**sixth matter complained of**) (Ex 8: CB C pp1442-1444); and

(e) caused printed copies of the document headed "Cover Up" containing the words set out in Attachment 7 of the FASOCC to be delivered to residents of Western Australia through the post (**seventh matter complained of**) (Ex 8: CB C p1446).

319. The imputations held to be conveyed are:

> *[7(a)] As Premier, Mr McGowan had corruptly attempted to cover up the personal involvement of himself and others in criminal acts by overseeing the passing of laws designed to provide exemptions from them from the criminal law.*

Eighth Cross-Claim matter

320. On or around 14 August 2020, Mr Palmer spoke the words as are attributed to him in Attachment 8 to the FASOCC during the course of an interview by Hamish McDonald on the ABC's "RN Breakfast" radio program (Ex 9: audio at CB USB 169; transcript at CB C pp1472-1472C).

321. The imputations held to be conveyed are:

[9(a)] As Premier, Mr McGowan had behaved criminally, and was improperly seeking to confer upon himself immunity from the criminal law.

[9(c)] As Premier, Mr McGowan was acting corruptly by seeking to confer upon himself criminal immunity.

Ninth matter complained of

322. On or around 1 September 2020, Mr Palmer spoke the words as are attributed to him in Attachment 9 to the FASOCC during the course of an interview by Sky News journalist Peter Gleeson (Ex 10: audio at CB USB 190; transcript at CB C pp1519-1519D).

323. The imputation pleaded was found not to have been conveyed.

P. DEFENCE OF JUSTIFICATION

Issues for determination

324. The three imputations that Mr Palmer alleges are substantially true are as follows:

First Cross-Claim matter complained of

3a. As Premier, Mr McGowan lied to the people of Western Australia when he said that he had acted upon the advice of the Chief Medical Officer in closing the borders.

3b. As Premier, Mr McGowan lied to the people of Western Australia when he told them their health would be threatened if the borders did not remain closed.

Second Cross-Claim matter complained of

5b. As Premier, Mr McGowan lied to the people of Western Australia about his justification for imposing travel bans.

325. The question falling for determination is whether Mr Palmer has established that each of those imputations are substantially true (Issues II.E [11.1], CB A pp103-104).

326. In that connection, the question becomes whether Mr Palmer has established the matters in particulars 1 to 7 in the FADCC (Issues 2.E [11.2]).

327. For the reasons which follow, Mr McGowan submits that Mr Palmer has failed to establish the substantial truth of imputations 3(a), 3(b) and 5(b).

Principles – defence of justification

328. To succeed on a complete defence of justification both at s 25 of the Act and at common law, it is necessary to prove the truth of each imputation found to be conveyed and defamatory by the relevant matter.

329. Section 25 of the Act provides:

> "It is a defence to the publication of defamatory matter if the defendant proves that the defamatory imputations carried by the matter of which the plaintiff complains are substantially true."

330. By s 4, "*substantially true*" is defined as "*true in substance or not materially different from the truth*".

331. The operation of the defence in its statutory form (s 25, Act) was explained this way by McColl JA in *Besser v Kermode* (2011) NSWLR 157 (***Kermode***) at [86]:

> In summary, a defendant seeking to justify the defamatory matter under the 2005 Act may take the following courses of action, some statutory, some based on the common law:
>
> (a) prove that the defamatory imputations carried by the defamatory matter of which the plaintiff complains are substantially true: s 25;
> (b) prove that rather than the defamatory imputations pleaded by the plaintiff, the defamatory matter carries nuance imputations which are substantially true;
> (c) to the extent that the defendant fails to establish all the defamatory imputations carried by the defamatory matter of which the plaintiff complains are substantially true, rely on those proved to be true in mitigation of the plaintiff's damages: partial justification; and
> (d) to the extent the defendant cannot prove that the defamatory imputations carried by the defamatory matter of which the plaintiff complains are substantially true, prove that it carries contextual imputations that are substantially true, by reason of which the defamatory imputations do not further harm the reputation of the plaintiff: s 26.

332. The position summarised above is the same at common law, see McColl JA at [59] in *Kermode*:

> In summary, at common law in Australia:
>
> (a) a defendant seeking to justify defamatory matter had to prove all stings of the defamatory matter relied upon by the plaintiff were substantially true;
> (b) a defendant seeking to justify defamatory matter could not do so by seeking to plead and justify an imputation with a substantially different

> sting from that or those pleaded by the plaintiff; a defendant could only plead nuance imputations; and
> (c) if a defendant could only establish that one of two or more stings relied upon by the plaintiff was substantially true, the defence of justification failed, but the evidence led to establish that defence could be relied upon in mitigation of damages: *Channel Seven Sydney Pty Ltd v Mahommed* (at [158]); P Milmo and W V H Rogers, Gatley on Libel and Slander , 11th ed (2008) Sweet & Maxwell (at [35.14]) ('Gatley')."

333. *"Substantial truth"* means that the respondent must prove that every material part of each imputation is true: *Channel Seven Sydney Pty Ltd v Mahommed* (2010) 278 ALR 232; [2010] NSWCA 335 at [138] per McColl JA (Spigelman CJ, Beazley JA, McClellan CJ at CL, and Bergin CJ in Eq agreeing). A "*material part*" is any detail which alters or aggravates the character of the imputations: *Rofe v Smith's Newspapers Ltd* (1924) 25 SR (NSW) 4 at 22 per Street ACJ. That is, to succeed on a defence of justification it is not necessary to establish that every part of an imputation is literally true; it is sufficient if the "sting" or gravamen of an imputation is true.

Has Mr Palmer established the substantial truth of imputations 3(a), 3(b) and 5(b)?

First and Second Cross-Claim Matters (imputations 3(a), 3(b) and 5(b))

334. The imputations found to be conveyed that are the subject of Palmer's truth defence are as follows:

> *[3(a)] As Premier, Mr McGowan had lied to the people of Western Australia when he said that he had acted upon the advice of the Chief Medical Officer in closing the borders.*
>
> *[3(b)] As Premier, Mr McGowan lied to the people of Western Australia when he told them their health would be threatened if the borders did not remain closed.*
>
> *[5(b)] As Premier, Mr McGowan lied to the people of Western Australia about his justification for imposing travel bans.*

335. In each case, the imputation conveyed was that Mr McGowan *lied*; that is, that he knowingly misled the people of Western Australia by communicating to them facts that he did not believe to be true.

336. For Palmer's truth defence to succeed, Palmer must therefore establish actual dishonesty on the part of McGowan. In other words, Palmer must establish, to the high standard

required in relation to allegations of actual dishonesty, that McGowan did not subjectively believe that:

a. he had acted upon the advice of the Chief Medical Officer in closing the borders;

b. the health of the people of Western Australia would be threatened if the borders did not remain closed; and

c. his justification for the closure of the borders was true.

337. For the following reasons, Palmer has failed to do so.

338. *First*, Palmer's submissions on this topic (PS, [497]*ff*) do not squarely address the terms of the relevant imputations. They instead largely proceed on the basis that Palmer's truth defence must succeed if he can establish that the medical advice obtained by McGowan did not conclude that it was *"necessary"* to close the border which is not to the point because none of the imputations conveyed were that McGowan lied about medical advice concluding that it was necessary to close the border.

339. In particular, Palmer's truth defence clearly cannot succeed in respect of imputations 3(a) and 3(b) because there is no evidence from which to conclude that McGowan did not believe that he had acted on the advice of the Chief Medical Officer in closing the border in early April 2020 and keeping them closed in July 2020 nor that McGowan did not believe that the health of the Western Australian population would be threatened if the borders did not remain closed. In relation to imputation 5(b), Palmer's truth defence would require him to establish that McGowan did not believe the justifications he gave publicly for the closure of the border. Palmer's attack on McGowan's stated justifications relates entirely to the medical advice received by McGowan. However, it does not come anywhere near establishing that McGowan himself did not believe his stated justifications – which, in general terms, were that the decision was based on medical advice – to be true.

340. As Palmer has failed to established that McGowan did not believe the matters set out in [336] above the truth defence must fail in respect to imputations 3(a) and (b) and 5(b).

341. *Secondly*, Palmer's submissions focus intensely on the advice received from Dr Robertson in the 29 March Email notwithstanding that the matters by which imputations 3(a) and (b) and 5(b) were conveyed occurred on 31 July 2020 and 12 August 2020 by

which time McGowan had also received advice from Dr Robertson:

a. on 20 May 2020 that *"until community spread is eliminated in the two affected jurisdictions (New South Wales and Victoria), which would require at least a month to confirm (two 14-day incubation periods), opening of the interstate borders was not recommended"* (CB C p588); and

b. on 24 June 2020 (CB C p588-9) (repeated on 24 July 2020 (CB C p612-3) that:

   i. the decision to close the border had *"remained highly effective in reducing interstate cases and eliminating community spread"*;

   ii. *[w]ith continued COVID-19 outbreaks and community spread in two jurisdictions primarily in Victoria, the risk of introduction across an interstate border remains and, at least from Victoria, has increased;"*

   iii. *"[p]roposals to open the borders to jurisdictions with no community spread, such as South Australia and Northern Territory, if legally viable, could be considered on public health grounds, as the risk of re-introduction from these jurisdictions remains very low. This would, however, place increased reliance by WA on the effectiveness of their border controls, particularly for travelers passing through those jurisdictions to WA. Given the different approaches these jurisdictions have taken to implementing the border controls, and that they may be lifted at different times to the WA borders, consideration of the risk posed would require further assessment";* and

   iv. *"[u]ntil community spread is eliminated in the affected jurisdictions, which will require at least a month to confirm (two 14-day incubation periods), or reduced to such low levels as to pose a minimal risk, such as in New South Wales, where rapid containment measures have prevented further spread, opening of the interstate borders is not recommended..."*

(underlining added).

342. It is to be emphasised in respect of the last extract that Dr Robertson's conclusion was that it was not recommended to open the interstate borders *at all* for so long as community spread was present in New South Wales and Victoria.

343. Palmer contends (PS[527] to [534]) that only imputation 3(b) relates to the decision to maintain the border closures (as opposed to implementing the border closures in early April 2020) and thereby seeks to direct focus on imputations 3(a) and 5(b) and on the 29 March Email as opposed to the later advice. However, the first matter complained of (Ex 6: CB C p931A) occurred on 31 July 2020 and was directed at the decision that had recently been made to maintain the hard border in its entirety as opposed to *"only in relation to hot spots in Australia."* The alleged *"lie … about threats that don't exist"* referred to the threat arising from opening the borders to jurisdictions where there was no community spread. That is reinforced by the reference to Dr Robertson's advice as to the possibility of a *"travel bubble"* between *"Western Australia and Northern Territory, for example"*. The possibility of opening the border to those States and Territories free from community transmission was not raised by Dr Robertson until 24 June 2020. Palmer's truth defence as to imputation 3(a) must be considered in the context of McGowan's state-of-mind in June and July 2020 when he decided that the border should remain closed in its entirety and the advice he had received up to that time. The same reasoning applies to imputation 5(b) which was conveyed by the statement by Palmer that Dr Robertson had said that McGowan *"was lying to the people of Western Australia, because he [Robertson] said that South Australia, Queensland, Tasmania, ACT and the Northern Territory were all further advanced in cleaning the virus than, than, than Western Australia, so there was no real reason for those travel bans"* (Ex 7: CB C p1200A).

344. The meaning of the advice given by Dr Robertson in June and July is apparent on its face: he considered that the risk of COVID-19 spreading across an open border had increased; the border closure had been effective; while it was possible partially to re-open the border to States and Territories where there was no community transmission, the consequences for Western Australia of doing so would depend on the border controls of those other States and Territories; and therefore a general reopening of the interstate borders was not recommended. The references at PS, [511] to [513] to the hearsay evidence of Dr Robertson in other proceedings and on *WA Today* as to what he intended the letters to mean is not relevant to the objective assessment of their meaning.

345. The fact that the advice admitted of a theoretical possibility, requiring further consideration, of a partial re-opening of the border is not to the point for present purposes. As the advice made plain – and is obvious as a matter of commonsense – the consequences for Western Australia of a partial re-opening would depend on the border

controls of those States and Territories whose border with Western Australia was re-opened. The fact that this possibility was not dealt with conclusively by Dr Robertson does not in any way refute or diminish the import of his advice that the risk of transmission from New South Wales and Victoria had increased, the border closure had been effective and that re-opening was not recommended. The possibility of a partial re-opening was merely a factor to be taken into account by Mr McGowan having regard to all of the competing policy considerations that informed the determination of appropriate border controls to control the spread of COVID-19 (as to which see further [349] below). The existence of the possibility formed part of the medical advice and did not need to be the subject of further consideration by Dr Robertson in order for Mr McGowan to be able honestly to say that his decision to maintain the border closure was based on that advice. McGowan did, in fact, take it into account and concluded that similar *"travel bubble"* arrangements had not worked in the past (CB C p933B.62-.68). There is no valid basis to contend, as Mr Palmer does at PS, [522] to [526], that McGowan was unduly motivated by economic reasons rather than those relating to public health when making decisions made about the border nor that he lied to the public about that (*cf.* PS, [522] to [526]). The tenor of Mr McGowan's evidence was that the decisions were generally made for health reasons (see e.g. T.355.14-.18). Nor would any reasonable person expect any leader to disregard economic factors entirely in determining an appropriate response to COVID-19 including insofar as border closures were concerned.

346. Finally, Mr Palmer's submission that Mr McGowan was untruthful about the content of the advice (e.g. on the occasions referred to at PS [516] to [518]) must fail in light of the fact that Dr Robertson expressly advised Mr McGowan that re-opening the border was not recommended notwithstanding what he had said about the possibility of a partial re-opening.

347. Mr Palmer has therefore failed to establish that Mr McGowan lied to the people of Western Australia when he said that he was acting on the advice of the Chief Medical Officer in closing the border, told them that their health was threatened if the border did not remain closed or spoke his justification for closing the border.

348. *Thirdly*, even if (contrary to the submissions above on the second point) one were to adopt Palmer's proposed approach of considering the decision to close the border in early April in isolation insofar as imputations 3(a) and 5(b) are concerned, Mr Palmer's submissions proceed on the false premise that Mr McGowan told the public at that time that the

medical advice upon which he was acting was to the effect that border closure was *"necessary"*. Mr McGowan did not tell the public on 2 April 2020 that the medical advice was that the border closure was *"necessary"*. At the press conference of 2 April 2020, Mr McGowan said that *"[b]ased on medical advice, we will move to introduce a hard border closure effective from midnight, or 11:59pm, on Sunday night"* (CB C p381) and the subsequent media statement stated that *"[b]ased on the best medical advice, effective from midnight, or 11.59pm, on Sunday, April 5, people will no longer be able to enter Western Australia without an exemption"* (underlining added).

349. Mr McGowan made the decision to close the border following his receipt of the views of medical experts on matters relevant to that decision and communicated as much to the public. It would have been inappropriate for McGowan or any Premier to abdicate to medical advisers the decision as to whether it was necessary to close the borders or even whether that should occur. More fundamentally, the concept of necessity is meaningless in isolation: an action can only be described *"necessary"* if a particular outcome cannot obtain without it. So, when Mr McGowan's government was required in March and April 2020 to consider its response to the spread of COVID-19, different steps would be *"necessary"* to achieve an acceptable level of cases depending on what level was deemed acceptable. Questions of that nature – with which the world has been grappling over the last 2 years – invite complex policy considerations relating to multiple issues. What different leaders have determined as *"necessary"* in that respect has varied considerably over different jurisdictions and times during the pandemic. It was Mr McGowan's role and not that of his medical advisers to determine what outcome was to be pursued and what steps were *"necessary"* to achieve it. That is consistent with the statements that he made on 2 April 2020 which did not suggest to the public that the medical advisers were the ones who had decided that the border closures were necessary nor even that it should occur. No reasonable person would have interpreted them as such. Rather, they would have interpreted the statement in the media release of 2 April 2020 (CB C p382) that *"[t]he McGowan Government has taken the extraordinary, but necessary step to place a hard border closure on the State of Western Australia"* as meaning that the Government had decided that it was necessary to do so rather than the medical advice being to that effect. Plainly enough, Mr McGowan was of the view that the threat posed by COVID-19 to Western Australia at the time was sufficiently grave that he considered it necessary to close the border in order to reduce the spread of the disease following his receipt of the

advice in the 29 March Email, which contained advice that permitting people to cross the border *"does add to the risk … of cases of COVID-19 being detected in WA"* and *"that closing the border will have the effect of slowing the spread of COVID-19."* That decision was consistent with Mr McGowan's evidence that his view was *"[w]e're dealing with a – a deadly virus, and so we did everything we had to do"* (T.332.41-2).

350. Mr Palmer is therefore driven (PS, [497]) to rely on a handful of answers given by Mr McGowan in response to questions as to his opinion as to what was conveyed by the press conference and media release on 2 April 2020. It is difficult to see how Mr McGowan's opinion in this respect could be relevant to the question of what was, in fact, conveyed by him on 2 April 2020. That question depends on an analysis of a reasonable person's likely interpretation of the text in the circumstances. In any event, the analysis in the preceding paragraph is entirely consistent with most of the answers given by Mr McGowan under cross-examination from T.328.43 to T.329.29 being, in substance, that he told the public that closing the border was necessary and that necessity arose from the advice he had received. He did not say in that passage that his advice was that it was necessary, that the medical experts were the true decision-makers nor even that they had advised him the closing the border was necessary. Mr Palmer therefore relies on a small number of answers obtained after the cross-examiner's admittedly repeated *"strumming [of] this harp"* (T.329.34) which finally yielded Mr McGowan's acquiescence to the proposition that he was telling the public that the medical advice was that *"a hard border was necessary"* at T.329.31 to T.329.36. Notwithstanding Mr Palmer's reliance on them at PS [497], these answers should be given no real weight in relation to any issue relevant to the outcome of the proceedings.

351. Finally, Mr McGowan's unchallenged evidence was that he had received oral advice at the emergency management team meetings held once or twice a day at the time to the effect that the Government *"should close the border to stop the importation of the virus into WA"* (T.333.24-.25). The implicit submission at PS, [501] that no such oral advice was received should be rejected in light of Mr Palmer's failure to challenge Mr McGowan's evidence in this respect. That submission is also inconsistent with Dr Robertson's evidence of 27 July 2020 before Rangiah J (CB C p692.26-29). Mr McGowan agreed that the oral advice was *"substantially in the same terms"* as the advice recorded in the 29 March Email. This further confirms that the approach taken by Mr McGowan was to consider the views contained in 29 March Email and in additional oral

medical advice and conclude on that basis that closing the border was the right decision. That approach is reflected in the text of the press conference and media release of 2 April 2020.

352. Mr McGowan submits that Mr Palmer has failed to discharge the onus of establishing the substantial truth of imputations 3(a), 3(b) and 5(b) on the balance of probabilities.

Q. CONTEXTUAL TRUTH

Issues for determination

353. The issues falling for determination on Mr Palmer's defence of contextual truth are set out at Issues II.E [12.1]-[12.5], CB A pp104-107), now taking into account the final determination on meaning, as to which see [311] to [323] above.

354. Mr Palmer bears the onus on these issues.

Principles – Contextual truth, s 26 the Act

355. Section 26 of the Act provides a defence to the publication of a defamatory matter if the respondent establishes that:

a. the matter carried, in addition to the defamatory imputations of which the applicant complains, one or more other imputations (contextual imputations) that are substantially true; and

b. the defamatory imputations do not further harm the reputation of the applicant because of the substantial truth of the contextual imputations.

356. As to (a), the first step in the exercise is to determine whether the contextual imputations are conveyed at all, in accordance with the principles that apply to assessing whether the applicant's imputations are conveyed: *Radio 2UE Sydney Pty Ltd v Chesterston* (2009) 238 CLR 460; *Hockey*; *Milne v Ell* [2014] NSWCA 407.

357. Further, the imputations must be conveyed "*in addition to*" the applicant's imputations, that is "*other than*", the applicant's imputations. An imputation will be an "*other imputation*" carried "*in addition*" to the applicant's imputations if it is different in substance from the applicant's imputations: *Fairfax Media Publications v Zeccola* (2015) 91 NSWLR 341 (***Zeccola***) at [42]-[46], [72] and [114].

358. In that connection, a contextual imputation pleaded at a higher level of generality than

the specific imputations pleaded by an applicant is *capable* of differing in substance such as to satisfy the requirements of s 26 of the Act: *Zeccola* per McColl JA at [73]-[74].

359. Whether a general imputation is *in fact* conveyed is a different matter.

360. There are important limits on the extent to which a general contextual imputation (e,g,: "*the applicant is dishonest*") is available. Otherwise, it would be open to the respondent in virtually every case to plead a general contextual imputation (e.g.: "*the applicant is a bad person*") in order to introduce sufficient unhelpful facts to "*swamp*" the applicant's imputations. That limit is whether the matter complained of conveys a general imputation "*in addition to*" the applicant's imputations (as opposed to putting a series of specific allegations at a higher level of generality).

361. In some cases, the collection of instances of misconduct in the matter complained of will be capable of conveying a general imputation in addition to specific imputations: see *Cornwall v Channel Seven Sydney Pty Ltd* (***Cornwall***) [2016] NSWCA 255 at [62].

362. In *Zeccola* at [81], the Court of Appeal found that the matter complained of contained references to a "*wider field of financial default*" such as to support an imputation of general financial default by the plaintiffs in addition to the specific instances of such default selected by the plaintiffs.

363. In other cases, a single alleged instance of misconduct may be so serious that it may also convey a general charge against the applicant: see *State of New South Wales v Deren* (***Deren***) (1999) Aust Torts Reports 81-502; [1999] NSWCA 22 at [78]. In that case, the Court held the matter complained of was capable of conveying the general imputation that the "*the second plaintiff is a child molester*" "*in addition to*" specific imputations about several incidents of sexual assault on young children: *Deren* per Priestly JA, Powell and Stein JJA agreeing on this point at [78].

364. However, there will be other occasions where a single allegation of misconduct is not sufficiently serious so as to convey a general charge at the same time: see *Bookbinder v Tebit* [1989] 1 WLR 64 (regarding a single allegation of misuse of resources by a public official).

365. The question of whether a particular charge of wrongdoing carries a general charge "*may depend on the context in which the words are used*" and the "*gravity of the misconduct imputed in the particular charge*" (see *Abou-Lokmeh v Harbour Radio Pty Ltd* [2016]

NSWCA 228 at [39]). At [59] of *Cornwall*, it was observed that "*the cases demonstrate a range of possible outcomes, reflective of their particular facts and circumstances…*". In other words, each case will turn on the language of the publication and the imputations under consideration.

366. As to *"no further harm",* the balancing exercise set out in sub-section 26(2) requires the Court to weigh the facts matters and circumstances relied upon in support of the substantial truth of the contextual imputation against the applicant's imputations: *John Fairfax Publications Pty Ltd v Blake* (2001) 53 NSWLR 541.

367. In far more elegant terms, McColl JA in *Abou-Lokmeh* at [29] explained the defence this way:

> "*A defence of contextual truth must defeat the whole defamatory matter of which the plaintiff complains, that is to say, all the plaintiff's stings or imputations. The tribunal of fact must be able to conclude that, because of the substantial truth of the contextual imputations, the defamatory imputations which constitute the plaintiff's cause of action do not further harm the plaintiff's reputation. The focus is on comparing the contextual imputations with the plaintiff's cause of action. As McCallum J explained in McMahon, "the defence does not compare imputation with imputation. [Its] essence ... is to permit the defendants to put the plaintiff's imputations in their factual context according to the content of the whole of the article*."

368. There is a division in the authorities as to the way in which an applicant's imputation found to be true is to be treated in the *"no further harm"* balancing exercise. In *Fairfax Digital Australia & New Zealand Pty Ltd v Kazal* (2018) 97 NSWLR 547 (***Kazal***), McColl JA reasoned that a respondent's defence of contextual truth must also overcome those of the applicant's imputations otherwise found to be true. That is, a substantially true imputation does not cease to be one of "*the defamatory imputations of which the plaintiff complains*" within s26(a) of the Act. In *Kazal* at [21] McColl JA said:

> "*However, in my view, once a plaintiff's imputation has been found to be substantially true, that finding cannot be ignored. It must be given effect, not only for the purposes of mitigation of damages, but, too, in considering any contextual truth defence. In my view, a plaintiff is not entitled to have the tribunal of fact consider the s 26(b) exercise, without considering when determining whether the defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations, that any plaintiff's defamatory imputation found to be true has already harmed the plaintiff's reputation*."

369. At [31] to [33], McColl JA went on to say:

As I said in Abou-Lokmeh v Harbour Radio Pty Ltd:

> '*[29] A defence of contextual truth must defeat the whole defamatory matter of which the plaintiff complains, that is to say, all the plaintiff's stings or imputations. The tribunal of fact must be able to conclude that, because of the substantial truth of the contextual imputations, the defamatory imputations which constitute the plaintiff's cause of action do not further harm the plaintiff's reputation. The focus is on comparing the contextual imputations with the plaintiff's cause of action. As McCallum J explained in McMahon, "the defence does not compare imputation with imputation. [Its] essence ... is to permit the defendants to put the plaintiff's imputations in their factual context according to the content of the whole of the article.*"'

When putting 'the plaintiff's imputations in their factual context according to the content of the whole of the article', it is clearly relevant for the tribunal of fact to consider that by reason of the substantial truth of one or more of those imputations, any presumption that the plaintiff's reputation has suffered damage by reason of the publication of that imputation has been rebutted and the plaintiff's reputation has, accordingly, already been lowered to that extent. It remains open to the plaintiff to complain of that imputation and to submit that the effect of the finding of substantial truth does not weigh the s 26(b) scales in the defendant's favour.

The s 26 defence still operates to defeat the plaintiff's cause of action, according to the tribunal of fact's determination on the s 26(b) weighing exercise, but with the 'true' nature of the plaintiff's reputation able to be considered in that context."

370. The Court of Appeal in *Hutley v Cosco* (2021) 104 NSWLR 421; [2021] NSWCA 17 at [134]-[146] took a different approach, reasoning (at [142]) that to include substantially true imputations in the balancing exercise came *"perilously close"* to the practice of pleading back a plaintiff's imputation, which would be inconsistent with the purpose of s 26. To the extent it needs to be determined in this case, the approach to the balancing exercise in *Kazal* is to be preferred.

371. Despite the complexities involved in its application, the rationale for this element of the defence of contextual truth is a simple one. Colloquially, is there an elephant in the room? That is, is there some allegation in the matter complained of about which the applicant does not complain (in his or her imputations) but which, if true, means that the things about which the applicant *does* complain do not further harm his or her reputation?

372. The oft-used example is the article that calls X a murderer and a jaywalker. The applicant, X, sues only on the jaywalker imputation. A respondent may not be able to prove that X is a jaywalker, but he or she can prove that X is a murderer. In those circumstances, the truth of the murderer contextual imputation is such that the jaywalker imputation (true or

not) does no further harm to the reputation of X.

Contextual imputations - meaning and "in addition": (a) Are the contextual imputations conveyed? and (b) do they differ in substance from the imputations pleaded by McGowan?

First Cross-Claim Matter Complained of (Ex 6, CB USB 84A, CB C p931A)

Contextual Imputation 1: McGowan is a liar

373. Contextual imputation 1 is a general imputation as to Mr McGowan's character. It is not conveyed by the First Cross-Claim Matter (Ex 6, CB C p931A). Properly considered, the First Cross-Claim Matter conveys that Mr McGowan has lied in relation to border closures, either by conveying to the people of Western Australia that there would be some sort of threat to their health, or that he had relied on the Chief Health Officer's advice (again, related to the health impacts of the border closures) (see lines 6-8 and 20-22). This is insufficient to convey the general character trait of Mr McGowan being a "*liar*", other than in relation to these matters. In contrast to *Zeccola*, the First Cross-Claim Matter does not refer to any wider field of misconduct or lies. Contextual Imputation 1 is also not "*in addition*" to the imputations found to have been conveyed - both involve a charge of lying in respect of a specific matter, there is no charge of lying generally to be found expressly or by implication in the First Cross-Claim Matter. Contextual Imputation 1 is simply seeking to express the imputations at a higher level of generality - it does not sufficiently differ in substance to the imputations pleaded by Mr McGowan and is therefore not "in addition to" those imputations.

Contextual Imputation 2: Mr McGowan deliberately misrepresented the nature of the medical advice which his government had received concerning COVID-19 and the appropriate response to it.

374. Contextual Imputation 2 is not conveyed by the First Cross-Claim Matter or not conveyed "*in addition*" to the imputations relied on by Mr McGowan.

375. The First Cross-Claim Matter refers to a lie or lies in specific respects - namely, in relation to the border closures and health or health advice. Contextual Imputation 2 is vague and imprecise - it refers to Mr McGowan having "*deliberately misrepresented the nature of the medical advice… and the appropriate response to it*" but says nothing about the borders closures or the link between the medical advice and the borders notwithstanding that the border closures are the subject matter of the First Cross-Claim Matter. The viewer of the First Matter Complained of would not understand Contextual Imputation 2 to have arisen from the First Cross-Claim Matter.

376. Further or alternatively, when properly considered in the context of the First Cross-Claim Matter it does not assert anything different to the imputations pleaded by Mr McGowan. Therefore it does not differ in substance from Mr McGowan's imputations and is therefore not "*in addition*" to the imputations pleaded by Mr McGowan (and found to have been conveyed).

Second Cross-Claim Matter Complained of (Ex 7, CB USB 137, CB C pp1200-1200A)

Contextual Imputation 3: Mr McGowan caused the State of Western Australia to renege on a mediation agreement made between it, a former Chief Justice of Western Australia and the Applicant

377. Contextual Imputation 3 is not conveyed and does not convey a defamatory "*sting*" about Mr McGowan. Lines 1-13 of Ex 7, CB C pp1200-1200A refer to Mr McGowan having "*disregarded*" the mediation agreement. However, the ordinary reasonable viewer would not take from this that Mr McGowan "*caused*" the State to renege on the mediation agreement. The word "*renege*" (i.e. directly rescind or dishonour) carries a substantially different meaning to "*disregard*" (i.e. proceed without regard to) and entails a more deliberate and higher order of inconsistent action.

378. Alternatively, Mr McGowan accepts that, if this imputation is held to be carried, it is in addition to the imputations relied on by him in his Cross-Claim.

Contextual Imputation 4: Mr McGowan abused his position as Premier by overseeing the passing of laws designed to protect his government from criminal liability.

Contextual Imputation 6: Mr McGowan abused his position as Premier by overseeing the passing of laws designed to abolish the right of the media to obtain information by way of Freedom of Information Applications

379. Contextual Imputations 4 and 6 are not conveyed by the Second Cross-Claim Matter. That is, the ordinary reasonable viewer would not understand the matter to convey that Mr McGowan "*abused his position as Premier by overseeing the passing of laws…*". While it is clear that Second Cross-Claim Matter conveys Mr Palmer's strong opinions about the content of the Amending Act, they do not amount to allegations of "*abuse*". In particular, Mr Palmer did not suggest that the Government was not acting legitimately by passing the laws providing for exemptions of criminal liability and/or FOI applications. Rather, the reasonable viewer would interpret Mr Palmer's words as meaning that there was a question as whether the Government had, in fact, engaged in criminal conduct, what that conduct was and that the ability of the media to investigate those matters may have been reduced. Further, all of Mr Palmer's comments were expressly directed at the

Government rather than Mr McGowan or his role in the passing of the relevant laws, and would not be understood by the ordinary reasonable viewer to relate to Mr McGowan specifically (see lines 15-32).

380. Alternatively, Mr McGowan accepts that, if this imputation is held to be carried, it is in addition to the imputations relied on by him in his Cross-Claim.

Third to Seventh Cross-Claim Matters Complained of (Ex 8: CB

Contextual Imputation 9: Mr McGowan behaved disgracefully as Premier by overseeing the passing of laws which gave Mr McGowan and others an exemption from the criminal law.

Contextual imputation 10: Mr McGowan behaved disgracefully as Premier by overseeing the passing of laws which abolished the right of the media, or any member of the Western Australian public, to make FOI applications to find out what had been done by Mr McGowan.

Contextual Imputation 12: Mr McGowan behaved disgracefully as Premier by overseeing the passing of important legislation in an absurdly short time.

381. Mr McGowan concedes that each of Contextual Imputations 9, 10 and 12 are carried by the Third to Seventh Cross-Claim Matters. Further, he agrees that Contextual Imputations 10 and 12 are "*in addition*" to the imputation relied on by Mr McGowan.

382. Contextual Imputation 9 is not "*in addition*" to imputation 7(a) pleaded by McGowan. Properly considered, Contextual Imputation 9 is insufficiently different in substance to imputation 7(a). Palmer's submission that Contextual Imputation 9 is conveyed because "*For a Premier to orchestrate criminal immunity for himself and others, in respect of prior illegal conduct…would be regarded by the ordinary reasonable reader as disgraceful behaviour*…" (see PS [564]) illustrates the incorrectness of the submission that Contextual Imputation 9 differs in substance to 7(a). That submission is, in effect, one of corrupt conduct and imputation 7(a) makes allegations that "*McGowan had corruptly attempted to cover up the personal involvement of himself and others in criminal acts*…" by engaging in effectively the same behaviour as is suggested by Contextual Imputation 9. That is, by overseeing the passing of laws which give exemptions from the criminal law. The disgraceful behaviour alleged is, in effect, and considered in context, corrupt behaviour.

Contextual Imputation 14: Mr McGowan is a dishonourable man.

383. Contextual imputation 14 is a general imputation as to Mr McGowan's character. It is not conveyed by the Third to Seventh Cross-Claim Matters and/or does not differ in

substance to the imputation pleaded by Mr McGowan. Properly considered, in context, the subject of the Third to Seventh Cross-Claim Matters is the passing of a law with specific features, and not a general charge as to Mr McGowan's character, divorced from the passing of this law. Further, in context, and given that imputation 7(a) makes allegations of corruption, which could easily be said to be dishonourable, such an imputation does not differ in substance and therefore is not "*in addition*" to the imputations pleaded by Mr McGowan.

Eighth Cross-Claim Matter Complained Of (Ex 9: CB USB 169, CB C pp1472-1472C)

Contextual Imputation 17: Mr McGowan behaved disgracefully as Premier by overseeing the passing of laws which abolished the right of the media to make FOI applications, so that the press could not find out what Mr McGowan and his government had done.

384. Mr McGowan accepts that Contextual Imputation 17 is conveyed, and is "*in addition*" to the imputations relied on by Mr McGowan in relation to the Eighth Cross-Claim Matter.

Contextual Imputation 20: Mr McGowan has overseen the passing of legislation which has destroyed the reputation, and long-standing value to the State, of State Agreements entered into by the State of Western Australia

385. Contextual Imputation 20 is said by Mr Palmer to arise from lines 58-64 of Ex 9, CB C p1472B. Mr Palmer claimed in this passage that Mr McGowan "*destroyed state agreements which have provided investment for Western Australia and made it prosperous over the years*…" This is the only part of the matter in which state agreements are mentioned, and no reasonable listener would understand from those words that the legislation has destroyed the "*reputation*" of state agreements (to the extent that a state agreement can even have a reputation). Contextual Imputation 20 therefore does not arise. In any event, this imputation does not convey a defamatory "*sting*" about Mr McGowan.

386. If, contrary to the above, it is found that Contextual Imputation 20 does arise, Mr McGowan accepts that it is "*in addition*" to imputation 9(a) and 9(c) pleaded by Mr McGowan.

Contextual Imputation 24: Mr McGowan is a dishonourable man

387. Contextual imputation 24 is a general imputation as to Mr McGowan's character. It is not reasonably conveyed by the Eighth Cross-Claim Matter. Properly considered, in context, the subject of the Eighth Cross-Claim Matter is the passing of a law with specific

features, and not a general charge as to Mr McGowan's character, divorced from the passing of the Amending Act.

Evidence - are the Contextual Imputations substantially true?

388. The onus is on Mr Palmer to prove the substantial truth of each of the contextual imputations. Mr McGowan submits that Mr Palmer has not discharged that onus, and that the evidence falls well short of establishing that any of the contextual imputations are substantially true. As to the evidence relevant to each imputation, Mr McGowan makes the submissions set out below.

Contextual Imputation 1: McGowan is a liar.

Contextual Imputation 2: Mr McGowan deliberately misrepresented the nature of the medical advice which his government had received concerning COVID-19 and the appropriate response to it.

389. As to contextual imputations 1 and 2, Mr Palmer relies on the same particulars as he does in support of the truth of imputations 3(a), 3(b) and 5(b) (FADCC particulars [1]-[7], CB A p64). Accordingly, Mr McGowan refers to and relies on his submissions regarding Mr Palmer's justification defence at paragraphs [334] to [352] above, along with the submissions regarding hydroxychloroquine at [247] to [250] above.

390. In addition, Mr Palmer seeks to rely on the following further matters that go beyond his case as particularised and should not be permitted to be raised. In any event:

a. as to Mr Palmer's claim that Mr McGowan lied when he claimed that his cross-claim was part of his defence (PS [586]), see the submissions at [41] and [42] above;

b. as to Mr Palmer's claim that Mr McGowan lied in his oral evidence about a driver who crashed a car into a power pole near his house (PS [587]), see the submissions at [39] above;

c. as to Mr Palmer's claim that Mr McGowan lied when he claimed that the High Court had upheld the validity of the provisions in the Amending At realtng to criminal immunity (PS [589]), see the submissions at [40] above;

d. as to Mr Palmer's claim that Mr McGowan lied in his press-conference on 12 August 2020 regarding why Mr Palmer was personally named in the Amending Act (PS [590]), Mr McGowan did not accept in his oral evidence that he lied in relation to this matter, and neither was it clear from his evidence whether he knew or did not

know as at the time of the press conference on 12 August 2020 that Mr Palmer was named personally in the Amending Act (T.492.41-494.08). That Mr McGowan said "*That's a drafting issue*" in response to a question from a reporter regarding this issue is neither here nor there. It does not indicate that Mr McGowan did or did not know whether Mr Palmer was named personally, or if he knew, whether he knew why. It could simply indicate that Mr McGowan considered the reporter to be asking a question about "*a drafting issue*", that is, whether there was a discrepancy between the terms of the relevant State Agreement and the Amending Act. Given the seriousness of an allegation of a lie or deliberate falsity, the evidence relied on by Mr Palmer fails to reach the high threshold necessary to make good this allegation.

Contextual Imputations 14 & 24: Mr McGowan is a dishonourable man.

391. The particulars Mr Palmer relies on in support of the substantial truth of Contextual Imputations 14 and 24 are at particulars 8 to 58A of the FADCC (CB A pp72-83). They can be broadly split into the following categories, each of which is addressed below:

a. Objective of Mr McGowan in hastily preparing the Amending Act - election consequences (FADCC particulars 36-37):

i. Mr Palmer's submits as follows (at PS, [53]):

"There is a powerful inference, notwithstanding McGowan's denials (see T471.1-36, 473.11-475.45), that he feared that an adverse outcome in the arbitration might become public just before the election and that that would harm his re-election prospects. McGowan's denials in this regard sit most uncomfortably with his reliance on the caretaker period to justify the urgency of the legislation (CB 1183D, lines 228-234)."

ii. There is no proper basis for the inference to be drawn. In fact:

1. There was a clear and obvious motivation for the enactment of the Amending Act: to protect the State from the Damages Claim.

2. Mr McGowan emphatically and repeatedly made clear that the prospect of harm to his re-election prospects by reason of an arbitral award becoming public shortly before the election was not something that entered his mind, was not something that concerned

him and was not his motivation for the Amending Act. His evidence was consistent, clear and credible. (T.471.1-36 and T.473.1-476.3). There is no basis to disbelieve him.

3. Further, had he turned his mind to the political implications of news of an arbitral award being delivered shortly before the election, Mr McGowan's view would have been that such news would not have been detrimental to his re-election prospects as it would have hurt his political opponents more than his party. This is because:

    a. the decisions to reject the BSIOP Proposal were decisions of Mr McGowan's predecessor, from the opposing political party (T.471.5, T471.16, 471.35, T.474.4, T474.46-475.2);

    b. Mr Palmer was more closely aligned with the Liberal party, Mr McGowan's political opponent, than with Mr McGowan's party, including by reason of the fact that Mr Palmer was a former life member of the Liberal Party and campaigned "strenuously" for the Liberal party in 2019 (T471.34, T.474.3, T475.4-7).

4. Mr McGowan explained the timing of the Amending Act as follows (CB C p1183D, lines 228-232):

    "The clock is ticking. And obviously it's going to reach a conclusion, ah, potentially in December or January, ah, at the end of this year. Ah, we need to resolve this matter now. Ah, Parliament will stop sitting, we will lose the opportunity to resolve it by using Parliament. Ah, and then we go into a caretaker period."

    That Mr McGowan was aware of an election, and that it would be preceded by a caretaker period in which no legislation could be passed, comes nowhere close to proving that "*he feared that an adverse outcome in the arbitration might become public just before the election and that that would harm his re-election prospects*." The obvious alternative explanation is that McGowan sought to achieve the desired effect of nullifying the award by way of legislation while

that remained a practical possibility.

b. Execution of the Mediation Agreement and the "dishonest charade" (FADCC particulars 38-40);

i. The State had been **ordered by the arbitrator to enter into a mediation agreement by 31 July 2020**. In particular, on 26 June 2020 the arbitrator made an order "*By no later than 30 October* 2020 *the Parties will attend a mediation to be held over 2 days (Mediation) and shall appoint to act as mediator such person as may be agreed by the Parties by 31 July 2020…*" (CB C p589B).

ii. The evidence does not establish that Mr McGowan actually knew of the execution or signing of the mediation agreement (T.488.10-38), or intended for the State not to participate in the mediation (T.488.34-45).

iii. In any event, the execution of a mediation agreement, at the same time as preparing legislation which would, *if passed*, impact or nullify the underlying dispute and mediation, cannot be said to be dishonest, misleading, or a failure to comply with a 'good faith' obligation. As pointed out by Mr McGowan (T.488.43-T.490.11), there was no certainty that the bill which became the Amending Act would in fact be passed by Parliament. Unless and until that occurred, it was appropriate for the parties to take steps towards the mediation of the dispute. It is neither dishonest nor dishonourable, for the executive government to proceed separately from the legislative arm and in doing so, not to seek to pre-empt what Parliament may or may not do in the exercise of its function.

iv. Mr McGowan does not dispute that the bill which became the Amending Act was kept secret until shortly before or at its introduction to Parliament. However, this fact goes nowhere. There is no force in any submission or suggestion by Mr Palmer that the fact that secrecy or confidentiality surrounded the preparation of legislation, and the presentation and consideration of legislation by Cabinet (when Cabinet activities are by their very nature, confidential or secret), suggests some kind of dishonour or nefarious conduct on the part of Mr McGowan. See also the submissions at [257] to [259] above.

v. These particulars are not made out, and, in any event, do not support the substantial truth of an imputation that "*Mr McGowan is a dishonourable man*".

c. The terms of the Amending Act (FADCC particulars 41-57):

i. The Amending Act was passed and enacted by Parliament, not by Mr McGowan personally. The enactment by Parliament of an Act with certain features or terms, is highly unlikely to involve disgraceful or dishonourable conduct by an individual, even if the individual is the head of the executive Government except potentially in the most extreme circumstances which do not apply here. That is especially so given that the intended effect of the Amending Act was to protect the interests of the State.

ii. It follows that such particulars cannot and do not assist Mr Palmer to establish the substantial truth of the imputation that "*Mr McGowan is a dishonourable man*".

d. State of mind of Mr McGowan - public statements and funding of cross-claim (FADCC particulars 58-58A):

i. As to Mr McGowan's public statements (particular 58 of FADCC) and Mr Palmer's reliance on the fact that Mr McGowan's public statements are contrary to what was found by the arbitrator and the court, Mr McGowan made clear in evidence that he did not read the arbitral awards (T.428.41-43). Any allegations of dishonesty, defiance or dishonour based on Mr McGowan's public statements being contrary to passages in the arbitral awards is therefore misconceived.

ii. Further, the fact of Mr McGowan making the statements set out at particular 58(c) falls well short of establishing a "contemptuous disregard for the importance of the Australian Constitution and for the institution of the High Court of Australia".

iii. As to the funding of the cross-claim, as particularised in 58B of the FADCC, Mr Palmer has failed to establish that it was "*Mr McGowan's decision*" for the State to fund his Cross-Claim. While Mr McGowan does not dispute that the State is funding the Cross-Claim, the idea that it was his "*decision*"

for the State to do so is incorrect, and unsupported by any evidence. Further, the funding occurred pursuant to longstanding and unexceptional policy. See the submissions at [44] and [45] above on this issue. Finally, Mr McGowan gave evidence that in the event he was successful in his cross-claim any damages awarded will be paid to the State, i.e., Mr McGowan will not keep the award (T.321.36 – 38).

iv. In view of the above, Mr McGowan submits that Mr Palmer has failed to establish these particulars.

392. In addition, Mr Palmer seeks to rely on the following further matters, which are not particularised in support of the truth of Contextual Imputations 14 and 24, and are therefore impermissibly relied on. In any event, each of these are addressed below.

a. Mr McGowan's "*willingness to lie*", as to which see the submissions at [28] to [45] above; and

b. Matters relied on by Mr Palmer as demonstrating malice, as to which see [236] to [271] above.

Contextual Imputation 12: Mr McGowan behaved disgracefully as Premier by overseeing the passing of important legislation in an absurdly short time.

393. Mr Palmer relies on the secrecy of the preparation of the bill that became the Amending Act, the terms of the Amending Act, and the time in which the Amending Act was passed in support of the substantial truth of Contextual Imputation 12.

394. As mentioned at [391.b.iv] above, the fact of the secrecy of the preparation of the bill which became the Amending Act goes nowhere. Further, as to the content and terms of the Amending Act, see the submissions at [391.c.i] above. Similarly the time in which the Amending Act was passed goes nowhere, and in any event is a consequence of Parliament carrying out its legislative function in a certain way (which cannot validly be impugned). It is neither an example of any absurdity, nor of disgraceful behaviour by Mr McGowan.

395. Mr Palmer has failed to establish the substantial truth of Contextual Imputation 12.

Contextual Imputation 3: Mr McGowan caused the State of Western Australia to renege on a mediation agreement made between it, a former Chief Justice of Western Australia and the Applicant

396. Mr McGowan submits that Mr Palmer has failed to establish the substantial truth of

Contextual Imputation 3, and relies on his submissions at [391.b.i] and [391.b.iii] above in this regard.

Contextual Imputation 4: Mr McGowan abused his position as Premier by overseeing the passing of laws designed to protect his government from criminal liability.

Contextual Imputation 9: Mr McGowan behaved disgracefully as Premier by overseeing the passing of laws which gave Mr McGowan and others an exemption from the criminal law.

397. Mr McGowan submits that Mr Palmer has failed to establish the substantial truth of Contextual Imputations 4 and 9. The only particulars relied on in support of these extremely serious allegations, including that Mr McGowan "*abused his position as Premier*" are the fact of and terms of the Amending Act itself. Mr McGowan refers to his submissions at [391.c.i] above in this regard.

Contextual Imputation 6: Mr McGowan abused his position as Premier by overseeing the passing of laws designed to abolish the right of the media to obtain information by way of Freedom of Information Applications

Contextual imputation 10: Mr McGowan behaved disgracefully as Premier by overseeing the passing of laws which abolished the right of the media, or any member of the Western Australian public, to make FOI applications to find out what had been done by Mr McGowan.

Contextual Imputation 17: Mr McGowan behaved disgracefully as Premier by overseeing the passing of laws which abolished the right of the media to make FOI applications, so that the press could not find out what Mr McGowan and his government had done.

398. Mr McGowan submits that Mr Palmer has failed to establish the substantial truth of Contextual Imputations 6, 10 and 17. The only particulars relied on in support of these extremely serious allegations, including that Mr McGowan "*abused his position as Premier*" are the fact of and terms of the Amending Act itself. In this regard, Mr McGowan refers to and repeats the submissions at [391.c.i] above.

399. Further, in his submissions (PS[620]), Mr Palmer submits that Mr McGowan "*has provided no explanation or justification for preventing public or media access, through the long-established and well-understood FOI regime with all its attendant qualifications and exemptions, to documents shedding light on what had here been done, in darkness, and why*". It appears that this allegation is based on the notion that Mr McGowan had some kind of duty to explain or justify the features of the legislation. However, Mr Palmer does not allege (nor could he), that Mr McGowan had a duty to explain or justify the features of legislation passed by Parliament, including the fact that it contains exemptions from the FOI regime.

Contextual Imputation 20: Mr McGowan has overseen the passing of legislation which has destroyed the reputation, and long-standing value to the State, of State Agreements entered into by the State of Western Australia

400. Mr Palmer primarily relies on public commentary (which, aside from the article at CB C pp1484-1485 is not particularised in the FADCC) to establish the substantial truth of this contextual imputation. He has not sought to adduce any opinion evidence – assuming any such evidence could be given admissible – notwithstanding his agreement (PS [634]) that whether Contextual Imputation 20 is substantially true can only be a matter of opinion, and whether such an opinion is correct "*may not be known with certainty for many years*". Mr Palmer has failed to discharge his onus of proving, on the balance of probabilities, that the imputation is substantially true.

401. Mr Palmer has fallen well short of establishing the substantial truth of Contextual Imputation 20.

The balancing exercise under s26 Defamation Act

402. To the extent that any of the contextual imputations are found to be conveyed and "*in addition to*" the imputations pleaded by Mr McGowan, Mr Palmer has failed to establish the substantial truth of any of his contextual imputations. It follows that he has failed to establish his contextual truth defence with regard to any of the matters complained of by Mr McGowan.

403. Further, and in any event, the Court would not find as a result of the balancing exercise, if it gets that far, that the truth of any of the Contextual Imputations (and weighing the facts, matters and circumstances relied on in support of the substantial truth of that imputation) mean that Mr McGowan's pleaded imputations do not further harm his reputation.

R. COMMON LAW QUALIFIED PRIVILEGE: REPLY TO ATTACK

Issues for determination

404. The issues falling for determination on common law qualified privilege are:

a. Whether Mr Palmer has established that each of the first to eighth matters complained of were published on an occasion of qualified privilege at common law. In particular, whether each of the first to eighth matters complained of constituted replies to attacks by Mr McGowan, as particularised in paragraphs [108] - [127] in the FADCC.

b. If so, whether Mr Palmer has established that each communication was germane or relevant to the protected occasion.

405. Mr McGowan submits that the answer to each of the questions above is "no".

Principles – qualified privilege at common law, "reply to attack"

406. The principles applicable to the defence of common law qualified privilege generally are set out at [132] - [142], above.

407. A recognised category of a particular circumstance in which the requisite reciprocity of duty and interest will be present arises where a respondent responds proportionately to an attack on the respondent or some legitimate interest of the respondent or another that the respondent has a sufficient reason to defend. See e.g.: *Blackham v Pugh* (1846) 15 LJCP 290, 291–4; *Laughton v Bishop of Sodor and Man* (1872) LR 4 PC 495, 504; *Adam v Ward* [1917] AC 309, 321–2, 347–8; *Loveday v Sun Newspapers Ltd* (1938) 59 CLR 503, 516; *Penton v Calwell* (1945) 70 CLR 219, 242–3, 250; *Bass v TCN Channel Nine Pty Ltd* (2003) 60 NSWLR 251; *Vassiliev v Frank Cass & Co* [2003] EWHC 1428 (QB); *Harding v Essey* (2005) 30 WAR 1, [10]–[13]; *French v Herald & Weekly Times Pty Ltd (No 2)* (2010) 27 VR 171, [63].

408. Where an attack occurs in a public forum such as to attract media attention, a response to the attack via the media may be protected. See e.g.: *Loveday v Sun Newspapers Ltd* (1938) 59 CLR 503, 515–16; *Trad*.

409. The rationale for the recognised category of privilege is that a person may defend themselves against written or verbal attacks. The response must therefore be sufficiently connected with and reasonably commensurate with the attack, although in that regard, '"*no nice scales will be used*": *Adam v Ward* (1917) AC 309, 330 (Lord Dunedin). See also *Watts v Times Newspapers Ltd* [1997] QB 650, 671; *Penton v Calwell* (1945) 70 CLR 219, 234; *Harbour Radio Pty Ltd v Trad* (***Trad***) (2012) 247 CLR 31 at [35].

410. As to the requirement for a requisite connection between the alleged "*attack*" and the publication said to be a response, see: *Penton v Calwell* (1945) 70 CLR 219 at 233; *Turner v Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 All ER 449 at 460; *Kennett v Farmer* [1988] VR 991 at 1003 - 1004; *Perkins v New South Wales Aboriginal Land Council* (Unreported, NSW Supreme Court, 15 August 1997); *Heytesbury Holdings Pty Ltd v City of Subiaco and Costa* (1998) 19 WAR 440 at 461 - 462; *Amalgamated Television Services*

Pty Ltd v Marsden [2002] NSWCA 419 at [1223] - [1224]; *Henry v BBC* [2005] EWHC 2787 at [103]; *Echo Publications Pty Ltd v Tucker* [2007] NSWCA 73 at [80]; *French v Herald and Weekly Times Pty Ltd (No 2)* (2010) 27 VR 171 at 192, [76]; *Trad* at 48 [33], 49 [34]-[35]; *Mengi v Hermitage* [2012] EWHC 3445 (QB); *Hive & Wellness Australia Pty Ltd v Mulvany* [2019] VSC 273 at [70], [72]; *Gould v Jordan (No 2)* [2021] FCA 1289 at [106], [122]; *De Kauwe v Cohen (No 4)* [2022] WASC 35 at [667] – [668].

Reply to Attack Defence - the Evidence

411. The following section responds to Mr Palmer's submissions on his "*reply to attack*" qualified privilege defence as follows:

    a. Mr Palmer had already responded to the pleaded "*attacks*"; and

    b. Separate attacks and ripostes do not attract the privilege.

Mr Palmer had already replied

412. In relation to **the first matter complained** of by Mr McGowan, Mr Palmer pleads preceding "*attacks*" on 26 July 2020 (FADCC 66(a), CB A 86; CB C 614-615), 28 July 2020 (FADCC 66(b), CB A 86; CB C 874) and 29 July 2020 (FADCC 66(b), CB A 86; CB C 877-78). Mr Palmer also pleads that Mr McGowan's 31 July 2020 press conference was a relevant "attack" (FADCC 65, CB 85). However, Mr McGowan's 31 July 2020 press conference was held after the first matter complained of in the cross-claim (at about 11.30-12.30pm AWST which is about 1.30pm-2.30pm AEST) (Ex A: ABF [17], CB 114).

413. However, by the time of the first matter complained of, at 12.15pm Brisbane time on 31 July 2020 (see MFI-3, Media Alert dated 31 July 2020), Mr Palmer had already replied, on:

    c. 27 July 2020:

        i. in a Twitter post at MFI2 p 245 (see also T.280.13-33 regarding this post);

        ii. In a second Twitter post at MFI2 p 246 (see also T.280.35-281.25);

iii. In a third Twitter post at MFI2 p 247 (see, for this and all other posts below, T.281.27-281.46);

d. 30 July 2020:

i. In a Facebook post at MFI2 pp248-250;

ii. In a Twitter post at MFI2 p 251;

iii. In a second Twitter post at MFI2 p 252; and

iv. In a third Twitter post at MFI2 page 253.

414. In relation to the **second matter complained** of by Mr McGowan, Mr Palmer pleads preceding "attacks" on 31 July 2020 (FADCC 65, 66(c), CB A pp85-86; CB 933-933C), 11 August 2020 (FADCC 73, 77, CB A pp87, 88; CB C pp1075-1140), and three "*attacks*" on 12 August 2020 (FADCC 70-72, 77, CB A pp86-87; CB C pp1183-1199).

415. However, by the time of the second matter complained of, at 12pm Brisbane time on 12 August 2020 (see MFI-4 - Media Alert dated 12 August 2020), Mr Palmer had already replied, on:

a. 1 August 2020:

i. In an advertisement posted on Facebook at MFI2 p255;

ii. In an advertisement placed in *The West* at MFI2 pp256-257;

b. 3 August 2020:

i. In a Facebook post at MFI2 p258-259;

ii. In a Twitter post at MFI2 p260;

iii. In a Twitter post at MFI2 p261;

c. 4 August 2020:

i. In a Twitter post at MFI2 p262;

ii. In a Twitter post at MFI2 p263;

d. 10 August 2020:

i. In a Facebook post at MFI2 pp264-266;

ii. In a Facebook post at MFI2 pp267;

iii. In a Twitter post at MFI2 pp268;

e. 12 August 2020:

i. In a Facebook post at MFI2 pp272-272; and

ii. In a Twitter post at MFI2 pp273.

416. In relation to the **third to seventh matters** complained of by Mr McGowan, Mr Palmer has pleaded two "*attacks*" on 13 August 2020 (at FADCC 80, 81, CB A p89; CB C pp1207-1214, 1216-1217).

417. However, by the time of the third to seventh matters complained of on 13 August 2020, Mr Palmer had already replied:

a. On 13 August 2020 (after the two "*attacks*"); at:

i. in a Facebook post at MFI2 p 274-276;

ii. in a Twitter post at MFI2 p 277;

iii. in a Twitter post at MFI2 p 278;

iv. in a Twitter post at MFI2 p 279;

v. in a Twitter post at MFI2 p 280;

vi. in a Twitter post at MFI2 p 281; and

vii. in a Twitter post at MFI2 p 282.

418. (The **eighth matter** complained of by Mr McGowan followed the sixth matter complained of by Mr Palmer, which had been published earlier on that same day).

419. Mr Palmer's closing submissions state at PS [647], correctly, that various attacks are identified at paragraphs [65], [66], [70]-[74] and [80]-[82] of the FADCC (CB A 85- 89).

These are the "*attacks*" listed in relation to each of the matters complained of in the paragraphs above.

420. At PS [198], Mr Palmer then claims that the "*first, second and sixth matters*" in the primary proceedings are relied on as "*attacks*": this is correct in relation to the first and second matters in the primary proceedings, but not the sixth (which is not a pleaded attack in the FADCC).

421. At PS [650], Mr Palmer refers to a list of publications including seven that are not pleaded in the FADCC as "*attacks*": those at (c), (d), (h), (i), (j), (k) and (l).

422. PS [651] refers to "*attacks*" by the Attorney-General that similarly do not form part of Mr Palmer's pleaded defence.

423. Mr Palmer more broadly seeks (at eg PS [648] and [649]]) to rely on "*other*" attacks said to have been made by Mr McGowan. None of these were pleaded - in any event, none assist his case. The FADCC had referred to "*numerous other public attacks*" at [66] (CB A p86) and [82] (CB A p89), but none of these were pleaded or otherwise particularised. As Mr Palmer recognises in his submissions at PS [639], a court in assessing whether a publication is truly in the nature of a reply to an attack is tasked with a factual assessment of the connection between the two. This cannot (and should not occur) where the purported "*attack*" is not even specified in a pleading. In any event, no other material to which the matters complained of might properly be seen as responsive has been identified at any stage of this litigation. As to the requisite connection between an "attack" and "*response*", Mr McGowan relies on the principles set out at [409] and [410] above.

424. Further, Mr Palmer, at PS [654] and [655], refers to Mr McGowan having "*co-opted the media to his cause*". Any argument that the media somehow amplified Mr McGowan's attacks does not form part of Mr Palmer's pleaded case (or if what Mr Palmer intends to claim is that he was subjected to separate, unspecified, "*attacks*" from "*the media*", this is both not pleaded and also not articulated in any clear way).

425. Finally, and importantly, Mr Palmer himself accepts at PS [657] that the true matter which had distressed him and which motivated the matters complained of by Mr Palmer was not any publication from Mr McGowan at all, "*attack*" or otherwise. Rather, Mr Palmer was *"particularly troubled"* by the Amending Act and what he considered to be Mr McGowan's role in it (see generally, the submissions in relation to damages on Mr Palmer's claim, which canvass his evidence on this topic). How the progress of a law

amounted to an "*attack*" on Mr Palmer (as appears to be pleaded at [73] and [75] of the FADCC, CB A 88) is not explained in his submissions. An "*attack*", as Mr Palmer accepts must exist for his pleaded defence to arise, requires "*something in the nature of a charge against, or an assault on, the integrity, good faith or reputation*" of a person: *Gould v Jordan (No 2)* [2021] FCA 1289, [73]. It would be a surprising result if the proposing of legislation (as pleaded at FADCC [73] CB 88) were found to be an "attack" so as to make available a defence for "*responses*" that would otherwise have been defamatory.

426. Therefore, Mr McGowan submits that the passage of legislation was not an "*attack*" on Mr Palmer in any sense that could be legally relevant for the purpose for Mr Palmer's submission based on "*reply to attack*". Neither the enactment of the Amending Act nor Mr McGowan's role in it has (nor could it have) been pleaded as such. The admission at PS [657] that the passage of this legislation is what Mr Palmer had sought to respond to highlights why this defence is unavailable (on Mr Palmer's pleaded case, or more generally).

Separate attacks and ripostes do not attract the privilege

427. At PS [659] Mr Palmer also accepts that "*in some respects parts of Palmer's responses were by way of counter-attack rather than strictly defensive*". Even if the matters complained of were found to be responsive (which, per the above, was plainly not the case), Mr Palmer extended beyond defending himself to become the aggressor: *Turner v Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 All ER 449 at 470.

428. Finally, to the extent that any of the matters complained of were ripostes (ie, responses to matters Mr McGowan had published in response to matters Mr Palmer had published), they do not attract the privilege: see *Kennett v Farmer* [1988] VR 991, 1003-1004; *Perkins v New South Wales Aboriginal Land Council* (Unreported, NSW Supreme Court, 15 August 1997); *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419, [1223], [1224]; *Hive & Wellness Australia Pty Ltd v Mulvany* [2019] VSC 273, [72]; *French v Herald and Weekly Times Pty Ltd (No 2)* (2010) 27 VR 171, 192, [76]. As is noted by Nathan J at 1004 of *Kennett v Farmer* [1988] VR 991, prolonged exchanges should not be the subject of a shield from defamation laws including because there could be a general disservice to the public in enticing them.

429. Accordingly, to the extent that the matters complained of were separate attacks, or in the

nature of ripostes, the defence does not apply.

Conclusion on "reply to attack"

430. In each instance the matters sought to be characterised by Mr Palmer as legally relevant replies to alleged attacks by Mr McGowan:

a. occurred *after* a prior reply to the relevant alleged attack had been made by Mr Palmer which in each case was at least proportionate to the statement to which it responded;

b. were therefore insufficiently connected to any attack Mr Mr McGowan and/or disproportionate to it in light of the replies that had already been made; and

c. in truth, amounted to a separate and renewed attacks by Mr Palmer as an aggressor on Mr McGowan that do not operate to attract qualified privilege.

S. MALICE

Issues for determination

431. In reply to Mr Palmer's defence of common law qualified privilege, Mr McGowan alleges that Mr Palmer was actuated by malice in publishing the matters complained of.

432. The following issues fall for determination (Issues II.F [14]-[14.1], CB A pp108-110):

> Malice: whether Mr McGowan has established that Mr Palmer published each of the first to eighth matters complained of for an improper purpose, that is, to hurt and harm Mr McGowan and damage his reputation and discredit him politically and personally.
>
> As relevant to the question of whether the improper purpose may be inferred, whether Mr McGowan has established [the matters set out at at Issues II.F [14.1(a)-(f)].

433. For the reasons set out below the answer to each of the questions above is "yes".

Principles – malice

434. The applicable principles are set out at [223]-[235], above.

Submissions on malice

435. Mr Palmer published each of the matters complained of for an improper purpose, that is,

to hurt and harm Mr McGowan and damage his reputation and discredit him politically and personally. This purpose is to be inferred from the following matters.

436. Mr Palmer's knowledge of, or alternatively, reckless indifference to the falsity of the allegations contained within each of the matters complained of giving rise to each of the imputations set out in the FADCC.

437. The statements by Mr Palmer, which he knew or must have known to be false given he had read the Amending Act, that the purpose of the Amending Act was to provide Mr McGowan and the Attorney-General with some kind of general "*immunity from criminal prosecution*" including the allegation "*he can murder, shoot you, raid your house and he's immune from the criminal law*" (CB C pp1075-1140)

438. Mr Palmer's false claims that the Mineralogy Parties were not seeking approximately AUD$30 Billion in the Damages Arbitration.

439. The failure of Mr Palmer to put any of the allegations to Mr McGowan, or give him any opportunity to respond to any of the allegations.

440. The extreme and sensational nature of the words adopted by Mr Palmer, including for instance the use of the words "*lies*" and "*criminal*".

441. Mr Palmer's conduct in persisting in making further insulting and derogatory statements of and concerning Mr McGowan, of a kind calculated to lead to further harm and loss and damage to Mr McGowan's reputation and increase the hurt and indignity suffered by Mr McGowan, including:

    a. multiple radio advertisements placed by Mr Palmer airing on 6PR Perth between 7:25am and 3:56pm on 14 August 2020 (CB C pp1467-1471);

    b. various Facebook posts posted on Mr Palmer's Facebook page including:

        i. on 20 August 2020 a post titled "*Politicians protect themselves*" which includes the following statement attributed to Mr Palmer: "*The Act against me and my companies are unconstitutional and are against the ethics of freedom that so many Australians before us have died for in two world wars. We don't need a Chinese or Soviet model of government where governments rule over the courts*" (MFI2 p298).

        ii. on 23 August 2020 a post which contains the following statements attributed

to Mr Palmer:

1. that Mr McGowan "*instigated the people of Western Australia to hate me so he could bring into law the greatest abrogation of human rights ever encountered in the history of Australia*,"; and

2. that Mr McGowan and the Attorney General, are "*nothing more than Keystone Cops who have given themselves exemption from criminal laws and civil liability*." (MFI2 p299).

iii. on 28 August 2020 a post titled "*Western Australian Parliament attacks the Rule of Law- North Korea Laws in Australia*" which includes the following words: "'*The Act gives the Premier the power to make laws without reference to Parliament. In essence, the Act allows the Premier to rule by decree. North Korea in an Australian setting," Mr Palmer said. "Our way of life and the Australian Constitution is all we have. We cannot allow Mark McGowan and John Quigley to destroy it. Don't believe their cover-up. First they have come for me. What will you do when they come for you?*'" (MFI2 pp300-301).

iv. on 1 September 2020 a post containing a video recording of Mr Palmer's Skynews interview with Alan Jones in which Mr Palmer makes the following statements:

1. "*To be exempt from the Criminal Code means that you can kill someone, you can break into their house… This Act also has the Premier having the power and authority to make legislation, make acts, without references to Parliament. It's very similar to what happened in Germany in the 1930s and this is an Act that takes away all human rights from all people in relation to these things….*"; and

2. "*The Nuremburg trials in 1947 in Germany said quite clearly that what happened in Germany happened because lawyers and the courts didn't stand up to the Nazi Government. And of course it's not an extreme thing when they're exempt from the criminal law that means they've got a licence virtually to kill you, to rob from you, to steal from you, they can't be prosecuted, all public servants are exempt so these sort of principles are un-Australian*" (MFI2 pp302-

304, USB of video).

442. The statements made of Mr Palmer on 31 July 2020 (being the first matter complained of by Mr McGowan) and 12 August 2020 (being the second matter complained of by Mr McGowan) that Mr McGowan had lied when he said he was relying on the advice of the Chief Medical Officer of Western Australia in implementing a hard border and enforcing travel bans, which Mr Palmer knew or must have known were false because he had read the transcript of evidence given by Dr Andrew Robertson in Federal Court of Australia proceedings *Palmer v State of Western Australia* QUD 183 of 2020, and the expert reports of Dr Robertson filed in those proceedings (see letter dated 10 February 2022 from Clayton Utz to Sophocles Lawyers).

Relevant evidence

443. The following evidence is relevant:

a. Mr Palmer was unable to identify, within the documents he said he relied upon (or otherwise) any substantial basis for the proposition that Mr McGowan lied about the health advice. See T.250.1-268.21 and in particular:

i. T.258.18-.22;
ii. T.289.37;
iii. T.260.41; and
iv. T267.25-.35.

b. On and from 12 August 2020, Mr Palmer publicly claimed that there was no claim seeking approximately AUD$30 billion in the arbitration with the State of Western Australia, when he knew that statement was false. See for example:

i. T.229.20-25;
ii. Mr Palmer's sworn interrogatories state that the Amended Statement of Issues Facts and Contention in the arbitration dated 28 May 2020 (CB C pp461-553) stated the quantifications and calculations by Mineralogy and International Minerals of their damages, and Mr Palmer confirms that it was his signature on that document (MFI2 p241);
iii. Mr Palmer knew that interest was continuing to run (T.225.27);
iv. In making these comments Mr Palmer asserted he was "retailing (sic) to what I had been subjected to at that time" (T.231.14).

c. When Mr Palmer said that the purpose of the Amending Act was to give Mr McGowan and the Attorney General some kind of general "*immunity from criminal prosecution*", including the allegation that "*he can murder, shoot you, raid your house and he's immune from the criminal law*", he knew that was false:

i. As referred to in the submissions regarding credit of Mr Palmer above, Mr Palmer's attempt to explain what part of the bill that became the Amending Act led him to this apparent conclusion was both evasive and confusing (T.234.15-T.243.11). It should not be believed.

444. Mr Palmer's continued conduct prior to the time of publication of the first cross-claim in making insulting, offensive and derogatory statements of and concerning Mr McGowan, primarily in the form of Facebook and Twitter posts published by or on behalf of Mr Palmer (See e.g.: MFI2 pp283-287 and Mr Palmer's oral evidence at T.270.12-T.272.46; MFI2 p288 and Mr Palmer's oral evidence at T.273.3; MFI2 pp289-290 and Mr Palmer's oral evidence at T.275.11-12; MFI2 p291 and Mr Palmer's oral evidence at T.275.44-46; MFI2 pp292-295 and Mr Palmer's oral evidence at T.277.26). Such posts were clearly calculated to harm and damage Mr McGowan's reputation, and demonstrate a history of hatred towards Mr McGowan. Mr McGowan submits that this historical hatred leads Mr Palmer to be recklessly indifferent to the truth of his publications.

T. RELIEF

Issues for determination

445. The following issues fall for determination (Issues II.G [15]-[17], CB A pp110):

Damages:

(a) If an entitlement to an award of damages is established, the amount of damages to be awarded to Mr McGowan.

(b) Whether the circumstances warrant an award of aggravated damages.

Injunctive relief: whether Mr McGowan has established that a permanent injunction should be granted.

Costs and interest.

Principles – general damages

446. Division 3, Part 4 of the Act governs the award of general damages for non-economic loss.

447. In awarding damages, the Court is to ensure that there is an appropriate and rational relationship between the harm sustained by the applicant and the amount of damages awarded: s 34, Act.

448. Section 35 of the Act provides for a maximum amount of damages for non-economic loss that may be awarded in defamation proceedings, which is currently $432,500: Gazette No 247 of 11.6.2021.

449. State of mind (e.g.: malice) is to be disregarded at the point of awarding damages save to the extent that it affects the harm sustained by the applicant: s 36, Act.

450. An award of general damages in defamation proceedings seeks to compensate an applicant for two primary heads of damages: injury to reputation and hurt to feelings. Damage is presumed on proof of publication of defamatory matter.

451. The quantification of general damages in a defamation case is a notoriously impressionistic exercise, ultimately aimed at achieving three purposes. Those purposes, together with the authorities, were conveniently summarised by McClellan CJ at CL (with whom Ipp and Basten JJA agreed) in *Aktas v Westpac Banking Corp Ltd* [2009] NSWCA 9 at [89] to [91]:

> *[89] It [an award of damages] provides reparation for the harm done to the plaintiff's reputation; consolation for distress or hurt to the plaintiff's feelings; and vindication of the plaintiff's reputation: Carson v John Fairfax & Sons Ltd [1993] HCA 31; (1993) 178 CLR 44 (at 60). The first two purposes are frequently considered together.*
>
> …
>
> *[91] The assessment of damages in defamation is necessarily imprecise. Damages are 'at large' in the sense that they cannot be arrived at through calculation or the application of a formula: Carson (at 115) per McHugh J; Rogers v Nationwide News Pty Ltd [2003] HCA 52; (2003) 216 CLR 327 (at 348-349) per Hayne J. This is because much of the harm done to the plaintiff is loss that cannot be quantified in monetary terms: Rogers (at 349) per Hayne J. Consequently, assessing damages is a matter of impression and not addition: Cassell & Co Ltd v Broome [1972] AC 1027 (at 1072). Juries have found it helpful to consider what the defendant, as opposed to the plaintiff, should be liable for in the circumstances to aid this impressionistic task. 'It became ... indisputable that a jury could consider not only what the plaintiff should receive, but what the defendant should pay': Uren v John Fairfax & Sons Pty Ltd [1966] HCA 40; (1966) 117 CLR 118 (at 151) per Windeyer J; Coyne v Citizen Finance Ltd [1991] HCA 10; (1991) 172 CLR 211 (at 228) per Toohey J.*

(This aspect of the decision was not disturbed on appeal to the High Court: *Aktas v Westpac Banking Corp Ltd* (2010) 241 CLR 79).

452. Ultimately, the amount of damages must be sufficient to publicly *"nail the lie"*, thereby vindicating an applicant: *Rigby v Associate Newspapers* [1969] 1 NSWR 729 at 743; *Lower Murray Urban and Rural Water Corporation v Di Masi* [2014] VSCA 104; 43 VR 348 at [107].

453. It is relevant to take into account the following factors.

454. *First,* the good reputation of the applicant. The level of damages should reflect the high value the law places upon reputation and, in particular, upon the reputation of those whose work and life depend upon their honesty, integrity and judgment: *Ali v Nationwide News Pty Ltd* [2008] NSWCA 183 at [74] per Tobias and McColl JJA citing with approval *Crampton v Nugawela* (1996) 41 NSWLR 176 at 195; and *John Fairfax Publications Pty Ltd v O'Shane* (No 2) [2005] NSWCA 291 at [3] per Giles JA, Ipp JA agreeing.

455. A presumption as to good reputation is bound up in the presumption of damage to that reputation, but evidence of good reputation is admissible: *O'Hagan v Nationwide News Pty Ltd* (2001) NSWLR 89 at 91 per Meagher JA.

456. *Secondly,* the gravity of the defamatory imputations: *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1071 per Lord Hailsham of Marylebone LC; *Coyne v Citizen Finance Ltd* (1991) 172 CLR 211 at 241; *Cerutti v Crestside Pty Ltd* [2016] 1 Qd R 89 at [35] per Applegarth J; *Ali v Nationwide News* at [74] per Tobias and McColl JJA.

457. *Thirdly,* evidence of actual damage to reputation. Despite the presumption of damage on proof of publication, it remains open to an applicant to lead evidence of actual damage to reputation: *Zaia v Eshow* [2017] NSWSC 1540 at [108]-[109].

458. *Fourthly,* extent or scope of publication. When assessing the extent of publication in cases involving print publications, the Court routinely relies on circulation and readership numbers, e.g.: *Hockey* at [448] and *Chel v Fairfax Media Publications Pty Ltd* [2017] NSWSC 996 at [117].

459. In cases involving radio and television broadcasts, the Court takes into account viewer and listener figures: e.g.: *Greig v WIN Television NSW Pty Ltd* [2009] NSWSC 632 at [130] (television) and *Ahmed v Harbour Radio Pty Ltd* [2013] NSWSC 1928 at [54] (radio).

460. Consistent with the Court's approach to the determination of meaning, those readers, listeners and viewers are taken to have read, listened to or watched the whole of the matter complained of and not just particular portions: *Hockey* at [66].

461. *Fifthly*, hurt to feelings and upset. A significant component of damages in defamation is a solatium for hurt feelings resulting from the publication of the matter complained of and assessment of those damages calls for consideration of subjective evidence of the applicant's own state of mind at the time he read the matter complained of and up to trial, *Broome v Cassel & Co* [1972] AC 1027 at 1125 per Lord Diplock; *Ali v Nationwide News at* [72] per Tobias and McColl JJA.

Principles – aggravated damages

462. Aggravated damages may be awarded where the conduct of the respondent has increased the subjective hurt suffered by the applicant. To obtain an award of aggravated damages the applicant must additionally establish that the respondent's conduct was lacking in bona fides, improper or unjustifiable: *Triggell v Pheeney* (***Triggell***) (1951) 82 CLR 497.

463. The Court may order a respondent in defamation proceedings to pay damages for non-economic loss that exceed the maximum damages amount applicable at the time the order is made if, and only if, the court is satisfied that the circumstances of the publication of the defamatory matter to which the proceedings relate are such as to warrant an award of aggravated damages:35(2), Act;, *Bauer Media Ltd v Wilson* (2018) 56 VR 674.

464. In assessing damages, including aggravated damages, the Court is "*entitled to look at the whole conduct of the defendant from the time the libel was published down to the time … [of] verdic*t" *Triggell* at 513; referring to *Praed v Graham* (1889) 24 QBD 53 at 55 (Lord Esher MR).

Principles – permanent injunctive relief

465. The principles regarding mandatory injunctions were summarised by White J in *Hockey v Fairfax Media Publications Pty Limited* (No 2) (2015) 237 FCR 127. At [15] his Honour stated:

> *Whatever be the position in England, permanent injunctions restraining a repetition of publication of matters found to be defamatory are not usually issued as a matter of course in this country. The authorities show that injunctions are issued only when some additional factor is evident, usually, an*

apprehension that the respondent may, by reason of irrationality, defiance, disrespect of the court's judgment or otherwise, publish allegations similar to those found to be defamatory unless restrained from doing so: Higgins v Sinclair [2011] NSWSC 163 at [245]; Royal Society for the Protection of Cruelty to Animals v Davies [2011] NSWSC 1445 at [63]–[66]; Polias v Ryall [2014] NSWSC 1692 at [99]; Sierocki v Klerek (No 2) [2015] QSC 92 at [52]–[53].

466. A crucial factor in deciding to grant a final prohibitory injunction is an assessment of the existence and degree of any threat or risk of a repeat of the publication of the defamatory matter successfully sued on in the proceedings: *Carolan v Fairfax Media Publications (No 7)* [2017] NSWSC 351.

Submissions on general damages

467. In this case, the imputations are squarely directed at Mr McGowan's conduct in his role as Premier of Western Australia. They are of the utmost severity, and attack the heart of Mr McGowan's role as an elected politician, and Premier of Western Australia. It is submitted that this should be reflected in the amount of general damages awarded.

468. Further, Mr Palmer accepts that it was a natural and probable consequence that each of the first and second cross-claim matters would be republished, and there can be no serious contest that they reached a broad audience through the mass media and grapevine. As to the second to seventh and the eighth cross-claim matter, Mr McGowan submits that they were designed by their very nature to reach a broad audience utilising the mass media for this purpose.

469. The relevant evidence is set out below.

470. Evidence as to Mr McGowan's good reputation is set out in the McGowan Affidavit, and relevant facts are agreed by the parties at Ex A: ABF [10]-[16], CB A p113.

Mr McGowan's reaction to the matters complained of

471. Mr McGowan sued Mr Palmer over 9 publications he made between 31 July 2020 and 1 September 2020 (T.298.3-5), and gave evidence in his affidavit [87] about how he became aware of those publications (which it therefore was not necessary to address in oral evidence: T.298.7-11).

First cross claim matter: 31 July 2020 Palmer Press conference, Tank Street, Brisbane (Ex 6: footage at CB 84A and transcript at 931A)

472. In relation to the message conveyed at 31 July 2020 press conference that "*as Premier, Mr McGowan lied to the people of Western Australia when he said he had acted upon the advice of the Chief Medical Officer in closing the borders*" (T.298.38-42), Mr McGowan's evidence was:

    a. That this "*Made me feel angry, hurt, offended, exasperated, quite – in the context, another problem that I had to deal with*": (T.298.46-47);

    b. That he had received advice that "*vaccines were a very long way away*" and "*as a State that's isolated*" he was accordingly trying to do things "*to protect people's lives and people's health*" (T.299.4-6);

    c. This meant that it was a "*time in which lots of people were in a bit of a state of heightened anxiety, and I would go on to say some people were in a state of terror about what was going on*" (T.299.6-7);

    d. In this context "*where it was a period of high drama and high stress for me, was a deeply offensive and hurtful statement that I had to endure*" (T.299.14-15);

    e. The suggestion that Mr McGowan had lied to the people of Western Australia made him feel: "*Offended, angry, hurt, bit of outrage. He knows it's not true yet persists with it. It was a – it's quite a serious allegation to make against someone who has been through the last two years of what I've been through in order to try and protect the 2.6 million people who live in Western Australia. So it's a very hurtful statement that – that builds upon the original statement that he made that was very offensive in the first place. So I – it – it's – it adds to the – the – the offence."* (T.299.20-25).

473. In relation to a message conveyed at the same 31 July 2020 press conference that "*As Premier, Mr McGowan lied to the people of Western Australia when he told them their health would be threatened if the borders did not remain closed*" (T.299.30-31), Mr McGowan's evidence was that:

    a. He felt "*Angry, offended, upset, degree of exasperation in having to continually deal with the untrue statements made by Mr Palmer*" (T.299.33-34);

    b. Mr Palmer is "*a person who has national standing, and one of the few political*

figures, if you like, if you can describe him as that, who – who would be recognised across Australia in any community, in any town, in any suburb, and so therefore he has some standing in the community, and a range of people who believe what he says" (T.299.34-39);

c. Mr Palmer "*also put into those words 'as Premier', so I've been a Premier for five years. I've had to – at that point in time, I think it was three and a half years, but I've had to go through an enormous amount in order to get to this position, and by that, I mean enormous amount of striving and struggle and strain and pressure and upheaval in order to get to this position, and then for – and then over the course of the four or so months up to 31 July dealing with COVID, which is a highly stressful thing to deal with, and it's hard to recreate now, but highly stressful at that point in time, with some dramatic decisions that I never imagined in my life I would have to make, and – and round-the-clock issues to be considered, the meetings, and Cabinet meetings, State Disaster Council meetings and emergency management team meetings and consultations and National Cabinet meetings and advice and decisions you have to make that were very, very stressful and subject to lots of analysis. And for him to make those statements and put in the words 'as Premier' is extremely offensive*" (T.299.39-300.5);

d. Mr McGowan felt this statement was "*Deeply offensive because it's demonstrably untrue, and to continue with that line of verbal assault until now, when since the period of this statement until now, when since the period of the statement until now, what is demonstrably proven is that the measures we put in place worked in order to protect the State of Western Australia and save lives, and we saved countless lives by what we've done, and, I might add, countless jobs, as well. And so for him to continue with this line of verbal or – this line of statements if offensive and hurtful*" (T.300.10-16);

e. Mr McGowan was at the time dealing with significant pressures including a high volume of meetings to "*try and protect the state from what was a very, very serious threat to us*" (T.300.16-27);

f. In that context, "*So for Mr Palmer to continue with those sorts of offensive statements from then to now is hurtful and angering and outrageous, and he's the sort of person that gets a band of people out there who believe this stuff because he*

has a – a following based upon his status as head of the United Australia Party and the – the massive amounts of advertising he puts in and all the people, the band of followers, he seems to acquire, who get wound up and outraged by the sorts of stuff he has, so – or he says. So the – the offence that he causes rolls on because of the fact he has decided to continue with these allegations up until now" (T.300.29-36).

474. In relation to transcript headed Exhibit 6, including "*the call by Mr Palmer for the Western Australian Government not to lie to the Western Australian people about threats that don't exist*" (T.300.37-43), Mr McGowan's evidence was;

   a. He felt that this was "*deeply exasperating and frustrating and false what he says there, and it – it causes a degree of – it caused a degree of pain in the context in which it was said*" (T.300.36-301.1);

   b. That context was a "*very frightening period*" during which he was aware of events in Victoria including "*shutting down apartment blocks*" and around the world such as "*the graves they were building on some island off New York*" (T.301.1-14);

   c. Mr McGowan had "*literally people coming to my house in Rockingham yelling at my wife and children about, at that point in time, how we had to, you know, take action, people in a state of quite heightened anxiety in the community*" (T.301.16-19);

   d. In that context, "*for Mr Palmer to say that it wasn't a threat and I was lying about the threat is just blatantly false, and obviously exacerbated the stress under which I was labouring at that point in time*" (T.301.19-21);

   e. Mr McGowan is: "*actually prone to sleepless nights and at that point in time I had a lot of sleepless nights worrying about everything that was going on. So his – his behaviour here and more broadly was very unhelpful and quite hurtful to everything that I – well, to what I felt and also what I was trying to do*" (T.301.22-25).

475. In relation to passage in transcript that "*Mark McGowan, by keeping the borders closed, is destroying the lives of many Western Australians*" (T.301.27-33), Mr McGowan's evidence was that:

   a. He felt, when he became aware of this: "*Angry, hurt, offended, frustrated. It's patently false, and – and highly – well, it's false. It's not even misleading*" (T.301.35-37);

b. This occurred at a time at which Western Australia had had a single lockdown, the first in the country, and a total of 11 people had died in Western Australia of whom "*three acquired the virus in Western Australia*" (T.301.37-40);

c. Mr McGowan was a "*premier of the state who had a solemn duty to protect the state*", so the suggestion was both "false" and "*very offensive to me at a personal level and caused me some degree of outrage because this, again, is a person for whom there is a large group of people out there seem to be under his spell and listen to the sorts of thing he says, and by saying these sorts of things he motivates and agitates these people into some pretty extreme action*" (T.301.45-302.3); and

d. After his Honour asked whether Mr McGowan knew that what Mr Palmer had said was untrue because of publicly available material rather than any particular specific matter that he was aware of that Mr Palmer knew: "*Yes, it's a very, very – your Honour, it's very publicly available information as to the state of – the State of Western Australia"* (T302.27-31).

Second matter complained of - Palmer Sky News interview 12 August 2020, Exhibit 7 CB C 1200-1200A.

476. In relation to an interview by Mr Palmer on Sky News on 12 August 2020 (T.302.37-41), conveying that "As premier, Mr McGowan lied to the people of Western Australia about his justification for imposing travel bans" (T.302.37-303.12), Mr McGowan's evidence was:

a. This made Mr McGowan feel: "*Angry, frustrated, exasperated, outraged, a – a sense of hurt that – that he would suggest such a thing*" (T.303.17-18);

b. The fact that Mr Palmer would suggest that Mr McGowan had lied to the people of Western Australia about the justification for imposing travel bans made him feel (T.301.22-44):

> "*Angry. I have been in Parliament for 25 years. I have been in opposition, I have been a backbencher, I have been a Parliamentary secretary, I have been a Minister, I have been opposition leader, I have been premier and treasurer. So I have been through a lot in order to – to get to this thing, but in my whole life, and certainly my political life, I have never been through anything like dealing with COVID, particularly in the year 2020. Perhaps 2021 as well, but certainly*

2020. Never been through anything like it, and the – the stress and the pressure and the angst and the hostility and the – the – the decisions that had to be made that were difficult and almost incomprehensible in any other circumstance that I never imagined and never trained for prior to getting to that point in time March-April 2020 when it all came upon us were – it was a very difficult and demanding period of my life. And, as I said, you go through a lot of sleepless nights, a lot of pressure, a lot of angst, a lot of tossing and turning about whether or not you're doing the right thing, and I adopted the approach the whole way through that caution was the right approach, that I would be cautious about what we were confronting in order to protect the State and use the advantages that – and isolate it ..... but isolate it ..... and that was the advice that we received, that those measures around using a border for Western Australia, both internationally actually, but also interstate would be effective. And, so, for someone in that context, particularly someone with standing, like Mr Palmer, to suggest that I was a liar on basically what was the biggest decision of my life was an offensive and hurtful and deeply aggrieving statement for him to make that, in effect, cuts to the core of what I stand for and what I had do in the most difficult of circumstances."

c. This occurred in the context of "*some of the most dramatic times of my life*" (T.303.44-46);

d. In that context, "*to have someone of means with standing and money out there blithely saying and advertising these sorts of things with a sense of abandon as to the consequence of what he said and did was very offensive and hurtful*" (T.303.46-T304.2).

Third - Seventh Matter Complained of by Mr McGowan, "Cover Up" letter at CB C 1436

477. In relation to the "Cover Up" letter by which "*Mr Palmer was saying about Mr McGowan, as premier that you had corruptly attempted to cover up the personal involvement of yourself and others in criminal acts by overseeing the passing of laws designed to provide exemptions from them from the criminal law*" (T.304.4-12), Mr McGowan's evidence was that he:

a. Felt: "*Extremely angry. Extremely angry that I've got this person out there suggesting I'm corrupt and trying to provide an exemption for myself from the*

criminal law" (T.304.15-17);

b. Was the Premier "*sworn to act in the – with the highest propriety and standards in my public duties*" (T.304.18-19);

c. The suggestion: "*cuts to the core of what you're about when you're in public life, certainly if you're in a senior position in public life, that your role has a duty to the people who elected you – in fact, all the people, those who elected you and those who didn't*" (T.304.22-24);

d. The suggestion from Mr Palmer: "*is deeply a deep wrong against my character, particularly in the context where again I was trying to protect the State from some of Mr Palmer's actions which would have caused – if successful, would have caused massive, massive pain for Western Australia*" (T.304.27-30);

e. The statement "*is a deeply offensive, rude and hurtful statement"* (T.304.34-35);

f. Mr McGowan considers that "*what people like Mr Palmer does is he creates a band of angry people in our community who believe this sort of stuff and get themselves so wound up that they do crazy things in relation to me and my family*" (T.304.36-38);

g. Examples of threats to Mr McGowan's family have included: "*things like threaten to kill me and my family, threaten to kill my children, things like ram their cars into power poles outside my home, things like – and you may think I'm joking, but drive armoured cars to my office with fake machine guns on the top, things like send packages to my wife with white powder in it with threats to behead my children, things like leave multiple messages on my phone threatening to kill me, my family, to sniper attack us, to hunt us down when I'm out of office. Things like that*" (T.304.38-44);

h. In general, "*So, look, this sort of stuff that he does is false, it's offensive and it causes and contributes to great pain to me and my family*" (T.305.13-14).

478. In relation to the statement in the letter commencing "In 1972 Richard Nixon" (T.305.16-17), Mr McGowan's evidence was that:

a. For a group of older people with a "*dim*" view of President Nixon, "*certainly for that group of people this would be something that was offensive to them*" (T.305.28-29);

b. For Mr McGowan this was: "*It's not as bad as the other ones. It's not as bad as the other things he has said about me but, you know, I value my public reputation*" (T.305.37-38);

c. As someone who valued his reputation: "*for him to – for him to impugn it in that way is offensive to me*": (T.305.33-34).

Eighth Matter Complained of - Palmer interview with Hamish MacDonald on 14 August 2020 at CB 1472.

479. In relation to the eighth matter complained of which conveyed that "*As Premier, Mr McGowan had behaved criminally and was improperly seeking to confer upon himself immunity from the criminal law*" (T.206.11-27), Mr McGowan's evidence was that:

a. Upon becoming aware of this Mr McGowan felt: "*Infuriated, angry, quite exasperated and frustrated and, to a degree, hurt*" (T.306.30-31);

b. "*Mr Palmer, by alleging I was engaging in criminal acts by passing legislation, is demonstrably wrong and offensive and hurtful*" (T.306.37-38);

c. This was particularly so "*because the context was one where I was on the side of the angels in trying to defend the State and save the State from what was a terrible threat to our finances and our capacity to fund important services into the future in Western Australia*" (T.306.38-41);

d. For Mr Palmer "*then to use the legislation which did no such thing as give me an immunity to murder people or to steal or anything such as that nature and then to say that in public in this, you know, quite extensive and quite offensive interview was very offensive*" (T.307.4-7);

e. In the context where Mr McGowan is an elected Premier, "*the idea that somehow I would murder or shoot or raid, or anything like that, people is a deeply offensive statement*" (T.307.18-19).

480. In relation to the suggestion in the same interview that "*as the Premier you were acting corruptly by seeking to confer upon yourself criminal immunity*" (T.307.18-19):

a. Mr McGowan felt: "*Very angry*" (T.307.25);

b. The suggestion was "*extremely offensive*" (T.307.27);

c. In Mr McGowan's view this (T.307.27-38):

> "*implies that you are there for yourself and you're prepared to use your position to acquire – acquire wealth or, you know – or property or whatever it might be on the basis of advancing yourself, as opposed to advancing the interests and the wellbeing of the people that you're elected to represent, and so – and also has an undertone of being somehow sinister and – and underhanded and completely self-centred, and also an undertone that somehow you're sort of part of some sort of conspiracy that exists in other countries that we – you know, we pride ourselves in not being like, and so his – his suggestion or imputation or implication that I'm corrupt is a hurtful, offensive and – and certainly from my point of view, and considering the history of both Western Australia and Australia in these matters, a very, very nasty, hurtful and demeaning and outrageous statement*."

Submissions on aggravated damages

481. Mr McGowan submits that he is entitled to an award of aggravated damages by reason of the following matters (see [15] and [16] of the FASCC):

a. Mr McGowan's knowledge that the defamatory meanings are untrue;

b. Mr McGowan's knowledge that Mr Palmer published the defamatory meanings in the circumstances set out at (c)(i) to (iii) below; and

c. the cross-respondent's lack of bona fides, as evidenced by the matters set out below:

i. he knew, it may be inferred (if not admitted) from the very nature of the content of what was published, that it would cause persons who heard it to think less of and shun and avoid the cross-claimant;

ii. he could have had no reasonable belief in the truth of the defamatory meanings pleaded above, or was recklessly indifferent to the truth or falsity of them;

iii. each publication was made with the intention of causing political harm to the cross-claimant and to cause him to make governmental decisions in relation to the closure of borders and his dispute with the Western Australian Government that were favourable to the cross-respondent.

482. Further, Mr McGowan also relies upon his *knowledge* of the following matters.

483. Mr Palmer's conduct in persisting in making further insulting and derogatory statements of and concerning Mr McGowan, of a kind calculated to lead to further harm and loss and damage to Mr McGowan's reputation and increase the hurt and indignity suffered by Mr McGowan, including:

a. multiple radio advertisements placed by Mr Palmer airing on 6PR Perth between 7:25am and 3:56pm on 14 August 2020 (CB C pp1467-1471);

b. various Facebook posts posted on Mr Palmer's Facebook page including:

i. on 20 August 2020 a post entitled "*Politicians protect themselves*" which includes the following statement attributed to Mr Palmer: "*The Act against me and my companies are unconstitutional and are against the ethics of freedom that so many Australians before us have died for in two world wars. We don't need a Chinese or Soviet model of government where governments rule over the courts*" (MFI2 p298).

ii. on 23 August 2020 a post which contains the following statements attributed to Mr Palmer:

1. that Mr McGowan "*instigated the people of Western Australia to hate me so he could bring into law the greatest abrogation of human rights ever encountered in the history of Australia,*"; and

2. that Mr McGowan and the Attorney General, are "*nothing more than Keystone Cops who have given themselves exemption from criminal laws and civil liability*." (MFI2 p299).

iii. on 28 August 2020 a post titled "*Western Australian Parliament attacks the Rule of Law- North Korea Laws in Australia*" which includes the following words: "'*The Act gives the Premier the power to make laws without reference to Parliament. In essence, the Act allows the Premier to rule by decree. North Korea in an Australian setting," Mr Palmer said. "Our way of life and the Australian Constitution is all we have. We cannot allow Mark McGowan and John Quigley to destroy it. Don't believe their cover-up. First they have come for me. What will you do when they come for you?*'" (MFI2 pp300-301).

iv. on 1 September 2020 a post containing a video recording of Mr Palmer's Skynews interview with Alan Jones in which Mr Palmer makes the following statements:

1. "*To be exempt from the Criminal Code means that you can kill someone, you can break into their house… This Act also has the Premier having the power and authority to make legislation, make acts, without references to Parliament. It's very similar to what happened in Germany in the 1930s and this is an Act that takes away all human rights from all people in relation to these things.…*"; and

2. "*The Nuremburg trials in 1947 in Germany said quite clearly that what happened in Germany happened because lawyers and the courts didn't stand up to the Nazi Government. And of course it's not an extreme thing when they're exempt from the criminal law that means they've got a licence virtually to kill you, to rob from you, to steal from you, they can't be prosecuted, all public servants are exempt so these sort of principles are un-Australian*" (MFI2 pp302-304).

484. Mr Palmer's conduct in persisting with the serious allegations made in his contextual truth defence (Contextual Imputations 4, 6 and 26) that Mr McGowan "*abused his position as Premier*" notwithstanding the High Court's decision about the Amending Act and Mr Palmer's inability or failure to provide particulars to support the serious allegation of "*abuse of position*" (see CB A p97).

485. The relevant evidence is set out below.

Effect of Palmer's defence of contextual truth

486. Mr McGowan confirmed that he was aware that Mr Palmer and his company Mineralogy had commenced proceedings in the High Court to have the Amending Act declared invalid: (T.307.42-45), and that those proceedings failed: (T.307.47).

487. In relation to the suggestion that *Mr McGowan abused his position as Premier by overseeing the passing of laws designed to protect his government from criminal liability* (**Contextual imputation 4**) (T.308.3-5):

a. Mr McGowan considered this: "*Deeply offensive, demonstrably untrue and quite*

hurtful. As I've said before – I don't want to labour it, but it was a pretty big deal": (T.308.9-10);

b. The statements were: "*particularly offensive to me, particularly because, in my view, our position was upheld by the High Court, that we had, at least in a legal sense, not done anything that was – that was – that could be challenged. In a moral sense, we did the right thing. I did the right thing*" (T.308.23-26)

488. In relation to contextual imputation *Mr McGowan abused his position as Premier by overseeing the passing of laws designed to abolish the right of the media to obtain information by way of Freedom of Information Applications* (**Contextual imputation 6**) (T308.43-46)

a. In relation to the defence being persisted with: "*The abuse of the position as Premier is – is an egregious and offensive statement that is hurtful*" (T.309.1-2);

b. "*to suggest that I abused my position in that context, where it was virtually every member of Parliament supported it, again, shows a misrepresentation of the truth on the part of Mr Palmer*" (T.309.32-34).

489. In relation to *Mr McGowan behaved disgracefully as Premier by overseeing the passing of laws which gave Mr McGowan and others an exemption from the criminal law* (**Contextual imputation 9**) (T309.36-40) and *Mr McGowan behaved disgracefully as Premier by overseeing the passing of laws which abolished the right of the media, or any member of the Western Australian public, to make FOI applications to find out what had been done by Mr McGowan* (**Contextual imputation 10**) (T.309.36-40)

> "*Yes, that's an offensive statement and – and hurtful to have "behaved disgracefully". Look, passing legislation is what we do. Now, people may have different views as to the – whether legislation is correct or otherwise, but that's what we do. Passing legislation is not a disgraceful thing*" (T.309.40-43).

490. In relation to *Mr McGowan behaved disgracefully as Premier by overseeing the passing of important legislation in an absurdly short time* (**Contextual imputation 12**) (T.310.4-6):

> "*It's – it's a – it's a – it's a – again, a frustrating and exasperating statement that causes me some degree of anger. Passing legislation quickly is sometimes what Parliaments do, and sometimes there's reasons for that, and again, he*

promotes these ideas that cause other people in the community – and as I said before, some people go down the rabbit hole and come up with some pretty bad ideas out of it. He promotes these ideas in the community that somehow I have behaved disgracefully, but then encourages all these people to weaponize themselves physically, literally physically against myself and my family. So how does it make me feel? It makes me feel offended, angry and hurt that he continues to say these things" (T.310.6-15).

491. In relation to persisting with claims that Mr McGowan is a liar (**Contextual imputation 1**) (T.310.20-21), Mr McGowan's evidence as to how this made him feel was:

> "*Well, as I said before, in your political life, allegations like corruption or that you're a liar are a – a very hurtful and deeply offensive statement because it feeds into a perception in the community, certainly amongst some people, that – that that is the natural truth surrounding people in political life. So for someone of means and with great capacity to attract media coverage and to attract followers and to get – get advertisements – multiple advertisements suggesting such things is deeply offensive and hurtful and gets some currency and coverage amongst some people in the community who believe these things*" (T310.28-35).

492. In relation to persisting with claims that Mr McGowan is "*a dishonourable man*" (**Contextual imputation 14**) (T.310.37-38), Mr McGowan's evidence was:

> "*It makes me feel angry, frustrated, hurt, outraged*" (T.310.38-39).

493. In relation to persisting with claims that Mr McGowan deliberately misrepresented medical advice (**Contextual imputation 2**) (T.311.4-13), Mr McGowan's evidence was that this made him feel:

> "*Very angry, because it's demonstrably untrue, and it was untrue at the time he said it, but over the last 18 months even more – even more obviously an untrue statement, because whilst it has, and certainly in other parts of Australia, caused some consternation, the measures we put in place, the measures were based upon health advice and they were based upon the Chief Health Officer's advice, they were based upon the – the – the medical advice we received, and also other states did, and so – and other states did exactly the same as us. In fact, every state. But he – he continues to persist with a grievous untruth that continues to*

enliven angst and anger and hostility and physical hostility towards me and my family."

494. In relation to persisting with allegation that Mr McGowan caused the state of Western Australia to renege on a mediation agreement (**Contextual imputation 3**) (T.311.15-19), Mr McGowan's evidence was that:

> "*Well, it's an – it's – it makes me feel unhappy that he would suggest such a thing, because that does not reflect the nature of cabinet government, and also suggests that somehow that – that I and the government are underhanded and – and are, well, underhanded people*" (T.311.21-24).

495. In relation to Mr McGowan has overseen the passing of legislation which has destroyed the reputation, and long-standing value to the State, of State Agreements entered into by the State of Western Australia (**Contextual imputation 20**), Mr McGowan's evidence was that:

> "*It makes me feel unhappy and frustrated and agitated that he would suggest – continue to suggest that. Once again, it's demonstrably untrue" (T311.40-41);*
>
> *"it – it's a damaging statement to my reputation in the context of the role that I currently hold, which is premier and treasurer, but the role that I held at the time, which is Premier and Minister for State Development, and the fact that he persists with that, certainly in a state which is a – broadly termed a mining state, because a large part of the state's economy is based upon mining, is offensive to me and my – my – my view of myself*" (T.312.4-10);

<u>Continuing publications by Palmer</u>

496. After the publications Mr McGowan sues on in these proceedings, he understands that Mr Palmer has continued generally to make allegations about him: (T.313.45-46, T314.1-2).

497. As to how this made Mr McGowan feel (T.315.28-42):

> "*It's an ongoing campaign to – to denigrate my character and to undermine what I do and to suggest criminality and to suggest I'm some sort of – comparable to – I note there's - - I'm comparable, and I note there's references to Nazi Germany and the Soviet Union and so forth. Comparable to some of the worst dictators in history, murderous – mass murderers, and a – a set of*

advertisements which appeared, and that was – they were – they were running constantly in response to our legislation that suggested I'm criminal, corrupt, akin to a dictator, someone who can undermine the criminal law and commit whatever sort of crime I want to do whenever I feel like it, literally kill people. A whole bunch of Facebook and other posts that – that are just simply outrageous. Outrageous slurs on my character. How does it make me feel? It makes me feel angry and quite exasperated, frustrated, hurt, unhappy, because it was an ongoing campaign that continues, by the way, that does not let up, and so it's a – it's a round-the-clock thing because Mr Palmer has billions of dollars – he does – in order to undermine people who make decisions in the public interest against his interests in order to try and achieve other commercial outcomes for himself. It's a shocking thing that he does."

Submissions on permanent injunctive relief

498. As to injunctive relief, the ordinary course is to determine permanent injunctive relief following delivery of judgment (as submitted at [274] above).

Bret Walker	Nicholas Bender	Clarissa K Amato	Claire Roberts
St James	Banco Chambers	Banco Chambers	Eleven Wentworth

6 April 2022