FEDERAL COURT OF AUSTRALIA

Sutherland Shire Council v Folkes   
[2015] FCA 1288

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| Citation: | Sutherland Shire Council v Folkes [2015] FCA 1288 |
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| Parties: | **SUTHERLAND SHIRE COUNCIL v NICHOLAS HUNTER FOLKES, PARTY FOR FREEDOM INCORPORATED and SHERMON BURGESS**  **JAMAL RIFI v NICHOLAS HUNTER FOLKES, PARTY FOR FREEDOM INCORPORATED and SHERMON BURGESS** |
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| File number: | NSD 1601 of 2015  NSD 1602 of 2015 |
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| Judge: | **RARES J** |
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| Date of judgment: | 11 December 2015 |
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| Catchwords: | **HUMAN RIGHTS** – application under s 46PP of the *Australian Human Rights Commission Act 1986* (Cth) for interim injunction to prevent respondents from holding and or addressing a public event – where speakers at public event likely to engage in unlawful racial discrimination – power of Court under s 46PP to act *quia timet*  **STATUTORY INTERPRETATION** – construction of ss 18C and 18D of the *Racial Discrimination Act 1975* (Cth) – where publication of material created apprehension of future unlawful acts or speech – where anticipated future acts or speech likely to offend, insult, humiliate or intimidate persons of Middle Eastern or Lebanese race or national or ethnic origin – where such acts or speech not likely to be done reasonably for purposes of s 18D |
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| Legislation: | *Australian Human Rights Commission Act 1986* (Cth)  *Local Government Act 1993* (NSW)  *Racial Discrimination Act 1975* (Cth)  *Summary Offences Act 1988* (NSW)  *Constitution*  *International Convention on the Elimination of all Forms of Racial Discrimination* |
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| Cases cited: | *Australian Broadcasting Commission v O’Neill* (2006) 227 CLR 57  *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520  *McCloy v New South Wales* (2015) 325 ALR 15  *NSW Commissioner of Police v Folkes* [2015] NSWSC 1887 |
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| Date of hearing: | 11 December 2015 |
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| Place: |  |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 73 |
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| Counsel for the Applicant: | Mr CJ Leggat SC with Mr T Glover |
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| Solicitor for the Applicant in NSD 1601 of 2015: | Sutherland Shire Council |
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| Solicitor for the Applicant in NSD 1602 of 2015: | Macedone Legal |
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| Counsel for the First and Second Respondents: | Mr J Loxton |
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| Solicitor for the First and Second Respondents: | Robert Balzola and Associates |
|  |  |
|  | The Third Respondent did not appear |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1601 of 2015 |

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| BETWEEN: | SUTHERLAND SHIRE COUNCIL  Applicant |
| AND: | NICHOLAS HUNTER FOLKES  First Respondent  PARTY FOR FREEDOM INCORPORATED  Second Respondent  SHERMON BURGESS  Third Respondent |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1602 of 2015 |

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| BETWEEN: | JAMAL RIFI  Applicant |
| AND: | NICHOLAS HUNTER FOLKES  First Respondent  PARTY FOR FREEDOM INCORPORATED  Second Respondent  SHERMON BURGESS  Third Respondent |

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| JUDGE: | RARES J |
| DATE OF ORDER: | 11 DECEMBER 2015 |
| WHERE MADE: | SYDNEY |

THE COURT NOTES THE UNDERTAKINGS BY THE FIRST RESPONDENT ON HIS OWN BEHALF AND ON BEHALF OF THE SECOND RESPONDENT THAT:

1. He will not, by himself, his servants or agents, hold a public assembly in the local government area of Sutherland Shire Council, being the area which appears outlined in red on the map attached to these orders, on Saturday, 12 December 2015.

2. He will not address a public assembly in the local government area of Sutherland Shire Council, being the area which appears outlined in red on the map attached to these orders, on Saturday, 12 December 2015.

3. 3. He will do all acts and things necessary to include on the front page of the website http://www.nick-folkes.com and on the front page of the website http://www.partyforfreedom.org.au, and the Facebook pages of Party For Freedom Inc and Nick Folkes, the following words:

“The 2015 Cronulla Riots Memorial has been cancelled.

The public assembly proposed for Saturday 12th December 2015 at Don Lucas Reserve in Cronulla has been cancelled and will not be held.

By Order of the Federal Court of Australia I am making this announcement.”

4. The second respondent, by itself, its servants and agents, will not hold a public assembly in the local government area of Sutherland Shire Council, being the area which appears outlined in red on the map attached to these orders, on Saturday, 12 December 2015.

5. He shall, by 7:00pm on Friday, 11 December 2015, do all acts and things necessary by using his best endeavours to include on the Facebook page of the Great Aussie Patriot, the following words:

“The 2015 Cronulla Riots Memorial has been cancelled.

The public assembly proposed for Saturday 12th December 2015 at Don Lucas Reserve in Cronulla has been cancelled and will not be held.

By Order of the Federal Court of Australia I am making this announcement.”

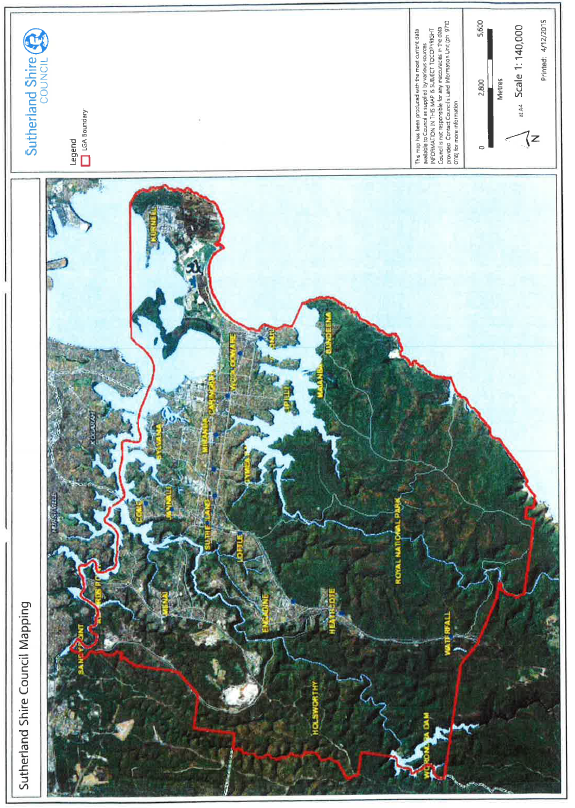
**AND THE COURT ORDERS THAT:**

6. There be no order as to costs.

7. The proceedings stand over for directions to 5 February 2016 at 9:30 am.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**Annexure**



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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1601 of 2015 |

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| BETWEEN: | SUTHERLAND SHIRE COUNCIL  Applicant |
| AND: | NICHOLAS HUNTER FOLKES  First Respondent  PARTY FOR FREEDOM INCORPORATED  Second Respondent  SHERMON BURGESS  Third Respondent |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1602 of 2015 |

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| BETWEEN: | JAMAL RIFI  Applicant |
| AND: | NICHOLAS HUNTER FOLKES  First Respondent  PARTY FOR FREEDOM INCORPORATED  Second Respondent  SHERMON BURGESS  Third Respondent |

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| JUDGE: | RARES J |
| DATE OF ORDER: | 11 DECEMBER 2015 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. Until further order, the third respondent by himself, his servants or agents be restrained from holding or addressing a public assembly at either or both Cronulla or Maroubra.

2. The third respondent pay the costs of the application for interlocutory relief heard today.

3. The third respondent be served with these orders:

* 1. on or before 5:00 pm on 11 December 2015 orally, by telephone, or electronically, including by posting them on the “Great Aussie Patriot” Facebook page;
  2. personally at any time.

4. The proceedings be stood over to 5 February 2016 for directions.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1601 of 2015 |

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| BETWEEN: | SUTHERLAND SHIRE COUNCIL  Applicant |
| AND: | NICHOLAS HUNTER FOLKES  First Respondent  PARTY FOR FREEDOM INCORPORATED  Second Respondent  SHERMON BURGESS  Third Respondent |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1602 of 2015 |

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| --- | --- |
| BETWEEN: | JAMAL RIFI  Applicant |
| AND: | NICHOLAS HUNTER FOLKES  First Respondent  PARTY FOR FREEDOM INCORPORATED  Second Respondent  SHERMON BURGESS  Third Respondent |

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| JUDGE: | RARES J |
| DATE: | 11 DECEMBER 2015 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

**(REVISED FROM THE TRANSCRIPT)**

1. These proceedings began on 7 December 2015 after **Dr** Jamal **Rifi**, on 4 December 2015, and Sutherland Shire **Council**, on 7 December 2015, had each lodged a **complaint** with the Australian Human Rights **Commission** pursuant to s 46P of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**).
2. The complaints made allegations of unlawful discrimination against each of the first respondent, Nicholas **Folkes**, who was the public officer and apparently controlling mind of the second respondent, **Party** for Freedom Incorporated, as well as against the third respondent, Shermon **Burgess**, who styles himself on social media under the sobriquet “the Great Aussie Patriot”.
3. The Council is a body politic of the State of New South Wales, with the legal capacity and powers of an individual pursuant to s 220(1) of the *Local Government Act 1993* (NSW). Dr Rifi is a Lebanese born Australian citizen. He is a former Commissioner of both the Ethnic Affairs Commission and the Community Relations Commission and has a distinguished curriculum vitae of community activity. His complaint to the Commission, and that of the Council, alleged that Dr Rifi and Council residents and ratepayers of Middle Eastern and Lebanese race, nationality or ethnic origin, had experienced racial hatred amounting to unlawful discrimination under Pt IIA of the *Racial Discrimination Act 1975* (Cth) (**RD Act**) (see the definition of “unlawful discrimination” in s 3(1) of the AHRC Act). The complaints did not make any allegation of unlawful discrimination on any other ground, such as religion.

## The current issues

1. The immediate focus of the complaints, and the interlocutory relief that Dr Rifi and the Council originally sought today, is that Mr Folkes and his Party have advertised and promoted an **event**, being a public meeting or assembly, that they have styled “2015 Cronulla Riots Memorial” proposed to be held on Saturday 12 December 2015. Both Mr Folkes and Mr Burgess have been billed as keynote speakers at this event. The respondents wish to hold their event at the Don Lucas **Reserve** in Cronulla.
2. The Council and Dr Rifi sought interlocutory relief under s 46PP of the AHRC Act to restrain the respondents from holding, and in the case of Mr Folkes and Mr Burgess, addressing, an event at Cronulla or Maroubra on 12 December 2015 and thereafter, until the earlier of 31 January 2016 or the termination of their complaints by the President of the Commission. They also sought an order that Mr Folkes post or include on the front page of both his personal and the Party’s websites a statement that the event has been cancelled and that the Court has ordered the publication of that statement.
3. This morning in *NSW Commissioner of Police v Folkes* [2015] NSWSC 1887, Adamson J made an order pursuant to s 25(1) of the *Summary Offences Act 1988* (NSW) prohibiting the holding of the public assembly referred to in Mr Folkes’ 6 November 2015 notice of intention to hold a public assembly, given on behalf of his Party, between midday and 2pm tomorrow at the Reserve.
4. Following her Honour’s orders, Mr Folkes gave evidence before and offered undertakings to this Court, on his own behalf and that of his Party, that he and it would not hold and he would not speak at the event or any meeting in the Council’s area tomorrow, and that he would take steps to publish on his own, the Party’s and Mr Burgess’ web pages and Facebook pages, a notice that the event had been cancelled, and that the notice he was giving had been published by order of this Court. Disturbingly, Mr Folkes said that he proposed to hold an “halal free barbecue” for persons who nonetheless were likely to turn up for the now cancelled event. I accepted the undertakings and, after standing the proceedings over to 5 February 2016 for directions, I excused Mr Folkes and his Party from further attendance today.
5. Thereafter, the Council and Dr Rifi pressed for relief against Mr Burgess, who did not appear. I am satisfied by the evidence of Shawn Sallesi that he served Mr Burgess, by leaving at his home, with his mother, the originating application and interlocutory application together with the evidence on which the Council and Dr Rifi rely in support of the interlocutory application. There is also other evidence that Mr Burgess knows of the proceedings today.
6. Until the commencement of the hearing this morning, Mr Folkes and his Party had opposed the grant of any of the interlocutory relief that Dr Rifi and the Council sought. Their counsel had filed written submissions explaining the basis of that opposition. Those submissions are useful in identifying arguments that might have been put by Mr Burgess, had he appeared, and I will consider them for that purpose in the course of these reasons.

## Background

1. The Council is the owner and trustee of the Reserve, which is in its local government area. The Reserve covers a substantial area and is zoned for public recreation purposes. It is a public place and is located near Cronulla Beach.
2. Dr Rifi asserted that he has been and is offended, insulted and humiliated by the content of material that the respondents have published on their webpages and on their publicly accessible Facebook pages concerning persons of Lebanese or Middle Eastern race, nationality or ethnicity. He feared that Mr Folkes, Mr Burgess and others who will, or are likely to, address persons at the event will express the same or substantially similar views to those complained of. Although Mr Folkes and his Party no longer propose to hold the event, the orders that have been made by the Supreme Court, and the undertakings given by Mr Folkes and the party in this Court, do not necessarily preclude others, such as Mr Burgess, from seeking to be present at the Reserve and to address an event or persons who will also be present at the Reserve.
3. The Council is concerned, like Dr Rifi, that if the event takes place as the respondents planned, one or both of Mr Folkes and Mr Burgess, as well as others, will engage in one or more acts that will amount to what the RD Act proscribes as unlawful discrimination against persons such as Dr Rifi and others who live in the Council’s area who are of Lebanese or Middle Eastern race or national or ethnic origin, and that that will occur because of their race or national or ethnic origin.

## The statutory framework

1. Relevantly, the AHRC Act defines “unlawful discrimination” as meaning any acts, omissions or practices that are unlawful under Pt II or Pt IIA of the RD Act (s 3(1)). A person aggrieved by an alleged unlawful act can lodge a complaint with the Commission on the person’s own behalf, or on behalf of others who are similarly aggrieved (s 46P(2)). The Commission must refer any complaint lodged under s 46P to its President, who must inquire into and attempt to conciliate the complaint (ss 46PD, 46PF). The President may terminate a complaint for various reasons, including if she is satisfied that the subject matter involves an issue of public importance that should be considered by this Court or the Federal Circuit Court, or that there is no reasonable prospect of the complaint being settled by conciliation (s 46PH(1)(h) and (i)).
2. If a complaint has been terminated by the President, any person who was an affected person in relation to the complaint can apply under s 46P0(1) of the AHRC Act to this Court or the Federal Circuit Court alleging unlawful discrimination by one or more of the respondents to the complaint.
3. Importantly, under s 46PP a complainant, respondent or affected person, such as Dr Rifi or the Council, can apply to either Court for an interim injunction to maintain either the *status quo* as it existed immediately before the complaint was lodged, or the rights of any of the persons who could apply for that relief (s 46PP(1) and (2)). Moreover, s 46PP(5) provides that a Court cannot require a person to give an undertaking as to damages as a condition of granting such an interim injunction. A Court hearing proceedings under s 46PP, by dint of s 46PR and subject to Ch III of the *Constitution*, is “not bound by technicalities or legal forms”.
4. The preamble to the RD Act recited that the Parliament desired to make provision for the prohibition of racial discrimination and for giving effect to the *International* ***Convention*** *on the Elimination of all Forms of Racial Discrimination*, pursuant to its powers under s 51(xxix) and (xxvi) of the *Constitution* to make laws with respect to external affairs and with respect to the people of any race for whom it is deemed necessary to make special laws.
5. Dr Rifi and the Council principally relied on s 18C of the RD Act, which is in Pt IIA of the Act. That section is qualified by s 18D, and both relevantly provide:

**18C Offensive behaviour because of race, colour or national or ethnic origin**

(1) It is unlawful for a person to do an act, otherwise than in private, if:

(a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and

(b) the act is done because of **the race**, colour or **national or ethnic origin** of the other person or of some or all of the people in the group.

Note: Subsection (1) makes certain acts unlawful. Section 46P of the *Australian Human Rights Commission Act 1986* allows people to make complaints to the Australian Human Rights Commission about unlawful acts. However, an unlawful act is not necessarily a criminal offence. Section 26 says that this Act does not make it an offence to do an act that is unlawful because of this Part, unless Part IV expressly says that the act is an offence.

(2) For the purposes of subsection (1), an act is taken not to be done in private if it:

(a) **causes words, sounds, images or writing to be communicated to the public**; or

(b) is done in a public place; or

(c) is done in the sight or hearing of people who are in a public place.

(3) In this section:

***public place*** includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

**18D Exemptions**

Section 18C does not render unlawful anything **said or done reasonably and in good faith**:

…

(b) **in the course of any statement, publication, discussion or debate made or held for** any genuine academic, artistic or scientific purpose or **any other genuine purpose in the public interest**; or

(c) **in making or publishing**:

(i) a fair and accurate report of any event or matter of public interest; or

(ii) **a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.** (emphasis added)

1. If an act is done for two or more reasons, one of which is the race or national or ethnic origin of a person, for the purposes of Pt IIA, the act is deemed by s 18B to have been done because of that specific reason. Additionally, s 18F provides that Pt IIA is not intended to exclude or limit the concurrent operation of any law of a State or Territory.
2. Part II of the RD Act also provides in s 9(1) and (2) that it is unlawful for a person to do any act involving a distinction based on race or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life, including any right of a kind referred to in Art 5 of the *Convention*.
3. The RD Act also makes it unlawful for a person:

* to publish, or cause or permit to be published, an advertisement or notice that indicates or could reasonably be understood as indicating an intention to do an act that is unlawful by reason of a provision of Pt II of the RD Act (s 16);
* to incite or assist or promote the doing of an act that is unlawful by reason of a provision of Pt II (s 17).

1. As in Pt IIA, s 18 deems, for the purposes of Pt II, that an act that is done for two or more reasons, one of which is the race or national or ethnic origin of a person, to have been done for the latter reason.
2. The *Convention* provides in Art 4 that:

**States Parties condemn all propaganda** and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or **which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination**. (emphasis added)

1. Relevantly, Art 5 of the *Convention* required States Parties to “undertake to prohibit racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race … or national or ethnic origin, to equality before the law”.

## Events leading to the application

1. Over the past few months, the respondents’ publicly accessible Facebook websites have made or conveyed numerous references to the intention of Mr Folkes and his Party to hold the event. For example, the Party, I infer through Mr Folkes, created a Facebook webpage entitled “2015 Cronulla Riots Memorial”. The **riots memorial webpage** contained the following statements, among others, that appear to have used geographic and religious adjectives interchangeably to describe the gangs and persons whose alleged behaviour the author was declaiming:

This year marks the ten year anniversary of the Cronulla Riots, a very important date in the Australian calendar that will be commemorated on Saturday 12th December 2015 at Cronulla Beach, Cronulla.

Party for Freedom will be holding a memorial service, and invites you to attend. We ask you to invite your friends and family and reach out to Cronulla locals who were affected by the devastating and brutal cover-up perpetrated by the state and federal governments. For many years prior to the Cronulla Riots, **Middle Eastern gangs from southwest Sydney were cruising the streets of Sydney looking for trouble. Many of these Islamic gangs targeted Australians especially Anglo-Australians who lived in the Shire**.

For many Australians, the Cronulla Riots represents a time ‘when Aussies stood their ground’ against years of oppression and intimidation **committed by southwest Sydney gangs**. … **The ethnic gangs of southwest Sydney** were protected and supported **even though their social behavior was repugnant, brutish and** **racially motivated**.

…

On Sunday 4th December 2005, two volunteer Cronulla lifesavers were bashed by a group of young Muslim men. …

The spark was lit; the scene was being set down for a showdown. The following Sunday on 11th December 2005, ugly scenes erupted at Cronulla beach and also at the train station where **men of middle eastern and sub continental appearance** were attacked. Over the course of the day, more and more disgruntled Aussies gathered in and around the Cronulla Beach. The crowds continued to grow reaching over 5,000 people. Overall, the crowd was well behaved but there were others seeking revenge **after years of Islamic intimidation and thuggery**. Memories were still fresh of the Sydney and Ashfield **gang rapes** that occurred from 2000 to 2002 when **white Australian women** were racially targeted and **brutally pack raped by Muslim men with many white victims suffering days of torture**.

Many of the crowd that gathered at Cronulla Beach were full of anger seeking retribution after the years of torment. Advance Australia Fair and Waltzing Matilda **were sung while derogatory comments and slogans were chanted by youth aimed at Lebanese Muslims**. …

That night, **over 100 Muslim youth** gathered at Punchbowl Park, Punchbowl. **Additional groups** gathered in Arncliffe **getting ready to form convoys for the journey to Cronulla**. **The thugs were armed** with baseball bats, knives, iron bars and even guns. A convoy of between 60 to 100 cars drove down to Cronulla Beach seeking revenge. Police were ordered “**NOT TO APPROACH CONVOYS OF MEN OF MIDDLE EASTERN APPEARANCE**”. **The ‘Lions of Lebanon’, youth of Muslim background were given the ‘green light’ to smash up Cronulla and Maroubra**. Police did eventually step in and confiscate 40 iron bars and arrested 14 people in Maroubra. **The violence** **and racially motivated attacks** continued throughout the night and ensuing weeks after the Cronulla Riots that took place on Sunday 11th December 2005.

…

The following criminal prosecutions against the juvenile and **violent gang members of southwest Sydney** were totally inadequate. …

… Most of the blame was laid at Cronulla locals whom were the ‘real victims’ screaming out for government intervention in addressing **the gang violence perpetrated by Muslims**. …

The initial Cronulla Riot was a **reaction to years of intimidation, harassment and sexual and physical assaults perpetrated** **by the ethnic gangs of southwest Sydney**.

…

It is time the Australian government **halted all Muslim and third world immigration** and abolished the divisive multicultural policy before our nation descends into irreversible ethnic conflict and hostilities that has plagued many nations. It is time for the political establishment both Labor and Liberal to accept fault in not addressing the many issues that were brewing in Sydney prior to the Cronulla Riots. …

1. The webpage posting concluded:

The upcoming tenth Cronulla Riots anniversary is a fitting time to bury multiculturalism.

We hope to see at Cronulla Beach on Saturday 12th December 2015.

‘R.I.P Multiculturalism’. (bold emphasis added)

1. A transcript prepared by officers of the Council of a Youtube video titled “Cronulla Update: ‘Democracy’ is under threat”, that appears on the Party’s Youtube page, records the following statement:

what happened 10 years ago in Cronulla as a great time in Australian history, Australians stood up against **the menace of Muslim anti-social behaviour, the gangs from South West Sydney that were going down there intimidating people calling women Aussie sluts and the rapes and everything that was going on and the Sydney rapes notorious Sydney rapes episode and also the Ashfield rape episode. And all that seemed like gang violence where Aussies were being intimidated and Aussies are still being intimidated by the cultural enriches today**. But getting back to the memorial service it is going to go ahead. We are going to be down there. (emphasis added)

1. Mr Burgess’ Facebook webpage displayed the following postings by him:

* on 25 November 2015:

I am getting inboxes from people telling me that they have a friend or family member having massive battles with State Government Housing because they are trying to get them to find a new place to live as apparently they need the housing for **our newly arrived Country Shoppers from Syria**. So let me get this straight. Australian citizens are expected to pack up and move out or be Homeless **so a Border Hopper can have their house**? WTF is this nation becoming? (emphasis added)

* on 26 November 2015 in a video:

What's going to happen when we let these 12,000 refugees in this year and then at the start of next year we are getting another 12,000. So that's 24,000 of these refugees **supposedly from Syria**. **We are going to see a massive massacre or a terrorist attack in Australia and they're going to target either a popular tourist destination**, they're going to target say a football grand final, it could be anything like that, somewhere where it's packed and a lot of people, **it could even be a concert like it was in France and people get massacred**. … (emphasis added)

* also on 26 November 2015:

**Syria** is 90% Islamic, trust me they are not Christian’s. **They will lie through their teeth.** Just like Pakistani and Saudi Muslims are doing and **jumping in with the refugees and saying they are Syrian**. (emphasis added)

* on 28 November 2015, above a photograph of what appeared to be a street demonstration:

Massive ISIS gathering in Germany. This is what happens when **you don’t close your borders and allow in Syrian Refugees**. Germany is Gone. It is finished. (emphasis added)

* on 1 December 2015:

Good old Gymea. I love the Shire, it is so Aussie there unlike Western Sydney where people are always pissed off looking and you walk around **feeling like your in Beirut**. (emphasis added)

1. Several graphic and disturbing videoclips of persons, including Mr Burgess, performing songs are posted on his Facebook webpage. One videoclip consists of a song that is a string of abuse attacking a generic “Arab man”. The song accuses its subjects of being extremists and a danger to Australia. It has a racially vilifying refrain that runs:

So we say F… Off Arab man

You’re a stranger in our land

And we just want you all to go home.

Go home, we don’t want to know

Yes, we all just want you to go.

1. The lyrics in a second of those videoclips contains the following rant:

Rejects of Palestine.

You don’t deserve paradise.

Religion of parasites.

You want a f…ing war, let’s start a f… war.

It’s time for war.

1. The last sentence morphs into an inflammatory refrain that is repeated twice more. And a third videoclip of another song urges that its addressees, who are obviously referred to in the line, “F… off to the Middle East”, should leave the country.
2. On 30 November 2015, under a posting advertising the event, a correspondent on Mr Burgess’ Facebook page calling himself Andrew Pointon posted this:

Wish I could be there. I went to Cronulla 2 weeks after the riot and I’ve never been so proud to be Australian, Aussie flags were hangin off of balconies & flying from roof tops & flag poles everywhere. **I hope every shit skin that is stupid enough to show their donkey arse ugly face gets their** **head kicked in**. Good luck to all that will be there. Stand tall and do Australia proud. (emphasis added)

1. Mr Burgess’ “Great Aussie Patriot” Facebook webpage records that it has nearly 40,000 followers or persons who have apparently shown more than a passing interest in viewing and reading its contents. There are frequent postings on it of material from Mr Folkes and his Party, including a significant number of items that have promoted the event, including arranging and selling return bus transport from Melbourne and Canberra for persons interested in attending.
2. The United Nations Geospatial Information Section map of the Middle East includes, at its western side, Egypt and Sudan, and at its eastern side, Iran and Oman, bounded by Turkey at the northern border and Ethiopia and Yemen as its southern border. Thus, the Middle East includes Egypt, Sudan, Syria, Iran, Iraq, Jordan, the Gulf States, Lebanon and Israel. The 2011 Census of Population and Housing conducted by the Australian Bureau of Statistics recorded that 2,103 persons, amounting to 1% of those living in the Council area, had Lebanese ancestry and 276, or 0.1%, had Turkish ancestry. It is likely that there are other persons living in that area whose ancestry is Middle Eastern.
3. Scott **Phillips**, who is its general manager, explained that the Council had conveyed to Mr Folkes and his solicitor its concerns about the probability that those likely to speak at the event, including Mr Burgess (and, until he gave his undertakings today, Mr Folkes), will engage in an act that amounts to unlawful discrimination. That is, the Council fears, as does Dr Rifi, that at least some of what Mr Burgess and others who share his views are likely to say or do at the event, which will be in a public place, is likely to offend, insult, humiliate or intimidate a group of people, and that he or they will do such an act or acts because of the Lebanese or Middle Eastern race or national or ethnic origin of people in that group.
4. Mr Phillips attended two meetings with Mr Folkes on 6 November 2015, at both of which senior officers of the New South Wales Police attended. The second meeting occurred with, among others, the Hon Scott Morrison MP, the federal member for Cook (which includes the Council’s area) at his electorate office, the Council’s Mayor, Cr. Carmelo **Pesce** and the Deputy Commissioner of Police, Mick Fuller. Mr Morrison and Cr Pesce told Mr Folkes at this meeting that each had received numerous representations from his constituents seeking assurances that the event would not proceed.
5. On 3 December 2015, the Council wrote to Mr Folkes, his Party and Mr Burgess seeking undertakings from each of them that he or it would not hold or address a public assembly at the event. In its letters to Mr Folkes and his Party, the Council asked that, *first*, he post a notice on the front page of their websites stating that the event had been cancelled and, *secondly*, he remove material from those websites that conveyed specific imputations against persons of Lebanese and Middle Eastern race or national or ethnic origin, being imputations of the nature to which I have already referred. The letters asserted that the material complained of was unlawful because it contravened s 18C of the RD Act. The letters stated that, if the addressee did not give the undertakings sought, the Council would make a complaint to the Commission and seek urgent interlocutory relief in this Court.
6. On 4 December 2015, Mr Folkes responded on his Party’s letterhead and refused to give any undertakings.
7. On 5 December 2015, Mr Burgess posted a video of himself on his Facebook page under the title “Aussie’s in Canberra get kicked to the gutter to accommodate Border Hoppers plus the update on Cronulla”. In that video, Mr Burgess said:

Now a little message to the Mayor of Cronulla. Let me say something to you, **you’re trying to deny Australians their democratic right to free speech**. ...

I have rang the organiser for this Cronulla December the 12th rally, Nick Folkes, and he said the rally will be going ahead no matter what. Now I am not an organiser of this rally but I am a guest speaker **and I will still be there on December the 12th to speak and have Australians’ concerns be heard because that is our democratic right**. As far as I know we are not living under communism we are living under a democracy and democracy means you have freedom of speech. To deny that freedom of speech is pretty much against the law. So, **Australians will be there, we will have our free speech and you will not stop us**. I’m the Great Aussie Patriot, catch you later. (emphasis added)

1. Dr Rifi gave evidence that he is concerned that the material complained of on the respondents’ webpages does, and the event will, offend, insult and humiliate not only himself and his immediate family but also other persons of Lebanese or Middle Eastern race, nationality or ethnic origin. He said that previously he had debated with Mr Folkes in live radio broadcasts and felt personally insulted by Mr Folkes’ comments to him concerning his race, nationality and ethnic origin. I am satisfied that the evidence of Mr Burgess’ expressions of his views have at least a similar tendency.
2. Dr Rifi is concerned that the material complained of and the event are calculated to affect adversely racial harmony in the community generally and, in particular, relations between persons of Lebanese and Middle Eastern race, nationality or ethnic origin and others living, not only in the Council area, but in society as a whole. He stated that he is worried that the event, as well as the other material complained of, will cause persons of Lebanese and Middle Eastern race, nationality or ethnic origin to feel marginalized and not part of mainstream society. He is concerned that such feelings may also be used by malign persons to recruit local youths, especially having regard to the timing of the event, near the first anniversary of the Lindt Cafe incident in Martin Place, Sydney.

## The Council’s and Dr Rifi’s submissions

1. The Council argued that its concerns would be resolved if the event were held at a private venue and not in a public place or in the vicinity of Cronulla.
2. In essence, both the Council and Dr Rifi contend that the respondents’ promotional material for the event and their other publications reveal a theme that is likely to be repeated by Mr Burgess and others speaking and attending if the event is held. That theme is that persons of Middle Eastern or Lebanese race or national or ethnic origin should be reviled.

## The written submissions of Mr Folkes and his Party

1. As I noted earlier, counsel for Mr Folkes and his Party had filed written submissions before this hearing. Those argued that because the Council’s and Dr Rifi’s complaints to the Commission expressed only concern at what would happen at a future time, namely tomorrow when the event is scheduled to occur, they did not satisfy s 46P of the AHRC Act. They also submitted that because the Council and Dr Rifi had not sought interlocutory relief in respect of the material complained of on the websites, there would not be any finding to warrant the grant of interlocutory relief about what may happen at the event. The written submissions argued that if an interlocutory injunction were granted they may be exposed to the potential of a double penalty, one for a contravention of the RD Act and the other for a breach of this Court’s order or the Supreme Court’s order. Last, the written submissions argued that the Council and Dr Rifi had delayed in bringing their proceedings and that it was too late for the event to be prevented because too many people were now committed to attend in any case. Mr Folkes proposes to hold an “halal free barbecue” instead of the event and gave evidence that he wished to advertise that gathering.

## Consideration

1. This is not a final judgment. It is necessary to decide this application urgently on evidence that is, or may be, incomplete, or after a full trial when the parties have had more time to prepare, will be found to be wrong or to require substantial qualification. Nothing I say in these reasons will decide the facts or the rights of the parties on a final basis although, of course, it will have an immediate consequence on what may or may not occur tomorrow in respect of Mr Burgess’ conduct. That is the nature of an interlocutory decision. The Court must make a decision in circumstances of urgency where the parties have not had a full opportunity to put forward their whole cases. Thus, the Court makes its decision, that will reflect its assessment of how best to balance the parties’ conflicting positions. In doing so, the Court must apply the following principles of law.
2. There are two threshold questions that must be decided on the limited evidence and argument now before me in order to determine whether an interlocutory injunction should be granted, as explained in *Australian Broadcasting Commission v O’Neill* (2006) 227 CLR 57 at 81-84 [65]-[72] by Gummow and Hayne JJ, with whom Gleeson CJ and Crennan J agreed on this point (at 68 [19]).
3. Those questions are, *first*, whether the Council and Dr Rifi have made out a *prima facie* case, in the sense that if the evidence remains as it is, there is a probability that subsequently, at the trial of the proceedings, they will be found to be entitled to relief and, *secondly*, whether the inconvenience or injury that the Council and Dr Rifi would be likely to suffer, if an interlocutory injunction were refused, outweighs or is outweighed by the injury that Mr Burgess would suffer if an injunction were granted.
4. The nature of the rights that each of the parties asserts and the practical consequences likely to flow from the grant of any injunction are matters that the Court assesses in considering how strong a *prima facie* case for that relief the person seeking it must prove.
5. It is not necessary that the Court find that it is more probable than not that the party seeking interlocutory relief will succeed at the trial. Depending on the circumstances, all that need be shown to justify maintaining the *status quo* until the trial occurs is that there is a sufficient likelihood that the person seeking the relief will later succeed at the trial.
6. The freedom of speech and the freedom of assembly are essential human rights in a democracy governed by the rule of law. However, no freedom can be absolute because, if it were, its exercise would necessarily impede some other essential human right or aspect of our daily lives. Both statute and common law strike balances between rights and freedoms as they impact upon each other. Over centuries, the common law of defamation evolved to maintain a fragile and often controversial balance between the freedoms of speech and opinion and the individual’s right to his or her reputation: *O’Neill* 227 CLR at 73 [32] per Gleeson CJ and Crennan J (with the agreement of Gummow and Hayne JJ at 89 [93]).
7. A similar balance is reflected in the *Constitutional* implied freedom of communication on government and political matters. That freedom is a qualified limitation on the legislative power of the Commonwealth Parliament. It ensures that the Australian people may exercise a free and informed choice as electors: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ. As French CJ, Kiefel, Bell and Keane JJ explained in *McCloy v New South Wales* (2015) 325 ALR 15 at 18-19 [2]-[3], the implied freedom may be subject to legislative restrictions that serve a legitimate purpose compatible with the system of representative government for which the *Constitution* provides. Their Honours said that this will depend on whether the extent of any legislative burden on the implied freedom “can be justified as suitable, necessary and adequate, having regard to the purpose of those restrictions”.
8. Part IIA of the RD Act is framed in a way that seeks to strike such a balance. *First*, s 18C(1) imposes a limitation on the freedom of speech and expression by making it unlawful for a person to do an act, otherwise than in private, if the act is reasonably likely in all the circumstances to offend, insult, humiliate or intimidate another person or group of people and the act is done because of the race, colour or national or ethnic origin of the other person or some or all of the people in the group. *Secondly*, however, s 18D qualifies that limitation. It provides, relevantly, that anything said or done reasonably and in good faith in the course of any statement, publication, discussion or debate made or held for any genuine purpose in the public interest is not rendered unlawful by s 18C.
9. Thus, s 18D recognises that, in some situations, it will be lawful for a person to make a statement in public that does, for example, offend a person or group because of the person’s or group’s race or national or ethnic origin. Critically, for such a statement to be lawful, s 18D requires that it be said or done both reasonably and in good faith.
10. What is, or people think should be, government policy on matters such as immigration or the racial, national or ethnic origin of those in our society are matters of genuine public interest. People can lawfully speak about those matters reasonably and in good faith without contravening s 18C of the RD Act, even where their speech offends, insults, humiliates or intimidates others. But, that does not mean that anyone can say anything that he or she likes, however unreasonable the statement may be under the guise that s 18D will render such acts lawful.
11. The purpose of the RD Act, as explained in its preamble, is to make provisions to prohibit racial discrimination and to give effect to the *Convention*. And, as the States Parties, including Australia, to the *Convention* recognized in Art 4, propaganda that attempts to justify or promote racial hatred and discrimination in any form are to be condemned and made unlawful. The *Macquarie Dictionary* online gives one meaning of “propaganda” as being “dissemination of ideas, information or rumour for the purpose of injuring or helping an institution, a cause or a person” (sense 3). I am of opinion that this definition encapsulates the sense in which Art 4 of the *Convention* uses the word.
12. At common law in defamation actions, the courts have been particularly cautious before granting interlocutory injunctions that may impede a defendant’s freedom of speech as Gleeson CJ and Crennan J discussed in *O’Neill* 227 CLR at 73 [32]. However, s 46PP of the AHRC Act created a statutory remedy of an interim injunction to deal with the class of cases that may arise before a court can resolve a controversy about whether unlawful discrimination has occurred. This remedy extends to cases of alleged racial discrimination.
13. The Parliament created the remedy in s 46PP to deal with situations that, ordinarily, can be expected to involve at least one less substantive consideration than may apply in defamation actions at common law when a court considers whether to grant an interim injunction prohibiting a publication. In a defamation action, a defendant may be able to prove that the matter complained of was true. Both at common law and under the uniform *Defamation Acts* passed in 2005 and 2006 by each Australian State and Territory, truth is a complete defence in a defamation action.
14. Section 18D of the RD Act, while reflecting the values of the freedoms to make fair comment on, or fair reports of, an event or matter of public interest, and to make publications of a potentially wide nature, does so in a qualified manner. The critical qualification to the exceptions created by s 18D is that any act that s 18C would otherwise render as unlawful discrimination must first be said or done reasonably and in good faith. Thus, when a court is considering the grant of interlocutory relief under s 46PP of the AHRC Act, in respect of an alleged act of unlawful discrimination based on a contravention of Pt IIA of the RD Act, a threshold question may, and in these proceedings does, arise as to whether there is a *prima facie* case that the act sought to be restrained is, or if allowed to occur, will be, said or done reasonably and in good faith. It is not necessary in deciding the present issues for me to consider any question in relation to Mr Burgess’ good faith and I make no findings concerning that question.
15. The respondents’ publications in evidence are replete with denigratory assertions that persons answering the description of Middle Eastern or Lebanese race or national or ethnic origin in Mr Burgess’ utterances should not be allowed to enter or remain in Australia, and whom he characterises in song as strangers here who are all extremists and dangerous. Mr Folkes and his Party advertised Mr Burgess’ presence as a speaker at the Reserve tomorrow, in material that asserted that persons of Middle Eastern race or national or ethnic origin have operated for years in lawless gangs and, to use Mr Folkes’ words publicising the event, put “Australians, especially Anglo-Australians” at risk of “social behavior [that] was repugnant, brutish and racially motivated”. Mr Folkes also asserted that the purpose of the event was to commemorate a riot by the alleged “Australian” victims that he said “was a reaction to years of intimidation, harassment and sexual and physical assaults perpetrated by the ethnic gangs of south west Sydney”. Mr Burgess’ webpages rehearse a similar theme.
16. I reject the written submission that the Council’s and Dr Rifi’s complaints are not capable of engaging s 46P of the AHRC Act. The power given to the Court by s 46PP includes the power to act *quia timet* – that is in anticipation of an act that will change the *status quo* – by granting an interim injunction to preserve the *status quo ante*. The Parliament made racial discrimination unlawful in the circumstances prescribed in Pt II and Pt IIA of the RD Act. A person can, as the Council and Dr Rifi did, request that, based on past acts of unlawful discrimination, the Commission deal with a feared future repetition.
17. I also reject the written submission that there is no need to make findings about the content of the material complained of on the webpages.
18. The written submission failed to identify how the grant of an interlocutory injunction might expose a person, such as Mr Burgess, to the risk of the double jeopardy if it were breached, of committing an offence under the RD Act and contempt. Under s 26 of the RD Act, unlawful discrimination is only an offence if Pt III expressly makes it so, and the subject matter for which the Council and Dr Rifi seek interlocutory relief against Mr Burgess does not appear to be proscribed as an offence in Pt III.
19. I am of opinion that the Council and Dr Rifi have established a sufficiently strong *prima facie* case. That is because I am satisfied it is sufficiently probable that they will succeed at a trial in demonstrating that if Mr Burgess were permitted to address persons at the Reserve tomorrow, he would cause words to be communicated in a public place, namely the Reserve, or any other place open to the public, that would offend, insult, humiliate or intimidate persons who are of Middle Eastern or Lebanese race or national or ethnic origin, and that what would be said or done would not be reasonable. That is because the tenor of the material complained of on the respondents’ websites demonstrates that the likelihood is that Mr Burgess and others who would speak at the event, would stereotype all persons of Lebanese and Middle Eastern race, or national or ethnic origin, as being thugs, gang members, rapists and generally detestable.
20. The material complained of on the respondents’ websites appears, on the evidence presently before me, to consist of generalisations that ascribe denigratory characteristics to all persons whom the authors identify as being of Middle Eastern or Lebanese race or national or ethnic origin and to promote hatred, insult and intimidation of those persons because of their race or national or ethnic origin. The generalisations in the material complained of appear to be made because of the race or national or ethnic origin of the persons whom the authors, including Mr Burgess, call Middle Eastern or Lebanese.
21. It is fallacious to reason that because all birds have wings, and the birds on my windowsill have red and green feathers on their wings, therefore all birds have red and green feathers on their wings. The same non-sequitur appears in the respondents’ and their correspondents’ generalisations in the material complained of about persons of Middle Eastern or Lebanese race or national or ethnic origin.
22. The argument that because one or more persons of a particular race or national or ethnic origin engaged, or were suspected of engaging, in a criminal act or series or acts, therefore all persons of the same race or national or ethnic origin have the same propensity only needs to be stated to demonstrate its unsoundness. No reasonable argument could be put that because some persons of a particular race engaged in a class of conduct, all persons of that particular race will always do so.
23. A purpose of the RD Act is to prohibit the publication of such generalized propaganda from asserting racially stereotypical and offensive features. It may be that some persons committed, or were accused of committing, particular crimes or acts that the respondents’ material complained of discusses, and that those people were of a particular race or national or ethnic origin. That circumstance could not reasonably enable anyone to think, for the purposes of s 18D, that all people of that race or national or ethnic origin have the same propensity to commit crimes.
24. I am satisfied after considering the whole of the evidence that it is likely that Mr Burgess and others who are likely to attend and speak at the event, if it or a similar function were held, will engage in unlawful racial discrimination of the nature I have described.
25. It is likely that Mr Burgess and others who would speak at the event or the Reserve, or a similar occasion, will make statements or do acts that are reasonably likely, in all the circumstances, to offend, insult, humiliate and intimidate Dr Rifi and other persons of Lebanese or Middle Eastern race or national or ethnic origin, that those statements or acts will be done because of those persons’ race, national or ethnic origin within the meaning of s 18C of the RD Act, and will not be said or done reasonably.
26. Accordingly, I am satisfied that the Council and Dir Rifi have established a *prima facie* case for relief against Mr Burgess, being the first condition for a grant of the interlocutory injunction that they seek.

## Balance of convenience

1. I must now consider where the balance of convenience lies. I am satisfied that the injury that the Council, Dr Rifi and the persons whose interests they are concerned to protect will suffer, if the event proceeds tomorrow, is likely substantially to outweigh the injury that Mr Burgess will suffer if the injunction is granted: *O’Neill* 227 CLR at 82 [65]. I am of opinion that it is preferable to maintain the *status quo* so as to protect the rights of the persons likely to be affected if the event were to occur or Mr Burgess were to speak in public and as I consider on the evidence, now, before me, to be highly likely, Mr Burgess will engage in acts of unlawful racial discrimination of the tenor in the website material complained of.
2. While Mr Burgess will not be able to exercise some of his rights of free speech, the likelihood is that that exercise will be inseverably connected to acts that will be unlawful by force of s 18C of the RD Act.
3. I reject the written submission that I should refuse relief because of the delay by the Council and Dr Rifi in seeking interlocutory relief and its futility. The Council and Dr Rifi had sought earlier to persuade Mr Folkes’ not to go ahead with the event, as had the Police. It was not unreasonable for them to await developments as to whether the Commissioner for Police would apply for orders to regulate the conduct of the event. In any case, I am not satisfied that Mr Burgess has suffered any substantive prejudice by reason of the delay in bringing these proceedings that warrants the refusal of the interlocutory relief sought. Nor do I consider that such relief will be futile. Mr Burgess wishes to speak at the Reserve and elsewhere, to air his racially discriminatory views at public assemblies. Mr Burgess can be ordered not to speak at the Reserve or in a public assembly in Cronulla and Maroubra. If he disobeys such orders, he will commit a contempt of the Court and be liable to the Court’s inherent and statutory power to punish him for contempt.

## Conclusion

1. For these reasons I will make orders to restrain Mr Burgess from holding or speaking at a public assembly at the Reserve and either or both Cronulla or Maroubra until further order, as the Council and Dr Rifi sought. That will enable the status quo to be maintained until a full trial can occur.

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| I certify that the preceding seventy-three (73) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rares. |

Associate:

Dated: 22 December 2015