



Administrative Decisions Tribunal New South Wales

Medium Neutral Citation: *Margan v Manias* [2013] NSWADT 177

Hearing Dates: 3 July 2013

Decision Date: 07/08/2013

Jurisdiction: Equal Opportunity Division

Before: M Chesterman, Deputy President
J Newman, Non-judicial Member
P Smith, Non-judicial Member

Decision:

1. The complaint of unlawful homosexual vilification is substantiated with regard to statements uttered by the Respondent in Oxford Street, Darlinghurst, during the period between 2 and 8 August 2010 and reproduced in paragraph [48] of this decision.
2. The Respondent is to pay to the Applicant the sum of \$1,000 as compensation for the harm caused to him by the publication of these statements.
3. Within twenty-eight (28) days of the date of this decision, the Respondent is to procure, at his expense, the publication of the following apology as a quarter-page advertisement in the Sydney Star Observer:

This apology is made pursuant to an order of the Administrative Decisions Tribunal of New South Wales (ADT) made on 7 August 2013.

On a date between 2 and 8 August 2010, I uttered statements in Oxford Street, Darlinghurst, concerning homosexual men.

On 7 August 2013, the ADT held that my statements amounted to unlawful homosexual vilification. The ADT found that they were capable, or had the effect, of inciting hatred or serious contempt of homosexual men on the ground of their homosexuality. The ADT also found that my statements were not published reasonably and in good faith for purposes in the public interest.

I apologise for publishing these statements. I acknowledge that the words that I used vilified homosexual men in breach of the New South Wales Anti-Discrimination Act 1977. The aim of this Act is to promote tolerance, understanding and acceptance in the community. The Act sets limits on what can be said or done in public.

Catchwords: Vilification on ground of homosexuality - meaning of 'incitement' - remedies

Legislation Cited: Administrative Decisions Tribunal Act 1997
Anti-Discrimination Act 1977

Cases Cited: *Collier v Sunol* [2005] NSWADT 261
JM & JN v QL & QM [2010] NSWADT 66
Sunol v Collier (No 2) [2013] NSWCA 196

Category: Principal judgment

Parties: Simon Margan (Applicant)
Danny Manias (Respondent)

Representation: In person (Applicant)
No appearance (Respondent)

File Number(s): 111101

Publication Restriction: The address and other contact details of the Applicant are not to be published

REASONS FOR DECISION

Procedural history

- 1 This decision concerns a complaint by the Applicant, Simon Margan, that on and shortly before 9 August 2010 the Respondent, Danny Manias, engaged in conduct amounting to unlawful vilification on the ground of homosexuality.
- 2 On 6 August 2011, Mr Margan complained about this conduct to the Anti-Discrimination Board ('the Board'). In his complaint, he alleged that it amounted both to unlawful homosexual vilification under section 49ZT of the *Anti-Discrimination Act 1977* ('the Act') and to the offence of serious homosexual vilification under section 49ZTA. On 25 August 2011, he sent further information to the Board regarding his allegations.
- 3 On 31 August 2011, the President of the Board advised Mr Margan that his complaint of homosexual vilification had been accepted for investigation and that he could ask for it to be referred to the Tribunal. The President stated also that in his opinion the offence of serious homosexual vilification may have been committed and that he would refer the matter to the Attorney General for a decision as to possible prosecution.
- 4 On 22 September 2011, pursuant to a request from Mr Margan, the President referred the complaint of unlawful homosexual vilification to the Tribunal.
- 5 Between 26 October 2011 and 17 April 2013, the complaint was given consideration in twelve case conferences. It was also the subject of two unsuccessful attempts at mediation.
- 6 Mr Margan failed to appear at two of these case conferences. His reason for not attending was that he was suffering from serious physical injuries, which had been inflicted on him in circumstances outlined below. Following each of these instances of non-attendance, he applied successfully (on 24 January 2012 and 30 April 2013) for his complaint to be reinstated.
- 7 Mr Manias appeared in person at two of the case conferences, held on 25 June and 11 August 2012. He did not appear at any of the other conferences, or at the mediations. In addition, he did not file any evidence, despite being directed to do so.
- 8 The Tribunal's decision on 30 April 2013 (made in chambers) that the complaint should be reinstated was the subject of a Notice of Decision dated 1 May 2013. The Notice also included directions that the parties should file further material within specified periods of time and that the complaint was listed for a one-day hearing commencing at 10 a.m. on 3 July 2013.
- 9 Copies of this Notice of Decision were sent to both parties. The Registry's file shows that the copy addressed to Mr Manias was sent by registered mail to his last-known address on 2 May 2013.
- 10 At the hearing before us on the scheduled date, 3 July 2013, Mr Margan appeared in person. There was no appearance by or on behalf of Mr Manias.
- 11 Mr Margan applied for a determination that the hearing should proceed *ex parte*. Having satisfied ourselves that the Notice of Decision, specifying the date and time of the hearing, had been served on Mr Manias in a manner complying with the *Administrative Decisions Tribunal Act 1997* (see section 138(1)(a)(ii)), we granted this application and proceeded with the hearing.
- 12 In the course of the hearing, we became aware that Mr Margan, in formulating his submissions, had not taken account of a recent decision of significance for his case. In this decision, *Sunol v Collier (No 2)* [2013] NSWCA 196, the Court of Appeal stated a number of important principles relating to the interpretation of section 49ZT of the Act. We therefore gave leave to him to file supplementary submissions after the hearing. He availed himself of this opportunity, and we have taken account of his supplementary submissions, filed on 16 July 2013, in reaching our decision.
- 13 During the hearing, Mr Margan informed us that the Attorney General had declined to prosecute Mr Manias under section 49ZTA of the Act, on the ground that the Director of Public Prosecutions had advised that an applicable limitation period had expired. Mr Margan added that he had applied unsuccessfully to the Supreme Court for a declaration that this advice was incorrect and that an appeal by him against this decision was awaiting a hearing in the Court of Appeal.
- 14 The question whether Mr Manias might, if prosecuted, be found guilty of the offence created by section 49ZTA is, of course, not relevant to our decision. We mention the matter only as background.

Relevant provisions of the Act

- 15 The provisions of the Act making homosexual vilification unlawful in certain circumstances are sections 49ZS and 49ZT. These state:-

49ZS Definition

In this Division:

public act includes:

- (a) any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material, and
- (b) any conduct (not being a form of communication referred to in paragraph (a)) observable by the public, including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia, and
- (c) the distribution or dissemination of any matter to the public with knowledge that the matter promotes or expresses hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the homosexuality of the person or members of the group.

49ZT Homosexual vilification unlawful

(1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the homosexuality of the person or members of the group.

(2) Nothing in this section renders unlawful:

- (a) a fair report of a public act referred to in subsection (1), or
- (b) a communication or the distribution or dissemination of any matter on an occasion that would be subject to a defence of absolute privilege (whether under the *Defamation Act 2005* or otherwise) in proceedings for defamation, or
- (c) a public act, done reasonably and in good faith, for academic, artistic, religious instruction, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

- 16 The orders that the Tribunal may make following a hearing of a complaint are set out in section 108. So far as relevant, this section states:-

108 Order or other decision of Tribunal

(1) In proceedings relating to a complaint, the Tribunal may:

- (a) dismiss the complaint in whole or in part, or
- (b) find the complaint substantiated in whole or in part.

(2) If the Tribunal finds the complaint substantiated in whole or in part, it may do any one or more of the following:

- (a) except in respect of a matter referred to the Tribunal under section 95 (2), order the respondent to pay the complainant damages not exceeding \$100,000 by way of compensation for any loss or damage suffered by reason of the respondent's conduct,
- (b) make an order enjoining the respondent from continuing or repeating any conduct rendered unlawful by this Act or the regulations,
- (c) except in respect of a representative complaint or a matter referred to the Tribunal under section 95 (2), order the respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant,
- (d) order the respondent to publish an apology or a retraction (or both) in respect of the matter the subject of the complaint and, as part of the order, give directions concerning the time, form, extent and manner of publication of the apology or retraction (or both)...
- (g) decline to take any further action in the matter.

Relevant facts

- 17 The evidence tendered by Mr Margan and admitted by us comprised the report on his complaint prepared by the President of the Board, three witness statements signed by him and a large quantity of documentary material relating to the alleged conduct of Mr Manias on which he based his complaint. At the hearing, he testified under oath that the contents of his statements were true and correct to the best of his knowledge and belief.
- 18 We accept Mr Margan's testimony as truthful and reliable, since none of it strikes us as improbable or incoherent and Mr Manias did not appear or file any evidence.
- 19 This testimony described conduct by Mr Manias in Oxford Street, Darlinghurst, on two occasions. The first occurred on a day in the week preceding Monday 9 August 2010. The second occurred between 10 and 10.45 p.m. on that day.
- 20 Broadly in line with terminology used by Mr Margan, we will label Mr Manias's actions on the earlier occasion as 'the verbal conduct' and his actions on the evening of 9 August 2010 as 'the physical conduct'.
- 21 *The verbal conduct.* In paragraphs 2 to 7 of a witness statement signed on 3 July 2013, Mr Margan described this

conduct as follows:-

2. On a day in the week prior to Monday [09 August 2010] I was putting up same-sex marriage posters along Oxford Street.
 3. I occasionally observed and heard Danny Manias. He appeared to have been following me, moving along the street, He appeared to be keeping pace with me even when I stopped to put up a poster which slowed me down, compared with the pace of the ordinary pedestrians.
 4. Towards the corner of Oxford Street and Brisbane Street he became fully audible to me. He was shouting the comments to the street in general but no one particularly.
 5. He yelled "I am going to eradicate all gays from Oxford Street" and "Do not worry I am doing good work".
 6. These comments made me turn around and see his face.
 7. I crossed Oxford Street well before the College Street intersection traffic lights at that stage, even though it was not at the lights and the street was at its widest, to avoid a confrontation.
- 22 In an account of this incident forming part of his complaint to the Board, Mr Margan alleged that in addition to the two comments quoted in paragraph 5 of his witness statement, Mr Manias also said 'There are wicked things taking place on Oxford Street'. During the hearing, Mr Margan confirmed that this allegation formed part of his case.
- 23 We find that the verbal conduct alleged by Mr Margan occurred as described in his witness statement and in the passage, to which we have just referred, in his account provided to the Board.
- 24 *The physical conduct.* In paragraphs 8 to 28 of his witness statement of 3 July 2013, Mr Margan gave the following relevant information about this conduct:-
8. On Monday [09 August 2010] I had attended a LGBTI [Lesbian, Gay, Bisexual, Trans and Intersex] discussion group meeting of Gay Free Thinkers [Former ACON building, 9 Commonwealth Street, Surry Hills]...
 9. The meeting ended just before 10.30 p.m...
 10. I was walking up Oxford Street, along the south side, to my car parked on Burton Street... My route meant I crossed the Crown Street and Oxford Street lighted traffic crossing.
 11. I saw same-sex marriage posters having been torn down with apparently unusual zeal, almost shredded.
 12. I had just passed one of Oxford Street's LGBTI-friendly bars [Midnight Shift...] and was just passed (*sic*) the entrance to a LGBTI-friendly restaurant [Tum Nak Thia, 101 Oxford Street Darlinghurst].
 13. I was outside the '7-Eleven', in front of that convenience store's glass wall, before the door. Then I felt something swish past my head. I realised it was someone's foot. I turned to see who had done this, I saw the respondent, Danny Manias.
 14. He appeared to be surprised that his foot had not made contact with me. I asked him, "Did you just try to kick me in the face?"
 15. He did not reply and paced around on the spot. I tried to move off, but he shadowed my movement in response. There was an obstruction, which meant moving away from this position up the street would have meant moving closer to him. I backed off towards the '7-Eleven' wall. Danny Manias was in between me and the street.
 16. There were two girls, of 'islander' appearance, sitting outside the door of the '7-Eleven'. They were laughing and egging the respondent on.
 17. I recognised him from previously and was worried he might have a knife... I screamed for help several times and turned my head to see if there was anyone who could come to my aid or witness what was happening.
 18. I realised that I had diverted my gaze from my attacker and looked back catching his foot out of the corner of my eye. I saw the sole of Danny Manias' hard-soled heavy-duty shoe.
 19. I tried to move backwards, but his foot contacted with base of my eye socket. I felt immediate pain and fell to the ground.
 20. The girls on the step were still laughing and I was under the impression they knew the respondent. They said something particularly unsympathetic to my plight, however, I do not remember what it was now.
 - 21... I summoned up some strength and screamed again. I scream[ed] out "Help me! This is a gay bashing" and "I have been assaulted".
 22. I was under the impression he was walking away from the incident down the street...
 23. A man, who was employed as a waiter at Tum Nak Thia [Napanchayakorn] restaurant, who was holding his arm brought paper napkins from the restaurant. He stated "They had been extorting money from restaurant patrons as they were leaving the restaurant."...
 26. The good Samaritans present [being people who had come to Mr Margan's aid] assured me that the police and an ambulance had been called and that my attacker had been apprehended further down the street.
 27. The Pacific Islander woman (*sic*) came over and started asking the good Samaritans around me for loose change saying "Are you alright" to me, but then immediately after asking "Do you have 20c on you" to a variety of the good Samaritans...
 28. I warned the police about the respondents (*sic*) saying "They are friends of my attacker" and my statement made the islander girls depart.
- 25 According to the report of a consultant psychiatrist dated 16 June 2013, the injuries inflicted by Mr Manias on Mr Margan included a blowout fracture to his left interior medial orbital wall, causing a continuing loss of visual acuity, and

a number of facial fractures. He continues to suffer from cognitive problems, sleep disorders and some stuttering in his speech. These symptoms are consistent with Post-Traumatic Stress Disorder and suggest also that he may have suffered traumatic brain injury.

- 26 After being arrested near the intersection of Oxford and College Streets, Mr Manias was charged with five assault offences and remanded in custody. Two of these charges, including the one relating to Mr Margan, were of assault causing actual bodily harm and the remaining three were of common assault.
- 27 In the course of a Local Court hearing concluding on 3 March 2011, Mr Manias pleaded guilty to all these offences. He read out a statement to the Court in which he said that he was 'extremely sorry' for what he had done and that a doctor who had examined him in gaol had told him that he was schizophrenic. The Court observed that there was evidence showing that before and at the time of his assaults he was suffering from a mental illness. With respect to these and a number of other offences, he was sentenced to imprisonment for 18 months. He was also placed under a good behaviour bond with conditions requiring that he continue to receive treatment for his illness.
- 28 A number of statements tendered by the police to the Local Court were put before us by Mr Margan. The accounts that they gave of the five assault offences to which Mr Manias pleaded guilty included the following matters of relevance in these proceedings.
- 29 The assaults were all estimated to have occurred between 10.20 and 10.40 p.m. on 9 August 2010. The victims were all adult males. The first assault, mentioned in Mr Margan's statement, was on the waiter at Tum Nak Thia Restaurant. The second was the assault on Mr Margan. There followed three other assaults, on a taxi driver (near Oxford Square Plaza) and on two further victims, near Gloria Jean's Coffee Shop and at a location closer to the intersection of Oxford and College Streets. The taxi driver testified that just before assaulting him Mr Manias 'swore very loudly' at him. No other victim heard Mr Manias say anything. Only Mr Margan mentioned the 'islander' girls. The police officers who arrested Mr Manias stated that he appeared to be drunk and/or affected by drugs, that he had 'glazed eyes' and that his behaviour was 'extremely irrational'.
- 30 In the absence of any countervailing evidence, we find that the physical conduct alleged by Mr Margan occurred as just outlined.

Discussion

- 31 *A single 'public act'?* A significant component of Mr Margan's argument at the hearing and in his supplementary submissions was the proposition that, although the verbal conduct and the physical conduct of Mr Manias took place on different days, they should be held to constitute a single 'public act' for the purposes of determining Mr Margan's complaint of unlawful homosexual vilification.
- 32 In seeking to establish this proposition, Mr Margan pointed out first that the definition of 'public act' in section 49ZS of the Act includes both 'speaking', in paragraph (a), and 'any conduct... observable by the public, including actions and gestures...' in paragraph (b).
- 33 He submitted further that Mr Manias's verbal conduct and physical conduct should be regarded as interrelated or 'combined', for the following reasons:-
 - (a) These two instances of conduct occurred in the same location: Oxford Street, Darlinghurst.
 - (b) The Tribunal has taken judicial notice of the fact that this location is 'predominantly associated with the LGBTI community'.
 - (c) The verbal conduct was a 'reinforcement of' the subsequent physical conduct.
 - (d) The test of whether unlawful vilification occurred under section 49ZT requires an assessment of the reactions of a hypothetical, not an actual, observer of the relevant conduct. It is irrelevant, therefore, to determine whether any one or more persons witnessed both the 'verbal' and the 'physical' conduct. What should be assessed instead is the reaction of a hypothetical observer of both these instances of conduct.
- 34 Mr Margan acknowledged, however, that in a recent homosexual vilification case, *JM & JN v QL & QM* [2010] NSWADT 66, the Tribunal treated as separate 'public acts' each of a series of alleged incidents in which the two respondents (or, in some instances, one of them) made loud derogatory comments about the applicants, referring to their homosexuality, in a public place. Although an underlying factor throughout was a substantial degree of hostility between the applicants and the respondents, the Tribunal did not find - nor, it seems, was it argued - that all of these incidents, or indeed any group of them, should be regarded as a single 'public act'.
- 35 We indicated to Mr Margan at the hearing that we were not inclined to accept his proposition. We remain of that view.

- 36 We indicated also that we had no doubts that the verbal conduct of Mr Manias and his physical conduct, considered separately, each constituted a 'public act' within the definition in section 49ZS.
- 37 *The 'public acts' considered separately.* In the remainder of his submissions, Mr Margan accordingly urged us to make a finding of unlawful homosexual vilification in relation to each of these 'public acts', treating them as independent of each other.
- 38 His claim was each of them fell within the terms of section 49ZT(1) because Mr Manias's conduct was such so as to 'incite' feelings of 'hatred towards' or 'serious contempt for' a 'person' (himself) or a 'group of persons' (homosexual men generally) 'on the ground of the homosexuality of the person or members of the group'.
- 39 We accept Mr Margan's statement, made more than once in his evidence, that he is a homosexual man.
- 40 In his supplementary submissions, Mr Margan placed significant reliance, as we suggested that he should, on the Court of Appeal's decision in *Sunol v Collier (No 2)* [2013] NSWCA 196. This is the leading authority on the interpretation of section 49ZT of the Act. The judgments of the three members of the Court contain pronouncements of direct relevance to these proceedings.
- 41 At [26 - 34] and [41], Bathurst CJ said:-

26 I have set out the section above. The first question raised is what is meant by the word "incite". The meaning of the word has been considered both in the context of anti-discrimination legislation and in the context of criminal offences involving incitement. In *Young v Cassells* (1914) 33 NZLR 852, a case concerning the charge of inciting persons to resist constables, Stout CJ described the word as meaning "to rouse, to stimulate, to urge, to spur on, to stir up, to animate" (at 854). In *R v Massie* [1998] VSCA 82; [1999] 1 VR 542, Brooking JA, with whom Winneke P and Batt JA agreed, said at 555 that the word covered words which command, request, propose, advise or encourage. In *R v Eade* [2002] NSWCCA 257; (2002) 131 A Crim R 390, Smart AJ (at [59]) cited what was said by both Stout CJ and Brooking JA with approval.

27 The word has received a similar construction in the context of anti-discrimination legislation: *Catch the Fire Ministries* supra [*Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284; (2006) 15 VR 207] at [14]; *Kazak v John Fairfax Publications Limited* [2000] NSWADT 77 at [23]; *Burns v Dye* [2002] NSWADT 32 at [19]; *Veloskey v Karagiannakis* [2002] NSWADTAP 18 at [21]; *Burns v Laws (No 2)* [2007] NSWADT 47 at [102].

28 Although it is clear from this review of the authorities that the word "incite" can cover a wide variety of conduct, it must be borne in mind that it is not sufficient to attract the operation of s 49ZT that the words simply express hatred, serious contempt for, or severe ridicule of a person on the grounds of homosexuality; the relevant public act must be one which could encourage or spur others to harbour such emotions: *Burns v Dye* supra at [20]; *Burns v Laws (No 2)* supra at [113].

29 It is also well established, both in the area of criminal law and in the context of anti-discrimination legislation, that it is not necessary for a person in fact to be incited by the words or publication: *R v Eade* supra at [60]; *R v Assistant Recorder of Kingston-Upon-Hull*; *Ex parte Morgan* [1969] 2 QB 58 at 62; *Veloskey v Karagiannakis* supra at [25]; *Catch the Fire Ministries Inc* supra at [14].

30 The next issue is whether an intention to incite is required for a contravention of s 49ZT. The Tribunal has consistently held that intention is not an element of a contravention of this or related sections: *John Fairfax Publications Pty Ltd v Kazak* [2002] NSWADTAP 35 at [10]; *Burns v Dye* supra at [21]; *Veloskey v Karagiannakis* supra at [24]; *Burns v Cunningham* [2011] NSWADT 240 at [69].

31 Neither party at the hearing suggested that that approach was incorrect. I am prepared to proceed on this basis without finally deciding the issue. It is consistent with the approach taken by the High Court in *Waters v Public Transport Corporation* [1991] HCA 49; (1991) 173 CLR 349. In that case Mason CJ and Gaudron J made the following comments:

"However, the principle that requires that the particular provisions of the Act must be read in the light of the statutory objects is of particular significance in the case of legislation which protects or enforces human rights. In construing such legislation the courts have a special responsibility to take account of and give effect to the statutory purpose. In the present case, the statutory objects, which are stated in the long title to the Act, include, among other things, 'to render unlawful certain Kinds of Discrimination, to promote Equality of Opportunity between persons of different status'. It would, in our view, significantly impede or hinder the attainment of the objects of the Act if s.17(1) were to be interpreted as requiring an intention or motive on the part of the alleged discriminator that is related to the status or private life of the person less favourably treated. It is enough that the material difference in treatment is based on the status or private life of that person, notwithstanding an absence of intention or motive on the part of the alleged discriminator relating to either of those considerations." (at 359)

Deane J agreeing at 382; but see McHugh J at 401.

32 The next issue of construction raised by the section is whether the public act required for a contravention of s 49ZT is one which would incite hatred, serious contempt for or severe ridicule in an "ordinary reasonable reader" or in a reasonable member, or an ordinary member, of the class to which the public act was directed. The first of the three alternatives is the one which has been consistently adopted by the Tribunal, following the test set out by the Court of Appeal in *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158 at 165 that "the ordinary reasonable reader ... is a person of fair average intelligence, who is neither perverse nor morbid or suspicious of mind, nor avid for scandal. That person does not live in an ivory tower but can and does read between the lines in the light of that person's general knowledge and experience of worldly affairs": *John Fairfax Publications Pty Ltd v Kazak* supra at [13]-[14]; *Veloskey v Karagiannakis* supra at [26]; *Burns v Cunningham* supra at [69].

33 A different approach to the question was taken by the Court of Appeal of Victoria in *Catch the Fire Ministries Inc* supra. In that case Nettle JA took the view that for conduct to incite hatred it must reach a relevant audience. In those circumstances he said the question is to be answered having regard to the effect of the conduct on a reasonable member of the class of persons to whom it is directed (at [16]-[18]). Ashley JA and Neave JA on the other hand suggested the question should be decided by reference to an ordinary member of the class rather than a reasonable member (at [132], [157]-[158]).

34 I prefer the view of Ashley and Neave JJA. This is because the legislation is concerned with the incitement of hatred towards, serious contempt for, or serious ridicule of homosexuals. That, of my view, can be measured only by reference to an ordinary member of the class to whom the public act is directed. To determine the issue by reference to a reasonable person without considering the particular class to whom the speech or public act is directed would, in my opinion, impose an undue restriction on the operation of the legislation.

41 In these circumstances, s 49ZT should be construed as follows:

(a) Incite means to rouse, to stimulate, to urge, to spur on, to stir up or to animate and covers conduct involving commands, requests, proposals, actions or encouragement.

(b) It is not necessary for a contravention that a person actually be incited.

(c) It is not sufficient that the speech, conduct, or publication concerned conveys hatred towards, serious contempt for, or serious ridicule of homosexuals; it must be capable of inciting such emotions in an ordinary member of the class to whom it is directed.

(d) It is not necessary to establish an intention to incite....

42 Allsop P said (at [60 - 62]):

60 The text of s 49ZT reflects an attempt by Parliament to weigh the policies of preventing vilification and permitting appropriate avenues of free speech. Subsections (1) and (2) should be read together as a coherent provision that makes certain public acts unlawful. Subsection (2) is not a defence; it is a provision which assists in the defining of what is unlawful. It attempts to ensure that certain conduct is not rendered unlawful by the operation of subsection (1).

61 Subject to the following comments, I agree with the Chief Justice as to the construction of subsection (1). The question of the audience against which the public act is to be assessed for the purposes of s 49ZT(1) may be very important in any individual case. It will be intimately connected with the whole context of the public act. Thus, in an emotionally charged public meeting where reason has been pushed aside by passion or hatred, it may be inappropriate to posit the standard of the "reasonable" member of the class which may be aptly described as a group of impassioned bigots. The question is ultimately one of fact in the context in which the act takes place. If the general public is being addressed, bearing in mind the approach conformable with *Brown* and *Coco*, the ordinary and reasonable members of the public may be appropriate to consider.

62 Further, satisfaction of s 49ZT(1) is not necessarily to be assumed or concluded by rude, indecorous, base or insulting language that reflects some dislike of, or opposition to, homosexuality. The section provides for an act to incite hatred, serious contempt, or severe ridicule. Fine linguistic distinctions should of course not be drawn which may deflect attention from the language of the statute. The words of the statute are to be applied with a recognition of the degree or quality of the act contemplated by the language. The act is to be assessed by reference to the context in which it takes place, including the audience or likely audience

43 At [79], Basten JA said:-

79 Applying this approach, I agree with the construction of s 49ZT of the *Anti-Discrimination Act 1977* (NSW) outlined by Bathurst CJ. The critical aspect of s 49ZT for present purposes is the requirement that to be unlawful the conduct must incite "hatred towards, serious contempt for, or severe ridicule of" persons within the protected class. Mere insults, invective or abuse will not engage the prohibition.

44 A somewhat different approach to the term 'incite' was taken in a Tribunal decision, *Burns v Laws (No 2)* [2007] NSWADT 47, to which the Chief Justice referred. At [110 - 112], the Tribunal said:-

110 The second qualification [to the principles stated in previous Tribunal decisions on section 49ZT(1)] relates to the Tribunal's use of the terms 'capacity' and 'capable'. We agree with Mr Reynolds [counsel for the respondent] that these terms have the potential to understate what must be proved. In defamation law, they bear upon what is in essence a threshold question only. An allegedly defamatory imputation is judicially determined to be 'capable of defaming' the person to whom it refers if there are sufficient grounds to warrant referring to a jury the quite distinct question of whether it actually did defame this person.

111 In our opinion, the issue to be resolved under s. 49ZT(1) is better framed as follows: would the relevant 'public act' have had the 'effect' of inciting, in the sense of urging or prompting, a hypothetical 'ordinary reasonable person' to experience one or more of the relevant reactions towards one or more homosexual people (as identified by the complainant), on the ground of their homosexuality? If terms such as 'capacity' or 'tendency' (this word appears in Neave JA's judgment in *Catch the Fire Ministries* at [161]) are to be employed instead, it should be understood that they refer to the actual effect rather than the potential or possible effect.

[112] This point is important if, as previous authorities have made clear, the term 'incite' is to be interpreted as meaning merely 'urge', not 'successfully urge' or 'induce'. A test that required no more than proof that the relevant public act had the potential or possible effect of urging an ordinary reasonable person to experience one or more of the relevant reactions would in our view be unduly broad.

45 The Tribunal's reference here to the reactions of an 'ordinary reasonable person' must now be considered incorrect in the light of the different pronouncements on this question by Bathurst CJ (with the concurrence of Basten JA) and Allsop P in *Sunol v Collier (No 2)*. But the Tribunal's observations as to the potential ambiguity of the terms 'capable' and 'capacity' in this particular context should, we think, be borne in mind.

- 46 In view of the authoritative status of the Court of Appeal's judgments in *Sunol v Collier (No 2)*, we do not think it necessary to refer to a number of earlier Tribunal decisions on section 49ZT to which Mr Margan referred us.
- 47 *The verbal conduct of Mr Manias.* Mr Margan submitted that the three derogatory comments uttered loudly by Mr Manias while he (Mr Margan) was putting up same-sex marriage posters in Oxford Street constituted unlawful homosexual vilification directed both at him and at homosexuals generally.
- 48 These comments, it will be recalled, were 'I am going to eradicate all gays from Oxford Street', 'Do not worry I am doing good work' and 'There are wicked things taking place on Oxford Street'.
- 49 We agree with this submission. Taken in conjunction, these comments were not merely insults. They had the capacity to incite, or the effect of inciting, ordinary members of the audience at which they were directed - i.e., the general public - to experience hatred and/or serious contempt for Mr Margan, and for homosexual men generally, on the ground of his or their homosexuality. Members of the public hearing them would have been 'prompted' or 'spurred on' to harbour these feelings.
- 50 In addition, the first and third of these comments, considered in isolation, would, we think, satisfy these criteria.
- 51 Past Tribunal decisions on similar facts can never be regarded as binding. They can only provide guidance, at most. But it is worth noting that in *Collier v Sunol* [2005] NSWADT 261 the Tribunal held that each of two similarly brief statements, published separately on the internet, involved incitement falling within section 49ZT(1). These statements (with spelling corrected) were (a) 'I hope and pray that God moves and brings more of the religious right into Australia to keep the poofs and fags kept held down' and (b) 'faggots are all wicked evil people'.
- 52 The first of these statements, urging its readers to think that homosexual people should be 'held down', is not too remote in substance from Mr Manias's claims that he wishes to 'eradicate all gays from Oxford Street' and that this is 'good work'. The substance of the second is akin to that of Mr Manias's assertion that 'wicked things' take place in Oxford Street.
- 53 There are no grounds for believing that the defence, or ground of exemption, created by section 49ZT(2) might be available in the present case. In particular, we find that Mr Manias's statements were not published reasonably and in good faith for purposes in the public interest, within the meaning of paragraph (c) of that provision.
- 54 We accordingly uphold Mr Margan's complaint in so far as it is based on the verbal conduct of Mr Manias in Oxford Street during the week before 9 August 2010.
- 55 *The physical conduct of Mr Manias.* In our opinion, the complaint based on Mr Manias's assault on Mr Margan must be rejected, because there was no 'incitement' of the relevant kind. Our reasons for reaching this conclusion are as follows.
- 56 Most importantly, at the time when he committed the five assaults for which he was convicted on his plea of guilty, Mr Manias said nothing that might have encouraged onlookers to view favourably what he was doing or that might in any other way prompt them to have negative feelings towards homosexual people. He said nothing, indeed, to indicate that he believed his victims to have been homosexual, or that it was on account of their homosexuality that he attacked them. The only victim to have testified to hearing Mr Manias say anything at all - the taxi driver - stated only that Mr Manias 'swore very loudly' at him.
- 57 It is also significant that the assault on Mr Margan was one of a string of assaults on five victims seemingly chosen at random in the course of an outburst of violent aggression. The evidence strongly suggests that this is the way in which onlookers would have interpreted Mr Manias' behaviour.
- 58 In addition, the evidence provides no basis for a finding that Mr Manias recognised Mr Margan as a person whom he had seen putting up same-sex marriage posters during the previous week. Even if Mr Manias did recognise Mr Margan, no-one observing the assault would know or believe that they had recently encountered each other in these circumstances.
- 59 In his submissions, Mr Margan placed strong reliance on his contention that Oxford Street, Darlinghurst - in particular, the section of this street where the assaults occurred - was well known to be an area where homosexual people were often to be found. He maintained that this was a fact of which the Tribunal had taken judicial notice in the past. He also emphasised that the Tum Nak Thia Restaurant, where the first assault occurred, was well known to be frequently visited by homosexuals.

- 60 It is significant, however, that the next assault, on Mr Margan himself, took place outside a convenience store. There is no immediate reason to believe (and no evidence) that the customers of this store would solely or predominantly constitute homosexuals. The same observation may be made about the location of the three subsequent assaults. We can accept that each of these assaults occurred in a street where homosexuals are often found, but not (in the absence of evidence) where they predominate to such an extent that any victim of an assault taking place there would be assumed to be homosexual.
- 61 A proposition on which Mr Margan's argument depends is that 'ordinary' members of the public who witness a serious assault on a person will feel 'prompted' or 'spurred on' by what they see to feel 'hatred' or 'serious contempt' for the victim. We cannot subscribe to this proposition, even if the circumstances are such that onlookers might believe that the victim belongs to a group within society (such as homosexual people) that has often been the target of public hostility. It would mean that any assault on a person occurring in a public place where homosexual people are often found would constitute an act of unlawful homosexual vilification, unless the evidence suggests that onlookers would discern a motivation other than homophobia for the assault.
- 62 Finally, the evidence in this case suggesting that the 'islander girls' might actually have been 'prompted' by Mr Manias's assault on Mr Margan to feel hatred or contempt towards homosexual men is not relevant because, as Mr Margan himself argued, what matters is the reaction of hypothetical, not actual, observers.

Remedies

- 63 In a statement of claim filed before the hearing, Mr Margan sought the following remedies: (a) a statement by the Tribunal that Mr Manias's verbal and physical conduct amounted to 'vilification with violence'; (b) damages in the sum of \$60,000; (c) an order for publication of an apology in the *Sydney Star Observer* and the *Sydney Morning Herald*; (d) orders prohibiting Mr Manias from entering 'the Oxford Street area' or the suburb of Epping; and (e) an order that Mr Manias 'adhere indefinitely' to the terms of an Apprehended Violence Order that Mr Margan had previously obtained against him.
- 64 At the hearing, Mr Margan conceded that orders as sought in paragraphs (d) and (e) of this list were not within the powers conferred on the Tribunal by section 108 of the Act.
- 65 In our opinion, suitably framed orders along the lines set out in paragraphs (a) to (c) are warranted.
- 66 Because we have upheld this complaint in relation only to the verbal conduct of Mr Manias, the order that we make under paragraph (a) will refer only to this conduct.
- 67 The fact that we have rejected the complaint in relation to the physical conduct of Mr Manias has particularly strong implications for Mr Margan's claim for damages. But for this, an award in the vicinity of the substantial amount that he sought might well have been justified. As indicated above at [25], the injuries that he sustained were serious and have caused him to suffer continuing disabilities. He also provided evidence of a substantial loss of earning capacity, for which, he said, a claim successfully brought by him under victims' services legislation did not compensate him.
- 68 These matters fall, however, outside the range of compensation that may be awarded with respect to the claim in respect of the verbal conduct. They fall more naturally within the scope of common law proceedings for damages for trespass to the person. (In this connection, we note that, subject to some exceptions that might be relevant on the facts of this case, the standard limitation period of three years for such proceedings is close to expiring.)
- 69 The verbal conduct of Mr Manias was directed, in part, at Mr Margan. We accept his evidence that while he was putting up same-sex marriage posters Mr Manias appeared to be following him and 'keeping pace with' him. It was in this context that Mr Manias shouted out the comments that we have held to constitute homosexual vilification.
- 70 Because Mr Margan was in this sense a target of the vilification, it is appropriate that he receive damages for both the hurt to his feelings and the apprehension that he suffered. But since only one incident of vilification was involved and the relevant events were of a relatively short duration, it is also appropriate that only a modest sum be awarded. In so ruling, we take account of principles stated by the Tribunal in *Burns v Sunol* [2012] NSWADT 246 at [112 - 118].
- 71 We award the sum of \$1,000 under section 108(2)(b) of the Act as compensation for the damage suffered by Mr Margan in consequence of Mr Manias's verbal conduct.
- 72 We agree with a suggestion, made at the hearing by Mr Margan, that the publication of an apology in one newspaper only, the *Sydney Star Observer*, might suffice in this case. Although in his statement of claim he sought an order that it should be a full-page apology, we consider that a quarter-page advertisement is more appropriate. According to a

'Media Kit' distributed by this newspaper, which Mr Margan tendered, an advertisement of this size would cost \$800 exclusive of GST.

- 73 The wording of the apology, which is to be published pursuant to an order under section 108(2)(d), is based on precedents in earlier Tribunal decisions.

Our orders

- 74 We order as follows:-

1. The complaint of unlawful homosexual vilification is substantiated with regard to statements uttered by the Respondent in Oxford Street, Darlinghurst, during the period between 2 and 8 August 2010 and reproduced in paragraph [48] of this decision.
2. The Respondent is to pay to the Applicant the sum of \$1,000 as compensation for the harm caused to him by the publication of these statements.
3. Within twenty-eight (28) days of the date of this decision, the Respondent is to procure, at his expense, the publication of the following apology as a quarter-page advertisement in the *Sydney Star Observer*:

This apology is made pursuant to an order of the Administrative Decisions Tribunal of New South Wales (ADT) made on 7 August 2013.

On a date between 2 and 8 August 2010, I uttered statements in Oxford Street, Darlinghurst, concerning homosexual men.

On 7 August 2013, the ADT held that my statements amounted to unlawful homosexual vilification. The ADT found that they were capable, or had the effect, of inciting hatred or serious contempt of homosexual men on the ground of their homosexuality. The ADT also found that my statements were not published reasonably and in good faith for purposes in the public interest.

I apologise for publishing these statements. I acknowledge that the words that I used vilified homosexual men in breach of the New South Wales Anti-Discrimination Act 1977. The aim of this Act is to promote tolerance, understanding and acceptance in the community. The Act sets limits on what can be said or done in public.

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.