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Important Information

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Federal Court of Australia
District Registry: New South Wales
Division: Human Rights

NSD950 of 2025

Joseph Toltz and others
Applicants

Nick Riemer and another
Respondents

SECOND RESPONDENT'S OUTLINE OF SUBMISSIONS ON INTERLOCUTORY APPLICATIONS

Introduction

1. The Second Respondent seeks orders, pursuant to s 31A of the *Federal Court of Australia Act 1976* (Cth) and rule 26.01(a) and (c) of the *Federal Court Rules 2011* (Cth) (**Rules**) summarily dismissing the claims against it in paragraphs 52, 53 and 60, 86 - 89 in so far as they relate to paragraphs 52, 53 and 60; and paragraphs 90 – 94 of the Amended Statement of Claim filed on 30 July 2025 (**ASOC**) .

2. The Second Respondent also joins with the First Respondent in seeking orders that the following paragraphs of the ASOC be struck out pursuant to rule 16.21(1)(d) and/or (e) of the Rules:

   (a) Paragraph 87;

   (b) Paragraph 10 – the words "*predominantly Jewish people and/or Israeli"* and "*A substantial proportion of Jewish and/or Israeli people identify themselves as Zionists"*; and

   (c) Paragraph 21, Paragraph 22 – the words "*more than 5,000" and "some 1,400*"; Paragraphs 23-25, 28 and 32.

3. Additionally, the Second Respondent seeks orders that the following further paragraphs of the ASOC be struck out:

   (a) Paragraph 86 – the words "*and/or cumulatively and/or collectively"*; and

   (b) Paragraph 88 (a) and (c).

Power of the court to summarily dismiss proceedings

4. ***Spencer*** *v Commonwealth* (2010) 241 CLR 118 sets out the relevant principles:

   (a) The exercise of powers to summarily terminate a proceeding must always be attended with caution, whatever may be the basis upon which that disposition is sought;

(b) It is not a power to be exercised lightly;

(c) There must be a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way.

5. It requires a critical examination of the available materials to determine whether there is a real question of law or fact that should be decided at trial.[1]

Power of the Court to strike out pleadings

6. A party may apply to the Court for an order that part of a pleading be struck out on the ground that the pleading is likely to cause prejudice, embarrassment or delay in the proceeding: r 16.21(1)(d) or fails to disclose a reasonable cause of action: r 16.21(1)(e).

7. The power of the court to strike out all or part of a pleading is discretionary where it is necessary to do so in the interests of justice.[2] The discretion is informed by the overarching purpose of the civil practice and procedure provisions in s 37M of the *Federal Court of Australia Act 1976* (Cth).[3] This approach is also required by s46PR of the *Australian Human Rights Commission Act 1986* (Cth).[4]

8. It is well established that material facts must be pleaded with a degree of specificity which is sufficient to convey to the opposite party the case that party has to meet.[5] A pleading is likely to cause prejudice or embarrassment for the purposes of r 16.21(1)(d) if it susceptible to various meanings, contains irrelevant allegations that will increase expense or includes defects which result in it being ambiguous or too general. A party cannot be expected to respond to mere context or narrative material.[6]

9. For the purposes of r 16.21(1)(e) of the Rules, the question is not whether the facts pleaded are in themselves sufficient to give rise to a cause of action; rather, the question is whether it would be open to the applicant to prove facts at the hearing which would constitute a cause of action.[7] Where a point of law has to be decided, and the judge is satisfied that this

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[1] *Australian Securities and Investment Commission v* ***Cassimatis*** [2013] FCA 641 at [46] per Reeves J; *Hall v Craig* [2022] FCA 1312 at [10] per Perry J.
[2] *John Holland Pty Ltd v Maritime Union* [2009] FCA 437 at [60].
[3] *KTC v David* [2022] FCAFC 60 at [119]-[123] per Wigney J; *Takemoto v Moody's Investors Service Pty Limited* [2014] FCA 1081 at [18] per Flick J and *Spiteri v Nine Network Australia Pty Ltd* [2008] FCA 905 at [22] per Edmonds J.
[4] *Dye v Commonwealth Securities Limited (No 2)* [2010] FCAFC 118 at [48] per Marshall, Rares and Flick JJ; *Maiocchi v Royal Australian and New Zealand College of Psychiatrists* [2014] FCA 301 at [8] per Robertson J.
[5] *Imobilari Pty Ltd v Opes Prime Stockbroking Ltd* [2008] FCA 1920 at [99] per Finkelstein J.
[6] *KTC v David* [2022] FCAFC 60 at [120] per Wigney J; *Chandrasekaran v Commonwealth of Australia (No 3)* [2020] FCA 1629 at [105] – [106] per Wigney J; *Takemoto v Moody's Investors Service Pty Limited* [2014] FCA 1081 at [18] per Flick J.
[7] *Pancontinental Mining Ltd v Posgold Investments Pty Ltd* (1994) 121 ALR 405.

can be done by him or her appropriately, thereby avoiding the necessity of, and expense in going to trial, he or she is entitled to determine the point.[8]

Summary dismissal of claims against the Second Respondent and Paragraphs 10 and 88(a)

10. The ASOC alleges that 14 separate publications of Dr Riemer contravene s 18C of the RDA. Those publications appear on the social media platforms X, Facebook and in the Overland Journal on separate dates spanning 8 October 2023 to 3 May 2024. The Second Respondent is alleged to be vicariously liable under s 18E of the RDA for two of those posts – Riemer's Overland Article published on 15 October 2023 and the "No Room for Zionism in our Unions" Speech and Posts: ASOC [90]-[94].

11. There are three key elements to make out a claim under s 18C of the *Racial Discrimination Act 1975* (Cth) (**RDA**) that are relevant in these proceedings:

    (a) whether the pleaded imputations reasonably arise from the particular publication;

    (b) whether the imputations are reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and

    (c) whether the act was done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group

12. Element (a) above requires an objective assessment from the perspective of the hypothetical reasonable group member.[9]

13. Element (b) above is an objective test although the subjective feelings of witnesses including the Applicants is relevant.[10] It is necessary to consider only the perspective of the ordinary or reasonable member or members of the group, not those at the margins of the group whose view may be considered unrepresentative.[11]

14. Element (c) above requires consideration of the true reason or reasons for which the *relevant act* was done.[12] It is not just the stated intention of a respondent, the Court can infer causation from the words spoken or published. The provision does not require that there be an intention to offend, insult, humiliate or intimidate another person or a group of people in order for an act to be unlawful.[13] Some statements which cause offence to a group

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[8] *Williams & Humbert v W&H Trade Marks* [1986] AC 368 referred to in *Winters v Fogarty* [2017] FCA 51 at [11] per Bromberg J.
[9] *Wertheim v Haddad* [2025] FCA 720 at [44] per Stewart J.
[10] *Silberberg v Builders Collective of Australia Inc* (2011) 197 FCR 261, 482 at [21]
[11] *Eatock v Bolt* (2011,) 197 FCR 261, 321at [251].
[12] *Toben v Jones* [2003] FCAFC 137; 129 FCR 515 at [63].
[13] *Bharatiya v Antonio* [2022] FCA 428 at [14].

may be made without a racially based reason and rather because of a lack of sensitivity or even thought towards others.[14]

15. In ***Wertheim*** *v Haddad* [2025] FCA 720, Stewart J held that passages of a sermon containing critical statements about Zionists and Israel, but not about Jews per se, did not convey imputations about Jewish people for the purposes of s 18C of the RDA.

16. His Honour held at [107] that:

> **the ordinary, reasonable listener would understand that not all Jews are Zionists or support the actions of Israel in Gaza and that disparagement of Zionism constitutes disparagement of a philosophy or ideology and not a race or ethnic group.** Needless to say, political criticism of Israel, however inflammatory or adversarial, is not by its nature criticism of Jews in general or based on Jewish racial or ethnic identity: see *South African Human Rights Commission on behalf of South African Jewish Board of Deputies v Masuku* [2022] ZACC 5; 2022 (4) SA 1 (CC) at [4]-[6] and [161]-[166] per Khampepe J for the Court. Indeed, the applicants did not submit that it is… (emphasis added)

17. In *South African Human Rights Commission on behalf of South African Jewish Board of Deputies v Masuku* [2022] ZACC 5, Khampepe J for the Court found at [164]:

> [164] The tenor of this back and forth continued between the groups when Mr Masuku made a threat to those who would join the Israeli Defense Force (IDF). **It was common cause that only Jewish families would send their children to join the IDF, but that it was unlikely that a Jewish person would join the IDF if they were not a Zionist supporter. While a threat of this sort is offensive and menacing, it is not clear that a reasonable person would conclude that this reference was based on Jewish identity.**
>
> (emphasis added)

18. Hence, even where it was common ground that members of the IDF were Jewish and likely to be Zionists, it was still not clear that a reasonable person would conclude that a reference to the IDF was based on Jewish identity.

19. In *Jones v Scully,*[15] Hely J held that an imputation that Jews were "*seeking to control the world, or already have gained that control"* was conveyed by the reference to *"International Zionism" having*

[14] *Toben v Jones* [2003] FCAFC 137; 129 FCR 515 at [69].
[15] [2002] FCA 1080 at [222]-[223].

an "ages old effort of One World control via their New World Order". However, the context in which that sentence appeared had several references to Jews and Judaism including an opening sentence referring to "*The international Zionist Jews"* and the following phrases: "*Wars are the Jews' harvests!*" and *"anti-Christs of Talmudic Judaism"*.[16]

20. In *Kaplan v State of Victoria* (No 8),[17] Mortimer J at [30]-[34] referred to but did not consider it necessary to examine Professor Rutland's opinion that the term "antisemitism" can also be used to encompass "anti-Zionism that seeks to delegitimise the State of Israel"; although she observed that it was outside the accepted definition of antisemitism and that the RDA does not use the term 'antisemitism'.

Analysis of the Two Publications

21. Riemer's Overland Article published on 15 October 2023 is set out at [51] of the ASOC as follows:

> *"That is just one reason why solidarity with Palestinians is essential for anyone who wants to retain their own fundamental freedoms. Palestine solidarity is not just internationalism or anticolonialism or antiracism or even humanitarianism; it is not just an expression of compassion, or altruism, or basic decency: it is a necessity for the defence of democratic prerogatives against authoritarianism and neo-fascism in Western nations. In cheering on the antidemocratic suppression of protest Zionists sometimes thought of as 'liberal' have let their masks slip. Their support for Israeli apartheid and permanent war against Palestinians can only mean opposition to democracy in their own countries" [P3/12]*
>
> *… The official representatives of democracy, with honourable rare exceptions, have failed democracy again.*
>
> *… Condemning a person means abandoning the effort to understand them. After a condemnation, all that is left is absolute rejection and banishment: renouncing the devil and all his works. Condemning is what a judge does when they sentence a prisoner to death. Once someone is condemned, there's no point in talking about why they might have done what they have done: the final verdict is delivered; no more remains to be said. This is exactly why Zionists demand that we condemn Hamas: to block any move towards understanding it and what might motivate its resistance to Israel colonisation – to erase the understanding of why Palestinians are fighting back. [P4/13]*

[16] [2002] FCA 1080 at [217]-[219].
[17] [2023] FCA 1092 at [30]-[34].

22. The imputation alleged to arise from the first extract is pleaded at [52] of the ASOC as follows:

> *(a)* contrary to the false image that Jewish people and Israeli people have cultivated, Jewish people and Israeli people have now been exposed as racist supporters of apartheid and of a permanent war against Palestinians as well as being people who surreptitiously oppose democracy in their own countries.

23. *First*, the pleaded imputation does not reasonably arise because the extract refers to Zionists and not Jewish people or Israeli people. Further, in contrast to the publication considered in *Jones v Scully*, there is no reference to Jews or Judaism. A reasonable person in the class of Jewish and/or Israeli people living in Australia would not conclude this to be a reference based on Jewish or Israeli identity. This is supported by the evidence of the Overland Article published on 29 May 2025 titled "*Statement by Jewish University staff and students regarding racial vilification allegations at the University of Sydney*" signed by 57 individuals who state:

> These complainants do not speak for us as Jewish people. Dr Riemer's and Professor Keane's criticisms of Zionist ideology and Israel's actions in Palestine and Lebanon do not offend, insult, humiliate, or intimidate us, as the complainants allege.[18]

24. It is also supported by the views of several Jewish groups and other groups who made submissions on this issue to the recent NSW Inquiry into Antisemitism.[19] The views of the Applicants are therefore not representative of the group.

25. *Second,* the extract refers to *conduct or beliefs* of Zionists – the suppression of protest, support for Israeli apartheid and support for permanent war against Palestinians. This can be contrasted to criticism of the group because of their Jewish or Israeli race.[20] The comments in the extract extend to those persons who also hold those beliefs or engage in the same kind of conduct which includes many individuals not of Jewish or Israeli race whose position on the War in Gaza can be described as "anti-Palestine" or "pro-Israel".[21] That the extract begins with referring to "solidarity with Palestinians" reinforces this view. This is a political view not one associated with either the Jewish or Israeli race or ethnic origin.[22]

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[18] Affidavit of Stephen Woodbury affirmed 28 August 2025, Annexure SW-1.
[19] Affidavit of Stephen Woodbury affirmed 28 August 2025, Annexure SW-2-6.
[20] See: *Miller v Wertheim* [2002] FCAFC 156 at [12]-[13] per Heerey, Lindgren and Merkel JJ.
[21] For example Mr Peter Morgan in *Joseph Tolz & Ors v John Keane & Anor,* NSD951/2025 is neither Jewish nor Israeli: Affidavit of Jospeh Tolz affirmed 1 August 2025, Exhibit JT-1 at [9].
[22] *Lattouf v Australian Broadcasting Corporation (No 2)* [2025] FCA 669 at [110] per Rangiah J.

26. Paragraph [53] of the ASOC pleads that the following imputation arises from the third extract:

    a. Jewish people and Israeli people demand condemnation of Hamas only so as to erase any understanding of why there is Palestinian resistance to Israel's occupation of the Palestinian territories.

27. Again, the pleaded imputation does not arise because the passage refers to Zionists and does not mention Jews or Judaism. The reasonable member of the class of Jewish or Israeli persons living in Australia would not conclude that this reference was based on Jewish or Israeli identity.

28. Further, the extract refers to particular conduct or opinion – demanding the condemnation of Hamas - which is a political view held by persons of all kinds of race and ethnic origin. It is an impermissible leap to conclude that the reasonable member of the class of Jewish or Israeli persons would have reasonably read this passage as criticising all Jewish and Israeli people.

29. The "No room for Zionism in our Unions" Speech and Posts is pleaded at [58] of the ASOC as follows:

> *There were some hugely powerful & moving speeches from Palestinians at yesterday's Botany protest which I hope we captured on video. I spoke on why there's no room for racism, settler-colonialism, apartheid or Zionism in our unions.*
>
> *That's why there is no room for racism, for settler-colonialism, for apartheid in our unions, and there is no room for Zionism in our unions.*

30. At [60] of the ASOC, this passage is alleged to give rise to the following imputations:

    (a) Jewish people and Israeli people should be excluded from any participation in Unions in Australia including in the National Tertiary Education Union.

    (b) Because of racism, settler-colonialism and apartheid engaged in by Jewish people and Israeli people there is no room for such people in the Union movement in Australia, including in the National Tertiary Education Union.

31. The pleaded imputation at (a) does not reasonably arise because the ordinary reasonable member of Jewish persons or Israeli persons living in Australia would not conclude this passage to be a reference to Jewish people or Israeli people but rather to persons who hold the political ideology of Zionism as only this word is used, and the passage does not refer to Jewish or Israeli people at all.

32. The pleaded imputation at (b) does not reasonably arise *first* because the passage refers to Zionism and does not contain a reference to Jews or Judaism, which is not reasonably understood to be a reference to all Jewish or Israeli persons. *Secondly*, by including a comma and "and" after "no room for racism, for settler-colonialism, for apartheid in our unions" there is a separation in concepts and the ordinary and reasonable reader would understand that Zionism is an additional characteristic not necessarily sharing all the characteristics of the former part of the sentence. *Thirdly*, the passage seeks to exclude from unions, including the National Tertiary Education Union, particular beliefs or political positions i.e. racism, settler-colonialism and apartheid. The holding of these particular beliefs extends to persons of all races. At most, the imputation that could be said to arise is the linkage of these traits with persons who hold the political view of being "anti-Palestinian" or "pro-Israel" which is not limited to Jewish or Israeli persons.

33. As the pleaded imputations do not reasonably arise, the claim under s 18C of the RDA cannot be established at least for the two publications the Second Respondent is alleged to be vicariously liable for. This is a clear case for summary dismissal because the finding of Stewart J in *Wertheim* is directly applicable to the impugned imputations in this case and there is no apparent distinguishing feature that might suggest a different result.

Additional Arguments

34. In addition to the imputations not reasonably arising from the two publications, there are further insurmountable obstacles to establishing a claim under s 18C of the RDA. Currently, the Applicants do not plead Zionism is a race, ethnic origin and/or nation origin: ASOC at [7]-[8]. However, they plead at [10] of the ASOC that Zionists are predominantly Jewish people and/or Israeli people and a substantial proportion of Jewish and/or Israeli people identify themselves as Zionists. At [88(a)] of the ASOC they plead that references to Zionists are, properly understood, to be a reference to (at least) a majority of Jewish people and Israeli people in Australia.

35. This would not be sufficient to make out a claim under s 18C of the RDA as the Court has held that not all Jews or Israeli people are Zionists and disparagement of Zionism is not disparagement of a race or ethnic group. This view is supported by the evidence of the Jewish persons who signed an article to the Overland Journal on 29 May 2025 and several Jewish groups who made such statements to the recent New South Wales Inquiry into Antisemitism.[23]

[23] Affidavit of Stephen Woodbury affirmed 28 August 2025, Annexures SW-1 and SW- 3-6.

36. Further, this formulation seeks to invoke principles of indirect discrimination law where racially neutral conditions or requirements have the effect of nullifying the human rights of persons who share a race, national or ethnic origin: see RDA, s 9(1A). However, the test for causation under s 18C(1)(b) of the RDA uses the phrase "because of" and therefore is more akin to a direct discrimination claim where the Court must consider the *true reason or reasons* for which the *relevant act* was done.[24] A claim relying on an indirect link to race based on the holding of a political opinion or ideology that is distinguishable from the Jewish race and/or ethnic origin or the Israeli ethnic or national origin[25] cannot succeed.[26]

37. Even if the Applicants were granted leave to replead that Zionism was a race for the purposes of s 18C of the RDA, the Court would not entertain such an argument as this would be contrary to Stewart J's finding in *Wertheim* that Zionism was a philosophy or ideology and not a race or ethnic group.

38. Alternatively, for the same reasons, the impugned parts of paragraph [10] and paragraph 88(a) are irrelevant and embarrassing and should be struck out.

Paragraphs 86, 87 and 88(c)

39. The impugned parts of paragraph 86 invite the Court to make inferences about whether a particular publication is reasonably likely to offend ordinary or reasonable members of the group identified as "Jewish persons or Israeli persons in Australia" by reference to a consideration of the *cumulative* or *collective* impugned publications. However, that is not how each publication, which occurred on separate dates on various platforms is to be understood for the purposes of s 18C of the RDA.[27] It cannot be assumed that the ordinary, reasonable reader would read every single one of the selected publications and the focus of s 18C of the RDA is on "an act" or "the act" not a collection of acts.

40. Similarly, paragraph 87 seeks to rely on each of the impugned publications *cumulatively or collectively* for the purposes of establishing 'causation' and the 'racial elements' in s 18C of the RDA. First, 'racial elements in s 18C of the RDA' is ambiguous and not sourced in the text of the provision. Second, the Applicant invites the Court to infer the true reason Dr Riemer made a particular publication on a particular day by reference to 13 other publications made on different dates and on various platforms. This analysis will not

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[24] *Toben v Jones* [2003] FCAFC 137; 129 FCR 515 at [63] per Keifel J (as her Honour then was).
[25] The Second Defendant reserves its rights as to whether it admits there is an Israeli ethnic or national origin for the purposes of s 18C of the RDA.
[26] C.f *Wertheim* at [209]-[210].
[27] See *Wertheim v Haddad* [2025] FCA 720 at [106] –[107] per Stewart J.

'throw light' on the true reason for Dr Riemer posting a particular publication on a particular day, which could occur before or after any of the other 13 publications and is therefore embarrassing and will unnecessarily prolong the proceedings.

41. In addition to there being no basis in the RDA to view the publications *cumulatively* or *collectively*, the pleading operates prejudicially on the Second Respondent, which is only alleged to be liable for two of the 14 publications, and ought not be required to address publications that it is not alleged to be liable for.

42. Finally, paragraph 88(c) invites the Court to make findings about Dr Riemer's "tendency" to engage in conduct which is *intended* to offend and/or insult and/or humiliate and/or intimidate Jewish persons and Israeli persons. There is no need to prove 'intention' for the purposes of s 18C of the RDA and seeking to prove this element by reference to an undisclosed catalogue of acts of Dr Riemer and his subjective intention for those acts will only unnecessarily lengthen the proceedings for a collateral purpose.

Paragraphs 21 -25, 28, 32

43. Paragraphs [21]-[25], [28] and [32] of the ASOC plead factual assertions concerning matters relating to historical conflicts which have arisen between Israel and the Palestinian people. It is unnecessary for these matters to be determined by the Court to make out the elements of s 18C of the RDA as set out above. Their inclusion in the ASOC is therefore irrelevant and embarrassing and should be struck out.

Paragraphs 8(a) and (b)

44. The words "descent" in paragraph [8(a)] and "nationality" in paragraph [8(b)] do not appear in s 18C or s 18B of the RDA[28] and should be struck out as irrelevant and embarrassing.

Robert Dick

Banco Chambers

Bronwyn Byrnes

6 St James Hall Chambers

28 August 2025

[28] *Macabenta v Minister for Immigration & Multicultural Affairs* (1998) 90 FCR 202, 209-211.