



Civil and Administrative Tribunal  
New South Wales

Case Name: Margan v Taufaa

Medium Neutral Citation: [2017] NSWCATAD 216

Hearing Date(s): 20 January 2017

Date of Orders: 30 June 2017

Decision Date: 30 June 2017

Jurisdiction: Administrative and Equal Opportunity Division

Before: A Scahill, Senior Member  
Dr M Murray, General Member

Decision: (1) The complaint of unlawful homosexual vilification is substantiated.

(2) The Respondent is to pay to the Applicant the sum of \$10,000 as compensation for the harm caused to him by the assault and the publication of these statements within 21 days of the publication of this decision.

(3) The Tribunal directs that the Respondent, Mr Taufaa provide submissions on Mr Margan's applications for costs. Any submissions are to be provided to the Tribunal and Mr Margan by 14 July 2017.

(4) Mr Margan's application for costs will be determined on the papers after that date.

Catchwords: Homosexual vilification

Legislation Cited: Anti-Discrimination Act 1977  
Civil and Administrative Tribunal Act 2013  
Civil and Administrative Tribunal Rules 2014  
Crimes (Sentencing Procedure) Act 1999

Cases Cited: Burns v Sunol [2012] NSWADT 246  
Burns v Sunol (No 2) [2012] NSWADT 247  
Collier v Sunol [2005] NSWADT 261  
JM & JN v QL & QM [2010] NSWADT 66  
Sunol v Collier (No 2) [2013] NSWCA 196  
Margan v Manias [2013] NSWADT 177

Category: Principal judgment

Parties: David Margan (Applicant)  
Paul Taufaa (Respondent)

Representation: In Person (Applicant)

File Number(s): 2015/00383313

Publication Restriction: The Tribunal ordered that the Applicant's home addressed not be published under section 64(1) of the Civil and Administrative Tribunal Act 2013

## REASONS FOR DECISION

### Background

#### *Procedural history*

- 1 This decision concerns a complaint by the Applicant, Simon Margan, that on 15 September 2014, the Respondent, Paul Taufaa, engaged in conduct amounting to unlawful vilification on the ground of homosexuality.
- 2 On 29 September 2014, Mr Margan complained about this conduct to the Anti-Discrimination Board (ADB). In his complaint, he alleged that it amounted both to unlawful homosexual vilification under section 49ZT of the *Anti-Discrimination Act 1977* ('the ADA') and to the offence of serious homosexual vilification under section 49ZTA. On 13 October 2014, Mr Margan sent further information to the ADB regarding his allegations.
- 3 On 14 July 2015, pursuant to section 90B (5) of the ADA, the President referred the complaint of unlawful homosexual vilification to the Tribunal.
- 4 The complaint was subject of a number of case conferences.
- 5 At the hearing before us on the scheduled dates, 20 January 2017 and 17 March 2017, Mr Margan appeared in person. There was no appearance by or on behalf of Mr Taufaa.

## **Preliminary matters**

### *No appearance by the Respondent Mr Taufaa*

- 6 Mr Taufaa did not appear at the hearing on 20 January 2017. The Tribunal noted from the file that the ADB had written to Mr Taufaa on 30 October 2014; 11 December 2014 and 14 December 2014, to an address [deleted]. Mr Taufaa had not responded to any of those letters.
- 7 When the matter came to the Tribunal, the Tribunal wrote to Mr Taufaa at the Rutherford address on 29 July 2015, 27 August 2015, 27 January 2016, 21 April 2016.
- 8 On 11 August 2016, the Tribunal wrote to Mr Taufaa at an address in Argenton advising of a case conference on Wednesday 7 September 2016.
- 9 Mr Taufaa did not appear at any of the case conferences.
- 10 A person purporting to be Mr Taufaa telephoned the Tribunal on 22 August 2016. He spoke to a registry staff member and asked what was going to be happening on 7 September 2016. Mr Taufaa told the staff member that he had been receiving the relevant mail at his sister's address. A person purporting to be Mr Taufaa again rang the Tribunal on the 14 September 2016 and spoke to the same staff member. He again asked what would be happening in the Tribunal on 19 October 2016. The staff member asked Mr Taufaa to provide his current address. Mr Taufaa swore at the staff member and the conversation finished.
- 11 The Tribunal notes that the Tribunal wrote to Mr Taufaa on November 2016 to the address at Argenton and again on Monday, 16 January 2017 to advise of the hearing for Friday the January 2017.
- 12 At the hearing, Mr Margan told the Tribunal that he had contact with Mr Taufaa on Facebook about the complaint and the hearing.

## **Rules for service - Civil and Administrative Tribunal Rules 2014, regulation 13**

- 13 The Tribunal notes that Regulation 13 of the *Civil and Administrative Tribunal Rules 2014*, provides that a notice or document may be served or given to a person by posting a copy of the notice or document addressed to the person to the person's address for service or if there is not an address for service, to the

person's business or residential address last known to the person or body serving the notice or document. In these circumstances, the Tribunal had sent notices to Mr Taufaa at his Rutherford address.

- 14 The Tribunal notes that a person purporting to be Mr Taufaa acknowledged receipt of the correspondence when he telephoned the Tribunal, responding to the Tribunal's letters advising of forthcoming case conferences.
- 15 The Tribunal had heard that Mr Taufaa and Mr Margan had communicated on Facebook about the hearing.
- 16 In the circumstances, the Tribunal was satisfied that Mr Taufaa had been served with notices of the hearing of 20 January 2017 and was aware of the proceedings. The Tribunal considered it appropriate to proceed to hearing *ex parte*, in Mr Taufaa's absence.

#### **Complaint made on behalf of Mr Massa.**

- 17 The Tribunal notes that Mr Margan lodged a complaint on 29 September 2014 on behalf of himself and Mr David Massa.
- 18 Mr Massa did not appear at the hearing. Mr Margan advised the Tribunal that he no longer brought the complaint on behalf of Mr Massa. He brought the complaint only on his own part.

#### **Offence of serious racial vilification section 49ZTA of the Anti-Discrimination Act 1977**

- 19 Mr Margan's original complaint to the ADB of 29 September 2014 nominated homosexual vilification and serious homosexual vilification under section 49ZTA of the ADA. For a complaint of serious homosexual vilification to proceed to prosecution, consent is necessary from the Attorney General. The Tribunal had not been advised that such consent had been obtained. Accordingly, the Tribunal understood that a complaint of serious homosexual vilification had not proceeded.

#### **Relevant provisions of the ADA**

- 20 The provisions of the ADA 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.

21 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.

### **Standard of proof**

22 Where the Tribunal needs to be satisfied of the existence of a fact – for example that an action has occurred - it needs to be satisfied on the civil standard of proof “the balance of probabilities”.

### **Relevant facts**

23 The Tribunal had before it the President of the ADB’s report accompanying the referral of the matter to the Tribunal. This report included:

- (1) Statement of Mr David Massa dated 23 September 2014;
- (2) Statutory declaration of Mr Simon Margan declared on 19 September 2014.

24 A summons was issued by the Tribunal to NSW Police Service. In response to the summons, the Police Service produced

- (i) A DVD labelled ‘CCTV footage ARQ nightclub’
- (ii) Copy of ERISP recording R 0338967

25 Unfortunately, the disc labelled CCTV ARQ nightclub, could not be read. Technical assistance from Tribunal IT staff was unsuccessful in opening a file with footage. The Tribunal requested the Police to provide a new copy – but nothing was provided.

26 The ERISP recording was played before the Tribunal. It was a video and sound recording of the police interview of Mr Taufaa conducted after 4.00am on the morning after the assault.

### **The Applicant’s case**

27 Mr Margan relied upon the contents of the President of the ADB’s report; the statement of David Massa, his own statutory declaration, the ERISP recording of Mr Taufaa’s police interview, and the court orders made by the Local Court in convicting Mr Taufaa for the assault.

28 Mr Margan made oral submissions.

### **Summary of Events**

29 As part of his written complaint to the ADB, Mr Margan provided the following summary of events.

30 On the previous day (16 September 2014), the victim and the witness (Mr Massa and Mr Margan respectively), and some friends, met at the Beresford Hotel [354 Bourke Street, Surry Hills NSW, Australia 2010].

31 On 15 September 2014, the Mr Massa and Mr Margan travelled to the ARQ Nightclub ('ARQ') [16 Flinders Street Darlinghurst NSW, Australia 2010] and arrived around 10 minutes before the lock-out at 1:30am.

32 At around 3:00a.m, on the lower level of ARQ, David Massa was approached by the Respondent, both of whom talked for some time.

33 At around 3:30a.m, the Respondent behaved in an aggressive manner causing the witness to come over to the incident area.

34 The Respondent made a statement, of a threatening nature and containing the word 'faggot', including "fuck off faggot", to Mr Massa and accompanied these comments with physical violence, an assault of the victim.

35 Mr Massa and Mr Margan then approached various security guards on their way up and out of ARQ to make sure the Respondent was detained and arrested by police and to seek medical attention for the victim.

36 The police arrived and the Respondent was detained and arrested and the victim and witness were taken to hospital by ambulance.

### **Statement of Mr David Massa**

37 Mr Massa made the following statement Surry Hills Police Station on 23 September 2014.

38 I am 38 years of age.

39 About 4pm on Sunday 14 September 2014, I left my residential address and caught a train into Sydney where I met up with a friend. After having a meal, my friend and I walked to the Beresford Hotel, a licensed premise located on

Bourke Street, Darlinghurst. My friend and I met with another friend and we socialised at the Beresford between 8 pm and about midnight.

- 40 About midnight, my friends and I walked from the Beresford Hotel to the ARQ Nightclub, located on Flinders Street, Darlinghurst. Once gaining entry to the ARQ nightclub, my friends and I all walked downstairs to the bar located on the bottom floor of the venue. After approximately one hour, I was sitting on a stool talking to a male whom I had just met. I would describe the male as having medium brown skin, short black hair, approximately 6 feet tall, heavy set. He was wearing a tee shirt with a dark panel on the front and lighter coloured sleeves. I think that the man's name was Paul. When our conversation finished, I walked onto the dance floor for a period of time.
- 41 When I had finished dancing, I walked back in the direction of the male. A female stopped me from getting close to the male by stepping in front of me. The female was wearing a white dress and I had never spoken to her before. The female raised both of her hands and pushed them against my chest. The force of her push made me take a few steps back. The man stepped forward and the female stepped to the side.
- 42 He said – "Fuck off, faggot."
- 43 The male pushed me backwards and then formed his hand into a fist. The male leant forward and punched his fist in the direction of my head. His fist connected with my mouth, and the force of this punch made me fall backwards. I cannot remember the next few seconds and I think that I may have lost consciousness. At no time did I ever give the male permission to assault me or touch me in any manner.
- 44 The next thing that I remember was trying to get to my feet and could taste blood in my mouth, I could feel the blood dripping down the front of me. I could not move my bottom lip and the pain felt as though my lip had been ripped off. I raised my hand to my mouth and felt my lip and when I looked at my hand, I saw that there was blood on my fingertips.
- 45 When I got to my feet, I saw that one of my friends, Simon Margan had walked over to the male. I saw that Simon had both of his hands above his head, with

his palms open, I walked straight to the door because I knew that I needed to get out of the nightclub. I walked up the stairs and spoke with a security guard.

46 I said - "I have just been assaulted."

47 The male security guard told me that his name was Sam and he asked me to wait outside whilst he phoned police. I saw Sam walk down the stairs and I waited out the front doors of the nightclub. About one minute later, my friend Simon joined me out the front of the nightclub, in Flinders Street. I waited there for police to arrive.

48 When police arrived a few minutes later, Constable Connery organised for an ambulance to come to the location. When the ambulance arrived, Simon and I got in the ambulance and we were taken to St Vincent's Hospital. When I arrived at the hospital, the doctor told me that they would either have to use stitches or glue to repair my lip. After being cleaned up, the doctor used glue to fix my lip and to stop the bleeding, When the doctor had finished, a friend of mine picked me up and took me to his unit for the night.

49 About 3pm on Tuesday 16 September, I visited my general practitioner who gave me a tetanus shot. This visit cost me \$130, and I received a Medicare rebate of approximately \$70.

50 On Tuesday 23rd September 2014, I attended Surry Hills Police Station where I provided police with this signed statement. I have not received the invoice from the NSW Ambulance Service yet, but as soon as I do receive it, I will ensure that I get a copy to Constable Sara Connery at Surry Hills Police Station.

### **Statutory Declaration of Simon Margan**

51 Mr Margan made the following Statutory Declaration about the events. He adopted this statement at the hearing under oath.

52 I affirm that this statement concerns incidents, including the assault, which occurred on the Monday (15 September 2014).

### **INCIDENT**

53 [3] A Queensland man (a blond-haired man who we had just met at the Beresford Hotel), David Massa (a friend of mine), and I left the Beresford Hotel

[16 Flinders Street, Darlinghurst NSW, Australia 2010], an LGBTI friendly night club (Sunday being this night club's LGBTI night), when it started to close at 1:00am and made our way down Short Street and Flinders Street, on the way to the Oxford Hotel. I was carrying my two bags and David's backpack.

54 We changed our plans as we were passing the ARQ night club [16 Flinders Street, Darlinghurst, New South Wales, Australia 2010], a well-known LGBTI night club. We all entered the ARQ night club just before lockout at 1:20pm, as the majority of our group wanted to go to that club instead.

55 We were at various times at different parts of the nightclub, with the Queenslander or I taking turns to mind the bags.

56 At 3:00am, I was again minding our bags (which were on the circular chest-high shelf skirting and supported by a pillar which in turn was a support pillar for the roof) near the main dance floor podium (which doubles as a stage during the regular performances at the ARQ). The main dance floor podium is a platform elevated from the floor by around a 1/2 metre, which gave me a good view of the entire room. I was at the corner of the podium as I wanted to keep an eye out for my friends whilst still dancing.

57 I observed that David Massa had moved over to the pillar (which also doubled as a circular shelf) on the left of the main club revolving door entrance (to the left of the doors when leaving the club's lower level) and was sitting at one of the stools.

58 During my dancing, I noticed David had been approached by an approximately 6-foot tall heavy-set, but clearly weighty (fat) man of New Zealand mauri (sic) appearance, short black hair and dark/tanned skin. He was wearing white sneakers, light blue jeans, a shirt which had a black 'wife beater' structured main body, but with attached sleeves of a leaf yellow/green colour with a black mottled pattern.

59 The New Zealand mauri and David talked for approximately 25 minutes (3:00-3:25pm) in a seemingly friendly manner.

60 There was a woman in between David and the New Zealand man, who I had not previously seen before.

- 61 I noticed that the woman had left and David and the New Zealand man were standing and staring at each other. The New Zealand man appeared to grow increasingly angry and was shouting a few things, continuously staring at David, even though David was just standing there looking but not saying a word.
- 62 I started immediately moving from my position on the elevated dance floor, as I believed the situation was escalating and I was concerned for my friend's safety. As I approached through the crowd, keeping my eyes on David and the New Zealander, I made desist statements such as "no, stop", but I was unsure whether I was being heard.
- 63 The New Zealand man punched David in the face. He immediately fell flat on his back to the floor.
- 64 I saw a little blood at his mouth. He did not move for what seemed to be a long time.
- 65 As David seemed to wake and was rising, I had almost reached the assault area. Being within in earshot (knowledge based on my experience of that nightclub), I shouted for the New Zealand man to desist in vigorous terms, i.e. "Stop!". David got to his feet and the New Zealand man hit him again, without warning. During this he made various statements intimating forthcoming violence towards David on the basis of his homosexuality, which included the word 'faggot', including the phrases "Fuck off faggot!" and "I am going to kill you faggot!" (sic).
- 66 I made a successful attempt to lessen the impact of the next punch, by reaching across, and between, them both, and grabbing the New Zealand man's fist in mid-flight. This stopped the punch from proceeding to David. I screamed "What are you doing?".
- 67 I made a half-successful attempt at deflecting the fourth and final punch, which was deflected and made contact with David's shoulder.
- 68 I called for assistance. A security guard (wearing a jumper) came over and proceeded to stop the New Zealander making further attacks. He said to the security guard that "He (meaning David with gesture) touched my girl".

- 69 I helped David to go out of the lower level of ARQ. We passed the poker machine room and up the stairs to the bouncer-patrolled vestibule area just before the main double doors of the club. Only one of the double doors remained open (the left one, i.e. 'left' on way out). A bouncer was present (Sam), who I had remembered from previously.
- 70 David and I waited in the vestibule area with various security guards (including Sam on the front door) and the ARQ venue manager (name unknown) first introducing ourselves and then discussing what had happened for about 10 minutes [3:30am-3:40am]. I took a video tape of this particular event at David's request.
- 71 For about 15 minutes [3:40am-3:55am], David and I then discussed what had happened with the police, including constable Sarah Connery, who had arrived with the ambulance service they had arranged.
- 72 I was taken by Ambulance with David Massa to St Vincent's Hospital by the ambulance officers, Tim and Michael.
- 73 As I was getting into the ambulance I turned around and saw David's attacker being lead out of the ARQ Nightclub, by the main entrance doors we had just left by. He was the same person I saw earlier punch David. I witnessed him being handcuffed and talked to by police. I asked one of the police officers what was happening and I was informed he was being arrested for assaulting David.
- 74 The ambulance arrived at St Vincent's Hospital at 4:00pm, where David was booked into the hospital at 4:04pm. We were placed in the emergency injury ward.
- 75 David was treated for his injuries 3 hours later. After that, in the morning, we were taken home in a friend's car.

### **ERISP recording**

- 76 The Tribunal viewed the recording of the police interview of Mr Taufaaio held at approximately 4 AM after the assault. In the interview, Mr Taufaaio admits to the assault. He said he was prompted by Mr Massa touching his cousin's wife. He also referred to Mr Massa as having tried to kiss him. Mr Taufaaio did not

relate having said “Fuck off faggott” or “I’m going to kill you faggott”. He was not asked by the interviewing police whether he had made any comments.

### **The Tribunal’s finding of facts**

77 The Tribunal accepts Mr Margan’s testimony as truthful and reliable. The account was internally consistent and coherent. Mr Taufaa did not appear or provide any evidence. Mr Taufaa’s interview with the police does not contradict Mr Margan’s account.

78 Mr Massa’s statement was also consistent with Mr Margan’s evidence.

79 The Tribunal is satisfied that Mr Margan is a homosexual man.

80 The Tribunal finds that Mr Taufaa used the terms “fuck off faggott” and “I’m going to kill you faggott” at the same time as he assaulted Mr Massa at the ARQ nightclub.

81 The court orders showed that Mr Taufaa was convicted of *assault occasioning actual bodily harm* by the Sydney Downing Centre on 9 October 2014. He was directed to enter into a good behaviour bond for two years under section 9 (1) of the *Crimes (Sentencing Procedure) Act* 1999. He was made subject to supervision and guidance of the probation and parole service. He was also fined \$1100.

### **The Tribunal’s analysis of the relevant law**

#### *Public Act*

82 Section 49 ZT requires that there be a “public act”. Section 49ZS defines a public act as including (a) *any form of communication to the public, including speaking,..... and (b) any conduct (not being a form of communication referred to in paragraph (a)) observable by the public, including actions and gestures ....*

83 Mr Margan submitted and the Tribunal accepts, that Mr Taufaa’s actions and words “fuck off faggott” and “I’m going to kill you faggott” as he assaulted Mr Massa in the nightclub included communication to the public and conduct observable by the public.

84 The Tribunal is satisfied that the words and the assault each individually constitute public acts.

*Incite*

85 In *Margan v Manias* [2013] NSWADT 177, the Tribunal adopted the approach of the court of Appeal in *Sunol v Collier* (No 2) [2012] NSWCA 44 at paras [25]-[34], Bathurst CJ about the construction of section 49ZT in relation to written material placed on the internet.

86 At paragraph 41 *Sunol v Collier* (No 2) [2012] NSWCA 44 the Chief Justice Bathurst summarised the construction of paragraph 49ZT as follows:

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....

*Did the action and words incite hatred towards, serious contempt for, or severe ridicule of, Mr Margan on the grounds of his homosexuality?*

87 Mr Margan submitted that Mr Taufaa's comments of "fuck off faggott" and "I'm going to kill you faggott" in themselves could incite the emotion of serious ridicule of homosexuals in an ordinary member of the class to whom it was directed.

88 The Tribunal accepts this submission. The comments were not merely insults. They had the capacity to incite, or the effect of inciting, ordinary members of the audience to which they were directed, that is those who were present in the ARQ nightclub – to experience hatred and/or serious contempt for Mr Margan and for homosexual men generally, on the grounds of their homosexuality. Members of the public hearing these comments may have been prompted or spurred on to harbour these feelings.

- 89 The assault on its own could not be said to have been incitement to hatred or serious contempt on the grounds of homosexuality. However, coupled as it was with the words “Fuck off faggott” and “I’m going to kill you faggott”, in this context the actions would constitute incitement.
- 90 The Tribunal notes that there is no contention that Mr Taufaa’s words or actions fall into the exemption provided by section 49ZT (2) of the ADA such as statements published reasonably and in good faith for the purposes and in the public interest.

### **Remedies**

- 91 Mr Margan submitted that under section 108(2) (a) of the ADA, the Tribunal could award damages of up to \$100,000. He noted that neither he nor Mr Massa had received any compensation in relation to the matter. Mr Massa had accrued medical expenses. They both had to throw out their bloodstained clothes from the evening.
- 92 Under subsection (2)(a) of section 108, damages may only be ordered 'by way of compensation for any loss or damage suffered by reason of the Respondent's conduct'. Punitive damages are not provided for in the Act.
- 93 Mr Margan’s evidence to the Tribunal was that when Mr Taufaa said “Fuck off faggott” he felt in danger and unsafe. He still feels unsafe and he does not go out now to nightclubs. It left him feeling unsafe that this could happen along Oxford Street where there are many homosexual men. The incident left him feeling that it condoned violence against gay men. It had made him feel less of a person. He felt degraded and humiliated. He has to some extent now overcome this and the impact has lessened.
- 94 Mr Margan referred to the matter of *Margan v Manias* [2013] NSWADT 177 where he had been awarded \$1000 in relation to a complaint of verbal vilification on a single occasion.
- 95 In the matter of *Burns v Sunol* [2012] NSWADT 246 Mr Sunol had published words vilifying homosexual men and lesbians on the internet on several occasions. An amount of \$3000 was awarded to Mr Burns for the harm caused to him by the publications. In *Burns v Sunol (No 2)* [2012] NSWADT 247, the

Tribunal had awarded Mr Burns \$2000 for the harm suffered as a result of further internet publications by Mr Sunol. Mr Margan submitted that when these cases were heard, damages awards were lower.

- 96 In later complaints of internet vilification by Mr Burns against Mr Sunol, the Tribunal had awarded an amount of \$2500 for the harm caused to Mr Burns by the publications.
- 97 Mr Margan submitted that these previous cases had involved words only. In this instance words and actions could be considered to last longer and sound in higher damages.
- 98 In the matter of *Burns v Sunol* [2012] NSWADT 246 the Tribunal at [112]- [118] the Tribunal analysed the principles and case law around awarding damages in vilification matters. As far as the Tribunal's comments are relevant to this matter the Tribunal summarises them as follows.
- 99 Damages under section 108(2)(a) must be assessed according to compensatory principles. The equivalent principles in tort and contract law are a guide, but they are not controlling. There is little guidance to non-pecuniary harm within the realm of injury to feelings. There have been cases decided under section 49ZT and the similar provisions dealing with racial vilification section 20C of the ADA. The awards across the jurisdictions for nonpecuniary harm caused by vilification have varied between \$1,500 - \$20,000.
- 100 The verbal conduct of Mr Taufaa was directed, at Mr Massa. However, the statements were made in a public place and were accompanied by a vicious assault of Mr Massa in the hearing and view of others present in the nightclub including Mr Margan. Mr Margan had also approached Mr Taufaa trying to intervene to prevent the assaults. It was in this context that Mr Taufaa shouted out the comments and undertook the assault that we have held to constitute homosexual vilification.
- 101 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. This matter involved one incident of vilification. However, it involved words and actions. It was frightening and led to serious

injuries to Mr Margan's friend. Mr Taufaa received a criminal conviction. It is appropriate that a significant 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].

102 We award the sum of \$10,000 under section 108(2)(b) of the Act as compensation for the damage suffered by Mr Margan in consequence of Mr Taufaa's physical and verbal conduct.

**Apology – Section 108 (2) (d)**

103 Mr Margan also submitted that Mr Taufaa should be required to publish an apology. He undertook to provide appropriate wording to the Tribunal within seven days.

104 Mr Margan's draft apology read as follows

In the early hours of Monday (15 September 2014) I, Paul Taufaa, assaulted a gay man, David Massa, in the basement level of ARQ [16 Flinders Street, Darlinghurst NSW, Australia 2010]. This behaviour was inappropriate for a LGBTI friendly venue, such as the ARQ nightclub, and Oxford Street in general, a predominantly LGBTI area.

The New South Wales Civil and Administrative Tribunal (NCAT) found that this assault, and the accompanying comments, were capable, or had the effect, of inciting hatred or serious contempt of homosexual men on the ground of their homosexuality. NCAT also found that this assault, and the accompanying comment, were unlawful actions that could therefore not be reasonably done in good faith for purposes in the public interest. Based on this, my assault of a gay man amounted to unlawful homosexual physical and verbal vilification.

Once again, I apologise for the assault on David Massa and the hurtful comments made to him. I acknowledge that assaulting a gay man on Oxford Street was in breach of Anti-Discrimination Act 1977 (NSW). The aim of this legislation is to promote tolerance, understanding and acceptance in the community, thereby this legislation sets limits on what can be said, or done, in public.

[NOTE: This is a Tribunal ordered apology, made pursuant to an order of the NCAT made on \_\_\_date\_\_.]

Yours Sincerely, Paul Taufaa

105 Mr Margan did not specify where the apology should be published. The Tribunal considered the issue of whether to order that Mr Taufaa provide a published written apology to Mr Margan. The Tribunal considered Mr Taufaa's lack of engagement with the complaint process both before the ADB and the Tribunal.

- 106 The Tribunal also considered Mr Margan's evidence that he had had some discussion on Facebook with Mr Taufaa about the complaint. The Tribunal considered that there was little value in ordering Mr Taufaa to provide an apology. His words and actions had been savage. His interview before the police did not evince any remorse. His actions in not engaging with the complaint process did not suggest any remorse. Mr Taufaa has not previously provided an apology despite having been dealt with through the criminal system and having had further Facebook discussions with Mr Margan.
- 107 In the circumstances, the Tribunal considered that there was no value to be had in ordering Mr Taufaa to provide an apology.

### **Application for costs**

- 108 Mr Margan made the following submissions in relation to costs.
- 109 The Respondent had previously rejected any attempt to negotiate a conciliation on the matter, including any sort of consented version of an apology. In consideration of the Respondent's unwillingness to take part in the Tribunal proceedings and the Respondent's unwillingness to engage with the process of an apology, we feel we should reiterate the need for costs to be awarded in our favour regardless of the result of the hearing. We incurred some administrative costs in undertaking this complaint. These have included the original trial court hearing transcript, subpoenas associated with obtaining an accurate service address for the Respondent and miscellaneous costs associated with printing and sending materials necessary for the complaint. The total costs of these expenses would now amount to no more than \$250.

### **Power to award costs**

*Costs provisions, section 60 Civil and Administrative Tribunal Act 2013, (CATA)*

- 110 The relevant provisions dealing with the awarding of costs are set out in section 60 of the CATA. The general rule is that each party to proceedings is to bear their own costs: CATA s 60(1).
- 111 Costs may only be awarded if the Tribunal is satisfied that there are special circumstances warranting the award of costs: CATA s 60(2) - having regard to the matters set out in s 60(3) (a)-(g) of CATA.

112 The Tribunal sets out these matters below.

### **Section 60**

(3) In determining whether there are special circumstances warranting an award of costs, the Tribunal may have regard to the following:

(a) whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings,

(b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings,

(c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law,

(d) the nature and complexity of the proceedings,

(e) whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance,

(f) whether a party has refused or failed to comply with the duty imposed by section 36 (3),

(g) any other matter that the Tribunal considers relevant.

(4) If costs are to be awarded by the Tribunal, the Tribunal may:

(a) determine by whom and to what extent costs are to be paid,

### **Orders**

- (1) The complaint of unlawful homosexual vilification is substantiated.
- (2) The Respondent is to pay to the Applicant the sum of \$10,000 as compensation for the harm caused to him by the assault and the publication of these statements within 21 days of the publication of this decision.
- (3) The Tribunal directs that the Respondent, Mr Taufaa provide submissions on Mr Margan's applications for costs. Any submissions are to be provided to the Tribunal and Mr Margan by 14 July 2017.
- (4) Mr Margan's application for costs will be determined on the papers after that date.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.

Registrar

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.