

NOTICE OF FILING

Details of Filing

Document Lodged:	Outline of Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	18/10/2024 5:31:30 PM AEDT
Date Accepted for Filing:	18/10/2024 5:31:41 PM AEDT
File Number:	VID1023/2023
File Title:	MOIRA DEEMING v JOHN PESUTTO
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

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

The date of the filing of the document is determined pursuant to the Court's Rules.



**FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA
DIVISION: GENERAL**

MOIRA DEEMING

Applicant

JOHN PESUTTO

Respondent

RESPONDENT’S CLOSING SUBMISSIONS

A. INTRODUCTION.....2

B. MATTERS COMPLAINED OF AND ISSUES IN DISPUTE6

C. MEANING9

D. FACT FINDING PRINCIPLES.....40

E. SERIOUS HARM67

F. PUBLIC INTEREST107

G. HONEST OPINION.....146

H. *LANGE* QUALIFIED PRIVILEGE171

I. CONTEXTUAL TRUTH.....178

J. DAMAGES – GENERAL206

K. DAMAGES – AGGRAVATED DAMAGES.....214

L. INJUNCTIVE RELIEF238

Filed on behalf of:	The Respondent
Prepared by:	Peter Bartlett
Law firm:	MinterEllison
Tel 03 8608 2152	Fax
Email	
Address for service	Level 20, 447 Collins St Melbourne, VIC 3000

A. INTRODUCTION

A.1. This is a defamation proceeding in which the applicant, Mrs Deeming, seeks to impugn five publications (**Publications**) by the respondent, Mr Pesutto, on 19 and 20 March 2023, in his capacity as the Opposition Leader for the State of Victoria. By the Publications, Mr Pesutto explained a decision he and his leadership colleagues had made on 19 March 2023 to move a motion to expel Mrs Deeming from the Parliamentary Liberal Party (**Party**).

A.2. **Overview.** There are a number of answers to Mrs Deeming's claims:

- (a) **Meaning.** In our submission, none of the imputations pleaded in the statement of claim (**SOC**) on Mrs Deeming's behalf are carried by the Publications, other than the imputations in 24.1 and 24.3 of the SOC. As Wheelahan J observed at the first case management hearing of this matter, while urging Mrs Deeming to replead, the meaning of a publication is to be determined by looking at the impression conveyed by the entire publication, not a focus on individual words, whereas the SOC slices up the publications, picking out separate potential aspects, rather than articulating the single meaning carried in respect of each distinct charge. If that submission is accepted, Mrs Deeming's claims in respect of four of the five impugned Publications—all publications other than the Expulsion Motion and Dossier—are liable to be dismissed on that basis alone.
- (b) **Serious harm.** Mrs Deeming must establish that each of the Publications, in respect of which one or more of her pleaded imputations was carried, caused or was likely to cause serious harm to her reputation. That burden, in our submission, has not been discharged, in circumstances where: (i) there were antecedent confounding causes of damage to her reputation, including many explicit imputations published by persons other than Mr Pesutto before any of the Publications to the effect that Mrs Deeming is a Nazi, a Nazi sympathiser or a person who stands with Nazis; and (ii) any reputational harm from Mr Pesutto's Publications which are not actionable, because the imputations pleaded by Mrs Deeming in her SOC are found not to be conveyed, or a defence has succeeded, has to be isolated and excluded. This is not a case where damage to the applicant's reputation began with, and therefore flowed as a matter of straightforward causation from, a publication by the respondent.¹
- (c) **Public interest.** Mr Pesutto reasonably believed that publication of each of the Publications was in the public interest, attracting the operation of the new defence in

¹ Cf *Greenwich v Latham* [2024] FCA 1050.

s 29A of the *Defamation Act 2005* (Vic) (**Act**), a matter we develop briefly by way of introduction below.

- (d) **Honest opinion.** The Publications were expressions of opinions honestly held by Mr Pesutto on the basis of substantially true facts, attracting the operation of the defence in s 31 of the Act.
- (e) **Lange qualified privilege.** The Publications concerned the discussion of government and political matters, and their publication was reasonable in the circumstances, and so are protected by the *Lange* form of common law qualified privilege.
- (f) **Contextual truth.** To the extent that any of the imputations pleaded by Mrs Deeming are found to be carried by the Publications, the Publications attract the defence of contextual truth in s 26 of the Act by reason of the substantial truth of the contextual imputations identified in Mr Pesutto’s defence.

A.3. **The section 29A defence.** The Publications complained of in this proceeding engage the relatively new defence in s 29A of the Act, which commenced operation on 1 July 2021. Section 29(1) 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.

A.4. That each of Mr Pesutto’s Publications concerned a matter of public interest cannot be doubted—they were about the suitability for office of an elected member of Parliament arising out of a notorious event in the life of our city that was of legitimate interest to all Australians.

A.5. Nor, in our submission, can there be any real doubt about the operation of the second element of the defence. Mr Pesutto believed he needed to communicate the Leadership Team’s² decision to move to expel Mrs Deeming from the Party and the reasons for it to the public,³ and thereafter subject that decision to public scrutiny in difficult interviews from which he knew he would not ‘emerge unscathed’.⁴

A.6. Over almost four days of cross-examination, Mr Pesutto was unshaken when challenged on the rationale for each of the Publications. And his belief was objectively reasonable. Notably,

² Comprising at the relevant time Mr Pesutto, Mr David Southwick, Ms Georgie Crozier, and Dr Matt Bach.

³ CBB Tab 30, pages 345–348 [105]–[115] (Affidavit of John Pesutto dated 27 May 2024).

⁴ CBB Tab 31, page 384 [71(b)] (Second affidavit of John Pesutto 22 July 2024).

Mr Southwick said that it is 'the job of a leader'⁵ to inform the media as to the actions taken and decisions made.

- A.7. Section 29A prescribes a liberalising defence. It tolerates the publication of defamatory matter in the service of the public interest. The defence invites an inquiry into the state of mind, rather than the conduct, of the respondent (the latter being the province of s 30 of the Act, and the *Lange* form of the defence of qualified privilege at common law). The focus of the inquiry is the publication taken as a whole (the 'matter'), not the imputations found to be carried by the matter. The defence does not fail because some other person might reasonably have held a different state of mind in respect of the same facts, or because the respondent could have acted differently in some respect, unless those matters negate a finding that the respondent reasonably believed that their publication taken as a whole was in the public interest.
- A.8. If the Court accepts that Mr Pesutto conscientiously believed that publication of each of the Publications was in the public interest, and that that belief was reasonable in the sense of being a rational belief that it was open to him to hold, the s 29A defence must succeed. To hold otherwise, in the context of a proceeding brought against a senior political leader in respect of publications concerning a political matter, would be to interfere with the freedom of that leader to explain an important decision to the Victorian public, on the basis of an *ex post facto* assessment that overrode the calculus he had conscientiously performed at the time, having regard to the political context; a context which, axiomatically, he is best placed to assess.
- A.9. **Other matters.** Mrs Deeming has said that she brought this defamation case to 'clear [her] name',⁶ after Mr Pesutto 'tared her with the Nazi brush'⁷ by allegedly imputing that she was, in essence, a Nazi or a Nazi sympathiser.⁸ Mrs Deeming⁹ and a number of her witnesses¹⁰ baldly asserted that the Publications caused public links to be drawn between Mrs Deeming and the neo-Nazi protesters who had attended Parliament in support of the Let Women Speak Rally on 18 March 2023 (**Rally**).

⁵ T1002.9-10 (Southwick XXN);

⁶ CBB Tab 1, page 53 [258] (Affidavit of Moira Deeming dated 27 May 2024). See also various of Mrs Deeming's public statements extracted in Part 1 of Annexure D of the Defence, CBA Tab 3, pages 146-149.

⁷ T4.39.

⁸ SOC [5], [10], [14], [19], [24]: CBA Tab 2, pages 8-9, 18-19, 22-24, 28-29, 33-34.

⁹ For example, CBB Tab 1, page 21 [105], [108]-[110], page 29 [146] (Affidavit of Moira Deeming dated 27 May 2024).

¹⁰ CBB Tab 3, page 109 [18] (Affidavit of Raewyn Louise Clark dated 21 July 2024); CBB Tab 4, page 121 [52] (Affidavit of Andrew Stephen Deeming dated 27 May 2024); CBB Tab 9, page 168 [8] (Affidavit of Renee Heath dated 27 May 2024); CBB Tab 12, page 195 [7] (Affidavit of David Hodgett dated 27 May 2024); CBB Tab 13, page 203 [10] (Affidavit of David Hodgett dated 30 July 2024); CBB Tab 15, page 212 [10] (Affidavit of Joseph John McCracken dated 27 May 2024); CBB Tab 20, page 248 [9] (Affidavit of Richard Riordan dated 24 May 2024); CBB Tab 21, page 258 [17] (Second Affidavit of Richard Riordan dated 26 July 2024); CBB Tab 22, page 263 [9] (Affidavit of John Ruddick dated 24 May 2024); CBB Tab 23, page 269 [16] (Affidavit of Ryan Smith dated 21 May 2024); CBB Tab 24, page 280 [18] (Second Affidavit of Ryan Smith dated 21 July 2024); CBB Tab 27, page 297 [10] (Affidavit of Kim Wells dated 24 May 2024); CBB Tab 28, page 309 [12(e)] (Second affidavit of Kim Wells dated 9 July 2024).

A.10. Those allegations, however, do not engage with the fact that:

- (a) Prior to the Publications, links and associations had already repeatedly been drawn in the mainstream media and on social media between the Rally, the neo-Nazi protestors and Mrs Deeming, both directly and through the other organisers, including the most explicit imputations against Mrs Deeming of Nazism and Nazi sympathy (see section 14 below).
- (b) The Publications were not the cause of those public links, but rather a reaction to them: a reaction that was repeatedly tied by Mr Pesutto not to the conduct of the neo-Nazis, but to the matter that had by the evening of 19 March 2023 become his principal concern, namely Mrs Deeming's associations with Mrs Keen and Ms Jones. Mr Pesutto and other senior Liberals all saw that the events of 18 March 2023 had captured the public's attention and (reasonably) considered it inevitable that Mrs Deeming's associations would become an increasingly bigger part of the story and cause serious harm to the Party, if the Party did not take immediate and decisive action (see sections 17 and 27.8 and following below).
- (c) Mrs Deeming understood that Mr Pesutto had never publicly accused her of being a Nazi or a Nazi sympathiser.¹¹ Mr Pesutto has repeatedly disclaimed any assertion that he considers Mrs Deeming to be a Nazi or a Nazi sympathiser.¹²

A.11. Much time at trial was spent exploring matters with no direct connection to whether Mr Pesutto is liable in defamation law for the Publications, such as:

- (a) whether Mr Pesutto agreed or disagreed with (or should have more strongly supported) Mrs Deeming's views about sex-based rights;
- (b) whether the public narrative concerning the organisers of the Rally after the neo-Nazis had attended was fair and accurate, and whether Mr Pesutto, as leader, should have ignored or rejected the public narrative, or published a statement on Mrs Deeming's behalf or in support of her and the other organisers;

¹¹ See, for example, Mrs Deeming's contemporaneous understanding after three of the Publications, set out in text messages at 9:28am on 20 March 2023 to a journalist at *The Age* (Exhibit R138, CBC Tab 153, page 689) wherein she observed *'[Mr Pesutto] said there was nothing I could do because he couldn't survive being associated with anybody even associated with anybody else who had associated with Nazis. (Off record)' and 'I offered to do a blanket condemnation of Nazism and anything else but they said no' Because I had drinks with Kelly J, Angela Jones & Kath Deves'*; the fact Mrs Deeming was relieved when she saw the Expulsion Motion and Dossier later that day on 20 March 2023 because she did not think it justified her expulsion (CBB Tab 1, page 27 [139] (Affidavit of Moira Deeming dated 27 May 2024); CBB Tab 2, pages 92–93 [101]–[102] (Second Affidavit of Moira Deeming dated 23 July 2024).

¹² Defence, Annexure C: CBA Tab 3, pages 143-145; Transcript of 3AW interview as defined at [8] of the SOC: CBA Tab 9 lines 101-104; Transcript of Press Conference – 20 March 2023: CBA Tab 14 lines 147-149; Exhibit R304, CBC Tab 653. See also Mrs Deeming's public statements extracted in Part 1 of Annexure D of the Defence at CBA Tab 3, pages 146–149.

- (c) whether Mr Pesutto had a closed mind heading into the 19 March 2023 meeting;
- (d) whether that meeting was a ‘pile on’ (and allegations such as whether Mrs Deeming should have been entitled to bring a ‘support person’);
- (e) whether the collective decision at the end of that meeting to move a motion to expel Mrs Deeming for her public associations was fair, reasonable or consistent with the values of the Liberal Party and, in particular, freedom of association;
- (f) whether the factual basis underlying that collective decision had been adequately investigated;
- (g) whether the processes of the Party in the period following the moving of the motion (that is, after the last of the Publications sued on had been published) were wanting in some respect;
- (h) what the terms of the ‘compromise’ endorsed by the Party on 27 March 2023 (a week after the last of the Publications sued on) were and whether in the period between Mrs Deeming’s suspension on 27 March and her expulsion on 12 May 2023, Mr Pesutto’s conduct and treatment of Mrs Deeming (and Ms Heath) was fair; and
- (i) whether Mrs Deeming should have been expelled from the Party on 12 May 2023, after she finally disclosed to Mr Pesutto, her Parliamentary colleagues and the media her long held but hitherto undisclosed intention to sue Mr Pesutto and/or the Party.

A.12. Save to the extent that they rationally bear upon Mr Pesutto’s state of mind in respect of each of the Publications at the time of publication, or could be said to have increased Mrs Deeming’s subjective harm in respect of Mr Pesutto’s conduct in publishing one or more of the Publications for which he is found to be liable, these are all, in our submission, false issues.

A.13. To the extent that they might expose anyone to criticism, they are matters for the Party and ultimately the electors of this State, not a Court adjudicating a defamation claim.

B. MATTERS COMPLAINED OF AND ISSUES IN DISPUTE

1. The Publications

1.1. The Publications are:

- (a) a media release dated 19 March 2023 (**Media Release**);¹³
 - (b) an interview with Neil Mitchell of 3AW Melbourne on 20 March 2023 (**3AW Interview**);¹⁴
 - (c) an interview with the Australian Broadcasting Corporation on 20 March 2023 (**ABC Interview**);¹⁵
 - (d) a press conference on 20 March 2023 (**Press Conference**);¹⁶
 - (e) an expulsion motion and its annexure of 20 March 2023 (**Expulsion Motion and Dossier**).¹⁷
- 1.2. Mr Pesutto admits publication of each of the Publications, and that Mrs Deeming was identified by each of the Publications.
- 1.3. With the exception of imputations 24.1 and 24.3 with respect to the Expulsion Motion and Dossier, Mr Pesutto denies the Publications convey the imputations alleged by Mrs Deeming.

2. The issues in dispute

- 2.1. By way of roadmap, we submit that the most efficient means of analysing the issues in the proceeding is as follows:
- (a) **Meaning.** Has Mrs Deeming established that any (and if so which) of the imputations pleaded in the SOC in respect of each of the Publications was carried to ordinary, reasonable recipients?

If Mrs Deeming has not established that any of her pleaded imputations were carried in respect of any of the Publications, then her claim in respect of that Publication fails.

- (b) **Serious harm.** If Mrs Deeming has established that one or more of her pleaded imputations were carried in respect of any of the Publications, she must then establish that *that* Publication caused or was likely to cause serious harm to her reputation.

That inquiry falls to be considered, in turn, against: (i) confounding causes of reputational harm, such as antecedent publications by persons other than Mr Pesutto,

¹³ SOC [3]: CBA Tab 2 page 6; Media Release – John Pesutto: CBA Tab 6, page 163; Media Release – Liberal Party Website: CBA Tab 7, page 165.

¹⁴ SOC [8]: CBA Tab 2, page 17; Transcript of the 3AW interview: CBA Tab 9, page 168.

¹⁵ SOC [12]: CBA Tab 2, page 20; Transcript of the ABC interview: CBA Tab 11, page 177.

¹⁶ SOC [17]: CBA Tab 2, page 25; Transcript of the Press Conference: CBA Tab 14, page 182.

¹⁷ SOC [22]: CBA Tab 2, page 31; Expulsion Motion and Dossier: CBA Tab 15, page 196.

and any of the Publications in respect of which Mrs Deeming's case fails because her pleaded imputations are found not to have been carried; and (ii) such evidence or inferences as to reputational harm as can be pointed to as flowing as a matter of causation from each relevant Publication, in the sense captured by an imputation found to be carried by that Publication.

If Mrs Deeming has not established that any of the Publications, in respect of which imputations pleaded in the statement of claim are found to have been carried, caused or is likely to cause her serious harm, then her claim in respect of that Publication fails.

- (c) **Defences.** To the extent that Mrs Deeming's claims in respect of any of the Publications survive the analysis in sub-paragraphs (a) to (b) above, has Mr Pesutto established any of the defences pleaded in the Defence, and has Mrs Deeming established any relevant ground of defeasance?
- (i) ***Section 29A public interest defence.*** Did Mr Pesutto reasonably believe that publication of any surviving Publication was in the public interest?
 - (ii) ***Section 31 honest opinion defence.*** Was any surviving Publication an expression of opinion by Mr Pesutto based on proper material (s 31(1) of the Act) and if so, has Mrs Deeming established that Mr Pesutto did not honestly hold the opinion expressed at the time of publication (s 31(4)(a) of the Act)?
 - (iii) ***Lange qualified privilege.*** Did any surviving Publication constitute the reasonable discussion of government and political matters and, if so, has Mrs Deeming established that Mr Pesutto's dominant actuating motivation in publishing that Publication was one of malice?
 - (iv) ***Section 26 contextual truth defence.*** Did any surviving Publication carry any of the contextual imputations pleaded by Mr Pesutto in his defence and, if so: (i) were those contextual imputations matters of substantial truth; and (ii) if so, did any of the imputations pleaded by Mrs Deeming and found to be carried by that Publication further harm Mrs Deeming's reputation because of the substantial truth of those contextual imputations?
- (d) **Damages and relief.** If all of the defences referred to in sub-paragraph (c) fail in respect of any Publications surviving the analysis in sub-paragraphs (a) to (b) above, then questions of damages, aggravated damages and other relief will arise.

- 2.2. Because no evidence is admissible on the question of the meaning of the Publications, and the disposition of the dispute between the parties on meaning is likely to narrow very significantly the other matters upon which the Court is required to adjudicate, we propose to deal with the question of meaning first, before turning to other issues.

C. MEANING

3. Applicable principles

- 3.1. The principles in relation to defamatory meaning are well established and are unlikely to be in dispute.¹⁸ They were recently summarised by this Court in *Greenwich v Latham*.¹⁹
- 3.2. The determination of whether a publication conveys an imputation is question of fact.²⁰ A publication either conveys a meaning or it does not. The answer to that question cannot be, like beauty, in the eyes of the beholder.²¹ The task of the Court is to ‘arrive at a single objective meaning, being that which an objective audience composed of ordinary decent persons should have collectively understood the matter to bear’.²²
- 3.3. Questions of meaning are to be determined objectively by reference to the hypothetical construct of the ‘ordinary reasonable reader/viewer’.²³ Mrs Deeming bears the onus of satisfying the Court that the Publications, in their natural and ordinary meaning, conveyed the meanings pleaded in the SOC to the ordinary reasonable reader/viewer.
- 3.4. The ordinary reasonable reader/viewer is regarded as:
- (a) being of fair, average intelligence, experience and education;
 - (b) being fair-minded, neither perverse, morbid nor suspicious of mind, nor avid for scandal;
 - (c) existing at the mid-point of extremes of temperament (unusually suspicious at one end and unusually naïve at the other end);

¹⁸ *Trkulja v Google LLC* (2018) 263 CLR 149, 159-61 [30]-[32] (noting this decision was with respect to the issue of capacity); *Favell v Queensland Newspapers Pty Ltd* (2005) 221 ALR 186, 189-90 [6]-[12], 192 [17] (Gleeson CJ, McHugh, Gummow and Heydon JJ); *Chau v Fairfax Media Publications Pty Ltd* [2019] FCA 185 [14]-[31] (Wigney J); *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496 [70]-[91] (Wigney J); *Chau v ABC (No 3)* (2021) 386 ALR 36, 45-8 [31]-[38] (Rares J); *V'landys v ABC (No 3)* [2021] FCA 500 [41]-[55], [72]-[73]; *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 41)* [2023] FCA 555 [28]-[42]; see also *V'landys v ABC* [2023] FCAFC 80 [73]-[74], [76]-[84] and *ABC v Wing* (2019) 271 FCR 632, 646-7 [31]-[33].

¹⁹ [2024] FCA 1050 [119]-[124].

²⁰ *Lewis v Daily Telegraph Ltd* [1964] AC 234, 281; *Bazzi v Dutton* (2022) 289 FCR 1; [2022] FCAFC 84 (**Bazzi v Dutton**), [27], [53].

²¹ *Bazzi v Dutton* [27], [53].

²² *Greenwich v Latham* [2024] FCA 1050 [121].

²³ For a recent statement as to the qualities of that person, see *V'landys v ABC* [2023] FCAFC 80, [73]ff.

- (d) not living in an ivory tower nor being unusually naïve, but able to engage in a degree of loose thinking, with a capacity for implication that is greater than a lawyer's;
- (e) able to read between the lines in the light of their general knowledge and experience of worldly affairs;
- (f) not examining a publication overzealously, nor searching for strained, hidden, forced or sinister meanings;²⁴ and
- (g) having read or watched the entire matter complained of and considered the context as a whole.²⁵

3.5. In the case of transient publications such as television or radio broadcasts, ordinary viewers or listeners are likely to have watched or listened to the publication only once, without pausing or going back over it.²⁶ That is a matter of importance here, in respect of the 3AW Interview, the ABC Interview and the Press Conference. The listener or viewer will have picked up the dominant impression from what was said, rather than have focused on isolated words, particularly where those words are inconsistent with that dominant impression.

3.6. The ordinary reasonable person gleans the single natural and ordinary meaning of each distinct charge conveyed by a publication. It does not matter that, in the real world, different people may take different meanings from the same matter.²⁷

3.7. The meaning that Mr Pesutto intended to convey is irrelevant on the question of meaning (but of importance on the question of his reasonable belief in the public interest in publishing the Publications, and an assessment of his honestly held opinions). So too is the manner in which a publication was actually understood by those who in fact comprehended it.²⁸ Such evidence is inadmissible on the issue of meaning.²⁹

3.8. At its core, the task of ascertaining the meanings conveyed by the Publications is a matter of impression and the governing principle is reasonableness.³⁰ Strained, forced or utterly unreasonable interpretations of the Publications must be rejected.

²⁴ See also *Horlick v Associated Newspapers Ltd* [2010] EWHC 1544 (QB) [8]; *Taylor v Nationwide News Pty Ltd (No 2)* (2022) 404 ALR 266, 283 [80] (Katzmann J).

²⁵ *Greenwich v Latham* [2024] FCA 1050 [120].

²⁶ *Chau v ABC (No 3)* (2021) 386 ALR 36, 46 [35] (Rares J); *Vlandys v ABC* [2023] FCAFC 80 [73].

²⁷ *Slim v Daily Telegraph Ltd* [1968] 2 QB 157, 171-172 (Diplock LJ).

²⁸ *Hough v London Express Newspaper Ltd* [1940] 2 KB 507 (CA) 515; *Toomey v John Fairfax & Sons Ltd* (1985) 1 NSWLR 291, 301-2.

²⁹ *Abraham v The Advocate Co Ltd* [1946] 2 WWR 181, 182.

³⁰ *Jones v Skelton* [1964] NSWLR 485, 491; *Stocker v Stocker* [2020] AC 593 [35] (Lord Kerr).

- 3.9. A distinction must also be drawn between the ordinary reasonable person’s understanding of what the Publications are actually saying or implying, and a judgment or conclusion which they may reach as a result of their own beliefs or prejudices.³¹

Distinction between capacity to be conveyed, and whether conveyed in fact

- 3.10. There is an important distinction between the principles applicable at the *capacity* stage, and the principles applicable at the time of determining the factual question as to what meaning is carried by a publication. The *former* is an exercise in generosity, and not parsimony.³² It is to the *former* that admonitions about Courts exercising ‘great caution’ in striking out are directed.³³ The reason for that caution, and that exercise in generosity, is that at the capacity stage, the Court is being asked to determine what meanings can be left to the tribunal of fact (usually, where capacity questions arise, a jury). At the capacity stage, a meaning will only be struck out if ‘no reader could reasonably understand the words to bear any meaning outside the range delimited ... by the judge; and that it would be “perverse” for any jury to do so’.³⁴
- 3.11. There is no role for the generosity principle in respect of the *latter* question, which is resolved by applying the single meaning rule and the standards of the ordinary reasonable person outlined above.

The proper pleading of imputations

- 3.12. An imputation must plead the precise act or condition attributed to, or charged upon, the applicant.³⁵ ‘Precise definition’ of the imputations ‘is a matter of prime importance.’³⁶ The imputation must be as precise as the language of the publication allows.³⁷
- 3.13. It is the meaning conveyed, rather than the words themselves, which must be precisely defined in the crafted imputation.³⁸ The requirement of specificity is not ‘an invitation to dress the matter up in fanciful or ingenious terms’.³⁹

³¹ See *Lewis v Daily Telegraph Ltd* [1964] AC 234 (HL), 274–5, 285–6; *Mirror Newspapers Ltd v Harrison* (1982) 149 CLR 293, 300–1; *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158, 166–7; *Barrow v Herald & Weekly Times Pty Ltd* [2015] VSC 263 [14]–[19]; *Bazzi v Dutton* [43]–[44], [53].

³² *Trkulja* 160 [32].

³³ *Favell* 189 [6]; see also *Corby v Allen & Unwin Pty Ltd* (2014) 108 NSWLR 431, 458 [147] (‘*Corby*’).

³⁴ *Corby* 456 [136] citing *Jameel v The Wall Street Journal Europe SprL* [2004] EMLR 89; [2003] EWCA Civ 1694 [9].

³⁵ *Monte v Mirror Newspapers Ltd* [1979] 2 NSWLR 663 (NSWSC), 678 (Hunt J) (‘*Monte*’).

³⁶ *Ibid* 676.

³⁷ *Drummoynne v ABC* (1991) 21 NSWLR 135, 137.

³⁸ *Monte* 678.

³⁹ *Ibid*.

- 3.14. Each pleaded imputation must convey a separate and distinct charge.⁴⁰ When tasked with considering whether an imputation is distinct, a useful test is to consider whether the evidence required to justify the imputations would be substantially different.⁴¹
- 3.15. There may be levels or gradations of seriousness in imputations, which it is legitimate to plead in the alternative (although the manner in which Mrs Deeming has purported to do so is the subject of criticism at part 5 below). The distinction in those levels is ordinarily by the character of the proof attributed to the underlying allegation (for example, that the underlying fact occurred, or *there are reasonable grounds to suspect* the underlying fact occurred, or *there are grounds to investigate* whether the underlying fact occurred). In respect of the different gradations, the underlying fact or charge is the same; the distinction between is as to the degree of certainty that it occurred, and thereby the seriousness of the charge.

4. Application

General observations

- 4.1. With the exception of imputations 24.1 and 24.3, the imputations pleaded by Mrs Deeming are repetitive, contrived and – had an application been brought of the kind that is now discouraged by the Defamation Practice Note (DEF-1), at [4.10] – liable to be struck out. Most are not even capable of being conveyed.
- 4.2. The pleading technique Mrs Deeming has adopted in this case is not consistent with either authority or good practice. As Wheelahan J put it in these proceedings, the Media Release is ‘18 lines and [Mrs Deeming has] come up with 23 imputations’.⁴² His Honour asked, ‘how many ways are there of saying the same thing?’⁴³ As his Honour observed,⁴⁴ in *Lewis v Daily Telegraph Ltd*, Lord Devlin said ‘it is the broad impression conveyed by the libel that has to be considered and not the meaning of each word under analysis’.⁴⁵ Wheelahan J expressed the view, ‘counsel for the applicant should review the imputations in this case’.⁴⁶
- 4.3. Mrs Deeming’s subsequent review and explanation, provided by letter on 4 July 2024⁴⁷ (without amendment to the pleading), does not cure any of the fundamental deficiencies

⁴⁰ *Whelan v John Fairfax & Sons Ltd*(1988) 12 NSWLR 148, 160 (Hunt J).

⁴¹ *Gant v The Age Co Ltd* [2011] VSC 169, [40] (Beach J).

⁴² Transcript of hearing in this proceeding on 2 February 2024, T4.9.

⁴³ Ibid T5.19.

⁴⁴ Ibid T6.1–2.

⁴⁵ *Lewis v Daily Telegraph Ltd* [1964] AC 234, 285; recently quoted with approval by the Full Court in *Bazzi v Dutton* [47], [53].

⁴⁶ Transcript of hearing in this proceeding on 2 February 2024, T21.16.

⁴⁷ CBA Tab 5, page 160.

identified by his Honour. On the contrary, the explanation provided in that letter tends to confuse, rather than elucidate, Mrs Deeming's case as to meaning.

- 4.4. That is because the practice deployed by Mrs Deeming of 'grouping' of imputations is not only confusing but bad at law. Imputations must differ in substance. In determining if meanings differ in substance, considering what evidence may be used to justify those meanings may assist that exercise.⁴⁸ In this case, the grouped imputations generally fail that test.
- 4.5. The Court must stand back and approach the task as the authorities require, considering the broad impression conveyed by the Publication applying the standards of the ordinary reasonable person and the single meaning test, rather than parsing select words and lines from select parts of transcripts of the (mostly transient) Publications, as Mrs Deeming's senior counsel did in opening, and required Mr Pesutto to do with the transcripts of the interviews during his cross-examination.
- 4.6. Upon stepping back and approaching the task properly, we submit that the Court will be satisfied that the defamatory meanings conveyed by the Publications are the contextual imputations identified in Mr Pesutto's defence, and not the imputations pleaded by Mrs Deeming (with the exception of imputations 24.1 and 24.3): the Media Release Imputation,⁴⁹ the 3AW Imputations,⁵⁰ the ABC Imputation,⁵¹ the Press Conference Imputations,⁵² and the Expulsion Motion Imputations.⁵³

5. Mrs Deeming's approach

- 5.1. Mrs Deeming's letter of 4 July 2024 provided a further explanation of her case as to meaning.⁵⁴ Relevantly, Mrs Deeming:
 - (a) no longer presses imputations 5.6, 5.12, or 5.18 in relation to the Media Release; and
 - (b) in relation to each of the Media Release and the ABC Interview, categorised the numerous imputations into 'groups' of different gradations of seriousness and 'alternative meanings' for that group. Those groupings are set out below, but Mr Pesutto will submit they hardly elucidate or clarify Mrs Deeming's case as to meaning, but rather betray its confused character.

⁴⁸ *Abou-Lokmeh v Harbour Radio Pty Ltd* [2016] NSWCA 228 [31]; *Fenn v ABC* [2018] VSC 60 [16] and the cases cited therein.

⁴⁹ Defence [5.3]: CBA Tab 3, page 95.

⁵⁰ Defence [10.3]: CBA Tab 3, page 97.

⁵¹ Defence [14.3]: CBA Tab 3, page 98.

⁵² Defence [19.3]: CBA Tab 3, page 100.

⁵³ Defence [24.4]: CBA Tab 3, page 102-103.

⁵⁴ CBA Tab 5.

- 5.2. The simple point is this: in contrast to Mr Pesutto's imputations, which capture the fundamental encapsulation of each Publication, using its language, Mrs Deeming's imputations are impermissibly divorced from both the language used by the Publications and the message they will have conveyed to ordinary reasonable persons.

Media Release

- 5.3. Twenty imputations remain on Mrs Deeming's case, categorised in four groups.

Group 1 Imputations

- 5.4. The Group 1 imputations are imputations 5.1 to 5.5:

5.5 being the most serious: *Deeming is a Neo Nazi.*

5.1, 5.2 and 5.3 being pleaded in the alternative as three distinct less serious meanings if the Court does not find that that 5.5 is carried:

5.1: *Deeming supports white supremacists and Neo-Nazis;*

5.2: *Deeming holds abhorrent white supremacist and Neo-Nazi views;*

5.3: *Deeming knowingly associates with white supremacists and Neo-Nazis.*

Imputation 5.4 being pleaded as a less serious alternative to imputation 5.1: *Deeming sympathises with white supremacists and Neo-Nazis.*

- 5.5. On no possible interpretation could imputation 5.5 be carried by the Media Release.
- 5.6. Lines 1-2 refer to 'neo-Nazi protestors'. They are further described as protestors in line 3. Mrs Deeming is introduced in the third paragraph, where she is described as attending a rally, as distinct from a protest. The persons she is identified as associating with are not neo-Nazis, or the neo-Nazi protestors. They are clearly identified at lines 6-7 as 'speakers and other organisers'. It is *those* speakers or other organisers who are then said to be 'publicly associating with far right-wing extremist groups including neo-Nazi activists'. The verbs used to describe her conduct are 'organising, promoting and participating in' a rally. They are not a blunt attribution of a definitive identifying characteristic such as being a 'Nazi'.
- 5.7. Ordinary, reasonable readers of the Media Release will have well understood that there is a crucial distinction between those who organised, promoted, participated in and spoke at the Rally on the one hand, and the neo-Nazi protestors. They were dealt with in different parts of the Media Release. If it were intended to impute that Mrs Deeming was a Nazi, the Media

Release would have said so, not couched the criticism of Mrs Deeming in terms of having been involved with speakers and other organisers who had themselves been publicly associated with far right-wing extremist groups including neo-Nazi activists. The ordinary reasonable reader would also have noted the distinction between the neo-Nazi protesters involved in the abomination on the steps of the Victorian Parliament (lines 1-2), on the one hand, and the far right-wing extremist groups including neo-Nazi activists with whom the speakers and other organisers were said to have been publicly associated (lines 6-7). They were obviously different groups. If the Media Release were intended to impute that anyone had an association with the neo-Nazi protesters, it would have said so, not drawn that clear distinction.

- 5.8. Imputations 5.1, 5.2, 5.3 and 5.4 suffer from a similar vice. They plead the operative verbs ‘*supports*’, ‘*holds...views*’, ‘*knowingly associates*’ and ‘*sympathises*’. None of those verbs are used with respect to Mrs Deeming in the Media Release. The words ‘*support*’, ‘*holds*’, ‘*knowingly*’, and ‘*sympathises*’ – let alone ‘*white supremacist*’ – are not used at all.
- 5.9. The complete absence of any mention of white supremacists is sufficient of itself to dispense with imputations 5.1-5.4. ‘White supremacist’ is a distinct charge that cannot simply be added to an imputation because a reference to a neo-Nazi has been made.
- 5.10. The only conduct that Mrs Deeming is charged with in the Media Release is organising, promoting and participating in a rally, with speakers and other organisers with certain publicly associations. That is, in the language of the authorities, the only act or condition attributed to Mrs Deeming or with which she is charged. Yet *none* of the Group 1 imputations (or for that matter, any of the 20 remaining pleaded imputations) pleads that act or condition, no doubt because the pleader appreciated that an imputation that accurately reflected that act or condition would be readily defensible by Mr Pesutto on a number of bases.
- 5.11. The ‘abhorrent’ views referred to in the Media Release are explained in lines 10-11 to be the view of those Mrs Deeming had associated with – not Mrs Deeming’s views, which are not the subject of *any* criticism in the Media Release. It is never suggested that Mrs Deeming shares the views of the ‘speakers and other organisers’ identified in line 6, let alone that Mrs Deeming shares the views of neo-Nazis protestors identified in line 1, or the neo-Nazis identified in line 7. It is also never suggested that Mrs Deeming *knew* about any such views, such that she could *knowingly* associate for the purposes of imputation 5.3.
- 5.12. The Group 1 imputations are divorced from the plain impression that will have been carried by the Media Release to ordinary, reasonable readers. To find any of the Group 1 imputations carried would be to import into the Media Release words, concepts, and linkages that are completely absent from the text. Another way of putting it is that if any person *in fact*

understood a Group 1 imputation to be carried by the Media Release, that must have been the result of that person being avid for scandal; unduly suspicious; searching for strained, hidden, forced or sinister meanings; or jumping to conclusions based upon their own beliefs or prejudices.

Group 2 to 4 Imputations

5.13. The Group 2 imputations are imputations 5.7 to 5.11:

5.7: Deeming is unfit to sit in the Victorian Parliament because she supports white supremacists and Neo-Nazis.

5.8: Deeming is unfit to sit in the Victorian Parliament because she holds abhorrent white supremacist and Neo-Nazi views.

5.9: Deeming is unfit to sit in the Victorian Parliament because she knowingly associates with white supremacists and Neo-Nazis.

5.10: Deeming is unfit to sit in the Victorian Parliament because she sympathises with white supremacists and Neo-Nazis.

5.11: Deeming is unfit to sit in the Victorian Parliament because she is a Neo Nazi.

5.14. Following the structure explained by Mrs Deeming with respect to Group 1, imputation 5.11 is the most serious, for which imputations 5.7, 5.8 and 5.9 are alternatives, with imputation 5.10 being a further alternative for imputation 5.7.

5.15. The Group 2 imputations suffer from the same vices as Group 1. The difference is each imputation has tacked on to it a preamble that ‘*Deeming is unfit to sit in the Victorian Parliament because...*’. That does not cure the otherwise deficient aspects or stings of the imputations, regarding which Mr Pesutto refers to and repeats the submissions made in respect of Group 1.

5.16. The fundamental *sting* of each Group 2 imputation remains the same: that Mrs Deeming (a) *supports* white supremacists and Neo-Nazis (b) *holds* abhorrent white supremacist and Neo-Nazi views (c) *knowingly associates* with white supremacists and Neo-Nazis (d) *sympathises* with white supremacists and Neo-Nazis or (e) *is* a Neo Nazi. None of the italicised verbs captures the act or condition asserted of Mrs Deeming or with which she is charged in the Media Release.

5.17. We make the same submissions with respect to the Group 3 and Group 4 Imputations:

(a) The Group 3 imputations are imputations 5.13 to 5.17:

5.13: Deeming is unfit to belong to the Victorian Parliamentary Liberal Party because she supports white supremacists and Neo-Nazis.

- 5.14: *Deeming is unfit to belong to the Victorian Parliamentary Liberal Party because she holds abhorrent white supremacist and Neo-Nazi views.*
- 5.15: *Deeming is unfit to belong to the Victorian Parliamentary Liberal Party because she knowingly associates with white supremacists and Neo-Nazis.*
- 5.16: *Deeming is unfit to belong to the Victorian Parliamentary Liberal Party because she sympathises with white supremacists and Neo-Nazis.*
- 5.17: *Deeming is unfit to belong to the Victorian Parliamentary Liberal Party because she is a Neo-Nazi.*

(b) The Group 4 imputations are imputations 5.19 to 5.23, which are said by Mrs Deeming to be ‘a more serious alternative to group 3’, ‘in the event the Court finds the equivalent imputations in groups 3 and 4 differ in substance’:

- 5.19: *Deeming is unfit to belong to the Liberal Party because she supports white supremacists and Neo-Nazis;*
- 5.20: *Deeming is unfit to belong to the Liberal Party because she holds abhorrent white supremacist and Neo-Nazi views;*
- 5.21: *Deeming is unfit to belong to the Liberal Party because she knowingly associates with white supremacists and Neo-Nazis;*
- 5.22: *Deeming is unfit to belong to the Liberal Party because she sympathises with white supremacists and Neo-Nazis.*
- 5.23: *Deeming is unfit to belong to the Liberal Party because she is a Neo Nazi.*

5.18. There is no sensible basis upon which the Court would find Groups 3 and 4 differ in substance. The fundamental sting of the imputations remains identical. An ordinary, reasonable person would consider that a person who is unfit to belong to the Liberal Party is also unfit to belong to the Parliamentary Liberal Party, and vice versa.

Paragraph 6 of the SOC

5.19. Paragraph 6 of the SOC pleads:

The imputations pleaded in the preceding paragraph, or imputations that do not differ in substance, were carried to readers of the Press Release who also listened to an interview of Pesutto with Neil Mitchell of 3AW Melbourne on 20 March 2023 (**3AW Interview**).

5.20. The purpose of this plea is obscure. Mrs Deeming does not plead that any of the imputations in paragraph 5 of the SOC would be carried by the 3AW Interview alone. For the reasons outlined above, as the imputations in paragraph 5 are not conveyed by the Media Release, they could not sensibly be conveyed to an audience to whom both the Media Release and 3AW Interview were published.

5.21. Nor is there any evidence that any person other than Ms Walton both read the Media Release and listened to the 3AW Interview without being provided those Publications by Mrs Deeming's lawyers, or if there are any other such persons, how many there might be.

Mr Pesutto's imputation

5.22. Mr Pesutto pleads that that Media Release carries a single imputation, as follows:

Media Release Imputation: Mrs Deeming, by reason of having been involved in organising, promoting and participating in, and attending, a rally with speakers and other organisers who themselves have been publicly associated with far right-wing extremist groups including neo-Nazi activists, is not a fit and proper person to be a member of the Victorian Parliamentary Liberal Party under Pesutto's leadership.

5.23. The Media Release Imputation captures:

- (a) the act or condition asserted of Mrs Deeming or with which she is charged in the Media Release, namely being involved in organising, promoting and participating in a rally (lines 5-6);
- (b) that the conduct occurred in relation to a rally with speakers and other organisers who themselves have been publicly associated with far right-wing extremist groups including neo-Nazi activists (lines 6-7);
- (c) and that for those reasons, Mrs Deeming was not a fit and proper person to be a member of the Party (lines 8-9) (her position was untenable) having regard to the values of Mr Pesutto, and the Party which he leads (lines 11-12).

5.24. If the above submissions are accepted, then none of Mrs Deeming's pleaded imputations will have been carried with respect to the Media Release, and it will follow that her causes of action with respect to the Media Release fail, because she will have failed to establish an element of the cause of action for defamation.

3AW Interview

5.25. Mrs Deeming presses each imputation said to be conveyed by the 3AW Interview, being:

10.1: *Deeming helped organise, promote and attended a rally with Nazi activists.*

10.2: *Deeming had so conducted herself as to warrant being expelled from the Liberal Parliamentary Party by associating with Nazi activists.*

10.3: *Deeming associates with Nazis.*

10.4: *Deeming is a Nazi sympathiser.*

- 5.26. The 3AW Interview commences with Mr Mitchell asking Mr Pesutto what Mrs Deeming did 'wrong' (line 10). Mr Pesutto then answers with the precise act or condition attributed to Mrs Deeming or with which she is charged: *that Mrs Deeming had associations, with organisers of the protest, who have known links with Nazis, Nazi sympathisers, far right extremists, white supremacists* (lines 11-2).
- 5.27. That immediately sets the tenor of the interview, and it would be understood by the listener to be the precise conduct alleged to have been engaged in by Mrs Deeming – *association with organisers who have known links*. That is further explained at lines 39-41, where Mr Pesutto explains that the problem is that Mrs Deeming also helped *organise and promote* the Rally *with people who had known associations*.
- 5.28. When the 3AW Interview is considered as a whole, by the standards of the ordinary reasonable person who will have listened to it only once, those are the matters that carry the dominant impression of what Mr Pesutto was saying about Mrs Deeming: she had associated with organisers of the protest who themselves had known links with Nazis, Nazi sympathisers, far right extremists, white supremacists.
- 5.29. It is an association with an association that Mr Pesutto was repeatedly emphasising throughout the interview (for example, line 99). At no point was it suggested that Mrs Deeming had *herself* associated with Nazis or Nazi activists (imputations 10.1 to 10.3), much less that she herself *was* a Nazi sympathiser (imputation 10.4).
- 5.30. If those submissions are accepted, then none of the pleaded imputations in respect of the 3AW Interview is carried.
- 5.31. It is irrelevant, in respect of the imputations carried about Mrs Deeming, that Mr Pesutto might at other points in the interview have mis-spoken about the extent of Mrs Keen's associations, by referring to Richard Spencer, Mark Collett and David Duke (lines 18-19). The extent of Mrs Keen's associations is not a matter captured by any of the pleaded imputations.
- 5.32. Nor is it relevant that, at one point, Mr Pesutto, upon being pressed by Mr Mitchell, identified Mrs Keen as a sympathiser of Nazis (lines 112-113). That, too, is not a matter captured by any of the pleaded imputations that Mr Pesutto has come to trial to meet. The imputations pleaded in the SOC do not assert that Mrs Deeming helped organise a rally with or associated with Nazi *sympathisers*, it asserts an association with Nazi *activists*, which is obviously a different thing. A sympathiser is a person who passively shares views with others; an activist is a person who acts on their views.

- 5.33. The only reference to Mrs Deeming in relation to the neo-Nazis who turned up at the Rally is at lines 74-78. The allegation is not that Mrs Deeming in any way anticipated, organised, supported, associated with, or sympathised with those neo-Nazis. Mr Pesutto distinguishes between the possible knowledge of Mrs Deeming and the knowledge of other organisers regarding the neo-Nazis at lines 133-138.
- 5.34. The interview must be understood as a whole, including statements in which Mr Pesutto disavows allegations about Mrs Deeming: *'I know Moira's not a Nazi'* (line 102).
- 5.35. It is true that, immediately after that statement, Mr Pesutto said *'but my point is that she's associating with people who are'* (line 103). That, however, was an obvious mis-statement and will have been understood as such by ordinary, reasonable listeners, who will have heard Mr Pesutto say, over and again, that the issue was Mrs Deeming having associated with persons who themselves have associations, including at lines 97-98. Any listener who focused on the mis-statement at line 103, and treated it as over-riding what Mr Pesutto had said over and again in the course of the 3AW Interview (at lines 11-13, 39-41, 46-47, 97-98) would be a person who was avid for scandal; unduly suspicious; searching for strained, hidden, forced or sinister meanings; or jumping to conclusions based upon their own beliefs or prejudices.

Mr Pesutto's imputations

- 5.36. Mr Pesutto submits that, when the correct test is applied, the 3AW Interview carried two imputations, as follows:

3AW Imputation (a): Mrs Deeming, by reason of having helped to organise and promote a protest rally and associating with persons with known links to Nazis, Nazi sympathisers, far right extremists and/or white supremacists, is not a fit and proper person to be a member of the Victorian Parliamentary Liberal Party under Pesutto's leadership.

3AW Imputation (b): Mrs Deeming, by reason of not having left a protest rally that she had helped to organise and promote when neo-Nazis turned up, is not a fit and proper person to be a member of the Victorian Parliamentary Liberal Party under Pesutto's leadership.

- 5.37. These imputations reflect the conduct of Mrs Deeming identified by Mr Pesutto as being the subject of concern in the 3AW Interview:
- (a) that Mrs Deeming helped organise and promote a rally (lines 39-40);
 - (b) the rally was associated with persons with known links to Nazis, Nazi sympathisers, far right extremists and/or white supremacists (lines 11-12, see also lines 40-41, 46-47, 99-100, 134-135, 151-152);

- (c) Mrs Deeming did not leave the rally when neo-Nazis turned up (lines 77-78, 87).
- 5.38. They then reflect the concern expressed in the 3AW Interview that such conduct is inconsistent with Mr Pesutto's values (lines 44, 100-104, 107-109, 111, 124-128, 149-153), such that Mrs Deeming is not a fit and proper person to be a member of the Party under Mr Pesutto's leadership.
- 5.39. Mr Pesutto's imputations comply with the rules of pleading, by articulating the precise act or condition asserted of Mrs Deeming or with which she is charged by Mr Pesutto in the 3AW Interview. They capture the impression, or sting, that the ordinary reasonable listener will have gleaned from the interview.
- 5.40. If the above submissions are accepted, it follows that Mrs Deeming's claims in respect of the 3AW Interview fail because she has not established an element of the cause of action for defamation.

ABC Interview

- 5.41. Mrs Deeming has pleaded 24 imputations in respect of the ABC Interview, an interview of less than five minutes duration captured in 65 lines of transcript. As with the Media Release, the imputations have been categorised into the following groups.

Group 1 Imputations

- 5.42. The Group 1 imputations are imputations 14.1 to 14.6:

14.5 being the most serious imputation in group 1: *Deeming is a Neo Nazi.*

14.6 being a less serious alternative imputation to 14.5: *Deeming is a white supremacist.*

14.1, 14.2 and 14.3 are pleaded in the alternative as three distinct less serious meanings if the Court does not find that imputation 14.5 is carried:

14.1: *Deeming supports white supremacists and Neo-Nazis.*

14.2: *Deeming holds abhorrent white supremacist and Neo-Nazi views.*

14.3: *Deeming knowingly associates with white supremacists and Neo-Nazis.*

14.4 is said to be a less serious alternative to 14.1, being: *Deeming sympathises with white supremacists and Neo-Nazis.*

- 5.43. As in the case of the Media Release, the proposition that the ABC Interview conveys that Mrs Deeming is a neo-Nazi or white supremacist is utterly untenable. The **only** act or condition asserted of Mrs Deeming, or with which she is charged by Mr Pesutto, in the ABC Interview

is that she attended, and was actively involved in the organisation and promotion of a protest (lines 4-6); at which there were speakers who have known links with neo-Nazis and white supremacists (lines 6-7).

5.44. Notable other features of the ABC Interview are that:

- (a) the word 'support' is never used with respect to neo-Nazis or white supremacists (it is used in entirely different contexts at lines 13, 19, 48, 59 and 62) (cf imputation 14.1);
- (b) the only person who describes Mrs Deeming's views as abhorrent is the interviewer Mr Rowland (lines 31-32), who appears to then correct himself to describe her appearance at the rally as abhorrent (line 32);
- (c) while Mr Rowland suggests that Mr Pesutto holds those views, Mr Pesutto does not accede to that suggestion, instead referring back to 'the reasons I have outlined' (line 35), which will have been understood as a reference back to the start of the interview when Mr Pesutto charged Mrs Deeming with having attended and been actively involved the organisation of the Rally at which there were speakers with known links to neo-Nazis and white supremacists (line 4-7);
- (d) even accepting for the sake of argument that Mr Pesutto acceded to and adopted Mr Rowland's attribution, the 'abhorrent views' are never described as white supremacist views or neo-Nazi views, let alone *both* (cf imputation 14.2);
- (e) there is no suggestion that the persons Mrs Deeming had associated with (the 'speakers' identified at line 6) are themselves neo-Nazis or white supremacists; to the contrary, on the plain words used, the 'speakers' are said to have known links to neo-Nazis and white supremacists (lines 6-7);
- (f) nothing in the ABC Interview suggests that such any association was *knowingly* engaged in by Mrs Deeming (cf imputation 14.3); and
- (g) the word 'sympathises' or some variant of it is not used (cf imputation 14.4).

5.45. As with the Media Release, the pleaded imputations in respect of the ABC Interview are simply not carried, when the standard of the ordinary, reasonable viewer, and the single meaning test in respect of each distinct charge, is applied. Any person who understood any of the pleaded imputations to be carried could only have done so if they ignored the plain words that Mr Pesutto used when expressly stating the reason for the motion he was bringing against Mrs Deeming at lines 4 to 7. Such a person would be avid for scandal; unduly suspicious;

searching for strained, hidden, forced or sinister meanings; or jumping to conclusions based upon their own beliefs or prejudices.

Groups 2 to 4 Imputations

5.46. The Group 2 imputations are imputations 14.7 to 14.12:

14.11, being identified by Mrs Deeming as the most serious imputation in Group 2: *Deeming is unfit to sit in the Victorian Parliament because she is a Neo Nazi.*

14.12, being an alternative to 14.11: *Deeming is unfit to sit in the Victorian Parliament because she is a white supremacist.*

14.7, 14.8 and 14.9 pleaded in the alternative as three distinct less serious meanings if the Court does not find that imputation 14.11 is carried:

14.7: *Deeming is unfit to sit in the Victorian Parliament because she supports white supremacists and Neo-Nazis.*

14.8: *Deeming is unfit to sit in the Victorian Parliament because she holds abhorrent white supremacist and Neo-Nazi views.*

14.9: *Deeming is unfit to sit in the Victorian Parliament because she knowingly associates with white supremacists and Neo-Nazis.*

Imputation 14.10 is a less serious alternative to 14.7: *Deeming is unfit to sit in the Victorian Parliament because she sympathises with white supremacists and Neo-Nazis.*

5.47. **The Group 3 imputations are** imputations 14.13 to 14.18:

14.17: *Deeming is unfit to belong to the Victorian Parliamentary Liberal Party because she is a Neo-Nazi.*

14.18: *Deeming is unfit to belong to the Victorian Parliamentary Liberal Party because she is a white supremacist.*

14.13, 14.14 and 14.5:

14.13: *Deeming is unfit to belong to the Victorian Parliamentary Liberal Party because she supports white supremacists and Neo-Nazis.*

14.14: *Deeming is unfit to belong to the Victorian Parliamentary Liberal Party because she holds abhorrent white supremacist and Neo-Nazi views.*

14.15: *Deeming is unfit to belong to the Victorian Parliamentary Liberal Party because she knowingly associates with white supremacists and Neo-Nazis.*

14.6 appears to be pleaded in the alternative to 14.13: *Deeming is unfit to belong to the Victorian Parliamentary Liberal Party because she sympathises with white supremacists and Neo-Nazis.*

5.48. The Group 4 imputations are imputations 14.19 to 14.24, which are said to be a ‘more serious alternative to Group 3’, comprising:

14.23, the most serious meaning identified: *Deeming is unfit to belong to the Liberal Party because she is a Neo Nazi.*

14.24, the apparently less serious alternative to 14.23: *Deeming is unfit to belong to the Liberal Party because she is a white supremacist.*

14.19, 14.20 and 14.21, as alternatives to 14.23:

14.19: *Deeming is unfit to belong to the Liberal Party because she supports white supremacists and Neo-Nazis.*

14.20: *Deeming is unfit to belong to the Liberal Party because she holds abhorrent white supremacist and Neo-Nazi views.*

14.21: *Deeming is unfit to belong to the Liberal Party because she knowingly associates with white supremacists and Neo-Nazis.*

14.22, as a less serious alternative to imputation 14.19: *Deeming is unfit to belong to the Liberal Party because she sympathises with white supremacists and Neo-Nazis.*

- 5.49. The Group 2 to 4 imputations adopt the imputations of Group 1 with a different preamble. For the reasons we developed regarding the Media Release, the preamble cannot cure the otherwise deficient aspects or stings of the imputations, identified in respect of Group 1.
- 5.50. There is no sensible basis upon which the Court would find Groups 3 and 4 to differ in substance. The fundamental sting of the imputations remains identical. An ordinary, reasonable person would consider that a person who is unfit to belong to the Liberal Party is also unfit to belong to the Parliamentary Liberal Party, and vice versa.

Mr Pesutto's imputation

- 5.51. Mr Pesutto submits the plain meaning of the ABC Interview is encapsulated in the imputation pleaded in the Defence, namely:

ABC Imputation: Deeming, by reason of having attended and been actively involved in the organisation and promotion of a protest on the steps of the Victorian Parliament at which there were speakers with known links with neo- Nazis and white supremacists, is not a fit and proper person to be a member of the Victorian Parliamentary Liberal Party under Pesutto's leadership.

- 5.52. That this is what will have been conveyed to the ordinary reasonable reader is apparent from the first paragraph of the interview (lines 1-12). Mr Pesutto identified what he said in those lines as '[t]he reason I'm bringing this motion'. By the introduction, Mr Pesutto set the tone of the remainder of the interview for the listener, who would be from then on under no misapprehension as to what Mr Pesutto was alleging about Mrs Deeming.

- 5.53. The ABC Imputation captures the act or condition asserted of Mrs Deeming or with which she was charged by Mr Pesutto in the ABC Interview, namely attending (line 4), and having active involvement in the organisation and promotion of the protest (lines 5-6). That protest is then explained to have had speakers with known links with neo-Nazis and white supremacists (lines 6-7). That is then identified to be contrary to Mr Pesutto's values as leader (lines 2-3, 7, 10-12). Mr Pesutto's values are reiterated throughout the interview (lines 17-22, 37-41, 48-51).
- 5.54. If the above submissions are accepted, it follows that Mrs Deeming's claims in respect of the ABC Interview fail because she has not established an element of the cause of action for defamation.

Press Conference

- 5.55. Mrs Deeming presses each imputation said to be conveyed by the Press Conference. Mr Pesutto contends that none is carried, when the ordinary reasonable person and single meaning tests are applied.
- 5.56. As with the other Publications, Mr Pesutto expressly identified the precise act or condition asserted of Mrs Deeming or with which she was charged in the course of the Press Conference. He did so on a number of occasions, in very consistent terms, none of which is captured by the imputations pleaded in the SOC. Over and over again, Mr Pesutto emphasised that the concern was Mrs Deeming having associated with persons who had associations or had shared platforms with persons with Nazi and like sympathies (our emphasis):
- (a) Lines 11-16: *What came to light on the weekend when seeing the awful circumstances on the steps of this Parliament were that **Moira Deeming, a member of the Parliamentary Liberal Party, had actively participated with and worked with the organisers of the rally. That rally was organised by people who have known and established links with people who have known and established links with people who have Nazi sympathies, promote white supremacist views and ethno-fascist views. That is odious. It is unacceptable.***
 - (b) Lines 17-19: *I will never, ever accept any member of the Parliamentary Liberal Party **under my leadership ever associating with anybody who shares a platform with people who peddle hate, division and attack people for who they are.***
 - (c) Lines 38-42: *the events of the weekend showed uh upon further investigation that **the association between Moira Deeming and the organisers of the rally were that those organisers have shared platforms with fascists, ethno-nationalists, white supremacists and Nazis and it became clear to me on further investigation following the rally...***

- (d) Lines 49-59: *it's clear that Mrs Deeming, from social media, escorted uh, at least one of the organisers through this very Parliament, Kellie-Jay Keen uh through this Parliament. Then attended the rally, stayed at the rally when Nazis attended and then celebrated with organisers of the rally, after the rally and ugly scenes had occurred on the steps of this Parliament and the street before it. One of the people with whom Ms Deeming was celebrating is Angie Jones and she tweeted on Saturday night, after the ugly scenes that we saw on the steps of this Parliament, as follows, quote 'Nazis and women want to get rid of pedos, why don't you?' That is totally unacceptable, and I don't think any reasonable, decent minded person would think that that is OK.*
- (e) Lines 64-67: *I'm here to say it will never be acceptable in this state, Victoria, as a member of the Liberal Party to associate with anybody who is connected with or shares platforms with Nazis, white supremacists, ethno-nationalists or whatever other odious agenda someone wishes to peddle.*
- (f) Lines 72-76: *What Moira Deeming's actions both before, during and after the rally demonstrate is that she's had an association with people who organised the rally, along with her assistance, who have shared platforms with a viewpoints with people who promote Nazi views of sympathies.*
- (g) Lines 76-77: *Secondly, Ms Deeming stayed at the rally when the Nazis arrived.*
- (h) Lines 77-79: *Thirdly, having seen the ugly scenes and having had an opportunity to disown and disassociate from those very people, Ms Deeming chose to celebrate as evidenced on social media.*
- (i) Lines 107-110: *Now what has prompted my action overnight is that a member of the Parliamentary Party of the Liberal Party was working with people who have shared platforms and promoted people who have Nazi views and white supremacist views.*
- (j) Lines 145-149: *it's clear on the evidence we've been able to gather overnight that Moira Deeming has worked with these organisers and that these organisers, not talking about Moira, but these organisers have shared platforms, done videos with, worked with people who have Nazi views, white supremacist views, totally unacceptable in our state.*
- (k) Lines 238-240: *The reason being, any question of an association, even indirectly, with Nazis, white supremacists, ethno-fascists or whatever else is so odious in 2023, as it should be, that I can't see a way back...*

- (l) Lines 296–302: *it wasn't just that Moira stayed at the protest when Nazis turned up, it was the celebration you can see on social media afterwards, which tells you perhaps all you need to know about why it's necessary to bring this motion. It's saying, "I am prepared to associate with these people" and not take the opportunity to walk away from them and disown the odious things that they have shared with people I've described before.*
- (m) Lines 418-421: *It was incumbent about Moira as a member of Parliament to understand the dangerous consequences that can come when you are associated with people who share platforms with Nazis and white supremacists. Everybody must be responsible for their actions.*

5.57. These passages capture the dominant impression that the ordinary, reasonable person will have gleaned as to the meaning Mr Pesutto was seeking to convey by his statements at the Press Conference. They are captured by the imputations we have pleaded in our Defence, which are in stark contradistinction to those pleaded in the SOC:

Press Conference Imputation (a): Deeming, by reason of having worked with organisers of a rally with known and established links with people who have Nazi sympathies and who promote white supremacist and ethno-fascist views, is not a fit and proper person to be a member of the Victorian Parliamentary Liberal Party under Pesutto's leadership.

Press Conference Imputation (b): Deeming, by reason of not having left a protest rally that she had helped to organise when neo-Nazis arrived, and not immediately disowning or disassociating from them, is not a fit and proper person to be a member of the Victorian Parliamentary Liberal Party under Pesutto's leadership.

Press Conference Imputation (c): Deeming, by celebrating her involvement in a protest rally, which she helped to organise with people who have shared platforms and viewpoints with people who promote Nazi views or sympathies, and which was attended by neo-Nazis, is not a fit and proper person to be a member of the Victorian Parliamentary Liberal Party under Pesutto's leadership.

5.58. The imputations in 19.1 to 19.10 of the SOC, by contrast, are not carried. Any person who understood them to be carried could only have done so by reason of being avid for scandal; unduly suspicious; searching for strained, hidden, forced or sinister meanings; or jumping to conclusions based upon their own beliefs or prejudices.

19.1: Deeming helped Neo-Nazis by working with them to promote their hateful agenda of vilification and hatred

5.59. The use of the word 'help' in relation to promoting an agenda appears at line 8. Mrs Deeming is only introduced at line 12, and her conduct is immediately identified as having 'actively participated with and worked with the organisers of the rally'. She is distinguished in the following sentence (lines 14-16) from the organisers who had such 'known and established links'.

- 5.60. It is clear that Mr Pesutto's assertion is that Mrs Deeming was several steps removed from either having helped or worked with actual neo-Nazis. In particular, there is no assertion anywhere in the Press Conference that Mrs Deeming had any contact at all with the neo-Nazis, much less by way of 'working with them'.
- 5.61. The only use of the word 'help' in relation to Mrs Deeming is that she 'helped organise' the rally, which is contained in a *question*, and not an answer by Mr Pesutto (line 22).

19.2: Deeming had so conducted herself in assisting Neo-Nazis to promote their hateful agenda of vilification and hate on the steps of Parliament that she should be expelled from the Parliamentary Liberal Party

- 5.62. This imputation is not carried for the same reasons as imputation 19.1. There is no allegation in the Press Conference that Mrs Deeming provided assistance to neo-Nazis.
- 5.63. The use of the word 'assisting' or a variation of it is only used in relation to Mrs Deeming in line 75 (in relation to assistance to organise the Rally).
- 5.64. This imputation is bad for a further reason. An imputation must identify the precise act or condition asserted of the applicant or with which the applicant is charged. Imputation 19.2 does not specify what Mrs Deeming is said to have done by way of providing assistance to neo-Nazis (cf imputation 19.1 which asserted (untenably) that Mrs Deeming had *worked with them*). The imputation does not identify what Mrs Deeming is actually said to have done.

19.3: Deeming deliberately gave Neo-Nazis a platform on the steps of Parliament

- 5.65. The Press Conference does not convey Mrs Deeming deliberately gave neo-Nazis a platform.
- 5.66. Imputation 19.3 necessarily carries the notion that Mrs Deeming somehow intended to provide a platform for neo-Nazis. There is simply nothing in the Press Conference to carry any such meaning.
- 5.67. To the extent that the neo-Nazis were said in the course of the Press Conference to have been afforded a platform at the Rally, Mr Pesutto's words were relevantly as follows (lines 130-5, our emphasis):

Every MP has a responsibility, not just to this Parliament but to the people they represent – to conduct themselves in a way which respects our democracy and doesn't **provide an opening** for Nazis or whomever else who peddles odious and hateful views **to jump into activities** with their protests or public meetings every member of Parliament must take responsibility for their actions.

5.68. The emphasised words convey that the neo-Nazis opportunistically took advantage of the Rally to peddle their views, not that they were there as a result of a deliberately engineered opportunity by anyone, let alone Mrs Deeming.

19.4: Deeming actively participated in a rally and knowingly worked with the key speaker, Kellie-Jay Keen, to promote her Neo-Nazi sympathies of hate and vilification, and promote her white supremacist and ethno-fascist views of hate and vilification

5.69. The sting of imputation 19.4 is that Mrs Deeming knowingly worked with a person, Mrs Keen, who had abhorrent sympathies and views.

5.70. The fundamental flaw in this imputation is that the Press Conference did not convey that Mrs Keen had abhorrent sympathies or views. Rather, as the passages we have set out at [5.56] above show, Mr Pesutto was at pains, time and time again, to make the point that his concern was that Mrs Deeming had associated with Mrs Keen, in circumstances where *Mrs Keen had associations* with persons who had abhorrent views. He did not assert that Mrs Keen had those views herself.

5.71. The only reference to Mrs Deeming's knowledge is at lines 289-90 and 294-5, but they convey uncertainty on Mr Pesutto's part, in the context of Mr Pesutto explaining how easily the associations of concern to him had been identified. It is not a statement that could be reasonably understood as suggesting that Mrs Deeming actually had knowledge of Mrs Keen's public associations (as was plainly understood by the journalist at lines 315-16 who understood that the accusation, if any, was that Mrs Deeming 'should have known'). But even if an allegation of knowledge could be imputed, the knowledge in question is of associations not *with Mrs Keen*, but *of Mrs Keen with other persons* who are discreditable.

19.5: Deeming engaged in hateful conduct while a member of the Parliamentary Liberal Party by actively participating in and working with the organisers of a rally who she knew were Neo-Nazi sympathisers

5.72. For the reasons explained in respect of imputation 19.4, there is no suggestion that the organisers of the Rally were neo-Nazi sympathisers. They are said to have an association with people who are.

5.73. There is also nothing in the Press Conference that conveys that Mrs Deeming had knowledge of any such matters (see [5.71] above).

5.74. Further, Mrs Deeming's conduct is never described as hateful. The conduct identified is limited to Mrs Deeming having:

(a) actively participated and worked with organisers of the Rally (lines 12-14);

- (b) stayed at the Rally when Nazis attended (line 52, a matter reiterated at line 76-77); and
- (c) celebrated with the organisers of the rally (lines 52-54).

5.75. The use of the word ‘hate’ or a variation is attributed to ‘the Nazis who turned up’ (line 29) or ‘Nazis and whomever else’ (lines 132-133) ‘those people... on the steps’ (plainly a reference to the Nazis, at lines 254-355); to distinguish that free speech does not include ‘hate speech’ (line 27-28) or ‘hateful’ speech (line 62); that the Nazi salute can incite ‘hate’ (line 334, see also line 406) and is a ‘hateful’ gesture (line 388). Such a word or concept is never attributed in any way to Mrs Deeming.

19.6: Deeming knowingly associated with people who share a platform with Neo-Nazis who peddle hate and division and attack people for who they are

- 5.76. For the reasons explained in respect of imputation 19.4, the Press Conference cannot be reasonably understood to convey that Mrs Deeming ‘*knowingly* associated’.
- 5.77. At its highest, Mr Pesutto expressed scepticism that a person in Mrs Deeming’s position would not have known of their associations, having regard to how easy it was to discover them. But there is a gulf between an assertion that a person knew something, and an assertion that there are grounds to conclude that a person may have known, or ought to have known, something.⁵⁵

19.7: Deeming had so conducted herself in staying at a rally attended by Neo-Nazis and then celebrating with the key speakers of the rally who had Neo-Nazi sympathies after ugly scenes had occurred on the steps of Parliament so as to warrant her immediate expulsion from the Parliamentary Liberal Party

- 5.78. For the reasons explained in respect of imputation 19.4, the Press Conference did not allege that speakers (or organisers) of the Rally had neo-Nazi sympathies, or that Mrs Deeming celebrated with people that did.

19.8: Deeming had so conducted herself before, during and after a rally at Parliament in associating herself with the key speakers who have shared platforms and endorsed viewpoints of Neo-Nazis so as to warrant her immediate expulsion from the Parliamentary Liberal Party

- 5.79. This imputation bears similarities to Press Conference Imputation (a) which is pleaded in the Defence and reproduced in [5.57] above.
- 5.80. However, imputation 19.8 misses the important qualifying feature of Press Conference Imputation (a), namely that Mrs Deeming’s immediate expulsion from the Party is warranted by reason of *the conflict with Mr Pesutto’s values as leader of the Party*, which is emphasised by Mr

⁵⁵ Cf *Hore-Lacy v Cleary* [2007] VSCA 314, (2007) 18 VR 562 [54]. See also *ABC v Wing* (2019) 271 FCR 632, 653 [60], [80].

Pesutto throughout the Press Conference: (see lines 17-18, 64-67, 154-158, 238-246, 249-258, 418-421).

- 5.81. For that reason, imputation 19.8 is not the final distillation of the precise act or condition asserted of Mrs Deeming, or with which she is charged by Mr Pesutto, in the Press Conference. The final distillation of the relevant act or condition is accurately reflected in Press Conference Imputation (a).

19.9: Deeming supports Neo-Nazis' hateful views towards others by her association with Neo-Nazi sympathiser, Kellie-Jay Keen, the key speaker at the Let Women Speak Rally

- 5.82. For the reasons explained in respect of imputation 19.4, the Press Conference did not allege, nor convey, that Mrs Keen was a neo-Nazi sympathiser.
- 5.83. Nor is there any assertion in the Press Conference that Mrs Deeming 'supports' the hateful views of neo-Nazis or holds hateful views herself. Mrs Deeming's views are never the subject of criticism by Mr Pesutto.
- 5.84. This imputation, again, is not the final distillation of any act or condition asserted of Mrs Deeming, or with which she is charged. The relevant acts and conditions are captured in the Press Conference Imputations pleaded by Mr Pesutto in his Defence, and reproduced at [5.57] above.

19.10: Deeming stands with Neo-Nazis and white supremacists

- 5.85. This imputation is again bad in form. It does not identify, as required by the authorities, with precision the act or condition asserted of Mrs Deeming or with which she is charged by Mr Pesutto in the Press Conference. It does not identify how Mrs Deeming is said to 'stand with' neo-Nazis and white supremacists. The reader is left to guess at the meaning of the imputation, which demonstrates that it is impermissibly vague and ambiguous.
- 5.86. To the extent that the Press Conference imputed anything about Mrs Deeming's conduct in connection with the neo-Nazis who attended the Rally, it was confined to the criticism at lines 76-77 that she 'stayed at the rally when the Nazis arrived'. That conduct is the subject of Press Conference Imputation (b) pleaded by Mr Pesutto in his Defence (and reproduced at [5.57] above). Press Conference Imputation (b) is good in form, because unlike imputation 19.10 it identifies the precise conduct on the part of Mrs Deeming that was the subject of Mr Pesutto's criticism in the Press Conference, namely her failure to leave the Rally when the neo-Nazis arrived, in circumstances where she had helped to organise the Rally.

Paragraph 20 of the SOC

5.87. At paragraph 20 of the SOC, Mrs Deeming pleads:

The imputations pleaded in the preceding paragraph, or imputations that do not differ in substance, were carried to listeners or viewers or recipients of republications of the Press Conference who also listened to the 3AW Interview. Deeming repeats the matters she pleaded in paragraph 6 above.

5.88. As with the paragraph 6 of the SOC,⁵⁶ the purpose of paragraph 20 is obscure.

5.89. None of the imputations Mrs Deeming pleads are carried by either publication, and having regard to both publications does not change that analysis.

5.90. Nor is there any evidence that any person, both listened to the 3AW Interview, and watched the Press Conference, or some republication of the Press Conference (noting even Ms Walton only watched extracts of the Press Conference that were reported on),⁵⁷ or if there are any such persons, how many there might be.

Mr Pesutto's imputations

5.91. Mr Pesutto submits that none of the imputations pleaded by Mrs Deeming in paragraph 19 of the SOC are carried, and that the true meanings of the Press Conference are encapsulated in the Press Conference Imputations pleaded in his Defence and reproduced at [5.57] above.

5.92. If those submissions are accepted, then all of Mrs Deeming's claims in respect of the Press Conference fail, because she has not established a requisite element of the cause of action for defamation.

Expulsion Motion and Dossier

5.93. The imputations carried by the Expulsion Motion and Dossier are straightforward. The very purpose of the Motion was to set out the meanings that are said to be carried by the document taken as a whole.

5.94. Mr Pesutto submits that those meanings are accurately captured by the Expulsion Motion Imputations pleaded in his Defence at paragraph 24.4. Those imputations are as follows:

Expulsion Motion Imputation (a): Deeming conducted herself in a manner likely to bring discredit on the Victorian Parliament or Victorian Parliamentary Liberal Party, by organising, promoting and attending a rally where Kellie-Jay Keen (also known as Posie Parker) was the principal speaker, in circumstances where Ms Keen was known

⁵⁶ See [5.20] above.
⁵⁷ T471.24-35 (Walton XXN).

to be publicly associated with far right-wing extremist groups including neo-Nazi activists.

Expulsion Motion Imputation (b): Deeming conducted herself in a manner likely to bring discredit on the Victorian Parliament or Victorian Parliamentary Liberal Party, by meeting with and publishing a video with Kellie-Jay Keen, Katherine Deves and Angie Jones.

5.95. Expulsion Motion Imputations (a) and (b) track closely the language of the Motion at paragraphs 2(a) and (b): see Court Book, Part A, page 196.

5.96. In his Defence, Mr Pesutto admitted that imputations 24.1 and 24.3 pleaded by Mrs Deeming are carried by the Expulsion Motion and Dossier. Those imputations are as follows:

24.1: *Deeming had so conducted herself on 18 March 2023 in relation to a public rally that it warranted her expulsion from the Victorian Parliamentary Liberal Party.*

24.3: *Deeming conducted activities in a manner likely to bring discredit on the Victorian Parliament or Parliamentary Liberal Party by organising, promoting and attending a rally on 18 March 2023.*

5.97. Strictly speaking, imputation 24.1 is bad in form, in that it does not capture the precise act or condition asserted of Mrs Deeming or with which she is charged. It does not articulate the conduct Mrs Deeming is alleged to have engaged in, in circumstances where the Expulsion Motion and Dossier states that the relevant conduct is organising, promoting and attending a rally in specified circumstances, and meeting with and publishing a video with Mrs Keen, Ms Deves and Ms Jones. Imputation 24.1 is, however, effectively subsumed within Expulsion Motion Imputations (a) and (b) and in those circumstances Mr Pesutto does not resile from the admission in his Defence.

5.98. Imputation 24.3 is a less precise form of Expulsion Motion Imputation (a), and is subsumed within it. Again, however, having admitted that it was conveyed in his Defence, Mr Pesutto does not seek to resile from that admission.

5.99. In practical terms, there are no differences between imputations 24.1 and 24.3 on the one hand, and Expulsion Motion Imputations (a) and (b) on the other.

5.100. We submit that the balance of the imputations pleaded in paragraph 24 of the SOC are not carried.

24.2: Deeming had so conducted herself in associating with Neo-Nazi activists on 18 March 2023 that it warranted her expulsion from the Victorian Parliamentary Liberal Party

5.101. The conduct of Mrs Deeming is identified in the wording of the motion. That conduct, which it is said is likely to bring discredit on the Parliament, or Parliamentary Party is:

- (a) organising, promoting and attending a rally; and
- (b) meeting and publishing a video with Mrs Keen, Ms Deves and Ms Jones.

5.102. The detail of Mrs Deeming's alleged conduct is then specified in paragraph 2(a) of the motion, namely associating with Mrs Keen where she 'was known to be publicly associated with far right-wing extremist groups including neo-Nazi activists'. The allegation, again, was one of an association with a person who had associations.

5.103. Contrary to the import of imputation 24.2, there is simply no allegation in the Expulsion Motion or Dossier either that:

- (a) Mrs Keen is a 'neo-Nazi activist'; or
- (b) Mrs Deeming has any associations with neo-Nazi activists, let alone neo-Nazi activists on 18 March 2023, which could only be a reference to the neo-Nazis who attended Parliament that day.

5.104. The only reference to neo-Nazis in paragraph 2(b) of the motion is that Ms Jones 'had made association with Nazis' including by the Jones tweet. That conduct is not attributed to Mrs Deeming, and is not an assertion that Ms Jones is a neo-Nazi activist. It is not capable of meeting the description in imputation 24.2.

5.105. The Annexure then provides greater detail as to the allegations described in the motion at paragraph 2. The only references to Nazis or neo-Nazis in the Annexure are in: (a) the *Pink News* article extract under paragraph 7, which describes persons who have appeared in videos with Gariépy; (b) paragraph 9 which describes Mrs Keen being photographed with a neo-Nazi; (c) paragraph 10 which notes Mrs Keen was accused of using a Barbie doll wearing a Nazi uniform as her profile picture; (d) paragraph 13 which states the bare fact that a group of neo-Nazis performed the Nazi salute on the steps of Parliament on 18 March 2023; (e) paragraph 17, which relates to the Mrs Deeming and Mrs Keen not roundly condemning the men who made the Nazi salute at the Rally; and (f) paragraph 18 which states the words of the Jones tweet.

5.106. None of that detail attributes to Mrs Deeming an association with neo-Nazi activists at any time, or asserts that either Mrs Keen or Ms Jones meet the description of neo-Nazi activists.

24.4: Deeming conducted activities in a manner likely to bring discredit on the Victorian Parliament or Parliamentary Liberal Party by publicly associating with Neo-Nazi activists on 18 March 2023

5.107. For the reasons just explained regarding imputation 24.2, no allegation or meaning is conveyed that Mrs Deeming associated with neo-Nazi activists; that she did so publicly; that

she did so on 18 March 2023; or that Mrs Keen or Ms Jones meet the description of neo-Nazi activists.

24.5: Deeming organised, promoted and attended a rally on 18 March 2023 where Kellie-Jay Keen, a known Neo-Nazi, was speaking

- 5.108. Nothing in the Expulsion Motion and Dossier accuses Mrs Keen of being a neo-Nazi or known neo-Nazi. The references to neo-Nazis and Nazism in the Expulsion Motion and Dossier are identified above with respect to imputation 24.2. At their highest, they convey an *association* between Mrs Keen and neo-Nazis, or those who have shared platforms with neo-Nazis, or have engaged in Nazi rhetoric.

24.6: Deeming met and published a video with known Neo-Nazis on 18 March 2023

- 5.109. For the reasons given with respect to imputations 24.2 and 24.5, this imputation must also be rejected. There is simply nothing in the Expulsion Motion and Dossier to suggest that Mrs Keen, Ms Deves or Ms Jones (the persons with whom Mrs Deeming recorded the Video) are neo-Nazis or known neo-Nazis.

Paragraph 25 of the SOC

- 5.110. Paragraph 25 of the SOC pleads:

The imputations pleaded in the preceding paragraph, or imputations that do not differ in substance, were carried to listeners or viewers of the Press Conference who also listened to the 3AW Interview. Deeming repeats the matters pleaded in paragraph 6 above.

- 5.111. Presumably the Press Conference referred to in that plea is intended to be a reference to the Expulsion Motion and Dossier. With the exception of imputations 24.1 and 24.3, none of the imputations pleaded in relation to either publication is carried. That position is not changed if the two publications are considered together.
- 5.112. As with the 3AW Interview (see [5.20] above) and the Press Conference (see [5.88] above), the purpose of the plea in paragraph 25 of the SOC is obscure. There is no evidence that any person other than Mr Wells both listened to the 3AW Interview and read the Expulsion Motion and Dossier or some republication of it, or if there are any other such persons, how many there might be.

Mrs Deeming's ability to succeed on different meanings

- 5.113. In paragraphs 10 and 11 of her Opening Submissions, Mrs Deeming noted modern pleading practice requires a plaintiff to identify the imputations, but argued she could succeed if the

Court finds the Publications carry imputations that do not differ in substance from the pleaded imputations and those imputations are not more injurious.⁵⁸

- 5.114. Subject to what was said about the degree of departure that is permitted, both in the first instance decisions Mrs Deeming referred to,⁵⁹ and as explained further below by reference to Full Court and High Court authority, so much may be accepted.
- 5.115. However, the submission that followed, that because Mr Pesutto admits the relevant matters are defamatory, Mrs Deeming is entitled to succeed on this element of the tort irrespective of what meanings are carried, is nonsense.⁶⁰
- 5.116. Mrs Deeming has deliberately chosen (despite clear warnings from the bench of the risks to her in doing so) to frame her case on meaning as she has, at a very high level, in respect of the first four Publications. She is, of course, entitled to do so. As the Full Court said in *Australian Broadcasting Corporation v Chau Chak Wing*,⁶¹ an applicant in defamation proceedings chooses the imputations he or she relies upon, thus framing the field of inquiry at trial. The Court may not find in favour of the plaintiff if the plaintiff does not make out the meanings for which he or she has contended, or a permissible variant or mere nuance of those meanings.⁶² The field of departure from a pleaded imputation is narrow, extending only to meanings that are *comprehended in*, or are *a mere shade or nuance* of, and not more serious than, a pleaded meaning, determined by fairness and practical justice, including whether the defendant has sought to justify the variant imputation.⁶³ Mrs Deeming having framed the field of inquiry as she did in her SOC, despite warnings from the bench, bears the risk that, if her pleaded meanings are found not to be carried in respect of any particular Publication, she fails entirely in her causes of action in respect of that Publication.
- 5.117. Mr Pesutto has pleaded what he contends are the true meanings of each of the Publications in his Defence; that is, the Media Release Imputation, the 3AW Imputations, the ABC Imputation, the Press Conference Imputations and the Expulsion Motion Imputations.

⁵⁸ Mrs Deeming's Opening Submissions, [10]-[11]: CBD Tab 4, page 90.

⁵⁹ In paragraph 10 of Mrs Deeming's Opening Submissions, the difference permitted was described as 'meanings that are not substantively different in that they are comprehended in, or are a shade or nuance of, the pleaded meaning', citing *Nassif v Seven Network (Operations) Ltd* [2021] FCA 1286 [80] (Abraham J); *Stead v Fairfax Media Publications Pty Ltd* [2021] FCA 15; 387 ALR 123 [15] (Lee J).

⁶⁰ *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519, 531-532 [17]-[19] (Brennan and McHugh J). Practically speaking, it is obvious that by attempting to plead a permissible variant in *ABC v Wing* (2019) 271 FCR 632; [2019] FCAFC 125 the defendant was essentially admitting the matter was defamatory but alleging it was defamatory in a slightly different way.

⁶¹ (2019) 271 FCR 632; [2019] FCAFC 125.

⁶² *Ibid*, [16]-[17]. These two paragraphs were conspicuously overlooked in [10]-[11] of Mrs Deeming's Opening Submissions, which otherwise drew the principles from that case: CBD Tab 4, pages 90.

⁶³ *Ibid*, [18]-[19], [42]-[43], [47].

- 5.118. Putting to one side the Expulsion Motion and Dossier, none of those imputations is a nuance of the imputations pleaded by Mrs Deeming in the SOC. Mrs Deeming has, for whatever forensic reason, elected to eschew suing on meanings to the effect alleged by Mr Pesutto. She could, at any time, have applied to amend the SOC to plead and herself rely on the imputations alleged by Mr Pesutto (a course of action known in the authorities as ‘pleading back’), but she has not done so.
- 5.119. Again, putting to one side the Expulsion Motion and Dossier, Mr Pesutto’s pleaded imputations are not nuances of the imputations in the SOC, because they are all substantially different from Mrs Deeming’s imputations:
- (a) **Media Release.** Mr Pesutto’s case is that the Media Release carries an imputation that, ‘Deeming, by reason of having been involved in organising, promoting and participating in, and attending, a rally ... is not a fit and proper person to be a member of the Victorian Parliamentary Liberal Party under Pesutto’s leadership’: Defence, [5.3(a)]. None of the imputations pleaded by Mrs Deeming in respect of the Media Release at SOC, [5] makes any reference to the Rally at all. The difference is thus stark. Among other matters, the evidence going to the substantial truth of Mr Pesutto’s imputation is necessarily confined to Mrs Deeming’s conduct in connection with the Rally. The evidence that would go to the substantial truth of Mrs Deeming’s imputations would necessarily be entirely different.⁶⁴
 - (b) **3AW Interview.** Mr Pesutto’s case is that the 3AW Interview carries the imputations extracted at [5.36] above, being the 3AW Interview Imputations: Defence, [10.3]. None of the imputations pleaded by Mrs Deeming in respect of the 3AW Interview at SOC [10] refer to Mrs Deeming ‘associating with persons with known links to Nazis, Nazi sympathisers, far right extremists and/or white supremacists’ (3AW Interview Imputation (a): Defence, [10.3(a)]. Nor do any refer to Mrs Deeming ‘not having left a protest rally...when neo-Nazis turned up’. For the reasons outlined in paragraph (a), the evidence that would go to the substantial truth of Mrs Deeming’s imputations would necessarily be entirely different, and the difference in the imputations alleged to be conveyed by Mrs Deeming and Mr Pesutto respectively are stark.
 - (c) **ABC Interview.** Mr Pesutto’s case is that the ABC Interview carries an imputation that Mrs Deeming ‘by reason of having attended and been actively involved in the organisation and promotion of a protest on the steps of the Victorian Parliament... is not a fit and proper person to be a member of the Victorian Parliamentary Liberal Party

⁶⁴ *Gant v The Age Co Ltd* [2011] VSC 169 [40] (Beach J).

under Pesutto's leadership': Defence, [14.3]. As with the Media Release, none of the imputations pleaded by Mrs Deeming in respect of the ABC Interview at SOC [14] refer to a protest at all. Among other matters, the evidence going to the substantial truth of Mr Pesutto's imputation is necessarily confined to Mrs Deeming's conduct in connection with the protest identified in [14.3], and would necessarily be entirely different.

- (d) **Press Conference.** Mr Pesutto's case is that the Press Conference carries three imputations extracted above at [5.57]: Defence, [19.3]. None of the imputations pleaded by Mrs Deeming in respect of the Press Conference at SOC [19] refer to 'organisers of a rally with know and established links with people who have Nazi sympathies and who promote white supremacist and ethno-fascist views': Defence, [19.3(a)]. Nor do any refer to Mrs Deeming 'not immediately disowning or disassociating from [the neo-Nazis]': Defence, [19.3(b)], or 'people who have shared platforms and viewpoints with people who promote Nazi views or sympathies': Defence [19.3(c)]. Nor do any of those imputations refer to Mrs Deeming having 'helped to organise' the rally: Defence [19.3(b) and (c)]. The evidence that would support the substantial truth of Mr Pesutto's imputations is therefore necessarily entirely different than that which would be required to justify the Mrs Deeming's imputations with respect to the Press Conference.

- 5.120. The position is different with respect to the Expulsion Motion and Dossier. In respect of that document, Mr Pesutto concedes that imputations 24.1 and 24.3 are carried but pleads that the true meanings carried by the Expulsion Motion and Dossier are the Expulsion Motion Imputations: Defence, [24.4]. The concession that imputations 24.1 and 24.3 are carried necessarily means that Mrs Deeming has established that the Expulsion Motion and Dossier was defamatory in the sense encapsulated by those two imputations, such that the Court must go on to consider whether Mrs Deeming has established the serious harm element of the cause of action with respect to that Publication and, if so, whether Mr Pesutto has established any of the affirmative defences he relies on.

6. Conclusions on meaning

- 6.1. With the exception of imputations 24.1 and 24.3, which are admitted to be conveyed, Mrs Deeming's case as to meaning is, in our submission, fanciful and contrived.
- 6.2. The pleading practice which was adopted in the SOC is contrary to the many injunctions in the authorities which we have collated and made submissions about in section 3 above. The

flaws in the SOC were identified with clarity and by way of warning at the first case management conference by Wheelahan J, but ignored by those advising Mrs Deeming.

- 6.3. At core, no conscientious attempt was made on Mrs Deeming's behalf to plead with precision the act or condition asserted of her or with which she was charged by Mr Pesutto in any of the Publications. Instead, the Publications were parsed in an impermissible way, overlooking the dominant impression they will have conveyed to ordinary, reasonable recipients, in order to construct an absurd number – 67 – of imputations.⁶⁵ As Wheelahan J correctly observed at the first case management hearing, most were so strained that they would have been liable to be struck out at the capacity stage.
- 6.4. The practice adopted on Mrs Deeming's behalf is to be deplored. It is not consistent with the overarching obligation to plead 23 imputations in respect of an 18 line Media Release, or 24 imputations in respect of a five minute television interview.⁶⁶ It has necessitated, just in these submissions alone, almost 30 pages of analysis and the incurring of very substantial legal costs in respect of what is, at the end of the day, a factual question as to which no evidence is admissible.
- 6.5. That degree of analysis is not, in our submission, required in dispensing with the issue of meaning in this case.
- 6.6. The Court is entitled, as the tribunal of fact, simply to step back and identify the single meaning in respect of each distinct charge that is carried by the Publications. In our submission, when the correct approach is adopted, it will lead to the conclusion that the meanings carried by the Publications are the imputations pleaded by Mr Pesutto in his Defence; that is, the Media Release Imputation reproduced at [5.22] above; the 3AW Imputations reproduced at [5.36] above; the ABC Imputation reproduced at [5.51] above; the Press Conference Imputations reproduced at [5.57] above; and the Expulsion Motion Imputations reproduced at [5.94] above.
- 6.7. If Mr Pesutto's submissions are accepted, then Mrs Deeming's causes of action in respect of the Media Release, the 3AW Interview, the ABC Interview and the Press Conference fail at the first hurdle, because she will not have established that any of the imputations pleaded in the SOC are carried. That will then have flow on consequences for what remains in the case: whether serious harm can be established, and the application of defences.

⁶⁵ Reduced to 64 imputations months later.

⁶⁶ Only three of which were not ultimately pressed.

- 6.8. Because of Mr Pesutto's admission that imputations 24.1 and 24.3 pleaded in the SOC in respect of the Expulsion Motion and Dossier are carried, the serious harm element of the cause of action in respect of publication of that document, and (if that element is established with respect to that document) Mr Pesutto's pleaded defences in respect of that document will need to be addressed, even if Mr Pesutto's submissions on meaning are otherwise accepted in full.
- 6.9. The balance of these submissions assume, contrary to Mr Pesutto's position set out above, that the Court finds that some or more of the imputations pleaded by Mrs Deeming are carried by each of the Publications.

D. FACT FINDING PRINCIPLES

7. Burden of proof

- 7.1. Mrs Deeming carries the onus of proving:
- (a) the extent of publication of each Publication (publication itself having been admitted by Mr Pesutto);
 - (b) that the Publications carried one or more of the imputations pleaded in the SOC;
 - (c) that any such imputations were carried by other publications relied upon in the statement of claim as being relevant to Mrs Deeming's claims: in respect of the Media Release, see SOC, [6]; in respect of the ABC Interview, see at SOC, [12.5] and [12.8]; in respect of the Press Conference, see SOC, [17.4], [20]; in respect of the Expulsion Motion and Dossier, see SOC, [22.5], [25]; and
 - (d) that the publication of each Publication caused, or is likely to cause, serious harm to Mrs Deeming's reputation.
- 7.2. If it becomes necessary to consider defences, Mr Pesutto carries the onus of proving that:
- (a) **Public interest:** he reasonably believed publication of each of the Publications was in the public interest, such that he is entitled to a defence under s 29A of the Act.
 - (b) **Lange qualified privilege:** each of the Publications attracts the protection of the common law form of the defence of qualified privilege for reasonable communications to the public concerning government or political matters..⁶⁷

⁶⁷ *Lange v ABC* (1997) 189 CLR 520, 571-3 (*Lange*).

- (c) **Honest opinion:** each of the Publications was an expression of opinion, related to a matter of public interest and based on upon substantially true facts: s 31(1) of the Act.
- (d) **Contextual truth:** whether the contextual imputations pleaded in the Defence were carried to ordinary reasonable recipients and whether those contextual imputations, and imputations 24.1 and 24.3 (and, depending on the Court's other findings as to meaning, imputations 19.6, 19.7, 19.8, 22.2 and 22.4), were matters of substantial truth such that Mrs Deeming has suffered no compensable harm to her reputation by reason of any residual imputations carried by the Publications but not shown to be matters of substantial truth: s 26 of the Act.

7.3. If Mr Pesutto discharges his onus in relation to his honest opinion defence in respect of any Publication, Mrs Deeming bears the onus of proving in defeasance that Mr Pesutto did not honestly hold the opinions he expressed (s 31(4)(a)).

7.4. If Mr Pesutto discharges his onus in relation to the *Lange* qualified privilege defence, Mrs Deeming bears the onus of proving in defeasance that Mr Pesutto was actuated by a dominant motive of malice in publishing each of the Publications (meaning, a dominant motive other than the reasonable discussion of government and political matters).

8. Standard of proof

8.1. In making findings of fact in this case, the Court must consider the factors listed in s 140(2) of the *Evidence Act 1995* (Cth) (*Evidence Act*), being: (a) the nature of the cause of action or defence; (b) the nature of the subject matter of the proceeding; and (c) the gravity of the matters alleged. These are mandatory considerations reflecting a legislative intention that a Court must be mindful of the forensic context informing an opinion as to its satisfaction about matters in evidence.⁶⁸

8.2. Although s 140 of the *Evidence Act* is not to be approached as involving a codification of any corresponding common law principle,⁶⁹ nevertheless it has been treated⁷⁰ as reflecting the

⁶⁸ *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 41)* [2023] FCA 555 (*Roberts-Smith*) [96] (Besanko J, citing *CEPU v ACCC* [2007] FCAFC 132; (2007) 162 FCR 466 [30]).

⁶⁹ *Papakosmas v The Queen* (1999) 196 CLR 297; 73 ALJR 1274; [1999] HCA 37, 10.

⁷⁰ See *CEPU v ACCC* (2007) 162 FCR 466; *Qantas Airways Ltd v Gama* (2008) 167 FCR 537; 247 ALR 273; [2008] FCAFC 69; *Morley v Australian Securities and Investments Commission* [2010] NSWCA 331 [737]; *Roberts-Smith*, [99] (Besanko J); *Lehrmann v Network Ten Pty Ltd* [2024] FCA 369 (*Lehrmann*) [94], [98] (Lee J).

common law as stated in *Briginshaw v Briginshaw*.⁷¹ In *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*, a majority of the High Court relevantly said:⁷²

The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.

- 8.3. Although those observations related to the common law, they have been applied in considering the operation of s 140 of the Evidence Act.⁷³ In *Qantas Airways Ltd v Gama*, Branson J (with whom French and Jacobson JJ agreed) observed that the correct approach is, ‘adopting the language of the High Court in *Neat Holdings*’, one that recognises that ‘the strength of the evidence necessary to establish a fact in issue on the balance of probabilities will vary according to the nature of what is sought to be proved’.⁷⁴
- 8.4. In *Lehrmann*, Lee J explained the concept of the balance of probabilities and its relationship with *Briginshaw*. First, his Honour identified that the concept of the ‘balance of probabilities’ is often misunderstood to be a simple estimate or mechanical comparison of probabilities.⁷⁵ What it in fact requires is a ‘a subjective belief in a state of facts on the part of the tribunal of fact. A party bearing the onus will not succeed unless the whole of the evidence establishes a “reasonable satisfaction” on the preponderance of probabilities such as to sustain the relevant issue’.⁷⁶ Second, his Honour explained that the factor of ‘gravity’ is linked to consideration of the *improbability* or ‘inherent unlikelihood’ of the occurrence requires consideration.⁷⁷
- 8.5. These principles, in our submission, have limited, if any, work to do in respect of the findings of fact relevant to the defences pleaded by Mr Pesutto. In particular, and by way of summary, there is nothing improbable about:

⁷¹ (1938) 60 CLR 336; [1938] HCA 34 (*Briginshaw*), 361-2; See also *Lehrmann*, [100] (Lee J); *NOM v DPP* [2012] VSCA 198; (2012) 38 VR 618, 655 [124] (Redlich and Harper JJA and Curtain AJA); *Brown v New South Wales Trustee and Guardian* [2012] NSWCA 431, [51] (Campbell JA, Bergin CJ in Eq and Sackville AJA agreeing).

⁷² (1992) 67 ALJR 170, 170-1; 110 ALR 449; [1992] HCA 66 (Mason CJ, Brennan, Deane and Gaudron JJ).

⁷³ *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32; (2023) 97 ALJR 857, 874–875 [57] (Kiefel CJ, Gageler and Jagot JJ); *New South Wales v Hathaway* [2010] NSWCA 184 [263], [272].

⁷⁴ (2008) 167 FCR 537; 247 ALR 273; [2008] FCAFC 69 [139].

⁷⁵ *Lehrmann* [98], [100].

⁷⁶ *Ibid.*

⁷⁷ *Ibid* [103].

- (a) a political leader holding the view that publications about a serious decision he had taken in conjunction with his leadership team needed to be explained, via the media, to the public;
- (b) a political leader honestly holding opinions to the effect he expressed in publications to the media; or
- (c) the drawing of the inferences for which Mr Pesutto contends from matters such as: (i) Mrs Keen having shared public platforms with persons holding abhorrent views, and expressing abhorrent views; (ii) Ms Jones having posted a tweet equating the views of women with those of Nazis; or (iii) Mrs Deeming's conduct in connection with the Rally, including her failure to leave after becoming aware of the presence of neo-Nazis, failing to follow advice from the Deputy Leader of the Party, equivocating about the identity of the neo-Nazis, and participating in a YouTube video toasting the success of the Rally (**Video**).

8.6. A more cautious approach to fact-finding, however, is applicable to some of the allegations made by Mrs Deeming against Mr Pesutto, including:

- (a) those in support of Mrs Deeming's aggravated damages claims, which necessarily require the Court to find not only the relevant conduct occurred, but that it was improper, unjustifiable or lacking in *bona fides*; and
- (b) those made in an attempt to defeat Mr Pesutto's honest opinion and *Lange* defences, which necessarily impugn Mr Pesutto's honesty and/or require a finding of malice.

8.7. These serious allegations include that Mr Pesutto knew that what he published was false or was recklessly indifferent or wilfully blind in relation to the truth of what he published (SOC, [38.1]), engaged in a campaign of denigration against Mrs Deeming (SOC, [38.6(a)]), did not honour the agreement with Mrs Deeming to a compromise suspension motion at the meeting of Party Members on 27 March 2023 (SOC, [38.7(g)]), falsely stated the reasons for accepting Mrs Deeming's suspension rather than expulsion (SOC, [38.7(h)]), deliberately misrepresented the reasons for Mrs Deeming's expulsion (SOC, [38.7(o)]), did not honestly hold his stated opinions (Reply, [2.3(c)]) and was actuated by malice (Reply, [6.2]).

8.8. Findings of this kind are rare.⁷⁸ They are tantamount to allegations of dishonesty or fraud.⁷⁹ They must be proved to the *Briginshaw* standard, by cogent evidence commensurate with the

⁷⁸ *McBride v Body Shop International plc* [2007] EWHC 1658 (QB), [49] (Eady J): 'very rare indeed'; *Henderson v London Borough of Hackney* [2010] EWHC 1651 (QB), [33] (Eady J): 'extremely rare'.

⁷⁹ See *Hughes v Risbridger* [2009] EWHC 3244 (QB), [15].

seriousness of the charges.⁸⁰ If a piece of evidence is equally consistent with the absence of malice, it cannot as a matter of law provide evidence upon which a finding of malice can be made.⁸¹

- 8.9. Mrs Deeming's case sought to impugn not just the honesty and integrity of Mr Pesutto (the alternative Premier of this State), but also that of Mr Pintos-Lopez (a respected former barrister and Tribunal member) and the entire Leadership Team of a major political party who have a long record of public service. She sought to do so by a wide-ranging enquiry, occupying much of the hearing time at trial, in relation to events with no direct connection at all to the Publications sued on.
- 8.10. The allegations of dishonesty and improper motives are both serious and inherently improbable.⁸² The Court should expect exacting proof of such allegations commensurate with their seriousness, their inherent unlikelihood, and the gravity of the consequences that would flow for Mr Pesutto and others who are engaged in public service, all of whom impressed in the witness box as doing their best to provide assistance to the Court.

9. Recordings, documents and other contemporaneous representations

- 9.1. The affidavit evidence filed by or on behalf of Mrs Deeming evidence was often based on her or her witnesses' perceptions or opinions on matters they were not actually involved in, the absence of any knowledge of a matter, or conflated recollections.
- 9.2. When tested in cross-examination, it was quickly apparent that Mrs Deeming had no real recollection of critical events at all, other than how she felt about them. Almost the entirety of her account of the meeting on 19 March 2023 in her affidavits was not read, and was shown in cross-examination to be wrong in a large number of critical respects.⁸³ Those errors included serious allegations against other attendees at that meeting set out in quotes of direct speech.⁸⁴
- 9.3. The evidence of Mr Pesutto and the other witnesses for the respondents was of a different character. Their accounts of the critical events had the hallmarks of witnesses endeavouring to provide assistance to the Court by giving their honest recollections of relevant events. They were generally clear about matters they remembered in detail, careful to distinguish matters where they remembered the substance but not the detail, and prepared to make appropriate concessions.

⁸⁰ *Rackham v Sandy* [2005] EWHC 482 (QB), [17].

⁸¹ *Telnikoff v Matusevitch* [1991] 1 QB 102 (CA), 120; *Ibrahim v Swansea University* [2012] EWHC 290 (QB), [19]–[20]; *Barrow v Bolt (No 3)* [2014] VSC 16 [24] (John Dixon J); *Barrow v Bolt* [2014] VSC 599 [41] (T Forrest J).

⁸² *Lehrmann* [104].

⁸³ T269.19-270.35, 271.19-23, 276.37-280.3-283.15 (Deeming XXN).

⁸⁴ CBB Tab 1, page 16 [76] (Affidavit of Moira Deeming dated 27 May 2024).

- 9.4. The Court has the benefit of a large volume of contemporaneous documents and recordings. As is commonly now the case in litigation in this Court, affidavits, both in chief and in reply, were filed by both sides before the conclusion of discovery.
- 9.5. The fact-finding exercise requires the Court to engage with the totality of the evidence. Significant weight attaches to contemporaneous documents (including videos and recordings, and contemporaneous messages emails, minutes, tweets, articles, and interviews), from which sensible inferences can be drawn about what people did, knew or thought at the time.⁸⁵ The assessment of affidavit evidence must accommodate the fact that the affidavits were not prepared with the benefit of the entirety of the relevant universe of documents being to hand.
- 9.6. Obviously, where they exist, recordings provide the best evidence of what was said on particular occasions, but the perceptions of the persons who were present remain important.
- 9.7. The meeting of 19 March 2023 is a striking example. Mrs Deeming’s counsel sought to characterise that meeting as a ‘pile on’ amounting to some form of bullying of Mrs Deeming. All of the other persons present at that meeting, however, gave accounts that are flatly inconsistent with that characterisation, and readily reconciled with a fair review of the recording and the transcript of that meeting. The Leadership Team’s assessment is to be preferred. They called Mrs Deeming in to discuss what had happened the previous day. Mrs Deeming can have been in no doubt about the seriousness of the matter, having regard to her discussion with Mr Southwick the previous day, and the growing media storm surrounding her presence at a Rally attended by neo-Nazis who were claiming that they were there to support Mrs Keen. The meeting lasted some 70 minutes. Throughout the meeting, Mrs Deeming repeatedly interrupted others, and often seemed unable to grasp straightforward matters being put to her. The Leadership Team uniformly formed the view, based on their perceptions of what was occurring in the room, that Mrs Deeming was either failing or refusing to understand the seriousness of the situation into which her conduct had plunged the Party, and the need to take immediate and decisive remedial action. That assessment is consistent with the recording of the meeting, which concluded with Mrs Deeming being prepared to do no more than denounce ‘Nazism and, I don’t know, anything similar and any accusations of paedophilia for the trans community’⁸⁶ and to condemn ‘that a whole group of people are paedophiles because of their sexuality or gender identity’, Nazism and support for Nazis.⁸⁷ That was a world away from what the Leadership Team had been seeking from Mrs Deeming.

⁸⁵ *Lehrmann* [122]-[126] (and throughout), and the cases cited therein.

⁸⁶ Exhibit A2 lines 912-14.

⁸⁷ Exhibit A2 lines 936-39.

9.8. The recording reveals the following matters that directly contradict the account given in Mrs Deeming's affidavits:

- (a) Mr Pesutto never called Mrs Deeming's views on sex-based rights 'fringe' views.⁸⁸ Nor did the Leadership Team attack her advocacy for sex-based rights on the basis they were 'fringe' views.⁸⁹
- (b) No one at the meeting said it was Mrs Deeming's 'third strike', and Mrs Deeming never said that nobody had told her about any strikes or that in her opinion none of the three matters said to be strikes was bad.⁹⁰ It was Mrs Deeming who raised the fact that she had had three controversies in a row, not any member of the Leadership Team.
- (c) Mr Pesutto never said Mrs Deeming had an attitude problem.⁹¹
- (d) Mrs Deeming never showed any suspicion about the accuracy of the claims being put to her.⁹² Rather, she tried to downplay them but ultimately admitted that she could understand why the Leadership Team thought they were not a good look.⁹³
- (e) Mrs Deeming never asked if she could see the evidence, or what was on Mr Pintos-Lopez's laptop screen, and Mr Pintos-Lopez never refused to show her what was on the screen.⁹⁴
- (f) No one ever asked Mrs Deeming to denounce Mrs Keen as a Nazi, and Mrs Deeming never said that she had been following Mrs Keen on mainstream TV for a decade.⁹⁵
- (g) There was no allegation that Mrs Keen is a Nazi,⁹⁶ nor Ms Jones or Ms Deves.⁹⁷
- (h) The Leadership Team was not focused on getting Mrs Deeming to denounce the organisers of the Rally as Nazis.⁹⁸

⁸⁸ Cf CBB Tab 1, page 14 [60] (Affidavit of Moira Deeming dated 27 May 2024); CBB Tab 2, page 84, [88(a)], page 89, [91(a)] (Second affidavit of Moira Deeming dated 23 July 2024).

⁸⁹ Cf CBB Tab 1, page 14 [63] (Affidavit of Moira Deeming dated 27 May 2024).

⁹⁰ Cf CBB Tab 1, page 14 [64] (Affidavit of Moira Deeming dated 27 May 2024).

⁹¹ Cf CBB Tab 1, page 15 [65] (Affidavit of Moira Deeming dated 27 May 2024).

⁹² Cf CBB Tab 1, page 15 [70] (Affidavit of Moira Deeming dated 27 May 2024).

⁹³ Cf CBB Tab 2, page 87 [89(f)] (Second affidavit of Moira Deeming dated 23 July 2024).

⁹⁴ Cf CBB, page 15 [71] (Affidavit of Moira Deeming dated 27 May 2024); pages 82–3 [85], page 84 [88(e)] (Second affidavit of Moira Deeming dated 23 July 2024).

⁹⁵ Cf CBB Tab 1, page 15 [72] (Affidavit of Moira Deeming dated 27 May 2024).

⁹⁶ Cf CBB Tab 2, page 83 [87], page 85 [88(g)] (Second affidavit of Moira Deeming dated 23 July 2024).

⁹⁷ Cf CBB Tab 1, page 17 [77] (Affidavit of Moira Deeming dated 27 May 2024); CBB Tab 2 page 85 [88(g)]; page 87 [89(h)] (Second affidavit of Moira Deeming dated 23 July 2024).

⁹⁸ Cf CBB Tab 2, page 87 [89(h)–(i)], page 89 [91(c)], page 90 [92(c)] (Second affidavit of Moira Deeming dated 27 May 2024).

- (i) Mrs Deeming did not say she would not denounce Mrs Keen, Ms Jones and Ms Deves as Nazis without seeing proof.⁹⁹
- (j) Dr Bach never said that Mrs Deeming had gone out celebrating with Nazis after the Rally, nor did he say, ‘You were drinking champagne with Nazi bigots! You filmed it yourselves and put it on the internet!’¹⁰⁰
- (k) Mrs Deeming never told the Leadership Team that Mrs Keen had launched a tirade against Nazism just before they filmed the Video.¹⁰¹
- (l) Mrs Deeming tried to downplay her level of involvement as an organiser of the Rally,¹⁰² despite having been involved in organising the Rally for months beforehand, including paying for security and sound, organising access, liaising regarding insurance and providing briefing notes to Mrs Keen.
- (m) Mrs Deeming never said, ‘I shouldn’t be held responsible for other people’s tweets that I’ve never seen and I’m not condemning anyone without irrefutable proof’, nor that the Leadership Team should not either.¹⁰³

9.9. Mrs Deeming accepted that, from their perspective, she understood why the Leadership Team was concerned with the content of the Jones Tweet.¹⁰⁴ She also accepted there was a real issue about the alleged public associations that Mrs Keen had with Nazis and white supremacists.¹⁰⁵ Those matters were not acknowledged by Mrs Deeming in her affidavits; and her entire narrative to the Party and the public after the meeting quickly became one of there being no substance at all to the allegations put to her in the meeting, a contention that was never correct.

9.10. Mrs Deeming asserted that some of the differences between what actually occurred at the meeting, and her account of what occurred in her affidavits, were based upon her interpretation of what was said.¹⁰⁶ In cross-examination, Mrs Deeming continued to conflate concepts:¹⁰⁷

Dr Collins: Let me put it another way to you. You were being asked about whether, to your knowledge, any of the people you had worked with on the LWS rally might have had sympathies or liaisons with Nazi groups, not whether any of them were Nazis?---Or “worked with” and had liaisons, sympathies – worked with, “liaisons with

⁹⁹ Cf CBB Tab 2, page 85 [88(g)], page 87 [89(i)], page 89 [90(c)], [91(c)] (Second affidavit of Moira Deeming dated 27 May 2024).

¹⁰⁰ Cf CBB Tab 1, page 16 [76] (Affidavit of Moira Deeming dated 27 May 2024).

¹⁰¹ Cf CBB Tab 1, page 16 [76] (Affidavit of Moira Deeming dated 27 May 2024).

¹⁰² Cf CBB Tab 2, page 86 [89(b)] (Second affidavit of Moira Deeming dated 27 May 2024).

¹⁰³ Cf CBB Tab 1, page 17 [79] (Affidavit of Moira Deeming dated 27 May 2024).

¹⁰⁴ T289.2-6 (Deeming XXN).

¹⁰⁵ T289.14-16 (Deeming XXN).

¹⁰⁶ T278.24-24 (Deeming XXN).

¹⁰⁷ T279.1-3 (Deeming XXN).

Nazi groups”. Wouldn’t – I take that to be basically the same meaning, that if they did those kinds of things, then they would be Nazis and I would know them.

- 9.11. Mrs Deeming explained it as ‘I think I mistook a lot of what was said by other people’.¹⁰⁸
- 9.12. It has been suggested on Mrs Deeming’s behalf that she was confused or ambushed at the meeting. That suggestion should not be accepted, when the recording is considered as a whole and one focuses upon Mrs Deeming’s settled understanding towards the end of the meeting (particularly in the transcript of the recording at lines 912-40), rather than her iterative understanding as it unfolded.

Evidence from Mr Pesutto’s witnesses regarding this meeting

- 9.13. Dr Bach, a teacher, said that he has ‘more robust conversations than this with 11 year olds most weeks’.¹⁰⁹ Whether or not that involved a degree of hyperbole, Mrs Deeming was not a child as at 19 March 2023. She was a seasoned politician and no stranger to controversy. The Party had found itself in a growing political crisis of her doing. There was nothing inappropriate about her being called to account for herself before the Leadership Team. In Dr Bach’s view, what occurred at the meeting was ‘most fair’,¹¹⁰ ‘incredibly pastoral’¹¹¹ and Mrs Deeming ‘was treated with respect, as she deserved’.¹¹² His affidavit evidence that the other members of the Leadership Team had dealt with Mrs Deeming with ‘kid gloves’ was reinforced having heard the recording of the meeting.¹¹³
- 9.14. Dr Bach became deeply concerned that Mrs Deeming did not understand the seriousness of what they were talking about.¹¹⁴ Given Mrs Deeming was ‘in her own way a seasoned politician’ given her long stint as a local councillor, Dr Bach did not believe that she could not understand why this was such a huge issue.¹¹⁵
- 9.15. Dr Bach formed the view that Mrs Deeming was not telling the truth that she had no idea her close associates had said and done the things that were alleged.¹¹⁶ The material concerning Mrs Keen and Ms Jones was very easy to access and he could not believe Mrs Deeming had not carried out cursory checks given she was working so closely with them, sharing a stage with them and promoting their event including in Parliament.¹¹⁷ Dr Bach was correct in relation to Mrs Deeming’s knowledge of Mrs Keen’s public associations: prior to the Rally,

¹⁰⁸ T281.27 (Deeming XXN).

¹⁰⁹ T924.14-15 (Bach XXN).

¹¹⁰ T923.46 (Bach XXN).

¹¹¹ T924.16 (Bach XXN).

¹¹² T962.14 (Bach XXN).

¹¹³ T924.18-20 (Bach XXN).

¹¹⁴ T944.23-26, 947.16, 960.27-28, 972.9-10 (Bach XXN).

¹¹⁵ T921.9-11 (Bach XXN).

¹¹⁶ T920.43-45 (Bach XXN).

¹¹⁷ T972.25-29 (Bach XXN).

Mrs Deeming had received, and engaged with, warnings on social media about Mrs Keen having shared platforms with neo-Nazis and white supremacists, including members of the Proud Boys and Jean-François Gariépy.¹¹⁸

- 9.16. Mr Southwick said the recording of the meeting ‘proved that we were very considered and very measured, and the focus was all about the Nazis and not about Mrs Deeming’s personal issues that she was focused on’.¹¹⁹ That is a fair reading of what occurred at the meeting. It was Mrs Deeming who had raised her focus on sex-based rights issues; while the Leadership Team repeatedly told her that that was not the issue, and steered the conversation back to her associations with Mrs Keen and Ms Jones.
- 9.17. Ms Crozier thought Mrs Deeming was defiant in the meeting,¹²⁰ arguing and pushing back the whole way along.¹²¹ Ms Crozier was not convinced by what Mrs Deeming was saying.¹²² Ms Crozier rejected outright the proposition that Mrs Deeming was treated unfairly,¹²³ or harassed and bullied.¹²⁴ Ms Crozier explained that if Mrs Deeming had come in and immediately shown an understanding of the gravity of the situation, things could have been different, but she did not understand the gravity of the neo-Nazis and how she or the Party were being perceived and brought into disrepute.¹²⁵ Mrs Deeming sought to downplay the Rally as nothing more than a ‘listening post’,¹²⁶ and Ms Crozier succinctly and correctly explained why that was a clear mischaracterisation of the Rally.¹²⁷
- 9.18. Mr Pesutto denied that he and his colleagues ‘ganged-up’ on Mrs Deeming in the meeting,¹²⁸ or behaved towards her in an unreasonable way.¹²⁹
- 9.19. By the end of that meeting it was clear to Mr Pesutto, and the rest of the Leadership Team, that ‘Mrs Deeming was not going to do anything like what we needed to do’.¹³⁰ The ‘general denunciations’ offered by Mrs Deeming would not be sufficient.¹³¹ Mr Pesutto put the issue succinctly:¹³²

I think Mrs Deeming, your Honour, knew what the concerns were. She was an MP. The matters that were put to her were, in our view, fairly straightforward. And if

¹¹⁸ Exhibit R26, CBC Tab 733; Exhibit R340, CBC Tab 736.

¹¹⁹ T1082.8-11 (Southwick XXN).

¹²⁰ T1151.12 (Crozier XXN).

¹²¹ T1157.11-12 (Crozier XXN).

¹²² T1152.5-9, T1153.33-34, T1154.24-27, T1155.1-4, T1157.34-36, T1160.13-14, 19-22 (Crozier XXN).

¹²³ T1153.26 (Crozier XXN).

¹²⁴ T1153.29 (Crozier XXN).

¹²⁵ T1154.30-38 (Crozier XXN).

¹²⁶ T1156.32-33 (Crozier XXN).

¹²⁷ T1156.40-43, T1157.2-4 (Crozier XXN).

¹²⁸ T721.5-6 (Pesutto XXN).

¹²⁹ T721.8; CBB Tab 31, page 383 [69] (Second affidavit of John Pesutto dated 22 July 2024).

¹³⁰ T610.30-31 (Pesutto XXN).

¹³¹ T610.45-46 (Pesutto XXN).

¹³² T611.28-33 (Pesutto XXN).

anything surprised, your Honour, it was that anyone having looked at that material and considered what was raised with Mrs Deeming in that meeting would have needed any time to reflect on it. It was pretty obvious how dangerous and how risky it was for the party and its reputation.

- 9.20. Mr Pintos-Lopez, both before and after hearing the recording, considered the tone of the meeting was professional, measured, respectful relatively courteous and ‘about right’.¹³³ He did not think there was anything inappropriate about the way Mr Pesutto had conducted it. Mr Pintos-Lopez said little, but considered the ‘core facts’ he read out to Mrs Deeming were ‘easily digestible’ and ‘sufficient for her to comprehend’ the nature of the allegations about Mrs Keen’s associations.¹³⁴
- 9.21. The cross-examination of Mr Pintos-Lopez regarding the leadership meeting was emblematic of the difficulties which flowed from Mrs Deeming’s mischaracterisation of it. For example,¹³⁵ he gave evidence that his impression was that Mrs Deeming would not ‘distance herself from Mrs Keen and Ms Jones’. In cross-examination, Senior Counsel for Mrs Deeming rephrased this evidence and suggested that Mr Pesutto had asked Mrs Deeming to ‘denounce the women’¹³⁶ and that by asking Mrs Deeming to ‘denounce the women entirely’, he was inappropriately asking her to denounce their views on sex-based rights. Mr Pintos-Lopez disagreed that was what Mrs Deeming was being asked to do.¹³⁷
- 9.22. Thereafter, a confusing exchange followed about whether one can ‘denounce’ a person entirely, or just their conduct or both, at the end of which Mrs Deeming’s senior counsel suggested that Mr Pintos-Lopez’ understanding of the recording was ‘incorrect’.¹³⁸
- 9.23. However, it is clear from the transcript that this exchange proceeded from a false premise. Mr Pesutto never used the word ‘denounce’ in the meeting.¹³⁹ Rather, when exploring the ‘third option’ of a statement, he had suggested that for a statement to have any worth, Mrs Deeming would have to ‘disown’ those people. Mrs Deeming replied ‘Can’t I just disown anything, any views or that they’ve said?’¹⁴⁰ Mr Pesutto started to say he was happy to explore such a statement, before Mrs Deeming quickly cut him off and clarified that she meant ‘like, in

¹³³ CBB Tab 36, page 443 [38] (Affidavit of Rodrigo Pintos-Lopez dated 24 May 2024); T1254.34-55.9 (Pintos-Lopez XXN).

¹³⁴ T1255.38-56.23 (Pintos-Lopez XXN).

¹³⁵ CBB Tab 37, page 443 [39] (Affidavit of Rodrigo Pintos-Lopez dated 24 May 2024).

¹³⁶ T1257.43 (Pintos-Lopez XXN).

¹³⁷ T1258.5-10 (Pintos-Lopez XXN).

¹³⁸ T1258-59.28 (Pintos-Lopez XXN).

¹³⁹ In fact, Mrs Deeming had been the one to use the word ‘denounce’ in the leadership meeting: Exhibit A2 line 842. Later, at line 882, Mr Southwick also used the term ‘denounced’ in response, but only in response to the context of ‘these women that you know’ not having denounced them and instead having taken ‘selfies with them’. It is likely that this was reference to the photo of one of the speakers at the Rally, Stassja Frei, that was by then circulating on social media, posing in front of the Nazis on the steps: see e.g. Exhibit R411, CBC Tab 810.

¹⁴⁰ Exhibit A2 line 650.

general’.¹⁴¹ After Mrs Deeming’s clarification, the discussion turned to whether Mrs Deeming, as a public figure, should ‘actually want to be associated’ with people who had ‘a long history of saying stuff in the public domain, which are pretty bloody offensive’¹⁴² including matters that would be interpreted as the Jones tweet would be.¹⁴³ The settled position was expressed by Mr Pesutto at lines 687-8: a statement ‘would need to go a long way to disassociating yourself from them and disassociating us’. When the recording of the meeting is fairly considered, contrary to the way it was presented on Mrs Deeming’s behalf, it is clear that (a) no-one was asking Mrs Deeming to denounce Mrs Keen or Ms Jones as people; and (b) Mrs Deeming never expressed any inclination to distance herself or disassociate from Mrs Keen or Ms Jones, but was prepared only to distance herself from views expressed in general terms about Nazis, Nazism and the absence of a connection between trans people and paedophilia.¹⁴⁴

10. Credit and general observations on the witnesses

General approach

10.1. In *Russell v Australian Broadcasting Corp (No 3)*, Lee J said at [438]:¹⁴⁵

Many experienced judges have expressed the caution that any criticisms of a witness, which go beyond the legitimate necessities of the occasion, should be avoided. Unnecessary credit findings should be eschewed. Part of this reticence reflects a body of research casting doubt on the ability of judges to make accurate credibility findings based on demeanour: see *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118 (at 129 [31] per Gleeson CJ, Gummow and Kirby JJ).

10.2. There are few issues in this case which will require the Court to make any adverse credit findings. Most differences in the evidence in this case can be explained by differences in information, perception, recollection and opinion.

Mrs Deeming and her witnesses

10.3. Mrs Deeming’s evidence was often characterised by difficulties in distinguishing between things that had in fact occurred, and the way she felt about things that had occurred. She often appeared to have reasoned backwards from her feelings in order to construct a factual narrative that accorded with those feelings. Much of her evidence was inconsistent with

¹⁴¹ Exhibit A2 lines 650-652.

¹⁴² Exhibit A2 lines 653-655.

¹⁴³ Exhibit A2 lines 672-674. Mr Pesutto confirmed that any statement would have ‘need to go a long way to disassociating yourself from them and disassociating us’ (lines 687-688). Mr Southwick clarified, yet again, that this had nothing to do with their views: ‘I think there’s one thing about working on an issue, there’s another thing in terms of associating yourself with those individuals’ (lines 868-869).

¹⁴⁴ Exhibit A2 lines 912-940.

¹⁴⁵ [2023] FCA 1223, [438] (*Russell*).

contemporaneous documents and the accounts of more reliable witnesses. Mrs Deeming forgot things; she misremembered things; she conflated events; she conflated statements; and she conflated her feelings and thoughts with words and actions. For example:

- (a) In cross-examination, Mrs Deeming explained away the obvious inaccuracies in her ‘contemporaneous’ notes of the 19 March 2023 meeting by stating that they reflected ‘what I was feeling’.¹⁴⁶ Mrs Deeming thought it was likely that the notes ‘mixed up my memories from this meeting and the one on the 21st. I mixed them together’.¹⁴⁷ That is one possible explanation, which would be consistent with the other contentious evidence she has given, for example, about her understanding that the compromise agreement meant that she would be ‘exonerated’. However, it means that Mrs Deeming’s recollection that she made the notes ‘a day or so later’¹⁴⁸ must be wrong.
- (b) Upon being shown that she had engaged with or received tweets putting her on notice, prior to the Rally, that Mrs Keen had public associations with the Proud Boys and Jean-François Gariépy, Mrs Deeming accepted she had been incorrect when earlier giving unqualified evidence that she had no prior knowledge of any such alleged associations.¹⁴⁹
- (c) Mrs Deeming accepted that, contrary to what she and a number of her witnesses had alleged in their affidavits, prior to the first of the Publications, her name had been associated with what had happened at the Rally in multiple national media publications.¹⁵⁰ Mrs Deeming accepted that she must have been ‘100 per cent’¹⁵¹ wrong when she had previously thought she had not been named in the media in association with the Rally at that time.¹⁵²
- (d) We have made submissions above about the very significant inaccuracies in Mrs Deeming’s account of what occurred during the 19 March 2023 meeting.¹⁵³

10.4. Mrs Deeming plainly suffered significant distress following the events of the Rally, the public opprobrium cast upon her conduct and associations, and the trauma of her suspension and

¹⁴⁶ T280.1-2 (Deeming XXN).

¹⁴⁷ T283.6-7 (Deeming XXN).

¹⁴⁸ CBB Tab 1, page 17 [86] (Affidavit of Moira Deeming dated 27 May 2024).

¹⁴⁹ T229.14-24 (Deeming XXN).

¹⁵⁰ T241.41-47 (Deeming XXN).

¹⁵¹ T288.28 (Deeming XXN).

¹⁵² T253.4-10; T288.19-23 (Deeming XXN).

¹⁵³ At [9.8].

expulsion from the Parliamentary Party. These events coloured Mrs Deeming's memory and perception; something she and her husband noted in their affidavit evidence.¹⁵⁴

- 10.5. We do not contest that Mrs Deeming gave an honest account of her current feelings, but her poor memory, significant sense of grievance, and enduring (but wrong) belief that Mr Pesutto betrayed her and caused all the harm she has suffered, clearly clouded her evidence, meaning that it was often just wrong on important matters.
- 10.6. A clear example concerned Mrs Deeming's notes of the meeting of 19 March 2023. Mrs Deeming made the notes some time afterwards. Her notes bear little resemblance to what had happened some 24 hours or so earlier, as incontrovertibly established by the recording of that meeting. In particular, the recording reveals the following aspects of the meeting that directly contradict Mrs Deeming's contemporaneous notes:
- (a) the Leadership Team did not talk about Mrs Deeming's views 'over & over';¹⁵⁵
 - (b) Mrs Deeming was not repeatedly asked if she knows Nazis;¹⁵⁶
 - (c) Mrs Deeming never said about Mrs Keen, 'I don't think it's true. Mainstream. 10 years. CPAC backed';¹⁵⁷
 - (d) Dr Bach never said, 'You've spent time with Nazis';¹⁵⁸
 - (e) Mrs Deeming never said, 'Can I see evidence?' and no one said, 'No';¹⁵⁹ and
 - (f) Dr Bach never said, outraged, 'You were drinking champagne with Nazi bigots'.¹⁶⁰
- 10.7. In respect of matters at the heart of this case, Mrs Deeming showed a remarkable lack of interest, despite what appears to have been an almost singular focus on Mr Pesutto's 'allegations' and 'clearing her name' for the past 18 months. For example, despite making numerous statements in the Party room, publicly and in these proceedings about matters such as Mrs Keen's associations and the neo-Nazis' intentions, and having dismissed the Expulsion Motion and Dossier as containing nothing but false statements, Mrs Deeming had never read key documents or even watched the videos referred to in the Expulsion Motion and Dossier.¹⁶¹

¹⁵⁴ CBB Tab 1, page 31 [158] (Affidavit of Moira Deeming dated 27 May 2024); CBB Tab 4, 131 [101] (Andrew Stephen Deeming).

¹⁵⁵ Cf Exhibit R81, CBC Tab 4, page 43.

¹⁵⁶ Cf Exhibit R81, CBC Tab 4, page 43.

¹⁵⁷ Cf Exhibit R81, CBC Tab 4, page 43.

¹⁵⁸ Cf Exhibit R81, CBC Tab 4, page 44.

¹⁵⁹ Cf Exhibit R81, CBC Tab 4, page 45.

¹⁶⁰ Cf Exhibit R81, CBC Tab 4, page 45.

¹⁶¹ T184.17-19 (Deeming XXN); T185.1-17 (Deeming XXN).

10.8. It was particularly striking that, in cross-examination, Mrs Deeming accepted the accuracy of every material part of the contents of the Dossier, including that:

- (a) she had helped organise the Rally;¹⁶²
- (b) she had promoted the Rally;¹⁶³
- (c) she had been photographed, smiling, with Mrs Keen;¹⁶⁴
- (d) Mrs Keen had appeared in a video with Jean-François Gariépy;¹⁶⁵
- (e) Mrs Keen had appeared in a video with Soldiers of Christ Online;¹⁶⁶
- (f) Mrs Keen had appeared in a selfie with Hans Jørgen Lysglimt Johansen;¹⁶⁷
- (g) Mrs Keen had used a Barbie doll in a Nazi uniform as a profile picture;¹⁶⁸
- (h) a speaker at one of Mrs Keen's rallies had quoted from Adolf Hitler's *Mein Kampf*;¹⁶⁹
- (i) neo-Nazis performed a Nazi salute on the steps of Parliament House and held a banner reading, 'DESTROY PAEDO FREAKS' on 18 March 2023;¹⁷⁰
- (j) Mr Sewell had made a public statement in which he said that the neo-Nazis had attended on 18 March 2023 'as a vanguard for a protest';¹⁷¹
- (k) Mrs Keen had posted the Pridestapo image;¹⁷²
- (l) Mrs Deeming had participated in the Video, drinking champagne with Mrs Keen, Ms Jones and Ms Deves;¹⁷³
- (m) in the Video, there was debate about whether the neo-Nazis might in fact have been trans rights activists or police in costume;¹⁷⁴ and

¹⁶² T300.8-11 (Deeming XXN).
¹⁶³ T300.13-15 (Deeming XXN).
¹⁶⁴ T300.16-35 (Deeming XXN).
¹⁶⁵ T302.8-34 (Deeming XXN).
¹⁶⁶ T303.45 (Deeming XXN).
¹⁶⁷ T304.7-21 (Deeming XXN).
¹⁶⁸ T304.27-305.3 (Deeming XXN).
¹⁶⁹ T305.5-7 (Deeming XXN).
¹⁷⁰ T305.16-26 (Deeming XXN).
¹⁷¹ T306.5-12 (Deeming XXN).
¹⁷² T306.21-27 (Deeming XXN).
¹⁷³ T306.32-38 (Deeming XXN).
¹⁷⁴ T307.30-40 (Deeming XXN).

- (n) Ms Jones had posted the Jones tweet..¹⁷⁵
- 10.9. It was then clear that Mrs Deeming was confused as to the terms of the motion that accompanied the Dossier.
- 10.10. The motion related to ‘organising, promoting and attending a rally where [Mrs Keen] was the principal speaker in circumstances where Ms Keen was known to be publicly associated with far right-wing extremist groups including neo-Nazi activists’, and ‘meeting with and publishing a video with Kellie-Jay Keen, Katherine Deves, and Angie Jones’ and the Jones tweet..¹⁷⁶
- 10.11. When questioned, however, Mrs Deeming said that she understood the ‘reason for moving the motion to expel’ as being ‘smearing me with Nazism and implying that I was literally at a Nazi rally’..¹⁷⁷ When pressed as to her misunderstanding, Mrs Deeming said, ‘I just didn’t really know what he was trying to do’..¹⁷⁸
- 10.12. Many of the witnesses called on Mrs Deeming’s behalf were similarly uninterested in the facts underlying the decision to move to expel Mrs Deeming. The members of the Party called on Mrs Deeming’s behalf had reviewed little or none of the evidence referred to or linked in the Expulsion Motion and Dossier..¹⁷⁹
- 10.13. With the exception of Mr Wells and, to a lesser extent, Ms Heath, the other members of Parliament who gave evidence in support of Mrs Deeming presented as generally credible witnesses prepared to make sensible concessions..¹⁸⁰
- 10.14. Mrs Deeming’s witnesses were, however, often mistaken, as is clear from the contemporaneous documents. For example:
- (a) Some of them suggested there had been, or that they had seen, no previous media controversy surrounding Mrs Deeming or her views on social or political issues. That is, however, just wrong. Mrs Deeming had been the subject of such public criticism that articles had been published about ‘The Vilification of Moira Deeming’..¹⁸¹ Ms Wong, for example, gave evidence of the existence of a David and Goliath culture war in Victoria in relation to so-called sex-based rights (a euphemism which we will adopt in these submissions, but which is problematic for a range of reasons which do not need to be explored in these proceedings), in which Mrs Deeming’s views are those of

¹⁷⁵ T307.42-308.1 (Deeming XXN).

¹⁷⁶ Expulsion Motion and Dossier: CBA Tab 15, page 196.

¹⁷⁷ T310.6-10 (Deeming XXN).

¹⁷⁸ T310.27-28 (Deeming XXN).

¹⁷⁹ For example, T462.27-47; T463.1-21 (Hodgett XXN); T477.1-478.6 (Smith XXN); T499.13-500.24 (Wells XXN).

¹⁸⁰ For example, T461.41-43 (Hodgett XXN).

¹⁸¹ For example, Exhibit R109, CBC Tab 71.

‘David’, in contradistinction to the ‘Goliath’ view of government, the media and institutions. Ms Wong said that by February 2023, Mrs Deeming had been ‘publicly vilified’ for her views in relation to sex-based rights, which were seen to be ‘hateful’ and ‘utterly vile’ and to be ‘attacking and inciting’ hatred.¹⁸²

- (b) A number of Mrs Deeming’s witnesses suggested Mr Pesutto was the one to first link Mrs Deeming, the Rally and the neo-Nazi attendance at the Rally. That too was wrong. There had been an explosion of references to Mrs Deeming’s presence at the Rally on social media and in the almost every part of the mainstream press before the first of the Publications. On social media, the most explicit imputations of Nazism, Nazi sympathy and support for Nazism had been published about Mrs Deeming. This was a position Mrs Deeming ultimately accepted.¹⁸³ The significance of this cannot be understated: Mrs Deeming has brought this proceeding on the premise that any damage to her reputation by reason of her involvement in the events of 18 March 2023 began with and was caused by the Publications. That premise is manifestly false. Moreover, most of the imputations pleaded in the SOC, and all of the most serious imputations of Nazism and Nazi sympathy – which we contend are not carried by the Publications — were in fact published about Mrs Deeming by persons other than Mr Pesutto well before the first of the Publications.
- (c) A number of witnesses expressed views as to the events at the Party meeting on 27 March 2023, which on their face appeared to be different to Mr Pesutto but which ultimately came down to a different interpretation of the words they all seem to accept Mr Pesutto said. That difference in interpretation is, we submit, of no moment. The meeting occurred a week after the last of the impugned Publications, and so is irrelevant to questions of liability in this defamation proceeding. At the end of the day, there was a genuine difference of view as to the meaning of the motion passed by the Party on 27 March 2023. That difference was resolved in favour of Mr Pesutto’s interpretation when the minutes of the 27 March 2023 meeting were discussed and adopted on 12 May 2023.¹⁸⁴ By s 251A(6) of the *Corporations Act 2001* (Cth), the signed minutes of the meeting are presumed accurate unless the contrary is proven. Mrs Deeming has not displaced that presumption; she could hardly do so in circumstances where the Court has heard from only a subset of the persons present at the meeting.

¹⁸² T1065.25-41, T1066.4-14, T1068.27-1069.23 (Wong XXN). As reflected in an article published on 26 February 2023 by her organisation, Women’s Forum Australia, called ‘*The Vilification of Mrs Deeming: When Common Sense Clashes with the Authoritarian Left*’ (Exhibit R71, CBC Tab 193).

¹⁸³ T241.41-47 (Deeming XXN).

¹⁸⁴ Exhibit R284, CBC Tab 595.

- 10.15. With respect to the members of Parliament called on Mrs Deeming's behalf (other than Mr Wells and Ms Heath), their perceptions and opinions on the events from 18 to 27 March 2023, and the Expulsion Motion (including whether it justified the expulsion of Mrs Deeming), might have differed from those of Mr Pesutto and the other members of the Leadership Team, but we do not contend that their views were not honestly held. Differences of opinion as to whether the matters in the Expulsion Motion and Dossier justified the expulsion of Mrs Deeming, for example, are to be expected—it was a *motion* put forward for debate and decision by the Party, in circumstances where everyone knew that there was a difference of views.
- 10.16. Ms Heath was a less satisfactory witness. Mr Pesutto accepts that Ms Heath's contemporaneous notes of the 27 March 2023 were a relatively accurate reflection of the words spoken at that meeting. However, Ms Heath was, when cross-examined, unable to recall matters on over 30 occasions,¹⁸⁵ many concerning basic issues. Ms Heath prevaricated and took an overly pedantic and semantic approach to answering questions.¹⁸⁶ Ms Heath falsely denied surreptitiously sharing her notes of the meeting on 27 March 2023 with Mrs Deeming, something that was itself dishonest, done dishonestly by the exchange occurring via Gmail rather than Parliamentary email addresses, and contrary to Ms Heath's understanding of her obligations¹⁸⁷ and express direction she received.¹⁸⁸ Ms Heath only corrected her false evidence after being shown, by Mrs Deeming's solicitors, the Gmail exchange of 29 March 2023 on the evening before she was to face cross-examination,¹⁸⁹ including in relation to a statement in her affidavit that was false.¹⁹⁰
- 10.17. Mr Wells was also an unsatisfactory witness, whose clear animus towards Mr Pesutto¹⁹¹ was matched only by his willingness to insert himself over and again into this dispute and cause trouble. It appears to have been Mr Wells' phone call to Mrs Deeming on the morning of 20 March 2023 that caused Mrs Deeming to believe that: (a) Mr Pesutto was then saying something different about her from what she understood at the end of the meeting with the Leadership Team (an allegation which was entirely out of character and which found no support in any other utterance by Mr Pesutto at any other time); (b) to complain about not having been allowed to bring a support person to the Leadership Team meeting; and (c) to

¹⁸⁵ T412.33, 40-41; T413.2, 5, 34; T414.10, 16, 27, 39, 41, 46; T415.13, 21, 24, 44; T418.15; T421.38; T433.22, 25, 28, 39; T423.2; T424.47; T425.2, 12, 15-16; T428.26; T429.14, 44, 46; T435.25, 46; T436.27, 32, 41 (Heath XXN).

¹⁸⁶ For example, T424.38-44 (Heath XXN).

¹⁸⁷ T422.24-28; T423.27-37 (Heath XXN).

¹⁸⁸ Exhibit R248, CBC Tab 504; noting that Mr Pesutto believed he directed a staffer to tell Ms Heath not to give the meeting notes to Mrs Deeming (T865.28-29) and did not permit Ms Heath to provide the meeting notes to Mrs Deeming (T867.11-12).

¹⁸⁹ T427.23-24 (Heath XXN).

¹⁹⁰ T424.34-36 (Heath XXN); CBB Tab 9, page 176 [47] (Affidavit of Renee Heath dated 27 May 2024).

¹⁹¹ The animus was evident from the language and gratuitous expressions in Mr Wells' affidavits, many of which were ultimately not read following objection. This animus appears to stem from Mr Pesutto's failure to reward Mr Wells with a position in shadow cabinet, following his elevation to the leadership: CBB Tab 31, page 370 [20(a)] (Second affidavit of John Pesutto).

draft incorrect notes regarding what was said at the meeting with the Leadership Team and to engage defamation lawyers later that day. It was also Mr Wells who: (d) negotiated the terms of the 27 March 2023 compromise;¹⁹² (e) sat quietly by while Mr Pesutto announced the terms of the compromise agreement, which he now says he knew Mrs Deeming did not agree with;¹⁹³ (f) told Mrs Deeming to be quiet to stop her raising any objection to the compromise agreement;¹⁹⁴ (g) assisted Mrs Deeming's media campaign, despite the disloyalty inherent in a member of the Party doing so to assist someone who had been suspended by a vote of the Party;¹⁹⁵ and (h) took no efforts to verify the accounts he was given by Mrs Deeming, in circumstances where those accounts were inherently implausible and objectively wrong.¹⁹⁶

10.18. The unqualified nature of Mr Wells' evidence concerning the words allegedly used by Mr Pesutto in both his phone call on 19 March 2023 and in their negotiations in the Party Room on 27 March 2023 (both of which are inconsistent with the evidence of all of the other witnesses,¹⁹⁷ the documents and common sense, as explained in detail elsewhere) means this Court should, in our submission, reject Mr Wells' evidence on those matters where it is inconsistent with that of other witnesses.

10.19. As to Mrs Deeming's other witnesses, most of their evidence is either unexceptional or beside the point. In particular:

- (a) The Rally witnesses' opinions and perceptions in their affidavits do not take matters very far. The video evidence provides a clear account of what happened at the Rally. The public perceptions of those events were more relevant to the political nightmare facing the Party Leadership Team, than the recollections of Rally attendees.
- (b) The reputation witnesses were honest witnesses. However, they are, understandably, Mrs Deeming's friends and supporters, who come from certain circles. All agreed that Mrs Deeming's reputation had not suffered in those circles as a result of the Publications, and may in fact have been enhanced.¹⁹⁸ The reputation witnesses were also unable to give any cogent evidence of actual harm to reputation caused by the Publications. None was able to tie any evidence of harm to reputation to any particular Publication at all. In almost all cases, their evidence was of observations of Mrs Deeming *since* the Publications, not *because of* the Publications. That distinction is fundamental in circumstances where Mrs Deeming's reputation had been smeared

¹⁹² CBB Tab 27, page 300 [28]-[31] (Affidavit of Kim Wells dated 24 May 2024).

¹⁹³ CBB Tab 27, page 300 [32] (Affidavit of Kim Wells dated 24 May 2024).

¹⁹⁴ CBB Tab 27, page 300 [32] (Affidavit of Kim Wells dated 24 May 2024).

¹⁹⁵ T505.14-506.4.

¹⁹⁶ T497.1-16 (Wells XXN).

¹⁹⁷ See CBB Tab 23, page 271 [36] (Affidavit of Ryan Smith dated 21 May 2024); T465.17-30 (Hodgett XXN).

¹⁹⁸ For example, T1071.23-28 (Wong XXN).

with the publication of explicit imputations of Nazism, Nazi sympathies and support for Nazis on 18 and 19 March 2023, prior to any of Mr Pesutto's Publications.

The expert witness, Mr Campey

10.20. Mr Campey was an honest witness. It is very much to his credit that, in cross-examination, he admitted to a litany of errors and shortcomings in his reports. Those matters were so extensive that the reports are ultimately of extremely limited value to the Court.

Mr Pesutto and his witnesses

10.21. Much of the criticism of Mr Pesutto's witnesses was misplaced.

10.22. For example, it was repeatedly put that the members of the Leadership Team had no basis to disbelieve Ms Deeming's assertions about various matters at the 19 March 2023 meeting. However, that was not true. Often what Mrs Deeming had said was inherently implausible given what they knew to be true (for example, that Mrs Deeming was heavily involved in the organisation of the Rally; that the allegations of Mrs Keen having public associations with the far right were 'all over the internet'; and that everyone else, including the mainstream media and the other organisers and official LWS social media, had immediately recognised 'the men' as neo-Nazis and as having attended in support of Mrs Keen).

10.23. Dr Bach cogently explained his concerns. Dr Bach became concerned that Mrs Deeming did not understand the seriousness of what they were talking about.¹⁹⁹ Given Mrs Deeming was 'in her own way a seasoned politician' given her long stint as a local councillor, Dr Bach did not believe that she could not understand why her involvement with the Rally was such a huge issue.²⁰⁰ Dr Bach formed the view that Mrs Deeming was not telling the truth that she had no idea her close associates had said and done the things that were alleged.²⁰¹ The material concerning Mrs Keen and Ms Jones was very easy to access and he could not believe Mrs Deeming had not carried out cursory checks given she was working so closely with them, sharing a stage with them and promoting their event including in Parliament.²⁰² He was objectively correct: despite her denials at the meeting of any knowledge of Mrs Keen's public associations with unsavoury people, Mrs Deeming had in fact been warned before the Rally of Mrs Keen's associations with members of the Proud Boys and Jean-François Gariépy, a matter Mrs Deeming ultimately conceded.²⁰³

¹⁹⁹ T944.23-26, T947.16, T960.27-28, T972.9-10 (Bach XXN).

²⁰⁰ T921.9-11 (Bach XXN).

²⁰¹ T920.43-45 (Bach XXN).

²⁰² T972.25-29 (Bach XXN).

²⁰³ T229.20, T237.10-27 (Deeming XXN).

10.24. It was repeatedly put to Mr Pesutto's witnesses that their interpretations of what had occurred at the Leadership Team meeting were wrong or dishonest. There was, at least, a high degree of chutzpah in the puttage, having regard to:

- (a) Mrs Deeming's contemporaneous account to a journalist, which showed that she well understood the Leadership Team's concerns as expressed at the meeting. That account was quite different from what Mrs Deeming later asserted in her affidavits, and what her senior counsel put in cross-examination to Mr Pesutto and the other members of the Leadership Team.²⁰⁴
- (b) Mrs Deeming's own understanding of what she had offered at the meeting, namely to make some general statements (without reference to Mrs Keen or Jones or their specific conduct) condemning Nazism and bigotry towards the LGBTQI+ community, was substantially the same as the Leadership Team's evidence and contrary to what was put to Mr Pesutto and the other members of the Leadership Team in cross-examination.²⁰⁵
- (c) Despite Mrs Deeming, at certain points in the meeting, saying that she understood and shared the Leadership Team's concerns about the material they had uncovered, within 24 hours of the meeting, Mrs Deeming had put out a statement on social media saying that she and the other organisers of the Rally had done 'nothing wrong'.²⁰⁶ That conduct by Mrs Deeming showed that she never had any intention of disassociating herself from Mrs Keen or Ms Jones as the Leadership Team had wanted. It was quite wrong to put to Mr Pesutto and the other members of the Leadership Team in cross-examination that Mrs Deeming had, in effect, been prepared to do anything to avoid an expulsion motion being moved against her. As Mr Pesutto explained, he felt vindicated in his assessment of Mrs Deeming when, less than 24-hours later, Mrs Deeming issued that statement.²⁰⁷

10.25. There is no basis for any submission, let alone a finding, that Mr Pesutto or any of the witnesses he called gave dishonest evidence, as was repeatedly put to them. Each witness is dealt with in turn.

10.26. Mr Pesutto was a courteous and honest witness, willing to make concessions where appropriate. He was criticised by Mrs Deeming's senior counsel, at times, for making speeches in the witness box or for acting like a politician. Those criticisms were not well-founded. A

²⁰⁴ Exhibit R138, CBC Tab 153, page 689

²⁰⁵ T610.37-45 (Pesutto XXN); T942.6-10 (Bach XXN); T1151.38-43 (Crozier XXN); T1094.4-7 (Southwick XXN).

²⁰⁶ Exhibit R39, CBC Tab 394, as explained further at 48.68 below.

²⁰⁷ T615.26-29 (Pesutto XXN).

central issue in this case is Mr Pesutto's state of mind at all relevant times and, in particular, whether he honestly believed the Publications were in the public interest, and honestly held the opinions he expressed. Mr Pesutto was entitled—indeed required—to explain his thought processes to the Court. That he did so, over almost four days of at times very repetitive cross-examination, with unfailing courtesy, stands very much to his credit.

10.27. When Mr Pesutto remained steadfast in his beliefs and honesty, while retaining his composure and courtesy, to the frustration of the cross-examiner, it was put to him, variously, that:

- (a) when he knows a truthful answer would not assist him, he doesn't answer it;²⁰⁸
- (b) he was treating the questioning in cross-examination like a press-conference;²⁰⁹ and
- (c) he was not there to answer questions truthfully.²¹⁰

10.28. There was no proper basis for those criticisms, each of which Mr Pesutto rejected.

10.29. Mr Pesutto's decision not to disclose the existence of a recording of the 19 March 2023 meeting earlier is open to criticism, but his explanation for not doing so should be accepted as honest. He explained that Mr Southwick told him that Mr Southwick had a recording of the meeting in late 2023 or early 2024.²¹¹ He was not sure if he became aware of this after his defence was filed.²¹² Mr Pesutto was surprised that Mr Southwick had recorded the meeting, but did not think it was his material or evidence to disclose.²¹³ It was suggested to Mr Pesutto that in fact he did not want to obtain a copy of that recording because it would contradict his account of that meeting - a matter Mr Pesutto denied²¹⁴ (and which it is submitted the recording demonstrates was an appropriate denial).

10.30. Dr Bach was an honest and engaged witness. Dr Bach is now far removed from his Parliamentary colleagues ('old, but separated friends'²¹⁵), working as a teacher in the United Kingdom, well away from the world of Victorian politics. He had no motivation to lie or dissemble, and his evidence was consistent with contemporaneous records and other witnesses. Despite a clear regard he had for Mrs Deeming as a colleague,²¹⁶ Dr Bach was frank in his concerns that the comments and associations of Mrs Keen and Ms Jones implied that

²⁰⁸ T815.19-20 (Pesutto XXN).

²⁰⁹ T815.23-25 (Pesutto XXN).

²¹⁰ T815.27 (Pesutto XXN).

²¹¹ T576.15-24 (Pesutto XXN).

²¹² T576.26-27 (Pesutto XXN).

²¹³ T576.30, 34 (Pesutto XXN).

²¹⁴ T577.35-37 (Pesutto XXN).

²¹⁵ T934.3 (Bach XXN).

²¹⁶ For example, making a point of seeking her out to ensure Mrs Deeming was 'comfortable' with his response should he be asked about her views in an interview: T909.8-11; seeking her input and engaging on issues Dr Bach thought Mrs Deeming 'would care deeply about': T910.36-44.

the Party, through Mrs Deeming, was not being careful enough to ensure that members of the LGBTI+ community knew that the Party saw and respected them.²¹⁷ Dr Bach considered Mrs Keen and Ms Jones' views, as he perceived them, to be utterly anathema to the Party and politically toxic.²¹⁸ Dr Bach's principal concern was the linkage that had developed through Mrs Deeming to Mrs Keen and Ms Jones.²¹⁹ Dr Bach was also concerned about broader issues concerning the treatment of trans people and sensitive and appropriate ways to talk about trans issues.²²⁰

10.31. Mr Southwick was a witness with a strong emotional connection to the horrific events of 18 March 2023. While Mr Southwick's failure to disclose at an earlier date the recording he made of the 19 March 2023 meeting is open to criticism, his reason for making the recording was compelling and deeply personal. He explained that 18 March 2023 had been a very triggering event, and was 'one of the darkest days for a member of the Jewish community to be exposed' to.²²¹ Following his phone call to Mrs Deeming on the afternoon of that day, Mr Southwick had expectations of her, and was 'more than disappointed' and in fact 'shocked' at what had happened. The trivialisation of the events of that day in the Video was 'so offensive' to Mr Southwick he felt he couldn't trust Mrs Deeming.²²² He considered Mrs Deeming had lied to him about what she was going to do that day in response to the Rally and he therefore needed to take steps to protect himself. He had never taped a private conversation with a colleague before, but it was so very personal to him, that he did so.²²³ He was anxious to ensure that events weren't 'turned around and misconstrued'.²²⁴ It was a decision Mr Southwick only made walking into the room; a decision that was not premediated.²²⁵ That Mrs Deeming subsequently gave false accounts of what occurred in the 19 March 2023 meeting (for example, as recorded in the meeting notes of the 21 March 2023 Party Room meeting,²²⁶ and in sworn affidavits in this proceeding), suggests that Mr Southwick's concerns proved prescient.

10.32. The thesis that Mr Southwick did not disclose the recording because it was damaging to Mr Pesutto's case is nonsense. The recording showed Mrs Deeming's sworn account, in two affidavits, to be wrong in many material respects. The recording, as we have explained above, is damning of Mrs Deeming's credit and means that the entirety of her evidence as to her purported recollections of key events has to be treated with caution. On the other hand, the recording shows that the accounts of the 19 March 2023 meeting given by Mr Pesutto and the

²¹⁷ T908.42-46 (Bach XXN).
²¹⁸ T920.37-38 (Bach XXN).
²¹⁹ T927.39-42, T941.43-44, 46-47 (Bach XXN).
²²⁰ T978.32-33 (Bach XXN).
²²¹ T998.25-28 (Southwick XXN).
²²² T998.37 (Southwick XXN).
²²³ T998.38-41 (Southwick XXN).
²²⁴ T999.27 (Southwick XXN).
²²⁵ T1000.25-49 (Southwick XXN).
²²⁶ Exhibit R228, CBC Tab 432, page 2225.

other members of the Leadership Team were honest accounts of their recollections. To the extent that there are differences between those recollections and the recordings, they were matters of detail, not fundamental substance, and readily explained by the vicissitudes of human memory.

- 10.33. Mr Southwick was otherwise a witness who we submit was plainly doing his best to give honest answers and assist the Court – even when he became emotional. His raw and honest evidence, ‘And that’s why I took huge offence of that, because any Jew that I know that sees someone performing a Nazi salute is a Nazi. I don’t know anybody that would think that any different, except for Ms Deeming’, did not deserve the sarcastic retort from counsel thanking him for making a speech.²²⁷ Nor should it have been sarcastically put to Mr Southwick that the Court had ‘heard a lot from you on how you feel’; nor when Mr Southwick apologised, should it have been put to him, ‘I don’t think you are sorry’.²²⁸
- 10.34. Ms Crozier was also an honest and compelling witness. Ms Crozier was no adversary of Mrs Deeming. Ms Crozier was eager to support Mrs Deeming to become a successful member of Parliament, and a part of the Party team, and supported her to run as Opposition Whip.²²⁹ Ms Crozier in her position as Shadow Minister for Women had spoken out in favour of balancing laws to ensure the protection of women’s rights.²³⁰ She had also taken a number of points of order in Mrs Deeming’s defence in response to Mrs Deeming’s maiden speech, which was the subject of attack in the House and was being reported widely.²³¹ When she thought Mrs Deeming’s conduct was worthy of praise, she gave it without hesitation, for example noting that Mrs Deeming ‘performed well’ in her presentation for preselection.²³² Ms Crozier also congratulated Mrs Deeming on her maiden speech, which was ‘absolutely’ a genuine expression of her feelings.²³³ The corollary of this was she was equally clear when she thought Mrs Deeming’s conduct was worthy of censure: ‘What was ridiculous was having a hair appointment, I would suggest’.²³⁴ Of this peripheral yet telling incident, Ms Crozier, it is submitted fairly stated ‘It’s Parliament’.²³⁵ The Court should have no hesitation in accepting Ms Crozier’s evidence.
- 10.35. Ms Staley also shared a number of views with Mrs Deeming regarding sex-based rights.²³⁶ Ms Staley provided the Court with insight into the Party’s internal processes, including as to

²²⁷ T1055.34-38 (Southwick XXN).

²²⁸ T1092.12-16 (Southwick XXN).

²²⁹ T1131.23 (Crozier XXN).

²³⁰ T1125.9-11 (Crozier XXN).

²³¹ T1135.1-6 (Crozier XXN).

²³² T1129.6-7 (Crozier XXN).

²³³ T1134.30-38 (Crozier XXN).

²³⁴ T1134.6-9 (Crozier XXN).

²³⁵ T1133.27-29 (Crozier XXN).

²³⁶ T1190.40-1191.21 (Staley XXN).

preselection.²³⁷ Ms Staley was a clear and confident witness, who answered questions succinctly and directly. She explained in clear terms why she considered aspects of Mrs Deeming's views extreme.²³⁸

- 10.36. Mr Pintos-Lopez was an impressive witness. Shortly after his cross-examination commenced, it was clear that the earlier aspersions that had been regularly cast upon both him and his work were unjustified and undeserved.²³⁹ Far from deliberately misleading either Mrs Deeming or anyone else, what he had done was strip back the numerous allegations and opinions of others that he had found on the internet (during over three hours of searching, viewing material and chasing down rabbit holes) to the 'core facts', then reference them. Mr Pintos-Lopez explained that he distinguished between core facts, and characterisations of those facts.²⁴⁰
- 10.37. Further, the oft-repeated suggestion that Mr Pintos-Lopez had failed to read, or deliberately excluded exculpatory material in order to mislead, was shown to be false.²⁴¹ Ultimately, every 'core fact' Mr Pintos-Lopez selected and read out during the 19 March 2023 meeting and included in the Expulsion Motion and Dossier was ultimately admitted by Mrs Deeming to be true (see 10.8 above). It was clear from Mr Pintos-Lopez's evidence, as would be expected of a former barrister and Tribunal member, that he was acutely aware of his obligations as a witness, which was reflected in the conscientious and professional manner in which he gave evidence.
- 10.38. Mr Johnston was an honest witness, and, no longer being part of Mr Pesutto's staff, had no motivation to do anything other than provide assistance to the Court.
- 10.39. Similarly, Mr Woff was a frank witness who gave clear evidence about what he had done, and had been directed to do, in the course of his employment over the relevant period. He was frank about the conversation in which he was directed to distribute the Expulsion Motion and

²³⁷ T1191.47-1192.12 (Staley XXN).

²³⁸ T1194.7-15 (Staley XXN).

²³⁹ T26-27, T32-34 (opening); T565.11-12 (during cross-examination of Mr Pesutto: 'you would agree ...this dossier is no better than a project prepared by an eight year old?')

²⁴⁰ T1249.2-11 (Pintos-Lopez XXN).

²⁴¹ The repeated criticism was that he not read the last sentence of the second bullet point regarding the Garipey article which said: 'Keen denied prior knowledge of the interviewers' far-right affiliations', and that he did this to make the allegations against Keen look worse than they were. However, as Mr Pintos-Lopez explained that was not a 'core fact' and it is clear from the transcript of the meeting with Leadership Team that he also did not read the next sentence (the first of the third bullet point), which said: 'Parker has faced numerous allegations of courting ideas of white supremacy.' There is, apparently no complaint from Mrs Deeming that Mr Pintos-Lopez chose not to read or include that non-core fact, which was an inculpatory line from the article in *The National* (Exhibit R136, CBC Tab 143, page 663) which Mr Pintos-Lopez appears not to have included, for the same reason he also did not include every exculpatory statement from the Pink News article (he did not consider them to be a core fact he could verify). Also, to be clear, there were numerous further allegations against Mrs Keen both on Twitter and in the article in *The National* and it is to his credit that Mr Pintos-Lopez included multiple sources of the same allegation regarding the Garipey interview, and a link to the one with Mrs Keen's exculpatory statements, rather than simply including the link to the article in *The National* which did not include quotes from Mrs Keen.

Dossier to the media.²⁴² He did not dissemble, and when he accepted propositions put to him he described them as a ‘fair characterisation’.²⁴³ His demeanour was open and candid.

11. Mrs Deeming’s failure to call Mrs Keen and Ms Jones (*Jones v Dunkel*)

Applicable principles

- 11.1. The rule in *Jones v Dunkel*²⁴⁴ provides that an unexplained or not readily understood failure by a party to call a witness may, in appropriate circumstances, lead to an inference that the uncalled evidence would not have assisted the case of the party who might be expected to call the witness.
- 11.2. The inference may only be drawn in relation to a witness (as opposed to a party) if the following conditions are met:²⁴⁵
 - (a) the witness would be expected to be called by one party rather than the other;
 - (b) the witnesses’ evidence would elucidate a particular matter; and
 - (c) the witnesses’ absence is unexplained or not readily understood.
- 11.3. The significance of the inference depends on the closeness of the relationship of the absent witness with the party who did not call the witness.²⁴⁶ The degree to which a witness may be said to be in a party’s camp will generally be stronger where there is evidence of an ongoing relationship, because ‘the rule in *Jones v Dunkel* is a principle founded in common sense’.²⁴⁷
- 11.4. The rule in *Jones v Dunkel* does not require a party to give ‘cumulative evidence’ or to waste time calling unnecessary witnesses under pain of an adverse inference.²⁴⁸
- 11.5. The failure to call a witness is of probative significance where another witness has a ‘lack of recollection and obfuscation’, and particularly when dealing with inferences arising out of documentary evidence or where there is contradictory evidence or inferences to be given.²⁴⁹

²⁴² T1185.13-28 (Woff XXN).

²⁴³ T1186.27-29 (Woff XXN).

²⁴⁴ (1959) 101 CLR 298.

²⁴⁵ *Payne v Parker* [1976] 1 NSWLR 191, 201 (Glass JA), cited with approval in *ASIC v Hellicar* (2012) 247 CLR 345, 447 [264] (Heydon J), who adopted that approach in analysing the issue in that case: see [264]-[268]. See also *Ghazal v Government Insurance Office of New South Wales* (1992) 29 NSWLR 336, 343.

²⁴⁶ Approved in *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157, 176 [64] and *ASIC v Australian Lending Centre Pty Ltd* (No 3) (2012) 213 FCR 380, 417 [153].

²⁴⁷ *Director, Office of the Fair Work Building Industry Inspectorate v CFMEU* [2013] FCAFC 8 [102].

²⁴⁸ *Cubillo v Commonwealth of Australia* (No 2) (2000) 103 FCR 1, 120 [360]. See also JD Heydon, *Cross on Evidence*, Australian edition (LexisNexis loose-leaf, accessed online March 2018) [1215].

²⁴⁹ *Charan v Nationwide News Pty Ltd* [2018] VSC 3 [343].

- 11.6. Before there is any work for *Jones v Dunkel* to do, the inference that is sought needs to be articulated by reference to the evidence otherwise before the Court, so that an assessment can be made as to whether the absent witness could have shed relevant light upon whether the inference ought to be drawn, or whether in light of the evidence some explanation is called for. *Jones v Dunkel* inferences do not operate at large.
- 11.7. A number of the issues in this litigation, including many of the matters the subject of Mrs Deeming’s reply, concern the conduct, beliefs, views and associations of Mrs Keen and Ms Jones. Many of the matters put to Mr Pesutto’s witnesses also contained presumptions or propositions as to Mrs Keen or Ms Jones’ state of mind or intentions.²⁵⁰
- 11.8. Mrs Keen and Ms Jones have been close associates and strong public supporters of Mrs Deeming since the Rally.²⁵¹ At the end of her cross-examination, Mrs Deeming confirmed that she was still in regular contact with Ms Jones,²⁵² and that Ms Jones had been in Court during the trial.²⁵³ Mrs Keen messaged Mrs Deeming with encouragement early in the trial.²⁵⁴ Mrs Deeming was still proud, as of 19 September 2024, to be associated with Mrs Keen and Ms Jones.²⁵⁵ Ms Jones was in Court for much of the trial. Both Mrs Keen and Ms Jones were regularly tweeting, throughout the trial, in support of Mrs Deeming, and often in terms that were appallingly disparaging of others.²⁵⁶
- 11.9. In the premises, there can be no dispute that Mrs Keen and Ms Jones are in Mrs Deeming’s camp and that she is the party who would have been expected to call them as witnesses. The submission made by Mrs Deeming’s counsel during objections to evidence that such *Jones v Dunkel* inferences can have no role to play in this case because Mrs Deeming does not bear the onus in respect of a defence they are relevant to is contrary to authority and cannot be sensibly maintained.²⁵⁷ In any event, Mr Pesutto denies the inferences are relevant solely to the contextual truth defence; they are relevant to various matters, including various allegations expressly pleaded by Mrs Deeming (see, for example, Reply [2.4 (xiii)-(viii)]; [3.4]; [6.3(b)]).
- 11.10. Mrs Deeming chose not to call either Mrs Keen or Ms Jones to give evidence. Instead, this trial has played out in circumstances where Mrs Deeming’s senior counsel repeatedly made assertions from the bar table about what Mrs Keen and Ms Jones must have meant by things

²⁵⁰ For example, the proper interpretation or intended meaning of the Jones tweet.

²⁵¹ Exhibit R222, Tab 392; Exhibit R249, CBC Tab 208; Exhibit R292, CBC Tab 619; Exhibit R312, CBC Tab 683; Exhibit R313, CBC Tab 684; Exhibit R555; Exhibit R556.

²⁵² T349.43-46 (Deeming XXN).

²⁵³ T350.4 (Deeming XXN).

²⁵⁴ T351.5-9 (Deeming XXN).

²⁵⁵ T350.42-43 (Deeming XXN).

²⁵⁶ Exhibit R555; Exhibit R556.

²⁵⁷ T296.9-14; *Charan v Nationwide News Pty Ltd* [2018] VSC 3 [341]-[351], noting that the inferences sought to be drawn were only relevant to the justification defence on which the plaintiff, Mr Charan, bore no onus.

they had said, or why their actions and associations should be excused, or how the obvious meaning of their social media posts or comments in videos have been misinterpreted or misrepresented. In respect of each of those matters, inferences to the effect that the evidence that Mrs Keen and Ms Jones could have given would not have assisted Mrs Deeming's case can and should readily be drawn.

E. **SERIOUS HARM**

12. **Introduction to serious harm**

Overview of legal principles

12.1. Section 10A(1) of the Act provides:

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.

12.2. Mrs Deeming bears the onus of establishing the serious harm element for each Publication.

12.3. The subsection invites attention to two distinct matters: harm actually caused by the publication of the matter; and harm likely to be caused.²⁵⁸ However, the focus of the provision is solely on harm to reputation; injury to feelings, however grave, does not bear on serious harm.²⁵⁹

12.4. Section 10A of the Act requires Mrs Deeming to prove, as a matter of fact, that the publication of *each* separate Publication caused, or is likely to cause, serious harm to her reputation.

12.5. As this Court said in *Greenwich v Latham*:²⁶⁰

The question of whether a statement has caused or is likely to cause serious reputational harm is a matter of fact, which can be established only by reference to the impact which the statement is shown actually to have had. It depends on a combination of the inherent tendency of the words and their actual impact on those to whom they were communicated...

12.6. In *Peros (No 3)*, Applegarth J said:²⁶¹

As a matter of first principle governing causation of loss and damage, a defendant is liable only for the harm to reputation and other loss caused by its publication. The starting point under s 10A is that the defendant is responsible only for harm to a

²⁵⁸ *Lachaux v Independent Print Ltd* [2015] EWHC 2242 (QB); see also [2020] AC 612 [20].

²⁵⁹ *Rader v Haines* [2022] NSWCA 198 [28(3)], [29(3)].

²⁶⁰ [2024] FCA 1050 [163]-[164].

²⁶¹ *Peros (No 3)* [73]-[74], [78].

claimant's reputation that is caused by the defamatory publication sued over, not for harm caused by other publications or other causes. ...

In proving the "serious harm" element of the cause of action and in proving damages at trial, the plaintiff must attempt to isolate the damage caused by the publication of which he or she complains....

- 12.7. Courts now have to 'grapple with questions of causation [of harm to reputation], in a way they have not needed to before in defamation cases'..²⁶²

Matters confounding the serious harm analysis in this case

- 12.8. It cannot be doubted that Mrs Deeming will have suffered serious harm to her reputation in the minds of some people following the events of 18 and 19 March 2023, not least because the most explicit imputations of Nazism, Nazi sympathy and support for Nazis were published about Mrs Deeming online by persons other than Mr Pesutto on 17, 18 and 19 March 2023..²⁶³

- 12.9. For the purposes of the s 10A enquiry, there are seven confounding factors to be grappled with, which we address in turn in sections 13 to 19 below. Miscellaneous matters are then dealt with in section 20.

- 12.10. **Extant reputation.** Mrs Deeming had an extant polarising reputation, consideration of which must be the starting point for the serious harm analysis..²⁶⁴ People held entrenched views about her. She had been publicly vilified for her views,²⁶⁵ which were regarded by some as hateful. Her reputation was not, therefore, undamaged at the time of publication of the Publications..²⁶⁶

- 12.11. **Earlier publications by third parties.** Unlike the position in most defamation cases (*Greenwich v Latham* is a recent example), Mrs Deeming's reputation was damaged in a very large number of publications by third parties occurring before the first of Mr Pesutto's Publications, both on social media and in legacy media. The effect of those publications has to be isolated and excluded from analysis of the effect on Mrs Deeming's reputation of the publication of the Publications..²⁶⁷

- 12.12. **Publications sued on have to be considered separately.** Mrs Deeming sues Mr Pesutto in respect of five Publications. If the Court finds that some of those Publications are not

²⁶² David Rolph, *A serious harm threshold for Australian defamation law* (2022) 51 Aust Bar Rev 185, 201.

²⁶³ Schedule C.

²⁶⁴ *Peros (No 3)* [231].

²⁶⁵ Ms Wong gave evidence that as at 26 February 2023, Mrs Deeming had been the subject of public vilification, smeared and attacked following her maiden speech: T1069.29-30, 40-42, T1070.13-18 (Wong XXN). Ms Wong also gave evidence that people like Mrs Deeming are sometimes vilified and derided as transphobic and having hateful views in the public square: T1066.4-22 (Wong XXN). See also Exhibit R116, CBC Tab 78; Exhibit R71, CBC Tab 193.

²⁶⁶ *Peros (No 3)* [231].

²⁶⁷ *Peros (No 3)* [67]-[72], [241]-[243]; *Selkirk v Wyatt* (2024) 302 FCR 541, 563 [98].

actionable, then any assessment of the damage to Mrs Deeming's reputation from the publication of an actionable Publication must be made that excludes any harm to reputation arising out of the Publications which are not actionable. If the Court finds that a Publication is actionable, any serious harm to reputation caused by that Publication must be excluded from the serious harm analysis in respect of any subsequent Publication. In the present matter, for example, if the Court were satisfied that the publication of the Media Release had caused or was likely to cause serious harm to Mrs Deeming's reputation, and had been very widely published, it is commensurately less likely that the subsequent Publications will have caused or been likely to cause serious damage to Mrs Deeming's reputation.

- 12.13. **Republications.** Mrs Deeming relies upon alleged republications of the 'sense and substance' of each Publication (save for the 3AW Interview) but only as to damages.²⁶⁸ Therefore, as a matter of law, the effects of those republications cannot be used to establish serious harm, which is a threshold element of the cause of action.²⁶⁹ In any event, on a proper analysis of the alleged republications (discussed further below), almost all of the alleged republications upon which Mrs Deeming relies do not carry any of the imputations of which Mrs Deeming complains.
- 12.14. **Self-harm.** Mrs Deeming did significant damage to her own reputation, by continuously putting into the public domain assertions that she had been smeared by Mr Pesutto with Nazism, Nazi associations and having Nazi sympathies, including by the statements set out in Annexure D to the Defence. In so doing, she published defamatory imputations about herself, being imputations which Mr Pesutto denies were carried by any of the Publications. Mrs Deeming's self-harm, too, must be excluded from the serious harm analysis in respect of any actionable Publications.²⁷⁰
- 12.15. **No actual evidence on harm.** There is no evidence before the Court of actual harm to reputation that is tied to any particular Publication, meaning that Mrs Deeming's case is entirely inferential. This is not a case like *Greenwich v Latham* where one could see public responses to a publication that picked up on and repeated the imputation carried by the publication, so as to give rise to a clear chain of causation. The inferential case is made all the more complicated by Mrs Deeming having pleaded some 67 imputations (64 of which are pressed), in circumstances where it is plain that many (we submit all but two) are not carried.

²⁶⁸ SOC [3.5], [12.9], [17.5], [22.6]: CBA Tab 2, pages 8, 22, 28, 33.

²⁶⁹ *Amersi v Leslie* [2023] EWHC 1368 (KB), [150]-[159], but particularly [155]; *Greenwich v Latham* [2024] FCA 1050, [164] (and the cases cited therein), and as is implicit from the causal analysis at [180]-[186].

²⁷⁰ Cf SOC [7.14]: CBA Tab 2, pages 15-16 relied upon in respect of the Publication by way of cross-reference: CBA pages 12-34.

12.16. **Mitigatory publications by Mr Pesutto.** Any damage that might otherwise have been done to Mrs Deeming’s reputation by the publication of the Publications concerning the matters she principally complains of, namely smears of Nazism and sympathy for Nazism, has been mitigated by Mr Pesutto’s repeated public statements acknowledging he does not believe Mrs Deeming to be a neo-Nazi, a white-supremacist, or anything of similar substance or effect, and distinguishing between the conduct, associations and views of Deeming and the other organisers of the Rally, as set out in Annexure C to the Defence.

The pleaded case on serious harm

12.17. Mrs Deeming’s pleading of the serious harm element for each of the Publications is confusing, prolix and repetitive.²⁷¹ Various allegations are repeated across Publications, and there is extensive cross-referencing in the allegations between later Publications and earlier Publications; sometimes when it is clearly inapposite.

12.18. Mrs Deeming’s case, however, appears to boil down to the following matters, from which she invites the Court to infer the existence of serious harm:

- (a) the seriousness of the defamation and the unrestricted nature of the Publications;
- (b) the status of Mr Pesutto as leader of the Party, further or alternatively, the status of Neil Mitchell and the Australian Broadcasting Corporation;
- (c) Mrs Deeming and one of her supporter’s comments on meaning at the meeting on 27 March 2023;
- (d) the alleged campaign, the cumulative effect of multiple publications or the effect of alleged republications, or the publication in the *Herald Sun* at Schedule D of the SOC;
- (e) the alleged wide discussion of Mr Pesutto’s ‘false allegations’ on online platforms: SOC [7.8], or the perceived effects of two events over six months later which do not appear to be tied to Mr Pesutto, let alone a particular Publication SOC [7.17]; and
- (f) the extent of publication and the nature of the publications.

12.19. Mr Pesutto accepts that relevant considerations when determining whether a claimant has established the serious harm element will ordinarily include:²⁷² the gravity/seriousness of the defamation; the extent of publication; who the statements were published by and to; the

²⁷¹ SOC [7], [11], [16], [21], [26]: CBA Tab 2, pages 12-34.

²⁷² *Peros (No 3)* [67]-[72]; *Hun To v Aljazeera International (Malaysia) SDN BHD* [2023] FCA 1103 [48].

inherent probabilities; and evidence of the actual impact of the publications. We address those matters in section 20 below.

Multiple publications on the same subject matter and the alleged ‘campaign’

- 12.20. The cumulative effect of the Publications, the alleged republications (which are otherwise relied upon only as to damages) and the articles in Schedule D of the SOC (only one of which is alleged to be a republication), as well as the alleged ‘campaign’ by Mr Pesutto, cannot be used by Mrs Deeming to discharge her statutory burden to establish serious harm in the manner suggested by her pleading. That is because the statutory question directs attention to, and only to, whether the publication of *each* Publication caused or was likely to cause serious harm.
- 12.21. The difficulty with the approach adopted by Mrs Deeming was explained by Collins Rice J in *Sivananthan v Vasikaran*,²⁷³ in a passage set out twice in *Peros (No 3)*:²⁷⁴

If a defendant has undertaken a protracted course of conduct publicising allegations, a corresponding improbability arises that any member of that public later re-encountering them in published form will be impacted *as an effect of that specific publication*. The serious harm test is about the impact of an individual publication by a defendant on its readership. If the readership already knows everything about the defendant’s view of the claimant contained in the publication from the defendant’s own history and course of conduct, it is correspondingly unlikely that the publication will have material impact.

Reputational harm cannot be aggregated for the purposes of serious harm

- 12.22. As a matter of law, Mrs Deeming cannot aggregate the harm caused by each Publication to satisfy a threshold element of the cause of action for each Publication.
- 12.23. That position is well established in the United Kingdom,²⁷⁵ where Collins Rice J recently explained in *Mahmudov v Sanzberro*:²⁷⁶ ‘the authorities are clear that *each and every* element must be made out in relation to *each* publication complained of...’;²⁷⁷ and ‘since each publication must satisfy the test, *it is not possible to aggregate or cumulate injury to reputation over a number of statements or publications* in order to pass the threshold’.²⁷⁸
- 12.24. That reasoning is obviously applicable in Australia, given serious harm is (unlike in the United Kingdom) a separate element of the cause of action in respect of *each* matter.²⁷⁹

²⁷³ [2022] EWHC 2938 (KB) [56] (emphasis in original), referring to *Lee v Brown* [2022] EWHC 1699 (QB)

²⁷⁴ *Peros (No 3)* [78], [232].

²⁷⁵ [2018] EWHC 1961 (QB) [22] (*Sube*), cited in [2022] 4 WLR 29 [36] (emphasis in original).

²⁷⁶ *Mahmudov v Sanzberro* [2022] 4 WLR 29.

²⁷⁷ *Ibid* [36] (emphasis in original).

²⁷⁸ *Ibid* [42]; see also Mullis et al *Gatley on Libel and Slander* (Sweet & Maxwell, 13th ed, 2022) [4-011].

²⁷⁹ Section 10A(1) provides: ‘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

- 12.25. In the SOC, Mrs Deeming pleads serious harm separately for each Publication, save for in [7.6(b)].²⁸⁰ of the SOC in respect of the Media Release and the 3AW Interview. However, the pleaded allegations in respect of serious harm for each Publication are almost identical, rely upon and cross-reference various matters in respect of every Publication, and place great emphasis on Mr Pesutto's alleged 'campaign' which, as we have already submitted, is irrelevant.
- 12.26. Further, most of the particulars of harm and the evidence of harm to reputation are expressed in very general terms such as 'since the Publications', meaning there has been no real attempt (save for the failed attempt in Mr Campey's reports) to identify the harm to reputation caused by *each* distinct Publication.

Proof of serious harm and the burden of establishing causation

- 12.27. Proof of serious harm has been discussed in a variety of helpful recent decisions, including amongst others, *Greenwich v Latham*.²⁸¹ and in *Peros (No 3)*.²⁸²
- 12.28. A useful recent case in England and Wales which gives rise to some of the same issues that confront Mrs Deeming in the present matter is *Miller v Turner*.²⁸³ In that case, the claimants (Mr Miller and Ms Power) had to establish that the defendant (Mr Turner) had caused or was likely to cause serious harm to their reputations by Tweets he had posted, in circumstances where Mr Miller and Ms Power were controversial figures, and there was confounding material in the public domain that was damaging to their reputations for which Mr Turner was not responsible. Causation was, as in the present case, the key issue. The subject matter was also quite similar to that in the present matter, including publications about gender diverse and trans people and imputations akin to Nazism.
- 12.29. We set out in full the key passages in the opinion of Collins Rice J:²⁸⁴

63. Mr Miller and Ms Power did and said controversial things in public. Many more people than Mr Turner were able to form and express adverse views by direct observation of this, and did so: they did not need to read or know about Mr Turner's tweets to tell them what to think. The Claimants and Mr Turner belonged in populous,

the person'. Section 8 provides that each defamatory matter gives rise to a single cause of action notwithstanding it may carry more than one defamatory imputation. See also the definition of a 'matter' in section 3 which, while inclusively defined, in all instances refers to a singular item of communicated matter: *an* article, *a* program, *a* picture.

²⁸⁰

SOC: CBA, page 12.

²⁸¹

[2024] FCA 1050 [162]-[174].

²⁸²

[2024] FCA 1050 [162]-[174].

²⁸³

[2023] EWHC 2799 (KB) (*Miller v Turner*).

²⁸⁴

[2023] EWHC 2799 (KB) [63]-[75]. The case shares various similarities, including the way it has been run like a harassment or unfair dismissal claim; and the fact it involves serious allegations relating to Nazism and the like, polarising figures, evidence of real world serious harm to reputation but also multiple publications and possible causes (including the claimant's own public statements about gender and trans people, which Collins Rice J described as 'a notoriously tense, sensitive and heated area of recent and polarised public discourse': see [67]), presenting real causation issues, which ultimately could not be overcome.

strongly opposed and deeply entrenched different camps ... and each had given public evidence of their views. Each camp says what it thinks about the other, on any and every platform, online and otherwise, vocally and vehemently. People get hurt in the crossfire. But a published statement is not defamatory, however defamatory its meaning, unless *its publication* – rather than anything else – *has caused or is likely to cause serious harm to the reputation of the claimant*. Otherwise, freedom of expression takes its course.

64. There is a further problem of evidence of alternative explanations for the reputational harm sustained by the Claimants. That is that their evidence for such *specific* examples of real-world consequences of reputational harm as they mention is that it was positively *not* caused by publishees reading the material complained of. Such specific examples are not essential to making out serious harm, but Ms Grossman asked me to look at them. I have done so. And I see this is *not* a case where no-one can be found to say they thought any the worse of the Claimants. The issue in this case is not *whether* they took a dim view of the Claimants but *why*. Without any evidence from any of them, I have no basis for speculating on a potential link to the effects of Mr Turner's tweets. And such evidence as the Claimants gave themselves does not support the inference they invite me to draw.
65. ... Ms Power complained more generally of anonymous or pseudonymous accounts 'repeating defamation' and trying to get her cancelled from events. There is also complaint of an anonymous letter to Penguin Books. The same applies to these. Any action taken by third parties on these publications is not within the purview of the present claim alleging the causation of serious harm *unless* it can be linked back to the posting and reading of the publications complained of.
66. I have *no* evidence for that. It is *not* more inherently probable that all of this material and these outcomes can be attributed to someone reading Mr Turner's tweets and being influenced by them than that, for example, they read someone else's opinions, or Mr Miller's and Ms Power's own opinions, or that they formed their views independently by judging the Claimants on the basis of their real-world activities in controversial contexts. Mr Turner's tweets drew attention to, and were comments on, Mr Miller's and Ms Power's own comments, actions and associations, and all of those had public lives of their own.
67. ... She accepts that some of the 'cancelling' or 'no-platforming' of which she complains happened before the publication of any of the material complained of. She is on record as further attributing a significant proportion of it to her own public statements about gender and trans people – a notoriously tense, sensitive and heated area of recent and polarised public discourse in which other women describing themselves as feminists have experienced negative reactions and no-platforming. There is no discernible causal connection between this and the publications complained of.

Conclusions

68. In its original form, Mr Miller and Ms Power's claim had been made on a basis of both harassment and defamation. They discontinued the harassment claim. But some of their pleading and evidence appears to be still angled towards the legal targets of harassment claims (discussed below) rather than defamation claims... The 'serious harm' of the s.1 test is not constituted by aggregate campaigns or cumulative courses of conduct. It is not constituted by a claimant's experience of oppression, or by their own personal distress at name-calling and accusation. It is constituted by a claimant's demonstration – by direct evidence or by laying evidential groundwork for probable inferences of fact – that *the publications* complained of were read, and thence led by a legally relevant chain of *causation* to third party publishees changing what they

otherwise thought about the claimant to an extent describable as *serious reputational harm*.

69. That is a factual, and highly fact-sensitive, test. It does not necessarily require objective proof of the impact of any individual publication in the mind of any individual publishee. But it does require more than a defamatory publication on the one hand and a claimant with an impacted reputation on the other. It requires establishing a legally relevant cause-and-effect link between the two on the balance of probabilities. That is an essentially evidential process, with the burden on a claimant. It does require critical and contextual engagement with the objective probabilities on a case by case basis. It is sensitive to evidence supporting the causal power of factors other than those to be inferred from the meaning of the words. That is what *Lachaux* meant by an evidential process deriving inferences of fact based on a *combination* of meaning, the situation of a claimant, the circumstances of publication *and the inherent probabilities*. Those inherent probabilities must be considered in context.
70. Here, I have accepted that the meanings of the words complained of identify a number of imputations of real gravity. The publications were not to a limited number of identifiable individuals, but nor is this a mass publication case directly comparable to *Lachaux* itself. The evanescence of tweets, the supersaturation of Twitter with information flows, and the multivalency – the omnipresence, persistence and extensive partisan engagement – of the sorts of debates with which this case is concerned do have to be factored in, and not just the unlimited possibility of access to undeleted public posts online. I take the Twitter analytics of the individual publications complained of into account, especially with regard to engagement within the jurisdiction: these do not in my judgment encourage a ready inference of high or lasting impact. I allow for some percolation, and for Mr Turner's profile. These are all relevant to the circumstances of publication.
71. I bear in mind the evidence I have of the class of *immediate* publishees of this material. The context of the relevant threads was extremely partisan. There is some strong evidence of a direct and powerful counter-reaction or backlash to Mr Turner's tweets from among those who evidently knew or came to know the Claimants (at least online). This vocal response clearly thought none the worse of the Claimants – they did not accept the import or materiality of what Mr Turner said about them. On the contrary, they clearly thought a great deal the worse of Mr Turner for making these allegations, and said so with considerable force. Such responsive support as is visible for what Mr Turner said appears largely to be referable to those already polarised in the HWNDU and LD50 affairs. There is little or no evidence for adverse reputational impact (or for propensity to onward percolation) from the Twitter threads themselves. There is no sign of anyone's mind being changed; minds showed every sign of being and staying firmly made up. And any neutral observers stumbling across the relevant threads and exchanges in real time would no doubt have been able to make their own minds up not just by reference to Mr Turner's accusations but by reference to the Claimants' own conduct in response – the immediate context for the publications. I consider that response in more detail below.
72. Then – and importantly – two further factors fall to be considered on the authorities set out in *Amersi*. First, there is no support in those authorities for drawing inferences for the causation of serious harm *by the publications sued upon* by means of an evidential process amounting to the indiscriminate aggregation of all the imputations complained of, other seriously damaging imputations not complained of, other publications not sued on, and a range of publications by third parties with similar content. Ms Grossman is technically right to say that making the same inferential case in relation to each publication or imputation sued on by reference to the same factors is something different from indiscriminate aggregation. Conceptually, it is. But in this

case it is hard to discern *any* evidential case being made for the *distinctive* impact of the imputed meanings in the publications sued on, beyond what is referable to the meaning of the words in isolation. The case for any inference of causation is not effectively raised.

73. Accusing *anyone*, however otherwise polarising or besieged their reputation, of antisemitism, threatening violence or publishing Hitlerian euthanasia theories is a serious matter, and of undoubted defamatory tendency. But section 1 requires a clear articulation, and an evidential basis, for what difference the publications and imputations complained of made or were likely to make in real life. I do not in this case have that clear articulation or that evidential basis. '*Drawing inferences is not a process of optimistic*' – or rather, it might be said, pessimistic – '*guesswork; it is a process whereby the court concludes that the evidence adduced enables a further inference of fact to be drawn.*' (*Amersi* [158]).
74. The other factor emphasised in *Amersi* ([157]) is that section 1 is a threshold issue, and in applying it, it is necessary not to lose sight of the basic tort rules of causation. Evidence *contrary* to the imputation of causal responsibility is no less potentially important than evidence tending to favour it.
75. In all of these circumstances, I have not been able to conclude that Mr Miller and Ms Power have sufficiently discharged the burden Parliament has placed upon them of demonstrating that it is more probable than not that the imputations of which they complain, in the publications of which they complain, caused or were likely to cause serious harm to their reputations. That does not mean I have concluded that their reputations have not been seriously – and perhaps unfairly – harmed. It means that they have not sufficiently attributed such harm to Mr Turner's publications, so that his freedom of expression would fall to be curtailed in law accordingly.

13. Mrs Deeming's extant reputation

The importance of the pre-existing state of Mrs Deeming's reputation to serious harm

- 13.1. In a case such as the present, consideration of the harm that the Publications caused and whether that harm amounts to 'serious harm' must commence with the state of Mrs Deeming's reputation prior to the publication of the Publications.²⁸⁵
- 13.2. As Applegarth J put it in *Peros (No 3)*:²⁸⁶

It may be only possible to properly assess the effect on reputation of a final publication in a series of articles, social media posts or other publications, and whether it caused 'serious harm', if one has regard to the likely state of the claimant's reputation among readers of the earlier publications immediately before they read the final publication.

General observation on polarising politicians and harm to reputation

- 13.3. This Court has repeatedly observed that many ordinary, reasonable people will not be influenced by statements concerning a politician about whom they have already formed a

²⁸⁵ *Peros (No 3)* [231]; See also *Selkirk v Wyatt* (2024) 302 FCR 541, 563 [98].
²⁸⁶ *Peros (No 3)* [232].

view.²⁸⁷ It is arguable some such claimants who have succeeded (at least at first instance) in defamation claims would have struggled to establish the serious harm element under the current Act²⁸⁸ (for example, Clive Palmer,²⁸⁹ Mark McGowan²⁹⁰ and Peter Dutton²⁹¹).

- 13.4. The partisan nature of an audience has also been acknowledged as a relevant factor when considering serious harm in both the United Kingdom²⁹² and Australia.²⁹³ For example, in *Sivananthan v Vasikaran*, Collins Rice J said:²⁹⁴

If publication is ... to an audience already either partisan or resolutely neutral as between them, then again a claimant may have to work harder to make their case on causation. In a polarised context, it may be less probable that anyone's mind will have been changed either way by the publication. If no-one's mind is changed, then establishing the causation of reputational harm is a problem

- 13.5. Similarly, in *Miller v Turner*,²⁹⁵ Collins Rice J noted that commenting publicly on gender issues and trans people is 'a notoriously tense, sensitive and heated area of recent and polarised public discourse in which other women describing themselves as feminists have experienced negative reactions and no-platforming'; something that was relevant to her Lordship's decision that the claimants had not, despite establishing serious harm to their reputations, discharged their statutory burden to show that the publications they sued on were the cause of that serious harm.
- 13.6. The evidence in this case is that Mrs Deeming had a polarised reputation that split largely along political and ideological or factional lines. Notably, during cross-examination, Mr Hodgett gave evidence that, following the Publications, he was inundated with messages from the public, the overwhelming majority of which were critical of *Mr Pesutto*.²⁹⁶ Similar evidence of a highly polarised reaction was given by Mr Pintos-Lopez²⁹⁷ and other witnesses.
- 13.7. Mrs Deeming had, in the month or so before the Rally, become embroiled in two high-profile controversies, each relating to the same highly controversial social issues which were the

²⁸⁷ *Palmer* (2022) 404 ALR 621, 714; *Hanson-Young v Leyonhjelm (No 4)* [2019] FCA 1981 [78]; *Dutton v Bazzi* [2021] FCA 1474 [186].

²⁸⁸ Applegarth J made a similar observation in *Peros (No 3)*, [64]-[66], albeit using *O'Shea v Everingham* as an example of where a claim by a polarising claimant that had previously succeeded may now fail.

²⁸⁹ *Palmer* (2022) 404 ALR 621 [449] in respect of the harm to Mr Palmer's reputation.

²⁹⁰ *Palmer* (2022) 404 ALR 621 [470] in respect of the harm to Mr McGowan's reputation.

²⁹¹ *Dutton v Bazzi* [2021] FCA 1474 [230]-[232], where White J awarded \$35,000 and did so primarily on the basis of Mr Dutton's distress and offence. This decision was overturned on appeal on the issue of meaning.

²⁹² For example, see *Sivananthan v Vasikaran* [2022] EWHC 2938 (KB); *Miller v Turner* [2023] EWHC 2799 (KB) [71]; *Lee v Brown* [2022] EWHC 1699 (QB)

²⁹³ *Peros (No 3)*, [64]-[66], using *O'Shea v Everingham* as an example of where a claim that succeeded may now fail.

²⁹⁴ *Sivananthan v Vasikaran* [2022] EWHC 2938 (KB).

²⁹⁵ [2023] EWHC 2799 (KB).

²⁹⁶ T463.46-464.1-8 (Hodgett XXN).

²⁹⁷ CBB Tab 37, page 445 [57]-[58] (Affidavit of Rodrigo Pintos-Lopez dated 24 May 2024).

subject of the Rally. The attacks on Mrs Deeming, because of her views, had been strident, see for example [13.17(e)] below.

- 13.8. It was also obvious, including to Mrs Deeming, that her involvement with the Rally was going to give rise to further controversy. Mrs Deeming ‘had known always that it [the Rally] was likely to be controversial’.²⁹⁸ She accepted Mrs Keen was a self-described controversial campaigner.²⁹⁹ She considered Mrs Keen to be provocative.³⁰⁰ Mrs Deeming was aware that Mrs Keen had been described in media coverage³⁰¹ and was considered by some people to be ‘transphobic’.³⁰² Mrs Deeming was aware, prior to the Rally, that there were people who considered Mrs Keen to be a ‘vile bigot’.³⁰³

The admissibility of evidence concerning Mrs Deeming’s reputation

- 13.9. The presumptions which previously existed in defamation cases as to both good reputation, and damage to reputation from the publication of defamatory matter, are now gone.³⁰⁴ This, together with the focus on causation in s 10A(1), means a change in approach to admissibility of evidence in defamation cases where serious harm is in issue.
- 13.10. Mrs Deeming filed broad-ranging evidence relating to her reputation prior to the Publications. Mr Pesutto did not object to most of that evidence, which was not limited in the traditional way to Mrs Deeming’s settled reputation in the ‘relevant sector’.³⁰⁵ We recognised that the traditional rules around the admissibility of evidence in defamation cases (notably, the rules in *Dingle*³⁰⁶ and in *Scott v Sampson*.³⁰⁷) have to be reconsidered when assessing the serious harm element, because they may otherwise inhibit the proper qualitative assessment of causation of harm.

²⁹⁸ T164.47-48 (Deeming XXN).

²⁹⁹ T165.18-20 (Deeming XXN).

³⁰⁰ T165.31 (Deeming XXN).

³⁰¹ T169.43-44 (Deeming XXN).

³⁰² T170.13 (Deeming XXN).

³⁰³ T169.12-13 (Deeming XXN).

³⁰⁴ *Peros (No 3)* [2024] QSC 192, [79], [102]; *Selkirk v Wyatt* (2024) 302 FCR 541, 563 [92] (good reputation) [94] (harm to reputation). As to the presumption of good reputation, see also *Peros v Nationwide News Pty Ltd (No 2)* [2024] QSC 83 (*Peros (No 2)*).

³⁰⁵ *Peros (No 2)* [2024] QSC 192, [17].

³⁰⁶ *Peros (No 3)* [241]-[248] (and surrounding), which explains that the rule in *Dingle* concerns the proof of a bad reputation in mitigation of damages, and a party who resists a finding of serious harm does not necessarily have to prove that the claimant had a *bad* reputation but may be assisted by showing the claimant’s reputation is ‘damaged’. That is because other publications may be relevant to causation when considering the serious harm element in s 10A.

³⁰⁷ *Peros (No 3)* [67]-[72].

- 13.11. A party who resists a finding of serious harm does not have to prove that the claimant had a settled *bad* reputation, but may be assisted simply by showing the claimant's reputation was mixed or 'damaged' ...³⁰⁸ In *Peros (No 3)*, Applegarth J said:³⁰⁹

Strictures about the means of proving a bad reputation should not necessarily apply to an assessment of the harm that has been caused, or is likely to be caused, to the reputation of a person. This is not to say that tendering a report or article proves that the claimant's reputation was damaged by it. A damaged reputation is not established by the simple fact that a publication to a certain effect occurred. The publication may be from a source that lacks credibility or the claims made in it may be refuted in the same publication or immediately after it. Depending upon the circumstances, the earlier publication or publications may or may not have damaged the claimant's reputation. However, there seems no reason in principle why a defendant should not be able to tender those publications and submit that in the circumstances they affected the reputation of the claimant among readers, including readers of the subject publication. In making such a submission the defendant may rely on direct evidence or reasonable inferences that the claimant's reputation was adversely affected by the earlier publications. For example, a reasonable inference may be that a person's reputation was affected by an earlier publication that reported an authoritative source and no contrary view about the person's conduct.

Permitting a defendant to rely on other publications by it or by others to the same or similar effect on the issue of causation might be said to carry the risk of practical consequences for the conduct of trials, in which defendants compete to minimise the effect of their publications compared to others. However, in my view, this is a necessary consequence of a requirement to prove that the publication sued over caused the claimant serious harm.

- 13.12. As serious harm is in issue and is a question of fact, and the state of Mrs Deeming's reputation with the relevant audiences by the time of the Publications is relevant (and has been put in issue by Mrs Deeming), the appropriate approach is to admit all evidence which may bear on the question of harm to Mrs Deeming's reputation in the eyes of the recipients of the Publications. That is particularly so where that evidence is already admissible for another purpose³¹⁰ or has otherwise been admitted without any objection as part of an affidavit (for example, the evidence in and media articles annexed to Mr Pesutto, Ms Crozier, Ms Staley and Ms Wong's affidavits; and the social media posts, mainstream media articles and other publications linking the Rally, Mrs Deeming and the neo-Nazis).³¹¹

³⁰⁸ *Peros (No 3)* [242].

³⁰⁹ *Peros (No 3)* [245]-[246].

³¹⁰ Once the evidence is admissible for one purpose, there is no reason the Court should limit its use thereafter; to treat the evidence otherwise would be to approach the matter in blinkers: *Lehrmann* [1004], citing [2001] 1 WLR 579 (*Burstein*), 596; *Speidel v Plato Films Ltd* [1961] AC 1090, 1143-1144. See also *Peros (No 3)* [275], [277]-[279], which show the rules are practical ones, preventing the admission of evidence which could lengthen a trial.

³¹¹ Noting that it was agreed during Mrs Deeming's cross-examination that these documents could be tendered by agreement, without further cross-examination or any *Browne v Dunn* issue being raised, after Mr Pesutto stopped cross-examination on those publications in order to seek to maintain the then agreed trial timetable.

13.13. Further, as Collins Rice J made clear in *Miller*, evidence *contrary* to the inference of causal responsibility is no less important than evidence tending to favour it.³¹²

Even before the Rally, Mrs Deeming was a polarising politician with a mixed reputation

13.14. Mrs Deeming filed extensive evidence from various reputation witnesses, including some members of Parliament and others from within her own political circles, church groups and women's rights advocates, which indicated that Mrs Deeming had a good reputation for various matters within the circles within which they move.

13.15. Mr Pesutto accepts that, within those particular circles, prior to the Publications, Mrs Deeming had a good reputation.³¹³ Far from being damaged by the Publications, the evidence was that her reputation may even have been enhanced in those circles.³¹⁴

13.16. In other circles, however, the situation was obviously different. Mrs Deeming was a polarising public figure, so much so that articles had been written about the extent to which she had been publicly vilified for her views.³¹⁵

13.17. The evidence in that regard is, we submit, overwhelming:

(a) Ms Staley, Ms Crozier and Mr Pesutto's other witnesses, and even some of Mrs Deeming's own witnesses' evidence in their affidavits, established that Mrs Deeming was a figure of controversy.³¹⁶

(b) Mrs Deeming's own witnesses loved her precisely because she was 'courageous',³¹⁷ 'brave',³¹⁸ and 'said things which other people were too afraid to say'.³¹⁹

³¹² *Miller v Turner* [2023] EWHC 2799 (KB) [74]. See also *Peros (No 3)* generally.

³¹³ That is consistent with paragraphs 44 and 45 Mr Pesutto's first affidavit, where he said: '*based on my experience as Leader of the Party (which caused me to mix with and meet a variety of people...)*' I formed the view that Mrs Deeming '*had a mixed reputation within the Parliament*', and candidly acknowledged that both inside and outside of Parliament '*some people loved Mrs Deeming and shared her views on [controversial social and political] issues*'.

³¹⁴ T369.16-34 (Duke XXN); T470.12-20 (Walton XXN); T1071.23-28 (Wong XXN).

³¹⁵ Exhibit R116, CBC Tabs 78, pages 387-389; Exhibit R71, CBC Tabs 193, pages 1390-1393.

³¹⁶ CBB Tab 10, page 185 [10] (Affidavit of Renee Heath dated 27 May 2024); CBB Tab 13, page 202 [9] (Affidavit of David Hodgett dated 30 July 2024); CBB Tab 16, page 219 [10] (Affidavit of Joseph John McCracken dated 18 July 2024); CBB Tab 21, page 257 [13] (Affidavit of Richard Riordan dated 26 July 2024); CBB Tab 24, page 279 [13] (Affidavit of Ryan Smith dated 21 July 2024); CBB Tab 30, page 335 [44]-[45] (Affidavit of John Pesutto dated 27 May 2024); CBB Tab 34, page 410 [5], [8] (Affidavit of Georgie Crozier dated 27 May 2024); CBB Tab 41, page 488 [15] (Affidavit of Louise Staley dated 24 May 2024).

³¹⁷ CBB Tab 3, page 106 [6] (Affidavit of Raewyn Louise Clark dated 21 July 2024); CBB Tab 6, page 140 [5], page 142 [18] (Affidavit of Christopher Duke dated 24 May 2024); CBB Tab 9, page 167 [4] (Affidavit of Renee Heath dated 27 May 2024); CBB Tab 16, page 219 [12] (Affidavit of Joseph John McCracken dated 18 July 2024); CBB Tab 23, page 266 [8] (Affidavit of Ryan Smith dated 21 May 2024); CBB Tab 29, page 319 [13] (Affidavit of Rachel Wong dated 27 May 2024).

³¹⁸ CBB Tab 6, page 142 [18] (Affidavit of Christopher Duke dated 24 May 2024); CBB Tab 16, page 219 [12] (Affidavit of Joseph John McCracken dated 18 July 2024); CBB Tab 29, page 318,[8] (Affidavit of Rachel Wong dated 27 May 2024).

³¹⁹ CBB Tab 22, page 263 [8] (Affidavit of John Ruddick dated 24 May 2024).

- (c) Ms Wong’s evidence was that there is a ‘culture war’ going on in Australia between, on the one hand, women’s rights advocates (described by Ms Wong as ‘David’) and trans-rights advocates and their supporters, including large parts of the mainstream media, Government and academia (described by Ms Wong as ‘Goliath’), which necessarily affects the way controversial advocates in those spaces are perceived.³²⁰
- (d) Other political leaders, including then Premier Daniel Andrews and the Greens Leader Samantha Ratnam, had described Mrs Deeming or her views as, among other things, ‘hateful’.³²¹
- (e) Numerous articles and social media posts were properly admitted in evidence, and established that there was a raft of material in the public domain before the publication of the Publications to the effect that:
- (i) Mrs Deeming was considered ‘too extreme’ by the Prime Minister’s office to be suitable for pre-selection for a seat in the House of Representatives;³²²
 - (ii) in mid-2022, when Mrs Deeming was first pre-selected, Mrs Deeming and various of her views were regarded by some (and had been described by the then Premier and leader of the Greens) as ‘hateful’ and ‘extreme’;³²³
 - (iii) Mrs Deeming’s maiden speech in February 2023 had been the subject of strident criticism for the extreme views she expressed, and she was then criticised publicly following the release of the FOI documents dating back to the time when she was a member of the Melton City Council;³²⁴
 - (iv) Mrs Deeming had been ‘publicly vilified’ in an ‘onslaught of tabloid style articles’ and the media was ‘attacking and inciting’ hatred, and she had been described as ‘utterly vile’;³²⁵
 - (v) Mrs Deeming’s reported statements regarding the Safe Schools program had gained notoriety by the fact that on 11 March 2023, only a week before the

³²⁰ T1065.33-1066.6 (Wong XXN); as reflected in an article published on 26 February 2023 by her organisation, Women’s Forum Australia, called ‘*The Vilification of Mrs Deeming: When Common Sense Clashes with the Authoritarian Left*’.

³²¹ Exhibit R109, CBC Tab 71, page 337-338; Exhibit R112, CBC Tab 74, page 353-360; Exhibit R115, CBC Tab 77, pages 376-386; Exhibit R116, CBC Tab 78, page 387-389; Exhibit R141, CBC Tab 162, page 718.

³²² CBB Tab 41, page 487 [10] and the reporting referred to therein (Affidavit of Louise Staley dated 24 May 2024).

³²³ CBB Tab 30, page 347 [112] (Affidavit of John Pesutto dated 27 May 2024); Exhibit R141, CBC Tab 162, page 715-718.

³²⁴ Exhibits R108-112, CBC Tabs 70-74, pages 334-360; Exhibits R114-120, CBC Tabs 76-82, pages 370-406.

³²⁵ T1066.6-14 (Wong XXN); as reflected in an article published on 26 February 2023 by her organisation, Women’s Forum Australia, called ‘*The Vilification of Mrs Deeming: When Common Sense Clashes with the Authoritarian Left*’.

Rally, Dr Bach was asked about Mrs Deeming's 'paedophilia apologists' comments' on Joy FM;³²⁶ and

(f) even Mrs Deeming conceded her perceived views on social issues were controversial, agreeing during cross-examination that some of her views concerning the merits of the Safe Schools program,³²⁷ and trans and gender diverse people, were controversial, even within the Party.³²⁸

13.18. As Mr Pesutto explained it, while he did not share this assessment of Mrs Deeming as a person, she was, rightly or wrongly, a person who attracted controversy,³²⁹ and who was regarded by many (particularly within the 'left', the LGBTQI+ community, the media and significant parts of the community Mr Pesutto was trying to attract back to the Party) as someone who gave succour to hateful and/or extreme social or political views.³³⁰

13.19. Put another way, some people loved Mrs Deeming; some people hated her; and there was often no middle ground. The sector, relevantly, can be described as her reputation for holding, expressing and giving succour to hateful, controversial or extreme social or political views.

14. Earlier publications by third parties

14.1. Until trial, Mrs Deeming had asserted that, before the Publications, no one had or was going to link Mrs Deeming with the neo-Nazis who had attended the Rally.

14.2. During cross-examination, however, Mrs Deeming accepted that well before the meeting with the Leadership Team on 19 March 2023, her name had become associated with what had happened at the Rally in multiple national media publications.³³¹ Mrs Deeming also accepted that she must have been '100 per cent'³³² wrong when she had previously thought she had not been named in the media in association with the Rally at that time.³³³ That was an appropriate concession.

14.3. In the course of the running of the trial, the Court was taken only to the tip of the iceberg. This is important, as almost all of Mrs Deeming's evidence of harm to reputation proceeds on the assumption that evidence of damage to her reputation 'since the Publications' should be

³²⁶ CBB Tab 32, page 392 [11] (Affidavit of Matt Bach dated 26 May 2024).

³²⁷ T117.2-4 (Deeming XXN).

³²⁸ T116.45-47 (Deeming XXN).

³²⁹ T661.13 (Pesutto XXN).

³³⁰ CBB Tab 30, page 335 [44]-[45] (Affidavit of John Pesutto dated 27 May 2024).

³³¹ T241.41-47 (Deeming XXN).

³³² T288.28 (Deeming XXN).

³³³ T253.4-10; T288.19-23 (Deeming XXN).

attributed to or as having been caused by the Publications. When one has regard to the extent of the evidence which has been tendered, that assumption cannot be sensibly maintained.

14.4. The relevant evidence of publications prior to the Publications is presented in table form Schedule C to these submissions.

14.5. Purely by way of example, and without derogating from the totality of the evidence in the annexure, between around 12:52pm on the day of the Rally and the time the first of the Publications (the Media Release) was published at 8:42pm on 19 March 2023:

(a) The following (by no means exhaustive) things were said about Mrs Deeming on X: 'standing up there with Nazis';³³⁴ 'being on the same side as Nazis';³³⁵ 'you're associating with Nazis';³³⁶ 'what a disgrace you are. Standing with Nazis';³³⁷ 'You're choosing to associate yourself with a nazi';³³⁸ 'are you calling for people to be exterminated like the Nazis standing along side you?';³³⁹ 'Your platforming yourself with NAZI skills and you wanna redefine what 'real haters' are. You're a disgrace';³⁴⁰ 'You embraced Nazis';³⁴¹ 'Says the Nazi sympathiser';³⁴² 'Just YOU and the neo-nazis. PROUD??';³⁴³ 'You're supporting a fascist. You're supported by Nazis';³⁴⁴ 'You share the same genocidal beliefs about a small minority that those Nazis do, which is why they turned up...in solidarity';³⁴⁵ 'They, the nazis, were there with you';³⁴⁶ 'Maybe serving LNP members shouldn't be escorting the person that that the nazis came to support, just a thought';³⁴⁷ 'No no baby they were supporting you! they are your ally's and friends!!';³⁴⁸ 'the Nazis are on YOUR SIDE';³⁴⁹ 'Own it. They're your people. And while you're at it, resign. #Nazis';³⁵⁰ 'Babe, you're in bed with the neo nazis, don't try to deflect that the bottom line is they were there for you';³⁵¹ 'they were there in support of you. they were doing the nazi support to show they liked you and were on your side and wanted to defend you from the 'tras';³⁵² 'Then why did their

³³⁴ Exhibit R348, CBC Tab 745, page 3755.

³³⁵ Exhibit R351, CBC Tab 748, page 3758.

³³⁶ Exhibit R354, CBC Tab 751, page 3761.

³³⁷ Exhibit R356, CBC Tab 753, page 3763.

³³⁸ Exhibit R359, CBC Tab 756, page 3766.

³³⁹ Exhibit R362, CBC Tab 759, page 3769.

³⁴⁰ Exhibit R364, CBC Tab 761, page 3771.

³⁴¹ Exhibit R365, CBC Tab 762, page 3772.

³⁴² Exhibit R366, CBC Tab 763, page 3773.

³⁴³ Exhibit R383, CBC Tab 781, page 3804.

³⁴⁴ Exhibit R384, CBC Tab 782, page 3805.

³⁴⁵ Exhibit R391, CBC Tab 790, page 3813.

³⁴⁶ Exhibit R395, CBC Tab 794, page 3817.

³⁴⁷ Exhibit R396, CBC Tab 795, page 3818.

³⁴⁸ Exhibit R399, CBC Tab 798, page 3821.

³⁴⁹ Exhibit R501, CBC Tab 901, page 3923.

³⁵⁰ Exhibit R404, CBC Tab 803, page 3826.

³⁵¹ Exhibit R409, CBC Tab 808, page 3831.

³⁵² Exhibit R414, CBC Tab 813, page 3836.

member Moira Deeming join them? If one Liberal is a Nazi, they all bloody are’;³⁵³ in response to Mrs Deeming’s ‘disappointed’ tweet: ‘Funny you’re only saying this now, not hours ago when it happened – like, when there was an actual microphone right there waiting for you to speak into it’;³⁵⁴ ‘Moira Deeming, you can’t hide, You’ve got Nazis on YOUR side’;³⁵⁵ ‘A liberal MP that’s a liar and a nazi Yes you are’;³⁵⁶ ‘They supported you and none of your lot did a thing about it’;³⁵⁷ ‘According to the Nazis, they were there as your “Vanguard” against the TRAs’;³⁵⁸ ‘...Please reflect on why nazis support your position’;³⁵⁹ ‘Nope, nope, Moira. You knew beforehand. You CHOSE to walk with Nazis. That makes you a Nazi. Now, we get to see if @JohnPesutto is as weak as we think he is’;³⁶⁰ ‘This is nonsense gaslighting from you. You proudly stood by these men. If you’d had a problem with them you would have gone home’;³⁶¹ ‘Darl...you can drop the fake clutching of peals act...those Nazis were there to support your mob...no police between you...disgusting that not on terf including you, Deves or KJK have repudiated them’;³⁶² ‘You should be thrown out of Parliment [sic] resign’;³⁶³ ‘You’re not fit to be a member of Parliament’;³⁶⁴ ‘Moira, the call is coming from within the house. the Nazis were on your side. You are a nazi’;³⁶⁵ ‘Get absolutely in the bin you nazi sympathiser’.³⁶⁶

- (b) There had been numerous calls for Mr Pesutto (or in reply to Mr Southwick’s statement with Mr Battin as published on X)³⁶⁷ to condemn or take action against Mrs Deeming.³⁶⁸ encapsulated by an X user asking ‘Why is a member of the Victorian parliament appearing at a rally with Nazis and extremists. You’re fine with this?’

³⁵³ Exhibit R443, CBC Tab 842, page 3865.

³⁵⁴ Exhibit R415, CBC Tab 814, page 3837.

³⁵⁵ Exhibit R416, CBC Tab 815, page 3838.

³⁵⁶ Exhibit R425, CBC Tab 824, page 3847.

³⁵⁷ Exhibit R430, CBC Tab 829, page 3852.

³⁵⁸ Exhibit R435, CBC Tab 834, page 3857.

³⁵⁹ Exhibit R436, CBC Tab 835, page 3858.

³⁶⁰ Exhibit R439, CBC Tab 838, page 3861.

³⁶¹ Exhibit R449, CBC Tab 848, page 3871.

³⁶² Exhibit R450, CBC Tab 849, page 3872.

³⁶³ Exhibit R463, CBC Tab 861, page 3884.

³⁶⁴ Exhibit R471, CBC Tab 870, page 3893.

³⁶⁵ Exhibit R474, CBC Tab 873, page 3896.

³⁶⁶ Exhibit R485, CBC Tab 884, page 3907

³⁶⁷ For example, Exhibit R389, CBC Tab 788, page 3811; Exhibit R390, CBC Tab 789, page 3812; Exhibit R393, CBC Tab 792, page 3815; Exhibit R394, CBC Tab 793, page 3816; Exhibit R413, CBC Tab 812, page 3835; Exhibit R438, CBC Tab 836, page 3860; Exhibit R447, CBC Tab 846, page 3869; Exhibit R469, CBC Tab 868, page 3891; Exhibit R470, CBC Tab 869, page 3892; Exhibit R477, CBC Tab 876, page 3899; Exhibit R482, CBC Tab, page 3904; Exhibit R488, CBC Tab 887, page 3910; Exhibit R509, CBC Tab 909, page 3931; Exhibit R511, CBC Tab 912, page 3938.

³⁶⁸ For example: Exhibit R374, CBC Tab 771, page 3781; Exhibit R379, CBC Tab 777, page 3800; Exhibit R380, CBC Tab 778, page 3801; Exhibit R385, CBC Tab 783, page 3806; Exhibit R416, CBC Tab 815, page 3838; Exhibit R417, CBC Tab 816, page 3839; Exhibit R419, CBC Tab 817, page 3840; Exhibit R439, CBC Tab 838, page 3861; Exhibit R448, CBC Tab 847, page 3870; Exhibit R464, CBC Tab 863, page 3886; Exhibit R465, CBC Tab 864, page 3887; Exhibit R475, CBC Tab 874, page 3897; Exhibit R484, CBC Tab 883, page 3906; Exhibit R486, CBC Tab 885, page 3908; Exhibit R488, CBC Tab 887, page 3910; Exhibit R519, CBC Tab 920, page 3948.

@JohnPesutto @SouthwickMP ?! #springst’³⁶⁹ Those calls also came from high profile individuals, such as Rob Baillieu;³⁷⁰ and by 9:33pm a user was describing the ‘Deafening silence tonight from @CoalitionVic @LiberalAus @LiberalVictoria on why one of their own, Moira Deeming, is still a member of the Liberal Party after being one of the starts of today’s Nazi rally on the steps of Parliament House’³⁷¹

(c) Mrs Deeming had been linked to the Rally and the neo-Nazis including in the following mainstream media publications:

- (i) *news.com.au*, ‘Ant-trans speaker’s fans throw Nazi salute amid counter-protest’ at 4:06pm on 18 March 2023;³⁷²
- (ii) *The Age*, ‘Neo-Nazi salutes at protest could prompt change to anti-vilification laws’ at 11:40am on 19 March 2023;³⁷³
- (iii) *The Daily Mail*, ‘Victoria to explore neo-Nazi crackdown after ugly clash’ at 12:11pm on 19 March 2023;³⁷⁴
- (iv) *ABC News*, ‘Victorian government may consider amending laws after Nazi salute at Parliament rallies’ at 1:37pm on 19 March 2023;³⁷⁵
- (v) *The Guardian*, ‘Daniel Andrews says Nazis “aren’t welcome” as Victorian government considers “further action” following salutes’ at 2:15 on 19 March 2023;³⁷⁶
- (vi) *The Northern Daily Leader*, ‘Victoria to explore neo-Nazi crackdown after ugly clash at 2:38pm on 19 March 2023’;³⁷⁷
- (vii) *Illawarra Mercury* ‘Victoria to explore neo-Nazi crackdown after ugly clash at 2:38pm on 19 March 2023’;³⁷⁸
- (viii) *news.com.au*, “‘Not welcome’”: Dan Andrews slams neo-Nazi protestors after violent Melbourne clash’ at 3:51pm on 19 March 2023;³⁷⁹

³⁶⁹ Exhibit R329, CBC Tab 777.

³⁷⁰ Exhibit R420, CBC Tab 819.

³⁷¹ Exhibit R465, CBC Tab 864, page 3887.

³⁷² Exhibit R27, CBC Tab 773, pages 3783-3788.

³⁷³ CBC Tab 610, page 3932.

³⁷⁴ Exhibit R512, CBC Tab 913, page 3939.

³⁷⁵ Exhibit R34, CBC Tab 354, page 1898.

³⁷⁶ Exhibit R217, CBC Tab 352, page 1885.

³⁷⁷ Exhibit R212 CBC Tab 343, page 1850.

³⁷⁸ Exhibit R216, CBC Tab 347, page 1866.

³⁷⁹ Exhibit R520, CBC Tab 921, page 3949.

(ix) *Neos Kosmos* ‘Neo-Nazi crackdown on the cards after Melbourne clash’;³⁸⁰

(x) the Channel 9 6pm News bulletin..³⁸¹

14.6. This material puts beyond doubt that Mrs Deeming’s reputation had been seriously damaged by the events at the Rally and the reaction to it before the first of the Publications.

14.7. Material in between the first and successive Publications for which Mr Pesutto is not alleged to bear responsibility must also be taken into account in disentangling harm. While there are numerous examples, given Mrs Deeming’s position that there was nothing wrong with the Video, one that is instructive is an article on 20 March 2023 from *Crikey* entitled ‘Anti-trans rally speakers are falsely claiming neo-Nazi supporters were undercover police, trans activists’..³⁸² This article does not refer to the Publications; commented on the Video; noted the conspiracy theories floated therein; and referred to Mrs Keen’s known far-right associations as well as Mrs Deeming’s ‘joke’ about the neo-Nazis ‘saying hello’..³⁸³

15. Publications sued on have to be considered separately

15.1. Any assessment of damage to Mrs Deeming’s reputation from a Publication must exclude any harm to reputation arising from any of the Publications which are not actionable, or any damage which is caused by an earlier Publication that is found to be actionable.

15.2. That is, as explained at [12.22]–[12.26], harm to reputation cannot be aggregated.

16. Republications and reporting by other publishers

Republications relied upon only for damages

16.1. Mrs Deeming has pleaded republications as going only to damages..³⁸⁴ The *actual* effects of those republications on Mrs Deeming’s reputation (assuming they exist) cannot be used to meet the serious harm element of the cause of caution..³⁸⁵

16.2. This does not mean the Court must close its eyes to the reputational harm that was *likely* to be caused by each Publication, or may not make some allowance for any grapevine or percolation effect that was the natural and probable consequence of each of the Publications.

³⁸⁰ Exhibit R213, CBC Tab 344, page 1851.

³⁸¹ Exhibit R209, CBC Tab 322, page 1824.

³⁸² Exhibit R524, CBC Tab 928, pages 3963-3967.

³⁸³ Exhibit R524, CBC Tab 928, pages 3966.

³⁸⁴ SOC, [3.5], [12.9], [17.5], [22.6], CBA Tab 2, pages 8, 22, 28, 33.

³⁸⁵ *Amersi v Leslie* [2023] EWHC 1368 (KB), [150]-[159], but particularly [155]; *Greenwich v Latham* [2024] FCA 1050, [164], and as is implicit from the causal analysis at [180]-[186].

- 16.3. However, Mrs Deeming cannot simply list various alleged republications (whether in the SOC or in the annexures Mr Campey's supplementary report) without pleading the elements of the cause of action in respect of them (including why Mr Pesutto is legally responsible for them and what those alleged republications impute) and then simply assert that the alleged republications establish the serious harm element.
- 16.4. In any case where an alleged republication includes, for example, qualifying words by a journalist, or Mrs Deeming's side of the story, or a criticism of Mr Pesutto or the Leadership Team (as many of the alleged republications did), that naturally affects the imputations carried by the alleged republication, and is often wholly inconsistent with the premise underlying Mrs Deeming's contention that the imputations carried by Mr Pesutto's Publications were also carried by the alleged republication.
- 16.5. For the reasons set out more fully in the Damages section below at [J] and in Schedule B, Mr Pesutto denies that almost all the pleaded republications actually republish the defamatory sense and substance of the Publications that Mrs Deeming relies upon in her pleaded claims, such that Mrs Deeming cannot and has not made out her pleaded case on serious harm by reference to them.

21 March 2023 Herald Sun Articles

- 16.6. In paragraph [7.9] of the SOC (and later paragraphs that cross-reference to it), Mrs Deeming seeks to rely upon a 'two page spread' in the *Herald Sun* on 21 March 2023 to establish the serious harm element in respect of each Publication. The relevant article is annexed at Schedule D to the SOC.³⁸⁶ The plea is misconceived, both legally and factually. Mrs Deeming cannot rely on the harm caused by newspaper articles by a different publisher, only the second of which is said to be a 'republication', and then only of the Press Conference (SOC [17](k)).
- 16.7. In any event, it is clear that Mrs Deeming's chief complaint was that the *Herald Sun* had superimposed an image of Mrs Deeming and Mrs Keen at the Rally, alongside an image of the neo-Nazis performing the Nazi salute (what she described as 'your photo collage').³⁸⁷ Mrs Deeming was furious with the *Herald Sun*.³⁸⁸
- 16.8. It is easy to understand why the photo would be of concern to Mrs Deeming. It looks as though Mrs Deeming is standing, in formation with Mrs Keen, immediately in front of the neo-Nazis as they performed the Nazi salute on the steps of Parliament House; and it is accompanied by an inset photograph showing Mrs Deeming smiling and holding champagne in company with

³⁸⁶ SOC: CBA Tab 2, pages 13 and 56-57.

³⁸⁷ Exhibit R231, CBC Tab 439, pages 2271-2299.

³⁸⁸ Exhibit R231, CBC Tab 439, pages 2271-2299.

Mrs Keen, Ms Jones and Ms Deves. Self-evidently, Mr Pesutto was not and is not responsible for the editorial decisions made by the *Herald Sun*. Mrs Deeming cannot establish serious harm to her reputation in respect of any of the Publications by Mr Pesutto by reference to those decisions.

16.9. Mrs Deeming appears to have been animated in her fury by text messages from Shannon Deery, a journalist at the *Herald Sun*, who did not give evidence. In those messages, Mr Deery suggested to Mrs Deeming that no one had been talking about her or linking her to the neo-Nazis at the Rally until Mr Pesutto did.³⁸⁹ Whatever view Mr Deery might have held and expressed in text messages to Mrs Deeming, he was factually wrong.

16.10. By the evening of 18 March 2023, both *news.com.au* and *The Australian* had already published almost identical photographs of Mrs Deeming and the neo-Nazis next to each other conveying a similar impression as the impugned collage to Mrs Staley.³⁹⁰



16.11. On no sensible view could Mr Pesutto be held legally responsible for the harm caused by any of these articles or the photographs.

³⁸⁹ Exhibit R231, CBC Tab 439, pages 2271-2299.

³⁹⁰ Compare the images at Schedule D to the SOC at CBA Tab 2, page 56-57 to the messages at Exhibit 189, CBC Tab 276, pages 1660-1663.

17. Mrs Deeming's harm to her own reputation

Attendance at the Rally

- 17.1. In addition to the material identified above, contemporaneous communications permit the Court to infer that Mrs Deeming's attendance at the Rally would inevitably have caused and been likely to cause harm to Mrs Deeming's reputation. The unprompted, instinctive and clear assessments of Ms Staley and Mr Guy (the immediate past leader of the Party) on the evening of 18 March 2023 as to the likely electoral impacts of link/association (even indirect) with neo-Nazis are examples.³⁹¹
- 17.2. Further, it is clear from the recording of the Leadership Team's meeting with Mrs Deeming that by Sunday afternoon, having carefully considered matters, Mr Pesutto and the Leadership Team felt they already had a 'huge problem', which was only going to 'build' and 'intensify' to a 'crescendo'; particularly once the Andrews government learned about the associations and conduct of the other organisers of the Rally.³⁹²
- 17.3. Mr Pesutto (who had previously reflected on the fallout from recent similar controversies that affected the Party,³⁹³ and whose job it is to understand the public mood and likely direction of a story like this) formed the view that the 'damage' that would flow to the Party itself from the 'perception out there that we are associated with Nazis', was hard to estimate, but posed a 'very serious' problem.³⁹⁴ Eventually, even Mrs Deeming conceded that things looked worse than she realised.³⁹⁵ This was the very reason the Leadership Team felt they needed to act.³⁹⁶

Repetition of Mr Pesutto's alleged meanings

- 17.4. In paragraph [7.14] of the SOC (and its cross-referenced equivalent for each Publication), Mrs Deeming relies on statements she and Nick McGowan made at the meeting on 27 March 2023 which warned that any decision to expel Mrs Deeming would be labelling Mrs Deeming a Nazi. With respect, this is a confused plea. The relevant point from that Ms Heath's notes of the meeting show that others who spoke did not think Mrs Deeming was a Nazi or a Nazi sympathiser or anything of the sort.

³⁹¹ Exhibits R189 and R192, CBC Tab 276 and 279, pages 1660-1663 and 1669.

³⁹² Exhibit A2, lines 32-49.

³⁹³ Exhibit A2, lines 32-49.

³⁹⁴ Exhibit A2, lines 50-60.

³⁹⁵ Exhibit A2, lines 559.

³⁹⁶ Exhibit A2, lines 647-649.

- 17.5. Mrs Deeming’s ability to respond to the Publications is, however, a relevant consideration to the question of likelihood of serious harm..³⁹⁷
- 17.6. So is the fact that Mrs Deeming chose to use her platform as a public figure to elevate and draw attention on other occasions to allegations that had not been made by Mr Pesutto.
- 17.7. A notable example concerns Mrs Deeming’s first concerns notice dated 11 May 2023 (**First Concerns Notice**), which Mrs Deeming sent to Ms Credlin, Rachel Baxendale of *The Australian*, and Sumeyya Ilanbey of *The Age*..³⁹⁸
- 17.8. Mrs Deeming leaked the First Concerns Notice before she had even sent it to Mr Pesutto and despite publicly acknowledging only five days earlier that Mr Pesutto had confirmed that he had never accused her of being a Nazi or of having Nazi sympathies, and saying she was ready to move on..³⁹⁹
- 17.9. Mrs Deeming accepted that she leaked her First Concerns Notice because she wanted it reported on..⁴⁰⁰ That notice related *only* to the Expulsion Motion and Dossier and included 47 hyperbolic imputations, including imputations to the effect that Mrs Deeming is a Nazi or has Nazi associations or is a Nazi sympathiser (none of which have been repeated in the SOC in respect of the Expulsion Motion and Dossier, and none of which is capable of being conveyed)..⁴⁰¹
- 17.10. Mrs Deeming admitted she wanted *The Australian* to publish an article saying ‘I’m alleging that Mr Pesutto has called me a Nazi’..⁴⁰² Mrs Deeming admitted the First Concerns Notice was sent and leaked on 11 May 2023 because she knew the second motion to expel her from the Party was going to be moved at a meeting on 12 May 2023..⁴⁰³
- 17.11. To the extent that anyone in the public may have believed that Mr Pesutto had accused Mrs Deeming of being a Nazi, they may well hold that belief because *Mrs Deeming* had falsely made that assertion herself and caused it to be put in the public domain.
- 17.12. Conduct of that kind serves to confound the causation exercise at the heart of the serious harm enquiry.

³⁹⁷ *Palmer* (2022) 404 ALR 621, 714 [434].

³⁹⁸ Exhibit R49, CBC Tab 589, page 2779-2808; T333.44-45; T334.2; Exhibit R50, CBC Tab 598, page 2829-2858; T336.19-44; T337.35-40 (Deeming XXN).

³⁹⁹ Exhibit R59, CBC Tab 571, page 2731-2733 (Mrs Deeming’s statement made by tweet at 11.13am on 6 May 2023). T334.21-25; 336.39-44 (Deeming XXN).

⁴⁰⁰ Annexure D to the Defence: CBA Tab 3, page 146.

⁴⁰¹ T336.1-7 (Deeming XXN).

⁴⁰² T338.14-16 (Deeming XXN).

17.13. The same point can also be illustrated by reference to Ms Wong, who gave evidence concerning alleged harm to Mrs Deeming’s reputation in online materials. Ms Wong gave evidence that ‘since the Publications’ (not, *because of* the Publications, let alone any particular Publication) she had seen numerous posts on social media that were ‘disparaging’ of Mrs Deeming, which called her a Nazi or accused her of associating with Nazis.⁴⁰⁴ However, the only examples referred to in her affidavit⁴⁰⁵ were replies to tweets Ms Wong had herself published in May 2023, rather than in response to the Publications. In the first of those tweets, on 4 May 2023, Ms Wong alleged Mr Pesutto had made ‘false nazi claims’ and shared an article (which Mrs Deeming had caused to be published by leaking her legal threats⁴⁰⁶) entitled ‘Moira Deeming sets John Pesutto a legal deadline to withdraw “Nazi smear”’ written by a journalist friendly to Mrs Deeming.⁴⁰⁷ This was an example of Ms Wong and Mrs Deeming putting into the public domain an allegation that Mr Pesutto had made ‘nazi claims’ against her; to the extent that anyone believed that to be true, it was not the result of any of the Publications, but by the conduct of a third party. Ms Wong’s second tweet on 12 May 2023 was in response to Mrs Deeming’s expulsion on 12 May 2023 (itself a possible cause of harm to reputation), which was caused by that earlier threat and leak.⁴⁰⁸

17.14. Mr Pesutto pleaded various instances in Annexure D to his Defence,⁴⁰⁹ comprising:

- (a) an article published by *The Australian* on 12 May 2023 entitled ‘Moira Deeming serves John Pesutto with defamation concerns notice’ (discussed above);⁴¹⁰
- (b) an article published by *The Australian* on 31 May 2023 entitled ‘Moira Deeming: Expelled MP issues second defamation notice against embattled Liberal leader John Pesutto’;⁴¹¹
- (c) a Tweet published by Mrs Deeming on 27 September 2023;⁴¹²
- (d) a Tweet published by Mrs Deeming on 28 September 2023;⁴¹³
- (e) a Tweet published by Mrs Deeming on 29 October 2023;⁴¹⁴

⁴⁰⁴ CBB Tab 29, page 321–2, [20] (Affidavit of Rachel Wong dated 27 May 2024).

⁴⁰⁵ CBB, page 321–2, [21].

⁴⁰⁶ Exhibit R269, CBC, Tab 552, pages 2682-2683.

⁴⁰⁷ Exhibit R273; CBC, Tabs 560 and 556, pages 2688-2690.

⁴⁰⁸ Exhibit R273.

⁴⁰⁹ SOC: CBA Tab 2, pages 146-149.

⁴¹⁰ Exhibit R51, CBC Tab 602, pages 2864-2869.

⁴¹¹ Exhibit R286, CBC Tab 611, pages 2948-2953. Mrs Deeming agreed that she leaked all her concerns notices because she wanted media organisations to report on their contents T339.15-21 (Deeming XXN).

⁴¹² Exhibit R529, CBC Tab 934, page 3990.

⁴¹³ Exhibit R530, CBC Tab 935, page 3991.

⁴¹⁴ Exhibit R532, CBC Tab 937, page 3993.

- (f) a video of an interview of Mrs Deeming by UK Commentator Andrew Doyle on ‘Free Speech Nation’, published on X on 30 October 2023;⁴¹⁵
- (g) a video of an interview of Mrs Deeming on ‘The Mess We’re In’ channel, published on YouTube on 3 November 2023;⁴¹⁶
- (h) a Tweet published by Mrs Deeming on 16 November 2023;⁴¹⁷
- (i) a Tweet published by Mrs Deeming on 20 November 2023;⁴¹⁸
- (j) a Tweet published by Mrs Deeming on 23 November 2023;⁴¹⁹ and
- (k) a Tweet published by Mrs Deeming on 5 December 2023.⁴²⁰

18. No evidence of actual harm to reputation

- 18.1. It is not unusual that Mrs Deeming has not led any evidence from any person who read or heard one of the Publications, and as a result of that Publication thought less of her.⁴²¹ Such an evaluation is ‘qualitative, not quantitative’.⁴²²
- 18.2. However, a sober assessment of the full body of evidence before the Court supports the inference that few people are likely to have changed their opinion of Mrs Deeming as a consequence of the Publications, let alone as a result of any particular Publication, which is the sole focus of the serious harm enquiry.
- 18.3. Serious harm may be proved by inference, but the evidence must support such an inference being drawn.⁴²³ The Court can draw inferences from other evidence and, in particular, as this Court found in *Greenwich v Latham*:⁴²⁴

Third party communications and comments posted online *by those who have watched, heard or read the relevant publication* can be evidence of reputational harm, to the extent they can be said to be a natural and probable consequence of the publication complained of. See *Economou v De Freitas* [2017] EMLR 4; [2016] EWHC 1853 (QB) at [129] (Warby J); *Riley v Sivier* [2023] EMLR 6; [2022] EWHC 2891 (KB) at [103] (Steyn J); *Barron v Vines* [2016] EWHC 1226 (QB) at [44]–[46] (Warby J).

⁴¹⁵ Exhibit R533, CBC Tab 938.

⁴¹⁶ Exhibit R534, CBC Tab 939.

⁴¹⁷ Exhibit R535, CBC Tab 940, page 3994.

⁴¹⁸ Exhibits R303, CBC Tab 652.

⁴¹⁹ Exhibit R538, CBC Tab 944, page 4001.

⁴²⁰ Exhibit R539, CBC Tab 945, page 4002.

⁴²¹ *Peros (No 3)*, [86].

⁴²² *Peros (No 3)* [2024] QSC 192, [55]-[56].

⁴²³ *Lachaux* [2016] QB 402 at 424 [65]; *Peros (No 3)*, [88], [412].

⁴²⁴ [2024] FCA 1050, [163]-[164] (emphasis added).

18.4. However, unlike the circumstances of *Greenwich v Latham*, most of the comments on social media are not replies to or otherwise referable to the Publications. The evidence from which Mrs Deeming may invite the Court to draw inferences (e.g. Mr Campey's report) is unsatisfactory and can also be distinguished from that in cases like *Greenwich v Latham*.⁴²⁵ and *Riley v Sivier*.⁴²⁶

Mrs Deeming's 'social media' expert evidence

Overview on Mr Campey's reports

18.5. Mrs Deeming relies on two reports by Geoffrey Campey: an initial report dated 29 May 2024.⁴²⁷ and a supplementary report dated 12 August 2024.⁴²⁸ Mr Campey is a principal of Social Media Evidence Experts.⁴²⁹

18.6. Mr Campey's reports were intended to perform the following three distinct functions:

- (a) estimating the number of people Mr Campey opined are likely to have seen the Publications;⁴³⁰
- (b) generating estimates of the number of mentions on social media of particular words and combinations of words at particular points of time;⁴³¹ and
- (c) estimating the number of people who engaged with the Publications.⁴³²

18.7. While Mr Campey was an honest witness, his reports were based on false assumptions, riddled with material errors,⁴³³ often failed to disclose source documents or processes of reasoning, grossly overestimated the extent of publication, and provide extremely limited assistance to the Court.

The first function – estimating the number of people who have seen the Publications and alleged republications of the Publications

18.8. Mr Campey was asked to assume that specified publications were republications of the Publications, but did not know whether that was in fact correct.⁴³⁴ As we have submitted elsewhere, many of the alleged republications did not in fact repeat the sense and substance of

⁴²⁵ Cf *Greenwich v Latham*, [182]-[186].

⁴²⁶ Referred to and relied upon at *Greenwich v Latham*, [168]-[172].

⁴²⁷ CBB (Expert Evidence), Tab 1 with annexures at Tab 2.

⁴²⁸ CBB (Expert Evidence), Tab 3 with annexures at Tab 4.

⁴²⁹ T371.16-17 (Campey XN).

⁴³⁰ T382.43-45 (Campey XXN).

⁴³¹ T383.1-3 (Campey XXN).

⁴³² T383.12-13 (Campey XXN).

⁴³³ For example: T371.45-372.2, T372.35-40 (Campey XN).

⁴³⁴ T387.22-25 (Campey XXN).

the Publications, and so are irrelevant to Mrs Deeming’s claims, even assuming she otherwise establishes her causes of action against Mr Pesutto.⁴³⁵

- 18.9. To estimate views, Mr Campey used ‘Meltwater’, a commercial online platform used for monitoring and analysing social media, commercial and public broadcast and print media, alternative news outlets and other online data sources.⁴³⁶ In particular, Mr Campey used the Social Listening and Analytics tools provided by Meltwater, generating metrics called ‘Reach’ and ‘Social Echo’.
- 18.10. Mr Campey said that despite its limitations, he believed that Meltwater provides a reflection of online engagement,⁴³⁷ and the figures it generates are broadly accurate,⁴³⁸ albeit less accurate than the statistics held by the publishers of the websites as to the number of visitors that each of their webpages received.⁴³⁹ However, Mr Campey admitted that he does not have any specialised knowledge of Meltwater beyond any other user,⁴⁴⁰ and agreed it was ‘an approximate tool at best’.⁴⁴¹
- 18.11. Meltwater describes Reach as its estimate of ‘potential viewership of a specific article based on the number of monthly unique visitors to the source’.⁴⁴² Mr Campey said Reach is the maximum conceivable number of people who might have seen a particular publication⁴⁴³ ‘purely just for information purposes’.⁴⁴⁴
- 18.12. In cross-examination, it emerged that Mr Campey had engaged in an apples-and-oranges comparison. Reach is an estimate of total *monthly* viewership of the *homepage* of a website. The relevant question, however, is the viewership of a *particular news article*, that may or may not be accessible via a homepage, and which is likely to have been readily accessible for a period of *about a day*.⁴⁴⁵ This led to manifestly untenable opinions in Mr Campey’s first report, which we address below at [18.18].
- 18.13. Meltwater does not disclose its methodology for calculating Social Echo, but it was Mr Campey’s ‘supposition’ that it does so by scanning across social media platforms looking for links to the URL of a particular news article, with any posts found to contain the URL analysed to determine the number of engagements with that post such as likes, comments,

⁴³⁵ Schedule B.

⁴³⁶ CBB (Expert Evidence), Tab 1, [5.2].

⁴³⁷ CBB (Expert Evidence), Tab 1, [5.29].

⁴³⁸ CBB (Expert Evidence), Tab 1, [5.30].

⁴³⁹ CBB (Expert Evidence), Tab 1, [5.31].

⁴⁴⁰ T383.23-25 (Campey XXN).

⁴⁴¹ T383.42 (Campey XXN).

⁴⁴² CBB (Expert Evidence) Tab 1, [5.9].

⁴⁴³ T384.7-9 (Campey XXN).

⁴⁴⁴ T377.45-46 (Campey XN).

⁴⁴⁵ T391.-13 (Campey XXN).

shares and reposts.⁴⁴⁶ Mr Campey said that Social Echo is more concrete than Reach and can identify engagements with particular publications, insofar as the Meltwater platform allows.⁴⁴⁷

18.14. Mr Campey preferred Social Echo to Reach where it is available,⁴⁴⁸ but the annexures to Mr Campey's reports show that Social Echo is often not available.⁴⁴⁹

18.15. Mr Campey said in his initial report that 'discounting the Reach figure provided by Meltwater at least 25%, would be an indication of the number of users who have likely consumed the content of a particular Publication'. Mr Campey meant this discounted figure could be relied on as an estimate of the number of people who were likely to have read a particular article.⁴⁵⁰ Mr Campey called this 'a very conservative estimate'.⁴⁵¹

18.16. However, in cross-examination Mr Campey conceded the 25% deduction he had applied was 'absolutely' an 'arbitrary figure', which could have equally been 50% or some other figure.⁴⁵²

18.17. By the time of preparing his supplementary report, Mr Campey had received subpoenaed material from some, but not all, of the publishers of the websites in question.

18.18. That data revealed that Mr Campey's allegedly 'very conservative' estimates were actually 'overstated'⁴⁵³ and 'wildly exaggerated'.⁴⁵⁴ For example:

(a) Meltwater provided a Reach figure for the *Epoch Times* website of 8.94 million, much greater than mainstream Victorian publications such as *The Age* the *Herald Sun* websites.⁴⁵⁵ Mr Campey's first report estimated that 6,705,000 people had read an article concerning Mrs Deeming on the *Epoch Times* website.⁴⁵⁶ Mr Campey's own research, however, indicated that only 29 people had commented on that article.⁴⁵⁷ Mr Campey admitted that it was highly unlikely that 6,705,000 people had read the article.⁴⁵⁸

(b) Mr Campey estimated that a publication concerning Mrs Deeming on the *ABC News* website was likely to have had (after discounting) approximately 6.6 million views.⁴⁵⁹

⁴⁴⁶ CBB (Expert Evidence), Tab 1, [5.25].

⁴⁴⁷ T384.11-13 (Campey XXN).

⁴⁴⁸ T384.4-5 (Campey XXN).

⁴⁴⁹ See, e.g. CBB (Expert Evidence), Tab 4.3 (Annexure 6A – ABC Interview Schedule), where only one of eight sources has Social Echo data available.

⁴⁵⁰ T384.40-44 (Campey XXN).

⁴⁵¹ CBB (Expert Evidence), Tab 1, [5.28].

⁴⁵² T385.42-44 (Campey XXN).

⁴⁵³ T386.43-44 (Campey XXN).

⁴⁵⁴ T388.21-22 (Campey XXN).

⁴⁵⁵ CBB (Expert Evidence), Tab 1, [13.14].

⁴⁵⁶ CBB (Expert Evidence), Tab 1, [13.14].

⁴⁵⁷ CBB (Expert Evidence), Tab 6A, p 2.

⁴⁵⁸ T387.42-43 (Campey XXN).

⁴⁵⁹ CBB (Expert Evidence), Tab 1, [13.14].

After the return of a subpoena issued to the ABC, however, the article was in fact revealed to have only 482 views⁴⁶⁰—99.9927% less than that so-called ‘very conservative’ estimate. The Social Echo figures were lower, but still wildly imprecise.⁴⁶¹

- 18.19. Mr Campey referred to Reach of *The Age* website as a whole over the course of a month of 2.79 million people – a figure that could tell the Court nothing about how many people saw any particular article on that website on any particular day.⁴⁶² His report opined that 2.092 million people had seen every article on *The Age* website, whatever its subject matter or prominence, an obviously wrong proposition.⁴⁶³
- 18.20. The same assumptions were adopted by Mr Campey in relation to the *news.com.au* website. Mr Campey opined that an article concerning Mrs Deeming on that website had been seen by 12.3 million people – about 45% of the entire Australian population from birth onwards.⁴⁶⁴
- 18.21. Mr Campey estimated Reach of the *Daily Mail* as approximately 8 million, and opined that an article concerning Mrs Deeming had therefore, on a ‘very conservative’ basis, been seen by 6 million people. Subpoenaed data showed there had been in fact only 8,182 hits on the article in question⁴⁶⁵—an overstatement of 99.8977%.
- 18.22. Mr Campey used Meltwater’s estimated Reach of the *3AW* website of 354,000 to estimate how many people viewed the *3AW* Interview on that website. The actual figure revealed by subpoenaed material was 84. The estimate was out by 99.9781%.⁴⁶⁶
- 18.23. Of the subpoenaed material Mr Campey received, only some provided data as to the ‘unique’ views of a particular publication, as opposed to its ‘total’ views. Unique views represent the total number of unique users who have viewed a publication, whereas total views include multiple views of a publication by a single user.⁴⁶⁷ Mr Campey accepted that it is preferable to utilise data of unique views rather than total views, in order to avoid double-counting.⁴⁶⁸ The majority of the data used in the tables of Mr Campey’s second report are as to total views, not unique views.⁴⁶⁹

- 18.24. In respect of X (formerly Twitter):

⁴⁶⁰ T388.24-25 (Campey XXN).

⁴⁶¹ T377.47 (Campey XN).

⁴⁶² T389.23-28 (Campey XXN).

⁴⁶³ T389.30-41 (Campey XXN).

⁴⁶⁴ T390.1-24 (Campey XXN).

⁴⁶⁵ T391.24-38, 41-42 (Campey XXN).

⁴⁶⁶ T403.13-27 (Campey XXN).

⁴⁶⁷ T375.15-21 (Campey XN).

⁴⁶⁸ CBB (Expert Evidence), Tab 3, [4.2.10].

⁴⁶⁹ T382.3-4 (Campey XN).

- (a) Mr Campey only had access to total views not unique views.⁴⁷⁰ Mr Campey accepted that for newsworthy items such as the Media Release, a single X user will potentially have seen multiple posts by different users on the same trending topic, even if they do not follow all those users.⁴⁷¹
- (b) Mr Campey assumed that for each re-post of a publication on X, there are 19 additional users.⁴⁷² This was based on data about Twitter usage from the Pew Research Centre, whose methodology Mr Campey knew nothing about.⁴⁷³ It was data from the United States. Mr Campey accepted that X usage in Australia was lower than in the United States.⁴⁷⁴ It was also data from 2019.⁴⁷⁵ Mr Campey believed that, after the sale of Twitter in 2022, and its rebranding as X, Twitter use had declined.⁴⁷⁶
- (c) Mr Campey accepted there was potentially a lot of double counting in relation to his report in respect of X figures.⁴⁷⁷

Second function – estimating mentions of ‘Moira Deeming’ on social media

- 18.25. Mr Campey sought to determine the trend of online discussion or mentions in respect of Mrs Deeming between February and May 2023.⁴⁷⁸ To do so, he inputted into Meltwater various search terms.⁴⁷⁹ Mr Campey has only produced a subset of the results, and there is no way to determine whether that subset is representative of the total number of posts produced by Meltwater.⁴⁸⁰
- 18.26. What Mr Campey’s report revealed was that mentions of the key words ‘Moira Deeming’ began to spike at or shortly after 3pm on 18 March 2023,⁴⁸¹ shortly after the neo-Nazis had performed the Nazi salute on the steps of Parliament House during the Rally. Interest in Mrs Deeming continued into 19 March 2023. Mr Campey noted that, between approximately 7 and 8pm on 19 March — still before the first of the Publications — there was a significant number of mentions of Mrs Deeming on social media, primarily comprising ‘calls on Mr Pesutto to condemn Mrs Deeming or take action against her’.⁴⁸²

⁴⁷⁰ T381.38-42 (Campey XN).
⁴⁷¹ T392.44-393.5 (Campey XXN).
⁴⁷² T393.7-8 (Campey XXN).
⁴⁷³ T393.13-22 (Campey XXN).
⁴⁷⁴ T393.24-29 (Campey XXN).
⁴⁷⁵ T393.38 (Campey XXN).
⁴⁷⁶ T393.40-394.13 (Campey XXN).
⁴⁷⁷ T394.15-17 (Campey XXN).
⁴⁷⁸ T382.23-29 (Campey XN).
⁴⁷⁹ T394.23-25 (Campey XXN).
⁴⁸⁰ T395.12-13 (Campey XXN).
⁴⁸¹ T395.35-41, T396.7-9 (Campey XXN).
⁴⁸² T398.19-20 (Campey XXN).

18.27. It is also of note that Mr Campey's analysis did not capture most of the negative comments regarding Mrs Deeming prior to the first of the Publications, some of which are summarised at paragraph 14.5(a) above. Mr Campey's results were necessarily confined to the search terms he used.⁴⁸³ Some might have been missed because of the unknown Meltwater sampling or algorithms.

Third function – online engagement with the Publications

18.28. As to the third function, estimating online engagement with the Publications, after cross-examination, it was clear that no weight can be afforded to this evidence.

18.29. Mr Campey used Meltwater to identify the number of mentions on social media of each of the Publications.⁴⁸⁴ He relied on data provided by Pascallas Pty Ltd, another collector of online data, but did not know if the data it provided was accurate.⁴⁸⁵

18.30. It was, we submit, wholly unreliable. For example, in relation to the 3AW Interview, the Meltwater apparently platform identified 46 mentions of the 3AW Interview. The results are necessarily confined to the search terms used by Mr Campey.⁴⁸⁶ Those mentions were identified using the combination of search terms 'Pesutto' and '3AW'.⁴⁸⁷ However, when looking at the actual mentions identified by Mr Campey, it is apparent that many of them did not 'have anything whatsoever to do with' the 3AW Interview,⁴⁸⁸ and include posts from outside Australia.⁴⁸⁹

18.31. Further, even if the results relate to a Publication, they do not evidence harm to reputation was caused by that Publications. That is because, while the social media posts generated in Meltwater's samples are classified as 'neutral', 'negative' or 'positive', these classifications have been determined in some unknown way by Meltwater,⁴⁹⁰ which does not reflect a positive or negative response to Mrs Deeming.⁴⁹¹ Mr Campey has not analysed whether Meltwater's classification is right or wrong,⁴⁹² and given the search terms Mr Campey used included various search terms such as '#istandwithmoiradeeming' (which would indicate a tweet of support for Mrs Deeming rather than evidence of harm to reputation), the total

⁴⁸³ T404.30-35 (Campey XXN).

⁴⁸⁴ T398.43-46 (Campey XXN).

⁴⁸⁵ T399.10 (Campey XXN).

⁴⁸⁶ T404.30-35 (Campey XXN).

⁴⁸⁷ T399.25-29 (Campey XXN).

⁴⁸⁸ T401.27-28 (Campey XXN).

⁴⁸⁹ T402.43-46 (Campey XXN).

⁴⁹⁰ T403.44-404.2 (Campey XXN).

⁴⁹¹ T404.12-18 (Campey XXN).

⁴⁹² T404.20-21 (Campey XXN).

number of tweets identified is of no assistance in evidencing harm to Mrs Deeming's reputation.

Conclusion on Mr Campey's evidence

18.32. While the Court may find Mr Campey's collation of the subpoenaed data of some assistance, that data is now set out in Schedule B to these submissions. Otherwise, Mr Campey's opinions are of very little assistance when considering whether Mrs Deeming has discharged her burden to established serious harm.

Overview of Mrs Deeming's lay evidence

18.33. None of Mrs Deeming's witnesses gave evidence that Mrs Deeming's reputation was harmed in the circles in which they moved.⁴⁹³

18.34. Nor was there a body of evidence of the effect of any specific publication. The witnesses tended to deal with them compositely and by reference to their observations *since* the Publications, not *because of* the Publications.

18.35. A number of Mrs Deeming's witnesses on harm had not read or heard a Publication contemporaneously.

18.36. In short, much of the evidence was so vague as to be of no probative value; as became clear when some of it was tested in cross-examination or analysed.

Evidence of reaction to specific Publications

18.37. **Media Release.** There is no evidence of any actual harm to Mrs Deeming's reputation in the eyes of those who read the Media Release. For example:

- (a) The best evidence of the impact on Mrs Deeming's reputation with the direct *publishees* of the Media Release are the articles written by, and the questions asked by, journalists the next day. These include the questions asked by of Mr Pesutto in the 3AW Interview, during the Press Conference and the ABC Interview, or in other publications not sued on such as his interview later that evening with Ms Credlin. A fair reading of those Publications and the alleged republications shows that no journalists understood Mr Pesutto to be alleging that Mrs Deeming was a neo-Nazi or neo-Nazi sympathiser or anything of the sort. They all clearly understood the sting of

⁴⁹³ For example, Duke: T369.39-41; Walton: T470.11-21; Wong: T1058.14-15.

the allegation to be to the effect encapsulated by the Media Release Imputation pleaded by Mr Pesutto in his Defence at [5.3(a)].

- (b) A number of Mrs Deeming's Parliamentary colleague witnesses had not seen or read the Media Release until they were provided with a copy by Mrs Deeming's lawyers in preparation for this case.⁴⁹⁴
- (c) Other witnesses who purported to have read the Media Release, such as Mr Mundine and Mrs Henderson, quickly wrote messages or tweets in support of Mrs Deeming; indicating that she had not suffered any reputational harm in their eyes.⁴⁹⁵

18.38. **3AW Interview:**

- (a) Mr Wells listened to the 3AW Interview. He thought the allegations were different to what he understood Mr Pesutto had said to him the night before. He considered that 'the accusations he made about Deeming in this interview did not make sense to me and did not justify expulsion'.⁴⁹⁶
- (b) Ms Walton heard the 3AW Interview at the time it went to air.⁴⁹⁷ Ms Walton's evidence was that Mrs Deeming remains, within the circles Ms Walton moves, someone who continues to embody the values of the community;⁴⁹⁸ seen to be very courageous;⁴⁹⁹ and continues to be known as a person who is loyal, dedicated and of great integrity.⁵⁰⁰
- (c) Mr Duke heard the 3AW Interview on the radio.⁵⁰¹ He gave evidence that Mrs Deeming continued to enjoy a reputation with the wider Presbyterian community as someone with a reputation for being honest, courageous, friendly and caring.⁵⁰²
- (d) Mr Riordan was not able to say if he had listened to the 3AW Interview, saying he 'would have heard extracts of it, but not likely to have heard it live myself'.⁵⁰³

18.39. **Press Conference:**

⁴⁹⁴ For example, Mr Hodgett: T457.10-12, T457.45-458.7; Ms Heath: T412.20-413.24; Mr Riordan: T442.28-29.
⁴⁹⁵ Exhibit A190.
⁴⁹⁶ CBB Tab 27, page 298 [15] (Affidavit of Kim Wells dated 24 May 2024).
⁴⁹⁷ T471.14-15.
⁴⁹⁸ T470.1517.
⁴⁹⁹ T470.12-13.
⁵⁰⁰ T470.19-20.
⁵⁰¹ T369.9 (Duke XXN).
⁵⁰² T369.15-21 (Duke XXN).
⁵⁰³ T442.31-33 (Riordan XXN).

- (a) The only evidence from a witness which appeared to be a response to the Press Conference was that of Mr Ruddick. Mr Ruddick did not have a pre-existing relationship with Mrs Deeming; they only met after the Publications..⁵⁰⁴
- (b) Mr Ruddick was drawn to Mrs Deeming, having listened to her maiden speech and having formed the view she was a ‘courageous’ politician because she was willing to say things other people were ‘afraid to say’..⁵⁰⁵
- (c) On 20 March 2023, despite not knowing Mrs Deeming and despite Mrs Deeming not having yet said anything in response to any of the allegations in the Publications, Mr Ruddick immediately posted a tweet republishing part of the Press Conference in support of Mrs Deeming and against Mr Pesutto..⁵⁰⁶ The tweet embedded a short video from the Press Conference and said:

Here’s Victorian Opposition leader John Pesutto saying Moira Deeming will be sacked from the Liberal Party because ‘she has an association with ... people who promote Nazi views’.

It’s a slur that is equally outrageous and false. He looks stressed.

- (d) Mr Ruddick said that he received replies to that tweet which were ‘disparaging of Moira (or disparaging of me for publicly supporting Moira), including many which implied she was a Nazi or Nazi supporter’. However, he only included six examples in his affidavit and on closer inspection of the tweet and the replies to it (there are approximately 476, which are still available online) it is clear the responses were overwhelmingly supportive of Mrs Deeming and derogatory of Mr Pesutto. This is despite (or perhaps because of) the fact that Mr Ruddick misquoted what Mr Pesutto actually said..⁵⁰⁷

18.40. **ABC Interview.** No witness aside from Mrs Deeming gave evidence of their response to the ABC Interview specifically, or that they saw it at the time it went to air..⁵⁰⁸

18.41. **Expulsion Motion and Dossier.** None of Mrs Deeming’s witnesses (including Mrs Deeming⁵⁰⁹) had followed and reviewed its links and references..⁵¹⁰ However, they did review the Expulsion Motion and Dossier itself. The response from Mr Wells to the content

⁵⁰⁴ CBB Tab 22, page 263, [7] (Affidavit of John Ruddick dated 24 May 2024).

⁵⁰⁵ CBB Tab 22, page 263, [8] (Affidavit of John Ruddick dated 24 May 2024)..

⁵⁰⁶ CBB Tab 22, page 265, [13] (Affidavit of John Ruddick dated 24 May 2024).

⁵⁰⁷ This is clear from the video embedded in the tweet. The words Mr Ruddick omitted at the ellipsis and at the end show Mr Pesutto actually said ‘*Deeming has an association with people who organised the Rally along with her assistance, who have shared platforms with and viewpoints with people who promote Nazi views or sympathies*’.

⁵⁰⁸ Mr Riordan thought it was ‘more likely’ he heard the ABC Interview than the 3AW Interview, but he had no recollection of listening to it: T442.35-39.

⁵⁰⁹ T184.17-19 (Deeming XXN); T185.1-17 (Deeming XXN).

⁵¹⁰ For example, T462.27-47; 463.1-21 (Hodgett XXN); T477.1-478.6 (Smith XXN); T499.13-500.24 (Wells XXN).

of the Expulsion Motion and Dossier was telling – ‘Deeming should not be expelled for this’,⁵¹¹ and in his view the ‘information in the Dossier did not justify the Expulsion Motion’.⁵¹² Mr Wells, obviously, did not think the less of Mrs Deeming by reason of the contents of the Expulsion Motion and Dossier.

General witness evidence of Mrs Deeming’s reputation ‘since the Publications’

18.42. Dealing with the evidence of the witnesses who addressed harm to reputation:

- (a) Mr Duke considered that Mrs Deeming continues to enjoy a reputation within the wider Presbyterian community for being honest, courageous, friendly and caring.⁵¹³ He said Mrs Deeming also continues to enjoy a reputation as a cornerstone within that community and somebody who embodies its values,⁵¹⁴ including being loyal, dedicated, and a person of great integrity.⁵¹⁵
- (b) Ms Walton, who knows Mrs Deeming through the Brimbank Presbyterian community, said that Mrs Deeming continues to be seen in the circles in which she moves as very courageous, embodying the values of the community, loyal, dedicated and of great integrity.⁵¹⁶
- (c) Ms Wong has stayed in contact with Mrs Deeming since they met in 2022,⁵¹⁷ and posted tweets in support of Mrs Deeming after the Publications.⁵¹⁸ In cross-examination, Ms Wong accepted that Mrs Deeming retained her good reputation in Ms Wong’s professional circles⁵¹⁹ and was seen by some as being even ‘more courageous’ now than she was prior to the Publications.⁵²⁰
- (d) Ms Gorman worked (and continues to work) part-time for Mrs Deeming as an electoral officer.⁵²¹ Although she gave evidence that Mrs Deeming received negative messages via phone, email and social media shortly after the publications,⁵²² there is no evidentiary connection between those and the Publications (let alone any particular

⁵¹¹ CBB Tab 27, page 298, [21] (Affidavit of Kim Wells dated 24 May 2024)

⁵¹² CBB Tab 12, page 199 [23] (Affidavit of David Hodgett dated 27 May 2024).

⁵¹³ T369.16-21 (Duke XXN).

⁵¹⁴ T369.30-34 (Duke XXN).

⁵¹⁵ T369.37-41 (Duke XXN).

⁵¹⁶ T470.12-20 (Walton XXN).

⁵¹⁷ CBB Tab 29, page 318, [7] (Affidavit of Rachel Wong dated 27 May 2024).

⁵¹⁸ CBB Tab 29, page 321–2, [21] (Affidavit of Rachel Wong dated 27 May 2024).

⁵¹⁹ CBB Tab 29, page 319, [13] (Affidavit of Rachel Wong dated 27 May 2024).

⁵²⁰ T1071.26-28.

⁵²¹ CBB Tab 8, page 158, [1] (Affidavit of Renee Simone Gorman dated 24 May 2024).

⁵²² CBB Tab 8, page 161, [14] (Affidavit of Renee Simone Gorman dated 24 May 2024).

Publication, as the serious harm test requires). She herself did not believe that Mrs Deeming was a Nazi or Nazi sympathiser or had aligned with Nazi sympathisers.⁵²³

- (e) Ms Hughes (a university friend) continues to support Mrs Deeming.⁵²⁴ Rather than thinking less of Mrs Deeming, she worries about her.⁵²⁵
- (f) Mr Mundine remains close personal friends with Mrs Deeming and Mr Deeming.⁵²⁶ Despite being a prominent figure, Mr Mundine did not consider it necessary to disassociate from Mrs Deeming and believed the allegations against her were baseless.⁵²⁷ Mr Mundine has published numerous tweets in support of Mrs Deeming.⁵²⁸
- (g) Ms Thompson met Mrs Deeming in 2010 and they became close friends.⁵²⁹ She has not distanced herself from Mrs Deeming since the Publications.⁵³⁰
- (h) None of the MPs or other politicians who gave evidence for Mrs Deeming gave evidence that they themselves thought less of Mrs Deeming as a result of the Publications. On the contrary, many voted for Mrs Deeming to remain a member of the Party and spoke in support of her doing so, despite having read the Expulsion Motion and Dossier.

18.43. Many of Mrs Deeming's witnesses and those in her circles was that they did not and do not consider that the facts and matters set out or alleged in the Publications warrant any form of punishment, let alone dismissal.⁵³¹ It must follow logically that they did not understand any of the Publications to carry imputations to the effect that Mrs Deeming is a Nazi, Nazi sympathiser, associate of Nazis or stands with Nazis.

18.44. The clear majority of communications in evidence that were referable to Mr Pesutto or the Publications (for example, letters, emails and lobbying to Mr Pesutto or his office or other MPs)⁵³² were supportive of Mrs Deeming. Mr Hodgett explained that following the Publications he was inundated with around 100 messages from the public, the overwhelming majority (around 97%)⁵³³ of which were supportive of Mrs Deeming and critical of Mr Pesutto.

⁵²³ CBB Tab 8, page 162, [18] (Affidavit of Renee Simone Gormon dated 24 May 2024).

⁵²⁴ CBB Tab 14, page 207, [10] (Affidavit of Anna Hughes dated 27 May 2024).

⁵²⁵ CBB Tab 14, page 207-8, [14]-[15] (Affidavit of Anna Hughes dated 27 May 2024).

⁵²⁶ CBB Tab 17, page 224, [12] (Affidavit of Nyunggai Warren Stephen Mundine AO dated 29 May 2024).

⁵²⁷ CBB Tab 17, page 226, [22] (Affidavit of Nyunggai Warren Stephen Mundine AO dated 29 May 2024).

⁵²⁸ CBB Tab 17, page 227, [24] (Affidavit of Nyunggai Warren Stephen Mundine AO dated 29 May 2024).

⁵²⁹ CBB Tab 25, page 285, [2] (Affidavit of Dayna Thompson dated 27 May 2024).

⁵³⁰ CBB Tab 25, page 287, [9] (Affidavit of Dayna Thompson dated 27 May 2024).

⁵³¹ For example: CBB Tab 23, [19]-[20] (Affidavit of Ryan Smith dated 21 May 2023); CBB Tab 20, [14] (Affidavit of Richard Riordan dated 24 May 2024).

⁵³² For example: Mr Hodgett at CBB Tab 13, page 196 [14] (Affidavit of David Hodgett dated 30 July 2024).

⁵³³ T463.46-464.1-8 (Hodgett XXN).

- 18.45. This is consistent with the evidence of Mr Pintos-Lopez.⁵³⁴ It is also consistent with Mrs Deeming's admission in her private text message to Mrs Keen on 6 April 2023, where she said she planned to speak to the media soon but 'had learned of making the media wait lol' before saying: 'But I just had to write to you, because even though things went crazy in Au & NZ, it's been the most effective PR campaign we've ever had here'..⁵³⁵
- 18.46. The only contrary lay evidence consisted of isolated examples, like those referred to in [17.17] of the SOC which cannot (even accepting Mrs Deeming's evidence) be tied to the Publications with anything more than speculation, or did not withstand scrutiny, or both. For example, Mr Duke gave generalised evidence about how he had seen comments on newspaper articles about Mrs Deeming become negative since the Publications..⁵³⁶ However, when this evidence was questioned during cross-examination, it quickly became apparent that Mr Duke either did not read the articles or could not recall reading the comments on articles concerning Mrs Deeming that pre-dated the Publications,⁵³⁷ meaning that even if the Court could give his generalised evidence any weight (which it should not), there was no sensible reference point to compare it to.
- 18.47. Journalists were the primary audience of some of the Publications, including almost all of the direct publications of the Media Release. Therefore, any evidence of those journalists' reactions to the Publications is relevant to assessing whether Mrs Deeming's reputation was seriously harmed by the publication of the Publications.
- 18.48. Critically, none of the articles which are alleged to be republications suggest the authors of those articles understood Mr Pesutto had alleged Mrs Deeming was a neo-Nazi or a Nazi sympathiser or anything similar; and their alleged republications accordingly did not carry any such imputations either..⁵³⁸
- 18.49. Further, the questions asked by the journalists during the interactive and participatory Publications (particularly the Press Conference, but also the interviewers in the 3AW Interview and the ABC Interview) and at later press conferences (e.g. Mr Pesutto's press conference on 27 March 2023) suggest that the journalists did not understand Mr Pesutto had alleged Mrs Deeming was a neo-Nazi, a Nazi sympathiser or anything of the sort..⁵³⁹

⁵³⁴ CBB Tab 38, page 445, [57]-[58] (Affidavit of Rodrigo Pintos-Lopez dated 16 July 2024).

⁵³⁵ Exhibit R249, CBC Tab 510, page 2564.

⁵³⁶ CBB Tab 6, page 142, [14] (Affidavit of Christopher Duke dated 24 May 2024).

⁵³⁷ T365.6-25 (Duke XXN).

⁵³⁸ See Schedule B - Alleged republications of matters complained of.

⁵³⁹ FN with line reference.

19. Mitigatory publications by Mr Pesutto

- 19.1. Mr Pesutto made numerous public statements (both in and in addition to the Publications) where he confirmed he does not believe Mrs Deeming to be a neo-Nazi, a white-supremacist, or anything of similar substance or effect, something Mrs Deeming has previously accepted.⁵⁴⁰
- 19.2. Those statements are detailed in Annexure C to Mr Pesutto's Defence.⁵⁴¹

20. Other matters

Gravity of the defamation

- 20.1. Mrs Deeming relies on the seriousness of the imputations pleaded. The relevant question is, however, the seriousness of the imputations found to be carried by the individual Publications.

Extent of publication

- 20.2. Mr Pesutto has admitted each of the Publications was published. The following extent of publication is either admitted or may be found by the Court:
- (a) **Media Release:** up to 821 persons,⁵⁴² the majority of whom would be journalists;
 - (b) **3AW Interview:** approximately 143,000 to 159,205 persons⁵⁴³ (of which up to 205 were downloads from the website, with the remainder through the radio);
 - (c) **ABC Interview:** up to (but likely substantially less than) 227,648 persons through live television broadcast (likely substantially less, as many viewers of the combined episode may have watched another part of the broadcast);⁵⁴⁴ up to (but likely substantially less than) 12,621 persons on ABC iView (for the same reason);⁵⁴⁵ approximately 20,942

⁵⁴⁰ Annexure C to the Defence: CBA Tab 3, pages 142-145. See also Exhibit R59, CBC Tab 571, pages 2731-2733 (Mrs Deeming's statement made by tweet at 11.13am on 6 May 2023), wherein Mrs Deeming had, prior to her expulsion, confirmed she accepted that Mr Pesutto had publicly confirmed as much and said she was ready to move on.

⁵⁴¹ Annexure C of the Defence: CBA Tab 3, pages 143-145: Media Release, lines 5-7: CBA Tab 6, pages 163-164; 3AW Interview, lines 11-13, 97-98, 101-104, 116-117, 135-138: CBA Tab 9, pages 169-175; Press Conference, lines 12-16, 73-79, 147-149, 237-240, 418-420: CBA Tab 14, pages 182-195; Mr Pesutto's interview with Peta Credlin on Sky News dated 20 March 2023 (Exhibit A29, with transcript Exhibit A30); Mr Pesutto's interview with 3AW on 27 March 2023 (Exhibit A19, with transcript Exhibit A20); Mr Pesutto's press conference dated 27 March 2023 (Exhibit A204, CBC Tab 493 pages 2478-2492); Mr Pesutto's press conference dated 4 May 2023 (as reported in Exhibit R273, CBC Tab 560).

⁵⁴² Defence, [3.5]: CBA Tab 3, page 94; Statement of Agreed Facts, [9], CBD Tab 2, page 4. Comprising 28 unique views on the John Pesutto – Member for Hawthorn website; 26 unique views on the Victorian Liberal Party website; and approximately 767 recipients on the mailing list of journalists and others with an interest in receiving media releases from the office of the Leader of the Opposition

⁵⁴³ Statement of Agreed Facts, [18]-[20], CBD Tab 2, page 6.

⁵⁴⁴ Statement of Agreed Facts, [29], CBD Tab 2, page 6.

⁵⁴⁵ Statement of Agreed Facts, [30], CBD Tab 2, page 7.

through the ABC Interview on radio;⁵⁴⁶ less than 364 persons via download from the ABC website;⁵⁴⁷ a smaller percentage of 134,954 page views;⁵⁴⁸

- (d) **Press Conference:** no extent of publication is admitted but the Court may infer that various journalists were present and comprehended what was said; and
- (e) **Expulsion Motion and Dossier:** by email to 28 Members of the Party at 6:01pm on 20 March 2023;⁵⁴⁹ following publication of an article on *The Age* website and media enquiries, Mr Pesutto's office provided a copy of the Expulsion Motion and Dossier to various media outlets including the *Herald Sun* and *The Australian*, through 15 different journalists.⁵⁵⁰

Identity of the Publisher

- 20.3. In paragraph [7.12] of the SOC, Mrs Deeming relies upon Mr Pesutto's role and status as the leader of the Party to infer that many of those to whom his statements were published have believed, and were likely to believe, that the defamatory imputations are true, irrespective of contrary information from Mrs Deeming or other sections of the public and media.
- 20.4. However, the Court should not too readily assume the public bestow an authority on politicians on any matter; especially hotly contested political ones. Rather, as cases like *Palmer v McGowan (No 5)* explain,⁵⁵¹ and past media coverage of Mrs Deeming shows, politics is a brutal sport; members of the public often dismiss the views of politicians they disagree with; and persons who have strong views concerning an issue or politician (particularly a politician who shares their views on contentious social issues) are unlikely to take much notice of what another politician says about them; even the Premier of the State.⁵⁵²
- 20.5. The fact that people are willing to dismiss the political opinions of persons ostensibly on the same side of politics as them is evidenced by the immediate reaction of other Liberal politicians and pundits to the Publications (for example, Ms Henderson, Mr Mundine, Ms Credlin, and other MP witnesses). Even Mr Ruddick, who did not know Mrs Deeming or anything about

⁵⁴⁶ Statement of Agreed Facts, [31], CBD Tab 2, page 7.

⁵⁴⁷ Statement of Agreed Facts, [34(a)], CBD Tab 2, page 7.

⁵⁴⁸ Statement of Agreed Facts, [34(b)], CBD Tab 2, page 7. Many of the viewers of this webpage in Australia would have clicked on and listened to the ABC Interview, particularly as it also contained a written article.

⁵⁴⁹ Defence, [22.3(i)]: CBA Tab 3, page 101; Statement of Agreed Facts, [53], CBD Tab 2, page 10; Exhibit R224, CBC Tab 397, pages 2083-2100.

⁵⁵⁰ Defence, [22.3(ii)-(iii)]: CBA Tab 3, page 101; Statement of Agreed Facts, [54], CBD Tab 2, page 10; Exhibits A181 and A182, CBC Tabs 414 and 415, pages 2152-2173.

⁵⁵¹ *Palmer v McGowan (No 5)* (2022) 404 ALR 621, 716 [447]–[449].

⁵⁵² See, for example, the findings in *Palmer v McGowan (No 5)*, concerning the lack of any real effect of the incredibly popular Premier's defamatory comments on Mr Palmer's reputation. See also the fact that none of Mrs Deeming's witnesses had apparently heard that the Premier, Mr Daniel Andrews had described Mrs Deeming as 'hateful': Exhibit R109, CBC Tab 71; Exhibit R112, CBC Tab 74; Exhibit R115, CBC Tab 77; Exhibit R116, CBC Tab 78.

the veracity of the allegations in the Publications (but who liked Mrs Deeming's style as a politician) immediately jumped to her defence on X.⁵⁵³

- 20.6. In respect of the 3AW Interview, Mrs Deeming relies on the status of Neil Mitchell's radio program (paragraph [11.6] of the SOC); and in respect of the ABC, that the ABC portrays itself as a respected, reliable, non-partisan and balanced news source such that it would be considered a reliable news source by its audience (paragraph [16.6] of the SOC).
- 20.7. Insofar as Mr Mitchell's status is relied upon, Mr Mitchell was not the person making allegations about Mrs Deeming and, in fact, he vigorously questioned and pushed back on things Mr Pesutto said. For example, he opened the interview by saying 'I'd argue Moira Deeming was entitled to be there';⁵⁵⁴ said in respect of Mrs Keen's videos 'But she does say, she does say she'll be interviewed – willing to be interviewed by anybody';⁵⁵⁵ and he also said '... Angie Jones we've spoken to she says that tweet you referred to is right out of context and she had a history with the person tweeting it'.⁵⁵⁶ Further, the next day Mr Mitchell interviewed Mrs Keen, providing her with a platform to respond to the same or similar audience.
- 20.8. Insofar as the alleged status of the ABC with its audience is concerned, similar comments can be made. It may also be inferred that Mrs Deeming's reputation with the audience of the ABC was also poor or tarnished by reason of the ABC's previous coverage of Mrs Deeming.⁵⁵⁷ Mrs Deeming later complained to the ABC ombudsman over the ABC's coverage of the Rally (not the Publications) arguing it had contained false and damaging statements.⁵⁵⁸

Mrs Deeming's Expulsion

- 20.9. Paragraph [7.13] of the SOC (and later paragraphs that cross-reference to it) is another misplaced plea. Mrs Deeming relies upon the fact she was ultimately expelled from the Party as something that would reinforce that the imputations in what she described as 'Mr Pesutto's statements' were true and were the basis for her expulsion, and therefore evidence serious harm.
- 20.10. Mrs Deeming's expulsion was not caused by the Publications. It was a decision of the Party Room. The expulsion relied on or followed the actions of numerous people other than Mr Pesutto. The proximate causes were Mrs Deeming's conduct in leaking, destabilising and

⁵⁵³ CBB Tab 22, page 264 [13(a)] (Affidavit of John Ruddick dated 24 May 2024).

⁵⁵⁴ SOC, Schedule C: CBA Tab 2, page 48 (lines 3-4).

⁵⁵⁵ SOC, Schedule C: CBA Tab 2, page 49 (lines 26-27).

⁵⁵⁶ SOC, Schedule C: CBA Tab 2, page 55 (lines 196-197).

⁵⁵⁷ See, for example, Exhibit R120, CBC Tab 82, page 401-406. ; Exhibit R125, CBC Tab 93, pages 460-468; Exhibit R34, Tab 354, pages 1898-1904; T253 (Deeming XXN) (regarding prior coverage of the Rally and Mrs Deeming from 1.137pm on 19 March 2023)

⁵⁵⁸ Exhibit R308, CBC Tab 672, pages 3181-3182.

publicly threatening litigation; the five signatories to the motion, none of whom were Mr Pesutto, determining to move the motion; and each member of the Party Room who voted for Mrs Deeming's expulsion, each of which could properly be described as a *novus actus interveniens*.⁵⁵⁹

21. Conclusion

- 21.1. Mrs Deeming bears the burden of establishing that the publication of *each* Publication caused, or was likely to cause, serious harm to her reputation. She seeks to do so by an entirely inferential case, which involves impermissibly aggregating harm and relying on alleged republications contrary to authority.
- 21.2. An inferential case might have been available in the absence of any confounding causes of damage to reputation, but that is simply not this case. No attempt has been made to grapple with the seven confounding causes we have identified above: (a) Mrs Deeming's extant reputation as a polarising and controversial figure; (b) the effect of the mountain of earlier publications by third parties smearing Mrs Deeming with explicit allegations of Nazism, Nazi sympathy and Nazi associations; (c) the fact that if serious harm is established with respect to one Publication, it is correlatively less likely to be established with respect to each subsequent Publication; (d) the subsequent damaging publications about Mrs Deeming by third parties for which Mr Pesutto is not responsible; (e) the publications that Mrs Deeming herself made, or caused to be made, in which she made allegations about what she said Mr Pesutto had imputed of her; (f) the absence of any evidence of actual harm to reputation; and (g) the mitigatory publications by Mr Pesutto.
- 21.3. In our submission, Mrs Deeming has not discharged her burden of establishing the serious harm element in respect of any of the Publications.

F. PUBLIC INTEREST

22. Applicable principles

- 22.1. Section 29A came into force in Victoria on 1 July 2021. It relevantly provides (our emphasis):⁵⁶⁰

29A Defence of publication of matter concerning issue of public interest

- (1) 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

⁵⁵⁹ *Rayney v WA (No 4)* [2022] WASCA 44, [121]-[130], [194]-[195]. See also *Palmer (No 5)* [447]-[449], wherein the admitted effects of the passing of the Amendment Act itself was not causally relevant.

⁵⁶⁰ Emphasis added.

- (b) the defendant reasonably believed that the publication of the matter was in the public interest.
- (2) In determining whether the defence is established, a court *must* take into account *all of the circumstances of the case*.
- (3) *Without limiting subsection (2), the court may take into account the following factors to the extent the court considers them applicable in the circumstances: [non-exhaustive list of factors not set out thereafter].*
- 22.2. Section 29A was enacted, at least in part, as a response to the perceived failings in the statutory qualified privilege defence in s 30 of the Act. Those failings included perceived difficulties faced by investigative journalists when invoking the defence.
- 22.3. However, they also included concerns that, having saddled the common law *Lange* defence with the (in practice, often onerous) requirements of reasonableness of *conduct* under the precursor to the s 30 defence (the defence in s 22 of the *Defamation Act 1974* (NSW)),⁵⁶¹ Courts had effectively denuded the *Lange* defence of any real practical utility.⁵⁶²
- 22.4. In *Palmer (No 5)*, after considering thoughtful submissions concerning the need to rethink the approach to *Lange* (which Lee J was clearly sympathetic to, but felt compelled to reject at first instance because of intermediate appellate Court authority equating reasonableness of conduct in *Lange* with reasonableness of conduct in s 30), Lee J said:⁵⁶³
- ... it is important, a quarter century on from the decision in *Lange*, to step back from the body of law that has developed and consider the underlying principle the High Court was articulating. That is, the need to strike a balance between freedom of discussion of government and politics and reasonable protection of the persons who may be involved, directly or incidentally, in the activities of government or politics: *Lange* (at CLR 566–7; ALR 112). In circumstances where the *Lange* defence is almost never made out, principally because of the stringent reasonableness requirement, how can it be said that a proper “balance” is being struck? If a requirement of reasonableness is an appropriate attenuation of free speech in striking this balance in the present context, there is something to be said for an evaluative approach to reasonableness not encrusted by, and viewed through the prism of, the authorities that have so constrained the utility of the statutory defence.
- 22.5. Section 29A has been the subject of limited judicial consideration.
- 22.6. This is the first case going to verdict in which the public interest defence in s 29A has been relied upon as a defence for what are, quite clearly, political communications, and the first case going to verdict not involving a mass media or journalist respondent.

⁵⁶¹ *Palmer (No 5)*, [207], [212]-[219].

⁵⁶² *Palmer (No 5)*, [221]; Adehlia Ebert, ‘Defamation and democracy: Political criticism under the public interest defence’ (2022) 27 *Torts Law Journal* 163, particularly by reference to the substantial body of literature cited at fn3.

⁵⁶³ *Palmer (No 5)*, [222].

Cases concerning s 29A

- 22.7. Section 29A of the Act was first considered in *Barilaro v Google LLC*.⁵⁶⁴ Rares J identified that (a) the criteria in s 29A are to be distinguished from those in s 30 of the Act;⁵⁶⁵ (b) the concept of qualified privilege does not burden the defence in s 29A;⁵⁶⁶ (c) the defence is modelled on s 4 of the *Defamation Act 2013 (UK) (UK Act)*;⁵⁶⁷ (d) the considerations in s 29A(3) must not always be met in order for the defence to succeed;⁵⁶⁸ (e) a failure (at least on the part of a respondent such as Google) to take reasonable steps to obtain and include an applicant's side of the story might form the basis for a conclusion that a respondent did not reasonably believe that publication of the matter was in the public interest.⁵⁶⁹
- 22.8. In *Murdoch v Private Media Pty Ltd*,⁵⁷⁰ Wigney J considered an application to strike-out a s 29A defence. His Honour noted: (a) s 29A establishes a 'comparable defence' to s 4 of the UK Act;⁵⁷¹ (b) decisions of the courts of the United Kingdom on s 4 of the UK Act provide some guidance for the proper construction of s 29A but must be approached with caution due to linguistic differences between the two provisions;⁵⁷² (c) the criteria in s 29A should not simply be equated with the tests for common law or statutory qualified privilege, just as s 4 of the UK Act was not to be equated with the common law *Reynolds*.⁵⁷³ defence which it replaced;⁵⁷⁴ and (d) the baggage with which the defence of qualified privilege has been laden should not be inflicted on s 29A.⁵⁷⁵ Wigney J observed that the 'reasonableness' enquiry under s 30 and *Lange* was directed to *conduct*.⁵⁷⁶ whereas the corresponding enquiry under s 29A is directed to the defendant's *belief*.⁵⁷⁷
- 22.9. The first, and to date only, final decision on s 29A is *Russell v Australian Broadcasting Corp (No 3)*,⁵⁷⁸ in which Lee J traced the development of the defence from earlier iterations of statutory qualified privilege and cognate common law and statutory defences in the United Kingdom.⁵⁷⁹

⁵⁶⁴ [2022] FCA 650 (*Barilaro*).

⁵⁶⁵ Ibid, [384] (Rares J).

⁵⁶⁶ Ibid, [389] (Rares J), citing *Serafin v Malkiewicz* [2020] 1 WLR 2455, 2476 [73] (Lord Wilson).

⁵⁶⁷ Ibid, [387] (Rares J).

⁵⁶⁸ Ibid, [388] (Rares J).

⁵⁶⁹ Ibid, [388] (Rares J).

⁵⁷⁰ [2022] FCA 1275 (*Murdoch*).

⁵⁷¹ Ibid, [57] (Wigney J), referring to the Explanatory Memorandum for the *Defamation Amendment Bill 2020* (NSW).

⁵⁷² Ibid, [58] (Wigney J).

⁵⁷³ *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

⁵⁷⁴ Ibid, [61]-[62] (Wigney J), referring to *Serafin v Malkiewicz* [2020] 1 WLR 2455, 2476 [72]-[73] (Lord Wilson); *Banks v Cadwalladr* [2022] EWHC 1417 (QB), [102] (Steyn J).

⁵⁷⁵ Ibid, [62] (Wigney J).

⁵⁷⁶ In *Palmer (No 5)*, [207], [212]-[219].

⁵⁷⁷ *Russell*, [328], [329], [336] (Lee J).

⁵⁷⁸ [2023] FCA 1223.

⁵⁷⁹ Ibid, [264]-[308] (Lee J).

- 22.10. In defamation proceedings, defamatory matter is presumed to be false.⁵⁸⁰ All defences proceed on the basis of that presumption. The predicate of all privilege and related defences is that the matter cannot be proved to be true, and therefore contains some degree of misinformation. If there were no public interest in the publication of misinformation, in any circumstances, none of those defences would be competent.
- 22.11. The common law has, for centuries, recognised that there are circumstances in which a plaintiff's right to be compensated for damage to reputation must yield to a defendant's right to publish information, even where it is wrong, having regard to the common convenience and welfare of society.⁵⁸¹ Privilege defences attach to *occasions* of publication – statements in Parliament; statements in judicial and quasi-judicial proceedings; fair and accurate reports of certain proceedings; statements in pursuit of a legal, social or moral duty or interest to persons with a reciprocal right or interest in receiving the statement; and responses to attacks.⁵⁸² More recently, liberalised qualified privilege defences were developed by legislatures and the common law: the *Lange* defence for the reasonable discussion of government and political matters,⁵⁸³ and the defence in s 30 of the Act and its precursor in s 22 of the *Defamation Act 1974* (NSW) for the reasonable publication of matters on some subject to persons with an interest or apparent interest in having information on that subject. More liberal defences evolved in other common law countries such as the United Kingdom (*Reynolds*)⁵⁸⁴ and then s 4 of the *Defamation Act 2013*) and Canada (*Grant v Torstar Corp*).⁵⁸⁵
- 22.12. In each instance, the law recognises that there are circumstances in which a plaintiff whose reputation has been damaged by the publication of defamatory matter must be denied a remedy because of a countervailing public interest in freedom of expression.
- 22.13. Statements in the authorities to the effect that there is no public interest in the dissemination of misinformation therefore cannot be construed as demanding a conclusion that unless a publication is substantially true it is not defensible. To so hold would render all privilege defences, including s 29A, dead on arrival.⁵⁸⁶
- 22.14. In the case of the duty and interest form of common law qualified privilege, the controlling criteria are the existence of a reciprocal duty or interest between publisher and recipient, and the absence of malice. For the *Lange*⁵⁸⁷ form of extended qualified privilege, the criteria are

⁵⁸⁰ *Roberts v Camden* (1807) 9 East 93 (KB), 95; 103 ER 508, 509; *Australian Consolidated Press v Uren* (1966) 117 CLR 185, 204; *The Age Company Ltd v Elliott* (2006) 14 VR 375, [14-15], [20-22].

⁵⁸¹ *Toogood v Spyring* (1834) 1 Cr M & R 181; (1834) 149 ER 1044, 1049-50 (Parke B).

⁵⁸² *Russell*, [273] (Lee J).

⁵⁸³ *Lange v ABC* (1997) 189 CLR 520, 571, 574-5.

⁵⁸⁴ [2001] 2 AC 127.

⁵⁸⁵ 2009 SCC 61, [2009] 3 SCR 640.

⁵⁸⁶ *Ibid*, [339] (Lee J), albeit in the context of public interest journalism.

⁵⁸⁷ *Lange v ABC* (1997) 189 CLR 520, 571, 574-5.

that the communication concerns government or political matters, that *the conduct* of the publisher is reasonable in the circumstances, and the absence of malice. For the *Reynolds* common law defence in the UK, the controlling criterion was that the publication consisted of ‘responsible journalism’ on a matter of public concern.

- 22.15. In the case of s 29A, the controlling criteria prescribed by the legislature are straightforward: the publication must concern an issue of public interest; and the publisher must have reasonably believed that the publication was in the public interest. Other than for the purpose of applying these criteria, the fact that the publication included ‘misinformation’ is irrelevant.
- 22.16. In construing and applying the criteria, the court in *Russell* (as it did in *Barilaro* and *Murdoch*) was conscious to avoid saddling s 29A with the baggage of s 30 of the Act and, indeed, with that of the *Reynolds* ‘responsible journalism’ defence in the UK.⁵⁸⁸
- 22.17. As Lee J noted in *Russell*, the *Reynolds* defence was significantly broader than *Lange* qualified privilege, but never formed part of the common law of Australia.⁵⁸⁹ Thus, although s 29A is stated in some extrinsic materials as being a progeny of s 4 of the UK Act (and, by extension, *Reynolds*), s 29A must not be divorced from its distinct domestic context.⁵⁹⁰ So too must the court avoid placing a gloss on the ordinary meaning of the statutory language – to which primacy must be afforded.
- 22.18. Section 29A is not, in terms, a defence of ‘responsible journalism’. Its availability is not limited to journalists. It has a potentially broad reach and is capable of adapting to the circumstances of a particular case, including this one. That is a matter of particular importance when it comes to considering the statutory mandate in s 29A(2) that *all of the circumstances of the case* be taken into account; and when considering which, if any, of the non-exhaustive list of factors in s 29A(3) are *applicable in the circumstances*. In particular, matters which may be critical in cases of investigative journalism and mass media communications – such as setting out the substance of both sides of a story – may have no work to do at all in assessing the reasonableness of a publisher’s belief in a case such as the present, which involves a politician engaged in advocacy of his own position.
- 22.19. In its plain meaning, s 29A affords a defence to any publisher who publishes any type of defamatory matter that concerns an issue of public interest, so long as the publisher reasonably believed that the publication was in the public interest. Those criteria are not a synonym for

⁵⁸⁸ *Russell*, [305] (Lee J). The *Reynolds* defence was replaced by s 4 of the UK Act which, although it did not adopt the language of ‘responsible journalism’, was intended to fill the gap previously occupied by *Reynolds*

⁵⁸⁹ *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419, [1165]–[1170].

⁵⁹⁰ *Russell*, [270]–[271] (Lee J).

‘responsible journalism’⁵⁹¹ – a notion of no relevance in a case such as the present in which the respondent is not a journalist or media organisation – although the court naturally would derive assistance where relevant from earlier decisions on s 4 of the UK Act and *Reynolds* before it.⁵⁹²

22.20. There are three elements to the applicable enquiry in s 29A:⁵⁹³

- (a) an objective enquiry as to whether the matter concerns an issue of public interest;
- (b) a subjective enquiry as to whether the defendant in fact believed that the publication of the matter was in the public interest (based on things the defendant said, knew, did or failed to do, and in relation to which the truth or falsity of the matter is irrelevant); and
- (c) an objective assessment, based on all the circumstances of the case, as to whether the *defendant’s belief* was reasonable; that is, whether a reasonable person standing in the defendant’s shoes would have held that belief.

22.21. The first element is not in dispute in this proceeding.

22.22. The second element directs attention to Mr Pesutto’s actual state of mind at the time of publication of each of the Publications.⁵⁹⁴ Despite sustained and repetitive cross-examination as to Mr Pesutto’s state of mind, this element of the defence cannot seriously be in dispute in this proceeding.⁵⁹⁵

22.23. The third element – the assessment of whether Mr Pesutto’s state of mind was objectively reasonable – focusses attention on the character of the Publications as a whole. It imports a discretionary value judgment as to whether the public would benefit from the subject matter of the Publications being discussed.⁵⁹⁶

22.24. The requirement of ‘reasonableness’ calls for an ‘open-textured’ and ‘value-laden’ judgment exercised according to the justice of the case.⁵⁹⁷ An important aspect may be an honest and reasonable belief in the truth of what was published.⁵⁹⁸ The ‘reasonableness’ enquiry is not

⁵⁹¹ Cf applicant’s opening submissions, [33], [50]; T21.29-38, T97.16-25.

⁵⁹² *Russell*, [329], [330], [338] (Lee J).

⁵⁹³ *Murdoch* [64]-[67] (Wigney J); *Russell*, [319], [321], [325] (Lee J).

⁵⁹⁴ *Russell*, [321]-[322] (Lee J).

⁵⁹⁵ See [3.1] and following below.

⁵⁹⁶ *Russell*, [320] (Lee J), citing *O’Sullivan v Farrer* (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson and Gaudron JJ); *Bellino v ABC* (1996) 185 CLR 183, 229 (Dawson, McHugh and Gummow JJ); *ABC v O’Neill* (2006) 227 CLR 57, 69 [20]-[21] (Gleeson CJ and Crennan J).

⁵⁹⁷ *Russell*, [325] (Lee J).

⁵⁹⁸ *Russell*, [339]. Although it is not difficult to conceive of cases where the absence of an honest belief would not be fatal: for example, publication of an emergency warning notice where not all the facts are known.

directed to *conduct* (cf *Lange* qualified privilege, s 30 of the Act and its predecessors) but, rather, to the reasonableness of *belief*.⁵⁹⁹ However, the enquiry may nonetheless be informed by evidence of the respondents' conduct and almost all the suggested considerations in s 29A(3) direct attention to aspects of a respondent's conduct.⁶⁰⁰

22.25. In *Murdoch*, Wigney J reasoned that the focus of the reasonableness enquiry will likely be on the nature and content of the publication, the seriousness of the defamatory imputations found to have been conveyed by the publication, the information possessed by the defendant and its sources, and the steps taken by the defendant to check or verify that information.⁶⁰¹

22.26. However, the court should not lose sight of the fact that the enquiry is directed to the publisher's *belief*. Conduct that might be considered unreasonable (for example, procuring a whistleblower to disclose information in breach of the law) will not necessarily affect the reasonableness of a defendant's belief that a publication is in the public interest (if, for example, the information so procured provides a reasonable basis for such a belief). In this case, this distinction may take on particular importance if, for example, the Court were to consider the underlying decision of the Leadership Team to move the motion to expel Mrs Deeming to be lacking in some respect, but recognised that, that decision having been taken, it was nonetheless reasonable for Mr Pesutto to believe that it was in the public interest to inform the public of Victoria of the decision.

22.27. In *Murdoch*, Wigney J was strongly inclined to the view that the enquiry into whether a defendant reasonably believed that publication of 'the matter' was in the public interest relates to the whole of the matter that conveyed the defamatory imputations, not simply the defamatory imputations or sting conveyed by the matter. That was because the word 'matter' is defined in s 4 of the Act as including an article, report or program; s 8 of the Act establishes a clear distinction between the 'matter' on the one hand and the defamatory imputations conveyed by that matter on the other hand; and the same distinction is evident in the terms of s 29A, most notably in s 29A(3)(a).⁶⁰² This was consistent with the approach taken to s 4 of the UK Act.⁶⁰³ In *Russell*, Lee J approved Wigney J's approach.⁶⁰⁴ The construction is, with respect, plainly correct. Mrs Deeming's contrary contention at Reply [4.2] should be rejected.

⁵⁹⁹ *Russell*, [328], [329], [336] (Lee J).

⁶⁰⁰ *Russell*, [337] (Lee J).

⁶⁰¹ *Murdoch*, [68] (Wigney J).

⁶⁰² *Ibid*, [70]-[71] (Wigney J).

⁶⁰³ *Ibid*, [72] (Wigney J); see *Banks v Cadwalladr* [2022] EWHC 1417, [121]-[122] (Steyn J); *Economou v de Freitas* [2018] EWCA Civ 2591, [121]-[122] (Sharp LJ); *Flood v Times Newspapers Ltd* [2012] 2 AC 273, [129] (Lord Mance); *Bonnick v Morris* [2003] 1 AC 300, [24] (Lord Nicholls).

⁶⁰⁴ *Russell*, [316] (Lee J).

- 22.28. In addition to the reasons given by Wigney J, the chapeau to s 29A(1) prescribes a defence to the publication of ‘defamatory matter’, whereas sub-paragraphs (1)(a) and (1)(b) refer only to the ‘matter’. Had the legislature sought to limit the defence in the manner for which Mrs Deeming contends, it would be expected to have used the phrase ‘defamatory matter’ in sub-paragraphs (1)(a) and (1)(b).
- 22.29. It is accepted, however, that the nature, character and seriousness of the defamatory imputations conveyed by the ‘matter’ are relevant to assessing whether the matter concerned an issue of public interest and whether the defendant reasonably believed that its publication was in the public interest, not least because that is one of the potential considerations referred to in s 29A(3).⁶⁰⁵ Generally, the defamatory imputations must bear some relevance to the issue of public interest with which the matter is concerned.⁶⁰⁶ That is both logical and consistent with the policy underlying s 29A. If, for example, a publication generally concerned a subject of public interest, but the defamatory content was a gratuitous slur as to some matter unrelated to that subject, it may be that a defendant either did not subjectively believe that the publication of the matter, taken as a whole, was in the public interest, or that any such belief was not objectively reasonable. But that is not this case: here, the allegedly defamatory content of the Publications coincides precisely with the subject matter of the Publications.
- 22.30. Finally, in *Russell*, Lee J accepted that a defence under s 29A might be lost in cases of ongoing publication by the defendant (e.g. via the internet) if the circumstances change such that a defendant’s belief in the public interest in the matter is no longer reasonable.⁶⁰⁷ In this case, the Media Release (which was on web pages that Mr Pesutto could control) are not available on an ongoing basis. Mr Pesutto does not control the ongoing availability of any of the other Publications and so is not responsible for the fact that they may continue to be available.
- 22.31. Further and in any event, however, if a defence is lost in respect of an ongoing publication from some point in time, the applicant must demonstrate serious harm to their reputation on and from the date the defence was lost, by reason of publications occurring after that date, in order for the cause of action to be complete.⁶⁰⁸ There is no evidence either of the extent of any recent publications of the Publications; or of any recent harm to Mrs Deeming’s reputation from any such publications.

⁶⁰⁵ *Murdoch*, [73] (Wigney J).

⁶⁰⁶ *Ibid*, [74]-[75] (Wigney J), citing *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2007] 1 AC 359, [51] (Lord Hoffman); *Lachaux v Independent Print Ltd* [2021] EWHC 1797 (QB), [130] (Nicklin J).

⁶⁰⁷ *Russell*, [341] (Lee J).

⁶⁰⁸ *Banks v Cadwalladr* [2023] EWCA Civ 219, [41]-[51] (Warby LJ).

23. The question for the Court

- 23.1. In view of the correct concession by Mrs Deeming that the Publications each concerned an issue of public interest, the only question the Court must answer in respect of s 29A is whether Mr Pesutto reasonably believed, in all the circumstances of the case, that the publication of each Publication was in the public interest.
- 23.2. As we observed at the outset, that question is distinct from the reasonableness or otherwise of the decision of the Leadership Team to move a motion to expel Mrs Deeming from the Party. The issue is whether, in circumstances where the Leadership Team had decided to move a motion to expel Mrs Deeming from the Party, Mr Pesutto reasonably believed that it was in the public interest to explain that decision to the public via the Publications.

24. Mr Pesutto's cogent and clear explanation of purpose

- 24.1. Mr Pesutto considered his decision to move the Expulsion Motion was the most momentous he had made as Party leader and the first major test of his leadership.⁶⁰⁹ In Mr Pesutto's opinion, the Victorian public had a right to know why the Leadership Team was proposing to expel from the Party a Member of Parliament who had only recently been elected as a Liberal.⁶¹⁰ It was important that this decision was explained.⁶¹¹ Mr Pesutto was also of the opinion that it was important to communicate this decision to his colleagues and the public quickly.⁶¹² Based on his experience in public life, Mr Pesutto believed it was inevitable that the decision would leak to the media,⁶¹³ and that the events surrounding the Rally would be a major news story, if not *the* story, for every masthead and network in the coming days.⁶¹⁴
- 24.2. Mr Pesutto believed he had to address the issue to retain credibility, because the public would be watching to see how the Party responded to the presence of Nazis on the steps of Parliament, and that if he failed to act, that would itself become the story.⁶¹⁵ He believed bringing the motion to expel Mrs Deeming was the right thing to do, and that it needed to be explained to the public, including because the Expulsion Motion effectively sought to overturn an element of an election result.⁶¹⁶ It was important to Mr Pesutto that he was proactive in explaining this, so that it was not mischaracterised or misrepresented by others, including the then Premier, who he regarded as a talented politician who would take every available

⁶⁰⁹ CBB Tab 30, page 345, [100]; page 346–7, [111] (Affidavit of John Pesutto dated 27 May 2024).

⁶¹⁰ CBB Tab 30, page 346, [106] (Affidavit of John Pesutto dated 27 May 2024).

⁶¹¹ CBB Tab 30, page 346–7, [111] (Affidavit of John Pesutto dated 27 May 2024).

⁶¹² CBB Tab 30, page 346, [108] (Affidavit of John Pesutto dated 27 May 2024).

⁶¹³ CBB Tab 30, page 346, [109] (Affidavit of John Pesutto dated 27 May 2024).

⁶¹⁴ CBB Tab 30, page 346, [110] (Affidavit of John Pesutto dated 27 May 2024).

⁶¹⁵ CBB Tab 30, page 346–7, [111] (Affidavit of John Pesutto dated 27 May 2024).

⁶¹⁶ CBB Tab 30, page 346–7, [111] (Affidavit of John Pesutto dated 27 May 2024).

opportunity to inflict damage upon the Opposition.⁶¹⁷ Mr Pesutto also wanted to assure members of both the LGBTI+ community, and the faith community, that the Party was not against them.⁶¹⁸

- 24.3. In cross-examination, Mr Pesutto's purpose was unshaken. Mr Pesutto explained 'the public needed to understand why a major political party was taking action to vote on an expulsion motion...[I] believed it was essential that I explain to the Victorian people why I was doing this'.⁶¹⁹ He further said that he:⁶²⁰

was gravely concerned about the damage to the party that I believed the party would suffer if we did not act straight away. I didn't believe there was an opportunity to delay matters without risking serious harm to the party; that's the reason I went out. I believed I needed to explain it to the people.

- 24.4. After the Media Release, Mr Pesutto needed to give further explanations and answer public scrutiny:⁶²¹

I knew that there was a very real possibility that the decision that I had made, along with my leadership colleagues, would be contested in public discourse, and it was. And that's why I believed I needed to be out quickly explaining that to the people.

...

People were going to agree or disagree to the decision, and they did. It was – it was a very intense set of days. And I knew that there would be people who agreed with it and people who opposed it, and that would be an intense public debate. And it was.

- 24.5. For those reasons, Mr Pesutto considered it necessary to accept requests for interviews the next day, in order to explain his position as Leader of the Opposition on the events surrounding the Rally, the Leadership Team's decision to move to expel Mrs Deeming from the Party and his values as leader of the Party.⁶²² The Press Conference was part of that process, as Mr Pesutto explained:⁶²³

the purpose of the press conference was to convey the reasons for why we were taking the step, your Honour, and I thought that was an important matter. I thought that it was untenable to make that decision and then hide from the public. There was a clear and pressing need, in my judgment, your Honour, to explain why I was taking the – the step to move the motion.

- 24.6. Accordingly, on 20 March 2023, Mr Pesutto participated in the 3AW Interview, the ABC Interview and the Press Conference.

⁶¹⁷ CBB Tab 30, page 347, [112] (Affidavit of John Pesutto dated 27 May 2024).

⁶¹⁸ CBB Tab 30, page 347, [113] (Affidavit of John Pesutto dated 27 May 2024).

⁶¹⁹ T591.16-17 (Pesutto XXN).

⁶²⁰ T593.23-27 (Pesutto XXN).

⁶²¹ T758.22-24, 30-33 (Pesutto XXN).

⁶²² CBB Tab 30, page 347, [114] (Affidavit of John Pesutto dated 27 May 2024).

⁶²³ T798.27-32 (Pesutto XXN).

- 24.7. In relation to the Expulsion Motion and Dossier, Mr Pesutto had been given to understand from his staff that *The Age* had a copy of the Expulsion Motion and Dossier, and that in those circumstances he should give it to the remainder of the media who wanted it.⁶²⁴ He denied he used *The Age* as a pretext to hand out the document;⁶²⁵ or that he did so to harm Mrs Deeming's reputation;⁶²⁶ or to put pressure on his colleagues to vote in favour of the Expulsion Motion.⁶²⁷ It was insinuated that had Mr Pesutto believed his conduct to be appropriate in distributing the Expulsion Motion and Dossier, he would have mentioned it at the 21 March 2023 meeting.⁶²⁸ Mr Pesutto rejected that insinuation, and explained that he had just spent the previous two days 'working as hard as I could to communicate the reasons for the decision, and I saw the motion and dossier as just part of that process of informing the public'.⁶²⁹ There was a clear public interest in the contents of the Expulsion Motion and Dossier. Peta Credlin had expressed interest in reviewing it when interviewing Mr Pesutto on the evening of 20 March 2023.⁶³⁰ Mrs Deeming was relieved when she saw it, because she had finally seen the evidence and thought it helped her position.⁶³¹ There is an incongruity in Mrs Deeming complaining about Mr Pesutto publicising the precise terms of the motion and the evidence, when on Mrs Deeming's view it provided clarity and was exculpatory.
- 24.8. It was put to Mr Pesutto that he should have provided the Expulsion Motion and Dossier to Mrs Deeming prior to making public statements about her conduct. Mr Pesutto again explained he 'believed it was urgent that I speak to the Victorian people in the way that I did, for the reasons that I've said it was important. Once the decision was made to move the motion, I believed it was in the public interest to get out there and explain my decision along with the leadership group'.⁶³²
- 24.9. As he continued to give press statements throughout the week on the issue, Mr Pesutto remained concerned to 'communicate the reasons for deciding to move the motion, but also to ensure that the reasons were not being mischaracterised'.⁶³³
- 24.10. There was nothing objectively unreasonable about Mr Pesutto's beliefs. As explained below, they were views shared by other members of the Leadership Team, other members of the Party, and senior members of Mr Pesutto's then staff.

⁶²⁴ T835.26-29 (Pesutto XXN).

⁶²⁵ T835.43-44 (Pesutto XXN).

⁶²⁶ T836.5-6 (Pesutto XXN).

⁶²⁷ T836.8-9 (Pesutto XXN).

⁶²⁸ T838.31-32 (Pesutto XXN).

⁶²⁹ T838.34-35 (Pesutto XXN).

⁶³⁰ Exhibit A30, lines 168-169.

⁶³¹ CBB Tab 30, page 347, [114] (Affidavit of John Pesutto dated 27 May 2024).

⁶³² T821.26-30 (Pesutto XXN).

⁶³³ T840.3-4 (Pesutto XXN).

24.11. The views of those who had the same information and similar experience in political leadership are the most relevant when assessing the reasonableness of Mr Pesutto's belief. They include:

- (a) **Mr Southwick:** Mr Southwick explained that Mr Pesutto's publications and statements on 19 and 20 March 2023 were 'responding to the events that unfolded', but were not 'funnelling' or creating the media storm that had arisen.⁶³⁴ Mr Pesutto was informing the media regarding his action, and that 'is the job of a leader'.⁶³⁵ Mr Southwick considered 'that the information was properly being given to the public' and Mr Pesutto was in short 'doing his job'.⁶³⁶ Mr Southwick rejected the contention put to him that it was inappropriate for Mr Pesutto to engage with the media about the Expulsion Motion.⁶³⁷
- (b) **Ms Crozier:** Ms Crozier considered Mrs Deeming's conduct and associations were bringing the Party into disrepute, and she was not going to be branded, or let the Party be branded, by such associations.⁶³⁸
- (c) **Dr Bach:** In Dr Bach's view, it would have been a political 'own goal' to wait and not deal with the matter promptly.⁶³⁹
- (d) **Ms Staley:** Ms Staley described the apparent appearance of Mrs Deeming at a rally with Nazis as 'incredibly damaging',⁶⁴⁰ and felt compelled to message Mr Pesutto and Mr Southwick with her concerns.
- (e) **Mr Pintos-Lopez:** Although Mr Pintos-Lopez had given advice to 'slow down' on the Sunday morning, he considered that 'if any action was required, the reason to act needed to be explained to the party room and to the electorate'.⁶⁴¹ Mr Pintos-Lopez also believed that 'one of the most pernicious problems for the Liberal Party brand was the idea that within the ranks of the Parliamentary Party were people who held offensive fringe or extremist views' and any 'association' between the Party and the neo-Nazis who attended the rally 'would be anathema to Mr Pesutto's vision' for the Party.⁶⁴² During cross-examination, it was put to Mr Pintos-Lopez that Mr Pesutto's actions had caused reputational harm to the Party.⁶⁴³ Mr Pintos-Lopez accepted there

⁶³⁴ T1002.3-4 (Southwick XXN).

⁶³⁵ T1002.9-10 (Southwick XXN).

⁶³⁶ T1002.25-29 (Southwick XXN).

⁶³⁷ T1096.10-19 (Southwick XXN).

⁶³⁸ CBB Tab 34, page 414, [38] (Affidavit of Georgie Crozier dated 27 May 2024).

⁶³⁹ T946.23-25 (Bach XXN).

⁶⁴⁰ T1198.29-32 (Staley XXN).

⁶⁴¹ CBB Tab 37, page 441, [17] (Affidavit of Rodrigo Pintos-Lopez dated 24 May 2024).

⁶⁴² CBB Tab 37, page 441, [17] (Affidavit of Rodrigo Pintos-Lopez dated 24 May 2024).

⁶⁴³ T1217.9 (Pintos-Lopez XXN).

were some within the Liberal Party who held that view but was firm in his opinion that Mr Pesutto's conduct was in fact 'reputationally enhancing'.⁶⁴⁴ There is nothing in the fact that Mr Pesutto came to his own view about what was in the public interest. It was clear that he conscientiously weighed the advice Mr Pintos-Lopez had given him, but came to the view that the matter was urgent and could not wait. That is no more surprising than a member of senior counsel who considers, but rejects, helpful suggestions from juniors about questions that might be asked in cross-examination, or matters that might find their way into a written submission. The essence of leadership is to seek and consider advice, before reaching one's own decision.

25. The political context

- 25.1. Mr Pesutto is a politician, not a journalist. The Publications were each made for the purpose of explaining the decision the Leadership Team had taken to move to expel Mrs Deeming from the Party. The public interest in the Publications lay in the explanation of that decision. The public interest did not require Mr Pesutto to play devil's advocate, or to mimic the role of a journalist by seeking comment from Mrs Deeming or setting out her side of the story. The relevant question for the purposes of s 29A is simply whether Mr Pesutto reasonably believed that the publication of the Publications was in the public interest.
- 25.2. The situation in a case such as the present is thus fundamentally different from cases of investigative journalism and mass media publication. In such cases, the public interest generally (although not always) lies in ensuring that both sides of a story are fairly set out. That is because a journalist or mass media publisher will generally not subjectively believe that a publication is in the public interest without doing so, and any such belief will not be objectively reasonable in any event, having regard to the ethics of journalism.
- 25.3. The Publications each concerned the decision by the Leadership Team to move a motion to expel Mrs Deeming from the Party. Ordinary recipients of the Publications will have understood that the motion had not yet been moved, that Mrs Deeming would have an opportunity to put her side of the story, and that the ultimate decision as to Mrs Deeming's fate lay in the hands of the Party, not Mr Pesutto. So much was made clear by Mr Pesutto when explaining the decision in the Publications, including:
 - (a) in the Media Release, at line 8, where the action Mr Pesutto was going to take was clearly explained to be moving a motion in the party room;

⁶⁴⁴ T1217.9 (Pintos-Lopez XXN).

- (b) in the 3AW Interview at lines 158-160, where Mr Pesutto said: ‘...if the motion gets up. I expect it will, *but the party and the members will need to make a decision about that. I really need to be careful of the processes as they are for the members of the party to decide*’ (emphasis added);
- (c) in the ABC Interview, where Mr Pesutto explained he was ‘bringing’ a motion, which was to go to the party room (lines 3-4), that a notice provision needed to be observed first (lines 15-16), and that it would be subject to ‘the vote of the Parliamentary Party’ (line 25);
- (d) in the Press Conference at:
 - (i) lines 31-33 where Mr Pesutto identified that the processes of the Party Constitution would be observed, and ‘the party room will make a decision’;
 - (ii) lines 150-155, in which Mr Pesutto was asked whether the motion would pass, and he expressed confidence in the support of the Party room;
 - (iii) at lines 168-173 in which Mr Pesutto said: ‘It will be for the party room and the party room alone, each member of that party room, to make a decision next week on this matter. It won’t be my decision. I’m putting the proposal to the party room and I respect the fact that it will be every member of that party room voting as a group to decide the outcome of that motion. I’m confident it will pass but I’m also respectful of the fact that they will decide the answer to that’;
 - (iv) at lines 177-190, in which questions were asked about whether the motion would pass;
 - (v) at lines 192-196, where Mr Pesutto stated: ‘I’m just concerned about the uh, process being respected and every member of the party room having an opportunity to consider my reasons, to hear in response from Moira, who obviously will have a chance to put her side of the argument to the party room as well. They’ll decide it’.
- (e) In the Expulsion Motion and Dossier, which:
 - (i) in paragraph 1 identified that the purpose of the document was to give notice of an intention to call a meeting at which a motion (identified in paragraph 2) would be moved;

- (ii) in paragraph 3 identified that Mrs Deeming would be given an opportunity to explain her conduct before a vote of the Party; and
- (iii) in paragraph 4 identified that Mrs Deeming would be expelled *if* the motion was passed by an absolute majority of the Party.

- 25.4. It was suggested to Mr Pesutto that he brought the Expulsion Motion, and unreasonably persisted with it, in his own political self-interest, to retain his Leadership, and to rid himself of Mrs Deeming, rather than public interest. Mr Pesutto was steadfast in his evidence that he had formed the belief that Mrs Deeming's conduct before, during and after the Rally made her not a fit and proper person to be a member of the party under his leadership.⁶⁴⁵
- 25.5. Mr Pesutto equally rejected the proposition that he had formed the view from the night of 18 March 2023 that he was going to release material about Mrs Deeming, to malign her in order to justify her expulsion from the Party.⁶⁴⁶
- 25.6. He forcefully and persuasively denied acting in his own personal political interest: 'It was done to protect the Liberal Party of Victoria. That's why I did it.'⁶⁴⁷ It was 'completely wrong' that he had no concern whatsoever about damage to the reputation of the Party, and in fact it had 'everything to do with the protecting the Liberal Party'.⁶⁴⁸ Mr Pesutto was unshaken in that conviction.⁶⁴⁹

Ms Chrysanthou: You knew, didn't you, that it would be disastrous for your leadership if the outcome of the motion was not to expel Mrs Deeming?---Your Honour, I felt it would be disastrous for the party. It was the party that I was concerned about. So that was my main driver in this.

Ms Chrysanthou: Well, I want to suggest to you that wasn't your main driver – the party. Your main driver was a concern for yourself and how it would impact you if the vote was no, wasn't it?---That's wrong, your Honour.

Ms Chrysanthou: Well, you understood, didn't you, that it would be disastrous for your leadership if the vote was no?---Your Honour, if you can take your mind back, your Honour, to the events of the 19th, when I decided to take on this course I knew what it could mean, but I was committed to doing it because of what I thought the party needed to do. So the issue of my leadership was not something that just sprung up – had sprung up late in that week. I was very aware, very aware, of what it would mean. That's why I said during my evidence last week about the magnitude of the decision and how consequential it would be.

⁶⁴⁵ T778.30-38 (Pesutto XXN).

⁶⁴⁶ T711.21-24 (Pesutto XXN).

⁶⁴⁷ T754.39-42 (Pesutto XXN).

⁶⁴⁸ T723.18-34 (Pesutto XXN).

⁶⁴⁹ T848.30-46 (Pesutto XXN).

- 25.7. On the question of what was disastrous, Mr Pesutto drew an important distinction, and clearly identified what would in fact in his view be disastrous for the Party.⁶⁵⁰

... it depends what Ms Chrysanthou means by “disastrous”, your Honour. This is the point I’m trying to make. I did this because of my reasons for wanting to do it. There’s a public debate around that that erupted in the days that followed, but I had my reasons for wanting to do it because I believe in the Liberal Party, particularly in Victoria, promoting and projecting a certain set of values. Yes, if the vote had gone badly, if it had proceeded to a vote and it had gone on badly, I would have lost. But what would be more disastrous? This is why I’m just qualifying the word “disastrous”. The calculus I had had to undertake on Sunday the 19th already factored that in. I had to decide what am I for, what kind of party do I want, how do I protect the party strategically from all manner of attacks from media, the government, everyone else? These were all factors I had taken into account on Sunday. So it is true, I’m not denying that, had it gone to a vote and the result had been adverse, sure, there would have been very serious consequences. When you say “disastrous for leadership”, I think I was asked this at a press conference somewhere along the way, it would have an act – it would have been a failure of leadership, in my view, not to act. That’s why I did it.

- 25.8. Mr Pesutto’s consistent and unshaken conviction should be accepted. It explains his conduct on 18 and 19 March 2023, at the Leadership Team meeting on 19 March 2023, in publishing each of the Publications, and in the subsequent conduct leading to the expulsion of Mrs Deeming on 12 May 2023. There is nothing improbable about any of that evidence. The hypothesis put to Mr Pesutto in cross-examination, by contrast, involves serious allegations of dishonesty, akin to malice or fraud. That hypothesis could only be accepted if a damning finding as to Mr Pesutto’s credit were to be made. There is no basis upon which such a finding could be properly sought. As we submitted at [8.1]-[8.10] above, where a piece of evidence is equally consistent with the absence of malice, it cannot as a matter of law provide evidence upon which a finding of malice can be made.

26. Reasonable belief

- 26.1. Because the s 29A test is whether the defendant reasonably believed that the publication of the matter (taken as a whole, and not limited only to the defamatory content of the matter) was in the public interest, the defence necessarily tolerates elements of misinformation and matters such as infelicities of expression, save where they serve to negate the existence of a reasonable belief.
- 26.2. Given the large number of accusations levelled at Mr Pesutto in cross-examination regarding his word choices and phrasing in each of the Publications, it is necessary to step through his cross-examination and responses to those allegations. The question for the Court is whether,

⁶⁵⁰ T849.4-19 (Pesutto XXN).

having regard to any of those matters, individually or cumulatively, Mr Pesutto's subjective belief that publication of each of the Publications was in the public interest is negated.

- 26.3. The approach adopted in cross-examination was, in our submission, misplaced or more appropriate to an enquiry in respect of the s 30 defence.
- 26.4. The ultimate question in the s 29A context involves a discretionary value judgment as to whether the public would benefit from the subject matter of the impugned matters being discussed, taking each matter as a whole.⁶⁵¹ That, in turn, requires stepping back from the detail, and instead comparing the basis for the respondent's subjective belief that publication of the matters was in the public interest, with the substance of what was published, bearing in mind the political context. When that exercise is undertaken in respect of each of the Publications, nothing undermines Mr Pesutto's reasonable belief that publication of each of the Publications was in the public interest.

Media Release

- 26.5. Mr Pesutto said it was 'completely wrong' that the purpose he was seeking to achieve in the Media Release was to associate Mrs Deeming with Nazis.⁶⁵² He denied that he knew the conduct of the neo-Nazis in the first two paragraphs would be conflated with the conduct of Mrs Deeming referred to in the third paragraph.⁶⁵³ He did not accept having any intention to conflate those matters.⁶⁵⁴ He also had no intention of conveying that Mrs Deeming was associating with far-right extremist groups, including neo-Nazi activists.⁶⁵⁵
- 26.6. All of that evidence was plainly consistent with terms of the Media Release and Mr Pesutto's explanation as to why he believed it was necessary to explain the decision that had been made by the Leadership Team to the public.
- 26.7. The Media Release began with an understandable condemnation of the neo-Nazis who had invaded the steps of Parliament House and become the principal subject of public attention in the preceding 24 hours or so. It then went on to identify, with precision, and using different terms (moving from the neo-Nazi 'protesters' to the role of the 'speakers and other organisers') the reason for the decision to move the motion to expel Mrs Deeming, being 'her involvement in organising, promoting and participating in a rally with speakers and other organisers who

⁶⁵¹ *Russell*, [320] (Lee J), citing *O'Sullivan v Farrer* (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson and Gaudron JJ); *Bellino v ABC* (1996) 185 CLR 183, 229 (Dawson, McHugh and Gummow JJ); *ABC v O'Neill* (2006) 227 CLR 57, 69 [20]–[21] (Gleeson CJ and Crennan J).

⁶⁵² T746.31-32 (Pesutto XXN).

⁶⁵³ T748.9-13 (Pesutto XXN).

⁶⁵⁴ T748.22-26 (Pesutto XXN).

⁶⁵⁵ T750.20-23 (Pesutto XXN).

themselves have been publicly associated with far right-wing extremist groups including neo-Nazi activists’: lines 5-7.

- 26.8. When using the phrase ‘publicly associated’ in the Media Release, Mr Pesutto explained he was doing so ‘in the sense that they were publicly identifying themselves with or associating with – that it was clear for members of the public to see that’.⁶⁵⁶ He went on to explain that the ‘element of association was so critical’ because ‘it was visible to the Victorian public that there was a connection between Ms Keen and Jones to the things that were at the heart of the dossier’.⁶⁵⁷
- 26.9. Again, there was nothing surprising about any of that given the belief that Mr Pesutto had formed as summarised in above. His concern was that anyone conducting a cursory internet search would see that Mrs Keen, in particular, had a history of public associations with neo-Nazis and white supremacists, including but not limited to Jean-François Gariépy and Hans Jørgen Lysglimt Johansen, and had appropriated Nazi imagery in her social media engagements, including via the use of the Nazi Barbie doll and in the Pridestapo tweet.
- 26.10. Mr Pesutto rejected the proposition that paragraph 5 of the Media Release was not true. Mr Pesutto said clearly ‘I believe that to be true and have since’.⁶⁵⁸ Mr Pesutto was completely unshaken when cross-examined as to the basis for the decision that was taken to move to expel Mrs Deeming from the Party.
- 26.11. In short, nothing emerged in cross-examination to suggest that Mr Pesutto’s subjective belief that publication of the Media Release was in the public interest was not objectively reasonable.

3AW Interview

- 26.12. Mr Pesutto explained the 3AW interview was a ‘very tough interview’, which was ‘fast-paced, often with interruptions’.⁶⁵⁹ Mr Pesutto was not trying to defend his position, rather he was ‘trying to explain the position to the Victorian people’.⁶⁶⁰ That characterisation of the interview is entirely consistent with the recording played to the Court.

Richard Spencer, Mark Collett and David Duke

- 26.13. Mr Pesutto accepted that he mis-spoke in the 3AW Interview when he stated of Mrs Keen at lines 18-19:

⁶⁵⁶ T751.25-26 (Pesutto XXN).

⁶⁵⁷ T751.31-33 (Pesutto XXN).

⁶⁵⁸ T750.32-33 (Pesutto XXN).

⁶⁵⁹ T759.32-33 (Pesutto XXN).

⁶⁶⁰ T759.39-40 (Pesutto XXN).

She's done videos with Richard Spencer, Mark Collett, Klu [sic] Klux Klan leader David Duke.

26.14. He frankly accepted, as he had previously explained in his affidavit, that he had no information prior to the morning of 20 March 2023, that Mrs Keen had shared a platform with David Duke,⁶⁶¹ Richard B Spencer,⁶⁶² or Mark Collett.⁶⁶³

26.15. In cross-examination, Mr Pesutto explained he mis-spoke in a way that did not reflect the material that had been provided to him. He said:⁶⁶⁴

I concede that was an error. I had a document in front of me that I was reading from as I was doing the interview in my office, and I just misread that when I was giving the interview; I concede that.

26.16. This mistake was in the context of a 'fast-paced' interview without 'the luxury of time',⁶⁶⁵ in which he 'misread the document under the pressure of the interview'.⁶⁶⁶ The relevant bullet part of the document he misread stated:⁶⁶⁷

In October 2019, Keen appeared in a video interview with Jean-François Gariépy, a far-right YouTuber who advocates for a "white ethno-state" and has made videos with neo-Nazis Richard B. Spencer and Mark Collett as well as former Ku Klux Klan leader David Duke

26.17. The error made by Mr Pesutto might have been of significance in defamation proceedings brought by Mrs Keen but, in our submission, it is irrelevant in the present proceedings, for at least three reasons.

26.18. *First*, Mr Pesutto does not come to Court to defend an allegation by Mrs Deeming that he exaggerated the extent of Mrs Keen's associations with neo-Nazis in the 3AW Interview. The only imputations he faces in respect of the 3AW Interview, as explained above, concern whether he imputed that Mrs Deeming was herself a Nazi activist or a Nazi.⁶⁶⁸

26.19. *Secondly*, there is no suggestion that Mr Pesutto's error was deliberate; to the contrary, the evidence was it only came to Mr Pesutto's attention after about 7pm on 20 March 2023.⁶⁶⁹

26.20. *Thirdly*, it cannot be sensibly suggested that Mr Pesutto's error negates any reasonableness in Mr Pesutto's belief that his participation in the 3AW Interview as a whole was in the public interest. As Mr Pesutto explained, after the error came to his attention, 'I did not put out a

⁶⁶¹ T732.8-9 (Pesutto XXN).

⁶⁶² T732.11-13 (Pesutto XXN).

⁶⁶³ T732.17-18 (Pesutto XXN).

⁶⁶⁴ T760.42-44 (Pesutto XXN).

⁶⁶⁵ T761.14-16 (Pesutto XXN).

⁶⁶⁶ T761.21 (Pesutto XXN).

⁶⁶⁷ Exhibit R78, CBC Tab 331, pages 1835-1837.

⁶⁶⁸ SOC, [10.1]-[10.3]: CBA Tab 2, pages 18-19.

⁶⁶⁹ T828.10-12 (Pesutto XXN).

statement clarifying that matter as I considered doing so would only draw attention to a clear but minor misstatement, which did not affect any of the opinions I expressed or the steps that we intended to take. Instead, I resolved to take more care with my words later that week'.⁶⁷⁰ In cross-examination, his position was unchanged: 'I felt that whilst it was a clear misstatement it wasn't so material to the broader issues that were raised in the motion and dossier'.⁶⁷¹

26.21. There was nothing unreasonable about the view Mr Pesutto formed. The substance of the point was that Mrs Deeming had associated with Mrs Keen, who had public associations with neo-Nazis, far right extremists and white supremacists. That point remained correct, to Mr Pesutto's reasonable belief, even allowing for the error in relation to Duke, Spencer and Collett, because of the other material of which Mr Pesutto was aware at the time of the 3AW Interview, including the matters set out on the 'Moira Deeming Fact Sheet' emailed to him by Mr Pintos-Lopez at 8:43pm the evening prior, which he was attempting to read from in the interview. That fact sheet relevantly stated (points 1, 2, 4 and 5, and citations and hyperlinks links excluded):⁶⁷²

3. Keen's associations with neo-Nazis and far-right activists:

- In October 2019, Keen appeared in a video interview with Jean-François Gariépy, a far-right YouTuber who advocates for a "white ethno-state" and has made videos with neo-Nazis Richard B. Spencer and Mark Collett as well as former Ku Klux Klan leader David Duke.
- In 2019, gave an interview to Soldiers of Christ Online, a far-right network. Keen denied prior knowledge of the interviewers' far-right affiliations.
- Parker has faced numerous allegations of courting ideas of white supremacy. One incident came after she took a selfie with Hans Jørgen Lynglimt Johansen, a Norwegian neo-Nazi who was probed by police after his comments against Jews and denial of the Holocaust. Parker was also accused of using a Barbie doll wearing a Nazi uniform as her profile picture on the social media site Spinster.
- Standing for Women's protest in Newcastle on January 16 sparked controversy after one of the speakers – Lisa Morgan – quoted Adolf Hitler to attack trans rights. "Do you know the big lie? The big lie was first described by Adolf Hitler in Mein Kampf ... The big lie is that trans women are women," Morgan told the people at the Parker-organised demonstration.
- Keen's Melbourne event on 18 March 2023, was supported by a group of at least 30 neo-Nazis, organized by the National Socialist Network, who were seen performing the Nazi salute on the steps of Parliament House and displaying a banner which read "DESTROY PAEDO FREAKS".

⁶⁷⁰ CBB Tab 30, page 349, [121] (Affidavit of Pesutto dated 27 May 2024).

⁶⁷¹ T828.17-18 (Pesutto XXN).

⁶⁷² Exhibit R78, CBC Tab 331, pages 1835-1837.

26.22. By the time Mr Pesutto was first made aware of the error at 7.19pm that evening,⁶⁷³ the public associations his office had uncovered had increased,⁶⁷⁴ and the Expulsion Motion and Dossier had already been checked by his staff (including Mr Pintos-Lopez) and signed by his Leadership Team colleagues.⁶⁷⁵ By the next morning, there was even more material.⁶⁷⁶

Associating with people who are Nazis

26.23. Mr Pesutto also mis-spoke at lines 102-103, when he said 'I know Moira's not a Nazi, but my point is that she's associating with people who are'. Mr Pesutto frankly explained the error he had made in that sentence:⁶⁷⁷

I concede that that sentence was not properly expressed, and I can understand the problem with that sentence. It should have sounded something like, "I know Moira is not a Nazi, but my point is she is associating with people who are associating with," so on and so forth; it should have said that.

26.24. That error, too, was of no moment when the 3AW Interview is considered as a whole. Mr Pesutto had expressed himself clearly not four lines earlier in the transcript, when he said at lines 98-100 (our emphasis): 'we're left with a situation where **you have a member of the Liberal team associating with people with these associations. Known public associations with these – and I just can't – I can't let it stand**'. He had also expressed himself clearly on the question of Mrs Deeming's associations on a number of other occasions in the course of the 3AW Interview: see the passages referred to at [5.26]-[5.29] above.

26.25. It will have been obvious to any person fairly listening to the 3AW Interview as a whole that Mr Pesutto's concern was that Mrs Deeming had associated with Mrs Keen, who had certain associations; not that Mrs Deeming herself had associated with Nazis.

26.26. Mr Pesutto explained that in the pressure of the interview, and the pace of it, he was not sure he even realised he had made that error in expression until much later.⁶⁷⁸ Nevertheless, he felt when viewed in its entirety, he went out of his way in the 3AW interview to make clear the issue he had was 'based on associations'.⁶⁷⁹ Mr Pesutto only became aware that he had misspoken that evening, when the misstatement was identified by a member of his staff.⁶⁸⁰ Mr Pesutto rejected the proposition that it was dishonest of him not to recant the error when he

⁶⁷³ Exhibit A176, CBC Tab 396, pages 2065-2082; Exhibit R224, CBC Tab 397, pages 2083-2100.

⁶⁷⁴ Exhibit A176, CBC Tab 396, pages 2065-2082; Exhibit R224, CBC Tab 397, pages 2083-2100.

⁶⁷⁵ Exhibit R226, CBC Tab 401, page 2124.

⁶⁷⁶ Exhibit R229, CBC Tab 436, pages 2231-2253.

⁶⁷⁷ T771.21-25 (Pesutto XXN).

⁶⁷⁸ T771.27-29 (Pesutto XXN).

⁶⁷⁹ T771.38-44 (Pesutto XXN).

⁶⁸⁰ T824.30-32 (Pesutto XXN).

became aware of it.⁶⁸¹ Such a position was plainly sensible – doing so would only have drawn more attention to the matter.

26.27. Again, the short point is that, taken as a whole, the mis-statement was a minor matter that did not bear upon how Mr Pesutto's statements as a whole in the course of the 3AW Interview will have been reasonably understood by listeners; particularly having regard to Mr Pesutto's statement at lines 98-100.

Associations and intention

26.28. **Into league with.** When using the phrase 'into league with people, with views I cannot accept' at lines 30-1, Mr Pesutto did not intend to suggest any formal connection, but a preparedness to share platforms,⁶⁸² 'with organisations or people that spout views I can't accept'..⁶⁸³ He did not accept that being 'in league' meant more than a mere association..⁶⁸⁴

26.29. That is a reasonable view for Mr Pesutto to have held. The expression 'in league with' is at best vernacular. It has no necessarily sinister connotation. The Macquarie Dictionary defines 'in league (sometimes followed by *with*)' as 'united by or having a compact or agreement; allied'. In context, Mr Pesutto was saying no more at lines 30-1 than that Mrs Keen's history of activism had caused her to become allied with people whose views he could not accept; which is another way of saying that she had been publicly associated with, or shared platforms with, such people.

26.30. In any event, the use of the words 'into league with', about Mrs Keen, could hardly negate the reasonableness of Mr Pesutto's belief that publication of the 3AW Interview, taken as a whole, and which was about the decision to move to expel Mrs Deeming, was in the public interest.

26.31. **Known associations.** By using the phrase 'known associations' at lines 24, 40-1 and 134-5, Mr Pesutto said he was not intending to convey that Mrs Deeming had knowledge of those associations. He meant: 'publicly known. That was public. It wasn't confidential. It was something that could be ascertainable from the public record'..⁶⁸⁵

26.32. That, too, was a reasonable view for Mr Pesutto to hold. If one can do a simple internet search, and find matters such as selfie photographs and videos of two people together, that is aptly described as an association between the two people that is publicly known.

⁶⁸¹ T828.24-26 (Pesutto XXN).

⁶⁸² T763.39-43 (Pesutto XXN).

⁶⁸³ T763.37 (Pesutto XXN).

⁶⁸⁴ T764.13-16 (Pesutto XXN).

⁶⁸⁵ T764.28-29 (Pesutto XXN).

- 26.33. Again, the use of the words ‘known associations’ about Mrs Keen could hardly negate the reasonableness of Mr Pesutto’s belief that publication of the 3AW Interview, taken as a whole, was in the public interest, in circumstances where the public interest in the 3AW Interview concerned Mr Pesutto’s explanation of the decision that had been taken to move to expel Mrs Deeming from the Party.
- 26.34. **Nazi sympathiser.** At line 112, Mr Mitchell asked, ‘So, you’re saying Kellie-Jay Keen is a sympathiser of Nazis, correct?’ to which Mr Pesutto responded at line 113 ‘Yes’.
- 26.35. Mr Pesutto said he honestly believed that to be true at the time, based generally on the information he had to hand.⁶⁸⁶ When it was suggested Mr Pesutto did not have sufficient information to believe that, Mr Pesutto was steadfast that he did honestly believe that to be so when he said it.⁶⁸⁷ He said that, in the weeks and months that followed, Mr Pesutto’s concern about things Mrs Keen had said and done increased.⁶⁸⁸ However, he said it is not a view that he currently holds,⁶⁸⁹ in a context where he had been sued by and had settled defamation proceedings with Mrs Keen.
- 26.36. This is another example of an immaterial matter. Mrs Deeming does not allege that the 3AW Interview carried an imputation to the effect that she had associated with Mrs Keen, knowing that Mrs Keen is a Nazi sympathiser. As we have submitted above at [5.36], the imputations pleaded in the SOC assert an association with Nazi *activists*, which is obviously a different thing.
- 26.37. In any event, however, Mr Pesutto was entitled, at the time of the 3AW Interview, to hold the opinion that Mrs Keen held Nazi sympathies having regard to the fact that she had built up a body of public associations with people such as Gariépy and Johansen, and had appropriated Nazi imagery in her social media presence, such as the use of the Nazi Barbie doll image.
- 26.38. As with the other matters addressed in this section, it could not in our submission be suggested that the expression of an honestly held, but erroneous belief, that Mrs Keen was a Nazi sympathiser meant that Mr Pesutto’s belief that publication of the 3AW Interview as a whole was not reasonable, where the focus of the interview was upon explaining the decision that had been made to move to expel Mrs Deeming from the Party.

⁶⁸⁶ T772.25-27 (Pesutto XXN).

⁶⁸⁷ T772.33-35 (Pesutto XXN).

⁶⁸⁸ T772.37-40 (Pesutto XXN).

⁶⁸⁹ T774.25-26 (Pesutto XXN).

26.39. **Rap sheet.** Mr Pesutto’s use of the phrase ‘rap sheet’ was a colloquial term, not intended to convey that Mrs Deeming knew of Mrs Keen’s associations. Rather, it was ‘more about people who have a long established record of activity on certain platforms or the like’..⁶⁹⁰

ABC Interview

26.40. It was put to Mr Pesutto that he did not believe in the truth of lines 3-7, in which he outlined the reasons for the Expulsion Motion. Mr Pesutto was clear that he did believe in the truth of those matters..⁶⁹¹ That was unexceptional evidence. It was entirely consistent with the substantive basis for the belief Mr Pesutto had formed by the time of the Leadership Team meeting on 19 March 2023 as to the need to move a motion to expel Mrs Deeming from the Party; a belief that Mr Pesutto continues to hold.

26.41. It was suggested that by saying at line 20 ‘we don’t stand with neo-Nazis, we don’t stand with white-supremacists’, Mr Pesutto was intending to convey that Mrs Deeming stood with neo-Nazis and white supremacists. Mr Pesutto again denied that..⁶⁹² In context, Mr Pesutto’s denial is obviously correct. At that point of the transcript, Mr Pesutto was speaking generally about his values, not about the basis for moving the motion against Mrs Deeming.

26.42. It was also suggested that at lines 39-41, where Mr Pesutto said ‘[a]nd what I’m doing is a statement that we will not tolerate or ever accept any association with neo-Nazis and white-supremacists or anybody who sympathises with them’, Mr Pesutto was referring to Mrs Deeming. Again, Mr Pesutto denied that..⁶⁹³ Mr Pesutto explained that at the start of the interview he made ‘it clear’ that his concern relating to Mrs Deeming lay with association, and ‘I’m not in that statement saying that it’s Mrs Deeming who has the association with Neo-Nazis or white supremacists’..⁶⁹⁴

26.43. That again is plainly correct in context. At lines 39-41, Mr Pesutto was making a generalised statement. Viewers will have well understood that his concern with Mrs Deeming’s conduct was as he outlined it at the outset, ‘Moira Deeming not only attended the protest on the steps of parliament but was actively involved in different ways in the organisation and promotion of this protest **at which there were speakers who have known links with neo-Nazis and white-supremacists**, and I won’t have any of it’: lines 4-7 (our emphasis).

⁶⁹⁰ T766.42-43 (Pesutto XXN).

⁶⁹¹ T780.23-27 (Pesutto XXN).

⁶⁹² T780.37-38 (Pesutto XXN).

⁶⁹³ T781.34-42 (Pesutto XXN).

⁶⁹⁴ T781.45-47 (Pesutto XXN).

- 26.44. Mr Pesutto denied implicitly agreeing with the interviewer that Mrs Deeming held abhorrent views.⁶⁹⁵ Mr Pesutto said he did not want to affirm that proposition and sought to move the topic back to issues he wanted to talk about.⁶⁹⁶ That is consistent with a fair reading of the transcript. As we submit above at [5.44(c)], Mr Pesutto did not accede to the interviewer's suggestion, instead referring back to 'the reasons I have outlined' (line 35), which will have been understood as a reference back to the start of the interview when Mr Pesutto identified as his concern that Mrs Deeming had attended and been actively involved in the organisation of the Rally at which there were speakers with known links to neo-Nazis and white supremacists (line 4-7). By engaging with Mr Rowland's comments on that topic, Mr Pesutto considered it 'would have taken the interview in a different direction entirely'.⁶⁹⁷ As Mr Pesutto said, he made it very clear at the top of the interview that 'it's not because Mrs Deeming is a Nazi or Nazi sympathiser'.⁶⁹⁸
- 26.45. Mr Pesutto denied that he 'escalated the allegation by calling her a Nazi sympathiser and then escalated it even further by accusing her of being a Nazi'.⁶⁹⁹ Rather, his statement stands on its own, 'Nazis and white supremacists don't make debates respectful'.⁷⁰⁰ Understood as a whole, it cannot be seriously suggested that Mr Pesutto was asserting in the ABC Interview that Mrs Deeming is a Nazi sympathiser or a Nazi; those suggestions are flatly inconsistent with the careful articulation of Mr Pesutto's concerns about Mrs Deeming at the start of the interview at lines 4-7.
- 26.46. Returning to the relevant question, in our submission, none of the matters put to Mr Pesutto undermined the reasonableness of his belief that publication of the ABC Interview was in the public interest, for the reasons he gave, having regard to the context.

Press Conference

- 26.47. Mr Pesutto explained that the purpose of the Press Conference was:⁷⁰¹

to convey the reasons for why we were taking the step, your Honour, and I thought that was an important matter. I thought that it was untenable not to make that decision and then hide from the public. There was a clear and pressing need, in my judgment, your Honour, to explain why I was taking the – the step to move the motion.

- 26.48. At lines 6-8 of the Press Conference Mr Pesutto said:

⁶⁹⁵ T782.6-8 (Pesutto XXN).
⁶⁹⁶ T782.3-4, 46 (Pesutto XXN).
⁶⁹⁷ T783.35-36 (Pesutto XXN).
⁶⁹⁸ T784.26-27 (Pesutto XXN).
⁶⁹⁹ T784.31-32 (Pesutto XXN).
⁷⁰⁰ T784.38-39 (Pesutto XXN).
⁷⁰¹ T798.28-32 (Pesutto XXN).

It will never be acceptable in Victoria for Nazis to get a platform or anyone who shares their views or anyone who works with them to help them promote their odious agenda.

26.49. Mr Pesutto repeatedly, and consistently, identified the basis of his concerns about Mrs Deeming's conduct in the passages of the transcript of the Press Conference that we have reproduced at [5.56] above.

26.50. The various propositions that were put to Mr Pesutto in cross-examination to seek to undermine the clear import of the Press Conference, with respect, went nowhere:

(a) Mr Pesutto fairly denied that he was intending to convey that Mrs Deeming shared Nazi views or worked with the neo-Nazis to promote their agenda.⁷⁰²

(b) It was suggested that Mr Pesutto's reference to 'people' (plural) at line 14 was said without having any information regarding multiple people.⁷⁰³ Mr Pesutto explained 'it was based on our concerns around Ms Keen and Ms Jones and the fairly indisputable fact as I understood it that Ms Jones' tweet was clearly connected to the presence of the Nazis there when she said "Nazis and women want to get paedo filth"'.⁷⁰⁴

As we have explained in Schedule A, the Jones tweet, which Mr Pesutto reasonably understood to be conflating the views of women about trans people and the views of Nazis (that trans people are paedo freaks who should be destroyed), was the adoption or appropriation of a view held by Nazis that is both odious and unacceptable. Ms Jones' tweet was referred to at item 5 in the 'fact sheet' he had been provided.⁷⁰⁵

(c) Mr Pesutto denied that there had been no investigation of the kind referred to at line 38,⁷⁰⁶ and he did not accept that the material upon which the allegations concerning Mrs Keen were based were cursory internet searches.⁷⁰⁷ He maintained that he had a proper basis to say of any person who was an organiser that they had shared platforms 'with fascist ethno-nationalist white supremacists and Nazis',⁷⁰⁸ and he rejected that he knew that was false when he said it.⁷⁰⁹ Mr Pesutto rejected the assertion that he made the statement knowing it would have a serious impact on Mrs Deeming's reputation,⁷¹⁰ or that he intended to cause serious damage to Mrs Deeming's reputation.⁷¹¹ In fact, Mr Pesutto went out of his way 'to demonstrate that it was the

702 T799.10-12, 20 (Pesutto XXN).

703 T800.8-10 (Pesutto XXN).

704 T800.10-13 (Pesutto XXN).

705 Exhibit R78, CBC Tab 331, pages 1835-1837 at page 1837.

706 T800.31-33 (Pesutto XXN).

707 T800.35-36 (Pesutto XXN).

708 T800.38-41 (Pesutto XXN).

709 T800.43-44 (Pesutto XXN).

710 T800.46-47; T801.1-16; T802.1-3 (Pesutto XXN).

711 T802.5-7 (Pesutto XXN).

association between Mrs Deeming and the organisers that we were concerned about’..⁷¹²

All of that evidence was unexceptional. Mr Pesutto did have a basis for believing that Mrs Keen had been publicly associated and shared platforms with neo-Nazis and white supremacists, such as Gariépy and Johansen. He had gone out of his way, as the passages reproduced at [5.56] above demonstrate, to make clear the basis for his concerns about Mrs Deeming.

- (d) Mr Pesutto denied seeking to conflate Mrs Deeming’s conduct in relation to Mrs Keen with a connection to the neo-Nazis,⁷¹³ and said he had ‘tried as hard as I could throughout that press conference to do precisely the opposite – to convey that it was not that; it was the association with the organisers’..⁷¹⁴ That is plainly correct, as the passages reproduced above at [5.56] demonstrate.
- (e) Mr Pesutto did not accept that he was seeking to associate Mrs Deeming with the neo-Nazis at lines 72-79..⁷¹⁵ Mr Pesutto explained that the word ‘dissociate’ was plainly referring to Mrs Keen and Ms Jones, and not an allegation that Mrs Deeming had failed ‘to disown and disassociate herself from the Nazis who attended the steps’..⁷¹⁶ That is a correct reading of the transcript in context.
- (f) Mr Pesutto was firm that he ‘did’ have a basis to say that Mrs Deeming ‘was working with people who’ve shared platforms and promoted people who have Nazi views and white supremacist views’..⁷¹⁷ Mr Pesutto explained he had credible information on which to make those allegations about Mrs Keen and Ms Jones..⁷¹⁸ Again, that was unexceptional evidence having regard to the belief Mr Pesutto had formed by the time of the Leadership Team meeting on 19 March 2023.
- (g) Mr Pesutto rejected the proposition put to him that he intended to blame Mrs Deeming directly for the attendance of Nazis on the steps of Parliament by his comments regarding individual responsibilities of MPs at lines 130-135..⁷¹⁹ He reiterated that he was ‘going out of my way to emphasise that the concern was with the associations, and the concern embedded in that particular comment was that Mrs Deeming had worked with Ms Keen and Ms Jones, and it was through them that the concern

⁷¹² T801.23-24 (Pesutto XXN).

⁷¹³ T802.38-40 (Pesutto XXN).

⁷¹⁴ T802.40-42; see also T803.7-10 (Pesutto XXN).

⁷¹⁵ T803.25-34 (Pesutto XXN).

⁷¹⁶ T803.36-46 (Pesutto XXN).

⁷¹⁷ T804.25-42; see also regarding line 147, T805.1-9 (Pesutto XXN).

⁷¹⁸ T806.16-25 (Pesutto XXN).

⁷¹⁹ T805.18-19 (Pesutto XXN).

arose’..⁷²⁰ He ‘certainly’ rejected any suggested that he alleged that Mrs Deeming provided an opening for the Nazis to attend the Rally, or that ‘it was her fault’..⁷²¹ Contrary to what counsel for Mrs Deeming asserted was the plain meaning of the words, Mr Pesutto explained what was self-evident from his statement:⁷²²

as I’ve said, Mrs Deeming had worked with Ms Keen and Ms Jones, potentially others, to organise this rally. It was that rally that provided an opportunity for Nazis to turn up, but I’m not saying that Mrs Deeming invited them, or was the cause, but you have to be responsible – my broader point is you have to be responsible, in public life, for what you do and whom you work with. And that did, even with the caveats that Mrs Deeming didn’t invite the Nazis – I’ve never suggested anything of the sort – that the rally, and the way it was conducted did provide an opening for them.

- (h) It was put to Mr Pesutto that he sought to mislead the press corps and therefore the public about the information he had by not referring to the quote from Mrs Keen in in *Pink News* article in which she said she abhorred or disagreed with Nazi views..⁷²³ Mr Pesutto explained that was ‘wrong’, as was the proposition that he did so in order to harm Mrs Deeming..⁷²⁴

Mr Pesutto did not have to quote Mrs Keen’s statement. His principal concern was as set out in the passages we have reproduced at [5.56] above; namely, that Mrs Keen had known links and shared platforms with people with abhorrent views. In view of the volume of those links and shared platforms, and the fact that it was the existence of those links and platforms that was the animating concern, Mr Pesutto was not required to accept at face value a motherhood statement from Mrs Keen about the abhorrence of Nazi views, much less to focus upon that statement at a Press Conference the purpose of which was to explain his decision to move to expel Mrs Deeming from the Party. This is not a proceeding brought by Mrs Keen.

- (i) Mr Pesutto explained that his use of the word ‘odious’ in line 240 as follow: ‘I am clearly saying that it’s Nazis, white supremacists or ethno fascists that are odious and that any – and link or association is unacceptable to the party’..⁷²⁵ He was not describing Mrs Deeming as odious..⁷²⁶
- (j) Mr Pesutto rejected the proposition put to him that in lines 244-245 (in which he forcefully expressed his opposition to neo-Nazis) that he was suggesting that his action

⁷²⁰ T805.21-23 (Pesutto XXN).

⁷²¹ T805.18-32 (Pesutto XXN).

⁷²² T805.35-42 (Pesutto XXN).

⁷²³ T806.27-33 (Pesutto XXN).

⁷²⁴ T806.33-37 (Pesutto XXN).

⁷²⁵ T807.41-43 (Pesutto XXN).

⁷²⁶ T808.5-6 (Pesutto XXN).

in seeking expel Mrs Deeming from the Party was a stance against the Nazis who attended Parliament.⁷²⁷

That is plainly the case. The Press Conference was not only about Mrs Deeming; it was also about ‘questions and issues around the Nazis themselves’.⁷²⁸ Mr Pesutto explained what was apparent from the words themselves ‘that comment is not directed at Mrs Deeming. It’s a comment about the Nazis and a more general comment. It’s about the need to stand up against that’.⁷²⁹

- (k) It was put to Mr Pesutto that he was not truthful in his answer at lines 289-290, to the question posed at 287-288:

Question: Is it plausible that Ms Deeming was unaware of the extremist links of the organisers and if she was unaware do you think it’s fair to kick her out?

J Pesutto: I don’t think it’s open to me to be satisfied that Moira didn’t know about their history.

Mr Pesutto rejected the suggestion that that answer was dishonest, and was clear that he ‘gave a truthful answer to that question’.⁷³⁰ He did not choose that wording to imply Mrs Deeming *did* know – had he wished to, he would have said so explicitly.⁷³¹ That evidence was coherent and should be accepted. As it turns out, Mrs Deeming *did know* of some of Mrs Keen’s extremist associations; she had received (and in respect of the Proud Boys, engaged with) social media posts prior to the Rally alerting her to Mrs Keen’s public associations with, at least, Jean François Gariépy and the Proud Boys, a matter that Mrs Deeming conceded in cross-examination.⁷³²

- (l) At lines 293-294, Mr Pesutto incorrectly drew a direct association between Mrs Keen and David Duke.⁷³³ We have addressed the immateriality of that matter at [26.13] to [26.21] above.
- (m) With respect to lines 296-300, Mr Pesutto explained he was not intending to convey, and did not accept he was understood to suggest, that Mrs Deeming was prepared to associate with people who she knew had associations with fascists and Nazis.⁷³⁴ That

⁷²⁷ T810.1-3 (Pesutto XXN).

⁷²⁸ T810.8-9 (Pesutto XXN).

⁷²⁹ T8109-11 (Pesutto XXN).

⁷³⁰ T811.35-38 (Pesutto XXN).

⁷³¹ T811.1-6 (Pesutto XXN).

⁷³² T229.20, 237.10-27 (Deeming XXN).

⁷³³ T813.3-7 (Pesutto XXN).

⁷³⁴ T813.35-39 (Pesutto XXN).

should be accepted having regard to the Press Conference taken as a whole, and in particular the references we have reproduced at [5.56] above.

- (n) At lines 313-316, Mr Pesutto was asked (in summary) if Mrs Deeming had implied she did not know about the links to the Nazis, and what Mrs Deeming said when it was put to her that she should have known. Mr Pesutto responded at lines 317-312:

J Pesutto: Look, I hope you'll understand, I'm not going to go into the details of the meeting we had. I'm prepared to say it was a lengthy meeting, we went through a whole range of issues uh, and I was satisfied on reflection and consideration of all the matters we discussed, that this was the appropriate action to take and I think you can draw the relevant inferences from that.

It was suggested to Mr Pesutto that he chose not to answer truthfully, but 'conveniently' decided not to disclose the details of the meeting.⁷³⁵ Mr Pesutto was clear that was 'wrong'.⁷³⁶ Mr Pesutto explained he was trying to avoid a long question and answer about the particulars of the discussion, because he was not 'particularly sure' about the extent of Mrs Deeming's knowledge.⁷³⁷ He did not accept he was seeking to imply Mrs Deeming did know about the associations.⁷³⁸ Again, as it turns out, that was a prudent approach to adopt. Mrs Deeming *did know* of some of Mrs Keen's extremist associations before the Rally, a matter that she conceded in cross-examination.⁷³⁹

- (o) At lines 418-421, Mr Pesutto said:

It was incumbent upon Moira as a member of Parliament to understand the dangerous consequences that can come when you are associated with people who share platforms with Nazis and white supremacists. Everybody must be responsible for their actions.

It was put to Mr Pesutto that he intended to represent that Mrs Deeming went ahead with the Rally knowing of the associations alleged against Mrs Keen and Ms Jones.⁷⁴⁰ As Mr Pesutto succinctly put it '[t]hat's not what I say'.⁷⁴¹ He went on to explain what again was apparent from the plain words used:⁷⁴²

It was that as public figures, we all have a responsibility, and we can't blame others for any oversights that we are responsible for. That's my main point there, that Mrs Deeming was a member of Parliament.

⁷³⁵ T814.13-19 (Pesutto XXN).
⁷³⁶ T814.19 (Pesutto XXN).
⁷³⁷ T814.39-42 (Pesutto XXN).
⁷³⁸ T815.12-15 (Pesutto XXN).
⁷³⁹ T229.20, 237.10-27 (Deeming XXN).
⁷⁴⁰ T816.24-26 (Pesutto XXN).
⁷⁴¹ T816.26 (Pesutto XXN).
⁷⁴² T815.29-32 (Pesutto XXN).

(p) It was put to Mr Pesutto that his statement at lines 425-428 (in which he declined to go into details of the discussion at the Leadership Team meeting) was not honest, and sought to convey that Mrs Deeming did not make an offer to condemn Nazism.⁷⁴³ That proposition did not follow from anything that Mr Pesutto said, much less indicate any dishonesty on his part. Mr Pesutto denied not going into details because ‘the details contradicted what [Mr Pesutto] had been saying all day’.⁷⁴⁴

26.51. None of the matters upon which Mr Pesutto was cross-examined in respect of the Press Conference rationally undermines the question for the Court, which comes back to the language of s 29A(1)(b): did Mr Pesutto reasonably believe that publication of the Press conference was in the public interest? That question is answered, in our submission, not by a line-by-line parsing of the conference, but by assessing Mr Pesutto’s evidence as to his reasons for believing that the publication of the Press Conference was in the public interest against a consideration of what he said during the Press Conference, taken as a whole.

26.52. When that exercise is undertaken, the answer is straightforward: the thrust of what Mr Pesutto said at the Press Conference about Mrs Deeming resides in the passages we have reproduced at [5.56] above. His belief in the public interest in the publication of the Press Conference was articulated in the manner we have summarised above, in the context we have summarised above.

Expulsion Motion and Dossier

26.53. Mr Pesutto gave evidence that his staff (particularly Mr Pintos-Lopez) had the responsibility for putting the Expulsion Motion and Dossier together.⁷⁴⁵ He had trusted Mr Pintos-Lopez with the research because he had confidence in his forensic capabilities.⁷⁴⁶ He had instructed Mr Pintos-Lopez to draft the document because of his relevant experience, including as a barrister.⁷⁴⁷ He carefully reviewed it but could not recall making any changes.⁷⁴⁸ He considered it appropriate for the purpose for which it was prepared – namely, to comply with the Constitution and to give his colleagues the information and evidence they needed in order to decide whether to support the motion. He had no reason to disbelieve any of the facts stated in the Expulsion Motion and Dossier.⁷⁴⁹

⁷⁴³ T816.34-45 (Pesutto XXN).

⁷⁴⁴ T816.2-4 (Pesutto XXN).

⁷⁴⁵ CBB Tab 30, page 351, [131] (Affidavit of John Pesutto dated 27 May 2024).

⁷⁴⁶ CBB Tab 30, page 339, [66] (Affidavit of John Pesutto dated 27 May 2024).

⁷⁴⁷ CBB Tab 30, page 348, [96] (Affidavit of John Pesutto dated 27 May 2024).

⁷⁴⁸ CBB Tab 30, page 351, [131] (Affidavit of John Pesutto dated 27 May 2024).

⁷⁴⁹ CBB Tab 30, page 351, [131] (Affidavit of John Pesutto dated 27 May 2024).

- 26.54. Mr Pesutto did not have a discussion in any detail about what should go into and come out of the Dossier. He had a great deal of trust in Mr Pintos-Lopez to put it together, and could not recall any detailed discussion about each stage or iteration of that document as it progressed.⁷⁵⁰ None of that is surprising. Mr Pesutto, as leader of the Opposition, was entitled to rely on the competence and professionalism of his staff; particularly one with the education and skillset of Mr Pintos-Lopez. He was obviously not the primary author of the Dossier.
- 26.55. Mr Pesutto did not have a specific recollection of noticing matters having been removed, save that the document became shorter.⁷⁵¹ This is consistent with Mr Pintos-Lopez' desire, consistently stated in cross-examination, to focus on the 'core facts'.⁷⁵²
- 26.56. Mr Pesutto rejected the proposition that by only including the first page of the *Pink News* article, the context of the interview with Jean-François Gariépy was completely altered.⁷⁵³ That was a fair belief for Mr Pesutto to hold: the significance of the *Pink News* article, to Mr Pesutto, resided in the fact that Mrs Keen had voluntarily chosen to share a platform with a discreditable individual. The *Pink News* article was put forward in support of a motion to that effect: motion 2(a), not in support of a motion that Mrs Keen held the same views as Gariépy. Neither of the motions in the Expulsion Motion and Dossier made any representations as to Mrs Keen's views – the relevant matter was that she 'was known to be publicly associated with far right-wing extremist groups including neo-Nazi activists'.
- 26.57. It was obvious from the first page of the article that the substance of its analysis was that Mrs Keen's decision to appear with Gariépy was considered by some to be 'brave', 'interesting' and 'brilliant'; nothing suggested Mrs Keen had appeared on the platform because she was herself a white nationalist or shared the views of Gariépy. Mr Pintos-Lopez rejected outright any suggestion that that he was trying to mislead anyone. Rather, he stated, as he did consistently with throughout his entire cross-examination, he was trying to do the opposite – he was putting propositions and giving the reader links to the sources for them to verify for themselves the underlying information.⁷⁵⁴
- 26.58. In any event, this is a false issue. The decision to include only the first page of the *Pink News* article in the final version of the Dossier was not a decision that Mr Pesutto made.⁷⁵⁵ It was not even established that he was aware of that decision, or put to him that it was unreasonable to rely on others to finalise the Dossier. It was not put to Mr Pintos-Lopez that Mr Pesutto

⁷⁵⁰ T788.11-20 (Pesutto XXN).

⁷⁵¹ T789.35-37 (Pesutto XXN).

⁷⁵² T1250.1; T1266.23-28; T1267.25-41 (Pintos-Lopez XXN).

⁷⁵³ T823.1-3 (Pesutto XXN).

⁷⁵⁴ T1267.25-41 (Pintos-Lopez XXN).

⁷⁵⁵ T823.16 (Pesutto XXN).

had directed him to mislead others in the way he presented the Expulsion Motion and Dossier. Instead, the entire cross-examination on these points proceeded on the basis that it was Mr Pintos-Lopez who sought to mislead the readers.⁷⁵⁶ In those circumstances, whatever criticisms might be able to be levelled Mr Pintos-Lopez (and none should be; quite the contrary), it could hardly constitute a matter that negates *Mr Pesutto's* reasonable belief that publication of the Expulsion Motion and Dossier was in the public interest.

- 26.59. Mr Pesutto denied that deliberate decisions were made to remove exculpatory material from the Dossier. He did not accept that any omitted material was exculpatory at all.⁷⁵⁷ He rejected that the Dossier was constructed so as to cause maximum damage to Mrs Deeming;⁷⁵⁸ to mislead members of Parliament;⁷⁵⁹ or to mislead the press once the Expulsion Motion and Dossier was distributed.⁷⁶⁰
- 26.60. To similar effect, although Mr Pintos-Lopez accepted that everything he provided a link to was in the Dossier was 'relevant', the opinion he formed as a result of his research was not that Mrs Keen did not look into the people who interviewed her and abhorred Gariépy's views but rather:⁷⁶¹

she was a polemicist ... who was interested in notoriety by associating with people who would create some kind of scandal around her – that's the opinion that I formed at the time – and that she had no problem associating with people with abhorrent views to promote her brand.

Ms Chrysanthou: But did you also form a view that she didn't agree with those views?--I don't know whether I formed the view that she agreed with them or didn't agree with them. What I formed the view of was that she was fast and loose with those associations, and didn't really care and, in fact, had an interest in those associations because that furthered her brand.

- 26.61. It was put to Mr Pesutto that he should have provided the Expulsion Motion and Dossier to Mrs Deeming prior to making public statements about her conduct. Mr Pesutto again explained he 'believed it was urgent that I speak to the Victorian people in the way that I did, for the reasons that I've said it was important. Once the decision was made to move the motion, I believed it was in the public interest to get out there and explain my decision along with the leadership group'.⁷⁶²
- 26.62. Returning to the statutory language, the question in s 29A(1)(b) in respect of the Expulsion Motion and Dossier is whether Mr Pesutto's subjective believe that publication was in the

⁷⁵⁶ T1267.17-41 (Pintos-Lopez XXN).

⁷⁵⁷ T823.45-47 (Pesutto XXN).

⁷⁵⁸ T824.3 (Pesutto XXN).

⁷⁵⁹ T824.5 (Pesutto XXN).

⁷⁶⁰ T824.8-9 (Pesutto XXN).

⁷⁶¹ T1231.22-45 (Pintos-Lopez XXN).

⁷⁶² T821.26-30 (Pesutto XXN).

public interest was objectively reasonable, in the sense that the public would benefit from the subject matter of it being discussed, taking it as a whole.

- 26.63. In our submission, it plainly was. There was a high degree of public interest in the basis upon which Mr Pesutto and the other members of the Leadership Team had decided to move to expel Mrs Deeming from the Party. That public interest existed, irrespective of the merits of the decision. It can be tested this way – even if the Dossier had been a wholly inadequate foundation for a motion to move to expel Mrs Deeming, the *fact was* that it was the basis for the motion. It was in the public interest for members of the Party and the broader community to know the basis for the decision so that it could be scrutinised and critiqued. As Mr Duke said, for example, he welcomed the opportunity to have his say before the Party voted on the matter,⁷⁶³ in circumstances where he considered there to be no proper basis for the motion.

Conclusion

- 26.64. Nothing has emerged to undermine the reasonableness of Mr Pesutto’s clearly expressed subjective belief that publication of each of the Publications was in the public interest.

27. The criteria in s 29A(3) of the Act

- 27.1. Section 29A(2) positively requires this Court to consider ‘all of the circumstances of the case’.
- 27.2. Section 29A(3) provides non-exhaustive guidance on some of the factors that may be relevant. However, the Court is not required to consider all, or even any, of the factors in s 29A(3), which are not intended to operate as a checklist.⁷⁶⁴
- 27.3. We submit that the checklist has no useful work to do in light of the preceding analysis, which is the more appropriate way of addressing the application of the defence in a case not involving a mass media or journalist respondent. Nonetheless, we shall briefly address each of the prescribed factors.

s 29A(3)(a) and (b) – seriousness of the imputations and distinction between allegations

- 27.4. Mr Pesutto’s belief that the publication of the Publications was in the public interest lay in his view that it was incumbent upon him to explain the decision of the Leadership Team to move a motion to expel Mrs Deeming to his colleagues and the public. He honestly held the views expressed in the contextual imputations pleaded in the Defence, and imputations 19.6, 19.7,

⁷⁶³ T366.5-6 (Duke XXN).

⁷⁶⁴ See, s 29A(4), the words in the chapeau to s 29(3) (which provides ‘the court *may* take into account the following factors *to the extent the court considers them applicable* in the circumstances) and the Explanatory Note set out at *Russell*, [266].

19.8, 24.1, and 24.3 of the SOC.⁷⁶⁵ The very purpose of the Publications was to explain the decision of the Leadership Team.

27.5. In those circumstances, the seriousness of the imputations carried by the Publications is a neutral factor. The reasonableness of Mr Pesutto's belief that publication of the Publications was in the public interest essentially coincided with his belief.

27.6. It is clear from each of the Publications that the decision that had been taken was to move a motion to expel Mrs Deeming from the Party, which had not yet been voted on. In that sense, ordinary recipients of each Publication would have understood that Mr Pesutto was distinguishing between an allegation of the Leadership Team and a concluded finding by the Party. This point was expressly made in each of the Publications, as detailed at [25.3] above.

s 29A(3)(c) – the extent to which the matter published relates to the performance of the public functions or activities of the person

27.7. The Publications clearly concerned Mrs Deeming's public functions and activities as a first term member of Parliament and a member of the Party of which Mr Pesutto was and is the leader. This factor strongly favours the reasonableness of Mr Pesutto's belief that publication of the Publications was in the public interest.

s 29A(3)(d) – whether it was in the public interest in the circumstances for the matter to be published expeditiously

27.8. Mr Pesutto's reasonable belief was that it is was in the public interest for him to publish the Publications expeditiously, for the reasons already set out above and in his affidavits.⁷⁶⁶ He maintained that position under sustained cross-examination, explaining he was 'extremely concerned about the risks to the party if we didn't take urgent action'.⁷⁶⁷ He said:⁷⁶⁸

this is a process where there were a range of different factors we had to take into consideration. And the process was one of them, but informed by the seriousness of the issues in the media and in political discourse over the course of that weekend as well.

...

I followed the course I believed which was appropriate, which was to gather as much information as we could, but then make a decision about whether we needed to act. Urgency was an imperative as well

...

⁷⁶⁵ Noting that in his evidence, Mr Pesutto clarified that he did not believe to be true SOC imputations [24.2] and [24.4]: T825.33-47 (Pesutto XXN).

⁷⁶⁶ CBB Tab 30, page 346, [108]-[113], page 353, [140]-[141] (Affidavit of John Pesutto dated 27 May 2024); CBB Tab 31, page 380, [58(h)], [59] (Affidavit of John Pesutto dated 22 July 2024).

⁷⁶⁷ T592.15-16 (Pesutto XXN).

⁷⁶⁸ T678.42-45; T679.4-7, 19-31 (Pesutto XXN).

I was concerned about the urgency and I was very conscious that, whilst delay can have a prepossessing appeal because you're putting off very difficult action, it can come at a great cost. And the great cost I was concerned about, when reflecting on all of the different options that might have been available that day, delay carried enormous risk because the atmosphere of that weekend, the dynamics that were circulating across political discussion in the media, on social media, were very strong. And in my experience of being involved in public life and in and around government is that in a matter like this if you delay and open yourself up to the charge of not taking an issue seriously, whatever the steps might be if you are – if you delay for a day while there is broadside after broadside launched against the party on the basis of accusations, fair or unfair, that we haven't acted in response to the protests which saw neo-Nazis there, that can come at a great price to the party standing as well. So I had to take those matters into consideration.

- 27.9. The story was going to develop: 'It was already building as a story, and, in my experience, it was going to continue to build and become a critical issue for the party'..⁷⁶⁹
- 27.10. Mr Pintos-Lopez' advice was put to Mr Pesutto, who explained the role of such advice in his office, and why he chose a different course..⁷⁷⁰

I followed the course I believed which was appropriate, which was to gather as much information as we could, but then make a decision about whether we needed to act. Urgency was an imperative as well, your Honour, which I'm happy to elaborate if it will assist. But I expect my staff to give advice as they see it. I promote in my office the idea of contestability of advice. I don't want people to tell me what they think I want to hear. And I welcome advice from all perspectives, but ultimately I'm the one who has to make a decision. And, your Honour, I had to take into account a range of factors. And Mr Pintos-Lopez was a Chief of Staff I regarded very highly. I too considered delaying matters as part of the many considerations I entertained that day. But I just wish to emphasise, I'm the one who has to make the decision with my leadership colleagues at the end of the day.

- 27.11. While some of the members of Parliament called by Mrs Deeming expressed different views, none of them was the leader and none of them had the same information – save for the Leadership Team, who all supported the decision to publicise the decision.
- 27.12. The members of Parliament called by Mrs Deeming, for example, were seemingly not even aware that Mrs Deeming's involvement at the Rally had become a major part of the developing story both in the mainstream media or on social media well prior to the first of the Publications, or that there were growing calls for Mr Pesutto and the Party to act against Mrs Deeming, including from a former leader and a senior Liberal, and on social media..⁷⁷¹

⁷⁶⁹ T755.28-30 (Pesutto XXN).
⁷⁷⁰ T679.4-15 (Pesutto XXN).
⁷⁷¹ See [14], [17.1].

s 29A(3)(e), (f), (h) – the sources of the information and attempts to verify

- 27.13. Mr Pesutto took appropriate steps in the circumstances to satisfy himself as to the accuracy of the information upon which the decision to move to expel Mrs Deeming was based and which, in turn, formed the basis for his belief that it was in the public interest to publish each of the Publications.
- 27.14. Mr Pesutto reasonably relied upon his staff (primarily Mr Pintos-Lopez, whom he held in high regard) to investigate, verify and source the materials that underpinned the decision, which were set out in the Publications.⁷⁷² He was entitled to do so.
- 27.15. Mr Pintos-Lopez, a Harvard educated, experienced and respected former barrister, spent several hours researching, and formed the view that what he had found was the tip of the iceberg, and verifiable by reputable sources.⁷⁷³
- 27.16. The materials sourced by Mr Pintos-Lopez included (but were not limited to):
- (a) mainstream media reports concerning the Rally, including the article in *news.com.au* entitled ‘Anti-trans speaker’s fans throw Nazi salute amid counter-protest’, which identified the neo-Nazis as having attended in support of Mrs Keen, described the Rally as an anti-trans event, and included a photograph of Mrs Deeming;⁷⁷⁴
 - (b) information provided by other trusted sources (e.g. Mr Southwick’s account of his call with Mrs Deeming);
 - (c) materials that did not require verification, such as the Jones tweet, and the Video in which Mrs Deeming, Mrs Keen, Ms Deves and Ms Jones, among other things, drank champagne, spoke of the success of the Rally, and discussed whether the neo-Nazis might actually have been police or trans rights activists; and
 - (d) a range of other materials that were in the public domain and ‘all over the internet’, including the materials concerning Mrs Keen’s public associations and conduct.
- 27.17. During the meeting with the Leadership Team:

⁷⁷² CBB Tab 30, page 339, [66], page 340 [72], page 348, [116]-[117] (Affidavit of John Pesutto dated 27 May 2024).

⁷⁷³ CBB Tab 37, page 441, [22] – 443 [32] (Affidavit of Rod Pintos-Lopez dated 24 May 2024).

⁷⁷⁴ Exhibit R27, CBC Tab 773, pages 3783-3788, cited in Expulsion Motion and Dossier (CBA page 87).

- (a) despite the amount of material available, in the end, Mr Pintos-Lopez spoke only to the ‘core facts’,⁷⁷⁵ that he had earlier assured Mr Pesutto and the Leadership Team were absolutely ‘solid’;⁷⁷⁶
- (a) Mrs Deeming did not dispute the veracity of any of the material concerning Mrs Keen and Ms Jones; and
- (b) ultimately accepted that, regardless of the truth of otherwise of the allegations, the Leadership Team had convinced her that, based on the material discussed in the meeting,⁷⁷⁷ ‘whether we like it or not, people think we turn the other cheek to Nazis’, and it did ‘look way worse than I thought’..⁷⁷⁸

27.18. The sources of information have not been shown to be false.

27.19. To the contrary, as explained at [10.8] above, when Mrs Deeming was taken in cross-examination to each of the matters put to her in the meeting on 19 March 2023 and contained in the Expulsion Motion and Dossier, she accepted their accuracy.

s 29A(3)(g) – whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person

27.20. For the reasons we developed in [22.18] above, in our submission this factor is not applicable in the context of Publications by a politician made in order to inform the public of a political decision. Mr Pesutto is not a journalist. He was not obliged to play devil’s advocate or mimic the role of a journalist..⁷⁷⁹ Rather, Mr Pesutto was putting information into the public domain for the very purpose of enabling it to be reported on by journalists (who could then be relied upon to seek comment from Mrs Deeming).

27.21. That then duly occurred, as would be expected, with the result that Mrs Deeming’s side of the story was fully included in the ensuing public debate, which Mrs Deeming’s third list of documents reveals she took full advantage of, facilitated, and promoted.

⁷⁷⁵ T1250.1; T1266.23-28; T1267.25-41 (Pintos-Lopez XXN).

⁷⁷⁶ CBB Tab 30, page 340 [72] (Affidavit of John Pesutto dated 27 May 2024); CBB Tab 30, page 394 [21] (Affidavit of Matthew Bach dated 26 May 2024).

⁷⁷⁷ Including the reporting concerning the neo-Nazis attendance at the Rally, Jones Tweet, the champagne video and the alleged associations between Mrs Keen and the far right read out by Mr Pintos-Lopez.

⁷⁷⁸ Exhibit A2, lines 549 to 559.

⁷⁷⁹ CBB Tab 31, page 366, [7]-[8] (Affidavit of John Pesutto dated 22 July 2024).

s 29A(3)(i) – the importance of freedom of expression in the discussion of issues of public interest

- 27.22. This factor strongly favours the reasonableness of Mr Pesutto’s belief that publication of the Publications was in the public interest.
- 27.23. Mrs Deeming’s position that this ‘disciplinary matter’ ought to have been dealt with in-house behind closed doors, was unrealistic and, in any event, would have involved covering up a matter of public interest, rather than exposing it to public debate and scrutiny.
- 27.24. As Mr Pesutto explained, he considered it important to tell voters why he and the Leadership Team were proposing to remove Mrs Deeming, a first term member of Parliament, from the Party. The decision to move the Expulsion Motion followed an entirely understandable and intensifying public focus upon the events at the Rally and Mrs Deeming’s conduct, including growing calls upon Mr Pesutto to take action against Mrs Deeming.
- 27.25. The genie was well and truly out of the bottle before the first of the Publications. Mr Pesutto reasonably believed that unless he got out in front of the story, his political opponents would capitalise on it in order to maximise the damage to the Party.⁷⁸⁰
- 27.26. There was an additional reason why it was in the public interest for the Leadership Team’s decision to be explained to the public. As Mr Duke explained, after he learned of the decision, he sent Mr Pesutto and other members of the Party a letter, because he wanted to have his say, as an interested member of the public before the Party made a decision.⁷⁸¹ Mr Duke welcomed the opportunity to have his say before the Party voted on the matter.⁷⁸²
- 27.27. If Mr Pesutto had not published the Publications, people like Mr Duke (and the many others who lobbied their members of Parliament) would have been left in the dark as to the prospect of Mrs Deeming’s expulsion until after a final decision had been made, behind closed doors, and would thus have been deprived of the ability to seek to influence the outcome.
- 27.28. If political leaders such as Mr Pesutto were inhibited in their ability to inform the public of the reasons for their decisions, then public debate, freedom of expression and our democracy would be the poorer for it.

⁷⁸⁰ CBB Tab 30, page 347, [112] (Affidavit of John Pesutto dated 27 May 2024).

⁷⁸¹ T365.37-45 (Duke XXN).

⁷⁸² T366.5-6 (Duke XXN).

G. HONEST OPINION

28. Relevant principles

28.1. Section 31(1) of the Act provides that it is a defence to the publication of defamatory matter if the respondent proves that:

- (a) the matter was an expression of opinion of the respondent 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’.

28.2. Mrs Deeming admits that each of the Publications related to a matter of public interest: Reply, [2.2]. It must follow that she is taken to admit that any opinions expressed in the Publications related to matters of public interest.

28.3. The availability of the defence of honest opinion is an important aspect of freedom of expression. In *Channel Seven Adelaide Pty Ltd v Manock*, Gleeson CJ stated (in relation to the corresponding common law defence of fair comment):⁷⁸³

The protection from actionability which the common law gives to fair and honest comment on matters of public interest is an important aspect of freedom of speech. In this context, ‘fair’ does not mean objectively reasonable. The defence protects obstinate, or foolish, or offensive statements of opinion, or inference, or judgment, provided certain conditions are satisfied.

28.4. In the same case, Gummow, Hayne and Heydon JJ referred to the statement of Bingham LJ in *Brent Walker Group Plc v Time Out Ltd*,⁷⁸⁴ that ‘the law is not primarily concerned to provide redress for those who are the subject of disparaging expressions of opinion, and freedom of opinion is (subject to necessary restrictions) a basic democratic right’.⁷⁸⁵

28.5. Similarly, in an observation that is apposite to expressions of opinion on the fitness of a person to hold a political office (on which minds may, of course, reasonably differ, often quite dramatically), in *Massoud v Nationwide News Pty Ltd*, Leeming JA emphasised:⁷⁸⁶

Of course, the point of the defence of honest opinion is that it is a defence for what would otherwise be actionable defamation. It is an aspect of the balance struck by the law to the effect that sometimes unjustified comment which injures a plaintiff’s reputation may be made without liability.

⁷⁸³ (2007) 232 CLR 245, 252 [3] (*Manock*).

⁷⁸⁴ [1991] 2 QB 33, 44.

⁷⁸⁵ *Manock* 262 [35]; see also 297 [115]-[117] (Kirby J).

⁷⁸⁶ (2022) 109 NSWLR 468, [170].

28.6. The distinction between an expression of opinion and a statement of fact is not defined in the Act. The distinction was addressed by the High Court in *Manock*. The plurality (Gummow, Hayne and Heydon JJ, with whom Gleeson CJ agreed), found that an opinion must be indicated with reasonable clearness by the words of the publication, the manner of speaking, the context, the tone of voice, the relationship between the material relied upon and the comment, and the circumstances in which the words are published.⁷⁸⁷ Their Honours continued (citations omitted):⁷⁸⁸

The question of construction or characterisation turns on whether the ordinary reasonable ‘recipient of a communication would understand that a statement of fact was being made, or that an opinion was being offered’ – not ‘an exceptionally subtle’ recipient, or one bringing to the task of ‘interpretation a subtlety and perspicacity well beyond that reasonably to be expected of the ordinary reader whom the defendant was obviously aiming at’.

28.7. A ‘comment’ (or opinion) is something which is or can reasonably be inferred to be a deduction, inference, evaluation, conclusion, criticism, judgment, remark or observation.⁷⁸⁹ A statement is more readily identifiable as an expression of opinion where the facts on which it is based are stated or indicated with sufficient clarity to make it clear that it is a comment based on those facts.⁷⁹⁰

28.8. An opinion may be expressed in strong language. It matters not if the opinion is unreasonable, unjustified, prejudiced, exaggerated or obstinate.⁷⁹¹ The Court need not find the opinion ‘objectively correct’;⁷⁹² it is irrelevant whether the Court agrees with the opinion.⁷⁹³

28.9. At common law, where a publication includes both defamatory statements of fact and defamatory opinions, the relevant defence is one of fair comment, not justification. The orthodox plea in such a case is known as a ‘rolled up’ plea.⁷⁹⁴

28.10. Under the *Defamation Act 1974* (NSW), the cause of action for defamation was the publication of a defamatory *imputation*, not the publication of defamatory matter: see s 9(2). The comment defence in the 1974 Act was accordingly a defence to the publication of an imputation carried

⁷⁸⁷ *Manock* 262-3 [35].

⁷⁸⁸ *Ibid* 264 [36]; see also *Harbour Radio Pty Ltd v Ahmed* (2015) 90 NSWLR 695, 703 [37]-[40].

⁷⁸⁹ *John Fairfax Publications Pty Ltd v O’Shane* [2005] NSWCA 164, [25] (Giles JA), citing *Clarke v Norton* [1910] VLR 494, 499; *Buckley v The Herald & Weekly Times Pty Ltd* [2008] VSC 459, [28]; *Manock*, 267 [42] (Gummow, Hayne and Heydon JJ).

⁷⁹⁰ *Manock*, 253 [6] (Gleeson CJ, citing *Pryke v Advertiser Newspapers Ltd* (1983) 37 SASR 175, 192 (King CJ)).

⁷⁹¹ *Manock*, 252 [3] (Gleeson CJ); *O’Shaughnessy v Mirror Newspapers Ltd* (1970) 125 CLR 166, 173 (Barwick CJ, McTiernan, Menzies and Owen JJ); *Turner v Metro-Goldwyn-Mayer Pictures Ltd* [1950] All ER 449 (HL), 463; *Gardiner v John Fairfax & Sons Pty Ltd* (1942) 42 SR (NSW) 171, 174 (Jordan CJ).

⁷⁹² *Bickel v John Fairfax & Sons Ltd* [1981] 2 NSWLR 474, 487 (Hunt J).

⁷⁹³ D Rolph, *Rolph on Defamation* (Thomson Reuters, 2nd ed, 2024) [14.10], citing *McQuire v Western Morning News Co* [1903] 2 KB 100, 109; *Branson v Bower* [2002] QB 737, 741 (Eady J).

⁷⁹⁴ There are countless examples, but see e.g. *Sutherland v Stopes* [1925] AC 47 at 62-5, 75-8, 99; *O’Sullivan v Schubert* [1963] VR 143.

by defamatory matter, not the publication of the matter as a whole.

- 28.11. In the second reading speech for the 2005 Act, the then NSW Attorney-General said (our emphasis):⁷⁹⁵

By way of clarification, I affirm that clause 31 is not intended to alter the position at common law in regard to the pleading of defences or the kinds of facts that can be relied on to support a defamatory opinion. The equivalent defence at common law is the defence of fair comment.

At common law, as I understand it, the defence of fair comment is available in respect of such defamatory imputations or defamatory meanings carried by the matter concerned that can be said to be opinions rather than a statement of fact. An imputation is basically an accusation or charge about someone, whether express or implied. At common law the opinion must be based on proper material, namely, statements of fact that are true or statements that are privileged. Statements of fact may be set out in the matter that expresses the opinion, but facts can be relied on even if they are not set out with the opinion if they are notorious or widely known. An opinion may be based on facts that are either defamatory or non-defamatory. *However, where a publication of matter includes both defamatory statements of fact and a defamatory opinion, it is appropriate at common law for the plea to be limited to fair comment and not to include a plea of justification. This kind of pleading is conventionally called a rolled-up plea.*

- 28.12. The s 31 defence in the 2005 Act is a defence to the ‘publication of defamatory matter’, where ‘the matter’ (not the imputations) is an expression of opinion rather than a statement of fact.
- 28.13. The 2005 Act thus unequivocally preferred the common law position to that under the 1974 Act: see s 8.
- 28.14. It follows, put crisply, under the 2005 Act, that where a publication will have been understood by reasonable recipients as conveying expressions of opinion (supported by facts that are stated or otherwise sufficiently indicated), a defence of honest opinion under s 31 is available in respect of the *whole* matter, if the requirements of the section are satisfied. No defence of justification is required in such a case to found an answer to the applicant’s claim.
- 28.15. That is not to say that the pleaded meanings are irrelevant. Even at common law, the defence of fair comment had to respond to the meanings conveyed by the matter complained of: it was in those meanings that a respondent was required to prove the matter complained of was comment and that the comment was fair.⁷⁹⁶
- 28.16. The correct approach to the statutory defence was summarised by Lee J in *Stead v Fairfax Media*

⁷⁹⁵ Hansard, NSW Legislative Assembly, 12 October 2005 (the Hon Bob Debus MP).

⁷⁹⁶ *Manock*, 261 [31]-[32], 286-8 [81]-[83] (Gummow, Hayne and Heydon JJ, Gleeson CJ agreeing); *ABC v Wing* (2019) 271 FCR 632, 642 [19]; *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519, 528 [8] (Brennan CJ and McHugh J).

Publications Pty Ltd (emphasis in original):⁷⁹⁷

It is also important to bear in mind that the statutory defence requires that it is the *matter* that was an expression of opinion, not the imputation or imputations conveyed — in contrast to the defences contained in s 25 (justification) and s 26 (contextual truth). Although the significance of the defamatory matter lies in its meaning, the pleaded meanings, although relevant, cannot be determinative of the necessarily contextual characterisation inquiry as to whether a statement is opinion. Put another way, although the pleaded meaning is not to be the sole focus, given that the critical question is whether the defamatory sense of the matter was conveyed as an expression of opinion rather than an assertion of fact, it is necessary that the inquiry is conducted, as McCallum J said in *Feldman* (at [43]) “through the lens of the defamatory meaning held to have been conveyed”.

It seems to me that if one is faithful to the text of the Act, the correct approach can be stated quite simply: to determine whether the matter would have been understood by the ordinary reasonable reader to be an expression of opinion rather than a statement of fact; and although this contextual inquiry necessarily requires consideration of the meanings found to be conveyed, it is not constrained or dictated by their terms so as to transform the inquiry into a consideration as to how each imputation would be understood.

- 28.17. An opinion is based on proper material if: (a) the material on which it is based is set out in specific or general terms in the published matter, or notorious, or accessible from a reference, link or other access point included in the matter (for example, a hyperlink on a webpage), or otherwise apparent from the context in which the matter is published;⁷⁹⁸ and (b) the material is (relevantly) substantially true.⁷⁹⁹
- 28.18. Even if a respondent is not able to establish that all of the material upon which the opinion is based is proper material they may still succeed in the defence. An opinion does not cease to be based on proper material only because some of the material on which it is based is not proper material, so long as the opinion might reasonably be based on such of the material as is.⁸⁰⁰
- 28.19. In *Feldman v Polaris Media Pty Ltd (as trustee of The Polaris Media Trust trading as The Australian Jewish News) (No 2)*,⁸⁰¹ McCallum J said:

The defence in the present case included lengthy particulars of the alleged proper material. The provision of such particulars is a requirement of r 15.28(2)(a) of the *Uniform Civil Procedure Rules 2005* (NSW), and is necessary to put a plaintiff on notice of a defendant’s case, but I do not think such particulars are necessarily to be treated as determinative. The correct approach was explained by Hunt J in *Bickel v John Fairfax &*

⁷⁹⁷ (2021) 387 ALR 123, [130]-[131]; *Molan v Dailymail.com. Australia Pty Ltd* [2022] FCA 1004, [81] (Bromwich J), overturned on a different point in [2023] FCAFC 26; *Massoud v Nationwide News Pty Ltd*; *Massoud v Fox Sports Australia Pty Ltd* (2022) 109 NSWLR 468, [194]-[195]; see also, by analogy, *Hockey v Fairfax Media Publications Pty Ltd* (2015) 237 FCR 33, [308]-[320] (White J, dealing with the defence in s 30 of the Act).

⁷⁹⁸ Act, s 31(5)(a).

⁷⁹⁹ Act, s 31(5)(b).

⁸⁰⁰ Act, s 31(6).

⁸⁰¹ [2018] NSWSC 1035, [47].

Sons Ltd (1981) 2 NSWLR 474, where his Honour said that the material upon which a comment is based is that upon which it purports to be based (at 492A):

in the sense of that which the ordinary reader would have understood from the matter complained of to have been intended by the author to be considered as the basis of his comment.

28.20. A defence under sub-s 31(1) (opinion of the respondent) is defeated if, and only if, the applicant establishes that the opinion was not honestly held by the respondent at the time the defamatory matter was published.⁸⁰²

28.21. As submitted above, factual findings (for which the applicant bears the onus of proof) that Mr Pesutto did not honestly hold the asserted opinions, or did not believe or reasonably believe that the opinions were honestly held, are tantamount to findings of malice, fraud or dishonesty.

29. Mr Pesutto's pleaded case – Mr Pesutto's opinion

29.1. Mrs Deeming has denied that the Publications were an expression of Mr Pesutto's opinion: Reply [2.1].⁸⁰³

29.2. In relation to each of the Media Release, 3AW Interview, ABC Interview, and Press Conference, Mr Pesutto's defence of honest opinion is that each was an expression of his opinion that Mrs Deeming is not a fit and proper person to be a member of the Victorian Parliamentary Liberal Party under his leadership.⁸⁰⁴

29.3. Each of the Publications was an expression of Mr Pesutto's opinion, on the basis of facts that were set out for assessment.

29.4. If that submission is accepted, then honest opinion is the relevant affirmative defence, not justification or contextual truth (which are defences to publications of matters of fact, not to publications of expressions of opinion). Mr Pesutto's contextual truth defence is a fall-back defence, that only needs to be considered if the Court rejects his submission that each of the Publications will have been reasonably understood as an expression of his opinion.

29.5. **Media Release.** The Media Release described the presence of the neo-Nazis on the steps of Parliament House as 'an abomination' and an 'affront to the values we should all hold dear as Victorians'. In respect of Mrs Deeming, it said that 'her position was untenable'. All of that was, and will have been understood as, an expression of Mr Pesutto's opinion. In substance, the Media Release conveyed the opinion that Mr Pesutto had formed about Mrs Deeming

⁸⁰² Act, s 31(4)(a).

⁸⁰³ Reply: CBA Tab 4, page 151.

⁸⁰⁴ Defence, [44]-47]: CBA Tab 3, page 105-110.

based upon her conduct in organising, promoting and participating in the Rally: that her position as a member of the Party was untenable.

- 29.6. The facts upon which the opinion was based were set out in the Media Release: in relation to Mrs Deeming, that she had been involved ‘in organising, promoting and participating in a rally with speakers and other organisers who themselves have been publicly associated with far right-wing extremist groups including neo-Nazi activists’.
- 29.7. **3AW Interview.** The 3AW Interview was also clearly cast in terms of Mr Pesutto’s opinion. He said that the problem was that Mrs Deeming had helped organise and promote the Rally with people ‘whose values are not consistent with mine’ (lines 41-2), and ‘not consistent with the Liberal Party or Victoria’s values in my view’ (line 44). He described Mrs Deeming’s associations with the organisers of the Rally (in line 103), as ‘unacceptable for me as a leader and I believe unacceptable for the party’ (line 104), and ‘I’m not prepared as leader of the party to abide by any of it’ (lines 108-109). He explained, in relation to the Jones tweet ‘I just don’t think that’s acceptable’ (line 118), and of bringing the expulsion motion ‘I believe it’s the right thing to do’ (lines 121-122). All of that was, and will have been understood as, an expression of Mr Pesutto’s opinion. Mr Pesutto was and will have been understood as explaining that, based upon the associations Mrs Deeming had with the organisers of the Rally, he had come to the opinion her conduct was not acceptable and warranted the moving of an expulsion motion against her.
- 29.8. The facts on which the opinion were based were set out in the 3AW Interview: in relation to Mrs Deeming, that she had associations with organisers of the protest who have known links with Nazis, Nazi sympathisers, far-right extremists and white supremacists (e.g. lines 11-12, 39-41, 52-55, 98-104).
- 29.9. **ABC Interview.** Mr Pesutto explained ‘the reason I’ve taken this step is because I believe it’s important as Victoria’s alternative Premier to set out the values I stand for and the values my party stands for’ (lines 1-3). He continued that the ‘values that we saw displayed on the steps of parliament are not consistent with the values I and the Liberal Party stand for’ (lines 10-12). Mr Pesutto was and will have been understood as setting out his opinion that Mrs Deeming’s conduct was not consistent with his values and the values of the Party under his leadership.
- 29.10. The facts on which the opinion were based were set out in the ABC Interview: in relation to Mrs Deeming, that she attended, organised and promoted a protest at which there were speakers who have known links with neo-Nazis and white supremacists (lines 4-7).

- 29.11. **Press Conference.** Mr Pesutto explained that ‘I will never, ever accept any member of the Parliamentary Liberal Party under my leadership ever associating with anybody who shares a platform with people who peddle hate, division and attack people for who they are’ (lines 17-19). In relation to links with people ‘who have Nazi sympathies, promote white supremacist views and ethno-fascist views’, Mr Pesutto described that as ‘odious’ and ‘unacceptable’ (line 16). He later used other language that was unmistakably that of his opinion: ‘totally unacceptable’ (line 43), ‘totally unacceptable and I don’t think any reasonable, decent minded person would think that that is okay’ (lines 57-8), ‘I’m here to say it will never be acceptable’ (line 64), ‘Now as the leader a responsible leader ... that can’t and is not acceptable’ (lines 79-81), ‘totally unacceptable in our state’ (line 149). Viewers will reasonably have understood Mr Pesutto, throughout the Press Conference, to be expressing his opinion that Mrs Deeming’s position as a member of the Party was not tenable.
- 29.12. The facts on which the opinion were based were set out by Mr Pesutto clearly at lines 72-79: Mrs Deeming (a) had an association with people who organised the Rally who had shared platforms with and viewpoints with people who promote Nazi views and sympathies; (b) stayed at the Rally when the neo-Nazis arrived; and (c) then celebrated with the organisers on social media. The facts were restated by Mr Pesutto in various ways throughout the Press Conference: lines 13-16, 39-41, 49-57, 107-110, 146-149, 238-240, 296-302, 418-420.
- 29.13. **Expulsion Motion and Dossier.** The terms of the motion moved by Mr Pesutto were that Mrs Deeming had ‘conducted activities in a manner likely to bring discredit on the Parliament or the Parliamentary Party’ and should be expelled from the Victorian Parliamentary Liberal Party. The entire purpose of the motion was to put that opinion (which was shared by the Leadership Team) to the test with the remainder of the Party Room, by reference to the contents of the accompanying Dossier, at a vote of the Party the following week.
- 29.14. The facts on which the opinion were based were summarised in paragraphs (a) and (b) of the motion: that Mrs Deeming had organised, promoted and attended the Rally where Mrs Keen was the principal speaker in circumstances where Mrs Keen was known to be publicly associated with far right-wing extremist groups in neo-Nazi activists (paragraph 2(a)); and that she met and published a video with Mrs Keen, Ms Deves and Ms Jones (paragraph 2(b)); and then supported by the facts contained in the accompanying Dossier (with hyperlinks).

30. Mr Pesutto’s opinions were honestly held

- 30.1. By the evening of 19 March 2023, Mr Pesutto had formed the opinion that there was going to be a perception of a link or association between the Party, through Mrs Deeming, and the

events of the Rally, including the attendance of the neo-Nazis, and that then Victorian Premier Daniel Andrews (and many others⁸⁰⁵) would jump on that perception and attack the Party on that basis.⁸⁰⁶

30.2. By the end of the meeting on 19 March 2023, Mr Pesutto formed the view that:⁸⁰⁷

- (a) Mrs Deeming had failed to appreciate how offensive the neo-Nazi presence at the Rally was;
- (b) Mrs Deeming had failed to appreciate the seriousness of her attendance and participation in the Rally and the Video, and the apparent association between herself and Mrs Keen and Ms Jones;
- (c) Mrs Deeming did not understand the connection that would be drawn between the Party (through her attendance) and Mrs Keen and Ms Jones; and
- (d) if Mrs Deeming was not prepared to take the reasonable action of calling out the social media posts of Mrs Keen and Ms Jones that were presented to her at the 19 March meeting, she would expose the Party to more serious and potentially damaging scenarios in the future.

30.3. The circumstances in which Mr Pesutto felt that it was incumbent upon him to publish each of the Publications are set out above in section [24].

30.4. Mr Pesutto's evidence was that the following were all his honest opinions, and he believed them to be true:

- (a) the Media Release Imputation;⁸⁰⁸
- (b) the 3AW Imputations;⁸⁰⁹
- (c) the ABC Imputation;⁸¹⁰
- (d) the Press Conference Imputations, as well as imputations [19.6], [19.7] and [19.8] in the SOC;⁸¹¹ and
- (e) the Expulsion Motion Imputations, as well as imputations [24.1] and [24.3] in the

⁸⁰⁵ See, for example lines, 35-50, 328-329 in Exhibit A3.

⁸⁰⁶ CBB Tab 30, page 338 [61] (Affidavit of John Pesutto dated 27 May 2024).

⁸⁰⁷ CBB Tab 30, page 343-4 [91] (Affidavit of John Pesutto dated 27 May 2024).

⁸⁰⁸ CBB Tab 30, page 345 [104] (Affidavit of John Pesutto dated 27 May 2024).

⁸⁰⁹ CBB Tab 30, page 348 [119] (Affidavit of John Pesutto dated 27 May 2024).

⁸¹⁰ CBB Tab 30, page 349 [123] (Affidavit of John Pesutto dated 27 May 2024).

⁸¹¹ CBB Tab 30, page 349-50 [124] (Affidavit of John Pesutto dated 27 May 2024).

SOC.⁸¹²

30.5. Mr Pesutto was only faintly challenged in relation to some of his opinions, in the form of puttage that was not further explored by the cross-examiner. He rejected questions put to him that he did not believe the 3AW Imputations⁸¹³ or the Expulsion Motion Imputations and imputations [24.1] and [24.3] to be true.⁸¹⁴ In relation to the Press Conference, Mr Pesutto rejected that he knew it was false to say Mrs Deeming was not a fit and proper person to be a member of the Party under his leadership.⁸¹⁵ Mr Pesutto's opinions with respect to the Media Release and the ABC Interview were not the subject of challenge.

31. The opinions related to a matter of public interest

31.1. Mrs Deeming admits that each of the Publications related to a matter of public interest: Reply [2.2].⁸¹⁶ It follows that, if the Publications are found to be expressions of Mr Pesutto's opinion, the opinions relate to a matter of public interest, because the opinions coincide with the subject matter of the Publications in each instance.

31.2. Mrs Deeming's concession is correct. Matters of public interest are defined broadly for the purposes of opinion defences. A comment relates to a matter of public interest if it concerns the conduct of any person that inherently, expressly or inferentially invited public criticism of discussion,⁸¹⁷ or if the subject matter is 'such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on'.⁸¹⁸

31.3. Any conduct by a member of Parliament, acting in that capacity; and any conduct by a person in public at an event such as the Rally, readily satisfies those descriptions.

32. The opinions were based on proper material

32.1. Because opinion defences are 'one of the fundamental rights of free speech and writing' and 'of vital importance to the rule of law on which we depend for our personal freedom'⁸¹⁹ they protect the publication of expressions of opinion even where expressed in strong language, or are unreasonable, unjustified, prejudiced, exaggerated or obstinate.⁸²⁰

⁸¹² CBB Tab 30, page 351–2, [132] (Affidavit of John Pesutto dated 27 May 2024); noting that in his evidence, Mr Pesutto clarified that he did not believe to be true SOC imputations [24.2] and [24.4]: T825.33-47 (Pesutto XXN).

⁸¹³ T778.30-38 (Pesutto XXN).

⁸¹⁴ T826.4-7 (Pesutto XXN).

⁸¹⁵ T817.17-23 (Pesutto XXN).

⁸¹⁶ Reply: CBA Tab 4, page 151.

⁸¹⁷ *Bellino v Australian Broadcasting Corp* [1996] HCA 47, (1996) 185 CLR 182, 221.

⁸¹⁸ *London Artists Ltd v Littler* [1969] 2 QB 375, 391 (Lord Denning MR).

⁸¹⁹ *Lyon v Daily Telegraph, Ltd* [1943] KB 746, 753 (Scott LJ).

⁸²⁰ *Manock*, 252 [3] (Gleeson CJ); *O'Shaughnessy v Mirror Newspapers Ltd* (1970) 125 CLR 166, 173 (Barwick CJ, McTiernan, Menzies and Owen JJ); *Turner v Metro-Goldwyn-Mayer Pictures Ltd* [1950] All ER 449 (HL), 463; *Gardiner v John Fairfax & Sons Pty Ltd* (1942) 42 SR (NSW) 171, 174 (Jordan CJ).

- 32.2. The facts which form the basis for the proper material need only to be ‘substantially true’ in the sense that they are ‘true in substance or not materially different from the truth’...⁸²¹ ‘Slight inaccuracies’ and ‘errors or mistakes of no real substance’ do not matter...⁸²²
- 32.3. And importantly, by s 31(6) of the Act, the defence is not lost where some of the material on which it is based is false or not substantially true, provided that the opinion might reasonably be based on such of the material as is proper material...⁸²³
- 32.4. Mr Pesutto’s error in relation to Spencer, Collett and Duke in the 3AW Interview and the Press Conference is a good example of the operation of s 31(6). A substantially true fact upon which Mr Pesutto’s opinion was based in each case was that Mrs Deeming had associated with Mrs Keen, who had known links with neo-Nazis, Nazi sympathisers, far right extremists and/or white supremacists. The error in relation to Spencer, Collett and Duke did not render that fact false, because of Mrs Keen’s interview with Jean-François Gariépy, and her public association with Hans Jørgen Lynglimt Johansen: see also [32.32]-[32.35] below.

Mr Pesutto’s values

- 32.5. Each of Mr Pesutto’s opinions were based in part on the values he sought to bring to the leadership of the Party. There was no challenge to Mr Pesutto’s evidence as to the values which animate his participation in public life.
- 32.6. Throughout his political life, Mr Pesutto has believed in and espoused values of individual liberty, personal responsibility, the responsible exercise of freedom of speech, equality of opportunity, an enterprising culture, the rule of law and a just and humane society...⁸²⁴
- 32.7. In his campaigns, Mr Pesutto has expressed the following views in interviews and to journalists:⁸²⁵
- (a) Mr Pesutto wants to temper political debate and bring people together;
 - (b) Mr Pesutto intends to call out homophobic and transphobic behaviour;

⁸²¹ Act s 31(5)(b)(i); s4.

⁸²² *Herald & Weekly Times v Popovic* (2003) 9 VR 1, 56 [268] (Gillard AJA); See also *Massoud v Nationwide News Pty Ltd* (2022) 109 NSWLR 468, [80]-[81] (and the cases cited therein), [160]; *Howden v Truth & Sportsman Ltd* (1937) 58 CLR 416, 419 (Starke J); 420 (Dixon J); 424–425 (Evatt J); *Sutherland v Stopes* [1925] AC 47, 79 (Lord Shaw); *Channel Seven Sydney Pty Ltd v Mahommed* [2010] NSWCA 335, [138].

⁸²³ *Massoud v Nationwide News Pty Ltd* (2022) 109 NSWLR 468, [186]-[187], read in light of [80], [160], [169]-[170].
⁸²⁴ CBB Tab 30, page 328 [6] (Affidavit of John Pesutto dated 27 May 2024).

⁸²⁵ Exhibit R126, CBC Tab 94, pages 469-474; Exhibits R127 and R128, CBC Tabs 96 and 97, pages 479-491; Exhibit R129, CBC Tab 99, pages 501-505; Exhibit R130, CBC Tab 103, pages 519-524; CBB Tab 30, page 328–329 [8]–[9] (Affidavit of John Pesutto dated 27 May 2024).

- (c) Mr Pesutto is a progressive, inclusive, modern liberal, who believes that we are free to be whoever we want to be, whoever we want to love and whatever identity we want to adopt;
- (d) the Liberal Party should be inclusive and tolerant of diversity; and
- (e) the Liberal Party should aspire to connect with as many people across Victoria as possible.

32.8. Mr Pesutto believes the Liberal Party needs to become and be perceived to be more mainstream.⁸²⁶ He is a firm believer in liberalism, at the heart of which is an enterprising spirit and culture, which he believes is broad and universal enough to appeal to anyone.⁸²⁷ Mr Pesutto has always strived to represent and be a voice for all Victorians, regardless of background, because he believes that all people share an abiding bond of essential humanity. He considers this not just a value, but a strategic imperative. To form government, a party must represent a wide and diverse range of communities.⁸²⁸

32.9. Under Mr Pesutto's leadership, the Victorian Liberal Party strives to:⁸²⁹

- (a) be a principled, professional, credible and modern alternative government for all Victorians;
- (b) uphold the inherent dignity, responsibility and potential of all people;
- (c) assist and protect those who are vulnerable or disadvantaged; and
- (d) foster and celebrate an accepting, tolerant and diverse society.

32.10. It follows from each of those matters that the following behaviour conflicts with Mr Pesutto's fundamental values and those of the Party under his leadership:

- (a) publicly associating or sharing platforms with white supremacists and neo-Nazis;
- (b) the adoption of neo-Nazi and white supremacist imagery and language;
- (c) ambivalence towards neo-Nazism, fascism and white supremacy; and
- (d) the peddling of baseless conspiracy theories.

⁸²⁶ CBB Tab 30, page 328 [7] (Affidavit of John Pesutto dated 27 May 2024).

⁸²⁷ CBB Tab 30, page 329 [10] (Affidavit of John Pesutto dated 27 May 2024).

⁸²⁸ CBB Tab 30, page 329 [11] (Affidavit of John Pesutto dated 27 May 2024).

⁸²⁹ CBB Tab 30, page 329–330 [12] (Affidavit of John Pesutto dated 27 May 2024).

32.11. Mr Pesutto explained that ‘each leader brings their style and values to the leadership’.⁸³⁰ He rejected the contention that his personal values as a leader were irrelevant.⁸³¹ He explained:⁸³²

But I’m the leader, and I was elected because of what I can bring to the role. And I think any suggestion that the leader isn’t relevant to how you translate what are very general principles into the daily interpretation of events and policies and debates, it’s just unrealistic.

32.12. Mr Pesutto explained that he did not consider that someone should be expelled from the Party room simply because they expressed views different from his. Mr Pesutto’s response was more nuanced:⁸³³

It depends on how they do it, and the consequences they visit on the party because of the way they do it, whether they take into consideration the broader interests of the party, particularly in opposition when you are trying to win government.

32.13. Mrs Deeming understood the substance of Mr Pesutto’s values to be and include that:

- (a) he wanted to be a principled opposition;⁸³⁴
- (b) he wanted the opposition to be a credible alternative government for all Victorians;⁸³⁵
- (c) the Party needed to be able to attract votes from Labor and other parties in the Victorian Parliament;⁸³⁶
- (d) the Party he led had to be united, inclusive, accepting of a tolerated and diverse society, including being accepting of the LGBTI+ community;⁸³⁷
- (e) the Party had to assist and protect those who are vulnerable and disadvantaged;⁸³⁸
- (f) his expectation was that every member of the parliamentary team had to do their part to demonstrate to Victorians that the Party was united, inclusive, modern, and deserving of being elected as the next government of the State.⁸³⁹

⁸³⁰ T585.30 (Pesutto XXN).
⁸³¹ T586.5-7 (Pesutto XXN).
⁸³² T586.17-20 (Pesutto XXN).
⁸³³ T586.45-587.1 (Pesutto XXN).
⁸³⁴ T112.15-16 (Deeming XXN).
⁸³⁵ T112.18-19 (Deeming XXN).
⁸³⁶ T112.21.22 (Deeming XXN).
⁸³⁷ T112.24-33 (Deeming XXN).
⁸³⁸ T112.35-36 (Deeming XXN).
⁸³⁹ T112.38-46 (Deeming XXN).

- 32.14. Mrs Deeming also understood that as a member of Parliament, she had a responsibility to avoid being divisive,⁸⁴⁰ and not to pit one group in the community against the another.⁸⁴¹
- 32.15. Mrs Deeming understood that everything she did in her capacity as a member of Parliament, and as a whip in the Upper House for the Opposition reflected upon the Party as a whole.⁸⁴² She accepted that everything she did in public, and in relation to events likely to be controversial, reflected not just upon her, but upon the Party.⁸⁴³ She also accepted that by posting under the handle @MoiraDeemingMP on X everything she tweeted reflected not just upon her, but on the Party,⁸⁴⁴ and would be associated with her in her capacity as a member of Parliament.⁸⁴⁵
- 32.16. Mrs Deeming also accepted that the fact of neo-Nazi groups operating in a Victoria is a matter that ought to be taken extremely seriously by all persons in public life, including by politicians from all parties.⁸⁴⁶ Mrs Deeming also agreed that there was no place for being blithe, cavalier, or casual in relation to neo-Nazi activities in public,⁸⁴⁷ and that it would be a dereliction of duty for the leadership of any political party not to call out the performance in public of the Nazi salute,⁸⁴⁸ and do so immediately, loudly, and unequivocally.⁸⁴⁹

Media Release

- 32.17. The Media Release was an expression of Mr Pesutto's opinion that '[Mrs] Deeming is not a fit and proper person to be a member of the Victorian Parliamentary Liberal Party under his leadership'.⁸⁵⁰
- 32.18. The following substantially true facts are proper material upon which Mr Pesutto's opinion was, and might reasonably be,⁸⁵¹ based, being material that was set out in the Media Release in specific or general terms:

⁸⁴⁰ T113.1-2 (Deeming XXN).
⁸⁴¹ T113.4-5 (Deeming XXN).
⁸⁴² T112.4-6 (Deeming XXN).
⁸⁴³ T168.7-9 (Deeming XXN).
⁸⁴⁴ T178.27-28 (Deeming XXN).
⁸⁴⁵ T178.23-25 (Deeming XXN).
⁸⁴⁶ T132.24-27 (Deeming XXN).
⁸⁴⁷ T136.35-37 (Deeming XXN).
⁸⁴⁸ T136.39-43 (Deeming XXN).
⁸⁴⁹ T136.43 (Deeming XXN).
⁸⁵⁰ Defence, [44.3(i)]: CBA Tab 3, page 105.
⁸⁵¹ Act, s 31(6).

The Rally held on the steps of the Victorian Parliament on 18 March 2023 that was attended by neo-Nazi protesters: lines 1-2, 5-7

32.19. Save for a debate about the proper meaning of ‘attend’, this fact was admitted by Mrs Deeming.⁸⁵² The Rally was plainly attended by neo-Nazi protesters in the ordinary sense of that term: the Macquarie Dictionary definition, for example, includes ‘to be present at’. We address this matter further in Schedule A to these submissions.

Mrs Deeming’s position as a member of the Victorian Parliament and (at the time) a member of the Victorian Parliamentary Liberal Party: lines 8-9

32.20. This fact is admitted.⁸⁵³

Mrs Deeming’s involvement in organising and promoting, and attending, the Rally: lines 5-7

32.21. Mrs Deeming admitted involvement in organising and promoting and attending the Rally.⁸⁵⁴

Other organisers of the Rally were publicly associated with far-right extremist groups including neo-Nazi activists: lines 5-7

32.22. Mrs Keen was publicly associated with far-right extremist groups including neo-Nazi activists.

32.23. Mrs Deeming admitted that:

(a) Mrs Keen had appeared in a video with Jean-François Gariépy;⁸⁵⁵ and

(b) Mrs Keen had appeared in a selfie with Hans Jørgen Lysglimt Johansen.⁸⁵⁶

32.24. Each of those matters are public associations, in the sense that they occurred in public and evidence of them was readily accessible online, which Mr Pesutto knew.⁸⁵⁷

32.25. For example, Mr Pintos-Lopez had researched and then briefed⁸⁵⁸ the Leadership Team on the Sunday afternoon. One of the first articles he found, and the primary article read from and referenced in both the meeting with the Leadership Team and Mrs Deeming, and in his briefing sheets and the Expulsion Motion and Dossier, was the article entitled ‘*Who is Posie Parker? The anti-trans founder of Standing for Women*’ published in *The National*.⁸⁵⁹ Mr Pintos-Lopez said it concerned Mrs Keen’s ‘associations with neo-Nazis including her associations

⁸⁵² T305.16-26 (Deeming XXN).

⁸⁵³ Statement of Claim, [1.1]-[1.3]: CBA Tab 2, page 5.

⁸⁵⁴ T300.8-15 (Deeming XXN); CBB Tab 1, page 8 [42] (Affidavit of Moira Deeming dated 27 May 2024).

⁸⁵⁵ T302.8-34 (Deeming XXN); Exhibit R42, CBC Tab 473.

⁸⁵⁶ T304.7-21 (Deeming XXN); Exhibit R42, CBC Tab 473.

⁸⁵⁷ This is clear from his briefing from Mr Pintos-Lopez, his attendance in the Leadership Team meeting where these matters were described and the Moira Deeming Fact Sheet he was provided before the Publications: Exhibit R78, CBC Tab 331, pages 1837-1837.

⁸⁵⁸ CBB Tab 37, pages 441-443 [23]-[29], [33], [36] (Affidavit of Rodrigo Pintos-Lopez dated 24 May 2024).

⁸⁵⁹ Exhibit R136, CBC Tab 143, pages 661-664.

on social media platforms and videos with white supremacists',⁸⁶⁰ as well as allegations of other offensive conduct and rhetoric. Of this particular issue, the article relevantly stated:

Parker has faced numerous allegations of courting ideas of white supremacy. One incident came after she took a selfie with Hans Jørgen Lysglimt Johansen, a Norwegian neo-Nazi who was probed by police after his comments against Jews and denial of the Holocaust.

She was interviewed by the far-right network Soldiers of Christ Online, and appeared in a video alongside Jean-François Gariépy, a prominent far-right YouTuber who calls for a “white ethno-state”, according to PinkNews. Other guests on Gariépy’s show have included former Ku Klux Klan leader David Duke.

32.26. Mr Pesutto’s opinion is capable of being reasonably sustained, having regard to the operation of s 31(6) of the Act, by the existence of those public associations, and the fact that there was a raft of material in the public domain (discussed above and below, and in Schedule A to these submissions) alleging that Gariépy and Johansen were both from the far right and white supremacists, neo-Nazis or Holocaust deniers. Whether Gariépy and Johansen were *in fact* white supremacists, neo-Nazis and Holocaust deniers is not necessary to sustain Mr Pesutto’s opinion.

32.27. As Mr Pesutto explained he was ‘deeply concerned’ that Mrs Deeming’s conduct could bring the Party and the Parliament into disrepute (see also [26.8], [26.24], [26.31]).⁸⁶¹ He had already been (even prior to learning of Mrs Keen’s links) concerned that, ‘rightly or wrongly’, a ‘link or association’ would be drawn between the Party and the neo-Nazis who attended the Rally.⁸⁶² After learning of Mrs Keen’s associations he was ‘very concerned’ Mrs Deeming’s conduct and associations would create ‘an impression of an association between the Party and far-right extremism or doctrines which supported vilification and hatred of members of our community’.⁸⁶³ As he explained in cross-examination when Mrs Keen’s statements quoted in the *Pink News* article were put to him, he was concerned that Mrs Keen ‘happened to be always appearing on platforms like that’,⁸⁶⁴ and her protestation that she abhorred white supremacy was ‘not a convincing statement’ having regard to the ‘breadth of the information’ he had regarding Mrs Keen at the time.⁸⁶⁵ It is also clear from the recording of the Leadership Team meeting that their concerns, including those of Mr Pesutto, went both to the fact of the

⁸⁶⁰ CBB Tab 37, pages 441-443 [23]-[29], [33], [36] (Affidavit of Rodrigo Pintos-Lopez dated 24 May 2024).

⁸⁶¹ CBB Tab 30, page 341 [77] (Affidavit of John Pesutto dated 27 May 2024).

⁸⁶² CBB Tab 30, page 338 [61] (Affidavit of John Pesutto dated 27 May 2024).

⁸⁶³ CBB Tab 30, page 347 [113] (Affidavit of John Pesutto dated 27 May 2024).

⁸⁶⁴ T734.41-47 (Pesutto XXN).

⁸⁶⁵ T741.31-35 (Pesutto XXN).

associations and links and also the public nature and perception of them, which would themselves be toxic to the Party (lines 34-54; 653-656; 891-900).

- 32.28. In any event, the evidence went beyond establishing just that there is material in the public domain accusing Gariépy and Johansen of being white supremacists or neo-Nazis.
- 32.29. In respect of Gariépy, Mrs Deeming relied extensively throughout the trial on the *Pink News* article⁸⁶⁶ for the truth of its contents, including in relation to the quote attributed to Mrs Keen, and the assertion that Mrs Keen only does cursory checks of the people she publicly associates with. The article was tendered by Mrs Deeming, without objection from Mr Pesutto, and without any limitation being sought as to its use.
- 32.30. Section 59(1) of the *Evidence Act 1995* provides that hearsay evidence is ‘not admissible’ to prove the truth of the facts asserted. However there is a substantial body of authority establishing that the words ‘not admissible’ means ‘not admissible over objection’. Section 60 provides that ‘the hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of an asserted fact’.
- 32.31. Hearsay evidence is thus not excluded, and may be relied upon to prove the truth of the facts asserted, when there has been no objection.⁸⁶⁷
- 32.32. The *Pink News* article is thus evidence of the fact that Gariépy is a far-right YouTuber who calls for a white ethno-state; who has made videos in which he attempts to prove white superiority and calls for all-white separatist states and crackdowns on immigration; and has well-known white nationalist views. It is also evidence of Mrs Keen’s awareness of those matters, including that Gariépy was a white supremacist and racist.
- 32.33. The article in *The National* was also tendered without any objection or limitation. It identified Johansen as a neo-Nazi.

⁸⁶⁶ Exhibit A37. Counsel for the Applicant put to witnesses the truth of assertions in the article: T736.19-32, 741.39-742.2, 778.21-23 (Pesutto XXN); T976.1-3, 34-40 (Bach XXN); T1100.26-28 (Southwick XXN), T1230.5-9, 39-41, 1231.26-44, 1252.34-36 (Pintos-Lopez XXN).

⁸⁶⁷ *R v Reid* [1999] NSWCCA 258, [5]; *R v Spathis* [2001] NSWCCA 476, [416]; *R v Lyberopoulos* [2002] NSWCCA 280, [41]; *R v Kaddour* (2005) 156 A Crim R 11, [62]; *Gonzales v The Queen* (2007) 178 A Crim R 232, [25]-[26]; *WC v The Queen* [2015] NSWCCA 52, [20]; *Perish v The Queen* [2016] NSWCCA 89, [261]-[269]; *Selstam v McGuinness* (2000) 49 NSWLR 262, [149]; *Gray v Ware Building Pty Ltd* [2013] NSWCA 271, [94]; *Commissioner of Taxation v SNF (Australia) Pty Ltd* [2011] FCAFC 74, [25]-[26]; *ZAB v ZWM* [2021] TASSC 64, [15].

- 32.34. Other material in the public domain asserting that Gariépy is a white supremacist, a racist, anti-semitic or a neo-Nazi included the article in *The National*,⁸⁶⁸ Australian newspaper articles published in the lead up to the Rally,⁸⁶⁹ and compilation documents from that time, which identified other public sources, such as Wikipedia, which would lead the public to believe the links.⁸⁷⁰ It is also clear the allegations he was a neo-Nazi and associated with Mrs Keen were circulating on social media. For example, one user on X posted a comment in reply to one of Mrs Deeming's tweets early in the morning before the Rally with photo of Mrs Keen with Gariépy, describing him as a neo-Nazi.⁸⁷¹
- 32.35. In relation to Johansen, in addition to the article in *The National*,⁸⁷² there is a substantial body of other readily accessible material in the public domain to the effect that he is a far right political activist and a Holocaust denier, with a reported history of public anti-Semitic and racist statements. For example, on 30 November 2018, Johansen was reported to have called the Holocaust 'a carefully constructed control mechanism through a guilt narrative'.⁸⁷³ Johansen was also reported to have made comments including: 'The Jews put us to the test, that's what they do, that's their task. That is the metaphysical role of the Jews'.⁸⁷⁴ In the lead-up to the Rally, mainstream Australian media called Johansen a Holocaust denier⁸⁷⁵ and a 'political extremist known for his racist and antisemitic statements, including Holocaust denial'.⁸⁷⁶

By her involvement in organising and attending the Rally, Mrs Deeming associated herself with people whose views are abhorrent to Mr Pesutto's values, the values of the Victorian Liberal Party and the wider community: lines 5-7, 10-11

- 32.36. Mrs Deeming agreed that, by appearing at the Rally with Mrs Keen, sharing a stage with her, assisting in organising the Rally, and appearing in the Video with Mrs Keen after the Rally, she associated herself very closely with Mrs Keen.⁸⁷⁷
- 32.37. Mrs Keen's views include that:
- (a) It is appropriate to conduct rallies at which she screams out, at trans rights protesters, that trans gender people who identify as women are not women, that trans gender

⁸⁶⁸ Exhibit R136, CBC Tab 143, pages 661-664; Exhibit R329, CBC Tab 717, pages 3689-3691 (viewed over 100,000 times, shared 130 times, commented on 202 times, liked 715 times)

⁸⁶⁹ Exhibit R175, CBC Tab 230, page 1470.

⁸⁷⁰ Exhibit R175, CBC Tab 230, page 1470.

⁸⁷¹ Exhibit R340, CBC Tab 736, page 3746.

⁸⁷² Exhibit R136, CBC Tab 143, pages 661-664; Exhibit R329, CBC Tab 717, pages 3689-3691 (viewed over 100,000 times, shared 130 times, commented on 202 times, liked 715 times)

⁸⁷³ Exhibit R87, CBC Tab 29, page 154.

⁸⁷⁴ Exhibit R106 and R107, CBC Tab 64 and 65, pages 295-313.

⁸⁷⁵ Exhibit R175, CBC Tab 230, page 1470.

⁸⁷⁶ Exhibit R134, CBC Tab 128, page 625.

⁸⁷⁷ T182.15-18 (Deeming XXN).

people who identify as men are not men, and that there is no such thing as a non-binary person. All of that conduct is highly offensive in context, and amounts to a denial of the humanity, dignity and right to equality of the trans gender individuals at whom she directs her comments at her rallies.

- (b) It is appropriate to, before the commencement of rallies she conducts, wave at trans and gender diverse and shout 'Hello, boys', many of whom would not identify as men. Mrs Deeming agreed that Mrs Keen was being deliberately provocative when doing so at the Rally.⁸⁷⁸
- (c) It is appropriate to celebrate rallies when speakers deliver offensive anti-trans sentiments, or quote from Adolf Hitler's *Mein Kampf*.
- (d) She and those who support her are TERFs (an insulting and divisive anti-trans term) – a matter she invites attendees at her rallies to scream out as she sings a verse from the musical *Brigadoon* in order to provoke trans rights protesters in attendance.
- (e) It was appropriate, in the Video, to celebrate the supposed success of the Rally, when in fact the attendance of the neo-Nazis at and in support of the Rally meant that the day had been a dark one in the life of our city.
- (f) It was appropriate, in the Video, to indicate that she is 'alright with a little bit of violence... proportionate violence' towards allegedly violent trans rights activists.
- (g) It was appropriate, in the Video, to speculate, among other matters, that the neo-Nazis might in fact have been police or anti-trans protesters in costume.

32.38. Having regard to his values, there can be no doubt that the views and conduct of that kind were abhorrent to Mr Pesutto.

32.39. The same may be said of the Jones tweet, which Mr Pesutto found highly offensive,⁸⁷⁹ a slur against the LGBTI+ community,⁸⁸⁰ concerning in its impact on that community,⁸⁸¹ odious,⁸⁸² 'pretty awful,'⁸⁸³ and consistent with what the neo-Nazis had displayed on the steps of Parliament and seemed to equate the views of the Rally with the views of Nazis.⁸⁸⁴

⁸⁷⁸ T202.2-4 (Deeming XXN).

⁸⁷⁹ CBB Tab 30, page 341 [77] (Affidavit of John Pesutto dated 27 May 2024); T687.27-32 (Pesutto XXN).

⁸⁸⁰ T687.23-25 (Pesutto XXN).

⁸⁸¹ T756.44-757.2 (Pesutto XXN).

⁸⁸² T701.4, 778.5, 800.1-2, 820.38-42 (Pesutto XXN).

⁸⁸³ T778.7 (Pesutto XXN).

⁸⁸⁴ T701.1-10, 26-28 (Pesutto XXN).

3AW Interview

32.40. The 3AW Interview was an expression of Mr Pesutto's opinion that '[Mrs] Deeming is not a fit and proper person to be a member of the Victorian Parliamentary Liberal Party under his leadership'..⁸⁸⁵

32.41. The following substantially true facts are proper material upon which Mr Pesutto's opinion was, and might reasonably be, based, being material that was set out in the 3AW Interview in specific or general terms:

The Rally held on the steps of the Victorian Parliament on 18 March 2023 that was attended by neo-Nazi protesters: lines 51, 126, 136

32.42. We repeat [32.19] above.

Mrs Deeming's position as a member of the Victorian Parliament and (at the time) a member of the Party: lines 46-47, 64, 99

32.43. We repeat [32.20] above.

Mrs Deeming's involvement in organising and promoting, and attending, the Rally: lines 39-40

32.44. We repeat [32.21] above.

Other organisers of the Rally, including Mrs Keen, were known to have links with Nazis, Nazi sympathisers, far-right extremists and white supremacists: lines 11-13

32.45. We repeat [32.22] to [32.35] above. There is no difference in substance between an allegation that a person is publicly associated with other persons, and an allegation that a person is known to have links with other persons.

By her involvement in organising and attending the Rally, Mrs Deeming associated herself with people with those links: lines 98-99

32.46. Mrs Deeming agreed that by appearing at the Rally with Mrs Keen, sharing a stage with her, assisting in organising the Rally, she associated herself very closely with Mrs Keen..⁸⁸⁶

Mrs Deeming did not leave the Rally when the neo-Nazis arrived: line 87

32.47. Mrs Deeming admitted she did not leave the Rally when the neo-Nazis arrived..⁸⁸⁷

⁸⁸⁵ Defence, [45.3(i)]: CBA Tab 3, page 107.

⁸⁸⁶ T182.15-18 (Deeming XXN).

⁸⁸⁷ Reply, [2.4(xx)]: CBA Tab 4, page 154.

After the Rally, Mrs Deeming participated in a video with Mrs Keen and two other organisers of the Rally, including Ms Jones, who posted a Tweet with the words, 'Nazis and women want to get rid of paedo filth. Why don't you?' : lines 50-55

32.48. Mrs Deeming admitted she participated in the Video.⁸⁸⁸ Mrs Deeming admitted Ms Jones posted the Jones tweet.⁸⁸⁹

ABC Interview

32.49. The ABC Interview was an expression of Mr Pesutto's opinion that '[Mrs] Deeming is not a fit and proper person to be a member of the Victorian Parliamentary Liberal Party under his leadership' .⁸⁹⁰

32.50. The following substantially true facts are proper material upon which Mr Pesutto's opinion was, and might reasonably be, based, being material that was set out in the ABC Interview in specific or general terms:

The Rally held on the steps of the Victorian Parliament on 18 March 2023 that was attended by neo-Nazi protesters: lines 5, 51, 58-65, 244-245, 251-252

32.51. We repeat [32.19] above.

Mrs Deeming's position as a member of the Victorian Parliament and (at the time) a member of the Victorian Parliamentary Liberal Party: lines 25, 23-26, 42-43

32.52. We repeat [32.20] above.

Mrs Deeming's involvement in organising and promoting, and attending, the Rally: lines 4-6

32.53. We repeat [32.21] above.

The presence of speakers at the Rally with known links to neo-Nazis and white supremacists: lines 6-7

32.54. We repeat [32.22] to [32.35] above.

By her involvement in organising and attending the Rally, Mrs Deeming associated herself with those speakers: lines 4-7, 39-41

32.55. We repeat [32.36] above.

⁸⁸⁸ T306.32-38 (Deeming XXN).

⁸⁸⁹ T307.42-308.1 (Deeming XXN).

⁸⁹⁰ Defence, [46.3(i)]: CBA Tab 2, page 108.

Mrs Deeming's position as a member of the Victorian Parliament and (at the time) a member of the Victorian Parliamentary Liberal Party: lines 12-13

32.56. We repeat [32.20] above.

Mrs Deeming's involvement in organising and promoting, and attending, the Rally: lines 13-14

32.57. We repeat [32.21] above.

Other organisers of the Rally, including Mrs Keen, had known and established links and have shared platforms with people who have Nazi sympathies, and who promote white supremacist and ethnofascist views: lines 13-16, 109-110, 147-149

32.58. We repeat [32.22] to [32.35] above. There is no difference in substance between an allegation of public association, known links, and known and established links.

By her involvement in organising and attending the Rally, Mrs Deeming associated herself with people with those links: lines 17-19, 39-40, 64-67, 72-76, 300-302

32.59. We repeat [32.36] above.

Mrs Deeming escorted one of the organisers, Mrs Keen, through the Parliament to facilitate her presence at the Rally: lines 49-51

32.60. Mrs Deeming admitted doing so. Mrs Deeming admitted that she did not have clearance to take Mrs Keen to the Parliamentary Annexe. She acknowledged she did not technically have 'authorisation' to take Mrs Keen and her security guards through the Parliament House precinct, but said she did not realise until after the Rally that she was not meant to have taken Mrs Keen and the security guards into the Annex building.⁸⁹¹ In any event, by doing so Mrs Deeming facilitated Mrs Keen's presence at the Rally.

Mrs Deeming did not leave the Rally when the neo-Nazis arrived or immediately disown and disassociate from them: lines 52, 77-79, 300-301

32.61. Mrs Deeming admitted she did not leave the Rally when the neo-Nazis arrived.⁸⁹²

32.62. At about 2:30pm on 18 March 2023, Mr Southwick called Mrs Deeming. Mr Southwick, among other things, said that Mrs Deeming needed to publish a media statement denouncing the neo-Nazis, and offered to help her.

32.63. Despite having seen the neo-Nazis at the Rally and having received this counsel from Mr Southwick, Mrs Deeming did not do so unequivocally and promptly. Instead, Mrs Deeming instructed a staff member to start drafting a statement⁸⁹³ but never finalised or published it;

⁸⁹¹ CBB Tab 2, page 75 [51] (Affidavit of Moira Deeming 23 July 2024).

⁸⁹² Reply, [2.4(xx)]: CBA Tab 4, page 154.

⁸⁹³ T288.2-3 (Deeming XXN).

and at 6:03pm, Mrs Deeming posted a tweet that criticised the conduct of Victoria Police and trans rights protesters at the Rally.⁸⁹⁴ Her tweet did not condemn the neo-Nazis; did not identify the neo-Nazis for what they were; and when referring to the Nazi salute included a puerile emoji, all of which trivialised what had occurred.

32.64. At approximately 7:50pm, Mrs Deeming, Mrs Keen, Ms Jones and Ms Deves recorded the Video, which was uploaded to YouTube.⁸⁹⁵

After the Rally, Mrs Deeming celebrated with organisers of the Rally, including Ms Jones who posted a Tweet with the words, 'Nazis and women want to get rid of paedo filth. Why don't you?': lines 52-57, 78-79, 298-299

32.65. Mrs Deeming admitted she participated in the Video.⁸⁹⁶ Mrs Deeming admitted Ms Jones posted the Jones tweet.⁸⁹⁷

Expulsion Motion and Dossier

32.66. The Expulsion Motion and Dossier was an expression of Mr Pesutto's opinion that '[Mrs] Deeming had brought discredit on the Victorian Parliament and the Victorian Parliamentary Liberal Party and should be expelled from the Victorian Parliamentary Liberal Party'.⁸⁹⁸

32.67. The following substantially true facts are proper material upon which Mr Pesutto's opinion was, and might reasonably be, based, being material that was set out in the Expulsion Motion and Dossier in specific or general terms:

The Rally held on the steps of the Victorian Parliament on 18 March 2023: CBA 196 [2(a)]

32.68. We repeat [32.19] above.

Mrs Deeming's position as a member of the Victorian Parliament and (at the time) a member of the Victorian Parliamentary Liberal Party: CBA 196 [1], [2]

32.69. We repeat [32.20] above.

Mrs Deeming's involvement in organising and promoting, and attending, the Rally: CBA 196 [2(a)],

32.70. We repeat [32.21] above.

⁸⁹⁴ Exhibit A142, CBC Tab 275, page 1659.

⁸⁹⁵ Exhibit R37, CBC Tab 893.

⁸⁹⁶ T306.32-38 (Deeming XXN).

⁸⁹⁷ T307.42-308.1 (Deeming XXN).

⁸⁹⁸ Defence, [48.3(i)]: CBA Tab 3, page 110.

The principal speaker at the Rally was Mrs Keen (also known as Posie Parker), who runs an organisation known as Standing for Women: CBA 196 [2(a)], 198 [5]

32.71. This fact is not in dispute.

Mrs Keen is known to be publicly associated with far right-wing extremist groups and neo-Nazi activists, including Jean-François Gariépy (a far-right activist who advocates for a white ethno-state and has made videos with neo-Nazis and former Ku Klux Klan grand wizard David Duke), Soldiers of Christ Online (a far-right network), Hans Jørgen Lysglimt Johansen (a Norwegian neo-Nazi, anti-semitic and Holocaust denier): CBA 202 [7]-[9]

32.72. We repeat [32.22] to [32.35] above, as well as Mrs Deeming's admission that Mrs Keen had appeared in a video with Soldiers of Christ Online.⁸⁹⁹

Mrs Keen has used a Barbie doll wearing a Nazi military uniform as her profile picture on an online profile, and has posted an image online that equates expressions of LGBTIQ+ pride with the conduct of Nazi Germany and the Gestapo: CBA 205 [10], 210 [14]

32.73. Mrs Deeming admitted that Mrs Keen had:

- (a) used a Barbie doll in a Nazi uniform as a profile picture;⁹⁰⁰
- (b) posted the Pridestapo image.⁹⁰¹

Standing for Women organised an event on 16 January 2023 at which one of the speakers, Lisa Morgan, quoted Adolf Hitler: CBA 207 [11]-[12]

32.74. Mrs Deeming admitted a speaker at one of Mrs Keen's rallies had quoted from Adolf Hitler's *Mein Kampf*.⁹⁰² That video is available to the Court.⁹⁰³

Mrs Deeming facilitated Mrs Keen's presence at the Rally by escorting her through the secured carpark of Parliament House: CBA 200 [6]

32.75. We repeat paragraph [32.60] above.

At the Rally, a group of neo-Nazis, organised by the National Socialist Network, occupied the steps of the Victorian Parliament and performed the Nazi salute while displaying a banner bearing the words, 'DESTROY PAEDO FREAKS': CBA 208 [13]

32.76. As to whether the Rally was 'attended' by neo-Nazis, we repeat [32.19] above. Mrs Deeming otherwise admitted that neo-Nazis performed a Nazi salute on the steps of Parliament House and held a banner reading, 'DESTROY PAEDO FREAKS' on 18 March 2023.⁹⁰⁴

⁸⁹⁹ T303.45 (Deeming XXN).

⁹⁰⁰ T304.27-305.3 (Deeming XXN); Exhibit R42, CBC Tab 473.

⁹⁰¹ T306.21-27 (Deeming XXN); Exhibit R42, CBC Tab 473.

⁹⁰² T305.5-7 (Deeming XXN)

⁹⁰³ Exhibit R131, CBC Tab 121, page 582.

⁹⁰⁴ T305.16-26 (Deeming XXN).

Mrs Deeming did not leave the Rally when the neo-Nazis attended: CBA 198 [5], 208 [13]

32.77. We repeat [32.61] above.

After the Rally, at around 4.41pm on 18 March 2023, Ms Jones posted a Tweet with the words, 'Nazis and women want to get rid of paedo filth. Why don't you?': CBA 196 [2(b)], 211 [18]

32.78. Mrs Deeming admitted Ms Jones had posted the Jones tweet..⁹⁰⁵

After the Rally, on 18 March 2023, Mrs Deeming met and published a video with Mrs Keen, Ms Jones and Katherine Deves, in which they drank champagne and Deeming did not roundly condemn the neo-Nazis who had attended: CBA 196 [2(b)], 211 [15]-[17]

32.79. Mrs Deeming admitted she participated in the Video drinking champagne with Mrs Keen, Ms Jones and Ms Deves..⁹⁰⁶ Mrs Deeming also admitted in the Video that there was debate about whether the neo-Nazis might in fact have been trans rights activists or police in costume, as the Leadership Team perceived it..⁹⁰⁷ The Court has the benefit of that Video. There was no round condemnation of neo-Nazis in that Video.

33. The operation of s 31(6) in this case

33.1. There is little, if any, dispute about material set out above. Because of the operation of s 31(6) of the Act, however, Mr Pesutto is not required to establish the substantial truth of every fact upon which his opinion was based.

33.2. Section 31(6) requires the Court to consider whether Mr Pesutto's opinion 'might reasonably be based on such of the material as is proper material' – that is, in this case, might reasonably be based on such facts as are proved to be substantially true.

33.3. In our submission, even if the Court is not satisfied that all of the facts upon which Mr Pesutto's opinion was based were substantially true, it can be satisfied that his opinion might reasonably be based on such facts as have been proved to be true..⁹⁰⁸

34. Alleged defeasance

34.1. In alleged defeasance of Mr Pesutto's honest opinion defence, Mrs Deeming alleges that Mr Pesutto 'did not believe **any of the imputations**, being denied in the Defence as carried, were true' (our emphasis) by reason of the long list of matters set out in the Reply at [2.4]..⁹⁰⁹

⁹⁰⁵ T307.42-308.1 (Deeming XXN).

⁹⁰⁶ T306.32-38 (Deeming XXN).

⁹⁰⁷ T307.30-40 (Deeming XXN).

⁹⁰⁸ See *Massoud v Nationwide News Pty Ltd* (2022) 109 NSWLR 468; [2022] NSWCA 150; [186]-[187], read in light of [80], [160], [169]-[170]; *Greiss v Seven Network (Operations) Limited (No 2)* [2024] FCA 98, [355].

⁹⁰⁹ Reply: CBA Tab 4, page 152-155.

- 34.2. It can immediately be seen that the ground of defeasance is embarrassing. The ground of defeasance in s 31(4)(a) requires Mrs Deeming to prove that ‘**the opinion** was not honestly held by the defendant at the time the defamatory matter was published’ (our emphasis).
- 34.3. Mrs Deeming has not pleaded a ground of defeasance directed to the only relevant matter; namely, whether Mr Pesutto honestly believed the opinions he expressed, which are:
- (a) in relation to all of the Publications other than the Expulsion Motion and Dossier, that Mrs Deeming is not a fit and proper person to be a member of the Victorian Parliamentary Liberal Party under his leadership: see Defence, [44.3(i)], [45.3(i)], [46.3(i)], [47.3(i)]; and
 - (b) in relation to the Expulsion Motion and Dossier, that Mrs Deeming had brought discredit on the Victorian Parliament and the Victorian Parliamentary Liberal Party and should be expelled from the Victorian Parliamentary Liberal Party..⁹¹⁰
- 34.4. The attacks on Mr Pesutto’s opinions in cross-examination went nowhere. He was steadfast in his view that Mrs Deeming’s conduct before, during and after the Rally meant that she was not a fit and proper person to be a member of the Party under his leadership, and had brought discredit on the Parliament and the Party..⁹¹¹

⁹¹⁰ See Defence, [48.3(i)]; CBA Tab 3, page 110.

⁹¹¹ T778.30-38, 817.21-23 (Pesutto XXN).

H. *LANGE* QUALIFIED PRIVILEGE

35. Applicable principles

- 35.1. The *Lange* defence protects reasonable communications to the public concerning government or political matters.⁹¹² Malice defeats the defence.⁹¹³
- 35.2. There is no support in *Lange* or the subsequent authorities for any contention that, in assessing reasonableness for the purposes of the *Lange* defence, one is to conduct a roving inquiry that extends beyond the reasonableness of publishing the imputations selected for complaint by the applicant.
- 35.3. In *Farm Transparency International Ltd v NSW*,⁹¹⁴ Gageler J explained the purpose of *Lange*:

In *Lange*, the implied constitutional freedom was held to necessitate adjustment of the balance until then struck in the law of defamation between protection of personal reputation and freedom of speech. The adjustment involved extending the common law defence of qualified privilege to recognise that "each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia".

The precept of *Lange* is that freedom of communication to and between electors, and between electors and elected legislative and executive representatives, on matters of government and politics is an "indispensable incident" of the system of representative and responsible government prescribed by the Constitution. Within the scope of the freedom is communication of disagreeable or objectionable information from few to many by way of "agitation" for legislative and political change. Explained in the language of Kirby J:

"The form of government created by the Constitution is not confined to debates about popular or congenial topics, reflecting majority or party wisdom. Experience teaches that such topics change over time. In part, they do so because of general discussion in the mass media."

Lange's insight, first elucidated in *Australian Capital Television Pty Ltd v The Commonwealth* and *Nationwide News Pty Ltd v Wills*, is that the majoritarian principle, upon which our system of representative and responsible government relies for its outworking, carries an inherent risk of legislative or executive impairment of "the capacity of, or opportunity for, the Australian people to form the political judgments required for the exercise of their constitutional functions" An aspect of that systemic risk is that "political communications unhelpful or inconvenient or uninteresting to a current majority might be unduly impeded".

The implied freedom of political communication is a structural implication serving to safeguard the efficacy of the system against realisation of that systemic risk.

⁹¹² *Lange v ABC* (1997) 189 CLR 520, 571-3.

⁹¹³ *Ibid*, 574.

⁹¹⁴ (2022) 96 ALJR 655, 674 [74]-[77].

35.4. In *Palmer (No 5)*, Lee J succinctly explained:⁹¹⁵

Each member of the Australian community has an interest in receiving information, opinions and arguments concerning government and political matters, and each person has a correlative duty to disseminate such information, opinions and arguments.

35.5. The bounds of the defence have not yet been defined. In *Setka v Abbott Beach* J observed:⁹¹⁶

The precise width and ambit of what is a government or political matter encompassed by the Lange defence has been the subject of numerous authorities. The boundaries of the defence are yet to be delineated. In *Theophanous v Herald & Weekly Times Ltd & Anor*, Mason CJ, Toohey and Gaudron JJ said:

For present purposes, it is sufficient to say that "political discussion" includes discussion of the conduct, policies or fitness for office of government, political parties, public bodies, public officers and those seeking public office. The concept also includes discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate, e.g., trade union leaders, Aboriginal political leaders, political and economic commentators. Indeed, in our view, the concept is not exhausted by political publications and addresses which are calculated to influence choices. Barendt states that:

"political speech' refers to all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about".

35.6. Unlike common-law qualified privilege, there is no requirement that there be a corresponding duty or interest between publisher and recipient.⁹¹⁷ As to the extent of publication permitted, in *Marshall v Megna Allsop P* observed:

This was not a rule laid down only for mass media (however one defines such an innominate class), though there was a recognition of the need to protect communications of a political kind to a wide audience. It was a fashioned extension to the common law of qualified privilege based on a Constitutionally founded interest in all in the community to disseminate and receive information, opinions and argument concerning government and politics as long as the conduct is reasonable.⁹¹⁸

Government and political matters

35.7. In her Reply, Mrs Deeming admits that each of the Publications concerned governmental and political matters.⁹¹⁹

⁹¹⁵ *Palmer (No 5)* [202].

⁹¹⁶ *Setka v Abbott* [2012] VSC 534 [33].

⁹¹⁷ *Palmer (No 5)*; *Chetwynd v Armidale Dumaresq Council* [2010] NSWSC 690 [257].

⁹¹⁸ [2013] NSWCA 30 [21].

⁹¹⁹ Reply, [6.1]: CBA Tab 4, page 156.

Mr Pesutto's conduct was reasonable

- 35.8. As has been made clear earlier in these submissions, it is not the decision to bring the Expulsion Motion that must be reasonable. It is Mr Pesutto's conduct, having made that decision, to publish each of the Publications that must be reasonable. Mr Pesutto has explained in detail why that was so, and the critical issue of public importance and interest he needed to address.
- 35.9. To the extent the *Lange* defence is burdened by the legislative factors identified in s 30(3) of the Act, Mr Pesutto refers to and repeats his submissions on those matters under the s 29A public interest rubric.
- 35.10. As is earlier explained, there is a significant conceptual overlap between the defences under s 29A of the Act, and the *Lange* form of qualified privilege. The latter is undoubtedly a more challenging defence to make good. However, if the Court is satisfied that Mr Pesutto's *Lange* defence is made out (as Mr Pesutto submits it should be), the Court can have more confidence in also concluding that Mr Pesutto's s 29A defence ought also be accepted. Similarly, if the Court is satisfied that Mr Pesutto's s 29A defence is made out, the Court can draw comfort, subject to the requirement of reasonableness, that each of the Publications was published on an occasion of qualified privilege under *Lange*.

Malice – applicable principles

- 35.11. There is a presumption that a publisher acted honestly and with a proper purpose.⁹²⁰ A publication is actuated by malice where there is an abuse of the occasion protected by privilege.⁹²¹ As explained by the High Court in *Roberts v Bass*:

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...

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,

⁹²⁰ *Roberts v Bass* (2002) 212 CLR 1, [96]-[97].

⁹²¹ *Roberts v Bass* (2002) 212 CLR 1, [75]-[76].

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.

35.12. In *Roberts v Bass* Gaudron, McHugh and Gummow JJ explained:⁹²²

Carelessness of expression or carelessness in making a defamatory statement never provides a ground for inferring malice. The law of qualified privilege requires the defendant to use the occasion honestly in the sense of using it for a proper purpose; but it imposes no requirement that the defendant use the occasion carefully. *Even irrationality, stupidity or refusal to face facts concerning the plaintiff is not conclusive proof of malice.*

...

Publishing material with the intention of injuring a candidate's political reputation and causing him or her to lose office is central to the electoral and democratic process. There is nothing improper about publishing relevant material with such a motive as long as the defendant is using the occasion to express his or her views about a candidate for election. The Constitution's protection of freedom of communication on political and governmental matters would be of little effect if an elector was liable in damages because he or she had the motive of injuring the political reputation of a candidate for election to the legislature.

35.13. As Lord Diplock stated in *Horrocks v Lowe*:⁹²³

The motives with which human beings act are mixed. They find it difficult to hate the sin but love the sinner. *Qualified privilege would be illusory, and the public interest that it is meant to serve defeated, if the protection which it affords were lost merely because a person, although acting in compliance with a duty or in protection of a legitimate interest, disliked the person whom he defamed or was indignant at what he believed to be that person's conduct and welcomed the opportunity of exposing it.* It is only where his desire to comply with the relevant duty or to protect the relevant interest plays no significant part in his motives for publishing what he believes to be true that "express malice" can properly be found.

...

My Lords, what is said by members of a local council at meetings of the council or of any of its committees is spoken on a privileged occasion. *The reason for the privilege is that those who represent the local government electors should be able to speak freely and frankly, boldly and bluntly, on any matter which they believe affects the interests or welfare of the inhabitants. They may be swayed by strong political prejudice, they may be obstinate and pig-*

⁹²² (2002) 212 CLR 1, 41 [103], 42 [107] (emphasis added).

⁹²³ *Horrocks v Lowe* [1975] AC 135, 152 (emphasis added).

headed, stupid and obtuse; but they were chosen by the electors to speak their minds on matters of local concern and so long as they do so honestly they run no risk of liability for defamation of those who are the subjects of their criticism.

35.14. In *Lange* the High Court explained:⁹²⁴

... the existence of ill will or other improper motive will not itself defeat the privilege. The plaintiff must prove that the publication of the defamatory matter was actuated by that ill will or other improper motive (*Mowlds v Fergusson* (1939) 40 SR (NSW) 311 at 327–9). *Furthermore, having regard to the subject matter of government and politics, the motive of causing political damage to the plaintiff or his or her party cannot be regarded as improper.* Nor can the vigour of an attack or the pungency of a defamatory statement, without more, discharge the plaintiff's onus of proof of this issue.

35.15. Mrs Deeming relies on the following particulars of malice.

- (a) On 19 March 2023, Deeming told Pesutto, and he knew prior to making the Publications, that the neo-Nazis to whom he referred in the Publications did not 'attend' or participate in the LWS Rally;⁹²⁵
- (b) Pesutto made the Publications to convince the public and the world at large that Deeming should be expelled from the Parliamentary Liberal Party and her political career destroyed by misrepresenting that she had direct or indirect 'associations' with Nazism, when his true purpose was to expel her for her advocacy of sex based rights (with the Leadership Team saying to her on 19 March 2023 that this was her 'third strike' and she 'could not be rehabilitated'). Pesutto has falsely denied that this was his true purpose, knowing that this was not a proper basis for her expulsion or for the publication of the Publications;⁹²⁶
- (c) In relation to the Expulsion Motion and Dossier, Pesutto released the Expulsion Motion and Dossier to the media for an improper purpose in that he did so notwithstanding that Clause 55(d) of the Victorian Parliamentary Liberal Party Constitution (and long-standing convention) requires members of the Parliamentary Party to maintain confidence in all documents exchanged within the party room;⁹²⁷
- (d) The matters in defeasance of honest opinion identified above; and
- (e) that Mr Pesutto could not reasonably have believed that the publication of the Publications (or any of them) were in the public interest in circumstances when he had the knowledge particularised in respect of the matters alleged in defeasance:

⁹²⁴ *Lange* 574 (emphasis added).

⁹²⁵ Reply, [6.3] particular (a): CBA Tab 4, 156.

⁹²⁶ Reply, [6.3] particular (d): CBA Tab 4, 156-157.

⁹²⁷ Reply, [6.3] particular (e): CBA Tab 4 157.

- (i) At the time of initial publication of the Publications; or
- (ii) Alternatively, very shortly afterwards, from at least from 20 or 21 March 2023, when he received emails from members of the public who had attended the LWS Rally or witnessed it and who told Pesutto that the neo-Nazis did not ‘attend’ or participate in the LWS Rally; or
- (iii) Alternatively, from 11 May 2023 when he received Deeming’s Concerns Notice.

Malice - application

Mrs Deeming telling Mr Pesutto that the neo-Nazis did not attend the Rally: Reply, [6.3(a)]

- 35.16. Mrs Deeming said in the 19 March 2023 meeting that the neo-Nazis were not ‘there supporting us’.⁹²⁸ However, this is not properly evidence of malice on the part of Mr Pesutto in defeasance of the *Lange* qualified privilege defence.
- 35.17. Firstly, the Leadership Team’s concerns were with Mrs Deeming’s association with Mrs Keen and Ms Jones. This did not depend on a view that the neo-Nazis in fact attended the Rally. Mr Pesutto made clear in that meeting that the Leadership Team’s concerns were about Nazi and other links with the people Mrs Deeming was working with.⁹²⁹ For this reason, the Leadership Team insisted that any statement would need to disown the fellow organisers of the Rally. Mr Pesutto said, for example, ‘I will not be associated by one or two times removed with Angie Jones. I will not’.⁹³⁰ At the conclusion of the 19 March meeting, after the Leadership Team decided to proceed with the expulsion motion, Mr Pesutto said that the reason for brining the Expulsion Motion was ‘links of people to self-confessed and self-professed Nazis’.⁹³¹
- 35.18. Secondly, in any case, there was significant factual material to suggest that contrary to Mrs Deeming’s claims in the 19 March meeting, the neo-Nazis did attend the Rally. This material is outlined in Schedule A.

⁹²⁸ Exhibit A2, line 109.

⁹²⁹ Exhibit A2, lines 165, 169.

⁹³⁰ Exhibit A2, lines 815-816.

⁹³¹ Exhibit A3, lines 23-24.

Mr Pesutto expelling Mrs Deeming for political gain: Reply, [6.3(d)]

- 35.19. First, this particular of malice includes facts that are now known to be incontrovertibly false. The recording of the 19 March meeting reveals that the Leadership Team never said to Mrs Deeming that it was her ‘third strike’ or that she ‘could not be rehabilitated’.
- 35.20. Second, throughout the 19 March meeting the Leadership Team were at pains to make clear that the concern was not about Mrs Deeming’s advocacy of sex-based rights, for example:
- (a) at the outset, Mr Pesutto said, ‘I should say people have views about gender identity right across the board so nothing I’m saying is about whether you should or shouldn’t have those views, it’s not my place to judge, people will have those views’;⁹³²
 - (b) Mr Southwick said, ‘your views are your views, I’ve never tackled anything about them, and I respect that you’re able to have your views 100%’;⁹³³
 - (c) Mr Pesutto said, ‘David was not condemning you for your views. In fact, he was doing the opposite, and respecting the fact that whatever views you have are yours’;⁹³⁴
 - (d) Mr Pesutto said, ‘If you want to be in the party, it’s possible to do that without having to relinquish your views, or walk away from the things you believe in, but there would have to be some clear, if you like, road rules’;⁹³⁵ and
 - (e) Mr Southwick said, ‘no one’s asking you or telling you that you have to give up your views’.⁹³⁶
- 35.21. Mr Pesutto has refuted on all subsequent occasions that his true purpose for expelling Mrs Deeming was for her advocacy of sex-based rights.⁹³⁷

No improper purpose for releasing Expulsion Motion and Dossier: Reply, [6.3(e)]

- 35.22. Mr Pesutto did not release the Expulsion Motion and Dossier for the improper purpose alleged in particular (e). Mr Pesutto’s purpose in releasing the Expulsion Motion and Dossier is cogently and persuasively explained in the public interest section at [24.7]-[24.8] above.

⁹³² Exhibit A2, line 16-18.

⁹³³ Exhibit A2, line 442-443.

⁹³⁴ Exhibit A2, line 463-465.

⁹³⁵ Exhibit A2, line 692-694.

⁹³⁶ Exhibit A2, line 771-772.

⁹³⁷ See, e.g., Expulsion Motion and Dossier: CBA Tab 15, page 196; Exhibit R228, CBC Tab 432, page 2225; CBB Tab 30, page 344, [96] (Affidavit of John Pesutto dated 27 May 2024).

Matters in defeasance of honest opinion: Reply, [6.3(b)-(c)]

- 35.23. The allegations of defeasance are dealt with at [34] above. Having regard to the rejection of the allegations of defeasance Mr Pesutto submits the Court must make, there is no need to have regard to particulars (b) and (c), both of which repeat those matters.
- 35.24. It is unclear whether particular (b) relies on the allegations of defeasance to assert that Mr Pesutto knew that the imputations were untrue and/or was recklessly indifferent to their truth to the point of wilful blindness without any, or any reasonable inquiry. It appears that this assertion is reliant on the underlying allegations of defeasance, as without them this is a bald assertion without any stated basis. Mr Pesutto denies this assertion and repeats the submissions with respect to honest opinion above.

I. CONTEXTUAL TRUTH

36. Relevance

- 36.1. In our submission, for the reasons developed in relation to the honest opinion defence in section [29] above, each of the Publications will have been reasonably understood by readers, viewers and listeners (as the case requires) as an expression of Mr Pesutto's opinion, on the basis of stated facts. If that submission is accepted, then the applicable defence is honest opinion, not justification or contextual truth: see [28.9] and [29.4] above.⁹³⁸
- 36.2. This contextual truth defence is a fall-back defence, which does not need to be considered if the Court accepts that each the Publications is an expression of opinion in the sense described in the authorities set out in section [28.9] above. All of the submissions below proceed from the presumption that the Court has rejected that submission.

37. Overview

- 37.1. A **contextual imputation** is an imputation that a respondent contends is carried by defamatory matter and that is a matter of substantial truth.
- 37.2. The contextual truth defence pleaded by Mr Pesutto only has work to do if the Court finds that Mr Pesutto has established that one or more of the Publications carried contextual imputations (that is, imputations that are both carried and matters of substantial truth).
- 37.3. If, however, the Court accepts that one or more of the Publications carried contextual imputations (that is, imputations that are both carried and matters of substantial truth), then

⁹³⁸ There are countless examples but see eg *Sutherland v Stopes* [1925] AC 47 at 62-5, 75-8, 99; *O'Sullivan v Schubert* [1963] VR 143.

the potential application of the contextual truth defence will turn on the Court's findings as to which, if any, of the imputations pleaded by Mrs Deeming in the SOC, which are not contextual imputations, are carried (**residual imputations**).

37.4. Because Mrs Deeming has pleaded so many different imputations, of varying gradations of seriousness, and because there is a very large number of potential permutations of outcome in respect of meaning, it is difficult to advance helpful submissions on the potential application of the contextual truth defence. That is because the application of the contextual truth defence turns on weighing the effect on Mrs Deeming's reputation of the contextual imputations, against the effect on her reputation of the residual imputations. That exercise cannot be meaningfully conducted in the absence of the Court's ruling in respect of (a) whether there are any residual imputations and, if so, what they are; and (b) whether there are any contextual imputations and, if so, what they are.

37.5. Put simply, however:

- (a) if the Court agrees with all Mr Pesutto's submissions on meaning in section C above, then Mrs Deeming's case fails in respect of all Publications other than the Expulsion Motion and Dossier, and the potential application of the contextual truth defence is limited to that publication; and
- (b) if the Court finds that there are some residual imputations, the contextual truth defence may have a role to play in respect of each Publication: in the language of s 26(1)(b), the defence would operate if the residual imputations 'do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations.'

37.6. If Mrs Deeming's defamation claim succeeds in respect of any Publication, the particulars and evidence admitted in support of the contextual truth defence for any Publication will, regardless of whether any contextual truth defence succeeds as a defence to any other Publication, still be relevant to mitigation of damages in respect of Mrs Deeming's claim.⁹³⁹

38. Applicable legal principles

Contextual truth as a defence

38.1. Section 26 of the Act provides:

⁹³⁹ Mr Pesutto also relies on the substantial truth of such of the particulars of truth as are proved true in mitigation of damages: Defence, [68.2]: CBA 116. The principles allowing this are explained in the Damages section below.

- (1) It is a defence to the publication of defamatory matter if the defendant proves that –
 - (a) the matter carried one or more defamatory imputations that are substantially true (**contextual imputations**); and
 - (b) any defamatory imputations of which the plaintiff complains that are not contextual imputations and are also carried by the matter do not further harm the reputation of the applicant because of the substantial truth of the contextual imputations.
- (2) The contextual imputations on which the defendant may rely to establish the defence include imputations of which the plaintiff complains.

38.2. The rationale for the defence is to permit the trier of fact to be asked the ‘ultimate question’: whether, of all the defamatory imputations conveyed by the matter, and having regard to which of those imputations are true, the plaintiff’s reputation was further harmed by those imputations not proven to be true.⁹⁴⁰

38.3. Prior to 1 July 2021, s 26 was in different terms. The significance of the amendments to s 26 which came into effect in Victoria on 1 July 2021⁹⁴¹ is that it is no longer necessary that a respondent’s contextual imputations be different in substance from an applicant’s pleaded imputations. The Act expressly contemplates that a respondent may rely on one or more of an applicant’s own meanings as contextual imputations. On a plain reading of s 26, a respondent may now rely, as contextual imputations, on *any* imputations carried by a publication, whether exactly the same as, permissible variants of, carrying a common sting with, or entirely different in substance from, the imputations of which the applicant complains.

38.4. This change in the operation of s 26 is relevant to the disposition of the present case. Mr Pesutto relies, as contextual imputations, among other matters, on the imputations pleaded by Mrs Deeming in her SOC at [19.6], [19.7], [19.8], [24.1], [24.2], [24.3] and [24.4] – a course that would not have been available to him under the previous formulation of s 26.

38.5. In assessing the defence, the question is whether, taken together, the effect on the reputation of Mrs Deeming of such of the contextual imputations as are proved to be substantially true is such as to ‘swamp’ the effect on Mrs Deeming’s reputation of any residual imputations which the Court may find have been carried but not been proven to be true.

38.6. When considering whether any residual meanings further harm Mrs Deeming’s reputation, the Court does not seek to align each of the contextual imputations with each of her imputations. Rather, the Court weighs the particulars, and the evidence relied upon in support

⁹⁴⁰ *Kermode v Fairfax Media Publications Pty Ltd* [2010] NSWSC 852, [26] (Simpson J); upheld on appeal: *Fairfax Media Publications Pty Ltd v Kermode* (2011) 81 NSWLR 157.

⁹⁴¹ See eg Collins, ‘The Reformulated Contextual Truth Defence: More Radical than First Appears’ (2022) 50 *Federal Law Review* 206.

of the substantial truth of the contextual imputations, and considers whether, in light of that evidence, Mrs Deeming's reputation was not further harmed by the residual imputations of which she complains.⁹⁴²

- 38.7. In her Opening Submissions, Mrs Deeming argues that this aspect of the defence is 'contentious'.⁹⁴³ That is not correct.
- 38.8. Mrs Deeming's attempt to distinguish the longstanding authority of *John Fairfax Publications Pty Ltd v Blake*⁹⁴⁴ is misconceived. Contrary to Mrs Deeming's submission, Spigelman CJ (with whom Rolfe AJA agreed) did not focus on the word 'matter' in s 16 of the *Defamation Act 1974* (NSW) to arrive at his construction. Rather, at [5], the Chief Justice was actuated by the words 'by reason' of and the words 'substantial truth'. Spigelman CJ correctly noted that the section drew attention not simply to the imputation, but to the injury to reputation caused by the substantial truth of the imputation. This necessarily required consideration of the underlying facts, matters and circumstances said to establish the truth of the contextual imputations. The language of s 26 is not materially different.
- 38.9. Hodgson JA dissented in *Blake*, preferring a construction of s 16 that required the weighing of imputation against imputation. But his Honour was of the view that either approach would achieve substantial justice because, in his view, the relevant underlying facts, matters and circumstances would need to be stated within the contextual imputations themselves.⁹⁴⁵
- 38.10. Ultimately, contextual truth is a species of justification defence. The underpinning of any justification defence is the law's acceptance that the publication of what is true is not actionable in defamation because it serves only to lower a plaintiff's reputation and standing to their correct level.⁹⁴⁶ Approached with this policy underpinning in mind, the question posed by s 26 is whether, having regard to all the imputations carried by a publication, both true and untrue, the effect of the publication has been simply to lower the plaintiff's standing to its correct level or whether the untrue imputations have reduced the plaintiff's reputation below

⁹⁴² *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 41)* [2023] FCA 555, [2602] (Besanko J); *Feldman v Polaris Media Pty Ltd (as trustee of the Polaris Media Trust trading as the Australian Jewish News)* (2020) 102 NSWLR 733, 765 [162] (Emmett AJA); *John Fairfax Publications Pty Ltd v Blake* (2001) 53 NSWLR 541, [61] (Hodgson JA).

⁹⁴³ Cf Mrs Deeming's Opening Submissions, [45]-[62]: CBD pages 96-100.

⁹⁴⁴ (2001) 53 NSWLR 541 (*Blake*). *Blake* has been Applied in a string of recent cases: *Greiss v Seven Network (Operations) Ltd (No 2)* [2024] FCA 98, [314] (Katzmann J), *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 41)* [2023] FCA 555, [2602] (Besanko J); *Palmer v McGowan (No 5)* [2022] FCA 893, [321] (Lee J); *Nassif v Seven Network* [2021] FCA 1286, [125]-[127] (Abraham J); *Feldman v Polaris Media Pty Ltd (as trustee of the Polaris Media Trust trading as the Australian Jewish News)* (2020) 102 NSWLR 733, 765 [162] (Emmett AJA); *Fairfax Digital Australia & New Zealand Pty Ltd v Kazal* [2018] NSWCA 77, [98] (Gleeson JA, with whom Meagher JA agreed at [35]); *Nationwide News Pty Ltd v Weatherup* [2018] 1 Qd R 19, [46] (Applegarth J, with whom Fraser JA and Douglas J agreed at [1] and [2]).

⁹⁴⁵ *Blake*, [61].

⁹⁴⁶ *Plato Films Ltd v Speidel* [1961] AC 1090, 1145-6 (Lord Morris).

its correct level.⁹⁴⁷ This question must turn on the evidence which has been adduced to justify any imputations, so that a court may comprehend the extent to which the plaintiff's reputation has in fact been lowered.

- 38.11. This will be especially so in a case (like the present) involving a large number of generalised meanings.
- 38.12. Mrs Deeming also relies in support of her construction of s 26 on the decision in *Edwards v Nine Network Australia Pty Ltd (No 5)*.⁹⁴⁸ That decision provides no such support. First, the Court in *Edwards* was dealing with the version of s 26 which existed prior to 1 July 2021 and, as such, none of Mrs Deeming's submissions (which turn on changes to the language of s 26 since 1 July 2021) were addressed by *Edwards*. Secondly, the Court in *Edwards* did not refer to *Blake* and was not invited to consider whether the reasoning of the majority in *Blake* was correct. Thirdly, the test applied in *Edwards* was whether the false imputations 'would still have some effect on [the plaintiff's] reputation notwithstanding the effect of the *substantial truth* of the contextual imputations' (emphasis added).⁹⁴⁹ That test is consistent with the approach of the majority in *Blake* and inconsistent with an approach that merely requires a semantic weighing of imputations against one another.
- 38.13. As to Mrs Deeming's submissions concerning the risks of permitting the pleadings to justify a wide-ranging inquiry that does not consider the 'context provided by the publication', that is of no moment in this case. The matters that Mr Pesutto has relied upon in support of his contextual truth defence were all publicly available and publicly known at the time of the Publications. Mr Pesutto has not improperly used the pleadings to conduct a 'wide-ranging inquiry' divorced from context. On the contrary, his case has been appropriately confined. Criticism as to the wide-ranging nature of the inquiry at this trial should be more appropriately directed at Mrs Deeming's pleas in support of her aggravated damages, which have significantly expanded the issues in dispute far beyond the usual bounds of a defamation claim (discussed below).

Substantial truth

- 38.14. Section 26 of the Act (like s 25) employs the language of 'substantial truth'. Section 3 provides that 'substantially true' means true in substance or not materially different from the truth.

⁹⁴⁷ See to similar effect: *Kermode v Fairfax Media Publications Pty Ltd* [2010] NSWSC 852, [26] (Simpson J); upheld on appeal: *Fairfax Media Publications Pty Ltd v Kermode* (2011) 81 NSWLR 157.

⁹⁴⁸ [2024] FCA 422 (*Edwards*).

⁹⁴⁹ *Edwards*, [338], citing *Channel Seven Sydney Pty Ltd v Mahommed* (2010) 278 ALR 232, [139].

38.15. To establish ‘substantial truth’, a respondent must prove that every material part of each imputation is true.⁹⁵⁰ A ‘material part’ of an imputation is any detail which alters or aggravates the character of the imputation.⁹⁵¹ Thus, in order to establish the substantial truth of a contextual imputation, it is not necessary to establish that every part of it is literally true; it is sufficient if the ‘sting’ or gravamen of the imputation is true.⁹⁵² Irrelevant, immaterial or trivial parts, slight inaccuracies and errors of no real substance do not defeat the defence, provided they do not alter the publication’s defamatory sting.⁹⁵³

Facts which go beyond those set out in the Publications

38.16. Mr Pesutto seeks to justify some of the contextual imputations by reference to facts which go beyond those included in the Publications. This is orthodox and unexceptional. In *Maisel v Financial Times Ltd (No 1)*,⁹⁵⁴ the House of Lords held that where an imputation alleging a general charge was conveyed, the defendant was entitled to give particulars demonstrating why that was true by reference to a wide variety of matters and was not confined to the facts in the article.⁹⁵⁵

39. The Contextual Imputations and their common stings

The contextual imputations

39.1. The contextual imputations in respect of each Publication are:

(a) **Media Release**

Media Release Imputation:⁹⁵⁶ Mrs Deeming, by reason of having been involved in organising, promoting and participating in, and attending, a rally with speakers and other organisers who themselves have been publicly associated with far right-wing

⁹⁵⁰ *Channel Seven Sydney Pty Ltd v Mahommed* (2010) 278 ALR 232, [138] per McColl JA (Spigelman CJ, Beazley JA, McClellan CJ at CL and Bergin CJ in Eq agreeing); *Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1, [306] (Gillard AJA).

⁹⁵¹ *Rofe v Smith’s Newspapers Ltd* (1924) 25 SR (NSW) 4, 22 (Street ACJ).

⁹⁵² *Channel Seven Sydney Pty Ltd v Mohammed* (2010) 278 ALR 232, [138]; *Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1, [306] (Gillard AJA); *Sutherland v Stopes* [1925] AC 47, 55, 75, 78-9.

⁹⁵³ *Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1, [306] (Gillard AJA); *Sutherland v Stopes* [1925] AC 47, 79; *Alexander v The North Eastern Railway Co* (1865) 6 B & S 340; 122 ER 1221.

⁹⁵⁴ [1915] UKHL 910; (1915) 112 LT 953, 955; 84 LJKB 2145, 2147 regularly cited since, including in *Habib v Nationwide News Pty Ltd* (2010) 76 NSWLR 299, [314] and in this Court in *Rush v Nationwide News Pty Ltd (No 6)* [2018] FCA 1851, [94], and in the context of contextual imputations in *Greiss v Seven Network (Operations) Limited (No 2)* [2024] FCA 98, [325] (former iteration of s 26).

⁹⁵⁵ *Ibid.*

⁹⁵⁶ Defence, [5.3]: CBA, Tab 3, page 95.

Mr Pesutto’s defence is that the Media Release carried the Media Release Imputation, which is substantially true. If (which Mr Pesutto denies) the Media Release carried any of the imputations pleaded by Mrs Deeming in the SOC at [5], then Mr Pesutto contends that those imputations do not further harm Mrs Deeming’s reputation because of the substantial truth of the Media Release Imputation: Defence, [49]-[51]: CBA 112.

extremist groups including neo-Nazi activists, is not a fit and proper person to be a member of the Victorian Parliamentary Liberal Party under Mr Pesutto's leadership.

(b) 3AW Interview

3AW Imputations:⁹⁵⁷

- (i) Mrs Deeming, by reason of having helped to organise and promote a protest rally and associating with persons with known links to Nazis, Nazi sympathisers, far right extremists and/or white supremacists, is not a fit and proper person to be a member of the Victorian Parliamentary Liberal Party under Pesutto's leadership; and
- (ii) Mrs Deeming, by reason of not having left a protest rally that she had helped to organise and promote when neo-Nazis turned up, is not a fit and proper person to be a member of the Victorian Parliamentary Liberal Party under Mr Pesutto's leadership.

(c) ABC Interview

ABC Imputation:⁹⁵⁸ Mrs Deeming, by reason of having attended and been actively involved in the organisation and promotion of a protest on the steps of the Victorian Parliament at which there were speakers with known links with neo-Nazis and white supremacists, is not a fit and proper person to be a member of the Victorian Parliamentary Liberal Party under Mr Pesutto's leadership.

(d) Press Conference:

Press Conference Imputations:⁹⁵⁹

- (i) Mrs Deeming, by reason of having worked with organisers of a rally with known and established links with people who have Nazi sympathies and who

⁹⁵⁷ Defence, [10.3]: CBA 97.

Mr Pesutto's defence is that the 3AW Interview carried the 3AW Imputations, which are substantially true. If (which Mr Pesutto denies), the 3AW Interview carried any of the imputations pleaded by Mrs Deeming in the SOC at [10], then Mr Pesutto contends that those imputations do not further harm Mrs Deeming's reputation because of the substantial truth of the 3AW Imputations: Defence, [52]-[54]: CBA 112-113.

⁹⁵⁸ Defence, [14.3]: CBA, tab 3, page 98.

Mr Pesutto's Defence is that the ABC Interview carried the ABC Imputation, which is substantially true. If (which Mr Pesutto denies), the ABC Interview carried any of the imputations pleaded by Mrs Deeming in the SOC at [14], then Mr Pesutto contends that those imputations do not further harm Mrs Deeming's reputation because of the substantial truth of the ABC Imputation: Defence, [55]-[57]: CBA 113.

⁹⁵⁹ Defence, [19.3]: CBA, Tab 3, page 100.

Mr Pesutto's Defence is that the Press Conference carried the Press Conference Imputations, which are substantially true. If (which Mr Pesutto denies) the Press Conference carried any of imputations [19.6], [19.7] and [19.8] pleaded by Mrs Deeming in her SOC, then Mr Pesutto contends that those imputations are also substantially

promote white supremacist and ethno-fascist views, is not a fit and proper person to be a member of the Victorian Parliamentary Liberal Party under Mr Pesutto's leadership;

- (ii) Mrs Deeming, by reason of not having left a protest rally that she had helped to organise when neo-Nazis arrived, and not immediately disowning or disassociating from them, is not a fit and proper person to be a member of the Victorian Parliamentary Liberal Party under Mr Pesutto's leadership; and
- (iii) Mrs Deeming, by celebrating her involvement in a protest rally, which she helped to organise with people who have shared platforms and viewpoints with people who promote Nazi views or sympathies, and which was attended by neo-Nazis, is not a fit and proper person to be a member of the Victorian Parliamentary Liberal Party under Mr Pesutto's leadership.

Imputation [19.6] (which Mr Pesutto denies is conveyed by the Press Conference; it only becomes a contextual imputation if, contrary to that denial, it is found by the Court to have been carried): Mrs Deeming knowingly associated with people who share a platform with Neo-Nazis who peddle hate and division and attack people for who they are..⁹⁶⁰

Imputation [19.7] (which Mr Pesutto denies is conveyed by the Press Conference; it only becomes a contextual imputation if, contrary to that denial, it is found by the Court to have been carried): Mrs Deeming had so conducted herself in staying at a rally attended by Neo-Nazis and then celebrating with the key speakers of the rally who had Neo-Nazi sympathies after ugly scenes had occurred on the steps of Parliament so as to warrant her immediate expulsion from the Parliamentary Liberal Party..⁹⁶¹

Imputation [19.8] (which Mr Pesutto denies is conveyed by the Press Conference; it only becomes a contextual imputation if, contrary to that denial, it is found by the Court to have been carried): Mrs Deeming had so conducted herself before, during and after a rally at Parliament in associating herself with the key speakers who have shared

true. Mr Pesutto's case is then that if the Press Conference carried any of imputations [19.1] to [19.5] or [19.9] pleaded by Mrs Deeming in her SOC, then those imputations do not further harm Mrs Deeming's reputation because of the substantial truth of the Press Conference Imputations and imputations [19.6], [19.7] and [19.8]: Defence, [58]-[61]: CBA, tab 3, page 113-114.

⁹⁶⁰ Statement of Claim: CBA, tab 2, page 29.

⁹⁶¹ Statement of Claim: CBA, tab 2, page 29.

platforms and endorsed viewpoints of Neo-Nazis so as to warrant her immediate expulsion from the Parliamentary Liberal Party.⁹⁶²

(e) **Expulsion Motion and Dossier**

Expulsion Motion Imputations:⁹⁶³

- (i) Mrs Deeming conducted herself in a manner likely to bring discredit on the Victorian Parliament or Victorian Parliamentary Liberal Party, by organising, promoting and attending a rally where Kellie-Jay Keen (also known as Posie Parker) was the principal speaker, in circumstances where Ms Keen was known to be publicly associated with far right-wing extremist groups including neo-Nazi activists; and
- (ii) Mrs Deeming conducted herself in a manner likely to bring discredit on the Victorian Parliament or Victorian Parliamentary Liberal Party, by meeting with and publishing a video with Kellie-Jay Keen, Katherine Deves and Angie Jones.

Imputation [24.1]: Mrs Deeming had so conducted herself on 18 March 2023 in relation to a public rally that it warranted her expulsion from the Victorian Parliamentary Liberal Party.⁹⁶⁴

Imputation [24.2] (which Mr Pesutto denies is conveyed by the Expulsion Motion and Dossier; it only becomes a contextual imputation if, contrary to that denial, it is found by the Court to have been carried): Mrs Deeming had so conducted herself in associating with Neo-Nazi activists on 18 March 2023 that it warranted her expulsion from the Victorian Parliamentary Liberal Party.⁹⁶⁵

⁹⁶² Statement of Claim: CBA, tab 2, page 29.

⁹⁶³ Defence, [24.4]: CBA, tab 3, page 102-103.

Mr Pesutto's Defence is that the Expulsion Motion and Dossier carried the Expulsion Motion Imputations and imputations [24.1] and [24.3] pleaded by Mrs Deeming in her SOC. Mr Pesutto contends that each of those imputations are substantially true. If (which Mr Pesutto denies) the Expulsion Motion and Dossier carried any of imputations [24.2] and [24.4] pleaded by Mrs Deeming in her SOC, then Mr Pesutto also contends that those imputations are substantially true. Mr Pesutto's case is then that if the Expulsion Motion and Dossier carried any of imputations [24.5] and [24.6] pleaded by Mrs Deeming, then those imputations do no further harm to Mrs Deeming's reputation because of the substantial truth of the Expulsion Motion Imputations, and imputations [24.1], [24.2], [24.3] and [24.4]: Defence, [62]-[65]: CBA, tab 2, page 114-115.

⁹⁶⁴ Statement of Claim: CBA, tab 2, page 33.

⁹⁶⁵ Statement of Claim: CBA, tab 2, page 34.

Imputation [24.3]: Mrs Deeming conducted activities in a manner likely to bring discredit on the Victorian Parliament or Parliamentary Liberal Party by organising, promoting and attending a rally on 18 March 2023.⁹⁶⁶

Imputation [24.4] (which Mr Pesutto denies is conveyed by the Expulsion Motion and Dossier; it only becomes a contextual imputation if, contrary to that denial, it is found by the Court to have been carried): Mrs Deeming conducted activities in a manner likely to bring discredit on the Victorian Parliament or Parliamentary Liberal Party by publicly associating with Neo-Nazi activists on 18 March 2023.⁹⁶⁷

39.2. While the precise words and conduct specified each contextual imputation is different, they bear a common sting, namely that Mrs Deeming's conduct before, during, and after the Rally, and her associations with Mrs Keen and Ms Jones, having regard to their public associations and/or views, means she is unfit to be a member of the Party under Mr Pesutto's leadership and/or has brought discredit on the Party or the Parliament.

40. The Contextual Imputations pleaded in the Defence are carried

40.1. In our submission, applying the principles in relation to meaning set out in section C above, each of the Media Release Imputation, the 3AW Imputations, the ABC Imputation, the Press Conference Imputations and the Expulsion Motion Imputations are carried.

40.2. Unlike the imputations pleaded by Mrs Deeming in the SOC, each of those imputations carefully follows the language and sense of the Publications.

40.3. Each complies with the rules of pleading, by articulating a single meaning in respect of each distinct charge carried by the relevant Publication. In each case, the imputation is the final distillation of the act or condition asserted of Mrs Deeming or with which she is charged.

40.4. Each imputation captures the sting of the Publication, having regard to the impression that the Publication will have had on readers, listeners or viewers.

40.5. While the characterisation of a matter as constituting an expression of opinion (such that honest opinion is the relevant defence) or a statement of fact (such that justification or contextual truth is the relevant defence) turns on how the *matter* will have been reasonably understood (not the imputations carried by the matter), it is notable, in our submission, that each of the contextual imputations (including those pleaded by Mrs Deeming) are imputations that are in the nature of expressions of opinion based on facts, not statements of fact.

⁹⁶⁶ Statement of Claim: CBA, tab 2, page 34.

⁹⁶⁷ Statement of Claim: CBA, tab 2, page 34.

41. Factual matters and evidence relevant to contextual truth

Overview of Annexure A allegations

41.1. Mr Pesutto relies on the matters set out in Annexure A to his Defence in support of the substantial truth of the contextual imputations. By way of overview, Mr Pesutto relies upon:

- (a) background matters such as Mr Pesutto's values, and Mr Pesutto and Mrs Deeming's roles in the Party, which ought not be controversial are not addressed again below: we repeat the matters at [32.5]-[32.16] above;⁹⁶⁸
- (b) the fact that Mrs Keen is a notorious anti-transgender activist and transphobe who has:⁹⁶⁹
 - (i) been publicly associated with white supremacists and neo-Nazis, and those who support such hateful and divisive views;⁹⁷⁰
 - (ii) appropriated with endorsement neo-Nazi and white supremacist symbols in her public social media presence;⁹⁷¹
 - (iii) displayed disgraceful ambivalence towards neo-Nazism and white supremacy;⁹⁷² and
 - (iv) publicly made abhorrent racist comments.⁹⁷³

By the time of the Rally, Keen's extensive associations with white nationalists and far-right extremists, and her extensive and abhorrent racist and transphobic rhetoric was notorious as explained further below.

- (c) Ms Jones is an anti-trans activist and, among other things, a co-host of TERF Talk Down Under,⁹⁷⁴ a YouTube channel described as 'Angie and Stassja, two Melbourne based gender critical women, talking TERF [trans exclusionary radical feminist] with an Australian focus',⁹⁷⁵ who had before the Rally posted anti-trans material using Nazi symbolism;⁹⁷⁶

⁹⁶⁸ Defence, Annexure A, [1]-[8]: CBA, tab 3, pages 119-120.

⁹⁶⁹ Defence, Annexure A, [10], [15(a)] (detailed further at [58]-[81]): CBA, tab 3, pages 120, 121 and 130-134.

⁹⁷⁰ Defence, Annexure A, [58]-[70], [73]: CBA, tab 3, pages 130-132.

⁹⁷¹ Defence, Annexure A, [77]: CBA, tab 3, page 132.

⁹⁷² Defence, Annexure A, [71]-[72], [78(a), (c)]: CBA, tab 3, pages 131-133.

⁹⁷³ Defence, Annexure A, [81]: CBA, tab 3, page 134.

⁹⁷⁴ A show title that was happily repurposed in the Video on the evening of 18 March 2023.

⁹⁷⁵ Defence, Annexure A, [11]: CBA, tab 3, pages 120-121.

⁹⁷⁶ For example, on 12 October 2022, Ms Jones posted a tweet comparing the use of LGBTI+ flags to the flags used by fascists: CBC Tab 86.

- (d) the events associated with the Rally, including Mrs Deeming’s promotion, escorting of Mrs Keen without authorisation, and organisation of the Rally, her support of Mrs Keen’s anti-trans rhetoric during the Rally, and her failure to leave the Rally despite the prominence of the neo-Nazis’ abhorrent conduct;⁹⁷⁷
- (e) Mrs Deeming’s conduct after the Rally, including:
- (i) the failure to immediately and unequivocally condemn the neo-Nazis, despite request from Mr Southwick;⁹⁷⁸
 - (ii) Mrs Deeming’s failure ever to publicly denounce the Jones tweet or public associations created by it;⁹⁷⁹
 - (iii) Mrs Deeming’s tepid post-Rally tweet, which focused on criticising the Victoria Police rather than condemning the neo-Nazis;⁹⁸⁰
 - (iv) the post-Rally video, which included disgraceful, conspiratorial and discreditable conduct by Mrs Deeming and others, who she continued to be willing to associate publicly with;⁹⁸¹
 - (v) prior to and at the Leadership Team meeting, Mrs Deeming’s continued failure to demonstrate an appreciation of the seriousness of her attendance and participation in the Rally and the Video and her associations with Mrs Keen and Ms Jones;⁹⁸²
 - (vi) after the Leadership Team meeting but before Mrs Deeming’s suspension, her ongoing refusal to accept any responsibility or appreciate the seriousness of the situation, including as demonstrated by her 20 March 2023 Press Release and her conduct at the scheduled Party meeting on 21 March 2023;⁹⁸³ and
- (f) Mrs Deeming’s conduct after the compromise agreement reached on 27 March 2023, where she acted inconsistently with the terms and spirit of the agreement and her earlier condemnations contained in her private email to the Party and in the 27 March 2023 Press Release,⁹⁸⁴ and thereafter continued to proudly and publicly associate herself with Mrs Keen and Ms Jones.

⁹⁷⁷ Defence, Annexure A, [16]-[27]: CBA, tab 3, pages 121-123.

⁹⁷⁸ Defence, Annexure A, [28]-[29]: CBA, tab 3, page 123.

⁹⁷⁹ Defence, Annexure A, [31]-[34]: CBA, tab 3, pages 123-124.

⁹⁸⁰ Defence, Annexure A, [41]: CBA, tab 3, page 126.

⁹⁸¹ Defence, Annexure A, [36]-[40]: CBA, tab 3, pages 125-126.

⁹⁸² Defence, Annexure A, [44]-[46]: CBA, tab 3, pages 126-127.

⁹⁸³ Defence, Annexure A, [47]-[49]: CBA, tab 3, pages 127-128.

⁹⁸⁴ Defence, Annexure A, [56]: CBA, tab 3, pages 129-130.

41.2. In light of the above matters, Mrs Deeming’s conduct before, during, and after the Rally, and her associations with Mrs Keen and Ms Jones, having regard to their associations and expressed views, taken as a whole, is:⁹⁸⁵

- (a) conduct that conflicts with Mr Pesutto’s values;
- (b) conduct that conflicts with the values, ideals and standards of the Party under Mr Pesutto’s leadership;
- (c) not the conduct of a person who is a fit and proper person to be a member of the Party under Mr Pesutto’s leadership; and
- (d) conduct likely to bring discredit on the Victorian Parliament and the Party.

As at the date of the Rally, Mrs Keen’s public associations and abhorrent conduct were notorious: Annexure A, Part A, [10]

41.3. There can be no sensible doubt that, by the time of the Rally, Mrs Keen’s public associations and other discreditable conduct were in the public domain and readily ascertainable by cursory searches.

41.4. In the lead up to the Rally, for example, the following information about Mrs Keen was in the public domain:

- (a) On 15 October 2019, *Pink News* published an article about Mrs Keen’s interview with Jean-François Gariépy.⁹⁸⁶ It called Gariépy a ‘white nationalist’ and ‘prominent far right YouTuber who calls for a “white ethno-state” who had made videos with neo-Nazi Richard Spencer’. Mrs Keen’s alleged association with Gariépy is detailed further below. The *Pink News* article was tendered by Mrs Deeming without objection.
- (b) On 22 June 2022, *Woman’s Place UK* (a women’s rights organisation in the UK) published an article entitled ‘Woman’s Place and Kellie-Jay Keen (aka Posie Parker)’, which publicised the reason for its earlier decision to cut links with Mrs Keen, and shared screenshots of racist tweets by Mrs Keen (discussed further below). The *Woman’s Place UK* article said, among other things, ‘We felt it important to distance ourselves from these stated views’; ‘We stand by our decision’; ‘At the time of our statement, the comments made by KJK that caused us to act were circulating widely’; ‘We have seen nothing to suggest that KJK has changed her mind or her stance.

⁹⁸⁵ Defence, Annexure A, [89]: CBA, tab 3, page 135.
⁹⁸⁶ Exhibit A37.

Indeed, many of her subsequent connections, statements and actions have only strengthened our decision not to work with her’.⁹⁸⁷

- (c) On 19 January 2023, Stephen Bates MP sent a letter to the Minister for Immigration, Citizenship and Multicultural Affairs seeking that Mrs Keen’s visa to Australia be revoked.⁹⁸⁸ He posted screenshots of this letter in a tweet, which stated that Mrs Keen is a ‘prominent transphobe who poses a significant risk to members of the trans and gender diverse community of Australia’ who partakes in ‘hate speech’.⁹⁸⁹ This was reported in the *Star Observer* on 20 January 2023, which also reported that Brisbane’s LGBTQI+ community had started an online petition asking the Immigration Minister to cancel Mrs Keen’s visa; that Proud Boys had been speakers at Mrs Keen’s rallies; that Mrs Keen had an ‘established record of promoting or excusing hate or violence towards trans and other marginalised communities’; and outlined a history of harmful rhetoric and associations.⁹⁹⁰ On 18 February 2023, *Out in Perth* reported that a petition to revoke Mrs Keen’s visa was removed after legal threats.⁹⁹¹
- (d) On 23 January 2023, *Out in Perth* reported on Lisa Morgan having quoted Adolf Hitler at a Let Women Speak event.⁹⁹²
- (e) On 4 February 2023, Scottish newspaper *The National* published an article entitled ‘Who is Posie Parker? The anti-trans founder of Standing for Women’, containing a lengthy history of Mrs Keen’s alleged associations and rhetoric.⁹⁹³ The article stated that Mrs Keen is ‘controversial’ and ‘has faced criticism relating to allegations of racism, white supremacy, and ties to far-right anti-LGBT groups’. It included the following allegations:
- (i) Mrs Keen is a special adviser to the women’s rights organisation Women’s Liberation Front, which reportedly accepted a \$15,000 donation from Alliance Defending Freedom, which campaigns against abortion and LGBT rights;
 - (ii) Mrs Keen has written for right-wing magazine the *Spectator* against trans rights;
 - (iii) the allegations made by *Woman’s Place UK* discussed at (b) above; and

⁹⁸⁷ Exhibit R17, CBC Tab 68.

⁹⁸⁸ R133, CBC Tab 127.

⁹⁸⁹ R132, CBC Tab 126.

⁹⁹⁰ Exhibit R134, CBC Tab 128.

⁹⁹¹ Exhibit R137, CBC Tab 148.

⁹⁹² Exhibit R135, CBC Tab 132.

⁹⁹³ Exhibit R136, CBC Tab 143.

- (iv) allegations of ‘courting ideas of white supremacy’, including associating with Hans Jørgen Lysglimt Johansen (described as a Norwegian neo-Nazi), Soldiers of Christ Online (described as a far-right network) and Jean-François Gariépy (described as a prominent far-right YouTuber who calls for a ‘white ethno-state’ who had interviewed former Klu Klux Klan leader David Duke); using a Barbie doll wearing a Nazi uniform as her social media profile picture; and a speaker at an event of Mrs Keen’s quoting Adolf Hitler.

Something was sought to be made by Mrs Deeming of the fact that *The National* is a Scottish newspaper with a small circulation. However, the more relevant points for present purposes are that: (a) that Mr Pintos-Lopez researched it and considered it credible; and (b) the article and the allegations and associations reported within it were circulating widely in Australia in the lead up to the Rally. For example, one tweet by an Australian user on 5 March 2023 stated: ‘If you’re wondering why people are concerned about Kellie-Jay Keen aka Posie Parker coming to Australia to campaign against trans rights, here’s an article that explains why even gender critical women have taken steps to distance themselves from her’ and shared the article from *The National*. That tweet alone was viewed 102,800 times, showing the extent to which those allegations were circulating in the public domain.⁹⁹⁴

- (f) On 10 March 2023, the *Daily Mail* published an article entitled ‘Cops on high alert as controversial UK women's rights campaigner who has been slammed as “transphobic” prepares to give speeches on tour of Australia’.⁹⁹⁵ It quoted a group called Pride in Protest saying Mrs Keen partakes in ‘vile bigotry’ and ‘far right politics’. It reported that Mrs Keen posed with a campaigner who celebrated Winnie Mandela’s death, and has said access to abortion and contraceptives need to be rolled back for children and teenagers. It reported that she has spoken alongside Christopher Barcenas, a member of the Proud Boys. It quoted Mrs Keen saying, ‘In today’s money... probably I am a transphobic’.
- (g) On 11 March 2023, *The Weekend Australian* published an article entitled ‘Protesters clash at anti-trans rally in Sydney’.⁹⁹⁶ It reported that at the Sydney LWS rally, trans advocacy groups chanted ‘Posie Parker you can’t hide, you’ve got Nazis on your side’.

⁹⁹⁴ Exhibit R328, CBC Tab 716 (and shared 130 times, commented on 202 times, liked 715 times).

⁹⁹⁵ Exhibit R12, CBC Tab 212.

⁹⁹⁶ Exhibit R329, CBC Tab 717.

- (h) On 13 March 2023, the *Courier Mail* published an article entitled ‘Controversial UK activist Kellie-Jay Keen leads Brisbane protest’,⁹⁹⁷ reporting on the Brisbane LWS rally, at which Mrs Keen called transgenderism a ‘dirty fetish’ and a ‘cult’. It included quotes from counter-protesters who said the far right ‘turn out in droves to support’ Mrs Keen. It reported links with Proud Boy activists, Holocaust denier Johansen and white supremacist Gariépy.
- (i) On 14 March 2023, *The West Australian* published an article entitled ‘LGBTQI in Perth protest over visiting anti-trans activist Kellie-Jay Keen’.⁹⁹⁸ It reported that counter-protesters had chanted, ‘Posie Parker you can’t hide, you have Nazis on your side’, and repeated the allegations of a speaker at an event in January quoting Adolf Hitler.
- (j) Even Wikipedia, which is often the public’s first port of call for information, included an array of similar allegations. For example, the Wikipedia page for Mrs Keen as at 5:50pm on 18 March 2023 included allegations of Mrs Keen publishing racist tweets, appearing in a video interview with Gariépy, and a speaker at a Let Women Speak rally quoting Adolf Hitler in *Mein Kampf*.⁹⁹⁹

41.5. Apart from these matters, in the lead up to the Rally, there was a raft of material circulating on social media about Mrs Keen which were to similar substance and effect. These tweets also contained allegations that went beyond those summarised above. Some of the allegations were repeated in replies to Mrs Deeming’s own tweet of 14 March 2023, and put her on notice of a number of the allegations that were relied upon in the Expulsion Motion and Dossier. These included allegations of Mrs Keen giving a platform to the Proud Boys’ Barcnas at the Miami rally,¹⁰⁰⁰ which Mrs Deeming saw and replied to,¹⁰⁰¹ and Mrs Keen being linked to Gariépy.¹⁰⁰²

41.6. Those were not the only allegations which were circulating on social media. For example, the documents compiled by those working for Mr Pesutto on 20 and 21 March 2023 included reporting about Mrs Keen not fully vetting her interviewers for their beliefs, and research into other figures Mrs Keen was reported to have associated with.¹⁰⁰³ They also include reporting of Mrs Keen praising far-right campaigner Stephen Yaxley Lennon (Tommy Robinson), tweeting that transgender women should be sterilised, Mrs Keen’s racist tweets, Mrs Keen’s

⁹⁹⁷ Exhibit R175, CBC Tab 230.
⁹⁹⁸ Exhibit R330, CBC Tab 718.
⁹⁹⁹ Exhibit R187, CBC Tab 272.
¹⁰⁰⁰ Exhibit R19, CBC Tab 724.
¹⁰⁰¹ Exhibit R26 CBC Tab 733.
¹⁰⁰² Exhibit R340, CBC Tab 736.
¹⁰⁰³ Exhibit R228, CBC Tab 436

selfie with Johansen, as well as Mrs Keen's interviews with Gariépy and Soldiers of Christ Online...¹⁰⁰⁴

- 41.7. Many of the matters being publicly reported by Mrs Keen have been sourced back to primary documents and then set out in in Part D of Annexure A of the Defence, as discussed below.
- 41.8. As we observed earlier in these submissions, Mrs Keen is in Mrs Deeming's camp: see [11] above. Mrs Deeming's failure to call Mrs Keen is unexplained. In those circumstances, inferences are available that any evidence Mrs Keen could have given by way of response to the evidence of her public associations and conduct would not have assisted Mrs Deeming.

'Publicly known' – the proper approach to evidence in Annexure A, Part D

- 41.9. In objections to evidence, Mrs Deeming has argued against admitting various documents (including videos) which Mr Pesutto sought to tender in support of the allegations set out in Part D of Annexure A.
- 41.10. In particular, Mrs Deeming argued that Mr Pesutto has not proved that persons that Mrs Keen has been publicly associated or shared platforms with (whether directly or indirectly) are in fact neo-Nazis or white supremacists or far right extremists. There are two answers to that submission.
- 41.11. *First*, Mr Pesutto has in fact proved that Mrs Deeming has been publicly associated or shared platforms with such persons. In particular, Mrs Deeming admitted in cross-examination that Mrs Keen appeared in a video with Gariépy...¹⁰⁰⁵ Mrs Deeming tendered, without objection, the *Pink News* article about Mrs Keen's interview with Gariépy...¹⁰⁰⁶ which described Gariépy as a 'white nationalist' and 'prominent far right YouTuber who calls for a "white ethno-state"'. Mrs Keen was quoted in that article, in passages Mrs Deeming relied on for the truth of their contents, as expressing concern about his conduct. We repeat our submissions at [32.29]-[32.32] above.
- 41.12. *Secondly* and in any event, however, the sting of the relevant contextual imputations does not, in our submission, reside in whether Mrs Keen has publicly associated with actual neo-Nazis, white supremacists or far right extremists; it resides in Mrs Deeming's association with Mrs Keen, in circumstances where she has been publicly associated with persons who are said to be neo-Nazis, white supremacists and far right extremists. Put another way, the sting of the contextual imputations relied upon concerning Mrs Deeming's associations ultimately resides

¹⁰⁰⁴ Exhibit R526, CBC Tab 930.
¹⁰⁰⁵ T302.8-34 (Deeming XXN).
¹⁰⁰⁶ Exhibit A37.

not in whether these other people *in truth* hold the views they are publicly known or understood to hold, but rather from the fact that they are *publicly known or understood* to hold those views.

41.13. This reflects the Leadership Team’s concerns in the 19 March 2023 meeting – that the perception of neo-Nazi links is politically toxic, and required an immediate and decisive response. As Mr Pintos-Lopez put it, the matter that was of concern was that Mrs Keen had been ‘fast and loose with those associations, and didn’t really care and, in fact, had an interest in those associations because that furthered her brand’.¹⁰⁰⁷

41.14. Mrs Keen’s public associations are extensive:

- (a) On or about 19 February 2019, Mrs Keen spoke at the Mot Dag Conference in Norway where she was pictured with Johansen.¹⁰⁰⁸ Material readily accessible in the public domain is to the effect that Johansen is a Norwegian neo-Nazi,¹⁰⁰⁹ far-right political activist of the Alliance-Alternative for Norway Party, with a reported history of public antisemitic and racist statements. For example, on 30 November 2018, Johansen was reported to have called the Holocaust ‘a carefully constructed control mechanism through a guilt narrative’.¹⁰¹⁰ Johansen was also reported to have made comments including: ‘The Jews put us to the test, that's what they do, that's their task. That is the metaphysical role of the Jews’.¹⁰¹¹ The Australian media has called Johansen a Holocaust denier¹⁰¹² and a ‘political extremist known for his racist and antisemitic statements, including Holocaust denial’.¹⁰¹³
- (b) On 23 September 2019, Mrs Keen participated in a Facebook Livestream with Sheronna Bishop or ‘America’s Mom’.¹⁰¹⁴ That participation took place three days after Bishop was reported to have posted a video with Proud Boys members.¹⁰¹⁵ The Proud Boys are, notoriously, a far-right, neo-fascist militant organisation that promotes and engages in political violence,¹⁰¹⁶ and which has been designated a terrorist group in Canada.
- (c) In October 2019, Mrs Keen appeared in a video interview with Gariépy.¹⁰¹⁷ Material readily accessible in the public domain is to the effect that Gariépy is a well-known

¹⁰⁰⁷ T1231.22-45 (Pintos-Lopez XXN).

¹⁰⁰⁸ Exhibit R89, CBC Tab 31.

¹⁰⁰⁹ Exhibit R136, CBC Tab 143; Exhibit R328, CBC Tab 716 (viewed over 100,000 times, shared 130 times, commented on 202 times, liked 715 times).

¹⁰¹⁰ Exhibit R87, CBC Tab 29.

¹⁰¹¹ Exhibit R106, CBC Tab 64; Exhibit R107, CBC Tab 65.

¹⁰¹² Exhibit R175, CBC Tab 230.

¹⁰¹³ Exhibit R134, CBC Tab 128, page 625.

¹⁰¹⁴ Exhibit R91, CBC Tab 36.

¹⁰¹⁵ Exhibit R98, CBC Tab 48.

¹⁰¹⁶ Exhibit R316, CBC Tab 692.

¹⁰¹⁷ Exhibit 92, CBC Tab 39.

French-Canadian white nationalist, prominent far-right YouTuber who calls for a 'white ethno-state',¹⁰¹⁸ a white supremacist¹⁰¹⁹ and founder of YouTube channels including 'The Public Space', which was identified by the Anti-Defamation League as containing and promoting antisemitic and white supremacist content.¹⁰²⁰ Based on publicly available materials Gariépy has appeared in a video with Nick Fuentes,¹⁰²¹ an American far-right political commentator known for his white supremacist, misogynistic, homophobic, antisemitic and Islamophobic views.¹⁰²² Further, on 14 September 2018, David Duke participated in a 2 hour 5 minute video with Gariépy on 'The Public Space'.¹⁰²³ Duke is a former grand wizard of the Ku Klux Klan whose reported white supremacist and antisemitic views are notorious and in the public domain.¹⁰²⁴

- (d) On 2 July 2020, Mrs Keen participated in a live telephone interview with Richie Allen on the Richie Allen Radio Show. Earlier in the episode Mark Collett was a guest with Allen.¹⁰²⁵ Collett is the founder of the UK white nationalist group Patriotic Alternative and reportedly a neo-Nazi political activist.¹⁰²⁶
- (e) Mrs Keen was interviewed by Kay Soco of SOCO Films and Kay SOCO Films on or about 22 July 2020¹⁰²⁷ and 1 September 2020.¹⁰²⁸ In her interview of 22 July 2020, Mr Keen said:

However, there is also the fact that paraphilias like transsexualism, transgenderism; they are often accompanied by another paraphilia. It is very uncommon for a man just to have one. So that's another link with - and the most common is paedophilia. So that would be another link.

...

Paedophiles will gain easier access to children because of the trans agenda.

¹⁰¹⁸ Expulsion Motion and Dossier, page 8: CBA, tab 2, page 205.

¹⁰¹⁹ Exhibit R175, CBC Tab 230.

¹⁰²⁰ Exhibit R90, CBC Tab 34.

¹⁰²¹ Exhibit R85, CBC Tab 23. It can readily be inferred from Gariépy's distinctive voice that he is the one speaking in the video, while the male on the right of the video clearly resembles images of Fuentes in CBC Tab 54. A document compiled by Mr Pesutto's staff on 21 March 2023 indicates that they understood Gariépy interviewed Fuentes: Exhibit R229, CBC Tab 436, pages 2246-2247.

¹⁰²² Exhibit R100, CBC Tab 54.

¹⁰²³ The parties have agreed this fact: document entitled 'Parties agreed position as to Applicant's objections to Respondent's Tender List', no. 4.

¹⁰²⁴ Exhibit R83, CBC Tab 8.

¹⁰²⁵ The parties have agreed this fact: document entitled 'Parties agreed position as to Applicant's objections to Respondent's Tender List', no. 8.

¹⁰²⁶ Exhibit R289, CBC Tab 616.

¹⁰²⁷ Exhibit R94, CBC Tab 43.

¹⁰²⁸ Exhibit R95, CBC Tab 45.

SOCO stands for ‘Soldiers of Christ Online’, which is reported to be a far-right network.¹⁰²⁹

- (f) On or about 5 November 2022, at a Let Women Speak rally in Miami, Mrs Keen provided a platform to a male speaker.¹⁰³⁰ Material in the public domain has identified this man as Chris Barcenas,¹⁰³¹ a notorious member of the Proud Boys.¹⁰³² This has also been reported by the Australian media.¹⁰³³ Material readily accessible in the public domain is to the effect that the Proud Boys are a far-right neo-fascist militant organisation that promotes and engages in political violence.
- (g) On or about 15 January 2023 at a Standing for Women event in Newcastle, United Kingdom, a speaker, Lisa Morgan, referred to Adolf Hitler in the following terms: ‘Do you know the big lie? The big lie was first described by Adolf Hitler in *Mein Kampf* ... The big lie is that trans women are women’. After Morgan left the microphone, instead of condemning her for the association made with Hitler and *Mein Kampf*, Mrs Keen energetically approached the microphone and asked, ‘Who’s next? Who’s next?’¹⁰³⁴ ‘The Big Lie’ speech was reported in the Australian media.¹⁰³⁵
- (h) It was reported that the LWS rally in Auckland, New Zealand on 25 March 2023 was attended by far-right extremists including people wearing Azov Battalion and Boogaloo Boys insignia, members of white nationalist group Action Zealandia, and members of extremist groups Voices for Freedom.¹⁰³⁶

Mrs Keen has used vile rhetoric: Annexure A, Part D, [77], [78(a)], [78(c)], [81]

- 41.15. Prior to the Rally, Mrs Keen used, and was publicly known to have used, and in fact used, vile antisemitic, Nazi, white supremacist and anti-trans rhetoric.
- 41.16. Mrs Keen adopted Nazi and white supremacist imagery and language in her public social media presence, including by:
 - (a) changing her profile picture to a picture of a Barbie doll wearing a Nazi uniform,¹⁰³⁷ the obvious meaning of which was to equate Keen’s thirst for activism with that of Nazis during World War II; and

¹⁰²⁹ Exhibit R136, CBC Tab 143, page 663.
¹⁰³⁰ Exhibit R124, CBC Tab 92, minute 1:02:57-1:05:00.
¹⁰³¹ Exhibit R19, CBC Tab 724.
¹⁰³² Exhibit R105, CBC Tab 63.
¹⁰³³ Exhibit R12, CBC Tab 212, page 1438.
¹⁰³⁴ Exhibit R131, CBC Tab 121.
¹⁰³⁵ Exhibit R135, CBC Tab 132; CBC Tab 718, page 3693.
¹⁰³⁶ Exhibit R246, CBC Tab 498.
¹⁰³⁷ Exhibit R80, CBC Tab 2 and Exhibit R99, CBC Tab 51.

- (b) on or about 7 June 2020, posting ‘Pridestapo’ on Spinster with an image of a Nazi eagle insignia and a swastika superimposed over a rainbow,¹⁰³⁸ the obvious meaning of which was the equation of expressions of LGBTI+ pride with the conduct of the Nazis and the Gestapo during World War II.
- 41.17. During a YouTube livestream of a LWS event on 26 February 2023 in London, Mrs Keen said, ‘Fascist is a new word for legend’.¹⁰³⁹
- 41.18. Mrs Keen has also engaged in disgusting and disgraceful ‘jokes’ about the deaths of trans people on social media, including in response to a post sent to her on Facebook containing a link, ‘Estrogen patch for menopause linked to higher heart disease risks’ with the question ‘I wonder what the effect on men is...’, Mrs Keen responded, ‘Hopefully death’.¹⁰⁴⁰
- 41.19. Mrs Deeming has admitted most of these matters, after communicating with Mrs Keen regarding them. As to the ‘hopefully death’ comment, Mrs Deeming did not press her objection to the tender of the screenshot of this Facebook comment from Mrs Keen’s former Facebook account, after Mr Pesutto referred to a video where Mrs Keen admitted to being banned from Facebook for posting this tweet.¹⁰⁴¹ It was plainly an abhorrent tweet.
- 41.20. Mrs Keen was publicly reported to have made racist comments on social media throughout 2017 and 2018, including:¹⁰⁴²
- (a) on 3 July 2017, stating ‘A class of 7 year olds just walked past only 2/15 girls weren’t wearing hijab. #ffs #disgusting #islam #sexist #eastonprimarysortitout’;
- (b) on 11 August 2017, stating ‘we say the way men socialised results in certain behaviour but not Muslim men and how they feel about white girls?’ in response to a post stating ‘Hey? What ethnicity and religion are these offenders? Hmmm. Why isn’t this mentioned I wonder?’ accompanied by a link to a post by Lincolnshire Police regarding an investigation into modern slavery;
- (c) on 16 April 2018, stating ‘Are we allowed to notice where these men are from and question the culture in which they’ve grown? I mean we seem to be able to blame rape culture but not Pakistani/Muslim rape culture’;

¹⁰³⁸ Exhibit R93, CBC Tab 41.

¹⁰³⁹ Exhibit R151, CBC Tab 192.

¹⁰⁴⁰ Exhibit R82, CBC Tab 6.

¹⁰⁴¹ Respondent’s Submissions in response to Applicant’s Objections dated 9 October 2024, [3.9].

¹⁰⁴² Exhibit R17, CBC Tab 68.

- (d) on 16 April 2018, stating ‘No idea. But there are pockets of Bradford where the culture is not British. Like many ex pat communities they hold on to their past culture rather tightly. There was an all boys school that was 99.9% Pakistani Muslim. Awful place for women’; and
- (e) on 25 May 2018, stating ‘Dear UK, it seems we are at a time where you can offend everyone except Muslims and trans women...all the rest of you are expected to take it on the chin. CBA to issue a disclaimer’.

41.21. There was no limitation on the tender in relation to the Woman’s Place UK’s statements and screenshots of tweets. There is no reason to doubt the veracity of Woman’s Place UK’s public statements and reposting of these tweets, given they were obviously only posted reluctantly after being pressed by supporters on why they were unwilling to work with Mrs Keen, despite some of their common goals. An inference as to authenticity and the lack of any reasonable explanation for those tweets that can be drawn from that document itself,¹⁰⁴³ and can be readily drawn because of Mrs Deeming’s failure to call Mrs Keen as a witness.

The Rally and subsequent conduct: Annexure A, Parts B and C, [13]-[41]

41.22. There can be no dispute that Mrs Deeming was actively involved in organising and promoting the Rally. We have addressed the relevant evidence above and at Schedule A to the submissions.

41.23. The events of 18 March 2023 can be relevantly summarised as follows:

- (a) Mrs Deeming collected Mrs Keen from her hotel and drove her to the Parliament House car park, escorting Mrs Keen and her security guards to the Rally through the Parliament House precinct.
- (b) At the Rally, Mrs Deeming was an active participant, assisting Mrs Keen, liaising with marshals and Rally security, holding signs and delivering a speech in which she identified herself as a member of Parliament.
- (c) Although it was billed as a women’s rights rally, the event was properly described as an anti-trans rally, evidenced by Mrs Keen’s conduct and the speeches delivered by a number of those in attendance. We address that matter in more detail in Schedule A.

¹⁰⁴³ See, for example, the submissions previously filed in relation to the admissibility of screenshots and other documents on 9 October 2024, including the provisions and cases cited therein, including ss 58 and 183 of the *Evidence Act 1995* (Cth); *Commissioner of Taxation v Cassaniti* [2018] FCAFC 212, [64]-[65]; and *Boucher v The Queen* [2022] VSCA 3, [51]-[52].

- (d) Also in attendance at the Rally were the neo-Nazis. There was a clear ideological link between the neo-Nazis and Mrs Keen. The neo-Nazis themselves confirmed after the Rally that their intention was to support and protect Mrs Keen and the Rally and to express common cause with them against the trans rights protesters in attendance..¹⁰⁴⁴ Their banner, 'DESTROY PAEDO FREAKS', as we have explained in Schedule A above was, and was apt to be understood as, a call for the destruction of trans and gender diverse people, and it was in fact understood in that way by Mr Pesutto, other members of the Leadership Team and, for example, the trans person interviewed on the *Channel 9* news on 19 March 2023..¹⁰⁴⁵
- (e) The presence of the neo-Nazis was expected and quickly identified by organisers and attendees of the Rally, including Ms Jones (at 12:03pm) and the user of the Official LWS twitter handle (at 12:07pm).
- (f) Mrs Deeming had been warned prior to the Rally of some of Mrs Keen's notorious associations and the fact that elements of the far right would attend.
- (g) Mrs Deeming was informed by a policewoman that a big group from the right wing were agitating the left wing.
- (h) Later, Mrs Deeming saw the neo-Nazis, including as they performed the Nazi salute. Rather than leaving the Rally or taking steps to immediately and actively dissociate from that obviously problematic situation, Mrs Deeming remained at the Rally until its conclusion.
- (i) Stassja Frei, one of the attendees and anti-trans speakers at the Rally (and a person publicly associated with Ms Jones as the co-host of her show 'TERF talk down under'), posed for photographs in front of the neo-Nazis. Photos of her doing so began circulating online almost immediately, including in response to Mrs Deeming's own 'disappointed' tweet..¹⁰⁴⁶ At the Rally, Ms Frei also made an appallingly anti-trans speech, which was captured on publicly available videos..¹⁰⁴⁷
- (j) At about 2:30pm on 18 March 2023, Mr Southwick called Mrs Deeming. Mr Southwick, among other things, said that Mrs Deeming needed to publish a media statement denouncing the neo-Nazis, and offered to help her. Despite having seen the neo-Nazis at the Rally and having received this counsel from Mr Southwick,

¹⁰⁴⁴ Exhibit R299, CBC Tab 646.

¹⁰⁴⁵ Exhibit R218, CBC Tab 355.

¹⁰⁴⁶ Exhibit R411, CBC Tab 810.

¹⁰⁴⁷ Exhibit A137, CBC Tab 253, minute 1:19:40-1:23:03.-

Mrs Deeming did not do so unequivocally and promptly, instead posting the tweet at (l) and appearing in the video at (m) below.

- (k) At 4:41pm, Ms Jones published the Jones tweet: ‘Nazis and women want to get rid of paedo filth. Why don’t you?’¹⁰⁴⁸ As we have submitted in Schedule A, by this tweet, Ms Jones equated the views of the women present at the Rally (which in context was readily understood to mean their anti-trans views) with the views of Nazis generally and the neo-Nazis present at the Rally. This served to associate Ms Jones with the neo-Nazis and imply that those at the Rally shared the views of the neo-Nazis. Mrs Deeming has never publicly denounced the Jones tweet or the sentiment it expressed. Despite Ms Jones being in Mrs Deeming’s camp, and present throughout much of the trial, Mrs Deeming did not call her, and gave no explanation for her failure to do so.
- (l) At 6:03pm, Mrs Deeming posted a tweet that criticised the conduct of Victoria Police and trans rights protesters at the Rally.¹⁰⁴⁹ However, this Tweet did not condemn the neo-Nazis; did not identify the neo-Nazis for what they were; and when referring to the Nazi salute included a puerile emoji, all of which served to trivialise what had occurred.
- (m) At approximately 7:50pm, Mrs Deeming, Mrs Keen, Ms Jones and Ms Deves recorded the Video, which was subsequently uploaded to YouTube,¹⁰⁵⁰ in which:
- (i) Mrs Keen described the chat as ‘TERF talk down under’¹⁰⁵¹ and described the day as ‘exceptionally interesting’;¹⁰⁵²
 - (ii) Mrs Deeming described the Rally as ‘a fun day’;¹⁰⁵³
 - (iii) Ms Jones referred to alleged violent trans rights activists in attendance, to which Mrs Keen responded, ‘if someone comes and poses a risk to women, I’m kinda alright with a little bit of violence...proportionate violence’;¹⁰⁵⁴ and
 - (iv) Ms Deves said of the trans rights activists, ‘people need to start waking up to the fact as to how powerful and how dangerous this movement really is...they

¹⁰⁴⁸ Exhibit R184, CBC Tab 269.

¹⁰⁴⁹ Exhibit A142, CBC Tab 275.

¹⁰⁵⁰ Exhibit R37, CBC Tab 893.

¹⁰⁵¹ Exhibit R37, CBC Tab 893, minute 0:05; Exhibit R38, page 1.

¹⁰⁵² Exhibit R37, CBC Tab 893, minute 0:35, Exhibit R38, page 1.

¹⁰⁵³ Exhibit R37, CBC Tab 893, minute 4:10, Exhibit R38, page 2.

¹⁰⁵⁴ Exhibit R37, CBC Tab 893, minute 4:40, Exhibit R38, page 2.

have infiltrated our institutions’, and ‘even the police are afraid of their violence... we need to ask who are the baddies here’...¹⁰⁵⁵

- (n) In the Video, Mrs Deeming, Mrs Keen and Ms Jones showed a shocking ambivalence towards the presence of the neo-Nazis at the Rally, including:
 - (i) Mrs Deeming and Mrs Keen equivocating as to the identity of the neo-Nazis,¹⁰⁵⁶ including speculating they were Antifa, trans rights activists or police in costume;¹⁰⁵⁷
 - (ii) Mrs Deeming laughing and suggesting the Nazi salute was ‘as if they were saying hello’;¹⁰⁵⁸
 - (iii) Ms Jones referring to the neo-Nazis as ‘the Nazis’ in inverted commas;¹⁰⁵⁹ and
 - (iv) Ms Keen calling the presence or actions of the neo-Nazis ‘a tool of the left’...¹⁰⁶⁰
- (o) Mrs Deeming’s participation in the Video, and her comments within the Video:
 - (i) showed a wilful dismissal of the advice she had received from Victoria Police and Mr Southwick, and the obvious inferences to be drawn from the neo-Nazis’ banner and salute; and
 - (ii) demonstrate a failure to take seriously and properly condemn the attendance of the neo-Nazis at the Rally, and a preoccupation with the alleged activities of policer and counter-protesters instead.
- (p) The video concluded with Mrs Keen stating, ‘here’s to us being amazing’ and Mrs Deeming, Mrs Keen, Ms Deves and Ms Jones clinking champagne flutes...¹⁰⁶¹

The 19 March 2023 meeting: Annexure A, Part C, [42]-[48]

41.24. We have addressed this meeting in detail elsewhere: see [9] above. By the end of the meeting, it was clear to all members of the Leadership Team that Mrs Deeming had failed to understand the seriousness of what had occurred (including her participation in the Video and the public

¹⁰⁵⁵ Exhibit R37, CBC Tab 893, minute 17:30, Exhibit R38, page 5.

¹⁰⁵⁶ Exhibit R37, CBC Tab 893, minute 3:50, 12:45; Exhibit R38, page 2 and 4.

¹⁰⁵⁷ Exhibit R37, CBC Tab 893, minute 5:30, 11:00, 11:45, 12:50, 14:10; Exhibit R38, page 2, 3, 4.

¹⁰⁵⁸ Exhibit R37, CBC Tab 893, minute 13:20, Exhibit R38, page 4.

¹⁰⁵⁹ Exhibit R37, CBC Tab 893, minute 15:25, Exhibit R38, page 5.

¹⁰⁶⁰ Exhibit R37, CBC Tab 893, minute 16:15, Exhibit R38, page 5.

¹⁰⁶¹ Exhibit R37, CBC Tab 893, minute 24:00, Exhibit R38, page 7.

links that were by then already being drawn) and its implications for the reputation of the Party.

- 41.25. By the end of the meeting, Mrs Deeming's position was that she prepared to do no more than issue some kind of general denunciation of Nazism and 'accusations of paedophilia for the trans community'..¹⁰⁶²

Mrs Deeming's subsequent conduct and willingness to continue to associate: Annexure A, Part C, [56]

- 41.26. Much was made by counsel for Mrs Deeming during the trial of her alleged willingness to denounce the conduct of Mrs Keen and Ms Jones at the Leadership Team meeting and her not having been given a proper opportunity to consider the materials presented at the meeting.

- 41.27. For the reasons set out above at [9], Mr Pesutto disputes that interpretation of the 19 March 2023 meeting. The true position is that, by the end of the meeting, Mrs Deeming's settled position was that she was prepared to issue some form of general denunciation of Nazism and of a link between trans genderism and paedophilia: see [9.19] and [9.23] above.

- 41.28. In addition, however, Mr Pesutto relies on Mrs Deeming's continued failures to publicly condemn anything..¹⁰⁶³ (save for her 27 March Press Release, which she has since resiled from) and her subsequent conduct..¹⁰⁶⁴ and continued willingness to publicly associate with Mrs Keen and Ms Jones..¹⁰⁶⁵ To the extent some (but not all) of the contextual imputations contain a temporal element, that is an irrelevant detail..¹⁰⁶⁶ when considering whether Mr Pesutto has justified the substance of the defamatory sting.

- 41.29. Examples of Mrs Deeming's subsequent conduct and her continued associations include:

- (a) Mrs Deeming's tweet of 27 March 2023, in response to a tweet from Ms Jones, in which she said, 'Don't worry, I never condemned you, or KD, or KJ'..¹⁰⁶⁷ KJ was a reference to Mrs Keen. That tweet was, as Mr Pesutto correctly interpreted it, wholly inconsistent with the position that Mrs Deeming had adopted in the response prepared her behalf by solicitors and circulated to the members of the Party at about 6:30am on

¹⁰⁶² Exhibit A2, lines 912-914, 936-939.

¹⁰⁶³ For example, to ever publicly denounce the Jones tweet (despite what she has said in private): Annexure A, [34]: CBA, tab 3, page 124.

¹⁰⁶⁴ Annexure A, [56], being her subsequent conduct which was inconsistent with the 27 March Press Release: CBA. Tab 3 page 129-130.

¹⁰⁶⁵ Annexure A, [57], which includes cross-reference to the subsequent conduct, and the fact many parts of Annexure A, including [89], includes conduct 'after the Rally' and Mrs Deeming's 'associations with Keen and Jones': CBA tab 3, page 130 and 135.

¹⁰⁶⁶ *Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1, [306] (Gillard AJA); *Sutherland v Stopes* [1925] AC 47, 79; *Alexander v The North Eastern Railway Co* (1865) 6 B & S 340; 122 ER 1221.

¹⁰⁶⁷ Exhibit R48, CBC Tab 484.

27 March 2023,¹⁰⁶⁸ and the statement released in conjunction with the leader's office later that day.¹⁰⁶⁹

- (b) On 29 October 2023, Mrs Deeming tweeted, among other things, 'I was smeared as a Nazi associate & expelled from my MP team because I refused denounce 3 other innocent women who campaigned with me for sex based rights & child safeguards-as Nazi's'..¹⁰⁷⁰
- (c) On 16 November 2023, tagging Ms Keen, Ms Jones and Ms Deves in a tweet..¹⁰⁷¹
- (d) On 20 November 2023, posting a statement on Facebook¹⁰⁷² and X,¹⁰⁷³ which included the following assertions:
 - (i) 'Both during and after our rally, I and the organisers publicly condemned the Neo-Nazis, Nazism, antisemitism and bigotry of any kind' [despite knowing this was not true];
 - (ii) 'The next day, I was called into a meeting and informed by the Liberal Party leadership that if I refused to denounce the 'Let Women Speak' rally and it's organisers as being extremists and Nazi's/Nazi associates [despite knowing this was not true]; and
 - (iii) 'I was then falsely and publicly accused by the Victorian Liberal Leader, Mr John Pesutto, of being a knowing associate of Neo-Nazi sympathisers and extremists, and therefore deserving of expulsion from the Parliamentary Liberal Party. Mr Pesutto has denied making these accusations against me. He claims instead that he sought my expulsion because I'm guilty by association with persons, who were themselves guilty by association with neo-Nazism, The guilt by association fallacy is well known. But Mr Pesutto's version of guilt by association twice or thrice removed for the most extreme and serious punishment of expulsion, appears to be an excuse rather than a reason. Even Mr Pesutto's very own 'evidence dossier', which he distributed to my colleagues, the public and the media, has since been shown to be false' [despite knowing this was not true and admitting almost every part of the Expulsion Motion and Dossier was true under oath during cross-examination].

¹⁰⁶⁸ Exhibit R42, CBC Tab 473.

¹⁰⁶⁹ Exhibit R45, CBC Tab 487.

¹⁰⁷⁰ Exhibit R532, CBC Tab 937.

¹⁰⁷¹ Exhibit R301, CBC Tab 650.

¹⁰⁷² Exhibit R302, CBC Tab 651.

¹⁰⁷³ Exhibit R303, CBC Tab 652.

- (e) On 19 March 2024, posting a tweet saying, ‘It’s been a year. We did nothing wrong. #LetWomenSpeak’ along with a photo of Mrs Deeming, Mrs Keen, Ms Jones and Ms Deves.¹⁰⁷⁴ Mrs Keen reposted that tweet, on which Mrs Deeming commented ‘Still proud to be associated with you xx’.¹⁰⁷⁵ Mrs Keen also commented on the tweet, to which Mrs Deeming replied, including saying ‘Still one of the best nights of my life’.¹⁰⁷⁶

41.30. At the end of her cross-examination, Mrs Deeming confirmed that, as at 19 September 2024, she was still proud to be associated with Mrs Keen and Ms Jones.¹⁰⁷⁷

Conclusion

41.31. In light of the above matters, Mrs Deeming’s conduct before, during, and after the Rally (including her failure to clearly and unequivocally disassociate herself from the neo-Nazis), and her associations with Mrs Keen and Ms Jones and continued willingness to associate with them even now, having regard to their public associations and conduct, taken as a whole, is:

- (a) conduct that conflicts with Mr Pesutto’s values and the values, ideals and standards of the Party under Mr Pesutto’s leadership;
- (b) not the conduct of a person who is a fit and proper person to be a member of the Party under Mr Pesutto’s leadership; and
- (c) conduct likely to bring discredit on the Victorian Parliament and the Party.

41.32. Mr Pesutto submits that, in those circumstances, the following contextual imputations are matters of substantial truth: (a) the Media Release Imputation; (b) the 3AW Imputations; (c) the ABC Imputation; (d) the Press Conference Imputations and SOC imputations [19.6]–[19.8]; and (e) the Expulsion Motion Imputations and SOC imputations [24.1]–[24.4].

41.33. Mr Pesutto will be entitled to succeed in his defence of contextual truth, in respect of any of the Publications, if by reason of the substantial truth of the contextual imputations in respect of that Publication, any residual imputations pleaded by Mrs Deeming in her SOC in respect of that Publication that are found to be carried, but which are not matters of substantial truth, do not further harm Mrs Deeming’s reputation.

¹⁰⁷⁴ Exhibit R540, CBC Tab 946.

¹⁰⁷⁵ Exhibit R60, CBC Tab 947.

¹⁰⁷⁶ Exhibit 541, CBC Tab 948.

¹⁰⁷⁷ T350.43 (Deeming XXN).

41.34. As we submitted at [2.4] above, it is difficult to develop meaningful submissions in relation to how that analysis is to be conducted in the absence of the benefit of the Court's rulings in relation to (a) whether there are any residual imputations and, if so, what they are; and (b) whether there are any contextual imputations and, if so, what they are.

J. DAMAGES – GENERAL

42. Applicable principles

42.1. The principles applicable to the court's assessment of general damages are uncontroversial and were recently set out in *Palmer v McGowan (No 5)*¹⁰⁷⁸ (referred to in *Russell v Australian Broadcasting Corporation (No 3)*).¹⁰⁷⁹

42.2. Any award of damages is governed by the provisions of Part 4, Division 3 of the Act.

42.3. Pursuant to s 34 of the Act, the Court is required to 'ensure that there is an appropriate and rational relationship' between the harm found to have been suffered and the amount of damages awarded.¹⁰⁸⁰

42.4. Section 34 provides an ever-present guide to ensure remedies are fair and effective in the context of achieving the objects of the Act, with the aim of ensuring consistency of awards in defamation proceedings across jurisdictions and to correct any imbalance with awards of damages for personal injuries.¹⁰⁸¹

42.5. The maximum amount of damages for non-economic loss (excluding aggravated damages) that may be awarded is limited (capped) by the operation of ss 35(1) and 35(3) of the Act. The cap was increased from 1 July 2024 in accordance with s 35(3) of the Act to the sum of \$478,500 (G 26 of 27 June 2024), with the applicable cap being that in force at the time of judgment.

42.6. Section 35(2B) of the Act now provides that any aggravated damages must be awarded separately.

42.7. Section 36 provides that 'the court is to disregard the malice or other state of mind of the [respondent] at the time of the publication of the defamatory matter to which the proceedings relate or at any other time except to the extent that the malice or other state of mind affects the harm sustained by the [applicant]'.

¹⁰⁷⁸ (2022) 404 ALR 621 (*Palmer (No 5)*).

¹⁰⁷⁹ (2023) 303 FCR 372, [473].

¹⁰⁸⁰ *Palmer (No 5)*, [425].

¹⁰⁸¹ *Stead v Fairfax Media Publications Pty Ltd* (2021) 387 ALR 123, [236].

- 42.8. The three purposes of an award of general damages are: first, consolation for the personal distress and hurt caused by the publication, secondly, reparation for the harm done to the person's reputation, and thirdly, vindication of reputation.¹⁰⁸²
- 42.9. The assessment is an intuitive evaluative process conducted 'at large' but subject to the provisions of Part 4, Division 3 of the Act.¹⁰⁸³
- 42.10. At common law, once an applicant had proved the publication of a libel, and in the absence of a successful defence, an entitlement arose to an award of at least nominal damages.¹⁰⁸⁴ That presumption has, however, been disrupted.
- 42.11. In *Dank v Nationwide News Pty Ltd*, McCallum J said:¹⁰⁸⁵

The need to nominate a nominal sum in this jurisdiction may be doubted. The [Act s 22] expressly contemplates the possibility that, even where no defence to a defamatory publication has been established, the judicial officer may determine that no amount of damages should be awarded. So much is explicit in the requirement to determine 'the amount of damages (if any) that should be awarded to the plaintiff'.

- 42.12. To the extent any doubt remained about that position,¹⁰⁸⁶ the abolition of the presumption of damage that existed at common law has made the point academic.¹⁰⁸⁷

43. Consolation for the personal distress and hurt caused by the Publications

- 43.1. Mr Pesutto accepts that Mrs Deeming is genuinely distressed and aggrieved by the events that transpired following the Rally, including Mr Pesutto's publication of the Publications.
- 43.2. Mr Pesutto also accepts that, if Mrs Deeming is successful, she is entitled to damages for hurt, distress and embarrassment. Defamation being a tort, however, the damages to which she is entitled must be shown by Mrs Deeming to be caused by the Publications, and not too remote. Mrs Deeming is not entitled to damages for hurt feelings caused by:
- (a) the many publications, before the Publications, by third parties smearing Mrs Deeming in the most explicit terms with imputations of Nazism, Nazi sympathy and support for Nazism;¹⁰⁸⁸

¹⁰⁸² *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 60-1; confirmed in *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327, [60].

¹⁰⁸³ *Palmer (No 5)*, [428].

¹⁰⁸⁴ *Ibid*, [503]-[506].

¹⁰⁸⁵ [2016] NSWSC 295, [75]; cited in *Palmer (No 5)*, [507].

¹⁰⁸⁶ *Lehrmann*, [984]-[988].

¹⁰⁸⁷ *Selkirk v Wyatt* (2024) 302 FCR 541, 563 [94]; *Peros (No 3)* [2024] QSC 192, [102]; D Rolph, *Rolph on Defamation* (Thomson Reuters, 2nd ed, 2024) 461 [16.3].

¹⁰⁸⁸ See Serious Harm at [14].

- (b) editorial decisions made by other publishers that have caused her distress, such as the decision of the *Sunday Herald Sun* on 21 March 2023 to publish a two page spread of which included a doctored photo that showed Mrs Deeming standing immediately in front of the neo-Nazis while they were on the steps of Parliament House;¹⁰⁸⁹
- (c) publications made by, or as a result of the conduct of, Mrs Deeming herself, such as those particularised in Annexure D to the Defence;
- (d) other matters about which Mrs Deeming is aggrieved, but which are unrelated to the Publications, such as the Leadership Team’s decision to move a motion against her, the outcome of the meetings on 27 March 2023 and 12 May 2023, and the events occurring between those two dates; and
- (e) abuse that Mrs Deeming has received, where the cause of the abuse is not shown to be a Publication, such as where it more likely to be the result of some other matter, such as one or more of the matters identified in (a) to (d) above.

43.3. If the Court gets to the stage of awarding general damages to Mrs Deeming, she will be entitled to damages only for hurt flowing from the Publications, and only those Publications she succeeds upon.

44. Harm to reputation and vindication

Overlap between the serious harm element and harm to reputation for the purposes of damages

44.1. If the Court gets to the point of awarding damages for one or more of the Publications, it will have been satisfied that Mrs Deeming has established the serious harm element under s 10A of the Act, and that therefore one or more of the Publications caused or was likely to cause serious harm to Mrs Deeming’s reputation.

44.2. There is thus a substantial overlap between the matters Mrs Deeming must prove for the purposes of establishing the serious harm element of the cause of action, and the damages for vindication of reputation to which she will be entitled if Mr Pesutto is found liable. There are, however, two differences between the two analyses:

- (a) If damages are to be awarded for multiple Publications, the Court may consider and aggregate the harm caused by each of the Publications and award a single sum of damages, noting the ‘cap’ applies to the *proceeding* and not to each Publication.

¹⁰⁸⁹ CBB Tab 1, page 29, [145]-[147] (Affidavit of Moira Deeming dated 27 May 2024).

- (b) Mr Pesutto accepts that any republications of the defamatory sense and substance of a Publication are (unlike the position with respect to serious harm) matters the Court can properly have regard to when considering what damages to award.

Extent of publication and republications

- 44.3. The extent of the direct publication of the Publications has been addressed above: see [20.2], in Serious Harm.
- 44.4. Mrs Deeming has pleaded that she relies upon certain particularised republications of the sense and substance of all of the Publications (save for the 3AW interview) in support of her claim for damages.¹⁰⁹⁰
- 44.5. Mr Pesutto's position on each of the alleged republications is set out in detail at Schedule B – Table of Republications.
- 44.6. Almost all of the alleged republications do not constitute republications of the defamatory sense and substance of the Publications, for one or more of the following reasons, which are more fully set out in respect of each alleged republication in Schedule B – Table of Republications:
- (a) the relevant alleged republication does not publish the defamatory sense and substance of the relevant Publication;¹⁰⁹¹
 - (b) the relevant alleged republication refutes the defamatory sense and substance of relevant Publication, such that it is incapable of bearing a defamatory meaning to the effect of an imputation relied on by Mrs Deeming;¹⁰⁹² and/or
 - (c) the relevant republication has not been pleaded.
- 44.7. The only pleaded republication that Mr Pesutto accepts is actually a republication of the defamatory sense and substance of any of the Publications is one article in the *Star Observer*, entitled 'Liberal MP Deeming Faces Expulsion for Attending Melbourne Anti-Trans Rally' dated 20 March 2023.¹⁰⁹³ There is no data showing the extent of publication of that article.
- 44.8. As such, while the Court could take account of that republication if it finds the Media Release is actionable (or any others it accepts are actionable republications following careful review of

¹⁰⁹⁰ SOC [3.4], [12.8], [17.4], [22.5] CBA Tab 2, pages 7-8, 21-22, 26-28, 32-33.

¹⁰⁹¹ *Bracks v Smyth-Kirk* (2009) 263 ALR 522, [127]-[129]; see also *Greinert v Brooker (No 3)* [2018] NSWSC 1771, [19]-[21], including the relevant parts of *Greinert v Brooker (No 2)* [2018] NSWSC 1763 quoted therein, as discussed more fully and applied in Schedule B - Table of Republications.

¹⁰⁹² *Walker v Brimblecombe* (2015) 2 Qd R 384, 392 [28].

¹⁰⁹³ CBB (Expert Evidence), Tab 6.14, page 32-38.

Schedule B – Table of Republications), the effect on any damages award of any republications is, in our submission, likely to be minimal.

- 44.9. Schedule B – Table of Republications provides detailed reasons with respect to each of the legal and factual arguments that apply to each individual republication, as well as the view/publication data that can be used by the Court if it disagrees with Mr Pesutto’s submissions on any of those matters.

The need for vindication

- 44.10. In *Palmer (No 5)*, Lee J accepted that vindication is a separate consideration that must be given weight in assessing any award of damages, but found that if there is no real damage to reputation, there is little to vindicate, as there is little need for an award of damages to convince the ordinary bystander of the baselessness of the charge if it has not materially affected the opinion of the ordinary bystander.¹⁰⁹⁴

- 44.11. In this case, the need for vindication is tempered by:

- (a) the extensive evidence referred to in the serious harm section above that suggests it is unlikely that people changed their minds concerning Mrs Deeming as a result of the Publications; and
- (b) Mr Pesutto’s repeated public statements that he does not believe Mrs Deeming to be a neo-Nazi, a white supremacist, or anything of similar substance or effect.¹⁰⁹⁵

45. Mitigation

- 45.1. Should Mrs Deeming be entitled to general damages, Mr Pesutto pleads and relies on a number of matters in ‘mitigation of damages’, including:¹⁰⁹⁶

- (a) the substantial truth of various imputations and the particulars set out in Annexure A of his Defence, already discussed above in the Contextual Truth section;

¹⁰⁹⁴ *Palmer*, [496]-[499].

¹⁰⁹⁵ Annexure C of the Defence: CBA Tab 3, pages 143-145; Media Release, lines 5-7: CBA Tab 6, pages 163-164; 3AW Interview, lines 11-13, 97-98, 101-104, 116-117, 135-138: CBA Tab 9, pages 169-175; Press Conference, lines 12-16, 73-79, 147-149, 237-240, 418-420, CBA Tab 14, pages 182-195; Mr Pesutto’s interview with Peta Credlin on Sky News dated 20 March 2023 (Exhibit A29, with transcript Exhibit A30); Mr Pesutto’s interview with 3AW on 27 March 2023 (Exhibit A19, with transcript Exhibit A20); Mr Pesutto’s press conference dated 27 March 2023 (Exhibit A204, CBC Tab 493, pages 2478-2493); Mr Pesutto’s press conference dated 4 May 2023 (as reported in Exhibit R273).

¹⁰⁹⁶ Defence [68.1]-[68.5]: CBA Tab 4, page 116, Annexures A (pages 119-135), Annexure C (pages 143-145) and Annexure D (pages 146-149). At [68.7], Mr Pesutto indicates an intention to rely upon any other compensation received by Mrs Deeming in relation to the Publications or those having the same meaning or effect. However, no evidence of any such compensation was discovered or filed and accordingly, Mr Pesutto does not press that allegation.

- (b) Mr Pesutto’s repeated public statements that he did not believe Mrs Deeming to be a neo-Nazi, a white supremacist, or anything of similar substance or effect;¹⁰⁹⁷
 - (c) the fact that Mrs Deeming made, caused or acceded to public statements falsely asserting that Mr Pesutto has said that she is a Nazi or has Nazi associations or is a Nazi sympathiser, thereby causing or contributing to the damage to her reputation,¹⁰⁹⁸ as explained above in relation to serious harm, and set out more fully in Annexure D to the Defence and Schedule B – Table of Republications to these submissions; and
 - (d) Mrs Deeming’s prior damaged reputation, which we have addressed in the serious harm section of these submissions; and
 - (e) such other evidence as is properly admitted at trial.
- 45.2. The law has traditionally placed strict limits on the evidence that is admissible solely for the purposes of mitigation of damages. However, there have always been exceptions, and a respondent is generally entitled to rely in mitigation of damages on any other evidence which is properly before the court (including evidence led in support of a failed affirmative defence),¹⁰⁹⁹ so long as it bears upon the relevant sector of the applicant’s reputation.¹¹⁰⁰
- 45.3. Since at least *Burstein v Times Newspapers Ltd*,¹¹⁰¹ it has also been permissible to rely on directly relevant background context to mitigate damages.
- 45.4. Further, the rule in *Scott v Sampson* and evidence of bad reputation has always been subject to exceptions,¹¹⁰² and the law on both reputation and the admissibility of evidence in relation to it has changed further since the Acts and, in particular, the introduction of the serious harm element in s 10A.¹¹⁰³

¹⁰⁹⁷ Annexure C of the Defence: CBA Tab 4, pages 143-145: Media Release, lines 5-7: CBA Tab 6, pages 163-164; 3AW Interview, lines 11-13, 97-98, 101-104, 116-117, 135-138: CBA Tab 9, pages 169-175; Press Conference, lines 12-16, 73-79, 147-149, 237-240, 418-420: CBA Tab 14, pages 182-195; Mr Pesutto’s interview with Peta Credlin on Sky News dated 20 March 2023 (Exhibit A29, with transcript Exhibit A30); Mr Pesutto’s interview with 3AW on 27 March 2023 (Exhibit A19, with transcript Exhibit A20); Mr Pesutto’s press conference dated 27 March 2023 (Exhibit A204, CBC Tab 493, pages 2478-2493); Mr Pesutto’s press conference dated 4 May 2023 (as reported Exhibit R273).

¹⁰⁹⁸ *Hanson-Young v Leyonhjelm (No 4)* [2019] FCA 1981, [322]; Defence, [68.4]: CBA Tab 3, page 116 and Annexure D (pages 146–149); Exhibits R51, R286, R303, R529-530, R532-536, R538-539 CBC Tabs 602, 611, 652, 934-935, 937- 941, 944-945; Some further leak/communications with journalists that may have caused harm to Mrs Deeming’s reputation are also referred to in Schedule A to these submissions.

¹⁰⁹⁹ *Pamplin v Express Newspapers Ltd* [1988] 1 WLR 116, 120 recently quoted with approval in *Edwards v Nine Network Australia Pty Limited (No 5)* [2024] FCA 422 (*Edwards (No 5)*), [437].

¹¹⁰⁰ *Edwards (No 5)* [2024] FCA 422, [437]-[44]; *Lehrmann* [999]-[1008].

¹¹⁰¹ *Burstein*, discussed in *Lehrmann*, [1002]-[1003].

¹¹⁰² *Peros (No 3)*, [271]-[275] and the cases cited therein.

¹¹⁰³ *Selkirk v Wyatt* (2024) 302 FCR 541, 563 [94]; *Peros (No 3)*, [51]-[53] and more generally.

- 45.5. Ultimately, the guiding principle on admissibility is a practical one, controlling the reception of evidence in mitigation of damages which might prolong a trial or lead to a trial-within-a-trial.¹¹⁰⁴
- 45.6. But where evidence has been properly admitted in support of an issue in the case, such as the directly relevant background evidence to the publications, an affirmative defence, or in rebuttal of an applicant’s case on damages, and that evidence *also* bears upon the applicant’s reputation, the Court does not ignore it and assess reputation or damages ‘in blinkers’.¹¹⁰⁵
- 45.7. In the present matter, there is much evidence that is properly before the Court on issues between the parties that also bears upon both Mrs Deeming’s reputation and the appropriate and rational relationship between the harm sustained and the damages that ought to be awarded, including:
- (a) evidence as to the context in which the decisions were made by the Leadership Team and Mr Pesutto’s state of mind in publishing the Publications (for the purposes of the s 29A, *Lange* and honest opinion defences);
 - (b) serious harm, and in particular, consideration of causation and whether Mrs Deeming already had a mixed, polarising, entrenched,¹¹⁰⁶ or damaged.¹¹⁰⁷ reputation such that the publication of the Publications did not cause or was not likely to cause serious harm to her reputation;¹¹⁰⁸ and
 - (c) evidence rebutting assertions by Mrs Deeming and her witnesses and for repairing the credit of Mr Pesutto, who was questioned extensively on the basis of his evidence concerning Mrs Deeming’s reputation.¹¹⁰⁹
- 45.8. Identification of the relevant sector of an applicant’s reputation does not call for a minute or artificial dissection.
- 45.9. As Wigney J said in *Edwards (No 5)* (emphasis added):¹¹¹⁰

This principle [of confining the sector] must, however, be approached with a ‘modicum of common sense’ and ‘[q]uestions of degree are involved’.^[1111] In my view, it is not appropriate to minutely dissect and parse the imputation in question so as to

¹¹⁰⁴ *Lehrmann*, [1004], citing *Burstein*, 596; *Speidel v Plato Films Ltd* [1961] AC 1090, 1143-1144. See also *Peros (No 3)*, [277]-[279].

¹¹⁰⁵ *Lehrmann*, [1008]; *Wright v McCormack* [2023] EWCA Civ 892, [59]-[61], [76] (*Wright*).

¹¹⁰⁶ *Palmer (No 5)*, [437]-[448]; *Peros (No 3)*, [64].

¹¹⁰⁷ *Peros (No 3)*, [241]-[242].

¹¹⁰⁸ Section 34 of the Act; *Palmer (No 5)*, [433], [437]-[448], [470]; *Hanson-Young v Leyonhjelm (No 4)* [2019] FCA 1981, [293]-[294] and the various other cases cited in serious harm.

¹¹⁰⁹ T660-667 (Pesutto XXN).

¹¹¹⁰ [2024] FCA 422, [440].

¹¹¹¹ *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496, [690].

identify the narrowest possible sector, so that it can then be submitted that certain evidence of bad reputation is irrelevant because it does not fall within that narrowly defined sector. Nor should the evidence of bad reputation be analysed in that way. As Fitzgerald AJA noted in *Australian Broadcasting Corporation v McBride*,^[1112] the imprecision and difficulties that may arise in respect of the “same sector” test evaporate once it is understood that **the ‘ultimate test is whether the facts, matters and circumstances affecting a plaintiff’s reputation which a defendant seeks to rely on in mitigation could rationally diminish the harm to the plaintiff’s reputation from the defamatory imputation’**. I respectfully agree. The issue should be approached with that ultimate test in mind rather than by some minute and artificial dissection of the applicant’s reputation.

- 45.10. Lee J explained it differently, describing how to make use of Mr Lehrmann’s misconduct during the trial when assessing damages: ‘all this is a more complex way of saying that an assessment reflecting an appropriate and rational relationship between the harm sustained and the quantum of damages does not occur “in blinkers”’.¹¹¹³
- 45.11. In this case, the relevant sector of Mrs Deeming’s reputation, in our submission, extends to her reputation for holding, expressing, and giving succour to controversial or extreme social or political views.

46. Comparable awards

- 46.1. While each case is different, any damages assessment must both ensure that there is an appropriate and rational relationship between the harm found to have been suffered and the amount of damages, and strive to ensure consistency of awards of damages in defamation proceedings.
- 46.2. The most relevant analogues are the recent awards in cases involving (often serious) allegations by politicians or individuals against other polarising politicians, including *Palmer (No 5)* (Mr Palmer, \$5,000; Mr McGowan, \$20,000, no real harm, no mitigation; some distress to Mr McGowan); *Dutton v Bazzi*.¹¹¹⁴ (\$35,000, allegation which caused deep offence/distress, no mitigation), *Hanson-Young v Leyonhjelm (No 4)*.¹¹¹⁵ (\$120,000, real hurt and significant aggravation included), *Greenwich v Latham*.¹¹¹⁶ (\$100,000, real hurt and no mitigation, plus \$40,000 in aggravation).

¹¹¹² (2001) 53 NSWLR 430, [106].

¹¹¹³ *Lehrmann*, [1008]; *Wright*, [59]-[61], [76].

¹¹¹⁴ [2021] FCA 1474, [193]-[198], as summarised in *Palmer (No 5)*, [513].

¹¹¹⁵ [2019] FCA 1981, [237]-[353], as summarised in *Palmer (No 5)*, [512].

¹¹¹⁶ [2024] FCA 1050, [265]-[267].

K. DAMAGES – AGGRAVATED DAMAGES

47. General principles

- 47.1. At common law, aggravated damages may be awarded to compensate an applicant for harm that has been exacerbated by a respondent’s conduct in publishing defamatory matter or by subsequent conduct.¹¹¹⁷
- 47.2. The Court is entitled to look at the whole of the conduct of the respondent from publication to the time of judgment.¹¹¹⁸
- 47.3. In order to establish any entitlement to aggravated damages, the applicant must first establish that the respondent’s conduct was improper, unjustifiable or lacking in *bona fides*.¹¹¹⁹
- 47.4. The relevant principles were recently summarised in *Greenwich v Latham* as follows:¹¹²⁰

Aggravated damages are compensatory, not punitive, and they are awarded ‘precisely because other conduct by the defendant..., which may or may not take the form of another libel, rubs salt in the wounds inflicted by the libel sued upon’. See *Stead v Fairfax Media Publications Pty Ltd*,^[1121] approving *Sutcliffe v Pressdram Ltd*.^[1122]

They are awarded to compensate an applicant where the respondent’s conduct towards the applicant was improper, unjustifiable or lacking in *bona fides* and does in truth aggravate the applicant’s hurt to feelings they have already suffered. See *Triggell v Pheaney*^[1123] (‘the conduct of the defence may be taken into consideration not only as evidencing malice at the time of publication or afterwards, as, for instance, in filing a plea, but also as improperly aggravating the injury done to the plaintiff, if there is a lack of *bona fides* in the defendant’s conduct or it is improper or unjustifiable’); *KSMC Holdings Pty Ltd t/a Hubba Bubba Childcare on Haig v Bowden*^[1124] (‘Aggravated damages are awarded where the defendant’s conduct towards the plaintiff was improper, unjustifiable, or lacking in *bona fides* ... Hence, failure to apologise ... conducting proceedings in a certain manner, and continuing publication ... may all result in an award of aggravated damages if such conduct was improper, unjustifiable, or lacking in *bona fides*’).

Section 36 of the Act is headed ‘State of mind of defendant generally not relevant to awarding damages’ and provides:

In awarding damages for defamation, the court is to disregard the malice or other state of mind of the defendant at the time of the publication of the defamatory matter to which the proceedings relate or at any other time except to the extent that the malice or other state of mind affects the harm sustained by the plaintiff.

¹¹¹⁷ *Russell*, [494] (citing *Bickel v John Fairfax & Sons Ltd* [1981] 2 NSWLR 474, 496 per Hunt J).

¹¹¹⁸ *Russell*, [495].

¹¹¹⁹ *Triggell v Pheaney* (1951) 82 CLR 497, 513-514 (Dixon, Williams, Webb and Kitto JJ).

¹¹²⁰ *Greenwich v Latham* [2024] FCA 1050, [265]-[267].

¹¹²¹ [2021] FCA 15; (2021) 387 ALR 123, 179 [273] (Lee J).

¹¹²² [1991] 1 QB 153, 170 (Donaldson MR).

¹¹²³ (1951) 82 CLR 497, 514 (Dixon, Williams, Webb and Kitto JJ).

¹¹²⁴ (2020) 101 NSWLR 729, 760 [150] (Payne JA, Basten and White JJA agreeing).

48. Matters pleaded in aggravation of damages

Overview – the breadth and limited relevance of the allegations

- 48.1. Mrs Deeming has pleaded 32 different matters in aggravation of damages, including common pleas (such as alleged knowledge of falsity, the failure to apologise and conduct of the case) and numerous fact-specific allegations of conduct comprising conduct defined in the SOC as the Prior Conduct, the Media Campaign and the Subsequent Conduct.¹¹²⁵
- 48.2. Most are of these matters are of no, or at most, marginal relevance. Many concern allegations concerning the internal machinations of the Party and its processes. In some instances, they rely on the conduct of other persons and speculation that Mr Pesutto was somehow behind it. In most instances, there is no proper basis to allege that any of Mr Pesutto's conduct was improper, unjustifiable or lacking in *bona fides*.¹¹²⁶
- 48.3. The pleading of aggravated damages has, like Mrs Deeming's pleading of serious harm and meaning, distracted from the real issues in dispute. Defamation is a tort. In accordance with ordinary tortious principles, damages must be causally related to the publication of defamatory matter and not too remote; compensation is not available in relation to any *novus actus interveniens*. The quantum of any damages award Mrs Deeming could reasonably expect in this proceeding could not sensibly justify the time and costs involved in making discovery, filing evidence and drafting submissions concerning all of them; or the time spent at trial investigating them.¹¹²⁷
- 48.4. In *Russell*, Lee J lamented the applicant's reliance in that case upon 58 particulars of aggravated damages, stating it would not be consistent with the efficient use of the Court's time and resources for a judgment to be written addressing all 58 circumstances and entreated Mr Russell's senior counsel (also Mrs Deeming's senior counsel) to 'select the three best circumstances of aggravation said to found Mr Russell's entitlement to aggravated damages'.¹¹²⁸
- 48.5. We commend a similar approach in this case.
- 48.6. In the interests of attempting to deal with this aspect of the case as efficiently as possible, we have attempted to group different classes of circumstance together, where possible.

¹¹²⁵ SOC [38.1]-[38.8], including the Prior Conduct [38.5(a)-(d)], the Media Campaign [38.6(a)-(c)] and the Subsequent Conduct [38.7(a)-(c)]: CBA Tab 2, pages 37-39; See also the Reply at [8.1]-[8.5]: CBA Tab 4, pages 37-41 and 157-158.

¹¹²⁶ *Triggell v Pheeney* (1951) 82 CLR 497, 513-514 (Dixon, Williams, Webb and Kitto JJ).

¹¹²⁷ Mrs Heath's role in leaking the minutes is one example of collateral damage arising from the way the case was put.

¹¹²⁸ *Russell*, [459]-[460].

Section 140 of the Evidence Act and the Briginshaw standard

- 48.7. We repeat our submissions in section [8] above regarding the standard of proof concerning these allegations, which in order to sound in aggravated damages, require a finding not only that Mr Pesutto's alleged conduct occurred and caused Mrs Deeming hurt, but also that it was improper, unjustifiable or lacking in *bona fides*. They are findings of dishonesty, akin to fraud.
- 48.8. If the Court finds that Mr Pesutto was an honest witness, as we submit it should, it is hard to see how any of the particulars could justify an award.

Alleged falsity or reckless indifference to falsity: SOC, [38.1]

- 48.9. Mrs Deeming alleges that *Mr Pesutto's knowledge* of the falsity of the imputations conveyed by the matters complained of, or, alternatively, *his reckless indifference* to the truth or falsity of those imputations, warrants an award of aggravated damages.¹¹²⁹
- 48.10. Mr Pesutto's evidence (which he maintained under cross-examination) was that he did not accept that the vast majority of Mrs Deeming's pleaded imputations are conveyed by the Publications and he did not intend to convey them,¹¹³⁰ and that he believes that the meanings and opinions he intended to convey by way of the Publications were true.¹¹³¹ That was, in our submission, honest evidence that ought to be accepted.
- 48.11. In relation to the most serious alleged imputations – of Nazism, Nazi sympathy and so on – Mr Pesutto was clear that he never intended to convey any such imputations and did not consider that he had. That evidence was consistent with Mr Pesutto's own conduct in repeatedly stating, both in the Publications themselves and later, that he did not and does not believe Mrs Deeming is a Nazi or a Nazi sympathiser or anything of the sort.¹¹³²
- 48.12. If the Court were to find Mr Pesutto's beliefs as to meaning and falsity were so reckless as to constitute conduct that was improper, unjustifiable or lacking in *bona fides*, it would also necessarily impugn, at least:

¹¹²⁹ SOC, [38.1]: CBA Tab 2, page 37.

¹¹³⁰ CBB Tab 31, page 382, [62] (Affidavit of John Pesutto dated 22 July 2024).

¹¹³¹ CBB Tab 31, page 345, [104], pages 348-349, [119], [123], [124], page 351, [132] (Affidavit of John Pesutto dated 27 May 2024).

¹¹³² Annexure C of the Defence: CBA Tab 3, pages 143-145; Media Release, lines 5-7; CBA Tab 6, pages 163-164; 3AW Interview, lines 11-13, 97-98, 101-104, 116-117, 135-138; CBA Tab 9, pages 169-175; Press Conference, lines 12-16, 73-79, 147-149, 237-240, 418-420; CBA Tab 14, pages 182-195; Mr Pesutto's interview with Peta Credlin on Sky News dated 20 March 2023 (Exhibit A29, with transcript Exhibit A30); Mr Pesutto's interview with 3AW on 27 March 2023 (Exhibit A19, with transcript Exhibit A20); Mr Pesutto's press conference dated 27 March 2023: CBC Tab 493, pages 2478-2493; Mr Pesutto's press conference dated 4 May 2023 (as reported in Exhibit R273).

- (a) the entire Leadership Team’s evidence concerning their beliefs when they decided to move a motion and sign the Expulsion Motion and Dossier; and
- (b) other witnesses, who helped Mr Pesutto draft either the Media Release or the impugned parts of the email that turned into the Media Release.¹¹³³ and the Expulsion Motion and Dossier (including Mr Johnston, Mr Pintos-Lopez and Dr Bach).

Alleged urgent, excessively distributed and over-sensationalised manner of publication: SOC, [38.2], [38.7(b)]

48.13. Mrs Deeming relies on Mr Pesutto’s conduct in presenting the Publications in an unnecessarily urgent, excessively distributed and over-sensationalised manner.¹¹³⁴ Mrs Deeming also alleges that Mr Pesutto published the Publications more widely than to members of the Party entitled to vote on the proposed expulsion motion and without restriction to members of the public and members of the Liberal Party.¹¹³⁵

48.14. None of the Publications is expressed in an over-sensationalised manner.

48.15. Nor were any of the Publications unnecessarily urgent or excessively distributed. Mr Pesutto explained the reasons why he believed the publication of each of the Publications was in the public interest and needed to be the subject of an urgent response both in his affidavits and in the witness box. He also explained the reasons why he believed it was important for the decision that had been taken by the Leadership Team to be explained to the Victorian public and exposed to public scrutiny and discussion. The relevant evidence is summarised in sections [24] and [25] above.

48.16. There was nothing in Mr Pesutto’s conduct that rises to the level of being improper, unjustifiable or lacking in bona fides.

Failure to apologise; Response to concerns notice; denial of serious harm: SOC, [38.3]-[38.4]; Reply, [8.1]-[8.2]

48.17. Mrs Deeming relies on Mr Pesutto’s failure to apologise.¹¹³⁶ Relatedly, Mrs Deeming alleges Mr Pesutto’s response to her concerns notices ignored or downplayed the obvious and demonstrable consequences of the publication of the Publications;¹¹³⁷ and in her Reply alleges

¹¹³³ CBB Tab 30, page 344, [98] (Affidavit of John Pesutto dated 27 May 2024); CBB Tab 32, page 396, [38] (Affidavit of Matthew Bach dated 27 May 2024).

¹¹³⁴ SOC, [38.2]: CBA Tab 2, page 37.

¹¹³⁵ SOC, [38.7(b)]: CBA Tab 2, page 37.

¹¹³⁶ SOC, [38.3]: CBA Tab 2, page 37; Reply, [8.1]: CBA Tab 4, page 157.

¹¹³⁷ SOC, [38.4]: CBA Tab 2, page 37.

that Mr Pesutto's denial of serious harm in his Defence warrants an award of aggravated damages.¹¹³⁸

- 48.18. As a matter of law, a mere failure to retract or apologise for a defamatory statement does not aggravate damages.¹¹³⁹ An apology may go to mitigation of damages but the absence of an apology, without more, does not increase the plaintiff's hurt or widen the area of publication.¹¹⁴⁰ In order to warrant an award of aggravated damages, the failure to retract or apologise must be improper, unjustifiable or lacking in *bona fides*.¹¹⁴¹ A refusal to apologise may meet this test if it amounts to a continuing assertion of the defamatory imputations.¹¹⁴²
- 48.19. The failure to make an expansive apology in response to Mrs Deeming's concerns notices was not improper.¹¹⁴³ The concerns notices contained hyperbolic meanings (many of which were not ultimately sued on) and sought apologies and actions in relation to matters other than the Publications, some of which Mr Pesutto could not have even actioned himself.
- 48.20. Mr Pesutto's failure to apologise cannot amount, in our submission, to a continuing assertion of the defamatory imputations of which Mrs Deeming complains,¹¹⁴⁴ when he has repeatedly said he did not and was not accusing Mrs Deeming of those things.¹¹⁴⁵
- 48.21. As to Mr Pesutto's denial of serious harm and his conduct of the defence, there is a real dispute as to what the Publications mean; whether each Publication caused or was likely to cause Mrs Deeming serious harm; and as to whether, among other matters, their publication was in the public interest so as to attract the s 29A defence, reasonable so as to attract the *Lange* defence, and expressions of Mr Pesutto's honest opinion so as to attract the s 31 defence. Mr Pesutto was entitled to advance a case in relation to all of those matters. Even if the Court ultimately rejects those arguments, none could be said to have been put forward or persisted with in circumstances that are improper, unjustifiable or lacking in *bona fides*.¹¹⁴⁶

¹¹³⁸ Reply, [8.2]: CBA Tab 4, page 157.

¹¹³⁹ *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 66 (Mason CJ, Deane, Dawson and Gaudron JJ); *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239 (HL), 1247 (Lord Reid), 1262 (Lord Guest).

¹¹⁴⁰ *Ibid.* See also *Mirror Newspapers Ltd v Fitzpatrick* [1984] 1 NSWLR 643, 660 (Samuels JA).

¹¹⁴¹ *Andrews v John Fairfax & Sons Ltd* [1980] 2 NSWLR 225, 243 (Hutley JA), 250-1 (Glass JA); *Mirror Newspapers Ltd v Fitzpatrick* [1984] 1 NSWLR 643, 660 (Samuels JA); *Bauer Media Ltd Pty Ltd v Wilson (No 2)* (2018) 56 VR 674, [105], [119]-[123].

¹¹⁴² *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 78 (Brennan J); *Wagner v Harbour Radio Pty Ltd* [2018] QSC 201, [744] (Flanagan J).

¹¹⁴³ *Palmer (No 5)*, [492].

¹¹⁴⁴ *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 78 (Brennan J); *Wagner v Harbour Radio Pty Ltd* [2018] QSC 201, [744] (Flanagan J).

¹¹⁴⁵ See Defence, Annexure D: CBA Tab 4, pages 146-149.

¹¹⁴⁶ *Kazal v Thunder Studios Inc (California)* [2023] FCAFC 174, [416]-[417].

The Prior Conduct: SOC, [38.5]

- 48.22. The ‘Prior Conduct’ all pre-dates the Publications. It cannot be described, as the authorities require, as circumstances ‘in publishing the defamatory matter or by subsequent conduct’, nor circumstances ‘from publication to the time of judgment’.¹¹⁴⁷
- 48.23. Further, the Prior Conduct often relies (in a general unspecified way) on the ‘conduct of those [Mr Pesutto] directs and leads’, without any attempt to tie that conduct to Mr Pesutto. They are not proper particulars of aggravated damages in a defamation claim brought solely against Mr Pesutto.
- 48.24. We deal with these particulars of aggravated damages briefly.

Alleged failure to warn not to attend Rally: SOC, [38.5(a)]

- 48.25. The allegation that Mr Pesutto’s failure to warn Mrs Deeming not to attend the Rally or associate with Mrs Keen or the other organisers of the Rally, prior to 18 March 2023, could somehow justify aggravated damages in a defamation claim concerning the publication of the Publications on 19 and 20 March 2023 makes no sense.
- 48.26. Mr Pesutto did not know Mrs Deeming planned to attend the Rally and, regardless, Mrs Deeming is an adult and elected Member of Parliament expected to exercise her own judgment.¹¹⁴⁸ To suggest that Mr Pesutto (rather than Mrs Deeming) should have done research on Mrs Keen prior to the Rally is wholly unrealistic;¹¹⁴⁹ and there is no basis for finding that Mr Pesutto’s failure to do either was improper, unjustifiable, or lacking in *bona fides*.

No support person or agenda for 19 March meeting: SOC, [38.5(b)]

- 48.27. Mrs Deeming alleges she is entitled to aggravated damages because she was summoned to attend the meeting with the Leadership Team without a support person or an agenda. While none of the Leadership Team would have objected if Mrs Deeming had wanted to bring a support person,¹¹⁵⁰ the suggestion (which appears to have come from Mr Wells the next day)¹¹⁵¹ that the failure to offer her a support person or provide an agenda was improper or lacking in *bona fides* should be rejected;¹¹⁵² particularly as no other member of the Leadership

¹¹⁴⁷ Cf *Russell*, [494]-[498], and the cases cited therein.

¹¹⁴⁸ T905.14-16, 45-47 (Bach XXN); T1138.6-9 (Crozier XXN).

¹¹⁴⁹ CBB Tab 31, page 382, [65] (Affidavit of John Pesutto dated 22 July 2024).

¹¹⁵⁰ CBB Tab 31, page 383, [66]-[67] (Affidavit of John Pesutto dated 22 July 2024); T680.7-9 (Pesutto XXN).

¹¹⁵¹ CBB Tab 27, page 298, [17(b)](Affidavit of Kim Wells dated 24 May 2024).

¹¹⁵² CBB Tab 31, page 383, [67]-[68] (Affidavit of John Pesutto dated 22 July 2024); T563.44-46, 564.15-16, 680.29-32 (Pesutto XXN).

Team saw any issue with this, either at the time or when giving evidence. Mrs Deeming is a seasoned politician, not a child; and she could hardly have been in any doubt that the purpose of the meeting was to discuss the Rally.

Allegation as to ambushing, attacking, and bullying at 19 March meeting: SOC, [38.5(c)]

- 48.28. Mrs Deeming alleges that the conduct of the 19 March 2023 meeting with the Leadership Team warrants an award of aggravated damages,¹¹⁵³ on the basis that certain things happened and this conduct constituted ambushing, attacking and bullying.
- 48.29. On any view of the recording, Mrs Deeming's version of the 'facts' underpinning this particular are wrong. All attendees of the meeting aside from Mrs Deeming rejected Mrs Deeming's false characterisation of the meeting,¹¹⁵⁴ and the recording of the meeting itself comprehensively refutes much of what she says happened in it that underpinned that characterisation.
- 48.30. In any event, this particular relies heavily on the conduct of the other members of the Leadership Team; and there is no proper basis remaining for any suggestion that *Mr Pesutto's conduct* during this meeting was so objectively improper or unjustifiable, or lacking in *bona fides* that this particular could (even if legally permissible, which it is not) sensibly justify any aggravated damages being awarded against Mr Pesutto.

Alleged content of phone calls on 19 March 2023: SOC, [38.5(d)]

- 48.31. Mrs Deeming alleges that Mr Pesutto (and those he directs or leads) called members of the Party to say that she had arranged for the neo-Nazis to attend the Rally that the Leadership Team had the evidence she was a closet Nazi.
- 48.32. The closest evidence the evidence came to supporting this particular was Mr Wells' evidence. Mr Wells asserted that he received a phone call from Mr Pesutto, who said that Mrs Deeming had organised a group of Nazis to attend the Rally.¹¹⁵⁵ This is dealt with in Schedule A. Put simply, Mr Wells' account of the conversation should not be accepted. His recollection of the actual words used (rather than his impression) is inherently unbelievable, does not accord with Mr Pesutto's state of mind, is at odds with Mr Pesutto's other recorded statements, and irreconcilable with other conversations Mr Pesutto had that evening.¹¹⁵⁶ Mr Hodgett's

¹¹⁵³ SOC, [38.5(c)]: CBA Tab 2, page 38.

¹¹⁵⁴ CBB Tab 31, page 383, [69] (Affidavit of John Pesutto dated 22 July 2024); T721.5-8 (Pesutto XXN); T1082.6-11, 1110.28-29 (Southwick XXN); CBB Tab 37, page 443, [38] (Affidavit of Rod Pintos-Lopez dated 24 May 2024); T1254.37-42, 1255.6-9 (Pintos-Lopez XXN); CBB Tab 33, pages 402-403, [6], [9] (Affidavit of Matthew Bach dated 16 July 2024); T923.46, 924.14-16 (Bach XXN); CBB Tab 34, page 414, [35] (Affidavit of Georgie Crozier dated 27 May 2024).

¹¹⁵⁵ CBB Tab 27, page 297, [11] (Affidavit of Kim Wells dated 24 May 2024).

¹¹⁵⁶ CBB Tab 31, page 368-9, [13] (Affidavit of John Pesutto dated 27 May 2024).

recollection of what was said by Mr Pesutto to him that night is more likely to accord with the actual words used. Mr Hodgett said Mr Pesutto told him that there had been a rally that was gate crashed by neo-Nazis, that Mrs Deeming was involved and that Mr Pesutto was moving a motion to expel her.¹¹⁵⁷

- 48.33. In his affidavit, Mr Riordan said he received a phone call from Mr Southwick. That account did not match the particulars in [38.5(d)] of the Statement of Claim, or Mr Southwick's evidence.¹¹⁵⁸ In any event, Mr Riordan ultimately candidly agreed that the effect of the phone call with Mr Southwick was that Mrs Deeming had been an organiser of an event which had been attended by Nazis.¹¹⁵⁹ That account is consistent with Mr Southwick's account, Mr Southwick's contemporaneous statements in the recordings, and common sense. In any event, it is nonsensical to suggest that Mrs Deeming should be awarded aggravated damages in a suit against Mr Pesutto for something allegedly said by Mr Southwick.

The Media Campaign on 19 and 20 March 2023

Calculated and purposeful media campaign to damage reputation: SOC, [38.6(a)]

- 48.34. Mrs Deeming seeks aggravated damages on the basis Mr Pesutto engaged in a calculated and purposeful media campaign to damage Mrs Deeming's reputation ahead of the debate by the Members about the Expulsion Motion in the Party Room.¹¹⁶⁰ Mr Pesutto denies this was his purpose,¹¹⁶¹ and otherwise relies on his earlier submissions on public interest, honest opinion and malice. Mr Pesutto's conduct was not improper, unjustifiable or lacking in *bona fides*.
- 48.35. Describing Mr Pesutto's conduct as a 'campaign' takes the matter nowhere.¹¹⁶² Mr Pesutto believed it was necessary to explain the decision taken by the Leadership Team to the public, and to expose that decision to scrutiny and debate. That he did so via multiple media outlets was not improper, unjustifiable or lacking in *bona fides*.¹¹⁶³

Exclusion of denials of the imputations and failure to include exculpatory material: SOC, [38.6(b)-(c)]

- 48.36. Mrs Deeming alleges that in publishing the Publications, Mr Pesutto excluded Mrs Deeming's denials of the imputations or failed to include exculpatory material.¹¹⁶⁴ Similarly,

¹¹⁵⁷ CBB Tab 12, page 195, [5] (Affidavit of David Hodgett dated 27 May 2024).
¹¹⁵⁸ CBB Tab 20, page 248, [10] (Affidavit of Richard Riordan dated 24 May 2024).
¹¹⁵⁹ T440.42-43, 441.24-26 (Riordan XXN).
¹¹⁶⁰ SOC, [38.6(a)]: CBA Tab 2, page 38.
¹¹⁶¹ CBB Tab 31, page 383, [71(a)] (Affidavit of John Pesutto dated 22 July 2024).
¹¹⁶² *Lorbek v King* [2023] VSCA 111, [90].
¹¹⁶³ *Ibid.*
¹¹⁶⁴ SOC, [38.6(b)]: CBA Tab 2, page 38.

Mrs Deeming alleges Mr Pesutto excluded from the Publications her other public statements.¹¹⁶⁵

48.37. As explained elsewhere, the Publications were published for the information of Mr Pesutto's parliamentary colleagues and the public, to explain the Leadership Team's decision to move to expel Mrs Deeming. Mr Pesutto was not under any obligation of a kind that might have applied to a journalist, and there is no evidence that he deliberately excluded exculpatory materials.¹¹⁶⁶

48.38. There was nothing unjustifiable or lacking in *bona fides* about the way Mr Pesutto openly set out to explain the decision the Leadership Team had taken and then subject it to public scrutiny.

Alleged subsequent calculated attack campaign, wide publication, repetition, and encouragement to hate hold contempt for and ridicule Mrs Deeming: SOC, [38.7(a), (c), (d)]

48.39. We refer to our submissions at [7.35] above concerning the description of Mr Pesutto's conduct as a 'campaign'. The real question is: what was Mr Pesutto's purpose in publishing the Publications (and his subsequent conduct), and was it improper, unjustifiable or lacking in *bona fides* so as to warrant an award of aggravated damages.

48.40. In his affidavits and during cross-examination, Mr Pesutto steadfastly denied that he engaged in a calculated attack campaign¹¹⁶⁷ with the intention of causing others to hate, hold contempt for and ridicule Mrs Deeming,¹¹⁶⁸ or 'publicly malign' Mrs Deeming¹¹⁶⁹ or to put pressure on party members who would ultimately vote on the motion.¹¹⁷⁰ Mr Pesutto's purpose was as we have set out above in section [24] relating to Public Interest. That purpose cannot be described as improper, unjustifiable or lacking in *bona fides*.

Alleged refusal to withdraw or delay the Expulsion Motion or delay it: SOC, [38.7(f)]

48.41. Various members of the Party (and the entire Leadership Team) urged Mr Pesutto to proceed with the motion, and the Party Room clearly voted against Mr Riordan's motion to delay.¹¹⁷¹ Mr Pesutto's conduct was not improper, unjustifiable or lacking in *bona fides*.

¹¹⁶⁵ SOC, [38.6(c)]: CBA Tab 2, page 38.

¹¹⁶⁶ CBB Tab 31, page 384, [71(b)] (Affidavit of John Pesutto dated 22 July 2024); see Public Interest above.

¹¹⁶⁷ CBB Tab 31, page 384, [72(a)] (Affidavit of John Pesutto dated 22 July 2024).

¹¹⁶⁸ CBB Tab 31, page 384, [72(b)] (Affidavit of John Pesutto dated 22 July 2024).

¹¹⁶⁹ T754.9-10 (Pesutto XXN).

¹¹⁷⁰ T754.12-14 (Pesutto XXN).

¹¹⁷¹ CBB Tab 31, page 385, [72(d)] (Affidavit of John Pesutto dated 22 July 2024).

Alleged failure to honour compromise suspension motion at 27 March meeting: SOC, [38.7(g), (i)]

48.42. Mrs Deeming alleges the following with respect to the compromise reached at the 27 March 2023 meeting (our emphasis):¹¹⁷²

Not honouring the agreement with Deeming ...**that Pesutto would withdraw the Expulsion Motion and officially and completely exonerate Deeming from all the accusations he had made about her, via the issuing a “joint statement”**; and that there would be a **“media statement”** which would *“make it clear that no one was accusing [Deeming] of being a Nazi, or Nazi sympathiser”*.

...

Not joining with Deeming in **making the agreed joint public statement “that no one was accusing [Deeming] of being a Nazi, or Nazi sympathiser”** or otherwise exonerating her for not condemning the Nazis or being a Nazi sympathiser or for associating with Nazis or Nazi sympathisers, as agreed.

48.43. The 27 March 2023 meeting occurred a week after the last of the Publications was published, and is not causally connected to any of the Publications. Even if something occurred at that meeting that merits censure (which Mr Pesutto denies), it is not a matter that should be dealt with in the context of a defamation proceeding about five Publications that occurred on 19 and 20 March 2023.

48.44. In any event, Mr Pesutto’s conduct in connection with the meeting of 27 March 2023 was not improper, unjustifiable or lacking in *bona fides*. The facts leading up to what was ‘agreed’ at the 27 March 2023 meeting are dealt with in Schedule A. However, simply put:

- (a) what was said about the agreement reached is reflected in the contemporaneous notes taken by Ms Heath, with which almost every witness fundamentally agreed;¹¹⁷³ and
- (b) there was, at least, an ambiguity in the nature of the ‘joint statement’,¹¹⁷⁴ which was ultimately resolved at by the adoption of approved minutes at a Party Room meeting on 12 May 2023.¹¹⁷⁵

48.45. Ms Heath’s notes show that upon resumption of the meeting, the following compromise was announced and motion moved:¹¹⁷⁶

The promised compromised –

- moira to be suspended from the party room for 9 months

¹¹⁷² SOC, [38.7(g), (i)]: CBA Tab 2, page 39-40.

¹¹⁷³ An exception being Mr Wells: T503.14-15 (Wells XXN).

¹¹⁷⁴ For example, T466.44-467.25 (Hodgett XXN).

¹¹⁷⁵ For example, T468.15-16 (XXN); Exhibit T64, CBC Tab 597, pages 2827-2828; T889.44-47 (Pesutto XXN).

¹¹⁷⁶ Exhibit R240, CBC Tab 482, pages 2423-2427.

- a joint statement
- a media statement this statement will make clear that no one was accusing Moira of being a Nazi, or Nazi sympathiser.

Effective: 9 months from this meeting.

Motion:

- nine months suspension immediately
- joint statement from the leaders office in conjunction with Moira
- we will release a statement that she is not a Nazi

48.46. These were, as best Ms Heath could capture them,¹¹⁷⁷ the precise words use by Mr Pesutto when the compromise was announced.¹¹⁷⁸ Mrs Deeming agreed the Meeting Notes were the ‘closest’ record of what was agreed at the 27 March 2023 meeting.¹¹⁷⁹ No other motion was put to the Party Room in respect of Mrs Deeming that day.¹¹⁸⁰

48.47. Mrs Deeming does not remember the words that were spoken,¹¹⁸¹ but alleges that the agreement or compromise reached in this agreement was that:

- a statement would be issued by both Mrs Deeming and Mr Pesutto under both of their letterheads;¹¹⁸² and
- the agreed statement to be released by both Mr Pesutto and Mrs Deeming would exonerate Mrs Deeming from all claims.¹¹⁸³

48.48. Mrs Deeming’s evidence is inconsistent with the documentary records, and only partly supported by Mr Wells’ evidence.¹¹⁸⁴ No other witnesses supported Mr Wells’ version of events, despite him referring to multiple other persons being party to those conversations, including Mr Smith,¹¹⁸⁵ whose evidence was that ‘the “proposed compromise” as set out in

¹¹⁷⁷ T416.24-25, T419.18-26 (Heath XXN).

¹¹⁷⁸ T416.41 (Heath XXN).

¹¹⁷⁹ T328.43-45 (Deeming XXN).

¹¹⁸⁰ T420.23-24 (Heath XXN).

¹¹⁸¹ T318.35 (Deeming XXN).

¹¹⁸² CBB Tab 1, page 38, [188(c)] (Affidavit of Moira Deeming dated 27 May 2024); CBB Tab 9, page 171, [27]–[28] (Affidavit of Renee Heath dated 27 May 2024); CBB Tab 12, page 198, [23] (Affidavit of David Hodgett dated 27 May 2024); CBB Tab 15, page 215, [24(c)] (Affidavit of Anna Hughes dated 27 May 2024); CBB Tab 20, page 251, [28] (Affidavit of Richard Riordan dated 24 May 2024); CBB Tab 23, page 271, [36] (Affidavit of Ryan Smith dated 21 May 2024); CBB Tab 27, page 300, [31]–[32] (Affidavit of Kim Wells dated 24 May 2024).

¹¹⁸³ CBB Tab 1, page 38, [188(c)] (Affidavit of Moira Deeming dated 27 May 2024); CBB Tab 24, page 281, [24] (Affidavit of Ryan Smith dated 21 July 2024); CBB Tab 27, page 300, [31]–[32] (Affidavit of Kim Wells dated 24 May 2024).

¹¹⁸⁴ T504.3-4 (Wells XXN).

¹¹⁸⁵ T504.20-22 (Wells XXN).

Renee Heath's notes is consistent with my recollection of the resolution which we voted for'.¹¹⁸⁶

- 48.49. Mr Hodgett gave frank evidence. He explained that Mr Pesutto never said to him, or in his presence, that Mrs Deeming was entitled to be exonerated from all accusations against her regarding the Rally, or the Expulsion Motion and Dossier.¹¹⁸⁷ He did not observe any person say to Mr Pesutto that Mrs Deeming was looking for a full exoneration on those matters.¹¹⁸⁸
- 48.50. Mrs Deeming was not a party to any relevant conversation with Mr Pesutto.¹¹⁸⁹ Her knowledge of what happened in discussions with Mr Pesutto, was confined to what she was told by Mr Wells, Mr Smith, Mr Hodgett and Mr Southwick.¹¹⁹⁰ Ultimately, Mrs Deeming conceded that the central flaw in her argument about the entirety of the events at the meeting on 27 March 2023 was that she misunderstood what had been agreed, based on what people other than Mr Pesutto had told her.¹¹⁹¹

Joint statement

- 48.51. Mr Pesutto and the Leadership Team considered that a 'joint statement' meant a statement that would be jointly prepared, namely published by Mrs Deeming but with input into the drafting from Mr Pesutto's team.¹¹⁹² Mr Pesutto says he wanted to be able to 'hold the pen' to make sure Mrs Deeming said what he felt she needed to say. He said he never contemplated, and never would have, appearing on a joint media release with Mrs Deeming in relation to her statement about her involvement at the Rally.¹¹⁹³ Consistently with this, in Mr Southwick's view, a public statement from both Mr Pesutto and Mrs Deeming would have made no sense.¹¹⁹⁴ Dr Bach said it would have been absurd.¹¹⁹⁵
- 48.52. Mr Pesutto considered that some may have conflated the reference to a 'joint statement' with another part of the agreement, that Mr Pesutto was willing to confirm publicly that no one was accusing Mrs Deeming of being a Nazi or a Nazi sympathiser.¹¹⁹⁶ Mr Pesutto thought he had said something to this effect at that press conference, but acknowledges that, in hindsight, he could and should have been clearer in saying that no one was accusing Mrs Deeming of

¹¹⁸⁶ CBB Tab 23, page 271, [36] (Affidavit of Ryan Smith dated 21 May 2024).

¹¹⁸⁷ T465.17-22 (Hodgett XXN).

¹¹⁸⁸ T465.24-30 (Hodgett XXN).

¹¹⁸⁹ T317.25 (Deeming XXN).

¹¹⁹⁰ T317.31-33 (Deeming XXN).

¹¹⁹¹ T324.28-36 (Deeming XXN).

¹¹⁹² CBB Tab 30, page 356, [161] (Affidavit of John Pesutto dated 27 May 2024); CBB Tab 34, page 417, [59] (Affidavit of Georgie Crozier dated 27 May 2024); CBB Tab 39, page 464-5, [62] (Affidavit of David Southwick dated 27 May 2024).

¹¹⁹³ CBB Tab 30, page 356, [161] (Affidavit of John Pesutto dated 27 May 2024).

¹¹⁹⁴ CBB Tab 40, page 478, [38] (Affidavit of David Southwick dated 19 July 2024).

¹¹⁹⁵ CBB Tab 32, page 398, [56] (Affidavit of Matt Bach dated 26 May 2024).

¹¹⁹⁶ CBB Tab 31, page 371, [23(a)], page 372, [26], [28] (Affidavit of John Pesutto dated 22 July 2024)

being a Nazi or a Nazi sympathiser in his press conference on 27 March 2023. In any event, however, he said this clearly during in his press conference on 4 May 2023.¹¹⁹⁷ Mrs Deeming appeared to accept as much in a tweet two days later, saying her name had been cleared and she was ‘moving on’.¹¹⁹⁸

48.53. At the end of the day, there was a divergence in opinion on what was meant by the term ‘joint statement in conjunction with the leader’s office’. That divergence was resolved by the adoption of the Minutes of the 27 March 2023 meeting on 12 May 2023, which favoured Mr Pesutto, Mr Southwick, Ms Crozier and Dr Bach’s interpretation.

48.54. To find that Mr Pesutto’s conduct in connection with this issue was improper, unjustifiable and lacking in *bona fides* would necessarily impugn the integrity of Mr Southwick, Ms Crozier and Dr Bach, and all members of the Party who voted for the adoption of the minutes of the 27 March 2023 meeting on 12 May 2023.

Full exoneration

48.55. Mr Pesutto denies that the agreed compromise required him to provide some form of exoneration of Mrs Deeming, beyond confirming that no-one had accused her of being a Nazi or a Nazi sympathiser.¹¹⁹⁹ Mr Pesutto said a broader exoneration was never discussed or on the table, and did not make any sense, as if Mrs Deeming was to be fully exonerated there would have been no need for a suspension.¹²⁰⁰ Mr Pesutto was clear that it was ‘not right’ that Mr Wells told him, in substance that ‘Mrs Deeming would not agree to a compromise unless there was a full exoneration and a joint statement’ from Mr Pesutto and Mrs Deeming.¹²⁰¹ Mr Pesutto was unshaken that there was ‘no way I would have accepted an exoneration at that stage. This was about the sanction’.¹²⁰²

48.56. He explained:¹²⁰³

Ms Chrysanthou: It’s right, isn’t it, that in the 10 minutes or 15 minutes or however long the break was, when the compromise was being made, you never said to Mr Wells or Mr Hodgett or Mr Smith that you stood by the allegations in the dossier?

Mr Pesutto: I didn’t feel I needed to, your Honour. It seemed to be fairly self-explanatory and quite obvious that we wouldn’t be suspending somebody for any period, let alone nine months, if something wrong hadn’t occurred. And however

¹¹⁹⁷ Exhibit R273, CBC Tab 560.

¹¹⁹⁸ Exhibit R59, CBC Tab 571.

¹¹⁹⁹ CBB Tab 31, page 385, [72(e)] (Affidavit of John Pesutto dated 22 July 2024).

¹²⁰⁰ CBB Tab 31, page 372, [24] (Affidavit of John Pesutto dated 22 July 2024).

¹²⁰¹ T856.29-31 (Pesutto XXN).

¹²⁰² T856.34-35 (Pesutto XXN).

¹²⁰³ T867.26-33 (Pesutto XXN).

much Mrs Deeming disputes that, and I recognise she does, I don't think there's any universe in which any reasonable person thought we were suspending without cause.

- 48.57. The purpose of the compromise was to sanction Mrs Deeming but allow a pathway back. Mrs Deeming's personal disclosures went to mitigation of the outcome, rather than a withdrawal of the motion.¹²⁰⁴
- 48.58. Ms Crozier said there was never a promise of full exoneration, that nothing to that effect was said, and that she only heard of Mrs Deeming's view that she was entitled to a full exoneration a few weeks later.¹²⁰⁵
- 48.59. Mr Southwick said the words 'exoneration' or 'full exoneration' were never used or implied in any of his discussions, the focus of which was to negotiate the length of Mrs Deeming's suspension. He said it would have been completely illogical to suspend Mrs Deeming and 'fully exonerate' her at the same time.¹²⁰⁶ No contrary account was put on Mrs Deeming's behalf to Mr Southwick in cross-examination.¹²⁰⁷
- 48.60. Mrs Deeming herself agreed there was nothing in the Meeting Notes that recorded any discussion or agreement about the allegations in the Expulsion Motion and Dossier being withdrawn,¹²⁰⁸ or to the effect she was entitled to be exonerated from all the allegations contained in the Expulsion Motion and Dossier.¹²⁰⁹

Alleged false attribution of blame regarding 'concessions', and subsequent media conference and ABC Interview: SOC, [38.7(e), (h), (j)]

- 48.61. Mrs Deeming alleges that the following conduct of Mr Pesutto since publishing the Publications warrants an award of aggravated damages:¹²¹⁰

attributing blame to Deeming for not making 'concessions' about her conduct earlier than the Parliamentary Liberal Party Meeting on 27 March 2023, when that was blatantly false in respect of when she did in fact condemn the neo-Nazis who gatecrashed the Rally, and blatantly false by him asserting that she had condemned the speakers and organisers of the Rally and condemned the Rally itself;

...

Attending a media conference immediately following the meeting of the Parliamentary Liberal Party on 27 March 2023, in which he stated, falsely, that he withdrew the Expulsion Motion because Deeming had made "concessions" early that morning and stated falsely that he accepted Deeming's suspension (rather than expulsion) given "Moirra had provided what I had been seeking and recognised why it was important to do that", and that "the conduct that I wanted condemned has been condemned" that day when he knew

¹²⁰⁴ T867.35-47 (Pesutto XXN).

¹²⁰⁵ CBB Tab 35, page 424, [21] (Affidavit of Georgie Crozier dated 17 July 2024).

¹²⁰⁶ CBB Tab 40, page 477, [36]–[37] (Affidavit of David Southwick dated 19 July 2024).

¹²⁰⁷ If the matter is pressed by Mrs Deeming, there has been a failure to comply with the rule in *Browne v Dunn*.

¹²⁰⁸ T330.44-47 (Deeming XXN).

¹²⁰⁹ T331.4-10 (Deeming XXN).

¹²¹⁰ SOC, [38.7(e), (h), (i)]: CBA Tab 2, page 39-40.

from Deeming's statements on 20 March, 21 March and 27 March 2023 that she had condemned the neo-Nazis who gate crashed the Rally and had refused his unreasonable demand that she condemn or disassociate herself from the three women speakers at and organisers of the Rally as neo-Nazis or Nazi-supporters.

...

Repeating the misrepresentations in an interview on the ABC 7.30 Report the same evening where he said that Deeming had made concessions earlier that morning condemning the conduct of persons associated with her who organised the Rally and condemning the conduct of the Rally itself and falsely represented that Deeming had then walked back those concessions or had acted inconsistently with assurances she gave Members condemning the Rally and the organiser of the Rally.

48.62. Again, none of these matters occurring on 27 March 2023 bears any causal connection to the Publications. Even if established, they could not warrant an award of aggravated damages in a defamation proceeding concerning Publications occurring on 19 and 20 March 2023. Mr Pesutto's public statements on 27 March 2023 concerned an entirely different matter, namely the fact that, as a result of what occurred at the meeting earlier that day, the Party had voted to suspend Mrs Deeming from the Party for nine months.

48.63. In any event, however, Mr Pesutto's position is that Mrs Deeming *was* to blame for not making concessions earlier when asked.¹²¹¹ Mr Pesutto believed such concessions as Mrs Deeming had made prior to at least 26 March 2023 were inadequate. The compromise suspension motion was reached as a result of Mrs Deeming's concessions, made for the first time on 26 and 27 March, in combination with her personal disclosures at the 27 March meeting. Mr Pesutto's conduct was not improper, unjustifiable and lacking in *bona fides*.

Mrs Deeming's limited concessions at 19 March 2023 meeting

48.64. As explained above, particularly at [7.73] and [7.74], Mrs Deeming's concessions at the 19 March 2023 meeting were limited. By the end of that meeting it was clear to Mr Pesutto, and the rest of the Leadership Team, that 'Mrs Deeming was not going to do anything like what we needed to do'.¹²¹² The 'general denunciations' offered by Mrs Deeming would not be sufficient.¹²¹³ Mr Pesutto put the issue succinctly:¹²¹⁴

I think Mrs Deeming, your Honour, knew what the concerns were. She was an MP. The matters that were put to her were, in our view, fairly straightforward. And if anything surprised, your Honour, it was that anyone having looked at that material and considered what was raised with Mrs Deeming in that meeting would have needed any time to reflect on it. It was pretty obvious how dangerous and how risky it was for the party and its reputation.

¹²¹¹ CBB Tab 31, page 385, [72(c)] (Affidavit of John Pesutto dated 22 July 2024).

¹²¹² T610.30-31 (Pesutto XXN).

¹²¹³ T610.45-46 (Pesutto XXN).

¹²¹⁴ T611.28-33 (Pesutto XXN).

48.65. Mr Pesutto disagreed with the proposition put to him that Mrs Deeming had agreed to condemn the conduct.¹²¹⁵

what I understood from her comments and the meeting was that Mrs Deeming was not prepared to condemn their conduct. It had to be relevant to what they had done. I understood Mrs Deeming to be prepared to give general denunciations. I wanted to sever any connection that anyone could draw between what Mrs Deeming had done in – in, and in respect of, the rally and those two individuals, in particular.

48.66. He further explained:¹²¹⁶

My understanding of what Mrs Deeming was getting at was that she would make some general denunciations, but I wasn't convinced that we were ad idem on, 'No, you have to actually condemn those matters in relation to Ms Jones and Ms Keen.'

48.67. Mr Pesutto's position is consistent with what in fact happened at the 19 March 2023 meeting, the culmination of which was the expression of Mrs Deeming's final position at lines 912–40, namely that she was prepared only to issue a general denunciation of Nazism and a statement to the effect that trans gender individuals are not all paedophiles.

48.68. Mr Pesutto felt vindicated in his assessment when less than 24-hours later Mrs Deeming issued a public statement saying 'they' (the women at the Rally) had done nothing wrong.¹²¹⁷

21 March 2023 Party Room Meeting

48.69. During a regularly scheduled Party meeting, on 21 March 2023, Mrs Deeming's conduct and its consequences were discussed. There was some debate between the relevant witnesses as to what Mrs Deeming said, meant, and conveyed to the meeting when she spoke about the Expulsion Motion and the content of the Dossier. The evidence appears to be largely consistent that Mrs Deeming, as both Mr Wells and Ms Crozier put it, 'scoffed' at and 'rubbished' the content of the document.¹²¹⁸

48.70. Mr Pesutto agreed, as recorded in Ms Heath's notes of the meeting, that Mrs Deeming went through the contents of the Expulsion Motion and Dossier and said words to the effect that it 'wasn't true'.¹²¹⁹

48.71. There is thus no suggestion at all that Mrs Deeming made concessions at this meeting.

¹²¹⁵ T610.43-611.1 (Pesutto XXN).

¹²¹⁶ T615.19-22 (Pesutto XXN).

¹²¹⁷ T615.26-29 (Pesutto XXN).

¹²¹⁸ CBB Tab 34, page 415, [49] (Affidavit of Georgie Crozier dated 27 May 2024); CBB Tab 28, page 313, [28] (Affidavit of Kim Wells dated 9 July 2024).

¹²¹⁹ T840.16-28 (Pesutto XXN).

48.72. Mr Pesutto considered Mrs Deeming's conduct at that meeting demonstrated a continued failure to appreciate the implications of her association with Mrs Keen and Ms Jones, having regard to their associations, views and conduct. In cross-examination, contrary to the position she adopted at the 21 March 2023 Party meeting, Mrs Deeming accepted that all material allegations in the Expulsion Motion and Dossier are true as identified above at [32.67]-[32.79].

Concessions on 26 and 27 March 2023

48.73. On 26 March 2023 at 2.51pm, Mrs Deeming wrote an email to members of the Party with a response to the Expulsion Motion,¹²²⁰ in which she made the following concessions:

- (a) 'I accept that an experienced person such as [Mr Johnston (it was in fact Mr Pintos-Lopez)] was able to find [the accusations regarding Mrs Keen's associations] in "under ten minutes"';
- (b) 'I acknowledge that I did not follow up on my requests made at our inaugural Coalition conference, for specific help with how to wisely manage my pursuit of fairer sex-based protections'; and
- (c) 'I acknowledge that I did not follow up on my requests, made in an Upper House Parliamentary team meeting, for written guidelines and tips for New MPs'.

48.74. On 27 March 2023 at 6:29am, Mrs Deeming sent an email to her parliamentary colleagues attaching a response to the Expulsion Motion and Dossier,¹²²¹ prepared by her solicitors, in which Mrs Deeming, among other things:

- (a) conceded her participation in the Rally may have been an error of judgment;¹²²²
- (b) of Mrs Keen's use of a Barbie doll in Nazi uniform, stated 'Mrs Keen made a poor distasteful joke, which I unreservedly condemn, in an attempt to mock a far-left activist who had called her a Nazi Barbie doll';
- (c) stated 'I, however, unreservedly condemn any use of Hitler as an analogy or device to criticise modern behaviour whether by the left, right or anyone'; and
- (d) of Jones and the Jones tweet said: 'I unreservedly condemn her use of a Nazi analogy'..¹²²³

¹²²⁰ Exhibit R41, CBC Tab 468, pages 2364-2366.

¹²²¹ Exhibit R42, CBC 473, pages 2380-2388.

¹²²² T314.45-47 (Deeming XXN).

¹²²³ See also T315.1-316.14 (Deeming XXN).

48.75. On its own, the condemnations in the 6:29am email were not sufficient to dissuade the Leadership Team from the course of moving the Expulsion Motion. It was the combination of these concessions and Mrs Deeming’s speech at the 27 March 2023 meeting that moved Mr Pesutto.

Press Conference

48.76. Shortly after the 27 March 2023 meeting, Mr Pesutto did a press conference, with Mr Southwick, Ms Crozier and Dr Bach standing alongside him. Mr Pesutto was clear that he ‘did not’ lie throughout that press conference.¹²²⁴ As Mr Pesutto said, the transcript of that press conference speaks for itself.¹²²⁵ He – appropriately – indicated to the press corps that he was ‘not going to expand upon’ the personal reasons Mrs Deeming had disclosed at the meeting.¹²²⁶ It would have been completely inappropriate to do so, given Mrs Deeming had herself not shared that information publicly prior to the meeting. Mr Pesutto understandably did not feel it was his place to share Mrs Deeming’s personal disclosures to anyone outside the Party Room.¹²²⁷ In any event, Mr Pesutto made it abundantly clear throughout the press conference that it was the concessions made by Mrs Deeming *combined* with her disclosures at the 27 March 2023 meeting that caused him to reconsider the sanction to be imposed.¹²²⁸ Similarly, it would have been inappropriate for Mr Pesutto to disclose what Mrs Deeming had said at the 27 March 2023 meeting on the *7:30 Report* that evening.

48.77. It was put to Mr Pesutto and his witnesses that he lied throughout that press conference, an allegation Mr Pesutto denied repeatedly.¹²²⁹

48.78. Mr Southwick also disagreed that Mr Pesutto lied in the press conference on 27 March 2023.¹²³⁰ Contrary to the assertions put to Mr Southwick in cross-examination, the motion was not withdrawn because Mr Pesutto knew the motion was going to be lost,¹²³¹ or to ‘save face’ for Mr Pesutto — that ‘had nothing to do with it.’¹²³² Ms Crozier also rejected the assertion that Mr Pesutto lied in the press conference.¹²³³ Dr Bach did not recall Mr Pesutto lying in the press conference.¹²³⁴

¹²²⁴ T858.1-2 (Pesutto XXN).
¹²²⁵ T859.40 (Pesutto XXN).
¹²²⁶ T859.37-40 (Pesutto XXN).
¹²²⁷ CBB Tab 31, page 374-5, [32] (Affidavit of John Pesutto dated 22 July 2024).
¹²²⁸ T862.33-37 (Pesutto XXN).
¹²²⁹ T861.28-38; T862.11-25 (Pesutto XXN).
¹²³⁰ T1107.2-3 (Southwick XXN).
¹²³¹ T1108.16 (Southwick XXN).
¹²³² T1110.16-17 (Southwick XXN).
¹²³³ T1164.39-40 (Crozier XXN).
¹²³⁴ T986.16-20 (Bach XXN).

Alleged conduct in relation to the minutes of the 27 March 2023 meeting: SOC, [38.7(k)-(l)]

48.79. Mrs Deeming alleges that the following conduct of Mr Pesutto in relation to the 27 March 2023 meeting minutes warrants an award of aggravated damages:¹²³⁵

Refusing to provide Deeming with the minutes of the 27 March meeting and asking the Secretary to alter them which she refused.

Despite a resolution at the meeting of the Parliamentary Liberal Party meeting on 2 May 2023 that the final version of the 27 March minutes be agreed between certain Members, submitting his own version to the meeting on 12 May 2023 contrary to the resolution of 2 May 2023.

48.80. This is a further example of conduct that has no causal connection with any of the Publications that are in issue in this proceeding. Even if established, they would not be a proper basis for an award of aggravated damages in a defamation proceeding. They relate to an entirely different matter, namely the terms and performance of the compromise agreement that had been reached at the 27 March 2023 Party meeting.

48.81. In any event, however, contrary to the position suggested by both Mrs Deeming and Ms Heath's affidavit evidence, Mrs Deeming had received the meeting notes from Ms Heath by the morning of 29 March 2023 as explained above at [10.16]. Mrs Deeming could hardly have been hurt by Mr Pesutto not providing her with the Meeting Notes, in circumstances where she already had them in her possession.

48.82. Further and in any event, Mr Pesutto said he was not trying to hide anything from Mrs Deeming by not promptly settling the minutes or authorising Ms Heath to release them to her. He said there are no minutes until they are approved by the Party Room, he was not sure if Mrs Deeming was entitled to the minutes in light of her suspension, and given he could not sensibly have had the minutes approved for several weeks as everyone was away, this was not a priority.¹²³⁶ Mrs Deeming herself understood that notes did not become 'minutes' until such time as they were adopted by the Party Room.¹²³⁷ None of this conduct by Mr Pesutto rises to the level of being improper, unjustifiable and lacking in *bona fides*.

48.83. As to the allegation of submitting his own version of the 27 March minutes, Mr Pesutto said the events in the days following the meeting overtook and made unmanageable his task of meeting with Mr Southwick, Mr Wells and Ms Heath to settle the minutes, including Mrs Deeming's threat to sue him and the resulting second expulsion motion, and the continued leaking of Party matters relating to Mrs Deeming.¹²³⁸ Mr Pesutto denied dishonestly

¹²³⁵ SOC, [38.7(k)-(l)]: CBA Tab 2, page 40-41.

¹²³⁶ CBB Tab 31, page 375, [35] (Affidavit of John Pesutto dated 22 July 2024).

¹²³⁷ T327.29-31 (Deeming XXN).

¹²³⁸ CBB Tab 31, page 378, [51] (Affidavit of John Pesutto dated 22 July 2024).

altering the minutes.¹²³⁹ He denied thinking he might be able to work with the wording of the minutes ‘to avoid making a statement that publicly confirmed that [Mrs Deeming] was not a Nazi or a Nazi sympathiser’.¹²⁴⁰

- 48.84. In circumstances where (a) there was a *bona fide* dispute as to what the Party room had agreed on 27 March 2023; (b) Mr Pesutto had, on 4 May 2023, made a public statement that nothing in the Dossier had accused Mrs Deeming was not a Nazi or Nazi sympathiser; and (c) the Party room on 12 May 2023 resolved the dispute as to what had been agreed on 27 March 2023 by approving minutes of the meeting that accorded with Mr Pesutto’s interpretation, there is no basis for a conclusion that Mr Pesutto’s conduct was improper, unjustifiable and lacking in *bona fides*; indeed, a finding to that effect would equally impugn the members of the Party who voted to approve the minutes of the 27 March 2023 meeting on 12 May 2023.
- 48.85. Mr Pesutto did not intend to undermine and humiliate Ms Heath;¹²⁴¹ nor did he engage in conduct in retribution for her refusing to change the minutes (or rather meeting notes).¹²⁴² In any event, Mr Pesutto’s conduct towards Ms Heath cannot be sensibly argued to have aggravated Mrs Deeming’s harm by reason of the publication of the Publications.

Alleged conduct in relation to 6 May 2023 motion to expel Mrs Deeming: SOC, [38.7(m)]

- 48.86. Mrs Deeming alleges that as Leader and Chairman of the Party, on 6 May 2023 Mr Pesutto accepted an unconstitutional notice of motion to expel Mrs Deeming which did not give reasons in support of the motion, in breach of Clause 57 of the Party’s Constitution, and despite Mrs Deeming having requested the reasons twice, ignoring the request and permitting the motion to be put to the vote and passed by Members on 12 May 2023 which expelled her from membership.¹²⁴³
- 48.87. This, again, has nothing whatsoever to do with the matters in issue in this proceeding, namely whether Mrs Deeming was unjustifiably defamed by the five matters published by Mr Pesutto on 19 and 20 March 2023. Even if established, it could not be a basis for an award of aggravated damages for defamation.
- 48.88. In any event, however, Mr Pesutto denies the notice of motion was unconstitutional, or that there was anything improper in permitting the motion to be put to the vote on 12 May 2023.¹²⁴⁴ No cogent evidence was led to support the foundational fact that the notice of motion was

¹²³⁹ T889.40-41 (Pesutto XXN).

¹²⁴⁰ T863.26-27 (Pesutto XXN).

¹²⁴¹ T871.37-38 (Pesutto XXN).

¹²⁴² T871.44-46 (Pesutto XXN).

¹²⁴³ SOC, [38.7(m)]: CBA Tab 2, page 41.

¹²⁴⁴ CBB Tab 31, page 386, [72(j)] (Affidavit of John Pesutto dated 22 July 2024).

unconstitutional. Rather, the evidence in support of this allegations appeared to consist of opinions expressed by persons with no legal training.

48.89. The complaint can be shortly dealt with: upon receiving a complaint from Mr Riordan alleging the motion was unconstitutional, Mr Pintos-Lopez sought and obtained advice from Senior Counsel regarding the constitutionality of the notice of motion.¹²⁴⁵ In the circumstances, it is not arguable that Mr Pesutto's impugned conduct was improper, unjustifiable and lacking in *bona fides*.

Alleged conduct in relation to Mrs Deeming's threats to sue: SOC, [38.7(n)-(o)]

48.90. Mrs Deeming alleges that the following conduct of Mr Pesutto warrants an award of aggravated damages:¹²⁴⁶

Prior to the vote at the meeting on 12 May 2023, telling Members that Deeming had sent a Concerns Notice which contained a threat to sue the Members for defamation but refused to table the document when he knew that the threat was made only against him.

After the 12 May Meeting, deliberately misrepresenting the reasons for Deeming's expulsion claiming, falsely, that it was based on Deeming's threat to sue for defamation in a Concerns Notice, when to his knowledge the Concerns Notice was served on Pesutto on 11 May 2023 and could not possibly have been the basis for the motion issued on 6 May 2023.

48.91. By 20 March 2023, Mrs Deeming had decided she was going to commence defamation proceedings if Mr Pesutto 'didn't fix what he had done'.¹²⁴⁷ Mrs Deeming had engaged lawyers on that date. She has also claimed litigation privilege over some communications with Mrs Keen from 20 March 2023. If that privilege was correctly claimed (and Mr Pesutto does not dispute that it was), Mrs Deeming must have considered as at that date not just that legal proceedings were possible but that they were anticipated. On 6 April 2023, she remained of that view, telling Mrs Keen 'I will be sending the defamation letter for the 4 leaders of the Libs in late April'.¹²⁴⁸

48.92. On 26 April 2023 Mrs Deeming sent an email to Mr Wells in which she indicated she may need to commence defamation proceedings. Mrs Deeming forwarded that email to Ms Credlin.¹²⁴⁹

¹²⁴⁵ T1264.34-43 (Pintos-Lopez XXN).

¹²⁴⁶ SOC, [38.7(n)-(o)]: CBA Tab 2, page 41.

¹²⁴⁷ T340.40-42 (Deeming XXN).

¹²⁴⁸ Exhibit R249, CBC Tab 510, pages 2563-64 (emphasis added).

¹²⁴⁹ Exhibit R54, CBC Tab 522, pages 2589-2591.

- 48.93. At 6:45am on 4 May 2023, Mrs Deeming sent an email to the Leadership Team in which she stated unless the matter was resolved, she would instruct her lawyers to commence ‘legal proceedings’.¹²⁵⁰ Mrs Deeming suggested this was not intended to be a reference to commencing a court proceeding, or a defamation case.¹²⁵¹ Mrs Deeming suggested she had intended to refer to a ‘legal arbiter of some description’,¹²⁵² and that she had not intended to threaten to sue the Party.
- 48.94. However, the email speaks for itself. Even Mrs Deeming accepted that the terminology she used was a ‘big mistake on my behalf’.¹²⁵³ Mr Pesutto, and the members of the Party, were entitled to understand that Mrs Deeming had threatened to sue Mr Pesutto or the Party.
- 48.95. Mr Pesutto explained his concerns were the impact litigation may have on the ‘functioning of the party room’,¹²⁵⁴ and on the Party.¹²⁵⁵ Suing the leader was an ‘extraordinary step’.¹²⁵⁶ Mr Pesutto felt the second expulsion motion would have to be brought by other people in those circumstances.¹²⁵⁷
- 48.96. Mr Southwick explained that the ultimate expulsion of Mrs Deeming was ‘not just about the leader, but about the party and the party’s concerns with Ms Deeming and Ms Deeming’s behaviour’.¹²⁵⁸ As Mr Southwick put it, ‘I don’t see many parties that have somebody suing their leader and the person still sitting in the party room while they’re suing their leader’.¹²⁵⁹
- 48.97. It was put by Mrs Deeming’s counsel that the second motion to expel was somehow improper because Mrs Deeming was doing no more than exercising her legal rights by bringing defamation proceedings against Mr Pesutto. That Mrs Deeming was exercising her legal rights is not the issue. A political party is plainly entitled to consider that a member suing its leader is incompatible with that member’s continued membership of the party. In any event, the conduct here was not only unrelated to the Publications, it was the result of a motion moved by five persons other than Mr Pesutto, and accepted by a vote of the Party. Nothing about that constitutes conduct by Mr Pesutto that was improper, unjustifiable and lacking in *bona fides* such as would warrant an award of aggravated damages in this defamation proceeding.
- 48.98. Although it was not a particular of aggravation, it was put to Mr Pesutto at length that he effectively tried to hide his involvement in the motion to expel which succeeded on 12 May

¹²⁵⁰ Exhibit R55, CBC Tab 551, pages 2680-2681.

¹²⁵¹ T342.26-31 (Deeming XXN).

¹²⁵² T342.34 (Deeming XXN).

¹²⁵³ T343.5-8 (Deeming XXN).

¹²⁵⁴ T877.45-46 (Pesutto XXN).

¹²⁵⁵ T878.1-6 (Pesutto XXN).

¹²⁵⁶ T878.25-29 (Pesutto XXN).

¹²⁵⁷ T878.30-31 (Pesutto XXN).

¹²⁵⁸ T1112.40-41 (Southwick XXN).

¹²⁵⁹ T1115.20-21 (Southwick XXN).

2023. As Mr Pesutto explained, ‘I don’t think there is an MP who did not understand I was very much behind these matters and was very concerned about them’.¹²⁶⁰ Mr Pesutto entirely rejected the proposition that he was misleading the public;¹²⁶¹ that he ‘had it in for’ Mrs Deeming;¹²⁶² and he was concerned to conceal his involvement for fear it would ‘look very bad’ to ‘continue to persecute’ Mrs Deeming.¹²⁶³ Mr Pesutto denied misleading the Party room so they would vote to expel Mrs Deeming;¹²⁶⁴ in order to harm Mrs Deeming’s reputation;¹²⁶⁵ or to cement the harm he had caused on 19 and 20 March 2023.¹²⁶⁶

48.99. None of Mr Pesutto’s alleged conduct in relation to Mrs Deeming’s threats to sue warrants an award of aggravated damages.

Alleged conduct in November 2023: SOC [38.7(p)], Reply, [8.3]

48.100. Mrs Deeming alleges that Mr Pesutto claimed in November 2023 that Mrs Deeming’s suspension and subsequent expulsion had ‘always’ been because she had not condemned the neo-Nazis who had spoken at or protested at the Rally and had not disassociated herself from them, in circumstances where Mr Pesutto knew that those claims were patently false in that she did condemn the neo-Nazis who gate crashed the Rally and had no association with them and there were no neo-Nazis who spoke at the Rally.¹²⁶⁷

48.101. Mr Pesutto does not know what Mrs Deeming is referring to in this allegation, but denies making any false claims in November 2023.¹²⁶⁸

48.102. Mrs Deeming appears to have clarified this allegation in her Reply, alleging that in his November 2023 media statement, Mr Pesutto falsely stated the following:¹²⁶⁹

- (a) Mrs Deeming’s suspension and subsequent expulsion were never about her views on women’s issues.
- (b) I have never called Mrs Deeming a neo-Nazi or sympathiser.
- (c) The issues in this matter have never concerned freedom of speech.

¹²⁶⁰ T881.15-16 (Pesutto XXN).

¹²⁶¹ T886.1-2 (Pesutto XXN).

¹²⁶² T886.4-5 (Pesutto XXN).

¹²⁶³ T886.7-8 (Pesutto XXN).

¹²⁶⁴ T890.36-37 (Pesutto XXN).

¹²⁶⁵ T890.39-40 (Pesutto XXN).

¹²⁶⁶ T890.42-43 (Pesutto XXN).

¹²⁶⁷ SOC, [38.7(e), (p)]: CBA Tab 2, page 39, 41.

¹²⁶⁸ CBB Tab 31, page 386, [72(l)] (Affidavit of John Pesutto dated 22 July 2024).

¹²⁶⁹ Reply, [8.3]: CBA Tab 4, page 157-158.

- (d) The issue has always been whether Mrs Deeming called out or distanced herself from neo-Nazi protestors and references when asked to do so by senior Liberals.

48.103. Mr Pesutto denies that any of the above matters are false.¹²⁷⁰ Mr Pesutto's statement was consistent with his honestly held views that (a) the decision to move to expel Mrs Deeming was not because of her views, or freedom of speech, but was rather because of her conduct before, during and after the Rally; (b) he had never called Mrs Deeming a Nazi or Nazi sympathiser; and (c) Mrs Deeming had not distanced herself from Mrs Keen and Ms Jones when asked to do so by the Leadership Team; and had been, at best, tepid in her criticism of the neo-Nazis in her tweet of 18 March 2023 and had failed to call out the neo-Nazis in clear and unequivocal terms in the Video.

48.104. Mr Pesutto's statement on 20 November 2023¹²⁷¹ followed a statement published by Mrs Deeming earlier that day,¹²⁷² which itself contained factual inaccuracies including the following:

- (a) 'Both during and after our rally, I and the organisers publicly condemned the Neo-Nazis, Nazism, antisemitism and bigotry of any kind': that had not happened;
- (b) 'I was then falsely and publicly accused by the Victorian Liberal Leader, Mr John Pesutto, of being a knowing associate of Neo-Nazi sympathisers and extremists, and therefore deserving of expulsion from the Parliamentary Liberal Party': that is a misrepresentation of the contents of the Publications; and
- (c) 'Even Mr Pesutto's very own "evidence dossier", which he distributed to my colleagues, the public and the media, has since been shown to be false': the converse is true, as Mrs Deeming admitted in cross-examination: see [32.67]-[32.79] above.

Alleged disingenuous statements on 2 February 2024: Reply, [8.4]

48.105. Mrs Deeming alleges the following conduct of Mr Pesutto aggravates damages:¹²⁷³

Pesutto's statement during an interview with Tom Elliott of 3AW Melbourne on 2 February 2024 that: 'There was an outcome last year that, had it been observed, would have seen [Deeming] returned to the party room'. This statement was disingenuous and false, since Pesutto had himself reneged on the agreement which had been reached on 27 March 2023 (as pleaded at sub-paragraph 38.7(g) of the SOC).

¹²⁷⁰ CBB Tab 31, page 388, [73] (Affidavit of John Pesutto dated 22 July 2024).

¹²⁷¹ Exhibit R304, CBC Tab 653, page 3154.

¹²⁷² Exhibit R303 and R303, CBC Tabs 651 and 652, pages 3152-3153.

¹²⁷³ Reply, [8.4]: CBA Tab 4, page 158.

48.106. The true position is that Mrs Deeming had been suspended from the Party for nine months on 27 March 2023; that suspension period would have expired on 27 December 2023. Mr Pesutto stated on 4 May 2023 that nothing in the Dossier had accused Mrs Deeming of being a Nazi or Nazi sympathiser; and had made a statement to similar effect in his November 2023 media statement..¹²⁷⁴

48.107. In any event, however, this alleged conduct again relates to matters with no causal connection to the Publications in issue in this defamation proceeding; it relates to the distinct issues arising out of the interpretation and performance of the compromise agreement reached on 27 March 2023.

Alleged false statements regarding neo-Nazis attending the Rally: Reply, [8.5]

48.108. Finally, Mrs Deeming alleges..¹²⁷⁵

Despite his knowledge of the matters particularised in paragraph 2 above, especially that the neo-Nazis did not ‘attend’ or participate in the LWS Rally, Pesutto has asserted from 19 March 2023 and continued to assert that the neo-Nazis ‘attended’ the LWS Rally – for example: in his Defence and through his Counsel at the case management hearing on 2 February 2024 (when it was said on Pesutto’s behalf that the LWS Rally ‘involved’ neo-Nazi protestors and that the neo-Nazis ‘engaged’ with the LWS Rally and that ‘the only reason the Neo-Nazis were there was because the [LWS Rally] was taking place’).

48.109. There is nothing in this ground. The neo-Nazis did attend the Rally in the ordinary meaning of that term, and expressly said that they did so in order to support and protect Mrs Keen. That was Mr Pesutto’s understanding..¹²⁷⁶ That Mr Pesutto’s understanding was reasonable (and objectively so) is fortified by the analysis of the relevant facts in Schedule A to the submissions.

L. INJUNCTIVE RELIEF

49. Applicable principles

49.1. To the extent that Mrs Deeming presses for permanent injunctive relief alongside damages, the Court must be satisfied that there is a real apprehension that there will be a republication of any imputations found to be conveyed and defamatory..¹²⁷⁷ The Court would not be sufficiently satisfied of such a risk, and otherwise it would not generally interfere with or restrict the right to free speech in that way..¹²⁷⁸

¹²⁷⁴ Exhibit R273., CBC Tab 560.

¹²⁷⁵ Reply, [8.5]: CBA Tab 4, page 158.

¹²⁷⁶ T757.30-34 (Pesutto XXN).

¹²⁷⁷ *Rush v Nationwide News Pty Ltd (No 9)* [2019] FCA 1383, [4]-[46].

¹²⁷⁸ *Ibid*, [11]; *Carolan v Fairfax Media Publications Pty Ltd (No 7)* [2017] NSWSC 351, [13] (McCallum J).

50. Application

- 50.1. A final injunction would only be granted where the Court is satisfied that there is a real apprehension that there will be a republication of any imputations found to be conveyed and defamatory.¹²⁷⁹
- 50.2. Regardless of what the Court finds Mr Pesutto conveyed by the Publications on or around 19 and 20 March 2023, the Court should be satisfied that Mr Pesutto will not republish any of the imputations. Mr Pesutto is a professional and sophisticated party, who was for many years a trained and practising lawyer. The Court need have no – nor was there any factual basis for any – apprehension that Mr Pesutto will not respect and abide by the Court’s decision in this matter.
- 50.3. In the circumstances the Court ought not interfere with or restrict his right to free speech in that way.¹²⁸⁰

Date: 18 October 2024

M J Collins AM KC

T J Mullen

H Jager

D Dexter

Counsel for the Respondent



MinterEllison

Solicitors for the Respondent

¹²⁷⁹ *Rush v Nationwide News Pty Ltd (No 9)* [2019] FCA 1383, [4]-[46].

¹²⁸⁰ *Ibid* [11]; *Carolan v Fairfax Media Publications Pty Ltd (No 7)* [2017] NSWSC 351, [13] (McCallum J).