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Federal Court of Australia
District Registry: Victoria
Division: General VID404/2025

ALON CASSUTO

Applicant

MARY KOSTAKIDIS

Respondent

APPLICANT'S SUBMISSIONS: RESPONDENT'S STRIKE OUT APPLICATION

(pursuant to paragraph 5 of directions of McDonald J made 7 May 2025)

A. INTRODUCTION

1. These submissions are made by the Applicant, Alon Cassuto, in respect of the interlocutory application by the Respondent, Mary Kostakidis, by which she seeks orders striking out the whole, or alternatively certain paragraphs, of the Amended Statement of Claim filed on 8 May 2025 (**ASOC**).

2. Mr Cassuto brings a straightforward case against Ms Kostakidis under s 18C of the *Racial Discrimination Act 1975* (Cth). Mr Cassuto's s 18C case has been expressed in a pleading containing substantive paragraphs of just over 10 pages in length (a rarity in modern litigation).

3. Notwithstanding its brevity (as *required* by r 16.02(b) of the *Federal Court Rules 2011* (Cth)) and pellucidity, Ms Kostakidis seeks to strike out *almost every paragraph* of the ASOC. Her submissions dated 30 May 2025 (**RS**) — which, tellingly, run to more than three times the length of the pleading to which the strike out application relates — advance various criticisms, each of which is dealt with in these responsive submissions. They include complaints about the entirely conventional use of the words "*inter alia*" and "*including*" and the phrase "*further particulars may be provided*". Ms Kostakidis also foreshadows substantive attacks on the case being brought against her, to the effect that the case is not "*logical*" and will not succeed at trial. Those are of course inapt on a strike out application. Ms Kostakidis should file her defence so the parties can get on with the orderly progress and determination of this case at trial.

B. MR CASSUTO'S CASE

4. The case Mr Cassuto brings is clear from the ASOC. It can be summarised as follows.

(a) On two occasions (4 and 13 January 2024), Ms Kostakidis made a post on her public X account that was reasonably likely, in all of the circumstances, to offend, insult, humiliate or intimidate one or both of two victim groups: Australian Jews, and Israelis in Australia.[1] Mr Cassuto is a member of both groups.[2]

(b) In each post, Ms Kostakidis posted a statement and a video from Hassan Nasrallah, the then-leader of Hezbollah, a terrorist organisation committed to both the destruction of Israel and the murder of Jewish people.[3] The statements from Nasrallah in both cases included a warning to Israelis: "*[h]ere 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*".[4] In the case of the first post, Ms Kostakidis added endorsing statements of her own.[5]

(c) The circumstances, relevant to assessing the likely effect of the posts upon the relevant groups, include that they were made:

(i) after the invasion of Israel and attack by Hamas — another terrorist organisation also committed to the destruction of Israel and the murder of Jewish people[6] — on 7 October 2023, in which Hamas murdered 1,200 Israelis, took 240 people hostage, injured thousands and committed acts of sexual violence;[7]

(ii) after Hezbollah began rocket attacks on Israel from 8 October 2023 (before Israel had taken any step in response to the 7 October attack);[8]

(iii) following a significant increase in antisemitism and racial hatred towards Jews and Israelis in Australia.[9]

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1 ASOC [18]-[22], [25].
2 ASOC [1].
3 ASOC [5]-[8].
4 ASOC [18(b)], [20].
5 ASOC [18(a)].
6 ASOC [9]-[10].
7 ASOC [11]-[12].
8 ASOC [13].
9 ASOC [14].

(d) In each case, Ms Kostakidis' post was an act done "because of" the race, national or ethnic origin of the people in the victim groups.[10] Relevant to ascertaining Ms Kostakidis' reason for her posts is her frequent posting on X of antisemitic and anti-Israel conspiracy theories.[11]

5. This case may or may not succeed at trial. But the case is clear on the face of the ASOC. If she wishes to defend the proceeding, Ms Kostakidis should file her defence.

C. RELEVANT PRINCIPLES

6. The starting point must be to emphasise the purpose of pleadings, which is to define the issues so that the parties may know in advance of the hearing the case they are to meet.[12] That enables them to prepare fairly and efficiently for the trial. It also enables the trial to be conducted sensibly and efficiently and to be properly controlled.[13] The statement of claim must disclose a reasonable cause of action by alleging material facts which, if established at the trial, will enable the applicant to make out all the elements of the cause of action. It must also contain sufficient particularity to inform the opposing party of the case which is to be met.[14]

7. In modern litigation, "[t]he tendency is now towards narrative pleadings",[15] and "to address matters of substance rather than of form".[16] Thus, as outlined by Mansfield J in *BWK Elders (Australia) Pty Ltd v Westgate Wool Co Pty Ltd (No 2)*,[17] more than twenty years ago now, in the modern era:

> *technical objections raised to pleadings on the ground of alleged want of form are not so enthusiastically received. The Court's focus has been upon ensuring the case is identified with clarity, so that the opposing party knows the case to be met and the issues for trial are identified. The focus upon case management, to ensure the efficient and fair conduct of proceedings, has also led to the emphasis on technical pleadings rules being diverted to an emphasis upon ensuring that, in substance, the objectives of pleadings, as discussed for example by the High Court in Banque Commerciale SA en Liquidation v Akhil Holdings Ltd (1990) 169 CLR 279 at 286 per Mason CJ and Gaudron J, are fulfilled.*

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10 ASOC [23], [26].
11 ASOC [17].
12 *KTC v David* [2022] FCAFC 60, [114] (Wigney J).
13 See, eg, *Dare v Pulham* (1982) 148 CLR 658, 664 (Murphy, Wilson, Brennan, Dean and Dawson JJ); *Banque Commerciale SA, En Liquidation v Akhil Holdings Limited* (1990) 169 CLR 279, 286 (Mason CJ and Gaudron J); *BWK Elders (Australia) Pty Ltd v Westgate Wool Co Pty Ltd (No 2)* [2002] FCA 87, [3] (Mansfield J).
14 *BWK Elders (Australia) Pty Ltd v Westgate Wool Co Pty Ltd (No 2)* [2002] FCA 87, [3] (Mansfield J).
15 *Beach Petroleum NL v Johnson* (1991) 105 ALR 456, 466 (von Doussa J).
16 *BWK Elders (Australia) Pty Ltd v Westgate Wool Co Pty Ltd (No 2)* [2002] FCA 87, [20] (Mansfield J).
17 *BWK Elders (Australia) Pty Ltd v Westgate Wool Co Pty Ltd (No 2)* [2002] FCA 87, [20] (Mansfield J); see also *Hanson-Young v Leyonhjelm* (2018) 364 ALR 624; [2018] FCA 1688, [17] (White J), citing *Beach Petroleum NL v Johnson* (1991) 105 ALR 456, 466 (von Doussa J).

8. Rule 16.02 of the *Federal Court Rules* identifies the general requirements for the contents of a pleading. For example, a pleading must be as brief as the nature of the case permits (r 16.02(b)); identify the issues that the party wants the Court to resolve (r 16.2(c)); 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 it (r 16.02(1)(d)). It must not contain any scandalous or frivolous or vexatious material (r 16.02(2)(a) and (b)); be evasive or ambiguous (r 16.02(2)(c)); be likely to cause prejudice, embarrassment or delay in the proceeding (r 16.02(2)(d)); fail to disclose a reasonable cause of action or defence or other case appropriate to the nature of the pleading (r 16.02(2)(e)); or otherwise be an abuse of process of the Court (r 16.02(2)(f)).

9. Rule 16.21 provides that the Court may strike out all of part of a pleading on a number of grounds. It provides, in effect, that a pleading that fails to meet any of the requirements in r 16.02 may be struck out. On this application, Ms Kostakidis appears to rely upon r 16.21(1)(c) and (d). She does not contend that the ASOC fails to disclose a reasonable cause of action.

10. A pleading is likely to cause prejudice or embarrassment for the purposes of r 16.21(d) if it is "*susceptible to various meanings, contains inconsistent allegations, includes various alternatives which are confusingly intermixed … or includes defects which result in it being unintelligible, ambiguous, vague or too general*".[18] Such a pleading could equally be characterised as evasive or ambiguous for the purposes of r 16.21(c).[19] A pleading may be considered to be embarrassing if it suffers from "*narrative prolixity … to the point that it is not a pleading to which the other party can reasonably be expected to plead*".[20]

11. It bears emphasising that rr 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 civil practice and procedure provisions such as these is to facilitate the just resolution of disputes according to law, as quickly, inexpensively and efficiently as possible.[21]

12. Finally, but importantly, the power to strike out should be exercised in plain and obvious cases, where no reasonable amendment could cure the alleged defect or deficiency. The power is discretionary and should be employed sparingly and only in

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18 *KTC v David* [2022] FCAFC 60, [120], citing *Spiteri v Nine Network Australia Pty Ltd* [2008] FCA 905, [22]; *Fair Work Ombudsman v Eastern Colour Pty Ltd* [2011] FCA 803, [18]; *Shelton v National Roads and Motorists Association Ltd* (2004) 51 ACSR 278, [18].

19 *KTC v David* [2022] FCAFC 60, [120].

20 *KTC v David* [2022] FCAFC 60, [121], citing *Fuller v Toms* (2012) 247 FCR 440.

21 *KTC v David* [2022] FCAFC 60, [118].

a clear case lest a party is deprived of a case which in justice it ought to be able to bring.[22]

13. With these principles in mind, we turn to each of Ms Kostakidis' complaints.

D. MS KOSTAKIDIS' COMPLAINTS SHOULD BE REJECTED

D.1 The person or group of people

14. The first group of complaints by Ms Kostakidis relates to the way the groups of people who are the victims of her impugned conduct have been described in the ASOC.

15. Section 18C(1) of the *Racial Discrimination Act* provides as follows.

> **Offensive behaviour because of race, colour or national or ethnic origin**
>
> (1) It is unlawful for a person to do an act, otherwise than in private, if:
>
> (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
>
> (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

16. It can be seen that s 18C(1) contains two elements. The *first* is that the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or group of people. The *second* is 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.

17. In conformity with the statutory test, the ASOC alleges that:

(a) the audience of each of the impugned posts was reasonably likely to include (a) people of Israeli national origin in Australia; and/or (b) people of Jewish ethnic origin and/or race in Australia (ASOC [19] and [21]);

(b) in all of the circumstances (the circumstances are particularised), the posts were reasonably likely to offend, insult, humiliate and/or intimidate Australian Jews and/or Israelis in Australia (ASOC [22] and [25]);

(c) Ms Kostakidis made each post because of the race or national or ethnic origin of Israelis and/or Jews (ASOC [23] and [26]);

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22 *KTC v David* [2022] FCAFC 60, [125].

(d) Ms Kostakidis thereby breached s 18C of the *Racial Discrimination Act* (ASOC [24] and [27]).

18. Ms Kostakidis complains that the ASOC does not allege either a person or a group of people who are the subject and victims of the alleged offending conduct (RS [50]). She thus seeks to strike out paragraphs 3, 4, 19, 21, 22, 23, 25 and 26 of the ASOC. The essence of her complaint appears to be that the manner of expression of the group of people subject of the case is not clear. That submission should be rejected. The two victim groups (Australian Jews and Israelis in Australia) are clear on the ASOC.

19. **First**, there is no substantive difference between the nomenclature in paragraphs 19 and 21 ("*people of Israeli national origin in Australia*") and in paragraphs 22 and 25 ("*Israelis in Australia*"), nor between "*people of Jewish ethnic origin and/or race in Australia*" and "*Australian Jews*". This asserted difference appears to be an important part of Ms Kostakidis' complaint (see RS [53] and [57]) but is misconceived. Plainly, "*people of Israeli national origin in Australia*" is a longform expression for the later term: "*Israelis in Australia*". Likewise, "*people of Jewish ethnic origin and/or race in Australia*" is a longform expression for the subsequently used "*Australian Jews*". This is an example of Ms Kostakidis' submissions which quibble with form rather than grappling with the substance of Mr Cassuto's case.

20. **Second**, Ms Kostakidis complains about paragraph 3, in which it is alleged that there are approximately 115,000 people in Australia who identify as Jewish and paragraph 4, in which it is alleged that the vast majority of Australian Jews (a) consider themselves to be Zionist; (b) feel a personal connection to the State of Israel and the Israeli people; and (c) have concern for the safety of Israelis. She submits that the groups pleaded in paragraph 19 "*are identified differently to the vast majority of people in Australia who identify as Jewish and/or the vast majority of Jews alleged to have certain psychological characteristics in paragraph 4 of the ASOC*" (RS [53]).

21. Paragraph 3 pleads the approximate number of people who identify as Jewish in Australia. In conformity with the modern narrative style of pleading, it is introductory to paragraph 4. Paragraph 4 alleges that the vast majority of Australian Jews have the beliefs, feelings and concerns there identified. Obviously, people in Australia who identify as Jewish are the same as Australian Jews. Paragraph 4 is an important allegation because it is one of the "*circumstances*" relied upon to plead that the posts were reasonably likely to offend, insult, humiliate, and/or intimidate Australian Jews in paragraphs 22 and 25. That is, that fact that the vast majority of Australian Jews consider themselves to be Zionist, feel a personal connection to Israel and Israelis and have a concern for the safety of Israelis, is part of the circumstances which mean that the impugned posts were reasonably likely to offend, insult, humiliate and/or

intimidate Australian Jews (in addition, of course, to Israelis in Australia). There can be no real confusion about the meaning of paragraphs 3, 4 and 19, 21, 22 and 25 (cf RS [51]-[55]).

22. **Third**, it cannot seriously be suggested that the use of the term "*Australian Jewish population*" in particular (a) to paragraph 22 could possibly introduce any confusion (cf RS [58]). Particular (a) reads "*the connection of the Australian Jewish population to the State of Israel and safety of Israelis as set out in paragraph 4 above*". Paragraph 4 pleads the beliefs, feelings and concerns of the vast majority of Australian Jews to which we have referred. Particular (a) of paragraph 22 reinforces that which is obvious from any fair reading of the ASOC: that one of the groups victim of Ms Kostakidis' insulting and offensive posts was Australian Jews. One of the circumstances relevant to assessing the offensiveness of the posts is that which appears at particular (a).

23. **Fourth**, Ms Kostakidis complains that neither Australian Jews, nor Israelis in Australia are alleged as a group to be among the audiences of the impugned posts (RS [57]). This complaint is opaque. If the complaint is that Mr Cassuto does not allege that *all* Australian Jews or *all* Israelis in Australia were the audiences of the impugned posts, then it is plainly not necessary for Mr Cassuto so to allege. What he alleges, at paragraphs 19 and 21 of the ASOC, is that the audience of the posts was *reasonably likely to include* the pleaded audience, being Australian Jews or Israelis in Australia. If the complaint is that paragraphs 19 and 21 use the language "*people of Israeli national original in Australia*" instead of "*Israelis in Australia*" and "*people of Jewish ethnic origin and/or race in Australia*" instead of "*Australian Jews*", then that has been addressed at paragraph 19 of these submissions, above.

24. **Fifth**, contrary to RS [59], paragraphs 23 and 26 of the ASOC conform to the requirements of s 18C(1)(b) of the *Racial Discrimination Act*. In those paragraphs, Mr Cassuto pleads that Ms Kostakidis made each post "*because of the race or national or ethnic origin of Israelis and/or Jews*". Plainly, Australian Jews are a sub-group of Jews, and Israelis in Australia are a sub-group of Israelis. It is alleged that Ms Kostakidis made the impugned posts because of the race or national or ethnic origin of Israelis and/or Jews. All of the people in the victim groups (Australian Jews and Israelis in Australia) are either Jews or Israelis. That is, taking the first victim sub-group (Australian Jews), it is alleged that the impugned posts were reasonably likely to offend, insult, humiliate or intimidate Australian Jews, and the posts were made

because of their racial or ethnic origin, being that they are Jews. This is an entirely orthodox approach.[23]

25. Taking the second victim sub-group (Israelis in Australia), it is alleged that the impugned posts were reasonably likely to offend, insult, humiliate or intimidate Israelis in Australia, and the posts were made *because of* their national origin, being that they are Israeli. That is a simple case, and no further characteristic or definition is required (cf RS [59]-[60]). It conforms with the approach taken in the authorities. For example, in *Jones v Scully*, Hely J found that "*a leaflet that conveys an imputation that Jews are fraudulent, liars, immoral, deceitful and part of a conspiracy to defraud the world is reasonably likely to offend, insult, humiliate or intimidate Jews in Australia...*"[24] and, the leaflet was published "*because of*" the ethnic origin of Jews.[25]

26. **Sixth**, Ms Kostakidis makes the following further, striking, submission (RS [60]):

> *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.*

27. This submission exposes and typifies the approach Ms Kostakidis takes on this application, by which she raises theoretical criticisms of form, and avoids dealing with the substance of the claim made against her, which is obvious on the face of the ASOC. The pleaded reason for the impugned posts is: in the case of Australian Jews, their racial or ethnic origin as Jews; and in the case of Israelis in Australia, their national origin as Israelis. No other interpretation is fairly open. The fact that the Respondent can point to the fact that an individual in each group may have more than one race or national or ethnic origin is plainly irrelevant (RS [60]).

28. The group definitions in the ASOC are clear, notwithstanding the attempts on behalf of Ms Kostakidis to make a relatively simple case complex.

D.2 The group awareness of the impugned posts

29. Contrary to RS [65]-[73], nothing in s 18C requires proof of how many people in the victim groups *in fact* read Ms Kostakidis' posts. Such a requirement is not said, in Ms Kostakidis' submissions, to be grounded in any authority. Indeed, it is incongruent with the statutory text of s 18C itself and the recent decision of Stewart J in *Wertheim*

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23 *Wertheim v Haddad* [2025] FCA 720, [181], [204] (Stewart J).

24 *Jones v Scully* (2002) 120 FCR 243, [177]. See also [135].

25 *Jones v Scully* (2002) 120 FCR 243, [136]; see also *Wertheim v Haddad* [2025] FCA 720, [181], [204] (Stewart J).

v Haddad.[26] Section 18C(1)(a) applies to an act that "*is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people*". Mr Cassuto does not need to plead, or prove, that all of the group in fact saw Ms Kostakidis' posts, nor that all of the group (or any particular individuals within it) were in fact offended, insulted, humiliated or intimidated. If that were required, then a very different form of words would have been used by the legislature.

30. This is made clear by Stewart J in *Wertheim v Haddad,* where his Honour addressed a similar submission by the respondent who posited that a group cannot be offended, insulted, humiliated or intimidated by an act that nobody in the group witnesses. His Honour dismissed the point and held:[27]

> *The correct construction of s 18C(1)(a) is that once it is established that an act was done otherwise than in private (as required by the chapeau), the analysis of reasonable likelihood required by para (a) is undertaken on the assumption that the relevant person or group of people becomes aware of it.*

31. Further, as Hely J explained in *Jones v Scully*,[28] "*[a]s the test is an objective one, it is not necessary for an applicant to prove that any person was actually offended, insulted, humiliated, intimidated by the conduct in question*". That statement of the law has been adopted in many cases.[29]

D.3 Pleading of evidence as opposed to material facts: paragraphs 4, 5, 9, 14

32. Ms Kostakidis next complains about the particulars to paragraphs 4, 5, 9, 14.

33. She seeks orders that particulars to paragraphs 4, 5, 9 and 14 be struck out, because she says that those particulars contain evidence, rather than material facts.

34. In this regard, one must remember the function of particulars, which is "*to fill in the picture of the plaintiff's cause of action with information sufficiently detailed to put the defendant on his guard as to the case he has to meet and to enable him to prepare for trial*".[30] Indeed, the first 'note' to r 16.41 in the Federal Court Rules is as follows:

> Note 1: The object of particulars is to limit the generality of pleadings by:
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> (a) informing an opposing party of the nature of the case the party has to meet; and

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26 [2025] FCA 720, [168].
27 [2025] FCA 720, [168]; see also [169]-[171].
28 (2002) 120 FCR 243, [99].
29 See, eg, *Faruqi v Hanson* [2024] FCA 1264, [224] (Stewart J); *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389, [46] (Barker J); *Eatock v Bolt* (2011) 197 FCR 261, [241] (Bromberg J).
30 *Beach Petroleum NL v Johnson* (1991) 105 ALR 456, 466 (von Doussa J).

(b) preventing an opposing party being taken by surprise at the trial; and

(c) enabling the opposing party to collect whatever evidence is necessary and available.

35. It is also to be borne in mind that the distinction between evidence and particulars can be subtle. As Hunt J said in *Sims v Wran*,[31] "*[t]here is often a fine line between giving particulars of the case which a party proposes to make and disclosing the evidence by which that case is to be proved. It all depends upon what is necessary to guard the other party against surprise. If the other party cannot otherwise be so guarded, it may sometimes be necessary for a party to disclose his evidence, or at least a broad outline of it. The starting point is what is necessary to guard the other party against surprise; the starting point is not what can be said without disclosing the evidence to be led*". Similarly, as Giles JA said in *Allianz Australia Insurance Ltd v Newcastle Formwork Constructions Pty Ltd*,[32] "*[g]iving particulars of the case to be made out has been distinguished from disclosing the evidence by which the case is to be proved, but the distinction is not a clear one and the touchstone must be what is reasonably necessary to achieve the purposes last-mentioned*".[33]

36. The particulars to paragraphs 4, 5, 9 and 14 "*fill in the picture*" of Mr Cassuto's case, assisting Ms Kostakidis to understand the case that will be run at trial. To take an example, Mr Cassuto pleads at paragraph 5 of the ASOC that Hezbollah is a terrorist organisation based in Lebanon. He particularises its listing as a terrorist organisation under the *Criminal Code Act 1995* (Cth) on 10 December 2021. He then introduces Mr Nasrallah at paragraph 6, and Hezbollah's commitment to the destruction of the State of Israel in paragraph 7 and his statements calling for the destruction of Israel and Jews at paragraph 8. This philosophy of antisemitism and history of anti-Israel activity is then relevant to whether the impugned posts — in which Ms Kostakidis posts statements by Mr Nasrallah — were reasonably likely to offend, insult, humiliate and/or intimidate Australian Jews and/or Israelis in Australia. The plea at paragraph 5, and the particulars thereto, assist Ms Kostakidis by filling in the picture of Mr Cassuto's case. If anything, it will assist her in her preparation for trial. It seems Ms Kostakidis' complaint is, in substance, that she has been informed of *too much* of the case that will be called at trial. Paragraph 9 falls in the same category.

37. Turning to paragraph 14, Ms Kostakidis' complaint (about references to certain reports (RS [82]-[83])) would completely fall away if Mr Cassuto referred to a 738%

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31 [1984] 1 NSWLR 317, 322.

32 [2007] NSWCA 144, [18].

33 See also *Helmhout v Apostoloff* [2011] ACTSC 2, [76] (Refshauge J) ("the distinction between particulars and evidence is hard to make out at times"); *Brown v Greg Cotton Motors Pty Ltd* (1986) 68 ALR 646, 649 (Jenkinson J) (endorsing what Hunt J said in *Sims and Wran*, albeit in a different context).

increase in antisemitic incidents in 2023, and a 316% increase in 2024, followed by the examples of antisemitic incidents that follow, without reference to the reports from which the statistics come. This exposes that Ms Kostakidis' complaints are technical and do not further the overarching purpose.[34] Once again, her complaint is that she has been told too much about the case she will need to meet at trial.

38. In any event, Ms Kostakidis will not plead to particulars,[35] and in the circumstances it is not obvious *why* she makes her complaint. The Court should not countenance objections of this type in an era of modern civil litigation where parties are bound to conduct the proceeding consistently with the overarching purpose.

D.4 Pleading of alleged facts of no relevance to the cause of action: paragraph 14

39. Paragraph 14 pleads that since the October 7 Attack, there has been a significant increase in antisemitism and/or racism towards Jews and Israelis in Australia. Particulars are given of the 738% increase in antisemitic incidents in October and November 2023 compared with October and November 2022, and a 316% increase in the 12 month period ending 30 September 2024. Seven examples are then given. They range in dates from 9 October 2023 to February 2025.

40. As already explained, paragraph 14 provides a "*circumstance*" relevant to the assessment of whether the impugned posts were reasonably likely to offend the victim groups. That is: the significant rise in antisemitism since the October 7 Attack is part of the circumstances against which the court will assess whether Ms Kostakidis' posts — reposting and endorsing the statements of an antisemitic terrorist — contravened s 18C of the *Racial Discrimination Act*. The test for the purposes of s 18C is objective,[36] that is: *in all the circumstances*, was the conduct of Ms Kostakidis *reasonably likely to offend*. The significant rise in antisemitism in Australia following an attack which constituted the greatest loss of Jewish life since the Holocaust, is a relevant circumstance against which the objective likely effect of Ms Kostakidis' posts must be assessed. Thus, contrary to Ms Kostakidis' submission (RS [87]-[93]) paragraph 14 is plainly relevant to the case Mr Cassuto brings.

41. Ms Kostakidis complains, further, that some of the particularised events in paragraph 14 post-date the impugned posts (RS [85]-[86]). That is true. But the manner in which antisemitism has emerged in Australia (ie starting with protests and resulting in violence) is a circumstance relevant to the sensitives of the Jewish

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34 The same can be said in respect of the particulars to paragraph 4.

35 See note 3 to r 16.41.

36 See, eg, *Creek v Cairns Post Pty Ltd* [2001] FCA 1007, [12] (Kiefel J); *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16, [66] (French J); *Jones v Scully* (2002) 120 FCR 243, [99] (Hely J); *Kaplan v Victoria (No 8)* [2023] FCA 1092, [513] (Mortimer CJ).

community in an environment of heightened hostility. Incidents of antisemitism that happened *after* the impugned posts, may shed light on the rise of and atmosphere of antisemitism at the time of the posts. This is ultimately a trial issue.

D.5 Annexure A and paragraphs 16 and 17

42. Mr Cassuto alleges at paragraphs 16 and 17 of the ASOC that since the October 7 Attack, Ms Kostakidis has posted on X about Israel and/or Jews, including among other things spreading various antisemitic conspiracy theories. Those antisemitic conspiracy theories include that Israel controls the United States government, that Israel assassinated John F Kennedy, that there was an alliance between Zionists and the Nazis, and that Israeli Mossad agents were involved in the September 11 2001 attacks.

43. Ms Kostakidis' endorsement and spreading of antisemitic conspiracy theories, and her ongoing animus towards Israel and Zionism (as pleaded in paragraph 17) goes to the triable issue of whether she made the impugned posts "*because of*" the race or national or ethnic origin of Israelis and/or Jews (as pleaded in paragraphs 23 and 25).

44. Mr Cassuto gives Ms Kostakidis notice, by paragraph 17 and the Annexure referred to in the particulars thereto (which are picked up in the particulars to paragraphs 23 and 25) of the case he will make against her at trial: that is, how he will seek to prove that her posts were "*because of*" race or national or ethnic origin of Israelis or Jews. As Mortimer CJ explained in *Kaplan*,[37] "*the statutory term 'because of' clearly directs attention at the reason for conduct*"; "*[m]otive is not necessary, but in any given factual situation may be relevant, indeed centrally relevant*". Paragraphs 16 to 17 and Annexure A shed light on Ms Kostakidis' reasons and motives. She is being informed in advance of the inferential case being mounted against her.

45. Ms Kostakidis says that paragraph 16 has "*no relevance*" to the case (RS [95]). Paragraph 16 is introductory to paragraph 17. Both are relevant and material to the s 18C case for the reasons just given. For the avoidance of doubt (although it is clear in the ASOC), the entirety of the contents of Annexure A is relied upon (cf RS [100]).

46. While on the one hand complaining, in substance, that the ASOC tells her *too much*, Ms Kostakidis complains that the ASOC does not tell her *enough*: she submits that "*the pleading does not attempt to show how the contents [of Annexure A] (or parts of it) of the post relied upon to establish the conclusions pleaded in paragraph 17*" (RS [100]). With respect, Mr Cassuto is not required to disclose in his pleading the

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[37] *Kaplan v Victoria (No 8)* [2023] FCA 1092, [526]. See also *Toben v Jones* (2003) 129 FCR 515, [151] (Allsop CJ).

submissions he will make at trial. Ms Kostakidis has been given fair warning of the inferential case that will be relied upon to prove why her conduct fell within the meaning of s 18C(1)(b). Nothing more is required.

47. Further, Ms Kostakidis complains that there is no allegation that the contents of her posts, including those containing conspiracy theories, is false (RS [101], [102], [104]). Ms Kostakidis once again seeks to erect a strawman: there is no requirement that Mr Cassuto does so. In any event, the ordinary connotation of a 'conspiracy theory' is that which is false. The conspiracy theories and related posts by Ms Kostakidis pleaded at paragraph 17 and particularised at Annexure A expose, individually and collectively a reason or motivation for Ms Kostakidis' posts on 4 and 13 January 2024.

48. Another strawman is the assertion that the victim groups must have been aware of the posts in Annexure A (RS [102], [105]). That is no part of the statutory test.

D.6 Annexure A and the postdating of the 4 and 13 January Posts

49. Mr Cassuto relies upon all of Annexure A for the purposes of paragraphs 23 and 26 of the ASOC. That does not give rise to any embarrassment (in the legal sense) to Ms Kostakidis (cf RS [110]). Annexure A supports the inferential case that Mr Cassuto will bring at trial in respect of the *reason* for the 4 and 13 January posts. Lest there be any doubt, Ms Kostakidis' posting *after* 4 and 13 January 2024 can shed light on the reason for her conduct on those dates (in the same way that tendency evidence may be relevant[38]) and her conduct is in any event continuing, as the 4 and 13 January posts remain on Ms Kostakidis' X page.

50. Ms Kostakidis' criticism of paragraph 17 of the ASOC (RS [111]-[112]) is unwarranted. The paragraph contains allegations concerning the effect of the posts in Annexure A. In Mr Cassuto's submissions it is plain on the face of each post to which imputation they correspond.[39] Regardless, the effect of those posts is a matter for evidence at trial.

D.7 Historical events: paragraphs 5, 6, 7, 8, 9, 10, 11, 12 and 13

51. Paragraphs 5 to 13 of the ASOC are all material facts upon which Mr Cassuto relies for the first limb of s 18C: they go to the *circumstances* against which it will be assessed whether the impugned posts were *likely* to offend the victim groups, as summarised above at paragraph 4(c) of these submissions. Actual knowledge is not

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38 See *Faruqi v Hanson* [2024] FCA 1264, [197]-[199].

39 In case Ms Kostakidis is genuinely confused about which post corresponds to which sub-paragraph, Mr Cassuto has prepared further and better particulars, putting that beyond doubt, in an annexure to these submissions.

part of the statutory test in s 18C (cf RS [116]-[120]). Once again, Mr Cassuto gives Ms Kostakidis fair warning of the case he will bring.

D.8 Paragraphs 22 and 25 and the particulars thereto

52. At RS [122]-[172], Ms Kostakidis makes a scattergun attack on the particulars to paragraphs 22 and 25. Mr Cassuto deals with the complaints as follows.

53. **First**, remarkably, Ms Kostakidis complains about the common and conventional terms "*inter alia*", "*further particulars may be provided*" (RS [122]-[127]), and "*including*" (RS [144]-[145]). This complaint exemplifies the approach taken by Ms Kostakidis in this application. Ms Kostakidis provides no authority for the assertion that any of these common terms should be struck out. Mr Cassuto's claim is properly pleaded and particularised, and gives Ms Kostakidis fair warning of the case she is to meet.[40]

54. **Second**, Ms Kostakidis makes various submissions to the effect that the particulars to paragraphs 22 and 25 are not enough for Mr Cassuto to win his case (RS [131]-[143], [146]-[149], [153]-[158], [169]). In these parts of her submissions, Ms Kostakidis offers various reasons why she says her posts were not offensive within the meaning of s 18C. She can of course plead those matters in her defence, and seek to make them good at trial. The way in which the case against her is put is clear. Ms Kostakidis can advance her various contentions as to why her posts were not offensive within the meaning of the legislation in her defence, and at trial.

55. To take just one example, Ms Kostakidis' impugned posts include and, on Mr Cassuto's case, endorse, Mr Nasrallah's statement "*[h]ere 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*". Particular (j) to paragraph 22 furnishes one of the "*circumstances*" relevant to the assessment whether the impugned posts were likely to offend Australian Jews and/or Israelis in Australia. That circumstance, as particularised, is that the phrase 'from the river to the sea' has been used historically to intimidate Jews and/or Israelis and to oppose Israel's right to exist. Ms Kostakidis in that context asserts that there is not "*any logical basis on which it can be asserted that a [not too sensitive] reasonable person having a personal connection to the State of Israel and the Israeli people… would be emotionally affected in any of the ways*

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40 This can be contrasted with the case in which a "wholly speculative" case is mounted in a pleading, to erect a purported foundation for the giving of discovery to ascertain whether the speculative case exists. In such a scenario, the add-on of "further particulars will be provided following discovery" cannot cure a defective plea of that vice: see *Teakle Property Australia v Business Initiatives Pty Ltd* [2021] FCA 13 at [21] (Charlesworth J). Even there, the words "further particulars will be provided…" are not itself embarrassing.

relevant to s 18C of the RDA" (RS [134]). The assertion is itself offensive but, in any event, at best for Ms Kostakidis, is a trial issue. It is inapt for a strike out application.

56. Thus, each of the submissions at RS [131]-[143], [146]-[149], [153]-[158], [169] need not be addressed further, save to record that Mr Cassuto disagrees with each of them and if Ms Kostakidis wishes to press them, they will be addressed at trial.

57. **Third**, Ms Kostakidis mounts a specific complaint about particular (a) to paragraph 22. Notwithstanding her attempt to introduce confusion or complexity, here, particular (a) means what it says: one of the "*circumstances*" relied upon for the purposes of s 18C is the connection of the Australian Jewish population to the State of Israel and the safety of Israelis. Relevant facts supporting that particular are pleaded in paragraph 4 of the ASOC. Ms Kostakidis' resort to Wikipedia to attempt to suggest that the term 'Zionism' is ambiguous (RS [130] and fn 130) is without foundation and should be rejected. Zionism is, simply, the movement founded with the purpose of establishing a national home for the Jewish people in their ancestral homeland and which now supports that national home. The Macquarie Dictionary entry for the term is a single sentence to that effect.[41] Plainly, paragraph 4(a) to the ASOC supports that which is particularised at particular (a) to paragraph 22.

58. **Fourth**, a pedantic (but incorrect) point is made in respect of paragraph 13 of the ASOC. There, it is alleged that the day after October 7 Attack, and before Israel had taken any responsive step to the October 7 Attack, Hezbollah began launching rockets into Israel. The particulars state that since the October 7 Attack, Hezbollah has fired thousands of rockets from southern Lebanon at Israel, killing 24 people and displacing approximately 70,000 Israelis. Ms Kostakidis submits that there is a "technical error" in the phrasing of the particulars because, she says, the point of paragraph 13 is the timing of the commencement of rocket firing by Hezbollah, whereas the particulars particularise the *course* of rocket firing beyond that date (RS [152]). Contrary to that submission, the point of paragraph 13 is *both* the timing of the commencement of the rocket firing, and the fact of the commencement (and continuation) of that rocket firing.

59. **Fifth**, a specific criticism is made of particular (h). That particular reads: "*the 4 January Post is antisemitic according to the International Holocaust Remembrance Alliance definition of [antisemitism[42]] adopted by Australia and 42 other countries, because it denies the right of the Jewish people to self-determination and justifies the*

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41 Macquarie dictionary (online, 2025): "*noun*. a worldwide movement founded with the purpose of establishing a national home for the Jewish people in Palestine, which now provides support to the state of Israel".

42 This word was omitted, obviously in error, from particular (h) to paragraph 22 of the ASOC.

harming of Jews". Ms Kostakidis submits that this particular "*does not allege any material fact concerning [her actions] or the likely impact of those actions on the person or group said to be affected by those actions*" (RS [160]). Again, this is a matter for trial. Mr Cassuto alleges in particular (h) that the 4 January Post: *one*, denies the right of the Jewish people to self-determination and justifies the harming of Jews, and *two*, is properly characterised as antisemitic according to the International Holocaust Remembrance Alliance definition. That particular is not irrelevant — to the contrary, it is capable of furnishing another "*circumstance*" as to why the 4 January Post was reasonably likely to offend, insult, humiliate and/or intimidate Australian Jews and/or Israelis in Australia. The denial of the right of Jewish people to self-determination, and an attempt to justify harming Jews, is a circumstance that is reasonably likely to offend the victim groups. Further, that such a statement is antisemitic within the internationally-recognised meaning will assist in the assessment of the objective likely effect of the post on the victim groups.

60. **Sixth**, Ms Kostakidis makes the surprising submission that although evidence that a person or member of a group is offended is admissible to show how a reasonable person in the circumstances of a group would affected by the conduct of a respondent (RS [165]), particular (i) (which alleges that Mr Cassuto felt offended and insulted by the impugned posts) should be struck out (RS [163]-[166]). Plainly, Mr Cassuto's evidence as to the effect on him of the posts will be relevant.[43] He is a member of both victim groups (see ASOC [1(a)]). The question of whether the posts were reasonably likely to offend is still an objective query, but the circumstance that the applicant himself felt offended by the posts is part of the (orthodox) case he will advance at trial in support of the first element of s 18C.

61. **Seventh**, particular (j) is that the phrase (contained in the impugned posts) '*from the river to the sea*' has been used historically to intimidate Jews and/or Israelis and to oppose Israel's right to exist. Ms Kostakidis complains that this phrase is not alleged to be known to any person or group of persons subject of the impugned conduct (RS [168]). Once again, Ms Kostakidis ignores the statutory test. The use of a phrase that has historically been used to intimidate people of the same race or national or ethnic origin as the victim groups in this case is plainly part of the "*circumstances*" relevant to the assessment of the *likely* effect of the effect of the impugned conduct. No further material fact needs to be pleaded.

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[43] *Jones v Scully* [2002] FCA 1080, [99] (Hely J); *McGlade v Lightfoot* (2002)124 FCR 106, [44]-[45] (Carr J); *Eatock v Bolt* (2011) 197 FCR 261, [241] (Bromberg J); *Faruqi v Hanson (evidence rulings)* [2024] FCA 225, [46] (Stewart J).

62. **Eighth**, for the reasons given above at sections D.5 and D.6 of these submissions, Annexure A would not be struck out. Accordingly, contrary to RS [172], particular (k) to paragraphs 22 and 25 would stand.

63. **Ninth**, the complaint at RS [174]-[175] is difficult to understand. The ASOC alleges, in conformity with the statutory test, the reasonably likely effect of the impugned posts on the defined victim groups. The particulars put Ms Kostakidis on notice of how that conclusion will be proven at trial, by reference to the *circumstances* Mr Cassuto relies upon. Each of the matters particularised at paragraphs (a) to (k) of paragraphs 22 and 25 is part of the circumstances against which the reasonably likely effect of the impugned posts is to be judged. That is what is required by a pleading that alleges a breach of this kind.

64. **Finally**, the suggestion that the striking out of one particular to paragraphs 22 and 25 of the ASOC will result in the paragraphs being struck out entirely ([RS [174]) is erroneous.[44] The particulars set out a number of matters which assist in supporting the material fact in each paragraph. Each individual particular is sufficient in justifying the material allegation, the removal of one (or more) does not render the paragraph embarrassing.

D.9 Paragraphs 23 and 26 and the particulars thereto

65. Another series of unsound objections are made to paragraphs 23 to 26 and the particulars thereto.

66. **First**, at RS [179]-[184], Ms Kostakidis again advances the bold submission that "*inter alia*" and "*further particulars may be provided prior to trial*" should be struck out. Mr Cassuto repeats what he said at paragraph 53 above.

67. **Second**, Ms Kostakidis complains about the "*logic*" of the case being advanced for the purposes of the second limb of s 18C (RS [185]-[197]). The submission also seeks to add some evaluative test to be applied by the Court as to whether the statements contained in particulars (a) or (b) are "*untrue*" or "*unfair*". Those assessments would be an impermissible gloss on the statutory test under s 18C. In any event, as explained earlier in these submissions, they would at best for Ms Kostakidis be trial issues.

68. **Third**, she again attacks Annexure A (RS [198]-[199]), which has been dealt with above at sections D.5 and D.6.

69. Ms Kostakidis is well informed of the case she is to meet at trial (cf RS [200]-[205])

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44 The same point is made in respect of paragraphs 23 and 26 (RS [200]-[205]).

D.10 Paragraphs 24 and 27

70. The submission at RS [209]-[210] is difficult to understand. Two victim groups have been identified in the ASOC [22] and [25]: Australian Jews and Israelis in Australia. The fact that RS [209] itself refers to each of these victim groups exposes that Ms Kostakidis is well aware that those groups are the ones relied upon by Mr Cassuto to establish his claim.

D.11 'And/or'

71. As Ms Kostakidis' submissions acknowledge, alternative cases are entirely permissible, indeed they are commonplace. There is no reason why the phrase "*and/or*" is confusing (cf RS [215]). It appears Ms Kostakidis would be satisfied if the words "*and/or*" were replaced with "*further and in the alternative*" (RS [213]), revealing the focus on form over substance in the approach she takes.

72. Ms Kostakidis says that a "*high level of confusion*" exists in paragraphs 22, 23, 25 and 26. It is convenient to focus on paragraph 22 in addressing this submission. Paragraph 22 reads "*[i]n all the circumstances, the 4 January Post was reasonably likely to offend, insult, humiliate and/or intimidate Australian Jews and/or Israelis in Australia*". In the first use of phrase, Mr Cassuto is picking up the statutory test of "*offend, insult, humiliate or intimidate*". Those words are open textured, all connoting a negative, adverse effect. When read together, they contemplate a substantial effect.[45] It is apparent from paragraph 22 that Mr Cassuto relies upon each of those words (offend, insult, humiliate, intimidate) further and in the alternative to one another. This is a completely orthodox approach to alleging a breach of s 18C of the RDA.[46]

73. In the second use of the phrase, Mr Cassuto pleads the alternative victim groups relied upon for the purposes of s 18C. Each of paragraph (a) to (k) is relied upon, separately and together (or "*further and in the alternative*" to each other) to support that which is pleaded at [22]. That is clear on the face of the pleading (cf RS [220]).

74. Contrary to RS [218]-[219], particular (i) (that Mr Cassuto himself felt offended and insulted by the post) supports the inferential case that the victim groups (of which he is a part) would be reasonably likely in all the circumstances to be offended, insulted, humiliated and/or intimidated.

E. CONCLUSION

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45 *Kaplan v Victoria (No 8)* [2023] FCA 1092, [506] (Mortimer CJ).

46 See *Jones v Scully* (2002) 120 FCR 243, [102]-[103] (Hely J); *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16, [67], [69] (French J); *Faruqi v Hanson* [2024] FCA 1264, [238]-[239] (Stewart J).

75. The pleaded case is clear. Ms Kostakidis has launched a wide-ranging but unjustified attack on a properly pleaded case. Mr Cassuto respectfully submits that the strike out application should be dismissed with costs, and Ms Kostakidis should be required to put on her defence so that his claim may be heard and determined at trial.

Michael Borsky

Tim Jeffrie

Colette Mintz

4 July 2025

Annexure: Further and better particulars to paragraphs 17

The Applicant provides the following further and better particulars to paragraph 17:

1. As to sub-paragraph (a), the Applicant refers to the posts in the Annexure numbered 7, 21, 22, 23, 24, 26, 27, 28, 30, 32, 33, 34, 35, 37, 42, 46, 47, 50, 51, 55, 56, 58, 61.

2. As to sub-paragraph (b), the Applicant refers to the posts in the Annexure numbered 14, 20, 44.

3. As to sub-paragraph (c), the Applicant refers to the posts in the Annexure numbered 18, 38.

4. As to sub-paragraph (d), the Applicant refers to the posts in the Annexure numbered 10, 43.

5. As to sub-paragraph (e), the Applicant refers to the posts in the Annexure numbered 1, 2, 8, 11, 12, 13, 25, 31, 40, 41,

6. As to sub-paragraph (f), the Applicant refers to the posts in the Annexure numbered 4, 5, 6, 8, 14, 16, 28, 29, 30, 36, 39, 44, 45, 49, 52, 54, 57, 60.