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Document Lodged:	Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	1/10/2025 11:29:25 AM AEST
Date Accepted for Filing:	1/10/2025 11:29:29 AM AEST
File Number:	NSD951/2025
File Title:	JOSEPH TOLTZ & ORS v JOHN KEANE & ANOR
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



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No. NSD951 of 2025

Federal Court of Australia
District Registry: NSW
Division: Human Rights

Joseph Toltz and others
Applicants

John Keane and another
Respondents

Applicants' Submissions in Response

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RESPONSE TO FIRST RESPONDENT'S SUBMISSIONS (1RS)

1. On 1 August 2025, the Applicants filed an interlocutory application foreshadowing that leave would be sought in this Proceeding for the First and Second Applicants (Dr Toltz and Professor Rutland) to continue the proceeding on their own behalf and on behalf of 13 persons who are all Sydney University staff who were 'doxed' in the Keane Staff Members' Post as pleaded in the ASOC, and to amend the Originating Application and Statement of Claim accordingly.¹
2. Subsequently, on 5 September 2025, in accordance with the Courts' Orders of 21 August, a draft Amended Originating Application (**AOA**) and draft Amended Statement of Claim (**ASOC**) were served on each Respondent,² which reflect that Associate Professor Andy Smidt also seeks to be joined as a Fifth Applicant, and that the remaining 12 persons continue to be represented by the First and Second Applicants.
3. Professor Keane now seeks to object to the proceeding continuing under r 9.21 of the *Federal Court Rules* (**FCR**) on several bases, which include that:³
 - a. the 'same interest' requirement is allegedly not met;
 - b. any individual claims for damages it is said would significantly extend the trial and cause undue prejudice to the Respondents (sic);
 - c. the Court should allegedly exercise its discretion to refuse the application in the interests of justice and to uphold the overarching purpose of civil proceedings.
4. Professor Keane also seeks an order that if any proposed represented person, or the '5A' entity, wishes to participate in the proceeding, then they should have leave to apply to be joined as Applicants: 1RS [29(b)].
5. No authority is cited by Professor Keane's representatives to justify any objection or argument being advanced, or any order being sought at all.
6. For its part, the University does not object to the proceeding continuing under r 9.21 of the FCR (at [4] of the 2RS).
7. For the reasons that follow, it is contended that all the asserted grounds for objecting to the Applicants' r 9.21 FCR application should be dismissed, and that leave to amend the pleadings in the form appearing at **DPM-3** should be granted (subject to any amendments which might be ordered by the Court).
8. **Rule 9.21 FCR**: Rule 9.21(1) of the FCR provides:

¹ **DPM-1**

² **DPM-2**. An additional version was served on the parties on 30 September 2025 at **DPM-3**, with minor oversight amendments (not affecting the substance of the objections). These are the documents the Applicants rely on.

³ These are summarised at 1RS [26]-[29].

(1) A proceeding may be started and continued by or against one or more persons who have the same interest in the proceeding, as representing all or some of the persons who have the same interest and could have been parties to the proceeding.

9. Related to r 9.21 are provisions in the *Australian Human Rights Commission Act 1986 (AHRC Act)* concerning necessary consents in connection with representative proceedings (s46POA), all of which the Applicants have complied with via Dr Toltz's Affidavit of 1 August and manifest in the pleadings.
10. **Purpose of r 9.21:** The purpose of r 9.21 has been articulated as:
 - a. *"the obvious purpose of the rule (is) to facilitate the administration of justice by enabling parties having the same interest to secure a determination in one action rather than in separate actions"*,⁴
 - b. *"the avoidance of multiplicity of proceedings and the efficient determination, once and for all, of controversies in which parties have the same interest"*;⁵ and
 - c. *"promoting efficiency and access to justice"* by allowing the prosecution of claims that might have been uneconomical to pursue at the individual level.⁶
11. The rule is a simple, flexible tool of convenience in the administration of justice.⁷
12. While any judgment or order will be binding on those for whom an applicant sues, the represented parties are not liable for costs.⁸ The cost factor is a critical part of enhancing efficiency and access to justice for applicants.
13. Kirby J held in *Campbells Cash and Carry* that *"by their very nature,"* representative proceedings advance the overarching obligations where plaintiffs have the same interest and *"should not be subverted by an unduly narrow and restrictive interpretation of the language of the Rule itself."*⁹
14. These access to justice considerations are, concurrently, similarly reflected in the AHRC Act framework, which applies to the RDA. The amendments made on 2 October 2024 (prior to the AHRC Complaint being filed) to the costs rules in unlawful discrimination cases were intended to remove the barrier that the risk of an adverse costs order can have for applicants, in order to encourage people to bring applications to Federal Courts when their AHRC complaints are terminated. Those amendments, manifest in s46PSA of the AHRC Act, reflect the *"public interest in holding people to account for discrimination and harassment."*¹⁰ Relevantly, this model *"applies to representative actions"*.¹¹

⁴ *Carnie v Esanda Finance Corp Ltd* (1995) 182 CLR 398, 404 (Mason CJ, Deane and Dawson JJ)

⁵ *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, [55] (Gummow Hayne Crennan JJ)

⁶ *O'Donnell v Commonwealth* [2021] FCA 1223, [59]; *Carnie*, 429 (McHugh J); cf e.g. *Lloyd v Google LLC* [2021] UKSC 50, [63].

⁷ Cf *Carnie*, 417, 422

⁸ *Carnie*, 420 (Toohey and Gaudron JJ), citing *Markt & Co. Ltd. v. Knight Steamship Co. Ltd.*, [1910] 2 KB, p. 1039; *O'Donnell*, [59] (Murphy J).

⁹ *Campbells Cash and Carry*, [152].

¹⁰ Second Reading Speech, Hon Mr Dreyfus, 15 November 2023 p 8148; s 46PSA AHRC Act.

¹¹ *Ibid*; see s 46PSA(7) AHRC Act.

15. These are the proper purposes and focus to consider in relation to r 9.21 FCR. Such matters are absent in the submissions filed by the First Respondent.
16. **Same interest:** *Carnie* establishes that if the applicant and the represented persons “*have a community of interest in the determination of some substantial issue of law or fact in the action,*” r 9.21 is engaged.¹² Similarly persons would have the same interest if:
- a. “*there is a significant question common to all members of the class and they stood to be equally affected by the declaratory relief,*”¹³ or
 - b. “*a significant common interest in the resolution of any question of law or fact arising in the relevant proceedings.*”¹⁴
17. Considering these High Court statements, and the purposes of r 9.21 and the AHRC Act as set out above, and the group’s significant community interest to obtain declaratory relief against Professor Keane for his discriminatory conduct, there is no question that this proceeding can, and it is submitted, should, be continued as a representative proceeding under r 9.21 with the First and Second Applicants suing on behalf of themselves and on behalf of the persons in Schedule A. The Fifth Applicant (Andy Smidt) may also pursue her personal claims as an Applicant.¹⁵
18. The ‘community of interest’ or ‘significant common question’ to all members of the class is in obtaining declaratory relief that the First Respondent is liable for his impugned conduct under s18C RDA (and the Second Respondent vicariously liable). The determination of that common question is well within the confines of r 9.21. In *Carnie*, the High Court held that persons having separate causes of action in contract or tort may have “*the same interest*”. The fact that the claims arose under separate contracts was not sufficient to defeat the rule’s requirement that numerous persons have the same interest in the proceedings.¹⁶ Here the 18C actions arise out of the same impugned acts.
19. The Applicants submit that the 1RS on the issue of the ‘same interest’ requirement misapply the r 9.21 FCR requirement and its proper application to the s18C RDA context, conflating or confusing issues of liability and quantum. The 1RS raise concerns such as:
- a. “diversity of objections and concerns” among the doxed Staff Members (at [6]);
 - b. that this is “not a straightforward case” such as where represented persons “have been injured in the same train derailment” (at [8]);
 - c. that “each person’s perception of assertions will be shaped by social, familial, cultural, political, religious and philosophical influence” ([8]) (apparently now conceding the materiality of ‘historical’ facts despite earlier Riemer submissions).

¹² *Carnie*, McHugh J (at 427) with whom Brennan J agreed (at 408)

¹³ *Carnie*, Toohey and Gaudron JJ (at 421).

¹⁴ *Carnie*, Mason CJ, Deane and Dawson JJ 404; *O’Donnell* [20] (Murphy J).

¹⁵ *Prudential Assurance Co Ltd v Newman Industries Ltd* [1981] Ch 229, 255-256; *Lloyd v Google* [47]–[49].

¹⁶ *Campbells Cash and Carry* [46]; *Carnie*, 420-421 (Toohey and Gaudron JJ); 430 (McHugh J).

20. These types of issues or concerns pervade the 1RS but, it is contended, misapply the 'objective' test under s18C(1)(a) of the RDA, and conflate questions of any damages for represented persons, with questions of liability – *the latter* is what is relevant to a representative proceeding for the represented persons.
21. As to the 1RS regarding potential 'different perceptions' of the represented persons, none of this undermines the suitability of applying r 9.21 FCR.
22. The *individual* impacts on represented persons, are relevant matters to any quantum. They are not necessary for liability. Liability depends on the response of a representative member/s of the victim group.¹⁷ The relevant perspective under s18C(1)(a) is the hypothetical person in an applicant's position, the "*reasonably likely reaction of the person or people within the group concerned*". "*Proof of actual offence for a particular person or group is neither required nor determinative*".¹⁸ *Eatock v Bolt* [241]. Extreme or atypical reactions are disregarded. The inquiry is focused on assessing the "*boundaries within which reasonable responses will fall, not the identification of a finite number of acceptable reasonable responses*".¹⁹
23. The fact that different represented persons would experience Professor Keane's impugned acts differently – a matter that would apply to any form of injury such as a train derailment when considering individual damages, *cf* 1RS [8] – in no way detracts from the significant common question or interest in resolving whether Professor Keane's impugned acts breached s18C RDA for the Applicants, the represented persons, and Jewish or Israeli persons in Australia. In relation to the Staff Members Post in particular, as pleaded, the same or common interest is that the people are/were University staff, exposed to the same unlawful racial discrimination, consented to be represented and entitled to the same relief as the First and Second (and Fifth) Applicants.
24. The Bradley affidavit merely annexes documentation which comprises certain particulars subjoined to ASOC [46]. That documentation simply reflects cogent evidence in support of liability under s18C RDA. It does not assist the First Respondent's position at all.
25. The arguments raised at 1RS [12]-[13] about Dr Babicz's complaint to the University regarding the Hamas Flag and Staff Members Posts, also do not assist Professor Keane. Dr Babicz's complaint highlighted the interrelatedness of Keane's two impugned acts, and the University's failures in relation to same. The reference to 'Islamic Flags' is unavailing for the First Respondent. Hamas is a 'militant Sunni **Islamist** organisation',²⁰ listed as a Terrorist Group. It refers to itself as the '**Islamic** Resistance Movement'. As pleaded (at ASOC [31]), supported by evidence, Professor Keane knew and intended to post Hamas flags used by the Hamas military wing on and from 8 October 2023. The 1RS perpetuate confusion regarding the requirements of s18C(1)(a) and r 9.21. Nothing raised detracts from the applicability of r 9.21 to the present proceeding.

¹⁷ *Eatock v Bolt* (2011) 197 FCR 261, [247]; [251][252] (Bromberg J). See also *Clarke* [46];[51] and [60] *et seq* (Barker J); *Creek* [13] (Kiefel J); *Scully* [108] (Hely J).

¹⁸ Although subjective reaction is relevant to whether offence was reasonably likely.

¹⁹ *Eatock v Bolt* (2011) 197 FCR 261, [251].

²⁰ See 'Statement of Reasons' for listing Hamas as a terrorist group. Hamas started as the Muslim Brotherhood.

26. **Alleged ‘undue prejudice’ to Respondents:** As noted above, the 1RS argue that any individual claims for damages “*would significantly extend the trial and cause undue prejudice to the respondents*” (sic). (1RS [27]) That submission should be rejected.
27. *First*, the University does not object to the application of r 9.21. There is no other relevant Respondent. Dr Riemer is irrelevant to this proceeding and issue.
28. *Second*, the only individual claims for compensation which might be made are by doxed Applicants in respect of the Staff Members Post (no compensation is sought in relation to the Hamas Flags Post). As noted in *Carnie*, “*If the action, constituted as a representative action, succeeds those represented will have the benefit of declaratory relief... Whether they choose to take advantage of such a declaration will be a matter for them.*”²¹
29. That is an entitlement provided for by r 9.21, a rule which encapsulates within it overarching purpose concerns and significant access to justice concerns.
30. It is misconceived for the 1RS to suggest that if represented persons became Applicants and engage in individualised fact finding for purposes of obtaining compensation, this would somehow save time. Any time which might be spent on individualised fact finding would need to occur at some point. What seems to be driving this odd submission is a cryptic concern (never stated in express terms), that there is an unfair ‘cost’ advantage to the represented persons by being represented persons. Indeed, there *is* a cost benefit to them – that is precisely the purpose of r 9.21 FCR. That is not a manifestation of prejudice. It is a promotion of ‘*efficiency and access to justice.*’
31. *Third*, the 1RS identify no relevant prejudice whatsoever. Among other things, the 1RS do not seem to appreciate that avoidance of multiplicity of proceedings also has broad efficiency benefits.
32. *Fourth*, the references in the 1RS to ‘5A’ are unavailing. There is a group now in existence called 5A (Australian Academic Alliance Against Antisemitism). It did not exist at the University when Professor Keane made his Posts. That group, as manifest in Professor Rutland’s complaint to Mark Scott appearing at MDB-12 (p48), was “*formed by both Jewish and non-Jewish academics and professionals who are concerned about the increase in antisemitism at (Sydney) University since the Hamas invasion of Israel 7 October 2023*”. It is not up to any Respondent to try to dictate who the Applicant is that brings the claim. That is a matter for the Applicants. They and the represented persons are also proper parties in the matter, being personally targeted.
33. For all the aforementioned reasons, it is submitted that leave to amend should be granted in the requested form.

RESPONSE TO FIRST AND SECOND RESPONDENTS’ SUBMISSIONS (1RS / 2RS)

34. This part addresses remaining issues regarding attempted strike out arguments. The Applicants generally refer to and rely on their statement of relevant principles as set out

²¹ *Carnie*, Toohey and Gaudron JJ at 423. See also *Lloyd v Google LLC* [2021] UKSC 50, [47]-[48]; *Prudential Assurance Co Ltd v Newman Industries Ltd* [1981] Ch 229, 257.

in the Applicants' earlier Riemer Submissions at [6] and [11]-[20]. The Applicants note that the 1RS here do not actually make written submissions on the issue of strike out.

35. **Peter Morgan**: The 2RS reserves a right to dispute Mr Morgan's standing under s46PO AHRC Act (at 2RS [5]). The University was provided detailed submissions on this issue during the Conciliation,²² and ASOC [10] reflects the application of those principles. Given more time, it is contended that the University's position on this will not improve.²³
36. **Para 8(a) – 'or is eligible to be'**: The pleading of the words "*or is eligible to be*" in [8(a)] is no longer objected to by the University (2R) as it was in the Riemer proceeding. As to the 1RS, since no new objection is raised, the Applicants rely on their Riemer Submissions at [68] *mutatis mutandis* and will supplement this by oral submission as may be appropriate if and when the 1R's position may be articulated at the hearing.
37. **Para 8 - 'Zionists'**: For their part, the 1RS only object to the 'particulars' to ASOC [8], and not to the material facts. Parties plead only to facts, not to particulars: r 16.41 (note 3); r16.07 FCR. There is no basis for the objection, the particulars '*filling in the picture*'²⁴ of the Applicants' case and guarding the First Respondent against surprise at trial.
38. The 2RS for its part objects to the words "*and identifies as Zionist*" in ASOC [8] and to the particulars. This objection is contended to be misguided, the University not also objecting to any of the identifications as Zionists of the represented persons in ASOC [9].
39. It is relevant that Professor Keane is a senior Politics Professor at the University. He is also a strong proponent of BDS,²⁵ which overtly seeks to delegitimise Israel as a nation state, framing it as an 'apartheid' state. The BDS campaign, as the evidence will show, employs strategies intended to demonise Israel, Israelis and Jews and others who support Israel's right to exist, to harass and intimidate them to seek to eliminate Israel's existence. The method used is one of racial, ethnic or national stereotyping based on labelling Israeli Jews and Jews in support of Israel as evil, racist oppressor people. BDS uses the label '*Zionist*' and other references to Jewish and Israeli people in a pejorative way in this exercise.
40. For Professor Keane, his antizionism and related discriminatory treatment is seen in his Staff Member Post when conveying negative imputations or characteristics ('racists', 'without morals, scruples or conscience', 'like the Nazis') to presumed Jewish and Israeli people on the basis of their group membership because of race, ethnic or national origin (ASOC [48]-[54]).²⁶ The Post publicly singled out Jewish and Israeli people to criticise only them by reference to their position as 'pro-Israel' (Zionist), using 'pro-Israel' (national origin) and 'Promised Land' (ethnic, national origin)²⁷ as pejorative or negative terms. This was exclusionary, which is a strong form of racism,²⁸ especially institutional

²² DPM-4.

²³ Cf *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* [2007] FCA 615 [66].

²⁴ *Beach Petroleum NL v Johnson* (1991) 105 ALR 456, 466; *Sims v Wrان* [1984] 1 NSWLR 317, 322.

²⁵ DPM-5.

²⁶ See also the University's own findings on this point, at MDB 16-17, pp 65-68.

²⁷ The reference to Israel as the 'Promised Land' (Genesis 17, verses 1-16) is a central tenet of Judaism which is a faith central to the identity of many Jewish people.

²⁸ See e.g. *Faruqi v Hanson* [2024] FCA 1264 at [131] [134] cf [221].

racism.²⁹ The offence is exacerbated by Professor Keane's status.³⁰ Likewise, his Hamas Flag Post celebrated and endorsed Hamas and its objectives (ASOC [22]-[24]) and Hamas' 7 October conduct. Those Hamas objectives include destroying or 'obliterating' Israel, dismantling the *Zionist* entity (Israel) and 'killing the Jews.' Hamas' 7 October conduct, which is publicly celebrated and endorsed by Professor Keane, involved the killing, rape, maiming, sexual abuse, kidnapping and torture of Jewish and Israeli persons because they were believed to be Jewish or Israeli (ASOC [36]).

41. The fact that the Applicants and represented persons, as pleaded in ASOC [8] (and [9]), identify as 'Zionists' and 'people who believe in Israel being a nation state and the national home of and for the Jewish people' (the essence of what Zionism embodies as a belief which is intertwined with Jewish and Israeli identity, traditions, prayers, culture and practices etc)³¹, is relevant to the Applicants' case under s18C RDA, for both of Keane's impugned acts. It is relevant to the matters which causally inform Professor Keane's doing of the infringing acts (18C(1)(b)), and it is relevant to the social, cultural and historical "circumstances"³² informing the offensiveness etc of his conduct (18C(1)(a)). It is also relevant to the University's vicarious liability including its failures to take reasonable steps to prevent Professor Keane from publishing and to timely remove his infringing conduct ASOC [57]-[59].³³ ASOC [8] is fairly pleaded.

42. Contrary to the 2RS at [7]-[10]:

- a. There does not need to be an express reference to "Zionism" or "Zionist" in either impugned act for it to be relevant.³⁴ The question under s18C is always one of *context*, and the evidence and all the relevant circumstances.
- b. The invocation of *Wertheim* at [107] is immaterial. The 2RS seem keen to stretch that finding. Putting aside the critique of its approach in our Riemer Submissions, what is clear now at 2RS [8], is that the University is 'contesting' the numerosity and conceptual point that disparagement of Zionists/ism may in certain circumstances constitute discrimination to and about Jews or Israelis (which it often does). The 2RS present again at [8] outlier hearsay / opinion evidence to try to make their position good. Our prior supporting evidence shows the *actual predominant* Jewish / Israeli views in Australia. For present purposes, as there is a genuine 'contest' of evidence,³⁵ showing that the issue is seen as arguable,

²⁹ *Faruqi* at [141]-[142].

³⁰ Cf *Faruqi* at [134].

³¹ Cf *Kaplan*, [68]-[69] (Jewish identity and State of Israel). In *Cth v Tasmania* (1983) 158 CLR 1, 244, speaking of "people of any race" in s 51(xxvi) of the Constitution, Brennan J said: "As the people of a group identify themselves and are identified by others as a race by reference to their common history, religion, spiritual beliefs or culture as well as by reference to their biological origins and physical similarities, an indication is given of the scope and purpose of the power granted by par. (xxvi)..."

³² *Eatock v Bolt* (2011) 197 FCR 261, [257].

³³ This can be seen for example in contemporaneous complaints including of Dr Loren Mowszowski who was doxed in the Staff Members' Post: see MDB-8, p 40-41. Dr Mowszowski resigned from the University in June 2024, the broader catalyst being the hostile university environment "as a Jewish staff member", and the most distressing incident for her was the Staff Members Post. **DPM-6**. See also exit survey of A/Prof Andy Smidt: **DPM-7**. A relevant factor in her decision to leave the University was also the Keane incident.

³⁴ See e.g. Applicants' Riemer Submissions at [40], [46] [51] [57(a)] [74] [77].

³⁵ *KTC v David* [2022] FCAFC 60, [122].

ASOC [8] is fairly pleaded. The University knows the case against it and can draft its defence.³⁶

- c. References to the UKSC *JFS* case are unavailing. It is entirely off point.
 - d. At 2RS [10] the argument is a strawman. The fact that the Applicants can (and will) prove that most Jewish and Israeli people in Australia identify as Zionists, is not said to be a claim of itself. It is a relevant fact in the claim. Pleading that, however, is giving fair notice of the case to be advanced at trial.
43. **Para 12(a) – ‘descent’**: The 1RS object to ‘descent’ in ASOC [12(a)], seeking to apply the same grounds of objection (in the table) as were used in the Riemer proceeding. The Applicants submit that those grounds do not apply at all. For their part, the 2RS also object to ‘descent’ in ASOC [12(a)], and to ‘descent’ in the AOA at [1].
44. Further to what follows, the Applicants rely on their Riemer Submissions at [69]. Since it is well established that Jewish people satisfy the definition of ‘race’ or ‘ethnic’ origin for purposes of the RDA,³⁷ it is not necessary for the Applicants to press the reference at [1] of the AOA. However, it is incorrect for the 2RS to assert that the inclusion of ‘descent’ at ASOC [12(a)] is ‘embarrassing.’ No elaboration is provided for that position at all. This is not an objection that serves the overarching purpose in s37M FCAA and it should be dismissed. The University knows the true case against it and can draft its defence.³⁸ The Explanatory Memorandum to the *Racial Hatred Bill 1994* explained that the terms ‘race and ethnic origin’ are to be read complementarily and are intended to be given a broad meaning. Specifically, ‘ethnic origin’ was intended to be interpreted as set out in *King-Ansell v Police*³⁹ and *Mandla v Dowell Lee*⁴⁰ because such an interpretation:⁴¹
- would provide the broadest basis for protection of peoples such as Sikhs, **Jews** and Muslims. The term “race” would include ideas of ethnicity so ensuring that many people of, for example, Jewish origin would be covered. While that term connotes **the idea of a common descent**, it is not necessarily limited to one nationality and would therefore extend also to other groups of people such as Muslims.* (emphasis added)
45. **Para 12(b)**: Only the 1RS maintain the objection to “*and/or nationality*”. The 2RS do not. Consistent with the Applicants’ approach in the Riemer matter at [69], it is accepted that this phrase ‘*nationality*’ can be amended to ‘*national origin*’.
46. The Applicants note however that despite addressing the University’s point concerning its ‘*reservation of rights as to Israeli ethnic or national origin*’ in our Riemer Submissions at [55] (Cf 2RA in Riemer, fn 25) the University again here ‘reserves a right’ as to whether it admits there is an Israeli ethnic or national origin for purposes of s18C RDA. Clearly, Israelis *are* protected under the RDA, which the University should fairly recognise. There is precedent on point. In *Kaplan*, Guy Cohen’s claim against teacher, Mr Varney, was successful under s9 of the RDA on the basis of both his *Israeli* and his Jewish identity.⁴²

³⁶ *Fair Work Ombudsman v Eastern Colour Pty Ltd* [2011] FCA 803, [18]–[19].

³⁷ E.g. *Miller v Wertheim* [2002] FCAFC 156, [14]; *Kaplan v Victoria (No 8)* [2023] FCA 1092 e.g. [59].

³⁸ Refer to Applicants’ Riemer Submissions and authorities at [16].

³⁹ [1979] 2 NZLR 531 (Richardson J)

⁴⁰ [1983] 2 AC 548 (HL) per Lord Fraser of Tullybelton (562).

⁴¹ Cited too in *Eatock v Bolt* at [310].

⁴² *Kaplan v State of Victoria (No 8)* [2023] FCA 1092, eg. at [261]; [1035]; [1716]

47. **Para 23 (Hamas Covenants):** The University no longer presses the objection to this pleading (*cf* Riemer proceeding). The Applicants assume this matter is conceded. The 1RS provide no new ground of objection. The Applicants rely on their Riemer Submissions at [77]-[78] *mutatis mutandis*, to be supplemented as appropriate if/when any objection is fully articulated. Those submissions alluded to contemporaneous evidence of Jewish persons about normalised support at the University for Hamas. A sample complaint is annexed **DPM-8**. This is relevant to the material ‘circumstances’ under s18C(1)(a) which is relevant to the significant offensiveness in Professor Keane’s support of Hamas across his impugned acts.
48. **Paras 25 and 35 (‘Prohibited Terrorist Organisation Symbol’):** These two paragraphs are only objected to by Professor Keane. As noted, Professor Keane has made no written submissions to justify either objection, only citing grounds in brief. This is not adequate notice to the Applicants, as Submissions were ordered to be written. In any event, the objections should be dismissed. The paragraphs are relevant to the Hamas Flag Post (which informs the Staff Members Post). There is no basis to object on grounds of ambiguity, delay or not disclosing a reasonable cause of action.
49. For purposes of s18C(1)(a) RDA, in assessing the level of offence, intimidation etc, one must consider all the ‘*relevant circumstances*.’ Here, a number of circumstances are important, including the timing of the Hamas Flags Post (8 October), the status of the maker, Jewish peoples’ social, historical circumstances, and, most relevantly for present purposes, the *criminality* and offensiveness of the conduct.⁴³ Hamas is a listed terrorist organisation (as pleaded ASOC [21]) whose stated goals are the ‘liberation of Palestine’, guided by Islamic principles of “*destroying Israel*” and “*killing the Jews*”. The criminality of the Post under Federal law reinforces its seriousness such that it cannot be passed off as a ‘mere slight’.⁴⁴ That is a material fact for purposes of s18C(1)(a).
50. For purposes of s18C(1)(b), among various relevant factors which support that test being met, one factor is the gravity of offence. Courts may infer that a person must have intended offence by the gravity of what is done.⁴⁵ This is that type of case, including because of the criminality of the conduct. The display of Hamas Flags is conceptually similar to displaying Nazi symbols. Each act is criminalised, extremely offensive, intimidating etc to Jews, and carries an implicit message of support for harm to Jews.
51. **Para 28 (Hamas and 7 October):** ASOC [28] pleads factual matters which are relevant to the s18C actions. The relevance is manifest at ASOC [36], wherein several pleaded imputations of the Hamas Flag Post rely on ASOC [28]. Professor Keane’s Staff Member’s Post is also interconnected with the Hamas Flag’s Post: at ASOC [54(e)].
52. The 2RS at [11] object on grounds of relevance and embarrassment. Neither ground applies. The University misapplies the test of relevance. The test being applied by the University is “*necessity of determination*”. Yet the question is not whether facts are

⁴³ In addition to the criminality in Australia, this issue was raised by Germany’s WZB – **DPM-9**.

⁴⁴ *Clarke v Nationwide News* [2012] FCA 307 [67]-[68]; *Kaplan* [30][506].

⁴⁵ *Toben v Jones* [67-68] [154].

necessary to make out a s18C case, the question is whether facts are relevant to support the cause of action; here, Hamas's hostility and intent to kill Jews and Israelis on 7 October is relevant⁴⁶ when on 8 October Professor Keane celebrates and endorses the 7 October terrorist acts by Posting 5 Hamas flags endorsing Hamas' conduct and its objectives set out in its Covenants. The factual matters pleaded are open to proof by way of expert evidence⁴⁷ and/or judicial notice. It is open to the Court to make the finding on the basis that it accepts the evidence of the facts that occurred on the subject day.

53. **Paras 54(e) and (f) ('Because of' and tendency):** These objections are only made by the University. That is significant to emphasise. One would expect that if there was any credible basis to object to the paragraphs, Professor Keane would do so.
54. As to ASOC [54(e)], the University's objection should be dismissed in short shrift. Clearly, the Applicants are giving fair notice in ASOC [54(e)] of one of a myriad of factors alleged to be applicable to enable the conclusion that s18C(1)(b) was met. The 2RS states no ground under the rules to justify the objection, nor why the high threshold for a strike out should apply to deprive the Applicants of their case.⁴⁸ The matters raised are fairly arguable, serious and disputable.⁴⁹ The University should now file its defence.
55. As to [54(f)], the University repeats the same flawed tendency point raised in its Riemer 2RA at [42], with no modifications despite the Applicants already addressing it. The Applicants' pleading is supported by good authority. Professor Keane, as a BDS member or otherwise, has a tendency to state offensive messages directed at and about Zionists, Jews or Israelis supporting Israel's right to exist.⁵⁰ This supports the causal connection.⁵¹ Similarly, the University's repeated point about 'intention' is again flawed. As Allsop J said in relation to s18C(1)(b) in *Toben v Jones*:

*An investigation of the reason or reasons for the act will involve...an inquiry into the explanation for the act or why the act was done. While it may be accurate to say that this is not the same thing as enquiring as to the motive or purpose or intention behind such conduct, **proof of those matters (motive, purpose or intention) may, in any given case, be relevant, perhaps even central, to the ascertainment of the reason or reasons for the act in question.***⁵²

56. The paragraphs are fairly pleaded. The University's objection should be dismissed.

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⁴⁶ E.g. *Eatock v Bolt* (2011) 197 FCR 261, [257]. Also relevant are matters at ASOC [22]-[24], [26]-[27].

⁴⁷ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 196 (general facts of history from serious historians, studies and inquiries); *Thomas v Mowbray* [2007] HCA 33 e.g. [542]-[543], [538] [523] (judicial notice of 'notorious facts' of terrorism, and threats and intent to inflict casualties and claims of responsibility by Al Qa'ida) There is abundant material to support the pleaded finding: see e.g. **DPM-10**.

⁴⁸ E.g. *Trade Practices Commission v Pioneer Concrete (Qld) Pty Ltd* (1994) 52 FCR 164.

⁴⁹ *John Holland Pty Ltd v Maritime Union of Australia* [2009] FCA 437, [60]-[62].

⁵⁰ Examples at **DPM-11**.

⁵¹ Cf *Faruqi* [2024] FCA 1264 [199] [288]-[289]; also *Toben v Jones* [2003] FCAFC 137 at [167]-[169] (Allsop J).

⁵² *Toben v Jones* 129 FCR 515, [151] (Allsop J) (emphasis added); see also Carr J at [31]-[32].