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Federal Court of Australia
District Registry: New South Wales
Division: General

No. NSD 475/2023

ALEXANDER HART GREENWICH

Applicant

MARK WILLIAM LATHAM

Respondent

OUTLINE OF CLOSING SUBMISSIONS OF THE APPLICANT

INTRODUCTION

1. These submissions are to be read together with the opening submissions made on behalf of Mr Greenwich (**AOS**), and use the same defined terms.

2. For the reasons developed below, we contend the Court ought to find that:

   (a) the Primary Tweet and the DT Quotes carried the pleaded imputations: see [61]–[70] and [75]–[79] (Primary Tweet) and [82]–[92] (DT Quotes) below;

   (b) the alleged imputation arising from the Primary Tweet that, *Mr Greenwich engages in disgusting sexual activities*, is defamatory of Mr Greenwich: see [71]–[74] below (Mr Latham concedes that if the other pleaded imputations in respect of the Primary Tweet and DT Quotes are carried, they are defamatory of Mr Greenwich: Respondent's Opening Submissions (**ROS**), [57], [72]);

   (c) the serious harm element in s 10A of the *Defamation Act 2005* (NSW) (***Defamation Act***) has been established in respect of both of the Primary Tweet and DT Quotes: see [93]–[122] below;

   (d) as to the positive defences to the Primary Tweet:

      (i) the honest opinion defence under *Defamation Act,* s 31 has not been established and, even if it were, it is defeated because Mr Latham did

not honestly hold the opinion he purported to express: see [124]–[143] below; and

(ii) the common law qualified privilege (reply to attack) defence has not been established but even if it were, it is defeated by malice: see [156]–[166] below;

(e) as to the positive defences to the DT Quotes:

(i) the honest opinion defence under *Defamation Act,* s 31 has not been established and, even if it were, it is defeated because Mr Latham did not honestly hold the opinion he purported to express: see [167]–[175] below;

(ii) the common law qualified privilege (reply to attack) defence has not been established but even if it were, it is defeated by malice: see [176]–[192] below.

(iii) the section 30 statutory qualified privilege defence and the *Lange* defence have not been established, because Mr Latham has failed to establish the reasonableness elements of those defences; but even if they were otherwise established, they are also defeated by malice: see [193]–[201] (s 30) and [202]–[204] (*Lange*) below;

(iv) the public interest defence under *Defamation Act,* s 29A fails because Mr Latham has not led any evidence of his belief that publication was in the public interest; and further because any such belief was not in any event objectively reasonable: see [205]–[213] below;

(f) substantial damages, including aggravated damages are warranted in this case: see [214]–[260] below; and

(g) the proposed injunctive relief is also warranted: see [261]–[263] below.

OVERVIEW OF THE APPLICANT'S EVIDENCE

The Applicant, Alex Greenwich

3. Mr Greenwich is an elected member of the NSW Parliament and has held the seat of Sydney for over 11 years. He has been an advocate for a number of social justice issues for about 20 years: **CB, p. 131ff**., Greenwich Affidavit 28 February 2024 (**AG-1**), [3], [5] to [10].

4. Mr Greenwich is openly gay: AG-1, [4].

5. The Primary Tweet caused immediate shock to Mr Greenwich: AG-1, [55].

6. The evidence establishes the Primary Tweet and reactions to it, including reactions from members of the public supportive of Mr Latham and derogatory of Mr Greenwich, spread like wildfire: AG-1, [59] to [65], [71] to [76].

7. The DT Quotes were foreseeably reported in the news media, as intended by Mr Latham: AG-1, [98].

8. After the Primary Tweet was published, Mr Greenwich attended a work-related event (**the Capella Event**). He was shaken by people approaching him to discuss the Primary Tweet: AG-1, [66].

9. After returning from the event, Mr Greenwich had an emotional breakdown in the presence of his husband: AG-1, [67]. That evidence is corroborated by Mr Hoeld, discussed further below. No cross-examination was directed to this evidence.

10. As Mr Greenwich said at [67] of AG-1 (see also [83], [84], [139]), in evidence that was not challenged in cross-examination:

> For the first time in my political and public life, I had been attacked based on my sexuality, in the most grotesque way, and had been reduced to a sex act…

11. After Mr Latham continued his attacks on Mr Greenwich via the DT Quotes published in the DT Article, Mr Greenwich was again shocked by what Mr Latham was saying about him. At AG-1, [97] (see also [139]), Mr Greenwich described, in terms that were not the subject of any cross-examination:

> When I read the DT Quotes, I was shocked, my impression was that Latham was suggesting I was whinging about being attacked for my sexuality and what really upset me was that he equated what he said in the Primary Tweet with [what] I say in schools. I felt that Mr Latham was engaging in a back and forth argument with me about my sexuality. I also read the DT Quotes to imply that it was dangerous for me to go into school and that I was seeking to groom children by talking about gay sex in schools.

12. The threats and abuse incited by the Primary Tweet and then the republication of the DT Quotes are addressed in the discussion of serious harm below, but see AG-1, [127] to [138]. An apprehended personal violence order was taken out against one person for the protection of Mr Greenwich: AG-1, [138].

13. The publications of the matters complained of has impacted Mr Greenwich's personal and professional life in a very real way:

    (a) Mr Greenwich has commenced seeing a psychologist in connection with the publication of the matters complained of and the response to them: AG-1, [137];

    (b) Mr Greenwich has felt unsafe at work: AG-1, [140];

    (c) on 3 April 2023, Mr Greenwich directed his staff to close access to the Electorate Office for a week because of his concern for his staff: AG-1, [145];

    (d) Mr Greenwich is concerned that the matters complained of and the reaction to them has adversely affected his ability to be a good manager and provide a safe workplace: AG-1, [146];

    (e) Mr Greenwich's ability to attend large gatherings has been affected; he has experienced anxiety, feelings of a lack of confidence and being emotionally overwhelmed: AG-1, [141], and has cancelled his attendances at a number of events: AG-1, [147];

    (f) the matters complained of and the responses to them have affected Mr Greenwich's work in an overarching way which he describes as feeling "*constantly stressed and distracted*": AG-1, [147]; and

    (g) Mr Greenwich is now questioning his ability to continue in his political role: AG-1, [151] to [155].

14. Mr Greenwich does, and has done, good work for the State and the broader Australian community for many years. The matters complained of are disgraceful. They have damaged Mr Greenwich's passion for his political work and advocacy to the extent that he questions whether he may have to step back from that work.

15. In weaponising Mr Greenwich's sexuality and making the connection with Mr Greenwich's work in schools, Mr Latham hit his political target and monstered Mr Greenwich, reducing him to the outrageous stereotypes that, because he is a gay man, he engages in disgusting sexual activities and is a danger to children.

16. Whilst Mr Latham's intention and conduct in publishing is not an element of the cause of action, it becomes relevant to an assessment of Mr Latham's positive defences, malice and aggravated damages, discussed later in these submissions.

17. The cross-examination of Mr Greenwich underscored the very real emotional toll the publication of the matters complained of has had on him.

18. At times, Mr Greenwich appeared "*flustered*" (his word, T72.08), because of a desire on his part to convey to the Court what he considered to be relevant context for the questions he was asked. That should not be counted against him. Mr Greenwich was endeavouring to give a full and honest explanation to the Court in response to questions put to him, often at a very high level of generality, in cross-examination.

19. When Mr Greenwich gave the answer at T71.18-30 about the impact of being called a "*groomer*" and "*paedophile*" in the way that Mr Latham has, Mr Greenwich appeared noticeably paler in his physical appearance. He looked drained by the end of the cross-examination, despite it being polite, appropriate at all times and brief.

20. At no time was it put to Mr Greenwich that any part of his affidavit was untrue. For the most part, the cross-examination was directed at seeking to establish that Mr Greenwich was not fully debilitated by, or had recovered from the effects of, Mr Latham's attacks upon him. Three examples illustrate the point; each revealing of the extent to which Mr Greenwich has been impacted.

21. *First*, Mr Greenwich was shown his parliamentary diary (**Ex R3**) and questions were put to him to the effect that he had continued actively to perform his public role,

particularly from about July 2023 onwards. Mr Greenwich explained that he had, of course, continued to do the job he has been elected to do.

22. Analysis of the diary, however, shows that:

(a) there are a number of 'clear' days following publication of the matters complained of;

(b) following publication of the matters complained of, there are limited events in the diary during evening hours; and

(c) most appointments in the diary are in the nature of ordinary commitments (often zoom calls and the like) during ordinary business hours.

23. A document was prepared by those assisting Mr Latham which was apparently intended to be a survey of public events that Mr Greenwich has participated in since July 2023 (**MRI R2**). The document in fact showed a total of six events during that period, with the remainder of the items being media statements and a social media post.

24. The diary and **MRI R2** powerfully support Mr Greenwich's evidence of limited attendance at public events since the publication of the matters complained of, and a change in his general work patterns and commitments.

25. *Secondly*, Mr Greenwich was cross-examined about the "*My Saturday Ritual*" piece (**Ex R4**) published in March 2024. The cross-examination culminated in the following exchange, graphically demonstrating just how deeply Mr Greenwich has been affected by the publication of the matters complained of (T70.27–71.9):

> So your level of concern about your safety wasn't such that would prevent you attending cafes or restaurants with your husband, and sometimes some friends, in your neighbourhood?---The only way I can answer that is – is – is this, I would not want to advertise in advance when and where I was at certain places. I would not want to sit in prominent or public tables, because if I had broadcast that I was going to be somewhere at a certain time wanting to have a private dinner, I would be concerned for two reasons, (1) my general safety, and (2) that people would want to come target me and ask me questions about a range of things, including Mr Latham. However, do I feel comfortable to go out to dinner in a restaurant, yes. But do I want to provide those people who sent that correspondence to my office with the date and time I will be somewhere? No, certainly, I don't. And, indeed, the – the police advise me not to do that.

> And did I ask you about that?---You asked me about safety, and I gave you an answer about safety.
>
> And the second part of my question was your concerns about safety were not such as at March this year, a couple of months ago up to the present, that would constrain you from referring to the places that you might go to in that general way that you did in the article; do you agree with that?---I was very careful in providing information for this article not to be specific of when and where or the frequency of which I attended these places. And safety is – if you're talking about do I feel safe ordering takeaway, yes, I feel safe ordering takeaway. If you were asking do I feel safe going for an – an early run where no one can recognise me, yes, I feel safe. Do I feel – you know, would I feel safe broadcasting that I was going to be having dinner at a certain time with a certain group of people, no, I don't feel safe doing that. So I'm – I'm trying to answer a very general question in a whole – would – would I feel safe going on a holiday with my husband to Hyams Beach, absolutely. Would I want people to know at the time when and where I was going to be in Hyams Beach, no, I wouldn't.

26. *Thirdly*, Mr Greenwich deposed in his affidavit at [155] that he has, "*to now consider whether or not to continue in my political and public role*". It was put to Mr Greenwich, in effect, that that was no longer his state of mind. Mr Greenwich did not agree. The following exchange occurred at T 71.38–72.15:

> As you reflect now, I suggest to you that you are able and do choose to continue in a public political advocacy role, given where you are now; do you agree with that?---To the extent that "able" means being able to deliver on a commitment to public service, yes. I've always maintained the importance of having a stiff upper lip and putting up a brave face, and I have continued to do that. That – that lip, though, has been quivering. So, yes, I have been able to do a lot of these things. Have they been easy by, at the end of the day, being reminded that, you know, that week, I've got - - -
>
> HIS HONOUR: Well, Mr Greenwich - - -?---Sorry. It really isn't helpful to me - - -?---I – I – I apologise, your Honour.
>
> …
>
> It's Mr Smark's questions that you need to be addressing?---All right. Sorry. For my benefit, as I was – sorry. I – I have found some of the material from this traumatic and triggering, so I apologise that I was getting a bit flustered there. Could I ask you to repeat the question, and I - - -
>
> MR SMARK: Of course?---And I will be more succinct in the answer.
>
> As you reflect on where you are now, what you've been through, I suggest that you are able to, and want to, continue with your public political advocacy role; do you agree?---I cannot answer "yes" to that question.

27. It was apparent from his evidence that Mr Greenwich is exhausted and fed up by the plague of the consequences of the publication of the matters complained of.

Victor Hoeld, husband of Mr Greenwich

28. Mr Greenwich was informed on the afternoon before the start of the trial that his husband, Mr Hoeld, was not required for cross-examination. His affidavit (**VH**) has been read and its contents are unchallenged.

29. Mr Hoeld has been married to Mr Greenwich since 2012: **CB, p. 883ff.**, VH, [2]. He is a reliable witness to the hurt suffered by his husband as a result of the matters complained of. Mr Hoeld observed with obvious concern that Mr Greenwich had been affected by Mr Latham's publications in a way that he had never seen previously.

30. Mr Hoeld spoke to Mr Greenwich after publication of the Primary Tweet and heard that he was, "*audibly distressed, his voice was shaking and sounded different to his usual upbeat tone*": VH, [14].

31. Prior to the Capella Event, Mr Greenwich told Mr Hoeld he was nervous. When they returned home, Mr Hoeld observed (VH, [17]):

> [Mr Greenwich] break down like I had never seen before during the course of our relationship. I saw Alex sobbing in bed. I heard Alex say words to the effect, *"I feel helpless"* and *"I feel attacked"*. It seemed like for the first time in our relationship, I was not able to comfort Alex. It was extremely distressing to me to watch Alex during that evening.

32. Following publication of the Primary Tweet, Mr Hoeld also observed that:

(a) in the immediate aftermath, Mr Greenwich was inundated with telephone communications and he appeared to become stressed and overwhelmed: VH, [18], [23];

(b) Mr Greenwich became uneasy and wished to leave events early; he was upset and frustrated that people wanted to talk to him about the Primary Tweet instead of his work: VH, [24];

(c) despite members of the public expressing sympathy and kindness to Mr Greenwich after publication of the Primary Tweet, this seemed to make Mr Greenwich uncomfortable and disempowered: VH, [27]; and

(d) Mr Greenwich changed his routine and commenced getting up earlier in the morning, saying words to the effect, "*I just want to start my day in peace and quiet and not talk to anyone about Latham*": VH, [28].

33. Mr Greenwich read the DT Article to Mr Hoeld. Mr Hoeld described the effect of the DT Article (which contained the DT Quotes) as effectively compounding Mr Greenwich's pain. His evidence at VH, [32], was that, "*I could see that Alex was even more shaken, distressed, and withdrawn than he was after the Primary Tweet*".

34. After publication of the matters complained of, the couple started to get out of Sydney as much as possible: VH, [36]. During an overseas holiday in mid-2023, Mr Greenwich told Mr Hoeld, "*It's been nice not being called a groomer or paedophile for a whole week*": VH, [37].

35. Whilst Mr Greenwich might have been able to disconnect from what was happening in Australia at the time, that comment is telling insight that the impact of the publication of the matters complained of were still playing on Mr Greenwich's mind.

36. During the same holiday, Mr Greenwich told Mr Hoeld that he was questioning whether he ought to continue in his political role. Mr Hoeld felt relief, despite his respect for Mr Greenwich's commitment to his work. Mr Hoeld worries that his role in public life is deleterious to Mr Greenwich's wellbeing and safety: VH, [39].

Other witnesses

37. The rest of the evidence relied upon by Mr Greenwich was also unchallenged. The witnesses were Alexander Graham (Senior Electorate Officer), Anne McCall (Electorate Officer), Senator Hanson-Young and the Hon. Greg Piper MLA.

38. That evidence speaks with one voice about Mr Greenwich's reputation as a courageous, committed and respected advocate and politician who is known for tackling important and confronting social justice issues.

39. Each of the witnesses also described the changes they observed in Mr Greenwich's demeanour following the publication of the matters complained of: see, **CB, p. 904ff.** Graham, [35]-[36]; **CB, p. 914ff.** McCall, [25]-[27]; **CB, p. 934ff.** Hanson-Young, [24]-[25]; **CB, p. 957ff.,** Piper [18]-[19].

40. The evidence reveals that, in private moments away from the public, Mr Greenwich is a changed person as a result of Mr Latham's conduct – not his usual happy and energised self. His spirit has been broken by the publication of the matters complained of, Mr Latham's ongoing campaign against him, and the public response. That description was also, we submit, evident from Mr Greenwich's appearance in the witness box as he attempted to convey to the Court the extent to which his professional and personal life has been upended by Mr Latham's campaign against him.

41. Ms McCall, Electorate Officer, who was responsible for managing Mr Greenwich's diary, observed that after publication of the Primary Tweet, Mr Greenwich started to decline more invitations to attend events from colleagues, community organisations and the corporate sector: McCall, [25] to [27]. That is borne out by an analysis of Mr Greenwich's diary, which shows very few evening events in the period after the publication of the matters complained of, which most diary entries concerning work events during ordinary business hours.

42. The evidence of staffers as to matters relating to the element of serious harm is addressed later in these submissions.

MEANING – PRIMARY TWEET

43. There are two issues in relation to the meaning of the Primary Tweet:

    (a) did the Primary Tweet, *in fact*, convey the pleaded imputations; and

    (b) if so, were those imputations defamatory?

44. Mr Latham denies that either of the pleaded imputations in respect of the Primary Tweet was carried.

45. He also denies that the first pleaded imputation, *Mr Greenwich engages in disgusting sexual activities*, if carried, is defamatory. Mr Latham accepts that the second pleaded imputation, *Mr Greenwich is not a fit and proper person to be a member of the NSW Parliament because he engages in disgusting sexual activities*, is defamatory if it is found to be carried: ROS, [57].

Reputation and tests for defamatory meaning

46. Defamation law is concerned with the protection of reputation. In *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460, French CJ, Gummow, Kiefel and Bell JJ explained the meaning of reputation and the assessment of injury to reputation at [2] to [5] (footnotes omitted, our emphasis):

> [2] Spencer Bower recognised the breadth of the term "reputation" as it applies to natural persons and gave as its meaning:
>
> > "[T]he esteem in which he is held, or the goodwill entertained towards him, or the confidence reposed in him by other persons, whether in respect of his personal character, his private or domestic life, his public, social, professional, or business qualifications, qualities, competence, dealings, conduct, or status, or his financial credit ...".
>
> [3] A person's reputation may therefore be said to be injured when **the esteem in which that person is held by the community is diminished in some respect**.
>
> [4] Lord Atkin proposed such a general test in *Sim v Stretch*, namely that statements might be defamatory if "the words tend to lower the plaintiff in the estimation of right-thinking members of society generally". An earlier test asked whether the words were likely to injure the reputation of a plaintiff by exposing him (or her) to hatred, contempt or ridicule but it had come to be considered as too narrow. It was also accepted, as something of an exception to the requirement that there be damage to a plaintiff's reputation, that matter might be defamatory if it caused a plaintiff to be shunned or avoided, which is to say excluded from society.
>
> [5] The common law test of defamatory matter propounded by Lord Atkin was applied in *Slatyer v The Daily Telegraph Newspaper Co Ltd*, although Griffith CJ expressed some concern about the ambiguity of the expression "right thinking members of the community". The general test, stated as whether the published matter is likely to lead an ordinary reasonable person to think the less of a plaintiff, was confirmed by this Court in *Mirror Newspapers Ltd v World Hosts Pty Ltd*, *Chakravarti v Advertiser Newspapers Ltd* and by Callinan and Heydon JJ in *John Fairfax Publications Pty Ltd v Gacic*. Gummow and Hayne JJ in *Gacic* referred to the likelihood that the imputations might cause "ordinary decent folk" in the community to think the less of the plaintiff.

47. Their Honours went on at [35] to [37] (footnotes omitted, our emphasis):

> [35] The majority of the Court of Appeal in this case did not deny that the focus of an action for defamation is upon the plaintiff's reputation. However their Honours viewed aspects of reputation as distinct and subject to differing standards or considerations and, in the case of Spigelman CJ, to be judged by a different class of referee. It was by this process of reasoning that the general test for defamation was held by the majority not to apply in cases of imputations concerning a person's business or professional reputation.

> [36] **The concept of "reputation" in the law of defamation comprehends all aspects of a person's standing in the community**. It has been observed that phrases such as "business reputation" or "reputation for honesty" may sometimes obscure this fact. In principle therefore the general test for defamation should apply to an imputation concerning any aspect of a person's reputation. A conclusion as to whether injury to reputation has occurred is the answer to the question posed by the general test, whether it be stated as whether a person's standing in the community, or the estimation in which people hold that person, has been lowered or simply whether the imputation is likely to cause people to think the less of a plaintiff. An imputation which defames a person in their professional or business reputation does not have a different effect. It will cause people to think the less of that person in that aspect of their reputation. For any imputation to be actionable, whether it reflects upon a person's character or their business or professional reputation, the test must be satisfied.
>
> [37] **The reference in the general test, as stated in *Sim v Stretch*, to a plaintiff being "lowered in the estimation" of the hypothetical referee does not imply the exercise of a moral judgment, on their part, about the plaintiff because of what is said about that person. It does not import particular standards, those of a moral or ethical nature, to the assessment of the imputations. It simply conveys a loss of standing in some respect**.

48. As the plurality noted at [36] (see also [4]) the test first articulated in *Sim v Stretch* is now the *general* test for ascertaining defamatory meaning. The other traditional tests—that a statement is defamatory if it tends to expose a person to hatred, contempt or ridicule, or a person to be shunned or avoided—while usually comprehended within the general test, continue to have work to do, although they are too narrow to operate as synonyms for that test.

49. In *Parmiter v Coupland* (1840) 151 ER 340 at 342, Parke B recognised that statements which tend to expose a person to hatred, contempt or ridicule are statements that tend to diminish the person's reputation:

> A publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule, is a libel.

50. That is an important statement: it acknowledges the ordinary human experience that a person suffers a loss of standing when exposed to hatred, contempt or ridicule. As the cases in respect of the hatred, contempt or ridicule test illustrate, that often occurs because the impugned statement reduces a person to a caricature to be laughed at, reviled or pitied. As the plurality observed in *Radio 2UE* in the passage at [37] reproduced above, the defamatory character of the statement, and the assessment of the plaintiff's loss of standing, is not dependent upon the exercise of a moral judgment about the conduct of the plaintiff.

51. The same point was made by Neill LJ in *Berkoff v Burchill & Anor* [1996] 4 All ER 1008. At 1015G, his Lordship referred to the following passage from the judgment of Judge McAvoy in *Zbyszko v New York American Inc* (1930) 228 App Div 277:

> Any written article is actionable … if it tends to expose the plaintiff to public contempt, ridicule, aversion, or disgrace, or induce an evil opinion of him in the minds of others and deprives him of their society. It is not necessary that words impute disgraceful conduct to the plaintiff. If they render him contemptible or ridiculous, he is equally entitled to redress.

52. The hatred, contempt or ridicule test was considered by Hunt J in *Ettinghausen v Australian Consolidated Press Ltd* (1991) 23 NSWLR 443. His Honour cited with approval the decision of Judge Learned Hand in *Burton v Crowell Pub Co* 82 F (2d) 154 (1936), a decision of the Second Circuit Court of Appeals. That case concerned a photograph, a steeplechaser plaintiff, and a saddle resulting in an unfortunate optical illusion. Judge Learned Hand identified why such publication was defamatory (quoted in *Ettinghausen* at 448):

> Such a caricature affects a man's reputation, if by that is meant his position in the minds of others; the association so established may be beyond repair; he may become known indefinitely as the absurd victim of this unhappy mischance. Literally, therefore, the injury falls within the accepted rubric; it exposes the suffered to 'ridicule' and 'contempt'.

53. That analysis has resonance in the present context. The Primary Tweet was reductionist; it equated Mr Greenwich with a sex act that was described by Mr Latham in terms that were calculated to induce revulsion. It affects Mr Greenwich's reputation in the minds of others by creating an association between him and that sex act, exposing him to serious hatred, contempt and ridicule; a person to be laughed at, reviled or pitied.

Ordinary, reasonable person test

54. Whether a statement carries a defamatory meaning is assessed by the standards of the ordinary, reasonable person. The authorities are replete with judicial statements as to the qualities of that person. A recent statement appears in in *V'landys v Australian Broadcasting Corp* [2023] FCAFC 80 at [73]ff, Rares J (with whom Katzmann and O'Callaghan JJ agreed).

55. The applicable principles are not in dispute. The ordinary, reasonable person is not a lawyer, and: (a) is of fair, average intelligence, experience and education; (b) is fair-

minded; (c) is neither perverse, morbid nor suspicious of mind, nor avid for scandal; (d) does not live in an ivory tower, but can and does read between the lines in light of general knowledge and experience of worldly affairs; (e) does not search for strained or forced meanings; and (f) reads the entire matter complained of and considers the context as a whole.

56. The ordinary, reasonable person draws implications, especially derogatory implications, more freely that a lawyer would. That person is prone to engage in loose thinking, particularly where the words which are published are imprecise, ambiguous, loose, fanciful or unusual: *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496, [77]–[78] (Wigney J).

57. Publications may be "*tinged with, or even pregnant with, insinuation or suggestion*", so as to "*implicitly invite the reader to adopt a suspicious approach*" (ibid, [80]). As Gleeson CJ put it in *Drummoyne Municipal Council v Australian Broadcasting Corp* (1990) 21 NSWLR 135 at 137:

> It is a feature of certain forms of defamation that one can read or hear matter published concerning a person and be left with the powerful impression that the person is a scoundrel, but find it very difficult to discern exactly what it is that the person is said or suggested to have done wrong.

58. The meaning of an allegedly defamatory publication is a question of fact, and a "*matter of impression*": *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 258–60 (Lord Reid).

59. An applicant is entitled to succeed on a pleaded imputation, or any other meaning found by the tribunal of fact to be carried by the matter complained of, provided that that meaning is a variant on, or not substantially different from, and no more injurious or serious than, a pleaded meaning: *David Syme & Co Ltd v Hore-Lacy* (2000) 1 VR 667 at [17] (Ormiston JA), [52] (Charles JA), [69] (Callaway JA); *Australian Broadcasting Corp v Wing* (2019) 271 FCR 632; [2019] FCAFC 125, [17]–[18] (Besanko, Bromwich and Wheelahan JJ).

60. Mr Latham's vulgar abuse argument (see ROS, [10]) can be quickly dispensed with. The matters complained of are not mere abuse, they convey defamatory conditions about Mr Greenwich, for the reasons developed below. In any event, defamatory

meaning and vulgar abuse are not mutually exclusive: see eg *Bennette v Cohen* [2005] NSWCA 341 at [51] (Bryson JA, with whom Beazley JA and Brownie AJA agreed).

Was the pleaded imputation in SOC, [15.1] conveyed?

61. The first pleaded imputation is that, in its natural and ordinary meaning, the Primary Tweet meant and was understood to mean that "*Mr Greenwich engages in disgusting sexual activities*".

62. The Court does not need to – and ought not – agonise over the analysis of meaning of the Primary Tweet. Its meaning is a matter of impression. The first pleaded imputation is a faithful summary of the terms of the tweet; it is its unambiguous and literal meaning.

63. The context of the Primary Tweet is that it responded to the Metcalfe Tweet, which reproduced Mr Greenwich's quote to the *Sydney Morning Herald* about Mr Latham. So much is admitted by Mr Latham at ROS, [51(a)]. It refers to "*your dick*", which, in context, would have been understood by the ordinary reasonable reader to be a reference to Mr Greenwich's penis.

64. Contrary to Mr Latham's submissions at ROS, [51(b)] – and for that matter to the admission at ROS, [51(a)] – the Primary Tweet was plainly *about* Mr Greenwich – not homosexual men generally. That is the obvious – we submit only – open reading of it (cf ROS, [51(c)]).

65. Nor has the first pleaded imputation been cast at "*too high a level of generality*" (cf ROS, [51(d)]). It tracks directly, and faithfully summarises, the terms of the Primary Tweet.

66. On no fewer than four occasions, Mr Latham asserts in the ROS that the Primary Tweet was about "*homosexual sex*": ROS, [51(d)], [54], [55], [58]. That is, with respect, a submission that ought not to have been made and ought to be withdrawn.

67. In the first place, the sex act described in the Primary Tweet is an act that any human could engage in, irrespective of gender. There is nothing about it that is exclusive to homosexual men. The authors of the ROS, by equating the sex act described in the Primary Tweet with homosexual sex, have reflected and peddled an offensive stereotype.

68. Secondly, the Primary Tweet describes a particular act, in vulgar terms, to evoke a notion of filth and revulsion in the reader. It does not describe in any sense homosexual sexual activities generally. The submission that that act is a description of homosexual sexual activity is a crude caricature that has no place in modern discourse.

69. Mr Greenwich expressed the point clearly at T42.12-17:

> So the – the document seeks to accept that "covering your dick with shit" should be considered as homosexual sex. That – that makes my stomach churn. The document I read seeks to say that a reasonable person could assume that I go into schools to talk about sexual activity. I don't and I wouldn't. I read it as a continuation and a justification on the attack on me, the attack on my character, and the way in which people should see me.

70. The first imputation was, we submit, plainly carried.

Was the pleaded imputation in SOC, [15.1] defamatory of Mr Greenwich?

71. The first pleaded imputation is defamatory.

72. Ordinary, reasonable people will think less of those who engage in sexual activities described in filthy and revolting terms. Such persons are exposed to hatred, contempt or ridicule (and likely also to be shunned and avoided). They suffer a loss of standing by being held up to hatred, ridicule and contempt for the reasons developed at [50] above.

73. The association that Mr Latham drew between Mr Greenwich and the sex act he described in the Primary Tweet was apt to create a crude and reductionist association in the minds of readers; a caricature that Mr Greenwich is not a nuanced individual and public figure, but rather defined by Mr Latham's presumption as to the sexual activities he engages in. In the language of Judge Learned Hand in *Burton*, the injury from such an association is literally within the accepted rubric of defamatory meaning.

74. The submission at ROS, [19] that ordinary, reasonable people do not care what consenting adults do legally in the privacy of their own homes is without merit. There are many activities that are legal but frowned upon by ordinary, reasonable people, and engaging in filthy sexual activities is one of them. It is legal to drink oneself to oblivion at home and wake up in a pool of one's own vomit; but to say that a person does so is unarguably to publish a statement carrying a defamatory meaning about them.

Was the pleaded imputation in SOC, [16.1] conveyed?

75. We submit that, to readers of the Primary Tweet aware that Mr Greenwich is a member of the NSW Parliament, and who had read the Metcalfe Tweet, the Primary Tweet carried by way of true innuendo the second pleaded imputation, namely that "*Mr Greenwich is not a fit and proper person to be a member of the NSW Parliament because he engages in disgusting sexual activities.*"

76. The extrinsic facts relied upon by Mr Greenwich – that he is a member of the NSW Parliament, and the Metcalfe Tweet — are matters that the Court can infer will have been known by all or almost all readers of the Primary Tweet. The Primary Tweet was a response to the Metcalfe Tweet; readers only got to the Primary Tweet by having first seen the Metcalfe Tweet. Mr Greenwich has been a prominent member of the NSW Parliament since 2012: AG-1, [3].

77. The Primary Tweet was a response by Mr Latham to Mr Greenwich's quote as reproduced in the Metcalfe Tweet. That quote was about Mr Latham's fitness for office ("*people who are considering voting for One Nation need to realise they are voting for an extremely hateful and dangerous individual…*"). A hateful and dangerous individual, axiomatically, is not a fit person to sit in a seat of democracy in this country.

78. The Primary Tweet took Mr Greenwich's language ("*Mark Latham in a disgusting human being…*") and threw it back at him ("*Disgusting? How does that compare…*"). In so doing, Mr Latham will have been understood as questioning Mr Greenwich's own fitness for office.

79. The Primary Tweet was a retort: "*if you say I'm disgusting, what about the disgusting sexual activities that you engage in?*" (cf ROS, [51(b)]).

80. We submit that the second pleaded imputation was clearly carried. That the meaning is defamatory is conceded by Mr Latham: ROS, [57].

MEANING – DT QUOTES

81. Mr Latham accepts that if either of the pleaded imputations relating to the DT Quotes were carried, they are defamatory: ROS, [72]. Thus, the only question to be resolved as to meaning in relation to the DT Quotes is whether the pleaded imputations were, in fact, conveyed: see SOC, [24.1] and [25.1].

Was the pleaded imputation in SOC, [24.1] conveyed?

82. The first pleaded imputation is that "*Mr Greenwich is a disgusting human being who goes into schools to groom children to become homosexual.*"

83. Mr Latham's words were pregnant with insinuation. He said that Mr Greenwich had "*habits*" that needed to be the subject of attention; and that one of those "*habits*" was that Mr Greenwich "*goes into schools talking to kids about being gay*". He then immediately linked that statement to his assertion that he had deleted the Primary Tweet (which had imputed that Mr Greenwich engages in disgusting sexual activities) because he "*didn't want to be accused of anything similar*".

84. Mr Latham's words leave the powerful impression that there is something very discreditable about Mr Greenwich's habit of going into schools to talk about kids being gay. His words invite the reader to adopt a suspicious approach.

85. Mr Latham chose imprecise, ambiguous, and loose words, which were calculated to cause ordinary, reasonable readers to engage in loose thinking. Such readers will not have overlooked the association that Mr Latham expressly drew between his tweet, accusing Mr Greenwich of engaging in a disgusting sex act, and not wanting to be accused of "*anything similar*" to what Mr Greenwich does when he goes into schools to talk to kids.

86. In context, we submit that the ordinary, reasonable reader will have understood Mr Latham to be evoking the vile stereotype that gay men like Mr Greenwich are a danger to children; and that Mr Greenwich is a particular danger to children because he goes into schools to talk to kids about disgusting sexual acts; to lure them into becoming homosexual.

87. However, consistent with the principles discussed at [59] above, it is open to the tribunal of fact to find for the applicant on the basis of a variant of the first pleaded meaning. As Gleeson CJ said in *Drummoyne* at 137, it can be "*difficult to discern exactly what it is that the person is said or suggested to have done wrong*".

88. We submit it is clear that, by his words, Mr Latham was imputing that Mr Greenwich is a danger to children. Different readers may have understood the danger Mr Latham was alluding to in different ways; but all such meanings are defamatory and permissible nuances of the first pleaded meaning.

89. Contrary to Mr Latham's submissions, the ordinary, reasonable person will not have understood his words benignly. A member of Parliament who goes to schools for a proper purpose would not be described as having a "*habit*" of doing so that needs to be the subject of attention. They would not be accused of doing something that has to be called out in answer to a statement that the speaker of the words was a "*disgusting human being*".

Was the pleaded imputation in SOC, [25.1] conveyed?

90. The second pleaded imputation is that, to persons who knew that Mr Greenwich is a member of the NSW Parliament, the DT Quotes carried by way of true innuendo the imputation that "*Mr Greenwich is not a fit and proper person to be a member of the NSW Parliament because he goes into schools to groom children to become homosexual.*"

91. That Mr Greenwich is a member of Parliament is a matter that the Court can infer was known by all of the persons to whom the DT Quotes were published and republished. Mr Greenwich's status as a Member of Parliament was referred to in the first paragraph beneath the headline of the DT Article ("*about a Sydney gay MP*") and in the following paragraph ("*fellow MP Alex Greenwich*").

92. Self-evidently, and as correctly conceded by Mr Latham, if the second pleaded imputation is carried, it is defamatory.

SERIOUS HARM – PRIMARY TWEET AND DT QUOTES

93. Section 10A of the *Defamation Act* requires Mr Greenwich to prove that the publication of each defamatory matter (not the pleaded imputations, although they are a factor to be considered) caused, or is likely to cause, serious harm to his reputation.

Applicable principles

94. The relevant enquiry is answered by applying the statutory language in s 10A(1):

> It is an element (the "serious harm element") of a cause of action for defamation that the publication of defamatory matter about a person has caused, or is likely to cause, serious harm to the reputation of the person.

95. The subsection invites attention to two distinct matters: harm *actually* caused by the publication of the matter; and harm *likely* to be caused.

96. That duality was recognised in respect of the cognate provision in s 1 of the *Defamation Act 2013* (UK) in *Lachaux v Independent Print Ltd & Ors* [2015] EWHC 2242 (QB). At [65], Warby J said (in a passage accepted as correct by the Supreme Court of the United Kingdom: see [2020] AC 612, [20]):

> The court is not confined, when deciding this question, to considering only the defamatory meaning of the words and the harmful tendency of that meaning. It may have regard to all the relevant circumstances, including evidence of what has actually happened after publication. Serious harm may be proved by inference, but the evidence may or may not justify such an inference.

97. In assessing whether the matters complained of caused or are likely to cause serious harm, the "grapevine effect" can be taken into account. In *Hun To v Aljazeera International (Malaysia) SDN BHD* [2023] FCA 1103, McEvoy J said at [48] that the enquiry as to serious harm:

> …would need to extend to the gravity of the meanings conveyed by the relevant publications, the inherent tendency of those meanings to cause harm to the applicant's reputation in Australia, the extent of the publications, including the spread of whatever imputations are proved on the "grapevine", the persons to whom the publications were made or to whom the imputations came to be communicated on the "grapevine", the applicant's personal circumstances, evidence of the actual impact of the publications on the persons to whom they were made or who otherwise became aware of the substance of them, and the "inherent probabilities" involved.

Damage to Mr Greenwich's reputation

98. In the present matter, it is put by Mr Latham, in substance, that:

(a) the evidence of actual harm to Mr Greenwich's reputation does not rise to the level of seriousness necessary to discharge the burden imposed by s 10A; and

(b) publication of the matters complained of was unlikely to cause serious harm to Mr Greenwich's reputation, because Mr Latham was roundly condemned for both the Primary Tweet and the DT Quotes.

99. Neither submission has merit.

100. A spate of comments and messages were posted and received between 10.13am on 30 March 2023 (when Mr Latham posted the Primary Tweet) and 1.38pm on 1 April 2023 (when the DT Quotes were republished in the DT Article).

101. Twitter recorded at least 6,171 "views" of the Primary Tweet, prior to the time Mr Latham deleted it at about 12.34pm, 2 hours and 20 minutes after it was first posted: **CB, p. 118**, Agreed Fact at para. [27]. Many comments were posted in response to the Primary Tweet itself: **CB, pp. 351-2**. They were overwhelmingly supportive of Mr Latham.

102. A journalist, Hugh Riminton, reposted the Primary Tweet before it was pulled down by Mr Latham. That tweet was viewed at least 654,700 times (see 'views' at the bottom of that tweet): **CB, p. 354**. It immediately provoked further comments supportive of Mr Latham: **CB, pp. 356-67**.

103. From those two matters alone, the extent of publication of the Primary Tweet was plainly very significant.

104. There were also media reports in relation to the publication of the Primary Tweet, some of which republished the tweet in whole or in part, including *The Daily Mail* and news.com.au: **CB, pp. 368-401**.

105. It can be safely inferred that the comments and messages posted between 10.13am on 30 March 2023 (posting of the Primary Tweet) and 1.38pm on 1 April 2023 (when the DT Article was published) were caused by, and only by, publication of the Primary

Tweet, including because they responded directly to the Primary Tweet or referred to sex acts. They include:

(a) tweets posted in response to the Primary Tweet itself at **CB, pp. 351-2**;

(b) tweets posted in response to the Hugh Riminton Tweet at **CB 356–67**;

(c) tweet by 'John Wayne' dated 31 March 2023 at **CB, p. 403**;

(d) tweet by Ryan Fletcher dated 31 March 2023 at **CB, p. 405**;

(e) comments posted in mainstream media reporting of the controversy at **CB, p. 551-5**; and

(f) feedback to the online account of Mr Greenwich's Electorate Office on 30 and 31 March 2023 at **CB, pp. 692, 694, 696, 698, 700, 701, 702**.

106. More comments and messages were received after 1.38pm on 1 April 2023 (the time of republication of the DT Quotes in the DT Article).

107. Many of those comments and messages referred to sex acts, from which it may be inferred they were directly, causally connected to the Primary Tweet (because it carried imputations about a disgusting sex act). Others referred to Mr Greenwich as a groomer, paedophile or danger to children, from which it may be inferred they were directly, causally connected to the DT Quotes and the DT Article (because they carried imputations about Mr Greenwich grooming children).

108. The comments and messages after 1.38pm on 1 April 2023 include:

(a) tweet by 'Grifting Commies' dated 2 April 2023 at **CB, p. 407**;

(b) feedback to the online account of Mr Greenwich's Electorate Office from 1 April 2023 at **CB, pp. 704, 706-707, 709, 711, 713, 715, 717, 719, 722, 724, 726, 728, 730, 732, 734, 736, 738, 740, 742, 744, 746-747, 749, 752-754, 756, 758, 760, 762, 764, 766, 768, 770, 772, 774, 778, 780, 782, 784, 786**;

(c) anonymous letters received in May 2023: **CB, pp. 788, 790, 796-797, 799, 804**; and

(d) voicemails left in May, September and October 2023: **CB, pp. 830 to 840** (transcripts); **Ex A6** (audio files).

109. It cannot, of course, be excluded that the direct cause of the posting of some of those comments and messages may have been other media coverage of the controversy stirred up by the publication of the Primary Tweet and the DT Quotes, including in relation to Mr Greenwich's decision to take action in relation to those publications.

110. All of those comments and messages remain however, in our submission, evidence the Court is entitled to take into account when assessing actual serious harm to Mr Greenwich's reputation from the publication of the matters complained of. That is because there is no break in the chain of causation between:

(a) the original publication of the Primary Tweet;

(b) the foreseeable publicity attending the Primary Tweet;

(c) the making of the DT Quotes, which were causally connected to the deletion of the Primary Tweet;

(d) the republication of the DT Quotes in the DT Article as intended by Mr Latham;

(e) the foreseeable publicity attending the publication of the DT Quotes;

(f) Mr Latham's further statements in relation to the controversy caused by the publication of the Primary Tweet;

(g) Mr Greenwich's decision to take action in relation to the Primary Tweet and the DT Quotes; and

(h) the foreseeable publicity attending that decision and the foreseeable repetition in that connection of the defamatory substance of the Primary Tweet and the DT Quotes.

111. The comments and posts we have identified were quite despicable. They branded Mr Greenwich, among other things, as a "*repugnant sodomite*", "*pathetic, childish and jelly spined*", a "*dirty, dung-punching POOFTER*", a "*FREAK in our society*", a "*disgusting gay fucker with poo on your hands*", "*fucked up*", "*abnormal*", a "*male poo*

pusher" who made the writer "*want to throw up*", "*an Abomination of Nature*", "*a pompous little twat*", a "*dirty, filthy poofter*", a "*leftist moron*", a "*grubby little two faced coward*" with "*depraved habits*", a "*depraved grub*", a "*sodomite*" who "*will fry in hell like bacon*", a "*GRUB*", a "*disgusting poor excuse of a human being*", "*a snowflake and a virtue signalling, hate mongering, bigoted tosser*", "*disgusting*" and someone the writer will think of "*every time I take a shit*", "*ridiculous & childish*", "*a poor excuse low life unaustralian scumbag human being LGBTIQ freak*", a "*typical GRUB politician chasing the anal $$$$$$$$$$$*", a "*DISGUSTING human being*", "*unnatural, immoral and unclean*", a "*Fucking Fairy Faggot*", a "*Horrible piece of Shit*", a "*Fucking poofta cunt*", a man with "*depraved sexuality*", a "*FAGGOT POOFTAH piece of Shit*", "*a disgusting human being*" who should "*bury your head in shame*", a "*soy boy*", a "*dirty f'n fuckin' cunt*", "*Miss Greenwich, poofter, paedophile, piece of shit faggot cunt*", a "*poor little faggot*" and a "*fucken piece of shit*", "*a disgusting paedophile*", "*a sick bastard*", "*you paedophile*", a "*dirty fucken poofter*" who "*should have been put down at birth I believe in poofter bashing*", "*a defect from your parents having sex*" and a "*GROOMER*".

112. Another disturbing message is at **CB, p. 845**, "*Stay away from our kids mate. We are here to protect the kids at all costs made. This is a warning stay away from our kids*". Mr Greenwich considered this message to be menacing and reported it to Surry Hills police: AG-1, [132].

113. The most disturbing of the messages were those that were in the nature of death threats. They included statements such as: "*All you weirdo up the arse mongrels should be publically (sic) executed*", "*Throwing you 'blokes'!!! over cliffs was too good for you! Should be hung, drawn and quarted*", "*Jump over the gap you cunt*", "*you should have been put down at birth I believe in poofter bashing*", "*AIDS didn't kill enough of you…When a faggot dies a straight angel gets their wings*": **CB, pp. 658, 788, 835, 849, 851**.

114. Mr Greenwich reported the message at **CB, p. 849** to Surry Hills police: AG-1, [134].

115. The comments and messages inflicted harm to Mr Greenwich's reputation in the requisite sense: they evidence a loss of standing (*Radio 2UE* at [37]) and an injury to

the esteem in which Mr Greenwich is held by the community in some respect (*Radio 2UE* at [3]).

116. Contrary to Mr Latham's submission, it is not to the point that many people felt sympathy towards Mr Greenwich and antipathy towards Mr Latham. That submission amounts to little more than an assertion that the damage to Mr Greenwich could have been worse. So much may be admitted, but it does not erase the actual evidence of harm apparent from the terms of the comments and messages summarised above.

117. The submission at ROS, [62] that the individuals responsible for the comments and messages were "*weak evidence of serious harm*" because the senders were likely "*already adversely disposed to Mr Greenwich*" should be rejected as, with respect, ridiculous. The comments and messages are not weak evidence; they are a powerful body of violent and intimidatory responses to Mr Latham's provocation. It is far more likely that the tone of the comments and messages is reflective of Mr Latham's statements having hit their mark, by unleashing a torrent of hatred, contempt and ridicule towards Mr Greenwich.

118. From the volume and ferocity of the known responses, it can be inferred that they were likely the tip of the iceberg in terms of the damage in fact inflicted upon Mr Greenwich's reputation by the publication of the Primary Tweet and the DT Quotes.

Other evidence of the actual public reaction to the matters complained of

119. The unchallenged evidence of Senior Electorate Officer, Mr Graham, was that prior to the time of the publication of the Primary Tweet and DT Quotes, he had not experienced receiving so many hateful and threatening communications directed to Mr Greenwich, and the tone of the communications post-publication was worse: **CB, p. 907**, Graham at [13].

120. The public reaction to the publication of the matters complained of was so threatening that it necessitated the intervention of NSW Police and the implementation of a procedure to handle suspicious mail: **CB, p. 908**, Graham at [20]ff.; **CB, p. 918**, McCall at [21].

121. It also resulted in access to the Electorate Office being closed down from time to time, including for a week from 3 April 2023: **CB, p. 176**, AG-1 at [145]; **CB, p. 910**, Graham at [33]. CB**, p. 920**, McCall at [29].

122. Contrary to the submission in ROS, [63], the disruption caused at the Electorate Office of Mr Greenwich is evidence the Court may consider in assessing serious harm. It proves that the public reaction to Mr Greenwich was adverse to his reputation as a Member of Parliament. That harm is appropriately described as serious in nature.

LATHAM'S POSITIVE DEFENCES – THE PRIMARY TWEET

123. Mr Latham relies on two positive defences to the Primary Tweet: honest opinion and common law qualified privilege (reply to attack): ROS, [64]–[68].

Honest opinion

124. Section 31(a) of the *Defamation Act* provides:

> It is a defence to the publication of defamatory matter if the defendant proves that—
>
> (a) the matter was an expression of opinion of the defendant rather than a statement of fact, and
>
> (b) the opinion related to a matter of public interest, and
>
> (c) the opinion is based on proper material.

Expression of opinion

125. The first element of the defence concerns whether the matter (as opposed to the imputations found to be carried by the matter) was an expression of opinion rather than a statement of fact: *Feldman v Polaris Media Pty Ltd as Trustee of the Polaris Media Trust t/as The Australian Jewish News* [2020] NSWCA 56 at [66]. See also *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245 at [35]–[44] (Gummow, Hayne and Heydon JJ); *Stead v Fairfax Media Publications Pty Ltd* [2021] FCA 15 at [130] to [131] (Lee J); *Goldsborough v John Fairfax & Sons Ltd* (1934) 34 SR (NSW) 525.

126. Where fact and comment are closely intermingled, particularly in a short publication, the publication is more likely to be understood by ordinary, reasonable readers as a statement of fact: *Hunt v Star Newspaper Co Ltd* [1908] 2 KB 309 at 319-20 (Fletcher

Moulton LJ); *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245 at [42]–[43] (Gummow, Hayne and Heydon JJ).

127. Mr Greenwich submits that ordinary, reasonable readers of the Primary Tweet are likely to have understood it as a statement of fact (that Mr Greenwich as a matter of fact sticks his dick up bloke's arses so as to cover it in shit), than an expression of opinion (that Mr Greenwich is disgusting because he sticks his dick up bloke's arses so as to cover it in shit). Little, however, ultimately turns on this characterisation in the present matter because the other two elements of the defence cannot be made out.

Public interest

128. In the ROS at [66], Mr Latham faintly argues that the Primary Tweet was a matter of public interest. The alleged public interest is pleaded at Defence, [76] as "*Greenwich's attack [on Mr Latham] to the effect that he was a disgusting human being, is a disgusting human being and an extremely hateful and dangerous individual who risks causing a great deal of damage to our state who was therefore unfit to serve as a NSW MLC*."

129. That contention is, with respect, untenable.

130. If the Primary Tweet was an expression of opinion, then the opinion related to the assumed, private sexual practices of Mr Greenwich, and (in respect of the true innuendo meaning) whether by reason of those private sexual practices, Mr Greenwich is a fit person to be a member of the NSW Parliament.

131. The matter alleged by Mr Latham to constitute the subject of public interest was the context in which Mr Latham published the Primary Tweet, not the matter the subject of his opinion. The latter is the enquiry dictated by the terms of s 31(1)(b).

132. Australian law has never treated the publication of statements about the private sexual activities of others, including public figures, as matters of public interest, except where those activities are relevant to the performance of the person's public duties or where the person has themselves put those activities before the public.

133. The leading case is *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153, where Hunt J said at 167:

> A public figure's private behaviour or character can become a matter of public interest in one of two ways — either because it affects the performance of his public duties (a proposition which I discussed earlier) or because he makes it such a matter himself. If the plaintiff had in fact deliberately put himself forward to the public as subscribing to such high standards in his private behaviour, so that he could be taken as having appealed to the public for its judgment on that private behaviour, he cannot then be heard to say that the public does not have the right to pronounce the judgment which he asked of it: cf *Dwyer v Esmonde* (1877) 11 Ir R (CL) 542 at 550 and *G Goldsbrough v John Fairfax & Sons Ltd* (1934) 34 SR (NSW) 524 at 532; 51 WN 178.

134. Mr Greenwich does not fall within either category.

135. We note in passing the irreconcilable tension in Mr Latham's submissions. On the issue of whether the Primary Tweet is defamatory, Mr Latham asks the Court to find that, "*The ordinary reasonable member of the community does not care what consenting adults do legally in the privacy of their own homes*": ROS, [19]. That submission is directly against the subject of the Primary Tweet being a matter of public interest. On the other hand, Mr Latham asks the Court to find the Primary Tweet was somehow related to a matter of public interest for the purposes of his honest opinion defence.

Proper material

136. To satisfy the proper material element in s 31(1)(c), Mr Latham must establish that his opinion was "*based on proper material*" in that it was, as required by s 31(5), based on material which is, relevantly, substantially true and: (i) set out in specific or general terms in the published matter; or (iv) otherwise apparent from the context in which the material is published

137. The alleged proper material is pleaded in Defence, [77] at **CB, pp. 86-87**. It does not come within a bull's roar of being capable of establishing the third element of the defence.

138. If the Primary Tweet was an expression of opinion, then the facts on which the opinion was based were set out in the most specific of terms in the tweet: that Mr Greenwich sticks his dick up bloke's arses so as to cover it with shit. To establish a proper basis for the alleged opinion, Mr Latham would have to have pleaded, and then proved at trial, that those facts are substantially true. He would also have had to know those facts

to be matters of substantial truth at the time of publication of the Primary Tweet in order honestly to hold an opinion based upon those facts.

139. The pleaded proper material does not go anywhere near those facts, no doubt because Mr Latham at the time of publication of the Primary Tweet had no information whatsoever about whether those facts were matters of substantial truth.

140. The closest the Defence comes to the facts stated in the Primary Tweet is at [77(h)], where Mr Latham asserts that "*Greenwich is an openly gay man who has participated in homosexual sexual activities, material that was set-out in specific or general terms in the Primary Tweet and is substantially true*".

141. There is, obviously, a gulf between the "facts" pleaded in the Defence at [77(h)] and the "facts" stated in the Primary Tweet.

142. As we observed at AOS, [23], the "facts" pleaded in the Defence could no more establish a defence of honest opinion in this case than an allegation that a lawyer had breached the Bar rules could be defended by asserting that the lawyer was a barrister who accepted briefs and appeared in court, or an allegation that a doctor was a butcher who had mutilated patients could be defended by asserting that the doctor was a surgeon who performed operations.

143. Mr Latham has not given evidence. There is therefore no evidence at all about what, if anything, he knew about Mr Greenwich's private sexual activities at the time of publication of the Primary Tweet. In those circumstances, the Court should infer that Mr Latham could not have honestly held the opinion he alleges he expressed at the time of publication of the Primary Tweet, and was instead expressing a view based on nothing more than his homophobic prejudices, and that Mr Greenwich has therefore established the ground of defeasance in s 31(4)(a): see Reply, [9].

Common law qualified privilege (reply to attack)

Principles to be applied

144. At common law, a defence of qualified privilege is available where a defendant publishes a reply to a defamatory attack by the plaintiff. The reply must, however, be sufficiently connected to the attack, proportionate, and published without malice.

145. Here, Mr Latham asserts that he published the Primary Tweet by way of a response to a defamatory attack made upon him by Mr Greenwich in the quote that he gave to the *Sydney Morning Herald*: Defence, [38]–[48].

146. Properly understood, the Primary Tweet was in the nature of a riposte to the reply by Mr Greenwich to the attack that Mr Latham had launched on Mr Greenwich following the Belfield incident: see **Ex A2** (transcript); **Ex A6** (audio file). Nothing, however, turns on the distinction.

147. In *Harbour Radio Pty Ltd v Trad* (2012) 247 CLR 31, Gummow, Hayne and Bell JJ addressed the requirement that, to make out the defence, the reply must be sufficiently connected to the attack. Their Honours said at [35]:

> That the matter complained of is sufficiently connected to the privileged occasion to attract the defence may appear upon any one of several considerations. The matter may be sufficiently connected with the content of the attack, or it may go to the credibility of the attack, or to the credibility of the person making that attack. Questions of degree inevitably will be presented.

148. The relevant principles were more recently considered in *Gould v Jordan (No 2)* [2021] FCA 1289 at [68] to [75] (White J). See also *Burston v Hanson* [2022] FCA 1235 at [204] to [208]; *Hamilton v Clifford* [2004] EWHC 1542 (QB), [63]–[76].

149. The following propositions of relevance in the present matter, which are orthodox and unlikely to be in issue between the parties, can be distilled from the authorities:

(a) The reply must be proportionate and commensurate to the attack. That is to be assessed objectively.

(b) The reply to the attack must have been by way of *bona fide* answer or retort. The law does not encourage, by the latitude afforded to a reply to an attack, public vilification or an abdication of reason.

(c) The reply must not cross over into an attack on the integrity of the attacker, unless that is reasonably necessary for defending the respondent's reputation.

(d) Mere retaliation, which cannot be described as an answer or explanation, is not protected.

(e) Malice defeats the defence, and may be inferred where there is an excess in the reply that exceeds a reasonable view of the necessities of the occasion, or where irrelevant material is included in the reply so as to incite prejudice against the attacker.

Application

150. Mr Greenwich accepts that the Primary Tweet was a riposte to a reply to an attack, namely a riposte to the quote about Mr Latham that Mr Greenwich had provided to the *Sydney Morning Herald*. He also accepts that the manner of publication (a tweet) was sufficiently proportionate by way of response (to the Metcalfe Tweet).

151. But Mr Latham's reply could not in any sense be described as germane or commensurate to Mr Greenwich's attack.

152. Mr Greenwich had attacked Mr Latham because of what he believes to be Mr Latham's disgusting, hateful and dangerous rhetoric around transgender people and persons questioning their gender identities. He expressly tied his attack to a plea to voters to think carefully before casting a vote for Mr Latham at the election to be held that weekend.

153. It might have been one thing if, in the Primary Tweet, Mr Latham had responded in kind, by asserting, for example, that Mr Greenwich had incited the Belfield incident, or was advocating for some policy that Mr Latham believes to be disgusting, hateful or dangerous – matters for which Mr Latham had advocated in other fora, including the interview at **Ex A2** (audio file); **Ex A6** (video file). Such a response might well have been proportionate, germane and commensurate to the protected occasion.

154. But by the Primary Tweet, Mr Latham did nothing of the kind. Instead, he resorted to a personal attack that had nothing at all to do with Mr Greenwich's political beliefs or role in relation to the Belfield incident, but which rather gave voice to Mr Latham's ignorant and stereotypical views about homosexuality, which he weaponised in order to demean, hurt and humiliate Mr Greenwich.

155. As Mr Latham himself admitted in the DT Quotes, by publishing the Primary Tweet, he attacked Mr Greenwich "*harder*" than Mr Greenwich had attacked him.

156. The limits of a permissible attack are usefully illustrated by the result in *Harbour Radio Pty Ltd v Trad* (2012) 247 CLR 31. There, the plaintiff (Mr Trad) had accused the defendant (the broadcaster of radio station 2GB) of being to blame for the Cronulla riots by stirring up racial division. The defendant replied to that attack in a broad ranging spray against the plaintiff. Some parts of the reply were protected by the defence (allegations, in substance, that the plaintiff was a dangerous individual who had committed acts of violence and incited racism). Other parts, however, were not protected (allegations that the plaintiff was "*widely perceived as a pest*" and "*attacks those people who once gave him a privileged position*"). The latter allegations were found by the Court not to be fairly warranted or relevant responses to the plaintiff's attack: see [39]–[40].

Malice

157. Even if Mr Latham's riposte in the Primary Tweet was sufficiently connected to Mr Greenwich's attack to have been published on an occasion of privilege, the Court ought to find that it was actuated by malice.

158. A publication is actuated by malice where there is an abuse of the occasion protected by privilege. As the High Court explained in *Roberts v Bass* (2002) 212 CLR 1 at [75] to [76] (footnotes omitted):

> [75] An occasion of qualified privilege must not be used for a purpose or motive foreign to the duty or interest that protects the making of the statement. A purpose or motive that is foreign to the occasion *and* actuates the making of the statement is called express malice…
>
> [76] 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. Even knowledge or a belief that the defamatory statement was false will not destroy the privilege, if the defendant

> was under a legal duty to make the communication. In such cases, the truth of the defamation is not a matter that concerns the defendant, and provides no ground for inferring that the publication was actuated by an improper motive. Thus, a police officer who is bound to report statements concerning other officers to a superior will not lose the protection of the privilege even though he or she knows or believes that the statement is false and defamatory unless the officer falsified the information. Conversely, even 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.

159. Mr Greenwich alleges that Mr Latham was motivated by malice in publishing the Primary Tweet, being "*the improper purpose of exposing Mr Greenwich to public humiliation, ridicule, contempt and hatred by reason of Mr Greenwich's sexuality*": Reply, [3(b)].

160. The particularised conduct in support of that is that (Reply, [3], **CB, p. 96**):

(a) Mr Latham knew the imputations conveyed by the Primary Tweet were false or, alternatively, Mr Latham was recklessly indifferent to the truth or falsity of those imputations.

(b) At the time of publishing the Primary Tweet, Mr Latham did not know, and could not have known anything about the private, sexual activities of Mr Greenwich.

(c) The Primary Tweet was based on homophobic prejudices held by Mr Latham.

(d) In publishing the Primary Tweet, Mr Latham included irrelevant, extraneous, and prejudicial statements, and used language that was demeaning, homophobic and over-sensationalised.

(e) By Mr Latham's own pleading in paragraph 82(j) of the Defence, Mr Latham admits the Primary Tweet referred to sexual activity in graphic terms.

(f) In publishing the Primary Tweet, Mr Latham used language that was disproportionate and not germane to the language used in any of the alleged attacks, which concerns Mr Latham's fitness for public office and had nothing whatsoever to do with graphic sexual activity. We refer to the discussion above in respect of the disproportionate response in the Primary Tweet.

161. None of those matters can fairly be gainsaid on Mr Latham's behalf; all afford a basis for inferring the pleaded improper purpose.

162. Mr Latham's motive can be readily inferred from the content of the Primary Tweet It is difficult to conceive of any motive on Mr Latham's part for posting the Primary Tweet that is consistent with a proper exercise of the entitlement to respond to an attack of the kind protected by the privilege.

163. But, lest there be any doubt about it, Mr Latham closed the door by his subsequent conduct, particularly when he doubled down in the TNT Radio Interview (SOC, Sch C, **CB, pp. 59-64**). In that interview, Mr Latham sought to justify the Primary Tweet, but at no point did he assert that his reasons for posting it had anything to do with a response to an attack by Mr Greenwich.

164. Rather:

(a) When asked if the Primary Tweet was, "*a little bit over the top*", Mr Latham responded (lines 109-117):

> Well it's code for anal sex between blokes and I can tell you, Chris, if someone held a gun to my head and said I had to have anal sex with a bloke I'd vomit. I'd vomit all over him. And I speak for straight men. And this is what makes us straight. I know straight me have got no place in their alphabet, we're derided now as the villains in all circumstances, white men, colonisers, genocidal…

(b) When asked about Pauline Hanson's demand that Mr Latham apologise for the Primary Tweet, Mr Latham said (lines 194-205):

> Well I'm assuming as a woman, she doesn't understand how straight men feel about this. And I don't think gay men obviously wouldn't understand how straight men fell about it. But it's true. It's an absolute fact, integral to our existence. It's not confected outrage or confected point of view, but we find the thought of having anal sex with another man to be off-putting, disgusting, horrible, vomit worthy. So you know, that's just the reality. And that's not homophobia, that's just nature. That's why we're straight men…

(c) Elsewhere, he repeatedly referred to anal sex between men as variations of vomit worthy or puke worthy: eg lines 211-12.

165. Those responses illustrate that Mr Latham's motive in publishing the Primary Tweet was nothing more than a desire on his part to ventilate in extreme terms his revulsion of Mr Greenwich's sexuality, by an ignorant presumption as to the sexual activities he engages in. That matter had nothing whatsoever to do with any occasion which might otherwise have been protected by the publication of a germane and commensurate response to an attack.

166. Mr Latham has elected not to give evidence at trial. The inference is that nothing he could have said in the witness box would have assisted his case. One can, thus, all the

more readily draw the inference for which Mr Greenwich contends. The Court could infer that, if Mr Latham had given evidence, it would not have been to the effect that he believed what he said was true: see *Barrow v Bolt* [2014] VSC 599 at [55].

LATHAM'S POSITIVE DEFENCES – THE DT QUOTES

Honest opinion defence

Expression of opinion

167. The DT Quotes were not an expression of opinion. Ordinary reasonable readers will have understood them as clear expressions of fact that:

(a) Mr Greenwich had thrown out an insult by calling Mr Latham a disgusting human being for attending a meeting at a church hall;

(b) in those circumstances, attention needed to turn to Mr Greenwich's "*habits*";

(c) those "*habits*" include Mr Greenwich going into schools talking to kids about being gay; and

(d) Mr Latham had deleted his tweet because he "*didn't want to be accused of anything similar*".

168. The element in s 31(1)(a) cannot be established, and the defence fails at that first hurdle.

Matter of public interest

169. Mr Greenwich accepts that, if the DT Quotes were an expression of opinion, then they related to a matter of public interest. That matter of public interest was, in substance, the attendance by a Member of Parliament at a school for the purpose of addressing school children.

Proper material

170. The DT Quotes were not, however, based on proper material.

171. Mr Latham's alleged proper material is pleaded in Defence, [82]: **CB, pp. 88-89**.

172. The facts upon which Mr Latham's alleged opinion were based were set out in specific terms in the DT Quotes, namely that "*Greenwich goes into schools talking to kids about being gay*". That "fact" is pleaded in the Defence at [82(i)].

173. However, no evidence was adduced at trial by Mr Latham in support of that "fact". Mr Latham had to establish that *he* was aware at the time of publication of the DT Quotes on about 1 April 2023 that Mr Greenwich goes to schools (plural) to talk to kids about being gay, and then based his opinion on that fact.

174. Mr Latham's counsel adduced evidence that Mr Greenwich had spoken at Sydney Boys High School on 31 January 2023, including about when he had first realised he was gay: T 43.12-16. That evidence, however, does not assist Mr Latham. Mr Latham had to establish that, as at 1 April 2023, he was aware of what Mr Greenwich had spoken about at schools.

175. The Court should also find that the ground of defeasance in s 31(4)(a) has been established: see Reply, [10]. Mr Latham has not gone into evidence. There is therefore no evidence about what, if anything, he knew about Mr Greenwich's "*habits*" in relation to going to schools. In those circumstances, Mr Latham could not have honestly held the opinion he expressed at the time of publication of the DT Quotes.

Common law qualified privilege (reply to attack)

Mr Greenwich not a party to the alleged attack

176. The alleged "*attack*" relied on by Mr Latham appears to be the public condemnation of Mr Latham by third party "*political and media figures*" (not Mr Greenwich) arising out of his publication of the Primary Tweet (ROS, [77]); Defence, [49]: **CB, pp. 79-81**. Mr Latham asserts that the DT Quotes were his response to those third party attacks: Defence, [57].

177. It is accepted that Mr Greenwich need not be the "*attacker*" for a reply to attack defence to be established, but the defence cannot operate unless Mr Greenwich in some way authorised or was complicit in the attack: *Gould* at [73].

178. There is no evidence to that effect. No such allegation is even made against Mr Greenwich in the Defence at [57] to [60].

179. The defence thus fails.

Reciprocal interest has not been established

180. The defence also hinges on the contention that Mr Latham was, by the DT Quotes, answering the journalist's questions as to why he posted the Primary Tweet and removed it: ROS, [78]. There is, however, no evidence of the request made by the journalist: ROS, [76]. Mr Latham has elected not to give evidence on the point. This is an evidentiary lacuna.

181. The journalist also contacted Mr Greenwich. When the journalist's text messages to Mr Greenwich are considered, it appears her impression was that Mr Latham was "*fixated*" on the matter, had "*doubled down*", and that the journalist had asked Mr Latham to explain *his* conduct, not answer any attack against him by any third party political or media figures: **CB, p. 561**.

The DT Quotes were not germane to the alleged attack

182. An assessment of what is relevant to the attack requires "*particular care*": *Trad* at [27] (per Gummow, Hayne and Bell JJ).

183. The DT Quotes were not sufficiently connected with the content of any attack made on Mr Latham by any third party political and media figures, the credibility of those attacks on Mr Latham, or the credibility of the third party attackers.

184. The first part of the DT Quotes (SOC, Sch B, paras [9], [10]) were not about any attack on Mr Latham by political and media figures. They were about the impact of the Primary Tweet on Mr Greenwich.

185. The second part of the DT Quotes (SOC, Sch B, paras [11] and [12]) were not about Mr Latham defending himself against any attack by political or media figures or vindicating himself in connection with taking down the Primary Tweet. Indeed, there is no allegation that Mr Latham was attacked for his conduct in removing the Primary Tweet: obviously, that was the proper thing to do.

The DT Quotes were not commensurate

186. Even if Mr Latham could overcome each of those matters, he faces the further insuperable obstacle that the DT Quotes were not commensurate to any alleged attack.

187. The DT Quotes were correctly characterised in the headline to the DT Article as a "*doubling-down*" by Mr Latham.

188. By making the DT Quotes, Mr Latham went beyond any commensurate response to an attack by any political or media figures, and spilled over into a fresh attack on Mr Greenwich – this time an ugly smear connected to Mr Greenwich's "*habits*" in relation to school children, drawing upon the outrageous stereotype that gay men are a danger to children.

189. In short, the DT Quotes were not a *bona fide* answer or retort by way of vindication that was fairly warranted by the occasion. Mr Latham strayed into public vilification and an attack on Mr Greenwich's integrity that was not reasonably necessary in order for Mr Latham to defend his own reputation. The DT Quotes were in the nature of a form of retaliation, rather than an answer or explanation.

Malice

190. Mr Greenwich submits that the publication of the DT Quotes was actuated by malice, being the improper purpose of exposing Mr Greenwich to public humiliation, ridicule, contempt and hatred by reason of his sexuality: **CB, p. 97**, Reply, [4]. That, with respect, must be so: the occasion of privilege identified by Mr Latham was a response to attacks by political and media figures, but his response was a fresh attack on Mr Greenwich drawing upon an offensive trope about gay men.

191. The supporting particulars in the Reply, [4] are as follows:

(a) Mr Latham knew the imputations conveyed by the DT Quotes were false, or was recklessly indifferent to the truth or falsity of the pleaded imputations.

(b) The DT Quotes were based on homophobic prejudices held by Mr Latham.

(c) In publishing the DT Quotes, Mr Latham included irrelevant, extraneous, and prejudicial statements, and used language that was demeaning, homophobic and over-sensationalised.

(d) In publishing the DT Quotes, Mr Latham used language that was disproportionate and not germane to the language used in Mr Greenwich's alleged attacks.

192. Each of those matters is established:

(a) none of the particulars of malice can fairly be gainsaid on Mr Latham's behalf; all afford a basis for inferring the pleaded improper purpose;

(b) that motive, in particular, can be readily inferred from the content of the DT Quotes, and in particular the wholly extraneous reference to Mr Greenwich's "*habit*" of going to schools to talk about children, a subject which had not otherwise formed any basis for the controversy prior to that time;

(c) in circumstances where Mr Latham has elected not to give evidence at trial, the inference is that nothing he could have said in the witness box would have assisted his case; and

(d) in particular, it can be inferred that if Mr Latham had given evidence, it would not have been to the effect that he believed that what he said about Mr Greenwich going to schools was true: see *Barrow v Bolt* [2014] VSC 599 at [55].

Section 30 statutory qualified privilege

Principles to be applied

193. Subsections 30(1) and (2) of the *Defamation Act* provide:

> (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.

Mr Latham's conduct not reasonable

194. The defence fails for want of reasonableness on Mr Latham's part.

195. That is fundamentally because, objectively, there was no reasonable basis for Mr Latham to say what he said in the DT Quotes.

196. Mr Latham's introduction of school children into the discourse about Mr Latham's publication of the Primary Tweet (and his removal of it) was wildly unreasonable when considered in the context of the other parts of the DT Quotes referring to "*habits*" and Mr Latham not wanting to be "*accused*" of similar conduct.

197. The factors in s 30(3) of the *Defamation Act* are not prescriptive or exhaustive, and are more apt to be considered in cases involving investigative journalism. Nonetheless, in so far as they are relevant, a number of the factors point against Mr Latham's conduct being reasonable in the circumstances:

(a) the imputations carried by the DT Quotes are serious: s 30(3)(a);

(b) the DT quotes do not distinguish between suspicion, allegation or proven facts; and

(c) there is no evidence that Mr Latham took any steps to verify what he said about Mr Greenwich's "*habit*" of going to schools to talk to children about being gay.

198. In *Bailey v WIN Television NSW Pty Ltd* [2020] NSWCA 352, Simpson AJA said at [89]:

> The list of circumstances stated in s 30(3) as relevant to the determination of the reasonableness of the conduct of a publisher is neither mandatory ("a court may take into account") nor exhaustive (see par (j)). No single consideration is determinative. **A significant additional consideration (not expressly mentioned in s 30(3)) is the information available to the publisher prior to publication** (including any information that may be provided by individuals the subject of the publication: *John Fairfax Publications Pty Ltd v Zunter* [2006] NSWCA 227).

199. No evidence was adduced at all on Mr Latham's part as to his state of knowledge, as at 1 April 2023, concerning what Mr Greenwich did when he accepted invitations to speak at schools.

200. Mr Latham has pleaded a long list of factors said to establish his reasonableness, but he has adduced no evidence in support of them. In particular, there is no evidence to support the critical matters particularised at Defence, [64(f)]–[64(g)].

Malice

201. Malice defeats the s 30 defence: s 30(4). Mr Greenwich submits that the Court should find that the publication of the DT Quotes by Mr Latham was actuated by malice for the reasons discussed above in relation to the common law qualified privilege (reply to attack) defence.

Lange defence

202. The *Lange* defence protects reasonable communications to the public concerning government or political matters: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 571-3. Malice defeats the defence: ibid, 574.

203. In *Lehrmann v Network Ten Pty Ltd* [2024] FCA 369*,* Lee J at [967] accepted the correctness of the first respondent's concession in that case that if the analysis of the application of the s 30 statutory qualified privilege defence was performed correctly, the outcome in respect of the *Lange* defence would be the same.

204. The fate of the *Lange* defence here will be the same as that of the section 30 defence. For the reasons discussed above, the defence must fail because Mr Latham has not established the element of reasonableness, and was actuated by malice.

Public interest defence, Defamation Act, s 29A

205. Section 29A(1) of the *Defamation Act* provides:

> It is a defence to the publication of defamatory matter if the defendant proves that—
>
> (a) the matter concerns an issue of public interest; and
>
> (b) the defendant reasonably believed that the publication of the matter was in the public interest.

206. In determining whether the defence is established, the Court must take into account all of the circumstances of the case: s 29A(2). The factors in s 29A(3) are not prescriptive or exhaustive.

207. For the reasons stated in respect of the honest opinion defence to the DT Quotes, Mr Greenwich accepts that the DT Quotes concerned a matter of public interest. The issue is whether Mr Latham can establish the element in s 29A(1)(b).

208. In *Russell v Australian Broadcasting Corporation (No 3)* [2023] FCA 1223 at [322], Lee J said in relation to that element (our emphasis):

> Put another way, this element of the defence is not made good by showing that a notional reasonable person in the respondent's position could have believed that publication was in the public interest. **The respondent must prove this element by adducing evidence that the publisher turned the publisher's actual or attributed mind to the issue and did hold the relevant belief: *Turley v Unite the Union* [2019] EWHC 3547 (at [138(vii)] per Nicklin J). The significance of this aspect of the defence should not be understated.** *Ex post* rationalisations are not enough. In some ways it is analogous to person who made a future representation being required, among other things, to point to some facts or circumstances existing at the time of the representation on which the representor in fact relied to support the representation made: see, for example, *Sykes v Reserve Bank of Australia* [1998] FCA 1405; (1998) 88 FCR 511 (per Heerey J at 513); *Botany Bay City Council v Jazabas Pty Ltd* [2001] NSWCA 94; [2001] ATPR 46-210 (at [84] per Mason P).

209. Mr Latham submits that that statement is plainly wrong: ROS, [50]. That submission ought to be rejected. His Honour's finding in *Russell* is consistent with a body of law, including what Nicklin J said at [138(vii)] in *Turley* (our emphasis):

> A defendant wishing to rely upon the defence must have believed that what s/he published was in the public interest: *Economou* [139(2)] and [153] per Warby J (at first instance: [2017] EMLR 4). **The defendant must have addressed his/her mind to the issue.** This element of the defence is not established by showing that a notional reasonable person could have believed that the publication was in the public interest, but that the relevant defendant did believe that it was. In terms of evidence, **if a defendant leaves this issue unaddressed in his/her witness evidence, the defence is likely to fail at this initial hurdle.**

210. To similar effect, see *Murdoch v Private Media Pty Ltd* [2022] FCA 1275 at [66] (Wigney J) (our emphasis):

> The second element is that the defendant publisher believed that the publication of the matter was in the public interest. This element concerns the defendant's actual state of mind. **The defendant must prove that he, she or it in fact believed that publication of the matter was in the public interest**: see *Lachaux* at [131]. The focus is likely to be on "things the defendant said or knew or did, or failed to do, up to the time of publication"; and, importantly, the "truth or falsity of the allegation complained of" is not a relevant consideration: *Economou v de Freitas* [2016] EWHC 1853 (QB) at [139] (at first instance); *Doyle* at [73]. The reference to the "allegation complained of" in that passage from the first instance decision in *Economou* would appear to be a reference to the defamatory sting found to have been conveyed by the publication in question.

211. Even if, however, Mr Latham subjectively believed that publication of the DT Quotes was in the public interest, that belief was not reasonable.

212. The language of the DT Quotes goes well beyond a "*response to a controversy*" about Mr Latham's conduct and his fitness for office, as pleaded in the Defence at [71(c)]. As discussed above, the publication of the DT Quotes introduced entirely extraneous matters in the mix, namely Mr Greenwich's alleged "*habits*" in relation to going to schools to talk to kids about being homosexual; a subject Mr Latham apparently knew nothing about whatsoever (or at least has adduced no evidence about whatsoever).

213. The DT Quotes appear to be nothing more than the rehearsing of an offensive stereotype, based on Mr Latham's own prejudiced speculation.

DAMAGES

General damages

214. The purpose of an award of general damages is to: (a) console the applicant for personal hurt and distress caused by the publication of the matters complained of; (b) provide reparation for the damage done to his reputation; and (c) vindicate reputation: *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 60-1 (Mason CJ, Deane, Dawson and Gaudron JJ); *Barilaro v Google LLC* [2022] FCA 650 at [292].

215. In *Carson*, Brennan J said at 69–70:

> The sufficiency of the amount awarded is not to be determined by reference solely to circumstances past and present; the amount must be sufficient to vindicate the plaintiff's reputation in the relevant respect in the future…

216. His Honour went on at 72 (footnotes omitted):

> The same sum can operate as vindication, compensation and solatium, for "the amount of a verdict is the product of a mixture of inextricable considerations". The amount assessed under other heads may itself be sufficient in aggregate to provide the vindication required. The extent of the overlap depends on the circumstances. But the award in total must be sufficient to satisfy the purposes for which damages for defamation are awarded: vindication of reputation, compensation for injury to reputation and solatium for injured feelings.

217. In awarding any damages, the Court must ensure there is an appropriate and rational relationship between the harm sustained by Mr Greenwich and the award: *Defamation Act*, s 34.

218. In assessing general damages, including but not limited to aggravated damages, the Court may consider Mr Latham's conduct up to the time of the verdict: *Barilaro* at [296].

219. The maximum amount of damages for non-economic loss that may be awarded in defamation proceedings is, until 30 June 2024, $459,000. The maximum amount will increase on 1 July 2024, and the increased amount will be the cap if damages are awarded after that time: s 35(1), (3). The maximum amount may only be awarded "*in a most serious case*": s 35(2). The maximum amount may be exceeded where aggravated damages are warranted, but only to the extent of the amount of the aggravation: s 35(2A). Aggravated damages are to be awarded separately from other general compensatory damages: s 35(2B).

220. In the present matter, for the reasons developed above in relation to the serious harm element of the causes of action, the Court can be comfortably satisfied that Mr Greenwich has suffered serious damage to his reputation. The award of damages must provide reparation for that damage, and be sufficient to signal to the public the vindication to which Mr Greenwich is entitled.

221. Further, the evidence established that the hurt and distress caused to Mr Greenwich by the publication of the matters complained of was very significant. He was, by reason of those publications, the victim of outrageous homophobic and abusive responses, death threats and scandalous slurs. They left him, for the reasons we have identified earlier, diminished, distressed, humiliated and in need of professional assistance to manage his mental health.

Aggravated damages

222. Aggravated damages are awarded to compensate a successful applicant for increased hurt caused by some conduct of the respondent that is improper, unjustifiable or lacking in *bona fides*: *Triggell v Pheeney* (1951) 82 CLR 497.

223. Mr Greenwich relies on the following matters as to aggravation.

Knowledge of falsity or reckless indifference to the truth or falsity of the imputations

224. By the matters complained of, Mr Latham published slurs to the effect that Mr Greenwich engages in disgusting sexual activities, and goes to schools to groom children to become homosexual.

225. For the reasons developed in relation to the affirmative defences addressed above, Mr Latham had no proper basis whatsoever for the publication of those slurs. There is no evidence that he knew anything at all about Mr Greenwich's private sexual activities; or that he knew anything at all about the matters Mr Greenwich addressed when speaking to students at schools. Instead, Mr Latham simply embarked on his defamatory attacks based on nothing more than prejudices, playing on the stereotypes that gay men are depraved and a danger to children. He did not favour the Court with any explanation at all for his conduct.

226. This conduct was improper, unjustifiable and lacking in bona fides. It was obviously hurtful to Mr Greenwich: AG-1, [66]–[72], [82] to [84], [139]–[155].

Mr Latham's presentation of the matters complained of

227. It is plain from the face of the matters complained of that Mr Latham presented them in a demeaning, homophobic and over-sensationalised manner. This too added to Mr Greenwich's hurt, and was improper, unjustifiable and lacking in bona fides: AG-1, [55], [139].

Mr Latham's failure to apologise

228. Mr Greenwich, by his solicitors, sent to Mr Latham a concerns notice dated 19 April 2023. The notice was sent on an open basis and called for, among other matters, a reasonable apology, which was limited in its terms: **CB, p. 867**. It did not call for Mr Latham to grovel or compromise his beliefs.

229. At the time, Danny Eid Lawyers represented Mr Latham. They responded to the concerns notice on an open basis: **CB, pp. 880-881**. No apology was offered. Instead,

the response was that the proposal in the concerns notice (including the apology term) was disproportionate to the merits of the proposed proceedings: **CB, p. 881**.

230. This was not a proper or justifiable response. The proposal in the concerns notice was extremely modest in its scope and ought to have been embraced by Mr Latham.

231. Leaving aside the concerns notice, Mr Latham could have apologised to Mr Greenwich at any time. He has not done so, in circumstances where an apology is self-evidently called for having regard to the content of the Primary Tweet and the DT Quotes.

232. Far from apologising, Mr Latham doubled down in his campaign against Mr Greenwich. In two tweets, he disingenuously and falsely asserted that he had apologised to Mr Greenwich: see **CB, p. 662, 670**. Those tweets are obviously not genuine apologies for the reasons Mr Greenwich identifies in AG-1, [158], namely:

(a) they demonstrate a lack of accountability and responsibility for the words and actions that have caused harm to Mr Greenwich;

(b) they are sarcastic and use irony to further ridicule Mr Greenwich;

(c) they lack sincerity and genuine remorse;

(d) they deflect and shift blame to Mr Greenwich; and

(e) they minimise the harm caused to Mr Greenwich and the LGBTQ+ community.

233. Those two tweets are further examples of conduct that is improper, unjustifiable and lacking in bona fides, and that has increased the harm suffered by Mr Greenwich: AG-1, [158].

Downplaying the consequences of the matters complained of

234. The response to the concerns notice ignored or downplayed the consequences of the publication of the matters complained of: **CB, pp. 880-881**. This was improper, unjustifiable and lacking in bona fides.

Mr Latham's subsequent conduct

235. Mr Greenwich also relies, in support of his claim to aggravated damages, upon the extraordinary campaign that Mr Latham engaged in after the publication of the matters complained of: see SOC, [33.5(a)] to [33.5(f)].

236. That conduct is proved by the particularised matters in SOC, [33.5(i) to (xvi)] and the corresponding evidence in the Court Book:

(a) Mr Latham's 'Never Apologise' Tweet dated 31 March 2023: **CB, p. 542**;

(b) Mr Latham's 'Normal People' Tweet dated 1 April 2023: **CB, p. 557**;

(c) Mr Latham's "like" of a tweet stating, "Stick your apology up you ass": **CB, p. 618**;

(d) the TNT Radio Interview, the transcript of which is Schedule C to the SOC, at **CB, pp. 59-64**; and interview that was promoted, reported in the news, and subject of social media posts by Mr Latham;

(e) Mr Latham's 'Alphabet' Tweet dated 28 April 2023: **CB, p. 656**;

(f) Mr Latham's 'Alphabet Reply' Tweet dated 28 April 2023: **CB, p. 658**;

(g) Mr Latham's tweets in response to Abigail Boyd on 2 May 2023, and Mr Latham's "likes" of replies to those tweets: **CB, pp. 659 to 668**;

(h) Mr Latham's 'Can't Win' Tweet dated 4 May 2023, which accused Mr Greenwich of being, "obsessed with petty litigation against me for disagreeing with him": **CB, p. 670**; and

(i) Mr Latham's 'AVO' Tweet dated 4 May 2023, which called Mr Greenwich an "entitled European Prince" and referred to "Lawfare" and mocked Mr Greenwich, stating, "Should I take out an AVO for harassment?" (with crying, laughing emojis): **CB, p. 672**.

237. This campaign was improper, unjustifiable and lacking in *bona fides*. An honourable person would have recognised the harm that the Primary Tweet had done, and immediately retracted it and apologised for having posted it. An honourable person

would have responded contritely to the many calls for him to apologise. An honourable person would not have doubled down a vicious campaign of the kind that Mr Latham engaged in.

Further aggravation – pleas in the Defence

238. The Reply identifies a number of matters in Mr Latham's Defence that establish a basis that warrants an award of aggravated damages: see Reply, [2] at **CB, p. 94-96**. The identified matters are in the nature of pleadings and particulars that have no proper basis, and that have increased the subjective harm suffered by Mr Greenwich.

Further aggravation – ROS

239. A further matter of aggravation is the effect of the ROS on Mr Greenwich. Mr Greenwich told the Court he was angered and saddened when he read Mr Latham's written opening submissions. He rationally explained, from his perspective as a gay man, why the submissions were so damaging when he read them (T42.11-17):

> So the –the document seeks to accept that "covering your dick with shit" should be considered as homosexual sex. That – that makes my stomach churn. The document I read seeks to say that a reasonable person could assume that I go into schools to talk about sexual activity. I don't and I wouldn't. I read it as a continuation and a justification on the attack on me, the attack on my character, and the way in which people should see me. It – it – it saddened me. It angered me…

Other decisions

240. The assessment of damages in other defamation cases is of limited utility, and yet in every case judges are ritualistically referred to what are said to be comparable verdicts.

241. At the end of the day, every case turns on its own facts. There is a range and it will be for the Court to determine where this case falls on the spectrum. A selection of relatively decisions involving politician applicants is addressed below. None provides any precise analogy to the present matter.

Hockey

242. In *Hockey v Fairfax Media Publications Pty Limited* [2015] FCA 652, White J awarded the applicant, who was then the Treasurer of the Commonwealth, $120,000 for a

defamatory news poster, and $80,000 for two matters published on Twitter by *The Age*: [517].

243. Among other factors, Mr Hockey relied on evidence of actual damage, including negative emails received after the publications. The material was, however, of limited utility because his Honour considered the communications were more likely in response to other matters complained of which were found not to be defamatory: [477] to [478].

244. There was no award of aggravated damages.

Hanson-Young

245. In *Hanson-Young v Leyonhjelm (No 4)* [2019] FCA 1981, White J awarded the applicant, a Senator, a total amount of $120,000 (including for aggravation) in respect of four publications (comprised of separate assessments of $20,000, $35,000, $35,000 and $30,000): [351]. His Honour said the individual amounts may have appeared low but he considered the total sum of $120,000 appropriate: [352].

246. In assessing damages, his Honour considered that both parties were at the relevant time politicians and had participated in the "*rough and tumble*" of politics and the harm to Ms Hanson-Young had to be seen in that context: [348].

247. Mr Latham's conduct in the present case falls well outside the ordinary "*rough and tumble*" of politics. He launched personalised attacks on Mr Greenwich, founded on prejudicial stereotypes, rather than any *bona fide* difference in policy convictions or critique of Mr Greenwich's conduct in public life. He played the ball and not the person.

Dutton

248. In *Dutton v Bazzi* [2021] FCA 1474, White J awarded the applicant $35,000 in respect of a tweet that conveyed an imputation that Mr Dutton excuses rape. The decision was reversed on appeal.

249. In awarding damages at first instance, White J said at [186]:

> It is appropriate to take into account in relation to damages the matter to which I referred in relation to the assessment of defamatory meaning in *Hanson-Young v Leyonhjelm* at [78], i.e, that many ordinary reasonable people have their own political views and convictions and are not influenced, positively or negatively, by statements

> concerning a politician about whom they have already formed a view. That is particularly so in the case of Mr Dutton, given his high profile position. However, this is not a matter which should diminish the compensation to which Mr Dutton is entitled for distress or for the vindication of his character. These matters are independent of the matter just mentioned.

250. White J considered factors including the limited extent of publication of the relevant tweet, and that the defamation that Mr Dutton was a person who excuses rape, was serious: [229]. But, bringing to bear proportionality in that case, his Honour said at [230] (emphasis added):

> However, a sense or perspective does have to be brought to the assessment of the seriousness of the defamation. It was not published in any mainstream media and was published to a relatively small number of people only. Mr Bazzi did remove the Tweet shortly after his receipt of Mr Dutton's concerns letter. The ordinary reasonable readers of the Tweet would not have understood it to be the measured assessment of a serious political commentator. Many of those are likely to have recognised it as a statement reflecting political partisanship and, accordingly, to have not given it the same weight as they would had the statement been made in some other context. Those who did read The Guardian article for which Mr Bazzi provided the link (it seems only a small percentage), would have seen that it did not provide support for Mr Bazzi's pungent assessment.

251. The factual circumstances of *Dutton* are obviously distinguishable. The Primary Tweet and DT Quotes were widely published, first on social media and then in the mainstream press. The respondent in the present case, Mr Latham, once had the chance to become the Prime Minister of this country. Whilst the terms of the Primary Tweet and DT Quotes are not measured, Mr Latham's own political standing meant the ordinary reasonable reader of his publications would have given them more credence than the publications of the publisher in *Dutton.*

252. Another distinguishing feature is that whilst it was found that Mr Dutton was offended and distressed by the relevant tweet, he did not claim it had had serious consequences. Mr Dutton did not suggest the publication affected his day-to-day political life or Ministerial activities, or his relationships with other people: [231]. The unchallenged evidence in this case is entirely to the contrary: Mr Greenwich has been gravely affected in his work and personal life.

Palmer & McGowan

253. In *Palmer v McGowan (No 5)* [2022] FCA 893, Lee J found minor harm to the reputation of Mr Palmer and was not satisfied of any real or genuine hurt to feelings. His Honour observed that for many people, views as to Mr Palmer were already "*baked in*": [448]. His Honour awarded Mr Palmer $5,000 in general damages and made no award of aggravated damages.

254. As to Mr McGowan's cross-claim, Lee J found "*inconsequential impact*" of the publications on his reputation and that it was more likely that what occurred had enhanced his reputation. By contrast to Mr Palmer's case, his Honour found the evidence of hurt to feelings of Mr McGowan to be "*compelling*", "*But he is the Premier of Western Australia. Robust criticism is, and should be, part and parcel of the job*": [516]. His Honour awarded $20,000 in general damages.

255. The present case is, again, distinguishable. Mr Latham's attacks on Mr Greenwich were not, and should be considered, "*part and parcel of the job*". Were it otherwise, openly LGBTQ+ people would be deterred from entering public life, lest they face attacks on their essential humanity based on prejudicial stereotypes. Further, the impact of the matters complained of by Mr Greenwich was far from "*inconsequential*".

Barilaro

256. In *Barilaro v Google LLC* [2022] FCA 650*,* the applicant was awarded $675,000, including for aggravated damages: [405]. The award exceeded the maximum cap because the publications in question occurred before the commencement of amendments to s 35 of the *Defamation Act* came into force on 1 July 2021.

257. Although the imputations in that case were not based on Mr Barilaro's heritage or race, the racist nature of the publications and racist reactions were taken into account in assessing damages: [300], [305], [324].

258. We submit that, of all the recent politician cases surveyed, the circumstances of the present case are most closely aligned with the circumstances of *Barilaro.* Here, instead of racist smears, the smears were homophobic in nature, inciting a shameful public

reaction and hurt to Mr Greenwich that went to the heart of his personal identity that is a fixed constant within him – his sexuality.

259. As Rares J said in *Barilaro* at [348] (emphasis added):

> Of course, as a politician, Mr Barilaro could expect many people in the community not to agree with his policies or to regard him well. He could expect public criticism and condemnation for his political conduct and stances as part and parcel of being in political life, particularly in as publicly prominent a position as he had as Deputy Premier and a party leader. **Hate filled speech and vitriolic, constant public cyberbullying, however, cannot be classified as in any way acceptable means of communication in a democratic society governed by the rule of law. Google's conduct after 22 December 2020 in leaving both Mr Shanks' existing and subsequently posted videos online magnified the hurt to Mr Barilaro's feelings, inflamed hate filled responses directed at him by members of the public in personal confrontations and on social media and allowed a perception, until the trial, that Google actually had a bona fide defence in this proceeding for its conduct.** That was conduct that was unjustifiable, improper (because of its contemptuous nature) and, in relation to the conduct of the proceeding, lacking in bona fides (as I explain below): *Rush* 380 ALR at 517–518 [431]–[432].

260. Interest should be awarded on the damages sum, from the date of publication: eg *Hanson-Young (No 5)* [2020] FCA 34 at [5] to [8].

INJUNCTIVE RELIEF

261. The principles are not in dispute.

262. Having regard to the campaign he has engaged in against Mr Greenwich, and his failure to put on any evidence that he intends to refrain from further attacks in future, the Court should have a real apprehension that Mr Latham will publish allegations similar to the pleaded defamatory imputations unless he is restrained by the Court.

263. Injunctive relief is warranted in this case.

Dated: 23 May 2024

M J COLLINS

S JELIBA