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Sia Lagos

Registrar

Important Information

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Federal Court of Australia
District Registry: Victoria
Division: General



No. VID 404 of 2025

ALON CASSUTO

Applicant

MARY KOSTAKIDIS

Respondent

RESPONDENT'S SUBMISSIONS ON DISCOVERY

A INTRODUCTION

1. Both parties are seeking orders for discovery by category, which usually refines and narrows the range of discovery (*Clifton v Kerry J Investment Pty Ltd* [2020] FCAFC 5; (2020) 379 ALR 593 at [173] (the Court)).
2. By interlocutory application dated 19 March 2026, the applicant seeks an order that the respondent give discovery of the documents in the categories in Appendix A (**Applicant's Discovery Application**). Following conferral between the parties, the applicant is proposing the revised categories set out at Annexure 1 of these submissions (**Applicant's Revised Categories**). The respondent has agreed to give discovery of documents in all of the Applicant's Revised Categories, although she contends that the "Relevant Period" should end on 19 March 2025 not 16 March 2026.
3. By amended interlocutory application dated 30 April 2026, the respondent seeks an order that the applicant give discovery of the documents in the categories in Schedule A (**Respondent's Discovery Application**). Following conferral, the respondent is proposing the revised categories at Annexure 2 of these submissions (**Respondent's Revised Categories**). The applicant seeks to add words of limitation to categories 2, 3 and 9, opposes categories 5, 6 and 8, and opposes the proposed definition of "Document".
4. On her application, the respondent relies upon the affidavits of Jack Vaughan affirmed 10 March 2026 (**Vaughan #1**), 14 April 2026 (**Vaughan #2**) and 30 April 2025 (**Vaughan #3**).

B PRINCIPLES

5. An order for discovery will not be made unless it "will facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible" (r 20.11 *Federal Court Rules 2011* (Cth) (**FCR**)). An order for discovery should be proportionate to the nature, size and complexity of the case, and should not place an unreasonable burden on the party giving discovery (Central Practice Note CPN-1, [10.7]).
6. The party ordered to give discovery must give discovery of documents "that are directly relevant to the issues raised by the pleadings" (r 20.14(1)(a)). The "scope of discovery is dependant on what is in issue between the parties, which in turn, is dependant upon what is pleaded" (*Redline Contracting Pty Ltd v MCC Mining (Western Australia) Pty Ltd* [2012] FCA 1157 at [20] (Siopsis J)).

C THE ISSUES RAISED BY THE PLEADINGS

7. There is no dispute that the respondent made the 4 January Post and the 13 January Post. The applicant claims that the respondent's two posts on "X" on 4 and 13 January 2024 (**Posts**) were contrary to s 18C of the *Racial Discrimination Act 1975* (Cth) (**RDA**) because: (a) they were reasonably likely to offend, insult, humiliate or intimate Jewish and/or Israeli Australians; and (b) were made "because of" the race or national or ethnic origin of either or both of those groups. In support of (a), the applicant asserts that he himself felt offended and insulted by the Posts (Further Amended Statement of Claim dated 31

October 2025 (FASOC), [22(h)], [25]), an assertion denied by the respondent (Defence, [22(i)(iii)], [25](c)).

8. The respondent denies that either of the Posts was contrary to s 18C, but also relies on the exemption in s 18D(c) RDA (fair and accurate report, or a fair comment) (Defence, [24A], [26A]). Further, the respondent pleads that the applicant instituted the proceeding in bad faith (Defence, [1(d)], [29]), a pleading that is dealt with in more detail below from paragraph 14.

D APPLICANT'S REVISED CATEGORIES- END DATE OF "RELEVANT PERIOD"

9. The "Relevant Period" is a defined term applicable to all but one (category 2) of the applicant's proposed categories. The respondent contends it should be 19 March 2025, the date of her last post on X upon which the applicant relies in his FASOC. The applicant contends it should be 16 March 2026, a date with no obvious significance apart from its proximity to the date of the Applicant's Discovery Application. The respondent here makes four arguments in support of the earlier date.
10. *First*, an order that the respondent give discovery of documents created after 19 March 2025 is not necessary to "facilitate the just resolution of the proceeding" as quickly, inexpensively and efficiently as possible" (r 20.11 FCR). The applicant has already particularised 52 posts that the respondent made on X after the Posts in order to support the inference that the respondent made the Posts because of the race or ethnic origin of Jewish Australians, or the national origin of Israeli Australians (FASOC, [23], [26] and Annexure A), which run to 19 March 2025. Extending the Relevant Period beyond that date would oblige the respondent to give discovery of documents with an ever more remote connection to the question of her state of mind in January 2024, and is likely to make the proceeding run more slowly, more expensively and less efficiently.
11. *Secondly*, the FASOC must be treated as the definitive statement of the case that the applicant will advance, not only of the acts of the respondent said to contravene s 18C RDA but of "*how* those acts contravened the section" (*Toltz v Reimer* [2025] FCA 1385 at [86], emphasis original). In the present case, the FASOC pleads that the respondent made the Posts because of the race or national or ethnic origin of Jewish and/or Israeli Australians and that this can be inferred from the Posts themselves and also from the respondent's posts in Annexure A up to 19 March 2025 (FASOC, [23], [26]). The applicant should not be permitted to seek discovery of documents that go beyond the temporal edge of the case that he has himself set.
12. *Thirdly* and relatedly, despite being dated 31 October 2025, the applicant's FASOC does not rely on any posts by the respondent after 19 March 2025. The applicant did not include any of the respondent's subsequent posts referenced in the 14 April 2026 affidavit of Raphael Leibler at [17(a), (b)] and [19]. The applicant should not obtain an order for discovery that extends not only beyond his own pleaded case, but beyond the case he could have pleaded as at 31 October 2025.

13. *Fourthly*, extending the Relevant Period beyond 19 March 2025 would place an unreasonable burden on the 71-year-old respondent who has professional, family and health commitments (Vaughan #3, [6]-[9]). It would subject her to an onerous obligation to search through her X data, as well as her private materials, over an extra almost one-year period, causing an even greater intrusion into her private affairs, and exposing an even greater amount of information about third parties (a point of concern for her given reported harassment of Australians by “Zionist” and “pro-Israel” lobby groups (Vaughan #3, [9])).

E RESPONDENT’S REVISED CATEGORIES

14. Pertinent to the categories that the applicant either wants to limit (categories 2, 3 and 9) or that he opposes (categories 5, 6 and 8) is the respondent’s bad faith pleading. The respondent has pleaded that the applicant instituted the proceeding in bad faith, “as part of a deliberate campaign to undermine and discredit the respondent, a prominent Australian who, since 7 October 2023, has questioned and been critical of the conduct of the State of Israel in order to cause a chilling effect on her and others” (Defence, [29](g)). The respondent’s bad faith pleading goes to her denial that the Posts were reasonably likely to offend, insult, humiliate or intimidate Jewish and/or Israeli Australians, and to her denial that the applicant himself felt offended and insulted (Defence, [22], [25]).
15. The categories that the applicant opposes (categories 5, 6 and 8) will be dealt with first.

Categories 5 and 6- ZFA press conference and ZFA official statement

16. By categories 5 and 6, the respondent seeks documents recording or evidencing communications referring or relating to: the ZFA press conference conducted by the applicant and Jeremy Leibler, ZFA President, on 14 July 2024; and to the ZFA official statement of the same date.
17. The applicant admits (under cover of objection) that the ZFA held the press conference and that the ZFA made the official statement (Reply, [5(a),(b)]). However, the issue raised by the respondent’s Defence is not simply that these events occurred. The issue raised is whether these events are indicators that the applicant instituted the proceeding in bad faith.
18. An order that the applicant give discovery of documents in categories 5 and 6 would facilitate the just resolution of the proceeding. The documents are relevant to the bad faith issue raised in the Defence, that is whether the proceeding was instituted as part of a campaign to undermine and discredit a prominent critic of Israel. The ZFA’s press conference and official statement point to the existence of such a campaign. Through the press conference, the ZFA was courting widespread publicity before the applicant had even lodged his complaint with the Australian Human Rights Commission (Vaughan #2, [20]-[24]). And despite the applicant claiming that the respondent’s 13 January 2024 post contravenes s 18C RDA, the ZFA official statement links to that post, and, like that post, contains an extract from Mr Nasrallah’s speech. These features indicate that the applicant did not institute the proceeding because he was offended and insulted or because the Posts were reasonably likely to offend or insult other Jewish or Israeli Australians. The respondent is not “fishing”. She is not using discovery to ascertain whether she

has a case. Rather, she is seeking to obtain documents where there is already evidence that her case exists (*Trade Practices Commission v CC (New South Wales) Pty Ltd* (1995) 58 FCR 426 (*TPC*), 438).

Category 8- the lawyers' WhatsApp group

19. By category 8, the respondent seeks discovery of communications in the specified lawyers' WhatsApp group that refer or relate to her. At [29(g)] of her Defence, as part of her bad faith pleading, the respondent has pleaded: that on 6 December 2023, after the applicant had posted on X, a member of the "Creative WhatsApp group" wrote in the group chat, "[p]erhaps this is suitable for lawyers group, [mobile telephone number redacted]?"; and that on 14 January 2024, after the respondent's 13 January 2024 post, a member of that group wrote, "Is there no legal avenue against her". The respondent's evidence includes a 16 January 2024 Sydney Morning Herald article that reported that, "[d]ozens of leaked messages from a WhatsApp group called Lawyers for Israel show how members of the group repeatedly wrote to the ABC demanding [broadcaster Antoinette] Lattouf be sacked" (Ex JV-2, p 69). This article was referred to by Rangiah J in *Lattouf v Australian Broadcasting Corporation* [2025] FCA 812 at [32].
20. At [5(b)(iii)(3)] of his Reply, the applicant pleads that, "as far as the Applicant is aware", neither he nor his legal representatives are members of the Creative WhatsApp Group. It is telling that the applicant has not pleaded whether any of his legal representatives are or were members of the lawyers' WhatsApp group.
21. Messages in the lawyers' WhatsApp group that refer or relate to the respondent, are relevant to the issue raised by the pleadings of why the applicant has instituted the proceeding. They go to whether he did so at the instigation of his legal representatives or any other legal practitioner (see the respondent's concern in this regard: Vaughan #2 at [37(d)]). They go to whether the applicant instituted the proceeding as part of a campaign to undermine and discredit the respondent in order to cause a chilling effect (Vaughan #2 at [37(d)]) rather than for the reasons set out in s 18C(1) of the RDA. Again, the respondent is seeking to obtain documents where there is already evidence (in particular the Creative WhatsApp Group messages) that her case exists (*TPC* at 438).

Categories 2, 3 and 9- words of limitation should not be added

22. By categories 2, 3 and 9, the respondent seeks documents recording or evidencing communications in the period up to 14 July 2024 referring (or relating) to: the 4 January Post or the 13 January Post; other posts by the respondent on "X"; and, the respondent. 14 July 2024 is the date of the applicant's AHRC complaint and the ZFA's press conference and official statement. Again, these categories are relevant to the issues raised by the Defence of whether the applicant instituted the proceeding in bad faith.
23. The applicant seeks to limit each of the three categories to communications "to or from the applicant". The Court should not accept these proposed words of limitation. First, the proposed words of limitation would exclude "directly relevant" documents that are, or have been, in the applicant's "control" (compare r 20.14(1) FCR). "Control" means "possession, custody or power" (Dictionary, FCR). Secondly, the

applicant's own category 3 seeks from the respondent documents "recording communications relating to the Posts". He has not seen fit to add similar words of limitation to his own category. Thirdly, the respondent's categories 2, 3 and 9 are *intended* to capture documents recording or evidencing communications to which he has access as the CEO of the ZFA (compare affidavit of Raphael Leibler dated 1 May 2026 (**Leibler #2**), [15(b)]). If there are ZFA documents to which the applicant has access that refer or relate to the Posts or to other posts by the respondent, or that refer to the respondent, and they are directly relevant to the issues raised, the applicant should give discovery of them.

24. The respondent's solicitor Raphael Leibler now deposes, on instruction, that the applicant commenced the proceeding "in his personal capacity" (Leibler #2, [15(a)]). This is an assertion that can be tested at trial. However, the fact remains that the applicant is the CEO of the ZFA, a fact immediately highlighted in the FASOC (at [1(b)]), at the ZFA press conference (Ex JV-2, p 58), and in the ZFA official statement (Ex JV-2, p 65). And even if, as Raphael Leibler now deposes, the applicant did not commence the proceeding under the "direction" of the ZFA (Leibler #2, [15(a)]), that no doubt carefully chosen word does not preclude that he commenced the proceeding at the instigation or request of, or with the encouragement of, or in support of, the ZFA (see Vaughan #2 at [19], [37(d)]).

Definition of "Document"

25. In the Respondent's Revised Categories, the term "Document" is defined to include "any deleted, edited or archived communications". The applicant opposes this definition, yet category 1 of the Applicant's Revised Categories seeks from the respondent posts and similar from her X account and "associated metadata (including any deleted, edited, or archived content)". The applicant no doubt seeks such metadata recognising that in this digital age, relevant documents may be deleted, edited or archived, but can nevertheless be obtained upon a reasonable search.

Claimed burden on the applicant and the ZFA

26. To the extent that the applicant is claiming the Respondent's Revised Categories will place a disproportionate burden on him and the resources of the ZFA (Leibler #2, [16], [18(c)]), this claim should be assessed against the fact that the applicant brought the proceeding and against the burden the Applicant's Revised Categories are imposing on the 71-year-old respondent. Unlike the respondent, the applicant has organisational resources to draw on and will only be required to perform a reasonable search for documents up to 14 July 2024 (the latest date in any of the Respondent's Revised Categories).

Dated: 6 May 2026

Sheryn Omeri KC,
Richard Reynolds

Annexure 1: Applicant's Proposed Categories

- 1 All posts/tweets, replies, reposts/retweets, threaded posts, likes and interactions, profile information and media files made using or recorded on the X account @marykostakidis in the Relevant Period, together with associated metadata (including any deleted, edited, or archived content).
- 2 Drafts of the Posts.
- 3 Documents created in the Relevant Period recording communications relating to the Posts.
- 4 Documents created in the Relevant Period recording or referring to the purposes for which the Respondent published the Posts.

For the avoidance of doubt, documents solely containing third party opinion concerning the Posts or the Applicant's purposes in making the Posts are not required to be produced under category 3 or 4.

- 5 Documents created in the Relevant Period recording statements made by the Respondent referring to Israel, Israelis, the Jewish people, Jewish organisations, Zionists or Zionism, the Holocaust, Hezbollah, Hassan Nasrallah, Hamas or Yahya Al-Sinwar (including derivations or abbreviations of any of the above terms).
- 6 Documents evidencing any agreement, acknowledgment, membership, accreditation, or other acceptance by the Respondent of any Australian or international professional code of ethics, code of practice, editorial standard, or professional guideline applicable to journalists in the Relevant Period.
- 7 Any document recording or referring to a contract, arrangement or understanding, in existence in the Relevant Period, between the Respondent and a third party in relation to her activism or activity on social media, excluding standard terms and conditions that the Respondent has agreed to with a social media platform (including X) by virtue of her membership of that platform.

Where:

Relevant Period means 1 January 2023 to 16 March 2026. [**Note: Respondent contends for 19 March 2025 end date**]

Posts means 4 January Post and 13 January Post (as defined in the Applicant's Further Amended Statement of Claim).

Annexure 2: Respondent's Revised Categories (underlining reflecting applicant's proposed amendments that respondent opposes)

1. Any sources upon which the Applicant based his assertions of the:
 - a. matters particularised at paragraph 7 of the Further Amended Statement of Claim (FASOC);
 - b. statements particularised at paragraph 8 of the FASOC; and
 - c. statements particularised in the fourth and fifth (unnumbered) particulars to paragraph 10 of the FASOC.
2. All Documents recording or evidencing any communications [to or from the applicant] in the period 4 January to 14 July 2024 inclusive, referring or relating to either the 4 January Post or the 13 January Post.
3. All Documents recording or evidencing any communications [to or from the applicant] in the period 7 October 2023 to 14 July 2024 inclusive, referring or relating to posts by the respondent on the social media platform X.
4. All Documents recording or evidencing any communications in the period 7 October 2023 to 14 July 2024 inclusive, referring or relating to Richard Medhurst or to any post on social media by Richard Medhurst (including but not limited to any post on the X account @richimedhurst, and on the YouTube channel @RichardMedhurst).
5. All Documents recording or evidencing any communications in the period 4 January to 14 July 2024 inclusive, referring or relating to a press conference to be held by the Zionist Federation of Australia (ZFA) announcing a complaint to the Australian Human Rights Commission by the applicant against the respondent. **[Note: Applicant opposes this category]**
6. All Documents recording or evidencing any communications in the period 4 January to 14 July 2024 inclusive, referring or relating to the preparation of the official statement published by the ZFA on 14 July 2024 "ZFA CEO Alon Cassuto files 18C complaint against Mary Kostakidis". **[Note: Applicant opposes this category]**
7. [Not pressed]
8. All communications sent and received by members of the "lawyers group" referred to in the message sent in the "Creative WhatsApp Group" on 6 December 2023 and referred to in the Defence at paragraph 29(g)(i), in the period 6 December 2023 to 14 July 2024 inclusive, referring

or relating to the respondent. **[Note: Applicant opposes this category]**

9. All documents recording or evidencing any communications [to or from the applicant] in the period 7 October 2023 to 14 July 2024 inclusive, referring to the respondent.

Where:

Document includes any deleted, edited or archived communications. **[Note: Applicant opposes this definition]**