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## TRANSCRIPT OF PROCEEDINGS

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O/N H-1916362

**FEDERAL COURT OF AUSTRALIA**

**NEW SOUTH WALES REGISTRY**

**BROMWICH J**

**No. NSD 1148 of 2022**

**ROXANNE TICKLE**

**and**

**GIGGLE FOR GIRLS PTY LTD and ANOTHER**

**SYDNEY**

**10.19 AM, TUESDAY, 9 APRIL 2024**

**MS G. COSTELLO KC appears with MS B. GODING and MS E. NADON for the applicant**

**MS B.K. NOLAN appears with MS A. COSTIN for the respondent**

**MS Z. HEGER appears with MS GROUSE for the Sex Discrimination Commissioner**

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It indicates that the online world can sometimes function in ways that are seldom seen in a courtroom and in ways that cannot meaningfully be prevented or, indeed, controlled at all, especially when some likely viewers include people overseas. Such behaviour is unacceptable. Following that event at the case management hearing on 5 9 June 2023, I made the parties aware of my decision not to livestream the trial and why, referring to what had taken place. Those who bear total responsibility for this decision not to livestream are those who cannot be trusted to control themselves and behave appropriately. This trial is being held in open court. Those who can attend are welcome to sit in the public gallery, noting that, while we have the largest 10 available courtroom, there hasn't been enough room for everyone who wishes to observe.

That is to be regretted but there's nothing more I can do on that front. The advice I've received that the standing in the courtroom cannot be facilitated, that's a matter 15 of security and public safety in the serious and proper functioning of the court. I'm advised that there may be some capacity to add some extra seating by security at the next available break and, if we do that, we will do that if we can. There is also an online court file which contains the pleadings and the submissions for the Sex Discrimination Commissioner who has been given leave to intervene and appear the 20 – to assist the court on constitutional and interpretation issues, known as an amicus curiae or friend of the court but not on the question of whether or not there has been unlawful discrimination as alleged by the applicant. I've also sought the views of the parties about having their written submissions added to that file but I haven't heard back yet. I should say, that was only sought yesterday.

25 And, of course, I will be publishing a judgment which will be freely available. My final observation is that my judgment – in my judgment, I will be dealing with the specific issues arising in the proceedings – in the pleadings under the specific legislation and related constitutional provisions and other provisions and the 30 conventions that will be relied upon or I'm otherwise taken to and the evidence before me. I will be interpreting and implying the law as it exists. It's no part of my function to decide what the law should be. Subject only to validity, what the law should be is a matter for the Parliament. The applicant and the respondents and the Sex Discrimination Commissioner have made opening submissions in writing and 35 I've already noted that and will be making oral closing submissions regarding how the legislation operates, questions of validity and so on as well as questions of interpretation and application to the facts that are either agreed or as I find them.

40 Anyone who is expecting that I will be deciding anything broader than that may be disappointed. I just thought it important to put that on the record for the benefit of all. I'm not picking sides and I should say none of what I've said, as I understand it, applies to the actual parties to this proceeding nor to, necessarily, anyone else who is sitting in this courtroom. It's to do with elements going beyond that and I think they really, as I said back in June last year, don't assist the cause they think they're 45 supporting. We all need to behave in this case, despite the emotions involved, with civility. Ms Costello, should I first turn to the question of the 78B notices? I understand that has been sorted out.



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O/N H-1916363

**FEDERAL COURT OF AUSTRALIA**

**NEW SOUTH WALES REGISTRY**

**BROMWICH J**

**No. NSD 1148 of 2022**

**ROXANNE TICKLE**

**and**

**GIGGLE FOR GIRLS PTY LTD and ANOTHER**

**SYDNEY**

**10.15 AM, WEDNESDAY, 10 APRIL 2024**

**Continued from 9.4.24**

**DAY 2**

**MS G. COSTELLO KC appears with MS B. GODING and MS E. NADON for the applicant**

**MS B.K. NOLAN appears with MS A. COSTIN for the respondent**

**MS Z. HEGER appears as an interested party**

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So when you put this post here on 14 January, what were you – having read it now, what were you saying?---That the McIver's Ladies Baths should remain female only – female and children only.

5 Now, Roxy Tickle posted something in response to your post, didn't she?---Yes.

And in her post, she said that – so your post had said:

10 *The McIver's Ladies Baths' female and children only status should not be changed because of an onslaught of abuse. Please sign this petition so that women's hard-won rights of female spaces continue in this beautiful space.*

Didn't you?---Yes.

15 And then she said on January 14:

20 *Your tweet's a little misleading. Trans women who are morally and legally women have been going to the baths without problems for years. As trans women are legally women, should you wish to have trans women excluded from women's spaces, you need to talk to the government.*

And then you said:

25 *They have been because as management said, transitioned trans women were welcome, but that wasn't good enough for the activists. They want it to be self-ID. That's what started this whole thing.*

And then Ms Tickle said:

30 *How do you define transition though? The law defines it as somebody that has commenced transitioning, not completely transitioning. I don't know if you've thought about it from our side, but it's actually terrifying to go swimming as a trans woman.*

35 And then you said:

40 *I have a lot of empathy for that, I really do. But changing the rules of female spaces isn't the answer. It's not right or fair. A lot of women enjoy female spaces because of the comradery and safety. I feel like trans women should have that with trans women in these situations.*

And then Ms Tickle said:

45 *How do you define transition though? The law defines it as somebody that has commenced transitioning, not completed transitioning. I don't know if you've thought about it from our side, but it's actually terrifying to go swimming as a trans woman.*

And then you said:

5       *I have a lot of empathy for that, I really do. But changing the rules of female spaces isn't the answer. It's not right or fair. A lot of women enjoy female spaces because of the comradery and safety. I feel like trans women should have –*

hang on, I'm repeating myself here.

10      MS NOLAN: You have, but that's all right.

MS COSTELLO: Sorry, and then Tickle says:

15       *It feels really weird that the majority of women that I meet accept and treat me as a woman happily, openly, but not all. How should I deal with that, ignoring the majority?*

And then I'm going to ask you about a question about the next thing you said, Ms Grover, which was this. You said:

20       *If I was to meet you IRL –*

that means in real life, doesn't it?---Yes.

25      So:

30       *If I was to meet you in real life, I would treat you how you want to be treated. We live in a society; it's important to be kind to people. I would never cause you a problem in person. But this does not negate the need for female spaces.*

Ms Tickle, that was a polite exchange – Ms Grover, that was a polite exchange between you and Ms Tickle, wasn't it?---Yes.

35      And the communications between Ms Tickle and you, Ms Grover, have been polite at all times, haven't they?---Yes.

You said that if you were to meet her in real life, you would treat her, "how you wanted to be treated", didn't you?---Yes.

40      That would mean that if you met her in real life, you would call her Ms Tickle, wouldn't you?---No.

45      I suggest to you that it's not kind to say to someone who is a woman, formally, at law – having had gender affirmation surgery, and seeing herself as a woman – to refer to that woman as a man. I suggest to you that is not kind, Ms Grover. What do you say to that?---I don't think that it's kind to expect a woman to see a man as a woman.

sense that there has been discrimination on the basis of her gender in excluding her from the app and then in persisting in misgendering her post – subsequently. And so asking a series of questions which are about how Ms Tickle sees herself psychologically, socially, at work and her physical features is at the heart of  
5 relevance here, and I would seek to, in closing submissions, say that in the face of these features which, in our society, lead to the recognition of someone as being a woman, the respondents have persisted in misgendering the applicant, and that’s the reason I’m putting these questions.

10 HIS HONOUR: But isn’t the underlying proposition that you seek to advance is that the second respondent and, through her, the corporate first respondent don’t accept that someone who has been – in this case, been through that process is, as a result of that process, a woman? Isn’t that your point?

15 MS COSTELLO: Yes, your Honour.

HIS HONOUR: Well, can’t you just put that?

20 MS COSTELLO: Yes, your Honour.

So, Ms Grover, even where a person who was assigned male gender at birth has transitioned to being a woman by having gender-changing surgery, taking hormones to make them grow breasts, changed the nature of their facial hair through electrolysis so they don’t have facial hair, undergone facial reconstruction surgery so  
25 that they have more female features, wears long hair, wears makeup, wears female clothes, shops in a female clothing shop, describes themselves as a woman, introduces themselves as a woman, uses female change rooms, has a female birth certificate – even a woman like that – you don’t accept that that person is a woman, do you?---No.

30 Well, I suggest to you that in Australian society, the natural meaning of – the ordinary contemporary usual meaning of “woman” includes women whose gender is stated to be a woman on their birth certificate, having transitioned from man to woman. I suggest to you that that is a woman in our society. What do you say to  
35 that?---I don’t agree.

In February 2021, Ms Tickle registered herself on the Giggle app, didn’t she?---I believe it was that date, yes.

40 And the - - -

HIS HONOUR: What year was that in the question?

45 MS COSTELLO: February 2021, your Honour.

HIS HONOUR: 2021. I thought you said 2023.

MS COSTELLO: I'm happy to read the whole sentence. The whole sentence is:

5       *I deny the applicant's assertion that he was removed from the app on 24  
January 2022, as he had been removed from the app in October 2021 and he  
had not regained access.*

Ms Grover, the applicant was removed from the app in October 2021. That's right, isn't it?---He – he was removed at that time.

10    He was removed in October 2021, wasn't he?---Well, he wasn't on it, so he was removed. Whether the removing happened at that time, but he was – he was not on it, so he was removed, but I don't know if he – if that was the date of the removing.

15    The reason for the removal was an examination of the photograph. That's right, isn't it?---Yes.

And when you examined the photograph, you decided that he was not a woman and removed the applicant from the app. That's right, isn't it?---Yes.

20    And the way – the reason that you looked at the photograph is because of the – the reason that you removed the applicant, Ms Tickle, from the app is because you looked at that photo then, but before that time you hadn't looked at the photo, had you?---No.

25    So Ms Tickle's – Ms Tickle's case is that she was registered on the Giggle app in February '21, and your evidence is that she was removed in October '21. You accept that?---She was no longer on the app in October 2021, yes.

30    Because you removed her. That's right, isn't it?---Yes, but I don't know exactly what – I don't know the exact date or - - -

Well, the reason for the removal was you looking at the photograph. That's right, isn't it?---As would – the same as removing all males, yes.

35    And you looked at the photograph when Ms Tickle contacted Giggle about being removed from the app, didn't you?---Sorry, can you say that again?

40    You looked at the photograph when Ms Tickle contacted Giggle about being removed from the app, didn't you?---No. No.

45    When – so when do you say you looked at the photograph?---So the photograph would have come up in a daily users, and so we would just look. It was our – another way just to – to check because there was quite often a lot of men trying to get on the app, and we would make sure that – you know, that it was working and they hadn't gotten through. And so I would have seen the photo and just gone, "Male," and blocked. And then, from the moment of being blocked, if there was any attempt

On the morning of the 30<sup>th</sup> of October 2021 I missed a return phone call from Ms Grover. She didn't leave me a voicemail message. At 4.35 on the same day, I sent Ms Grover a text message that I would be available on the 1<sup>st</sup> of November '21 to talk with her. I received no response.

5

And that is – then there is an annexure with a copy of the text message. At 29:

On the 5<sup>th</sup> of November '21 at approximately 5 pm I tried calling Ms Grover's mobile number again; didn't receive an answer.

10

At 30:

On 5 November '21 at 5.48 I sent another follow-up email to Ms Grover and explained I tried to call her again. I received no further response.

15

And then there's a summary at 31:

Between the period of 4 October '21 and 5 November '21, I sent a total of eight follow-up emails to Ms Grover regarding my restricted access issue in the Giggle app. Only once did I receive a response.

20

So what Ms Tickle did was to send eight emails asking about her restricted access and also to call the phone number that was on your email sign-off. You agree with that?---Yes.

25

Now – so you read paragraph 26 in about September '23, and it says that – in it she says:

I made a phone call to the mobile number contained in Ms Grover's email signature in the email she had sent to me on 8 October '21.

30

So you know where Ms Tickle says she got your phone number, don't you? It's from your own email signature, isn't it?---I have no recollection of emailing the applicant, so if – if that's the claim, yes.

35

So when you read this affidavit in about September 2023, did you also read the annexures to the affidavit?---Yes.

And so did you see the email that Ms Tickle's talking about?---Yes.

40

And you see that your phone number's on the bottom?---Yes.

So you know, then, that your phone number – your mobile phone number was on the bottom of your email signature; yes?---Yes.

45

So why have you said in numerous interviews since you read this affidavit that you don't know where he got your phone number?



But if I can just ask my question again, it creates a negative impression of the applicant to say, "I don't know where she got my phone number, and it scares me that she called me." Do you see what I'm saying? It creates a negative impression that's not fair. That's right, isn't it?---I don't know where the applicant got my  
5 phone number, and it did scare me. The call scared me.

The content of the emails from Ms Tickle were polite, weren't they?---I'm only going from reading them now. At Giggle, we received some days hundreds or thousands of emails from males. We routinely deleted them or did not read them,  
10 because we could not possibly have.

But on these emails that you've read in – since September 2023, Ms Tickle's communications with you were polite, weren't they?---No.

15 Well, could you tell his Honour in what way they were impolite?---Sending eight emails to a female only app when you're aware that it's a female only app and you're also aware that you're biologically male is not polite, in my opinion.

There's nothing in the content of the emails that's impolite, other than what you've  
20 just said is there?---I would have to have a look at them again.

Well, have a look at them?---What page are they on?

HIS HONOUR: I think the email chain is at page 183, if that helps.  
25

MS COSTELLO: Thank you, your Honour.

So, if I could start you on page 184, that's 4 October 2021. At that email, it's:

30 *Hi Sall, I sent this message through to your app a week ago. Haven't received a response as yet. Sorry to disturb you, but would you mind passing it on to the appropriate person, please? I couldn't find any other way of contacting tech support. Thanks in advance, cheers.*

35 In response to that email, you write an email back, signed off:

*All the best, Sall, founder and CEO.*

With your mobile number, don't you?---That was my email signature.  
40

Yes. It's got your mobile number in it, doesn't it?---Yes.

And you say:

45 *Hi Roxy, I'm so sorry for this, can you send me your phone number and I will personally look into it right now.*

*Hi, Sall. Oh goodness, what a week. Sorry I didn't get a chance to try and call you on Tuesday. Really busy week. I tried just before 5 pm today. My call went straight to voicemail. I will try again in the morning. Have a nice evening. Cheers, Roxy.*

5

Do you agree with me that those are polite emails, Ms Grover?---No.

And then there's a text message on 181, and it – and that's the text message that she sent and it says:

10

*Hi, Sall. Thanks for calling. Sorry I missed your call, but Saturday is my proper "sleep-in and rest all day" day. Actually didn't think you'd be available on the weekend, but I could make time to talk tomorrow if that suited you better than waiting till Tuesday. Cheers, Roxy.*

15

So, Ms Grover, I suggest that the emails and texts from Ms Tickle have been polite, and the explanation for her having your personal phone number is that it's on the bottom of your email.

20

MS NOLAN: I object; two questions in one. Can the witness please break it down?

HIS HONOUR: You do need to break it up.

25

MS COSTELLO: I suggest to you that the content of the emails from Ms Tickle are polite, aren't they?---Not to me, they're not.

And I suggest that the text message is also polite, isn't it?---No.

30

And I suggest that the reason that Ms Tickle had your phone number is that it was in your email address – your email signature?---Okay.

And that to say that Ms Tickle is harassing you is an unfair characterisation of those communications, Ms Grover?---There was no other user, potential user, X user of

35

Giggle who ever called my phone.

If somebody that you considered a female sent those emails, you would consider them polite, wouldn't you?---There would be no reason for them to.

40

If someone you considered female had an issue – an IT issue about accessing your Giggle app and sent you those emails, you would not consider that impolite, would you?---Any issues that females who were using the app had would be done through the in-Giggle app. The emails we received on the hello@giggle were primarily from a flood of male abuse. We didn't receive emails from females of this nature.

45

I appreciate it is hypothetical, but if you had received these same emails and text messages from someone you considered to be a female, you wouldn't find them

When was the trip?---Arrived in London on 18 May and left on the 26<sup>th</sup>, I believe. March, sorry.

5 Did you describe Ms Tickle as a man in any of the interviews you gave in London?---Yes.

10 And did you say in those interviews in – that happened last month that you don’t know where he got your phone number? When I say “he”, that’s the language you use. I’m not referring to her as a he?---Yes.

And did you say you found him – and I use the word “him” because it’s your word, not mine – scary?---Yes.

15 And did you say you found the applicant harassed you?---Yes.

Now, having had the chance to go back and look at those emails that Ms Tickle sent you and look at the text message, would you now like to correct your view that you would articulate that he is – that you say he – I say “she” – communicated to you in a harassing or scary way?---No.

20 You’ve described in your email being bombarded by thousands of men, haven’t you?---Yes.

25 You don’t know if those are men who were assigned male birth – male gender at birth or people who are transgender women, do you?---I know they’re male people. That’s all I know.

I see the time, your Honour. Is it convenient?

30 HIS HONOUR: How are you travelling, Ms Grover?---I’m okay.

If you’re okay to continue, we can continue. Is that - - -

35 MS COSTELLO: My learned friend would like a break, your Honour.

HIS HONOUR: Break. All right.

MS COSTELLO: I’m fine.

40 HIS HONOUR: Well, that’s all right. Well, we will just make it brief, if we could, because I’m keen to use the day. If we maybe just make it, say, a 10 minute break until 20 to, would that be sufficient?

45 MS COSTELLO: Yes, your Honour. I think we’re – maybe if we make it 10 minutes, so we come back at, sort of, just before 20 to.

HIS HONOUR: Well, 20 to will be sufficient.

MS COSTELLO: Okay.

HIS HONOUR: So we will adjourn till 20 minutes to 12.

5

**ADJOURNED**

**[11.26 am]**

10

**RESUMED**

**[11.40 am]**

HIS HONOUR: Ms Grover, I forgot to say – and this is true for every single witness who's in cross-examination – that while your cross-examination continues, it's important you don't discuss your evidence with anyone. Yes. Yes, Ms Costello.

15

MS COSTELLO: Ms Grover, did you discuss your evidence with anyone during the break?---No.

20

I just note that if people from the public gallery were approaching the witness in the break, perhaps you could mention that you would prefer if they didn't.

25

HIS HONOUR: There's nothing wrong with anyone speaking to Ms Grover if she's willing to be spoken to, but you shouldn't discuss her evidence with her at all. It's just a very important principle for all witnesses in all courts in this country, when in the middle of cross-examination, they must not discuss their evidence with anyone. The other thing I was – just ask, can you either – I'm not sure if you can lean forward a bit or twist – pull the microphone in a little bit?---Is that better?

30

That is better, yes?---Okay.

It's hard to remember, but it's just easier for everyone to hear. All right, thank you. Ms Costello.

35

MS COSTELLO: Now, Ms Grover, I'm going to ask you some questions about the crowdfunding. So Giggle For Girls Pty Ltd has received money that's been raised through crowdfunding, hasn't it?---Yes.

40

Part of that is people donating money via a website, right?---The whole part of it is people donating via the website.

There are also proceeds going into crowdfunding from the sale of merchandise?---That is being donated by a supporter to the crowdfund.

45

I beg your pardon?---That's just – a supporter is raising money to donate to the crowdfund. So, it's no different.

So the supporter is raising money through selling merchandise, and then donating the proceeds to the crowdfund, is that right?---Yes.

5 And which supporter is that?---She runs the Twitter account No Self ID In QLD, I think it's called.

And who is that?---She's a Twitter user.

10 And what's her name?---She's anonymous on Twitter.

And what's her name?

HIS HONOUR: Why do you need to know the name?

15 MS COSTELLO: Because I'm drawing a link between the activities of the respondents and the sale of merchandise.

HIS HONOUR: The reason I'm – in ordinary circumstances, I wouldn't raise a concern, but as I indicated at the beginning of this hearing, on both sides of the ledger there's been a degree of inappropriate behaviour. Naming individuals opens them up to that sort of behaviour, regrettably, on both sides of the ledger. So I just need to be clear why you need to know the name.

20

MS COSTELLO: Perhaps I can ask the questions without adducing the name?

25 HIS HONOUR: Yes, that would be helpful.

MS COSTELLO: Okay.

30 Do you know, without telling the court the name, do you know the name of the person who is raising the money by selling the merchandise?---I know her first name.

Okay. And do you know her email address, without saying what that email address is?---I think we've sent emails to each other, yes.

35 And do you know her phone number?---Yes.

And so how many times have you spoken with the person this year?---We've become friends, so we talk frequently.

40 Okay. About how many times a week do you speak?---Seven.

About – so about every day?---Yes.

45 Okay. And does the person keep you informed about the sales of merchandise?---No, we're friends. We send each other memes. We're friends beyond this now, like, we – I don't – she has her Etsy store, she just asked if I could

– if she could do Team Giggle shirts because – so that she could contribute to the crowd fund. I said yes.

Okay. Did you say thank you?---Yes.

5

And how much money has been contributed to the crowdfunding?---I don't know.

So has the person made an affidavit in this proceeding?---No.

10 And did the person show you the merchandise before it was sold?---She showed me the Team Giggle t-shirt, and I said that looks great.

Okay, and what else did she show you?---That was it.

15 And have you discussed the merchandise with the person in your phone calls or emails?---What do you mean?

There's a number of things being sold by that person. That's right, isn't it?---Yes.

20 They sell it from an Etsy store called I'm Not The Fun Kind, don't they?---Yes.

And to your knowledge, what other items are for sale, apart from the t-shirt?---I've only ever gone on there to buy one of the t-shirts, the Team Giggle t-shirts.

25 Okay. So you've bought one of the Team Giggle t-shirts?---I bought one for myself and one for my daughter.

And when you bought that t-shirt, you went to the I'm Not The Fun Kind Etsy store, did you?---I think I asked her to send me the link and she sent me the link to the t-shirt.

30

And when you went to the link for the t-shirt, you – did you experience that typical online user experience where you go to buy one thing but there's also other things for sale on that website?---I don't recall.

35

You did read the affidavit material of Ms Tickle, didn't you?---Yes.

And so, attached to that affidavit, you saw pictures of the merchandise for sale on the I'm Not The Fun Kind Etsy website, didn't you?---Yes.

40

Would you agree with me that some of that merchandise is offensive?---Can I have a look at it?

Sure?---What page?

45

MS NOLAN: Starts at - - -

MS COSTELLO: I don't need your help, thank you very much. If I could ask you to go to court book 285?---285, did you say?

5 Yes. Okay, do you see that picture of a, "Sweaty Balls Team Giggle" scented soy candle, Ms Grover?---Yes, sorry.

Are you laughing, Ms Grover?---In the context of this room, it's just – sorry. I understand the offense in the context of this room.

10 Do you? What is the offense?---That it would – someone could consider it offensive. But I didn't make this.

15 You think it's amusing that someone – do you understand that it's deeply offensive to the applicant to be made the subject of such scorn as she is in this picture?---I have not made the applicant the subject of scorn.

20 Do you understand, though, that it is deeply offensive to the applicant to be the subject of this scorn?---That may be so, but I have not made the applicant the subject to this scorn.

Okay. So when you say, "That may be so", you do understand that this is deeply offensive to the applicant?---I mean, offense is very subjective, so what one person might take offense is something someone else doesn't.

25 If you could go to page 249, Ms Grover. So that's a – this is annexure - - -

HIS HONOUR: 249 is an annexure cover sheet.

30 MS COSTELLO: It is, yes, your Honour.

That is a cover sheet, and it says:

*A true copy of the merchandise a supporter of Ms Grover is selling through  
Etsy.*

35 And then you have various pages after that?---Mm.

40 And so if you look on the first page, you see it says "Etsy" and it's for sale from the "I'm Not The Fun Kind" seller, isn't it?---Mm.

And that's the person you know, but we're not going to name?---Mm.

45 And you can see on page 250 and 251 there are various items there, and on page 252 and 253 you can see various items. Now, on page 254 you can see a jumper or windcheater, and it's called, "He's a Man crewneck sweatshirt," isn't it?---Yes.

And so when did you become aware that some of the merchandise on – that was being sold by the “I’m Not The Fun Kind” seller included this sweatshirt with “He’s a Man” on it?---I mean, I don’t know when I would have – I mean, probably – I would’ve known about it before the – this affidavit, but I don’t know exactly when.

5 And so Giggle has been receiving the profits from the sale of this windcheater, right?---No, only the “Team Giggle”.

How do you know that it’s only receiving the proceeds - - -?---Well, that’s what I was – had been told by the operator of the store. “Can I make Team Giggle merchandise to” – so that she could have some money to donate to the crowdfund.

10 When I showed you the candle earlier, you’ve seen that before, haven’t you?---Yes.

15 You’ve seen it not just in this affidavit, but you’ve seen it on the online store, haven’t you?---Not on the online store, but I’ve seen it.

Where have you seen it?---On Twitter.

20 Okay. So have you seen on Twitter that merchandise with that picture on it and that cartoon on it is being sold?---I think I saw, like, a link one time.

And you know the seller, don’t you?---Yes.

25 And you haven’t said to the seller, “Look, don’t sell those things because they’re offensive,” have you?---I have not told her what to do, no.

So if in response to your public comments about the case other people are saying things, you don’t take it upon yourself to say, “That’s not nice. Don’t say that,” do you?---I think people can come to their own conclusions.

30 And you’ve encouraged people to buy the merchandise being sold by “I’m Not The Fun Kind,” haven’t you?---I think a few times, when she first did it, I did a tweet about it, and then occasionally when a woman would be – would take a photo and post it wearing the shirt, I would retweet it in celebration of the fabulous woman wearing a Team Giggle shirt.

35 You’ve tweeted yourself, referring people to the Etsy shop to buy the Giggle T-shirt, haven’t you?---Yes.

40 And you’ve said that all profits will go to Giggle crowdfund.com, haven’t you?---For the Giggle T-shirt.

Well, can you show me – if I could ask the witness to be given a tender bundle. This is a clean copy. These are the ones to which no objection was taken in the end. I’ve taken out the transcripts from the back. So if we look at page 4, you can see there

45



that there's a post from you, Sall Grover?---This is the "All profits will go to Giggle crowdfund"?

Yes?---Yes.

5

So when you say, "All profits will go to Giggle crowdfund.com," you don't say "of only the T-shirt", do you?---It's just the picture of that T-shirt. It's the link specifically to the part of the Etsy store that sells that T-shirt, so you're directly taken to that T-shirt.

10

So you know that there are Team Giggle bags, right?---Yes.

And caps?---Yes, I didn't – but I didn't post about them.

15

Right. But you are getting the proceeds from all the Team Giggle merchandise, aren't you?---From the Team Giggle one, yes.

20

Right. So it's not just T-shirts, is it?---My understanding of – on an Etsy thing of how it's made is that you put in the design and then it – it's, like – it's – it's made to order. So you have all of the options. So it's not like it's all sitting there as existing merchandise. So Etsy is a service – I've not used Etsy, but my understanding is that's how it's done.

25

There's more than one item being sold for which the profits are going to the crowdfund. That's right, isn't it?---Yes.

And so when you say, "All profits will go to Giggle crowdfund.com," you're not just talking about the T-shirt, are you?---Team Giggle.

30

But you don't say that, do you?---I do have a tweet that I can give to you of – the person who runs it was clarifying that to other people. It is public knowledge that it was just Team Giggle.

35

In this tweet of yours, what you say is, "All profits will go to Giggle crowdfund.com," and you have a link to the etsy.com.au listing of the "I'm Not The Fun Kind" seller, which has a T-shirt in it, but you don't say that all profits will go to Giggle crowdfund of only the T-shirt, do you?---I thought it was implied from the image.

40

And on the next page, you've got "No Self ID in QLD". That's the seller, isn't it?---Yes.

That's the person who describes themselves as "I'm Not The Fun Kind" on Etsy?---Yes.

45

And that person says:

*This shop is selling Team Giggle merch with all profits going to @salltweets crowdfund to defend the rights of women and girls. T-shirts, mugs, stubby coolers, bags, hats.*

5 See that?---Yes.

It doesn't say, "Only the things with Giggle written on it," does it?---She says, "Team Giggle merch".

10 It says, "Team Giggle merch," but it doesn't say, "Only the things with only Team Giggle written on it are going to Team Giggle," does it?---No.

And you've liked that tweet, haven't you? It says here at the top, "Sall Grover posts"?---I reposted it.

15 So you reposted that. So do you accept that someone reading your post would think that the things with "Team Giggle" written on it that people can buy – the proceeds will go to Team Giggle?---Yes.

20 So if we go back to the page 285 of the court book, you agree with me that the "Sweaty Balls Team Giggle scented soy candle" has Team Giggle's logo on it, don't you?---Yes.

25 And so you have reposted a link to the Etsy shop "I'm Not The Fun Kind" in circumstances where offensive merchandise is being sold, haven't you?---I think offence is subjective.

And if we go to the next page, which is page 6, you have reposted the Etsy store holder "No Self ID in QLD", saying:

30 *Saturday is a good day to buy a Tickle vs Giggle merch to support @salltweets defending herself from a gross man trying to bully his way onto her female-only app.*

35 And then it says:

*This shop is selling Team Giggle merch with all profits going to @salltweets crowdfund to defend the rights of women and girls. T-shirts, mugs, stubby coolers, bags, hats. Get on it.*

40 You see that?---Yes.

And you haven't said, "Don't describe Ms Tickle as a gross man," have you?---No.

45 In fact, you've reposted this, haven't you?---For the Team Giggle crowdfund, yes.

But you've reposted this post?---Yes.

And it refers to selling mugs, doesn't it?---Yes.

And the mug has that demeaning cartoon on it, doesn't it?

5 MS NOLAN: I object. It's not a mug. It's a candle.

HIS HONOUR: Candle.

10 MS COSTELLO: Sorry, the – yes, that's right. And, on page 7, you have reposted someone again referring people to the etsy.com listing, haven't you?---Is this the fairgameau.com tweet?

Maggie Grier?---Maggie. Sorry, yes.

15 And, on page 8, you have reposted the Fair Game link to the merch, haven't you?---Yes.

20 And, on page 9, you have depicted the Team Giggle merch, haven't you?---In all of the three pictures that I've reposted, I've only posted the T-shirt.

Now, if I could just take you to the next page in that bundle, page 10, that is – that's a screenshot of a post from you this year, on 19 February 2024. And, in that post, you say:

25 *The first lie about sex change operations is they don't change sex. They're self ID with body mutilations, life-long medical complications and a big bill.*

Don't you?---Yes.

30 And then, on the next page, at page 11, it says at the top Sall Grover. So this is --?---Yes.

Is this something that – this page, is this thing – this page showing that you've liked these things or that you've posted them?---It's showing that I've liked them.

35 Okay. So that means that you've liked this first one which is Lesbian Action Group saying:

40 *She's doing this for all of us women and I, for one, will be there to show my support and gratitude. If the Australian law says that Mr Tickle is a lesbian then lesbians cease to exist.*

You've liked that?---Yes.

45 And you've liked the next one:

*Mr Tickle, a castrated man, who, he says, feels like a woman and a lesbian is taking us all to court this week so that the Australian law can back him up and say that his feelings are more important than our rights. Sall Grover, this woman extraordinaire is fighting for him.*

5

So you've liked that to, haven't you?

MS NOLAN: "Is fighting him".

10

HIS HONOUR: "Is fighting him" not "fighting for him".

MS COSTELLO: "Is fighting him on this"?---Yes.

15

Now, Ms Grover, I suggest to you that, when you are posting and liking these sorts of messages that describe our client, the applicant, Ms Tickle, as a castrated man, that that is hurtful to our client. What do you say to that?

20

MS NOLAN: Well, I object, your Honour, and I have – I'm going to ask that the witness leave the room only because I've been lenient – wide berth in cross-examination and I'm - - -

25

HIS HONOUR: Ms Grover, it's customary, if something is being raised about the evidence you're about to give or may give, that you leave the courtroom and, ideally, just go down the corridor a bit so that you're not influenced by what's said in your absence. Thank you.

<THE WITNESS WITHDREW

[12.03 pm]

30

HIS HONOUR: Yes, Ms Nolan.

35

MS NOLAN: Although my friend's cross-examination is not eliciting the answers that she may hope to elicit, and I say – I should actually pause to say this that I say through your Honour to the gallery that please do not speak to Ms Grover at all about anything that I say in this courtroom with respect to her evidence. It is absolutely paramount that you don't. Although this - - -

40

HIS HONOUR: I think it would be best if – if no one approached Ms Grover while she's still giving her evidence because it doesn't help her if there's any suggestion made that she has spoken about her evidence to anyone. It's just better that doesn't happen.

45

MS NOLAN: I say to the court that I gave Ms Grover the usual warning when - - -

HIS HONOUR: Yes.

HIS HONOUR: Ms Heger, just before you commence, I will just make mention one matter which I don't seek to hear from the parties now, but it occurs to me for tomorrow to increase the prospects of finishing or to accommodate or apply, the choices might be to either start a little earlier or, if we don't want to put a squeeze on  
5 tomorrow, for the applicant to consider a reply being done by video link from Melbourne. I've been advised we do have a Melbourne courtroom available if that's something that the applicant would like to avail themselves of for their reply. I can deal with that at the end of the day. All right. Yes, Ms Heger.

10 MS HEGER: Your Honour, the Sex Discrimination Commissioner has intervened to assist the court on the various questions of law in these proceedings and takes no position on whether there has, in fact, been discrimination in this case. I propose to structure my submissions in this way: first, to go through the Sex Discrimination Act, its key provisions, and hopefully answer some of the questions your Honour  
15 alluded to before lunch; and then come to the key legal questions in the case, so deal secondly with what does "sex" mean in section 5 of the Act and how does it relate to the concept of gender identity in section 5B; next, what is the proper construction of section 7D dealing with special measures; and thirdly, the question of does section 5B have effect.

20 Now, it has been couched by the respondent as a question of constitutional validity of that provision, but in my submission it's really a question about the operation of section 9, particularly subsections (10) and (11) of the Sex Discrimination Act and whether section 5B gives effect in the language of that provision to the relevant  
25 international treaties. There's also a question about whether section 5B is alternatively supported insofar as it applies to trading corporations. I understand my learned friend Ms Costello will be addressing that insofar as it engages with the facts of this case, whether the – whether Giggle Proprietary Limited was a trading corporation. And then I'm proposing to rely on my written submissions in respect of  
30 the section 109 issue in respect of the Queensland Act unless your Honour has any particular questions about that.

HIS HONOUR: I think I understood that well enough as to the point you were making.

35 MS HEGER: All right. So turning first to the relevant provisions of the Sex Discrimination Act, where I propose to start was in - - -

40 HIS HONOUR: I've got the copy that's in the bundle. I do have a copy of the entire Act if I need to go beyond the sections that have been reproduced in the bundle, so - - -

MS HEGER: Yes.

45 HIS HONOUR: - - - let me know if I need to go beyond the sections that have been reproduced there.

HIS HONOUR: - - - flavour to it.

MS HEGER: Yes.

5 HIS HONOUR: And I know there is still the status provision in article 26 in ICCPR, in the International Covenant for Civil and Political Rights, but I still have to engage with how CEDAW works - - -

MS HEGER: Yes.

10 HIS HONOUR: - - - and just how this interacts with the nature of the enlargement – effective enlargement of Commonwealth power under the external affairs power.

MS HEGER: Yes. Well, I think authorities establish – and I might have to turn  
15 them up tonight – that when you’re approaching the question of Commonwealth power under the Constitution, that’s certainly not – and construing the external affairs power, that’s not frozen at any particular point in time.

HIS HONOUR: There’s certainly references to things moving on and - - -

20 MS HEGER: Yes.

HIS HONOUR: - - - that’s more to do with the Constitution itself, though, isn’t it  
- - -

25 MS HEGER: Yes.

HIS HONOUR: - - - than it is to do with how convention interacts with section  
51(xxxix), the external affairs power, because of its effect of enlarging  
30 Commonwealth power. The concern I’m really getting at is to do with – you know, it’s recognised in, after all, the cases dealing with 51(xxxix), going back to at least the Tasmanian Dams case, that this has been an enlargement, and those cases make it clear enough an enlargement necessary for Australia to be a participating member in the international community, but just where the limits lie on that. As I say, it’s one  
35 thing to interpret words that are there. It’s another thing to broaden the scope and thereby broaden the power. Maybe your answer to that, on considering it, is, “Nothing to be concerned about here,” but I think I do have to engage with it.

MS HEGER: Yes, yes, and I say what the CEDAW Committee is doing is not  
40 enlarging the scope or operation of the convention; it’s an authoritative interpretation of what the words in the convention mean because as I - - -

HIS HONOUR: But it is – when the High Court says to have regard to it, are they  
45 treating it as more than in a – conceptually in the manner that we treat extrinsic material interpreting statutes, that is, is it akin to a second reading speech, to an explanatory memorandum, or in the case of the Evidence Act, for example, reliance upon the Law Reform Commission report; those sorts of things? Is it an interpretive

HIS HONOUR: Dealing with (a) and (b), CEDAW and ICC - - -

MS HEGER: The ICCPR.

5 HIS HONOUR: Yes.

MS HEGER: Yes. So the effect of subsection (10) is that section 5B will only – read together with section 22, will only have effect to the extent that it gives effect to a relevant international instrument, which is why I say the question is more one of  
10 the operation of section 9 rather than constitutional validity because even if your Honour concluded that section 5B read with 22 does not give effect to any treaty, you would not need to declare it invalid; you would just conclude it's - - -

HIS HONOUR: You could say – it's analogous to the operation of the Judiciary Act  
15 in terms of what gets picked up or what doesn't; what gets applied or what doesn't.

MS HEGER: Yes, what has effect or what does not. Yes. Now, all that being said, the authorities recognise that this provision is drafted with a view to the external affairs power and section 9 generally, the heads of Commonwealth legislative power.  
20 So that's AB in the Full Federal Court at tab 23, paragraph 7 and 76. And so I accept the case law looking at whether a legislation implements a treaty will be relevant in informing whether the legislation here gives effect to the relevant international instrument, and the question in that context, as we've set out in the submissions, is whether the legislation is reasonably capable of being considered appropriate and  
25 adapted to implementing the treaty, and a measure of discretion is given to Parliament in selecting the means of implementation.

So we rely on CEDAW as well as article 26 of the ICCPR. Now, I've already made some submissions about why CEDAW treats women as transgender women. Now,  
30 here, I need to show that it also recognises that women – all women – should be protected from discrimination on the grounds of gender identity, as well, even though that concept is not referred to in the text of CEDAW. And again, I'm going to be relying on general recommendation 28 from the CEDAW committee – tab 98. I've already been to paragraph 5 of that recommendation.

35 HIS HONOUR: So go to 28 did you say? Yes.

MS HEGER: Recommendation 28, tab 98 of the - - -

40 HIS HONOUR: Yes, I've got 28.

MS HEGER: Yes. Paragraph 18 refers to intersectional forms of discrimination faced by women including on the basis of gender identity. States must recognise and prohibit them. And then there are other commentaries from the CEDAW committee  
45 confirming that the protections extend to gender identity and - - -

HIS HONOUR: So you've identified previously 5; now 18 and 28?

expense of women's rights. Overall, to be clear, the special rapporteur embraces the respondent's position, ie, that sex is the biological concept and seems to suggest that the concept of gender identity is in conflict with women's rights somehow. My response to that is this: first of all, that analysis assumes that "women" solely refers to biological females, which I've already addressed.

Secondly, the risk of violence doesn't arise so much on the facts of this case where we're talking about an online forum. But also the argument fails to recognise that it can be permissible to discriminate on the grounds of gender identity in some contexts. So, for example, in the context of indirect discrimination, if it's the condition, requirement or practice imposed is reasonable in all the circumstances then it's not unlawful. And, likewise, discrimination between people with different gender identities is not discrimination if it is for the purpose of achieving substantive equality within section 7D, subsection (1), paragraph (ab). So there may be some circumstances in which it is legitimate to discriminate on the grounds of gender identity. Nobody is saying otherwise. So that's my response to that argument.

Alternatively, we rely on article 26 of the ICCPR which refers to the law prohibiting any discrimination and guaranteeing to all persons equal and effective protection against discrimination on any ground such as race, colour, sex or other status. And it's – there are some other characteristics I skipped over there. But "other status" is the ground that we rely on. And there's now express recognition by the UN Human Rights Committee in that article 26 extends to discrimination on the grounds of gender identity. We've collected those in footnote 78 of the written submissions. And I would particularly refer to the case of G v Australia, which is at tab 104 of the joint book of authorities. So that was a case where a transgender woman was denied a birth certificate stating that she was female on the ground that she was married which is not, as I understand it, the same party in the AB case but a different person claiming discrimination on similar grounds.

And they claimed a breach of article 26 on the basis of discrimination on the ground of marital status as well as gender identity. And, at paragraph 7.12 of the decision, there's an express recognition that article 26, other status encompasses gender identity. Alternatively, the provision may have effect under section 9, subsection (11), the Trading Corporation point which, as I say, I think my learned friend Ms Costello will deal with. That just leaves section 109 of the constitution which I had intended to rely on my written submissions about but - - -

HIS HONOUR: Yes.

MS HEGER: - - - your Honour did ask me earlier if I was going to address it. And so I'm happy to.

HIS HONOUR: Well, I thought if you could do it in a short form - - -

MS HEGER: Yes.





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## TRANSCRIPT OF PROCEEDINGS

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O/N H-1916364

**FEDERAL COURT OF AUSTRALIA**

**NEW SOUTH WALES REGISTRY**

**BROMWICH J**

**No. NSD 1148 of 2022**

**ROXANNE TICKLE**

**and**

**GIGGLE FOR GIRLS PTY LTD and ANOTHER**

**SYDNEY**

**9.30 AM, THURSDAY, 11 APRIL 2024**

**Continued from 10.4.24**

**DAY 3**

**MS G. COSTELLO KC appears with MS B. GODING and MS E. NADON for the applicant**

**MS B.K. NOLAN appears with MS A. COSTSIN for the respondent**

**MS Z. HEGER appears as an interested party**

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power, expanding over time. And we say the same logic would apply even where you have one treaty such as CEDAW, the meaning of which has evolved over time and been authoritatively elaborated over time by the CEDAW committee. The second - - -

5

HIS HONOUR: So it's not only that the external affairs power wasn't fixed at federation but the adoption – the consequences of adopting a treaty and then legislate in response to it or in implementing it is similarly not fixed on the same reasoning; is that the point?

10

MS HEGER: Yes, it is – well, it's recognised that the subject matter of treaties may multiply over time and thus scope of legislative power can expand over time and legislation can be passed accordingly. The second thing I wish to say is just to recall the test for whether legislation implements a treaty for the purpose of the external affairs power. So it's set out at page 487 of the same case at the top:

15

*To be a law with respect to external affairs, the law must be reasonably capable of being considered appropriate and adapted to implementing the treaty. Thus, it is for the legislature to choose the means by which it carries into or gives effect to the treaty provided that the means chosen are reasonably capable of being considered appropriate and adapted to that end.*

20

So it's not a question of does the legislation implement the letter of the treaty? There's a, sort of, margin of discretion given to Parliament and the question is whether it's reasonably capable in the sense that I've just outlined. So I think your Honour made a comparison yesterday to whether a regulation is authorised by a statute. In this context, it's a bit broader because of that margin of discretion that's given. And so, when looking at whether legislation satisfies that test, of course, the first step is to ascertain the content of the relevant treaty obligation. And that must be the obligation as at the date of the relevant conduct that is at issue in a given case. And that sort of exercise of construing the treaty is not really any different from what the High Court was doing in Nauru, working out what the treaty obligation means at a certain point in time. You can look at things like the CEDAW Committee's recommendations and the like. And also the recommendations and other material issued by the CEDAW Committee will provide some evidentiary support for what's considered reasonable in the context of that reasonably capable test.

25

30

35

HIS HONOUR: But if it's – it's more in the nature of an aid to reasoning or was it more than that? I'm still trying to make sure I've clearly understood the proper role and the metes and bounds of the role of the committee's work and publications and so on in relation to how you interpret the scope of the enabling power of a convention and therefore the scope of the legislative power derived from it.

40

MS HEGER: It's an aid to interpretation and it's an authoritative aid for these reasoning, and this is really coming to the third proposition. The CEDAW Committee is, of course, something established by the convention itself by virtue - - -

45

HIS HONOUR: Can I just be clear on this: so 185 where it has got image0.png, you say that – I should draw an inference that that is the message for – was it at 178?

MS COSTELLO: I'm not sure that it's – that image0.png is the thing but, your  
5 Honour, our case is that the screenshot that you've seen at 177, that screenshot was sent by Ms Tickle to Ms Grover by cover of an email that said:

*I sent this message through your app a week ago and haven't received a response as yet.*

10

HIS HONOUR: So the answer to my question is yes, the reference to image is – should be inferred to be the image at 177 or 178 of the text.

MS COSTELLO: Yes, your Honour.

15

HIS HONOUR: All right.

MS COSTELLO: And then, in response to that email, Ms Tickle says:

20 *Hi Roxy. I'm so sorry for this. Can you send me your phone number and I will personally look into it right now?*

And then we have from Ms Grover's evidence that, when Ms Grover received that phone number, she then looked at the onboarding picture. And then Ms Grover says,  
25 when she saw that picture, she decided that he was a man. And thereafter the attitude of Ms Grover was that Ms Tickle would not given access to the app. Now, what you see here is that the email to Ms Grover is – comes from Roxy, Roxy being a female name. And the picture that Ms Grover looked at in terms of the onboarding picture we say was of a person presenting herself as a woman but, because of the way that  
30 Ms Grover views transgender women, she is unable to see that a transgender woman is a woman. And so, because of her view that, if it looks like a – someone born a man who is presenting as a woman then they're a man, then they're – then that person could not be let on to the app. And we say that the combination of Ms Tickle sending the in-app screenshot to Ms Grover, the fact that Ms Grover has replied to  
35 the email, the fact that Ms Grover has given evidence that she received calls from this person in the context where Ms Grover has asked Ms Tickle for her phone number and then looked it up means that your Honour ought to conclude that what happened here was that there was a refusal to address the customer service complaints and the requests for access to the app because of gender identity  
40 discrimination.

You may recall my – I hope you recall my question in cross-examination which is that, "If a woman who you perceived as a woman had sent this email you would have responded." There was an evasive series of non-answers to that question, but  
45 ultimately that's what your Honour should conclude. If someone born a woman with "woman" on their birth certificate from birth had sent these same customer service inquiries, the response of the respondents would have been that, "Well, maybe we've

- got a technical issue we need to resolve,” but instead, because Ms Tickle, with the female name, Roxy Tickle, asks to be let back on to the app, and they have a – and this is not an in-the-heart moment. This is their clear position because they have a policy of not treating that sort of person as a woman, they didn’t respond - - -
- 5 HIS HONOUR: Well, we’re crossing over - - -
- MS COSTELLO: - - - or let her back on.
- 10 HIS HONOUR: - - - into the indirect discrimination case, aren’t we, there? We need to keep a distinction between the two because it’s one or the other, not both.
- MS COSTELLO: Yes. On that, your Honour, acknowledging the need ultimately in your judgment for you to either - - -
- 15 HIS HONOUR: But it’s clear enough that you – unless you tell me that’s wrong and Bromberg J, albeit in dissent, in Sklavos and that – I don’t think the judgment – joint judgment with Griffiths J and myself disagree with Bromberg J on that – you - - -
- 20 MS COSTELLO: No, I was - - -
- HIS HONOUR: It has to be one or the other.
- MS COSTELLO: Yes, your Honour. What I was going to say is that whilst in your judgment it has to be one or the other, it is orthodox for applicants to plead it in the alternative, as we do.
- 25 HIS HONOUR: Well, you don’t. That’s part of my problem. You plead both. You don’t plead in the alternative, which is why I’m asking you which is your primary discrimination claim and what’s your secondary or alternative discrimination claim?
- 30 MS COSTELLO: Yes, your Honour. So I will come to that in just a moment but just to finish on this topic about how we say the breach arises, in fact, before characterising it as indirect or direct, I’ve started with this one, which is the - - -
- 35 HIS HONOUR: Well, the removal on the – well, you – the – you said there were two breaches. The first was inability to use the app. Sent emails asking why blocked. There was the initial reply and then there was no response and no reinstatement and, therefore, that amounted to refusing to provide the service. Is that
- 40 - - -
- MS COSTELLO: Yes. So just – so the first is this refusal - - -
- HIS HONOUR: You don’t have to agree with me. I’m just making sure I’m understanding it.
- 45 MS COSTELLO: Yes. So I had not got to the second one. So I was saying - - -

HIS HONOUR: Right.

MS COSTELLO: - - - the first one is this refusal of – refusal to respond to the customer service inquiries. The second is that the – is that Ms Tickle was excluded from using the Giggle app by reason of gender identity. That allegation is one that can be characterised as indirect discrimination because the imposition of a condition that you had to be a woman to use the app had a discriminatory impact upon Ms Tickle. Alternatively, it can be characterised as indirect – it can be characterised direct discrimination in that, in their discretionary acts in carrying out that policy, there was a specific identification of Ms Tickle’s photograph and a decision to treat that person as not female within the usual conditions of – for users of the app and to decide to exclude her looking at that photograph. So there’s the imposition of a condition which is under section 5B(1) and is classically understood as indirect discrimination.

HIS HONOUR: Sorry, 5B(2) is the - - -

MS COSTELLO: 5B(2). Yes. And then there’s the application of that condition to this applicant which could be characterised as direct discrimination in the way that the application of their – shall I say facially neutral policy applies to this applicant and so, in that way, it’s put in the alternative. It doesn’t - - -

HIS HONOUR: So if I deal with it chronologically – I think your two examples are in reverse chronology.

MS COSTELLO: Yes, your Honour.

HIS HONOUR: Dealing with it chronologically, in terms of the removal or being taken off the app – that first step – you put that as indirect discrimination by reference to – of a condition.

MS COSTELLO: Yes, your Honour.

HIS HONOUR: So is that your primary point? And alternatively, direct discrimination by the way in which the policy itself was carried out and treating – not treating the applicant as female?

MS COSTELLO: Yes, I respectfully adopt that summary which is, perhaps, much more eloquent than I put it - - -

HIS HONOUR: Yes.

MS COSTELLO: - - - but could I say - - -

HIS HONOUR: And then your – so that’s the first – that’s the first in time?

MS COSTELLO: Yes.

HIS HONOUR: All right. Sorry, I interrupted you.

MS COSTELLO: Yes. I just wanted to say that I've listened to your Honour yesterday refer to the pleading being confusing, and might I say, your Honour, that if  
5 you – I think the confusion - - -

HIS HONOUR: I don't think I used language quite as strong as that. Maybe I did, but all I was saying is that it wasn't clearly in the alternative and there was a bit of a mixing between the language of direct and indirect. So, for example, paragraph 35  
10 uses – refers to section - - -

MS COSTELLO: Yes. That's right.

HIS HONOUR: 5B, subsection (1).  
15

MS COSTELLO: So could I just address that?

HIS HONOUR: Yes.

20 MS COSTELLO: So if your Honour looks at that paragraph 35, and it does, as you say, refer to 5B(1) – if you deleted (a) – so if you delete 35(a) - - -

HIS HONOUR: Right.

25 MS COSTELLO: - - - using the imposed condition 6 more logically under paragraph 38 where we refer to 5B(2) so that the direct discrimination in 35 is the exclusion, and the refusal to deal with the customer service - - -

HIS HONOUR: All right.  
30

MS COSTELLO: - - - inquiry, whereas the indirect discrimination is pleaded under section 38, which is the - - -

HIS HONOUR: Well, you don't need to move the (a) because you've got the  
35 reference to the imposed condition in the chapeau to 38, I think.

MS COSTELLO: Yes. So I just thought if you were confused - - -

HIS HONOUR: Just easier to delete and not to add. Yes.  
40

MS COSTELLO: Yes. I just thought if it - - -

HIS HONOUR: Sure.

45 MS COSTELLO: - - - was confusing that we've put "using the imposed condition" under 5B(1), then - - -

HIS HONOUR: If you don't rely on (a) in 35, then I think that - - -

MS COSTELLO: Yes.

5 HIS HONOUR: - - - resolves it.

MS COSTELLO: Yes.

HIS HONOUR: All right.

10 MS COSTELLO: So that hopefully makes it clearer, and I'm sorry it wasn't - - -

HIS HONOUR: It's okay.

15 MS COSTELLO: - - - clearer earlier.

HIS HONOUR: But let me just return to the two breaches, then. So second in time is –the first having occurred in time, removal; the second in time is the not being reinstated, if I could use that as a generic - - -

20 MS COSTELLO: Yes.

HIS HONOUR: - - - term. Is that being treated as a separate instance of discrimination?

25 MS COSTELLO: Yes. We say - - -

HIS HONOUR: So – all right.

30 MS COSTELLO: - - - (b) and (c) are two breaches, your Honour, and (b) can be characterised either as direct under 35, or indirect under 38, and we put those in the alternative.

HIS HONOUR: Sorry, when you're saying (b) and (c), you're talking about section

35 - - -

MS COSTELLO: I'm talking about my pleading, sorry, 35.

HIS HONOUR: Paragraph 35. Yes.

40 MS COSTELLO: So 35(b) and (c) would, in our submission, most logically be seen as two breaches, one being the exclusion, the other being the refusal to put her back on.

45 HIS HONOUR: I see.

MS COSTELLO: And those two things were done - - -

HIS HONOUR: So those two are being pleaded as direct.

MS COSTELLO: Yes, your Honour.

5 HIS HONOUR: The two different steps, if you like - - -

MS COSTELLO: Yes, your Honour.

10 HIS HONOUR: - - - and the not being able to get back on – is that being pleaded as indirect only in respect of not being reinstated?

MS COSTELLO: Yes. So (b) and (c) are two breaches that we plead as either direct discrimination or indirect discrimination through an imposed condition. So I think it all makes a bit better sense if you just ignore (a) in 35(a), because when you  
15 look at the indirect discrimination in 5B, it alleges that in breach of 22, the discrimination was on the basis of the gender identity by using the imposed condition. Now, the use of the imposed condition had two impacts. It excluded her from the app, and it also meant that her request for re-entry or access was treated in a discriminatory way. So - - -

20 HIS HONOUR: She had access from February to September. It was the point of removal and then not allowed to get back on.

MS COSTELLO: Yes, your Honour.

25 HIS HONOUR: That's correct, isn't it?

MS COSTELLO: Yes, your Honour.

30 HIS HONOUR: To make sure I've got my history right. Yes. All right. All right.

MS COSTELLO: All right, then.. So, your Honour, the fact that respondents had a modus operandi of treating transgender women as men is clear, and it's, perhaps, starkly illustrated by the answer to the question that I asked after some, perhaps  
35 infelicitous questions where I was asking about the applicant's – the features of the applicant's gender identity, and then after an objection I asked Ms Grover the hypothetical question, which was even if – so I asked this. I said, "Ms Grover, even where a person who is assigned male gender at birth, has transitioned to being a woman by having gender changing surgery, is taking hormones to make them grow  
40 breasts, change the nature of their fascial hair through electrolysis so they don't fascial hair, undergone fascial reconstruction surgeries so that they have more female features, wears long hair, wears makeup, wears female clothing, shops in a female clothing shop, describes themselves as a woman, introduces themselves as a woman, using female changing rooms, has a female birth certificate, even a women like that,  
45 you don't accept that that person is a woman, do you", and the answer was, "No". And so it's clear that that's the approach of the first respondent and the second respondent, is that unless they're satisfied that the person was - - -



HIS HONOUR: That's fine.

MS COSTELLO: - - - I'm following instructions. So the next issue to - - -

5 HIS HONOUR: But I'm understanding the point I'm making - - -

MS COSTELLO: Yes. Yes, your Honour.

10 HIS HONOUR: - - - which may be responded to, that it looks to me at the moment, but these are all preliminary views, everyone who has ever appeared before me know this is the way I function for better or for worse, which is to test propositions as I go along to assist me in understanding them. But it seems to be at the moment that your case for the indirect discrimination may be stronger than your case on the direct discrimination - - -

15 MS COSTELLO: Yes, your Honour.

HIS HONOUR: - - - because of the way in which the evidence has evolved.

20 MS COSTELLO: If I might move to the special measures issue.

HIS HONOUR: Sure.

25 MS COSTELLO: The respondent's – the respondent's conduct – discriminatory conduct, being the exclusion of – this transgender woman from the Giggle app was not authorised under section 7D a special measure for the purpose of achieving substantial equality. We recognise that that – there's another section in the Sex Discrimination Act, 7B, which specifically puts the burden on the discriminator, so to speak. We don't say that what – we don't say that that applies with 7D. We have

30 the burden in terms of establishing discrimination and establishing that it's not carved out by the use of a special measure. We - - -

HIS HONOUR: I didn't think 7B is being relied upon.

35 MS COSTELLO: It's not. It's not. But I just wanted – I just didn't want your Honour to think we are assuming any sort of reversed onus which applies to 7B but doesn't apply to 7D.

HIS HONOUR: Right.

40 MS COSTELLO: Yes. The respondent's pleading at its defence is – only appears at 5.

HIS HONOUR: All of your 5B pleading is just simply denied.

45

*Grover's online posts reached large domestic and international audiences, which has led to the scale of online hate towards me being enormous.*

Now, the – she also says at 39 that:

5

*This has consumed my life outside of work and sport, which has led me to experiencing constant anxiety and occasional suicidal thoughts.*

10 And at 41 she talks about her anxiety being compounded. And she has brought this case to court seeking to – seeking a remedy for the discrimination she has, we say, experienced in circumstances where the purpose of the Act is to eliminate that kind of thing, and yet, having brought her complaint and then it didn't resolve in the Commission and legal action has been taken here, what it has resulted in is a global campaign by the respondents against Ms Tickle in circumstances where the evidence  
15 is that Sall Grover tweets in her profile as the CEO and founder of the first respondent company, she has over 90,000 followers now on Twitter, had about 45,000 when she – back in 2020, and so – so the evidence, which is at transcript 151, is:

20 *How many followers did you have in 2020?*

And the answer was:

25 *About 45,000.*

She said:

30 *I mean, let's say that's halfway between now and when I first started, so 45,000.*

And she agreed that now she has about 93,000. So the tweets that Ms Grover posts reach a very large audience, and the tweets are numerous. They are in the hundreds in respect of this case.

35 HIS HONOUR: Will it be you or Ms Nadon who's addressing the nexus between that conduct and the discriminatory conduct that's the basis of the case? Is that - - -

MS COSTELLO: Well, I will address it right now, which is to say – and it also ties back to the exchange we had just before.

40

HIS HONOUR: I am concerned about - - -

MS COSTELLO: Yes.

45 HIS HONOUR: - - - it being separate from the – if I could call it the alleged contravening conduct or the discriminatory conduct consequent upon, on your argument, but separate from.

say, well made out claim of indirect discrimination, as the applicant has – we would primarily put it as indirect discrimination, or alternatively, as direct discrimination – to this court, to be met with the persistent misgendering in the face of the evidence of the applicant, in the face of the complaint of the applicant, to laugh at a demeaning caricature of her in the witness box, to instruct counsel to use the male pronoun in submissions, to use the male pronoun in the written submissions, to deny that she’s a woman in their pleading, can only lead to the conclusion that the distress, embarrassment and hurt experienced by Ms Tickle, in being excluded from a women only space as a woman, has been amplified and compounded by the treatment.

We say that the encouragement of people to purchase merchandise from her friend, the unnamed person – unnamed in court, given your Honour’s observation that we didn’t need to know the name, but – so I can’t say the name, but it’s someone who goes by I’m Not The Fun Kind on Etsy. The encouragement to people to purchase merchandise from her friend at I’m Not The Fun Kind without any effort to distance the respondents from the offensive merchandise about Ms Tickle being sold should be seen as a feature that warrants aggravated damages in terms of compounding the hurt to Ms Tickle. The liking of offensive tweets by third parties about Ms Tickle, including a couple in the tender bundle, which are offensive – we do acknowledge the distinction between posts and liking, but we say that both cause pain.

Your Honour, the affidavit material of Ms Tickle gives what can only be examples of the tweets that Ms Grover has posted, since there are just so many of them. It cannot be sustained for the respondents to say, “Ms Tickle didn’t see the tweets, because she was blocked as a user”, in circumstances where the evidence of Ms Tickle unchallenged – there was no cross-examination on this point – was, “I feel hurt by this material, and here is” - - -

HIS HONOUR: Well, she was - - -

MS COSTELLO: - - - “the material.”

HIS HONOUR: - - - provided with copies of the material and responded to it and has given evidence about her response to it.

MS COSTELLO: Yes, your Honour.

HIS HONOUR: That seems to be your case on that aspect.

MS COSTELLO: So, what’s happened here is there is discrimination – I should say, we don’t say that she was provided – it wasn’t put to Ms Tickle that she was provided with this material by her lawyers or by anyone else. We say that this material is material that Ms Tickle has seen on Twitter.

HIS HONOUR: She didn’t – I didn’t think she articulated how she came to see it.

HIS HONOUR: It can't be as simple as that.

MS NADON: I apologise for cutting you off, your Honour.

5 HIS HONOUR: No, that's all right.

MS NADON: We would submit that in the context of Ms Tickle's gender identity as a woman and the conduct of – the act of unlawful discrimination being based on her gender identity, that in continuing a campaign over the course of two years where  
10 you are publicly referring to Ms Tickle as a man in many different public spheres is aggravating of the hurt and humiliation that she has suffered from the instance of unlawful discrimination, which was at the point of the hurt and humiliation that she has suffered from the instance of unlawful discrimination, which was at the point of the hurt and humiliation that she initially suffered at the point that she was first  
15 removed and then excluded from the app. And so perpetuating the hurt that she has experiencing because it's cementing every time that Ms Tickle is in the second respondent's and the first respondent's not a woman, and so it amplifies the hurt and humiliation that she has felt being in the public sphere.

20 HIS HONOUR: Is there any authority you can point to that says conduct long after the sued upon conduct which touches on the same area and relates to expressions of opinion, leads to aggravation of damages? There are constitutional limitations on how far I can go with some of this.

25 MS NADON: Yes, but there - - -

HIS HONOUR: Look at the Monis case in the High Court in 2012.

MS NOLAN: Coleman v Power.

30 MS NADON: The best we can do, your Honour, is take you to Taylor v Pemberton, which is at the joint list of authorities – actually even in her Honour's decision in Kaplan, she makes the – her Honour the Chief Justice makes the point that conduct that is aggravating can include conduct that occurs after the unlawful act of  
35 discrimination and includes - - -

HIS HONOUR: Which paragraph is that?

MS NADON: It includes - - -

40

HIS HONOUR: That's the help I'm after, Ms Nadon.

MS NADON: Paragraphs 1760 to 1762. She there explains that aggravating damages - - -

45

HIS HONOUR: So the part you just read out there - - -

MS NADON: She refers to her Honour's decision in *Wotton v State of Queensland* (No 5) - - -

5 HIS HONOUR: Right.

MS NADON: - - - and says - - -

HIS HONOUR: Subsequent conduct that has the same effect.

10 MS NADON: Subsequent conduct that has the same effect.

HIS HONOUR: Right.

MS NADON: And then in *Taylor v Pemberton*, Katzmann J decided that

15 subsequent conduct also included how the respondent conducts their case, and in that case, your Honour, an award of \$15,000 of aggravated damages was made on the basis that the respondents had described the applicant's complaint for sexual harassment as frivolous and vexatious, had made an untoward threat of costs order against the applicant's solicitors, and in consequence, the applicant described - - -

20 HIS HONOUR: So that's at 523, is it?

MS NADON: Yes, the applicant described her hurt as, or, sorry, described her reaction as making her feel sick in the stomach, and that was the conduct that

25 occurred after the sexual harassment.

HIS HONOUR: All right. Well, that's helpful, thank you.

MS NADON: So is your Honour satisfied that section 46PO, subsection (4)

30 empowers the court to order - - -

HIS HONOUR: I wasn't questioning that. I was just questioning the subsection number because it wasn't reproduced in the - - -

35 MS NADON: Sure. That aggravated damages can follow under the subsection?

HIS HONOUR: Her Honour reasoned to that effect in contrast to exemplary or punitive damages. Unless I'm told that her Honour's wrong and I shouldn't accept that reasoning, I would be inclined to. It seems to me that you've provided me with

40 some references, but there has to be a relevant nexus between the contravening conduct and the subsequent conduct of a kind that is properly viewed as being aggravating, so I can read the passages that I've been referred to.

MS NADON: On the question of the relevant nexus, to reiterate the point, the nexus we say is that they did not reinstate her. They excluded Ms Tickle, they did not reinstate her in the face of her complaint to the Commissioner, and then embarked on a public campaign over two years of persistently belittling Ms Tickle and referring to

45

her as a man, misgendering her across news channels, Twitter accounts where Ms Grover has 90,000 followers, in this court, in counsel's written submissions and oral submissions, in cross-examination. It has been ceaseless, the campaign against Ms Tickle.

5

HIS HONOUR: Right.

MS NADON: Katzmann J in Taylor at 525 also held that the conduct had to be described as improper and justifiable, and we submit by society standards, it is wholly unjustifiable for the second respondent in this case to have conducted herself in the manner that she did, in her campaign that spanned over two years, and reached the hundreds and thousands of public followers she has – sorry, under hundreds and thousands of public followers.

15 MS NOLAN: Tens of thousands.

MS NADON: Tens of thousands. The final point I wish to make concerning your Honour's task in assessing the compensation to which Ms Tickle is entitled arises from Kenny J's decision in Richardson v Oracle Corporation, that is at JLS70, the relevant paragraphs are paragraph 81, 90, 95 and 116. Your Honour, the - - -

20

HIS HONOUR: The list has got 118, you said 116, is - - -

MS NADON: I apologise. It's potentially 118, my mistake.

25

HIS HONOUR: Yes.

MS NADON: I will just confirm that, your Honour.

30 HIS HONOUR: Yes.

MS NADON: It should be 118, my apologies.

HIS HONOUR: All right. That's all right.

35

MS NADON: Her Honour referred to the general standards prevailing in the community as being important to the assessment of quantum of the appropriate amount of damages. In so doing, her Honour disapproved of the historically low range of damages awarded for loss of enjoyment of life within the antidiscrimination context as compared to the personal injury spheres and other legislative contexts.

40

Importantly for your Honour, Kenny J increased an award of general damages from \$18,000 to \$100,000. As Ms Costello foreshadowed, Ms Tickle seeks a sum total of \$2000,000 in compensation and encompasses general damages and aggravated damages. Ms Tickle has suffered distress, hurt and humiliation at the hands of the respondents. Her harm has been aggravated by the wholesale disregard of her gender identity arising by the repeated public misgendering of Ms Tickle to the wider public

45

MS NOLAN: Yes, certainly.

HIS HONOUR: All right. No one else has a problem with that? Yes, very well. Well, I will adjourn temporarily and resume in 10 minutes at 5 past 12.

5

**ADJOURNED**

**[11.53 am]**

10 **RESUMED**

**[12.06 pm]**

HIS HONOUR: Yes, Ms Nolan.

15 MS NOLAN: Your Honour made a quip that perhaps your Honour identifies as a  
bus stop, but I can say that this is not the vehicle that need go any further, because  
this case should be dismissed with ..... One always needs to start with facts, and my  
friend's submissions completely glossed over the facts and, in my submission,  
20 completely misappropriated them, misdescribed them, and in no way assisted your  
Honour in discerning the relevant factual controversy. I have to engage with the case  
as pleaded. That's what I've come here to meet, and that appears at court book page  
46, paragraphs 34 and following.

25 Relevantly, your Honour has made remarks that there is an allusion – I don't know if  
this is your Honour's words, but that's certainly how I intuited your Honour's  
remarks – that there is an allusion between direct and indirect discrimination. That is  
precisely the way I understood it, and I did my best to understand this. And you will  
see that I have been somewhat scornful or scathing, as my friends' submissions have  
30 various described my conduct as an independent member of the NSW bar, being  
frank and fearless in the advocacy for my client, which in my submission, is just not  
a submission open to senior members of the bar, certainly, to make.

I tried to make the best of it, and in doing so, took the view that there is only one way  
in which this pleading can be read as a matter of fairness to the applicant, and that is  
35 it has to be direct discrimination, because of the necessary interspersed of this  
imposed condition throughout the entirety of the unlawful discrimination alleged.

HIS HONOUR: Sorry, did you mean it have to be indirect discrimination?

40 MS NOLAN: No, it had to be direct, because of the comparator nature in which the  
imposed condition is used. It just had to be. Because indirect discrimination doesn't  
necessarily involve a comparator class. It's all about the effect that the  
discrimination has on the aggrieved class.

45 HIS HONOUR: Before we go any further, we just need to go and turn to section 5B  
and look at its terms, Ms Nolan.

MS NOLAN: Pardon me?

HIS HONOUR: You need to look at section 5B and look at its terms. Subsection (1) is direct discrimination, subsection (2) is indirect discrimination.

5 MS NOLAN: I understand that.

HIS HONOUR: Indirect discrimination refers to imposing a condition. A condition is pleaded.

10 MS NOLAN: I appreciate - - -

HIS HONOUR: There's plainly a case of direct discrimination and plainly a case of indirect discrimination.

15 MS NOLAN: But the imposition - - -

HIS HONOUR: They're not pleaded in the alternative, but they are both there.

20 MS NOLAN: And the imposition of the condition finds its way into the direct discrimination. Now, your Honour has helpfully assisted my friend to say that all that needs to be deleted is (a), but it finds its way into the 5(1) ground, and by virtue of that, because that is the predominant way in which it was pleaded, I've gone on to understand that the intended way in which that condition is intended to work is that it informs the 5B(1). So therefore, it can't have any work to do with respect to indirect discrimination. Now, if I'm wrong, that's because of the way in which it's pleaded. But your Honour - - -

25 HIS HONOUR: It was plain enough to me that there's an express pleading of direct discrimination and an express pleading of indirect discrimination but that the former was confused by infusing an element of the latter. But paragraph 35 expressly relies on section 5B, subsection (1) and paragraph 38 expressly relies upon section 5B – 5B, subsection (2). So they're – it cannot be contended that this case was other than bringing both. It's not clear that it was an alternative and that has been clarified in oral submissions but, whether you use the word “alternative” or not doesn't change the legal position that you have one or the other, you can't have both.

30 HIS HONOUR: I've made my submission that it is confusing and that your Honour has invited my friend to delete the imposition of the condition.

35 MS NOLAN: I've made my submission that it is confusing and that your Honour has invited my friend to delete the imposition of the condition.

40 HIS HONOUR: Well, I didn't invite her. She volunteered that. I didn't invite her.

MS NOLAN: Well, only through your Honour's examination of how the pleading might be improved. I'm making a pleading point at the moment. I accept your Honour sees a way through. I accept that. I've seen a way through the whole time. I know the way through.

45



HIS HONOUR: But if you're saying that you only need to address me on indirect discrimination because that – direct discrimination because that was all that was pleaded, that's just not a tenable submission to make.

5 MS NOLAN: I'm saying that it's the only way that it could be read but I understand that, by reason of the deletion of (a), then it opens up again so that there's no longer the elision and there is a clear – there is a clear - - -

10 HIS HONOUR: The only role of (a) would be to make the case look like it was only indirect discrimination, not that it was only direct discrimination. So – but I don't – I think it's plain enough that both were being pleaded albeit that there was an infelicity in subparagraph (a) or paragraph 35.

15 MS NOLAN: That's not right because there's a comparator class pleaded between cisgender and transgender people otherwise "cisgender" has no work to do. There is a distinct comparator class embedded in the imposition of the condition. That's the relevant comparator class because you have to make a discrimination between people of two different gender identities. That's the whole point. Anyway - - -

20 HIS HONOUR: As I say, I think it's plain enough that both have been pleaded and you should be addressing me on both.

MS NOLAN: I'm not saying that I'm not going to. I'm making a pleading point and saying that the case has changed and that is only at the eleventh hour in  
25 submissions. And I'm entitled to make that point and I should make that point and, if I don't make that point, it would be imprudent because I need to make that point to say that this is not the case that was being pleaded. What is relevant is the facts. So the relevant focus of any consideration of 5B always requires the court to engage with the definition of "gender identity". And my friends haven't done that at all.  
30 And gender identity has a specific definition which is found in paragraph 4. Just give me one second.

HIS HONOUR: Section 4, yes.

35 MS NOLAN: Yes, section 4. Your Honour has been taken to this by the Commissioner but not by my friends and they haven't sought to engage with the facts.

40 HIS HONOUR: Well, in the written submissions, they adopted the Commissioner's submissions on this.

MS NOLAN: But the submission – I understand that. You've got to engage with the facts - - -

45 HIS HONOUR: So - - -

who are potentially pregnant or are not potentially pregnant, for women who are breast feeding, who are not breastfeeding, and people with family responsibilities; I'm not relying on (f).

5 And the evidence does go to informing this court of the various inequalities, the relevant inequalities that women experience in their participation in public life on those various subparagraphs. And I started in opening taking you to each of those, and they're set out in my written submissions, but Dr – and I say the rules of evidence don't apply to them and then so, therefore, you're entitled to take them into  
10 account as the information necessary to inform you as to what this is directed to, how you determine what is necessary to achieve substantive equality? The adjudicative fact is whether the app is that special measure. But it's the chicken and the egg. It is actually the chicken laying the egg; these are the chickens and the egg is the app. So does your Honour wish for me to actually address you on this material, or are you  
15 content to have having read it?

HIS HONOUR: I've read all the affidavits. They seem to be addressing – on their face, they seem to be addressing other aspects of special measures dealing with 7D(1)(aa), and at least in parts, perhaps aspects of (c), (d) and (e).

20 MS NOLAN: Yes.

HIS HONOUR: But they don't seem to be addressing (a), (b).

25 MS NOLAN: It says they address men and women, sexual orientation - - -

HIS HONOUR: Orientation, and depending on how you read it - - -

MS NOLAN: Marital statuses, so divorced women is - - -

30 HIS HONOUR: Well, had you identified (b) before? If you didn't you do now (b) marital status.

MS NOLAN: Yes, marital statuses, pregnant women; you will get that from  
35 maternity choices. Maternity choices it not about the app, maternity choices goes to what women who are - - -

HIS HONOUR: Well, you – part of your evidence goes to – from Ms Grover and I think elsewhere about some of the topics about which people subscribing to the app  
40 may wish to discuss, including things that have happened to them and so on. I understand how it, in some way, seems to go to those issues. I'm not really sure how they establish special measures for the reasons already submitted previously but I don't see how any of it addresses (ab) and that's the relevant measure because the point of 7D is it arises through 7D. Remember, we're looking at – sorry, through 5B.  
45 We're looking at 5B, not 5. And therefore 5B has effects subject to, relevantly, section 7D. And the bit of 7D that is relevant is 7D, subsection (1), paragraph (ab). And I don't see how that evidence goes to that - - -

MS NOLAN: Because there's not a special measure taken for that purpose. Is that an answer to your Honour's question?

5 HIS HONOUR: Well, if it's not a special measure taken for that purpose then 7D isn't engaged and we go back to the balance of 5B.

MS NOLAN: My construction of 7D, as you may appreciate – and it may not be one that your Honour ultimately accepts but if you take it for a purpose of A or any of the purpose - - -

10 HIS HONOUR: So provided you do the measure for the purpose of A, you're free to discriminate as otherwise prescribed in 5B; is that your argument?

MS NOLAN: Yes. And why do I say that? Okay.

15 HIS HONOUR: Well, I will consider it. I don't find it very persuasive but I will consider it.

MS NOLAN: Well, it's set out in my written submissions at some length. And I will just - - -

20 HIS HONOUR: I didn't find it any more persuasive when I read them.

MS NOLAN: Well, they're my submissions and they're the only ones I've got, your Honour, because - - -

25 HIS HONOUR: Sure.

MS NOLAN: - - - they're the ones I've put forward and, you know, I can only – I can only advance - - -

30 HIS HONOUR: I'm – there's submissions on both sides that I will accept. There's submissions on both sides I probably won't accept. I'm used to doing that.

35 MS NOLAN: I know you're used to doing that, your Honour. And I'm used to doing what I'm doing and is giving it my level best at perhaps bringing to your Honour's attention a few other matters which may work in the - - -

40 HIS HONOUR: Can I just see if I've captured the point because that might be the most useful way forward. As I've understood it, you say that 7D is engaged for the purposes of 5B – 7D is engaged for the purposes of 5B if you can demonstrate special measures in any of the paragraphs other than (ab), not just by paragraph (ab) itself.

45 MS NOLAN: Any of the – you don't - - -

HIS HONOUR: But that's the concept, isn't it?

HIS HONOUR: So “or” is disjunctive in subsection (1) and conjunctive in subsection (2)?

5 MS NOLAN: Yes. It’s a – yes. And that – and it is a strange incident of legislative drafting, in my submission – well, it’s an unusual incident. I mean unusual when I say “strange” to have “or, or, or, or, or”. That is in - - -

10 HIS HONOUR: So 7D is to be read as licencing discrimination on one basis, provided the purpose is achieving substantial equality in a different respect?

MS NOLAN: Yes. And that’s the only way the Act could possibly work otherwise it would just be - - -

15 HIS HONOUR: All right. Well, I understand the submission and that has been a helpful exchange.

MS NOLAN: Thank you, your Honour. I don’t appropriate to go any further because - - -

20 HIS HONOUR: Sure.

MS NOLAN: - - - I’ve – I think that we’ve teased that out. And, I mean, I would dilate upon the evidence if your Honour were to find it helpful.

25 HIS HONOUR: But you don’t seek to advance the app as having the purposes of achieving substantial equality between people of different gender identities because you say you don’t need to - - -

MS NOLAN: I don’t need to.

30 HIS HONOUR: - - - and that’s not your argument.

MS NOLAN: But, in any event, it – this is where the devil lies in gender identities because gender identities, on that definition, is not fixed between cis and trans.

35 Gender identity is a much broader category. And, indeed, as the Commissioner made the submission, and I don’t embrace it because I say it’s fundamentally flawed for the reasons she gave, and that’s no disrespect to my friend or the Commissioner, but it’s – this is just the contest of ideas that is this debate, is a woman with a gender identity is a person on the definition who expresses it through her dress, mannerisms and the like. It doesn’t have to be located in her sex. The Commissioner says,  
40 “Well, that gives rise to non-binary category.” It goes further than that. If that’s what the legislature intended is to create three classes of gender identity which are located and anchored in sex then they could have done so because that’s easy and, indeed, state statutes do do that.

45 But the federal statute is much broader. It has this much more bold and enterprising idea of gender identity which is apt to permit all manners of expression. So one day

app could very well be catering for people with different gender identities. Who knows? Who knows? And it may – and indeed, it probably is. But what anchors them all in their participation on that app is their female sexed embodiment. A female is not rendered incapable of having a gender identity by reason of her sex, nor is a male, and it can be fluid. So in answer to your Honour’s question, gender identity probably was catered for by the app, but it was the gender identity – the different gender identities of females. And even if you were not persuaded by that submission, I rely on my earlier submission.

10 HIS HONOUR: All right.

MS NOLAN: I have to say I didn’t rely on 7B, and I know that your Honour was not – was displeased with me for actually taking my pleading point, but it’s a matter that I need to take so that I don’t waive it.

15 HIS HONOUR: No, I wasn’t displeased; I was just disagreeing with you.

MS NOLAN: Okay. Good. I’m glad because I wouldn’t want your Honour to be displeased. I’m just going to the - - -

20 HIS HONOUR: I’m largely Socratic in my method. It’s not – there’s nothing personal in any of it.

MS NOLAN: I don’t take much personally.

25 HIS HONOUR: I’m sure everyone who has at different times appeared before me has had discomfort, but that’s just how I operate.

MS NOLAN: I am actually - - -

30 HIS HONOUR: I don’t mean anything personal to anyone.

MS NOLAN: No, I understand that. I’m actually about to say I do feel discomfort, but of another kind. Is this an appropriate time? I know your Honour is keen to finish today. I don’t have a lot left.

HIS HONOUR: What’s - - -

MS NOLAN: I just need to have a break.

40 HIS HONOUR: No, no, but ballpark, how long do you think you need?

MS NOLAN: Probably 30 minutes.

45 HIS HONOUR: 30 minutes. All right. If we just adjourn briefly, is that sufficient?

MS NOLAN: Yes, please. That would be great.

HIS HONOUR: I will just be outside and I will come in as soon as you're back and ready.

MS NOLAN: Thank you.

5

HIS HONOUR: But can we keep it under 10 minutes, if possible? Could we keep it under 10 minutes, if possible?

MS NOLAN: Me? Yes. No, it's just in and out.

10

HIS HONOUR: All right. We will just adjourn temporarily.

**ADJOURNED**

**[3.08 pm]**

15

**RESUMED**

**[3.14 pm]**

20 HIS HONOUR: Yes, Ms Nolan.

MS NOLAN: Thank you. So now I'm just going to just move by way of brief reply to a number of matters that have arisen on my friend's submissions today, and I probably will do so – I will do as best as I can.

25

HIS HONOUR: Sure.

MS NOLAN: I've taken my pleading point to preserve that. I say that that's the reason – the only way that we construed the way that it was working was through comparator classes. 7D was pleaded as a result. 7B was not relied upon. If 7B can carry, 7B should. I just say that. I know that may not be – that may be frowned upon, given the view that your Honour has expressed - - -

30

HIS HONOUR: Sorry, what was the last point? The 7 - - -

35

MS NOLAN: 7B – if – look, if 7B is engaged, 7B should be engaged is the point I'm making. It's not relied upon. It was relied upon for the Commissioner, but then on the way in which the pleading is framed, it was determined that 7B wasn't engaged, and that's why I take the pleading point because the pleading is not clear. It was made clear on the day. Your Honour interprets it as being more clear.

40

HIS HONOUR: I don't see how you can get around the pleading referring to 7B, subsection (2), which is indirect discrimination.

45 MS NOLAN: 5D, subsection (2)?

HIS HONOUR: Sorry, 5B, subsection (2).

MS NOLAN: Yes. I understand that. We've had this exchange.

HIS HONOUR: All right.

5 MS NOLAN: And I've put forward the reason why I felt differently, and your Honour is unpersuaded. There's no utility in repeating it. My friend took the court to court book 179 – 178, 179.

HIS HONOUR: Right. Yes.

10 MS NOLAN: And as your Honour has put to her in your exchange with her that there is no evidence of receipt, the court would, in weighing the evidence, take into consideration these features of it. The second respondent has no recollection of this. It was put to her very clearly in the transcript that she – by my friend. So the  
15 proposition was put to her, with which she agreed, that her understanding of these events has only been gained by virtue of refreshing her memory for the purposes of these proceedings, and so therefore, that proposition having been put and accepted, my friend must wed to it now because it was her proposition put to the witness and there was no reason for me to explore it.

20 So to the extent to which there's some sort of Blatch v Archer-type point to come out of the fact that this has not been explained, the explanation was embedded within her own question, which is, "Well, you've only just come to refresh your memory now in circumstances where you've been presented with evidence," when the app was  
25 closed down in August of 2022 and, with it, all of the information that went along with it, so whether this was received, whether it wasn't received. Getting some IT expert in to corroborate that evidence, first of all, as your Honour has pointed out, reverses the onus; secondly, it's not necessary because your Honour's capable of drawing – of making a finding of fact on the evidence as it stands; and in any event,  
30 Blatch v Archer is not engaged because we're not in an exquisite position where we could actually prove something by reason of the fact that the whole thing's shut down long ago, 12 months before, so we're not in a position to be able to conduct some sort of forensic IT analysis.

35 I will just deal with a couple of submissions that my friends for the Commissioner made. Gender identity, insofar as my friend closed, was said to be a – you know, need not be the outward manifestation of it. What is troubling about that submission is it finds no support in the statute. As I've taken you to a couple of times today, "gender identity" is defined, and it doesn't include thoughts and feelings. They're all  
40 outward manifestations. It's not on the list of authorities, but one of the things that your Honour would take into account with respect to a purposive construction of the statute beyond what I've already said with respect to the way in which the statute should be approached – and I've taken you to that at length – is even if your Honour were persuaded that a purposive construction of the statute were mandated, we're in  
45 a position that the chief justice in Carr v Western Australia considered, I think at paragraph 5 or 12, I'm not quite sure – where Gleeson CJ there said when you have multiple purposes, you know, you don't give primacy to any one purpose.