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Details of Filing

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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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PALMER v McGOWAN

McGOWAN v PALMER

NSD 912/2020

PALMER'S OUTLINE OF CLOSING SUBMISSIONS

A. INTRODUCTION

A1. OVERVIEW

Overview: Palmer's Claim

1. The Applicant (**Palmer**) commenced these defamation proceedings on 19 August 2020. He sues on six defamatory publications by the Respondent (**McGowan**), all made in a two-week period between 31 July and 14 August 2020 (**the primary proceedings**).

2. On 16 February 2022, following argument at final hearing and pursuant to s 37P(2) of the *Federal Court of Australia Act 1976* (Cth) and r 30.02 of the *Federal Court Rules 2011* (Cth), the Court separately determined, before any other issue in the proceeding and on a final basis, whether any of Palmer's imputations pleaded in the Amended Statement of Claim were conveyed (**separate determination**).

3. The Court determined that the first and sixth McGowan publications each conveyed two of Palmer's pleaded imputations and the second to fifth McGowan publications each conveyed one of Palmer's pleaded imputations.

4. The first five McGowan publications sued on by Palmer were statements made at press conferences conducted by McGowan in the period 31 July – 7 August 2020. In them McGowan attacked Palmer (as, *inter alia,* an *"enemy of the state"* and an *"enemy of Australia",* with whom the State of WA was *"at war"*), supposedly in relation to steps taken by Palmer in connection with the COVID pandemic (including a High Court constitutional challenge to the "hard border" which McGowan had introduced for WA on 5 April 2020).

5. The sixth McGowan publication, on 14 August 2020, was a Facebook post concerning an enactment of the WA Parliament called the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) (**the *Amendment Act***), which McGowan and Quigley devised in March 2020, prepared with others in secret between about mid-June and August 2020, and introduced in the lower house without prior notice at 5pm on 11 August. It was passed two days later on 13 August 2020. See T463.25-46.

6. The *Amendment Act* related not to the COVID pandemic or the hard border, but to different subject matter altogether. It obliterated various rights and entitlements of companies associated with Palmer, in relation to mining tenements in the Pilbara, under a State Agreement with the State of WA, including the right to seek damages for breach

of that agreement by the State (one such breach having already been found to have occurred, in arbitration proceedings conducted by a former High Court justice, the Hon. Michael McHugh AC QC).

7. The *Amendment Act* also (*inter alia*) abolished Freedom of Information rights in connection with the subject matter and enactment of the *Amendment Act*, and provided retrospective immunity for criminal liability for the State (including Ministers such as McGowan) in relation to a widely-defined array of matters.

8. Once Palmer became aware of the introduction of the *Amendment Bill* late on 11 August 2020, of its contents, and of its enactment on 13 August 2020, he made various public statements about it.

Overview: McGowan's Cross-Claim

9. On 17 September 2020 McGowan filed a Cross-Claim, in which he sued Palmer for alleged defamation in respect of nine publications. Eight of those nine publications by Palmer shortly post-dated the introduction of the *Amendment Act*.

10. On 16 February 2022, during the separate determination, in addition to the matters identified at [2] above, the Court also separately determined, before any other issue in the proceeding and on a final basis, whether any of McGowan's imputations pleaded in the further amended cross claim were conveyed.

11. The Court determined that the first and eighth Palmer publications each conveyed two of McGowan's pleaded imputations, and the second to seventh Palmer publications each conveyed one of McGowan's pleaded imputations. The Court determined that the ninth Palmer publication did not convey the sole imputation pleaded in respect of it. It follows that the ninth publication warrants no further consideration.

Factual Landscape

12. The factual landscape which provides the essential background to these proceedings is thus dominated by two separate features:

    (a) the global COVID pandemic, the WA "hard border", and Palmer's High Court constitutional challenge thereto; and

    (b) the *Amendment Act*, and the commercial and arbitral history preceding it.

13. The first five McGowan publications sued on by Palmer, and the first Palmer publication sued on by McGowan, all of which pre-date the *Amendment Act*, relate (or are said to relate) to the first of those features.

14. The sixth and last McGowan publication sued on by Palmer, and the other seven surviving Palmer publications sued on by McGowan, relate to the second of those features.

Chronology

15. A **Chronology** is **attached** (marked "**A**") to these submissions, which summarises (including by reference to documents in the Court Book) the sequence of some of the various events germane to each of these two features.

16. In particular, the facts pertaining to the *Amendment Act*, its planning and preparation, the commercial and arbitral history which preceded it, and its aftermath are all important in these proceedings. They are addressed in some detail in section A2 below.

Agreed Background Facts

17. The parties have agreed upon certain **Agreed Background Facts (ABF)** (CB 112).

18. Palmer also sought, unsuccessfully, to agree with McGowan certain further facts relating to the extent of republication (in whole or in part) of Palmer's first-sixth matters. Palmer's position is set out in the **attached** document marked "**B**" and styled **Republication of Palmer's Matters**. See also [171] below.

Factual and Legal Issues for Determination [FLI]

19. The parties have agreed upon and filed a document styled **Factual and Legal Issues for Determination (Amended)** (CB 98).

Palmer's Claim: the "matters" and the defences

20. In his Amended Statement of Claim (**ASC**) filed 31 May 2021 (CB 1), the six defamatory publications by McGowan on which Palmer sues are:

    (a) words spoken in a press conference by McGowan on 31 July 2020 (**first matter**), variously republished including on *YouTube* and the *Sydney Morning Herald* (**SMH**) website;

(b) words spoken at a different point in the same press conference by McGowan on 31 July 2020 (**second matter**), variously republished including on the ABC website;

(c) words spoken in a press conference by McGowan on 3 August 2020 (**third matter**), variously republished including on the AAP and *Perth Now* websites and partially on a Channel Seven website;

(d) words spoken in a press conference by McGowan on 5 August 2020 (**fourth matter**), variously republished including on the *WA Today* Facebook page and substantially in *The West Australian* newspaper;

(e) words spoken in a press conference by McGowan on 7 August 2020 (**fifth matter**), variously republished including on the *Canberra Times* website;

(f) a Facebook post uploaded to the Mark McGowan Facebook page on 14 August 2020 (**sixth matter**).

21. McGowan, in his Further Amended Defence of 25 June 2021 (**FAD**) (CB 12), pleads as follows:

(a) as to the first five matters (the press conferences), he admits that he spoke the pleaded words at the press conferences (amongst other words);

(b) he admits that he knew that some or all of what he said at those press conferences could be republished in the media, but says that he did not intend just for those words to be republished, and that he had no control over what would actually be republished;

(c) for the most part he admits the specific republications pleaded, but says that in some cases not all of the words appeared in the republication;

(d) he admits that he is responsible for publication of the sixth matter (a Facebook post);

(e) he denies that any of the matters were capable of conveying the pleaded imputations or that they were in fact conveyed, and denies that they were capable of carrying or in fact conveyed any meaning defamatory of Palmer;

(f) he does not plead any defence of truth, or honest opinion, in respect of any of the imputations;

(g) his only substantive defence is to rely on three versions of qualified privilege, namely common law qualified privilege generally, statutory qualified privilege under s 30 of the ***Defamation Act*** *2005* (NSW), and the particular species of common law qualified privilege concerned with publication of government or political matters arising from the decision in ***Lange*** *v Australian Broadcasting Corporation* (1997) 189 CLR 520.

22. McGowan now concedes that each of the imputations, as found to have been conveyed, is defamatory of Palmer: see T 284.14-18.

23. Palmer, in his Reply filed 1 October 2020 (CB 24), alleges malice in defeasance of the qualified privilege defences.

McGowan's Cross-Claim: the "matters" and the defences

24. In his Amended Statement of Cross-Claim (**ACC**) filed 20 November 2020 (CB 34), the eight surviving publications by Palmer on which McGowan sues are:

(a) statements by Palmer on or about 1 August 2020 during the course of a press conference, allegedly republished in an AAP article and by other (unspecified) media (**first CC matter**);

(b) statements by Palmer on 12 August 2020 during the course of an interview on Sky News, alleged to have been republished by other (unspecified) media (**second CC matter**);

(c) a document variously published by Palmer on and from 13 August 2020, including in the *West Australian* newspaper, on Facebook, on Twitter and by letter box drop (**third-seventh CC matters**). There are some differences between these five matters, but each of them is essentially in the same or similar form. The document is also alleged to have been republished by other (unspecified) media;

(d) statements made by Palmer on 14 August 2020 during the course of an ABC radio interview, alleged to have been republished by other (unspecified) media (**eighth CC matter**).

25. Palmer, in his Further Amended Defence to Cross-Claim (**FADCC**) filed 12 November 2021 (CB 60), pleads, in summary, as follows:

(a) in relation to the first CC matter, he admits that he spoke certain words at a press conference on 31 July 2020, and that it was a natural and probable consequence that those words (actually spoken) would be republished;

(b) in relation to the second CC matter, he admits he spoke the pleaded words at a press conference and that it was a natural and probable consequence that those words would be republished;

(c) in relation to the third-seventh CC matters, he admits that he authored and signed the document and is responsible for its publication in the various media;

(d) in relation to the eighth CC matter, he admits that he spoke the words attributed to him in the transcripts of interviews attached to the ACC;

(e) he denies the matters were capable of conveying the pleaded imputations or that they were in fact conveyed, and denies the matters were capable of being or were in fact defamatory of McGowan;

(f) he pleads substantial truth to three of McGowan's imputations in relation to the first and second CC matters;

(g) he relies on a defence of contextual truth in relation to all of the matters;

(h) he relies on the "reply to attack" species of common law qualified privilege for each of the eight CC matters which remain in contest.

26. Palmer accepts that McGowan's imputations, as found to have been conveyed, are defamatory of McGowan.

27. McGowan's Reply (CB 92) alleges malice in defeasance of the qualified privilege (reply to attack) defence.

A2. THE *AMENDMENT ACT*, ITS ANTECEDENTS AND ITS AFTERMATH

The State Agreement

28. **Mineralogy** Pty Ltd, a company controlled and ultimately beneficially owned by Palmer, holds a number of mining leases in the Pilbara district of Western Australia: Palmer #1 at [3],[16] CB 1684, 1686; see also EX A[3] CB112.

29. In or about March 1993, the Government of Western Australia commenced negotiations with Mineralogy to develop a State Agreement for industrial projects in the north of

Western Australia, which negotiations continued until December 2001: Palmer #1 at [84] CB 1701.

30. On 5 December 2001, Mineralogy and other Palmer-related parties, including **International Minerals** Pty Ltd, entered into such an agreement with the then Premier of Western Australia, the Hon. Geoffrey Ian Gallop, acting for and on behalf of the State and its instrumentalities: see EX A [44] CB118.

31. The State Agreement was ratified by the ***Iron Ore Processing*** *(Mineralogy Pty Ltd) Agreement Act 2002* (WA) which came into operation on 24 September 2002: Palmer #1 at [86]-[88] CB 1701. The Agreement is Schedule 1 to the Act, at CB1288.

32. The **Minister** responsible for the administration of the *Iron Ore Processing Act* is also responsible for the administration of the agreement on behalf of the State: CB 1292. At relevant times prior to 2017 that Minister was Colin **Barnett**, and from 2017 to 2021 that Minister was McGowan: T450.11-34.

33. The purpose of the State Agreement was to facilitate the development of projects by Mineralogy, by itself or in conjunction with others, "*for the purpose of promoting employment opportunity and industrial development in Western Australia*": Palmer #1 at [92] CB 1702; Recital (d) at CB 1289.

34. On 8 August 2012, Mineralogy and International Minerals submitted a proposal, being the "Balmoral South Iron Ore Project Proposal" (**BSIOP Proposal**), to the Minister pursuant to clause 6 of the State Agreement (to which there was a subsequent addendum on 22 August 2012): Palmer #1 at [97] CB 1703; see also the summary of the proposal in 2014 Award [21]-[23] CB 259-275; EX A[45] CB 188; CB 1234-1235.

35. The *Amendment Act* defines the "first Balmoral South proposal" to mean the BSIOP Proposal and the addendum: see CB1234-1235.

36. Pursuant to clause 7(1) of the State Agreement (CB 1301-1304), and subject to the *Environmental Protection Act 1986* (WA), the powers of the Minister in respect of a proposal submitted pursuant to clause 6 were limited to the following:

    (a) to "*approve of the proposal without qualification or reservation*";

    (b) to "*defer consideration or decision*" until such time as further supporting material was submitted; and

(c) to "*require as a condition precedent to the giving of his approval to the said proposal that the Project Proponents make such alteration thereto or comply with such conditions in respect thereto as he thinks reasonable*".

37. The State Agreement does not grant the Minister any power to reject, or to refuse outright to approve, a proposal submitted pursuant to clause 6 of the State Agreement: *Mineralogy Pty Ltd & Ors v The State of Western Australia & Anor* [2005] WASCA 6, [4], [34], [58].

38. Notwithstanding these limitations on power, on 4 September 2012, the Minister notified Mineralogy and International Minerals of his refusal to consider the BSIOP Proposal, on the purported ground that it was not "*a valid proposal*": see the 2019 Award at [15], CB 312 (referred to in [47] below).

The Arbitrations

39. Pursuant to clause 42 of the State Agreement, the Minister's refusal to consider the BSIOP Proposal gave rise to a dispute to be settled by arbitration: Ex A [46] CB 118; 2019 Award [20] CB 313.

40. In 2013, Mr McHugh was appointed as the arbitrator (see the 2019 Award, CB 316) and an arbitration was subsequently conducted by him (**the First Arbitration**): Ex A [46].

41. The First Arbitration resulted in the making of an Award dated 20 May 2014 (**2014 Award**): Ex A [47] CB 118. The 2014 Award itself is CB 252-302.

42. In the 2014 Award, Mr McHugh made observations which included the following (emphasis added):

(a) *"The Court of Appeal of the Supreme Court of Western Australia had held that **the Minister has no power to reject a proposal**. He must approve it, defer a Proposal until a further proposal is submitted or require the Proposal to comply with such conditions as he thinks are reasonable"*: paragraph [9], CB 255-256.

(b) Clause 7(1)(b) of the State Agreement *"expressly recognises that a document may be a proposal for the purposes of the State Agreement although it fails to deal with all matters mentioned in Clause 6(2)(a)-(q)"*: paragraph [48], CB 294-295.

(c) *"The provisions of Clause 7(3), like those of Clause 7(1)(b), indicate that a document submitted to the Minister may be a proposal even though it fails to comply with the provisions of Clause 6(2) or other provisions of the State Agreement. It shows that, where a proposal is defective or ambiguous,*

consultation, not rejection, is the remedy propounded by the State Agreement": paragraph [50], CB295-296.

(d) *"Instead of granting a power of rejection, the parties have given the Minister two limited powers, both of which involve consultation with the Proponents before they are exercised. This compulsory obligation of consultation imposed on the Minister points strongly against a document being denied the character of a proposal merely because it fails to meet the requirements of Clause 6 or other provisions of the State Agreement"*: paragraph [53], CB296-297.

(e) *"It is difficult to escape the conclusion that the attempt to categorise the August 2012 submission as not being a proposal is* ***an attempt to circumvent the Court of Appeal's ruling*** *that the Minister has no power to reject a proposal: Mineralogy Pty Ltd v Western Australia [2005] WASCA 69 at [58]"*: paragraph [57], CB298.

(f) *"It follows then that the August 2012 submission was a proposal for the purposes of the State Agreement. The Minister was required to deal with it under Clause 7 of [the State Agreement], which he has failed to do"*: paragraph [66], CB301.

(g) *"****The failure of the Minister to give a decision within that time means that he is in breach of the State Agreement and is liable in damages for any damage that the Applicants*** [i.e. Mineralogy and International Minerals] ***may have suffered as the result of the breach****":* paragraph [67], CB301.

43. The 2014 Award contained the following declaration by the arbitrator:

> *"Declare that the August 2012 Submission was a proposal submitted pursuant to clause 6 of the State Agreement with which the Minister was required to deal under clause 7(1) of the [State] Agreement.",* CB302.

44. No appeal to the Court was brought by the State in respect of the 2014 award.

45. However, the State subsequently sought to contend that the 2014 arbitration award had exhausted the entitlement of the Palmer companies to seek or obtain an award of damages for any such breach, and that the Palmer companies could no longer pursue any such claim.

46. The Minister also subsequently purported to impose some 46 "conditions precedent" on the BSIOP Proposal (CB 309 at [3]), thereby belatedly accepting (CB 310 at [6]) that the Proposal was valid.

47. In October 2019, a second arbitral award (**2019 Award**) by Mr McHugh found that, contrary to the State's contentions, the Palmer companies remained entitled to pursue their claims for damages: see the 2019 Award, CB 308 at 348 [1] – [4].

48. Those claims for damages were essentially twofold, namely (CB 308 at [2]-[6]):

(i) the "first damages claim" was for loss said to flow from the 2012 refusal by the Minister to accept the BSIOP Proposal as a valid proposal under the State Agreement;

(ii) the "second damages claim" was for loss said to flow from the Minister's 2014 purported imposition of 46 "conditions precedent" on the Proposal, which conditions were alleged by the Palmer companies to be unreasonable and not capable, as a matter of law, of being imposed.

49. By about late 2019, it had been agreed that Mr McHugh would determine, in a third arbitral proceeding, any claims for damages suffered by Mineralogy and International Minerals as a result of the breach of the State Agreement.

Arbitration Directions

50. On 20 December 2019, in connection with that third arbitration, directions were made by Mr McHugh as to the exchange (by 14 March 2020) of a statement of issues, fact and contentions (SIFC), written statements of witnesses of fact and expert evidence, with further directions to be made on 14 May 2020: CB 348A-348C.

51. On 26 June 2020, Mr McHugh directed that the arbitration would be heard for 15 business days commencing on 30 November 2020: Directions CB 589A-589C.

52. Direction 10.4 provided that *"The Arbitrator shall deliver his award in the Arbitration by 12 February 2021"*: CB 589C; Ex A [50] CB118.

53. The fixed date for the WA State Election was at all times 13 March 2021, a month after the arbitration award was to be delivered: McGowan T470.47. 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).

54. On 26 June 2020, Mr McHugh also made directions that the parties would attend a mediation of matters arising in the arbitral proceedings, by 30 October 2020. In this regard, direction 8.2 noted that the State and the Palmer companies would "*act in good faith toward each other*" in respect of the mediation. Both the arbitration, and the mediation, were confidential: see CB589B, [8.2] and [8.5]; see also MFI-9, p. 88, [19]; CB 1183B lines 106-107.

55. On about 6 July 2020, Palmer (on behalf of Mineralogy and International Minerals) executed a counterpart of the arbitration agreement, which was co-signed by Mr McHugh, and on about 8 July 2020, the State executed a counterpart of that arbitration agreement, also co-signed by Mr McHugh: MFI-9, pp61-79.

56. By that time, preparation of the *Amendment Bill* was well under way, as will be outlined later in these submissions. McGowan and Quigley had no intention that the arbitration would proceed. The termination of the arbitration, and of the arbitration agreement entered into as recently as 8 July 2020, was one of the central purposes of the *Amendment Bill* introduced in the parliament on 11 August: McGowan [78] CB 1756.

57. On or about 6 August 2020, the State of Western Australia executed a counterpart of a mediation agreement between it, Palmer (on behalf of Mineralogy and International Minerals) and the mediator, a former Chief Justice of Western Australia (Mr Martin): CB 1023-1037. Mr Martin co-signed the signed counterpart and emailed the co-signed counterpart to the WA State Solicitor's Office (**SSO**): see MFI-9 pp 109-118.

58. Again, McGowan and Quigley had no intention that the mediation would proceed. The termination of the mediation, and of the mediation agreement entered into only days earlier on 6 August 2020, was expressly provided for in the *Amendment Bill* (which was introduced in the lower house on 11 August): clause 10, CB 1095.

59. The SSO represented the State in the arbitration and mediation: see MFI-9. The State was subject to the obligations of a model litigant: see Quigley at T501.39-504.12; see also SSO Guidelines at MFI-9, p 33. The maintenance of the rule of law and separation of powers in a liberal parliamentary democracy depends on the Crown, particularly the State and Commonwealth governments, observing a standard of fair play in disputes with its subjects: see *LVR (WA) Pty Ltd v AAT* [2012] FCAFC 90 at [42] and *Melbourne Steamship Limited v Moorhead* (1912) 15 CLR 333 at 342 per Griffiths CJ quoted in the SSO Guidelines at MFI-9, p 33. According to Quigley, the State Solicitor, Mr Egan, was the very person who was involved in drafting the *Amendment Bill* in secret from his home: T419.40-42, CB 1206C lines 141-146; see also [73] below.

The secret planning of the *Amendment Act*

60. By at least mid-June or early July 2020, McGowan and Quigley had started work in secret on the preparation of what would become the *Amendment Act:* McGowan at T463.30.

61. Indeed, McGowan said that from much earlier than that, by about March 2020, he and Quigley were discussing (secretly) the prospect of legislation, as a means of dealing with the problem represented by Palmer's damages claims in the third arbitration: T463.21-464.1.

62. Consistently with that timeframe, on 23 May 2020, Quigley and McGowan had an SMS exchange (CB 447A - 450), in the following terms:

> *Quigley:* *I have been awake since 4.15 thinking of ways to beat big fat Clive and his arbitration claim for 23.5 billion in damages remembering the turd has pulled off 2 big wins in arbitration… The solution is to be found in an amendment to legislation obstensibly* [sic] *to protect us Re* [the possibility of an unrelated dispute]… *which amendment for that purpose is merely a Trojan horse as within the very small legislative amendment will be a poison pill for the fat man… It's such a neat solution obstentially* [sic] *to solve one almost non existent problem but the side wind could drop the fat man on his big fat arse!…Hey are you glad me single again…not making love in sweet hours before dawn instead worrying how to defeat Clive!* 😂😂😂🤣
>
> *McGowan:* *Let's discuss the $23 billion claim*
> *We need to really sort out what to do.*
> *I don't want to let Parker know or any journo before we r ready*
>
> *Quigley:* *Absolutely secrecy of essence …* 😂😂😂

63. On 18 July 2020, McGowan sent Quigley an SMS in which he asked "*How's our Bill Re legal action by Palmer coming along*": CB606. By 27 July, they were discussing the precise timing of its introduction into Parliament: CB724A-724B.

64. The secret work in relation to this proposed legislation continued until, just before 5pm on 11 August 2020, the *Amendment Bill* was introduced to the Legislative Assembly in the WA Parliament: Ex A [54] CB118; CB 1167.

65. The 5pm timing was intentional. The object was to introduce the legislation (whose existence and imminence was until then unknown to anyone outside the very small circle, centred on McGowan, involved in its secret preparation) when all Courts in Australia were closed, thereby thwarting any opportunity for Palmer to seek judicial consideration of what was being done – see below.

66. The legislation reached the Legislative Council in the late morning of 13 August 2020 (CB 1404). It passed the Legislative Council at about 10.35 pm on that same day (CB

1435DD), and the Governor provided assent at approximately 11.15 pm on that evening, 13 August 2020: McGowan [78] CB 1756. See also Ex A [58], [59] (CB 118-119).

67. Other than McGowan and Quigley, and possibly one or two other Ministers, no member of Cabinet had any inkling of the Bill's existence until a Cabinet meeting at 4.15pm on 11 August 2020 (45 minutes before the Bill was introduced). Backbenchers, of all parties, knew nothing of it until Quigley rose to speak at 4.55pm on that day: Quigley at T520.42-522.22; see also CB1174C, 1177E-G, N-O, Q, T, W, X, 1435.

68. Quigley's Second Reading speech is at CB 1167-1172.

Significant provisions

69. The *Amendment Act*, amongst other matters (CB 1221, ss 10-13, 18-21):

- terminated the relevant arbitration agreements;
- nullified both the 2014 and 2019 arbitral awards in favour of the Palmer companies;
- terminated the 2020-21 damages arbitration;
- terminated the mediation agreement;
- granted immunity from the criminal law to "the State" (a term widely defined so as to include McGowan and others personally) in relation to *"protected matters"* (an expression defined to include any conduct *"connected with"* – itself a widely-defined term – the preparation or enactment of the Act);
- extinguished freedom of information rights in relation to any document connected with any such "protected matter";
- provided that no document connected with a "protected matter" was admissible or discoverable in any proceedings against "the State" (a term defined, as noted above, to include McGowan).

The aftermath

70. On 12 August 2020, the day after the *Amending Bill* had been introduced by Quigley in the lower house, McGowan and Quigley gave a press conference (CB 1183-1183L) in which McGowan said (at 1183 lines 16-19), among other things, in relation to the decision of Minister Barnett in 2012 concerning the BSIOP Proposal (see [38] above):

"I want to be clear on this. We believe Premier Colin Barnett took the right course of action to protect Western Australia at the time as the proposal by Mr Palmer was flawed and without appropriate detail."

71. McGowan had no legitimate basis for making such a statement. As McGowan well knew (see T427.30-45), Mr McHugh had expressly found in the 2014 Award (from which the State had not sought to appeal) that what Minister Barnett had done in 2012 was impermissible under the State Agreement, and constituted a breach of that agreement for which the State would be liable in damages: see [42], [43] above.

72. McGowan's statement was also directly contrary to the decision of the WASCA in *Mineralogy Pty Ltd & Ors v The State of Western Australia & Anor* [2005] WASCA 69 at [34], [58], to which Mr McHugh referred in the 2014 Award at [57]: see [42(e)] above. The insouciance of McGowan's statement is especially notable having regard to the observation of Mr McHugh referred to in [42(e)] above.

73. On the morning of 13 August 2020, Quigley gave a radio interview on ABC Radio Perth: CB1206A-1206E. In that interview, he explained, with obvious relish, the tactics which he and McGowan had deployed in relation to the preparation of the *Amendment Act*. Among his boasts were these (emphasis added):

(a) *"... i**t is like a complicated game of chess**, but in. no way is it a game. I, certainly together with the Premier, feel a heavy weight of responsibility on behalf of all Western Australians to repel this rapacious claim by this ... by this Palmer man"* (CB 1206A lines 11-14)

(b) *"... **this is a game of tactics**. Ah, Mr Palmer got ... an Arbitrator's award back in 2014 and in the intervening years has **failed to register the award. We, we identified this weakness … in his position. And so we prepared legislation that terminates the arbitration**, terminates it, full stop. Ah, the crucial part was it had to be terminated prior to, um, the arbitration being registered in the Supreme Court."* (CB 1206A lines 25-32)

(c) *"[W]e kept it so tight and then brought it in at 5 p.m. on Tuesday **after every court in the land was closed and the doors were locked**" (*CB 1206A lines 34-36)

(d) *"Now, let me explain the legislation. The legislation in clause 10 and 11 terminates the arbitration, as of the time of introduction. So it terminates it as though the arbitration never happened. And the time that that, that termination begins, or becomes effective, is when I did my second reading speech on Tuesday evening. **And it was too late for him to get to a court**." (*CB 1206A lines 38-42)

(e) *"And as I said to you, it is like, **it is like a fight**. And like my near neighbour Danny Green says, **you've just got to jab, jab, jab with your right, and move him over to the left, and then just knock him down with a right – a left hook.***

And what's happened here is that Mark 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 main game, of file – of registering the arbitration*. And we got through in time. We got that legislation into the Assembly on Tuesday night while all the courts were locked." (*CB 1206B line 95 – 1206C line 3)

(f) *"This is crucial that this bill is introduced and passed. And the academics and the other people can write about it afterwards, can analyse it afterwards all they like for months to come and criticise us or whatever, I don't care, but we've got to unleash the left hook today. We've got to knock [Palmer] down and knock him down today.* ***There is too much at risk for all Western Australians, for namby-pamby inquiries****: 'What does this word mean, what does that word mean?'"* (CB 1206C lines 133-139)

(g) *"****This legislation has been drafted over the last six weeks in secret*** *by the best legal minds in this city. The Solicitor-General of Western Australia, Mr Joshua Thomson SC, our incredible State Solicitor Mr Nick Egan and his legal team at the State Solicitor's Office. Mr Egan even left the office and worked at home to keep the job so secret that people in his own office wouldn't know"* (CB 1206C lines 141-146)

74. It is clear, and uncontroversial, that McGowan was personally closely associated with the preparation and enactment of the *Amendment Act.* He was also the responsible Minister for the State Agreement and thus for the arbitration proceedings: T471.38-39.

75. The unambiguous import of Quigley's statements in this radio interview is that the secret gestation and drafting of the *Amendment Act*, and its ultimate introduction and passage through Parliament, formed part of a deliberate tactical approach whereby Palmer would be repeatedly insulted by McGowan, would focus on responding to those insults, and so would not address the "weakness" which McGowan and Quigley had "identified" in his position, namely that he had not registered the two McHugh awards (favourable to his companies) in the Supreme Court.

76. McGowan essentially accepted that Quigley's description of the tactics used by the two of them was accurate, albeit that he thought Quigley had used *"some extravagant language"*: T 415.13 – 416.4; 417.30 – 418.24; 421.37 – 422.15; 422.44 – 423.20. See also in this regard the observation by senior counsel for the State at T484.12-15.

77. As Palmer pointed out (T204.38-205. 30), he for his part was naturally assuming at this time (July – August) that the State was genuinely about to participate in a mediation of the damages claims, and he considered that it would have been inappropriate (for reasons including the "good faith" obligations binding the parties) for him to take the adversarial step of registering the awards prior to that mediation.

77A. Contrary to the suggestion made more than once in MC, Palmer had not "forgotten" to register the awards: see Palmer affidavit paragraph 60 (CB 1696) and T205.10-30.

78. McGowan's and Quigley's course of conduct in the preparation and passing of the *Amendment Act* precipitated Palmer's publication of the second to seventh CC matters on 13 August 2020, and the eighth CC matter on 14 August 2020.

79. Of those matters, the third to seventh were publications by Palmer in essentially the same terms, by which he decried McGowan's conduct in passing legislation which stripped Palmer of his legal rights.

80. On 14 August McGowan then published the sixth matter, in which he claimed that he was "*clear[ing] up the facts about the laws we have just passed*": CB1458. In truth, when read with an understanding of the stratagems that had led to the passing of the *Amendment Act*, the sixth matter is revealed as little more than Pecksniffian "propaganda" designed to celebrate the achievements, and to advance the interests, of McGowan and his government, and to negate and denigrate those of Palmer. Its relationship to *"the facts"* is at best tangential and at worst downright dishonest.

81. One telling feature of the evidence, including when considering McGowan's claim that what he was doing in his 14 August post was *"clearing up the facts"*, was that McGowan actually had no knowledge of key facts pertaining to the 2014 and 2019 arbitral awards and to the Palmer companies' claim for damages – largely because he had not troubled himself to read any of those documents: T428.41-43; T429.39-45. Among the facts that McGowan airily said he did not know were:

(a) He did not know that Mr McHugh had found that the Minister was in breach of the State Agreement: T435.8-19, T435.32-34 and T460.28-32.

(b) He did not know that the State had thus been found liable to the Palmer companies for any damages they may have suffered: T460.34-35.

(c) And he did not know that no figure was attributed in the damages claim to the (subsequent) imposition of the 46 conditions: T429.32-37.

82. McGowan did know, however, that there was to be a third arbitration on the question of damages, which would consider whether the Palmer companies had actually suffered loss and, if so, its quantum: T462.8-15. And he also knew that whether the Palmer companies would succeed in establishing any such loss at all, let alone very substantial loss, was yet to be determined: T462.16-24. Indeed, as McGowan stated in a press

conference on 12 August 2020 (CB1183I, lines 479-481) and repeated in cross-examination, his understanding was that the State's case in those respects was "s*olid"*. McGowan (in August 2020) was "*confident*" of the State's position vis-à-vis any damages claim by the Palmer companies: T462.26-27.

83. Yet neither his (chosen and unnecessary) ignorance of the facts, on the one hand, nor his confident assertion of the "*solidity*" of the State's case (notwithstanding that ignorance) on the other, fettered McGowan's dishonest and freewheeling claims that it was in effect a *fait accompli* that "*Mr Palmer was going to take $30 billion from Western Australians*" (T435.21-22), and that "*he decided just to make his profits by taking $12,000 from every man, woman and child in Western Australia*" (sixth matter, CB1458 at 11). Neither a "reasonableness" defence, nor a defence predicated on reciprocal "interests", is tenable in such circumstances.

A3. THE AFFIDAVITS AND THE WITNESSES

The Parties' Affidavits

84. Palmer relies on the following affidavits.

(a) first affidavit of Clive Frederick Palmer, 27 January 2021 (**Palmer #1**, CB1682);

(b) second affidavit of Clive Frederick Palmer, 27 January 2021 (**Palmer #2**, CB1717);

(c) third affidavit of Clive Frederick Palmer, 9 June 2021 (**Palmer #3**, CB1727);

(d) affidavit of Anna Alexandrova Palmer of 27 January 2021 (**A Palmer**, CB1720); and

(e) affidavit of Domenic Vincent Martino of 21 January 2021 (**Martino**, CB1677).

85. McGowan relies on the following affidavits:

(a) affidavit of John Robert Quigley, 25 March 2021 (**Quigley**, CB1733);

(b) affidavit of Mark McGowan, 26 March 2021 (**McGowan**, CB1736).

86. Palmer, McGowan and Quigley each gave oral evidence in the proceedings and were cross-examined. Mr Martino and Mrs Palmer were not required for cross-examination.

87. Some general comments on the witnesses' evidence and demeanour follow, noting that *"credit is likely to be a factor in resolving at least some issues in this case"*: *Palmer v McGowan (No 2)* [2022] FCA 32 per Lee J at 47.

Witnesses for Palmer

Palmer (cf. MC [17] – [26])

88. Palmer gave evidence pertaining both to his own claim and that of McGowan. Palmer's evidence concerning his reputation and hurt to feelings was palpably raw and genuine, and virtually unchallenged. Its substance is addressed at [421]-[425] and [438]-[454] below. It is to be believed.

89. Most of the cross-examination of Palmer was devoted to topics presumably thought to be relevant to the allegation of malice raised by McGowan (as Cross-Claimant) in attempted defeasance of Palmer's defence of qualified privilege (reply to attack) to McGowan's Cross-Claim. These are dealt with at [660]-[670] below.

90. During that cross-examination, apparently in that context, it was repeatedly put to Palmer, in numerous different ways, that he was not being frank. For example he was accused of lying (T211.41; see also T258.25), of giving *"knowingly false"* answers (T211.34; see also T249.38 and T258.1), of *"playing word games"* (T232.9), of *"toying"* with questions (T232.9), of offering *"outright silly answer[s]"* (T214.31; see also T218.39 and T232.29), of being *"knowingly evasive"* (T214.31; see also T218.39 and T232.29), of being "*unresponsive"* (T258.28 and T274.3), of uttering a *"furphy"* (T256.34), of *"prevaricat[ing]"* (T258.39), of *"avoid[ing] squarely answering questions"* (T256.39-40), of being *"impertinent"* (T258.1-2), of being *"unwilling to confront the misleading nature of [his] own evidence"* (258.28-30), of "*just fencing"* (T260.37), of *"making up… answers as [he sees his]… tactical advantage may lie from question to question"* (T260.37-38), of giving testimony that is "*grossly irresponsible"* (T 267.19), and of displaying a "*fixed determination to blaggard (sic)"* McGowan (T267.22; see also T268.19-20).

91. In the face of these many provocations, Palmer maintained his equanimity (cf MC [26]), made concessions where appropriate (cf MC [22-23]) and forthrightly defended himself where necessary (see e.g. T236.23, cf MC [26]).

92. The following features of his cross-examination are to be noted.

93. ***First***, Palmer was more than once shown lengthy and complex documents and then required, under the pressure of cross-examination, to find certain detail within them. This was so, for example, of the transcript of evidence given by the Chief Health Officer, **Dr Robertson**, to the Federal Court. When Palmer was unable readily to locate the passages of the transcript which he had regarded as bolstering his view that McGowan had lied about what the medical advice had been in relation to the border closure, Palmer honestly, and without prevarication, admitted as much, whilst quite reasonably reserving the possibility that the transcript did in fact contain material of the kind he had asserted: T265.35-40; 266.1-4; 267.1-4. That stance was a legitimate one (cf MC [24]). As outlined below at [492] – [536], support for the relevant imputations is indeed to be found in the transcript (see esp. CB 713-714 and 717-718). Palmer's answers to interrogatories 2A and 3A also make this clear: see McGowan's Supplementary Tender, MFI 2, pp. 215, 219 (cf MC [24]). Palmer's inability to locate the passages in question, in the pressure of the moment in the witness box, is neither here nor there.

94. ***Secondly,*** some nine and a half pages of transcript are devoted to cross-examination as to what Palmer thought were McGowan's reasons or motives for publishing the sixth matter, having regard in particular to McGowan's prefacing his remarks with the (disingenuous) claim that he was *"clearing up the facts"*. Palmer was forthright in his assessment of those motives (see e.g. T217.1-10). His assessment did not at all amount to a refusal to make an *"obvious concession"* (cf MC [21]). On the contrary, Palmer's assessment corresponds with the submission advanced at [80] above, and also accords with the position Palmer advances in his Reply (that the sixth matter was published for an improper purpose, namely to hurt, harm, damage and discredit Palmer whilst at the same time improving McGowan's own political and electoral position: CB 24). And it is submitted that Palmer's assessment was correct: the sixth matter was merely a piece of political dissembling in the face of the *Amendment Act*'s secret preparation and extraordinary content, as to which see [53]-[80] above.

94A. ***Thirdly***, McGowan's attempt to discredit Palmer (at MC [18]-[19]), by reference to Palmer's genuinely held fears upon reading the *Amendment Act,* should be rejected for the reasons outlined at [662]-[664] below. As there submitted, it is not to the point that not all might agree with Palmer's approach to the process of statutory construction. He read the legislation (admitted by McGowan to be "extraordinary" and "unprecedented"),

formed genuinely held beliefs and fears based on its content, and genuinely feared that other consequences could not be ruled out.

94B. ***Fourthly***, McGowan's attempt (at MC [20(a)]) to discredit Palmer by reference to the possible outcomes of the stymied mediation is also misconceived. Parties to mediation often resolve matters on bases quite different from their opening gambits, and McGowan has no basis for asserting that the possibilities envisaged by Palmer were *"inherently incredible".* See also: [665]-[666] below.

94C. ***Fifthly***, McGowan ascribes to Palmer a belief that McGowan was "*literally* at war with him" (MC [20(b)]), and then attacks that supposed belief as also being *"inherently incredible".* It is clear, however, from the cross-examination referred to at MC [20(b)], that Palmer is not propounding such a "literal" belief; rather, he is simply making the point that he was amazed by McGowan's exaggerated bellicosity.

94D. Moreover, it might be noted that in fact McGowan's language did often come very close to what he now submits is "incredible". Thus, for example, CB1215 records the content of one of McGowan's Facebook posts of 13 August 2020, in which he declared (after again promoting the false assertion that the BSIOP proposal had been *"rejected"* because it was *"flawed"*): "*There's [sic] two sides here – the people of Western Australia, 2.6 million of us – versus one individual who wants to take us for $30 billion… And you have to pick a side."* McGowan was there pitting the whole State against Palmer, in a binary and existential state of conflict and hostility. That sounds very like a description of a war. That is the sort of language that McGowan chose to use, in the context of the extraordinary nature of the Amendment Act then being rushed through the parliament. It is not surprising that Palmer was astonished by the ferocity of what was being done to him. McGowan's attempt to discredit Palmer in the manner suggested in MC [20(b)] ought to be rejected.

94E. As to MC [22] and MFI 12 p 241, the document signed by Palmer did not include any $30 billion figure.

<u>Mrs Palmer & Martino</u>

95. Neither Mrs Palmer nor Martino was required for cross-examination. Their evidence, as to Palmer's reputation and hurt to feelings, was unchallenged.

Witnesses for McGowan

McGowan

96. McGowan is the Premier of Western Australia. He is a qualified lawyer. He graduated with a BA/LLB, and practised as a lawyer in the navy for 7 years (T316.7-21).

97. McGowan's evidence on various particular topics is discussed elsewhere in these submissions. However, two recurring features of his evidence under cross-examination are noted at this stage.

98. ***First*,** there were some occasions where, it is submitted, his evidence can only be treated as having been knowingly untruthful.

99. One striking example was his insistence that he had told the public what Dr Robertson's advice had been as at 2 April 2020, and again as at June-July 2020, when he plainly had not done so and indeed had quite misrepresented that advice: see [495]-[526], and esp. [520]-[521] below.

100. Another example came early in his evidence in chief. In the course of alleging (on no basis other than wild speculation) that Palmer "*creates a band of angry people in our community who… get themselves so wound up that they do crazy things in relation to me and my family",* McGowan claimed that one example of this was a person deliberately ramming a car into a power pole near his home: T304.36-45.

101. When he was asked, in cross-examination, whether in fact the police had investigated that incident at the time and had issued a public statement to the effect that it had not constituted a threat to McGowan and was purely coincidental, McGowan at first answered, *"Not to my knowledge"*: T392.35-41. At T394.15, he went further and insisted that it was *"not correct"* to say that the police had issued such a public statement. Finally, even when he eventually conceded that there had been a police statement, and that he had known of it at the time (T393.20-394.22), McGowan nevertheless continued to assert that the incident was "*contributed to*" by Palmer: T394.24-31.

102. All of those answers were untruthful.

103. Another example also emerged in chief, when McGowan claimed that the High Court had upheld the validity of the provisions in the *Amendment Act* relating to criminal immunity (provisions which underlie the imputations and contextual imputations going

to that topic). In this regard, McGowan asserted in chief, as a factor relevant to his claimed hurt to feelings: "*his suggestion that somehow I was engaged in criminal conduct on an ongoing basis has a particular offensiveness to me because he knows, and the High Court so held, that he was wrong*" (T308.31-33).

104. When it was put to him in cross-examination that, by that evidence, he was saying "*that the High Court upheld [his] position in relation to the provisions in the Amendment Act about criminal immunity*" (T395.29-39), he agreed that this was so. However, in fact, as he later accepted, "*the High Court did not make any finding or ruling one way or the other on whether the provisions of that criminal immunity were valid*" (T395.43-45).

105. Another example concerned the topic of his use of taxpayers' money to fund his cross-claim against Palmer (CB 1523-1524), something he falsely claimed was "*not of [his] choosing*" (CB1527-1527B). In the face of public criticism of his doing so, McGowan had claimed in the media, untruthfully, that his cross-claim was part of his defence (CB 1523), an untruth he sought to perpetuate in cross-examination. Although he conceded that his defence was actually one of qualified privilege, and that his defence made no reference to a cross-claim, and that the cross-claim concerned completely different publications, and that in his cross-claim he was in effect a plaintiff (T316.32-318.15), McGowan obstinately refused to accept that his statements in the media were untrue other than "*[p]erhaps in a technical legal way*": T320.1-3; see also T321.9-34.

106. He also refused to accept, despite his legal training and experience, that he well knew (as, it might be added, his lawyers must surely have reminded him at the time) that were he to lose his cross-claim, in the ordinary course costs would follow the event and the taxpayers would have to pay Palmer's costs of the cross-claim: T322.1-24. Those answers, as was put to him, were not candid.

107. McGowan did (somewhat grudgingly) concede that a loss on his cross-claim would at least mean that the taxpayers would have to pay his own costs (T321.40-47), and that the taxpayers (and not himself) were therefore carrying the financial risks of his cross-claim (T322.26-29, 323.7-13). But he refused to concede that to gamble with taxpayers' money in this way was dishonourable on his part: see T322.46-323.24. His evidence on this topic did him no credit.

107A. There is no evidence that *"McGowan's legal experience was confined to military law*": *cf* MC [41], [43]; see T316.17-34, 317.44-47; 320.12-15.

107B. McGowan's motivation in commencing his defamation proceedings, by his cross-claim, was that it would enable him to hedge against the prospect that Palmer might have success in the proceedings which he (Palmer) had initiated: see T321.1-11; 322.26-323.15. McGowan's focus seemed to be on the "big cheque" that taxpayers would get if he won. See [694] below.

107C. Yet McGowan attempted in cross-examination to suggest that he had no choice but to procure the State to fund his cross-claim, simply because he could not afford to fund that cross-claim himself: T322.31-40. Of course, McGowan did have a choice, *viz.* not to bring the cross-claim at all.

107D. Only after being confronted by Palmer's submission at [107] above has McGowan belatedly sought, on 6 April 2022 at MC [44]-[45], to fit the State's funding of his cross-claim within the parameters of some July 1990 guidelines as to Ministers "involved in legal proceedings" (Ex 15 item 118).

107E. However, the funding of McGowan's cross-claim is ill-fitted to those guidelines. The guidelines state that proceedings *"claiming damages for torts (especially defamation)"*, such as McGowan's cross-claim, are personal actions and that the legal costs associated with them are to be borne by the litigant himself regardless of the outcome, unless *"special circumstances"* exist (for example, *"where the prime motive for taking the proceedings is to make clear the truth concerning particular Government decisions"* – not so here), in which case the Cabinet *"might"* authorise the commencement of the action and an indemnity as to legal costs. Applications for such an indemnity are to be accompanied by an assessment prepared by the Attorney-General.

107F. McGowan was cross-examined on this point on 7 March (T321-3). His cross-examination continued on 9 March. He was not re-examined. Quigley was in the witness box later on 9 March, and again on 8 April.

107G. There is no evidence to suggest that, at the time the funding decision was made, any regard was had to these guidelines, or that any "special circumstances" existed (and if so, what they were), or that the Attorney-General (Quigley) had prepared any assessment of McGowan's application (if indeed an application were made). An inference is available that any evidence that McGowan could have adduced about the guidelines would not have assisted him in refuting the allegation that he acted dishonourably.

107H. The guidelines provide no answer to the submissions made at [107] above; if anything they underline them.

108. ***Secondly*****,** he frequently refused to make obvious concessions and/or resorted to linguistic nit-picking so as to evade having to give a direct answer.

109. An early example was his resort to conceding only, and repeatedly, that the word "necessary" was not to be found in Dr Robertson's advice of 29 March 2020 (CB349) – while simply refusing to confront the substantive questions as to whether, by any language at all, Dr Robertson had given advice to the effect that a hard border was necessary: T332.34-334.26.

110. Similarly, once he realised that the 29 March email was in terms which did not suit his position, he made several attempts to suggest that that written advice was not the only advice that he had, and/or that he also had oral advice from Dr Robertson. Repeatedly he sought to leave open the possibility that he might be able to avoid, by this means, the problems which the 29 March email had for him. See for example T330.29-42, 333.3-4, 323.23-37, 348.41-47.

111. Later, 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, offering responses such as "*it would have been very bad/ suboptimal for the State*" (T471.3 and T471.21-36) – notwithstanding his acceptance that he "*would have been running for office in an environment where there had been a terrible result*" (T471.14-15), occurring "*on his watch*", based on a decision of his predecessor with which he had "*thoroughly agreed*": T471.8-9, T471.17-19).

112. And despite being himself the responsible Minister, and despite the imminence of the mediation as at August 2020 when the Amendment Act was introduced, McGowan insisted that he *"did not know"* what the State's position would have been in such a mediation: T472.23-39.

<u>Quigley</u>

113. John Quigley is the Attorney-General of Western Australia and its first law officer (T501501.21-39; CB 1733 [1]). Prior to his election, in 2001, to the Western Australian Legislative Assembly, he was a barrister and solicitor having been admitted to practice in 1975: CB 1733, [2].

114. Quigley accepted that, among his responsibilities as Attorney-General, he is to ensure that the State, and he as Attorney-General, meet the highest ethical standards in conjunction with any proceedings with which the State is connected: T501.41-43. Quigley accepted that among those standards were "*honesty and fairness and the absence of deceit*" in "*proceedings not just before the courts but before other tribunals such as arbitrators*": T502.1-5. Quigley readily agreed that it is the obligation of the State to be both "*a model litigant… and a model commercial counterparty in its business dealings*": MFI-9, p. 33, T502.30-33.

115. From this seemingly admirable starting point, Quigley proceeded to give some quite extraordinary evidence. The various positions that he chose to adopt, some of them astounding in their departure from the standards referred to in the preceding paragraph, were so extreme that the submission must be made, and is made, that this witness, the Attorney-General, is not to be believed.

116. Quigley's affidavit evidence was directed to one sole proposition, namely the assertion that there had been no "Attack Plan" as alleged by Palmer in his Reply: see Quigley [4] – [10]. In advancing that proposition, Quigley claimed at [8] – [10] that in his ABC radio interview he had only been recounting in hindsight what had (apparently) happened, rather than explaining that what had happened was just what he and McGowan had actually planned to happen.

117. In that context, three aspects of Quigley's evidence may here be noted, which bear upon both the reliability of his evidence generally, and his conception of what is meant by the concepts of "honesty" and "high ethical standards".

118. ***First***, notwithstanding the obligation on the State to participate in mediation in good faith, an obligation imposed on it both by the mediation agreement and by reason of its role as "*a model litigant… and a model commercial counterparty in its business dealings*", Quigley told the media on 12 August 2020 that the State's approach to mediation would have been this: "*And the State of Western Australia's position: we don't offer $1, and never will. So we'd be going along to the mediation say we don't offer you $1*" (CB 1183D, lines 213-214).

119. When pressed on these matters, Quigley doubled down, making it clear that in his view the State should not have made any offer, monetary or otherwise. He said that in his view the State should not have attempted to engage in any attempt to reach a consensus

settlement at a mediation, even though that was flatly contrary to the good faith requirement: T512.13-21.

120. ***Secondly***, as Quigley well knew, pursuant to the *Commercial Arbitration Act*, the entirety of the arbitration proceedings, including the quantum of damages claimed by Palmer's companies, was confidential: T513.33-41. So Quigley simply used the cloak of parliament to disclose the amount claimed (T513.43-47, and see CB1170) and, having done so, gave a press conference in which he made the following quite astonishing remarks (CB1183B, lines 105-112):

> "*I would like to preface my remarks by saying this: firstly, under the Commercial Arbitration Act, the proceedings are strictly confidential, are strictly confidential. So I'm not at liberty… here in the press conference to ventilate the matters before the Arbitrator, or otherwise I'll be in breach of that law, and, as Attorney General, I will not do so. However, in Parliament yesterday, during my second reading speech I detailed the figure. And so I'll refer to my second reading speech if I may…*"

Thus, as Quigley willingly agreed, by that simple device, knowing that the press could readily access *Hansard*, he brought about the public disclosure of matters in respect of which he was bound by legal obligations of confidence: T516.3-8. Quigley rejected the notion that his conduct was dishonest or slippery (T516.10-18), but such descriptions are apposite and inescapable.

121. ***Thirdly,*** on the morning of 13 August 2020, the *Amendment Act* having passed the lower house and being about to go to the upper house later that day, Quigley gave the interview on ABC radio to which reference has been made above at [73]-[76]. As noted in those paragraphs, flushed with his own success in having outwitted Palmer, he outlined, in considerable unguarded self-congratulatory detail, the tactics that he and McGowan had used to ensure that the *Amendment Act* was passed prior to Palmer's registration of the two arbitral awards. See CB 1206A.

122. During cross-examination, however, at T519.32-538.38, Quigley gave diametrically contradictory evidence.

123. He accepted (see T519.37-520.31) that what he had said in the interview was indeed to claim that he and McGowan had engaged in tactics of the kind summarised at [75] above. But he then claimed that the explanation he had given to the public on radio about those tactics was "*completely false*" (T524.13-21).

124. He blithely accepted that his version in the witness box was "*truly spectacularly different*" to what he had said at length and in detail in the radio interview: T524.13-18.

125. In particular, Quigley renounced the claim made by him in the interview that he and McGowan had "*identified a weakness*" in Palmer's position, namely Palmer's not having registered the arbitral awards, and that they had planned to exploit that weakness by secretly preparing legislation to be enacted prior to Palmer's realising he should do so: T523.35-T524.11. He said in his oral evidence that he did not even know about the topic of registering the awards, at all, at the time he gave the interview: see T524.24-30, 525.34—35, 527.44-46.

126. He insisted that what he had said in the interview, namely that such a *"weakness"* had been identified, and that that had led to the preparation of the legislation, was *"completely and utterly false":* T528.3-529.10. He repeatedly stressed that his *volte-face* in the witness box should be preferred because he was now on his oath (apparently accepting (it would appear) that when not on his oath his truthfulness could not be assumed): see T523.36, 524.10, 524.14, 524.24, 529.12, 530.14, 530.31, 533.40, 534.36, 537.39, 538.2, 538.5, 538.9, 538.32, 538.35.

127. That evidence simply beggars belief.

128. Not even McGowan went so far as to resile from the accuracy of what Quigley had said in this ABC interview about identifying the "weakness" in Palmer's position namely his not having registered the awards, and about the crucial importance of getting the legislation passed before Palmer thought to do so. Quite the contrary, McGowan accepted that what Quigley said in the interview on those topics was accurate: see eg T415.13-416.4; 422.44-423.20.

129. McGowan also agreed (T421.37-422.15): that in the interview Quigley had been boasting about the success of the tactics they had used; that he and Quigley **had** planned their strategy "like part of a chess game or a boxing match", in the context of having identified that "weakness"; and that part of the strategy had been to "wrongfoot" Palmer just as Quigley had explained in the interview.

130. Quigley's evidence flatly contradicted that of McGowan, as well as contradicting his own unambiguous, contemporaneous and voluntary account in the interview itself.

Quigley's supplementary evidence on 8 April 2022

130A. On 8 April 2022, Quigley was "recalled" for "re-examination". Quigley wished to change certain answers he had given in evidence on 9 March 2022 (see T601.42-43 and T604.41-44).

130B. At T604.45, Quigley said this:

> *"[On 9 March] I gave evidence that I first became aware of the risk of the registration of the arbitral award on the morning of Wednesday 12 August 2020. I'm now aware I first became aware of the risk of the registration of the arbitral award – and I can't give you the precise time, but some time before the cabinet meeting which was convened at approximately 4 pm on the previous evening, that is, on Tuesday the 11th."*

130C. Quigley's second appearance in the witness box saw both his reliability and his credibility go backwards, not forwards.

130D. At the very outset, even though his return to the witness box was at his own request, for the express purpose of correcting "mistakes" (T547.40), Quigley mis-stated his own previous evidence that he said he wanted to change. He had <u>not</u> given evidence, on 9 March, that he first became aware of the risk of registration on the morning of 12 August 2020. Rather, his evidence on 9 March had been that he became aware "*earlier than the evening – like, 3 in the afternoon, after Question time or something like that*" (T526.35) on either the "*12th or 13th*" (T527.27).

130E. Then, when pressed in cross-examination as to just how long before 11 August he had become aware of the risk of Palmer registering the awards, Quigley:

(a) first said, repeatedly, that he was unable to recall; indeed, he could not even say whether it was hours, days, weeks or months prior to the 11 August Cabinet meeting; but he mused that it would not have been months (T631.36-T632.5); but then

(b) only a few minutes later (at T640.40), readily agreed that "*one of the reasons why [he was] keeping it all secret in June, July, August 2020 or thereabouts was because if Mr Palmer heard about it, [he] might register the awards*". In other words, he was indeed aware of it for months.

130F. This radically different evidence directly contradicted Quigley's now admittedly false ("*all wrong*" / "*completely wrong*") evidence on 9 March to the effect that "*he hadn't even turned his mind to registration / didn't even think about registration"* of the awards

(T636.21-44) at the time he gave his radio interview (notwithstanding his having boasted on radio that he had indeed identified this very weakness in Palmer's position).

130G. Quigley had no choice but to concede that the account he gave in the radio interview in this regard was not "*completely and utterly false*" – as he had insisted on 9 March – but was, in fact, "*completely and utterly true*" (T639.4-13). See also: T642.

130H. In numerous other respects, Quigley's evidence was that he just had no recollection of various matters, even though they were subjects to which his original affidavit, his oral evidence on 9 March and/or his further evidence on 8 April (instigated and brought about by him) centrally related: see for example T635.11-32.

130J. Quigley claimed that his ability to prepare for giving evidence in this trial was adversely affected because *"shortly before"* 9 March 2022, Clayton Utz told him that a *"writ for $50 million"* had *"just been served"* on Mr Egan (T605.40-42, 606.3-8). However, this Court's records for NSD54 of 2022 show that those proceedings were commenced on 31 January 2022 and that the solicitors for both Quigley (Jones Day) and Mr Egan (Clayton Utz) had filed notices of address for service on 8 and 9 February 2022 respectively, a month before Quigley gave evidence on 9 March. See T611.20-46.

130K. The Court should regard with considerable scepticism any of Quigley's explanations about his state of mind and preparation leading to any of his evidence.

130L. Quigley's supplementary evidence only serves to emphasise why, save for matters independently corroborated or adverse to his (or McGowan's) interest, none of his evidence can be relied upon. His was not merely the *"silly"* evidence of a bumbler who was *"not dishonest"* but merely *"all over the shop"* (cf 677.16-21). It was the evidence of someone who, on 9 March, whilst weaving his web of untruthfulness became entangled, and on 8 April in his unseemly attempt to extricate himself became further entangled.

130M. None of his evidence can be relied upon at all. In particular, he lied when he insisted (both on 9 March and on 8 April) that he had not meant what he said in the radio interview about what the (successful) tactics had been. The blatant untruthfulness of that evidence is revealed by his admitting that when speaking of the "tactics" involved in a boxing match he was speaking metaphorically: see T642.41 - 643.43). Indeed he was: it was a metaphor for the tactics comprising the Attack Plan that he and McGowan had

devised and implemented. His scrambling attempt to limit the metaphor to part but not all of those tactics (T644.1-39) is utterly unconvincing: see in particular T644.29-32.

B. THE PRIMARY PROCEEDINGS: PALMER'S CLAIM

B1. PUBLICATION AND REPUBLICATION [FLI 1] (See MC [54] – [100])

First - Fifth Matters

Publication

131. Palmer's position is that the admissions in the FAD at paragraphs [2a], [4a], [6a], [8a] and [10a] (CB 12-16) are sufficient to establish publication.

Scope of the "matters"

132. In his Defence (CB 23), McGowan admits he spoke the words actually sued on by Palmer, being the first five matters complained of by him (namely parts of four separate press conferences), but *"says further he spoke other words on that occasion, a transcript of which will be relied upon at the trial of this proceeding":* Defence paras 2(a), 4(a), 6(a), 8(a) and 10(a).

133. This gave rise to argument, both in the parties' written opening outlines (**PO** and **MO**) and at trial, as to the scope of the first-fifth matters. This occurred in circumstances where McGowan had not at any stage applied to "strike in" any other material additional to any of the "matters" sued on by Palmer (c.f. *Hayson v Nationwide News Pty Ltd* [2019] FCA 81 at [9]), and had only very recently (in 2022) identified the specific additional material which he now contends should be compulsorily added to each of the first five "matters", either as context or as matter.

134. At the Court's request (T92.27-41), the parties have prepared, and provided to the Court, a document styled **Agreed and Disputed Matters** dated 11 March 2022 (**ADM**).

135. In this document the parties set out their positions as to the extent to which any of the first-fifth matters should or might be augmented by additional words spoken by McGowan, whether as forming part of the matter or constituting context.

136. Palmer contends for his version of the matters on the following bases, adopting the written submission he furnished to the Court on 14 February 2022 (see T72), as varied during oral argument on that day and the following day (see T79-80, 104, 114, 120).

137. In *Hayson v Nationwide News Pty Ltd* [2019] FCA 81 at [9], Bromwich J summarised the principles to be derived from the authorities including *Phelps, Beran* and *Obeid*, as follows (emphasis added):

(3) The requirement to read a matter that has been published as a whole means that an allegation of defamation cannot be pleaded in a way that denies its overall meaning. Thus, the pleading must include *"every passage which materially alters or qualifies the complexion of the imputation complained of": Gordon v Amalgamated Television Services Pty Ltd* [1980] 2 NSWLR410 per Hunt J at 413[6], endorsed in *Australian Broadcasting Corporation v* ***Obeid*** [2006] NSWCA 231; 66 NSWLR 605 at [26(a)]. The pleading must place the parts relied upon in their full context **if that context is capable of materially affecting the imputations relied upon:** *Obeid* at [26(e)-(f).

(4) Beyond the requirement to plead a matter complained of contextually, an allegation of defamation may be cast as a matter of forensic choice (and, it may be said, risk: see *Obeid* at [4]). As Simpson J pointed out in *Phelps v Nationwide News Pty Ltd* [2001] NSWSC 130 at [22] (quoted and effectively applied in *Beran v John Fairfax Publications Pty Ltd* [2004] NSWCA 107 at [54]-[56], and endorsed more recently by McCallum J in *Gav v Ryde Ex Services Memorial and Community Club Ltd* [2018] NSWSC 621 at [7]):

> Individual circumstances will dictate whether a particular pleading will be permitted to stand. However, it is to be borne in mind that, subject to unfairness amounting to abuse of process, or unreasonableness, or the inability of the publication to sustain the form of pleading chosen, **it is generally for the plaintiff to select the manner in which he/she/it wishes to present a case**. It is **only** if the plaintiff's selection of the mode of pleading is **untenable** for one of those reasons that it will be struck out. By this I mean that where, for example, a plaintiff elects to proceed as though a number of individual parts of the matter complained of together amount to a composite publication, it is only if that approach is not reasonably open, or creates unfairness of such a degree as to constitute an abuse of process, that the pleading will be struck out. Similarly, where the plaintiff elects to proceed as though each were a separate publication, it is **only** where that view is not reasonably open (or where unfairness amounting to abuse of process would result) that that pleading will be struck out. Within those boundaries, a plaintiff is entitled to mark out the playing field.

(5) Thus, as pithily expressed by Hodgson JA in *Obeid* at [2], a person bringing a defamation suit *"**cannot be compelled** to include additional material in the statement of claim **unless** (1) this additional material is part of what can reasonably be regarded as one publication that includes the material relied on by the plaintiff, and (2) the material relied on by the plaintiff **must** reasonably be regarded as part of a publication that includes the additional material".*

(6) The compulsion to plead more than has been forensically chosen will **only** arise if the **only** reasonable view that is open is that the selection did not provide the *"whole of the context"* from which the tribunal of fact, considering the matter from the perspective of an ordinary reasonable reader, would be concerned to determine the meaning of what was published: *Obeid* at [69] …

138. Palmer did not object to the whole of the extracts now propounded by McGowan being received into evidence, at least provisionally. He submits that (with the qualifications noted below) they should not be substituted for the pleaded "matters", but he accepts that:

(a) it may be appropriate that his Honour know what question preceded particular words spoken by McGowan; and

(b) the whole of the extracts might be relevant to other issues such as reasonableness or malice.

<u>First and second matters: 31 July 2020 press conference (CB 933 – 933C)</u>

139. McGowan submits, at MO [59] – [62], that:

(a) the two matters were spoken on the one occasion, and in reverse order to that in which Palmer has pleaded them;

(b) the first and second matters should be combined as one, and (as so combined) are "properly constituted by" the whole of lines 1-94; and

(c) the first and second matters as pleaded are intrinsically linked, both temporally and in terms of subject matter.

140. As to the question of reverse order: the order in which they are pleaded is immaterial, if they are properly, or may properly be, treated as separate matters.

141. Lines 3–6 (pleaded by Palmer as the second matter) stand alone. A question is asked (lines 1–2) about an imminent call by Palmer for "*unity for the nation".* Essentially ignoring that topic, McGowan gratuitously launches into the blunt and unprompted accusation that *"Mr Palmer is the enemy of the state",* followed by the reiteration and expansion of that attack.

142. Palmer does not oppose the addition of lines 1-2 to this second matter: see T79.6-44.

143. The next question, at lines 7–8, moves to another topic, namely what might be motivating Prime Minister Scott Morrison and the Commonwealth. The answer to that question occupies lines 9–27, in which Palmer is not mentioned, and the focus is

generally on Commonwealth–State relations, the hard border and the Commonwealth's involvement in the High Court proceedings. Those lines do not reasonably "contextualise" either the first or second matter.

144. At line 28, a question is asked about *"the politics of this",* again apropos the Federal Government's position. In lines 31–35, McGowan responds in relation to that topic. Then, half-way through line 35, he moves away from that topic and changes the subject back to Palmer, and almost immediately, at lines 35–38, repeats the gratuitous attack he had made at lines 3–6.

145. Palmer has sued on those lines 35–38, which are pleaded as the first matter (even though, as can now be seen, the words in question were spoken later in the press conference than the words sued on as the second matter, namely lines 3–6). His choice of those four lines as the relevant matter is not unreasonable, and does not give rise to any unfairness.

146. However, Palmer would be content for the whole of lines 28-39 to constitute the first matter: see T80.21-24, 104.34-46.

147. Lines 40-49 concern the Commonwealth's having joined the Federal Court proceedings in support of Palmer. Palmer is mentioned, and McGowan does criticise Palmer. But this passage does not "materially alter or qualify" the complexion of the relevant imputations. Were they sufficiently germane to satisfy the tests for compulsory inclusion as part of the "matter" (as referred to above), the make little difference to its complexion: McGowan more or less repeats himself: see T80.25-27.

148. Lines 50 to the end do not require or warrant inclusion. The introduction of Dr Robertson signals a shift in the subject matter, to a discussion about the motivations for and desirability of a hard border rather than a travel bubble. This additional material is (relevantly) tangential; it does not "materially alter or qualify" the complexion of the relevant imputations.

<u>Third matter: 3 August 2020 press conference (CB 1001 – 1001B)</u>

149. McGowan makes the following submission (at MO [75]):

(a) The whole of lines 1–86 should be the "matter";

(b) Those 86 lines concern *"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;

(c) "For that reason, it contains the context to which the ordinary reasonable listener would be taken to have regard".

150. McGowan now presses for only lines 1-48 to be treated as this "matter".

151. It is not enough that the additional material provides "context" in the sense suggested (ie in effect as background). The additional material must provide context in the sense contemplated by the authorities (see [137] above).

152. Palmer has sued on the material in bold type in lines 31-37, which concern the discrete topic of Palmer's supposedly seeking to promote hydroxychloroquine as a cure for COVID when it was supposedly established by "*all the evidence*" that it was not a cure and that it was "*actually dangerous*".

153. Palmer agrees that the words in line 31, *"Just to pre-empt your question, Peter, look,"* should also certainly be part of this matter.

154. Lines 1–31 (up to *"do it properly."*) refer to the incorrect filling out of a form by Palmer's pilot (a topic treated with some evident hilarity by both the questioner/s and McGowan). Line 49 to the end refers to Palmer's High Court challenge to Western Australia's hard border.

155. None of lines 1–29, or line 49 to the end, relates to or would be capable of materially affecting the three imputations, which are specifically linked to the hydroxychloroquine topic. None of that material should form part of the "matter".

156. Palmer acknowledges that his name does not appear in the material in bold type in lines 31–37. However, no identification point has been raised in McGowan's Defence. On the contrary, the pleading in paragraph 6 of the Statement of Claim, that this "matter" was published *"of and concerning the Applicant",* is not denied, or the subject of a non-admission, or otherwise traversed.

157. Nevertheless, Palmer does not oppose the addition of lines 30–31 (*"…if you can't fill out a form how can you fly a jet. Ah but in any event Mr Palmer didn't do it properly*) to the matter: see T 105.22-23. This disposes of the identification point.

158. The position with respect to lines 38-48 is slightly different. Those lines do relate to the hydroxychloroquine topic, although whether they meet the threshold tests for

compulsory inclusion, as noted above per *Phelps, Beran, Obeid* and *Hayson,* may be doubted.

159. Nevertheless, Palmer would not oppose lines 38-48 being included as part of this "matter": see T 105.23-24.

Fourth matter: 5 August 2020 press conference (CB 1017 – 1017A)

160. McGowan's submission are at MO [82] – [84]. He submits that:

(a) The whole of lines 1–47 should be the "matter";

(b) Those 47 lines comprise the "section" relating to *"Mr Palmer's High Court action to bring down the hard border",* and provide "*the relevant context, including … reporters' reference to Mr Palmer's tweets alleging that Mr McGowan was a dictator"*;

(c) "For that reason, it contains the context to which the ordinary reasonable listener would be taken to have regard".

161. Again, it is not enough that the additional material provides "context" in the sense suggested (ie as background). The additional material must provide context in the sense contemplated by the authorities.

162. Palmer has sued on the material in bold type in lines 29–33, which concern the discrete topic of Palmer's supposedly using Western Australian money to try to damage the health of West Australians.

163. McGowan suggests that the material in bold type begins part-way through a sentence. As transcribed, that is so; however, the recording of the words as spoken would suggest otherwise. Nevertheless, Palmer would not resist the addition of lines 27–29: see T114.22-30.

164. Palmer opposes the addition of the balance of lines 1–47.

Fifth matter: 7 August 2020 press conference (CB 1049 – 1049E)

165. McGowan's submission are at MO [87] – [90]. He submits that:

(a) The whole of lines 1–171 should be the "matter";

(b) The whole 171 lines comprise the "section" relating to *"Mr Palmer's High Court action to bring down the hard border"*;

(c) "For that reason, it contains the context to which the ordinary reasonable listener would be taken to have regard".

166. Palmer has sued only on the material in bold type in lines 41–42, where McGowan describes Western Australia as being *"at war with"* Palmer.

167. In this instance, Palmer accepts that some of the material for which McGowan contends might reasonably be regarded as providing relevant context, in the *Hayson* sense referred to above. Palmer would accept that the whole of lines 1–43 may be treated as constituting this "matter": see T120.1-11.

168. As to all of the matters, it is Palmer's submission that questions from journalists can only reasonably be considered context.

Republication

169. It is common ground that the first-fifth matters were, to greater or lesser extent, republished in the mass media: see [21(c)] above.

170. Various particular republications are in evidence:

(a) First matter complained of: CB934 – 938A;

(b) Second matter complained of: CB939 – 940;

(c) Third matter complained of: CB1002 – 1003C;

(d) Fourth matter complained of: CB1018 – 1020;

(e) Fifth matter complained of: CB1064 – 1064B.

171. Moreover, as observed at [18] above, Palmer relies on the further facts relating to the extent of republication (in whole or in part) of Palmer's first-sixth matters that he sets out in the **attached** document, **Republication of Palmer's Matters**.

172. The fact of such subsequent republications (unrelated to the anterior question concerning the nature and occasion of the publication by McGowan – as to which see [207]-[235] below) is relied upon by Palmer as to damages only.

Sixth Matter

173. The admission at paragraph 12(a) of the FAD (CB 16), that McGowan "*is responsible as publisher for the conduct of his staff in uploading to Facebook*", is sufficient to establish publication of the sixth matter. Whether McGowan approved it before

publication (cf FAD 12(b)(i), CB 16) is neither here nor there, especially when it appeared under his name on his own Facebook page.

174. McGowan says at paragraph 12(b)(iii) of the FAD (CB 16) that he does not know and cannot admit that the post was downloaded and read across Australia. This goes essentially only to damages, but the admissions concerning circulation and readership suggest that the probability that the sixth matter was read and downloaded is so high that the Court will not need to trouble itself with this issue.

175. See also, in this regard, the Agreed Background Facts at para 62 (CB 119). As at the date of the Post, McGowan had 240,000 Facebook followers. The individual post recorded more than 57,000 *reactions* and had a *reach*, being the number of persons who saw the post at least once, of more than a million persons.

B2. THE IMPUTATIONS [FLI 2.1 – 2.6]

176. By separate determination (see [2] above), this Court has found that the six matters upon which Palmer has sued convey the respective imputations identified below.

177. McGowan now accepts that each of these imputations is defamatory of Palmer: see T284.14-18; and see also MO at [51] and Factual and Legal Issues for Determination 2.1-2.6.

First matter

178. Imputation 3(d) is: "*The Applicant represents a threat to the people of Western Australia and is dangerous to them*".

179. Imputation 3(e) is: "*The Applicant represents a threat to the people of Australia and is dangerous to them*".

Second matter

180. Imputation 5(b) is: "*The Applicant represents a threat to the people of Western Australia and is dangerous to them*.

Third matter

181. Imputation 7(a) is: "*The Applicant promotes a drug which all the evidence establishes is dangerous*".

Fourth matter

182. Imputation 9(b) is: "*The Applicant selfishly uses money he has made in Western Australia to harm West Australians*".

Fifth matter

183. Imputation 11(b) is: "*The Applicant represents a threat to Australians and is dangerous to them*."

Sixth Matter

184. Imputation 13(b) is: "*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*".

185. Imputation 13(c) is: "*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".*

As to all six matters

186. It is submitted that the meanings which the Court has found to have been conveyed by these six matters about Palmer are not only defamatory, as is now conceded, but grossly so. If no defence is made out, they should sound in substantial damages.

B3. DEFENCES OF QUALIFIED PRIVILEGE [FLI 3 – 5]

187. The FAD advances three separate defences of qualified privilege, at paragraphs 14(b) and 14(c) (CB 17). Paragraph 14(b) advances pleas of common law qualified privilege or alternatively privilege under s 30 of the *Defamation Act*. Paragraph 14(c) pleads *Lange* qualified privilege.

188. As to common law qualified privilege, it may be noted at the outset that the particulars relied upon by McGowan in his FAD (at CB 20) include the following (emphasis added):

> *31. The words spoken by the Respondent together with the First to Fifth Matters Complained and the Sixth Matters Complained of was published to persons:*
>
> *(1) enrolled as electors of the Legislative Assembly of Western Australia; and*
>
> *(2) resident in the state of Western Australia.*

32. In the premises, the Respondent had an interest in disseminating, and members of the public had corresponding interest, or apparent interest in receiving the Matters Complained Of.

189. McGowan, as is apparent, (unsurprisingly with respect) does not plead or particularise any "duty" on his part to publish (although, in his Opening Outline (MO [130]), he refers to "duty or interest").

190. The "interest" relied upon by McGowan, on the part of recipients, is an "interest" on the part of "members of the public" generally: particular 31(2).

191. There is no evidence as to whether any of those present at any of the relevant press conferences had either of the characteristics set out in McGowan's particulars 31(1) and (2).

Common law qualified privilege (See MC [130] – [154])

Principles

192. Adopting the formulation of French CJ, Gummow and Hayne JJ in ***Aktas*** *v Westpac Banking Corporation Ltd* (2010) 241 CLR 79 at [14] (footnotes omitted), the defence of common law qualified privilege may be expressed thus:

> *As a general proposition, the common law protects the publication of defamatory matter made on an occasion where one person has a duty or interest to make the publication and the recipient has a corresponding duty or interest to receive it; but the privilege depends upon the absence of malice.*

193. As to "interest", in ***Bashford*** *v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366, McHugh J restated the general common law principle in this way at [53]:

> *At common law, a defamatory statement receives qualified protection when it is made in discharge of a duty or the furtherance or protection of an interest of the maker of the statement or some person with whom the publisher has a direct business, professional or social connection, and the recipient of the statement has a corresponding duty to receive or interest in receiving it.*

194. As French CJ, Crennan and Kiefel JJ held in ***Cush v Dillon*** (2011) 243 CLR 298 at [11] (citing ***Roberts v Bass*** (2002) 212 CLR 1 at 26 and ***Adam v Ward*** [1917] AC 309 at 334 per Lord Atkinson), *"[r]eciprocity of duty and interest, as giving rise to a privileged occasion… is the hallmark of the common law defence"* (in contrast to the statutory defence where the reasonableness requirement is paramount: see below).

195. As their Honours also noted in *Aktas* at [14]:

> *The requirement of reciprocity of interest generally denies the common law privilege where the matter has been disseminated to the public at large.*

196. This feature of the reciprocity requirement has often been noted: see for example ***Theophanous*** *v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 133; ***Stephens*** *v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 261; *Lange* at 570, 572; *Bashford* at [26]; ***Bennette*** *v Cohen* [2009] NSWCA 60; (2009) Aust Torts Reports ¶82–002 at [10]; ***Wraydeh*** *v Fairfax Media Publications Pty Ltd* [2021] NSWCA 153 at [48].

197. Indeed, the absence of such reciprocity in media cases lies behind the enactment of the statutory defence, as frequently observed in cases such as those referred to in the previous paragraph.

198. The requirement of reciprocity confines the privilege to "strict limits" in other respects also: see for example *Bashford* at [136], [140] per Gummow J; *Bennette* at [10], [13] – [25] per Ipp JA.

199. On the one hand, either a publisher must be under a legal or moral duty to disclose the information (usually to protect the interests of the recipient), or (in a case where a publisher seeks, as here, to rely not on a duty but on what are said to be reciprocal "interests") the disclosure must be necessary in the furtherance or protection of legitimate interests of the publisher: *Bashford* at [53] per McHugh J; ***Papaconstuntinos*** *v Holmes a Court* (2012) 249 CLR 534 at [33]; *Cush v Dillon* at [12]; ***Guise v Kouvelis*** (1947) 74 CLR 102 at 111-112 per Latham J.

200. On the other hand, reciprocally, the interest of the recipient in having information on the subject matter "*must be of so tangible a nature that for the common convenience and welfare of society it is expedient to protect it*": *Stephens* at 261 per McHugh J (citing with approval O'Connor J in *Howe & McColough v Lees* (1910) 11 CLR 361 at 398). It would include "*an interest material to the affairs of the recipient… such as would for instance assist in the making of an important decision or the determining of a particular course of action*": ***Austin v Mirror Newspapers*** *Limited* (1985) 3 NSWLR 354 at 358-9.

201. However, as McHugh J stated in *Stephens* at 261, "*common law courts have repeatedly held that a person has no legitimate interest or duty to publish defamatory matter to the*

general public if no more is established than that the subject matter of the publication is one in which the public is interested".

202. Thus, a reciprocity of "interest", sufficient to constitute an occasion one of qualified privilege, will **not** arise even if "*what is published can properly be characterised as the public discussion of matters germane to a general-subject matter which can itself be classified as one of great public interest or concern*". Something more is required: ***Morosi*** *v Mirror Newspapers* [1977] 2 NSWLR 749 at 778 per *totam curiam*; *ABC v Comalco* (1986) 12 FCR 510 at 581 per Neave J and the authorities referred to therein.

203. It must be in the general interest of the whole community that the type of material in question be published, notwithstanding that is defamatory of a third party; the occasion must not be used for some purpose or motive foreign to the interest that protects the making of the statement; and there must be a significant connection between the defamatory statement and the privileged occasion: *Bennette* at [12] – [25].

204. The common law position is thus quite different from the broader meaning of "interest" that arises under the statutory formulation of the privilege, wherein the relevant interest is taken to "*include any matter of genuine interest to the [recipient]*" and reasonableness is substituted for the duty or interest required by common law qualified privilege: *Austin v Mirror Newspapers* at 359; *Morosi* at 797 per *curiam*. See also *Bennette* at [10].

205. In determining whether a privileged occasion arises, a court must "*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*": *Bashford* at [10] citing *Guise v Kouvelis* at 116 per Dixon J.

206. Even were a privileged occasion to be found (against Palmer's submission), such an occasion "*does not necessarily protect all that is said or written on that occasion".* Anything *"not relevant and pertinent",* not *"sufficiently connected",* to the discharge of the duty or the safeguarding of the interest which creates the privilege will not be protected. See *Adam v Ward* at 320-321, 327, 340, 348; *Cush v Dillon* at [19]; *Bashford* at [22]; *Bennette* at [25].

<u>The first - fifth matters (the press conferences)</u> (See MC [144] – [148])

207. McGowan published the matters to an assembled contingent including media reporters, technicians and whoever else may have been present, at press conferences called by him. The relevant circumstances included:

(a) McGowan authorised and plainly intended the wide republication of "*some or all*" of his words, by the media representatives, in the mass media;

(b) such republication was the natural and probable consequence of McGowan's publication.

208. Those matters are substantially admitted, if not in terms, by McGowan in his Defence: CB 12-16, FAD [2(b)], [4(b)], [6(b)], [8(b)], and [10(b)]. They were also substantially admitted by McGowan in his affidavit: McGowan at [16], [36], [46] and [56] (CB 1743, 1747, 1749, 1752).

209. The press representatives present were obviously there for the specific purpose of recording McGowan's words (electronically or otherwise) in order to republish "*some or all*" of what he said; that was the whole point of calling the press conference: see T324.1-19.

210. McGowan readily admitted that his purpose in calling press conferences (necessarily including those in which he denigrated and defamed Palmer) was to ensure their widest possible dissemination, wherever the listeners, viewers and readers might be and however numerous they might be: T324.1-T324.19.

211. McGowan also admits that various republications in fact subsequently occurred.

212. Palmer relies on those republications (ie the fact of such later republications) only as to damages: see CB 1-7, ASC 2(b), 4(b), 6(b), 8(b) and 10(b).

213. However, the **occasion** on which each of the five oral publications by McGowan took place was an occasion where, at the time of his publishing to whomever was present: McGowan plainly intended, expected and authorised the wide republication of his words to the general public; the press representatives were plainly in attendance for that very purpose; and such republication was the natural and probable consequence of McGowan's speaking the words he did.

214. The actual audience whom McGowan intended and set out to reach, by speaking as and to whom he did, at the time (on the occasion) that he spoke, was an audience constituted by members of the public generally. And he did reach that audience, ie members of the public generally: the matters were (in the words of the NSW Court of Appeal in *Aktas*) *"disseminated to the public at large"*.

215. In such circumstances, as the authorities referred to above make clear, no occasion of qualified privilege founded on reciprocity of "interests" (or of "duty" and "interest") could or did arise.

216. By his FAD, as noted above, McGowan does not assert that he was under any "duty" to publish the matters, defamatory of Palmer as they were, to anyone. Such a claim, especially in the circumstances of this case, would after all be untenable (see e.g. ***Stoltenberg*** *v Bolton; Loder v Bolton* (2020) 380 ALR 145; [2020] NSWCA 45).

217. Instead, in the FAD, McGowan asserts a reciprocity of "interest" between himself and "members of the public": see [187]-[191] above. That claim, as so particularised, necessarily involves accepting (correctly and realistically) that the assembled media personnel were a mere conduit of information to "the public" generally, as indeed they were. However, in such circumstances, *"where the matter has been disseminated to the public at large"* – as was admittedly intended, and as admittedly occurred – such a reciprocity cannot exist.

218. Perhaps in recognition of this, in opening, McGowan sought to re-cast the requisite reciprocity in quite a different a manner. It was submitted at T45-46 that because only a relatively small audience was physically present when McGowan was speaking, and because Palmer relies on the subsequent republications only as to damages, McGowan's publications are not to be treated in the same way as mass media publications (where the absence of reciprocity virtually always denies the privilege) but, instead, as publication only to those physically present.

219. Another proposition which seemed to be advanced in that regard was that the press representatives present had an "interest" in hearing whatever McGowan said in response to whatever questions were asked by any of them: see T45.24-28.

220. Such a proposition would presumably require McGowan to seek to confine the "members of the public", described in his particular 32, to only those few members of the public who were physically present to hear him speak the defamatory words.

221. There are several reasons why such a recasting of the reciprocity requirement, and such a torturing by McGowan of his own particulars, should be rejected.

222. ***First***, the reporters and other press personnel present were in reality merely proxies for, or a mere conduit to, the actual audience that was intended and expected by McGowan, namely the general public. As submitted above, the **occasion** on which each of these

five publications by McGowan took place was one where, at the time of his publishing to the press representatives and other persons present, McGowan intended and authorised, and aimed to achieve, the wide dissemination of his words to a much larger audience, and such dissemination was the natural and probable consequence.

222A. Contrary to McGowan's claim at MC [146], Palmer has not *"mischaracterised"* the first to fifth matters. The publications by McGowan were indeed *"disseminated through the mass media to very large audiences".* There has been no departure, by Palmer, from the pleaded case.

223. ***Secondly***, any "interest" the reporters and technicians had in receiving the information comprised by what McGowan chose to say was no more than such interest as any member of the general public might have had in receiving it.

224. ***Thirdly***, McGowan's pleaded case is that the "members of the public" who had a "corresponding interest" in receiving the matters published by McGowan were persons who were (1) enrolled as electors in WA and (2) resident in WA. As noted above, there is no evidence that any person present had either such characteristic. And many, at least, of those reached by the subsequent (intended) republications would obviously not have had such characteristics.

225. ***Fourthly*****,** there is no evidence that those present were only media personnel. Some at least of these press conferences can be seen on the videos to have taken place in public settings where any number of members of the public generally were or may have been present.

226. ***Fifthly***, in publishing these matters, McGowan was not "furthering or protecting" any relevant "interest" of his own. To the extent that McGowan might contend that he had an interest in acquainting the public with the up-to-date position concerning the High Court proceedings and the Commonwealth's stance in relation thereto (an ostensible topic of the first, fourth and fifth matters), that does not amount to his having an interest (much less one which needed to be "furthered" or "protected") in publishing gratuitous, insulting and derogatory attacks on one party to those proceedings.

227. The same analysis applies, with perhaps even greater force, to the second matter complained of, where a question about a call by Palmer for national unity was met with a non-responsive and gratuitous assault on Palmer as the "enemy of the state".

228. And to the extent that McGowan had an interest in answering reporters' jocular questions about a pilot's errors in relation to Palmer's application to come to WA (the topic on which some questions were asked in the third matter), still less did McGowan have a relevant interest in departing altogether from such questions, and "pre-empting" whatever the next question might have been, in order instead to make another gratuitous (and false) attack (in relation to hydroxychloroquine).

229. ***Sixthly*****,** nor did any member of the relevant audience (either the real audience namely the public generally, or the now-asserted mini-audience namely those physically present) have any corresponding or reciprocal "interest" in receiving such gratuitous attacks.

230. ***Seventhly***, it is not enough to attract common law qualified privilege (based on *reciprocity*) that a question be asked by someone who might have an interest (in the sense of being interested) in the answer. As noted earlier, that a topic might be "interesting", whether to the publisher or the recipient or both, does not in the least establish the necessary "interest" on the part of either.

231. ***Eighthly***, acceptance of McGowan's contentions would mean that any statement made by a person to reporters and/or recording technicians at any press conference (or made, to take another example, to an interviewer on a radio or television programme) would be protected by common law qualified privilege, while any news service disseminating and/or faithfully reporting on the press conference (or any such radio or television station) would not have the benefit of the privilege. This would permit a speaker to exploit the media, as propagandist patsies, as a device for the widespread publication of all manner of defamatory statements, safe in the knowledge that (unlike the media) he or she would have a qualified privilege defence. Such an outcome would be inimical to the principles underpinning the development of the common law defence.

232. In ***Lloyd-Jones*** *v Allen* [2012] NSWCA 230, the facts were to some extent analogous to those arising here. The defendant wrote a letter addressed to the NSW Ombudsman that complained about, *inter alia*, the mistreatment of and indifference towards Aboriginals in the Bega local community by persons in authority, and asked that this be investigated. It conveyed imputations defamatory of the Mayor. In two iterations of its publication, the letter was sent to the news desk of *The Sydney Morning Herald*, and to a *Four Corners* journalist. The evidence was that in each of those instances, the letter reached

unidentified persons of uncertain number who happened to read it, regardless of any special interest which he or she might have had: [72].

233. At [72], Nicholas J describes the scope of those publications as "wide". The same may be said of the scope of publication to the miscellaneous journalists, technicians and any passers-by in this case (if the occasion of publication were to be so confined).

234. At [73], Nicholas J reached the following conclusion (Beazley and McColl JJA agreeing) (emphasis added):

> *The circumstances in this case demonstrated no more than that the appellant communicated the information to the recipients because it appeared to be of public interest sufficient to lead to the publication of stories based on it. In other words, the publications were made in the hope that they, in turn, would generate the publication of reports to the public at large by a newspaper and television which would encourage the relevant authorities to act upon, and remedy, the complaints.* ***However, the fact that the subject matter was of public interest does not establish an interest or duty in the appellant to publish to journalists or programme producers matter which included defamatory statements concerning the respondent****. There was no interest to be protected by sending the letter to them; they were not persons with an interest or duty to investigate or remedy the matters of which complaint was made. Furthermore, there was no duty or interest in the recipients to republish to the world at large the defamatory matter included in it. I reject the appellant's submissions on this issue.*

235. Similar conclusions may be drawn even more readily here. In *Lloyd-Jones,* the publisher was seeking, as the Court found, not only to achieve a wide dissemination of the matter but by doing so to bring about a result (an investigation by the authorities) which she presumably believed would be in the public interest. Here, by contrast, McGowan sought the former (wide dissemination) without any connection to any such result such as the latter. His "interest" amounted to no more than a determination to attack Palmer and blacken his name at every opportunity.

<u>The sixth matter (the Facebook page)</u>:

236. In Palmer's submission, there can be no reciprocity of "interest", in the relevant sense, in relation to a Facebook page, particularly when it is the high traffic Facebook page of a state Premier, which is effectively addressed not only to his state but to the entire country, if not the world. In *Stoltenberg* at [147]-[161], the defence of qualified privilege failed in relation to a Facebook page set up to expose wrongdoing in a shire council, for reasons including the excessive extent of publication. (The judgment

records the evidence in that case at [113], showing that the page in question had a fraction of the traffic of McGowan's Facebook page.)

Were the communications related to the occasion?

237. If, contrary to Palmer's preceding submissions, the Court finds that McGowan published the matters on occasions of qualified privilege, the untrue and defamatory imputations published by McGowan of and concerning Palmer were unrelated to those "occasions". They were not *"relevant and pertinent"* to the safeguarding of any interest which made the occasion a privileged one.

238. In the second matter (**ADM**, lines 3-6), a reporter's question asking about Palmer's intention to call for national unity prompts entirely unresponsive words, accusing Palmer of being an "*enemy of the state"* and so on, thereby conveying an imputation that Palmer "*represents a threat to the people of Western Australia and is dangerous to them*". On no reasonable assessment could this gratuitous besmirching of Palmer be considered relevant to the occasion.

239. In the first matter (**ADM**, lines 35-38), a reporter's question concerning the motivations of Scott Morrison and the Commonwealth is met at first with three or four sentences related to that topic (lines 31-35). But McGowan then lurches away, to the sentences comprising the "matter", which were again unresponsive to the question and were essentially a repetition of the earlier unprompted attack (*"enemy of the state"*), again conveying imputations that Palmer "*represents a threat to the people of Western Australia/Australia and is dangerous to them*". Again, on no reasonable assessment can this be considered relevant to the occasion.

240. As to the third matter (**ADM**, lines 31-37), after discussing in a jocular way the administrative mistakes in Palmer's application to enter Western Australia (about which several questions had been asked), McGowan deliberately chooses to "pre-empt" the next question and to change the subject (*"Look, just so you know, …"*) so as to make unprompted and false accusations about Palmer and hydroxychloroquine, accusations which conveyed the imputation that Palmer "*promotes a drug which all the evidence establishes is dangerous*". Such accusations were, and such an imputation is, plainly irrelevant to the occasion.

241. In the fourth matter (**ADM**, lines 29-33), again McGowan first gives an answer of sorts to a question actually asked of him (this time about when the Federal Court might hand

down judgment), but then deliberately veers away from that topic simply because he wishes and chooses to launch another attack on Palmer (*"Just on Mr Palmer, ..."),* an attack which conveyed the imputation that Palmer "*selfishly uses money he has made in Western Australia to harm Western Australians*". Again, on no reasonable assessment can this be considered relevant to the occasion.

242. As to the fifth matter (**ADM**, lines 41-42), McGowan, whilst ostensibly discussing legal proceedings properly brought by Palmer and positively supported for some time by the Commonwealth, saw fit to publish words, pre-meditated and unprompted by any question, which conveyed the imputation that (essentially because he had had the temerity to bring such proceedings) Palmer "*represents a threat to Australians and is dangerous to them*". Such words cannot on any reasonable analysis be considered germane to the occasion.

243. As to the sixth matter (CB 1458), purportedly in response to comments by Palmer concerning the extraordinary nature of the *Amendment Act*, McGowan exploited the occasion to introduce irrelevant and/or untrue words, giving rise to the defamatory imputations that "*Palmer 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*", and that he "*is so dangerous a person that legislation was required to stop him making a claim for damages against the State of Western Australia*". Even on the most generous assessment such imputations were not germane to the occasion.

244. For all these reasons, McGowan's defence of common law qualified privilege fails.

Section 30 (See MC [185] – [220])

The legislation

245. Section 30 provides a non-mandatory and non-exhaustive list of considerations which may be taken into account in assessing whether a publisher's conduct was *"reasonable in the circumstances".*

246. As at the relevant time namely July-August 2020 (prior to the coming into force of the 2020 amendments in July 2021), s 30 was in the following terms:

> *(1) There is a defence of qualified privilege for the publication of defamatory matter to a person (the **recipient**) if the defendant proves that:*
> *(a) the recipient has an interest or apparent interest in having information on some subject, and*

(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 defendant in publishing that matter is reasonable in the circumstances.

(2) For the purposes of subsection (1) 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 defendant believes on reasonable grounds that the recipient has that interest.

(3) In determining for the purposes of subsection (1) whether the conduct of the defendant in publishing matter about a person is reasonable in the circumstances, a court may take into account:

(a) the extent to which the matter published is of public interest, and

(b) the extent to which the matter published relates to the performance of the public functions or activities of the person, and

(c) the seriousness of any defamatory imputation carried by the matter published, and

(d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts, and

(e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously, and

(f) the nature of the business environment in which the defendant operates, and

(g) the sources of the information in the matter published and the integrity of those sources, and

(h) 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, and

(i) any other steps taken to verify the information in the matter published, and

(j) any other circumstances that the court considers relevant.

"Reasonable" conduct: legal principles

247. It is important to bear in mind that a defence of qualified privilege (whether at common law or under s 30) permits a defendant to escape liability for publishing defamatory imputations even though they are not true.

248. It is therefore unsurprising that, just as for the common law defence the requirement of reciprocity is essential, the courts have insisted that the statutory "reasonableness" requirement is a serious and demanding one.

249. The principles are largely well-settled, and include the following:

(a) the publisher bears the onus of proof in relation to the reasonableness of his conduct in relation to the matters complained of: ***Wright*** *v Australian Broadcasting Commission* [1977] 1 NSWLR 697, 700 (Moffitt P); *Morosi at*

797; *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30, 44 (Hunt J); *John Fairfax Publications Pty Ltd v* ***Zunter*** [2006] NSWCA 227, [30] (Handley JA);

(b) the publisher must prove that he acted reasonably in publishing the specific matters complained of (and not, for example, matter relating more broadly to the general subject-matter): *Wright* at 705 (Moffitt P);

(c) the publisher must establish:

(i) that, before publication, reasonable care was exercised to ensure that his conclusions were correct, by making appropriate and proper enquiries, and checking the reliability and accuracy of sources;

(ii) that the conclusions followed logically, fairly and reasonably from the information obtained;

(iii) that the manner and extent of publication did not exceed what was reasonably required in the circumstances;

(iv) that each imputation intended to be conveyed was relevant to the subject about which information was published;

See, for example, ***Chau v Fairfax*** *Media Publications Pty Ltd* [2019] FCA 185 at [109], [110], [112]; ***Morgan v John Fairfax*** *& Sons Ltd (No 2)* (1991) 23 NSWLR 374 per Hunt AJA at 387-8, Samuels JA agreeing; *Theodore* ***Skalkos*** *v Joseph Assaf & Anor* (2002) Aust Torts Reports 81-644; [2002] NSWCA 14 at [53], [137]; ***Leyonhjelm*** *v Hanson Young* (2021) 282 FCR 341; [2021] FCAFC 22 at [297];

(d) the publisher will typically need to establish he believed in the truth of imputations he intended to convey: *Chau v Fairfax* at [110]; *Morgan v John Fairfax* at 541-2; *Skalkos* at [53], [137];

(e) the more serious the allegation, the greater the degree of care which the defendant must take prior to publication: *Chau v Fairfax* at [109]; *Morgan v John Fairfax* per Hunt A-JA at 387C; *Obeid*;

(f) the publisher must establish that the person defamed was given a reasonable opportunity to make a response to the allegation: *Chau v Fairfax* at [115];

(g) where (as here) serious allegations of fact have been published about a person without the publisher having taken steps to check with the person concerned, it is the publisher (and not the person defamed) who takes the risk that the allegations cannot be justified: *Zunter* at [30]; *Restifa v Pallotta* [2009] NSWSC 958, [26]; *Hanson-Young v Leyonhjelm (No 4)* [2019] FCA 1981, [184] (White J) (affd. *Hanson-Young v Leyonhjelm (No 4)* [2021] FCAFC 22);

(h) if the situation is one which calls for a response or in which seeking a response was appropriate, the failure to seek a response will usually be fatal to the defence: *Lange* at 574 (in the context of dealing with the reasonable conduct element in the extended common law qualified privilege defence);

(i) the objective truth of the published statements is not relevant to the defence, and does not bear on the s 30(3) factors: ***Rush v Nationwide News*** (2018) 359 ALR 473; [2018] FCA 357 at [140]-[148]; *Makim v John Fairfax & Sons Ltd* (unreported, Supreme Court of New South Wales, Hunt J, 15 June 1990).

(j) the factors in s 30(3) are not exhaustive and not binding: *Rush v Nationwide News* at [139].

250. The publisher must generally establish that he believed in the truth of any imputation that he did intend to convey, and that, in relation to the truth of any imputation that he did not intend to convey, his conduct was nevertheless reasonable.

251. Where the defendant denies having intended to convey the defamatory imputations sued upon, but the court finds that such imputations were indeed conveyed, that will usually present a serious difficulty for the defendant. It will be relevant to consider whether it was reasonably foreseeable that the imputation would be conveyed, whether this was considered by the respondent, and whether appropriate steps were taken to stop this happening: *Chau v Fairfax* at [111], and on appeal, *Fairfax Media Publications Pty Ltd v Chau* [2020] FCAFC 48 at [25(7)], [191]-[192]; *Morgan v John Fairfax* at 387G-388A; *Bailey v WIN Television NSW Pty Ltd* (2020) 104 NSWLR 541; [2020] NSWCA 352 at [127]. See also ***Lindholdt v Hyer*** (2008) 251 ALR 514; [2008] NSWCA 264 at [139].

252. Where a defendant takes no care, or insufficient care, to counteract the likelihood that the matters complained of would convey such meanings, that may render the s 30

defence untenable. As the Court of Appeal observed in ***Evatt*** *v Nationwide News Pty Ltd* [1999] NSWCA 99 at [43], "*an indulgent view should not be taken of the conduct of a journalist who fails to appreciate that his or her work conveys a defamatory imputation*". The same applies to a Premier.

253. Although there may sometimes be circumstances in which a defendant reasonably does not foresee that a matter might convey an imputation which a court later finds to have been conveyed, that cannot be the case where no consideration was given to the question by the defendant at all: *Evatt* at [31].

254. If it is reasonably obvious that a particular imputation might be conveyed by the matter published then, even if the defendant's evidence that he did not intend to convey that imputation is accepted, the defendant will not be found to have acted reasonably unless he or she took positive steps to ensure that the publication was <u>not</u> to be understood in that sense: *Obeid* at [75]; *Chau v Fairfax* at [111].

<u>Was McGowan's conduct "reasonable in the circumstances"?</u> (See MC [204] – [220])

255. Palmer accepts that the *"interest"* and *"apparent interest"* requirements in s 30 are met.

256. However, Palmer submits that the reasonableness requirement is manifestly not met. The onus of establishing reasonableness is on McGowan, and he has not discharged that onus.

257. The relevant principles have been outlined above at [247]-[254]. Having regard to those principles, the following submissions are made.

258. ***First***, the imputations found to have been conveyed by McGowan's publications are extremely serious imputations. McGowan's submission to the contrary at MC [220(c)] is not sustainable.

259. ***Secondly***, there is no evidence of conduct on the part of McGowan, prior to publication, which would be capable of establishing that McGowan acted reasonably in the circumstances of publication. On the contrary: McGowan took no steps to contact Palmer prior to publication and made no attempt to obtain or to publish any response from Palmer: <u>Palmer #1</u> at [20] (CB 1687). None of the matters contained the substance of (or indeed any reference to) Palmer's "side" of the relevant "story".

260. In relation to the sixth matter, McGowan's conduct was especially unreasonable. That matter consisted of a Facebook post which McGowan has admitted he did not even read before it was published: McGowan at [61] (CB 1752). That is the very antithesis of what reasonable conduct requires.

261. ***Thirdly***, as to the first, second, fifth and sixth matters, it is significant that McGowan's evidence was that one of the two reasons that he considered himself at "*war*" with Palmer, and regarded Palmer as "*the enemy of the State*", was that Palmer had made the claims that he had made in the arbitration: eg T409.29-39.

262. McGowan's conduct in publishing those matters was thus again especially unreasonable given his utter absence of factual basis. McGowan chose to publish the relevant imputations in circumstances where:

(1) he had never read the State Agreement, or the 2014 and 2019 arbitral awards, or the Palmer companies' claims for damages, and thus had chosen to remain ignorant of essentially all the relevant underlying facts (see [81] above); and

(2) he did know, by contrast, that it was not by any means clear that the Palmer companies would obtain any award of damages at all, much less an award of $30 billion; indeed, he and the State were "*confident*" that the State was on "*solid ground*" (see [82] above).

262A. As to 262(1) above, McGowan submits at MC [216] that his evidence had only been that he *"did not believe"* he had read the State Agreement, or the two McHugh awards, or the damages claims (in the third arbitration). But that is not so. His evidence was that he actually had not read them: see T428.41-43, 429.39-43, 435.32-436.1, 459.3.

263. ***Fourthly,*** there is no evidence which would support a suggestion that there was any need, in the public interest, that any of these six matters be published expeditiously. There was no legitimate reason for them to have been published by McGowan before steps of the kind referred to above had been taken by him. The statements McGowan made in each matter, about Palmer, were gratuitous attacks going beyond any exigency of timing. They were either non-responsive to, or went well beyond a reasonably appropriate response to, any question that McGowan was actually asked.

264. ***Fifthly***, in all six matters, McGowan made no distinction between allegations and proven facts. For example, the first and second matters declare Palmer variously to be "*the enemy of Western Australia*", "*the enemy of the State*" and "*the enemy of Australia*"

without drawing any such distinction. The same may be said of the fourth matter using the language of "*war*".

265. In relation to the third matter, the position is even worse because that matter conveyed false allegations of fact, including that Palmer wanted to "*promote Hydroxychloroquine to the people of the State*" when "*all the evidence*" established that Hydroxychloroquine was "*actually dangerous*". Similar considerations apply to the sixth matter, with its false assertions including that the "conditions precedent" purportedly imposed on Palmer's BSIOP Proposal were merely standard conditions applicable to all mining projects.

266. ***Sixthly***, McGowan did not intend to convey imputation 7(a), and nor did he give any consideration to the possibility that such an imputation would be conveyed: see McGowan's answers to interrogatories 1C and 2C (CB 1659, 1660). But the Court has found that the imputation was conveyed. It was at the very least reasonably foreseeable, and in fact, it is submitted, obviously likely, that the imputation would be conveyed. Yet McGowan took no steps to prevent the third matter from being so understood.

267. Similarly, McGowan also did not intend to convey either of imputations 13(b) and 13(c), and again gave no consideration to the possibility that such imputations would be conveyed: see McGowan's answers to interrogatories 1F (CB 1659) and 2F (CB 1660-1661). Again, the Court has found that those imputations were conveyed. Again, it was reasonably foreseeable, and, indeed, obviously likely, that those imputations would be conveyed.

268. ***Seventhly***, it is significant that McGowan had no belief in the truth of any of Palmer's imputations 7(a), 13(b) or 13(c): see McGowan's answers to interrogatories 6C and 6F (CB 1672-1673). In relation to imputations 13(b) and (c), McGowan's evidence is that he did not have any belief as to the truth or falsity of those imputations *"because I did not draft or see the matter complained of before it was published".* As noted above, this is the very antithesis of what reasonable conduct requires.

268A. ***Eighthly,*** as to MC [220(a)], whilst the *context* in which McGowan published the matters may have involved topics of general public interest (the COVID-19 pandemic and the hard border legislation), the matters – what McGowan said about Palmer – were not.

268B. ***Ninthly****,* as to MC [220(b)], whilst some of McGowan's remarks in relation to that general *context* may have *"related to his performance of his public functions",* his gratuitous and insulting sullying of Palmer did not.

268C. ***Tenthly***, as to MC [220(d)], McGowan's attacks on Palmer were almost exclusively couched as statements of fact. McGowan suggests at MC [220(d)] that some of the things he said (a handful of them) were mere statements of opinion, but those examples (presumably the best examples to which McGowan can point) are, in their context, subsidiary to the preceding assertions of fact which conveyed the sting of the imputations. Thus the sentence at CB 933A lines 37-38 ("*I think he's the enemy of Australia*") follows McGowan's repeated blunt assertions earlier in the press conference, in bald factual terms, that Palmer is *"the enemy of the State"*, and *"the enemy of Western Australia"* (at CB 933 line 3, and again at CB 933A line 37). In the circumstances as so declared, Palmer must be Australia's enemy. And the sentence at CB 1001A (which included *"I don't think"*) came hard on the heels of McGowan's (false) claim that Palmer had (in fact) been "*coming to Western Australia to promote a dangerous drug*".

268D. ***Eleventhly****,* as to MC [220(e) and (g)], it is (as submitted elsewhere) simply not the case that McGowan was responding to questions. In every one of these four press conferences, as to the relevant matter, McGowan was either volunteering statements rather than answering questions, or was swerving off course to launch gratuitous attacks on Palmer.

Lange **qualified privilege** (cf. MC [155] – [184])

Legal Principles (cf. MC [160] – [169])

269. In *Lange*, the High Court recognised and declared (at 571) 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 Court accordingly held (at 571) that the categories of qualified privilege should be extended to protect communications made to the public on a government or political matter.

270. The Court noted, at 572, that:

> *Because privileged occasions are ordinarily occasions of limited publication – more often than not occasions of publication to a single person – the common*

> *law has seen honesty of purpose in the publisher as the appropriate protection for individual reputation.*

271. The Court considered (at 572) that the common law limitation on the defence of qualified privilege, whereby only occasions where defamatory matter is published to a limited number of recipients were protected (because of the requirement for reciprocity of duty and/or interest: see 570), was inappropriate in the case of the privilege in its now-extended form, *"when the publication is to tens of thousands, or more, readers, listeners or viewers"*.

272. In that latter situation, the Court observed, *"the damage that can be done when there are thousands of recipients of a communication is obviously so much greater than when there are only a few recipients"*. **For that reason,** said the Court at 572-3 (emphasis added):

> *a requirement of reasonableness as contained in s 22 of the Defamation Act, which goes beyond mere honesty, is properly to be seen as reasonably appropriate and adapted to the protection of reputation and, thus, not inconsistent with the freedom of communication which the Constitution requires.*

273. The Court then confirmed, at 573, that the criterion of reasonableness of conduct, as found in s 22 of the *Defamation Act 1974* (NSW) (**1974 Act**), and also in the Codes of Queensland and Tasmania, was:

> *...the appropriate criterion to apply when the occasion of the publication defamatory matter is said to be an occasion of qualified privilege solely by reason of the relevance of the matter published to the discussion of government or political matters*.

Section 22

274. At this point it may be useful to summarise what was, as at 1997 when *Lange* was decided, the content of s 22 of the 1974 Act and the law in relation thereto.

275. In NSW, between 1974 and 2005, s 22 contained the statutory defence of qualified privilege. The central requirement of the defence, at s 22(1)(c), was that the defendant show that his conduct in publishing was *"reasonable in the circumstances"*.

276. Until 2002, there was no statutory "checklist" within s 22, such as the one in s 30(3) (as it stood in July-August 2020, set out at [246] above), and such as those now found in the present s 29A and s 30(3) of the *Defamation Act* (following the 2020 amendments which came into operation in July 2021).

277. However, in 1991 in *Morgan v John Fairfax* (at 387-8) the Court of Appeal had identified the following (non-exhaustive) propositions as to what was meant by "*reasonable in the circumstances*" in then s 22, and these propositions obtained in 1997 when *Lange* was decided:

> (1) It must have been reasonable in the circumstances to publish <u>each</u> imputation found to have been in fact conveyed. The more serious the imputation conveyed, the greater the obligation upon the defendant to ensure that his conduct in relation to it was reasonable.
>
> (2) If the defendant intended to convey any imputation in fact conveyed, he must [ordinarily] have believed in the truth of that imputation.
>
> (3) If the defendant did not intend to convey any particular imputation in fact conveyed, he must establish:
>
> (a) that he believed in the truth of each imputation which he did intend to convey; and
>
> (b) that his conduct was nevertheless reasonable in the circumstances, in relation to each imputation that he did not intend to convey.
>
> (4) The defendant must also establish:
>
> (a) that, before publishing the matter complained of, he exercised reasonable care to ensure that he got his conclusions right, by making proper inquiries and checking on the accuracy of his sources;
>
> (b) that his conclusions (whether statements of fact or expressions of opinion) followed logically, fairly and reasonably from the information that he had obtained;
>
> (c) that the manner and extent of the publication did not exceed what was reasonably required in the circumstances; and
>
> (d) that each imputation intended to be conveyed was relevant to the subject about which he gave information to the recipients.

278. At 388F, Hunt A-JA made plain that these propositions were not exhaustive and that it would be both impossible and unwise to attempt to give any comprehensive definition of what conduct would be "reasonable in the circumstances" in any given case.

279. By an amendment in 2002, s 22(2A) was inserted into the 1974 Act, setting out a list of eight factors – essentially drawn from the Morgan principles – which the court "may" take into account (along with any other matters considered relevant) in determining the issue of reasonableness.

280. For completeness, it may be noted that s 30(3) of the 2005 Act, in the form (set out above at [246]) in which it appeared as at July-August 2020 (prior to the coming into effect of the 2020 amendments in July 2021), was in substantially the same terms as its predecessor s 22(2A) (although the eight factors had expanded to ten).

What will be "reasonable in the circumstances"?

281. In *Lange,* as to what would be necessary to show reasonableness for the purposes of the newly-declared defence, the High Court said (at 574) (emphasis added):

> *"Whether the making of a publication was reasonable must depend upon all the circumstances of the case. But,* ***as a general rule****, a defendant's conduct in publishing material giving rise to a defamatory imputation* ***will not be reasonable unless*** *the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct* ***will not be reasonable unless*** *the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond*." (Citations omitted, emphasis added)

282. The authorities concerning the requirements under s 22 / s 30 are equally applicable to the *Lange* defence.

283. There is no third category of qualified privilege, in the form of a *Lange*-type defence (based on the public interest in the dissemination of opinions about governmental or political matters) but *"shorn of any condition of exercise of reasonableness"*: see ***Marshall v Megna*** [2013] NSWCA 30 at [25] (Allsop P), [174] (Beazley JA); *The Korean Times Pty Ltd v Un Dok Pak* [2011] NSWCA 365 at [30]-[33] (Basten JA).

284. In relation to the *Lange* defence, Palmer accepts that the matters complained of involve discussion of *"government and political matters".*

285. However, for *Lange*, as for s 30, the critical issue is whether McGowan can establish the *"reasonable conduct"* requirement.

"Reasonable in the circumstances": application to the evidence

286. For substantially the same reasons as advanced above in relation to the s 30 defence (see [256]-[268E]), it is submitted that McGowan has not come anywhere near establishing reasonableness.

287. One reason why that is particularly clear, in relation to *Lange,* is that McGowan simply gave Palmer no opportunity to respond. It is not to the point to say (*cf* McGowan's opening, T45.39-46.1) that McGowan was answering questions at a press conference and could not realistically defer answering until he had communicated with Palmer. That merely evades the problem. Of course McGowan could choose to answer questions if he wished to do so. But in the course of saying what he chose to say (in fact, in most

cases, **not** responsively to questions), he defamed Palmer. If no sufficient opportunity to respond is given, and defamatory imputations are published, then there is almost inevitably no defence under *Lange*: ***Hockey*** *v Fairfax Media Publications Pty Limited* (2015) 237 FCR 33 at [374] per White J; see also *Herald & Weekly Times Ltd v* ***Popovic*** (2003) 9 VR 1 at [197] per Gillard AJA.

288. In addition, among other things, McGowan neither intended to convey, nor gave any consideration to the possibility that he might convey, nor had any belief in the truth of, any of imputations 7(a), 13(b) and 13(c): see [266]-[268] above. As with s 30, so far as those three imputations in particular are concerned, no *Lange* defence is tenable.

Should *Lange* be reconsidered? (See MC [170] – [183])

289. No doubt appreciating the difficulties in the path of a *Lange* defence, McGowan, in his written outline at MO [155]ff (now MC [170]ff) seeks to postulate two different ways of "approaching" *Lange* reasonableness in this case. Neither stands scrutiny.

290. The ***first*** "approach", at MO [156] - [159] (now MC [171] – [174]), is that "Lange *accommodates eschewing* [ie, apparently, ignoring] *the reasonableness requirements on the facts of this case*": [174]. The "facts" emphasised in this context are, at [173], that "*the first-fifth matters complained of were published to a small group of reporters and sound engineers. The sixth had a broader reach* [in fact in the order of a million: see [174] above], *but was not a mass media publication in the relevant sense*".

291. At MO [156] (now MC [171]), it is asserted that in *Lange*, reasonableness was *"added as an extra requirement".* This is with respect wrong. The reasonableness requirement, for this new "category" of qualified privilege, was substituted for, not added to, the general common law requirement of reciprocity – because the reciprocity requirement effectively excluded, from the protection of the privilege, publications which reached large numbers of people: see *Lange* at 572-3.

292. The thrust of McGowan's contentions at MO [156]-[159] (now MC [171]-[174]) is that it is possible to derive from *Lange* a category of qualified privilege, to protect the publication of untrue defamatory statements concerning government or political matters to "only a few recipients", in circumstances where the publisher can demonstrate neither reasonableness nor reciprocity of interest. Such a category would not be qualified privilege at all, it would be *carte blanche*. It would run counter to the entire

development of the common law. The concept has been rejected at intermediate appellate level: *Marshall v Megna*.

293. McGowan's first potential "approach" to reasonableness ought to be rejected.

294. The ***second*** "approach", postulated at MO [160] (now MC [175]), is that "*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*". At [163], it is said that the concept of reasonableness needs to be approached *"more flexibly"*.

295. It is said, at MO [161] (now MC [176]), that *"unfortunately"* the reasonableness criterion in Lange has been interpreted as picking up judicial interpretations of "reasonableness" under s 22 of the 1974 Act. But as noted above at [274]-[282], the High Court in *Lange* made it crystal-clear that it was indeed the s 22 conception of reasonableness which the Court was adopting.

296. Reasonableness, as so understood, does indeed depend on the circumstances of the case. This was expressly recognised in *Lange* itself in 1997 (at 574), just as it had been in *Morgan* in 1991 and was again in s 22(2A) in 2002.

297. McGowan's contention under this second "approach" seems to be that the reasonableness requirement under Lange *"imposes an inappropriate burden on the implied freedom"* (MO 160; now MC [175]).

298. Yet it was precisely such a reasonableness requirement, drawn from s 22, that the High Court in *Lange*, at 572-3, held to be, in a case where there are large numbers of recipients of a communication, "*reasonably appropriate and adapted to the protection of reputation and, thus, not inconsistent with the freedom of communication which the Constitution requires"*: see [269]-[273] above.

299. McGowan does not articulate how the reasonableness requirement might be approached *"more flexibly"*, or indeed why such a "more flexible" approach might be necessary. It has always been the case, from *Lange* onwards, that reasonableness "*must depend upon all the circumstances of the case*".

300. McGowan's second suggested "approach" to reasonableness ought to be rejected.

301. ***Thirdly***, should these two "approaches" not find favour, McGowan has filed and served a Notice under section 78B of the *Judiciary Act 1903* (Cth) giving notice of the following matter:

> "…whether the 'extended qualified privilege defence' recognised in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (*Lange* qualified privilege defence) to the tort of defamation ought to require that a publisher relying on the defence establish that its conduct in publishing the relevant defamatory matter was reasonable in all the circumstances".

302. Two bases on which *"the reasonableness criterion in Lange ought be reopened"* are then outlined at MO [167] and [168] (now MC [182] and [183]). As acknowledged by McGowan at MC [180], special leave to reopen such a question has previously been refused by the High Court, and this Court is, in McGowan's submission, *"therefore bound"*.

303. As to MO [167] (now MC [182]), it is of course true that the statutory defences, such as s 22, which informed the development of the *Lange* qualified privilege defence, do not create a qualified privilege *"by reference to the implied freedom of political communication"*. After all, those statutory defences anticipated the recognition and development of the implied freedom by many decades. Relevantly, however, what the statutory defences provided for was the qualified protection of statements made to a wide audience (a protection not afforded by the common law), if they were *"reasonable in the circumstances"*.

304. The High Court, having discerned in the Constitution in the early 1990s the implied freedom of political communication, sought to ensure in *Lange* that the law of defamation would be consistent with that freedom. The Court reasoned, at 572-574, that a criterion of reasonableness, such as found in those statutory defences, would meet the need for a suitable requirement or test.

305. The suggestion that reasonableness *"has been transplanted from a wholly different context and lacks a conceptual connection"* is thus misconceived. On the contrary, woven through *Lange* qualified privilege and its statutory ancestors is the common thread that *"the reasonableness of the publisher's conduct both defines and confines the scope of the privilege": Popovic* at [12] per Winneke ACJ.

306. At MO [168(a)–(d)] (now MC [183(a)-(d)]), McGowan essentially rehearses arguments, of some elaborateness, which he may ultimately seek to put before the High Court at some time in the future. The suggestion advanced is that it *"may be doubted"* that the

High Court was right in holding that the reasonableness requirement was *"reasonably appropriate and adapted to the protection of reputation and, thus, not inconsistent with the freedom of communication"*.

307. Such arguments with respect are merely academic in this trial. Reasonableness remains an essential component of a *Lange* defence, as it has been for twenty-five years, and McGowan's conduct was not reasonable in all the circumstances of this case.

Malice: Legal Principles [FLI 6] (See MC [223] – [235])

308. The benefit of the defence of statutory qualified privilege will be lost if malice is shown. This is so both at common law and under the statute: s 30(4).

309. Where a publisher uses an occasion of qualified privilege for a purpose or motive foreign to the duty or interest that protects the making of the statement and that purpose actuates the making of the statement, the publisher is said to be guilty of express malice: ***Lindholdt v Heyer*** (2008) 251 ALR 514; [2008] NSWCA 264 at [136].

310. Proof of express malice, being "*any improper motive or purpose that induces the defendant to use the occasion of qualified privilege to defame the plaintiff*", destroys qualified privilege: *Roberts v Bass* (at [75]) per Gaudron, McHugh and Gummow JJ.

311. In *Roberts v Bass* (at [76]), Gaudron, McHugh and Gummow JJ said this about states of mind relevant to the presence of malice (emphasis added, footnotes omitted):

> *"Improper motive in making the defamatory publication must not be confused with the defendant's ill-will, knowledge of falsity, recklessness, lack of belief in the defamatory statement, bias, prejudice or any other motive than duty or interest for making the publication. If one of these matters is proved, it usually provides a premise for inferring that the defendant was actuated by an improper motive in making the publication. Indeed, proof that the defendant knew that a defamatory statement made on an occasion of qualified privilege was untrue is ordinarily conclusive evidence that the publication was actuated by an improper motive. But, leaving aside the special case of knowledge of falsity, mere proof of the defendant's ill-will, prejudice, bias, recklessness, lack of belief in truth or improper motive is not sufficient to establish malice. The evidence or the publication must also show some ground for concluding that the ill-will, lack of belief in the truth of the publication, recklessness, bias, prejudice or other motive existed on the privileged occasion and actuated the publication. ... [E]ven if the defendant believes that the defamatory statement is true, malice will be established by proof that the publication was actuated by a motive foreign to the privileged occasion. That is because qualified privilege is, and can only be, destroyed by the existence of an improper motive that actuates the publication."*

312. See also: *Leyonhjelm* at [432]-[435]; *Vlandys v Australian Broadcasting Corporation*

(No 3) [2021] FCA 500 at [152]-[153]; *Cush v Dillon* at [27]; and *Harbour Radio v* ***Trad*** [2012] HCA 44; (2012) 247 CLR 31.

313. Knowledge of falsity of the publication, as noted by their Honours in *Roberts v Bass*, is almost conclusive evidence of malice.

314. Conversely, although a positive belief in the truth of the matter, or an "honest belief", will usually negative any inference of malice (see also *Horrocks v Lowe* [1975] AC 135 (at 149) per Diplock LJ), this is not universally true. Malice will be demonstrated where, notwithstanding any positive belief, the defendant used the occasion for some improper purpose, for example to give vent to his or her personal ill-will or spite towards the plaintiff rather than to perform a relevant duty or protect a relevant interest.

315. Recklessness, by itself, will only destroy the privilege if it amounts to wilful blindness: McColl JA in *Lindholdt v Heyer* at [141]. But recklessness "*in combination with other factors may provide cogent evidence that the defendant was acting for an improper purpose, especially where the recklessness is associated with unreasoning prejudice*": McColl JA in *Lindholdt v Heyer* at [141] relying on *Roberts v Bass* at [84]-[86] per Gaudron, McHugh and Gummow JJ; *Gross v Weston* [2007] NSWCA 1 at [43] (per Hunt A-JA).

316. A failure to inquire as to the truth of the defamatory material may make it easier to draw the inference that the defendant's intention was to injure the plaintiff at the time of publication: ***Uren v John Fairfax*** *& Sons Pty Ltd* (1966) 117 CLR 118 (at 125) per McTiernan J.

317. The introduction of material irrelevant to the privileged occasion can also be evidence of malice: *Lindholdt v Heyer* at [141] relying on *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183 at 228.

318. Extravagant language (*"utterly disproportionate to the facts"*) can be evidence of malice: ***Spill v Maule*** (1869) LR 4 Exch 232 (cited in ***Calwell v Ipec*** *Australia Ltd* (1975) 135 CLR 321 at 332 per Mason J). The significance of extravagant language will be a matter of impression depending on the facts of the case: *Calwell v Ipec* at 332-333.

319. The dominant purpose or motive of the respondent that actuated the publication, which the applicant must show was foreign to the occasion of privilege and improper, can be inferred from what the respondent did, said or knew: ***Cripps v Vakras*** [2014] VSC 279

at [395].

320. However, malice must be positively proved by substantial and cogent evidence commensurate with the seriousness of the charge: *Chau v Fairfax* at [329]; *Godfrey v Henderson* (1944) 44 SR (NSW) 447 at 454; *Mackenzie v Mergen Holdings Pty Ltd* (1990) 20 NSWLR 42 at 50D.

321. The stringent nature of the test imposed by *Roberts v Bass* – in that the "malicious" state of mind must have "actuated" the publication – was recently emphasised by the NSW Court of Appeal in ***KSMC Holdings*** *Pty Ltd v Bowden* (2020) 101 NSWLR 729; [2020] NSWCA 28 at [60]:

> "*proof of ill-will, prejudice, bias, recklessness, lack of belief in the truth or some motive other than a duty or interest for making the publication is insufficient of itself to establish that malice actuated publication*" (our emphasis).

322. A plaintiff claiming malice on the part of the publisher must overcome the presumption that the publisher acted honestly, that is with a proper purpose: *KSMC Holdings* at [59]; *Roberts v Bass* at [96]. The onus is a heavy one, and *Briginshaw* principles apply: *KSMC Holdings* at [61] and the authorities there cited.

323. However, as the High Court in *Roberts v Bass* also observed, at [96]: "*in many - perhaps most - cases, a defendant who has no belief in the truth of what he or she publishes will know or believe that it is untrue*."

Qualified privilege and malice: the evidence [FLI 3 – 6] (See MC [236] – [271])

324. In his Reply, Palmer alleges that McGowan was actuated by express malice in publishing as he did. The particulars to the Reply identify the improper purpose, namely: by a sustained course of conduct, including in the lead-up to and enactment of the *Amendment Act*, McGowan acted to harm Palmer and his business and damage Palmer's reputation, while bolstering his own.

325. The relevant events, as to the lead-up to and enactment of the *Amendment Act*, have been summarised above at [28]-[83].

326. Against that factual background as well as the other facts noted above at [12]-[18], and in the light of the authorities, McGowan's publication of each of the first-sixth matters was actuated by malice, either expressly, or by inference, or both.

Knowledge of falsity, or absence of belief in the truth of the matter sued upon

327. McGowan, it is submitted, either knew of the falsity, or had no belief in the truth, of what he said in the six matters on which Palmer sues.

As to the first, second and fifth "matters": imputations 3(a) and (b), 5(b) and 11(b)
(cf. MC [244]-[246]

328. The imputations found to have been conveyed by each of these "matters" are in almost identical terms, namely that *"Palmer represents a threat to the people of Western Australia/Australia and is dangerous to them*".

329. Such incendiary charges, against one individual, that he personally constitutes a threat and a danger to a whole state or a whole country, could only be made honestly against a very few of the most infamous people in history (for example, Stalin, Hitler and now Putin). The term *"enemy of the state",* repeatedly and deliberately used by McGowan, is heavy with dark historical resonance, as even McGowan acknowledged: T381-2. And the ratcheting up of the rhetoric from *"battle"* to *"war"* in the fifth matter, was pre-planned and deliberate: T408, CB1049.

330. Revealingly, McGowan also said in cross-examination that the term *"enemy of the state"* was associated in his mind with espionage and warfare: T381.10-11. That moment of relative candour contrasted with his determination elsewhere to try to play down such language as merely *"figurative".*

331. Yet the two things that Palmer had actually done, which according to McGowan justified such wild charges, were: first, he had had the temerity as an Australian citizen to commence proceedings in the High Court of Australia to test the validity of state legislation under s 92 of the Constitution; and second, he had been successful in lawful arbitration proceedings against the State, before an esteemed arbitrator in the person of a former High Court judge, who had found that the State had breached its contract with the Palmer companies and therefore was liable in damages – a finding from which the State did not seek to appeal. Obviously both of those were actions completely and properly open to any Australian citizen.

332. To say that a citizen, in exercising his rights within the bounds of the law, is a threat and a danger to the entirety of the people whom that law protects, is such a grotesque exaggeration as to be downright false and knowingly so.

333. Both the matters conveying these imputations, and the imputations themselves, were, in truth, mere excuses for McGowan to stigmatise Palmer in the most virulent terms as in effect *persona non grata*, thereby *"violating all norms of legality*" (Sophocles letter 4 August, CB1006), and thus to garner for himself public support in his dispute with Palmer. McGowan must have known these accusations and imputations to be false at the time he conveyed them. He makes no attempt in these proceedings to seek to prove these imputations true. Instead, by his defence of qualified privilege, he accepts their falsity.

334. As to McGowan's knowledge of the falsity of the first, second and fifth matters, Palmer also relies on the truth of McGowan's Cross-Claim imputations 3(a), 3(b) and 5(b), and of Palmer's contextual imputations 1 and 2, in relation to the "hard border". That reliance arises in the following way.

335. For reasons developed later in these submissions, McGowan knew, at the time of making the statements that constitute the first, second, and fifth matters, that he had lied to the people of Western Australia when he told them that the medical advice which he had was that closing the border was necessary, and that their health would be threatened if the border did not remain closed. That was not the medical advice which he had, as he well knew.

336. At the time of publishing the first, second and fifth matters, therefore, McGowan must have known that his allegations to the effect that Palmer was a threat to the people of Western Australia and Australia, and dangerous to them, were also false. His asserted justification for making those allegations was based on a premise which he knew to be false, namely that the medical advice was that the borders must be closed (as at March-April 2020) and must remain fully closed (as at June-July 2020).

<u>As to the fourth "matter": imputation 9(b)</u>

337. The imputation found to have been conveyed by this "matter" is related to those conveyed by the first, second and fifth matters. It is that Palmer *"selfishly uses money he has made in Western Australia to harm West Australians*".

338. It may be uncontroversial that Palmer makes money from the development of iron ore reserves located in Western Australia. However, it is another thing altogether to allege that he selfishly uses this money "to harm" Western Australians. This allegation presumably involved the notion that Palmer had used his money to fund the High Court

border challenge. However, for the reasons given above, it is obviously false to say that commencing a Constitutional challenge to State legislation, *ipso facto*, is to harm the people of that State. It is also quite false to say that funding such a challenge is somehow *"selfish"*.

339. So far as both the fourth and fifth matters are concerned, there is a further point to be considered.

340. On 4 August 2020, one day after publication of the third matter, Palmer's solicitor wrote to McGowan (CB 1004), pointing out the falsity in the allegations made by McGowan in the first-third matters and emphasising the indefensible nature of McGowan's extravagant language. Despite receiving this letter, delivered by hand and email on 4 August 2020, McGowan proceeded to make the fourth defamatory publication the following day, on 5 August 2020. And he then published the fifth matter by McGowan two days after that, on 7 August 2020.

341. Both the fourth and fifth matters were published without responding to Palmer's letter of 4 August 2020 and without contacting Palmer at all. These circumstances point strongly to McGowan's being, at the very least, recklessly indifferent to the falsity of the allegations.

<u>As to the third matter: imputation 7(a)</u> (cf. MC [247] – [250])

342. The imputation found to have been conveyed by this "matter", published by McGowan on 3 August 2020, is that Palmer *"promotes a drug which all the evidence establishes is dangerous*".

343. This imputation is false in several respects, all of them known to McGowan at the time he spoke the words in question.

344. ***First*,** McGowan distorted and conflated two separate timeframes. At the relevant time (mid-May), not only was hydroxychloroquine not considered dangerous, but clinical trials both in Australia and around the world were "promising" in relation to its having a part to play in the prevention of COVID-19, and the Federal Government was endeavouring to acquire "a significant supply" of the drug: see CB 380; and see Palmer affidavit at [69] – [74], CB 1697-8.

345. In that context, in April, conformably with special exemptions made by the Federal Government, Palmer spent millions of dollars to acquire some 32 million doses of

hydroxychloroquine, in order to donate them to the Federal Government: CB 387, 409, 411; Palmer affidavit at [73], see also T199.13-23.

346. Palmer's application to travel to WA was made in about early May 2020: Palmer affidavit [75], CB 1698. One of the purposes of his proposed visit to WA was to progress the arrangement referred to in the previous paragraph: CB 426; see also Palmer affidavit at [75]. Palmer's application was refused on 20 May 2020: CB 425.

347. These matters were all specifically brought to McGowan's attention on the same day, 20 May 2020: CB 425-436; cf McGowan's evidence at T358-362.

348. Subsequently, in late May, June and July 2020, some reports did begin to emerge to the effect that hydroxychloroquine was not recommended for treating COVID-19: see for example CB 451, 562, 910, 1498. McGowan has not adduced any evidence to suggest that as at 20 May 2020 he had any idea that the drug was dangerous.

349. What McGowan said on 3 August 2020, however, was that when Palmer was trying to come to WA (which was in early May 2020, as McGowan knew), he was doing so to "promote" hydroxychloroquine as a cure for COVID, notwithstanding that "all the evidence" was that it was not a cure. He was coming to WA (ie in May), said McGowan, "to promote a dangerous drug". That was just not true, and McGowan knew it.

350. ***Secondly*,** Palmer was not "promoting" the drug at all, at any relevant time. He had bought large quantities of the drug for the express purpose of donating it to the Commonwealth Government, to be used by the health authorities as and when they saw fit.

351. Palmer gave unchallenged evidence of this. He stated that he "*was never an advocate one way or the other in relation to*" hydroxychloroquine (T199.20), rather he was "*was responding to what we thought was a national crisis*" (T199.21). He added:

> "*Whether or not they [the Government] used the hydroxychloroquine or not, it wasn't an issue for me either way, but certainly that was my intention, to protect people, and to make sure Australians wouldn't miss out… to make sure that what looked like a promising treatment would be available for Australians*" (T.202.37-42).

352. At the time he undertook these philanthropic activities, there was no indication that it was not a cure, much less that "all the evidence" was that it was not a cure, or that "all the evidence" was that it was "dangerous". To say so was just not true, and McGowan knew it.

353. On 20 May 2020, the same day that his application to travel to WA was refused, Palmer's lawyer wrote to McGowan to explain the purpose for Palmer's proposed entry to WA, to explain Palmer's purpose in acquiring hydroxychloroquine (namely to donate it to the Medical Stockpile for use should it approved), and to protest the refusal: CB425. By 20 May 2020 McGowan was thus "*aware of [these matters]… at the point in time… Mr Shaw's letter arrived*": McGowan T359.4-6.

354. Accordingly, by no later than 20 May 2020, McGowan knew that Palmer was donating the drug, not promoting it. McGowan's attempts, in cross-examination, to assert the contrary (apparently on the basis that doctors might at some unspecified point in the future promote the drug were it to be approved and, by that, Palmer was promoting the drug in May 2020) defy credulity: McGowan T362.34-363.6, T363.43-364.12.

355. ***Thirdly*****,** even as at 3 August 2020, it was false to say that "all the evidence" established that hydroxychloroquine was dangerous (even if that accusation be confined to mean dangerous as a treatment for COVID). By early August 2020, evidence was emerging to suggest that hydroxychloroquine was *ineffective* in treating COVID-19: see for example articles in *The Australian* dated 16 June 2020 (CB562), and 30-31 July 2020 (CB910-11, 930-1). However, even then it was still the subject of clinical trials, for use as such treatment: see for example CB 1498-9.

356. Having regard to the foregoing, McGowan must have known, at the time he conveyed the imputation "*Palmer promotes a drug which all the evidence establishes is dangerous*", that it was false. At the least, he could have had no belief in its truth.

As to the sixth matter: imputations 13(b)and (c) (cf. MC [251] – [253])

357. The imputations found to have been conveyed by this "matter", published by McGowan on 3 August 2020, are:

> 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*".
>
> 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".*

358. The sixth matter commenced by promising to "*clear up the facts*" (CB1458, line 2). But in reality it proceeded to paint a thoroughly deceptive picture. What McGowan said included (CB1458, emphasis added) that:

> *4. These laws are not about stopping [Palmer] from proceeding with a project.*

5. *The iron ore at Balmoral South is still there. Mr Palmer still has his right to make a proposal to dig it up or to sell that right to someone else.*

8. *[Palmer]* ***CHOSE not to proceed with the project*** [the subject of the BSIOP Proposal] *because of the conditions he was required to operate under.*

9. ***All*** *mining projects in Western Australia have conditions that are… fundamental to the operation of our mining industry.*

10. *The* ***only difference*** *here is that Mr Palmer decided that adhering to those conditions was too hard and he wouldn't proceed with the project.*

11. *So instead of choosing to make his profits by establishing a potential job-creating project at Balmoral South – as is his right –* ***he decided to just make his profits by taking $12,000*** *from every man, woman and child in Western Australia.*

13. *It would be unthinkable to allow a precedent that anyone could bankrupt a State just* ***because they weren't happy with conditions*** *set by the State government."*

359. Virtually every one of those statements is false, either in whole or in part. Among other things:

(a) The passing of the Amendment Act, with its "extraordinary" features including the abolition of the rights of the Palmer companies to obtain redress for the State's breach of contract, obviously <u>was</u> "about" stopping Palmer from proceeding with a project. The Act simply shattered any realistic commercial possibility that those companies could any longer expect to be able either to develop, or to sell, the mining rights in question: see Palmer at T203.40-204.8;

(b) Palmer did <u>not</u> *"choose"* not to proceed with the project. And he did <u>not</u> *"choose to make his profits by taking $12,000 from every man, woman and child in WA".* Rather,

(i) first, Minister Barnett refused (impermissibly) to consider the BSIOP proposal at all, necessitating Palmer's invoking of the arbitration provisions in the State Agreement in order to resolve the dispute as to whether the Minister could properly adopt such a position;

(ii) secondly, in the 2014 award the arbitrator upheld Palmer's contention, and found the State in breach of the Agreement, with the consequence that (before any "conditions" had ever been mentioned,

much less purportedly imposed), the State was liable to the Palmer companies in damages, for that breach;

(iii) it was the loss caused by that breach (the "first damages claim"), quite unrelated to the later imposition of conditions, which the Palmer companies later contended amounted to billions of dollars;

(iv) thirdly, after the 2014 award had been handed down, the Minister purported to impose 46 conditions on the BSIOP proposal. Those conditions were attached to the Minister's letter of 22 July 2014;

(v) Those 46 conditions were not remotely standard, in the sense of being no different to the conditions routinely imposed on mining projects;

(vi) Accordingly the Palmer companies thereupon contended, also, that the 46 conditions were unreasonable, and that further loss (the "second damages claim", not quantified) flowed from that;

(vii) the subject of the second arbitration, and of the 2019 award, was whether the Palmer companies had lost their rights to pursue their claims for damages (both the "first damages claim" and the "second damages claim"), and the arbitrator ruled that such rights had not been lost.

360. McGowan was the directly responsible Minister as well as the Premier. Either he knew the falsity of what he was saying, or at the very least he should have known.

361. In that latter respect it is telling that McGowan breezily said that he had never read either the State Agreement itself (T459.3) or either of the two McHugh arbitral awards (T428.41-43), or Palmer's actual claim for damages (T429.39-45). With characteristic indifference, McGowan thought those failures on his part constituted "reasonable" behaviour: T429.45.

362. In fact it was reckless, and it bespeaks malice.

The Attack Plan, including the Amendment Act (cf. MC [254] – [262])

363. Quigley's shameless description in his ABC radio interview (see [73] above) of the tactics behind the conception, drafting and enactment of the *Amendment Act* (substantially conceded by McGowan notwithstanding Quigley's dishonest disavowals

in cross-examination) captures the truly brazen nature of what was done, all to deprive Palmer of the mere possibility of receiving a favourable arbitral award (shortly prior to a State election).

364. McGowan coupled his preparedness to undermine the rule of law by rejecting proper judicial and administrative review processes (deprecated as "*namby-pamby inquiries*": T418.15-29), and by making a mockery of the State's model litigant obligations, with a deliberate and sustained course of vilifying public attacks on Palmer designed to "distract" and/or "wrongfoot" him (T421.37-422.15). The first-fifth matters were but some of those attacks, and the sixth was a duplicitous *ex post facto* defence of the indefensible.

365. The attacks were entirely extraneous to any occasion that might be said to have arisen (which is denied) and are clear evidence of malice.

365A. At MC [254] – [262], McGowan attempts now to distance himself from the Attack Plan. That attempt fails. The suggestion that there is no evidence that McGowan knew of the tactics involved is a truly heroic one in the light of Quigley's triumphant and contemporaneous radio interview. See the submissions at [60]-[68], [73]-[76] and [363]-[365] above.

Failure to inquire of Palmer

366. McGowan took no steps to check any of his allegations with Palmer: see [259] above.

367. McGowan received Palmer's concerns letter of 4 August 2020 (CB 1004), after his publication of the first-third matters Evidently indifferent to its contents (powerful though they were), McGowan made no contact with Palmer before his press conference on 5 August 2020, and published the fourth matter that day, and the fifth matter two days later.

368. After Palmer's second concerns letter dated 10 August 2020 (CB 1066) McGowan published the sixth matter, which he admits he did not even read beforehand.

Refusal to apologise (cf. MC [263] – [265])

369. McGowan has refused to apologise to Palmer, despite Palmer's concerns notices (CB 1004 and CB 1066). In cross-examination, McGowan, a lawyer as well as a Premier, gave a remarkably blunt assessment of what was required of him upon his receipt of the letters: he believed he could just ignore them (T406.38-39). And so he did. He did not

apologise (T406.41-42). Instead, he continued to attack Palmer with more insults. And he added, for good measure, that he did so with "*some hostility*", and that "*frankly*" he was "*not that worried about Mr Palmer's feelings*" (CB1517-1517A, line 39).

Foreign motive (cf. MC [266] – [267])

370. McGowan admitted that he wanted to *"denigrate"* Palmer (T375.16).

371. At various points in his cross-examination (eg T375.35–376.43, 396.30–397.26), he asserted that, by so denigrating him, his aim was to persuade Palmer to drop his High Court challenge (although at T377.1-41 he sought to retreat from that position). He added that in turn, by pressuring Palmer, he aimed to pressure the Commonwealth also to withdraw from the proceedings: T397.22-26. This was McGowan's admitted "*strategy throughout this period*" (T397.26), *viz.* the period of his publication of the first – sixth matters.

371A. At MC [266], McGowan submits that some of the matters relied upon as showing a foreign motive, in particular McGowan's desire to persuade Palmer to drop the High Court challenge, have not been particularised. That is hardly surprising, when the matters in question only emerged for the first time when McGowan revealed them in the witness box.

371B. At MC [267], an attempt is made to brush off the significance of McGowan's evidence about his attempt to pressure Palmer into dropping the High court case, and to suggest that McGowan's conduct was "not improper". That attempt fails altogether.

371C. The conduct most certainly was improper. McGowan acknowledged, largely in answer to questions from his Honour, that his aim – in *"denigrating"* Palmer – was to pressure him into not pursing his legal rights by litigation. And he admitted further that that deliberate *"denigration"* of Palmer was also aimed at pressuring the Commonwealth to do likewise. The evidence is to be found at T374.25 – 378.16, and again at T396.30 – 397.26.

371D. That conduct may or may not meet the tests for contempt, or abuse of process, or obstruction of the administration of justice, as to which see for example *Kazal v Thunder Studios Inc (California)* [2017] FCAFC 111 at [21]-[26], [74]-[88], and *Bastiaan v Nine Entertainment* [2022] FCA 60 at [59], [60], [73] (Rares J). But for present purposes, what is clear is that such conduct is unarguably evidence of malice.

372. He admitted that he "*had said some nasty things about him*": T418.20-21. Yet he refused to accept that such language was apt to foment a vicious public reaction against Palmer (T379.10-380.12), and instead insisted that his language was *"quite reasonable"* (T379.25-46). The contrast with McGowan's eagerness to allege (T304) that he himself was the subject of adverse public sentiment, owing to Palmer's language, is stark, and is another clear indication of his myopic bitterness towards Palmer.

373. If there was a privileged occasion (which Palmer denies), and if this was actually McGowan's motive (as he claimed), then the publications were actuated by motives foreign to the occasion and thus the occasion is defeated by malice.

374. Further, McGowan gave evidence that his publications of the matters, and especially his declaration to the public that he was at "war" with Palmer and that he considered him the "enemy of the State", were motivated by what McGowan claimed was *"[Palmer's having] the $30 billion claim against us*" (T409.29-39). However, this fact was left utterly undisclosed to the public (T409.34). Again, if there was a privileged occasion (which Palmer denies), the publications were actuated by a motive foreign to the occasion. McGowan was in truth giving vent to his private spleen, deriving from matters unknown to the audience – and thus any such occasion is defeated by malice.

Premeditated

375. McGowan's attacks on Palmer were not the result of a rush of blood in the heat of the moment. Rather, they were carefully planned speeches, stage-managed and widely disseminated for maximum effect. See for example: T409.41-T411.5; T324.1-19.

No intention to convey imputations

376. McGowan, according to his answers to interrogatories 1 and 2 (CB 1658-1661), not only did not intend to convey the following imputations, but gave no consideration to the possibility (an obvious one, it is submitted) that such imputations would be carried:

(a) 7(a) from the third matter;

(b) 13(b) and (c) from the sixth matter.

Extreme language (cf. MC [269])

377. The language employed by McGowan was repeatedly extreme, sensational, and inconsistent with reasonable conduct.

378. In particular, extravagant words like *"enemy" and "war"*, and phrases such as *"very very selfish", "the enemy of the State", "the enemy of Western Australia", "the enemy of Australia", "he decided to just make his profits by taking $12,000 from every man, woman and child in Western Australia"* and *"too dangerous for our state"* are not consistent with reasonableness.

379. The people of WA were being threatened by a "*very, very selfish*" man (fourth matter, **ADM** at lines 30 and 33; fifth matter, **ADM** at line 41) who "*uses money generated in Western Australia*" to "*bring down [its] borders*" and thus the State itself (fourth matter, **ADM** at lines 31-32).

380. In the language employed by McGowan, Palmer is a man so "*dangerous*" that a comparison with Donald Trump is to be embraced (third matter, **ADM** at lines 46-48), so low he is prepared to "*take*" from a "*child*" – indeed, from everyone (sixth matter, **ADM** at line 11, CB 1458), and so brazen he is prepared to act in an "*unthinkable*" way "*no one has ever attempted… before*" (sixth matter, lines 12 and 13, CB 1458).

381. The language used by McGowan – and relentlessly repeated – is "*utterly disproportionate*" to the occasion: *Spill v Maule*. It constituted inflammatory fearmongering, to which a Premier should not stoop. McGowan must have known the power and the influence of his words, yet he chose to deploy that power in a sustained and intemperate attack on Palmer, his business and his reputation. He did so in as widely-disseminated a way as he could: McGowan gathered the media about him to ensure the republication of the first to fifth matters, gravely defamatory as they were, to the widest possible audience, and he published the sixth matter – without even reading it – on Facebook for all the world to see.

382. In Palmer's submission, the "*extremity and exaggeration*" of McGowan's language in the first-sixth matters is "*explicable only by reference to the existence of ill will*": *Calwell v Ipec* at 332.

<u>Spite and ill-will, persisted in over time</u> (cf. MC [270] – [271])

383. McGowan manifests his spite and ill-will towards Palmer not only by the extreme and sensational language of the first-sixth matters. Such a state of mind, again reflected in personal and vitriolic language, infects many of his other communications concerning Palmer. It is a feature of his mindset which he seems unable to contain, as illustrated by the examples which follow.

384. The SMS exchange between McGowan and Quigley dated 23 May 2020 is excerpted at [62] above (see CB 447A–450). There Quigley refers to Palmer as "*big fat Clive",* and *"the turd",* and hopes to *"drop the fat man on his big fat arse!"*

385. Both the ugly language, and the tricky ploy Quigley proposes, are deplorable, for a Cabinet member and first law officer of the State (or for anyone).

386. McGowan's response proceeds on the apparent footing that that is a suitable way for an Attorney-General and a Premier to discuss a citizen. No criticism or even deprecation of such language, or of scheming to use the machinery of government and of the Parliament for an ulterior or concealed purpose, is forthcoming. McGowan simply discloses a preparedness to do whatever might be necessary "*to really sort out*" Palmer's claim against the State.

387. On numerous occasions, including those involving the widest possible dissemination of his insults, McGowan variously referred to Palmer as:

> "*a menace to Australia*" who was "*playing with people's lives*" (press conference 26 July 2020; Palmer #1, [117] CB 1709);
>
> "the *biggest loser*" (television appearance 28 July 2020, CB 874; Palmer #1, [119] CB 1709);
>
> "*Australia's greatest egomaniac*", "*an Olympic scale narcissist*" and an "*ego centrist of the highest order*" (press conference 2 August 2020; CB 986);
>
> "*absolutely obscene"*, a person who is "*trying to take our money*" and "*trying…to bankrupt Western Australia*" (press conference 12 August 2020; CB 1183A and Facebook post 12 August 2020; CB 1192); and
>
> "*he's really quite a piece of work"* whose *"whole strategy"* involves *"costing people their lives*" (press conference 4 September 2020, CB 1521).

388. On 14 August 2020, in an SMS exchange with Kerry Stokes (CB 1173), McGowan's visceral hatred for Palmer, and callous indifference to his rights, is in full view. Mr Stokes first joins in the fun with his reference to the "insect heads". McGowan thanks Mr Stokes, rather sycophantically, for *"those marvellous front pages"* (in which Palmer had been successively depicted on 12, 13 and 14 August as Dr Evil, a cane toad, and a cockroach), and then goes on:

> "*All the meally mouth [sic] tut tutting by some people about Palmers 'rights' makes me sick. The reality is 99% of people want Palmer stopped*"

389. McGowan thus describes anyone who speaks out against the legislative destruction of one citizen's legal rights as mealy-mouthed (*ie* overly delicate, precious). For anyone

to draw attention to such destruction of "rights" (for which McGowan emphasises his disdain by the use of quotation marks) makes him sick.

390. This is the language, and the attitude and state of mind, of someone consumed by malice.

391. Two days later, in another SMS exchange with Quigley on 16 August 2020 (CB 1463), McGowan described Palmer this way, which McGowan readily accepted was "*a pretty severe, damning indictment*" (T444.32):

> *McGowan: He's the worst Australian whose* [sic] *not in jail*

392. In numerous of their text exchanges, Quigley refers to Palmer as a *"fat liar"* or "*big fat liar"* or *"BFL".* Examples include CB 1463, 1478A, 1493C. McGowan again does not deprecate this; instead on 26 August 2020 he applauds Quigley's use of "*BFL*" to describe Palmer "*as brilliant*": CB1502C.

393. McGowan conceded that, even though he has never met Palmer, he "*dislikes*" Palmer and "*can't stand what he does*" (T443.26-35, 444.26-36). McGowan chose to use language, to describe Palmer, that he *"wouldn't ordinarily use"* (eg *"jerk",* T375, *"the worst Australian who's not in jail" (*a *"pretty severe, damning indictment",* T444), **"*because he wanted to denigrate him*"** (T375.16).

394. All of the above factors, especially their cumulative weight and effect, amply support a finding of malice against McGowan.

B4. DAMAGES and INJUNCTIONS [FLI 7, 8] (cf. MC [272] - [307])

The Statute

395. The *Defamation Act* 2005 provides the framework in which the common law assessment of damages for defamation now operates. Section 34 provides:

> *"In determining the amount of damages to be awarded in any defamation proceedings, the court is to ensure that there is an appropriate and rational relationship between the harm sustained by the Plaintiff and the amount of damages awarded".*

396. The relationship between personal injury and defamation damages is not to be construed mathematically or precisely, and a high value is given to reputation: *Channel Seven v*

Mahommed (2010) 278 ALR 232, at [270]-[271], ***Rogers v Nationwide News*** *Pty Ltd* (2003) 216 CLR 327 at [74], *Crampton v Nugawela* (1996) 41 NSWLR 176 at 193.

397. As this Court observed in ***Stead*** *v Fairfax Media Publications Pty Ltd* [2021] FCA 15; (2021) 387 ALR 123 (per Lee J at 170–172 [228]–[240]) and repeated in *Tribe v Simmons (No 2)* [2021] FCA 1164 per Lee J at [7]:

> *"Fixing upon a sum which represents an appropriate and rational relationship between the harm sustained and the amount of damages awarded is a necessarily bespoke exercise. In examining the nature and gravity of the attack on [the applicant]'s reputation, it will be necessary to consider and make findings as to a variety of matters peculiar to [the applicant] and the publications. The amount allowed in this case must reflect the* ***subjective*** *effect of the defamation on [the applicant]"* (emphasis in original)

398. Section 35(1) of the Act relevantly provides:

> *"Unless the court orders otherwise under subsection (2), the maximum amount of damages for non-economic loss that may be awarded in defamation proceedings is $250,000 or any other amount adjusted in accordance with this section from time to time (the maximum damages amount) that is applicable at the time damages are awarded.*"

399. The maximum damages amount has been successively increased. From 1 July 2021, it is $432,500: Gazette no. 132. The cap is not to be treated as establishing an award for a worst-case scenario and then mandating the scaling of damages downward from that range. Rather, it is simply to be treated as a cut-off point: *Rush No 7* per Wigney J at [671] citing, *inter alia*, *Bauer Media Pty Ltd v Wilson (No 2*) (2018) 56 VR 674; [2018] VSCA 154 at [182]-[209].

400. If the Court determines that an award of aggravated damages is warranted, the cap is not applicable: *Nationwide News v Rush* (2020) 380 ALR 432; [2020] FCAFC 115 at [443]-[444], [459]-[463]. Because the publications in this case were in the period 31 July – 7 August 2020, the amendments in relation to damages made by the *Defamation Amendment Act* 2020 (NSW), that came into force on 1 July 2021, do not have any present relevance: see Sch 4, cl 7 of the Act.

401. By s 39 of the Act, where multiple defamatory imputations are found to have been published, the Court may assess damages in a single sum.

Common Law

402. At common law, damage to reputation is presumed upon the publication of defamatory matter of and concerning the plaintiff: *Bristow v Adams* [2012] NSWCA 166 at [20]-

[28]; *Ratcliffe v Evans* (1892) 2 QB 524 at 528. It is generally unnecessary to lead evidence to show that a plaintiff has a reputation, for such is presumed: *Gatley on Libel and Slander* (12th ed, 2013) at [32.62]. See also *Hockey* at [446].

403. There are three purposes to an award of damages in defamation:

(a) consolation for hurt feelings;

(b) recompense for damage to reputation (including where relevant, business reputation);

(c) vindication of the plaintiff's reputation.

See: *Cheng v Pan; Cheng v Zhou* [2022] NSWCA 21 per Simpson AJA at [80], Basten and Payne JJ agreeing at [1] and [2]; *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 60 per Mason CJ, Deane, Dawson and Gaudron JJ; *Uren v John Fairfax* at 150; *John Fairfax & Sons Ltd v Kelly* (1987) 8 NSWLR 131 at 142; *Rogers v Nationwide News* at 347 [60] per Hayne J, Gleeson CJ and Gummow J agreeing; see also *Fairfax Media Publications v* ***Pedavoli*** [2015] NSWCA 237 at [17]-[18].

404. The damages awarded should vindicate the applicant, in the sense of being sufficient to convince a bystander of the baselessness of the charge: *Mahommed* at [120]-[121], *Broome v Cassell and Co* (1972) AC 1071; All ER 823.

405. While the written judgment is important, the quantum of damages is also critical. In *Chau v Australian Broadcasting Corporation (No. 3)* (2021) 386 ALR 36; [2021] FCA 44, Rares J said at [133]:

> *The ordinary reasonable viewer of the program and those to whom its imputations about Dr Chau were republished are not likely to spend hours reading these reasons and nor is anyone else except the present parties and their lawyers and any appellate court. The public are interested in what amount the Court awards, not the dross of legal reasons…*

See also *Cairns v Modi* [2013] 1 WLR 1015 at [32].

406. As this Court noted in *Hockey*, *"the level of damages should reflect the high value which the law places upon reputation and, in particular, upon the reputation of those whose work and life depends upon their honesty, integrity and judgment": Hockey* at [446] citing *Crampton v Nugawela* at 195, applied in *John Fairfax Publications Pty Ltd v O'Shane (No 2)* [2005] NSWCA 291 at [3]. Damage caused to a highly valued reputation should attract a commensurate award of damages: *Nettle v Cruse* [2021] FCA 935 per Wigney J at [54].

407. A Court is also able to take into account evidence that the making of the defamatory imputation had an especially adverse impact upon the plaintiff's reputation in the eyes of some group or class in the community (see *Reader's Digest Services Proprietary Limited & Anor v Lamb* [1981-1982] 150 CLR 500 at 507 per Brennan J). In the present circumstances, the damning imputations published by a State Premier about a prominent businessman inevitably had a wide resonance in Australian government and business circles and beyond. Se in this regard Martino at [11] – [15], CB1678-9; Mrs Palmer at [22], CB1724.

408. Yet vindication is only part of the exercise. As McColl JA held in *Pedavoli* at [20]:

> "*Further, the tribunal of fact may award the Plaintiff "a substantial sum by way of damages for the Plaintiff's injury apart from the claim for vindication of reputation." In such circumstances "it will be unnecessary to add a further sum for vindication [as] the award of that substantial sum will in itself serve to vindicate the Plaintiff's reputation." Such damages "for distress and anguish are the result of a social judgment, made by the [the tribunal of fact] and monitored by the appellate courts, of what, in the given community at the given time, is an appropriate award or ... solatium for what has been done."*

409. A helpful discussion of the relevant principles may be found in *Ali v Nationwide News Pty Ltd* [2008] NSWCA 183 at [70] – [78] per Tobias and McColl JJA (a decision from which special leave to appeal to the High Court was refused: *Nationwide News Pty Ltd v Ali* [2009] HCA Trans 24), adopted by Rothman J in *Polias v Ryall* [2014] NSWSC 1692 at [85].

410. Palmer also relies upon the "grapevine effect" in relation to his claim for damages. The "grapevine effect" has been described (by Gummow J in *Palmer Bruyn & Parker v Parsons* (2001) 208 CLR 388) as follows:

> *88 The expression "grapevine effect" has been used a metaphor to help explain the basis on which general damages may be recovered in defamation actions; the idea sought to be conveyed by the metaphor was expressed by Lord Atkin in Ley v Hamilton as follows:*
>
> > *"It is precisely because the 'real' damage cannot be ascertained and established that the damages are at large. It is impossible to track the scandal, to know what quarters the poison may reach: it is impossible to weigh at all closely the compensation which will recompense a man or a woman for the insult offered or the pain of a false accusation".*

> *89 The "grapevine effect" may provide the means by which a Court may conclude that a given result was "natural and probable". However, this will depend upon a variety of factors, such as the nature of the false statement and the circumstances in which it was published…"*

411. Kyrou J in *Cripps v Vakras* at [565] described the "grapevine effect" as simply:

> *"… the realistic recognition by the law that 'by the ordinary function of human nature, the dissemination of defamatory material is rarely confined to those to whom the matter is immediately published'. Members of the community communicate with one another about matters of public interest and concern; as such, the 'poison' of a libel may spread well beyond the confines of the person or persons to whom it was immediately published".*

Aggravated Damages

412. Conduct by a respondent that is unjustifiable, lacking in *bona fides* or otherwise improper will sound in aggravated damages: *Triggell v Pheeney* (1951) 82 CLR 497; *Hockey* at [446]; see also generally, *Cerruti* & *Anor* v *Crestside* & *Anor* [2016] 1 Qd R 89; [2014] QCA 33 at [37]-[40]; *Uren v John Fairfax* at 130 per Taylor J; *Andrews v John Fairfax & Sons Ltd* (1980) 2 NSWLR 225 at 250-1 per Glass JA; *Bickel v John Fairfax & Sons Pty Limited* (1981) 2 NSWLR 474; *Waterhouse v Broadcasting Station 2GB Pty Ltd* (1985) 1 NSWLR 58 per Hunt J at 74-5; *Tribe v Simmons (No 2)* [2021] FCA 1164 per Lee J at [40].

413. Conduct with those characteristics will be such as to increase the harm which the defamation has caused or may be supposed to have caused: *Mirror Newspapers Ltd v Fitzpatrick* [1984] 1 NSWLR 643 at 653; *Hockey* at [446].

414. Palmer, in his Amended Statement of Claim (CB 1 at 9) and in his further particulars (CB 29), has particularised aspects of McGowan's conduct which meet this description, including his failure to apologise, his repetition of the defamatory imputations, and the extreme and sensational language used by him.

415. An award of aggravated damages is entirely appropriate here, with the consequence that the statutory cap on damages is not applicable: see [400] above.

Matters relevant to the assessment of damages

<u>Circulation and reach of the publications</u>

416. Various matters are agreed: see the **Agreed Background Facts** document at paras 62 and 67 – 70 (CB 119, 120).

417. Palmer also relies on the matters set out in the document annexed hereto styled **Republication of Palmer's Matters**.

418. In short, all or part of each of the first five matters was republished on mass media outlets or platforms, such as on YouTube (over 10,000 views), the SMH website, the ABC website, the AAP website, the "Perth Now" website, the Channel Seven website, the WA Today Facebook page, the West Australian print newspaper, and the Canberra Times website, while it is apparent that the sixth matter was read very widely by any measure.

419. The Court can be comfortably satisfied that, in publishing the defamatory imputations to a gathered media contingent, the intended and natural and probable consequence of the publications was that they would reach a vast audience, and that they did indeed do so.

Damage to reputation (cf. MC [277] - [283])

420. Palmer has adduced extensive and unchallenged evidence concerning his personal and professional reputation. That unchallenged evidence ought to be accepted. It establishes Palmer's extensive involvement in business, political, educational and philanthropic life, and also the high repute in which Palmer is held in business and professional circles.

Palmer's evidence

421. Palmer has been involved in business for more than 40 years. He is a director of Mineralogy, a company he founded in about 1985, and through which he exploits iron ore mining tenements in the Pilbara district of Western Australia: CB1684[2]-CB1686[16]. Palmer has, through the projects he has initiated or controlled, contributed to the direct and indirect creation tens of thousands of jobs and billions of dollars of investment activity in the Australian economy: CB1686[16]. In 2021, Australia's *Government Media Mining Awards* magazine awarded Palmer the epithet "Entrepreneur of the Decade" in recognition of the contribution he made to business in Australia: CB1684[6]. See also A. Palmer, CB1723[18(a)].

422. From 2013 to 2016 Palmer served as a Member of the House of Representatives, during which time he was a Member of the House of Representatives Standing Committee on Economics, the House of Representatives Standing Committee on Infrastructure and Communications and the Joint Select Committee on Trade and Investment: CB1686[8].

In 2017 following his retirement from Parliament, the Parliament of Australia acknowledged his service to the country and contribution to Parliament: CB1686[10]. He is currently the Chairman of the United Australia Party: CB 1731 [19].

423. Palmer has served as an Adjunct Professor at both Deakin and Bond Universities, and he is a former Director of the John F Kennedy Library in Boston in the United States of America: CB1684[4]-[5] and [12]. See also A. Palmer, CB1722[17(b) and (h)].

424. Palmer is currently the Chairman of the Palmer Foundation, a philanthropic entity owned by his family which pursues charitable projects designed to promote the welfare of individuals and the society: CB1686[18]. Whilst he was a Member of Parliament, Palmer donated his Parliamentary salary to charitable organisations in his electorate of Fairfax: CB1685[9].

425. Consistently with this substantial record of achievement over many decades, in 2012, Palmer was elected a Living National Treasure and declared as such in a poll conducted by the National Trust of Australia. Recipients of the Award are selected by popular vote of the people of Australia for having made outstanding contributions to Australian society in any field of human endeavour: CB1685[7]. See also A. Palmer, CB1722[17(d)].

Martino's evidence

426. Martino is a qualified chartered accountant, and a former partner of the accountancy and consultancy firm Deloitte Touche Tohmatsu, where he has served as the firm's Managing Partner and Chief Executive Officer: CB1677[2]-[5]. Martino has also served as a Chairman or director of numerous public and private companies during his 30 years' experience in corporate finance, mergers and acquisition, initial public offerings and corporate strategy: CB1678[6]-[7].

427. Martino knows Palmer well, both personally and professionally. He has been a director of several of Palmer's associated companies, including Minerology, and has advised him on several proposed business transactions: CB1678[10]. Martino's family socialises with Palmer: CB1678[10].

428. By reason of this familiarity, Martino is well placed to assess Palmer's personal attributes and capabilities. On Martino's assessment Palmer is *"a strong family man and strong Australian patriot who considers it his duty to make a significant contribution to Australia":* CB1678[11]. On Martino's assessment, Palmer is also a man who, through

great tenacity, business ingenuity and risk taking, has achieved extraordinary success in business, of which the Balmoral iron ore projects are a particular mark of Palmer's achievement: CB1678-9[11].

429. Martino has made these observations of Palmer since they first met in 2005 or 2006. Martino moves in the business and mining and resource communities in New South Wales, Western Australia, Queensland and Victoria. He has a developed a strong network in the investment, institutional and stockbroking communities that fund and support mining projects. Martino also mixes socially in those circles and is involved in charitable circles by reason of the *pro bono* services his firm provides to some charitable operations CB1679[12].

430. Martino gives unchallenged evidence that Palmer is well known in these circles owing to his substantial involvement in the mining and resources industry and his propensity for philanthropic commitments: CB1679[12]. Martino testifies that, in July and August 2020, Palmer had a reputation in these circles as a dedicated family man, a substantial philanthropist, someone who goes out of his way to help those in need, and a very successful businessman: CB1679[14].

431. As Martino summarised things, *"[i]n the business, social and philanthropic circles in which [he] mix[es], Mr Palmer had a good reputation at the time of [the publication of] the matters":* CB1679[15]. Martino shares these views of Palmer: CB1679[14]-[15].

A Palmer's evidence

432. Mrs Palmer gives unchallenged evidence of Palmer's *"substantial public profile and standing, both in Australia and overseas":* CB1722[17]. She augments Palmer's evidence as to his professional achievements, noting, among other matters that Palmer was an official delegate representing Australia at the Asia Pacific Economic Cooperation Summit held in Sydney in 2007, a delegate at Club de Madrid World Leaders Forum and various international conferences, and a World Fellow with the Duke of Edinburgh Award: CB1722[17(a), (c), (f)-(g)].

433. Mrs Palmer also addresses Palmer's philanthropic activities, including his significant donation of $1 million to medical research conducted by the University of Queensland into the effectiveness of a COVID-19 treatment (Hydroxychloroquine): CB1723[18]-[19]. She gives evidence of Palmer having purchased and donated to the national medical stockpile, through the Palmer Foundation, medicine under research for the

treatment on COVID-19 in sufficient quantities to make it free to all in Australia, were it to be approved for use by the Australian government: CB1724[19(e)].

The effect of such evidence

434. Such evidence establishes that Palmer's personal and professional reputation prior to the publications was one of considerable distinction and prominence. Such a reputation manifested itself in his considerable business, political and philanthropic endeavours and his appointment as a delegate to positions of economic and diplomatic importance.

435. Palmer's professional, political and personal life was thus to a significant extent founded on his reputation for the support of and patriotism for Australia, including the support of Western Australia, where he had both a residence and business premises (CB1722[18(g)]), and his generosity, including in philanthropic matters and towards Australia. See: *Crampton* at 195.

436. Palmer's life's work is antithetical to the imputations McGowan levelled at him, and the imputations struck at the very heart of that work, and at Palmer's reputation as a man committed to his country and committed to using his money to advance the lives of Australians. Damage caused to such a highly valued reputation should attract a commensurate award of damages. In this connection, the more closely the defamation touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be: *De Kauwe v Cohen (No 4)* [2022] WASC 35 at [1160] per Le Miere J, citing *John v MGN Ltd* [1997] QB 586, 607 with approval.

437. It may be suggested that Palmer is to some extent a controversial figure. In mid-2020 he was, on the evidence, an unpopular figure at least in some quarters: see the McGowan/Stokes texts at CB1173-4, and see McGowan T375.22, 433.37-434.3. That is neither here nor there: the imputations are so serious that they must have damaged Palmer's reputation – even amongst people who already had adverse views about him.

437A. At MC [281] – [283], McGowan contends that the evidence *"indicates no real damage to [Palmer's] professional reputation".* This contention should be rejected.

437B. In August 2020, albeit he was Chairman of the United Australia Party, Palmer was not a politician in the sense of someone who is holding or seeking elected office: Palmer #3 CB 1730-1731 [17]-[20]. Rather, Palmer was (and remains) a prominent and successful Australian businessman – one of Australia's most successful and richest: see [421]-

[435] above. Before McGowan defamed him, the unchallenged evidence demonstrates that Palmer had a significant professional reputation within both the business community and the general public. See: [421]-[425] above.

437C. There is a fundamental difference between the two parties in this aspect of the case. McGowan has been a career politician since 1996. He remains a historically popular political figure: see [682] – [690] below. The evidence indicates that the matters published by Palmer had no negative effect on either his reputation or his popularity. They may even have enhanced them. Nor did McGowan express any concern about Palmer's publications (eg by sending Concerns Notices) prior to launching his cross-claim. And, as submitted elsewhere at [107B] and [694], his motivation in commencing his defamation proceedings, by his cross-claim, was that it would enable him to hedge against the prospect that Palmer might have success in the proceedings which he (Palmer) had initiated: see T321.1-11; 322.26-323.15.

437D In contrast, immediately after McGowan's publication of the Palmer matters, Palmer was portrayed in *The West Australian,* with derision and hostility, as Dr Evil and other cartoon caricatures: see [388] and [655]. Palmer's solicitor sent two successive, urgent, Concerns Notices. And Palmer gave uncontested evidence about his concerns about the immediate public reactions to him following McGowan's publications: see for example [460].

437E. As submitted in [437] above and at T650, the imputations were so serious that they must have damaged Palmer's reputation even amongst those persons who already had adverse views about him. McGowan's defamatory statements were so harsh that they could only diminish Palmer's reputation both personally and professionally and exacerbate any adverse views already held about him. They call for significant compensatory damages.

437F. The evidence does not suggest, much less establish, that in August 2020 the public's views about Palmer had "hardened", or become "baked in", to the extent that McGowan's defamatory statements would not have harmed his personal or professional reputation: *cf* T651.23, 676.11-16. White J in *Hanson-Young v Leyonhjelm (No 4)* [2019] FCA 1981 at [264]-[267] (see also [286]-[292]) rejected submissions along similar lines, notwithstanding that in that case Senator Hanson-Young was a prominent politician with widely known left-wing and feminist views, that Mr Leyonhjelm (formerly Senator Leyonhjelm) was an obvious political adversary with opposing right

wing and/or anti-feminist views, and that the subject matter of the defamation was sexual/gender relations: *cf Hockey* at 477-482.

437G. McGowan's defaming of Palmer occurred in the first six months of the COVID-19 pandemic, in July-August 2020, before COVID-19 vaccines were available, before vaccination status came to affect rights and obligations, before the Delta and Omicron variants meant that most Australians were directly affected by the virus, and long before even the lead-up to the May 2022 Federal election. No vaccine was available in 2020, and it was not known if or when a vaccine might become available. Some controversial issues that may now be associated with Palmer in some people's minds, such as the topic of vaccination and "anti-vaxx-ing" attitudes in relation to COVID-19, did not come into prominence until 2021.

437H. Indeed, until 11-12 August 2020, owing to the confidentiality obligations, neither the public nor the business community had any knowledge of the existence of the arbitration between the Palmer companies and the State of Western Australia.

437I. Damage to reputation is of course presumed, but there was also evidence adduced by Palmer of his good reputation at the time of the impugned publications in July and August 2020. That evidence, in the affidavits of Martino and Mrs Palmer, was not challenged: see T650.35 – 651.2.

437J. At T651.18, his Honour referred to Palmer as *"an active political figure"*. That suggestion, with respect, needs to be approached with some care, both chronologically and descriptively. At the time of McGowan's publications, Palmer was in fact, as he testified, a "**former** Australian politician" [CB 1684]. Palmer was elected as a Member of the House of Representatives of the 44th Parliament of Australia in 2013 but he retired from Parliament in 2016 (CB 1685 at [8]-[9]).

437K. Thus, by mid-2020, Palmer had not been a politician for four years (see also CB 1730-1731 at [17]-[19]). He did not hold or seek any elected office in the four years between the time of his retirement from Parliament in 2016 and the time when McGowan's publications were made in late July and early August 2020.

437L. Instead, Palmer's activities in late July and early August 2020 involved actively pursuing his business and philanthropic interests. This included

(a) pursuing commercial matters arising from the two previous arbitral awards in favour of Mineralogy and International Minerals, which Palmer's position as a director obliged him to pursue in the best interests of those corporations;

(b) the work he was doing in his capacity as the Chairman of the Palmer Foundation;

(c) the case which he brought in the High Court of Australia, in his capacity as a private citizen, and the case which he caused one of his companies to bring, seeking to challenge Western Australia's "hard border" policy under section 92 of the Constitution.

437M. Palmer's business interests in Western Australia dated back at least to 1985 when, as explained in Palmer's affidavit evidence, Mineralogy acquired its mining tenements. Throughout the period 1993 to 2001, he was personally extensively involved in negotiating the terms of what became the State Agreement. His close WA involvement continued after 2001, with the development and attempted development of projects pursuant to the State Agreement, the 2014 and 2019 arbitrations, and the proposed mediation in 2020 (see generally CB 1699-1703). None of this had anything to do with politics. Neither did the philanthropic activities of The Palmer Foundation.

437N. It would thus not be correct, in Palmer's submission, to characterise the exchanges between the parties in July and August 2020 as taking place *"between two political combatants"* [T675.45-47].

437O. McGowan claimed during cross-examination (T376.1-40, 396.30-397.26) that his purpose in "denigrating" Palmer by public statements was to deter Palmer from continuing to pursue litigation against the State. In other words, McGowan's evidence is that he was attacking Palmer for what he had done (legitimately pursuing legal actions), not because he and Palmer may have held differing views on matters of politics.

437P. Even if it were to be supposed that Palmer was a polarising public figure in July and August 2020, what would follow would be that there is broad range of attitudes held about him, from persons who admire him, to persons who dislike him, to persons who are neutral or open-minded about him. This is so with almost any public figure. Polarising public figures are still susceptible to suffering injury to reputation and hurt feelings.

437Q. McGowan's admitted intention in publishing the defamatory matters, in July-August 2020, was to "denigrate" Palmer. As a matter of common sense, such savage public

attacks, coming from an immensely popular political figure leading a state government, inevitably harmed Palmer's professional and personal reputation, both amongst persons with centre or centre-right political views and amongst those whose sympathies were more on McGowan's (Labor) side of politics.

437R. McGowan's broad bipartisan public support in July and August 2020 in West Australia means that many in the West Australian public, or at least a significant proportion, would not have viewed what was being said about Palmer as mere partisan political rhetoric. These were statements made not during an election campaign but in planned press-conferences (for the first five matters) and a carefully drafted (by others) Facebook post (the sixth matter). McGowan was acting in his role as an established Premier who was riding high, not as a candidate. The general public that heard or read the defamatory matters would be highly likely to think less of Palmer by reason of the identity and status of the publisher. The extraordinary level of vitriol directed towards Palmer and his actions as a private citizen and businessman necessarily had a substantial impact on his professional and business reputation.

437S. It is submitted that those in the political, business and philanthropic milieus in which Palmer moves, and the public more generally, are not likely to have held views about Palmer so "rusted on" that they are impervious to the impacts of seriously defamatory statements. A person with such stubborn or prejudiced views is necessarily not an ordinary, reasonable listener, viewer or reader. The assessment of damages should not be carried out by reference to any such hypothetical persons.

Hurt to feelings (cf. MC [284] - [293])

Palmer's evidence

438. In chief, Palmer gave evidence about his hurt feelings on reading the matters, which happened in each case shortly after they were published. His evidence was palpably sincere, and it was not challenged (save in one respect referred to below).

439. Palmer's description of his hurt and distress, given in candid and raw terms, is particularly compelling given his acceptance that he is a man familiar with the rough and tumble of political life, of robustly expressed contrary opinions, and unwarranted personal criticism, attacks and abuse: CB 1692[40].

440. However, McGowan's imputations were, for Palmer, beyond the pale: they cruelly took aim at his patriotism and commitment to Australia (CB 1692[40]), which Palmer sees as a fundamental and defining facet of his character. As he said, at T199.42-46:

> *"I was just very embarrassed and, you know, I was worried about what my family thought of me, that they thought this could be true. I guess we all have some form of self-image and I always thought that, you know, being an Australian, I mean, in public service really has no reward but you don't expect people to question your loyalty to the country or to – to the people":*

441. Palmer was not challenged in cross-examination on such evidence. It was convincing and it should be accepted.

442. As to the **first and second matters**, which include the potent expressions *"enemy of the State", "enemy of West Australia"* and *"enemy of Australia",* Palmer's evidence included (at T198.24-199.23):

> ***Now, when you became aware of those publications, what was your reaction?---**I would probably guess my – my – my immediate reaction was one of dismay. A little bit of shock, but mainly dismay. I couldn't understand why the word "enemy" was used and I just thought back, you know, what "enemy" means. I mean, I had been working in Western Australia since 1986 trying to create jobs for people and there's over 60,000 jobs had been created with our iron ore project and billions had been exported. But "enemy" really concerned me because, you know, for my family 30 history, my great uncle died in World War I at Ypres. I – I had my family at Tobruk and at Kokoda and places like that. And my nephews are still a TPI pensioners at – from the Vietnam War. My other nephew, Martin Brewster, led INTERFET. I thought all of those people have done more for our country than I could ever do. I never thought that I would – I would be labelled an enemy of – of Australia or of the State of Western Australia. I didn't – I didn't think it was called for.*
>
> *...*
>
> ***Did the use of the phrase "enemy of the state" have any particular significance in your mind when you read it?---**Well, it did. If we – if we look at the trials that Stalin had in – in the Soviet Union, I guess, in the thirties, I always read about them in school as being show trials. And in the German experience with Hitler, they had the People's Court where they regularly used the term "enemy of the state" and they would have trials within one day of people and then string them up, so it correlated with me the fact that I had become more or less the rock bottom of my own country. I – I was also upset that the comment was made by someone in such high office as a premier of a state.*
>
> *...*
>
> *I thought, well, I had done the best I could, you know, the Federal Government had asked because they couldn't get supplies of hydroxychloroquine, I think it would have been in April or May that they need to compete in international auctions and the TGA – of course, the bureaucracy of Australia had requested we do something about it and authorised us to go to auctions and to spend my*

> *own money. I think I spent about $30 million or something to acquire 37 million doses of hydroxychloroquine and donated it to the government stockpile. I was never an advocate one way or the other in relation to that. I was responding to what we thought was a national crisis. And I couldn't understand – you mightn't get any accolades for that, but I couldn't understand how they would say you didn't care about people.*

443. Mrs Palmer gives evidence that Palmer has a *"keen interest in Modern History":* CB1724[20]. Phrases such as *"enemy of the State"* would have a particular pungency for any student of history, as they plainly did for Palmer. The language used by McGowan was entirely excessive. Palmer felt that McGowan had crossed a line was seeking to *"destroy"* him, and he was *"very worried about what the future might bring"*: T200.08-10.

444. When asked about the **third matter**, concerning his so-called "promot[ion] of hydroxychloroquine", Palmer's response included (at T200.31-43):

> *I thought it wasn't true what he said. I think he said this in August. We had actually had the authority and request from the Federal Government to acquire the hydroxychloroquine earlier that year, at a time when they thought that was the only hope for Australians. What we agreed to do – I had no control over the drugs or use or any financial interest in it. I merely provided the money and people and bought them and donated them to the stockpile. I didn't have a view promoting them or having a business or anything. I thought this was sort of gutter politics. It was very concerning because it was suggesting I was equivalent to a drug dealer or someone like that that would have disregard for the law when, in actual fact, I had all the authorities from the Prime Minister and the cabinet to do all I could to protect that option of treatment for Australians which was the only option to save the country at that time. So I thought it was unfair to say these things in August.*

445. At the time of the third matter's publication, it seemed to Palmer that, quite unjustly, *"the Western Australian government had embarked upon a political campaign to win the next election and he [McGowan] used me as a scapegoat":* T201.19-21.

446. Palmer's hurt was significantly amplified by the status of the attacker: McGowan was the Premier of Western Australia and thus was capable of marshalling behind him the support of *"the whole government"*, and Palmer understood that people would take *"a lot of notice of what the premier says".* See: T201.24-28. Again, Palmer was *"worried about what might happen":* T201.27-29.

447. And Palmer's worries were not unfounded: *"there was a website set [up] subsequent to this w[h]ere people could spit on me when I came to Western Australia or attack my*

family": T201.28-32. An article about that website is at CB 887. As he continued, *"these were things that I envisaged at the time may happen, and I was concerned about my personal safety":* T201.29-32.

448. In an endeavour to stop McGowan's persistent and unwarranted attacks, Palmer asked his solicitors to write to him. In addition to seeking an apology, Palmer was concerned that McGowan's words were stoking something altogether more sinister and he was worried about his life and his family: T201.40-45. That letter, dated 4 August 2020, is at CB 1004.

449. Palmer's distress, including his concern about a connection between McGowan's publications and the establishment of the website and the prospect of harm coming to himself and his family was by no means irrational, nor was any such suggestion put to him. See in this regard *Ali v Nationwide News Pty Ltd* [2008] NSWCA 183 at [72] and [115]-[116] (Tobias and McColl JJA).

450. Palmer's evidence in these respects was clearly sincere. It was expressed in a notably simple and open tone and manner. It is properly to be considered in the Court's assessment of damages for hurt to feelings.

451. Palmer's concerns notice was to no avail: McGowan was unable to resist launching yet another unprompted attack on Palmer. Thus the very next day (5 August), in the **fourth matter**, notwithstanding Palmer's having spent tens of millions of dollars to acquire, for donation, medicine that then seemed to be a potentially promising treatment for COVID-19, McGowan published statements conveying the imputation that Palmer selfishly uses money he has made in Western Australia to harm Western Australians.

452. Palmer was very hurt by the **fourth matter**: he was particularly concerned that McGowan would seek to portray him as person who would wish intentionally to damage the health of Western Australians: T202.33-35. Palmer felt he was *"unfairly dealt with"*, as McGowan's statements were contrary to what he was trying to achieve all year. He *"just didn't know why [McGowan] would say things like that"*: T202.42-44. See also: CB 1689-90[30]. Again, this evidence was given in an understated way indicating bemusement and sadness.

453. But McGowan continued his attacks. In the **fifth matter** (two days later, on 7 August) he declared that *"we are in a war* [not just a "battle"] *with Clive Palmer",* thus conveying – yet again – that Palmer is a threat to Australians and is dangerous to them.

Again, Palmer was hurt and offended. He thought *"it's very dangerous for Australia if people can be threatened or coerced from going to court for a determination":* T203.9.

454. As to the **sixth matter**, on 14 August 2020, Palmer gave evidence that he *"just couldn't believe"* that McGowan would make the various statements in his Facebook post when they were *"just not true"*: see T203.40-204.1, 204.23-30.

Martino's evidence

455. Martino gave uncontested evidence that Palmer told him that he was *"deeply hurt"* by McGowan's comments, and *"referenced the enormous contribution he has made over the years in Western Australia",* and that these comments *"not only dismissed and ignored that contribution but falsely portrayed him in a light of a predator working against Western Australian in avaricious and self- serving manner":* CB1680[20].

A Palmer's evidence

456. Mrs Palmer gave evidence that Palmer also expressed to her the distress and hurt which McGowan's attacks caused him, especially those that falsely portrayed him as an "enemy" of the people in Australia, at "war" with Australians, and as someone who would take legal action with a motivation to "destroy the livelihoods" or "damage the health" of or otherwise harm West Australians. Husband and wife each felt that the statements were deeply hurtful, both to them, and their family (CB 1724[23]).

456A. At MC [277]-[280] and [284]-[293], McGowan contends that there was "no significant" hurt to Palmer's feelings. That submission should be rejected.

456B. Palmer relies on his oral submissions at T650.2 – 663.4, 664.7-45.

456C. The extracts McGowan identifies at MC [287]-[291] are selective and do not fairly reflect Palmer's the overall impact of his evidence: see also [439]-[454] above.

456D. McGowan's oral submissions at T673-674 that nominal damages can be awarded despite a concession that at least some hurt to feelings has been suffered should be rejected. Nominal damages are only awarded where there is no real damage at all. That is simply not so here, on the evidence. Palmer's evidence as to hurt to feelings was honest, and almost entirely unchallenged. Five of McGowan's matters were published, and caused Palmer hurt, well before the *Amendment Act* was unveiled on 11 August. To the extent that Palmer's hurt was added to by the attacks on him in the *Amendment Act*, that has no bearing on the hurt caused by the first five matters.

456E. Palmer also submits, as was briefly indicated in oral submissions at T705.16 – 706.35, that it is critical to bear in mind, as well as hurt to feelings and damage to reputation, the third element to be considered in damages for defamation, namely **vindication**. The principles are referred to above at [403]-[411].

456F. The significance of this distinction was illustrated in *Hockey* at [477]-[482] where hardened attitudes towards politicians were taken into account as a significant factor in assessing damage to reputation, but vindication was stressed at [498]-[501] as an independent head of damage. Even if the Court were to consider (contrary to these submissions) that there is no damage to reputation, that would not mean that there is no need for vindication. As White J explained in *Hockey*, citing long-standing authority, the judgment should reflect the *baselessness* of the charges. This is particularly the case where the defamer is a popular premier who maintained in his evidence that his publications were reasonable, but where McGowan makes no attempt to rely on any defence of truth or even honest opinion.

456G. Palmer has suffered, on the evidence, both hurt to feelings and damage to reputation. And in addition, he is entitled to an award of damages which tells the world that he has been vindicated.

Matters of aggravation (cf. MC [297] - [301])

457. The hurt and distress McGowan caused to Palmer by his publication of the first to sixth matters has been aggravated by the following factors.

458. ***First***, the stature of the defamer, viz. the Premier of Western Australia, and the wide publicity received by, and the additional gravity that attached to, his words by reason of his office.

459. ***Secondly***, the impact of the dissemination in the mass media (deliberate and intended) of the various matters. Palmer became reclusive ("*I didn't want to go outside, I didn't want to give media interviews so much")* and it caused anger to rise inside him: T209.26-28.

459A. The submission at MC [299] should be rejected. Palmer's evidence, to the effect that he became reclusive, was unchallenged. McGowan's deliberately denigrating and defamatory statements, from the bully pulpit through the mass media to the widest possible audience, were improper and unjustifiable conduct.

460. ***Thirdly***, the extent to which the public took heed of McGowan's aggressive attack on Palmer: *"websites that were set up to hate me in Western Australia"* and, in one particularly nasty instance of vituperation, a video was published online, which showed *"people in a nightclub singing they wanted to kill me":* T209.42-44. This too caused Palmer to "*lie low":* T209.44.

461. ***Fourthly***, the extent to which the matters were part of a relentless, repetitive and wide-ranging series of attack by McGowan which he relished launching with disturbing frequency. See above at [377]-[394]. (As McGowan acknowledged, he "*like[s] fighting back against [Palmer]*": CB1513-1516, esp. at 1513).

462. ***Fifthly***, the extent to which the publications were but part of a larger scheme, as boasted about by Quigley in his ABC radio interview on 13 August 2020, a scheme by which McGowan and Quigley, the Attorney-General of the State, secretly connived to deceive him and to destroy his legal rights.

463. Palmer's reaction to Quigley's radio interview was one of disbelief. The following passages, at T205-6, are a powerful reflection of the impact upon him when he realised, from the interview, what had been happening:

> *Well, it was one of disbelief, because, you know, … the State had come up with the idea of having a mediation to sort everything out which we thought was a good idea. We then embarked upon a system of negotiation with the mediator, you know, signing a mediation agreement and we thought we were all going to mediation to a resolution. We didn't file our awards because we thought that was the case*
>
> *… suddenly when we read this interview from McGowan I couldn't believe it that – from Quigley, sorry – that they had deceived Mr McHugh the mediator, myself and others that all the time a State Solicitor was drafting the amending Act at the time we were preparing to resolve it and that he was seen to gloat over, you know, left upper cut or right upper cut and – and that he had to deceive us so that we didn't register our awards.*
>
> *So I thought it was despicable that the first law offer of state would use dishonesty and deceit as a method of trying to enact legislation – be it valid or invalid – that our standards had fallen very low; I was very angry about it. That I had been deceived.*
>
> *I felt like I was stupid, that I had believed them in the first place, that I should have just gone ahead and registered the award regardless and not tried to resolve matters*
>
> *And it wasn't my understanding that, you know, using lies and misrepresentations is an honourable way for a practitioner – legal practitioner – which I understand Mr Quigley had been a barrister. … That you expect from people of that status to have a certain respect for the law and respect for honesty*

and dishonesty and not to act in a dishonest way. So I felt in one way stupid and the other way just helpless to see what we could do to – I got really mad that they had lied to everybody, all right? And they had lied to McHugh J. That they had signed a mediation agreement I think just eight days earlier and that they were encouraging us to get our material to give to the mediator and at the same time they were working to bring this Act in to destroy all of our rights.

So, you know, I then thought it might have been a criminal act they were doing and I remember looking up the Western Australia Criminal Code looking at fraud and, from memory, fraud – I think item D there said to deprive a person of their property by deceit and dishonest means and then I went further down the page and I looked at, you know, conspiring to do a crime is the same as doing a crime. And then I looked back at the amending Act and I saw that they had exempted themselves from the Criminal Law in respect of protected matters and I think the word "connected with" featured and the definition of "connected with" – it's not these things but it is other than these things; it's everything. So they had a blanket exemption under the Criminal Law for any acts they had done past, present or the future. So I – I then resolved never to visit Western Australia while that was there and to do what I could do to protect my family and my descendants which were covered by the Act.

464. Palmer's dawning awareness of McGowan's pivotal role in all of this had a particular impact upon him: T206.25:

> *Well I thought Mr McGowan was fully informed, that he was the head of the government and from some of the things he said in Parliament I believed he did. And I think, you know, this was all happening very fast – this interview and all of this came together – and suffice to say that it got too much for me and I ended up vomiting what I thought about all of this and just wondering what we could do.*

465. ***Sixthly***, McGowan's refusal to apologise, when, following the publication of the first, second and third matters, Palmer promptly sent a letter through his solicitors asking *inter alia* for an apology (CB 1004). McGowan did not apologise, and instead published the fourth, fifth and sixth matters, notwithstanding a second letter of demand after the fifth matter (CB 1066), as well as further publications attacking Palmer.

466. All of these factors demonstrate that McGowan's conduct, taken as a whole, both exacerbated the damage to Palmer's reputation and increased the hurt to his feelings: *Triggell* 82 CLR at 514.

467. The evidence establishes that Palmer genuinely felt distressed and dismayed by the various features of McGowan's conduct referred to above. This conduct should sound in a significant award of compensatory and aggravated damages.

Quantum

468. Although each case must be considered on its own merits, consideration of recent damages awards can be helpful. A table of some awards in recent media and online cases is **attached** and marked "**C**".

468A. This is a case where significant damages are appropriate: see, in particular, the reasons articulated in [437A]ff and [456A]ff above.

468B. This is far from the type of case where nominal damages might perhaps be awarded. McGowan has never made any attempt to plead or prove that any of his defamatory imputations was true, nor has he sought to advance any defence based on partial justification, Burstein facts, or contextual truth, or honest opinion.

468C. As to hurt to feelings, damage to reputation and vindication, see [420] – [456G] above.

468D. Importantly, it was not put to Palmer during cross-examination that his feelings were not in fact hurt or that his evidence on that topic was in any way insincere or exaggerated. It is not open to McGowan now to make submissions along those lines.

468E. The presumption of damage to reputation is in part to overcome the forensic disadvantage that a plaintiff may suffer who presents unchallenged evidence of high reputation, and the defendant does not attempt to justify the truth of any part of the defamation. The achievement of vindication for such a plaintiff necessitates not just that the plaintiff's case be upheld, but that the size of the verdict makes that vindication plain.

468F. The position of McGowan ("Mr 89%"), in his cross-claim, is fundamentally different. McGowan was at all material times wildly popular, and he knew it. He expressed the view privately to Mr Stokes, for example, that "99% of the people" would take his side against Palmer in relation to the Amendment Act.

468G. It appears that McGowan's assessment was justified by the outcome of the State election in March 2021, when McGowan led Labor to the greatest victory ever achieved by a political party at State level in Australia, winning 53 of 59 seats.

468H. Crucially, as submitted elsewhere, the evidence demonstrates that the filing of McGowan's cross-claim was a tactical move, chosen at the suggestion of McGowan's legal advisers as an intended hedge against the risk of Palmer succeeding on at least part of his claim (and the associated legal costs risk), rather than because McGowan had any significant hurt to feelings. (See for example CB 1523, 1525, 1527, 1528, 1529; and see

T319.21-23, 321.1-11, 322.42-47.) It even enabled McGowan to enhance his political standing further by suggesting that it would deliver "a big cheque" to the taxpayers of Western Australia.

468I. McGowan's cross-claim, unlike Palmer's claim, was not preceded by any concerns notices or other correspondence expressing concern about particular publications. That is because the cross-claim was "lobbed in" for perceived tactical advantage.

Injunctive Relief

469. Orders 2 and 3 in the Application seek permanent injunctions in the usual form. The relevant principles are set out at ***Rush v Nationwide (No 9)*** [2019] FCA 1383 at [9]-[31]; see also *Wagner & Ors v Harbour Radio Pty Ltd & Ors* [2018] QSC 201 at [916], *Carolan v Fairfax Media Publications Pty Ltd (No 7)* [2017] NSWSC 351 at [15], [18]-[31], [35]-[36], [56].

470. The *Defamation Act* does not provide for the making of permanent injunctions as a remedy against the publisher of defamatory statements or imputations (an award of damages being the main remedy provided under the Act): *Rush v Nationwide (No 9)* at [4] per Wigney J.

471. Nonetheless, this Court has the power or jurisdiction to make a permanent injunction against a publisher who has been found to have published defamatory statements that were not shown to be substantially true: *Rush v Nationwide (No 9)* at [4] per Wigney J.

472. The legal right to take proceedings in defamation for damage to reputation is sufficient to found jurisdiction in this Court under ss 5(2) and 22 of the *Federal Court of Australia Act* 1976 (Cth). And s 23 of that Act provides that the Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds as it thinks appropriate. See *Chau v Australian Broadcasting Corporation (No 3)* [2021] FCA 44; 386 ALR 36 per Rares J; *Rush v Nationwide (No 9)* at [5] per Wigney J.

473. Whilst courts have traditionally exercised a high degree of caution in granting interlocutory injunctions to restrain defamatory publications having regard to free speech concerns, the position is different where final relief is sought by a successful plaintiff:

> *"Restraining an unsuccessful respondent in a defamation case from republishing defamatory statements or imputations which have not been shown to be substantially true should generally be considered to be one of the types of*

cases where a restriction or limitation on the right of free speech may be warranted": *Rush v Nationwide (No 9)* at [5] per Wigney J; approved in *Stead* per Lee J at [309].

474. Final injunctions to restrain a threatened defamation or the repetition of what has been found to be defamatory ordinarily have been granted or refused with reference to the general principles applied by a court of equity in its auxiliary jurisdiction to restrain the repetition of a legal wrong: *Harbour Radio Pty Limited & Ors v* ***Wagner*** *& Ors* [2019] QCA 22; 2 QR 468 per Fraser at [50] and Morrison JJA and Burns J agreeing at [70]-[71], citing I C F Spry, *The Principles of Equitable Remedies*, 9th Ed, at 326 – 327, 334 – 335. See also *Rush v Nationwide (No 9)* at [27]-[29] to similar effect relying on the same learned text.

475. Permanent injunctions may issue where some factor suggests that there is a risk that a defendant will publish the same or similar defamatory matter unless restrained. Thus, a critical matter bearing on the exercise of the discretion to issue an injunction is the Court's assessment of the existence and degree of the risk. See: *Rush v Nationwide (No 9)* at [349]; *Wagner* at [52]; *Hockey (No 2)* per White J at [90]; *Stead* at [309]. See also *Munsie v Dowling (No 10)* [2018] NSWSC 709 per Rothman J. Other factors include the nature and seriousness of the defamatory imputations and the general undesirability of a multiplicity of actions between the parties.

476. If the qualified privilege defences are rejected and Palmer obtains a verdict, the following factors individually, and, more critically, cumulatively, provide a proper evidentiary foundation for the making of a permanent injunction.

(a) McGowan's obsessive repetition of the defamatory imputations: on four separate occasions McGowan charges Palmer with being a threat and/or a danger to Australians and/or Western Australians; and to these he adds further imputations, including promoting a dangerous drug, and using money made in WA "to harm" Western Australians. McGowan cannot help himself;

(b) the unconstrained and undisciplined way in which McGowan hurls himself into his defamatory attacks on Palmer, *apropos* of nothing: more than one of the defamatory imputations was entirely unresponsive to any question asked of him by a reporter;

(c) McGowan's refusal or inability to check himself notwithstanding his receipt of successive concerns notices; they ought to have been sobering but were not:

T202.3-5; cf the conduct of the respondent in *Dutton v Bazzi* [2021] FCA 1474 referred to by White J at [236];

(d) McGowan's gleeful relishing of the attacks on Palmer by others such as Quigley and Stokes;

(e) McGowan's inability to contain himself even in the courtroom where he continued his censorious critiques (see e.g. "*Mr Palmer's predations*"; "*people like Mr Palmer…";* "*this sort of stuff that Mr Palmer says and does…*": T304.32; T304.36; T304.45.

477. There can be no doubt as to the seriousness of the defamatory statements. McGowan tells his audience, which is all of us, that Palmer, a man with political influence in our country, is a danger to us, indeed so dangerous that he must personally be stopped by the full weight of the legislative machinery of the state. The imputations published of Palmer are false and their repetition should be prohibited.

478. The palpable enmity for Palmer displayed by McGowan, together with his seemingly uncontrolled instinct to defame Palmer, co-exist with his considerable political power and interest, and his routine access to the media for the wide dissemination of whatever he chooses to say. In all the circumstances, these factors demonstrate that this is a case (unlike for example most cases involving a corporate mass-media defendant) where there is a real risk of repetition of seriously defamatory imputations unless the Court does something to prevent it from occurring.

479. A permanent injunction is warranted.

Interest

480. The principles are set out in *Hanson-Young v Leyonhjelm (No 5)* [2020] FCA 34 at [7]-[16]. The appropriate interest rate is 3-3.5% from the time of publication until judgment.

C. McGOWAN'S CROSS-CLAIM

C1. PUBLICATION AND REPUBLICATION

481. In the FADCC, Palmer:

(a) admits publication of the first and second CC matters, in the course of press conferences on 31 July 2020 and 12 August 2020;

(b) admits authoring the third – seventh CC matters and otherwise being responsible for the publication of that document in the *West Australian* newspaper, on his Facebook and Twitter accounts, and by letterbox drop. He denies publication "by Google" (whatever that means) but generally accepts that he is liable for the widespread dissemination of the letter;

(c) admits speaking the words attributed to him in attachments 8 and 9 to the ACC, being interviews conducted with the ABC and Sky News on 14 August and 1 September 2020 (the eighth and ninth CC matters).

482. As to republication:

(a) Palmer admits that it was the natural and probable consequence that the words spoken by him during the two press conferences (the first and second CC matters) would be republished by those present;

(b) however, Palmer denies similar allegations of republication in relation to the 3rd – 7th, and 8th, CC matters. It is not clear why allegations of republication are made in respect of those matters. Nevertheless, it is accepted that once a publication appears in the mass media; its dissemination is broad.

C2. IMPUTATIONS [FLI 10.1 – 10.5]

McGowan's Imputations

483. By separate determination (see [2] above), this Court has found that eight of the nine matters upon which McGowan has sued convey the imputations identified below.

484. Palmer accepts that McGowan's imputations, as found to have been conveyed, are defamatory of McGowan.

First CC matter

485. CC Imputation 3(a) is: "*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*".

486. CC Imputation 3(b) is: "*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 CC matter

487. CC Imputation 5(b) is: "*as Premier, Mr McGowan lied to the people of Western Australia about his justification for imposing travel bans"*

Third-Seventh CC matters

488. CC Imputation 7(a) is: "*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 the criminal law*".

Eighth matter

489. CC Imputation 9(a) is: "*As Premier, Mr McGowan had behaved criminally, and was improperly seeking to confer upon himself immunity from the criminal law*".

490. Imputation 9(c) is: "*As Premier, Mr McGowan was acting corruptly by seeking to confer upon himself criminal immunity".*

Defences

491. As noted above, Palmer pleads truth to CC imputations 3(a), 3(b) and 5(b), which relate to the hard border, and contextual truth and common law qualified privilege (reply to attack) to all the eight matters remaining in contest.

C3. DEFENCES OF TRUTH [FLI 11]: CC imputations 3(a), 3(b) and 5(b)

Relevant facts (cf. MC [334] – [352])

492. CC Imputations 3(a) and 3(b) were conveyed by the first CC matter, a press conference given by Palmer in Brisbane on 31 July 2020: CB 931A. Palmer's remarks followed Dr Robertson's evidence on 27 July during Palmer's Federal Court proceedings challenging the validity of WA's hard border: CB 628ff.

493. CC imputation 5(b) was conveyed by the second CC matter, an interview given by Palmer on Sky News on 12 August 2020: CB 1200. In the interview, Palmer largely addressed the enactment of the *Amendment Act* but also commented on the hard border.

494. Two different time periods need to be considered in relation to these three imputations concerning the hard border. The first is late March-early April 2020, when the hard border was imposed. The second is June-July 2020, when questions arose as to whether the hard border should be continued or modified.

Late March-early April 2020: imposition of the hard border

495. McGowan announced the hard border closure on 2 April 2020. He held a press conference at which he stated, as to that topic:

> "*Some might think it's over the top and unnecessary. I can assure them it's not. Based on the medical advice, we will move to introduce a hard border closure effective from midnight or 11.59 p.m. on Sunday night"*: CB 381, lines 21-24.

The video and transcript of this press conference is item 25, CB381-381A.

496. On 2 April 2020, the press conference was followed by a media statement released by McGowan (CB382) which stated, *inter alia*:

> "*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*.
>
> *Based 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*".

497. In cross-examination, McGowan accepted that what he was telling the public, by his announcements, was:

(a) that the hard border was necessary (T328.29-3);

(b) that it was necessary because of the medical advice he had received T329.1-2;

(c) that the medical advice was that the hard border was necessary (T329.27-36).

498. But the medical advice did not say any such thing. To claim that it did, as McGowan repeatedly did, was knowingly false on his part.

499. On 29 March 2020, Dr Andrew Robertson, the Chief Health Officer of Western Australia, and Dr Paul Armstrong, Director, Communicable Disease Control, approved the following statements (among others) contained in an email (**the 29 March email**) sent at 7:51pm AWST (CB 349) (emphasis added):

"Dr Robertson and Dr Armstrong agree that closing the border will have the effect of slowing the spread of COVID-19. This measure ***may not reduce the risk significantly further than that which is achieved by measures already in place*** *(i.e., finding cases and their close contacts and placing them into isolation; or telling people crossing the border to isolate themselves; or closing and restricting businesses and restricting mass gatherings) but* ***may have a similar risk reduction to other measures****, such as closures of further categories of retail outlets."*

Closing all of the WA borders will have ***an*** *impact,* ***but is a relatively small impact compared to the effect of the other measures taken to date*** *(such as the examples listed above)*

They agree that ***closing the border will only be effective right now****, rather than at a later date as it will only be effective when there is a differential risk across the country of developing the disease. In the event that WA develops a similar rate of spread in the community as seen in other states currently, having the border closed will have far less impact".*

500. In his oral evidence, McGowan: stated that he was "*confident*" that he saw the email at about the "*point in time*" it was sent (T330.20-21); agreed that it was the only written medical advice upon which he relied in announcing the hard border (T330.23-30); and conceded that, insofar as he claimed to have received oral medical advice, the oral advice was consistent with the written advice set out in the 29 March email (T330.32-42; T333.1-9; T333.36-41).

501. Dr Robertson for his part has made it plain that the 29 March email constituted the totality of his advice (oral or written) in relation to closing the border at the time (2 April) that closure was imposed: CB 591 at 1(a) and 4 (final two sentences).

502. The 29 March email manifestly did not say, or even suggest, that it was "*necessary*" to close the borders, or that such a step should be or ought to be taken.

503. Rather, it conveyed the following (quite different) propositions:

(a) Closing the border would have the effect of slowing the spread of COVID-19;

(b) However, closing the border <u>may not reduce the risk significantly further</u> than had already been achieved by measures that were already in place;

(c) Closing the border <u>may have a similar risk reduction to other (possible additional future) measures</u>, such as closures of further categories of retail outlets;

(d) Closing the border would have <u>an</u> impact, but that impact would be <u>relatively small</u> compared to the effect of other measures which had already been taken;

(e) If it were to be decided to close the border, such a step would only be effective if implemented immediately.

504. McGowan conceded (only, and repeatedly) that the 29 March email did not include the word "necessary" (T332.44-333.1; T333.44-334.26) or the word "should" (T334.28-33). But he steadfastly refused to make the obvious concession that, regardless of whether those particular words were used, the gravamen of the advice was not to the effect that closing the borders was necessary, or should be done, at all. McGowan's obduracy in this regard was deliberately evasive and dishonest.

505. The 29 March email, in truth, merely compared various available options and, as McGowan agreed, left the decision to him (T335.31-38). It simply did not express a view, one way or the other, as to whether the option of closing the border should be chosen. Not only did it not say or convey that closing the border was necessary; it did not say or convey that such a step was recommended, or was the best or preferred option.

506. Quite the contrary in fact: it spelled out that other measures which had already been taken, and other measures (alternatives to the imposition of a hard border) which could in the future be taken, would or might be as effective.

June-July 2020: continuation of the hard border

507. By June-July 2020, there was public debate about whether the WA hard border needed to be maintained to its full and strict extent.

508. On 24 June 2020, Dr Robertson provided advice to the McGowan government (CB 588-589), *in the following terms*:

> *"Proposals to open the borders to jurisdictions with no community spread, such as South Australia and the Northern Territory, if legally viable, could be considered on public health grounds, as the risk of re-introduction from these jurisdictions remains very low".*

509. On 24 July 2020, Dr Robertson repeated that advice, verbatim: CB 612-613.

510. McGowan accepted that, from 24 June to 24 July, Dr Robertson's advice did not change: T349.20-24.

511. On 27 July 2020, Dr Robertson gave evidence in the Federal Court of Australia (Rangiah J). His evidence was that, after he had by those letters informed the WA Government that an intermediate position (ie short of a hard border, making exceptions for jurisdictions with no community spread such as South Australia and the Northern

Territory) could properly be considered from a public health perspective, he was not asked to provide any further advice concerning that possibility: CB692.10-17.

512. In his oral evidence on 27 July, Dr Robertson also gave evidence that at that time five of the states and territories, namely Queensland, South Australia, Tasmania, the Northern Territory, all met "*the medical definition for elimination*" of COVID-19 (CB 713 at lines 4-9). In respect of those jurisdictions, Dr Robertson confirmed that, in his 24 June letter (being annexure 5 to his first report, CB588-9), he was expressing the view that "*there would be grounds to open [the borders]":* CB713 at lines 11-36. He reiterated that position at CB 713.38-714.8, where he said that opening the borders "*could certainly be considered on public health grounds*". See also CB 717-718.

513. On 14 October 2020, *WA Today* reported that in his evidence to an Education and Health Standing Committee inquiry, Dr Robertson gave that "*his health advice had not been taken up*" and further that "*the state government's 'all-or-nothing' approach to reopening the border was not based on health advice*": CB1565A.

514. In the teeth of this evidence as to what Dr Robertson's advice and views in June-July 2020 and thereafter had actually been, and despite at one point conceding that the medical advice in fact was that an intermediate position (of opening to jurisdictions with no spread) could be considered (T352.27-30), McGowan nevertheless reverted to his intransigent line that "*the medical advice was simply to keep the borders closed full stop*" (T352.41-45).

515. McGowan admitted that he had not conveyed to the public what the advice actually was, namely that such an intermediate position could properly be considered: T352.32-33.

516. Indeed, on 31 July 2020 McGowan said this at his press conference that day (CB933B lines 72-76; see McGowan T 345.33-346.12):

Reporter: *Should we be concerned though that you've said that a travel bubble wouldn't be available due to health advice but our Chief Health Officer is saying it's OK?*

McGowan: ***No he's not.*** *He has been very clear, that the arrangement that we have in place is the right arrangement. It'd the advice he has given us.*

517. Again, on 7 August 2020, McGowan repeated his line as follows (CB 1049 lines 18-22; see McGowan T346.14-30):

> *We will continue our battle, in fact, our war, with Clive Palmer to protect our State. This is a pandemic, we won't be rushed into anything that is against our health advice. Our position has been clear and consistent, and it won't be*

> *changing. For as long as* ***our health advice recommends the hard border stay in place****, it will remain.*

518. McGowan's Facebook post of 8 August 2020 (CB 1065) was to similar effect.

519. Each of those statements by McGowan was false.

520. From early April to August 2020, McGowan repeatedly stated first that the public health advice was to impose, and subsequently that the public health advice was to continue unmodified, the Western Australian hard border. Those claims were directly contradicted by Dr Robertson's advice and evidence, in the 29 March email, in the letters of 24 June and 24 July 2020, and in his Federal Court testimony.

521. Every such claim by McGowan was false, to his knowledge.

522. In early October 2020, McGowan briefly took a different public tack. On 1 October 2020, NCA NewsWire reported McGowan thus (CB1532A):

> *Honestly, the benefit to opening to the Northern Territory or South Australia for Western Australia is not there…*
>
> *All we'll do is lose jobs were we to open to those states.*
>
> *The other states want us to open the border so that West Australian tourists will flood east, not so that people from the east will come here.*
>
> *They're only saying all this for very self-interested reasons because we have higher incomes, we have people that are more used to travelling and therefore we'll have more tourists from West Australians go to the east.*
>
> *They are not advocating for this for any other reason than that they want to see WA income spent in Sydney or Brisbane, or wherever it might be*"

523. Plainly such reasons for refusing to open the borders were, as McGowan conceded, "*economic reasons*": T353.26-46.

524. McGowan's remarks were widely reported (see also CB1560-63C), and widely criticised, including by Senator Cormann, the Tourism Council and the Chamber of Commerce: T354.6-17. For example, the Chief Executive of the Chamber of Commerce and Industry said: "*The West Australian business community expects that decisions regarding the removal of border restrictions will be made solely on health advice, not on the basis of economic protectionism*": CB1563A.

525. McGowan's October statements would appear to indicate that his true reasons for refusing to modify the hard border, at least with respect to South Australia and the

Northern Territory, were not the content of health advice available to him (since that advice was that such modifications could properly be considered), but were economic / political reasons.

526. By later that same day, McGowan in a second press conference sought to back away from his earlier remarks propounding those economic reasons, and retreated to repeating his original lie that the continuation of the hard border was based on health advice: CB 1563.

The substantial truth of the CC imputations

527. ***As to CC Imputation 3(a):*** McGowan plainly did not "*act upon the advice*" of the Chief Health Officer when he closed the borders on 2 April 2020. The Chief Health Officer had not advised that the borders ought to be closed. He had not said or suggested that such closure was necessary. He had not even said or suggested that that such a step was recommended or preferred. He had actually said that other measures, alternatives to a hard border, would or might have a similar impact on reducing the risk of COVID-19. See [499] above.

528. In telling the people of Western Australia (repeatedly) that in closing the border he was acting upon the health advice, McGowan lied.

Response to MC [338]-[350]

528A. McGowan here chooses to blur these three imputations – 3(a), 3(b) and 5(b) – together. But they are couched very differently, **by McGowan's choice** as plaintiff (cross-claimant). His imputations 3(a) and 5(b) are expressed in terms which only refer to the imposition of the hard border, ie in April. On the other hand, imputation 3(b) is directed to the continuance of the hard border, in June-July. Accordingly, among other things, Dr Robertson's advice of June and July is irrelevant to the truth or falsity of 3(a) and 5(b), although it is certainly relevant to the truth of imputation 3(b).

528B. As to imputations 3(a) and 5(b), which relate to the April imposition of the hard border, Palmer reiterates his submissions at [495] – [497] above. McGowan admitted – as he plainly had no alternative but to do, because it is irresistibly obvious – that what he was telling the public, in his 2 April press conference and media statement, was (a) that the hard border was necessary, (b) that it was necessary because of the medical advice, and (c) that the medical advice was that the hard border was necessary. But the medical advice simply did not say that. Accordingly, McGowan lied. See [498] – [506] above.

528C. But not only did he lie. Further, his imputations 3(a) and 5(b), as framed by him, are true. He did not *"act upon the advice of the CMO in closing the borders"*, and he did lie *"about his justification for imposing the travel bans"*.

528D. Further, as to imputations 3(a) and 5(b), whether or not McGowan lied in April depends upon what he knew then – and is not affected by what he may have been told later. Thus Dr Robertson's advice in May, June and July 2020 is not relevant to imputations 3(a) and 5(b).

528D. As to imputation 3(b), which relate to the July continuation of the hard border, Palmer reiterates his submissions at [507] – [526] above.

528E. Further, as to MC [344]-[346], Dr Robertson's advice in June - July did not simply advocate a continued "all or nothing approach": see paragraphs [507]-[513] above. McGowan's public statements about what Dr Robertson's advice had been at that time were simply untrue: see [514] – [519] above.

528F. As to MC [348]-[349], McGowan did indeed tell the public that the medical advice was that the border closure was "necessary". That is what both his press release and his press conference actually said, and he admitted in cross-examination that that was so: see [495]-[498], and [502]-[506] above. In that regard, contrary to MC [350] (last line), McGowan's answers certainly should be given "real weight". These are admissions as to what he intended, and knew, the words he spoke to mean.

528G. At MC [351], an attempt is made to resuscitate the undignified attempts by McGowan to suggest that perhaps he had received oral medical advice which was somehow different to the written medical advice. That attempt should be given short shrift. McGowan conceded in cross-examination that the oral advice he received was the same as the written advice. And Dr Robertson's expert report specifically confirms that to be so: CB 591 at 1(a) and 4; See [500] and [501] above.

529. CC imputation 3(a) is substantially true: ss. 4 and 25 of the *Defamation Act*.

530. ***As to CC Imputation 3(b):*** This imputation relates to the maintaining/continuing of the hard border in June-July 2020, rather than its initial imposition on 2 April 2020.

531. Dr Robertson's written advice of 24 June and 24 July, reiterated and confirmed in his Federal Court evidence on 27 July, was that consideration could properly be given, so far as public health grounds were concerned, to opening the borders, at least to those States and Territories that had eliminated COVID-19.

532. In telling the people of Western Australia that their health would be threatened if the borders did not ***remain*** closed, McGowan knew that the health advice was to quite different effect. The conclusion follows, again, that he lied.

533. CC imputation 3(b) is also substantially true.

534. ***As to CC Imputation 5(b)***: This imputation is couched in terms referring to McGowan's "*justification for imposing travel bans*". It therefore relates to the imposition of the hard border in early April, rather than to its continuation in June-July.

535. Either way, however, for the reasons outlined above, McGowan lied to the people of Western Australia about his justification for both imposing and maintaining the hard border.

536. Imputation 5(b) is also substantially true.

C4. DEFENCE OF CONTEXTUAL TRUTH [FLI2] (cf. MC [353] – [403])

Legal Principles

537. Palmer relies upon the defence of contextual truth under s. 26 of the *Defamation Act* in respect of all of McGowan's CC matters.

537A. The CC matters were published in July-August 2020, before the amendments made by the *Defamation Amendment Act 2020* (NSW) came into effect on 1 July 2021. Accordingly, s. 26 applies to these proceedings in the following form:

> ***Defence of contextual truth***
>
> *It is a defence to the publication of defamatory matter if the defendant proves that:*
>
> *(a) the matter carried, in addition to the defamatory imputations of which the plaintiff 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 plaintiff because of the substantial truth of the contextual imputations.*

537B. There are three elements to the defence of contextual truth: *first*, that the impugned matter carried one or more other imputations in addition to the plaintiff's defamatory imputations; *second*, that the contextual imputations are substantially true; and *third*, that the plaintiff's defamatory imputations do not further harm the reputation of the

applicant because of the substantial truth of the contextual imputations. See: ***Nassif*** *v Seven Network (Operations) Ltd* [2021] FCA 1286 at [121] per Abrahams J.

538. There is no requirement that a defendant's contextual imputations differ in kind from any one of a plaintiff's imputations. They need only differ in substance. See *Fairfax Media Publications v* ***Zeccola*** (2015) 91 NSWLR 341 at [69]-[84]; *Domican v Pan Macmillan Australia Pty Ltd* [2019] FCA 1384 at [32]; ***Palmer v McGowan*** [2021] FCA 430 at [17] per White J; *Nassif* at [122].

539. It is also well-established that a matter may convey a contextual imputation of a general nature, which differs in substance from one or more specific imputations of which the plaintiff complains: *Zeccola* at [49], [71]; ***Cornwell*** *v Channel Seven Sydney Pty Ltd* [2016] NSWCA 255 at [62], per Gleeson JA.

540. Indeed, in some cases, "*a single alleged instance of misconduct will be so serious that it may, at the same time, convey a general charge against the plaintiff*": *Cornwell* at [60], per Gleeson JA (with whom McColl and Macfarlan JJA agreed).

540A. A contextual imputation will be substantially true (at the time of publication) if it is true in substance or not materially different from the truth: s. 4 of the *Defamation Act*.

541. The issues for the Court in the present case are:

(a) whether Palmer's contextual imputations are conveyed;

(b) whether they differ in substance from McGowan's imputations;

(c) if (a) and (b) are answered affirmatively, whether the contextual imputations are substantially true; and

(d) whether the publication of those contextual imputations satisfies the test under s 26 of the *Defamation Act* ("did not further harm").

542. For the purposes of the balancing exercise under s 26, the Court does not merely compare the terms of McGowan's imputations with the terms of Palmer's contextual imputations. Rather, the focus must be on the facts, matters and circumstances relied upon as evidence to establish the truth of the contextual imputations. See *John Fairfax Publications Pty Ltd v Blake* (2001) 53 NSWLR 541 at 543. See also *Abou-Lokmeh v Harbour Radio Pty Ltd* [2016] NSWCA 228 at [29] per McColl JA; *McMahon v John Fairfax Publications Pty Ltd (No 3)* [2012] NSWSC 196 at [19] per McCallum J. *Palmer v McGowan* at [27]-[31] per White J.

543. The question for determination then is: is the truth, as so established by that evidence, of the contextual imputations (not the language in which they are expressed) such that McGowan's reputation is "not further harmed" by any of his imputations which are not defensible?

544. Although there has been some divergence of views in the authorities, Palmer submits that the better approach is for a Court undertaking the s 26 balancing exercise not to take into account any of an applicant's imputations which have been found to be a matter of substantial truth. ***Hutley v Cosco*** **(**2021) 104 NSWLR 421; [2021] NSWCA 17 at [130]-[146], [154]-[155] and [156] should be followed. See contra *Mizikovsky v Queensland Television Ltd* [2014] 1 Qd R 197; [2013] QCA 68.

544A. At MC [368] – [369], McGowan favours the different approach of McColl JA in *Fairfax Digital Australia & New Zealand Pty Ltd v* ***Kazal*** (2018) 97 NSWLR 547; [2018] NSWCA 77 at [21] – [33]. That case was an interlocutory application in relation to the pleadings. Her Honour's (obiter) view was a minority one, not joined in by Meagher JA or Gleeson JA (at [46]-[47] and [150] respectively).

544B. In *Kazal*, McColl JA considered, at [32], that it was relevant "*for the tribunal of fact to consider that by reason of the substantial truth of one or more [plaintiff's] 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*", although it does not "*weigh the s. 26(b) scales in the defendant's favour"*.

544C. However, McColl JA's approach was rejected by the Court of Appeal in *Hutley v Costco*: see Basten JA (at [142]), Macfarlan JA and White JA agreeing (at [154(3)] and [156]). Basten JA pointed out, as McGowan rightly accepts (at MC [370]), that her Honour's approach would "*undermine the requirement of s 26 that the defendant cannot rely upon imputations other than those which are different from and in addition to the plaintiff's imputations*".

544D. As the unanimous Court of Appeal later held in *Hutley*, "*the preferable course is simply to remove from the balancing exercise the substantially true imputations pleaded by the plaintiff and ask whether the imputations not shown to be true caused harm beyond that caused by the true contextual imputations*": see [142]. Such an approach embraces a purposive construction of s. 26(b).

544E. The question to be determined is, therefore: do the plaintiff's imputations not found to be substantially true further harm the reputation of the plaintiff given the harm done by the substantially true imputations pleaded by the defendant? See *Hutley* at [144].

Palmer's Contextual Imputations: (cf. MC [373] – [387])

(a) **Whether they are they conveyed and**
(b) **Whether they differ in substance from McGowan's imputations**

First CC matter (CB 931A, Ex 6) – Contextual Imputation 1:

McGowan is a liar

545. The general imputation, that McGowan *"is a liar"*, is supported by lines 6-8, 15-22 and 33-38 of Exhibit 6.

546. McGowan is charged with having told *"lies"* (plural). He is said to have lied about *"threats that don't exist"* (*ie* opening the border with States and Territories that have eliminated COVID-19), and he is said to have *"told lies"* about *"acting on the advice of the Chief Medical Officer",* given what that Chief Medical Officer had said in his evidence in court.

547. As outlined above, McGowan did tell lies about what the medical advice available to him was, both in March-April and in June-July.

548. Generally speaking, McGowan is thus "a liar". A general imputation of this kind differs in substance from specific imputations such as CC 3(a), 3(b) and 5(b), that McGowan lied on one or other discrete occasion.

549. Palmer's contextual imputation 1 therefore arises and it is different in substance from McGowan's imputations.

First CC matter (CB 931A, Ex 6) – Contextual Imputation 2:

McGowan deliberately misrepresented the nature of the medical advice which his government had received concerning COVID-19 and the appropriate response to it

550. The reader is told that the Chief Medical Officer had testified that he had given advice to the government that travel bubbles with low-risk jurisdictions such as the Northern Territory could work but had received no response, and that that testimony that was different from McGowan's claim that he had acted on the Chief Medical Officer's advice in keeping the hard border: lines 6-8 and, 15-22 and 33-38 of Exhibit 6.

551. Contextual Imputation 2 differs in substance from McGowan's 3(a). It is specific in its terms. Whereas McGowan's 3(a) focuses on whether or not McGowan had acted on the Chief Medical Officer's advice, Contextual Imputation 2 focuses on McGowan's misrepresenting of what that advice was.

Second CC matter (CB 1200, Ex 7) – Contextual Imputation 3:

McGowan caused the State of Western Australia to renege on a mediation agreement made between it, a former Chief Justice of Western Australia and Palmer

552. Contextual Imputation 3 arises from lines 1-13 of CB 1200. In paragraph 2, the viewer is told that a mediation agreement had been entered into between the State of WA, a former Chief Justice of WA and Palmer.

553. In paragraph 3 the viewer is told that, "*disappointingly",* by acting the way he had the previous night [when the Amendment Act was introduced in the Legislative Assembly], McGowan had *"disregarded"* that agreement.

554. Neither of McGowan's two imputations addresses his conduct in respect of the mediation agreement at all.

Second CC matter (CB 1200, Ex 7) – Contextual Imputation 4:

McGowan abused his position as Premier by overseeing the passing of laws designed to protect his government from criminal liability

555. Contextual Imputation 4 is carried. It arises in particular from lines 14-21, and 27-32 of CB1200.

556. For a Premier to orchestrate criminal immunity for his own government, in respect of past or future conduct the nature of which is not disclosed, would readily be regarded by the ordinary reasonable viewer as an abuse of his position.

557. The imputation differs in substance from the only CC imputation found to have been carried by the Second CC matter, namely CC imputation 5(b) which concerns lying about the "travel bans".

Second CC matter (CB 1200, Ex 7) – Contextual Imputation 6:

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

558. Contextual Imputation 6 arises from lines 6-32 of CB1200, and, in particular, lines 22-23 and 27-32, which refer specifically to the abolition of FOI rights.

559. Plainly this imputation too differs in substance from CC imputation 5(b), which concerns lying about the "travel bans".

Third – Seventh CC matters generally (CB1436-1446):
Contextual Imputations 9, 10, 12 and 14

560. The most serious defamatory sting that the Third – Seventh CC matters carry about McGowan (all five of them being in substantially the same terms) is the overarching one that it was disgraceful and dishonourable behaviour on his part to oversee the passing of legislation which had all the various extraordinary features noted earlier in these submissions, three of which are specifically the subject of these Contextual Imputations.

561. McGowan has chosen to select just one of those features (as to exemption from the criminal law) to sue on: CC imputation 7(a).

562. These contextual imputations are also conveyed, and they differ in substance from McGowan's sole imputation.

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

563. Contextual Imputation 9 arises from the entirety of each of these five publications and, in particular, the express references to exemptions from the criminal law in paragraphs 1, 2, 3, 10 and 11 of the third matter (CB1436) and the equivalent paragraphs in the other four matters.

564. For a Premier to orchestrate criminal immunity for himself and others, in respect of prior illegal conduct the nature of which is carefully not disclosed and cannot be the subject of FOI inquiries, would be regarded by the ordinary reasonable viewer as disgraceful behaviour, regardless of whether the legislation in question survived constitutional or other legal challenge.

565. Such an imputation differs in substance from McGowan's imputation 7(a) which only makes the narrower and more specific allegation that he was involved in a corrupt attempted coverup.

Contextual Imputation 10**:** *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 McGowan.*

566. Contextual Imputation 10 arises from the entirety of each of these five publications and, in particular, the express references to the abolition of the right to make freedom of

information applications in paragraphs 2, 5, and 10 of the third matter (CB1436) and the equivalent paragraphs in the other four matters.

567. For a Premier to orchestrate the passing of legislation which prevented the media and the public from finding out what he and his government had done – even though he evidently regarded that conduct as being such as to make it necessary to give himself an exemption from criminal liability – would be regarded by the ordinary reasonable viewer as disgraceful behaviour, regardless of whether the legislation in question survived constitutional or other legal challenge.

568. Such an imputation also differs in substance from McGowan's imputation 7(a).

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

569. Contextual Imputation 12 arises from the entirety of each of these five publications and, in particular, the express reference to the timing of the passage of the Amendment Act in paragraph 6 of the third matter (CB1436) and the equivalent paragraphs in the other four matters.

570. For a Premier to orchestrate the passing of legislation which had the various features referred to in the Third – Seventh CC matters, in such a rushed timeframe allowing no genuine opportunity for parliamentary consideration or review, would be regarded by the ordinary reasonable viewer as disgraceful behaviour, regardless of whether the legislation in question survived constitutional or other legal challenge,

571. Such an imputation plainly differs in substance from McGowan's imputation 7(a).

Contextual Imputation 14*: McGowan is a dishonourable man.*

572. The general imputation, that McGowan "is a dishonourable man", arises from the entirety of each of these five publications. The combination of all the outrageous features of the legislation, and of McGowan's conduct in overseeing the (rushed) passage of legislation having those features, conveys the general charge that McGowan is dishonourable.

573. That general imputation is different in substance from McGowan's imputation 7(a).

Eighth CC matter (CB 1472, Ex 9) – Contextual Imputation 17

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 McGowan and his government had done.

574. Contextual Imputation 17 arises from the entirety of CB1472, and, in particular, the express references to the abolition of FOI rights in lines 8-10, 44-51 and 94-105.

575. For a Premier to orchestrate the passing of legislation which prevented the media from finding out what he and his government had done – even though he evidently regarded that conduct as being such as to make it necessary to give himself and his government an exemption from criminal liability – would be regarded by the ordinary reasonable viewer as disgraceful behaviour, regardless of whether the legislation in question survived constitutional or other legal challenge.

576. Contextual Imputation 17 differs in substance from McGowan's two imputations 9(a) and 9(c), neither of which relates to the abolition of FOI rights at all.

Eighth CC matter (CB 1472, Ex 9) – Contextual Imputation 20

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.

577. Contextual Imputation 20 arises in particular from lines 58-64 of CB 1472.

578. Contextual Imputation 20 differs in substance from McGowan's two imputations, 9(a) and 9(c), which do not address the effect of McGowan's conduct on State Agreements at all.

Eighth CC matter (CB 1472, Ex 9) – Contextual Imputation 24

McGowan is a dishonourable man

579. The general imputation, that McGowan "is a dishonourable man", arises from the entirety of CB 1472. The combination of all the outrageous features of the legislation, and of McGowan's conduct in overseeing the secret preparation and rushed passage thereof, gives rise to a general charge that McGowan is dishonourable.

580. The general imputation concerning McGowan's overall character differs in substance from McGowan's particular imputations 9(a) and 9(c) which are confined to one specific aspect of the legislation.

CONTEXTUAL TRUTH: THE EVIDENCE (cf. MC [388] – [403])

Contextual Imputation 1

McGowan is a liar

581. Palmer relies on the follows facts to support the imputation that McGowan is a liar.

582. ***First, as to the hard border***, McGowan lied when he repeatedly asserted, contrary to the known fact, that the medical advice was that it was necessary to impose a hard border on 5 April 2020. And he lied again when he repeatedly asserted, contrary to the known fact, that the medical advice in June-July was to maintain the hard border without any relaxation at all. Palmer refers to and reiterates his submissions at [492]-[536] above.

583. ***Secondly, as to hydroxychloroquine,*** McGowan lied when he made the claims he did in the third matter (Ex 2, CB1001A lines 30-37) as follows:

> *"He [Palmer] 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 [sic.] 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."*

584. As submitted elsewhere, this was false, to McGowan's knowledge, in several respects. Palmer refers to and reiterates his submissions at [342]-[356] above.

585. Palmer also relies on the following matters which have emerged in the course of the trial.

586. ***Thirdly,*** McGowan lied when he claimed that his cross-claim was part of his defence of Palmer's proceedings: see [105]-[107] above.

587. ***Fourthly,*** McGowan lied when he claimed in his oral evidence that a driver who crashed a car into a power pole near his house did so as an attack on him provoked by Palmer: see [100]-[102] above.

588. ***Fifthly,*** McGowan lied when he claimed in his oral evidence that the High Court had upheld the validity of the provisions in the *Amendment Act* relating to criminal immunity: see [103]-[104] above.

589. ***Sixthly***, McGowan lied in making the assertions that he did in the sixth matter (CB1458), supposedly *"clearing up the facts"*. Palmer refers to and reiterates his submissions at [80] – [83] above.

590. ***Seventhly***, McGowan lied in his press conference on 12 August 2020 (CB1183F line 318) when he said *"That's a drafting issue*" in response to a question as to why Palmer was personally named in the *Amendment Act*. McGowan admitted in cross-examination that he knew that the actual purpose of naming Palmer was to impose a compulsory indemnity upon him (and his estate): T492.3-31 (although at T493.18-494.4 he retreated slightly from that evidence.) It was no mere "drafting issue", as McGowan well knew.

Response to MC [390]

590A. Each of the matters raised in [390], although not particularised, arose from the cross-examination of McGowan. McGowan thus has no basis for submitting that they should not be raised.

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.

591. Palmer repeats his submissions at, and referred to in [582] above.

Contextual Imputations 14 and 24

McGowan is a dishonourable man

592. Palmer relies on the following features of McGowan's conduct in support of these contextual imputations.

593. ***First***, his willingness to lie, as submitted above.

594. ***Secondly,*** his presiding (as Minister) over the dishonest charade by which the State misled and deceived not only Palmer and his companies but also the arbitrator (Mr McHugh) and the mediator (Mr Martin) in pretending that the arbitration and mediation would proceed, with the State's "good faith" participation, when in fact he fully intended that both the arbitration and the mediation would be terminated and extinguished by the *Amendment Act* which he was secretly preparing.

595. ***Thirdly,*** the breadth of the immunities in relation to criminal liability, provided for in the Amendment Act as to both past and future conduct, is so extraordinary as to be dishonourable. It is no wonder that Palmer was concerned that McGowan and his

government may have participated in, or may be prepared to participate in, conspiracy or other crimes.

596. ***Fourthly,*** the totality of McGowan's amoral deceit in preparing the *Amendment Bill* in secret and rushing it through Parliament in indecent haste, with all its extraordinary features. Such conduct, with its radical negative consequences for *inter alia* the rule of law and the stature of State Agreements, and the creation of sovereign risk, was abhorrent and contrary to all liberal democratic traditions as they have prevailed in Australia: see for example the Western Australian Bar's response to the Quigley's justification for the *Amendment Act,* at CB 1571-1579.

597. It is not to the point to say, as McGowan did (see for example T478.12) that both sides of politics ultimately voted for the Bill**.** It may well be that heavy criticism might be directed at all those who chose to allow such a Bill to pass. But it was McGowan who drove it, as Premier. He was, as he accepted (T493.35-38)*, "integral"* to its conception and passage. It is he who bears primary responsibility for the stain that it leaves on democracy and the rule of law in Western Australia.

598. For McGowan, as he several times admitted, the bedrock position was that *"the end justifies the means"*: see for example T486.6-23, 486.38-46, T490.1-29. That is a stance which in almost all of human experience demonstrates a dishonourable course of conduct.

599. Consistently with that morally empty stance, having falsely painted Palmer as an existential threat to the State and its inhabitants he could sanctimoniously proclaim that *"My conscience is clear. I know we are doing the right thing"* (CB1183G, line 371; CB1458 line 38). He could convince himself that "In a *moral sense we did the right thing"* (T308.25-26) to drive such outrageous legislation forward.

600. This is the position taken up by rule-benders and equivocators throughout history. It is one of cynical indifference to enduring principles of public integrity. It is the doctrine of *"Whatever it takes".* It is the kind of stance devastatingly discredited, for example, in Martin Niemoller's *"First They Came",* and by Thomas More's rejoinder to Roper in Robert Bolt's *A Man for All Seasons:*

> *... And when the last law was down, and the Devil turned 'round on you, where would you hide, Roper, the laws all being flat? This country is planted thick with laws, from coast to coast, Man's laws, not God's! And if you cut them down, and you're just the man to do it, do you really think you could stand upright in the*

winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake!"

601. ***Fifthly,*** McGowan's contemptuous disregard for the Australian Constitution and for the institution of the High Court of Australia when he spoke dismissively of a case pending before that Court by stating during a press conference held on or about 31 July 2020 that *"[W]e're in a pandemic. Constitutional niceties, I think, should go out the window"*: Palmer's second matter, Ex 1 CB 933 lines 24-25.

602. ***Sixthly,*** McGowan's bald-faced public affirmation that Minister Barnett's conduct in 2012 had been correct, when both the WA Supreme Court and the arbitrator (Mr McHugh, a former High Court Justice) had authoritatively held and decided to the contrary. See CB 1183.

603. ***Seventhly,*** McGowan's use of vitriolic public attacks as a tactic by which he sought to cow Palmer into silence and to dragoon the Commonwealth into toeing the WA line on the hard border.

604. ***Eighthly*** McGowan's decision to have the WA taxpayers, rather than himself, fund the risks involved in his choosing to mount a Cross-Claim in these proceedings.

605. ***Ninthly,*** to the extent not already addressed, all the matters relied upon in these submissions as demonstrating malice on the part of McGowan.

606. Contextual imputations 14 and 24 are substantially true.

Contextual Imputation 12:

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

607. Palmer refers to his submissions at [64]-[68] above.

608. The *Amendment Act* was indeed passed in an absurdly short time. Having been kept secret from virtually all members of both houses until Quigley rose in the lower house to move its introduction at 5pm on 11 August 2020, it was passed by both houses little more than 48 hours later. Obviously that meant there was nothing like sufficient time for members to absorb, consider, take advice on and deliberate on the appropriateness, scope or ramifications of such extraordinary and unprecedented legislation. Many of the members of parliament who spoke on 12 and 13 August 2020 made reference to this reality: see for example CB 1174B-1174C; 1177E; 1177L.

609. And as the Law Society of Western Australia pointed out in its statement of 19 August 2020 (CB1484), this was also the type of legislation in respect of which time was needed for extra-parliamentary bodies, such as the Law Society itself, to make submissions and representations to the elected representatives about the consequences of the legislation.

610. McGowan's conduct in overseeing the passing of the Amendment Act, in such circumstances, was disgraceful.

611. Contextual imputation 12 is substantially true.

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 Mr Palmer.

612. Palmer repeats his submissions at [54]-[59] above.

613. One effect of the *Amendment Act* was to terminate and nullify the mediation agreement which had only been entered into some days earlier.

614. Contextual imputation 3 is substantially true.

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.

Contextual Imputation 26:

Mr McGowan abused his position as Premier by overseeing the passing of laws which gave Mr McGowan and members of his government an exemption from the criminal law.

615. The *Amendment Act's* provisions in relation to exemptions from criminal liability, thereby placing those involved including McGowan beyond the reach of the criminal law in relation to a range of matters defined with such extraordinary breadth as to be almost unlimited, were an abuse of power, antithetical to the precepts and traditions of a liberal parliamentary democracy.

616. In overseeing its enactment, McGowan behaved disgracefully.

617. Contextual imputations 4, 9 and 26 are substantially true.

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.

618. Palmer repeats and relies upon his submissions at [564], [567] and [575] above.

619. Freedom of information laws are a vital component of modern liberal democracies: they provide a window into government to prevent corruption and abuse of power, and engage the public with the workings of government. The *Amendment Act* is utterly antithetical to these precepts.

620. 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.

621. Again, in overseeing the enactment of the *Amendment Act* with this feature, McGowan behaved disgracefully.

622. Contextual imputations 6, 10 and 17 are substantially true.

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.

623. Palmer repeats and relies upon his submissions at [28]-[83] above.

624. For decades preceding the *Amendment Act* it was accepted in Western Australia that State Agreements were an important vehicle by which the State might attract investment and ensure prosperity for its people. Fundamental to the strength and stature of those Agreements was the certainty and stability which was understood to be guaranteed by them.

625. That fundamental feature was stressed, for example, in the article published in the AMPLA Yearbook 1996 by the then Premier and responsible Minister, the Hon. Colin Barnett, entitled "*State Agreements*" (CB 157-170 at 160 and 164, emphasis added):

> *"Whereas other statutes are able to be changed at will, the provisions of State Agreements are only able to be changed by mutual agreement in writing between the parties to each State Agreement. State Agreements therefore provide certainty that ground rules for the life of each agreement project cannot be changed unilaterally…*
>
> *Unlike other statutes of Western Australia that can be changed by Parliament, State Agreement provisions can only be amended by mutual agreement by the parties thereto…"*

626. To similar effect, the Department of State Development published on its website at material times a document containing the following statements (see CB 216-218 at 216, emphasis added):

> *"Since 1952 State Agreements have been regularly used by successive Western Australian Governments to foster resource development such as mineral, petroleum, or wood extraction, and related downstream processing projects, together with essential related infrastructure investments…*
>
> *Such developments often require long term certainty, extensive or complex land tenure and are located in relatively remote areas of the State. Ratification of the Agreement through an Act, and the fact that State Agreement provisions can only substantially be changed by mutual consent, provide certainty with regards to the project itself, security of tenure and reduction of sovereign risk."*

627. The *Amendment Act* plainly undermined that certainty for which State Agreements were renowned, and raised the spectre of sovereign risk. This obvious consequence of the *Act* was pointed out, in the short time available to them, by various members of parliament, for example at CB1174C, 1177G, 1177O, 1177Q, 1177V, 1425.

628. The only rejoinder offered by McGowan and Quigley was to the effect that a number of prominent figures in the WA mining industry had indicated a lack of concern about the attack on Palmer constituted by the Act: see for example CB1183 lines 38-41, CB1183K lines 565-578, 1183L lines 603-607; McGowan at T495.29-31. The fatuousness of such a response speaks for itself.

629. In the days and weeks following the passing of the Act, there was a cascade of public commentary to the effect that the Act had inflicted terrible damage inflicted upon the reputation and reliability of State Agreements. They included the following.

630. On 19 August 2020 Law Society of Western Australia issued a statement in which it said, *inter alia*, that "*damaging the State's reputation for negligible sovereign risk*" is not "*for the peace, order and good government of Western Australia*": CB1484-1485.

631. On 19 August 2020, lawyer and businesswomen Caroline Di Russo (CB1489 at 1491), wrote (emphasis added):

> *In his speech in the legislative assembly, Quigley said that the bill didn't create sovereign risk because no other company has sought to challenge the Minister's decision or take the state to arbitration and that the change only applies very narrowly to this dispute and not to the broader Mineralogy state agreement.* ***Actually, the bill is the archetypal definition of sovereign risk.*** *Any unilateral change to a contract with a private party by a government on the wrong end of a commercial dispute smacks of wrangling with an African backwater despot. It might be a narrow change, but* ***it sets a precedent: challenge this government, and if you get the upper hand, it will pull the rug out from underneath you.*** *Given Mineralogy is the first company to challenge a state agreement, means we now have 100% strike rate of the Government moving to expropriate the rights of a private company who exercises the dispute resolution provisions prescribed in a state agreement. Regardless of the rhetoric,* ***this will make prospective investors think twice before committing big money to projects in WA****.*

632. On 22 August 2020, Tom Switzer and Robert Carling in the *Sydney Morning Herald* wrote (CB 1495):

> *To reiterate: the WA government has rushed through legislation to tear up the contract, deny Palmer natural justice, exempt the matter from freedom-of information rules and grant criminal immunity to the state and its agents. The government is saying it can do as it wishes, rewrite the rules to its advantage and thumb its nose at the rule of law.*
>
> *All this should be a warning light to anyone contemplating investment in WA. Indeed****, the government's action is a perfect example of sovereign risk, which drives away capital.***

633. On about 27 August 2020, Morgan Begg in *The Spectator Australia* wrote (CB1503 at 1505):

> *The WA government's excessively petty response is incredibly dangerous. The confirmation that the government is prepared to legislate away its liabilities presents a very real risk to any business who is considering investing in the state.* ***This is the definition of sovereign risk****.*

634. This contextual imputation is that the Amendment Act, overseen by McGowan, has "*destroyed the reputation, and long-standing value to the State, of State Agreements".* Whether that is so or not can only be a matter of opinion. The weight of opinions such as those in the examples noted above is resoundingly to that effect. Whether those

opinions are definitely right may not be known with certainty for many years; however, on the balance of probabilities this imputation has been shown to be substantially true.

CONTEXTUAL TRUTH: THE BALANCING EXERCISE UNDER s 26

635. Even if one or more of McGowan's imputations, as found to be conveyed, is not alleged or found to have been true, Palmer submits that for any CC Matter to which that may apply, that matter also carries one or more of his Contextual Imputations, and that those Contextual Imputations are substantially true.

636. On balance, the substantial truth of the Contextual Imputations (in particular, as is required, having regard to the evidence relevant to that truth) has the effect that those of McGowan's imputations that might be conveyed and not proved true will do no further harm to McGowan's reputation.

637. It follows that Palmer has established his contextual truth defence.

C5. DEFENCE OF COMMON LAW QUALIFIED PRIVILEGE – REPLY TO ATTACK [FLI 13] (cf. MC [404] – [430])

Legal Principles

638. The essence of the "reply to attack" species of qualified privilege is simply the presence of a "sufficient connection" between the matter complained of and the privileged occasion.

639. This principle is long-established in the authorities, expressed in various ways. For example, it has been said that the reply must: "*be commensurate with the occasion*": ***Penton v Calwell*** (1945) 70 CLR 219 at 233-234 per Dixon J, approved in *Trad* at 48 [33] per Gummow, Hayne and Bell JJ; be "*relevant to the attack*": ***Loveday*** *v Sun Newspapers Ltd* (1938) 59 CLR 503 at 516; and be "*sufficiently connected to the privileged occasion to attract the defence*": *Bashford v Information Australia*

(Newsletters) Pty Ltd (2004) 218 CLR 366 at 378 [27] per Gleeson CJ, Hayne and Heydon JJ.

640. The factors which give rise to a *"sufficient connection"* may involve "*any one of several considerations*", in relation to which "*[q]uestions of degree inevitably will be presented*": *Trad* at 49 [35]; see also 46 [27].

641. For the defence to operate, there must have first been an attack (but the attack need not necessarily have been made by the plaintiff): ***Gould*** *v Jordan (No 2)* [2021] FCA 1289 at [73], [100], citing Dixon J in *Loveday* at 520 and McColl JA in Abou-*Lokmeh v Harbour Radio Pty Ltd* [2016] NSWCA 228 at [94] – [100]. Further, a defendant may rely upon attacks made under parliamentary privilege to ground a defence in reply to attack: see *Gould* at [146]-[150].

642. The recipients of the publication must, as with any species of qualified privilege, share an interest in the publication. However, in the circumstances of a reply to attack, the concept of the corresponding interest on the part of the recipient must be widely interpreted: *Gould v Jordan (No 2)* [2021] FCA 1289 at [74].

643. Whilst there must be some proportionality between the attack and the response, the law gives a defendant considerable latitude in this regard. In *Penton v Calwell*, four of the judges were unanimous on this point and stressed its significance. Dixon J said at 233-234 (italics added):

> *"When the privilege of the occasion arises from the making by the plaintiff of some public attack on the conduct or reputation of the defendant or upon some interest which he is entitled to protect, the purpose of the privilege is to enable the defendant on his part freely to submit his answer,* ***whether it be strictly defensive or be by way of counter-attack****, to the public to whom the plaintiff has appealed or before whom the plaintiff has attacked the defendant. The privilege is given to him so that he may with impunity bring to the minds of those before whom the attack was made any bona fide answer or retort by way of vindication which appears fairly warranted by the occasion…*
>
> *The foundation of the privilege is the necessity of allowing the party attacked free scope to place his case before the body whose judgment the attacking party has sought to affect. In this instance it is assumed to be the entire public. The purpose is to prevent the charges operating to his prejudice. It may be conceded that to impugn the truth of the charges contained in the attack and* ***even the general veracity of the attacker may be a proper exercise for the privilege****, if it be commensurate with the occasion."*

Latham CJ and Williams J (at 243), and Starke J (at 250), expressed similarly robust views.

644. The point was also memorably expressed by Lord Oaksey in ***Turner v Metro-Goldwyn-Mayer Pictures Ltd*** [1950] 1 All ER 449 at 470-1 thus (emphasis added):

> *"There is, it seems to me, an analogy between the criminal law of self-defence and a man's right to defend himself against written or verbal attacks. In both cases he is entitled, if he can, to defend himself effectively, and he only loses the protection of the law if he goes beyond defence and proceeds to offence.* ***That is to say, the circumstances in which he defends himself, either by acts or by words, negative the malice which the law draws from violent acts or defamatory words****, If you are attacked with a deadly weapon you can defend yourself with a deadly weapon or with any other weapon which may protect your life.* ***The law does not concern itself with niceties in such matters. If you are attacked by a prize fighter you are not bound to adhere to the Queensbury rules in your defence."***

645. See also *Madden v Seafolly Pty Ltd* [2014] FCAFC 30 at [158]-[163].

646. Any question of proportionality arises, not on the issue of whether an occasion of privilege exists (a matter to be determined by reference to the principles identified in [639]-[640] above), but rather at a later stage of inquiry, namely whether the defendant was actuated by malice: see Latham CJ and Williams J in *Penton v Caldwell* at 243; and see *Loveday* at 515-516 per Starke J.

The Evidence as to Qualified Privilege – Reply to Attack

647. Various attacks by McGowan are identified at paragraphs [65], [66], [70] – [74], and [80] – [82] of the particulars to the FADCC (CB 85-89).

648. Those attacks include the first, second and sixth matters in the primary proceedings (on 31 July and 14 August 2020 respectively), as well as numerous other publications during press conferences in July-August 2020, and also various Facebook posts and a tweet.

649. Palmer also relies (see FADCC at 82, CB89) on many other public attacks which are in evidence, namely the public statements by McGowan on 29 July (CB888), 2 August (CB986), 3 August (CB1001), 5 August (CB1017), 7 August (CB1049).

650. Much of the language used by McGowan in these publications (all made to the world at large) is hostile, personal language which aggressively denigrates Palmer, including:

(a) that Palmer is *"a menace to Australia",* is *"selfish and irresponsible"* and is *"playing with people's lives"* (26 July; CB 614-5);

(b) that Palmer was *"the biggest loser"* (28 July, CB 874);

(c) that Palmer is "*a very, very selfish and self-centred person*" who was "*prepared to risk everyone's health for his own travel arrangements*" (29 July, CB 888);

(d) that Palmer needs to "*stop being a jerk*" (29 July, CB 888);

(e) that Palmer is *"the enemy of Western Australia*" (31 July; CB 933);

(f) that Palmer is *"the enemy of the State"* (31 July; CB 933);

(g) that Palmer is *"the enemy of Australia"* (31 July; CB 933);

(h) that Palmer was *"Australia's greatest egomaniac", "an Olympic scale narcissist"* and *"an egocentrist of the highest order"* (1 August; CB 986 – 986B; T202.7-9);

(i) that Palmer *"wanted to come to Western Australia to promote Hydroxychloroquine [which was] a dangerous drug"* (3 August; CB 1001A);

(j) that Palmer was trying to *"damage the health of West Australians"* (5 August; CB 1017A);

(k) that Palmer is *"very selfish",* and *"very very selfish"* (5 August; CB 1017A);

(l) that *"we"* (the State of WA, and/or the government of WA) were *"in a war"* with Palmer (7 August; CB 1049A);

(m) that Palmer was *"trying to take our money*" and *"trying ... to bankrupt Western Australia"* (12 August; CB 1183A; see also 13 August; CB1215);

(n) that Palmer's actions *"would cripple the State of Western Australia"* (12 August; CB 1183, 1184);

(o) that Palmer's actions would lead to the *"mass closures of hospitals, of schools, of police stations"* and the *"mass sackings of public servants, of child protection workers, of police officers"* and represented *"an extreme risk to Western Australia"* (12 August; CB 1183A; see also CB1216-1217, esp. at CB1216);

(p) that Palmer's actions were *"absolutely obscene"* (12 August; CB 1183A; CB 1192; see also 13 August; CB1215);

(q) that *"we are on the side of the people, and we're up against someone [Palmer] who is trying to bankrupt the State"* (12 August; CB 1192);

(r) that Western Australia was being "*bullied*" by Palmer (14 August; CB1207-1213, esp. at 1207 and CB1216-1217, esp. at CB1216).

651. Attorney-General Quigley also publicly attacked Palmer, in hostile and sensationalised language, in his ABC radio interview on the morning of 13 August (CB 1206Aff). Quigley's public statements in that interview included (see also [73] above):

- *"all Western Australians, families, babies, children … children will owe Palmer $12,000 if this … if … if we don't stop him";*
- *"This is absolutely, as the Premier said, obscene";*
- *"… it is like a fight. Like my near neighbour Danny Green says, you've just got to jab, jab, jab with your right and move him over to the left and then just knock him down with a right … a left hook";*
- *"And what's happened is that Mark McGowan has been jab, jabbing away with insults";*
- *"… we've got to unleash the left hook today. We've got to knock him down today. There is too much at risk for all Western Australians for namby-pamby inquiries";*

652. The attacks culminated in the *Amendment Act* itself, including its expressly singling out one individual, Palmer, by name – for the purpose of extracting a legislatively-imposed indemnity enforceable not only against him but against his heirs and successors in perpetuity.

653. The attacks are relentless, personal, public, vitriolic and vicious.

654. In undertaking the attacks, McGowan co-opted the media to his cause, and benefited – as he must have expected and anticipated and assumed, given his obviously cosy relationship with Mr Kerry Stokes – from the one-sided support of the *West Australian* newspaper in particular, which amplified McGowan's attacks and disseminated them even more widely.

655. Palmer points to the remarkable series of front pages of the *West Australian* in July and August 2020. On 29 July 2020, Palmer was described as a "*menace*" (adopting McGowan's language, CB 879A), and, on 12, 13, 14, and 18 August 2020, Palmer was successively depicted as Dr Evil (CB 1201A), a cane toad (CB 1201B), a cockroach (CB 1449A) and a chicken (CB 1478B), while on 15 August 2020 he was characterised as vermin, to be "*repel[led]*" by the application of "*McGowan's Pest Spray*", so that the people of Western Australia might be kept "*out of Palm's way*" (CB 1473A).

656. On 14 August 2020, McGowan celebrated the *Amendment Act* with Kerry Stokes in text messages, gushed over Stokes' "*marvellous front pages*" and effusively noted that he

"*appreciate[s] the support enormously*": CB 1173. True to form, the Pest Spray and Chicken front pages (15 and 18 August) quickly followed this exchange.

657. All of the publications by Palmer, on which McGowan sues in his Cross-Claim, post-date some or all of McGowan's many attacks. The responses are directly connected to the subject matters of such attacks. Palmer gave evidence (see T209.26-35, 242.39-45) that he felt he had to respond and to retaliate. The content of the *Amendment Act*, and his awareness of McGowan's integral role in relation to it, particularly troubled him, as outlined above: see [439]-[454], [463]-[464]. Palmer's need to respond, and the appropriateness of his responding, would have been well understood by Martin Niemoller.

658. There is more than "sufficient connection" between the attacks and the responses; and the responses are certainly "commensurate with" the attacks.

659. Even if it were to be considered that in some respects parts of Palmer's responses were by way of counter-attack rather than strictly defensive, each of the occasions remains privileged and each of Palmer's publications is protected: see for example *Penton v Calwell* at 233-234 per Dixon J and *Turner v Metro-Goldwyn-Mayer Pictures Ltd* at 470-1 per Lord Oaksey (both noted above at paragraphs [643] and [644]).

Response to MC [411]-[430]

659A. At MC [411]-[430], McGowan has endeavoured to answer Palmer's "reply to attack" qualified privilege defence by reference to the decision of Nathan J in ***Kennett*** *v Farmer* [1988] VR 991. In *Kennett*, Nathan J held (at 1003) that *"a riposte to an alleged defamatory retort, itself made in response to a source defamation, is not protected by qualified privilege".*

659B. In *Echo Publications Pty Ltd v Tucker* [2007] NSWCA 73 at [78]-[85] Hodgson JA (Mason P at [1] and McColl JA at [141] agreeing) observed that whilst in *"some cases, at least, a riposte to a response will not have the benefit of qualified privilege", "the limits of the doctrine have not yet been clearly established".*

659C. In particular, Hodgson JA observed, at [80], that insofar as Nathan J talks about a *"source defamation"* and an *"initial defamer",* this suggests that *"the doctrine applies only if the person seeking to rely on qualified privilege of the kind in issue here had initially defamed the plaintiff".*

659D. That has an important consequence, as Hodgson JA continued at [80]:

> *"If that is correct, it would seem that a plaintiff seeking to defeat a defence of qualified privilege on this basis should put on a reply alleging the initial defamation, so that the question whether there was an initial defamation could be properly considered. Presumably issues of publication and defamatory imputation would arise, and the defendant could presumably put on a rejoinder raising issues such as absolute and qualified privilege."*

659E. And at [81] Hodgson JA stated:

> *"it seems unlikely to me that a plaintiff could defeat a defendant's defence of qualified privilege on the basis of the* Kennett *doctrine unless its publication, in so far as it was defamatory of the defendant, was such as would itself have the protection of this same kind of qualified privilege."*

659F. McGowan has satisfied neither of these matters. This is, he has not filed a reply alleging any "initial defamation", and he has not identified any "retort" publication by him that would itself attract "reply to attack" qualified privilege.

659G. Instead, he has sought to cherry pick various statements by Palmer in the course of wide-ranging public discourse, so as (a) to seek artificially to attract the principle set out in *Kennett,* and (b) separately to argue that Palmer had already responded to McGowan's attack/s and thus the occasion for a reply did not arise.

659H. This approach does not stand scrutiny. McGowan's answer to Palmer's defence of "reply to attack" qualified privilege ought to be rejected.

659I. So much is confirmed by a cursory review of McGowan's examples in [412]-[417].

659J. As to MC [412]-[413], on 26, 28 and 29 July 2020, McGowan made a series of direct public statements to the mass media (as conduit to the broadest possible audience) attacking Palmer and describing him, *inter alia*, as a "*menace to Australia*", "*selfish and irresponsible*", "*playing with people's lives*", "*the biggest loser*", "*very, very selfish*", "*prepared to risk everyone's health*", and "*a jerk*": see [650(a)-(e)] above.

659K. The first cross-claim matter was published after those various vitriolic attacks; it is thus a "reply". No "source defamation" is pleaded that would move the cross-claim matter down the line, as it were, such that it was not a reply but instead a "riposte" to a "retort".

659L. Further, Palmer's publications, said now to be "ripostes", were published to a different (and smaller) audience (of Palmer's followers) on social media, whereas McGowan's publications were always destined for, and were disseminated in, the mass media, and Palmer's publications were responsive not to McGowan's 31 July 2020 press conference

but to his 26 July attack wherein in he describes Palmer as a "*menace to Australia*". Hence Palmer described McGowan as the "*real menace*" (see eg MFI 12 at p. 247).

659M. As to MC [414], the second cross-claim matter was Palmer's first press conference to the mass media after the ongoing attacks from McGowan to 12 August 2022 identified in paragraph 650(e)-(q) including McGowan and Quigley's press conference on 12 August 2022 (CB933) and the introduction of the *Amendment Act* the previous night. It is thus truly a "reply" to an attack, and not a "riposte". Again, no "source defamation" is identified.

659N. As to MC [415], all the publications McGowan has there identified were, save for the 1 August 2020 advertisement, in *The West*, to a different audience of social media followers. In any event, following Palmer's publications dated 1, 3 and 4 August, McGowan continued his attacks on Palmer, to which Palmer was entitled to reply and did reply by the second cross claim matter.

659O. As to the posts identified at MC [415(e)], the evidence does not disclose whether they were published before or after the second cross claim matter. Again, no "source defamation" is identified which might warrant characterising the second cross-claim matter as a "riposte".

659P. As to MC [416]-[417], contrary to McGowan's submission at MC [417] Palmer does not rely on attacks made on 13 August but instead relies on earlier attacks, see especially those made on 12 August 2020 (see FADCC at 77]-[79]). As to the third, and fifth to seventh cross-claim matters, there is no evidence that the social media posts anticipated them and thus there is no evidence that Palmer had already replied. As to the fourth cross-claim matter, it traverses different terrain from that identified in the social media posts and was published to a different audience (it was truly a reply published in the mass media). Again, no "source defamation" is identified which might warrant characterising the second cross claim matter as a "riposte".

659Q. As to MC [418], McGowan correctly notes that the eighth cross claim matter followed Palmer's sixth matter. This is, it did reply to it, and to the attack contained in it.

659R. In MC [419]-[424], McGowan's complaint that some of the attacks in the evidence were not particularised is somewhat surprising given his own failure to particularise the entirety of the answer which he now seeks to raise at the last minute to Palmer's "reply to attack" defence (as to which see 659A-F above). In any event, there can be no

prejudice to McGowan: the attacks relied upon and submissions have remained substantially the same since submissions filed and served on 1 February 2022; and the attacks relied upon were in the Court Book throughout the trial.

659S. As to MC [425], the *Amendment Act* was not "*the true matter which had distressed [Palmer] and which motivated the cross-claim matters".* See Palmer's oral submissions at T704.25-705.14.The *Amendment Act* was introduced on 11 August 2020, after the first cross-claim matter. Palmer's solicitor had, before the Amendment Act was introduced and before Palmer or his lawyer knew anything about it, sent not one but two concerns notices to the Premier about McGowan's publications to date, expressing Palmer's distress: CB 1004 and CB 1066. Palmer gave evidence about the specific distress he felt about McGowan's public statements made about him: T203.36-206.16; see also Palmer #1 at [124]-[127] about the steps he took in publishing the second to eighth cross-claim matters.

659T. As to MC [426], in the FADCC, Palmer pleaded the enactment of the *Amendment Act*, which necessarily entails McGowan's "integral" role in it: see FADCC particulars73-75 (CB 88). The Act directly targeted Palmer, and even his descendants, by its terms. As noted at [641] above, the "reply to attack" defence is available even where the attack is not made expressly by McGowan: see Gould. But in any event, McGowan by his own admission had an integral role in the preparation and passing of the Amendment Act. Further, in PS [657], Palmer made no such "admission" as is now claimed.

659U. As to MC [427]-[430], for the reasons stated in the preceding paragraphs, Palmer's replies were neither separate attacks nor "ripostes". McGowan has failed to establish any basis for refuting Palmer's defence of "reply to attac" qualified privilege.

Malice [FLI 14, 15] (cf. MC [431] – [444])

660. The matters set out in the Reply to the FADCC do not establish any improper purpose on the part of Palmer and do not affect the plain reality that Palmer was indeed replying to the numerous and savage attacks made against him. Nor was it put to Palmer during cross-examination that, in respect of any of the CC matters, he was motivated by the improper purpose particularised.

661. Palmer was cross-examined at considerable length (T240-249) as to his belief in the statements that the *Amendment Act* provided McGowan and Quigley 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 93 at 2(3).

662. Palmer was asked to specify the provisions of the *Amendment Act* upon which he based such conclusions. He did so. His assessment, one made in *"shock"* (T238.5-10, 239.6-11), based on his reading of the *Act* and the "*plot[ting] in secret*" that preceded its enactment (T239.10), was that *"I didn't know what they could be doing".* He *"formed the view that anyone who would draft that could be capable of anything":* T241.19-20. He thought that "*Mr McGowan could breach the criminal law in a number of ways… and if he's brought before a court under the Criminal Code he could plead the Act as an exemption and no offence would have been committed*": T247.28-31. Among such breaches, given the breadth of many of the definitions, Palmer included in his mind (as an *"extreme"*: T239.15, 240.31) immunity from prosecution for murder.

663. He was required to engage, in the witness box, in a statutory construction exercise of some complexity. However, whether or not his construing of the *Act* would meet with wide agreement among legal scholars or jurists is neither here nor there.

664. The essential propositions which the Court might properly derive from this evidence in cross-examination include the following:

(a) Palmer adhered to his views, courteously and firmly, despite the insistent ridiculing of those views by the cross-examiner;

(b) His views may be right or they may be wrong, but what is abundantly clear is that they were genuinely held;

(c) **Palmer was afraid** – he was so stunned by what he read in the Act that it caused him to fear that McGowan might do anything, that there was nothing he might not do: see T208.15-26; 238.6-10; 239.5-11; 242.32-41;

(d) That fear was a completely understandable human response, in the light of the brutality of the assault upon him constituted by the *Amendment Act*, coming as it did as the culmination of weeks of insults and denigration from the Premier of the State;

(e) It was also completely understandable in circumstances where the Act was a complete affront to the rule of law: T207.37-208.8;

(f) Palmer's fear was not confined to himself: he was concerned for his employees in Western Australia who were also under attack and for his family, and the criminal immunities only heightened that fear: T208.13-20;

(g) It was a consequence of his reading of not only the parts of the Act which created the criminal immunities, but also those other parts that were shocking to him, including the "*Henry VIII clause*", the abolition of rights of discovery and freedom of information, and the targeting of his descendants as well as himself in the legislation: T207.40-208.16; T238.5-10;

(h) Palmer's fear, of the known and of the unknown, was exacerbated by his contemporaneous discovery of the brazen tactics behind the conception, drafting and enactment of the legislation in secrecy, as revealed in the Quigley radio interview: T239.4-11;

(i) Even if Palmer were to be regarded as mistaken in his interpretation of the *Amendment Act*, there is no basis whatsoever for asserting or suggesting that he knew that his claim that the Act gave McGowan and Quigley "*some kind of general immunity from criminal prosecution*" was false, or that he acted with reckless indifference to its truth or falsity: *cf* T249.23-47.

664A. This evidence does not support a finding of malice: cf. MC [437], [443(c)].

665. Palmer was also cross-examined at some length as to the quantum of the damages claim in the arbitration: see T218-230. It was suggested in various ways that he had disavowed the $30 billion figure, and that that was not frank: see now MC [22], [438, [443(b)].

666. In fact Palmer's position had been rather more nuanced than the condensed version put to him. First, McGowan and Quigley had rounded the amount up by some two and a half billion dollars, an amount Palmer not unreasonably described as "*significant*" (T225.41-226.8). As noted above at [94E], the document signed by Palmer did not contain the $30 billion figure. Second, Palmer was attempting in interviews at this time, as he made clear, to adhere to the obligations of confidentiality by which he was bound under the arbitration agreement and the Commercial Arbitration Act – obligations which Quigley and McGowan had conspicuously dishonoured, as outlined above. Third, Palmer emphasised that the ultimate amount awarded or agreed (if any) would have been – but for the *Amendment Act* – the subject of a mediation, and thus, in the ordinary

course, was likely to have been compromised: see for example T220.39-222.31. Contrary to McGowan's submission, these matters do not support a finding of malice.

667. Palmer was also subjected to prolonged challenge as to his basis for asserting that McGowan had lied in relation to Dr Robertson's medical advice (see the first CC matter and CC imputations 3(a) and 3(b), and the second CC matter and imputation 5(b)). The cross-examiner admonished him for failing to locate, in a lengthy transcript (CB 658-723), those parts of Dr Robertson's testimony upon which he had relied in assessing McGowan's statements. But Palmer did have a proper basis for conveying the imputations (see [495]-[536] above) and he was neither untruthful nor reckless in doing so. Contrary to McGowan's submission at MC [443(a)], these matters do not support a finding of malice.

668. As to Palmer's language in the CC matters and elsewhere (including in the posts to which Palmer was taken in MFI2), the authorities make clear that use of strong language is not at all inconsistent with Palmer's exercise of the "reply to attack" privilege. This is particularly so given the ferocity and vitriol of the language used by both McGowan and Quigley, and the brutal nature of the attacks themselves (including the *Amendment Act*).

669. Palmer's language is not excessive to the occasion precipitated by those attacks. Rather it is an entirely understandable response to the many persistent and outrageous attacks made on him.

669A. The same may be said of Palmer's language in other statements not forming part of the matters in these proceedings, such as those referred to at MC [441] and [444]. As Palmer noted at T272.45 and T275.38-39 his statements were responsive to McGowan's contemporaneous statements and behaviour. All of the publications by palmer referred to at MC [441] came after the introduction of the Amendment Act into Parliament (as well as coming after the onslaught of insults from McGowan over previous months).

669B. The statements in MFI 2 at pp. 285-294

(a) were evidently responding to an attack on Palmer by McGowan in parliament: see MFI 2 at 283, 293,

(b) have repeated reference to #ausvotes or #auspol, and were published in the context of the 18 May 2019 Australian Federal Election, during which the United Australia Party, of which Palmer was the Chairman, ran candidates in opposition

to those of McGowan's Australian Labor Party. Palmer made the statements in the ordinary run of election politics.

669C. The submission in MC [444] that these statements demonstrate a *"history of hatred"* towards McGowan cannot stand scrutiny. The only proposition that was put to Mr Palmer in cross-examination was that he "*hate[s] what [McGowan] stands for*": T281.7. Even if Palmer had agreed to this different proposition, which he did not, it would not support a plea of malice that could defeat Palmer's plea of reply to attack qualified privilege. Palmer's response to the question was "*I don't hate Mr McGowan*" (T281.8).

669D. Indeed Palmer on several occasions spelled out that he did not bear McGowan any ill-will: see for example CB 977 (1 August 2020), CB 987 (2 August 2020) and CB 1021 (6 August 2020).

669E. The proposition as now advanced in MC [444] was never put to Palmer, and Palmer's answer at T281.8 went unchallenged (T281.10).

670. The evidence does not support a finding that Palmer was motivated by malice at the time he conveyed any of the CC matters. The plea of malice, in attempted defeasance of Palmer's reply to attack qualified privilege, fails.

C6. DAMAGES [FLI 15]

Legal Principles (cf. MC [446] – [466])

671. Palmer refers to the principles noted above at [395]-[415] above in relation to Palmer's primary claim.

672. In addition, Palmer relies on the principles as to **mitigation of damages**, in circumstances where defences of truth, contextual truth and qualified privilege are pleaded and pressed.

673. A respondent is entitled to rely in mitigation of damages on any evidence properly before the court, for example evidence that was primarily directed to a plea of justification. This is so even if, in some or all respects, the plea of justification may fail. See ***Pamplin*** *v Express Newspapers Ltd* [1988] 1 WLR 116 (CA) at 120A-E per Neill LJ; *Atkinson v Fitzwalter* [1987] 1 WLR 201 at 214 per Parker LJ; see also Keene LJ in ***Turner*** *v News Group Newspapers Ltd* [2006] 1 WLR 3469 at 3482 [44]; *Prager v Times Newspapers Ltd* [1988] 1 WLR 77 per Purchas LJ at 88 and per Nicholls LJ at

93.

674. The rule that permits such evidence to be given in mitigation is a specific exception to the general rule that only evidence of general reputation, not specific acts of misconduct of the plaintiff, are admissible in mitigation of damages. See for example *Speidel v Plato Films Ltd* [1961] AC 1090.

675. The position as stated in *Pamplin,* and repeatedly affirmed in subsequent UK cases, has been accepted by Australian courts: see for example *Holt v TCN Channel Nine* (2014) 86 NSWLR 96; [2014] NSWCA 90 at [26]-[30] and [32]; *Western Australian Newspapers Ltd v Elliott* (2008) 37 WAR 387; [2008] WASCA 172 at **[**60] *Nguyen v Nguyen & Ors* [2006] NSWSC 550 at [173]-[176]; *Zunter* at [48]-[51]; *Australian Broadcasting Corp v Chau Chak Wing* (2019) 271 FCR 632; [2019] FCAFC 125 at [89]-[93].

676. In *Zunter*, the Court held that the *Pamplin* principle applied to evidence led in respect of a failed contextual truth defence. See also *Gatley on Libel and Slander* 12th Ed. at 33.47.

677. Even when the defendant has no plea of truth to advance, evidence of particular facts directly relevant to the contextual background in which a defamatory publication came to be made is relevant to mitigation of damages. The reason for this rule is that, if such evidence were excluded, the tribunal of fact would be considering the evidence in an evidentiary vacuum; "*the jury would be required to assess damages in blinkers*". See *Burstein v Times Newspapers Ltd* [2001] 1 WLR 579 at 600F, approved in Australia including in *McBride v Australian Broadcasting Corporation* (2001) 53 NSWLR 430 at [14] per Ipp JA, Beazley JA agreeing at [1]; Fitzgerald A-JA at [86]. See also *Rush v Nationwide News Pty Limited (No 2)* (2018) 359 ALR 564; [2018] FCA 550 at [32]-[46]; *Turner* at 3483G, 3485A-C; *Gatley on Libel and Slander* 12th Ed. at 33.43-33.46.

678. The effect of mitigating evidence will generally be applied to the overall impact of the defamatory imputations and should generally not be applied to specific imputations, as that may underestimate the value to a defendant of an imputation successfully justified: see *Channel Seven Sydney v* ***Fisher*** [2015] NSWCA 414 at [58]-[62] per Basten JA (who was in the minority; the principle does not appear to have been considered by the majority).

679. A defendant may rely upon evidence led in support of a rejected contextual imputation and may seek findings from the trial judge based on mitigation in relation to that evidence: see *Fisher* at [50].

Damages and mitigation: the evidence

680. As to extent of publication, various matters are agreed: see the **Agreed Background Facts** document at paras 63 to 66: CB 119-120.

681. The assessment of damages, should McGowan succeed on his cross-claim, is to be assessed not mechanically but instinctively based on the actual harm, or lack of harm, to him.

Claim for damage to reputation

682. The first of Palmer's publications, sued on by McGowan, was on 31 July 2020: CB931A. At that time, the *West Australian* celebrated McGowan as "Mr 89%": see CB 879A. As at March 2021, some seven months later, McGowan's personal approval rating was still in the order of 88% or 89%, ie *"stratospherically high"*: T450.44-451.1.

683. At the state election in March 2021, McGowan's party won 53 out of 59 seats, the largest majority of seats for any government in the history of the state: T450.42. McGowan increased the margin in his own seat of Rockingham at the March 2021 election to 37%, making it the safest seat in Western Australia: T450.3-5.

684. Notwithstanding any presumption that might arise from the extent of publication (see ABF 63 – 66) and the seriousness of the meanings carried, the evidence establishes that the actual impact of Palmer's publications on McGowan's reputation was, at most, minimal.

685. Palmer published the matters in the course of responding to the ongoing public verbal assaults that McGowan directed against him. Palmer was a private citizen, who held no official government position, and who was involved in a high profile court case against Western Australia concerning the hard border. McGowan, the overwhelmingly popular State Premier, was incessantly attacking and demonizing Palmer because he had brought that court case.

685A. The public assaults from McGowan, an historically popular leader, denigrated and belittled the already unpopular Palmer. Those attacks were enthusiastically adopted and multiplied by McGowan's supportive *West Australian*, on front page after front page.

In such circumstances, this court can be comfortably satisfied that the cross-claim matters would have limited or no impact on McGowan's reputation (unless, perhaps, to enhance it, as the champion of the people against the "enemy of the State"). This conclusion is amply supported by the evidence including McGowan's continuing electoral success and popularity, as to which see [682]ff above.

686. On 31 July 2020 McGowan labelled Palmer *the "enemy of the State",* and said the public should disregard anything Mr Palmer had to say: 31 July 2020, CB 933 lines 3-6, 37-38.

687. In that same press conference on 31 July 2020, McGowan made clear (CB 933A lines 36-37) that he was "*happy to have a blue with Mr Palmer*" and repeated the attack on Palmer as "*the enemy of the State … the enemy of Australia".*

688. McGowan's choice of words on that and other occasions reflected deep-seated personal, commercial and political antipathy towards someone who was an unpopular figure in WA (see McGowan at T433.37-434.3). The ferocious attacks that McGowan launched against Palmer could only have further lowered the preparedness of readers and listeners to accord Palmer's views any weight. McGowan made Palmer the subject of public ridicule. He effectively used Palmer as a punching bag or bogeyman in his press conferences and in the *Amendment Act* itself to enhance his own reputation.

689. Rather than diminish McGowan's reputation, it is entirely possible that any statements by Palmer, criticising McGowan, only enhanced or reinforced McGowan's popularity and reputation. The front pages of the *West Australian,* referred to above, aptly illustrate this effect.

690. Even before attention is given to questions of mitigation, the probability is that little if any compensable damage to McGowan's reputation has flowed from anything said by Palmer in the first – eighth CC matters. Readers and listeners of anything Palmer said, in the context of his bearing the ongoing brunt of attacks from "Mr 89%", are likely to have given his statements limited weight.

<u>Hurt to feelings</u>

691. McGowan gave very lengthy answers in chief as to his having been offended and hurt by what Palmer said in the various publications. Whether as a matter of personal pride or political necessity, McGowan's view – repeatedly and strongly advanced – was that in difficult times he "did the right thing".

692. However, McGowan admitted that his approach to "doing the right thing", in relation to conceiving and implementing the *Amendment Act*, was that "the end justified the means". And the means were dishonourable, for the reasons advanced above. That combination of factors can only lead to a substantial lessening of the Court's willingness to compensate McGowan for hurt to feelings in that context.

693. In addition, McGowan's case on hurt to feelings suffers from some very notable weaknesses.

694. **First,** McGowan's motivation in commencing his defamation proceedings, by his cross-claim, was that it would enable him to hedge against the prospect that Palmer might have success in the proceedings which he (Palmer) had initiated: see T321.1-11; 322.26-323.15. McGowan's focus seemed to be on the "big cheque" that taxpayers would get if he won.

695. **Secondly,** there is no independent evidence, from any other witness apart from himself or from any document, about McGowan's hurt to feelings or of any actual impact of the publications on him. To the contrary, the contemporaneous evidence about what McGowan said and did reflects a man who relished engaging in verbal, legislative and curial battles with Palmer.

696. The available inference is, and indeed McGowan's own public statements confirm, that these proceedings were not brought to assuage McGowan's feelings but only as a tactical response to Palmer's action. That may not negate entirely McGowan's own evidence that his feelings were hurt, but they are powerful contemporaneous circumstances that suggest the hurt that was suffered was less than severe.

697. **Thirdly,** there is a real problem arising from the lack of candour attaching to McGowan's evidence on his hurt to feelings.

698. Reference is made in this context to his untrue evidence about the incident (T304.36-46, T390.28-394.33) involving a car crashing into a power pole near his house, and (T308.3-33, T395.4-396.4) about the High Court having supposedly upheld his position in relation to the criminal immunity provided by the Amendment Act: see the submissions on these matters above.

699. In addition, much of the hurt that McGowan claims depends on his assertions that his cross-claim imputations 3(a), 3(b) and 5(b) – as to lying about the hard border and the medical advice – were false, and that Palmer knew that they were false. McGowan gave

such evidence at T298.38 – 304.2.

700. However, for the reasons explained earlier in these submissions, each of those cross-claim imputations 3(a), 3(b) and 5(b) was true: see [495] – [536]. McGowan did lie about the medical advice. McGowan's hurt to feelings evidence on these imputations was therefore false, as were the claims that he made about Palmer's knowledge.

701. McGowan's false claims undermine the remainder of his hurt to feelings evidence.

702. Such hurt to feelings as McGowan may have proved should only sound in nominal damages.

703. Finally, to the extent that this Court makes any adverse credit findings against McGowan in relation to his evidence in this Court, the damages should be mitigated to reflect the damage to his reputation from those findings: *Channel Seven Sydney Pty Ltd v Mahommed* (2010) 278 ALR 232, [2010] NSWCA 335 at [254]-[255].

704. Any award of damages to McGowan should be nominal only.

704A. That submission as to nominal damages for McGowan in his case, is made because as outlined above there are fundamental differences between the two parties in this proceeding as to damages.

704B. Palmer issued concerns notices asking McGowan to stop, and commenced proceedings as a last resort after McGowan continued to use his significant political power and immense popularity to defame Palmer. By contrast, McGowan issued no concerns notices and, by his own admission, commenced his defamation proceedings as a tactical means of hedging his bets against the prospect of a loss to Palmer.

704C. McGowan was and remains a hugely popular state leader on whom Palmer's publications have had no impact. By contrast, as outlined above, McGowan's attacks have caused admitted hurt and damage to Palmer.

704D. The final head of damage is vindication. On McGowan's cross-claim, if the justification and contextual truth defences are not made out, the judgment to that effect will provide McGowan with a significant measure of vindication. However, that will not be the position on Palmer's claim even if he succeeds, where the only defence is the "confess and avoid" defence of qualified privilege.

704E. To the extent that any of the serious imputations the subject of the cross-claim defence are proved substantially true, then any damages awarded to McGowan would be very significantly mitigated.

Peter Gray SC 22 April 2022
Gabriella Rubagotti
Barry Dean
Hussein Elachkar

Counsel for Palmer

"A"
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APPLICANT'S CHRONOLOGY

Legend:

Palmer	*The applicant, Clive Palmer*
CP	*Palmer affidavit 27.1.21*
McGowan	*The respondent, Mark McGowan*
MM	*McGowan affidavit 26.3.21*
Quigley	*John Quigley, Attorney-General of WA*
BSIOP	*Balmoral South Iron Ore Project (Pilbara)*
ASC	*Amended Statement of Claim 31.5.21*
FAD	*Further Amended Defence 25.6.21*
Reply	*Reply (Palmer) 1.10.20*
ACC	*Amended Cross-Claim 20.11.20*
DCC	*Further Amended Defence to Cross-Claim 12.11.21* ['p' = particulars]

Date	Event	Reference	Court Book
1985	Mineralogy acquires mining tenements in the Pilbara	CP 16, 78	
1993-2001	Negotiations leading to State Agreement	CP 84, 85	
5.12.01	State Agreement between Palmer companies (including Mineralogy) and State of WA re the development of mining projects in the Pilbara	DCC p10 CP 85	253 [3] 311-312
2002	State Agreement ratified by WA Parliament	CP 86-88	172
2005	WA Court of Appeal rules that the Minister has no power to reject a proposal: *Mineralogy v WA* [2005] WASCA 69 at [58]		298 [57]
8.8.12	Palmer companies submit BSIOP Proposal to the Minister	DCC p17-18 CP 97	312 [14]
4.9.12	Minister refuses to consider BSIOP Proposal on the purported ground that it was not a valid proposal	DCC p23	312 [15]
20.5.14	McHugh QC first arbitration Award: • The BSIOP Proposal was one which, under the State Agreement, the Minister was required to consider [66] • Therefore the Minister is in breach of the State Agreement, and is liable for any damage suffered as a result of the breach [67]	DCC p29-31 CP 98	252
22.7.14	Minister imposes conditions on BSIOP proposal – thereby (now) accepting that the proposal was valid		309 [3] 310 [6]
March 2017	WA election – McGowan Government elected	MM 2	

11.10.19	McHugh QC second arbitration Award: • Palmer companies still entitled to pursue damages	DCC p32 CP 98	308
Late 2019	McHugh QC appointed as arbitrator to hear the damages claims, in a third arbitration	DCC p33	348A
Feb – March 2020	COVID pandemic begins to have major effects in Australia		
28.2.20	WA Supreme Court dismisses appeal by State of WA against one of the findings by McHugh QC in his 2019 arbitration award		1170
29.3.20	Statement of Advice from WA Chief Health Officer (Dr Andrew Robertson) and WA Communicable Diseases Control (Dr Paul Armstrong)		349, 594
1.4.20	Federal Health Minister Greg Hunt speaks about the potential of Hydroxychloroquine in clinical trials as to treating COVID-19	CP 69-70	380
2.4.20	Federal Department of Health gives an exemption to Hydroxychloroquine under the Therapeutic Goods Act *"in order to deal with the actual threat to public health caused by the COVID-19 emergency"*	CP 71	387
2.4.20	McGowan announces intention to impose "hard border"		381, 382
5.4.20	McGowan imposes WA hard border	FAD 17	381, 382
23.4.20	Federal Department of Health gives exemption for Palmer and others in respect of acquisition of Hydroxychloroquine to be donated to Australian Government	CP 74	411
20.5.20	Shaw letter to McGowan re Palmer's application to enter WA, attaching supporting documents	FAD 18-21	425
21-23.5.20	SMS messages Quigley/McGowan re Palmer		447A-450
25.5.20	Mineralogy and Palmer commence High Court proceedings challenging WA hard border (*'border proceedings'*)	FAD 22	
28.5.20	Written contentions of Applicants (Palmer companies) in third arbitration		461
24.6.20	Letter from WA CHO (Dr Robertson) to WA Commissioner of Police		588
24.6.20	Expert Report by WA CHO (Dr Robertson)		564
26.6.20	McHugh QC directions re third arbitration: • Defence of the State to be delivered by 18.9.20 • Parties to attend a mediation by 30.10.20	DCC p34 CP 100	589A 1170

	• Arbitration to be heard commencing 30.11.20 • Third Award to be handed down by 12.2.21 (WA election to be held 31.3.21)		
3.7.20	Supplementary report by WA CHO (Dr Robertson)		591
June – August 2020	McGowan, Quigley *et al* draft Amendment Act in secret	DCC p36-37, 42 MM 78	1206A
24.7.20	Further letter from WA CHO (Dr Robertson) to WA Commissioner of Police		612
26.7.20	McGowan publicly attacks Palmer as *"a menace to Australia", "irresponsible"* and *"playing with people's lives"*	CP 117	614
27.7.20	Dr Andrew Robertson, Chief Health Officer for WA, gives evidence in Federal Court	DCC p3	628ff
28.7.20	McGowan publicly attacks Palmer as *"the biggest loser"*	CP 119	874
30/31.7.20	Press reports that trials of hydroxychloroquine indicate that it is not effective in treating COVID-19		910, 930
31 July – 7 August 2020	First five matters sued on by Palmer • McGowan publicly attacks Palmer as, *inter alia,* an *"enemy of the State",* an *"enemy of Western Australia"* and an *"enemy of Australia"*, and as *"trying to damage the health of West Australians"*	ASC 2-11 CP 40-42, 120-121	933 1001 1017 1049
1.8.20	First matter sued on by McGowan – relates to borders/COVID	ACC 2, 3	931A
4.8.20	Letter of demand to McGowan	CP 44	1004
5–6.8.20	Mediation agreement Mineralogy/WA/mediator (Mr Martin QC)	DCC 38,39 CP 102, 103	1023 1031
7.8.20	McGowan publicly announces that *"we're in a war with Clive Palmer" (*5th Palmer matter)	CP 34, 40-42	1049-1049A
10.8.20	Further letter of demand to McGowan	CP 46	1066
11.8.20	Amendment Act introduced in Legislative Assembly (5pm) • Quigley makes 2nd reading speech	DCC p41	1167
12.8.20	Amendment Act passed in Legislative Assembly	DCC p42	1177MM
12.8.20	McGowan attacks Palmer's conduct as *"absolutely obscene"* and as *"trying to bankrupt"* the State	CP 126	1183, 1192

13.8.20	Quigley radio interview – ABC Perth (8.35 am)	DCC p42 CP 53 - 63	1206A
13.8.20	Amendment Act passed in Legislative Council (10.35pm), and assented to by Governor Beazley (11.15pm)	DCC p43-44	118-9 1435DD
12–14.8.20	In these three days, Palmer publishes 7 of the 9 matters sued upon by McGowan • All 7 relate to Amendment Act	ACC 4-9 CP 124-139	1200 1436-1446 1472
14.8.20	6th matter sued on by Palmer	ASC 12-13	1458-9
14.8.20	SMS messages Quigley/McGowan		1463
11-14.8.20	SMS messages McGowan/Stokes		1173
19.8.20	Law Society of WA press release • Amending Act is *"unprecedented and extreme"*	CP 110	1484
19.8.20	Palmer commences these proceedings	CP 52	
Aug 20	Numerous articles criticising the Amendment Act	CP 112	1393, 1450, 1484, 1486, 1489, 1494, 1503
17.9.20	McGowan Defence and Cross-Claim		
September 20	Mineralogy and Palmer commence High Court proceedings against State of WA re Amending Act *('Amendment Act proceedings')*	CP 107, 108	
October 20	Quigley article in *Brief* (WA) justifying Amendment Act • Quigley contends that the Act is *"extraordinary"*, but is not contrary to the rule of law – because it *is* the law	CP 110	1568
December 20	WA Bar Association response to Quigley's justification • Amendment Act fails to respect the rule of law • Quigley's approach amounts to defining the concept of the rule of law out of existence	CP 111	1571
6.11.20	High Court result in border proceedings – Palmer challenge unsuccessful		
24.2.21	High Court judgment in border proceedings	[2021] HCA 5	
31.3.21	WA election – McGowan Government re-elected		

13.10.21	High Court judgment in Amendment Act proceedings – • Act is not "invalid in its entirety" • ss 9(1) and (2), and 10(4)-(7), are not invalid • questions as to validity of certain other sections are "unnecessary to answer"	[2021] HCA 30	

"B"
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REPUBLICATION OF PALMER'S MATTERS

1. Line number references in this annexure are to the transcripts that form part of Exhibit 1 (first and second matters), Exhibit 2 (third matter), Exhibit 3 (fourth matter) and Exhibit 4 (fifth matter).

Mr Palmer's first matter

2. Some of the words spoken by Mr McGowan at the relevant 31 July 2020 press conference were republished by the following *Sydney Morning Herald* online article (**the 31 July 2020 SMH article**):

   https://www.smh.com.au/national/i-think-he-s-the-enemy-of-australia-mcgowan-ramps-up-war-of-words-with-palmer-on-wa-border-battle-20200731-p55hdj.html

3. The 31 July 2020 SMH article has had 1,268 page views: see the document produced by Fairfax Media Publications Pty Ltd (Packet S16) in response to the subpoena issued to it on 15 February 2022, to be tendered.

4. The 31 July 2020 SMH article republished the following words in Mr Palmer's first matter:

   a. "*Let Mr Palmer fight his own fights*" (line 35);

   b. "*I'm happy to have a blue with Mr Palmer"* (line 36);

   c. *"I think he's the enemy of Australia*." (lines 37 – 38); and

   d. "*the enemy of the state*" (line 37).

5. The 31 July 2020 SMH article paraphrased words spoken by Mr McGowan during the 31 July press conference in the following passage:

   a. "*He labelled Mr Palmer "the enemy of the state" and the country as a whole, while calling on the federal government to back away from the battle over his hard border policy.*" (lines 37 – 39).

6. Mr Palmer's first matter (lines 28-39) was republished on a Sky News television broadcast called "Afternoon Agenda", which ran in three consecutive 60 minute segments on 31 July 2020. The audience data for that television broadcast was as follows:

(a) an average audience of 26,500 and total reach of 73,900 for the 2.00 p.m. segment;

(b) an average audience of 16,800 and total reach of 48,700 for the 3.00 p.m. segment; and

(c) an average audience of 15,500 and total reach of 65,600 for the 4.00 p.m. segment: see the document produced by Australian News Channel Pty Ltd (Packet S15) in response to subpoena issued to it on 15 February 2022, to be tendered.

7. Additionally, the Sky News television broadcast republished lines 25-27 and 40-82 of the more extensive and combined form of the first and second matters, as contended by Mr McGowan.

Mr Palmer's second matter

8. Some of the words spoken by Mr McGowan at the relevant 31 July 2020 press conference were republished by a video embedded in the following ABC online article (**the 31 July 2020 ABC video**):

https://www.abc.net.au/news/2020-07-31/clive-palmer-wa-border-legal-bid-backed-by-attorney-general/12511212

9. The 31 July 2020 ABC video republished the following words in Mr Palmer's second matter:

a. *"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."* (lines 3-6).

10. Additionally, the 31 July 2020 ABC video republished lines 9-27 of the more extensive and combined form of the first and second matters, as contended by McGowan.

11. In the period 31 July 2020 to 7 December 2021 inclusive:

(a) there were 1,860 stream starts of the 31 July 2020 ABC video via the ABC website (CB 1607);

(b) there were 376 stream starts of the 31 July 2020 ABC video via the ABC News App (CB 1608);

(c) there were 95,227 page views of the ABC online article containing the 31 July 2020 ABC video via the ABC website (CB 1609-1610);

(d) there were 21,192 screen views of the ABC online article containing the 31 July

2020 ABC video via the ABC News App (CB 1611-1612; see also the letter from the ABC at CB 1652-1653 at [9]).

Mr Palmer's third matter

12. Some of the words spoken by Mr McGowan at the relevant 3 August 2020 press conference were republished in the following online article on the PerthNow website (**First PerthNow online article**):

https://www.perthnow.com.au/news/coronavirus/wa-premier-mark-mcgowan-says-billionaire-clive-palmer-wanted-to-enter-wa-to-promote-coronavirus-cure-ng-b881627900z

13. The First PerthNow online article republished the following words in Mr Palmer's third matter:

    a. *"He wanted to come to Western Australia to promote hydroxychloroquine to the people of the State as some sort of cure for COVID"* (lines 32-34); and

    b. *"(Mr Palmer) coming to Western Australia to promote a dangerous drug. I don't think was a good thing for our state and I'm pleased that (WA Police) rejected him"* (lines 35-37).

14. The First PerthNow article paraphrased words spoken by Mr McGowan at the 3 August 2020 press conference in the following passage:

    a. *"The Premier said evidence showed the product is "not a cure" and potentially dangerous."* (line 34).

15. In the period 1 August 2020 to 8 December 2021, the number of page views of the First PerthNow online article was 78,524 and the number of unique browsers was 71,884 (CB 1642-1643).

16. Some of the words spoken by Mr McGowan at the 3 August 2020 press conference were republished in the following 7News online article dated 3 August 2020 (**7News online article**):

https://7news.com.au/lifestyle/health-wellbeing/wa-premier-mark-mcgowan-lashes-clive-palmer-over-covid-cure-c-1212139

17. The 7News online article republished the following words in Mr Palmer's third matter:

    a. *"He wanted to come to Western Australia to promote hydroxychloroquine to the people of the state as some sort of cure for COVID"* (lines 32-34);

b. *"All the evidence is not only is it not a cure, it's actually dangerous."* (line 34); and

c. *"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 that (WA Police) rejected him."* (lines 35-37).

18. In the period 1 August 2020 to 8 December 2021, the number of page views of the 7News online article was 14,922 and the number of unique browsers was 13,868 (CB 1644).

19. A video embedded on the 7News online article republished the following words in Mr Palmer's third matter:

a. *"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.*" (lines 32-34).

20. In the period 3 August 2020 to 9 December 2021, the number of video views was 6,007 (CB 1648 – 1651).

21. An article similar to the 7News online article (which republished the same words from the third matter set out in paragraph 19) was published by *The West Australian* online (**the West Australian online article**).

22. In the period 1 August 2020 to 8 December 2021, the West Australian online article had 1,131 page views and 1,057 unique browsers (CB 1645).

23. An article similar to the 7News online article (which republished the same words from the third matter set out in paragraph 19) was published in the following online article on the PerthNow website (**Second PerthNow online article**):

https://www.perthnow.com.au/news/health/wa-premier-lashes-palmer-over-covid-cure-ng-s-2023497

24. In the period 1 August 2020 to 8 December 2021, the number of page views for the Second PerthNow online article was 1,941 and the number of unique browsers was 1,718 (CB 1646).

Mr Palmer's fourth matter

25. Some of the words spoken by McGowan at the relevant 5 August 2020 press conference were republished as part of a Facebook post, which has been available for viewing since 5 August 2020 and is located at the following URL (the **WA Today Facebook video**):

https://www.facebook.com/WAtoday/videos/live-premier-mark-mcgowan-oncovid-19-and-the-wa-recovery-plan/1206878303009685/

26. The WA Today Facebook video republished Mr Palmer's fourth matter (including the more extensive form of the fourth matter as contended by McGowan).

27. In the period 5 August 2020 to 3 March 2022, the WA Today Facebook video has received a total of 14,000 views. A screenshot of the WA Today Facebook page will be tendered.

28. Some of the words spoken by McGowan at the 5 August 2020 press conference were republished in the print edition of the *West Australian* newspaper on 6 August 2020 in an article "Law and Border" (on the front page) and "It's trial and error" (on pages 4 and 5) , written by Peter Law and Josh Zimmerman. The *West Australian* newspaper republished in that article the following words in Mr Palmer's fourth matter:

    a. "*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*". (lines 30-32)

    b. That Mr Palmer's persistence with the border challenge was *"very, very selfish"* (line 33).

29. In addition, the *West Australian* newspaper republished the following words (which are contained in the more extensive form of the fourth matter, as contended by McGowan):

    a. "He was going to build the Titanic, so I wouldn't go on any boat with Mr Palmer in light of his ambitions," (lines 11-12);

    b. "Considering the Commonwealth has withdrawn their witness evidence, I think should be withdrawn and it should go back to the drawing board" (lines 25-26);

    c. "It's before the courts and there will be a legal argument...but certainly the Commonwealth's evidence should be struck out," (lines 38-39; lines 45-46); and

    d. "If they're not part of the case, their evidence should be struck out." (lines 46-47)

30. For the year ending September 2020, the daily readership of *The West Australian* was 314,000 (CB 1580-1585).

Mr Palmer's fifth matter

31. Some of the words spoken by Mr McGowan at the relevant 7 August 2020 press conference were republished in the following online article on the *Canberra Times* website (**the Canberra Times online article**):

https://www.canberratimes.com.au/story/6868290/wa-at-war-with-clive-palmer-over-borders/?cs=14231

32. The Canberra Times online article republished the following words in Mr Palmer's fifth matter:

    a. *"We believe a fresh trial is the only way forward"* (lines 12-13);
    b. *"With or without the support of the commonwealth government, WA will keep fighting for what is our right and that is to protect the citizens of our state"* (lines 15-17); and
    c. *"We're in a war with Clive Palmer and it's a war we intend to win*" (lines 41-42).

33. The Canberra Times online article paraphrased some of the words spoken by Mr McGowan at the 7 August 2020 press conference in the following passage:

    a. *"Mr McGowan said it would have been far more preferable if the Commonwealth had actively supported WA's position."* (lines 7-8).

34. In the period 1 August 2020 to 7 December 2021, the total number of page views of the Canberra Times online article on the *Canberra Times* website, and on other websites owned by Rural Press Pty Ltd (trading as Australian Community Media) was 2,313 and the number of unique browsers was 2,240) (CB 1613-1637).

35. The following newspapers published a print version of the *Canberra Times* online article on 8 August 2020 and, for the 12 months ending September 2020, had the following daily readerships:

    (a) the Saturday edition of *The Canberra Times* (daily readership of 57,510);

    (b) the Saturday edition of *The Newcastle Herald* (daily readership of 64,944);

    (c) the Saturday edition of *The Advocate* (Burnie) (daily readership of 32,394); and

    (d) the Saturday edition of *The Examiner* (Launceston) (daily readership of 42,616) (CB 1638-1639).

36. Mr Palmer's fifth matter (including the more extensive form of the fifth matter as contended by McGowan) was republished as part of a Facebook post, containing a video (available for live streaming), which has been available on the Facebook page of ABC Perth since 7 August 2020 (**the ABC Perth Facebook video**).

37. In the period 7 August 2022 to 22 February 2022, the ABC Perth Facebook video had received a total of 31,574 total views: see the document produced by the ABC (Packet S17) in response to subpoena issued to it on 15 February 2022, to be tendered.

"C"
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TABLE OF DECISIONS

Judgment	Type of publication	Nature of imputations	Award
Green v Fairfax Media Publications Pty Ltd **[No 4] [2021] WASC 474**	Two print articles and two online articles	(a) The plaintiff actively encourages market manipulation. (b) The plaintiff defrauds the public and investors	$400,000 (general damages including aggravated damages)
Nassif v Seven Network (Operations) Ltd **[2021] FCA 1286**	Television broadcast of news story	(a) The applicant runs a charity that falsely claims to help disadvantaged families	$100,000 (general damages)
Tribe v Simmons (No 2) **[2021] FCA 1164**	Three tweets	Multiple allegations related to sexual abuse	$550,000 (general damages including aggravated damages)
Nettle v Cruse **[2021] FCA 935**	Four online publications	(a) The applicant colluded with another doctor in order to defraud the respondent; (b) The applicant, a surgeon, prioritised his own financial gain over his patient's welfare; (c) The applicant helped another doctor take advantage of the respondent, his patient; (d) The applicant is an unethical doctor in that he colluded with another doctor to defraud his patient, and prioritised his own financial gain over his patient's welfare; (e) the applicant, a doctor, is a compulsive liar; (f) the applicant colluded with another doctor in order to avoid paying a reimbursement which had been promised to the respondent; (g) the applicant, a doctor, failed to preserve the confidentiality of his patient's (the respondent's) medical records; (h) the applicant's conduct, in colluding with another doctor to avoid paying a reimbursement which had been promised to the respondent and in failing to preserve the confidentiality of his patient's medical records, was disgusting and unethical; (i) the applicant's conduct, in colluding with another doctor to avoid paying a reimbursement which had been promised to the respondent and in failing to preserve the confidentiality of his patient's medical records, was illegal; (j) the applicant is a fraudster and scammer; (k) the applicant, a surgeon, is a charlatan;	$450,000 (general damages including aggravated damages)

Judgment	Type of publication	Nature of imputations	Award
		(l) the applicant, a surgeon, is so careless and incompetent that he is a danger to his patients; (m) the applicant, a surgeon, has routinely caused physical harm to his patients as a result of surgeries he has performed; (n) the applicant, a surgeon, intimidates and threatens his patients; (o) the applicant, a surgeon, performed surgical procedures on a patient which that patient had not agreed to; (p) the applicant, a surgeon, abuses his position of power over his patients; (q) the applicant, a surgeon, provides inhumane medical care to his patients; and (r) the applicant, a surgeon, has violated the rights of his patients.	
Murphy v Nationwide News Pty Ltd **[2021] FCA 381**	Print and online articles	(a) The applicant as a lawyer was incapable of representing his client's interests in court by reason of the ravages of age and associated deafness	$110,000 (general damages)
Stead v Fairfax Media Publications Pty Ltd **[2021] FCA 15**	Two print articles and two online articles	(a) The applicant is a cretinously stupid person; (b) The applicant rashly destroyed capital causing enormous losses to unitholders; (c) The applicant is a venture capitalist, who made stupid investments in two worthless companies, Shoes of Prey and Vinomofo, which had no prospects of success; and (d) The applicant is an untrustworthy venture capitalist who fails to deliver on her promises to shareholders and investors.	$280,000 (general damages including aggravated damages)
Chau v Australian Broadcasting Corporation **(No 3) [2021] FCA 44**	Television broadcast and online article, together with online video of television broadcast	(a) The applicant is a member of the Chinese Communist Party and of an advisory group to that party, the People's Political Consultative Conference (CPPCC), and, as such, carries out the work of a secret lobbying arm of the Chinese Communist Party, the United Front Work Department; (b) The applicant donated enormous sums of money to Australian political parties as bribes intended to influence politicians to make decisions to advance the interests of the Republic of China, the Chinese government and the Chinese Communist Party; (c) The applicant paid a $200,000 bribe to the President of the General Assembly of the United Nations, John Ashe; and	$590,000 (general damages including aggravated damages)

Judgment	Type of publication	Nature of imputations	Award
		(d) The applicant was knowingly involved in a corrupt scheme to bribe the President of the General Assembly of the United Nations.	
***Wagner v Nine* [2019] QSC 284**	Television broadcast, and online video of television broadcast	(a) The plaintiff caused a man-made disaster, the deaths of 12 people, including an infant, as well as incomprehensible grief, trauma and devastation, by failing to take steps that he should have to prevent a controversial quarry wall he owned from collapsing, and causing the catastrophic flood that devastated the town of Grantham; and (b) The plaintiffs had sought to conceal the truth from becoming known about the role their quarry played in causing the catastrophic flood that devastated the town of Grantham.	$900,000 per plaintiff (general damages including aggravated damages)
***Gayle v Fairfax Media Publications Pty Ltd (No 2) Gayle v The Age Company Pty Ltd (No 2); Gayle v The Federal Capital Press of Australia Pty Ltd (No 2)* [2018] NSWSC 1838**	Three separate actions, with five separate articles (print and online) in each case.	(a) The plaintiff intentionally exposed his genitals to a woman in the West Indies team dressing room during a training session at the 2015 World Cup; and (b) The plaintiff indecently propositioned a woman in the West Indies team dressing room during a training session at the 2015 World Cup.	$300,000 (general damages)
***Wagner v Harbour Radio* [2018] QSC 201**	Multiple radio broadcasts	Many imputations including culpability for the deaths in the Grantham flood and an attempted cover up.	$850,000 per plaintiff (general damages including aggravated damages)
***Rush v Nationwide News (No 7)* [2019] FCA 496**	Poster; series of print articles published on one day plus online and tablet versions; further series of print articles published on one day plus online and tablet versions	(a) The plaintiff is a pervert; (b) The plaintiff behaved as a sexual predator; and (c) The plaintiff engaged in inappropriate sexual behaviour.	$850,000 (general damages including aggravated damages)
***Dr Chau v Fairfax Media* [2018] FCA 185**	Online article only	(a) The applicant bribed the President of the UN General Assembly; (b) The applicant participated in a conspiracy to bribe the President of the UN General Assembly; and (c) The applicant acted in so seriously wrong a manner as to deserve extradition to the United States on criminal charges, including charges of bribery.	$225,000 general damages
***Bauer Media Pty Ltd v Wilson* [2018] VSCA 154**	One magazine article and six online articles	The plaintiff (a comedienne and actress) was a serial liar.	$600,000 (general damages including aggravated damages)
***Sheales v The Age* [2017] VSC 380**	One print article and online articles	The plaintiff, a barrister, negligently misstated the facts of his client's case.	$175,000

Judgment	Type of publication	Nature of imputations	Award
Carolan v Fairfax Media Publications Pty Ltd (No 6) **[2016] NSWSC 1091**	Four online articles	Conducting blood tests without consent, conducting himself as to warrant termination by a football club, giving results of blood tests to an organized crime figure, injecting football players with a banned substance.	$300,000
Hockey v Fairfax **[2015] FCA 652**	Poster and two tweets	Allegations of corruption against the Federal Treasurer.	$200,000
Gacic v John Fairfax Publications **[2015] NSWCA 99**	One print article	The plaintiff was incompetent as a restaurant owner because he employed a chef who makes poor quality food.	$175,000
Pedavoli v Fairfax Media Publications **[2014] NSWSC 1674**	One print article and one online article	(a) The plaintiff is a paedophile; (b) The plaintiff committed a criminal offence by having sex with boys at the school at which she taught.	$350,000
Ahmed v Harbour Radio **[2013] NSWSC 1928**	Two radio broadcasts	The plaintiff is low and contemptible; brought vexatious AVO applications; should be driven out of business for her association with a convicted sex offender.	$240,000 plus $40,000 for a second broadcast
McMahon v Fairfax (No 7) **[2013] NSWSC 933**	Two print AFR articles	Failure (by a solicitor) to meet tax obligations, failure to meet employee entitlements, investigation by the Legal Services Commissioner into possible offences and breaches of the Legal Profession Act.	$300,000