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Document Lodged:	Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	16/02/2026 12:22:20 PM AEDT
Date Accepted for Filing:	16/02/2026 12:22:23 PM AEDT
File Number:	VID404/2025
File Title:	ALON CASSUTO v MARY KOSTAKIDIS
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink, reading "Sia Lagos".

Registrar

Important Information

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Federal Court of Australia
District Registry: Victoria
Division: General

No. VID 404 of 2025

ALON CASSUTO

Applicant

MARY KOSTAKIDIS

Respondent

RESPONDENT'S SUBMISSIONS ON COSTS

A INTRODUCTION

1. The respondent submits that, for the following four reasons, the appropriate order is that each party bear their own costs of the respondent's interlocutory application dated 16 May 2025 (**Application**): (i) each party has achieved partial success on the Application; (ii) the respondent had to bring the Application to achieve her success; (iii) it was reasonable for the respondent to rely on *Wertheim v Haddad* (2025) 311 FCR 263; and (iv) such costs order would not offend s 46PSA(5) of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) (and nor, if the Court considered it the appropriate order, would an order that costs be costs in the cause).

B PRINCIPLES

2. Except as provided by any other Act, the award of costs is in the discretion of the Court (s 43(2) of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**)). The discretion is to be exercised judicially (*Oshlack v Richmond River Council* (1998) 193 CLR 72 at [22] (Gaudron and Gummow JJ)). In general, as the applicant accepts, the discretion as to costs is exercised in favour of the successful party, but that is a principle not a rule and special circumstances may warrant departure from that principle (applicant's costs submissions (**AS**) at [11]; *Kruger v Thompson (No 2)* [2025] FCAFC 193 at [7]-[8]; *Rainforest Reserves Australia Inc v Minister for the Environment and Water (Costs)* [2025] FCA 702 at [17]-[19]).
3. In *Toltz v Riemer* [2025] FCA 1385, Kennett J expressed his provisional view that the appropriate order was that each party bear their own costs of the respondent's strike out application, on the basis that each had achieved partial success (at [152]). However, his Honour reserved the question of costs in order to hear submissions on the effect of s 46PSA of the AHRC Act (at [153]-[154]). Respectfully, the Court should find Kennett J's provisional view, in an analogous case, of more assistance than *Insurance Commission of Western Australia v Antony Leslie John Woodings as liquidator of the Bell Group Ptd (in liq) (No 3)* [2018] WASC 44(S) (**ICWA**) (cited at AS [13]). Not only is *ICWA* a decision of a different Court relating to liquidation, but "BGNV" (the ninth and tenth defendants) only succeeded on one of its arguments on one of the 18 prayers for relief it had applied to strike out (at [22]).

C (i) EACH PARTY HAS ACHIEVED PARTIAL SUCCESS ON THE APPLICATION

4. The applicant inaccurately asserts that the "only respect" in which the respondent succeeded was in relation to the ASOC's inconsistent descriptions of the groups (AS [7]). In fact, the Application was successful in the following four respects.

5. *First*, the Court struck out [3], [4], [19], [21], [22], [23], [25] and [26] of the amended statement of claim (**ASOC**) on the basis that those paragraphs used different, inconsistent descriptions to identify the two groups for the purposes of s 18C(1)(a) and (b) of the *Racial Discrimination Act 1975* (Cth) (**RD Act**) (Judgment (**J**) at [57], [96]). As his Honour noted, “[t]he proper identification of the relevant group or groups is an important step” in the action (J [58]).
6. *Secondly*, the Court also struck out [19] and [21] of the ASOC on the basis that the alleged “audience” of the two impugned posts was “ambiguous” and its relevance to the cause of action was “obscure” (J [63]). Divining the intended meaning of the alleged audience involved “supposition”, while the pleaded audience did not appear “to connect logically” to the elements of the cause of action (J [61]-[62]).
7. *Thirdly*, the application was successful in that the applicant in his written submissions dated 4 July 2025 annexed further and better particulars to [17] of the ASOC.¹ That paragraph had asserted a series of imputations said to be conveyed by “the Respondent’s posts on X about Israel and/or the Jews”. The further and better particulars for the first time identified which of the 61 posts in Annexure A are relied on as contributing to each of the imputations in [17]. It was partly because these particulars went “a substantial way to alleviating any unfairness or embarrassment” to the respondent, that his Honour did not strike out [16] and [17] (J [73], and see [75] and [77]).
8. *Fourthly*, the Court decided that sub-paragraph (h) in [22] and [25] should not be included in the further amended statement of claim. Having earlier noted that the expression “anti-Semitic” “may bear a range of meanings”, his Honour observed that the expression does not appear in s 18C of the RD Act, and that characterising particular conduct or statements as “anti-Semitic” according to one, potentially disputable definition, did not appear necessarily to lead to any particular conclusion about the applicability of s 18C (J [42], [91]).
9. The present case is similar to *Riemer* where each party achieved partial success on the respondent’s application. While Kennett J agreed to strike out certain parts of the pleading (at [151(b)]), he refused to strike out: certain words in [7] (see [114]); [88(a)] and the whole of [10] (at [119]); the whole of [21] and [22] (at [124]); the whole of [28] (at [129]); and [88(c)] (at [150]).

¹ The applicant nevertheless maintained in his 4 July 2025 submissions that [17] of the ASOC and Annexure A gave the respondent sufficient notice of the case against her (at [44], [50] and footnote 39 of those submissions).

10. Three additional points are made about the present case. First, much of both the applicant's 4 July 2025 written submissions² and of the 29 July 2025 hearing³ addressed issues on which the respondent, Ms Kostakidis, succeeded. Secondly, although of some length (as noted at AS [5]), the aide memoire⁴ merely summarised the parties' submissions on each paragraph of the ASOC, while the affidavit and exhibit⁵ were simply evidence of the extensive reporting of Mr Nasrallah's speech (the speech to which the two impugned posts refer). Thirdly, the lay expression of disappointment by the respondent a fortnight after the Judgment was published, should not play a part in the judicial exercise of the discretion to award costs (compare AS [9]). At best it amounts to inadmissible lay opinion evidence.

(ii) THE RESPONDENT HAD TO BRING THE APPLICATION TO ACHIEVE HER SUCCESS

11. By letter of 28 April 2025, the respondent informed the applicant of her intention to bring a strike out application in respect of the statement of claim dated 31 March 2025 (SOC) (Affidavit of Raphael Yehudah Leibler affirmed 17 December 2025, Exhibit RYL-1, pp 8-11). The respondent stated that the SOC "does not inform her of the case that she must answer" (at [4]), and the instances she gave included that: the SOC was "inconsistent (and therefore embarrassing)" in its identification of the "group of people" (at [4(a)] and [5]); the respondent did not comprehend the case against her in respect of the audience alleged at [19] and [21] of the SOC (at [4(a)]; and [17] of the SOC "would require the respondent to respond to ill-defined and general allegations made in relation to 45 pages of social media posts" in Annexure A (at [4(d)]).

12. The 28 April 2025 letter proposed that the applicant advise the respondent by 6 May 2025 whether he was agreeable to lodging an amended statement of claim responding to the matters raised, and that if he was not so agreeable the respondent would file her strike-out application (at [11(c)]).

13. By letter of 7 May 2025, the applicant enclosed an amended statement of claim (ASOC) and stated that he did not otherwise intend to amend the SOC (Exhibit RYL-1, pp 14-15). The ASOC made minor amendments to the SOC, including adding the words "in Australia" and

² The substantive arguments began on page 5. Pages 5-8 addressed the "groups" and the alleged audience, pages 12-13 and the Annexure on the final page, page 20, addressed [17] of the ASOC and the posts in Annexure A, and [59] on pages 15-16 addressed the criticism of particular (h) in [22] and [25] of the ASOC.

³ Submissions on the descriptions of the "groups" are at T 14.7-16.35; 30.24-36.24; 44.14-23, Counsel for Mr Cassuto noting at T 30.24-26 that "much ink" had been spilled by both parties on the definitions of the groups in the ASOC. Submissions on the fact that the alleged imputations at [17] of the ASOC were not particularised by reference to specific posts in Annexure A are at T 16.36-18.17; T 36.25-47.

⁴ The aide memoire was handed up on 29 July 2025 and a copy can be found at Exhibit RYL-1, pp 22-47.

⁵ Affidavit of Jack Vaughan affirmed 30 May 2025 and Exhibit JV-1.

“Australian” to [19], [22] and [25], but did not otherwise address the criticisms made of the SOC in the respondent’s 28 April 2025 letter. By email dated 7 May 2025, the respondent informed the applicant of her view that the ASOC was also liable to be struck out for the reasons set out in the 28 April 2025 letter (Exhibit RYL-1, p 16).

14. *After* the Application was filed on 16 May 2025, the applicant’s 4 July 2025 submissions, for the first time, annexed further and better particulars to [17].

15. In light of the documentary record summarised above, the costs order should reflect the fact that, the applicant having been given, but failing to take, the opportunity to amend his SOC, the respondent needed to bring the Application in order:

- a. successfully to establish that the pleading did not clearly identify the “groups” upon which the respondent relied for s 18C(1)(a) and (b);
- b. successfully to establish that the pleading did not clearly identify the alleged audience of the two impugned posts; and
- c. for the applicant to particularise each of the imputations pleaded at [17].

(iii) IT WAS REASONABLE FOR THE RESPONDENT TO RELY ON *WERTHEIM*

16. In *Wertheim*, Stewart J considered that a reference to when Palestine is “cleansed from the filth of the Zionists” was speaking to “when Palestine is no longer occupied”, and was “not about Jews” (at [110]). As the pleaded imputation (“the Jewish people are filthy”) had not been established, the relevant passage could not breach s 18C of the RD Act (at [42], [157]-[160], [197], [199], [204], [212]). Similarly, in the two impugned posts in the present case, Mr Nasrallah’s speech and the respondent’s own comments, were about the occupation of, and the conduct of the State of Israel in, the land of Palestine (and were not about Jews or Israelis). Although his Honour distinguished *Wertheim* in rejecting this aspect of the strike out application (at [39], [40]), it was reasonable for the respondent to rely on that decision (only published on 1 July 2025), as a *quasi* summary judgment point. Stewart J’s statement, at [107], that “*Needless to say, political criticism of Israel, however inflammatory or adversarial is not by its nature criticism of Jews in general or based on Jewish racial or ethnic identity*” was broad, relevant to the instant case and indeed appeared *prima facie* to be dispositive. It was reasonable for the respondent to expect his Honour to follow the decision in *Wertheim* unless satisfied that it was “plainly wrong”. The respondent respectfully submits that she should not be ‘punished’ for having relied upon *Wertheim* through an adverse costs order, particularly in a relatively new context for the application of s18C of the RD Act.

(iv) AN ORDER THAT EACH PARTY BEAR THEIR OWN COSTS DOES NOT OFFEND S 46PSA OF THE AHRC ACT

17. With effect from 2 October 2024, s 46PSA of the AHRC Act was amended to become a costs protection provision. The new provision has not yet been the subject of detailed judicial consideration.

18. Subsections (2) and (6). The respondent contends that s 46PSA(2) and (6)(c) of the AHRC Act are not engaged, at this stage of the proceedings, by the outcome of the Application. The Explanatory Memorandum to the *Australian Human Rights Commission (Costs Protection) Bill 2024* (Cth) (**Explanatory Memorandum**) (see especially [16] on p 14) confirms⁶ that the intention of Parliament is that:

- a. where an applicant ultimately has **substantive success** in the proceedings on one or more grounds,⁷ the respondent **must** be ordered to pay the applicant's costs (or a portion of those costs)⁸ (s 46PSA(2)); and
- b. where a respondent ultimately has **substantive success** in the proceedings (in the sense that the applicant has not been successful on any ground), the applicant **may** be ordered to pay the respondent's costs (s 46PSA(6)(c)).

19. Subsection (5). Section 46PSA(5) appears to prohibit the Court, at this stage, from ordering the applicant to pay the respondent's costs of the Application. The prohibition is, though, subject to the exceptions in subsection (6). Exception (c) appears to mean that a respondent who ultimately has substantive success in the proceedings may recover their costs of the proceedings (including their costs of an earlier interlocutory application on which they were successful- see Explanatory Memorandum at [16] on p 14). In the present case, the Court need not resolve the precise ramifications of s 46PSA(5) and (6). The order for which the respondent contends, that each party bear their own costs, would not run contrary to the prohibition in s 46PSA(5). The Court would not be ordering the applicant to pay the respondent's costs. Alternatively, if the Court considered it the appropriate order, an order that costs be costs in the cause would not contravene the prohibition in the subsection.

Dated: 16 February 2026

**Sheryn Omeri KC,
Richard Reynolds**

⁶ Section 15AB(1) and (2)(e) of the *Acts Interpretation Act 1901* (Cth).

⁷ The word "grounds" in s 46PSA(2) referring to the grounds of unlawful discrimination alleged in the originating application (s 46PO(1); and Ch 2 of "Discrimination Law and Practice", Sixth Edition, Federation Press (2024)).

⁸ The Explanatory Memorandum states that the intention of the Parliament is that where s 46PSA(2) is engaged, the Court "maintains the discretion to apportion costs as it sees fit" (at [10] on p 13).