

NOTICE OF FILING

Details of Filing

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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

FIRST RESPONDENT'S OUTLINE OF OBJECTIONS ON INTERLOCUTORY APPLICATION

Introduction

1. On 1 August 2025, the Applicants filed an interlocutory application (**1 August application**) seeking leave:
 - a. for the First and Second Applicants to continue the proceeding on behalf of 13 represented persons pursuant to Rule 9.21 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**);
 - b. to amend the title of the proceeding accordingly; and
 - c. to amend the Originating Application and Statement of Claim in the form attached to the Affidavit of the First Applicant, filed in support of the 1 August application (**Toltz Affidavit**).
2. On 5 September 2025, the Applicants provided a further set of draft documents, apparently intended to replace those provided alongside the Toltz Affidavit (being the Draft Amended Originating Application (**Draft AOA**) and the Draft Amended Statement of Claim (**Draft ASOC**) (**5 September documents**).

First Respondent's position

3. The First Respondent takes the following position in respect of the application and purported application:
 - A. Procedural matters
 - a. Formal
 - i. There is no competent application before the court seeking leave to add a Fifth Applicant.
 - ii. The headings of the 5 September documents do not refer to the Second to Fifth Applicants. They refer only to the First Applicant, suing on behalf of himself and the persons named in Schedule A.
 - b. Substantive
 - i. Should the Court be inclined to permit the joinder of the proposed Fifth Applicant, the First Respondent would not oppose that course.
 - ii. The First Respondent strenuously opposes the continuation of the matter as a representative proceeding, for the reasons set out below.
 - iii. If the proposed represented persons wish to participate in the proceedings, they should be permitted to do so as named Applicants (particularly given that they seek damages which would need to be individually assessed and quantified).

- iv. Alternatively, the Australian Academic Alliance Against Antisemitism (**5A**) might seek to be joined as the appropriate Applicant in lieu of the proposed represented persons.
- v. Should the Court be minded to permit the continuance of the matter as a representative proceeding, the First Respondent would seek that the proceeding be split and that the question of liability be heard and determined prior to any question of damages.

B. Pleadings

The First Respondent contends that the words and/or paragraphs of the Draft ASOC set out at the table under paragraph 2525 below should be removed prior to it being filed.

C. Final orders

The First Respondent respectfully requests that the Court make orders:

- a. dismissing the r9.21 application; and
- b. ordering that if any of the proposed represented persons, or 5A, wish to participate in the proceeding, they have leave to apply to be joined as Applicants; and
- c. that the words and/or paragraphs referred to in the table at paragraph 25 below be removed from the Draft ASOC prior to its filing; and
- d. that the Applicants pay the First Respondent's costs of the application.

A. **Procedural matters**

4. The First Respondent's objection to the r9.21 application is broadly founded on three grounds:
 - a. The proposed represented persons do not meet the "same interest" requirement, as their diverse perspectives, interpretations of and responses to the impugned communications undermine the commonality necessary for a representative proceeding.
 - b. Additionally, the individual claims for damages for loss of reputation, distress, and other personal harm introduce complexity that would extend the trial and cause significant prejudice to the respondents.
 - c. The conversion to a representative proceeding would be contrary to the principles of efficiency and good case management as embodied in s37M of the FCA Act and underpinning the purpose of r9.21.

"Same interest" requirement, and the applicants are not truly 'representative'

5. Rule 9.21 of the FCA Act requires that the represented persons have the "same interest" in the proceeding. The "same interest" test is more flexible than the framework set out in Part IVA of the FCA Act. It is well established that the "same interest" requirement is broad, and may extend to a significant common interest in the resolution of any question of law or fact arising in the relevant proceedings.
6. Material obtained by the First Respondent (Affidavit of Michael David Bradley affirmed 22 September 2025 (**Bradley Affidavit**), Annexures MDB-3 to MDB-18, pp 11 to 72) demonstrates the diversity of objections and concerns raised by the proposed represented persons in response to impugned acts. Their perspectives and understandings of the matters alleged in the Draft ASOC are widely divergent.

7. Further, there is no shared or common relevant attribute linking the First and Second Applicants and the proposed represented persons. They approach the issues from different, and (in some cases) diametrically contradictory perspectives.
8. This is not a straightforward case where each of the Applicants and the represented persons have received the same faulty medical device, or fallen prey to the same securities fraud, or have been injured in the same train derailment. The cause of action in this proceeding (as pleaded) is extraordinarily complicated and personal. Every paragraph of the Draft ASOC makes factual assertions that have been the subject of academic, legal, geopolitical and religious texts for decades, or centuries. Each person's perception of those assertions will be shaped by social, familial, cultural, political, religious and philosophical influences, and will be so personal that it is virtually impossible that any one person may 'represent' the views of another in any meaningful way.
9. While the "same interest" test does not require that an applicant's understanding of the matter be *identical* to that of the represented persons, there must be limits to the extent of the deviation. For example, materials seen by the First Respondent (Bradley Affidavit, Annexures MDB-3 to MDB-18, pp 11 to 72) disclose that the proposed group members have materially different interpretations of the matters in dispute, and several of those interpretations and understandings of the impugned materials are not represented by the Draft ASOC.
10. Notably, in a December 2023 email to a member of staff of the Second Respondent (Bradley Affidavit, Annexure MDB-14, pp 60), one of the proposed group members (Mr Babicz) pointed out that the photograph depicted in the First Respondent's so-called ' Hamas Flags Post ' was of "five **Islamic** green flags (**not** Palestinian flags, but **Islamic** flags)" (original emphasis).
11. By stark contrast, the Draft ASOC pleads that:
 - a. [29]: "[the picture] shows 5 green Hamas flags with Arabic writing visible on them (the Hamas Flags Post)".
 - b. [31]: Each flag was, and was known and intended by Professor Keane to be, a Hamas flag used by the Hamas military wing.
 - c. [32]: Each flag was, or is, known by the Applicants, and the persons on whose behalf the Amended Statement of Claim is filed, to be the Hamas flag.
 - d. [33]: The Applicants and the persons on whose behalf the Amended Statement of Claim is filed also knew, or now know, that the Hamas flag is the flag used by the Hamas military wing.
 - e. [34]: At all material times the Hamas Flag was thus recognisable as the Hamas flag.
12. If the First and Second Applicants were or have since become aware of the views of Mr Babicz that the green flags depicted are not Palestinian or Hamas flags, but are "**Islamic** green flags", then it is entirely inappropriate for the Statement of Claim to contain those factual assertions while seeking to represent Mr Babicz in the proceeding.
13. If, on the other hand, the First and Second Applicants were or are *not* aware of the views of Mr Babicz as to the flags post, there could hardly be a starker illustration of the unsuitability of this matter to be carried forward as a representative proceeding, and the Court cannot be satisfied that the "same interest" test can be made out across the vast and complex terrain of the Applicants' pleaded case.
14. It is therefore apparent that the pleaded case is in several respects either silent or directly contradictory to the expressed views of the proposed represented persons, and it cannot sensibly or honestly be contended that their interests in the proceeding are "the same" as those of, or are best represented by, the First and Second Applicants.

15. The First Respondent notes that the objectives and traditions of r9.21 are to permit a collective of individuals with the same interest in a matter to bring an application efficiently, economically, and in order to avoid a multiplicity of proceedings.
16. Should the proposed represented persons wish to advance their interests in the matter, they should seek to be joined as Applicants and participate in the proceedings in the usual course.
17. Alternatively, given that the proposed represented persons are all (or all bar one) members of 5A, and the proceedings appear to advance the objectives of that body (Bradley Affidavit, Annexure MDB-20, pp 77-78), 5A may seek to be joined as an Applicant in the proceeding.
18. If 5A does not wish to join, the First Respondent contends that the proposed represented persons ought not be given shelter or immunity by virtue of that strategic decision by 5A, of which they are all (or all bar one) members.

Complexity of Individual Claims for Damages

19. The proposed group members' individual claims for damages for loss of reputation, distress, and other personal harm introduce significant complexity. These claims are inherently personal and require individualised evidence and assessment, which would complicate and extend the trial.
20. The represented persons would be required to establish a clear causal link between the alleged discriminatory conduct and the harm suffered, and to adduce substantiated evidence of the harm, including its severity and impact, most likely in the form of expert medical evidence.
21. The court has inherent discretion to refuse conversion to a representative proceeding if the diversity of claims would delay the trial, cause prejudice to the respondents, or otherwise interfere with case management principles. The need to address each person's circumstances and asserted injuries (including with reference to a variety of individualised evidence) would necessarily result in such delays and prejudice.
22. Allowing the representative proceeding would prejudice the respondents by requiring them to address diverse and individualised claims within a single trial. This would undermine the efficiency and fairness of the proceeding.

Contrary to the Overarching Purpose of Civil Proceedings

23. The overarching purpose of civil proceedings is to resolve disputes justly, quickly, and inexpensively. The proposed representative proceeding, with its lack of commonality and complex individual claims, is contrary to this purpose. It would result in unnecessary costs, delays, and prejudice to the respondents.
24. In accordance with the case management principles including s37M of the FCA Act, the court may decline to make the representative order sought if the diversity of facts or claims arising would complicate or delay the trial or cause prejudice to the Respondents.

B. Pleadings

25. The proposed Draft ASOC has not yet been filed, therefore the First Respondent does not bring an application pursuant to r16.21. However, he contends that in the interests of efficient management of the proceeding, this Honourable Court should make orders permitting the Draft ASOC to be filed with the following parts having been struck out.

#	Para	Objectionable part	Basis (rule 16.21(1)(a)-(f))
1.	8(a)	The words: “or is eligible to be”	(c) is ambiguous; (d) is likely to cause delay in the proceeding; (e) fails to disclose a reasonable cause of action.
2.	8(a)(i)	The words: “predominantly Jewish people and/or Israeli” and “A substantial proportion of Jewish and/or Israeli people identify themselves as Zionists”	(c) is ambiguous; (d) is likely to cause delay in the proceeding; (e) fails to disclose a reasonable cause of action.
3.	12(a)	The word: “descent”	(c) is evasive or ambiguous; (d) is likely to cause prejudice or delay in the proceeding; (e) fails to disclose a reasonable cause of action.
4.	12(b)	The words: “and/or nationality”	[as above]
5.	23	<i>In toto</i>	(c) is evasive or ambiguous; (d) is likely to cause delay in the proceeding; (e) fails to disclose a reasonable cause of action.
6.	25	<i>In toto</i>	(c) is evasive or ambiguous; (d) is likely to cause delay in the proceeding; (e) fails to disclose a reasonable cause of action.
7.	28	<i>In toto</i>	(c) is evasive or ambiguous; (d) is likely to cause delay in the proceeding; (e) fails to disclose a reasonable cause of action.
8.	35	<i>In toto</i>	(c) is evasive or ambiguous; (d) is likely to cause delay in the proceeding; (e) fails to disclose a reasonable cause of action.

C. Final orders

26. The application under Rule 9.21 should be dismissed on the grounds that the proposed represented persons do not share the "same interest" required for a representative proceeding, including because the Applicants are – in material ways – not ‘representative’ of the proposed represented persons.
27. Further, the individual claims for damages would significantly extend the trial and cause undue prejudice to the respondents.
28. Finally, and most importantly, the court should exercise its discretion to refuse the application in the interests of justice and to uphold the overarching purpose of civil proceedings.
29. The First Respondent respectfully requests that the Court make orders:
- a. dismissing the r9.21 application; and
 - b. ordering that if any of the proposed represented persons, or 5A, wish to participate in the proceeding, they have leave to apply to be joined as Applicants; and
 - c. that the words and/or paragraphs referred to in the table at paragraph 25 above be removed from the Draft ASOC prior to its filing; and
 - d. that the Applicants pay the First Respondent’s costs of the application, including costs thrown away.

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Solicitors for the First Respondent