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IN THE FEDERAL COURT OF AUSTRALIA

DISTRICT REGISTRY: New South Wales Registry

DIVISION: General

NSD 1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017
and another named in the schedule
Appellants

and

ROXANNE TICKLE
Respondent

RESPONDENT'S OUTLINE OF SUBMISSIONS ON HER CROSS–APPEAL[1]

[1] Orders of Perry J dated 23 May 2025 at [3(b)]; Orders of Perry, Abraham & Kennett JJ dated 25 June 2025 at [3]; Orders of Abraham J dated 4 July 2025 at [1].

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INTRODUCTION

1 ***First***, the Primary Judge (**PJ**) erred by not finding that Ms Tickle's exclusion (**Exclusion**) from the Giggle App was direct discrimination under s 5B(1), instead of indirect discrimination under s 5B(2), by reason of her gender identity for the purposes of s 22 of the *Sex Discrimination Act 1984* (Cth) (**SDA**). ***Secondly***, the PJ erred in his findings as to the manner in which Ms Tickle ran her case in relation to ss 5B(1) and 5B(2) of the SDA. ***Thirdly***, the PJ erred in not finding direct, alternatively indirect, discrimination by reason of Ms Tickle's gender identity in relation to Ms Tickle not being readmitted (**Non-Readmission**) into the Giggle App. ***Fourthly***, the damages award is manifestly inadequate by reference to the available evidence in support of general and aggravated damages and the general standards prevailing in the community.

2 The PJ declaration of 5 September 2024 should be substituted for a declaration to the effect that the Cross-Respondents (**Ms Grover and Giggle**) unlawfully directly discriminated against Ms Tickle. The damages award should be set aside and in lieu thereof Ms Tickle should be awarded at least $30,000 in general damages, and at least $10,000 in aggravated damages.

GROUNDS 1 AND 2 – THE JUDGE ERRED BY NOT FINDING DIRECT DISCRIMINATION

3 Section 5B(1) of the SDA relevantly provides:

> For the purposes of this Act, a person (*the **discriminator***) discriminates against another person (the ***aggrieved person***) on the ground of the aggrieved person's gender identity[2] if, by reason of:
>
> (a) the aggrieved person's gender identity; or
>
> (b) a characteristic that appertains generally to persons who have the same gender identity as the aggrieved person; or
>
> (c) a characteristic that is generally imputed to persons who have the same gender identity as the aggrieved person;
>
> the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who has a different gender identity.

4 Sections 5B(1)(b) and (c) can "prevent the circumventions that would otherwise occur where discriminators justified their conduct by reference to a characteristic (actual or imputed) of persons [with

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2 By s 4(1) of the SDA: "***gender identity*** means the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth".

a protected attribute], rather than by reference to the [protected attribute itself]" and to addressing the issue of "stereotypes".[3]

5 Ms Grover and Giggle essentially accepted that there **had** been direct discrimination based on Ms Tickle's (perceived) sex as assigned at birth; see, J [75], [136]; NCM at [7].[4] Regardless of the "false distinction" (J[76]) that Ms Grover and Giggle seek to draw in the interpretation of the SDA, the admitted conduct in Ms Grover's and Giggle's outline of submissions, is conduct relevantly captured by ss 5B(1)(b) and 5B(1)(c).[5]

6 It is incontrovertible that Ms Tickle was excluded from the Giggle App based on her appearance. Ms Grover and Giggle contended below that this occurred because Ms Tickle – who is a transgender woman[6] – is a man.[7] Non acceptance of Ms Tickle's actual gender identity reflects Ms Grover's belief that transgender women are not women (see J [131] *contra* J [23]).[8]

7 Ms Tickle's gender identity discrimination case below was put on two, necessarily alternative, bases: direct and indirect discrimination, consistently with the language of s 5B of the SDA. Ms Grover and Giggle's conduct of excluding from the Giggle App users who are not cisgender women, or determined as having physical characteristics of cisgender women, grounded a claim for <u>direct</u> discrimination.[9] Alternatively, but to a similar effect, Ms Grover and Giggle imposed a condition that to access the Giggle App, a user had to be a cisgender woman or determined as having physical characteristics of a cisgender woman. That was a claim for <u>indirect</u> discrimination. The PJ found in favour of Ms Tickle's claim for indirect discrimination (J [12(a)–(b)], [129]). It was open to the PJ on the evidence to find direct discrimination as an alternative.[10] The PJ erred by not finding direct discrimination. The Judgement was affected by the following three errors.

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3 See, in the context of s 6(1)(b) & s 6(1)(c) of the SDA (as it was then drafted) concerning the protected attribute of marital status: *Commonwealth of Australia v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 191 at 207 (Wilcox J). As to the meaning of the word "generally" as referred to in s 5B(1)(b) & (c), see *Thomson v Orica Australia Pty Ltd* (2002) 116 IR 186 at [167]–[168] where Allsop J explained that the word "generally" in s 5(1)(b) & (c) of the SDA means "for the most part" or "extensively" and it might include "in a general sense".

4 "[Ms Tickle's] access was removed, most likely, following a visual inspection by [Ms Grover] for and on behalf of Giggle, on the basis that the [Ms Tickle] had the characteristics that pertain generally to persons of the male sex or that are generally imputed to persons of the male sex"; Appeal Book Part A (**AB A**) Tab 16, p 204. See, too, Amended Notice of a Constitutional Matter filed 3 July 2023 at [9] to the same effect; AB A Tab 04 p 28.

5 See also, Ms Grover's and Giggle's opening submissions at trial dated 25 October 2023 at [1]-[2], [25]; AB A Tab 08, p 80.

6 At J [3], the PJ accepted Ms Tickle's gender identity, stating that Ms Tickle has "an entitlement to be referred to by female pronouns".

7 AB A Tab 08 at [1] p 72.

8 Transcript of Proceedings (9–11 April 2024) (**TS**) p 115 l 20–30. See also Appeal Book Part B (**AB B**) Tab 23 at [9] and Tab 23.3, the exhibit which shows that precise attitude harboured by Ms Grover in January 2021, some nine months before Ms Tickle was excluded from the Giggle App: PJ [19], [24] AB B Tab 03 at [54], where Ms Grover says "The App was designed to accept females with a transgender identity (trans men and non-binary people). In cross–examination, Ms Grover agreed that Ms Tickle's removal was based on her reviewing the photograph and said "the same as removing all males, yes": TS p 117 l 30–35

9 AB A Tab 03 at [35], [38].

10 Noting that while both indirect and direct discrimination may be pleaded, the discriminatory conduct cannot amount to both, and the proper characterisation of the discriminatory conduct is a matter for the court: see ***Sklavos*** *v Australasian College of Dermatologists* [2017] FCAFC 128; (2017) 256 FCR 247 at [13]-[16] (Bromberg J).

8 ***First***, the PJ failed to find that the refusal (**Refusal**) to provide access to the Giggle App to Ms Tickle on review by Ms Grover of a "selfie" provided during the application process because she was not perceived to be a cisgender woman is directly discriminatory.[11]

9 The Refusal discriminated against certain attributes which find express protection under the SDA: s 5 (sex discrimination) and s 5B (gender identity discrimination). The PJ actually recognised as much (J [42]). The Refusal discriminated against Ms Tickle on the basis of appearance, by excluding her because she did not appear to be a cisgender woman.[12] The gender identity of Ms Tickle was that of a transgender woman, which included an appearance that was not sufficiently that of a cisgender woman in the perception of Ms Grover and Giggle.[13] In circumstances where "disparate treatment is a hallmark of direct discrimination",[14] the effect of the Refusal was to treat Ms Tickle disparately by reason of her "gender-related appearance" from women who appear cisgender.[15] The PJ should have found that Ms Tickle was the subject of unlawful direct discrimination.

10 The PJ precluded a finding of direct discrimination because the PJ wrongly imputed a requirement of knowledge or awareness of the protected attribute in the test for direct discrimination under s 5B(1) (J [78], [131]). In other words, the PJ concluded that to find direct discrimination by reason of a person's gender identity, the discriminator must first be aware of the person's gender identity. That finding is flawed for the following three reasons:

11 ***Firstly***, the deliberately broad definition of "gender identity" in the SDA includes elements that are intrinsic to the sense of self and outward social markers.[16] The breadth of the statutory definition aligns with the statutory objects set out in s 3(b) of the SDA, which include "to eliminate, so far as is possible, discrimination against persons on the ground of … gender identity … in the areas of … the provision of goods, facilities and services".[17] The Legislature's intent is clear: s 5B was introduced to confer broad protection from discrimination on the basis of a person's gender identity (so defined in s 4(1)). A knowledge requirement undercuts the protective purpose of the SDA.

12 ***Secondly*,** there is no provision of the SDA which imports an element of knowledge or awareness into the test for direct discrimination. The fundamentally personal nature of gender identity means the identity may not be broadcast to the public at large. How someone other than the aggrieved person could ever

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11 J[46(b)]; AB A Tab 03 at [34].
12 See by parity of reasoning *Sklavos* at [23], [27] (Bromberg J).
13 The fact of which can be inferred from Ms Tickle's removal from the Giggle App: J [24], [103]–[104], [125], [126], [131]. It may also be inferred from Sal Grover's Affidavit, AB B Tab 03 at [70]–[71].
14 *Sklavos* (2017) 256 FCR 247 at [20] (Bromberg J).
15 ***Purvis*** *v New South Wales* (2003) 217 CLR 92 at [236] (Gummow, Hayne and Heydon JJ).
16 Explanatory Memorandum to the 2013 Amendment Act at [13] p 12.
17 As to the importance of statutory object clauses in cases of legislation dealing with human rights, see: *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 359 (Mason CJ and Gaudron J). See, by parity, *Sklavos* (2017) 256 FCR 247 at [21] (Bromberg J).

positively and definitely know the aggrieved person's actual gender identity is also a difficult proposition as a matter of proof; but their suspicion, assumption or guesswork as to the aggrieved person's gender identity may be accurate, particularly if based on appearance, and is enough for the purposes of liability in s 5B(1). It would otherwise be inconsistent with s 27(1)(c)(ib) of the SDA, which prohibits a person from asking another person about a protected attribute where that information is connected to doing a particular act, including on the basis of gender identity.[18]

13 From a policy perspective, to require knowledge and/or awareness would, in some cases, enable a person to evade discriminating against the protected attributes simply by asserting that they had no knowledge of the protected attribute. This was the PJ's concern with the "false distinction" drawn by Ms Grover and Giggle.[19] To put it more starkly, as was the case here, Ms Grover denies that persons other than cisgender women can be female. Ms Grover and Giggle therefore view transgender women as (biological) men.[20] Ms Grover is the sole director and CEO of Giggle and was at all material times its "controlling mind".[21] How could Ms Grover and Giggle ever discriminate by reason of Ms Tickle's gender identity as a transgender woman, in circumstances where they do not accept the existence of the protected attribute?[22] In this light, and to put it another way, if knowledge of the attribute is required, wilful blindness or reckless indifference to whether a person has the attribute should suffice to meet the SDA's objectives and the protection of s 5B of the SDA.

14 ***Thirdly***, in any event, the evidence below was plainly sufficient to support a finding of direct discrimination.[23] The Refusal was discriminatory conduct against Ms Tickle on the ground of her gender identity. Ms Grover's and Giggle's exclusion of transgender women from the Giggle App was not an incidental consequence: it was done by deliberate design. To illustrate the point, Ms Tickle's evidence included a blog post published by Ms Grover in which she makes clear that, at least from July 2020, transgender women would not be allowed on the Giggle App. Further, Ms Grover's affidavit dated 23 October 2023 included an exchange from 20 February 2021 where Ms Grover states: "There are many other apps for trans women. Giggle is not one of them…".[24] Clearly Ms Grover and Giggle had a policy of excluding both men and transgender women from the Giggle App. The PJ erred by not finding such a policy (*cf* J [92]).[25] In maintaining that Ms Tickle was excluded from the Giggle App on the basis that

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18 See also the "Example" provided in s 27 of the SDA.
19 J[76].
20 See TS p 115 l 20–30, p 124 l 15; AB B Tab 03 at [12].
21 J [29]
22 See, too, by analogy, the rejection of an argument of material difference which involves the proscribed discrimination itself: *Commonwealth of Australia v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 191 at 209 (Wilcox J): "To the extent that the Commonwealth agues in this case that there is a material difference between single people and married people in that the former tend not to have "family" whereas the latter do, the difference is the proscribed discrimination itself". *Sayed v Construction, Forestry, Mining and Energy Union* (2015) 327 ALR 460 at [195] (Mortimer J)
23 J[18]-[20], [23]-[24], [91]-[92], [98]-[104], [125]-[128], [131], [135]-[136]; *cf* J[129]
24 AB B Tab 3, p 44.
25 AB B Tab 23 at [36(b)] and Tab 23.10 (page 1).

her photograph was male or perceived to be a male[26] – that is, was not sufficiently cisgender in appearance – Ms Grover and Giggle directly discriminated against Ms Tickle's gender-related identity and appearance. In doing so, they were giving effect to their decision to deny transgender women access to the Giggle App (PJ [92]).[27] The finding of indirect discrimination, in the face of this evidence (including the exclusionary purpose outlined above), demonstrates that the PJ failed to have proper regard to Ms Grover's and Giggle's express and clear intent to exclude Ms Tickle from the Giggle App by virtue of Ms Tickle's gender identity (as that term is broadly defined in the SDA) (J [136] *cf* [74]).

15 On a proper understanding, Ms Tickle's pleaded case was under s 5B(1)(a) as well as s 5B(1)(b) and/or s 5B(1)(c). The correct conclusion on a real review of the evidence is that the Exclusion constituted direct discrimination.[28] The PJ's reasoning that Ms Tickle's pleading confused direct and indirect discrimination and/or had the effect of abandoning the direct discrimination claim was wrong.[29]. The Court conflated a convenient pleading shorthand with the statutory concept in s 5B(2). Not appearing to be a cisgender woman is a characteristic that appertains generally to, or that is generally imputed to, transgender women.[30] Limbs (b) and (c) of s 5B of the SDA were expressly pressed in Ms Tickle's pleadings below,[31] and the PJ erred by not considering those limbs in his assessment of direct discrimination.[32]

GROUND 3 – THE JUDGE ERRED BY FAILING TO FIND THAT THE REFUSAL TO READMIT MS TICKLE WAS DISCRIMINATION

16 Ms Tickle's discrimination claim also concerned Ms Grover and Giggle's failure to readmit (**Non Readmission**) Ms Tickle to the Giggle App after her Exclusion.[33] The PJ found there was no evidence of any "actual decision not to readmit" and also that there was a "shortfall" of evidence to establish that Ms Grover and Giggle were made aware of her gender identity after Ms Tickle's Exclusion (PJ [132]-[133]). That finding was wrong for the following four reasons.

17 ***First***, there was sufficient evidence before the PJ to infer that Ms Grover decided not to allow Ms Tickle back onto the Giggle App after Ms Tickle had been removed (*cf* J [132], [134]). That is borne out by the

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26 J [24], [103]-[104], [125], [126], [131]; See also AB A Tab 08 at [1]; TS p 116 l 5; p 117 l 35; AB B Tab 03 at [71]-[72].

27 See AB B Tab 23 and Tab 23.10. See generally TS p 112 l 1, p 113 l 30, p 113 l 45.

28 J[79]

29 *cf* J [41], [46(d)], [129] and TS pp 230 l 25 – 234 l 20.

30 See also *Commonwealth of Australia v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 191 at 291 (Wilcox), although the reasoning for (b) and (c) is of lower importance in light of the statutory definition of "gender identity". As to the evidential point, the evidence at trial would support that transgender women can be mistaken for men on the basis that they have insufficiently cisgendered appearances: AB B Tab 03 at [71]–[72]; AB B Tab 08 at [18]; AB B Tab 14 at [10]; AB B Tab 17 at [3], [8].

31 AB A Tab 03 at [35]. While the PJ found that Ms Tickle's pleading was based only on her gender identity (J [79]), that is inconsistent with the actual terms of the pleading: "the First and/or Second Respondent discriminated against the Applicant on the basis of her gender identity within the meaning of s 5B(1)".

32 *cf* J [79]

33 AB A Tab 03 at [35] p 21.

PJ's reasons (J [119]-[120]; *cf* [126]), the documentary evidence before the Court,[34] and the transcript of proceedings.[35] In summary, the evidence was that Ms Tickle emailed Ms Grover on 4 October 2021 about her access issues. Ms Tickle signed off her email with the female name "Roxy".[36] On 8 October 2021, Ms Grover replied, identifying Ms Tickle as "Roxy", asked for her phone number and explained that she (Ms Grover) would "personally look into it right now". Ms Tickle replied on 11 October 2021, including her phone number in that reply. Ms Tickle sent a further email on 16 October 2021 stating "any luck yet". She sent a further five emails to similar effect over the coming days.[37] From Ms Grover's silence following Ms Tickle's polite follow up queries, coupled with Ms Grover's evidence that she looked at Ms Tickle's onboarding picture, and her evidence that a user's onboarding photo could be reviewed by Ms Grover and Giggle through inputting their onboarding phone number,[38] the correct conclusion on the evidence was that after receiving Ms Tickle's emails and texts in October 2021, Ms Grover used Ms Tickle's phone number, accessed her photo and made the Non Readmission decision deliberately, in line with the policy of excluding men and transgender women.[39] That is consistent with Ms Tickle not being readmitted to the Giggle App, her continued exclusion from the Giggle App, and also Ms Grover's failure to respond to any of Ms Tickle's subsequent communications. It is also consistent with Ms Grover's own evidence.[40] There was no "paucity of evidence" in this regard (*cf* J [132], [134]).

18 ***Secondly***, the PJ's conclusion proceeded on the incorrect premise that knowledge of the protected attribute is required before a person can be taken to have discriminated "by reason of" the protected attribute.

19 ***Thirdly***, even if knowledge was a true requirement inherent to a finding of direct discrimination, the PJ should have inferred that Ms Grover was aware of Ms Tickle's "gender identity" within the meaning of s 4(1) of the SDA. That inference is plainly available on the evidence before the PJ: namely, that Ms Tickle's emails and text messages sent between 4-30 4 October 2021 were signed "Roxy";[41] that Ms Grover responded to Ms Tickle on 8 October, using her female name "Roxy" promising to look into Ms Tickle's access concerns;[42] and Ms Tickle's onboarding photo that depicted a person with long hair, a purple low-scooping top and a lack of facial hair (i.e., matters falling within the statutory definition of "gender identity"),[43] which photo had uncontrovertibly surpassed the gatekeeping AI software used to

34 AB B Tab 23 at [18]–[30] and Tab 23.7.
35 TS p 124 l 30–45; p 126 l 10; p 229 l 20–40.
36 See also TS p 121 l 20.
37 J [20]; see also AB B Tab 23 at [18]-[30] and Tab 23.7 (pages 2 and 3).
38 J [101]-[102], [119]; See also AB B Tab 03 at [40], [44], [50]-[51], [70].
39 J [92], [100], [129]; see also AB B Tab 03 at [9], [54], [70]–[71].
40 See especially AB B Tab 03 at [70]–[71].
41 AB B Tab 23 and Tab 23.7 (page 2) and Tab 23.6 (page 1).
42 AB B Tab 23 and Tab 23.7 (page 3).
43 AB B Tab 03 at [70], *cf* TS p 117 l 35.

detect whether a user was a woman[44]. The only conclusion available to the PJ on the evidence at this juncture was to find that the "real reason"[45] for the Non-Readmission was her gender identity.

20 ***Fourthly***, to the extent the PJ took issue with the time in which Ms Grover reviewed Ms Tickle's photo (PJ [133]), that was no real barrier to his Honour inferring that the Non Readmission of Ms Tickle following Ms Grover's review of her photo. It is clear that Ms Grover reviewed Ms Tickle's photo during the period during which Ms Tickle was politely agitating her access issues. The critical issue was that Non-Readmission occurred after the email and text communications and Ms Grover's review of Ms Tickle's photograph .

GROUND 4: THE DAMAGES AWARD IS AFFECTED BY ERROR

Inadequate weighting of the evidence and the failure to consider prevailing community standards

21 The PJ correctly held that gender identity discrimination is "just as capable of being as harmful of all other kinds of discrimination listed in the SDA, and therefore of justifying substantial awards of damages"[46]. However, the PJ erred in the weight he afforded to the evidence at trial and the applicable principles, resulting in an award of damages that is manifestly inadequate.[47]

22 Ms Grover and Giggle's discriminatory conduct, first the Exclusion and secondly the Non-Readmission demonstrated a pattern of delegitimising Ms Tickle's gender identity. Ms Tickle's claim for compensatory damages was tethered in the Court below to a concise statement of the impact of Ms Grover and Giggle's actions in excluding her from, and refusing to re-admit her to, the Giggle App as follows: "The above events involving the Giggle App and Ms Grover have had a significant impact on my life. The respondents' unilateral decision that I am not a woman, and therefore cannot access the Giggle App, has upset me greatly and has resulted in me having to go to great lengths to provide that I am a woman. It has been exhausting and draining to do so."[48] The absence of independent medical or third-party corroborative evidence does not diminish Ms Tickle's suffering, taking into account the purposes of the legislation.[49] Ms Tickle's affidavit evidence deposing to her suffering and exacerbated anxiety due to Ms Grover's actions are of significant probative value and were not challenged.

23 The PJ, in concluding that there was a paucity of evidence in relation to the impact of the discriminatory acts on Ms Tickle and assessing the quantum of damages, erred:

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44 J [110], [112], [133].

45 *Purvis v New South Wales* (2003) 217 CLR 92 at [166] (McHugh and Kirby JJ).

46 J[231]

47 *House v The King* (1936) 55 CLR 499; ***Richardson*** *v Oracle Corporation Australia Pty Ltd* (2014) 223 FCR 334 at [76] (Kenny J). See by analogy the Victorian Court of Appeal's reassessment of damages on appeal in *H & Q Café Pty Ltd v Melbourne Café Pty Ltd* (2023) 72 VR 53 at [103] - [107] (Niall & Kennedy JJA, Forrest AJA).

48 AB B Tab 23 at [38]; see also at [39]-[41].

49 *Heraud v Roy Morgan Research Ltd (No 2)* [2016] FCCA 1797 at [73] (Judge Jones).

24 ***First***, in making an award of damages, a court necessarily has regard to the prevailing community standards, whilst giving proper consideration to statutory purpose and the extent of the harm suffered by the individual plaintiff.[50] Regard to prevailing community standards does not, and indeed cannot, render the award of damages punitive or distract from the "fundamentally compensatory" nature of an award of damages.[51] However, the value accorded to compensation for pain and suffering and loss of enjoyment of life for a particular wrong remains relevant to the court's task.[52] The PJ, notwithstanding reliance on *Richardson* by Ms Tickle, gave no consideration to prevailing community standards. The issues in this case alone demonstrate the importance placed upon proper and respectful recognition of, and lawful treatment on the basis of inherent traits such as gender identity and/or sex. Community standards are further borne out in the s 3 objects of the SDA, including to eliminate as far as possible discrimination against persons on the ground of gender identity.

25 ***Secondly***, by giving inadequate weight to the evidence of Ms Tickle of the impact of the discrimination on her. The impact on Ms Tickle was significant, upsetting, exhausting and draining. When considered in light of prevailing community standards, and recognising that each of these impacts arises from Ms Grover and Giggle's discrimination against Ms Tickle on the basis of an inherent part of her sense of self and identity – namely her gender identity and that she is a legally recognised woman – the PJ ought to have ordered a far greater sum. Further, the loss experienced ought to have been assessed in the context of Ms Grover's and Giggle's continued refusal to re-admit Ms Tickle to the "Giggle App," such that the discrimination, as pleaded, extended far beyond October or early-November 2021.

26 ***Thirdly***, by failing to have regard to prevailing community standards in assessing aggravated damages. The PJ erred in only making a finding of "some limited degree of harm" arising from the offensiveness of Ms Grover laughing at the offensive caricature of Ms Tickle during cross-examination.[53] The PJ accepted that specific evidence of harm was not necessary. As the PJ found, that specific conduct in cross-examination was "offensive and belittling".[54] In circumstances where the cross-examination occurred in an open court and in front of large number of observers, the nature of its harm to Ms Tickle (who was already aggrieved by the conduct of Ms Grover and Giggle) was, and should have been found as being, more than "slight". The PJ also failed to manifest any recognition in aggravated damages arising from the act of discrimination and the proceedings associated with it; including, Ms Grover's refusal to engage with the AHRC conciliation proceedings, refusal to reinstate Ms Tickle's access to the "Giggle App,"[55]

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50 *Richardson* at [25]-[26], [90] and [95] (Kenny J, Besanko and Perram JJ agreeing at [119]).
51 *Richardson* at [94]; *Taylor v August and Pemberton Pty Ltd* (2023) 328 IR 1 at [520] (Katzmann J).
52 *Richardson* at [96] and [117]-[118].
53 J[276]
54 J[276]
55 This was not relied upon by Ms Tickle as a basis for aggravated damages. It was submitted that the ongoing exclusion – ie. the refusal to readmit – established the relevant nexus between the contravening conduct and the subsequent aggravating conduct (TS p 265 l 45).

subsequent offensive, disparaging and hurtful comments by Ms Grover in public forums about transgender women, Ms Grover's contribution to, and encouragement of, the sale of deeply offensive and degrading merchandise about Ms Tickle's gender identity to make money to defend the case alleging discrimination,[56] and Ms Grover's (other) conduct at trial. The PJ had before him evidence of the impact on Ms Tickle of Ms Grover's public comments about her, and online scorn – including the offensive merchandise which Ms Grover laughed at[57] - which ought properly to have informed any inference of harm. In inferring only a limited degree of harm for some aspects of Ms Grover's conduct, the PJ failed to give proper weight to not just the offensiveness of Ms Grover's conduct overall, but also the circumstances in which most of it occurred, namely in public forums and in connection with Ms Tickle's discrimination proceedings[58]. The PJ also failed to consider the totality and extent of the evidence. No consideration was given in the assessment of aggravated damages to prevailing community standards.

27 As the PJ correctly observed, "there are no prior damage awards to use as any kind of yardstick as to what might be appropriate" (J [229]). This left a wide discretion to exercise, but not an unguided one. The relevant yardstick is not the existence of prior awards in gender identity discrimination cases, but rather, as Kenny J held in *Richardson*[59] and Bromberg J (albeit in dissent) reiterated in *Maritime Union of Australia v Fair Work Ombudsman,*[60] the compensable value of the harm is to be assessed by reference to the pain, suffering and loss of enjoyment of life experienced by the individual victim. By treating the absence of precedent in this specific category of discrimination as determinative, the PJ adopted too narrow a framework, overlooking the broader principles that guide the assessment of general damages, including statutory purpose, the harm actually suffered and prevailing community standards.

The principles and evidence relevant to the assessment of aggravated damages

28 Further, the PJ erred in failing to find that Ms Grover's conduct – both inside and out of the courtroom – subsequent to Ms Tickle's exclusion from the Giggle App founded a basis for the award of aggravated damages.

29 The manner in which a respondent conducts their case may exacerbate the hurt and injury suffered by the aggrieved party so as to warrant the award of additional compensation in the form of aggravated damages, including in discrimination cases.[61] In connection with the proceedings, Ms Grover engaged in a sustained attack on Ms Tickle's integrity and gender identity, infused with inuendo that Ms Tickle, and indeed transgender women more generally, pose a threat or danger to cisgender women. The cases cited by the

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56 see generally, TS: pp 135-142
57 AB B Tab 23 at [39]-[41].
58 TS p 3 l 15.
59 at [108].
60 (2016) 247 FCR 154; [2016] FCAFC 102 at [111].
61 See ***Triggell*** *v Pheeney* (1951) 82 CLR 497; *Elliot v Nanda & Commonwealth* [2001] FCA 418; ***Kaplan*** *v State of Victoria (No 8)* [2023] FCA 1092 (Mortimer CJ).

PJ[62] establish that "…aggravated damages could be awarded to an applicant whose distress was made worse by the respondents' conduct after the wrongful act or acts are committed…" The PJ failed to have regard to the clear evidence available before him that Ms Grover's conduct was clearly lacking in bona fides, was improper or unjustifiable[63] when regard is had to: the nature and extent of her comments and conduct (a campaign of humiliating and hurtful comments and conduct) over an extended period of time (refer, for example, to the examples above at [26]); the very public and wide-reaching nature of her comments; the context of her comments (occurring in the context of discrimination proceedings); and the constant and continual misgendering of Ms Tickle by Ms Grover and Giggle throughout the proceedings below (including in their submissions). Ms Grover's and Giggle's conduct demonstrated a complete disregard to the effect such treatment would have on Ms Tickle. As noted by Counsel below Ms Grover adopted a "campaign" based on gender identity,[64] which aggregated the harm suffered by Ms Tickle in the context of her unlawful discrimination claim on that very subject.

30 The repeated public statements made by Ms Grover questioning how Ms Tickle obtained Ms Grover's phone number, and Ms Grover's characterisation of the subsequent phone and email communications were found to be disingenuous.[65] These remarks, repeated across multiple platforms, were also both improper and unjustified.[66]

31 The PJ erred in concluding that there was an insufficient nexus between Ms Grover's subsequent actions and the act of discrimination. The subsequent actions of Ms Grover outlined above were based on Ms Tickle's gender identity, and amounted to conduct that has the same effect as the discrimination[67] (and certainly exacerbated the harm caused by the discriminatory act). Moreover, given the continuing nature of the discriminatory act in refusing to readmit Ms Tickle to the Giggle App, there is also an obvious nexus between that conduct and the discriminatory act. The substantial evidence of improper and unjustifiable conduct available to the PJ, and as outlined above (including at [25], [26], [29] and [30]), clearly demonstrated a link between the subsequent actions of Ms Grover and Giggle and the act of discrimination or could have enabled the PJ to find the relevant nexus.

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62 J [245]
63 *Triggel* at 514.
64 TS p 251 l 14; TS p 264 l 6-18; TS p 265 l 44-47; TS p 266 l 1- 20.
65 J [270]
66 *Triggell* at 514 (Dixon, Williams, Webb & Kitto JJ).
67 *Kaplan* at [1762], citing *Wotton v Queensland (No 5)* [2016] FCA 1457 at [1733] (Mortimer J).

7 July 2025

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Federal Court of Australia
District Registry: New South Wales

No. NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD (ACN 632 152 017) and another
Appellants

ROXANNE TICKLE
Respondent

On appeal from the Federal Court

APPELLANTS' OUTLINE OF SUBMISSIONS
IN RESPONSE TO THE RESPONDENT'S CROSS APPEAL

Grounds 1 – 3: direct discrimination

1. The Respondent's cross-appeal rests on a fundamental misconstruction of the statutory concept of "gender identity" under the *Sex Discrimination Act 1984 (Cth)* (**SDA**), and an attempt to recharacterise the factual findings of the primary Judge in a manner unsupported by the evidence.

2. The Respondent's submission at RCAS[1] [7] that the primary Judge could have found direct discrimination as an alternative — by reference to ***Sklavos*** *v Australasian College of Dermatologists* (2017) 256 FCR 247 at [13]–[16] — does not withstand scrutiny when considered against established authority and the structure of the statute and the Respondent's submission maintained on the appeal that the primary Judge was correct to find that the Appellants indirectly discriminated against the Respondent under s 5B(2). It is now well settled that the statutory definitions of direct and indirect discrimination operate as mutually exclusive categories.[2] Properly understood, the reasoning in *Sklavos* does not support a different

[1] Respondent's Written Submission on the Cross Appeal filed 7 July 2025
[2] That principle was first articulated by the High Court in *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165 and reaffirmed in *Waters v Public Transport Corporation* (1991) 173 CLR 349, 400–2 per McHugh J and 392–3, per Dawson and Toohey JJ, where it was held that equivalent provisions under State legislation — dealing with direct and indirect discrimination — could not apply concurrently to the same conduct. The reasoning in those cases has been consistently applied in the federal context. In *Munday v Commonwealth (No 2)* (2014) 226 FCR 199 at [157], Katzmann J held that conduct cannot at once satisfy the definitions of both s 5 (direct discrimination) and s 6 (indirect discrimination) of the *Disability Discrimination Act 1992 (Cth)*. Tracey J reached the same conclusion in *Walker v Victoria* [2011] FCA 258 at [28] and *Abela v Victoria* [2013] FCA 832 at [84], with reliance on *Australian Medical Council v Wilson* (1996) 68 FCR 46. The structural exclusivity of those provisions was further confirmed by the plurality in *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92 at [185], where Gummow, Hayne and Heydon JJ explained that the Act "makes separate and distinct provision" for each form of discrimination. That structural separation is replicated in the

conclusion. The discussion in *Sklavos* at [13]–[16] therein refers to the pleading of alternative cases, not to the simultaneous operation of mutually exclusive statutory tests on the same facts. The Respondent's reliance on those paragraphs is therefore misplaced.

3. The central proposition advanced on grounds 1 – 3 on the cross appeal — that the Respondent was subjected to direct discrimination by reason of "gender identity" — proceeds by collapsing the statutory distinction between "gender identity" and "sex," and by erroneously treating visual perception of sexed appearance as equivalent to knowledge of or imputation of gender identity. The basis upon which it was asserted that the Respondent was a man (RCAS [6]) — namely, observable sexed traits — necessarily engages the statutory distinction between "men" and "women" as it appears in s 7D(1)(a) of the SDA, and places the Respondent within the comparator class of "men" for the purpose of assessing whether the measure was taken to achieve substantive equality for women as a sex class. This is not a "false distinction": cf J[76]

4. The cross-appeal, like the reasons below, proceeds from the flawed premise that any person excluded based on perceived sex is, by that fact alone, also discriminated against on the ground of "gender identity". That construction is untenable. It disregards the statutory requirement that discrimination under s 5B must be "by reason of" a person's "gender identity", not simply by reason of the fact that they were perceived to be of the male or female sex by reason of their appearance and have a "gender identity". It also assumes wrongly that "gender identity" presumes a homogeneity of presentation which conforms to conventional visual markers of sex.[3] It equally erases the deliberate distinction drawn by Parliament between "sex" and "gender identity" — a distinction which underpins the 2013 amendments and the SDA's current structure.

5. The primary Judge's findings at J[129]–[131] are significant in two respects. *First*, his Honour found that the Second Appellant did not know, nor have reason to know, that the Respondent was a transgender woman at the time of exclusion from the Giggle App. The exclusion was made reflexively, based on the Respondent's selfie and a visual impression of maleness. That finding — that the exclusion was not "by reason of" gender identity — is a finding of fact that is not, and has not been shown to be susceptible to appellate revision[4]. *Second*, however, the

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SDA. While it is open to a party to plead direct and indirect discrimination in the alternative, a finding that the same conduct constitutes both forms of discrimination cannot be sustained.

[3] "Gender identity", as defined in s 4 of the SDA, is inherently protean: it may or may not correlate with physical appearance, social presentation, or mannerisms. It can be expressed outwardly, intermittently, or not at all. A person may identify as female while presenting with male-typical appearance; another may fluctuate in self-presentation; a third may reject binary or normative presentation altogether. That variability is precisely why s 5B requires a focused inquiry into whether the impugned conduct was actuated by the person's "gender identity" or characteristics imputed to it. To treat any exclusion on the basis of sexed appearance as presumptively discriminatory on the basis of gender identity collapses that inquiry entirely. It renders s 5B a catch-all provision through which any sex-based rule may be invalidated by subjective identification, defeating the structure of the SDA by depriving s 5 of distinct effect.

[4] *Fox v Percy* (2003) 214 CLR 118 at [25]; *Minister for Immigration and Border Protection v* SZVFW [2018] HCA 30; 264 CLR 541 at [41]. For the appeal to be successful, a finding of error is indispensable, and a mere

primary Judge proceeded to state that had the Second Appellant been aware of the Respondent's gender identity, the exclusion would still have occurred, and that such a decision would arguably be discriminatory on the ground of "gender identity". That that aspect of his Honour's reasoning is squarely challenged in the appeal. It misconceives the nature of the Appellants' policy of a female only space, which was assessed by sexed appearance, and elides the distinction between exclusion on the ground of perceived maleness and exclusion on the ground of "gender identity". The conflation of appearance-based exclusion with discrimination based on "gender identity" is a central error of legal characterisation challenged under Ground 1 of the Appeal.

6. For the purpose of determining whether the Appellants discriminated against the Respondent under s 5B(1) of the SDA, it is necessary to identify the acts of the Appellants and the reason for those acts.[5] The central question is why the Respondent was treated as the Respondent was. When determining whether the impugned treatment was "*by reason of*" (or "*because of*") gender identity within the meaning of s 5B(1), the analysis must logically follow the two-stage inquiry articulated by the plurality in *Purvis v State of New South Wales* (2003) 217 CLR 92 at [225]. First, how would the discriminator — here, the First Appellant or its agents — have treated a person who appeared male, in the same circumstances, who did not have the gender identity of the aggrieved person, viz. here, a transgender woman? Second, if the aggrieved person's treatment was less favourable than a person who appeared male without a transgender woman identity[6], was that treatment because of the aggrieved person's gender identity, or a characteristic imputed to that identity? Applied to this case, the answer to the relevant inquiry is clear: the Appellants excluded users based on visual perception of sex, indifferent to any known or imputed gender identity, and therefore excluded all person with male appearance indifferent to their "gender identity" or any characteristic imputed to it.

7. Section 5B(1) could only be engaged in relation to the application of s 22 if it were established that the Respondent was treated less favourably than a person without the Respondent's "gender identity" would have been treated in circumstances that were the same or not

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disagreement on a finding of fact is insufficient: *Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* [2018] FCAFC 93; (2018) 261 FCR 301 at [45] (Perram J, with whom Allsop CJ and Markovic J agreed).

[5] *State of New South Wales – Sydney Trains v Annovazzi* [2024] FCAFC 120 at [104] — [105]; and *Purvis v New South Wales* (2003) 217 CLR 92 at [236] (Gummow, Hayne & Heydon JJ)

[6] The Respondent's assumption that the proper comparator under s 5B(1) and (2) is necessarily a "cisgender woman" misapprehends the scope of the protected attribute of "gender identity". The definition of "gender identity" in s 4 of the SDA was enacted to protect individuals across the spectrum of gender diversity, not to entrench binary comparisons. The comparator to "transgender" will depend on the context and may include individuals with identities such as "non-binary," "gender fluid," "femme", "masc", "transmac" , "transfemme", "agender," "pangender," "tri-gender", "inter-gender", "poly gender" "gender queer," as well as culturally specific identities such as "sistergirl", "brotherboy" (in Australian indigenous culture) or "fa'afafine" (a recognised third gender identity in Samoan culture) (*cf AB v Western Australia* (2011) 244 CLR 390; *Norrie v NSW Registrar of Births, Deaths and Marriages* (2014) 250 CLR 490). To universalise "cisgender woman" as the baseline comparator is to erase the very diversity s 5B was intended to protect, and to conflate *sex*-based appearance with *gender-related* identity. There was no consideration of this issue by the primary Judge.

materially different. On the findings made, the App's exclusionary condition applied uniformly to all users who appeared male. There was no evidence that a person of similar appearance but without the Respondent's gender identity would have been treated differently. Accordingly, the threshold comparative requirement under s 5B(1) was not met. An awareness of the Respondent's gender identity would not have made the exclusion referable to that identity: no differential treatment of those with a transgender women identity compared to others of similar appearance was open on the evidence: cf. J[131].

8. Unsurprisingly, the Respondent does not challenge the finding that the Respondent is a "woman" within the meaning of the SDA: J[55] – [64]. But acceptance of that finding necessarily also entails acceptance that the Respondent's exclusion was by reason of perceived maleness — on the Respondent's case, a misapprehension of the Respondent's sex based on appearance — not because of the Respondent's "gender identity" or any characteristic imputed to it.

9. In short, a person of male appearance who did not identify as a woman would have been treated the same and this was accepted: J[163] and [178]. The treatment was not less favourable by reason of "gender identity" and does not satisfy the test in s 5B(1).

10. The cross-appeal further asserts that the primary Judge erred in failing to find that direct discrimination had occurred, or that the Respondent's pleading of direct discrimination had been "abandoned." As developed in the Appellants' appeal submissions in chief at [35], the proceedings below were conducted on the clear basis that the claim advanced was one of indirect discrimination under s 5B(2). That is how the primary Judge found that the case was, in truth, pleaded — a course from which the Respondent cannot now resile. Nevertheless, even if that were the case, the above analysis renders consideration of this assertion otiose.

11. Likewise, the non-readmission claim fails for the same reason as the original exclusion: it does not satisfy the causation test under s 5B(1). The asserted decision not to restore access was made, on the Respondent's own case, by reference to a misapprehension of perceived maleness. The App's condition remained appearance-based and indifferent to identity. The Respondent now seeks to characterise the exclusion as directed to both men and transgender women (RCAS at [17]), but that reformulation concedes the core difficulty: the relevant conduct was uniform and applied to all persons of male appearance, regardless of "gender identity". That is not differential treatment "by reason of" "gender identity", and no separate basis for liability arises from the alleged non-readmission.

Ground 4: damages

12. The cross-appeal challenges the sufficiency of the primary Judge's award of damages.

13. The basis of that claim is that the award made by the primary Judge was "manifestly inadequate" (RCAS, [2], [21]) and failed to reflect the evidence of subjective distress and the seriousness of the Appellants' conduct. The Respondent submits that the primary Judge gave "inadequate weight" to the Respondent's evidence (RCAS [25]) and failed to take into account "prevailing community standards" (RCAS [24], [26]). The Respondent also points to later conduct — including commentary and the refusal to readmit the Respondent — as aggravating factors (RCAS [22]–[26]).

14. These submissions do not establish the type of error required to displace an evaluative judgment. An appellate court may only intervene if one of the errors identified in *House v The King* (1936) 55 CLR 499 at 504–5 is shown[7]: namely, that the judge acted on a wrong principle, failed to consider something material, considered something irrelevant, misunderstood the facts, or reached a plainly unjust result. The Respondent does not identify any such error in support of an increase.

15. The Respondent's submissions unsurprisingly fail to engage with the fact that award of damages is itself infected by legal error. The only basis for the $10,000 aggravated damages award was a brief and involuntary act of laughter by the Second Appellant during cross-examination (J[276]). That act was not found to be deliberate, malicious, or intended to cause harm, nor was there any evidence that it aggravated any harm suffered, the primary Judge not being satisfied that any harm had been suffered. No general damages were awarded. The award of aggravated damages was thus not supplementary to a compensatory finding. It was made in isolation. That outcome is untenable as a matter of law.

16. If the Respondent now seeks an increase in that award, it is incumbent on the Respondent to address the fundamental legal, factual, and jurisdictional constraints that apply. The findings of the primary Judge were that: (a) no medical or corroborative evidence was led in support of harm (J[222]–[223]); (b) the Respondent made minimal use of the App (J[225]); (c) there was no evidence of social or functional exclusion (J[226]); and (d) the overall harm, as found (the Appellants say, impermissibly) was "slight" and unquantifiable (J[276]).

17. These findings do not support a compensable injury. That threshold is critical. Aggravated damages are compensatory, not punitive. They must be tethered to a recognised injury caused by the contravention. Conduct during litigation can only aggravate a pre-existing injury. It cannot independently ground liability. That principle is well settled.[8]

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[7] *Lee Transport Co Ltd v Watson* (1940) 64 CLR 1, 13, where Dixon J said: "The standards by which the amount of general damages is to be fixed are indefinite and uncertain, and to estimate the sum to be awarded involves the exercise of a form of discretionary judgment". See also *Miller v Jennings* (1954) 92 CLR 190, 196 (Dixon CJ and Kitto J).

[8] This principle was made clear by Atkinson J in *McIntyre v Tully* (1999) 90 IR 9 at [25]–[26], drawing on *Lamb v Cotogno* (1987) 164 CLR 1, *Mafo v Adams* [1970] 1 QB 548, and *John v MGN Ltd* [1997] QB 586. While conduct during litigation, such as cross-examination, may exacerbate injury, it cannot itself generate a separate

18. Three preconditions must be satisfied: (1) compensable harm must be found; (2) the litigation conduct must exacerbate that harm; (3) the conduct must be improper, unjustified or lacking bona fides.[9] None was met here.

19. First, the primary Judge awarded no general damages. There was no compensable harm to aggravate.

20. Second, the conduct relied upon—a momentary, reflexive laugh—was not found to be intentional. It was not found to be directed at the Respondent. It was not misconduct arising in the course of the Appellants' prosecution of their case but occurred while responding to the case put by the Respondent in cross-examination of the Second Appellant. It was a spontaneous courtroom response. That is insufficient to ground liability.

21. Third, the inference of albeit "slight" harm was not made on the basis of any proven facts.[10]

22. The Respondent seeks to increase this already flawed reward. That cannot be done without addressing these defects. None is addressed by the cross-appeal.

23. In addition, the conduct relied upon to justify aggravated damages occurred well after the events forming the subject of the terminated complaint. Section 46PO(3) of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) limits the Court's power to award damages in respect of conduct that is the same in substance as the terminated complaint or arises out of the same acts, omissions or practices. The conduct here occurred in court, years later, and in response to satirical material introduced into evidence in the prosecution of the Respondent's case: cf J[276]. It was not part of or related to the conduct impugned by the Respondent's complaint to the AHRC.[11]

24. Finally, any construction of s 46PO(4)(d) of the AHRC Act that permits compensatory liability to be imposed for expressive conduct during litigation raises a potentially serious constitutional question. The conduct in question occurred in court, during adversarial proceedings, in response cross examination in respect of political satire. The subject of that satire—a basis on which the Respondent had publicly claimed to be a woman[12]—is at the core of political

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and free-standing head of loss. It must aggravate something already found to exist. This approach was affirmed in *Ewin v Vergara (No 3)* [2013] FCA 1311 at [676]–[678] and *Wotton v State of Queensland (No 5)* [2016] FCA 1457; 157 ALD 14 at [1731] – [1733]

[9] *Triggell v Pheeney* (1951) 82 CLR 497 at 514

[10] AB B Tab 25 at [40], referring to RT-13, including p. 137. The Respondent says, "I have also seen a supporter of Ms Grover selling merchandise about this case on the website 'Etsy'. Much of the merchandise is transphobic and contains a number of awful statements related to me and this case. Profits from the merchandise are being donated to Ms Grover's crowdfund campaign." The Respondent does not state that this content has caused him any harm or discomfort.

[11] AB B Tab 24, RT-1 at p. 6 - 12

[12] The cross-examination related to a satirical candle: AB B Tab 26, p.137: 1- 25, AB B Tab 25 at [40], and RT-13, p. 137. That candle bore the label bearing a caricature of the Respondent and a speech bubble reading "So, I realised I was a woman because I hate the smell of balls. Balls. ... Hate 'em. I had to get away from smelly balls." It was intended to mock, in expressive terms, a publicly broadcast statement made by the Respondent to the effect

discourse in this litigation. To penalise expressive response to that claim is to burden political communication. [13]

25. In *Coleman v Power*[14], McHugh J observed that the fact that political speech is insulting does not remove it from constitutional protection. Insults, like irony, humour, and sharp criticism, are inherent features of political communication. Even highly offensive statements may still constitute protected political expression if they concern political matters.

26. If the freedom protects mockery, it protects response to mockery. To permit liability to attach to such conduct—particularly in the absence of any finding of harm—is to chill political engagement and penalise dissent.

27. The cross-appeal on damages does not address the legal, evidentiary, or constitutional barriers that constrain the primary judgment. It proceeds on the mistaken premise that the award was too low without engaging in the necessary analysis to disturb the discretionary award. In truth, the award made was not lawfully open. It cannot therefore be increased. It should not have been made at all. To the extent required, the Appellants apply to amend their notice of appeal to include this ground.

28. The cross-appeal must be dismissed with costs.

DATE: 18 July 2025

N. C. Hutley

B. K. Nolan

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that the realisation of being a woman was due to an aversion to the smell of men's locker rooms. That was not a private disclosure. It was part of a public-facing narrative, voluntarily disseminated through broadcast media by SBS Insight, and deployed in support of legal claims about gender identity and access to female-only spaces such as women's change rooms.

[13] See the test identified in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-562, 567, as modified and refined in ***Coleman*** *v Power* (2004) 220 CLR 1 at 50 [93], 51 [95]-[96]; *McCloy v New South Wales* (2015) 257 CLR 178 at 193-195 [2]; and *Brown v Tasmania* (2017) 261 CLR 328 at 359 [88], 363-364 [104], 375-376 [156], 398 [236], 413 [271], 416-417 [277]-[278], 432-433 [319]-[325]. See also *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at 22-23 [44]-[46], 37 [93], 51-53 [131]-[134]; *Babet v The Commonwealth* [2025] HCA 21 at [49], [72], [91].

[14] *Coleman* at [81], [105]. Gummow and Hayne JJ at [197] and Kirby J at [239] affirmed that insult, confrontation, and emotional expression are within the freedom. The same principle was recognised in *Monis v The Queen* (2013) 249 CLR 92 by Crennan, Kiefel and Bell JJ at [220], and by Hayne J at [85], albeit in dissent on outcome.

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IN THE FEDERAL COURT OF AUSTRALIA

DISTRICT REGISTRY: New South Wales Registry

DIVISION: General

NSD 1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017
and another named in the schedule
Appellants

and

ROXANNE TICKLE
Respondent

RESPONDENT'S OUTLINE OF SUBMISSIONS IN REPLY ON HER CROSS–APPEAL[1]

[1] Orders of Perry J dated 23 May 2025 at [6(a)]; Orders of Perry J dated 24 July 2025 at [4].

Filed on behalf of: The respondent

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GROUNDS 1-3: FINDINGS AS TO DISCRIMINATION

1 The Cross-Appellant (**Ms Tickle**) relies upon the submissions in the Respondent's Outline of Submissions on Her Cross-Appeal[2] and the Respondent's Submissions on Notice of Appeal[3] in respect of Grounds 1-3.

2 The assertion by the Cross-Respondents (**Ms Grover and Giggle**) that their Giggle App and conduct was indifferent to gender identity belies the evidence and their clear intent. Two possible groups of people that could be discriminated against based on a subjective assessment of whether or not they appeared sufficiently female are males and transgender women. Ms Grover and Giggle admit that the Giggle App's condition "remained appearance-based". Appearance is a core part of gender identity. Indeed, the definition of gender identity under the *Sex Discrimination Act 1984* (Cth) (**SDA**) expressly confirms and defines gender identity as including the gender related… "appearance" of a person.[4]

3 Ms Grover and Giggle's apparent argument that their conduct uniformly applied to all persons of male appearance is misplaced. Such an argument might succeed if this case was about discrimination against a male. But it is not. This case is about discrimination against a transgender woman; more particularly a person who identifies and lives her life as a woman, has undergone surgery to affirm her status as a woman and who is recognised as being a female on her birth certificate.

GROUND 4: THE DAMAGES AWARD IS AFFECTED BY ERROR

4 Ms Tickle, contrary to Ms Grover and Giggle's submissions, contends that the Primary Judge (**PJ**) erred in his approach to the facts and relevant legal principles applicable to the assessment of damages, as well as by ordering an award of damages that is manifestly inadequate.[5]

5 Ms Grover and Giggle's impugning of the award of damages as being infected with legal error is without basis. The PJ made an award of general damages (J [228]-[231]), following a finding of compensable harm arising from Ms Tickle's exclusion (**Exclusion**) from the Giggle App. The award of damages was, therefore, an award of both general *and* aggravated damages (see J [231] and [276]) for the harm Ms Grover and Giggle's conduct (in respect of both the discriminatory act itself and the conduct in connection with the proceedings) caused Ms Tickle. Whilst Ms Tickle submits that the assessment of the quantum of damages was infected with error, there was no error of the kind now

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2 7 July 2025.
3 7 July 2025.
4 SDA s 4(1).
5 Respondent's Outline of Submissions on Her Cross-Appeal (**ROSCA**), [21].

asserted by Ms Grover and Giggle in the approach taken by the PJ.

6 Ms Tickle was not cross-examined at trial.[6] Her evidence of harm was unchallenged.

7 Ms Grover and Giggle now seek to raise a new Constitutional argument and refer to extraneous materials (for example, an SBS *Insight* program) that has not previously been canvased before this Court and in the absence of a s 78B notice[7] to the Attorneys-General identifying the constitutional matter. Ms Tickle's position is that Ms Grover and Giggle should not be granted leave to introduce such an argument on appeal.

8 Without limiting these clear legal hurdles, Ms Grover and Giggle's assertion that the candle was "political satire" and that Ms Grover's response to that candle in Court was no more than "responsive" to that is an attempt to clothe denigration of Ms Tickle as so called freedom of expression. There is no evidence before this Court, nor was there any evidence in the Court below, supporting the assertion that the candle or Ms Grover's response to it was a political communication.[8] Ms Tickle does not accept that the candle has any "political" character to which the implied freedom extends. The meaning of "political" in the context of the constitutional freedom propounded by Ms Grover and Giggle, is narrower than suggested. It is not a personal right but is informed by communications in respect of government or political matters, necessary for the effective operation of the system of representative and responsible government.[9]

9 The state of the evidence[10] is that:

(a) the candle was sold by the Etsy store that produced "Team Giggle" merchandise, and that directly contributed funds towards Ms Grover and Giggle's legal campaign (TS pp 134.41-137.10);

(b) Ms Grover had seen the candle previously, including on Twitter (TS p 138.14-20). The candle

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6 J [275].

7 *Judiciary Act 1903* (Cth) s 78B(1): "Where a cause pending in a federal court…involves a matter arising under the Constitution or involving its interpretation, it is the duty of the court not to proceed in the cause unless and until the court is satisfied that notice of the cause, specifying the nature of the matter has been given [to the Attorneys-General], and a reasonable time has elapsed since the giving of the notice for consideration by the Attorneys-General, of the question of intervention in the proceedings or removal of the cause to the High Court".

8 The characterisation of the nature and content of the SBS Insight program as set out in FN 12 of Ms Grover and Giggle's Outline of Submissions in Response to the Respondent's Cross Appeal (**Submissions in Response**) is disputed.

9 *Unions NSW v State of New South Wales* (2019) 264 CLR 595 at [163] Edelman J; *McCloy v New South Wales* [2015] 257 CLR 178 at [2] (French CJ, Kiefel, Bell & Keane JJ) & [305] (Gordon J); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

10 J [258]-[260].

was also in Ms Tickle's affidavit;[11]

(c) She both posted, and reposted posts on Twitter, which provided a direct link to the Etsy store which sold the candle, indicating that "all profits [from the sale of Team Giggle merch] will go to gigglecrowdfund.com" (TS pp 140.1 – 141.16);[12]

(d) Ms Grover laughed at the candle during cross-examination in the proceedings below, and attributed that response to "the context of this room" (TS p 137.1-10).[13]

10 The PJ's assessment of Ms Grover's response to the candle and explanation that it was "funny in the context of the courtroom" as "obviously disingenuous […] offensive and belittling, and [as having] no legitimate place in the respondents prosecuting their case" (J [276]) is respectfully adopted as an accurate characterisation. The constitutional freedom identified in *Lange v Australian Broadcasting Corporation*[14] (as evolved by the courts) does not extend to speech generally,[15] but to freedom of communication about government or political matters. Even outside of political discourse, freedom of expression is not merely a freedom to speak inoffensively.[16] The constitutional freedom protecting communication about government or political matters does not demand a tolerance of communication capable of "inciting hatred, serious contempt or severe ridicule", particularly on the basis of a characteristic properly protected as a freedom.[17] When regard is had to the context in which the candle merchandise was initially distributed and the fact that the front of the candle included a the web address to Ms Grover's crowdfund , any purported political narrative unravels and the real intent of the merchandise is laid bare. The conduct of Ms Grover (including by directing people to the relevant Etsy store that sold the Team Giggle merchandise which included the candle and other offensive merchandise) was disparaging and unnecessary and could have no real role in any political debate.[18]

11 Indeed, so offensive was the candle merchandise that the PJ did not replicate or reproduce the message or portrayal on the candle in his judgment "as that may encourage further dissemination".[19]

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11 Ms Tickle's Affidavit dated 13 September 2023 at [40] and Annexure **RT-13**; **AB B**, Tab 23 at p 136. The text and image replicated on the candle also appears in a post on (then) Twitter dated 15 June 2023 (see, Ms Tickle's Affidavit dated 13 September 2023 at [39] and Annexure **RT-12**; **AB B**, Tab 23 at p 92.

12 See also AB A Tab 28 (2) and (3).

13 J [276].

14 (1997) 189 CLR 520.

15 *Coleman v Power* (2004) 220 CLR 1 at [28] (Gleeson CJ); *cf* [104]-[105] (McHugh J), [195]-[197] (Gummow & Hayne JJ), & [239] (Kirby J).

16 ***Eatock** v Bolt* (2011) 197 FCR 261 at [409]-[411] (Bromberg J).

17 *Sunol v Collier (No 2)* (2012) 289 ALR 128 at [72] (Allsop P) & [87] (Basten JA).

18 See *Toben v Jones* (2003) 129 FCR 515 at [77] (Kiefel J).

19 Despite these remarks from his Honour, Ms Grover has since made the conscious decision to publish and distribute images of the candle within social media forums. An image of candle was also the focus of a front page article on

The PJ was rightly sensitive to the harm dissemination of such offensive wording and portrayals would have (and is continuing to have) on Ms Tickle.

12 There is no proper basis upon which this Court can conclude that: (a) the candle was a political communication; or (b) Ms Grover's response was a political communication. The award of aggravated damages in this case does not raise any question of the constitutional validity of s 46PO(4)(d) of the *Australian Human Rights Commission Act* 1986 (Cth) (**AHRC Act)**, particularly in circumstances where Ms Grover's conduct cannot be held to be political discourse.

13 Even if the candle or Ms Grover's response to it was a "political communication" (which Ms Tickle strongly rejects), conduct which is "entirely gratuitous" has been identified as severing any connection with the content of a communication which is otherwise capable of being seen as "political" in nature.[20] Ms Grover and Giggle's conduct was directed at an expression of identity, which is itself an expression that freedom of expression serves to protect. As Bromberg J held in *Eatock*, "That expression also deserves to be considered and valued. Identity has a strong connection to one of the pillars of freedom of expression – 'self-autonomy stems in large part from one's ability to articulate and nurture an identity derived from membership in a cultural or religious group'".[21] The ability to articulate and nurture a gender identity, and to participate in Australian society without being discriminated against because of that identity is wholly consistent with the principles of fairness and equality for which the SDA, and the Amendment Act, was introduced to promote.[22]

14 It is well-established that the manner in which a respondent conducts their case may exacerbate the hurt and injury suffered by the aggrieved party so as to warrant the award of additional compensation in the form of aggravated damages.[23] Such an award for aggravated damages is not constrained by s 46PO(3) of the AHRC Act,[24] nor does it raise constitutional validity concerns in respect of s 46PO(4). Ms Grover and Giggle's conduct – including Ms Grover's response to the candle at trial – was gratuitous and unwarranted, as well as deeply offensive. Such disparagement directed at the legitimacy of the gender identity of an individual, or indeed a minority group, is destructive of the

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The Australian (online) on 20 July 2025 and was shared by Ms Grover on her X account on the same date (and subsequently).

20 *Holland v The Queen* (2005) 30 WAR 231 at [303] (McLure JA).

21 *Eatock,* at [423] (Bromberg J), citing *R v Keegstra* [1990] 3 SCR 697 at [736].

22 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2013, p 2893 (Mark Dreyfus QC MP, (then) Attorney-General).

23 See ***Triggell*** *v Pheeney* (1951) 82 CLR 497 at 514 (Dixon, Williams, Webb & Kitto JJ); ***Elliot*** *v Nanda & Commonwealth* (2001) 111 FCR 240 at [180] (Moore J); ***Kaplan*** *v State of Victoria (No 8)* [2023] FCA 1092 (Mortimer CJ).

24 See *Elliot* at [179]-[181] (Moore J); *Clarke v Nationwide News Pty Ltd t/as The Sunday Times* (2012) 201 FCR 389 at [349] (Barker J).

objects of the SDA to eliminate, so far as is possible, discrimination against persons on the ground of gender identity.[25]

15 Ms Tickle otherwise reserves her position to make any further oral arguments as are necessary in the event that s 78B notices are issued in this proceeding arising from this discrete issue.

25 July 2025

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[25] See *Eatock*, at [335] (Bromberg J).