Federal Court of Australia NSD950 of 2025

District Registry: New South Wales

Division: Human Rights

**Joseph Toltz** and others

Applicants

**Nick Riemer and another**

Respondents

## SECOND RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

1. This is an outline of key points in reply to the Applicant's submissions dated 18 September 2025 (**AS**) which will be more fully developed in oral address at the hearing.

**Summary dismissal of claims against the Second Respondent and strike out of [10] and [88(a)] of the ASOC**

2. At [24]-[27], the Applicant argues that imputations need not be made out to breach s 18C of the RDA. This point is confused and does not assist the Court.

3. *First*, while it is accepted that the statutory test is for there to be an 'act' that is reasonably likely in all the circumstances to offend, insult, humiliate or intimidate a group of people, the Applicants' pleaded case at [86] of the ASOC is grounded in particular imputations arising as follows:

> "Dr Reimer's making of each of the impugned acts, by conveying any or all of the imputations alleged, when considered individually and/or cumulatively and/or collectively, were reasonably likely in all the

circumstances to offend, insult, humiliate or intimidate Jewish persons or Israeli persons in Australia.

4. Having elected to plead their case by relying on imputations, the Applicants' criticism of the Second Respondent's submissions on whether those pleaded imputations arise are misplaced and should be disregarded.

5. *Second,* in *Wertheim,* Stewart J took the approach of first considering whether the pleaded imputations were made out[1] and where the imputations did not arise, those speeches were found not to contravene s 18C of the RDA. That is the "act" referred to in s 18C said to be unlawful is the act publishing the articles and the applicants use the device of identifying "imputations" to isolate the "stings" in the publications that are said to cause offence.[2] This is an orthodox approach, also followed in *Jones v Scully*;[3] *Jones v Toben*[4] and *Eatock v Bolt.*[5]

6. *Third,* in the same breath, the Applicants also appear to rely on any *implications* that arise from the impugned texts at AS[40]. Implications are another word for imputations. However, the implications must reasonably arise from a fair reading of the text taken from the perspective of the relevant group.[6] They must also be pleaded to enable the Court and the respondents to understand the Applicants' case. The Applicants do not plead any implications arising from the impugned publications. Accordingly, they are left with the pleaded imputations and the express words in the impugned publications themselves.

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[1] See *Wertheim v Haddad* [2025] FCA 720 at [42]-[43].
[2] *Wertheim v Haddad* [2025] FCA 720 at [42]-[43].
[3] (2002) 120 FCR 243 at [125]-[126] per Hely J.
[4] [2002] FCA 1150 at [87] per Branson J.
[5] [2011] FCA 1103 per Bromberg J.
[6] *Eatock* v Bolt at [19].

7. The Second Respondent submits that the Court is in as good a position now as it will be at trial to form a view about whether the pleaded imputations objectively arise from a fair reading of the impugned posts.[7]

8. *First*, in *Wertheim*, Stewart J carefully analysed several speeches and found that passages where there was no express link between Jewish persons and Zionists in the text itself did not give rise to a conclusion that the speaker was saying anything about Jewish people in general or all Jews.[8] This was because 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. For example at [110] - [111] and [134]-[135], Stewart J analyses the text as follows:

> In the passage relied on by the applicants, Mr Haddad refers to a time in the future when Palestine is "cleansed from the filth of the Zionists" (ST26:18-21). Once again, this would not be understood by the ordinary, reasonable listener to be a reference to Jews generally. The context is the Israeli occupation of Palestine, in particular Gaza. Mr Haddad is speaking to a time in the future when Palestine is no longer occupied. **That is not about Jews.** The imputation is not therefore established.
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> ...
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> In the second answer (ST60:17-21), Mr Haddad says that the media that are owned by "the Zionists" will always push the narrative that the Israelis have done nothing wrong and that it is always the Muslims of Gaza who have

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[7] *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615 at [15] per Drummond J; *Creek v Cairns Post Pty Ltd* [2001] FCA 1007; 112 FCR 352 at [12]-[13] per Kiefel J; *Bropho* at [66]; *Jones v Scully* at [98]-[99]; *Clarke* at [46]; *Bharatiya* at [14], [17].

[8] See *Wertheim* at [103]-[107].

done wrong and who deserve to be killed. Again, there is nothing in what Mr Haddad says there that would be understood as a reference to Jews generally. **He is talking explicitly about Zionists**.

In the circumstances, the pleaded imputation in Speech D is not established.

9. *Second,* the Applicant's reference to findings in other cases does not take this analysis further because, unlike *Wertheim,* the content and/or context of the text in those cases did refer to the race or ethnic origin of people. As set out in the Second Respondent's primary submissions, there was explicit reference to Jews in the text in *Jones v Scully* and in in the case of *Faruqi,* the text, which was "*piss off back to Pakistan*" was directed to a particular individual who was a public figure and well-known Muslim Senator who had immigrated to Australia.[9]

10. *Third,* the Applicant's submission at AS [31]-[38] that the Court must wait to hear further evidence of *subjective* offence or likely offence to the impugned posts must be rejected. The authorities referred to by the Applicants do not support the proposition that the Court needs to determine this objective test on the basis of evidence. *Clarke* at [55] and *McGlade* at [46] simply say that "the first logical step is to identify a person or group of people who, on the basis of a reasonable likelihood, may have been affected in the manner described by s 18C".

11. It is accepted that in *Faruqi* at [241], Stewart J said that such evidence could be of assistance, but he cautioned that it must not be uncritically adopted lest the objective test would wrongly become a subjective test. Later in *Wertheim* at [17], Stewart J took it as a matter of judicial notice that not all Jews in Australia or Israel support Israel's occupation of Palestine or the actions of the IDF in killing large numbers of civilians in Gaza.

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[9] See the discussion in *Faruqi* at [57].

12. The Applicants have already filed a substantial body of evidence that tends to support the perspective that:

    a. a majority of Israelis and Jewish persons identify as Zionists;

    b. Zionism may be linked to Judaism and is an expression of self-determination of Israeli people;

    c. a proportion of Jewish people find comments about Zionists to be antisemitic; and

    d. the Universities Australia Definition on Combatting Antisemitism, *inter alia* reads:

> *"All peoples, including Jews, have the right to self-determination. For most, but not all Jewish Australians, Zionism is a core part of their Jewish identity. Substituting the word "Zionist" for "Jew" does not eliminate the possibility of speech being antisemitic."*

13. However, in *Kaplan v State of Victoria (No 8)*,[10] Mortimer J at [30]-[34] observed that Professor Rutland's opinion that the term "antisemitism" can also be used to encompass "anti-Zionism that seeks to delegitimise the State of Israel" was outside the accepted definition of antisemitism and that the RDA does not use the term 'antisemitism'.

14. Moreover, the most the evidence will establish is that there is a divergence of views and some strongly opposing perspectives. For example, this member of the Australian Jewish community has said:

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[10] [2023] FCA 1092 at [30]-[34].

> *"I have deep roots in the Australian Jewish community. It is from this position that I write to express my disappointment and frustration at the weaponisation of antisemitism accusations to silence forms of protest and critique that are legitimately directed at the State of Israel and the political ideology of Zionism".*[11]

15. The Judge's task is to consider the ordinary reader's overall impression gained from a once-over-lightly assessment of the impugned post.[12] The Judge must not consider the oversensitive or the insensitive but ask whether the "reasonable victim" would feel the effects in the same way.[13]

16. At AS[44], the Applicants submit that s 18C will be met when '*enough or most*' of the group is offended. In *Faruqi* at [235], Stewart J held, relying on *Eatock v Bolt* at [251] that it must be remembered that a group of people may include the sensitive as well as the insensitive, the passionate and dispassionate, and the emotional and the impassive, so the "ordinary" or "reasonable" member or members of the group should be isolated for the assessment. At [236], his Honour found:

> *Moreover, It was said in Kaplan (at [513]) that in the operation of para (a) in respect of "a group of people", "an applicant need not prove the likely objective reaction or effect in the entire group, but must at least prove the* ***likely objective reaction or effect in most of the group****" (emphasis in original). That was later expressed differently as being a requirement in relation to "****enough of the group that the purpose of the legislative prohibition is advanced****." I do not read those statements as saying anything different from what was said in Eatock v Bolt about the* ***hypothetical representative of the group, but rather to emphasise that that construct must have the group as a whole in mind, or most or enough***

[11] Affidavit of Daniel McCoach at p 1294.
[12] *Eatock v Bolt* at [37].
[13] *Faruqi* at [252].

> ***of its members, so that <u>the inquiry is not too sensitive to the idiosyncratic – it should exclude the exceptionally robust and the hypersensitive or peculiarly susceptible</u>.*** (emphasis added)

17. In *Wertheim,* at [104] Stewart J found that the hypothetical reasonable victim in the group of Jewish people would not understand a reference to Zionists to be a reference to all Jewish people because not all Jews were Zionists and political criticism of Israel, is not by its nature criticism of Jews in general or based on Jewish racial or ethnic identity. Stewart J formed his view that the imputations did not arise from the particular speeches even though there was evidence from Jewish persons, including the Applicant and Robert Kaye SC about the characteristics of Jewish people in Australia and expert evidence from Dr Oboler on tropes commonly used to offend Jewish people.[14] It is therefore not correct that Stewart J made his findings in an evidentiary vacuum.

18. The Second Respondent submits that the Court can examine the impugned posts in this case taking into account the different perspectives that exist in the Jewish and Israeli community (i.e, taking the Applicants' case at its highest). Once that examination is undertaken, the Court will come to the same conclusion as Stewart J in *Wertheim,* namely, that the pleaded imputations (including all of the text pleaded by the Applicants) in the impugned publications the Second Respondent is alleged to be vicariously liable for do not arise because <u>not all</u> Jews and Israelis are Zionists; and Jews and Israelis do not appear in the text at all. The purpose of the legislative prohibition under s 18C of the RDA will not be advanced by construing a reasonable hypothetical group member as being reasonably likely to be offended by political views that are not critical of a persons' race or ethnic origin. The evidence from the Applicants will never be able to counter this.

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[14] *Wertheim* at [186]-[196].

19. On any fair reading of the Overland Article extracted at [51] of ASOC, the pleaded imputations do not arise. The text conveys a statement about solidarity with Palestinians as a broad concept being consistent with democratic ideals in Western nations. The reference to Zionists in the first paragraph is expressly linked to what is described as "opposition to democracy in their own countries". Even if the Applicants' case is taken at its highest and it is accepted that Zionism can sometimes be used as a synonym for Jews, it is clear that is not what is being conveyed in the Overland article. The explicit reference to Zionists coming from many countries identifies that Zionism is a political belief or ideology held by people who reside in countries other than Israel, many of whom are not Jews or Israeli. In the third paragraph, the text conveys a view about persons, including Zionists, who condemn Palestinians. This is a political view about the position of solidarity with Palestinians and not a criticism of the Jewish or Israeli race or national or ethnic origin.

20. Similarly, on any fair reading of the "No room for Zionists in our Unions Speech and posts" set out at [58] of the ASOC, the pleaded imputations do not arise. The text is clearly drawing a link or comparison between Zionism and other political or ideological concepts ("racism, settler-colonialism, apartheid or Zionism"). There is no express or implied link or reference to the race or ethnic origin of Jewish people or Israeli people.

21. Both of the impugned posts are on all fours with those considered by Stewart J in *Wertheim*. The text does not draw any link, express or implied, between Zionism and Jewish or Israeli people. No amount of evidence adduced by the applicants will impact on this conclusion. This is why the Court should now summarily dismiss the paragraphs of the ASOC which seek to make the Second Respondent vicariously liable for these posts under the RDA.

22. The Applicant's submission at [47] that criticism of conduct or beliefs of Jewish and Israeli persons is sufficient for s 18C of the RDA may be correct but that is

only where the conduct or belief was linked or attributed to Jewish teaching such that Jewish people would be offended. The authorities referenced in footnote 70 of the Applicants' submissions (*Jones v Scully* and *Faruqi*) are wholly distinguishable from the facts of this case. Here, the beliefs or practices referred to in the impugned posts are racism, apartheid and settler-colonialism, opposition to democracy and humanitarianism. These are not objective beliefs or practices of Jews or Israelis but contested political practices many countries have engaged in over history at some point in time. Viewed objectively and with regard to the text of the impugned posts, these terms do not convey any criticism of Israeli people or Jewish people's beliefs. Nor is there any attribution of these beliefs or practices to Jewish or Israeli people. This is to be contrasted with the leaflet in *Jones v Scully* which attributed to Jewish teachings the practice of paedophilia thereby offending and insulting Jewish people in Australia about whom there was evidence that such a practice was completely repugnant and horrific (at [197]).

23. The fundamental flaws in the Applicants' case against the Second Respondent which are also exposed in their submissions are (1) that the Applicants assume or assert that Zionism must mean the same thing as being Jewish or Israeli; and (2) this is what is conveyed or what should be imputed from the text of the impugned posts. Neither proposition is correct as a matter of law or fact. The Applicants' case against the Second Respondent is without foundation and should be summarily dismissed.

24. The Applicants' purported attack on Stewart J's finding in *Wertheim* at AS [30]-[44] do not diminish his orthodox approach to the statutory task called for by s 18C of the RDA. *First,* at AS [30] while it is correct that the Applicants in *Wertheim* did not plead Israeli race, Stewart J's approach to construction of the text is highly applicable. Political views are universally divergent within a particular race, and many people of different races hold Zionist views. The

divergence of political views within races remains even if the Court finds there is an Israeli race for the purposes of s 18C of the RDA and the Second Respondent makes no submissions opposing such a finding.

25. *Second,* the Applicants' purported distinction because the ASOC pleads the 'tendency' of Mr Reimer is misconceived. The Second Respondent accepts that tendency can be relevant to causation as held by Stewart J in *Faruqi* at [188] and therefore withdraws its application to strike out paragraph 88(c) of the ASOC but as is clear from the reasoning and findings in *Faruqi* (see e.g. at [199] and [218]-[223]); findings at to the tendency of the author will not establish liability where the text does not convey imputations that are reasonably likely to offend the relevant group.

26. *Third,* Stewart J correctly identified at [44] that it is the perspective of the hypothetical group member that must be adopted in assessing, objectively, whether the imputations are conveyed by the speeches: see also at [244]. Stewart J merely found it made no difference to his analysis in that case whether one considers the ordinary Jew in Australia or the broader community in Australia.

27. The Court can comfortably find that the text and context of the impugned posts the Second Respondent is alleged to be vicariously liable for do not give rise to a criticism of Jewish people or Israeli people. It is appropriate for the Court to dismiss the claim against the Second Respondent at this stage in the proceedings because the text and context for the text is not going to change between now and a final hearing. A fair reading of the text supports the Second Respondent's contentions that s 18C of the RDA is not engaged and the Court is in just as good a position to determine that now as it would be in a final hearing.

**Strike out application**

**Cumulatively or collectively in 86 and 87**

28. The Second Respondent presses its strike out of the words 'cumulatively or collectively' in paragraphs 86 and 87 in a more nuanced way.

29. At AS [59], the Applicants refer to Stewart J's finding in *Wertheim* at [168]-[171] that Jewish people need not have perceived a public act which offends s18C for liability under s18C to attach to support their reliance on the collective or cumulative posts of Mr Reimer. However, this passage means that the Court may assume that group members perceived the impugned post when analysing the elements of s 18C of the RDA not that it should be assumed that group members perceived every post ever written by the author.

30. The Applicant's reference to *Kaplan* at [1671] is misplaced as this passage is dealing with the cumulative effects on individuals for the purposes of calculating damages. *Wotton v Queensland* is a case about s 9 of the RDA not s 18C of the RDA and does not support their position. *McGlade* at [64]-[65] analyses different paragraphs in one article.

31. The authorities do establish that Courts have looked at articles together where it is likely they would have been read together and are directed at the same audience.[15] The ASOC does not plead any material facts that establish this. Further, subsequent posts cannot be relied upon to interpret preceding posts.[16]

32. For example, the Global Intifada post was made on 1 November 2023, and The Overland article was published on 15 October 2023, and the No Room for

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[15] *Gianni Versace SpA v Monte* (2002) 119 FCR 349 at [144]-[146]; *Eatock v Bolt* at [286]; *Wertheim* at [108] c.f [124].
[16] *Prior v Wood* [2017] FCA 193 at [123]-[125].

Zionists speech was posted on 12 November 2023. Therefore, the Global Intifada post can only be used to interpret the No Room For Zionists speech and not the Overland Article.

33. In any event, the Global Intifada post does not assist in giving rise to the pleaded imputations or implications the Applicant seeks to make out.

**Nationality in 8(b)**

34. The Second Respondent notes the Applicant has agreed to remove the reference to 'nationality' and substitute 'national origin' which is the term used by s 18C of the RDA.

**Descent in para 8(a)**

35. The Applicants' reliance on 'descent' is misguided. In contrast to s 9 of the RDA, it does not appear in the text of s 18C nor ss 10-15 of the RDA.

36. This is a deliberate choice of the legislature and evoking terms from United Kingdom case law that describe 'ethnic origin' does not make up for the lack of a statutory footing for this pleading.

**Paragraph 21, 22, 23-25, 28 and 32**

37. While it is accepted that the alleged facts pleaded in narrative form at paragraphs 21, 22, 23-25, 28 and 32 are potentially "circumstances" for the purpose of s 18C(1)(a) of the RDA, it remains the case that determining the truth of those alleged facts, including the motivations of Hamas personnel, is not necessary to determine a matter in issue in the proceedings and will lead to delay.

38. The preferable way to deal with this issue is to adopt the course of Stewart J in *Wertheim* at [15] to plead that these events were reported in Australia and/or were read and believed by the Applicants.

**Robert Dick**
Banco Chambers

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13 October 2025