

NOTICE OF FILING

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File Title:	JOSEPH TOLTZ & ORS v JOHN KEANE & ANOR
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



Joseph Toltz and others
Applicants

John Keane and another
Respondents

SECOND RESPONDENT'S OBJECTIONS TO AMENDED ORIGINATING APPLICATION AND STATEMENT OF CLAIM DATED 5 SEPTEMBER 2025

Introduction

1. Having been served with the proposed Amended Originating Application (**AOA**) and Amended Statement of Claim (**ASOC**), the Second Respondent objects to the following:
 - (a) the word “descent” in paragraph 1 of the AOA and paragraph 12(a) of the ASOC;
 - (b) the phrase “and identifies as Zionist” and the associated particulars in paragraph 8 of the ASOC;
 - (c) paragraph 28;
 - (d) paragraphs 54 (e) and (f).
2. The Second Respondent refers to and relies on the relevant principles for striking out pleadings and establishing a claim under s 18C of the *Racial Discrimination Act 1975* (Cth) (**RDA**) set out in its submissions dated 28 August 2025 in the associated Riemer proceedings.

Representative proceedings under rule 9.21(1) of the *Federal Court Rules 2011* (Cth)

3. Rule 9.21(1) of the *Federal Court Rules 2011* (Cth) (the **Rules**) provides that:

A proceeding may be started and continued by or against one or more persons who have the same interest in the proceeding, as representing all or some of the persons **who have the same interest and could have been parties to the proceeding**. (emphasis added)
4. The Second Respondent does not raise any objection at this stage in the proceedings as to whether the Applicants can bring representative proceedings under rule 9.21 of the *Federal Court Rules 2011* (Cth).

5. However, the Second Respondent reserves its right to dispute that Mr Peter Morgan, who neither identifies as Jewish nor Israeli, has standing to be a party to the proceedings as an ‘affected person’ under s 46PO(2A) of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) and obtain relief under s 46PO(4) of the AHRC Act. Consistent with the observations of Ellicott J at 78-79 in *Toobey's Ltd v Minister for Business & Consumer Affairs*,¹ the Second Respondent submits this question is more appropriately determined at any final hearing.²

The word descent in [1] of the AOA and [12(a)] of the ASOC

6. The word ‘descent’ does not appear in s 18C of the RDA and therefore its inclusion in the AOA and ASOC is embarrassing and should be removed.

Zionists in [8] of the ASOC and associated particulars

7. Neither the “ Hamas Flag Post” at [29] of the ASOC nor the “Keane’s Staff Members Post” at [42] of the ASOC refer to the term Zionist or Zionism and apart from an oblique reference to the term in [23] of the ASOC, there is no further link sought to be made between Zionsim, the impugned posts and the elements of s 18C of the RDA in the ASOC.
8. Zionism is a philosophy or ideology and not a race or ethnic group.³ Further, the Court has held that not all Jews or Israeli people are Zionists and disparagement of Zionism is not disparagement of a race or ethnic group.⁴ This view is supported by the evidence of the Jewish persons who signed an article to the Overland Journal on 29 May 2025 and several Jewish and other groups who made such statements to the recent New South Wales Inquiry into Antisemitism.⁵
9. It is the “combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past” that constitute Jews as a race or ethnic group for the purposes of the RDA.⁶ Unlike the Jewish religion, the holding of Zionist philosophical or ideological views is not co-extensive or “*almost impossible to distinguish*” from

¹ (1981) 36 ALR 64, 78-79 per Ellicott J.

² See also: *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313 at [65] per Collier J.

³ *Wertheim v Haddad* [2025] FCA 720, at [107] per Stewart J.

⁴ *Wertheim* [2025] FCA 720, at [107] per Stewart J.

⁵ Affidavit of Stephen Woodbury affirmed 28 August 2025, Annexures SW-1 and SW- 3-6.

⁶ *King-Ansell v Police* [1979] 2 NZLR 531 at 543 per Richardson J; *Jones v Scully* [2002] FCA 1080 at [111]

Jewish and Israeli ethnicity.⁷ Accordingly, a claim relying on an indirect link to race based on the holding of a political opinion or ideology that is distinguishable from the Jewish race and/or ethnic origin or the Israeli ethnic or national origin⁸ cannot succeed.⁹

10. Accordingly, even if the Applicants could prove that Zionists may be predominantly Jewish people and/or Israeli people or that a substantial proportion of Jewish and/or Israeli people may identify themselves as Zionists, this is not sufficient to make out a claim under s 18C of the RDA. The reference to the Applicants identifying as Zionists in paragraph [8] of the ASOC along with the associated particulars are therefore embarrassing and should be removed.

Intention of Hamas' Leadership in [28] of the ASOC

11. Paragraphs [28] of the ASOC plead factual assertions about the intention and reasons for Hamas' leadership taking certain actions in Israel. It is inconceivable that the Court could form a view on that based on any evidence that is likely to be led in this hearing, and it is unnecessary for these matters to be determined by the Court to make out the elements of s 18C of the RDA. Its inclusion in the ASOC is therefore irrelevant and embarrassing and should be struck out.

Cumulative causation in [54(e) and (f)] of the ASOC

12. Paragraph 54(e) seeks to rely on the "Hamas Flag Post" for the purposes of establishing whether the "Keane's Staff Members Post was done because of the race, national or ethnic origin of the people likely to be offended, insulted, humiliated or intimidated by the "Keane's Staff Members Post under s 18C(1)(b) of the RDA.
13. The Applicants therefore invite the Court to infer the *true reason* Professor Keane made a particular publication on 8 November 2023 by reference to another publication made one month earlier. In the context of this case, the pleading operates prejudicially on the Second Respondent, which is only alleged to be liable for the "Keane's Staff Member Post" and ought not be required to address a publication that it is not alleged to be liable for. Paragraph 54(e) of the ASOC should therefore be removed.

⁷ *R(E) v Governing Body of JFS* [2010] 2 AC 728 (UKSC) as per Lord Phillips at [39]; *Wertheim* at [210].

⁸ The Second Defendant reserves its rights as to whether it admits there is an Israeli ethnic or national origin for the purposes of s 18C of the RDA.

⁹ *Wertheim* at [209]-[210].

14. Further paragraph 54(f) invites the Court to make findings about Professor Keane's "tendency" to engage in conduct which does and is *intended* to offend and/or insult and/or humiliate and/or intimidate Jewish people and Israeli people. There is no need to prove 'intention' for the purposes of s 18C of the RDA and seeking to prove this element by reference to an undisclosed catalogue of acts of Professor Keane and his subjective intention for those acts will only unnecessarily lengthen the proceedings for a collateral purpose. Paragraph 54(f) should be removed from the ASOC.



Robert Dick

Banco Chambers

19 September 2025



Bronwyn Byrnes

6 St James Hall Chambers