HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

No M50 of 2026

WHITE AUSTRALIA PARTY INC.	First Plaintiff
THOMAS ANTHONY SEWELL	Second Plaintiff
and	
COMMONWEALTH OF AUSTRALIA	First Defendant
ATTORNEY-GENERAL OF THE COMMONWEALTH	Second Defendant

PLAINTIFFS' SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. By Constitutional Writ application filed 18 May 2026 and Special Case Book filed 17 July 2026 (**SCB**), the parties state five questions for the opinion of the Full Court.[1] The first three concern the validity of Pt 5.3B of the *Criminal Code* (Cth) (**Code**) made on 20 January 2026. The fourth and fifth concern relief and costs.

3. The validity questions are:
   (a) *Question 1*: Is Pt 5.3B invalid on the basis that it is not a law with respect to any head of Commonwealth legislative power?
   (b) *Question 2*: Is Pt 5.3B invalid on the basis that it impermissibly burdens the implied freedom of political communication?
   (c) *Question 3*: Is Pt 5.3B invalid on the basis that it infringes Ch III of the Constitution?

4. For the reasons which follow the Plaintiffs submit that each of Questions 1, 2 and 3 should be answered "yes". Any one affirmative answer entitles the Plaintiffs to relief.

PART III: SECTION 78B OF THE JUDICIARY ACT 1903 (CTH)

5. Notice has been given in compliance with s 78B of the *Judiciary Act 1903* (Cth).

PART IV: MATERIAL FACTS

6. The First Plaintiff is a political party within the meaning of s 4(1) of the *Commonwealth Electoral Act 1918* (Cth). It is a voluntary association with assets. It was formed in 2025

[1] SCB [230].

and, on 20 December 2025, was registered under the *Associations Incorporation Reform Act 2012* (Vic) as an association carried on for a lawful purpose.[2]

7. The First Plaintiff's stated objects are to preserve and advance the cultural, historical and ethnic interests of Australians of predominantly European heritage; to promote public awareness of the contributions of European Australians; and to advocate immigration and population policies by lawful political advocacy, education and community activity.[3] The Second Plaintiff is the First Plaintiff's National President.[4]
8. The proceeding was commenced in a form in which all 1,788 members of the First Plaintiff were joined as parties. At the Court's request, and upon the Defendants' concession as to standing, those members were removed as parties and the Second Plaintiff was substituted.
9. On 14 December 2025, there was a terrorist attack at Bondi Beach during Chanukah.[5] No involvement by the First Plaintiff or any of its members is suggested.
10. Part 5.3B of the *Criminal Code*, being the provisions challenged in this proceeding, was inserted by an Act passed by both Houses on 20 January 2026 which received the Royal Assent on 21 January 2026 and commenced on 22 January 2026.[6]
11. The Special Case refers to 19 prosecutions for civil unrest offences under State and Commonwealth laws over the preceding three years. The material also records that, since the commencement of Pt 5.3B on 22 January 2026, there has been no prosecution of the First Plaintiff, the Second Plaintiff, or any other member of the First Plaintiff under the challenged provisions. The ASIO report summary acknowledged that the First Plaintiff is aware of 'legal thresholds for criminality'; it 'deliberately' avoids or 'stops short' of them[7].
12. On 25 April 2026, the First Plaintiff applied to the Australian Electoral Commission for registration as an eligible political party.[8] If Pt 5.3B is invalid, the First Plaintiff intends to endorse and field candidates at the next federal election, to advocate policies consistently with its stated objects, to campaign for the election of those candidates, and to seek to form government.[9]

[2] SCB [2]; AIR Act ss 3, 7.
[3] SCB [5].
[4] SCB [6].
[5] SCB [15], [20].
[6] SCB [26.5]–[26.8].
[7] SCB [17]
[8] SCB [8]–[9].
[9] SCB [10].

13. On 11 May 2026, the Director-General of Security provided written advice to the AFP Minister recommending that the Minister consider the specification of "White Australia" as a prohibited hate group under Pt 5.3B[10].

14. On 15 May 2026, the Governor-General made the *Criminal Code (Prohibited Hate Group—White Australia) Regulations 2026* (Cth), which commenced on 16 May 2026. They were immediately publicised by posting on the Commonwealth website.

15. The expression 'White Australia' has a long history in Australian political and legal discourse. It is associated with the policy reflected in the *Immigration Restriction Act 1901* (Cth), and was referred to in this Court in *Robtelmes v Brenan* in respect of the *Pacific Island Labourers Act 1901* (Cth). In *R v Macfarlane; Ex parte O'Flanagan and O'Kelly*, Isaacs J described 'a determination to preserve a White Australia' as a sentiment 'of paramount national significance'[11]. The policy is part of the name of the First Plaintiff.

16. Following the making of the Regulations, on 26 May 2026 the Victorian Registrar of Incorporated Associations required the First Plaintiff to show cause why its registration should not be cancelled on the ground that, by reason of the Regulations, the First Plaintiff was not in operation. The Registrar has deferred any further action pending the determination of this proceeding.[12]

17. Much of the material included in the Special Case was sourced from the Defendants. The Plaintiffs agreed to its inclusion on the basis that it was evidence only that such material existed, and not as evidence of the truth, reliability, correctness or admissibility of the reports, opinions or conclusions contained in it. The relevance of that material was expressly reserved by the Special Case.

18. The Plaintiffs do not dispute that racism and antisemitism exist in Australian society, nor that the Commonwealth Parliament may enact valid laws directed to those matters within constitutional power. The Plaintiffs' case is that the existence of those issues does not answer the anterior constitutional questions raised by Pt 5.3B and the Regulations.

19. The Plaintiffs also contend that the evidentiary material relied upon by the Defendants is, in substantial respects, unattributed, unverified and contestable. In particular, the Special Case records contested assumptions concerning the proper test for antisemitism, and contested issues of causation, including whether particular incidents during the relevant period are attributable to international events in the Middle East, domestic events, or other

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[10] SCB [31].

[11] *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518 at 558 (Isaacs J).

[12] SCB [38]; AIR Act s 135(1).

causes. The Plaintiffs rely on those matters in support of their contention that the material does not cure the constitutional defects in the challenged law.

PART V: ARGUMENT

20. The plaintiffs' challenge does not depend upon acceptance of their political views, nor upon the desirability of the objectives pursued by parliament. The questions stated in the special case are questions of constitutional power. The impugned provisions must be characterised by their legal operation, not by the label attached to them in div 114A.1. They contend that it is not for the Legislature, the Executive or the Judiciary to determine the political future of the nation, but the Australian people at the ballot box.

A. The scheme of Pt 5.3B

21. There are three branches to Part 5.3B as inserted into the *Code* by *Combatting Antisemitism, Hate and Extremism (Criminal and Migration Laws) Act 2026* (Cth) (**CAHECML Act**). s114A.1 sets out the objects. ss 114A.2 to 9 provide for the Executive's listing powers of hate groups. Div 114B creates satellite offences.

22. As to the first branch s114A.1 states that the objects are to protect the Australian community against social, economical, psychological and physical harm and to give effect to Articles of the International Covenant on Civil and Political Rights (**ICCPR**) and the International Convention the Elimination of all Forms of Racial Discrimination (**CERD**).

23. As to the second branch, the regime for specification of a 'prohibited hate group' provides for four steps. *First*, upon complaint or referral or own initiative the Director-General of Security (**DGS**) provides written advice to the Australian Federal Police (**AFP**) Minister.[13] The DGS's state of satisfaction is not conditioned by an obligation to afford procedural fairness.[14] *Second*, the AFP Minister considers recommending that the Governor-General makes a 'prohibited hate group' regulation specifying the organisation.[15] Before making the recommendation, the AFP Minister must be reasonably satisfied that the organisation has engaged in, prepared or planned to engage in, or assisted the engagement in conduct constituting a 'hate crime' and that specifying the organisation is reasonably necessary to protect the Australian community or part of the Australian community against harm,

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[13] Code s 114A.5(6) with reference to s 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth). It is notable that the definition of 'politically motivated violence' extends (a) beyond acts of violence to acts of 'unlawful harm'; and (b) to acts engaged in in Australia that are intended or likely to achieve a political objective in another country. There is a complete absence of any requirement as to the DGS state of satisfaction.

[14] Code s 114A.5(5).

[15] Code s 114A.4(1)(a)(i), (2) and (3). It is not necessary that a hate crime has occurred.

including social, economic, or psychological harm. The AFP Minister's state of satisfaction is not conditioned by an obligation to afford procedural fairness.[16] *Third*, the Attorney-General's agreement in writing is obtained and the leader of the opposition is briefed.[17] There are no conditions on the giving of the Attorney-General's agreement. *Fourth*, the Governor-General makes the 'prohibited hate group' regulation. There are no conditions on the regulation-making power other than that it is preceded by the three steps previously outlined, which are then effectually superseded by the regulations.

24. As to the third branch this creates offences with respect to organisations.

B. Question 1: Pt 5.3B is not supported by any head of Commonwealth legislative power

25. There is no affirmative power under the Constitution s 51 for the Parliament of the Commonwealth to make laws for the formation, banishment or dissolution of a political party which is not a corporation, including the Australian Communist Party and White Australia Party Inc. That was the decision of this Honourable Court in *Australian Communist Party v The Commonwealth*,[18] and remains the position. For that reason Part 5.3B of the Code is invalid or invalid to that extent. For the reasons which follow the Court should adopt that proposition and make the orders claimed.

26. The dispositive issue under Question 1 is characterisation. It is a law which enables the Executive to select and proscribe organisations, including political associations, attaching criminal consequences to membership, support, direction, funding and continued existence.

27. The point is not answered by reference to the opinions, objects or alleged associations of the First Plaintiff. Constitutional power is not enlarged by the unpopularity of the political party to which the law is applied. The Communist Party Dissolution Act 1950 (Cth) was directed to an organisation alleged by Parliament to be revolutionary, violent, fraudulent, subversive and treasonable. Yet, in *Australian Communist Party Case*, the Court held that the Act was beyond power. The principle was not that communism was protected; it was that the Constitution withholds from Parliament and the Executive a power to determine for themselves the facts which bring a law within constitutional power.

28. Pt 5.3B repeats the constitutional vice of the *Australian Communist Party Case* in modern form. It does not prescribe, as a rule of conduct, the acts of advocacy, incitement, violence, assistance or discrimination which citizens may not do. It establishes a mechanism by which the Executive may specify an organisation by regulation, by constructive

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[16] Code s 114A.4(5).

[17] Code s 114A.6.

[18] *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 200 per Dixon J.

adjudication, with the consequence that ordinary incidents of political association — membership, support, fundraising, direction and participation — become criminal. The law disables the organisation from existing as a political actor and exiles it. As Dixon J also said[19] '*the actual decision of the question whether the body ought to be considered unlawful and dissolved accordingly is left completely to the final determination of the Executive*'.

29. There is no general Commonwealth power to enact criminal laws.[20] The Defence identifies two sources of power only to support Part 5.3B: first, s 51(xxix), by reference to the treaties recited in s 114A.1(1)(b); and secondly, an implied nationhood power said to arise from s 61 and s 51(xxxix). Neither expressly or otherwise sustains Pt 5.3B.

<u>The external affairs power does not support Pt 5.3B</u>

30. The Commonwealth's external affairs case depends upon characterising Pt 5.3B as a law implementing Australia's obligations under the ICCPR and CERD. That characterisation fails because Pt 5.3B does not enact the treaty norms as domestic legal norms. It invokes the treaties at the level of objects, but then creates a different and wider regime: executive proscription of organisations by regulation.

31. It is elementary that treaties do not become part of Australian municipal law merely by signature or ratification. The rights and obligations arising under a treaty require legislative implementation if they are to operate as domestic law. In *Dietrich v The Queen*,[21] Mason CJ and McHugh J rejected an attempt to translate an unincorporated ICCPR obligation into a domestic right, observing that the Court was being asked not to resolve uncertainty in domestic law, but to recognise a right which had not previously existed.

32. That point does not deny the breadth of s 51(xxix). It identifies the necessary inquiry. Where a treaty is relied upon as the source of external affairs power, the law must be capable of being characterised as one which implements the treaty obligation. As the Court said in *Victoria v The Commonwealth (Industrial Relations Act Case)*,[22] the relevant question is whether the law is supported by the legislative power with respect to external affairs. The treaty must prescribe a regime defined with sufficient specificity to direct the general course to be taken by the signatory States, and the domestic law must be reasonably capable of being considered appropriate and adapted to implementing that regime.

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[19] *Communist Party Case* (1951) 83 CLR 1 at 178 (Dixon J).
[20] *R v Kidman* (1915) 20 CLR 425 at 433.
[21] *Dietrich v The Queen* (1992) 177 CLR 292.
[22] *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416.

33. The required connection is purposive and substantive, not verbal. Parliament cannot secure power by reciting a treaty in an objects clause and then enacting a regime which departs from the treaty's operative requirements. The law must be faithful in its legal operation to the treaty norm said to support it. If the law discards the treaty's limiting elements, or substitutes a distorted regime for the treaty obligation, the connection is not supplied.

34. The difficulty for the Commonwealth on this issue is apparent once the treaty provisions are compared with Pt 5.3B: refer *R v Burgess* (1936) 55 CLR 608 at 646 (Latham CJ), 674–675 (Starke J), 687 (Dixon J); *Industrial Relations Act Case* (1996) 187 CLR 416 at 486–489; *Cunliffe v Commonwealth* [1994] 182 CLR 272 at 322 (Brennan J).

35. Article 20(2) of the ICCPR requires that "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" be prohibited by law. The obligation is directed to advocacy of a defined kind: advocacy of hatred which constitutes incitement to specified consequences[23]. Pt 5.3B does not enact that standard. It does not create an offence of advocacy of national, racial or religious hatred constituting incitement to discrimination, hostility or violence. It instead empowers the Executive to specify an organisation and thereby criminalise membership, support, direction and assistance of it.

36. That is not implementation of Article 20(2). It substitutes organisational destruction for a prohibition on inciting advocacy. It reaches conduct which may be remote from advocacy, remote from incitement, and remote from any actual or threatened discrimination, hostility or violence. It extends to assistance, preparatory conduct, planning, historical conduct, conduct outside Australia and conduct which need not itself have been adjudicated criminal by any court. That is not a faithful implementation of the ICCPR norm. It is an entirely different legislative choice.

37. Nor does Article 26 of the ICCPR sustain the law. Article 26 is directed to equality before the law and equal protection of the law without discrimination. Pt 5.3B confers no equality right, creates no anti-discrimination standard, and guarantees no equal protection to anyone. A regime for executive specification of organisations, followed by criminal consequences for association with them, is not reasonably capable of being characterised as a law implementing Article 26.

[23] See per Nettle JA as to incitement in *Catch the Fire Ministries Inc v Islamic Council of Victoria* [2006] 15 VR 207 esp at [14] and [34] also see [157]; cf *Racial and Religious Tolerance Act 2001* [Vic] ss 8 and 11.

38. CERD Article 4(b) comes closer to the subject matter, but it does not support Pt 5.3B as enacted. Article 4(b) requires States Parties to declare illegal and prohibit organisations which "promote and incite racial discrimination", and to recognise participation in such organisations as an offence punishable by law. The obligation is confined by its own terms. The organisation must promote and incite racial discrimination. Pt 5.3B is not so confined.

39. First, Pt 5.3B does not require a judicial or even statutory finding that the organisation promotes and incites racial discrimination. The operative criterion is not the treaty criterion. The law is triggered by a wider set of executive satisfactions, including forms of conduct and assistance which need not constitute promotion and incitement of racial discrimination.

40. Secondly, the definition of "hate crime" travels beyond the subject matter of CERD Article 4(b). It includes conduct motivated by beliefs about national origin and other matters which do not map onto the confined obligation in Article 4(b). The law also extends to threats and preparatory or assistance conduct in ways not reflected in treaty obligation.

41. Thirdly, the chapeau to Article 4 is critical. The obligations in Article 4 are to be undertaken "with due regard" to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of CERD, including freedom of opinion, expression, peaceful assembly and association. Pt 5.3B pays no such regard. It contains no carve-out for political communication, fair comment, protest, academic discussion, artistic expression or electoral advocacy. It excludes procedural fairness at key stages. It does not require prior adjudication by a court. That is not implementation of CERD with due regard to protected rights; it is a regime which subordinates those rights to executive designation.

42. Fourthly, Pt 5.3B treats the continued presence or existence of an organisation as itself capable of causing social, economic, psychological or physical harm. That concept is not found in Article 4(b). Article 4(b) is directed to organisations which promote and incite racial discrimination. It is not directed to organisations whose continued presence is considered by the Executive to cause social or psychological harm. By contrast here the minister could lawfully be reasonably satisfied that humiliation is psychological harm. That difference is fundamental. It demonstrates that the law is not confined to the treaty norm.

43. The contrast with *R v Tang*[24] is instructive. There, the Criminal Code provisions enacted slavery offences in terms answering the definition and substance of the supporting international obligation, and guilt was adjudicated by courts. The treaty norm became the domestic legal norm. Here, by contrast, the treaty norm — advocacy constituting

[24] *R v Tang* (2008) 237 CLR 1.

incitement, or organisations promoting and inciting racial discrimination — is not enacted as the operative standard of liability. What is enacted is a power of executive listing, with consequential criminalisation of association.

44. The purposive effect of the law is not prohibition at all, but regulation by executive listing power using a remote and vague advocacy trigger with destructive consequences for third parties. As also explained by Rich J in *Swan Hill Corporation v Bradbury*[25] prohibition by regulation is a contradiction in terms.

45. The external affairs power permits Parliament to implement treaties. It does not permit Parliament to use treaties as constitutional labels for laws which depart from the treaties in their operative criteria, their safeguards, and their practical effect. Pt 5.3B discards the limiting elements of the treaty obligations while expanding beyond the prohibited conduct under the treaty obligations. It is therefore not a law with respect to external affairs.

The nationhood power does not support Pt 5.3B

46. The Commonwealth's alternative reliance on an implied nationhood power also fails. The implication from s 61, supported where necessary by s 51(xxxix), is not an open-ended legislative power to suppress organisations whose political opinions or associations are considered dangerous, divisive or harmful. It is a limited implication arising from the existence and character of the Commonwealth as a national polity. It does not authorise coercive legislation of this kind.

47. The nationhood implication may support activities or enterprises peculiarly adapted to the government of a nation and incapable of being otherwise carried on for the benefit of the nation. It does not follow that the Commonwealth may dissolve, disable or criminalise political associations because the Executive considers their existence harmful to national cohesion or community safety. The Constitution establishes a representative system in which political judgment is committed to the electors. The existence of political parties, including repugnant or unpopular political parties, is not an injury to the nation; it is an incident of the system by which the nation governs itself.

48. The *Communist Party Case* is again decisive in principle. The Court there rejected the proposition that the Commonwealth's need for self-protection supplied power to dissolve a political party by legislative and executive determination. Dixon J's reasoning is irreconcilable with a nationhood power broad enough to sustain Pt 5.3B. If a party alleged to be revolutionary and subversive could not be dissolved by reference to protection of the

[25] *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 at 754.

Commonwealth in peacetime, a fortiori the First Plaintiff cannot be proscribed under an implied nationhood power triggered by executive opinion.

49. *Davis v The Commonwealth*[26] confirms the narrowness of the implication in its coercive operation. Even where the subject matter — the Bicentenary — was plainly national, the Court held invalid a prohibition on the unauthorised use of certain expressions because the measure was disproportionate. If the nationhood implication could not sustain a coercive prohibition on the use of words associated with a national commemoration, it cannot sustain a power to destroy a political association, prevent its electoral participation, and expose members and supporters to imprisonment.

50. The submission is not that the Commonwealth lacks power to protect the community from violence, threats, incitement or crime. It may do so under appropriate heads of power, including by enacting offences directed to conduct. The submission is that nationhood does not create a roving power of political proscription. A law directed to the existence of associations, especially political associations, trespasses into fields of ordinary State competence — incorporation, associations, public order and general criminal law — without any textual foundation in s 51.

51. The federal structure is material. The First Plaintiff exists by force of Victorian law. The practical operation of Pt 5.3B, once a regulation is made, is to render that incorporated association unable to function and to expose it to cancellation under State associations legislation. An implication drawn from the existence of the Commonwealth as a national government cannot be used to obliterate the constitutional distribution of legislative authority between Commonwealth and States.

52. Nor is the law saved by describing its purpose at a high level of abstraction as protection of the Australian community. That was the form of reasoning rejected in the *Australian Communist Party Case*. A law is not valid because Parliament asserts that it is protective. The question is whether the Constitution confers power to enact the law in the form chosen. Pt 5.3B protects, if at all, by authorising executive proscription of voluntary organisations. That is the very thing for which the Commonwealth lacks power.

<u>Executive opinion cannot supply the missing constitutional connection</u>

53. There is a further and independent vice. Even if legislation directed to particular conduct could be supported by a head of power, Pt 5.3B makes the connection with power depend upon executive opinion. The Minister's satisfaction, informed by security advice and

[26] *Davis v The Commonwealth* (1988) 166 CLR 79.

followed by regulation, supplies the practical hinge between the organisation and the alleged constitutional subject matter. That is constitutionally insufficient.

54. Parliament cannot confer upon the Executive a power to determine the facts which bring the law within constitutional power. The stream cannot rise above its source. If the constitutional connection depends upon whether an organisation has engaged in conduct of a kind sufficient to enliven power, that connection must be found in the law itself and, where necessary, adjudicated by a court. It cannot be supplied by ministerial satisfaction expressed in a regulation.

55. Pt 5.3B therefore fails at the level of characterisation. It is not a law implementing the ICCPR or CERD. It is not a law sustained by the nationhood implication. It is a law for executive proscription of organisations, including political organisations, with severe criminal consequences for association. No head of Commonwealth legislative power supports such a law. As Dixon J said in the *ACP Case*[27] '*the actual decision of the question whether the body ought to be considered unlawful and dissolved accordingly is left completely to the final determination of the Executive*'.

56. The conclusion on power is reinforced by the two constitutional limitations addressed below. Some of the same features which deny characterisation under s 51 — executive selection, absence of a judicial standard, destruction of political association, and criminalisation of ordinary incidents of political participation — also demonstrate that Pt 5.3B impermissibly burdens the implied freedom and infringes Ch III. The vice is structural: the law displaces the electors and the courts, and substitutes executive opinion as the determinant of lawful political existence.

57. For the above reasons Question 1 should be answered "yes".

C. Question 2: Pt 5.3B impermissibly burdens the implied freedom

58. Part 5.3B of the Code is invalid, further or alternatively, because it impairs the constitutionally protected freedom of political communication by providing for a law which denies all voice to a political party, in this instance the First Plaintiff.

59. The scheme is a law which goes beyond regulating political communication. It empowers the Executive permanently to destroy a political association and criminalise membership, support and participation in it. The effect is not merely to burden communication but to eliminate a political speaker from the constitutional system. Pt 5.3B therefore strikes at the institutional assumptions upon which representative government depends.

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[27] *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 178.

60. At the interlocutory injunction hearing in this matter, the Commonwealth conceded that there was a prima facie case that the law impermissibly burdened the implied freedom. For the reasons which follow, nothing pleaded in the Commonwealth's filed Defence shows that the admitted infringement on the implied freedom is legally permissible

61. The validity of the law falls to be assessed under the established framework stated in *Lange v Australian Broadcasting Corporation*,[28] and most recently applied in *Ravbar*[29] and *Hopper*.[30] On that analysis:

(a) the law imposes a direct and substantial burden on political communication;

(b) one of its central purposes is constitutionally illegitimate because it seeks to protect the community from the social, psychological and emotional consequences of political expression; and

(c) in any event the law is neither necessary nor adequate in its balance.

<u>The burden is direct and profound</u>

62. The Commonwealth rightly accepts that Pt 5.3B burdens political communication. The question is not whether a burden exists but its nature and magnitude.

63. The burden is direct because the law operates upon political associations engaged in political advocacy. Upon specification an organisation does not merely lose particular privileges or face additional regulatory controls. It ceases to exist for practical purposes. Its meetings cease. Its campaigns cease. Its publications cease. Its members must withdraw from participation on pain of criminal liability. Communication protected by the Constitution is thereby silenced at its source.

64. The burden is particularly acute where the specified organisation is a political party. Elections are conducted through political associations. Political parties aggregate political opinion, develop policy, recruit candidates and communicate with electors. To extinguish a political party is not merely to regulate political debate. It is to remove one participant from the constitutional process by which the people choose their representatives.

65. The burden is also *discriminatory*. The criteria for specification turn on the content and anticipated effect of communication — advocacy, threats, and the "*psychological*" and "*social*" harm said to flow from a group's presence and message. The law singles out

[28] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[29] *Ravbar v Commonwealth of Australia* (2025) 99 ALJR 1000; [2025] HCA 25.
[30] *Hopper v Victoria* (2026) 100 ALJR 582; [2026] HCA 11.

communication by reference to its viewpoint. A burden of that character requires the closest scrutiny.[31]

66. The burden is reinforced by the severity of the sanctions. Membership, support and continued association become punishable by imprisonment for up to fifteen years. The law therefore does not merely discourage communication. It criminalises participation in an identified political movement and compels dissociation from it.

The purpose of the law is constitutionally illegitimate

67. The Commonwealth pleads that the objects of Pt 5.3B include protecting the community from social, economic and psychological harm arising from the continued presence of organisations. That object is constitutionally fatal.

68. The constitutional system entrusts political judgment to electors rather than the Executive. The premise of representative government is that citizens may hear political claims, evaluate them, reject them, or accept them. The Constitution does not permit government to remove political actors because their views are offensive, distressing, divisive or psychologically harmful.

69. As Hayne J observed in *Monis v The Queen*:[32] *'History, not only recent history, teaches that abuse and invective are an inevitable part of political discourse. Abuse and invective are designed to drive a point home by inflicting the pain of humiliation and insult. ... The giving of really serious offence is neither incidental nor accidental. The communication is designed and intended to cause the greatest possible offence to its target no matter whether that target is a person, a group, a government or an opposition, or a particular political policy or proposal and those who propound it'.*

70. That proposition is recently demonstrated in the reasoning in *Jarrett v State of New South Wales*.[33] There the Court of Appeal rejected legislation directed to preserving "social cohesion" by restricting political activity because the law proceeded upon the assumption that citizens should be protected from the upsetting or divisive consequences of political expression. The same vice appears here in a more extreme form.

71. The present legislation goes substantially further than the legislation considered in *Jarrett*. There the associations continued to exist and continued to speak. Here the association itself is destroyed. If a temporary restriction on political assembly failed because its underlying

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[31] *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 169 per Deane and Toohey JJ; *Tajjour v New South Wales* (2014) 254 CLR 508 at [151] per Gageler J; *Brown v Tasmania* (2017) 261 CLR 328 at [165] per Gageler J.

[32] *Monis v The Queen* (2013) 249 CLR 92 at [85] (Hayne J).

[33] *Jarrett v State of New South Wales* [2026] NSWCA 62.

purpose was constitutionally incompatible, a permanent executive power of political extinction cannot be valid.

72. The Constitution does not require political discourse to be polite, agreeable or reassuring. The authorities repeatedly recognise that political communication often involves offence, insult, controversy and agitation. Those features are not defects in representative government. They are incidents of it.

<u>The law is not reasonably appropriate and adapted</u>

73. Even if the Court were to confine the purpose of Pt 5.3B to preventing hate crimes, the legislative means chosen are constitutionally disproportionate.

74. The law employs the most severe mechanism imaginable: executive destruction of the association itself. Yet numerous substantially less restrictive alternatives exist. Courts could determine applications for proscription; procedural fairness could be afforded; merits review could be available; conduct could be prosecuted directly; and the criteria could be confined to organisations presently engaged in conduct corresponding with Article 4(b) of CERD. Each alternative would address the asserted protective purpose while preserving a far greater measure of political freedom. As to necessity, there are obvious alternatives, each less restrictive of the freedom and each capable of achieving the protective end: see the Reply at [33].

75. The imbalance is overwhelming. Against a speculative and unquantified incremental benefit, Parliament has conferred a power permanently to suppress political organisations, criminalise association, exclude procedural fairness, avoid judicial determination and rely upon retrospective conduct. Such a scheme burdens political communication far beyond what could reasonably be regarded as necessary for the prevention of criminal conduct.

76. The vice is not peripheral. It lies in the very structure of the scheme. Political extinction by executive designation is the mechanism Parliament selected. That mechanism cannot be severed from the legislation because it is the legislation.

77. The vice is not confined to marginal or extremist speech. The statutory conception of "hate crime" set out at s 114A.3, when read in the light of the IHRA (International Holocaust Remembrance Alliance) definition of anti-Semitism discussed in the Special Case, may include contemporary orthodox debate and political advocacy about Israel and Palestine[34].

78. The definition treats as potentially anti-Semitic, and hence a hate crime for the purposes of the scheme, all public communications described as "related to Israel categories" under the

[34] SCB vol 4, p 1425.

IHRA eg as to "double standards" or negative descriptions of the "existence" of the State of Israel. Such forms of expression admittedly arise in political advocacy concerning Gaza, apartheid, boycott, foreign policy, or Australia's response to Israel. If such advocacy is characterised by the AFP Minister as anti-Semitism warranting listing, it may also in turn be characterised as conduct causing serious psychological harm, or creating a serious risk to the health or safety of Jewish Australians, whatever the true position is.

79. That consequence demonstrates the breadth of the burden. An organisation whose political object is to criticise Israel, or presumably Palestine, advocate boycott, condemn alleged apartheid, or influence Australian foreign policy may be exposed to specification, not because it advocates violence, but because its recurrent political communication may be treated as organised antisemitism causing psychological harm to a section of the public. The contrary, with respect to Palestine, may also be true. The Part does not require that such harm be intended, nor that the communication be directed to any identified individual. It is therefore capable of reaching protest, persuasion and advocacy at the core of representative and responsible government. A law which permits the executive proscription of organisations engaged in that orthodox political communication is not confined to the prevention of violence or terrorism; it burdens political communication in a manner that is neither adequately tailored nor justified by the asserted protective purpose.

80. To reinforce the point the Regulations also reference a vein of Australian public policy going back to Federation and beyond. The policy has plainly been the subject of political communications. No standard of conduct is established. No rule of law governs; there is merely proscription of the organisation and with it the associated policy. No court determines that a "hate crime" has occurred. No court, on the application of the Executive, proscribes the group. Procedural fairness is excluded twice over. Nothing conditions the Attorney-General's agreement. The selection of targets is unconstrained. Retrospective conduct going back to the date of the Federation may condition the selection of target groups. A Parliament pursuing only the protection of the community from crime does not need, and would not choose, each of those features.

81. As to balance, the detriment is what the scheme places in the hands of the Executive: a power to suppress, permanently and by criminal penalty, a very broad range of organisations — any association whose past or present conduct can be brought within the width of "hate crime" — together with the membership of each, and the penumbral silencing of many more, on criteria that are retrospective, satisfied in secret, and immune from fairness or review. The incremental benefit over the existing law — which already

criminalises incitement, urging violence, threats and the underlying conduct itself — is undemonstrated and at best modest. Whatever margin is allowed to the Parliament, a restriction of this severity, on communication of this character, achieved by means this blunt, restricts the freedom far more than is reasonably necessary to achieve the protective end.[35] Whatever margin is allowed to the Parliament, a restriction of this severity, on communication of this character, achieved by means this blunt, restricts the freedom far more than is reasonably necessary to achieve the protective end.[36]

82. Part 5.3B does not regulate political communication. It extinguishes political communication and nullifies and punishes its speakers. It is respectfully submitted that this case is materially stronger than most implied freedom cases that have reached the High Court.

83. For the above reasons Question 2 should therefore be answered "Yes".

D. Question 3: Pt 5.3B infringes Chapter III

The scheme vests judicial power in the Executive

84. Part 5.3B of the Code is invalid also because it confers upon the Executive of the Commonwealth powers of adjudication and punishment extending to extinguishment and exile of the First Plaintiff, and consequential incarceration of its members and supporters.

85. Chapter III proceeds upon a fundamental constitutional premise. The adjudgment and punishment of criminal guilt is exclusively a judicial function. Neither Parliament nor the Executive may impose punishment for criminal wrongdoing by executive decree, which is part of the bulwark of freedom this nation enjoys. That principle is reflected in *Chu Kheng Lim v Minister for Immigration*,[37] reaffirmed in *Alexander v Minister for Home Affairs*,[38] and anchored in the separation of judicial power established by *Boilermakers*.[39]

86. In *Chu Kheng Lim*,[40] Brennan, Deane and Dawson JJ said: '*There are some functions which, by reason of their nature or because of historical considerations, have become established as essentially and exclusively judicial in character. The most important of them is the adjudgment and punishment of criminal guilt under a law of the Commonwealth.*'

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[35] *Tajjour v New South Wales* (2014) 254 CLR 508 at [151] (Gageler J); *McCloy v New South Wales* (2015) 257 CLR 178 at 193–195 [2].

[36] *Tajjour v New South Wales* (2014) 254 CLR 508 at [151] (Gageler J); *McCloy v New South Wales* (2015) 257 CLR 178 at 193–195 [2].

[37] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

[38] *Alexander v Minister for Home Affairs* (2022) 276 CLR 336.

[39] *R v Kirby; Ex parte Boilermakers' Society of Australasia* (1956) 94 CLR 254.

[40] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27.

87. Pt 5.3B departs from the constitutional requirement. The practical and legal operation of the scheme is that an Executive officer determines whether criminal conduct has occurred and, upon making that determination, imposes severe and immediate punitive consequences upon an organisation and those associated with it. The Executive thereby assumes functions which Chapter III commits exclusively to courts.

88. The constitutional vice lies at the heart of the scheme. Section 114A.4(1)(a) empowers the Minister to determine that an organisation has engaged in, prepared, planned, assisted or advocated conduct constituting a "hate crime". That determination is not contingent upon conviction by a court. To the contrary, s 114A.4(4) expressly contemplates executive action in the absence of any criminal conviction. The Legislature confers power upon the Executive which therefore determines, for itself, whether conduct constituting a criminal offence has occurred.

89. The determination is not administrative in character. It requires findings about past conduct, motive, intent, causation and legal characterisation. The Minister must determine whether conduct answers the statutory definition of a hate crime and whether the organisation is sufficiently connected with that conduct to warrant designation. Those are adjudicative tasks involving the application of legal standards to disputed facts.

90. In substance, therefore, the Minister performs the function that would ordinarily be performed by a court exercising criminal jurisdiction. The Constitution does not permit Parliament to avoid Chapter III simply by describing the determination as administrative rather than judicial. As Gordon J observed in *Alexander*, the concern of Chapter III is with substance rather than form. The constitutional vice is that punishment does not follow a judicial finding of criminal guilt; the judicial finding of criminal guilt is replaced by ministerial opinion.

Punishment follows from executive adjudgment

91. The constitutional difficulty is compounded because punitive consequences follow immediately and automatically upon the Minister's determination. The designation is not merely regulatory. It operates as a form of proscription.

92. The immediate operation and effect of the challenged law conferring Executive power to list a hate speech group is to sterilise it, to criminalise all its activities and to acquire the group's remaining property other than on just terms including member assets and donations. This is subject to a narrow statutory window for taking certain legal action. Anything left is *bona vacantia* subject to *AIR Act* measures forfeiting assets in this case to

Victoria. Those who have resigned by reason of the threat of prosecution miss out. These punitive measures and forfeitures occur outside legal norms.

93. For example s 114B.6(2)(a)(ii) stultifies all support that assists the organisation '*to continue to exist'*. That is a statutory acknowledgment of the law's effective purpose: extra-judicial annulment, forfeiture of all assets, membership, goodwill and extra-curial punishment.

94. Upon listing, the organisation is rendered incapable of functioning. Leadership, administration, fundraising, recruitment, support and participation cease as a matter of law. The legislation is directed not merely to regulating conduct but to extinguishing the organisation itself. Thus, s 114B.6(2)(a)(ii) expressly targets conduct assisting an organisation "to continue to exist". The object of the scheme is therefore the elimination of the designated body from civil and political life.

95. Members and supporters likewise become subject to severe criminal consequences by reason of the Executive designation. Continued membership attracts criminal liability and substantial terms of imprisonment. The practical effect is to compel dissociation from the organisation under threat of punishment.

96. The property consequences bear the same punitive character. The organisation's funds and assets become immobilised. Financial support cannot be provided. Ordinary dealings become unlawful. Its continued incorporation is imperilled and its dissolution under State law is facilitated. Dixon J described materially similar consequences under the Communist Party Dissolution Act as a forfeiture. The constitutional character of such measures is punitive rather than regulatory.

97. Historically, consequences of that character—outlawry, forfeiture, proscription, exclusion from civil society, exile and the destruction of legal personality—have been imposed as punishment. In the Commonwealth constitutional tradition they have been imposed, if at all, only pursuant to judicial process.

98. Substance, not form, condemns Pt 5.3B. The hinge of the scheme is s 114A.4(1)(a): a ministerial finding to a civil standard that an organisation "has engaged in, prepared or planned to engage in, or assisted or advocated conduct constituting a hate crime". That is an adjudgment of guilt by reference to an executive opinion of criminal conduct based on the civil not criminal standard. Section 114A.4(4) makes explicit that no conviction is required: the Executive, not a court, determines that the standard was breached, irrespective of contravention of a criminal standard.

99. This in terms involves a usurpation of the judicial power. Punitive consequences not limited to exile then flow to the First Plaintiff, its members, managers, supporters, and funders.

The public denunciation and punishment of the organisation, members and supporters is the purpose of the listing power, which can only be described as punitive akin to the denunciation and exclusion from citizenship of the applicant in *Alexander*, or the power of cessation of civil rights considered in *Benbrika*.[41]

100. The scheme confers multiple layers of judicial power on the Executive. Before the Minister can make a finding under s 114A.4(1), the Minister must first determine whether conduct constitutes a "hate crime" under s 114A.3. This itself involves several distinct adjudicative functions described above.

The legislation is analogous to the measures condemned in *Alexander*

101. The legislation closely resembles the constitutional defect identified in *Alexander*. There, the Court emphasised that Parliament cannot confer upon the Executive the authority to determine, for itself, whether a person has engaged in criminal wrongdoing and then impose punitive consequences upon that basis.

102. Here the Executive determines whether an organisation has engaged in conduct constituting a hate crime, and substantial punishment then follows. The fact that the punishment assumes the form of proscription, destruction of associational rights, forfeiture-like consequences and criminalisation of continued membership does not avoid Chapter III. As *Alexander* demonstrates, the categories of punishment are not closed. The scheme therefore effects what Chapter III forbids: executive adjudgment followed by punitive consequences.

103. *Bill of Attainder analogy*: the Plaintiffs further submit that the legislation bears the hallmarks of what constitutional history describes as a *Bill of Attainder* or *Bill of Pains and Penalties*. The legislation permits the Executive to identify an organisation, determine that it has engaged in proscribed conduct, and then impose legal disabilities and punitive consequences without judicial trial. While those historical concepts are not in themselves constitutional doctrines, they illuminate the fundamental Chapter III concern which the legislation presents.

104. The targeting of the First Plaintiff occurred prior to and during the Second Reading Speech, in which the Second Defendant wrongly assumed it had voluntarily disbanded.[42] However whilst two other entities referred to disbanded, it did not. When that was appreciated the Defendants followed through and specifically targeted the First Plaintiff again on 15 May 2026 to ensure it was listed and it and its members punished.

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[41] *Benbrika v Minister for Home Affairs* [2023] HCA 33.

[42] Hansard Tuesday 20 January 2026, page 126; SC-012 p 0381.

<u>Conclusion</u>

105. In substance and operation Pt 5.3B authorises the Executive:

(a) to determine whether conduct constituting a criminal offence has occurred;

(b) to determine whether an organisation is implicated in that conduct;

(c) to impose immediate and severe consequences including proscription, forfeiture-like consequences, destruction of associational rights and criminal liability; and

(d) to do so without prior judicial adjudication.

106. That combination of adjudgment and punishment is an exercise of judicial power. Because the power is vested in the Executive rather than a court established under Chapter III, Pt 5.3B is invalid.

107. For the above reasons Question 3 should be answered "Yes".

PART VI: ORDERS SOUGHT

108. A declaration that part 5.3 B of the Code is invalid in whole.

109. In the alternative to the above, a declaration that 5.3 B of the Code is invalid to the extent that it prevents the First Plaintiff operating as a political party.

110. A writ of prohibition, restraining the Defendants from taking any step under or in reliance upon Pt 5.3B or the Regulations against the First Plaintiff.

111. Costs.

PART VII: ESTIMATE OF TIME

112. The Plaintiffs estimate that they will require 5 hours for the presentation of oral argument, including reply.

Dated: 29 July 2026

P E King
Counsel for the Plaintiffs
T: 02 9232 4671
E:pking@qsc.com.au

M S Sharify
Counsel for the Plaintiffs
T: 0452 038 932
E: shahed.sharify@vicbar.com.au

ANNEXURE TO APPELLANT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
12, 1995	***Criminal Code Act 1995 (Cth)***	30 June 2026 to current	**Part 5.3B**	*for illustrative purposes only*	*Not Applicable*