Federal Court of Australia
District Registry: New South Wales
Division: General

No. NSD1503 of 2024

PETER WERTHEIM AM and another
Applicants

WISSAM HADDAD and another
Respondents

RESPONDENTS' CLOSING SUBMISSIONS

A. Introduction

1. The First Respondent (**Mr Haddad**) is a recognised and respected Islamic preacher in Western Sydney. In November 2023, Mr Haddad delivered four religious lectures or sermons to congregants and fellow Muslims at the private premises of the Al Madina Dawah **Centre** and participated in an interview directed to the same audience (**speeches**). He did so in response to distress expressed to him by members of the Centre's Muslim community about the events happening in Gaza. The speeches were focused on matters of religious history which the experts accept are expressed in Islamic texts, interspersed with overt political commentary. Recordings of the speeches were later published on Facebook and Rumble pages that bore the name of the Centre (**relevant AMDC social media pages**) but were not established, maintained or promoted by Mr Haddad or the Second Respondent (**AMDC Inc**) and were also directed to Muslim followers of the Centre. The Applicants and their witnesses were exposed to the speeches only after they were sought out and reported on elsewhere, in a misleading and inflammatory way, without the Respondents' involvement.

2. Mr Haddad concedes that the speeches are taken to be acts done otherwise than in private by reason of s 18C(2)(a) of the *Racial Discrimination Act 1975* (Cth) (**RDA**). However, the Applicants' claim against Mr Haddad still fails because:

    2.1. having regard to the setting in which the speeches were delivered, their audience and a full and fair reading of them in their religious and political context, the Applicants have not established that the acts of delivering the speeches were in all the circumstances reasonably likely to offend, insult, humiliate or intimidate an ordinary, reasonable Jewish person in Australia for the purposes of s 18C(1)(a) of the RDA;

2.2. the reason why Mr Haddad delivered the speeches was to offer spiritual comfort to his congregants and Muslim followers by providing historical religious context for and commenting on the acts of the Israeli state in Gaza, not because of the race, national or ethnic origin of Jewish people in Australia for the purposes of s 18C(1)(b) of the RDA; and

2.3. in any event, those were genuine purposes in the public interest and Mr Haddad delivered the speeches reasonably and in good faith, such that his acts were not unlawful by reason of s 18D(b) of the RDA.

3. The Applicants' claim against AMDC Inc fails because:

3.1. the Applicants have not established that the publication of the speeches was attributable to AMDC Inc;

3.2. in circumstances where the speeches were published on web pages which, while publicly accessible, were directed only at congregants and followers of the Centre or otherwise at a Muslim audience, the Applicants have not established that the acts of publication were reasonably likely to offend, insult, humiliate or intimidate Jewish people in Australia or that they were done because of the race, national or ethnic origin of those people; and

3.3. in any event, what was published were true and accurate video recordings of the speeches as delivered, in service of a public interest in communicating religious lectures or sermons and commentary on matters of political concern to congregants and followers of the Centre or an otherwise Muslim audience, such that the acts of publication were not unlawful by reason of s 18D(b) and/or (c)(i) of the RDA.

4. Alternatively, if the Court finds that the speeches would have contravened s 18C by reason of political or religious content, s 18C is unconstitutional because it imposes an unjustified burden on the implied freedom of political communication or is a law for prohibiting the free exercise of the religion of Islam contrary to s 116 of the *Constitution*.

B. Background to the Respondents

5. Mr Haddad – whose legal name is William Haddad (affidavit of William **Haddad** sworn 9 May 2025 at [3] (CB 150)) – is an Australian citizen born in Sydney to Lebanese parents: Haddad at [5]-[6] (CB 150). He is a tradesperson who operates his own carpet laying business but also teaches part-time at the Centre: Haddad at [7]-[8] (CB 150).

6. Mr Haddad is a practising Muslim: Haddad at [10] (CB 150). He returned to his faith more than 20 years ago: Haddad at [12]-[15] (CB 150-51). Since that time, he has worked with Muslim youths and families, homeless people and other charitable endeavours and Muslim associations, particularly in Western Sydney but also Australia-wide: Haddad at [15]-[18], [20], [24], [27]-[28], [30], [34] (CB 151-54). Over those years he has completed a range of studies in Islam, including with several Sheikhs: Haddad at [12]-[15], [19], [21], [23]-[24], [29], [31], [37]-[39] (CB 150-55). At the time of delivering the speeches he was in the process of obtaining an Ejeza (a formal accreditation and recognition of study in an area of Islam), which he has since obtained together with another, although these are not necessary to be able to preach or teach Islam: Haddad at [37]-[40] (CB 154-55), annexures WH-1, WH-2 (CB 580, 578). None of this evidence was challenged in cross-examination. Enver Neziroski, a congregant of the Centre, gave unchallenged evidence about his trust and respect for Mr Haddad as a spiritual guide: affidavit of Enver **Neziroski** sworn 8 May 2025 at [12] (CB 144).

7. Mr Haddad established the current form of the Centre in 2022, having preached and taught at its previous location: Haddad [35]-[36] (CB 154); Neziroski at [13] (CB 144). AMDC Inc was established in April 2021 to take over the lease for the predecessor Centre: Haddad at [41] (CB 155). It is an incorporated association with a governing committee of five members (**Committee**): Haddad at [43] (CB 155). Mr Haddad is AMDC Inc's public officer for the purposes of s 34 of the ***Associations Incorporation Act*** *2009* (NSW): agreed statement of facts at [8] (CB 853). Mr Haddad regularly delivers sermons, lectures and speeches at the Centre: Haddad at [59] (CB 157).

8. The Centre is open to Muslims for prayer every day: Haddad at [72] (CB 158-59). Friday is the holy day in Islam and Friday prayers, sermons and lectures attract significant numbers of attendees: Neziroski [18]-[20] (CB 145); Haddad at [72] (CB 158-59). The attendees at Friday sermons and lectures are usually the same group, and exclusively Muslims: Neziroski at [21], [24] (CB 145-46); Haddad at [52] (CB 156). Mr Neziroski describes the Centre's community as 'tight-knit': Neziroski at [21] (CB 145). There is no evidence of anyone attending the Centre, including Friday sermons or lectures, who is not a Muslim or who has expressed a genuine interest in Islam and obtained specific permission from a Committee member to do so: cf. Haddad at [52] (CB 156).

C. The claim against Mr Haddad fails

C.1 Not reasonably likely to offend, insult, humiliate or intimidate (s 18C(1)(a))

Principles

9. The Court must make an objective assessment of the likely effect of the relevant act upon an ordinary, reasonable member of the relevant group, whose characteristics are constructed having regard to the characteristics of the whole or a substantial part of the group and excluding those who are particularly sensitive or particularly robust: see, e.g., ***Faruqi*** *v Hanson* [2024] FCA 1264 at [224], [235]-[238]. 'Likely' means a real and not fanciful prospect: see, e.g., ***Eatock*** *v Bolt* [2011] FCA 1103; (2011) 197 FCR 261 at 323 [260]; ***Clarke*** *v Nationwide News Pty Ltd* [2012] FCA 307; (2012) 201 FCR 389 at 401 [48]. The characteristics attributed to the ordinary and reasonable member of the group must be sensitive to cultural differences (*Clarke* at 402 [51]), but must also be 'consistent with what might be expected of a member of a free and tolerant society': *Clarke* at 403 [59].

10. It is necessary for the Applicants to prove the characteristics of *the* ordinary, reasonable member of the identified group; it is not sufficient merely to identify a subset of that group that may be characterised as reasonable and that were likely to be offended, insulted, humiliated or intimidated by the relevant act: cf. *Self Care IP Holdings Pty Ltd v Allergan Australia Pty Ltd* (2023) 277 CLR 186 at 229 [90]; contra *Kaplan* at [513].

11. The meanings of the terms used in s 18C include the following:

    11.1. offend — to vex, annoy, displease, anger, now esp to excite personal annoyance, resentment, or disgust (in anyone) (Now the chief sense);

    11.2. insult — to assail with scornful abuse or offensive disrespect; to offer indignity to; to affront, outrage …;

    11.3. humiliate — to make low or humble in position, condition or feeling, to humble … to subject to humiliation; to mortify;

    11.4. intimidate — to render timid, inspire with fear; to overawe, cow, now esp to force to or deter from some action by threats or violence.

    See, e.g., ***Bropho*** *v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16; (2004) 135 FCR 105 at 123 [67]; *Jones v* ***Scully*** [2002] FCA 1080; (2002) 120 FCR 243 at 269-70 [103]; ***Faruqi*** *v Hanson* [2024] FCA 1264 at [238].

12. However, the terms encompass only 'profound and serious effects, not to be likened to mere slights': see, e.g., ***Creek*** *v Cairns Post Pty Ltd* [2001] FCA 1007; (2001) 112 FCR 352 at 356-57 [16]; *Faruqi* at [239]. The relevant act must therefore have 'an aspect of gravity or severity', albeit not necessarily rising to 'racial hatred': see, e.g., *Faruqi* at [239]. This reflects that s 18C is applied in a pluralistic, tolerant and broad-minded democratic society in which the legitimate boundaries of free expression are not limited to speech that is polite or inoffensive: see, e.g., *Bropho* at 124 [69]. For example, a comment may not reach the necessary threshold of seriousness even if it is uninformed or ignorant as to the relevant group's cultural circumstances, and, importantly, even if it might be seen as over-generalising or being unfair or unbalanced: see, e.g., *Clarke* at 432-34 [272], [275], [284]. A comment also may not reach the necessary threshold if the ordinary, reasonable member of the relevant group would have recognised that it was addressed to an important public issue, even if they would have felt 'stung' by it: see, e.g., *Clarke* at 426-27 [230].

13. The requirement for the Court to consider 'all the circumstances' must be kept firmly in mind: see, e.g., *Eatock* at 322 [257]; *Clarke* at 401 [47]. The relevant circumstances depend on the facts of the particular case as found on the evidence: *Clarke* at 401 [46], [49].

14. What 'choices' Mr Haddad may have made in formulating the speeches cannot relevant in applying the objective test under s 18C(1)(a): see, e.g., *Creek* at 355 [12]; *Eatock* at 310 [206]; contra Applicants' outline of submissions dated 30 May 2025 (**AOS**) [28].

The construction issue

15. The Applicants contend that s 18C(1)(a) is to be applied on the premise that the subject matter of the relevant act has come to the attention of the person or group of people referred to in the subparagraph, and therefore that the relevant circumstances do not include ones bearing on reasonable likelihood that that would occur: Applicant's closing submissions dated 13 June 2025 (**ACS**) at [7].

16. This approach to s 18C(1)(a) is not consistent with its text or context, with the purpose of Pt IIA of the RDA or with authority.

17. The question to be answered for the purposes of s 18C(1)(a) is whether the *act* – that is, in this case, speaking the words – was reasonably likely, in all the circumstances, to produce an effect, being to offend, insult, humiliate or intimidate Jewish people in Australia. The focus of s 18C(1)(a) on the *act* and the likely effect of that act means it

would be wrong to ask whether the content of the words spoken by Mr Haddad were reasonably likely to offend, insult, humiliate or intimidate Jewish people in Australia when read or heard by such a person in the abstract. Put another way, the circumstances of the *act* must form part of the relevant circumstances for the purposes of applying s 18C(1)(a).

18. This is the natural reading of the subsection. It is consistent with common sense: the likelihood of the act coming to the attention of the relevant person or group must be relevant to the reasonable likelihood of that *act* offending, insulting, humiliating or intimidating the other person or group of people. The Applicant's construction, on the other hand, gives no effect to the language of s 18C(1)(a) focusing on the *act* and *all* the circumstances bearing on whether the act is reasonably likely to produce the effect referred to on the identified person or group. 'Otherwise than in private' serves a distinct purpose (contra ACS [8]): for example, an offensive statement made directly to a Jewish person in a private conversation would be excluded from the operation of the section by that condition. If Parliament had intended to premise s 18C(1)(a) on the hypothesis propounded by the Applicants, it could easily have done so.

19. The construction set out above is not inconsistent with a core purpose of s 18C being to regulate acts that may corrode social cohesion or cause fear because of race, colour, national or ethnic origin: ACS [8]. If an act is not reasonably likely to come to the attention of the relevant person or group in its full form and context, the potential for the act (itself) to have such an effect is reduced. That reduced effect is relevant when Parliament evidently intended Pt IIA to strike a balance between the purpose of promoting social cohesion and protecting freedom of speech: see, e.g., explanatory memorandum for the *Racial Hatred Bill 1994* at p 1; second reading speech for the *Racial Hatred Bill 1994* (Hansard, House of Representatives, 15 November 1994, pp 3336-37); *Eatock* at 311 [209]-[211]; *Bropho* at 122 [62], 125 [72]-[73]. The explanatory materials for the *Racial Hatred Bill* must also be read in light of the fact that when they were prepared, the Bill included criminal offences based on incitement, which ultimately were not enacted in Pt IIA. The Applicants' construction would have the effect of converting s 18C(1)(a) into a test of incitement, which is not the language used (cf. s 17 of the RDA).

20. In any event, the Applicants' construction is not reasonably open on the text of s 18C(1)(a). Section 15AA of the *Acts Interpretation Act 1901* (Cth) does not authorise

the Court to adopt an interpretation of s 18C(1)(a) that is not consistent with its language: see, e.g., *Disorganized Developments Pty Ltd v South Australia* [2023] HCA 22; (2023) 97 ALJR 575 at 581 [15], 582 [23].

21. The Respondents' construction is consistent with the approach taken by Mortimer CJ in ***Kaplan*** *v State of Victoria (No 8)* [2023] FCA 1092 at [507] of focusing on the particular act alleged and the audience of that act, not any subsequent act of publication: 'while the speech may have been subsequently distributed more widely … it was the making of this speech, in person, to [its audience] that is the conduct said to contravene s 18C'. Later, her Honour observed (at [511]) that '[t]he group who could be reasonably offended, insulted, humiliated or insulted must have been persons able to hear the speech'; and expressed the requirement as being to make 'an objective assessment of the nature and effects of those remarks, in all the circumstances in which they were *made*' (emphasis added): at [515]; see also *Clarke* at 401 [49] ('The "circumstances" that will readily be relevant are those particular factual circumstances *in which a particular act complained of was done*' (emphasis added)). It is evident that Mortimer CJ took into account the particular circumstances in which the speech in that case was delivered: at [517(f)].

22. These observations should be accepted and applied in this case. The Court would not be persuaded that they are plainly wrong for the reasons set out above: see, e.g., *BHP Billiton Iron Ore Pty Ltd v The National Competition Council* [2007] FCAFC 157; 162 FCR 234 at 254 [88]-[89] (Greenwood J, Sundberg J agreeing); *Faruqi* at [309].

The group

23. The Applicants have identified the relevant group for the purposes of s 18C as 'Jewish people in Australia': statement of claim at [35], [40] (CB 45-46). The Respondents accept that Jewish people in Australia constitute a race or ethnic group.

24. The Respondents accept that the characteristics of the ordinary, reasonable Jewish person in Australia include a consciousness of the circumstances of the Holocaust, a familiarity with historical forms of antisemitism (including at least some of the 'antisemitic tropes' described by Dr Oboler), and an experience of shock, distress and generalised fear at the events of 7 October 2023: cf. AOS [21].

25. However, the characteristics of the ordinary, reasonable Jewish person in Australia also include the experience of living in a free, multicultural and pluralistic, broadly tolerant democracy; with a strong rule of law, including laws that are designed to and at least

generally do protect against violence and incitement to violence; with robust civic institutions including those that at least generally enforce the law; being accustomed and expecting to be exposed to a diversity of beliefs and ideas, including ones that are challenging and confronting; and having a feeling of general safety in Australia (as the Applicants accept: AOS [21]), albeit somewhat tempered by the events of and following 7 October 2023. A consequence of this accumulation of features is that the ordinary, reasonable Jewish person in Australia would be fair-minded even in viewing material that they may find confronting. The ordinary, reasonable Jewish person in Australia would also have at least a general familiarity with the existence of religious narratives about religious and military encounters between Jews and Muslims. The Court can be confident that these are characteristics of the ordinary, reasonable Jewish person in Australia because they are consistent with the oral evidence given by the Applicants and most of the lay witnesses put forward by the Applicants under cross-examination, notwithstanding the submissions made about those witnesses below.

26. All of these characteristics must be taken into account in evaluating how (if at all) the ordinary, reasonable Jewish person in Australia would have responded to the acts of Mr Haddad delivering the speeches.

The relevance of the 'reaction' evidence

27. Subjective 'reaction' evidence of the kind relied on by the Applicants may assist the Court in understanding the perspective of the ordinary, reasonable member of the relevant group: see, e.g., *Faruqi* at [241]; *Scully* at 269 [99]-[101]. But the extent of the assistance to be gained from that evidence must depend on the extent to which it is representative of the way in which the ordinary, reasonable group member would react to the relevant acts in all the relevant circumstances. In the present case, the Court cannot conclude that the reaction evidence is representative for five reasons.

28. *First*, none of the Applicants' lay witnesses other than the two Applicants have seen full recordings of the speeches: transcript of the hearing (**T)** 41.4-32, 42.5 (Wertheim); 48.20-21 (Goot); 53.35-44 (Peleg); 71.12-20 (Teacher); 77.45-47 (Family Business); 86.24-33 (Kaye); 92.25-28, 93.1-26 (Data Scientist). They were instead shown '**montages**', which were heavily condensed from the full speeches, omitted large amounts of context including religious references and Arabic speech, and reordered Mr Haddad's statements such that they were presented in a way that did not reflect the original speeches: affidavit of Poppy Carlie Isabella Kambas affirmed 25 March 2025

at [2(a)] (CB 133), Exhibit PK-1. **Annexure A** to these submissions is an aide memoire identifying the parts of the full speeches (Exhibit PK-2 to the affidavit of Poppy Carlie Isabella Kambas affirmed 17 April 2025) which were omitted from the montages and reordered. The edited, decontextualised and otherwise misleading way in which the speeches were shown to these witnesses makes their reactions an unreliable guide to the reaction that an ordinary, reasonable Jewish person in Australia would have had to the relevant acts, being the delivery of the speeches themselves.

29. *Second*, none of the Applicants' witnesses including the Applicants observed the speeches directly, or came unguided across the recordings of those speeches at their original source. Instead, each heard about the speeches from another source such as *The Australian*, *Sky News* or a media monitoring site called the 'Middle East Media Research Institute' that 'exposes antisemitic footage': affidavit of **Data Scientist** sworn 25 March 2025 at [16] (CB 115); see also T92.35-36. Accordingly, all of the Applicants' lay witnesses were exposed to the content of the speeches in the abstract from the context in which they were actually delivered or published. The significance of these circumstances is addressed further below.

30. Contrary to oral submissions made by senior counsel for the Applicants, it is not for the Respondents to lead evidence through cross-examination that these witnesses would have reacted differently if they had been shown the full speeches. It is the Applicants who bear the onus of proving the element in s 18C(1)(a), including, if they wish to rely on reaction evidence for that purpose, demonstrating that it is informative of the ordinary, reasonable group member's perspective. The submission made by the Respondents is not that the witnesses *would have* reacted differently but that the Applicants have not demonstrated that their reactions are informative of the reaction that an ordinary, reasonable Jewish person in Australia would have had to seeing the full speech in its full and original context. No *Browne v Dunn* point arises on that approach. In any event, the utility of the Respondents going through the exercise suggested by senior counsel for the Applicants would have been limited for the reasons in the next paragraph.

31. *Third*, and related, all of the Applicants' lay witnesses saw and heard the montages (or, in the Applicants' case, the full speeches) after viewing selective and inflamed media reporting which cherry-picked fragments of their contents. Most had already formed a view about Mr Haddad's words before seeing the montages. No explanation has been

given as to why the Applicants saw fit to provide their lay witnesses with copies of the same media articles at the same time as asking them to watch the montages.

32. There is at least a realistic possibility that viewing the montages or speeches in that context coloured the witnesses' views of what Mr Haddad said: that they viewed the montages or speeches through a filter of expectation that they would be offensive or insulting, and were inclined to be more attuned to aspects of the speeches that could be seen in isolation to convey a negative message about Jewish people and less open to regarding those statements in their broader context (to the limited extent any such context was supplied in the montages).

33. To the extent the witnesses say they were intimidated by Mr Haddad's speeches, there is also a difficulty in disentangling that asserted reaction from their reactions to contemporaneous events, particularly those of 7 October 2023 and the Sydney Opera House protests, which they say caused them fear.

34. *Fourth*, the Court cannot be satisfied that the Applicants' lay witnesses are representative of ordinary, reasonable Jewish people in Australia:

    34.1. Mr Wertheim, Mr Goot, Mr Kaye and Data Scientist all have or have had leadership roles in Jewish peak or community organisations: affidavit of Peter **Wertheim** AM sworn 24 March 2025 at [9]-[14] (CB 74-77) (see also T31.47); affidavit of Robert **Goot** AO SC sworn 24 March 2025 at [2], [11]-[18] (CB 84-87) (see also T46.24-39); affidavit of Robert Kaye SC at [3] (CB 93); Data Scientist at [11]-[14] (CB 113-14) (see also T102.4-5).

    34.2. Mr Wertheim has previously been involved in a number of cases brought on behalf of members of the Jewish community alleging racial vilification: Wertheim at [11]-[14] (CB 75-77).

    34.3. The witness identified as being in the occupation of Family Business has previously been involved in Jewish youth organisations and self-identifies as a person 'active in advocacy, volunteering and related matters': affidavit of person in the occupation of Family Business sworn 25 March 2025 at [5] (CB 102) (see also T73.43-44).

    34.4. The witness identified as a Teacher has been a teacher of religion and Jewish history at Jewish schools for many years: affidavit of person in the occupation of Teacher sworn 25 March 2025 at [2] (CB 120) (see also T70.16-20).

34.5. Mr Peleg was born in Israel, is a recent immigrant to Australia from Israel and holds what one hopes are extreme views about the people of Gaza and Palestine, accepting those views are likely to have been informed by experiences of unacceptable violence against his friends and family: affidavit of Guy Peleg sworn 25 March 2025 at [3] (CB 127).

34.6. None of the witnesses put forward by the Applicants is under the age of 37 years, and four of them are at or around the age of 70 or older.

35. This is in a context where Mr Wertheim accepted – and it appears to be undisputed – that the Jewish community in Australia is diverse and holds a diversity of political and social opinions. That diversity does not appear to be reflected in the witnesses put forward by the Applicants.

36. *Fifth*, the Applicants have advanced no evidence to explain the methodology by which their lay witnesses were selected. It appears that they were either approached by one of the Applicants or a representative of the Executive Council of Australian Jewry personally, or put their name forward to give evidence upon hearing about a prospective case about alleged 'hate speech'. That kind of process would tend to result in the presentation of witnesses whose perspective aligns with that of the Applicants regardless of the extent to which it is representative of the broader community. There is otherwise nothing before the Court in the nature of demographic or survey evidence that demonstrates the representativeness of the Applicants' lay witnesses or their opinions.

37. These submissions are not to be critical of the witnesses or to denigrate or delegitimise their experiences, although no weight should be given to Mr Peleg's evidence in light of his apparent lack of hesitation in saying offensive things about other people including based on their national origin on the public forum of X (formerly Twitter). However, it is for the Applicants to prove how the ordinary, reasonable Jewish person in Australia would have reacted to the relevant acts. In the circumstances set out above, their lay evidence is of little assistance, if any, in doing so.

Relevant circumstances: the setting and audience

38. Two circumstances have particular relevance in assessing whether the ordinary, reasonable Jewish person in Australia would have been offended, insulted, humiliated or intimidated by Mr Haddad's acts of delivering the speeches for the purposes of s 18C(1)(a).

39. The *first* is the settings in which the speeches were delivered. This is relevant for the reasons in paragraphs 15 to 22 above.

40. Speeches A, B, C and E were delivered by Mr Haddad in person at the premises of the Centre, which is a place of prayer and worship: Haddad at [86], [99], [103], [111] (CB 162-66). The Centre is a standalone building which is manifestly a private property – it is surrounded by high black fencing and its entrance carries a sign that says 'Private Property No Trespassing': Haddad at [46]-[48] (CB 155-56), annexures WH-3, WH-4 (CB 611-17); Neziroski at [15]-[17] (CB 144-45), annexures EN-1, EN-2 (CB 604-10). The attendees of the Centre are ordinarily entirely Muslims: Haddad at [45], [49]-[52] (CB 155-56); Neziroski at [20]-[24] (CB 145-46). There is no standing invitation to non-Muslims to attend the Centre; any non-Muslim wishing to do so must obtain specific permission from a member of the Centre's governing Committee: Haddad at [49]-[52] (CB 156). All attendees at lectures or sermons (whether Muslim or not) must be prepared spiritually by participating in Islamic rituals: Haddad at [50] (CB 156); Neziroski at [23] (CB 145-46). Lectures and sermons are preceded by prayers in which attendees are also expected to participate: Haddad at [62]-[64] (CB 157-58). There is no evidence that any of the speeches was attended or heard directly by anyone who was not a regular congregant of the Centre and a practising Muslim.

41. It is evident from those settings, and from the contents of each of the speeches, that they were directed only to a Muslim audience. The lectures and sermons begin with prayer, contain Arabic phrases (including formal, not just conversational, Arabic) and reference Islamic religious texts and concepts: see also Haddad at [43], [83], [85] (CB 155, 161-62). They refer to Mr Haddad's 'brothers and sisters': see, e.g., transcripts of the speeches (**TS**) 1.20-22 (CB 288); 19.13, 31-34 (CB 306), 21.18 (CB 344). They talk about the way Muslims should behave and lessons for Muslims: see, e.g., TS18.53-54, 21.23-24 (CB 344). He invites people to attend 'Dawah' (outreach) in the city (TS19.37-39) – a message that could only have been intended for Muslims.

42. The evidently intended audience of the speeches being only Muslims is not changed by the fact that they were subsequently (by different acts) posted on the relevant AMDC social media pages. While those pages were publicly accessible, they were also plainly directed to a Muslim audience. The Facebook page consists of announcements about upcoming events and activities at the Centre, fundraising, Islamic teaching and other messages directed at Muslims: Haddad at [58] (CB 157), annexure WH-5 (CB 618). The

only evidence about the Rumble page is to the effect that Mr Haddad's sermons and lectures at the Centre – that is, religious speeches at a religious centre directed to Muslims – are regularly published there: T130.30-36. AMDC Inc does not promote either the Facebook or the Rumble pages; Mr Haddad's evidence to this effect was unchallenged: Haddad at [57] (CB 157).

43. While speech B is styled as a response to media coverage, Mr Haddad appears on the face of the speech to be using this as a rhetorical device to speak to his own congregants and community: he refers to his 'brothers and sisters' (TS23.15, 28.4, 37.7); entreats them to stand firm against negative media coverage (TS23.15-17); invites them to a protest (TS37.7). The appearance of the video is also different, lacking, for example, the social media 'backdrop' visible in speeches A, C and E. Importantly, Mr Haddad refers to a *separate* response *to* the media being released on YouTube (TS 28.1-5), which is speech D: T127.3 (Haddad). Similarly, while speech D was styled as a 'Media Response', it was in the context of a podcast evidently directed at a Muslim audience; the questions asked were from a Muslim perspective; and, in any event, it had a different format and Mr Haddad's unchallenged evidence was that he understood it would also be published in a different location (YouTube): Haddad at [107] (CB 166); see also reference in speech B at TS28.1-5. The circumstances of these speeches therefore do not detract from a conclusion that the relevant AMDC social media pages were directed only at an audience of Muslims interested in the Centre's activities, principally its regular congregants and local community.

44. No other form of social media forms part of the Applicants' pleaded case. The only objective circumstances relating to social media that can properly be taken into account in determining whether the acts of making the speeches were reasonably likely to offend, insult, humiliate or intimidate Jewish people in Australia is that recordings of them (or links to those recordings) were regularly posted on the Facebook and Rumble pages. Those pages were directed at a Muslim audience of people genuinely interested in the Centre's activities for the reasons in paragraph 42 above.

45. Even if the Court were to consider it appropriate to take into account evidence about broader social media despite the pleadings, that evidence does not support a conclusion that the speeches were directed at a broader audience. The cross-examination as to Mr Haddad's engagement with the wider media focused on his personal Instagram page. But if any implication is to be drawn from the few extracts of that page put into evidence,

it is against the Applicants, because it indicates that *Instagram* is the forum where Mr Haddad would seek to engage with the wider media. It allows for no inference that the relevant AMDC social media pages – that is, Facebook and Rumble – formed part of any design to engage with any audience beyond Muslims. The 'backdrop' visible in the recordings of Mr Haddad's speeches that referred to various forms of social media does not imply a broader audience: why would Mr Haddad be inviting anyone other than a Muslim audience interested in the Centre's religious content to 'like' or 'subscribe' to the Centre's social media? And even if the Court were to conclude that Mr Haddad was attempting to become some kind of social media influencer (which is not accepted), there is no evidence that the relevant AMDC social media pages formed part of that attempt, and in any event, it is necessary to ask the next question: who was Mr Haddad trying to influence? The obvious answer to that question is: a Muslim audience.

46. These circumstances made it objectively unlikely that the acts of delivering the speeches would have offended, insulted, humiliated or intimidated Jewish people in Australia. This unlikelihood is borne out by the fact that, as set out in paragraph 29 above, not one of the lay witnesses put forward by the Applicants observed the speeches directly, or came unguided across the recordings of those speeches at their original source. None of the lay witnesses was a Muslim; none could speak or understand more than a few words or phrases of Arabic; none had attended an Islamic religious centre or mosque for the purpose of any religious observance (other than to educate school students); and none visited the websites of Islamic religious centres or organisations unless prompted to do so: T41.14-19 (Wertheim); T48.42-43 (Goot); T55.18 – T56.3 and T57.18-31 (Peleg); T70.36-39 (Teacher); T79.24-25 (Family Business); T-86.39-40 (Kaye); T93.38-T94.5 (Data Scientist). It is only because of what appears to have been an extraordinary pursuit of Mr Haddad and the Centre by other media organisations that any Jewish person in Australia was exposed to the acts of delivering the speeches.

47. It cannot be the case that an act is reasonably likely to offend, insult, humiliate or intimidate a group because some members of the group have later been directed to or sought out a record of the act and then become offended by it. It also cannot be the case that an *act* is reasonably likely to offend, insult, humiliate or intimidate because the media may report on parts of that act out of context and in a distorted way, which appears to be calculated to inflame *their* audience. To adapt an observation made by Bromberg J in *Eatock* at 322 [256], in such cases it may properly be said that it is the actions of the person who has sought out exposure to the act or the media organisation that has reported

on it that is responsible for causing the offence. This result is consistent with the approach in *Kaplan* set out in paragraph 18 above.

Relevant circumstances: full content and context of the speeches

48. The *second* relevant circumstance is the full content of the speeches: cf. *Faruqi* at [221]. It is necessary for the Court to view the speeches as a whole. Viewing only those parts of the speeches that the Applicants have chosen to highlight in opening and by the yellow-highlighted text in the transcripts provided to the Court portrays them inaccurately and unfairly.

49. Once a full and fair view is taken, it is apparent that almost all of the references made by Mr Haddad to Jews and Jewish people are to the historical Jews of Al Medina referred to in Islamic religious texts, or to the state of Israel: contra AS [24]-[26]. **Annexure B** to these submissions identifies some key examples of passages in the speeches alleged by the Applicants to make generalisations about Jews and sets out what the Respondents submit is conveyed by those passages when read fairly and in context. In addition to these specific submissions, the Respondents emphasise the following contextual matters, which would influence the way in which am ordinary, reasonable Jewish person in Australia viewing the speeches fairly and in context would have understood them:

    49.1. Speeches A, B, C and E each begin with prayers and introductory comments, including Arabic speech, which make clear that they are in the nature of religious sermons or lectures directed to a Muslim audience.

    49.2. Speeches A, C and E form part of a lecture series titled 'The Jews of Al Madina', which contextualises the contents of the speeches as being focused on the Jewish people of that place in a historical time.

    49.3. The opening of speech A gives further context for that series by stating that it is a departure from the usual (religious) lecture series that would be delivered at that time, which is occurring because of the events happening in Gaza: TS 1.21-30 (CB 288).

    49.4. The majority of each of the speeches other than speech D comprises the delivery of narratives sourced in Islamic scripture. There is no contest between the experts, Sheikh Ibrahim and Professor Reynolds, that Mr Haddad accurately describes religious narratives and accurately quotes from scripture in most parts of his speeches.

49.5. Speech D is plainly political commentary, as is at least most of speech B. The titles of speech B ('Murdered by Israel Khutbah Jummah') and speech D ('Media Response to Reality of World Palestine') contextualise their contents as being focused on the conduct of Israel.

50. On a full and fair reading of the speeches, there are only a few possible candidates for passages that could fairly viewed as going beyond historical Jews or the state of Israel or its constituents, which are identified in yellow highlight in Annexure B. The Respondents maintain that, on a fair and objective contextual reading, those should not be understood as references to Jewish people generally for the reasons explained in the Annexure. Even if the Court forms the contrary view, those passages did not refer to Australian Jews; could be seen to be referable only to Jews of faith (addressed further in paragraphs 58 and 59 below); and otherwise were not of such gravity as to make them reasonably likely to have profound and serious effects on an ordinary, reasonable Jewish person in Australia whose characteristics reflect life in a free and tolerant society accustomed to rigorous debate and a diversity of views.

51. In these circumstances, the Applicants have not established the element in s 18C(1)(a).

C.2 Not because of the race, national or ethnic origin of Jewish people in Australia (s 18C(1)(b)

Principles

52. The question is why the act was done, and whether that included the race, colour, national or ethnic origin of the relevant group; see, e.g., *Toben v Jones* [2003] FCAFC 137; (2003) 129 FCR 515 at 531 [61]-[64] (Kiefel J), 552-53 [150]-[152] (Allsop J); *Kaplan* at [527]-[530]. Motive is not necessary but 'may be relevant, indeed centrally relevant': *Kaplan* at [526]. Thoughtlessness, carelessness, clumsiness or insensitivity of expression are insufficient: see, e.g., *Creek* at 359-60 [29]; *Kaplan* at [538]; *Bharatiya v Antonio* [2022] FCA 428 at [21].

Why Mr Haddad made the speeches

53. Mr Haddad's evidence is that he made each of the speeches:

53.1. in response to questions, concerns and distress expressed to him by members of the Centre's Muslim community about the events involving Israel and Palestine in Gaza since 7 October 2023: Haddad at [69]-[78] (CB 158-59);

53.2. for the purpose of providing support and spiritual comfort to members of the Muslim community by placing the current events in Gaza in a historical religious context: Haddad at [78]-[80], [84] (CB 159-61); and

53.3. not motivated and without intending to express any criticism or comment about Jewish people in Australia, by reason of their race or otherwise: Haddad at [85] (CB 161-62).

54. Mr Haddad's evidence to this effect is consistent with the content of the speeches, which, viewed fairly, refer wholly or at least predominantly to historical Jews as recorded in Islamic texts or the state of Israel and contain no reference to Australian Jews as set out above and in Annexure B.

55. The case theory advanced by the Applicants appears to be that Mr Haddad was deliberately saying controversial things about Jews in order to attract media attention. However, that case theory is not consistent with:

55.1. the unchallenged evidence of Mr Haddad's faith, his spiritual history and spiritual leadership as set out in paragraph 6 above;

55.2. the contents and context of the speeches as set out in paragraph 49 above and Annexure B, particularly speeches A, C and E, which clearly have the quality of religious lectures and mostly comprise recitation of religious narratives which the experts agree is an accurate reflection of religious texts. Reciting historical narratives from religious text in detail and at length is the very sort of thing a religious preacher would do in a genuine attempt to educate his congregants;

55.3. the evidently intended audience of the speeches as set out in paragraphs 40 to 45 above;

55.4. the fact that Mr Haddad took down (or believed he had taken down) all of the speeches other than speech B from the internet after receiving the Applicants' Australian Human Rights Commission complaint, leaving speech B only because he believed it clarified his position that he did not intend to cause harm or offence to any Jewish people in Australia: Haddad at [119] (CB 168); and

55.5. Mr Haddad's use of his personal Instagram, rather than other forms of social media, to the extent that he sought to engage in any dialogue with the broader community as set out in paragraph 45 above. There is no evidence that he did in relation to any of the speeches before they were delivered; the one Instagram post

in evidence depicting any part of the speeches was on 1 December 2023, referring to a MEMRI TV montage of speech A: exhibit A3.

56. Much of the reasoning deployed by the Applicants in support of their case theory appears to be tendency reasoning: because Mr Haddad has previously (so they say) said controversial things about groups of people in order to attract media attention in the past, the Court should infer that he was doing the same on the occasions of delivering the speeches. The Applicants provided no tendency notice and have not otherwise addressed the requirements of s 97 of the *Evidence Act 1995* (Cth) in relation to this use of that evidence. Whether or not the evidence was admissible in accordance with s 97, the Court must exercise caution in using it to engage in tendency reasoning of the kind propounded by the Applicants because of the risk that it may distract from the required task of assessing Mr Haddad's reasons for engaging in the particular acts of delivering the speeches: cf., e.g., *Hughes v R* (2017) 263 CLR 338 at [17]. This case is an illustration of that risk. Even if it is accepted that Mr Haddad had a tendency to say controversial things in order to attract media attention, it does not follow that any part of his reasons for doing so was the race or ethnicity of Jewish people in Australia. A desire to be controversial is not the same as a racial motivation.

57. For these reasons, the Court should not conclude that the speeches were 'plainly calculated' to convey a message about Jewish people in Australia, or any message about their race or ethnic origin: contra AOS [32].

58. There is a further or alternative reason why the Court should make that finding. Mr Haddad's evidence was that he identifies and refers to people as 'Jews' on the basis of their religion – that is, he means 'Jews of faith': see, e.g., T152.6-9, 154.20-22, 160.14, 161.20-21, 162.20-24. His evidence, which was not challenged as a matter of theology either with him or with the religious experts, is that this is the Islamic conception of 'Jews' (or 'Yahud'): T162.34 – 163.2. It is not correct that this was a recent invention. His evidence that he understands and means 'Jew' to refer to people of the Jewish faith is supported by at least the following matters:

    58.1. In Mr Haddad's explanation of speech A in his affidavit at [89] (CB 162), he described one of his purposes as being to explain 'how discontent between the two *faiths* is not new and not something we, as Islamic adherents, should fear'.

    58.2. In speech A, Mr Haddad says: 'as the Jews always claim that Muslims were always making things up, we want to quote even from *their own books* about

their very own mentality': TS2.3-5 (CB 289). 'Their own books' is a reference to Jewish religious texts: see, e.g., TS4.45 – 5.5 (CB 291). Mr Haddad also refers to 'whatever their religion told them': TS5.34-35 (CB 292).

58.3. In speech A, Mr Haddad refers to 'the Jews being Jews, having the same religion' (TS6.38-39), and also compares the two groups of Jews he is referencing to two sects of Islam: TS6.43-46 (CB 293).

58.4. In speech A, Mr Haddad also refers to the problems between Muslims and Jews in Muslim lands by reference to the accord between groups that he describes in religious terms: 'Jews, Christians and Muslims', who he describes as being 'from Abraham' and 'from the same prophet': TS14.20-21 (CB 301).

58.5. In speech C, Mr Haddad refers to a narrative about asking 'this Jew' 'which of the two religions is closer and more beloved to Allah?': TS41.10-12 (CB 364).

58.6. In speech D, Mr Haddad says: 'Muslim Jew Christian Hindu whatever *religion* you come from': TS60.32.

58.7. In speech E, Mr Haddad says explicitly: 'we're not anti-Semitic [sic] … it's not about race, *it's about religion*': TS71.13-14 (CB 398).

59. To the extent the Court considers that Mr Haddad did not make his position on this issue clear until part-way through his cross-examination, there is a rational explanation for that other than recent invention: as Mr Haddad explained, and was not challenged on, it is ordinary in the Islamic faith to associate the terminology of 'Jew' or 'Yahud' with the Jewish faith or religion rather than ethnicity or race.

60. While a shared religious history may be one feature that contributes to an ethnic origin (see, e.g., explanatory memorandum for the *Racial Hatred Bill 1994* at pp 2-3), they are religion is not the same as race or ethnic origin: see, e.g., ***King-Ansell*** *v Police* [1979] 2 NZLR 531 at 533 (noting that the *Racial Hatred Bill* post-dated *King-Ansell* and the explanatory memorandum refers to its definition of ethnic origin). It follows that even if the Court were to find (contrary to Mr Haddad's submissions) that he said things in his speeches for the reason of making a statement about 'Jews', the Court should conclude that his reason for doing so was *religion*, not the race or ethnic origin of Jewish people in Australia. Religion and ethnic origin are not coextensive (contra ACS [73]); for example, a person who converts to Judaism may be a Jew of faith but not an ethnic Jew, and conversely, there may be an ethnic Jew who does not subscribe to Judaism (as

in the case of the witness identified as being in the occupation of Family Business: at [6] (CB 102)). In any event, it is not to the point whether 'Jews of faith' may share an ethnic origin; the point is that if Mr Haddad's reason for acting was religion rather than ethnic origin, that does not satisfy the requirement in s 18C(1)(b).

61. In these circumstances, the Applicants have not established the element in s 18C(1)(b).

C.3 The exemption in s 18D(b) applies

Principles

62. The exemptions in s 18D are intended to be 'broad' and should be construed accordingly: see, e.g., second reading speech for the *Racial Hatred Bill 1994* (Hansard, House of Representatives, 15 November 1994, pp 3341); *Bropho* at 125 [72]-[73]. This reflects the balance intended by Parliament to be struck in Pt IIA as set out in paragraph 19 above: between promoting protecting a right to participate in public life free from unjustified offensive conduct based on race on the one hand and freedom of speech on the other.

63. 'Reasonably' in s 18D requires 'a rational relationship' between the act and one of the matters in s 18D(a) to (c) and that the act is not disproportionate to what is necessary to carry out the activity: see, e.g., *Bropho* at 128 [79]; *Faruqi* at [294]. This is an objective analysis: see, e.g., *Bropho* at 128 [79]; *Faruqi* at [295]. A relevant consideration may be whether the manner in which the act was done was evidently calculated to advance a purpose consistent with s 18D(a) to (c) or, instead, was gratuitously insulting or offensive: see, e.g., *Bropho* at 128-29 [80]-[81]. The same act may be unreasonable in one context but reasonable in another: see, e.g., *Bropho* at 128 [80]. An act does not fail the test of reasonableness merely because it would have been possible to do it in a different way more acceptable to the Court: see, e.g., *Bropho* at 128 [79]. And bearing in mind the intended breadth of the exemptions in s 18D, the requirement of proportionality should not be applied narrowly, but instead with a good margin of appreciation. 'It is only when what is said is so ill-informed or misconceived or ignorant and so hurtful as to go beyond the bounds of what tolerance should accommodate that it may be regarded as unreasonable': ***Catch The Fire*** *Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VR 207 at 242 [98] (in a similar but not wholly analogous statutory context).

64. 'Good faith' has an objective element and a subjective element. The subjective element is that the act is done honestly and for a legitimate (subjective) purpose, not an ulterior

purpose, for example as a cover to offend or insult people because of their race: see, e.g., *Bropho* at 131 [93]-[95]. The objective element is a requirement of 'fidelity to whatever norm, or rule or obligation the statute prescribes as attracting the requirement of good faith observance': *Bropho* at 131 [93]. This has been expressed as requiring a 'conscientious approach' to advancing a protected matter under s 18D: see, e.g., *Bropho* at 133 [102]. It will be relevant to consider whether the act was designed to minimise offence, insult, humiliation or intimidation as opposed to carelessly disregarding its effect on those who may be offended by it: see, e.g., *Faruqi* at [296].

65. The Respondents accept that this Court is bound to proceed on the basis that the onus of proving an exemption under s 18D lies on them (*Toben* at 528 [41] (Carr J), 534 [78] (Kiefel J generally agreeing with Carr J's reasoning on s 18D); see also 554 [159]-[161] (Allsop J)). They reserve the opportunity to argue the contrary if the matter goes on appeal: cf. *Bropho* at 126-27 [75].

No dispute as to genuine purposes in the public interest

66. It is 'a matter of interest or concern to people at large' (*Eatock v Bolt* (2011) 197 FCR 261 at 359 [433]) that:

    66.1. members and leaders of the Muslim community (as well as the broader community) are free to express views and participate in debate about the events taking place in Gaza, particularly since 7 October 2023, including in strong terms; and

    66.2. persons who are recognised in their community as religious leaders are free to deliver teaching and commentary on religious and historical subjects to members of that community, including to provide spiritual support, and religious context for current political events.

67. The Applicants accept that these were genuine purposes in the public interest: AOS [35]; agreed list of issues for determination (CB 856-57) (which does not include this as an issue). The only dispute is as to whether Mr Haddad made the speeches reasonably and in good faith for those purposes.

Reasonably and in good faith

68. Mr Haddad gave detailed evidence about his purposes in making each of the speeches: see particularly Haddad at [69]-[80] (CB 158-60), [84]-[85] (CB 161-62), [87] (CB 162), [100]-[101] (CB 165), [105] (CB 165), [107] (CB 166), [112]-[113] (CB 166-67). Those

purposes included to comment on the events taking place in Gaza, particularly since 7 October 2023, and to deliver religious teaching or commentary to members of the Muslim community to provide historical and religious context for those events and spiritual support. The Court should accept that Mr Haddad made the speeches and the relevant statements in them honestly for those purposes and not any ulterior purpose for the reasons in paragraphs 54 to 56 above.

69. In relation to these objective elements of s 18D(b), the political commentary made by Mr Haddad is supported by a range of independent sources (Haddad at [81] (CB 160-61)), and the Respondents' and Applicants' experts agree that the religious narratives expressed by Mr Haddad in speeches A, B, C and E accurately reflect religious texts with few exceptions: identified in Reynolds report at [32] (CB 244-45), [37] (CB 246), [54]-[55] (CB 251). Where the experts disagree is in their perception of whether or to what extent Mr Haddad goes beyond those texts to make generalisations about Jews as a people, which is not a matter of expert opinion. For the reasons set out in paragraphs 49 and 50 above and Annexure B, the Court should not conclude that Mr Haddad was not engaged in an exercise of making offensive generalisations or repeating antisemitic tropes about Jewish people (in Australia or otherwise), or doing so gratuitously or carelessly.

70. In any event, the public interest in religious or political speech (or any other public interest) cannot be limited to the bland repetition of uncontroversial source material. In a society in which political communication and religious freedom are constitutionally protected, there must be room allowed in the conditions of reasonableness and good faith for opinions that are open to contention and debate, and even those that may be regarded as novel or fringe (without accepting that Mr Haddad's views have those qualities), provided they are sufficiently connected with a matter of legitimate public interest or concern: in this case, the delivery of religious and/or political commentary to one's community.

71. The requirements of reasonableness and good faith also should not be construed as only allowing speech on topics of genuine public interest which is sanitised or blunted, or finely calibrated to minimise the potential for offence, or as closely controlling the manner in which someone can use religious texts to deliver a religious or political message: contra AOS [36]-[38]. Otherwise s 18D would have little work to do when s 18C(1)(a) is already controlled by a requirement of reasonable likelihood. It cannot be,

for example, that a religious preacher is required to consider if narrations derived from religious texts are historically authentic or convey a balanced perspective: cf. Reynolds at [29] (CB 243). This approach is consistent with the observation made by Nettle JA in *Catch The Fire* at 219-20 [36] that it cannot be 'for a secular tribunal to attempt to assess the theological propriety' of assertions said to be based on religious belief. The tests of reasonableness and good faith must be able to be applied in cases such as this without making such an assessment.

72. It may be accepted that the speeches were made in a climate of heightened emotion associated with a political debate in which there may be heightened sensitivities on both sides. However, that is precisely the kind of environment in which it is especially important to give the protections in s 18D their full force and effect. The possibility of inflamed and distorted reporting of the speeches by other media outlets cannot undermine the reasonableness and good faith of Mr Haddad's acts.

73. Accordingly, the Court should accept that any generalisations Mr Haddad did make about Jews were within the bounds of tolerability in a free and broad-minded democracy such as Australia.

74. This conclusion is also supported by the fact that Mr Haddad delivered the speeches in the setting of a religious centre and evidently directed them to a Muslim audience which did not include Jewish people in Australia, as set out in paragraphs 40 to 42 above. The same matters support a conclusion that Mr Haddad did not make the speeches in careless disregard of the possibility that they may offend members of that group.

75. For these reasons, the Court should find that Mr Haddad has made out the exemption in s 18D(b) of the RDA.

D. The claim against AMDC Inc fails

D.1 The Applicants have not established attribution

76. The acts relied on by the Applicants against AMDC Inc are the publication of recordings of each speech on the relevant AMDC social media pages (that is, Facebook and Rumble pages). The Applicants bear the onus of proving that those acts were done by AMDC Inc. *Jones v Dunkel* inferences cannot fill evidential gaps or convert conjecture into evidence: see, e.g., *Fair Work Ombudsman v Hu* [2019] FCAFC 133; (2019) 289 IR 240 at 254 [54] (Flick and Reeves JJ).

77. As an incorporated association registered under the *Associations Incorporation Act* (agreed statement of facts at [7] (CB 853)), AMDC Inc is a body corporate separate from its members: ss 8, 9, 19 of the *Associations Incorporation Act*.

78. The governing body of an incorporated association is its committee: s 28(1) of the *Associations Incorporation Act*. There is no evidence of any resolution or decision of AMDC Inc's Committee to the effect of authorising the publication of the relevant recordings or any others. Mr Haddad was not asked in cross-examination whether any such resolution or decision was ever made. There was no evidence for AMDC Inc to answer on this topic by calling any other committee member to give evidence; alternatively, this is a situation where there is a lacuna in evidence which cannot be filled by a *Jones v Dunkel* inference.

79. In the absence of any decision or resolution by AMDC Inc's Committee, it is necessary for the Applicants to establish that the speeches were published by an employee or agent of AMDC Inc in connection with his or her duties as an employee or agent such that AMDC Inc is vicariously liable for that publication pursuant to s 18E(1) of the RDA. The Applicants have not engaged at all with the requirements of s 18E(1): ACS [81]. The evidence does not establish that they are met for the following reasons:

    79.1. Mr Haddad's evidence, which was not challenged, is that he did not establish the relevant AMDC social media pages, had no involvement in their establishment, did not upload the speeches to them, and did not authorise any content before it was uploaded: Haddad at [54]-[55] (CB 156).

    79.2. All that was put to Mr Haddad in cross-examination is that he knew one of the purposes of recording his lectures and sermons was for publication on the Rumble page (which he accepted) (T130.22-26), that he knew his sermons were or were very likely to be uploaded to the Rumble page (which he accepted) (T127.39, 131.21-23), that he knew of the Facebook page as at November 2023 (which he accepted) (T127.13-16), and that he had visited the Facebook page as at November 2023 (which he could not recall) (T127.25-31). This does not come near to being sufficient to establish or enable an inference that Mr Haddad authorised anyone, either generally or specifically, to upload any content to either the Rumble or Facebook pages.

    79.3. Mr Haddad's acceptance of the vague proposition that he was 'in effect … in charge there' with respect to AMDC Inc (T116.34) goes nowhere in this context,

as does his role as public officer of AMDC Inc. In any event, the public officer of an incorporated association is a role that carries a particular status and responsibilities under the *Associations Incorporations Act* but does not confer or imply any particular managerial authority.

79.4. Mr Haddad gave evidence that there were 'volunteers' who would upload content under the moniker of 'Muslim Unapologetic' (T118.31 – 119.14), but there is no evidence that 'Muslim Unapologetic' had anything to do with the AMDC Facebook or Rumble pages, or about the relationship between the 'volunteers' and AMDC Inc.

79.5. Mr Haddad gave evidence that one Committee member, Mr Ye, was responsible for 'media' (T117.4-12, 139.12-14). But that evidence is too vague to enable any inference to be drawn as to the fact required to be proved under s 18E(1). Mr Haddad was not asked about Mr Ye's role in relation to the AMDC Facebook and Rumble pages.

79.6. Mr Haddad gave evidence that there was a 'media team' in Indonesia, formerly Kashmir, who were paid, instructed and 'contracted' to create graphic, flyers, posters and 'posts' (in the context of Instagram posts) (T147.46 – 148.15; see also 119.44 – 120.9). But again, there is no evidence that this team had any involvement with the AMDC Facebook or Rumble pages and Mr Haddad was not asked about any such involvement with those pages: contra ACS [81].

79.7. The fact that the Facebook page on which the speeches were published bears the name of the Centre – which is a place, not just a legal entity – is not sufficient to establish that the relevant acts were those of AMDC Inc.

80. There is no evidence that would enable an inference that any other employee or agent acting in connection with his or her duties as such uploaded the speeches to the relevant AMDC social media pages. It was open to the Applicants – who are sophisticated litigants represented by experienced solicitors and counsel – to issue notices to produce or subpoenas or apply to administer interrogatories to seek material relevant to their case on attribution. That would have been usual in a case such as this. But they did not do so. This is, again, a situation where there is a lacuna in the evidence which cannot be filled by a *Jones v Dunkel* inference.

81. The claim against AMDC Inc fails at this threshold.

D.2 Not reasonably likely to offend, insult, humiliate or intimidate

82. It is accepted that the acts of publishing the speeches on the relevant AMDC social media pages are taken to be done otherwise than in private because they caused words, sounds, images or writing to be communicated to the public. However, the nature and context of the pages remains important. For the reasons in paragraph 42 above, those pages are evidently directed at congregants of the Centre and an otherwise Muslim audience, and AMDC Inc does not promote either of them. In these circumstances, it is objectively unlikely that either page would be accessed by anyone other than congregants and followers of the Centre or fellow Muslims in the local area with an interest in the Centre's activities. A Jewish person in Australia would need to deliberately seek out the pages, or they would need to be reported on by someone else, in order for such a person to be exposed to their content. Again, it cannot be concluded that the acts of publication on the Facebook or Rumble pages were reasonably likely to offend Australian Jews on this basis.

83. The publication of the speeches otherwise was not reasonably likely to offend, insult, humiliate or intimidate an ordinary, reasonable Jewish person in Australia for the reasons in paragraphs 48 to 50 above and Annexure B.

D.3 Not because of race, national or ethnic origin

84. The natural reason for the speeches being published on the Facebook and Rumble pages was to make sermons and speeches delivered at the Centre accessible to those members of its community or fellow Muslims who were not able to attend in person. Mr Haddad's lectures and sermons were posted on the Rumble page routinely (T127.41), and the speeches were posted without editing or commentary. In those circumstances, the Court would not conclude that the subject matter of the speeches relating to Jews (or any other part of their subject matter) was a reason for their publication. The situation is analogous to *Creek* at 359 [28]-[29], where the mere publication in media of allegedly racist material, without editing or evidence of moderation, did not give rise to an inference that the act of publication was done by reason of race.

85. In any event, the Court would not conclude that the race or ethnic origin of Jewish people in Australia was a reason for the publication of the speeches for the reasons in paragraphs 53 to 60 above.

D.4 The exemptions in s 18D(c)(i) and/or (b) apply

86. There appears to be no dispute that the publication of recordings of the speeches on Facebook and Rumble was a fair and accurate report of the event of the speeches being made. There is no suggestion that the recordings published there were edited such that they did not provide a true representation of the speeches: see, e.g., *Creek* at 360 [32].

87. The speeches were events or matters of public interest for the same reasons as set out in paragraph 66 above. It is in the public interest that members of the Centre's local community and the broader Muslim community are free to receive the views of recognised religious leaders about matters of religion, history and contemporary political debate, even if those views may be challenging to others who happen upon them. The Applicants' contrary assertion (AOS [40]) is difficult to reconcile with their acceptance that the same matters are genuine purposes in the public interest (AOS [35]).

88. The questions of reasonableness and good faith are informed by the matters set out in paragraphs 68 to 74 above, but also by the manner of publication being on web pages that were evidently focused on communicating with congregants of the Centre and other Muslims with an interest in the Centre's activities, not on disseminating the speeches to a wider audience. The publication of the speeches on those focused web pages was in proportion to the end of communicating them to that audience and not to those who may be offended by their contents. The natural inference from the circumstances of the publications is that they were done for this purpose and not any ulterior purpose.

89. For these reasons, the exemptions in s 18D(c)(i) and (b) apply.

E. Alternative constitutional arguments

90. The Respondents' primary argument is that the constitutional protections of political communication and religious freedom inform the proper construction of ss 18C and 18D in the manner set out above. It should not be controversial that legislation should be construed in its broader constitutional and legal context, including the context of constitutional freedoms: see, e.g., *Hogan v Hinch* [2011] HCA 4; (2011) 243 CLR 506 at 538-39 [32] (French CJ); *Monis v R* [2013] HCA 4; (2013) 249 CLR 92 at 208 [331] (Crennan, Kiefel and Bell JJ); contra ACS [84]. In any event, the principle of legality that requires statutes to be construed so as not to interfere with fundamental common law rights, freedoms or immunities in the absence of clear language applies to freedom of expression (see, e.g, *Tajjour v New South Wales* [2014] HCA 35; (2014) 254 CLR

508 at 546 [29] (French CJ)) and freedom of religion (see, e.g., *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1985) 1 NSWLR 525 at 544 (McHugh JA)).

91. The Respondents contend that s 18C is unconstitutional only in the alternative, if and to the extent the Court concludes that the making or publication of the speeches would have contravened s 18C(1) of the RD Act by reason of content which comprises or is connected with political commentary (in the case of the implied freedom of political communication); or religious preaching, teaching or commentary or recitation of religious text (in the case of s 116 of the *Constitution*).

E.1 Implied freedom of political communication

92. In *Faruqi* at [308]-[378], the Court as presently constituted engaged in a detailed analysis of whether s 18C was unconstitutional by reason of the implied freedom of political communication as recognised, for example, in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. The Respondents accept the principles expressed in *Faruqi* and the way they were applied in the circumstances of that case with one qualification. The qualification is that in *Babet v Commonwealth of Australia* [2025] HCA 21, a majority of the High Court made clear that the approach of 'structured proportionality' applied in *Faruqi* at [349]-[377] is only a tool of analysis which is not necessary to apply in every case: at [49] (Gageler CJ and Jagot J, Gordon J agreeing at [72], Beech-Jones J agreeing at [242]). The ultimate question to be answered remains whether the law is reasonably appropriate and adapted to advance a legitimate purpose consistent with the maintenance of the constitutionally prescribed system of government.

93. The circumstances of this case are different from those in *Faruqi*. The tweet that was the subject of *Faruqi* was political only in that it was directed from one politician to another, in reply to political points but not political in its own content: *Faruqi* at [330]. In contrast, there are statements complained about by the Applicants which include overtly political content about the events in Gaza – matters of intense public and political debate – and which, on a fair and objective reading, contain no connection with the Jewish race or ethnic origin other than that they refer to Israel: see, e.g., speech A at TS17.39-40; speech B at TS23.10-17, 26.21, 33.13, 36.18; speech D at TS55.28-40; speech E at TS71.20-21, 72.10-14, 85.6-10. These are matters within the central conception of political communication.

94. Further, and in any event, the Court should accepts Mr Haddad's evidence is that the whole of the speeches were designed to bring a religious historical perspective to that matter of political debate, in response to requests from his congregants to do so: see paragraphs 54 to 56 and 68 above. That is also a matter within the central conception of political communication.

95. If the Court concludes that speech such as this is proscribed by s 18C, including that the defences under s 18D are not available because of the narrow approaches to reasonableness and good faith urged by the Applicants, then the resulting burden on political communication is not slight as it was seen to be in *Faruqi*. Such a result would have a substantial chilling effect on discourse about an important political topic, and disproportionately so on discourse from an Islamic perspective (though not only on that discourse).

96. Accepting that s 18C has a legitimate purpose of deterring and eliminating and thus protecting members of the public from racial hatred and discrimination (*Faruqi* at [339]-[346]), such a restriction on political communication is not reasonably appropriate and adapted to advancing that purpose. There are available alternative measures, such as to make explicit that an act is not unreasonable or done without good faith merely because it associates race or ethnic origin with the conduct of a political actor. The marginal benefit in terms of protecting members of the public from racial hatred and discrimination that is achieved by the Applicants' narrow approach compared with an alternative approach that permits speech of the kind delivered by Mr Haddad is manifestly outweighed by the adverse effect that the narrow approach has on the implied freedom: cf. *Faruqi* at [361]-[377]. This is because s 18C would (as past cases have demonstrated) still protect against most forms of speech that might fairly be regarded as antisemitic; it would just leave room for criticism of a state and its historical antecedents, which has an inevitable connection with religious history, at a time when the conduct of that state is a matter of large political debate.

E.2 Section 116

97. Section 116 of the *Constitution* provides that the Commonwealth must not make any law 'for' (relevantly) prohibiting the free exercise of any religion. This is a 'guarantee of religious freedom' reflecting that '[f]reedom of religion, the paradigm freedom of conscience, is of the essence of a free society': *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120 at 130.

98. The Court is bound to accept that the word 'for' in s 116 connotes that prohibiting the free exercise of any religion must be a purpose, end or object of the law: ***Kruger*** *v Commonwealth* (1997) 190 CLR 1 at 40, 86, 132, 160. The Respondents reserve the right to challenge this construction if the matter proceeds to the High Court.

99. A purpose of s 18C is to prohibit speech identified as manifesting racial hatred or discrimination, subject only to the protections in s 18D. Section 18D does not expressly or, on the Applicants' case, impliedly protect speech that constitutes the free exercise of any religion. If the Applicants' case is accepted, the speech prohibited by s 18C includes speech that the experts agree is sourced directly in Islamic religious texts, and the manner in which adherents to the Islamic faith may speak about those texts and their religious beliefs is closely controlled: see, e.g., in speech A at TS3.18-26, 4.8-23, 6.25-27, 8.22-27, 10.23-33, 10.45 – 11.2, 12.7-25, 12.33 – 13.23, 14.1-33, 17.7-16; speech B at TS28.14-23; speech C at TS39.24-25, 49.19-27, 50.29-32, 51.2-5, 54.2-8; speech E at TS67.22-24, 68.2-13, 69.21 – 70.2, 70.21-22, 73.23, 76.16-22, 77.4-18, 80.22, 81.17, 84.13-14, 85.3-4, 87.23-24, 88.10-13, 90.7-12, 91.4, 94.16-20, 100.2, 101.2-10; and see generally Annexure B. A prominent example is the hadith that includes the reference to the effect of 'There is a Jew behind me. Come and kill him'. The experts accept that this is an accurate reference to an Islamic religious text. On the Applicants' case, Mr Haddad contravened s 18C by repeating it.

100. This constraint on the free exercise of religion is not merely an unintended or incidental effect of a law having a different purpose: cf. *Kruger*. It is inherent in or encompassed by the purpose of prohibiting racially motivated offensive speech without protection of religious speech. In those circumstances, it can be said that a purpose of s 18C is to prohibit speech that includes the free exercise of any religion, contrary to s 116 of the *Constitution*.

F. Relief

101. The Respondents accept that, to the extent the Court find that they contravened s 18C, it would be open to the Court to make declarations reflecting those contraventions (cf. orders 1 and 2 in the originating application (CB 3-4)). It would also be open to the Court to order that the Respondents take reasonable steps to take down or arrange to be taken down from any website any content found to have contravened s 18C (orders 3(a) and (b) in the originating application (CB 4)), noting that, depending on the Court's findings, this may involve taking down only segments of some speeches.

102. However, it would not be appropriate for the Court to make an order in the terms of order 3(c) in the originating application (CB 4). That order is too vague and imprecise to be capable of effective compliance by the Respondents or enforcement: cf., e.g., *Australian Competition and Consumer Commission v Mandurvit Pty Ltd* [2014] FCA 464 at [85]. It also goes beyond the kind of order contemplated by s 46PO(4)(a) of the *Australian Human Rights Commission Act 1986* (Cth), which is an order directing the respondent not to repeat or continue 'such unlawful discrimination' as is found to have been committed. The injunctions that have typically been ordered in RDA cases are ones that restrain respondents from publishing or republishing specific and identified or identifiable material: see, e.g., *Faruqi* at [383]. The proposed form of injunction does not do that.

103. For similar reasons to those set out in *Faruqi* at [385], it also would not be appropriate to order the Respondents to post a corrective notice.



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