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Reply Submissions of the Respondent (to the proceeding) / Applicant (in Application to strike-out Statement of Claim)

No. VID404 of 2025

Federal Court of Australia

District Registry: Victoria

Division: General

ALON CASSUTO

Applicant

MARY KOSTAKIDIS

Respondent

INTRODUCTION

1. These submissions are made in reply to the "Applicant's Submissions: Respondent's Strike Out Application" (AS).

2. In short, the Applicant's response to the Respondent's various complaints about the ASOC,[1] invites the Court to countenance a proceeding being conducted in a way that would be procedurally unfair to the Respondent.[2]

3. Rather than acknowledging the identified difficulties with the ASOC, the Applicant wholly defends, and asks the Court to embrace, a pleading framed in the most generalised of ways.

4. Allegations which are not expressed in a properly articulated manner place a respondent in an invidious position.[3] As the Chief Justice went on to articulate in what was a s 18C case: "It is not appropriate for the Court to consider and determine any allegations which remain at a generalised level … To do so would involve a denial of procedural fairness to the respondents, and it would mean the Court has to engage in speculation about precisely what is covered by the allegations, a process which is wholly inappropriate ..."[4]

5. That the Application ought to be granted is demonstrated by the elaboration and recasting of the ASOC in the "summary" at AS, [4] (which purports to be a statement of Applicant's case) and elsewhere in the AS, where, for the first time, the Respondent has learned:

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1 Encapsulated in AS, [3].
2 *Banque Commerciale SA (in liq) v Akhil Holding Ltd* (1990) 92 ALR 53 at 58-59.
3 *Kaplan v State of Victoria (No 8)* [2023] FCA 1092, [177], per Mortimer CJ.
4 *Kaplan v State of Victoria (No 8)* [2023] FCA 1092, [178], per Mortimer CJ.

(a) of the precise "act(s)" relied on for the purposes of s 18C(1)(a);[5]

(b) that Annexure A and ASOC, [16]-[17], are not relied on as part of "all of the circumstances" relevant to whether the act is reasonably likely to offend, insult, humiliate or intimidate;[6]

(c) that some, but not all, of the particulars to ASOC, [22], are relied on as material facts to assessing the likely effect of the posts upon the relevant groups (that is, ASOC, [22(a)],[7] [22(b)], [22(c)] and [22(e)]);[8] and

(d) that the Applicant himself is not relied on as "another person" and, rather, as a member of "a group of people" for the purposes of s 18C(1)(b).[9]

6. The allegations made against the Respondent are serious[10] and, if established by clear evidence,[11] would have serious consequences for her. In such circumstances, the well-recognised "policy relating to the protection against the rise of abuse of court process"[12] looms large. The principle that a "pleading must not oppress a defendant by vague or uncertain allegations, lacking particularity" is one that is "applied with rigour where the allegations made against a defendant are of fraudulent or serious misconduct". In such a case, contrary to the approach of the Applicant in the ASOC and AS, "more precision is required than in other cases."[13]

LAW ON SECTION 18C

7. Contrary to AS, [16], s 18C(1) has three elements,[14] as set out in the Respondent's submission (RS) at [4].

STRIKE OUT APPLICATIONS - PRINCIPLES

8. The RS deals with the principles fully. See (RS, [25]-[45]. With respect to AS, [7]-[8], while it may be readily accepted that pleadings are required to be as brief as the nature

5 Compare the attempt to salvage two identified "victim groups" in AS, [4(a)] to the hodgepodge of expressions used in the ASOC paragraphs cited at footnote 1 of AS, as elaborated in Respondent's submission (**RS**) at [50]-[64]. Also, note, also, the rewriting of what is said to be the offensive content of the 4 and 13 January 2024 posts in AS, [4(b)].

6 Compare the three circumstances listed in AS, [4(c)(i), (ii) and (iii)], to the contents of ASOC, [16] and [17], and the reliance thereupon in particular (k) in ASOC, [22] and [25]. Although the chapeau to AS, [4(c)], uses the word "include", it is noteworthy that ASOC, [17], receives express mention in AS, [4(d)] (at footnote 11).

7 See AS, [21], which expressly mentions ASOC, [4].

8 Referred to, respectively, in AS, [4(c)(i), (iii) and (ii)].

9 This appears to be the effect of AS, [4(a)]. Note the importance of pleading clearly both group and individual claims as articulated in *Eatock v Bolt* [2011] FCA 1103, at [273]-[276] where, at trial, the Applicant was prevented from proceeding on poorly articulated individual claims. Note, also, that the lack of clarity is not fully remedied in the Applicant's case because it remains unclear whether he is part of the majority of Australian Jews referred to in ASOC, [4].

10 *Kaplan v State of Victoria (No 8)* (2023) FCA 1092, [213].

11 *Briginshaw v Briginshaw* (1938) 60 CLR 336, s 140 *Evidence Act 1995* (Cth).

12 *Pigozzo v Mineral Resources Ltd* [2022] FCA 1166, [207] citing *White Industries (Qld) Pty Ltd v Flower and Hart (a Firm)* [1998] FCA 806; (1998) 156 ALR 169, 241-242.

13 *Mio Art Pty Ltd v Macequest Pty Ltd & Ors* (2013) QSC 211, [70].

14 *Jones v Scully* (2002) FCA 1080, [95].

of the case allows,[15] much depends on the nature of the case at issue. However brief a pleading may be, there is to be "… no need for the opposite party to closely scrutinize the pleading in a process of textual construction to determine whether a particular fact is relied upon, or the purpose for which it is alleged …"[16] Attempts at trivialising the Respondent's complaints by categorising them all as "technical objections" is of no assistance. The Applicant's case must be identified clearly and distinctly,[17] particularly, given what is at stake. If it is not, it is liable to be struck out.

9. In addition, while it is acknowledged that emphasis is to be directed away from technicality towards ensuring that the objectives of pleading are, in substance, achieved,[18] it remains the case that, where the deficiencies in a pleading impact upon the proper preparation of the case and its presentation at trial, criticism of those deficiencies should be seriously entertained.[19] This is such a case.

10. AS, [10], is plainly not an exhaustive summary of when a pleading is likely to cause prejudice or embarrassment.[20]

11. As to AS, [12], whether the Applicant seeks leave to amend[21] is a matter for him and, if substantial parts of a pleading are struck out, the Court may strike out the whole pleading because to do otherwise would be confusing.[22]

SUBMISSIONS

The person or group of people: paragraphs 3, 4, 19, 21, 22, 23, 25 and 26

12. With respect to AS, [17(b)] and [21], when "in all the circumstances" is an element of the statutory test, "the circumstances" relied upon are material facts that must be pleaded.[23] They are not properly characterised as particulars which serve a wholly different purpose.[24] In any event, "[p]oorly drafted pleadings can never be cured by the provision of particulars, no matter how comprehensive they might be."[25]

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15 *Shelton v National Roads and Motorists Association Ltd* (2004) 51 ACSR 278, 283 [45].

16 *Oztech Pty Ltd v Public Trustee of Queensland* [2019] FCAFC 102; 269 FCR 349 at [28]-[32].

17 *Quinlan v ERM Power Ltd & Ors* [2021] QSC 35, [65].

18 *BWK Elders (Australia) Pty Ltd v Westgate Wool Co. Pty Ltd (No 2)* [2002] FCA 87, [20] cited in AS, [7].

19 *Barclay Mowlem Construction Pty Ltd v Dampier Port Authority* (2006) 33 WAR 82, [4]-[8], per Martin CJ. Chief Justice Martin's "robust" approach is cited with approval in *Teakle Property Australia v Business Initiatives Pty Ltd* [2021] FCA 13, [16]. However, see, also, [17]-[21].

20 See *Spiteri v Nine Network Australia Pty Ltd* [2008] FCA 905 at [22] citing *Bartlett v Swan Television and Radio Broadcasters Pty Ltd* (1995) ATPR 41-434.

21 Under rule 16.53.

22 *Trade Practices Commission v Australian Iron & Steel Pty Ltd* (1990) 22 FCR 305, 323; *Council for the City of the Gold Coast v Pioneer Concrete (Qld) Pty Ltd* [1998] FCA 791; 157 ALR 135, 153-154.

23 While five paragraphs of the particulars [of all the circumstances] to ASOC, [22] and [25] ((a)to (e) and (k)), had previously been alleged in earlier paragraphs of the ASOC, the matters raised in particulars (f) to (j) appear for the first time as particulars, only. The content of those paragraphs raise significant matters including what appear to be attempts to plead imputations (f), (g) and (j), a definition of anti-semitism (h) and evidence, (i).

24 *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2017) FCAFC 50, [53].

25 *Spiteri v Nine Network Australia Pty Ltd* [2008] FCA 905, [4].

13. With respect to AS, [18], it is simply wrong to suggest that the "two victim groups are clear on the ASOC."[26]

14. To put it another way, it cannot be the case, given the value attached to Australian citizenship,[27] to suggest, at AS, [19], that there is "no substantive difference between the nomenclature" used to describe "people of Israeli national origin in Australia and/or people of Jewish ethnic origin and/or race in Australia" (at ASOC, [19] and [21]) and "Australian Jews" (at ASOC, [4], [22] and [25]). That is particularly so where the Applicant's dual citizenship status is relied on in establishing his identity (ASOC, [1(a)]). It is not "obvious" that "people in Australia who identify as Jewish are the same as Australian Jews" (AS, [21]): they have a distinct and well-recognised differential recognised at law.[28] Where the "group(s) of people" relied on to satisfy s 18C(1)(a) is a reference to the same "people in the group(s)" in s 18C(1)(b), the group(s) must be identified with specificity and consistency. Otherwise, the pleading is impermissibly confusing.[29]

15. What is required is for the Applicant to identify, with clarity, a group of people alleged to be impacted upon by the alleged actions of the Respondent and, having done so, to use consistent language throughout that pleading to refer to that group.

16. The submissions made at AS, [23] and [24], invite an approach to the ASOC that is contrary to authority – it is not for the Respondent to "closely scrutinize the pleading in a process of textual construction"[30] (see paragraph 8, above) to infer what the Applicant may have meant.

17. The Applicant's reliance on *Jones v Scully* at AS, [25], is misplaced.[31] That case involved no pleadings.[32] The acceptance in that case that "Jews in Australia" have a common ethnic origin[33] says nothing about the sufficiency of the Applicant's pleading in this case. The paragraphs in *Jones v Scully* cited in AS, [25] simply involved findings

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26 See the analysis at RS, [50]-[64].

27 According to the Preamble to the *Australian Citizenship Act 2007* (Cth), "The Parliament recognises that Australian citizenship represents full and formal membership of the community of the Commonwealth of Australia, and Australian citizenship is a common bond, involving reciprocal rights and obligations, uniting all Australians, while respecting their diversity."

28 Again, see the analysis at RS, [59]-[60]. Further to what is said there, an Arab person who is an Israeli citizen, may well be a refugee fleeing the actions of the Israeli government. Both Israeli citizens in Australia and Australian citizens who identify as Jewish may consider themselves opposed to the Zionist philosophy and the practices of the State of Israel. The need for precision in pleading is not negated by simplistic statements of equivalence.

29 *KTC v David* (2022) FCAFC 60, [120].

30 *Oztech Pty Ltd v Public Trustee of Queensland* [2019] FCAFC 102; 269 FCR 349 at [28]-[32].

31 (2002) 120 FCR 243, [135] and [177].

32 The proceedings in *Jones v Scully* were commenced under the now-repealed s 25ZC of the *Racial Discrimination Act 1975* and involved an application to enforce a determination made by the Human Rights and Equal Opportunity Commission: see (2002) 120 FCR 243, 246 [2]-[6] and *Jones v Scully* (2001) 113 FCR 343.

33 (2002) 120 FCR 243, [20], [113].

of fact in what was a clear case.[34] In the same way, the paragraphs in *Wertheim v Haddad*[35] cited in AS, [25], are unhelpful to the Applicant's defence of the ASOC.[36]

18. In any event and in contrast to *Jones v Scully*, the ASOC uses three different descriptors of the "Israeli" group.[37] At AS, [25], the Applicant asserts that "no further characteristic or definition is required". This misstates the effect of ASOC, [23] and [26], in that it refers to "because of their national origin being Israeli" leaving out the reference in those paragraphs to the ethnic origin of Israelis. AS, [25], diverts from, rather than confronts the lack of precise identification of the [Israeli] group created by the ASOC.[38]

The group and awareness of the 4 and 13 January Posts: paragraphs 19, 21, 22 and 25

19. The submissions made at AS, [29]-[31], provide, at best, a partial response to the submissions they are addressing. At RS, [65]-[73], the point being made is how the failure to identify the group impacted by the Respondent's impugned actions combines with other lack of clarity in the ASOC to produce increased embarrassment in responding to the ASOC. In that context, Mortimer CJ identified in *Kaplan v State of Victoria (No 2)*[39] that "[t]he group who could be reasonably offended, insulted, humiliated or insulted must have been persons able to hear the speech". The Chief Justice formulated this observation on the nature of the action said to contravene s 18C.

20. The observations made by Stewart J in *Wertheim v Haddad*[40] and cited by the Applicant[41] are *obiter* in that His Honour went on to decide the question in issue in the same way on the basis of the construction he had rejected.[42] For present purposes, it may be observed that, even if the question whether the impugned act was likely to come to the awareness of the relevant group is not a separate inquiry necessitated by s 18C, the likely reach of the impugned action is relevant to the acknowledged question, namely, whether the action was reasonably likely, in all the circumstances, to offend, etc, the group.[43] The reach of the action must be part of the circumstances. This is also

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34 [135]: a finding that a particular imputation was likely to insult a Jewish person in Australia; [136]: a finding that the publication of the document containing that imputation was because of the ethnic origin of Jews; and [177], another finding that a particular imputation was likely to offend Jews in Australia. These findings of fact (in very clear circumstances) say nothing about what is an adequately clear identification of a group impacted by alleged actions in breach of s 18C of the RDA.

35 [2025] FCA 720.

36 [181]: ironically, this makes it clear that the relevant group was common ground: Jewish people in Australia" and [204]: this simply contains a finding of fact that particular offending comments were made because of Jewish race or ethnic origin. Again, this finding was made in very clear circumstances.

37 [19] and [21]: "people of Israeli national origin in Australia"; [22] and [25]: "Israelis in Australia"; and [23] and [26]: "national or ethnic origin of Israelis".

38 The importance of the confusion created is heightened by the subject matter of the 4 and 13 January 2024 posts which involve a report of a speech which is quite specific in its statements (as opposed to the general denigration of Jewish people in *Jones v Scully* and *Wertheim* v *Haddad*) and comments by the Respondent which clearly are directed to the actions of the Israeli government. Where the source of offence is much less clear, the need to identify with clarity those who are alleged to be likely to be offended is more acute.

39 [2023] FCA 1092, [511]-[513].

40 [2025] FCA 720, at [165]-[171].

41 At AS, [30].

42 [2025] FCA 720, at [172]-[177].

43 This seems to be acknowledged by Stewart J at [2025] FCA 720, at [169].

consistent with the straight forward result in *Kaplan v State of Victoria (No 2)*[44] where the action was a speech to the school body and the limit of the affected group comprised the persons physically present for the speech. The Chief Justice rejected the proposition that further spread of the speech's contents as a result of a recording of the speech by one of the Applicants was attributable to action of the speech, itself.[45]

21. Further, Stewart J's observation that, once it is established that an act was done otherwise than in private, the analysis of reasonable likelihood of offence, etc, is undertaken on the assumption that the relevant person or group becomes aware of it[46] goes too far. As the facts in *Kaplan*, *Faruqi* and *Wertheim* make very clear, "an act done otherwise than in private" comprehends very many different actions with greatly varying likely reach. It is an unlikely legislative result that they should all be treated in exactly the same way using the same very broad assumption.

22. The analysis in RS, [70], indicates, that any assumption that everyone in, or even a significant number of, in the variously identified "victim groups" in the ASOC became aware of the impugned actions is unrealistic. The relatively obscure nature of the news reporting in the impugned posts[47] also makes some precision in the delineation of the audience (or likely audience) of the posts a relevant matter. In *Eatock v Bolt*,[48] it was observed that s 18C "cannot have been intended to be imposed for the benefit of persons who fail to take reasonable care of their own interests."[49] Bromberg J went on to observe that the ordinary and reasonable member of any identified group will have the characteristics consistent with what might be expected of a member of a free and tolerant society.[50]

23. For the Respondent to fairly respond to the ASOC, it is imperative that the "group of people" be defined with precision so that the Respondent can respond to whether it is "reasonably likely in all the circumstances" for that defined "group of people" to be relevantly impacted. In this respect, it will be material to the cause of action sought to be made out that the relevant audience (or likely audience) of the impugned posts be delineated with some precision.

24. To the extent that the discussion in AS, [29]-[31], fails to indicate an understanding of the need to delineate the audience of the posts with some precision, it displays error.

The pleading of evidence is opposed to material facts: paragraphs 4, 5, 9 and 14

25. The approach taken at AS, [34]-[38], relies on a limited extract[51] from the judgment of Scott J in *Bruce v Odhams Press Ltd* [1936] 1 KB 697, 712-713. The full extract was reproduced by the Full Court in *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2017) FCAFC 50, [53] (emphasis added):

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44 [2023] FCA 1092.
45 [2023] FCA 1092, at [512].
46 [2025] FCA 720, at [168].
47 As noted in RS, [70].
48 [2011] FCA 1103.
49 *Eatock v Bolt* (2011) FCA 1103, [254]. Bromberg J was citing with approval Gibbs CJ in *Parkdale Custom Built Furniture Pty Ltd v Puxu* (1982) 149 CLR 191 at 199 (a misleading and deceptive conduct case).
50 *Eatock v Bolt* (2011) FCA 1103, [255]-[255].
51 AS, [34], citing *Beach Petroleum NL v Johnson* (1991) 105 ALR 456, 466.

> The cardinal provision in r. 4 is that the statement of claim must state the material facts. The word "material" means necessary for the purpose of formulating a complete cause of action; and if any one "material" fact is omitted, the statement of claim is bad; it is "demurrable" in the old phraseology, and in the new is liable to be "struck out".
>
> The function of "particulars" under r. 6 is quite different. **They are not to be used in order to fill material gaps in a demurrable statement of claim** – gaps which ought to have been filled by appropriate statements of the various material facts which together constitute the plaintiff's case of action. **The use of particulars is intended to meet a further and quite separate requirement of pleading, imposed in fairness and justice to the defendant. Their function 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. Consequently, in strictness particulars cannot cure a bad statement of claim.**

26. Contrary to AS, [36], it cannot be reasonably suggested that the purported particulars "fill in the picture" of the Applicant's cause of action. To take the same example as is addressed at AS, [36], an indication that "Hezbollah was listed as a terrorist organisation under the *Criminal Code 1995* (Cth) on 10 December 2021" does not "fill in the picture" of the allegation that "Hezbollah is a terrorist organisation based in Lebanon". At its highest, it is an indication of what evidence is proposed to be relied on to prove the fact.

27. The submission made at AS, [38], fails to appreciate the difficulty faced by the Respondent in circumstances where she is not permitted to plead to particulars[52] yet some, but not all, of the purported particulars are relied on as material facts.[53]

28. Moreover, the approach taken in AS, [34]-[38] fails to pay any mind to the fundamental rule expressed in r 16.02(1)(d) of the Rules that, namely, pleadings must state material facts but not the evidence by which the material facts are to be proved.[54] While the distinction between particulars and evidence may be subtle, at times,[55] no such subtlety arises in the case of the paragraphs of ASOC identified as pleading evidence.[56] It may also be observed that, in most situations, it is the pleader who is trying to avoid providing more information by way of particulars. In the present matter, by contrast and by way of example, the pleading of two published articles as particulars,[57] the ASOC simply creates confusion as to what in the articles is said to constitute relevant assertions.

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52 See note 3 to r 16.41(2) of the Rules.
53 See, in particular, ASOC, [22], [25].
54 Reproduced in RS, [39].
55 *Sims v Wran* [1984] 1 NSWLR 317, 322, cited in AS, [35].
56 See RS, [74]-[83].
57 See ASOC, particulars to [4(c)].

The pleading of alleged facts of no relevance to the cause of action: paragraph 14

29. AS, [39]-[40], do not withstand scrutiny. The Applicant submits that the pleaded incidents of racism constitute a circumstance relevant to "whether the impugned posts were reasonably likely to offend the victim groups".[58]

30. The logic pursued seems to be that, because people unconnected with the Respondent have done bad things to Jewish people, an otherwise innocuous (and unrelated) news report will be more likely to offend the ordinary and reasonable members of the "victim groups". For the reasons articulated in RS, [87]-[93], the argument does not address the content of the posts or establish any connection between those posts and the circumstance said to be relevant.[59]

31. Otherwise, the focus of the enquiry under s 18C is on whether the "acts" done on 4 January 2024 and 13 January 2024 were capable of satisfying the criteria in s 18C(1)(a) and (b). A plain reading of the provision indicates that the words "in all the circumstances" are to be assessed objectively and as at the time the acts were performed. It cannot be, in that case, that matters that post-date the "acts" are of any relevance.

Annexure A and paragraphs 16 and 17

32. A fatal flaw in ASOC, [16]-[17], and Annexure A, thereto, is that the pleaded paragraphs and Annexure do what the Applicant accuses, in his AS, the Respondent of doing, namely, taking a 'scatter gun' approach.

33. Annexure A consists of 61 posts that both pre-date and post-date the impugned posts. The vast majority post-date the 13 January 2024 post (Annexure A, posts 10-61) – we deal with this fact below at [42]. One source of embarrassment to the Respondent is the lack of any attempt by the Applicant to identify which of the 65 posts it relies upon to support its assertion that the Applicant's impugned posts breach s 18C.[60]

34. More concerning is the inference that the Applicant asks the Court to draw from the material in Annexure A. That is, the material in Annexure A is said to be a particular of the claim concerning the 4 and 13 January posts.

35. The failure on the part of the Applicant to provide any explanation as to which of the 65 posts (bearing in mind 10-65 of the posts are dated after the 13 January Post) is a clear demonstration of a pleading being embarrassing in that it is unintelligible, ambiguous, vague or too general, such that the Respondent is not aware of the case against her in respect of the Annexure.[61]

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58 AS, [40].

59 It appears that the argument is that the member of the "victim groups" have had a hard time and are, therefore, hyper-sensitive to anything said about events in the Middle East. It is not that type of psychological reaction to which s 18C is addressed. Alternatively, the ASOC seeks to establish guilt by non-association.

60 *Quinlan v ERM Power Ltd* [2021] QSC 35, [65]. The passage of Bowskill J is cited at some length in RS, [37].

61 *Fair Work Ombudsman v Eastern Colour Pty Ltd* [2011] FCA 803; (2011) 209 IR 263 at [18].

36. This remains the case despite what is termed an *Annexure: Further and better particulars to paragraphs [sic] 17* attached to the AS. The purported purpose of that document is to provide particulars to ASOC, [17] which makes a number of claims, unsubstantiated and argumentative, about the 'meaning' of the posts in Annexure A.

37. However, seeking to link particular posts from Annexure A to the various assertions made in ASOC, [17] does not assist the Respondent. There is no attempt by the Respondent to say why and how it is that the identified posts lead to the 'conclusion' or 'assertion' set out in ASOC, [17].[62]

38. A further matter to note is that AS, [43], defends the relevance of ASOC, [17], only in terms of seeking to establish that the actions of making the impugned posts were because of the race or national origin of the groups pleaded in ASOC, [23] and [25]. No attempt is made to defend reliance on ASOC, [17] and Annexure A, thereto, to support the allegations in ASOC, [22] and [25], (likelihood of offence, etc.[63] presumably, it follows that the striking out of particular (k) to ASOC, [22] and [25], respectively, is conceded.[64]

39. In *Wertheim v Haddad*,[65] Stewart J, in making a ruling as to whether a particular pleaded imputation was made out, said that the ordinary reasonable listener would understand that not all Jews are Zionists or support the actions of Israel in in Gaza and that disparagement of Zionism constitutes disparagement of a philosophy or ideology and not a race or ethnic group; that 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; and that it is not anti-semitic to criticise Israel just as much as to blame Jews for the actions of Israel is anti-semitic.[66]

40. ASOC, [17][67] characterises the posts contained in annexure A to the ASOC as criticising Israel (and other political and social institutions);[68] Israel;[69] adherents to Zionism and Nazism;[70] Israeli Mossad agents;[71] and Zionism and Nazism.[72] ASOC, [17(e)], characterises certain posts as denying or justifying the actions of Hamas in perpetrating the October 7 attack. However, an examination of the posts in question

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62 See, again, *Quinlan v ERM Power Ltd* [2021] QSC 35, [65]. As noted, the passage of Bowskill J is cited at some length in RS, [37].

63 See, in each case, particular (k). Note that a contradictory line is taken at AS, [62]. However, the argument relied upon is what is articulated in AS, [42]-[50] where annexure A is only defended in terms of being a basis for ASOC, [23] and [26].

64 This concession can be understood as an acknowledgement of the force of the submissions in RS, [107]-[112].

65 [2025] FCA 720.

66 [2025] FCA 720 at [107]. His Honour cited *South African Human Rights Commission on behalf of South African Jewish Board of Deputies v Masuku* [2022] ZACC 5; 2022 (4) SA 1 (CC) at [4]-[6] and [161]-[166] per Khampepe J.

67 And ASOC, [16], at least, partially.

68 ASOC, [17(a)(i)].

69 ASOC, [17(a)(ii)], [17(c], [17(d)] and [17(f)].

70 ASOC, [17(a)(iii)].

71 ASOC, [17(a)(iv)].

72 ASOC, [17(b)].

indicates that they, generally, involve criticisms of actions by the State of Israel and, certainly, do not involve criticisms of Jews, per se, or all Jews.[73]

41. It follows that, in addition to the matters articulated in RS, [94]-[106], recent authority supports the striking out of ASOC, [16] and [17] and Annexure A thereto.

Annexure A and the postdating of the 4 and 13 January Posts

42. AS, [49], reveals that Annexure A, rather than including material facts or particulars of material facts, constitutes evidence.[74] Admission of tendency evidence is at the discretion of the trial judge and is dependent on the material having "significant probative value".[75] That is an issue to be resolved in the lead-up to any trial, particularly, where, as has been discussed above, "…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".[76]

43. It is not appropriate to seek to side-step this substantial hurdle to admissibility by seeking to frame Annexure A as anything other than evidence that may ultimately be sought to be relied on.

44. As to the submission that the Respondent is engaging in continuing contravening conduct, it is not pleaded anywhere in the ASOC that, by not removing the posts, the Respondent is engaging in a separate breach of s 18C. The submission is irrelevant and, therefore, wrong.

45. In any event, AS, [49]-[50] confirms, albeit impliedly, that ASOC, [16] and [17] and Annexure A, thereto, are no longer relied upon as going to the likelihood that any of the members of the "victim groups" were likely to be offended, etc.[77]

Historical Events: paragraphs 5, 6, 7, 8, 9, 10, 11, 12 and 13

46. The Applicant's response at AS, [51], underscores why precise identification of the "people of the group" is necessary and why a more precise pleading is required. The reference in s 18C(1)(a) to "in all the circumstances" requires "that the social, cultural, historical and other circumstances attending … the people in the group be considered when assessing whether offence was reasonably likely".[78] Obscure historical facts that are said to make it "reasonably likely" that an act offends, insults, humiliates or intimidates can only "attend the people in the group" if they have knowledge of them: they are otherwise irrelevant.

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73 AS, Annexure, states that the posts relied upon for ASOC, [17(e)] are posts 1, 2, 8, 11, 12, 13, 25, 31, 40 and 41.

74 Thereby, contravening r 16.02(1)(d).

75 s 97(1)(b) *Evidence Act 1995* (Cth).

76 *Wertheim v Haddad* [2025] FCA 720 at [107] citing *South African Human Rights Commission on behalf of South African Jewish Board of Deputies v Masuku* [2022] ZACC 5; 2022 (4) SA 1 (CC) at [4]-[6] and [161]-[166] per Khampepe J.

77 See [38], above.

78 *Eatock v Bolt* (2011) FCA 1103, [257].

47. In addition, and in relation to AS, [51], the Applicant asserts; "Actual knowledge is not part of the statutory test in s18C". It is unclear what the Applicant means by this assertion. This may be by virtue of the fact that the Applicant misunderstands the submission made by the Respondent at RS, [116]. That is, knowledge of the historic events (by the members of the group) is crucially relevant, self-evidently, to the causal link between the 4 and 13 January Posts and the requisite emotional effect on the person or reasonable members of the affected group of people. An alternative way of expressing this, in terms of the presence or otherwise of a statutory requirement, is that "in all the circumstances", obviously means in all the relevant circumstances. It is the Applicant who is proffering circumstances as being relevant to whether offence, etc, are reasonably likely. Matters of which the "victim groups" are unaware, logically, cannot affect the likelihood of their entering one or more of the specified emotional states and, legally, cannot be relevant. It follows that circumstances which are irrelevant cannot be comprehended as part of "all the circumstances" to which the section refers.

48. This is consistent with the approach taken by Bromberg J in *Eatock v Bolt*[79] where his Honour stated that "[w]here allegedly offensive conduct is directed at both an identified person and a group of people and the claim made is that both the identified person or persons and the group of people were offended, the conduct should be analysed from the point of view of the hypothetical representative in relation to the claim that the group of people were offended, and in relation to each of the identified persons where a personal offence claim has been made."[80]

Paragraphs 22 and 25 and the particulars thereto

49. AS, [54]-[64], do not engage with the central point made at RS, [122]-[178], namely, that the ASOC does not plead sufficient material facts or particulars necessary to establish the 4 January 2024 and 13 January 2024 posts were reasonably likely to offend, insult, humiliate or intimidate a group of people. Seeking to reframe that complaint into a "trial issue" is of no assistance to the Court when the concern being articulated is whether a sufficient basis for a cause of action has been alleged in the paragraphs.

50. With respect to AS, [53], in addition to what is said in RS, [123]-[127], terms like "inter alia" bespeak of facts stated at too great a level of generality or with insufficient particularity.[81] It is trite that the Respondent is "entitled to be clearly informed of the way the case is put, accepting of course that the pleading is not the repository of evidence."[82] As stated in RS, [127], such terminology and the foreshadowing it contains add nothing to a pleading.

51. It is noted that AS, [53], does not engage with the case law cited in RS, [123]-[127].[83] apart from the reference to *Teakle Property Australia v Business Initiatives Pty Ltd*[84]

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79 (2011) FCA 1103.

80 *Eatock v Bolt* (2011) FCA 1103, [250].

81 *Takemoto v Moody's Investor Service Pty Limited* (2014) FCA 1081 at [23] citing *Australian Wool Innovation Ltd v Newkirk* [2005] FCA 290, 24.

82 *Business Service Brokers Pty Ltd v Optus Mobile Pty Ltd & Ors* [2021] VSC 310, [90].

83 Namely, *KTC v David* [2002] FCFCA 60 at [119]-[121] and *People with Disability* v *Minister for Disability Services* [2013] NSWSC 467, [32].

84 [2021] FCA 13, (at [21]).

which addresses a different question, namely, the degree of pleading precision required for allegations of conditions of mind pursuant to r 16.43 of the Rules, especially, for the purpose of pre-trial discovery.[85]

52. AS, [57], addresses RS, [128]-[140], which argue that particular (a) to ASOC, [23] and [25], should be struck out. Further to the matters in RS, [128]-[140], in the light of authority that criticism of Israel and criticism of the political ideology, Zionism, do not constitute criticisms of Jews, generally, nor are they anti-semitic, the irrelevance of some Jews being connected to the State of Israel and to Zionism is even, more obviously, irrelevant.[86]

53. AS, [58], responds in part to RS, [144]-[153]. The submission persists in the proposition that events which had not happened at the time of the impugned actions could affect the impact of the impugned action on the group said to be affected.

54. AS, [59],[87] defends the ASOC's reliance, in particular (h) to ASOC, [22] and [25], on a particular non-statutory definition of anti-semitism. The definition is defended as a circumstance going to the likely impact of the impugned actions on the purported group said to be affected. This explanation takes the matter no further. A definition, without support in the statute, cannot be a material fact. Neither does it have any legal significance.

55. AS, [59], also transforms the explanation as to why the definition is not breached into a standalone imputation of the impugned posts.[88] The two factors of the imputation, "denies the right of the Jewish people to self-determination" and "justifies the harming of the Jews" do not arise from the news report contained in the offending posts. In addition, however, the matters canvassed in the reported speech, including that some Jews in Israel would be well-served to return to other countries whose passports they hold, are the very types of opinions on political questions, such as criticism of Zionism, itself, that do not amount to antisemitism.[89]

56. The Respondent, otherwise, relies upon RS, [122]- [178], in respect of AS, [53]-[64]. It is noted that key matters such as the failure to allege knowledge of "circumstances" and the failure to identify with clarity the groups likely to suffer offence remain largely unaddressed.

Paragraphs 23 and 26 and the particulars thereto

57. The Respondent continues to rely on RS, [179]-[205], in respect of the matters expressed in AS, [65]-[69].

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85 The issue of the confusion and uncertainty created by pleading numerous alternative cases without identifying what material facts are relied upon for each alternative is discussed further, below, at [62]-[64].

86 [2025] FCA 720 at [107]. His Honour cited *South African Human Rights Commission on behalf of South African Jewish Board of Deputies v Masuku* [2022] ZACC 5; 2022 (4) SA 1 (CC) at [4]-[6] and [161]-[166] per Khampepe J. See [39], above, for the full extract from the reasons.

87 Responding to RS, [159]-[162].

88 This misstates the words in the ASOC.

89 [2025] FCA 720 at [107] (cited above).

58. The submissions made in RS, [179]-[205], gain further support from the observations of Stewart J in *Wertheim v Haddad*.[90] Indeed, the observations of Stewart J are largely anticipated, albeit, in a more specific context, in RS, [185]-[188] and [193].

59. Perhaps, the most obvious case of the ASOC pleading material which is incapable of being anti-semitic or motivated by race or ethnic or national origin is in ASOC, [23(b)], where the allegation acknowledges, expressly, that the Respondent's own words were simply criticisms of the State of Israel. As noted in RS, [191], the validity or truth of the criticism is, nowhere, challenged in the ASOC (or the AS).

Paragraphs 24 and 27 of the ASOC

60. RS, [206]-[211] support the proposition that ASOC, [24] and [27], should be struck out because of the ASOC's failure to identify, with clarity, the group of people said to be relevantly affected by the impugned actions of the Respondent.[91]

61. AS, [70], adds nothing of substance to the discussion.

The "and/or" syndrome: alleging multiple alternative cases

62. RS, [212]-[223], provides the most detailed treatment of the ASOC's repeated tendency to allege alternative cases using the phrase "and/or".[92]

63. Burchett J observed that the use of the "symbol" "and/or" has long been recognised to create uncertainty and unfairness: *Re Moage Ltd (in liq)*.[93] Likewise, the use of the term "inter alia" has been recognised as "unhelpful" and as a practice to be avoided.[94] It is likely that the reason that there is little authority concerning such use of the phrase "inter alia" in pleadings is that applicants usually recognise its unfair breadth.[95]

64. At [74] of AS, it is argued that particular (i) of [22] of the ASOC that states, "the Applicant himself felt offended and insulted by the Post", inferentially, supports the case that because he is a member of the 'victims groups' they would be reasonably likely in the circumstances to be offended, insulted, humiliated and/or intimidated. The question raised in RS, [218]-[219], is why other reasonable and ordinary members of the group would be humiliated or intimidated if the impact on the Applicant was only to offend and insult him. This suggests that, for the Respondent to be properly informed about the cases she has to meet, the material facts and particulars relied upon for each of the overlapping psychological impacts must be separately and individually pleaded.

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90 [2025] FCA 720 at [107]. His Honour cited *South African Human Rights Commission on behalf of South African Jewish Board of Deputies v Masuku* [2022] ZACC 5; 2022 (4) SA 1 (CC) at [4]-[6] and [161]-[166] per Khampepe J. See [39], above, for the full extract from the reasons.

91 The proposition is discussed, above, at [12]-[18] and at RS, [12]-[18].

92 The issues have been discussed, previously. See, above, at [50]-[51], RS, 123]-[127] and AS, [57].

93 *Re Moage Ltd (in liq)* [1998] FCA 296; (1998) 153 ALR 711, 716-718.

94 *Heaton Cleaning Pty Ltd v Haddington Pty Ltd* [2002] QASC 244, [5].

95 See, for example, *Voxson Pty Ltd v Telstra Corporation Ltd (No 2)* [2015] FCA 1491 at [20] and [40], where the respondent's complaint about the use of the expression, "inter alia", was resolved by the applicants being given leave to amend their pleading.

65. The use of "inter alia" at the end of the chapeau to the particulars in the ASOC, [23] and [26], is particularly troubling. Paragraphs [23] and [26] contain the most serious of the allegations in the ASOC, namely, that the Respondent has acted for reasons of race. The use of the phrase, inter alia, indicates that the Applicant has not bothered to plead fully the particulars said to give rise to the inference of racism and that the Applicant will not be constrained in the evidence he will be permitted to adduce because "inter alia" covers up a multitude of ambushes come the trial.

Conclusion

66. Multiple examples of failure by the Applicant to follow the rules of pleading are evident on the face of the ASOC. Rather than face the deficiencies which have been revealed and the unfairness that they cause to the Respondent, the Applicant has decided to press on. The Court is, respectfully, urged to act upon the failings identified in the RS and herein and to grant the relief sought in the application.

Dated 18 July 2025

Stephen Keim SC

Greg Barns SC

Kate Slack

Felicity Nagorcka