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No. NSD950 of 2025

Federal Court of Australia

District Registry: NSW

Division: Human Rights

Joseph Toltz and others

Applicants

Nick Riemer and another

Respondents

Applicants' Submissions in Reply

Filed on behalf of (name & role of party) The Applicants

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1. ***Imputations:*** The University's Reply Submissions (**2RRS**) assert that the Applicants' criticism of the University's approach to imputations is misplaced ([2]-[4]). However, the converse is true. The Applicants rely on their pleaded imputations and submit that the case and evidence, which is serious and disputable for purposes of the summary judgment application, will at trial establish the pleaded imputations[1] and liability for the relevant impugned acts. The key vice in the University's approach is that it ignores that imputations are a tool, but not a substitute for, the s18C test (*Scully* [124] [133]).[2]

2. ***Incorrect approach*:** The 2R's error is manifest in the inconsistencies between what was put in the University's written submissions versus its oral submissions (which were also inconsistent). On the one hand, the University has argued that whether imputations arise requires an objective assessment from the perspective of the hypothetical reasonable victim or group member.[3] The Applicants agree with this position. It is submitted that every case ultimately supports this approach, whether imputations were used or not.[4]

3. On the other hand, the University orally sought to introduce a different imputation 'test' that is not part of the s18C framework and is inconsistent with the RDA's purposes and core precedent. The position advocated for was that the subjective views of the group, even if they are the views of "*most of the group*", sometimes labelled as *'irrational'* views, could not override the non-groups' or the Court's own reasonable objective interpretation for purposes of s18C(1)(a).[5] That argument is plainly wrong for reasons including:
    a. A similar argument was advanced in *Eatock* by Mr Bolt which Bromberg J rejected.[6] As Bromberg J clarified at [299] (and [283]-[286]ff and [302]), it is the reaction of the ordinary representative of the group (and not the ordinary reasonable reader) which is the correct reference point when assessing imputations for purposes of s18C(1)(a) of the RDA. We submit that this authority of *Eatock* defeats the University's summary judgment application.

    b. The *Kaplan* case, it is contended, reinforces this conclusion. In addition to Mortimer CJ assessing both the reaction of Jewish and non-Jewish students to the given speech (at [515]), one of the speech's offensive characteristics was that the principal's description of what his father said as "*normalisation*" was found by Mortimer CJ to be "*likely to be interpreted by Jewish students as "normal", even if that is not its correct meaning*" ([521]). That finding addresses the 2R's *'irrationality'* point, even though the use of 'irrational' in connection with likely Jewish / Israeli reactions to the impugned acts in this case, is rejected, and is objected to by the Applicants as an inappropriate reference to Jewish views.

    c. Further, insofar as the University has invited Kennett J to potentially substitute his Honour's own reaction over the individuals'/ group's reaction (at Day 2 p139:5-7; p145:45-146:8, 25-38), this approach is clearly inconsistent with *Faruqi* at [241].

    d. The 2R's purposive argument (p146:25) should also be rejected. The RDA's purposes include that no Australian should live in fear because of their race, national or ethnic origin.[7] Disparagement directed at the legitimacy of racial identification of a group is likely to be destructive of racial tolerance.[8] Bromberg J

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[1] See further below at [4] on imputations; *Eatock* [285]; *Chakravarti* (1998) 193 CLR 519 at [53]-[55]; [60].
[2] *Versace v Monte* [2002] FCA 190[143]. Under 18C the focus is the 'act' and reasonably likely reaction of group.
[3] See 2RS in chief, [12]; and in reply 2RRS [6]; [15] [17] [25] [26]. Also at Day 2, p141:34; p147:46-47; P148:7.
[4] E.g. *Eatock* [253]; [283-286]; [298-299]; *Clarke* [73]-[75]; *Kaplan* [515-521]; *Creek* [13][16]; *Faruqi* [252]; *Wertheim* [44]; *McGlade* [46]; *Hagan* (Drummond J) [15] [28].
[5] Day 2, p138: 29-37; p139:5-7; p145:45 to 146:8, 25-32.
[6] At [253] (ignores 18C(1)(a) words and risk of prejudice); cf *Clarke* [74-75] and authorities generally above, fn [4].
[7] *Toben v Jones*, [131] (Allsop J), citing Attorney General about Racial Hatred Bill.
[8] *Eatock v Bolt*, summary (22). See further on purposes *Eatock* [209].

in *Eatock* found that people should *"be free to fully identify with their race without fear of public disdain or loss of esteem."*[9] The impugned acts here, as developed further below, which draw on negative assumptions or stereotypes about Jews or Israelis and disparage their identification as Zionists, done by a person with status, and proximate to 7 October, in a heightened time for Jews and Israelis, are likely objectively to offend, insult, intimidate etc enough or most of the group for purposes of s18C(1)(a): *cf Kaplan* [513] [515]-[521]. There is no additional hurdle for Jews, Israelis or any other protected group to be entitled to s18C protection.

e. The 2RRS remain heavily focused on *Wertheim* at [44]; [107]. The Applicants submit that the Court there, with respect, properly construed the 18C(1)(a) test (at [42];[44]), but, with respect, arrived at an incorrect finding, or could have arrived at a correct finding if the Court was provided with additional evidence (see AS [32]-[38] [44]). Ultimately, that is immaterial for present purposes because:
    i. This case, like every case, depends on its own context, evidence (lay and expert) and all the circumstances. *Wertheim* is not decisive on the summary judgment application.
    ii. No argument in *Wertheim* focused on *Israelis* (unlike this case). Noting 2RRS at [8], those passages cited by the University were not considered for 'Israelis' in *Wertheim*. The same distinction is identified in *Cassuto* at [40]. Nor did Stewart J consider that *most* Jews identify as Zionists.
    iii. In addition, *Wertheim* was a final hearing. This is interlocutory. The onus of proof differs markedly. There is clearly a serious contest of issues of fact and/or law.[10] This should also lead to the application's dismissal.

f. To the extent the 2R has submitted that even if "*most*" Jewish or Israeli persons were offended, insulted, intimidated etc, that this could be 'overridden' by the Court's own view, such a position is also inconsistent with *Faruqi* at [235-7] ('most or enough') or the identification in other cases of applicable victim sub-groups.[11] No case, not even *Wertheim,* on which so much emphasis is placed, adopts the 'objective test' really being advocated for by the University in its application.

4. As to permissible scope of findings on pleaded imputations (*cf* 2RRS [4]), in *Eatock,* Bromberg J at [284] found imputations were met which were "*similar to those contended for by Ms Eatock,*" (but not identical), being "*not more injurious than those pleaded*."[12] The approach taken by Bromberg J, and in *Chakravarti* [55][60] (judge to decide what meanings are fairly open), is said to be the correct approach on the scope of pleaded imputations.[13] This is noted for purposes of clarity to the Court and the parties in moving forward (and corrects 2RRS [2]). For purposes of dismissing the application, however, the above matters are ultimately decisive, although this authority reinforces the need to dismiss the application.

5. ***Criticising Israel or Zionism*:** The 2RRS at [8] maintains the University's arguments that, based on *Wertheim*: (a) *"disparagement of Zionism constitutes disparagement of a philosophy or ideology and not a race or ethnic group*"; and (b) "*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."* Ultimately none of these assertions negates that the Applicants have a reasonably arguable case. As *Cassuto* has found:

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[9] *Eatock*, [334]-[335]. See also [294]-[298].
[10] E.g. *ASIC v Cassimatis* [2013] FCA 641, e.g. [19]-[28][47]-[49]; *Spencer v Cth* [2010] HCA 28 [25]-[26].
[11] E.g. *Jones v Toben* [96]; *Creek* [13][16]; *McGlade* [46]*; Eatock* [296] [298].
[12] *Eatock* [285], citing *Chakravarti v Advertiser Newspapers* (1998) 193 CLR 519 at [53]-[55]; and [60].
[13] See also more generally, *Eatock* [19].

a. *Wertheim* is not authority for the notion that a statement about Zionists cannot be a contravention of 18C to Jewish or Israeli people because it is not about Jews.[14]
b. *Wertheim* did not find that such statements could not be offensive or insulting to Jewish people, but that the statements in the matter did not establish the pleaded imputations. Stewart J was also not asked to consider protection of 'Israelis'.[15]
c. The line between legitimate criticism of Israel and speech contravening s18C is an important question that should be determined following consideration of both lay and expert evidence in the particular circumstances of the case [41]-[42].
d. A statement might both criticise Israel and be antisemitic in nature. [41]-[42], [47].
e. Conduct which consists of speech about an ideology or political position, or which amounts to criticism of official action by a country, may contravene s18C. It is not an express requirement that, for conduct to contravene s18C, it must be "***about***" a race, ethnicity or nationality, or people of a race, ethnicity or nationality [44].
f. Some speech, although taking the form of criticism of a philosophy, ideology or government action, might meet breach 18C. It is reasonably arguable that speech directed to criticising the actions of Israel might contravene s18C(1) [46]-[47].

6. The passages in *Cassuto* cited above*,* which speak of possibilities of findings on posts which did not expressly refer to Jews, reinforce that the application should be dismissed. The Court's findings negate the 2RRS at e.g. [7] and [27]. Furthermore, the references at 2RRS [9] to *Scully* or *Faruqi* are also unavailing. It is trite that s18C can be breached for implied messages. *Faruqi, Eatock* and *Cassuto* all show this. To apply the rationale at 2RRS [9], it is well-known that it is offensive, insulting etc to Jews or Israelis to have assumed or ascribed characteristics as racist, pro-apartheid, supporting war, colonialists, and to be institutionally excluded for holding Jewish (Zionist) beliefs.

7. The references at 2RRS [10-11] do not fairly present the law (cf *Clarke* [50-51]; [74-75]; *McGlade* [46]ff) and go nowhere. Invariably in s18C cases, subjective evidence is adduced.[16] This is so the Court is *'equipped'* to make the right decision (*Clarke* [75]) '*in all the circumstances',* and to decide '*required*' social, cultural, historical context (*Eatock* [257]; *Cassuto* [74]), a matter that has added importance for historically oppressed minorities, e.g. for Jews.[17] In *Toben,* exceptionally, there was some historical evidence (but not direct), and all imputations were met because of their calumnious nature [93-94].

8. ***Abandonment of evidence*:** In the 2RS ([23], [24], [35]), the University relied on 6 annexures (SW-1 to SW-6) as purported evidence to support its then argument on the 'objective test', to try to show how a 'reasonable' Jewish or Israeli person in Australia would react to the present impugned acts for purposes of s18C(1)(a). In the 2RRS, there is no mention of the University's evidence. All that is said is there is 'divergence' and 'opposing perspectives' (2RRS [14]). That characterisation is rejected, but the description is enough to dismiss the application given the serious dispute. In reality, the Applicants' counterevidence, which is entirely admissible on the same basis as the University's own evidence, dwarfs and negates that evidence. Knowing that its evidence will not help the University's position, it changed its argument orally to say that this Court should simply treat the reaction of most Jewish or Israeli people in Australia as *'irrational',* and disregard it. That argument is unfounded and is unattractive. In any event, there is a clear contest of law or fact on the materials. Accordingly, the summary judgment application should be dismissed: fn [10].

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[14] *Cassuto v Kostakidis* [2025] FCA 1226, [39].
[15] *Cassuto* [37], [39]; [40].
[16] *Scully* (4 lay + general); *Hagan* (various lay); *Creek* (applicant); *Bropho* (6 lay, 1 expert); *Bharatiya* (applicant); *Faruqi* (10 lay, 3 expert); *Kaplan* (17 lay, 3 expert); *Eatock* (9 lay); *McGlade* (4 lay); *Wertheim* (7 lay, 2 expert); *Clarke* (applicant); *Kelly-Country* (applicant); *Silberberg* (applicant); *Barnes* (applicant and son); *Constantinou* (applicant); *Toben* (applicant general).
[17] *Clarke* [74]; also *Eatock* [257]; *Toben v Jones.*

9. ***The Overland Article*** is pleaded at ASOC [48] and is accessible in the link. The act as pleaded at ASOC [52]-[53] assumes or attributes negative characteristics to most Jews or Israelis in Australia (Zionists) via words "*cheering on antidemocratic suppression*", "*let their masks slip*", supporting "*apartheid,*" supporting "*permanent war*", "*opposing democracy in their own countries*" which relevantly includes Australia. The third extract imputes further implicit support by Dr Riemer of Hamas, which is a recurring theme across several of his acts in the ASOC: see AS [57]. The type of negative characteristics being imputed are also a recurring theme across the acts: *Ibid.* These matters would all be reasonably likely to be significantly offensive etc to Jews and Israelis in Australia.

10. The attribution of negative characteristics based on group membership is the essence of racial discrimination: *Eatock* [215]. In the McCoach Affidavit at p651ff, which attaches a sample of Dr Riemer's X posts from 7 October to 23 December 2023, there is repeat use of anti-Jewish and anti-Zionist content which informs the text used in the Overland Article and the No Room For Zionists Speech and Post. When this content is coupled with all relevant offensive context, such as Dr Riemer's BDS publications and tendency evidence, such matters show not only 'tendency' for purposes of s18C(1)(b), they also show relevant '*circumstances'* for the purposes of s18C(1)(a) of the RDA (*Kaplan* [516-521])[18] and inform the cumulative nature of Dr Riemer's pleaded impugned acts.

11. Certain aspects of the Overland Article ('*letting their masks slip'* or *'opposing democracy in their own countries'*), invoke classical antisemitism examples which inform the reasonably likely Jewish offence for purposes of 18C(1)(a): see DPM-8, p580, bullets 2, 6; *cf Scully* [135]). This act is directed to 'people' not just to ideology. There is a unique characteristic to antisemitic bullying or conduct that is informed by relevant social, cultural and historical factors: *Kaplan* [234-248]. Further, a number of Dr Riemer's other impugned acts engage with antisemitic stereotypes or assumptions.[19] Such conduct, coming from a person of status such as the NTEU President, makes Jews, especially young and impressionable Jews, vulnerable to the mischief that the RDA is intended to address.[20] The harm is both constitutive (victim-focused) and consequential (third party).

12. ***The No Room for Zionism in our Unions Speech and Posts*** is pleaded at ASOC [58] to [60]. The full speech was provided to the University on request on 15 July 2025[21] and appears in the McCoach Affidavit at pp840-843.[22] A perusal of the full speech clarifies that the Speech and Posts are not merely *'drawing a link… between Zionism and … racism, settler-colonialism, apartheid'* as asserted in 2RRS [20] (which is in any event offensive etc to Jews/Israelis), but is literally seeking to exclude Jewish and Israeli persons who support Israel's right to exist as a Jewish homeland (*cf* ASOC [10], [88(a)]), who hold or may assert fundamentally Jewish beliefs (Zionism), and assumes or attributes to Zionists as a group repugnant and inverted characteristics as '*racists,'* '*colonialists,'* and favouring '*apartheid.*'[23] This is to demonise, disregard and silence

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[18] The sheer number of actionable posts and conduct by Dr Riemer and the heightened anti-Israeli atmosphere at the University, including because of his and his student and staff supporters, are all relevant 'circumstances'.
[19] The IHRA examples invoked were set out in the AHRC Complaint at para [15], p 38. See also DPM-8 p580 and AS [57]. By way of examples: Zionists as 'racists' Licence to Lie and Slander (IHRA bullet 2, DPM p 580), Saturday Paper 'Owned by Zionists" (IHRA 2 'Jews control the media'); Lattouf Sacking Post (IHRA 2); Zionists Smartwash (IHRA 2); Zionists Support Genocide Repost, Genocide Enablers Post and Genocide Post and Speech (several bullets); Zionists Akin to Nazis Repost (several bullets); acts supporting Hamas (several) etc.
[20] E.g. *Kaplan* [251]; *Jones v Toben* [96]; *Eatock* e.g. [267]; [287]-[299].
[21] Email of Rotsteins to Ashurst of 15 July 2025 (11:53am).
[22] It was further provided to the Court on 13 October by email (8:35pm) and handed up on 14 October 2025.
[23] These matters are strongly disputed. E.g. Australia's House of Representatives in 1986 resolved that UNGA Resolution 3379 (1975) equating 'Zionism with racism' 'misrepresent[ed] Zionism' and 'served to escalate religious animosity and incite antisemitism' (rescinded by the UNGA in 1991). https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansardr%2F1986-10-23%2F0041;query=Id%3A%22chamber%2Fhansardr%2F1986-10-23%2F0159%22. In *Clarke,* a news

Zionists (in Australia) in accordance with Dr Riemer's BDS goal[24] of ending Israel as a Jewish state, a matter that is apparent from context and *'all the circumstances,'* including the final passage of the speech (p843) and for example, many posts in the surrounding evidence showing Dr Riemer's use of the NTEU as a vehicle to boycott or denounce Israel, Israelis and Jews who support Israel. Exclusionary statements are a strong form of racism: *Faruqi* at [131] [134] cf [221]. The impact of such conduct is heightened when the statement is from a person in power. Dr Riemer was NTEU President. The acts were creating institutional racism and discrimination: *Faruqi* [141]-[142]. Violence can be mental. And racism, as *Faruqi* shows, can be vicarious. All this buttresses liability here.

13. The pleaded imputations are clearly arguable: *cf Eatock* [19][285]. The Speech and Posts were part of Dr Riemer's organised blocking of Israeli shipping in Australia as stated in the speech (p842). The acts are targeted at local 'people' (*cf* 884), they are not merely concepts (there is *'no room'*). While Dr Riemer was using the NTEU to support Palestinians, he was concurrently blocking, demonising and attempting to silence Jews and Israelis who support Israel – Zionists.[25] There is cogent evidence about a variety of conduct evidencing this discrimination and offence etc to Zionists. The matters at [5] above regarding *Cassuto* are invoked here. It is submitted that the 18C(1)(a) test will be met at trial by evidence, and the matter should proceed to trial. For reasons noted, the materials in support of the Applicants' position should give the Court comfort to dismiss: fn [10] (if material is needed at all). Moreover, the arguments at e.g. 2RRS [23] and [27] are misguided. These impugned acts are examples where references to Zionism or Zionists cross the line into conduct which breaches s18C. What is imputed should be determined by the affected group. The *'context'* includes '*all the circumstances,*' which is an evidentiary matter. *Kaplan* [516-517]. On the evidence point, if any further reference be needed, there is a plethora of it showing a clear arguable case that Jews and Israelis experience precisely these types of acts as offensive etc as Jews or Israelis.[26]

14. ***Cumulative*:** The Applicants have already argued this in detail (AS [56]-[64]) and orally. The 2RRS at [29]ff address isolated points that do not undermine the force of the Applicants' position that ASOC [86-87] are properly pleaded such that there is no basis for a strike out. There is no attempt in the 2RRS to address matters at AS [57]-[58] (let alone [60]-[64]) which alone should defeat the application. A cumulative pleading is standard in s18C cases. The argument at 2RRS [31] about subsequent posts misreads *Prior.* The cited paragraphs show that subsequent posts cannot be relied on to interpret preceding posts where the *maker is different*. However, Dr Riemer made all his posts and failed to remove them. They are continuing acts. *Prior* simply buttresses our points: [124] and [141]. Thus, 2RRS [32-[3] are flawed. Further, the Call for Global Intifada has overlapping imputations as set out at AS [57(a)] and was an incident Dr Riemer said that the Vice Chancellor banned as it "*may be linked to support for terrorist activities"* (ASOC [33]). That Speech and Post (a 'collective act') does give rise to the pleaded imputations. Ultimately, all the 2RRS do is show this issue is arguable, hence, the application fails.

15. As to the further matters raised in the 2RRS, the Applicants rely on prior submissions.

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reference to Aboriginal people as 'criminal' without proper foundation [205] breached 18C. Here, Dr Riemer similarly refers to Jews/Israelis as a group as 'racist', 'colonialists' and pro 'apartheid' without proper foundation.
[24] See e.g. McCoach affidavit e.g. 651, 681, 683, 757, 763, 808; 822, 879, 889; 914; 921; 933; 938.
[25] See e.g. McCoach affidavit at 707-710; 718; 725; 726; 727; 729; 738; 739; 750; 752; 753; 785; 796; 801; 809; 810; 817; 820; 832; 834; 839; 860; 881; 884 (express hostility to Zionist members); 891; 911; 912; 923; 940
[26] DPM 23, 1781-4, 1994, 1996-7; DPM-21, 1611-4; DPM-24, 2041, 2044-6; 2098; 2147; 2162; DPM-27 2259-2261, 2284; DPM-28, 2297. Also DPM-9, 582, 585; DPM-18, 1384; DPM-2, 202; DPM-5, 243; DPM-20, p1444.