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Outline of Submissions of the Respondent (to the proceeding) / Applicant (in Application to strike-out Statement of Claim)

No. VID404 of 2025

Federal Court of Australia

District Registry: Victoria

Division: General

ALON CASSUTO

Applicant

MARY KOSTAKIDIS

Respondent

INTRODUCTION

1. The Applicant in the principal proceeding seeks a declaration that the Respondent breached s 18C(1) of the *Racial Discrimination Act 1975* (Cth) (the **RDA**) and an order that the Respondent publish a corrective notice and costs.¹
2. By an interlocutory application filed on 16 May 2025, the Respondent applies to strike out the Amended Statement of Claim (**ASOC**) on the basis that parts of it, variously:
 - (i) cause embarrassment to the Respondent;
 - (ii) plead evidence as opposed to material facts; and
 - (iii) plead alleged facts of no relevance to the cause of action.

(Application)

3. These submissions concern the Application.

LAW ON SECTION 18C

4. The cause of action created by s 18C(1) of the RDA has three elements,² namely, (1) the relevant act was done otherwise than in private;³ (2) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate a person or a group of persons;⁴ and

¹ Amended Statement of Claim, [28].

² *Faruqi v Hanson* [2024] FCA 1264, [25] (Stewart J) (**Faruqi**); *Jones v Scully* [2000] FCA 1080; 120 FCR 243, [95] (Hely J) (**Jones v Scully**); *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16; 135 FCR 105, [63] (French J) (**Bropho**); *Bharatiya v Antonio* [2022] FCA 428, [16]-[18] (Colvin J) (**Bharatiya**).

³ Section 18C(1) RDA. See, also, s 18C(2) and (3).

⁴ Section 18C(1)(a) RDA.

(3) 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 persons in the group.⁵

Element One: Action otherwise than in private

5. The ASOC alleges facts satisfying the first element. In particular, it alleges that the Respondent posted two publicly available posts on a social media platform which, respectively, are said to be the acts constituting the breach of s 18C of the RDA.⁶

Element Two: Reasonably likely to offend, insult, humiliate or intimidate a person or a group of persons

In all the circumstances

6. The requirement that the assessment be made “in all the circumstances” requires that the social, cultural, historical and other circumstances attending the person or the people in the group be considered when assessing whether the offence, et cetera, was reasonably likely.⁷
7. Just what circumstances will be relevant will vary from case to case and will depend on the evidence.⁸
8. Where the allegation concerns a post on social media, a central circumstance will be the content of that post.⁹

A person and/or a group of people

9. The relevant assessment of the action (in this case, the post on the social medium) looks to the likely effect of the act upon a hypothetical person in the circumstances of the applicant or as a member of the relevant group.¹⁰
10. This is an objective inquiry.¹¹
11. The assessment needs to be undertaken by reference to “a person or group of people”.¹²
12. “The group of people” referred in s 18C(1)(b) is the same group of people referred to with the indefinite article in s 18C(1)(a). The group must be identified in some way with reference to the listed characteristics of race, colour or national or ethnic origin.¹³

⁵ Section 18C(1)(b) RDA.

⁶ ASOC, [18] and [20].

⁷ *Faruqi*, [219]; *Eatock v Bolt* (2011) FCA 1103; 97 FCR 261 at [257] (Bromberg J) (*Eatock*).

⁸ *Faruqi*, [219]; *Clarke v Nationwide News Pty Ltd* [2012] FCA 307; 201 FCR 389, [47] (Barker J) (*Clarke*).

⁹ *Faruqi*, [221].

¹⁰ *Faruqi*, [224] and *Bharatiya* at [17].

¹¹ *Faruqi*, [224]; *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615, [15] (Drummond J) (*Hagan*); *Creek v Cairns Post Pty Ltd* [2001] FCA 1007; 112 FCR 352, [12]-[13] (Kiefel J) (*Creek*); *Bropho*, [66]; *Jones v Scully*, [98]-[99]; *Clarke*, [46]; *Bharatiya*, [14], [17].

¹² *Faruqi*, [225]; *Eatock*, [243]; *Kaplan v Victoria (No 8)* [2023] FCA 1092, [507] (Mortimer CJ) (*Kaplan*).

¹³ *Faruqi*, [225]. Examples of identification of the group by reference to the listed characteristics as set out *Faruqi*, [226]-[231]. Examples are taken from *Creek*, [13]; *Jones v Toben* [2002] FCA 1150; 71 ALD 629,

13. Care should be taken not to identify the affected group either too narrowly or too broadly. A narrowly defined group may lead to the inquiry being focused on the subjective or emotional reaction of a particular person or a particular group. A too broadly defined group may result in truly offensive material not being so regarded by reasonable members of the broader group.¹⁴
14. Members of a group may be offended by an action because it involves an attack on a vulnerable sub-group. However, to define a group to include, for example, persons in Australia who are not recent immigrants or people of colour, is likely to be too wide. Members of a broad group who are not the subject or target of a social media post are not the people the legislation is intending to protect.¹⁵

The likely reaction

15. To prove the requisite likely reaction of a group of people, the applicant need not prove the likely reaction of the entire group but must at least prove the likely objective reaction or effect in most of the group.¹⁶ In *Faruqi*, Stewart J commented that this formulation (derived from *Kaplan*) was no different to the requirement that it is the reaction of an ordinary ‘hypothetical representative’ of the group which is to be considered (derived from *Eatoch*). However, Stewart J appeared to endorse the emphasis from the reasons in *Kaplan* that, in using the construct of the ordinary or reasonable member of the group, one must have in mind the whole of the group, or most or enough of its members, so that the inquiry is not too sensitive to the idiosyncratic.¹⁷
16. In determining the reasonably likely effect on a group of people, the inquiry is directed to a hypothetical reaction of the ordinary or reasonable member of the group excluding overly sensitive and overly robust members of the group.¹⁸
17. Where the likely reaction of an individual is being considered, it is necessary to take the perspective of a hypothetical reasonable victim in the position of applicant.¹⁹
18. The words “offend, insult, humiliate or intimidate” take their ordinary English meanings.²⁰ However, s 18C(1)(a) applies only to conduct that has profound and serious effects, not to be likened to mere slights²¹ (though the effect need not be at the extreme level of racial hatred²²).

[96] (Branson J) (*Jones v Toben*); *Jones v Scully*, [108]-[109]; *Eatoch*, [287]; *Clarke*, [191]; *Hagan*, [25] and [28]; *Bropho*, [35]; *Kaplan*, [509].

¹⁴ *Faruqi*, [229] and *Clarke*, [189]-[190].

¹⁵ *Faruqi*, [234]: it also seems that such a group would fall outside the scope of the section because of other elements of the cause of action.

¹⁶ *Kaplan*, [513]: this was noted in *Faruqi* at [236].

¹⁷ *Faruqi*, [236]; *Eatoch*, [250].

¹⁸ *Faruqi*, [236]-[237]; *Eatoch*, [251] (distinguishing *Kaplan*, [513]).

¹⁹ *Faruqi*, [237]; *Clarke*, [50] and *Creek*, [13].

²⁰ *Faruqi*, [238]; *Jones v Scully*, [102]-[103]; and *Clarke*, [66].

²¹ *Faruqi*, [239]; *Creek*, [16]; *Bropho*, [70]; *Eatoch*, [268]; *Kaplan*, [506]; and *Constantinou v Australian Federal Police* [2024] FCA 123, [21] (O’Byrne J) (*Constantinou*).

²² *Faruqi*, [239], citing *Kaplan*, [506].

19. The requirement of “reasonably likely” to have the requisite effect is satisfied if there is a real and not fanciful or remote chance of the relevant outcome.²³ This is to be assessed on the balance of probabilities on which the applicant has the onus of proof.²⁴

Element Three: Done Because of Race, et cetera

Because of

20. Pursuant to s 18B of the RDA, for an act to be “because of” a relevant attribute, the attribute need only be a factor in the respondent’s decision to act.²⁵ That is, the race or other attribute of the group found reasonably likely to have been offended, insulted, humiliated or intimidated must be shown to be “a reason” for the conduct.²⁶
21. The inquiry is as to the true reason or true ground for the conduct. A person whose conduct is complained of may not be a reliable witness as to their own actions. Their insight may be limited. Their true reason may, however, be apparent from what they said or did and there may be other circumstances which throw light upon the reason for their actions.²⁷
22. The requisite causal connection is between the conduct and the race or other attribute of the person or group reasonably likely to be offended, insulted, humiliated or intimidated.²⁸ The conduct is the conduct reasonably likely to cause offence et cetera.²⁹ Motive is not necessary but may be relevant, even centrally relevant.³⁰ The provision does not require that there be an intention to offend, et cetera, a person or a group of people in order for an act to be unlawful.³¹
23. The quality of offensiveness of statements might be used to deduce something about motive and may be sufficient to supply the requisite causal connection.³²

Race, colour or national or ethnic origin

24. The components of the phrase “race, colour or national or ethnic origin” overlap. Together, they comprise a composite expression with each component bringing its own meaning or emphasis to the somewhat elusive concept of race with the expression, itself, being intended to offer a broad and non-technical basis for protection against what might loosely be referred to as “racial discrimination”.³³

²³ Faruqi, [240] and Eatock, [261].

²⁴ Faruqi, [240]; Bropho, [65]; and Eatock, [261].

²⁵ Faruqi, [259]; Creek, [28]; *Toben v Jones*, [37] (Carr J) and [62] (Kiefel J) and [152] (Allsop J).

²⁶ Faruqi, [259]; and Kaplan at [526].

²⁷ Faruqi, [260]; *Toben v Jones*, [63]; *Bharatiya*, [18]; and Kaplan, [526] and [536].

²⁸ Faruqi, [261]; *Eatock*, [307]; *Bharatiya*, [19]; and Kaplan, [524].

²⁹ Faruqi, [261]; *Eatock*, [304] and Kaplan, [530] and [536].

³⁰ Faruqi, [261]; Kaplan, [526]; and *Toben v Jones*, [151].

³¹ Faruqi, [261] and *Bharatiya*, [14].

³² Faruqi, [262]; *Toben v Jones*, [67] and Kaplan, [541].

³³ Faruqi, [263] and *Macabenta v Minister for Immigration and Ethnic Affairs* [1998] FCA 1643; 90 FCR 202, 209-211 (Carr, Sundberg and North JJ) (*Macabenta*).

STRIKE OUT APPLICATIONS - PRINCIPLES

25. “The function of pleadings is to state with sufficient clarity the case that must be met ... In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision.”³⁴
26. In a civil proceeding, the function of a pleading “is to alert the other party to the case they need to meet (and hence satisfy basic requirements of procedural fairness) and further, to define the precise issues for determination so that the court may conduct a fair trial.”³⁵
27. In a case of complexity such as these proceedings, “it is critical that the pleading allege ‘all the material facts...but not the evidence by which the facts are to be proved.’^[36] Otherwise, the would-be analyst of the pleading is left swimming in a sea of evidentiary facts while trying to identify the material facts for each cause of action”.³⁷
28. In its primary meaning, a material fact is a fact that the plaintiff must prove to succeed in a claim for relief upon a cause of action.³⁸
29. In *Uber Australia Pty Ltd v Andrianakis*,³⁹ the Victorian Court of Appeal endorsed the following approach (taken by Hargrave J in an earlier matter):

[I]n considering pleading objections on the ground that the pleading is embarrassing, the Court should stand back and consider the pleading as a whole and, in that light, ask: does the case alleged give clear notice of the case to be met at trial?
30. Rule 16.02(1) of the *Federal Court Rules 2011* (the **Rules**) sets out what a pleading may contain and r 16.02(2) sets out what it may not contain.
31. Rule 16.21 provides:
 - (1) A party may apply to the Court for an order that all or part of a pleading be struck out on the ground that the pleading:
 - (a) contains scandalous material; or
 - (b) contains frivolous or vexatious material; or
 - (c) is evasive or ambiguous; or
 - (d) is likely to cause prejudice, embarrassment or delay in the proceeding; or
 - (e) fails to disclose a reasonable cause of action or defence or other case appropriate to the nature of the pleading; or

³⁴ *Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279, 286 (*Banque Commerciale*). See also *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2017] FCAFC 50, [36] (*CFMEU*).

³⁵ *Wheelahan v City of Casey* (No 2) [2013] VSC 316, [25(b)] (*Wheelahan*).

³⁶ In *Mio Art*, Jackson J was referring to r 149(1)(b) of the Uniform Civil Procedure Rules 1999 (Qld). The equivalent is r 16.02(d) of the Federal Court Rules 2011 (Cth).

³⁷ *Mio Art Pty Ltd v Macequest Pty Ltd & Ors* [2013] QSC 211, [60] (*Mio Art*).

³⁸ *Mio Art*, [64].

³⁹ *Uber Australia Pty Ltd v Andrianakis* [2020] VSCA 168; 61 VR 580, [53]-[54] (*Uber*), citing *Babcock & Brown (No 2)* [2017] VSC 556, [17].

- (f) is otherwise an abuse of the process of the Court.
- (2) A party may apply for an order that the pleading be removed from the Court file if the pleading contains material of a kind mentioned in paragraph (1)(a), (b) or (c) or is otherwise an abuse of the process of the Court.
32. Rules 16.02 and 16.21 “must be interpreted and applied in light of s 37M of the Federal Court of Australia Act 1976 (Cth), which provides that the overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible”.⁴⁰
33. In *KTC v David*,⁴¹ Wigney J summarised the cautious approach to the use of the power to strike out. It should, his Honour said, “be exercised only in plain and obvious cases, where no reasonable amendment could cure the alleged defect or deficiency^[42]...The power is discretionary and should be employed sparingly and only in a clear case ‘lest one deprive a party of a case which in justice it ought to be able to bring’^[43].”
34. A strike out application is not directed to the underlying prospects of success of the proceedings.⁴⁴

Embarrassment

35. In *KTC v David*,⁴⁵ Wigney J set out the ways in which a pleading is likely to cause prejudice or embarrassment, for the purposes of r 16.21(1)(d). These include:
- (a) if the pleading is “susceptible to various meanings, contains inconsistent allegations, includes various alternatives which are confusingly intermixed, contains irrelevant allegations or includes defects which result in it being unintelligible, ambiguous, vague or too general”,⁴⁶
 - (b) if this is the case then the pleading “could equally be characterised as evasive or ambiguous for the purposes of r 16.21(1)(c) of the Rules”;⁴⁷
 - (c) a pleading may be embarrassing if it contains narrative prolixity or irrelevancies to the point that it is not a pleading to which the other party can reasonably be expected to plead. A party cannot be expected to respond to mere context, commentary, “history, narrative material or material of a general evidentiary nature”;⁴⁸

⁴⁰ *Chandrasekaran v Commonwealth of Australia (No 3)* [2020] FCA 1629, [101] (**Chandrasekaran**).

⁴¹ *KTC v David* [2022] FCAFC 60, [125] (**KTC v David**). See also *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd* (1994) 217 ALR 226; [1994] FCA 636, 236.

⁴² Citing *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd* (1994) 217 ALR 226; [1994] FCA 636, 236.

⁴³ *Citing Trade Practices Commission v Pioneer Concrete (Qld) Pty Ltd* (1994) 52 FCR 164, 175.

⁴⁴ *Spencer v Commonwealth* (2010) 241 CLR 118, [23].

⁴⁵ *KTC v David*, [119]-[123].

⁴⁶ *KTC v David*, [120].

⁴⁷ *KTC v David*, [120].

⁴⁸ *KTC v David*, [121].

- (d) “embarrassing” includes where “it is plain that the pleading party cannot lawfully call any evidence at the hearing to substantiate the pleading”;⁴⁹
 - (e) a “reasonable cause of action”, in r 16.21(1)(e) of the Rules, refers to “a cause of action that has some chance of success having regard to the allegations pleaded. A cause of action cannot be struck out merely on the basis that it appears to be weak”;⁵⁰
 - (f) a pleading may also be embarrassing “even though it contains allegations of material facts sufficient to constitute a cause of action, if the material facts alleged are couched in expressions which leave difficulties or doubts about recognising or piecing together what is referred to.”⁵¹
36. Relevantly, a “pleading which sets forth mere assertions or mere conclusions may be struck out. A pleading which sets out facts at too great a level of generality – or, conversely, with insufficient particularity – may also be struck out.”⁵²
37. In relation to the pleading motives, intentions or states of mind, relevant in these proceedings, in *Quinlan v ERM Power Ltd & Ors*,⁵³ Bowskill J observed:

It is not sufficient for a plaintiff simply to plead facts somewhere in the statement of claim; later to plead in a conclusory way that a party(ies) had a particular motive, intention or other state of mind; and contend that the other party(ies) are on notice, because of the general pleading, of what is to be alleged against them. ...It is not appropriate to plead a whole lot of facts, and leave it for the other parties to guess which are relied upon to support the pleaded inference, and for the court ultimately to “reach the correct decision”, irrespective of the parties’ arguments: it is for the party making the allegations to identify the case which it seeks to make and to do that clearly and distinctly”. This is all the more essential where the allegations are of fraudulent or serious misconduct, in respect of which more precision is required than in other cases.

Evasive and ambiguous

38. A pleading that is likely to cause prejudice or embarrassment for the purposes of r 16.21(1)(d) of the Rules can equally be characterised as evasive or ambiguous for the purposes of r 16.21(1)(c) of the Rules.⁵⁴

Pleading evidence

⁴⁹ *KTC v David*, [122].

⁵⁰ *KTC v David*, [123].

⁵¹ *People with Disability Australia Incorporated v Minister for Disability Services* [2013] NSWSC 467, [32] (*People with Disability*).

⁵² *Takemoto v Moody’s Investor Service Pty Limited* [2014] FCA 1081, [23] (*Takemoto*).

⁵³ *Quinlan v ERM Power Ltd* [2021] QSC 35, [65] (*Quinlan*). It is true that her Honour was referring to specific rules under the UCPR. While there is no absolute equivalence with the Federal Court Rules, the general observations carry force in the present context.

⁵⁴ *Chandrasekaran*, [105].

39. Rule 16.02(1)(d) of the Rules states that pleadings must “state the material facts on which a party relies that are necessary to give the opposing party fair notice of the case to be made against that party at trial, **but not the evidence by which the material facts are to be proved...**’ (our emphasis).

Strike out issues – RDA

40. There is useful jurisprudence relating to applications to strike out claims brought under the RDA.
41. In *Eatock*⁵⁵ the pleadings did not specify with sufficient clarity that claims of group offence as well as claims of personal offence were being pressed for each of the applicant and her witnesses. The amended statement of claim (the relief sought, and concluding allegations) were said to be “couched in collective rather than individual terms”.
42. Therefore, it was found that the claims were not clearly raised by the pleadings and “that the personal offence claims contended for by Ms Eatock were raised too late and [as a consequence] Ms Eatock ought not be permitted to pursue them in this proceeding”.⁵⁶
43. Because of the failure of the personal offence claims, the determination of the group offence claim would not rely on the “perspective of any particular individual ... [to determine whether] the newspaper articles were reasonably likely to offend. That determination needs to be made from the perspective of the ‘ordinary’ or ‘reasonable’ member of the group in respect of which the claim was made.”⁵⁷
44. An example of failure in pleading with adverse consequences is found in *Shurat Hadin, Israel Law Centre v Lynch (No 2)*.⁵⁸ In *Hadin (No 2)* the Court considered ss 9, 11, 13, 15, 16 and 17 of the RDA. The particulars within the statement of claim were struck out for various reasons⁵⁹ including: “adding nothing” and in that sense being “legally embarrassing”; “failing to plead material facts rather than conclusions”; unclear identification of acts alleged by the applicant to be that basis of the unlawful conduct; repetitive and, therefore, defective; and containing “impermissible cross-referencing”.
45. Robertson J observed that “the relevant question” is whether the facts on which the applicant relies are delineated such that “the respondent could fairly understand them and respond to them and, when the respondent did respond to them, the Court would then be in the position to decide whether the fact was or was not made out.”⁶⁰

⁵⁵ *Eatock*, [269]-[277].

⁵⁶ *Eatock*, [276].

⁵⁷ *Eatock*, [278].

⁵⁸ *Shurat Hadin, Israel Law Centre v Lynch (No 2)* [2014] FCA 413 (*Hadin (No 2)*).

⁵⁹ *Hadin (No 2)*, [80]-[86].

⁶⁰ *Hadin (No 2)*, [63].

The offending conduct

46. The ASOC identifies as the acts in breach of s 18C of the RDA two posts on the Respondent's social media account on X.⁶¹ The ASOC identifies the two posts as a post made on 4 January 2024 (**the 4 January Post**)⁶² and a post made on 13 January 2024 (**the 13 January Post**) (collectively, **the Posts**).⁶³
47. The conduct identified within the 4 January Post as constituting the offending conduct has four factual elements:
- (a) words by the Respondent: "The Israeli govt getting some of its own medicine. Israel has started something it can't finish with this genocide" (the first factual element).⁶⁴
 - (b) the reposting of a post by another X account, identified as @CensoredMen, (identified by the ASOC as "the First Nasrallah Post") containing the words: "The leader of Hezbollah, Hassan Nasrallah, tells the Israelis they will never be welcome in the region. "Here you don't have a future, from the river to the sea the land of Palestine is for the Palestinian people, and the Palestinian people only ..." (the second factual element).⁶⁵
 - (c) a link (as part of the First Nasrallah Post) to a video of a speech of Mr Nasrallah ("the Nasrallah Video") which was translated into English (the third factual element) and contained the words: "The number of military vehicles and the number of tanks that are being destroyed every day, the psychological situation, Yediot Ahronot said that one of the results of the Al-Asqa Flood battle is that 300,000 new people have sought therapy -have sought psychological therapy. So, you want to stay here, that's very difficult. It's going to be very difficult for you. if you want to be secure, you have an American passport, go back to the United States. You have a British passport go back to the UK. Here, you don't have a future, and from the river to the sea, the land of Palestine is for the Palestinian people, the mujahideen." (the quoted words being the fourth factual element)⁶⁶
48. The conduct identified within the 13 January Post as constituting the offending conduct has two factual elements:
- (a) The reposting of a post by another X account, identified as richardmedhurst, (identified by the ASOC as "the Second Nasrallah Post") containing the words: "Nasrallah's message to Israelis: 'If you want to be secure and safe, you have a US passport, go back to the US. You have a British passport, go back to the UK. Here you don't have a future. From the river to the sea, the land of Palestine is for the Palestinian people only.'"

⁶¹ ASOC at [18] and [20].

⁶² ASOC at [18].

⁶³ ASOC at [20].

⁶⁴ ASOC at [18(a)].

⁶⁵ ASOC at [18(b)(i)].

⁶⁶ ASOC at [18(b)(ii)].

(b) A link to the Nasrallah Video.⁶⁷

49. As noted above, where a post on social media constitutes the alleged action, the content of that post will be central in determining whether a person or a group of people are likely to be offended, or insulted, et cetera.⁶⁸ The alleged acts also play a central role in determining the relevance of what are said to be other circumstances pertaining the likelihood of the impact on the identified person or group.

The person or group of people: paragraphs 3, 4, 19, 21, 22, 23, 25 and 26

50. The ASOC does not allege either a person or a group of people who are the subject and victims of the alleged offending conduct.
51. The ASOC at paragraph 3 alleges that there are approximately 115,000 people in Australia who identify as Jewish.
52. In paragraph 4, the ASOC alleges that the vast majority of Australian Jews⁶⁹ have three psychological characteristics, namely, they consider themselves to be Zionist;⁷⁰ feel a personal connection to the State of Israel and the Israeli people;⁷¹ and have concern for the safety of Israelis.⁷² The meaning of or identity of “the vast majority of Australian Jews” is not specified.
53. In paragraph 19, the ASOC alleges that the audience of the 4 January Post was reasonably likely to include people of Israeli origin in Australia⁷³ and/or people of Jewish ethnic origin and/or race in Australia.⁷⁴ These alternative groups of people (who, collectively, are identified as “a Jewish and/or Israeli audience”) are identified differently to the vast majority of people in Australia who identify as Jewish and/or the vast majority of Australian Jews alleged to have certain psychological characteristics in paragraph 4 of the ASOC.
54. Paragraph 21 of the ASOC uses the concept of the Jewish and/or Israeli audience to allege that that audience was also reasonably likely to be part of the audience of the 13 January post.
55. Paragraphs 22 and 25 allege that the 4 January Post and the 13 January Post, respectively, were reasonably likely to offend, insult, humiliate and/or intimidate Australian Jews and/or Israelis in Australia. Australian Jews, that is, who may or may

⁶⁷ Paragraph [20] of the ASOC does not identify what content of the Nasrallah video, if any, forms part of the second post for the for the purpose of the ASOC. The failure creates the ambiguity that either the Applicant relies on the mere posting of a [any] video of a speech by Mr Nasrallah as giving rise to the cause of action or the Applicant relies on every word in the speech by Mr Nasrallah without specifying how that is likely to give rise to offence, insult, et cetera.

⁶⁸ *Faruqi*, [221].

⁶⁹ Presumably, Australian Jews are the same group of people as people in Australia who identify as Jewish. This is, however, not made clear.

⁷⁰ ASOC at [4(a)]; “Zionist” is not defined in the ASOC.

⁷¹ ASOC at [4(b)].

⁷² ASOC at [4(c)].

⁷³ ASOC at [19(a)].

⁷⁴ ASOC at [19(b)].

not be the 115,000 people in Australia who identify as Jewish. Therefore, a vast majority of those persons may or may not have the psychological characteristics alleged in paragraph 4.

56. Further, Israelis in Australia are a different category of persons to Australian Jews. There is no allegation that Israelis in Australia have the psychological characteristics alleged in paragraph 4.
57. Further, neither Australian Jews (or a vast majority of them) nor Israelis in Australia are alleged as a group to be among the audiences of either the 4 January Post or the 13 January Post.
58. Paragraph 22 (and paragraph 25), as one of their particulars,⁷⁵ allege the connection of the Australian Jewish population (a new term) to the State of Israel and the safety of Israelis “as set out in paragraph 4 above”. This does not assist in identifying the group of people who are said to be the subject of the conduct said to be in breach of s 18C of the RDA.⁷⁶
59. Paragraphs 23 and 26 of the ASOC allege that the Respondent made the 4 January and 13 January Posts because of the race or national origin of Israelis and/or Jews. Since s 18C(1)(b) of the RDA requires, as an element of the unlawful conduct, that the act is done because of the race, colour or national or ethnic origin of the other person or some or all of the people in the group, it is essential that the particular requisite characteristic of the group be identified, clearly. The ASOC has not identified with any precision the group or the characteristic which is relied upon. It is not clear whether the characteristic is identification as Jewish; identification as Jewish and the possession of certain relevant psychological characteristics; people of Israeli national origin (who may not identify as Jewish); people of Jewish ethnic origin and/or race (who may not identify as Jewish); Israelis in Australia (who, presumably are persons who have Israeli citizenship but who may not identify as Jewish or be ethnically Jewish).
60. The embarrassment to the Respondent caused by the failure to identify either a group or a requisite characteristic is accentuated by the wide and alternative pleading of the Respondent’s reason for posting each post.⁷⁷ The term “race or national origin or ethnic origin of Israelis and/or Jews” is unlimited in terms of location or nationality. The Respondent does not know whether the alleged reason is Swedishness, as may be the reason in the case of a Jewish person who is ethnically Swedish and a Swedish citizen. Equally, the collection of multiple alternative categories is broad enough to comprehend Arab ethnicity in the case of an Arab person who follows the Jewish faith or an Arab person who is a citizen of Israel.
61. Further, nowhere is it alleged that the alleged conduct is said to be unlawful because of its impact on the Applicant. Just as the group is not identified, the ASOC does not identify the Applicant as the “the other person” the subject of the alleged conduct for the purposes of s 18C(1)(a).⁷⁸

⁷⁵ See ASOC at [22(a)]: ASOC at [25] adopts the particulars to [22].

⁷⁶ Note that self-identification as a Zionist in [4(c)] of the ASOC is not subsequently referred to by the ASOC.

⁷⁷ *KTC v David*, [119]-[121] and *Bartlett*, [25]. See also *Eatock*, [269]-[267] on the broader issue of lack of clarity.

⁷⁸ *Eatock*, [269]-[279].

62. Paragraphs 19, 21, 22, 23, 25 and 26 of the ASOC each use a plethora of allegations in multiple alternatives. As will be discussed with regard to other paragraphs of the ASOC,⁷⁹ this use of multiple alternatives, often combined with multiple particulars, makes it impossible for the Respondent to know the case that is actually being advanced and is, therefore, embarrassing.⁸⁰
63. In the light of the foregoing, paragraphs 3, 4, 19, 21, 22, 23, 25 and 26 of the ASOC should be struck out as embarrassing.
64. It follows from such an order that paragraphs 24 and 27 of the ASOC should be struck out as each is dependent on one or more of the paragraphs referred to in the preceding paragraph of these submissions.

The group and awareness of the 4 and 13 January Posts: paragraphs 19, 21, 22 and 25

65. The actions of the Respondent said to constitute the breach of s 18C are two posts of material on the social medium, X.⁸¹
66. Paragraphs 19 and 21 of the ASOC allege, respectively in respect of the 4 and 13 January Posts, that the audience of each post was likely to include [some] people of Israeli national origin in Australia and/or [some] people of Jewish ethnic origin and/or race in Australia.
67. In *Kaplan*, it was said that an applicant must prove the requisite objective likely reaction or effect in most of the group.⁸² In *Faruqi*, some comment was made on the statement in *Kaplan* with Stewart J placing emphasis on the reaction of the hypothetical reasonable or ordinary person in the group.
68. In the present matter, paragraphs 22 and 25 of the ASOC, arguably, plead that the offending conduct was reasonably likely to have some or all of the requisite effects on [all] Australian Jews and/or Israelis in Australia.
69. Persons of whatever race or ethnic or national origin can only be affected in the requisite manner if they are aware of the respective posts and their respective content. Any relevant group of persons the subject of a breach of s 18C must be delineated by an awareness of the respective post and its contents.
70. This is a particularly acute issue in the present matter where the alleged offending actions are comprised of posting relatively esoteric news on the Respondent's individual social media account. This may be contrasted with the events in *Faruqi* where, although the initial post was on a social medium, a very broad spectrum of people became aware of it through widespread reporting on many mainstream media outlets. By way of illustration, if every one of the Respondent's 28,000 followers⁸³ read and was aware of the content of one or both of the posts and this audience contained

⁷⁹ *Infra*, [212]-[223].

⁸⁰ *KTC v David*, [45]: "various alternatives which are confusingly mixed".

⁸¹ ASOC at [18] and [20].

⁸² At [513].

⁸³ ASOC at [2(b)].

the same proportion of people in Australia who identify as Jewish⁸⁴ as persons who identify as Jewish from the Australian population,⁸⁵ the number of persons who identify as Jewish who were aware of one or both of the posts would be a total of 120 people.

71. The vagueness and resultant embarrassment arising from the ASOC's failure to identify, clearly or precisely,⁸⁶ the group of persons for the purpose of s 18C(1)(c) is exacerbated by:
 - (a) the absence of any allegation as to which persons of Israeli national origin in Australia and/or [some] people of Jewish ethnic origin and/or race in Australia were aware of the Posts; and
 - (b) the failure to restrict the allegations of requisite impacts in paragraphs 22 and 25 to persons who, in fact, formed part of the audience of the Posts.
72. In addition to the general embarrassment caused by these failures of the ASOC, the failure to identify precisely *either* the relevant audience of the respective posts *or* the alleged affected group makes it impossible for the Respondent to conduct her defence in terms of identifying the reasonable or ordinary members of the group of persons or to determine whether "most of the group" were likely to be relevantly affected.⁸⁷
73. It follows that, because of this embarrassment, paragraphs 19 and 21 and 22 and 25 of the ASOC should be struck out.

The pleading of evidence as opposed to material facts: paragraphs 4, 5, 9 and 14

74. The particulars to paragraph 4 of the ASOC contain neither material facts nor particulars of material facts.
75. The material described as various forms of published research, if it is relevant and admissible, is evidence.
76. The particulars to paragraph 4 of the ASOC should be struck out.⁸⁸
77. Paragraph 5 of the ASOC alleges that Hezbollah is a terrorist organisation based in Lebanon. The allegation can only be relevant if it is intended to be an allegation of fact using the ordinary meaning of "terrorist".
78. The particulars to paragraph 5 of the ASOC are to the effect that the organisation was listed under Commonwealth legislation on a date in 2021.
79. The listing does not constitute particulars of the allegation in paragraph 5 of the ASOC. While it is dubious whether the fact of the listing would amount to admissible evidence to prove the alleged status of the organisation, the particulars are, at best, evidence.

⁸⁴ ASOC at [3]: 115,000.

⁸⁵ Over 27 million: see [Australia's population officially passes 27 million | Australian Bureau of Statistics](https://www.abs.gov.au/media-centre/media-releases/australias-population-officially-passes-27-million) <<https://www.abs.gov.au/media-centre/media-releases/australias-population-officially-passes-27-million>>.

⁸⁶ *Eatock*, [269]-[277].

⁸⁷ *People with Disability*, [32]; *Hadin (No 2)*, [63].

⁸⁸ Rule 16.02(1)(d).

80. The particulars to paragraph 5 of the ASOC should be struck out.⁸⁹
81. Paragraph 9 of the ASOC alleges that Hamas is a terrorist organisation. The particulars to paragraph 9 are of the same category as the particulars to paragraph 5. The particulars to paragraph 9 should also be struck out.⁹⁰
82. The particulars to paragraph 14 of the ASOC refer in the first three paragraphs to a series of reports by the Executive Council of Australian Jewry as particulars of an allegation of an increase in racism in Australia towards Jews and Israelis in Australia.
83. The assertion of reliance on particular reports does not particularise a material fact and should be struck out.⁹¹ The subsequent paragraphs of the particulars do allege facts capable of being particulars and do not need to be struck out on this basis.⁹²

The pleading of alleged facts of no relevance to the cause of action: paragraph 14

84. Paragraph 14 of the ASOC alleges that, since an incident on 7 October 2023 described in the ASOC as the October 7 attack,⁹³ there had been a significant increase in anti-semitism and/or racism towards Jews and Israelis in Australia.

Irrelevance through anachronism

85. The events alleged in paragraph 14 of the ASOC are relied on as particulars of paragraphs 22,⁹⁴ and 25⁹⁵ of the ASOC. However, the particulars of paragraph 14 of the ASOC include events taking place subsequent to both 4 and 13 January 2024. As a result, events which had not yet occurred could have no influence in whether a group of persons were likely to be offended or otherwise emotionally affected by the actions of the Respondent.
86. The anachronistic nature of the allegations include: events occurring on unspecified dates in paragraph (b); an event occurring in February 2024 in paragraph (c); events occurring on 6 December 2024 in paragraph (d); events occurring on unspecified dates in paragraph (e); an event occurring in January 2025 in paragraph (f); and an event occurring in paragraph (g), in each case, of the particulars to paragraph 14 of the ASOC. In addition, the unalgebraically specified paragraph that precedes the algebraically defined paragraphs of the particulars of paragraph 14 alleges a report of events said to

⁸⁹ Rule 16.02(1)(d).

⁹⁰ Rule 16.02(1)(d).

⁹¹ Rule 16.02(1)(d).

⁹² As discussed in the paragraphs which follow ([85]-[93]), [14] of the ASOC is irrelevant and should be struck out for that reason. In determining questions of relevance of parts of a pleading, the Court will be guided by what was said in *Miro Art*, noted above, namely, ‘a material fact is a fact that the plaintiff must prove to succeed in a claim for relief upon a cause of action’: *Miro Art*, [64].

⁹³ See [11] of the ASOC.

⁹⁴ The 4 January Post was reasonably likely to offend, et cetera, Australian Jews and/or Israelis in Australia.

⁹⁵ The 13 January Post was reasonably likely to offend, et cetera, Australian Jews and/or Israelis in Australia.

occur up to 30 September 2024.⁹⁶ The undefined or anachronistic allegations should be struck out from the particulars of paragraph 14 of the ASOC.⁹⁷

The relevance of alleged incidents of antisemitism and/or racism towards Jews and/or Israelis in Australia

87. In the present case, the contents of the 4 and 13 January Posts are central in determining what other factual circumstances may be relevant to whether a person or a group of people are likely to be offended, or insulted, et cetera.⁹⁸ For a different factual circumstance to be relevant to whether a person or a group of people are likely to be offended, or insulted, et cetera, by a statement on social media, there must be some logical coherence between the contents of the statement and the other circumstance relied upon.
88. As has been noted above, paragraphs 18 and 20 of the ASOC allege that the posts, between them, contain a comment about the Israeli government getting some “of its own medicine” for conducting a genocide in Gaza; a report of a speech by the leader of a Lebanese terrorist organisation suggesting that the Israel army is doing poorly in a conflict and that Israelis with dual citizenship would be well-advised to return to the countries from whom they hold their other citizenship.
89. Sections 18 and 20 do not allege any reference in the two Posts to antisemitic or racist statements or actions in Australia. The ASOC does not allege that the Applicant took part in, approved of, or had any role to play in, those incidents which are alleged to have taken place before 4 or 13 January 2024 (the dates of the posts).
90. The ASOC does not seek to elaborate any logical connection between a series of incidents in Australia (in which the Respondent is not alleged to have played any part) and the reporting of a speech by the leader of a Lebanese based organisation. Neither does any such logical connection exist.
91. In addition, there is no allegation that a person or any member of any group of persons alleged to be the subject of the conduct in breach of s 18C of the RDA was aware of the antisemitic and/or racist incidents alleged in paragraph 14 of the ASOC.
92. It follows that paragraph 14 of the ASOC plays no part in establishing a cause of action pursuant to s 18C of the RDA.⁹⁹
93. The whole of paragraph 14 should be struck out.¹⁰⁰

Annexure A and paragraphs 16 and 17

94. Paragraph 16 of the ASOC alleges that the Respondent has, since 7 October 2023, posted on the social medium X about Israel and/or Jews. The particulars to paragraph

⁹⁶ This paragraph pleads evidence and has been discussed above ([83]) as being susceptible to being struck out for that reason.

⁹⁷ *KTC v David*, [119]-[121].

⁹⁸ *Supra*, [8]; *Faruqi*, [102].

⁹⁹ *KTC v David*, [119]-[121].

¹⁰⁰ *Miro Art*, [64]

16 refer to a compilation of the Respondent's posts as detailed in Annexure A to the ASOC. Annexure A consists of 45 pages of what are alleged to be posts by the Respondent.

95. Posting about Israel and/or Jews, per se, can have no relevance to whether or not the offensive conduct alleged against the Respondent is in breach of s 18C of the RDA. Paragraph 16 should be struck out as not going to establish a cause of action in the proceedings.
96. Paragraph 17 of the ASOC also particularises its allegations by reliance, en bloc, on the posts in Annexure A.
97. Paragraph 17 and Annexure A are relied upon as particulars of the allegations in paragraphs 22,¹⁰¹ 23,¹⁰² 25¹⁰³ and 26.¹⁰⁴
98. Paragraph 17(a) of the ASOC alleges that the Respondent's posts (in Annexure A) have spread and endorsed antisemitic conspiracy theories and sets out four examples of such antisemitic conspiracy theories.¹⁰⁵
99. The allegation that the Respondent's posts on X spread and endorsed antisemitic conspiracy theories is not an allegation of material facts.¹⁰⁶ It contains a number of conclusions including that an unspecified one or more of the posts were to a certain effect (an imputation); that the alleged effect of an unidentified one or more of the posts included endorsement of the effect of its content (a further imputation); that the alleged effect amounted to a conspiracy theory (an undefined and ambiguous concept); and that the alleged effect (by being a conspiracy theory) was antisemitic.¹⁰⁷
100. As is discussed further, below,¹⁰⁸ because of the structure used in paragraph 17, the Respondent is embarrassed by not knowing which post in the 45 pages is relied upon as the basis of the conclusions alleged in paragraph 17(a).¹⁰⁹ Even if the Respondent guesses which post is being referred to, the pleading does not attempt to show how the content (or parts of it) of the post is relied upon to establish the conclusions pleaded in paragraph 17.¹¹⁰

¹⁰¹ That the 4 January Post was reasonably likely to offend, et cetera, Australian Jews and/or Israelis: see [(k)] of the particulars.

¹⁰² The Respondent made the 4 January Post because of the race or national or national or ethnic origin of Israelis and/or Jews: see [(d)] of the particulars.

¹⁰³ That the 13 January Post was reasonably likely to offend, et cetera, Australian Jews and/or Israelis.

¹⁰⁴ The Respondent made the 13 January Post because of the race or national or national or ethnic origin of Israelis and/or Jews: see [(e)] of the particulars.

¹⁰⁵ In summary, the four examples are Israel has control of or significant influence over US political institutions, US media, UK politics; and the narrative in the western world ([17(a)(i)]); Israel assassinated President John F Kennedy ([17(a)(ii)]); there was an alliance and collaboration between Zionists and the Nazis ([17(a)(iii)]); and Israeli Mossad agents were involved in the 9/11 attacks.

¹⁰⁶ *Takemoto*, [23].

¹⁰⁷ *Takemoto*, [23].

¹⁰⁸ *Infra*, [111]-[112].

¹⁰⁹ The said conclusions may be regarded as imputations said to arise from one or more of 65 posts on social media without any attempt to identify the particular post or particular words said to give rise to any particular imputation.

¹¹⁰ *KTC v David*, [120]; *People with Disability*, [32].

101. Although paragraph 17(a) of the ASOC characterises the posts as having the effect of spreading and endorsing antisemitic conspiracy theories, it is not alleged in the ASOC that the content of any of the Respondent's posts in Annexure A is false. It is submitted it is an essential component of using the posts in Annexure A to establish a causal relationship between the 4 and 13 January Posts and the requisite emotional effect on the reasonable members of the affected group of people that the posts referred to in paragraph 17 and contained in Annexure A be false.
102. Similarly, it is essential to any attempt to use the posts in Annexure A to establish a causal relationship between the Respondent's actions in posting the 4 and 13 January Posts (on the one hand) and the race or national or ethnic origin of members of the affected group of people (on the other) that the posts referred to in paragraph 17 and contained in Annexure A be false.
103. Further, it is not alleged in the ASOC that any members of the affected group of people were aware of any of the posts in Annexure A. Unless the relevant person or members of the group were aware of the content of the posts in Annexure A, such posts can have no relevance to the causal relationship between the 4 and 13 January Posts and the requisite emotional effect on the reasonable members of the affected group of people.
104. Paragraphs 17(b)-(f) allege different conclusions¹¹¹ as to the effect of unspecified posts contained in Annexure A (imputations).¹¹² Although paragraphs 17(b)-(f) do not assert that the conclusions amount to conspiracy theories or are antisemitic, the ASOC still fails to allege that any of the conclusions alleged to arise from unspecified posts in Annexure A were false.
105. Neither is any other person or member of a group of people alleged to be aware of any of the posts in Annexure A.
106. Paragraph 17 and Annexure A should be struck out both for their failure to allege material facts and for their failure to play any part in establishing a cause of action pursuant to s 18C of the RDA.¹¹³ Paragraph (k) of the particulars in paragraphs 22 and 25 of the ASOC should also be struck out on the same basis.¹¹⁴

Annexure A and the postdating of the 4 and 13 January Posts

107. In the ASOC, paragraph (k) of the particulars to paragraph 22 of the ASOC (and, by reference, the particulars to paragraph 25) have been amended so that the particular (in each case) only draws upon the posts in Annexure A which predate the respective post.

¹¹¹ *Takemoto*, [23].

¹¹² Suggested that Zionism is equivalent to Nazism [17(b)]; suggested that Israel is a supremacist state [17(c)]; suggested that Israel was complicit in slaughtering its own citizens in the October 7 attack [17(d)]; sought to deny and/or justify the actions of Hamas in perpetrating the October 7 attack [17(e)]; and characterised Israel's response to the October 7 attack as being genocidal and akin to the actions of the Nazis in carrying out the holocaust [17(f)].

¹¹³ *Mio Art*, [64].

¹¹⁴ *KTC v David*, [119]-[121]; *Bartlett*, [25]; *Takemoto*, [23]

108. Only posts 1-5 in Annexure A predate the post constituting the offending conduct alleged in paragraph 18 of the ASOC, namely, the 4 January Post.¹¹⁵ Only posts 1-8 in annexure A predate the 13 January Post.¹¹⁶
109. None of the posts in Annexure A to the ASOC which predate the 4 January or the 13 January Posts are capable of giving rise to the imputations alleged in paragraphs 17(a)(i)-(iv), (c) or (d).
110. This amendment to which of the posts in Annexure A are relied upon to make out the likely offence, et cetera, in paragraphs 22 and 25 adds another layer of embarrassment and unfairness to paragraph 17 of the ASOC. It is implied that it is the imputations that arise (en globo) from the posts in Annexure A that cause the said posts to be relevant to the causes of the requisite emotional states for the purpose of s 18C of the RDA. However, once at least 51 of the posts are declared to be no longer relevant to paragraphs 22 and 25, the Respondent is left to work out for herself which of the imputations alleged in paragraph 17 are still relied upon for the purposes of making out the allegations in paragraphs 22 and 25. This is embarrassing and provides another reason why paragraph 17, Annexure A and particular (k) to paragraphs 22 and 25 (in each case) of the ASOC should be struck out.¹¹⁷

Imputations derived en globo from posts in Annexure A

111. The imputations alleged in paragraph 17 are said, without more, to have arisen from one or more of the 65 posts in Annexure A.¹¹⁸ Where words are said to give rise to serious imputations, it is important that the particular words said to do so are identified with particularity.
112. Paragraph 17 of the ASOC not only fails to identify the words giving rise to each imputation, it hides the words among 45 pages of writing and among sixty-one separate communications. This is an impermissible manner of pleading imputations and is embarrassing in the extreme. Paragraph 17 and Annexure A should be struck out for this specific reason, as well.¹¹⁹

Historical Events: paragraphs 5, 6, 7, 8, 9, 10, 11, 12 and 13

113. Each of the above paragraphs alleges historical events.
114. The events alleged in paragraphs 7, 8, 11 and 13 are relied upon as particulars of paragraphs 22 and 25 of the ASOC which allege that the 4 and 13 January Posts were reasonably likely to offend, et cetera, Australian Jews and/or Israelis in Australia.

¹¹⁵ Post 6 in Annexure A to the ASOC is the 4 January Post, itself.

¹¹⁶ Post 9 in Annexure A is the 13 January Post, itself.

¹¹⁷ *People with Disability*, [32]; *Quinlan*, [65].

¹¹⁸ The underlying logic appears to be that, because the Respondent has said something which is not the subject of the proceedings or alleged to be in breach of s 18C of the RDA, a person or a group of people is more likely to be offended or relevantly emotionally affected by something said which **is** alleged to be in breach of s 18C. The logic is questionable and seems to contradict the approach of s 18C that the test for likely impact on the affected group is objective.

¹¹⁹ *People with Disability*, [32]; *Quinlan*, [65].

115. Paragraphs 5, 6, 9 or 10 are not, otherwise, relied upon in the ASOC. It follows that paragraphs 5, 6, 9 and 10 play no part in establishing a cause of action in the proceedings and should be struck out for that reason.¹²⁰
116. None of paragraphs 5-13 of the ASOC are said to be known to any other person or a group of persons said to be the subject of the conduct in breach of s 18C of the RDA. Unless the relevant person or members of the group were aware of the historical events alleged in paragraphs 5-13, those events can have no relevance to the causal relationship between the 4 and 13 January Posts and the requisite emotional effect on the person or the reasonable members of the affected group of people alleged in paragraphs 22 and 25 of the ASOC.
117. It may be observed that very many people were aware that a significant event took place in the Middle East on 7 October 2023, although this may not extend to the precise manner of the event alleged in paragraphs 11(a)-(e). Nonetheless, it is essential that knowledge of even a well-known event among the victims of a breach of s 18C be alleged and ultimately proved for the cause of action to be made out.
118. However, it may also be observed that the ASOC alleges and relies upon facts that are quite obscure. These include statements made by Mr Nasrallah in 1997,¹²¹ 2000,¹²² 2002,¹²³ 2013¹²⁴ and 2020.¹²⁵
119. Similarly, the particulars to paragraph 10 of the ASOC refers to Hamas charter documents and speeches of Hamas officials which would not be broadly known.
120. It follows that paragraphs 5-13 of the ASOC should be struck out for failure to allege knowledge, of the events alleged therein, by the relevant persons said to be affected by the conduct in breach of s 18C of the RDA.¹²⁶
121. Paragraphs (b), (d) and (e) of the particulars of paragraphs 22 and 25 should also be struck out.

Paragraphs 22 and 25 and the particulars thereto

122. Paragraphs 22 and 25 each allege that, in all the circumstances, the 4 and 13 January Posts, respectively, were reasonably likely to offend, insult, humiliate and/or intimidate Australian Jews and/or Israelis. The paragraphs, expressly, rely upon the same particulars except that references in paragraph 22 to the 4 January Post are to be taken to be references to the 13 January Post.

Non-exhaustive Particulars

¹²⁰ *Miro Art*, [64].

¹²¹ ASOC at [8(a)].

¹²² ASOC at [8(b)].

¹²³ ASOC at [8(c)].

¹²⁴ ASOC at [8(d)].

¹²⁵ ASOC at [8(e)].

¹²⁶ *Quinlan Power*, [65].

123. The eleven paragraphs of particulars are preceded by the statement that the Applicant “relies inter alia on the following”. Following the eleven paragraphs of particulars, the statement that “further particulars may be provided prior to trial”.
124. Both the words “inter alia” and the words “further particulars may be provided prior to trial” should be struck out.
125. For the Respondent to know the case that she has to meet, it is essential that all the facts, matters and circumstances relied upon to make out an allegation going to an element of the cause of action are pleaded. It is impermissible to plead a number of relevant facts, matters and circumstances while, at the same time, reserving the right to rely on other matters that are not pleaded or identified. An important role of pleadings is to determine what evidence is admissible. It is unfair to plead only part of one’s case on a central issue.¹²⁷
126. If the Applicant discovers further facts, matters and circumstances going to establish the respective elements of the cause of action alleged in paragraphs 22 and 25, the Applicant can take the appropriate steps at that time to amend the particulars to the two paragraphs and, if necessary, to amend further the ASOC.
127. Foreshadowing the possibility of further particulars adds nothing and the words seeking to do this should be struck out.

Paragraph (a) of the Particulars: paragraph 4 and connection of the Australian Jewish population to the State of Israel and the safety of Israelis

128. Paragraph 4 of the ASOC alleges that the vast majority of Australian Jews consider themselves to be Zionist; feel a personal connection to the State of Israel and the Israeli people; and have a concern for the safety of Israelis.
129. It is unclear from paragraph (a) of the particulars whether the allegation in paragraph 4(a) of the ASOC is part of what is relied upon in paragraph (a) of the particulars. The latter refers only to the connection of the Australian Jewish population to the State of Israel (a paraphrase of paragraph 4(b)) and the safety of Israelis (a paraphrase of paragraph 4(b)). No reference is made to self-identification as Zionists in the particular. Paragraph 4(a) should be struck out on the basis that it is not relied upon (anywhere in the ASOC) to play any part in establishing a cause of action pursuant to s 18C of the RDA.¹²⁸
130. Paragraph 4(a) should be struck out because it is so imprecise and ambiguous as to be embarrassing.¹²⁹ Zionism is a political philosophy with many shades of meaning (which have evolved over time) such that to identify as a Zionist says very little about a person’s beliefs and sensitivities.¹³⁰

¹²⁷ *KTC v David*, [119]-[121]; *People with Disability*, [32].

¹²⁸ *Hadin (No 2)*, [80]-[86].

¹²⁹ *KTC v David*, [119]-[121].

¹³⁰ The Wikipedia page for Zionism spans many pages, traces events over more than a hundred years and includes references to a proposed Jewish homeland in a number of different countries including Uganda in colonial Africa: <https://en.wikipedia.org/wiki/Zionism>.

131. In any event paragraph 4 of the ASOC and paragraph (a) of the particulars to paragraphs 22 and 25 of the ASOC, respectively, should be struck out.
132. The ASOC does not seek to explain why a reasonable person who feels a personal connection to the State of Israel and the Israeli people and has concern for the safety of Israelis would be offended or otherwise relevantly affected by a news report on a social medium of a speech made by the leader of Hezbollah, an organisation which, the ASOC, itself, makes clear, is an important long term participant in serious events¹³¹ in the geopolitical region in which Israel is located and over which the Israeli government exercises military power.
133. The ASOC does not allege that the reports of the speech contained in the two posts¹³² are untrue¹³³ or unfair. The ASOC does not allege that even the statements of fact made in the speech, itself, are untrue. The ASOC does not allege that the respective reporting in either post endorses any content of the speech adverse to Israelis or that either post, in reporting and paraphrasing the speech, does anything other than report the speech, correctly.
134. The ASOC does not attempt to articulate why a reasonable person or a reasonable member of a group of people who is neither too sensitive nor too insensitive would be offended or otherwise relevantly affected by the news reporting involved in the two posts.¹³⁴ Neither is there any logical basis on which it can be asserted that such a reasonable person having a personal connection to the State of Israel and the Israeli people and concern for the safety of Israelis would be emotionally affected in any of the ways relevant to s 18C of the RDA. Such a hypothetical person, especially if she is seeking out such posts on social media, is likely to be keen to hear up to date news about what the leader of Hezbollah is saying because of its importance to public policy considerations for both the Israeli and Australian governments.
135. To the extent that paragraph (a) of the particulars to paragraphs 22 and 25 depends on the news reporting aspects of the posts, paragraph (a) and paragraph 4 of the ASOC are not capable of playing any part in establishing a cause of action pursuant to s 18C of the RDA.¹³⁵
136. The 4 January Post also contained a statement by the Respondent containing: “The Israeli govt getting some of its own medicine. Israel has started something it can’t finish with this genocide. #Gaza ”.¹³⁶
137. As the ASOC points out,¹³⁷ the contents of the speech asserted a number of facts which indicated that, in military terms, the conflict was not proceeding well for the Israeli government, a number of Israeli residents were suffering psychologically and it was in the interests of Israeli citizens who held passports from other countries to return to those

¹³¹ See [5], [6], [7], [8] and [13] of the ASOC.

¹³² The content of the posts relied upon by the ASOC are set out, respectively, at [18] and [20] of the ASOC.

¹³³ Indeed, [18(c)] of the ASOC sets out a quote from the speech which has been extracted by the authors of the ASOC which suggests that the reporting in both posts is accurate.

¹³⁴ *Faruqi*, [235]-[236]; *Eatoock*, [251] (distinguishing *Kaplan*, [513]).

¹³⁵ *Quinlan*, [65].

¹³⁶ ASOC at [18].

¹³⁷ ASOC at [18(b)(ii)].

countries.¹³⁸ The alleged statement by the Respondent does no more than reflect some or all of these matters. To the extent that the statement indicates that the Israeli government was, at the time, conducting a genocide in Gaza, the ASOC does not assert that that is or was untrue. Indeed, the ASOC does not assert that any part of the Respondent's words is untrue or, even, to the extent that they contain opinion or comment, that the opinion or comment is unreasonable or unfair.

138. The ASOC does not attempt to articulate why a reasonable person or a reasonable member of a group of people who is neither too sensitive nor too insensitive¹³⁹ would be offended or otherwise relevantly affected by those parts of the 4 January Post which contain the Respondent's own words. Neither is there any logical basis on which it can be asserted that such a reasonable person having a personal connection to the State of Israel and the Israeli people and concern for the safety of Israelis would be emotionally affected in any of the ways relevant to s 18C of the RDA. Such a hypothetical person, especially, if she is seeking out such posts on social media, is likely to be keen to be hearing responses, comments and opinions concerning reported events so as to inform their own opinions concerning such events. This is particularly the case where there is no suggestion that the responses, comments and opinions are untrue or unfair.
139. To the extent that paragraph (a) of the particulars to paragraphs 22 and 25 rely upon the Respondent's own words in the 4 January Post, paragraph (a) and paragraph 4 of the ASOC are not capable of playing any part in establishing a cause of action pursuant to s 18C of the RDA.¹⁴⁰
140. Paragraph (a) of the particulars to paragraphs 22 and 25 and paragraph 4 of the ASOC are not capable of playing any part in establishing a cause of action pursuant to s 18C of the RDA. They should be struck out.¹⁴¹

Paragraph (b) of the Particulars: paragraph 11 of the ASOC and the October 7 Attack

141. Paragraph 11 of the ASOC alleges that Hamas, a terrorist organisation based in the Gaza strip,¹⁴² committed a number of actions, including murder,¹⁴³ hostage taking,¹⁴⁴ injuring,¹⁴⁵ acts of sexual violence¹⁴⁶ and destruction of property¹⁴⁷ on 7 October 2023. Paragraph (b) of the particulars to paragraphs 22 and 25 of the ASOC refer to these actions, collectively, as atrocities and rely upon them as giving rise to the various emotional effects which are relevant to a breach of s 18C of the RDA.

¹³⁸ ASOC, the 4 January Post (item number 6 in annexure A to the ASOC) does not set out the words from the speech pleaded in [18(b)(ii)] of the ASOC. The graphic of the Post does, however, contain the Al Jazeera chyron stating that Nasrallah says Israel will not be able to achieve the goals of its war. The content of the chyron is not pleaded in [18] of the ASOC but is evident from Annexure A. it is equally possible that the Respondent's words in the 4 January Post are a comment on the content of the chyron.

¹³⁹ Faruqi, [235]-[236]; Eatock, [251] (distinguishing Kaplan, [513]).

¹⁴⁰ KTC v David, [119]-[121].

¹⁴¹ Miro Art, [64].

¹⁴² See ASOC at [9].

¹⁴³ ASOC at [11(a)].

¹⁴⁴ ASOC at [11(b)].

¹⁴⁵ ASOC at [11(c)].

¹⁴⁶ ASOC at [11(d)].

¹⁴⁷ ASOC at [11(e)].

142. The ASOC does not attempt to articulate why the historical fact of the October 7 Attack has any tendency to cause a reasonable person or a reasonable member of a group of people who is neither too sensitive or too insensitive¹⁴⁸ to be offended or otherwise relevantly affected by the news reporting or the words stated by the Respondent involved in the two posts. Neither is there any logical basis on which it can be asserted that such a reasonable person would be emotionally affected in any of the ways relevant to s 18C of the RDA by the content of the posts. Apart from the reported reference in the speech to the 7 October Attack,¹⁴⁹ the October 7 Attack is not referred to in either of the posts. The words of the Respondent¹⁵⁰ are directed to a different and subsequent historical event¹⁵¹ and involve no comment on the October 7 Attack. As noted above, the ASOC makes no allegation that either the news reporting or the words of the Respondent in the posts is untrue or inaccurate or unfair.
143. Paragraph (b) of the particulars to paragraphs 22 and 25 and paragraphs 9, 10, 11 and 12 of the ASOC¹⁵² are not capable of playing any part in establishing a cause of action pursuant to s 18C of the RDA. They should be struck out.¹⁵³

Paragraph (d) of the Particulars: paragraphs 7 and 8 of the ASOC: Hezbollah's commitment to the destruction of the State of Israel and the killing of Jews and Mr Nasrallah's statements to similar effect

144. Paragraph 7 of the ASOC alleges that Hezbollah is committed to the destruction of the State of Israel and the killing of the Jews. The allegation is particularised by reference to Hezbollah's 2009 manifesto and a reference, therein, to Israel as an eternal threat to Lebanon¹⁵⁴ and by reference to Hezbollah being responsible for a series of events including a bombing of an Israeli embassy,¹⁵⁵ a car bombing of a Jewish community;¹⁵⁶ an abduction of two Israeli soldiers;¹⁵⁷ a suicide bombing on a bus transporting Israeli tourists;¹⁵⁸ and ongoing rocket attacks on Israel targeting Israeli citizens such events ranging from 1992 until (it seems) the present day.¹⁵⁹
145. For the same reasons that "inter alia" was expressed above as requiring to be struck out of the particulars to paragraph 22 of the ASOC, "including" should be struck out of the particulars to paragraph 7 of the ASOC.
146. Paragraph 8 of the ASOC alleges that Mr Nasrallah has made repeated statements calling for Hezbollah or Muslims, generally, to rise up against and destroy Israel and Jews. The allegation is particularised as referring to a number of examples, namely, a

¹⁴⁸ Faruqi, [235]-[236]; Eatock, [251] (distinguishing Kaplan at [513]).

¹⁴⁹ Referred to as the Al-Asqa Flood Battle in ASOC at [18(b)(ii)].

¹⁵⁰ ASOC at [18(a)].

¹⁵¹ A genocide occurring in Gaza.

¹⁵² ASOC at [9], [10] and [12] are only relevant as providing introductory material to paragraph 11 of the ASOC and their relevance falls with the irrelevant nature of paragraph 11 to the cause of action sought to be made out in the ASOC.

¹⁵³ Quinlan, [65].

¹⁵⁴ ASOC at first (unidentified by alphabetical indicator) paragraph of the particulars of [7].

¹⁵⁵ ASOC at [(a)] of the particulars of [7].

¹⁵⁶ ASOC at [(b)] of the particulars of [7].

¹⁵⁷ ASOC at [(c)] of the particulars of [7].

¹⁵⁸ ASOC at [(d)] of the particulars of [7].

¹⁵⁹ ASOC at [(e)] of the particulars of [7].

statement in 1997 referring to Hezbollah's ideology as including the continued need to struggle against the Israeli enemy;¹⁶⁰ a statement in 2000 that there is no one in the entire world more cowardly, despicable, weak and feeble in psyche, ideology and religion than the Jew;¹⁶¹ a 2002 statement that, if Jews all gather in Israel, it will save the trouble of going after them, worldwide;¹⁶² a 2013 statement describing Israel as a cancerous growth and the elimination of Israel is not only a Palestinian interest but is the interest of the entire Muslim world and the entire Arab world;¹⁶³ and a statement in 2020 calling for the annihilation of Israel.¹⁶⁴

147. The ASOC does not attempt to articulate why the historical facts of hostile statements and hostile and violent actions by Hezbollah over a period of some decades has any tendency to cause a reasonable person or a reasonable member of a group of people who is neither too sensitive nor too insensitive¹⁶⁵ to be offended or otherwise relevantly affected by the news reporting or the words stated by the Respondent involved in the two posts. Neither is there any logical basis on which it can be asserted that such a reasonable person would be emotionally affected in any of the ways relevant to s 18C of the RDA by the content of the posts. The hostility of Hezbollah and Mr Nasrallah to the State of Israel and Jewish persons is part of what made a recent speech by Mr Nasrallah, for all persons interested in Middle East news, an important matter on which to report. As noted several times, the ASOC makes no allegation that the news reporting in the posts is untrue or inaccurate or unfair.
148. The words of the Respondent¹⁶⁶ in the 4 January Post draw upon the speech's indication of difficulties for Israel but her words are directed to a different historical event.¹⁶⁷ As also noted above, the ASOC makes no allegation that the words of the Respondent in the 4 January Post are untrue or inaccurate or unfair.
149. Paragraph (d) of the particulars to paragraphs 22 and 25 and paragraphs 4, 6, 7 and 8 of the ASOC¹⁶⁸ are not capable of playing any part in establishing a cause of action pursuant to s 18C of the RDA. They should be struck out.¹⁶⁹

Paragraph (e) of the Particulars and paragraph 13 of the ASOC: Hezbollah rocket attacks

150. Paragraph 13 of the ASOC alleges that, before Israel had taken any responsive attack to the October 7 Attack, Hezbollah began launching rockets into Israel.
151. The particulars to paragraph 13 of the ASOC state that, since the October 7 Attack, Hezbollah has fired thousands of rockets from southern Lebanon, killing people and displacing Israelis.

¹⁶⁰ ASOC at paragraph (a) of the particulars of [8].

¹⁶¹ ASOC at paragraph (b) of the particulars of [8].

¹⁶² ASOC at paragraph (c) of the particulars of [8].

¹⁶³ ASOC at paragraph (d) of the particulars of [8].

¹⁶⁴ ASOC at paragraph (e) of the particulars of [8].

¹⁶⁵ *Faruqi*, [235]-[2368]; *Eatoock*, [251] (distinguishing *Kaplan*, [513]).

¹⁶⁶ ASOC at [18(a)].

¹⁶⁷ A genocide occurring in Gaza.

¹⁶⁸ ASOC at [5] and [6] are only relevant as providing introductory material to paragraphs 7 and 8 of the ASOC and their relevance falls with the irrelevant nature of paragraphs 7 and 8 to the cause of action sought to be made out in the ASOC.

¹⁶⁹ *Quinlan*, [65].

152. There is a technical error in the phrasing of the particulars to paragraph 13 of the ASOC. The point of paragraph 13 is the timing of the commencement of the firing of rockets while the particulars purport to particularise a course of rocket firing that extended well beyond the day on which it commenced. For that reason, the particulars of paragraph 13 of the ASOC should be struck out as failing to provide any factual information relevant to the principal allegation which it is said to particularise.
153. Otherwise, paragraph (e) of the particulars to paragraphs 22 and 25 and paragraph 13 of the ASOC raise exactly the same issues as concerned paragraph (d) of the particulars. For the same reasons, paragraph (e) of the particulars to paragraphs 22 and 25 and paragraph 13 of the ASOC should be struck out.

Paragraphs (f) and (g) of the Particulars to paragraphs 22 and 25 of the ASOC: Imputations

154. Paragraph (f) of the particulars to paragraphs 22 and 25 assert an imputation,¹⁷⁰ respectively, of the 4 January Post and the 13 January Post that:
 - (a) Jews and/or Israelis are not indigenous to Israel and ought to go back to other places; and
 - (b) that all the land from the Jordan River to the Mediterranean Sea including all of the land on which the State of Israel exists is for the Palestinian people only.
155. Paragraph (g) of the particulars assert an imputation,¹⁷¹ respectively, of the 4 January Post and the 13 January Post that Jews and/or Israelis are not safe in Israeli and don't have a future in Israel.
156. The allegations in each of the two particulars ignore the circumstance that both the 4 and 13 January Posts are comprised, principally or solely, of a report of a speech of Mr Nasrallah. The ASOC does not explain and there is no logical reason why a reasonable person or a reasonable member of a group of people of Israeli national origin in Australia or of Jewish ethnic origin and/or race in Australia would regard a news report of a speech by a controversial Lebanese leader¹⁷² as conveying the content of the speech as a statement to the readers of the post by the person making the news report.
157. As for the Respondent's own words in the 4 January Post, they simply assert that the Israeli government may have difficulties in completing military actions undertaken by it referred to in the post as a genocide. These words do not endorse or reflect any of the matters pleaded in paragraphs (f) and (g) of the particulars of paragraphs 22 and 25 of the ASOC. They can be readily understood as a comment on the content of the chyon referring to Israel, according to the speech, having difficulties with its military

¹⁷⁰ The phrase used is that the Post was reasonably likely to convey the meaning pleaded to people of Israeli national origin in Australia and/or people of Jewish ethnic origin and/or race in Australia. See paragraph 19 of the ASOC for the meaning of Jewish/and/or Israeli audience.

¹⁷¹ The phrase used is that the Post was reasonably likely to convey the meaning pleaded to people of Israeli national origin in Australia and/or people of Jewish ethnic origin and/or race in Australia. See paragraph 19 of the ASOC for the meaning of Jewish/and/or Israeli audience.

¹⁷² Drawing on [5]-[8] of the ASOC.

objectives. They certainly do not carry the imputations alleged in paragraphs (f) and (g) of the particulars of paragraphs 22 and 25 of the ASOC

158. Paragraphs (f) and (g) of the particulars of paragraphs 22 and 25 of the ASOC should be struck out as incapable of arising from the pleaded material facts from which they are said to arise.¹⁷³

Paragraph (h) of the Particulars to paragraphs 22 and 25 of the ASOC: definition of antisemitism

159. Paragraph (h) of the particulars to paragraphs 22 and 25 of the ASOC alleges that the Posts are antisemitic according to a definition of antisemitism.¹⁷⁴
160. The paragraph does not allege any material fact concerning the actions of the Respondent or the likely impact of those actions on the person or group said to be affected by those actions.
161. In one sense, the allegation seems to be addressed to a matter of law. However, the RDA does not bestow any legal or factual relevance upon the pleaded definition or the terms used in paragraph (h), including words such as antisemitism or phrases such as the right of Jewish people to self-determination.
162. Paragraph (h) of the particulars to paragraphs 22 and 25 of the ASOC should be struck out as irrelevant; not alleging any material fact; and not capable of playing any part in establishing a cause of action pursuant to s 18C of the RDA.¹⁷⁵

Paragraph (i) of the Particulars to paragraphs 22 and 25 of the ASOC: the Applicant's feeling of offence and insult

163. Paragraph (i) of the particulars to paragraphs 22 and 25 of the ASOC alleges that the Applicant felt offended and insulted by the 4 and 13 January Posts.
164. Clearly, the paragraph cannot constitute particulars of the allegations in paragraphs 22 and 25 that the Posts were likely to intimidate or humiliate [some] Australian Jews and/or Israelis in Australia. It should be struck out for that reason.
165. There are further difficulties with the paragraph. While the evidence that a person or a member of a group is admissible to tend to show how a reasonable person in the circumstances of the other person or a reasonable member of the group would be affected by the actions of the Respondent,¹⁷⁶ the ASOC does not allege the Applicant as the other person the impact on whom is relevant to the cause of action. Neither has, as has been discussed,¹⁷⁷ the ASOC pleaded an unambiguous group of persons for the purpose of s 18C of the RDA. No allegation has been made that the Applicant is a

¹⁷³ Quinlan, [65].

¹⁷⁴ Described as the International Remembrance Alliance definition.

¹⁷⁵ *KTC v David*, [119]-[121]; *Miro Art*, [64]; *Quinlan*, [65].

¹⁷⁶ *Faruqi*, [237], [241] and [257]-[258].

¹⁷⁷ *Supra*, [50]-[64].

reasonable person for the purpose of identifying the likely reactions for the purpose of s 18C of the RDA.¹⁷⁸

166. In the circumstances, as the ASOC presently stands, paragraph (i) of the particulars to paragraphs 22 and 25 of the ASOC is not capable of playing any part in establishing a cause of action pursuant to s 18C of the RDA and should be struck out.

Paragraph (j) of the Particulars to paragraphs 22 and 25 of the ASOC: from the river to the sea

167. Paragraph (j) of the particulars to paragraphs 22 and 25 of the ASOC alleges that the phrase, from the river to the sea, has been used historically to intimidate Jews and/or Israelis and oppose Israel's right to exist.
168. As is the case with each of paragraphs 5-13 of the ASOC, the contents of paragraph (j) of the particulars are not alleged by the ASOC to be known to any other person or a group of persons said to be the subject of the conduct in breach of s 18C of the ASOC. Unless the relevant person or members of the group were aware of the alleged historical use of the phrase, the appearance of the phrase in the 4 and 13 January Posts could have no relevance to the causal relationship between the 4 and 13 January Posts and the requisite emotional effect on the person or the reasonable members of the affected group of people alleged in paragraphs 22 and 25 of the ASOC.
169. Further, for the reasons discussed above with regard to paragraphs (f) and (g) of the particulars to paragraphs 22 and 25 of the ASOC,¹⁷⁹ the occurrence of an historically intimidatory phrase in a news report of a speech of a controversial Lebanese leader and long-term opponent of Israel would not be a surprise to any reasonable reader of the Posts. As was the case with paragraphs (f) and (g), the ASOC does not explain and there is no logical reason why a reasonable person or a reasonable member of a group of people of Israeli national origin in Australia or of Jewish ethnic origin and/or race in Australia would regard a news report of a speech by the controversial Lebanese leader¹⁸⁰ as endorsing or adopting any language used in the speech with historically negative connotations or overtones to a particular group of people. It may be observed, again, that the fairness or accuracy of the report in the Posts is not challenged in any way by the ASOC.
170. For these reasons, paragraph (j) of the particulars to paragraphs 22 and 25 of the ASOC should be struck out.

Paragraph (k) of the Particulars to paragraphs 22 and 25 of the ASOC: paragraph 17 of and Annexure A to the ASOC

171. Paragraphs 16 and 17 of and Annexure A to the ASOC should be struck out for the reasons identified above.

¹⁷⁸Quinlan, [65].

¹⁷⁹Supra, [154]-[158].

¹⁸⁰Drawing on [5]-[8] of the ASOC.

172. It follows that paragraph (k) of the particulars to paragraphs 22 and 25 of the ASOC, which rely, without more, on paragraph 17 and some posts in Annexure A should be struck out.

Paragraphs 22 and 25 of the ASOC

173. Since each of the paragraphs of the particulars of paragraphs 22 and 25 of the ASOC should be struck out, the allegations of reasonable likelihood of relevant emotional impact upon the (ill-defined) group of persons should also be struck out.¹⁸¹
174. Further, even if one or more or all of the particulars relied upon were valid, the two paragraphs should be struck out.
175. The allegation of a conclusion to be drawn by inference from a series of primary facts may not be pleaded by simply alleging a series of apparently disconnected facts as particulars and alleging that a conclusion emerges ready made from those disparate facts.
176. For a respondent to be informed fairly and to know the case she has to meet, the ASOC has to plead not only the raw facts but must also show how particular facts are connected to one another and how partial inferences may be arrived at leading ultimately to the principal conclusion alleged and relied upon as establishing an element of the cause of action.
177. As has been seen by the discussion of individual paragraphs of the particulars of paragraphs 22 and 25, this has not been done in the ASOC.
178. For these reasons, also, paragraphs 22 and 25 of the ASOC should be struck out.

Paragraphs 23 and 26 and the particulars thereto

179. Paragraphs 23 and 26 each allege that the Respondent made the 4 and 13 January Posts, respectively, because of the race or ethnic origin of Jews or national origin of Israelis. Each of the two paragraphs of the ASOC rely on particulars broken into paragraphs. The particulars of each of paragraphs 23 and 26 draw upon words taken from the respective Post and, as the last paragraph of the particulars in each case, rely upon the contents of paragraph 17 and the posts contained in Annexure A to the ASOC.

Non-exhaustive Particulars

180. The introductory (alphabetically undelineated) material preceding the paragraphs of the particulars of paragraphs 23 and 26 of the ASOC states, in each case, that “it can be inferred that at least one of the reasons the Respondent made the [respective] Post was the race or ethnic origin of Jews or the national origin of Israelis having regard to inter alia to the following”. Following the eleven paragraphs of particulars, the statement that “further particulars may be provided prior to trial”. Following, in each case, the alphabetically delineated paragraphs of the particulars, the ASOC states that further particulars may be provided prior to trial.

¹⁸¹ *Quinlan*, [65].

181. Both the words “inter alia” and the words “further particulars may be provided prior to trial” should be struck out.
182. As has been discussed above in respect of paragraphs 22 and 25 of the ASOC,¹⁸² for the Respondent to know the case that she has to meet, it is essential that all of the facts, matters and circumstances relied upon to make out an allegation going to an element of the cause of action are pleaded. It is impermissible to plead a number of relevant facts, matters and circumstances while, at the same time, reserving the right to rely on other matters that are not pleaded or identified. An important role of pleadings is to determine what evidence is admissible. It is unfair to plead only part of one’s case on a central issue.¹⁸³
183. If the Applicant discovers further facts, matters and circumstances going to establish the respective elements of the cause of action alleged in paragraphs 23 and 26, the Applicant can take the appropriate steps at that time to amend the particulars to the two paragraphs and, if necessary, to amend further the ASOC.
184. Foreshadowing the possibility of further particulars adds nothing and the words seeking to do this should be struck out.

Paragraphs (a) and (c) of the Particulars to paragraph 23 and paragraphs (a) and (c) of the Particulars to paragraph 26: words of Nasrallah in the speech

185. Presumably, the logic relied upon by the ASOC in these paragraphs is that the news reporting on a social medium of statements in any way adverse to the citizens of a particular state or country is done because of the race or ethnic origin or national origin of those citizens.
186. The logic is flawed in that it ignores the inherent occupational requirements of news reporting. Many of the most important subjects of news reporting involve groups in some kind of conflict such that spokespeople on both sides of the conflict will say things that are insulting or offensive to persons on the other side of the conflict.
187. There is no logical basis to conclude that the news reporter (in whatever medium she operates) is motivated by or acting on matters of race or ethnic or national origin when making such reports.
188. This is particularly the case where there is no allegation that the news report of the statement in question is inaccurate, false or unfair.
189. It follows that each of paragraphs (a) and (c) of the particulars of each of paragraphs 23 and 26 of the ASOC is incapable of playing any part in establishing a cause of action pursuant to s 18C of the RDA and should be struck out.¹⁸⁴

¹⁸² Supra, [123]-[127].

¹⁸³ *Banque Commerciale*, 286.

¹⁸⁴ *Takemoto*, [23].

Paragraph (b) of the Particulars to paragraph 23

190. Paragraph (b) of the particulars to paragraph 23 of the ASOC relies upon the Respondent's own words in the 4 January Post in referring to both the Israel government and Israel and accusing Israel of genocide.
191. As has been noted several times, there is no allegation that the Respondent's words in the 4 January Post are untrue or, to the extent that they consist of comment, that the comment is unfair.
192. As has also been noted,¹⁸⁵ genocide refers to a different set of actions to those discussed in the speech reported in the 4 January Post. Nonetheless, the events are sufficiently connected that the criticism concerning the genocide cannot be said to be gratuitous.
193. There is no logical basis in saying that a criticism made of a nation state or of the government of that State as part of a news report of a significant event in the Middle East is motivated by or acting on matters of race or ethnic or national origin when making such reports. Indeed, this is particularly so when there is no allegation that the criticism is unfair, inaccurate or untrue.
194. It follows that paragraph (b) of the particulars of paragraph 23 of the ASOC is not capable of playing any part in establishing a cause of action pursuant to s 18C of the RDA and should be struck out.

Paragraphs (b) and (d) of the Particulars to paragraph 26

195. Paragraphs (b) and (d) of the particulars to paragraph 26 of the ASOC rely, respectively, on the actions of the 13 January Post and the 4 January Post as giving rise to the inference that the 13 January Post was because of the race or national origin or ethnic origin of Israelis and/or Jews.
196. The paragraphs are stating that the reason for the Posts (in breach of s 18C(1)(b) of the RDA) can be inferred from the fact of the Post without any reference to the content of the Post. Similarly, it is argued that the reason (in breach of s 18C(1)(b) of the RDA) for the 13 January Post can be inferred from the fact of the 4 January Post without reference to the content of that earlier Post. Since it has already been seen that the content of the Posts relied upon by the Applicant is not capable of playing any part in establishing a cause of action pursuant to s 18C of the RDA, the fact that the two Posts were made can take the Applicant no further.
197. It follows that each of paragraphs (b) and (d) of the particulars of paragraph 26 of the ASOC is incapable of playing any part in establishing a cause of action pursuant to s 18C of the RDA and should be struck out.¹⁸⁶

Paragraph (e) of the Particulars to paragraph 23 and paragraph (d) of the Particulars to paragraph 26: paragraph 17 of and Annexure A to the ASOC

¹⁸⁵ Supra, [148].

¹⁸⁶ Bartlett, [25].

198. Paragraphs 16 and 17 of and Annexure A to the ASOC should be struck out for the reasons identified previously.¹⁸⁷
199. It follows that paragraph (e) of the particulars to paragraph 23 and paragraph (d) to the particulars of paragraph 26 of the ASOC, which rely, without more, on paragraph 17 and some posts in Annexure A should be struck out.

Paragraphs 23 and 26 of the ASOC

200. Since each of the paragraphs of the particulars of paragraphs 23 and 26 of the ASOC should be struck out, the allegations of the posts being made because of the race or national or ethnic origin of Israelis and/or Jews should also be struck out.
201. Further, even if one or more or all of the particulars relied upon were valid, the two paragraphs should be struck out.
202. The allegation of a conclusion to be drawn by inference from a series of primary facts may not be pleaded by simply alleging a series of apparently disconnected facts as particulars and alleging that a conclusion emerges ready made from those disparate facts.
203. For a respondent to be informed fairly and to know the case she has to meet, the ASOC has to plead not only the raw facts but must also show how particular facts are connected to one another and how partial inferences may be arrived at leading ultimately to the principal conclusion alleged and relied upon as establishing an element of the cause of action.¹⁸⁸
204. As has been seen by the discussion of individual paragraphs of the particulars of paragraphs 23 and 26, this has not been done in the ASOC.
205. For these reasons, also, paragraphs 23 and 26 of the ASOC should be struck out.

Paragraphs 24 and 27 of the ASOC

206. Paragraphs 24 and 27 of the ASOC are the conclusionary paragraphs that allege that, by reason of the matters set out in paragraphs 25 and 26, the Respondent, by making the 4 January Post and the 13 January Post, respectively, breached s 18C of the RDA.
207. Because the paragraphs on which paragraphs 24 and 27 rely should be struck out, it follows that paragraphs 24 and 27 should, resultingly, be struck out.
208. Further, however, the ASOC has not purported to allege or identify either the other person or the group of persons who were reasonably likely to be offended and/or insulted and/or humiliated and/or intimidated by the actions of the Respondent.

¹⁸⁷ *Infra*, [94]-[106].

¹⁸⁸ *Banque Commerciale*, 286 and *Quinlan*, [65].

209. To allege that [some] Australian Jews and/or Israelis in Australia were so likely to be offended and/or insulted and/or humiliated and/or intimidated by the offending actions of the Respondent falls short of alleging or identifying either the other person or the group of persons who were reasonably likely to be offended and/or insulted and/or humiliated and/or intimidated by the offending actions of the Respondent. It merely says that some people were likely to be so affected.
210. By not identifying the person or group of persons, the ASOC prevents identification of a reasonable person in the circumstances of the other person or the hypothetical reasonable members of the group likely to be relevantly affected by the Respondent's actions.
211. Paragraphs 24 and 27 of the ASOC should also be struck out for the failure of the ASOC to allege a crucial component of the material facts necessary to make out the cause of action.

The “and/or” syndrome: alleging multiple alternative cases

212. The ASOC, on multiple occasions, alleges multiple different cases by using the combination of conjunctions, namely “and/or”.¹⁸⁹
213. In a civil proceeding, an applicant is not prevented from alleging an alternative case or cases.¹⁹⁰ The use of phrases such as “further” or “further and in the alternative” are frequently used signposts of the pleading of such cases.
214. It is impermissible, however, to group together and mix up multiple cases without pleading each alternative case being pursued clearly and separately from the other alternative cases. It is imperative that a respondent is in a position to understand both the factual and legal basis of each of the alternative cases being relied upon.¹⁹¹
215. Ambiguity and confusion is likely to be created by the use of the phrase “and/or”. The immediate effect of the use of that phrase is to cause a respondent to be unable to tell whether each alternative case is being pursued to finality or whether some alternative cases are true alternatives such that they cannot all be achieved in the proceedings.¹⁹²
216. The greatest confusion arises when a series of alternative results are alleged as arising from numerous facts alleged collectively. A respondent cannot know whether a particular alleged fact is relied upon for each and every alternative conclusion or whether some facts point in the direction of one alternative conclusion and others are relied upon for other conclusions.¹⁹³
217. This high level of confusion exists in paragraphs 22, 23, 25 and 26 of the ASOC.
218. It is clear in respect of paragraphs 22 and 25 of the ASOC that not every fact, matter or circumstance alleged in the particulars is relied upon in respect of every alternative

¹⁸⁹ ASOC, [16], [17(e)], [19], [21], [22], [23], [25] and [26].

¹⁹⁰ *Mio Art*, [59].

¹⁹¹ *Mio Art*, [62]-[63].

¹⁹² *KTC v David*, [45]: “various alternatives which are confusingly mixed”.

¹⁹³ *Takemoto*, [23]; *Bartlett*, [25].

conclusion alleged in the paragraph. This can be seen from paragraph (i) of the particulars of each of paragraphs 22 and 25 of the ASOC.

219. The Applicant alleges that he felt offended and insulted by each of the Posts. However, there is no allegation that he was humiliated or intimidated. Paragraph (i) of the particulars is one of the facts, matters and circumstances that is not relied upon for the conclusion that people were humiliated or intimidated.
220. The Respondent has no idea as to which of the facts matters and circumstances alleged in the particulars is relied upon to prove likelihood of offence; which are relied upon to prove insult; which are relied upon to prove humiliation; and which are relied upon to prove intimidation.¹⁹⁴
221. The same confusion results with regard to which of the facts, matters and circumstances in the particulars to the two paragraphs is said to impact upon Australian Jews and which are likely to impact upon Israelis in Australia.
222. If the Applicant wishes to pursue a large number of alternative cases pursuant to which the actions of the Respondent are alleged to be in breach of s 18C of the RDA, it will be incumbent upon him to plead each of those cases clearly and in such a way that the Respondent knows the basis on which it is alleged that her actions were in breach of the section.
223. In the meantime, paragraphs 16, 17(e), 19, 21, 22, 23, 25 and 26 of the ASOC should be struck out for the confusion and embarrassment to which they give rise.

Dated 30 May 2025

Stephen Keim SC

Greg Barns SC

Kate Slack

Felicity Nagorcka

¹⁹⁴ *KTC v David*, [119]-[121].