HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	M50/2026
File Title:	White Australia Party Inc. & Anor v. The Commonwealth of A
Registry:	Melbourne
Document filed:	Form 27D - Defendants' submissions
Filing party:	Defendants
Date filed:	14 Aug 2026

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

WHITE AUSTRALIA PARTY INC.
First Plaintiff

THOMAS ANTHONY SEWELL
Second Plaintiff

and

COMMONWEALTH OF AUSTRALIA
First Defendant

ATTORNEY-GENERAL OF THE COMMONWEALTH
Second Defendant

DEFENDANTS' SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ISSUES

2. The issues are accurately identified in **PS [3]**, which reflect the questions at **SC [230]**.

PART III: SECTION 78B NOTICE

3. Notice has been given under s 78B of the *Judiciary Act 1903* (Cth) (**SCB1 32-36**).

PART IV: MATERIAL FACTS

4. The submission (**PS [6]**) that the First Plaintiff is "a political party", carried on for "a lawful purpose", is inaccurate. The First Plaintiff is an arm of White Australia (**WA**), which is the "rebranded" National Socialist Network (**NSN**) and European Australia Movement (**EAM**) (**SC [39]**, **[47]**). It is the same organisation as NSN, EAM and WA (**SC [32], [34], [52]; SCB2 534**). Forming a political party was a calculated attempt to secure legal protection for members engaging in openly racist and antisemitic speech (**SCB2 534**). The "plan" was to seek protection from "serious jail time" and "to challenge the swastika by incorporating it in some capacity into [the] organisation. Then it is political communication" (**SC [49]**).

5. The inaccuracy, and the implicit premise that Nazi ideology is legitimate political communication, goes to the heart of the case. The First Plaintiff is not some political maverick advocating reintroduction of a dictation test (*cf* **SC [46]**). It is a neo-Nazi organisation that has engaged in hate crimes causing profound damage to the fabric of Australia's civil society. Members of NSN/EAM/WA have used Nazi slogans and imagery on many occasions (**SC [49], [57.1], [57.7], [57.8], [57.10], [57.12], [59.1], [59.6], [60.4]**), and have repeatedly engaged in anti-Jewish and other racist activities (**SC [57.8], [57.11], [57.13], [59.2]-[59.3], [59.5]-[59.13], [60.1]-[60.3], [63]; SCB2 604**). The First Plaintiff operates under the authoritarian control of the Second Plaintiff, a violent offender (**SC [57.1]-[57.5]**), who is the National President "indefinitely" and has "sole authority" to nominate a successor as well as in respect of membership, endorsing candidates for election, and setting national policy directions and priorities, and who can veto any decision of the National Executive (**SC [7]**).

6. In 1930, Hitler and Goebbels declared that the Nazi Party "had no intention of committing high treason" but would "come to power by legal means", their reassurances "dispell[ing] the fears of many middle-class Germans about the Nazi Party's intentions".[1] The ensuing horrors

[1] Sir Richard J. Evans, *The Coming of the Third Reich: How the Nazis Destroyed Democracy and Seized Power in Germany* (Penguin Books, 2004) 249.

of National Socialism later propelled the international community, including Australia, to bind themselves to treaty obligations *requiring* neo-Nazi organisations to be banned. Meeting that obligation is not unconstitutional. The political process must be open, and the levers of power amenable to change at the ballot box, but that does not compel the constitutional system to allow Nazism any footing in Australia.

PART V: ARGUMENT

A THE MAKING OF THE REGULATIONS

7. ***Criminal Code***: Part 5.3B of the ***Criminal Code*** (Cth) pursues the objects set out in s 114A.1(1)(a) by criminal proscription of certain activities in connection with a "prohibited hate group" (see ss 114B.1-114B.6). A "prohibited hate group" is a group specified by regulations made by the Governor-General under s 5(1) of the ***Criminal Code Act** 1995* (Cth) read with s 114A.2(1). The power to make such regulations is tightly confined by the need for anterior decisions of both the politically neutral **Director-General** of Security[2] and the politically accountable "AFP Minister". Before the Governor-General can make a regulation, the Minister must have received advice from the Director-General in accordance with s 114A.5(1) (s 114A.5(2)). The Minister must then be "satisfied on reasonable grounds", taking into account the Director-General's advice and any other information (s 114A.5(3)), that: *first*, the organisation has engaged in, prepared or planned to engage in, or assisted the engagement in, conduct constituting a "hate crime", or has advocated (whether or not in Australia) engaging in conduct constituting a hate crime (subject to certain exceptions); and *second*, specifying the organisation is reasonably necessary to protect the Australian community or part of it against harm of any one or more of the kinds referred to in s 114A.1(1)(a) (s 114A.4).[3]

8. "Hate crime" is defined in s 114A.3. For the purposes of the definition in sub-section (5), "harm" must meet a high threshold of "serious harm",[4] or "serious damage", or create a "serious risk" (subparas (a)(i), (ii), (v); see also the "note" and extrinsic material discussed at [43]).

9. ***Director-General's advice***: On 11 May 2026, the Director-General provided advice to the AFP Minister under s 114A.5 recommending that he consider whether "White Australia", also known as the "White Australia Party", should be specified (**SC [31]; SC-17**). The Director-

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2 *Australian Security Intelligence Organisation Act 1979* (Cth), ss 7, 8(4), 9, 10, 13 and 20. See also ***Church of Scientology** Inc v Woodward* (1982) 154 CLR 25 at 53 (Gibbs CJ), 58 (Mason J).

3 The AFP Minister must also obtain the Attorney-General's agreement in writing to the organisation being specified and arrange for the Leader of the Opposition to be briefed (s 114A.6).

4 The term "serious harm" is defined in the Dictionary to the *Criminal Code* as harm (including the cumulative effect of any harm) that endangers, or is likely to endanger, a person's life or that is or is likely to be significant and longstanding. The term "harm" is also defined.

General was satisfied, on the basis of an ASIO assessment, that WA "has engaged in activities, and the activities, or continued engagement in the activities, would or are likely to increase the risk of the promotion of communal violence" and "has engaged in activities that indicate a risk that it may advocate for, or engage in politically motivated violence, or engage in the promotion of communal violence in the future", including by reference to the activities summarised at **SCB2 525**, **526-527** (**SCB2 520**). The ASIO assessment referred to the Bondi attack as having "enduring implications for Australia's security environment" (**SCB2 526**). It said that WA "uses provocative language and slogans to inflame and exacerbate existing anti-immigration, racist and antisemitic narratives and perceived inter-community grievances", which is "likely to increase the risk of the promotion of communal violence" (**SCB2 526**). The assessment explained that this was because "individuals who consume this messaging will consider the promotion of communal violence a viable mechanism to express support for these narratives, or to seek to achieve objectives linked to these narratives", including individuals "who are inspired by the activities of [WA] but are beyond the organisation's control" (**SCB2 526**).

10. ***Minister's Reasons***: On 12 May 2026, the AFP Minister signed a Statement of Reasons for his state of satisfaction under s 114A.4 (**SC-18**). He referred to numerous acts that he was satisfied were "hate crimes" within s 114A.3(2) and (5) (**SCB2 537-546**), and various instances where WA's routine use of Nazi symbols would constitute specific Commonwealth hate crime offences and therefore would be "hate crimes" within s 114A.3(1) (**SCB2 546-548**).

11. The Minister was satisfied that specifying WA as a prohibited hate group was "reasonably necessary" to protect the community from relevant harm (s 114A.4(1)(b)). Specification "would prevent the organisation from legally operating in Australia – this would directly impact its ability to continue engaging in hate crimes that cause physical, psychological and social harm and prevent the organisation from continuing to spread its racist ideology, which causes social and psychological harm" (**SCB2 548**). In relation to physical harm, the Minister said that specification would protect the community "by ensuring WA cannot organise or mobilise for violence" including because "WA's ideology and rhetoric presents a broader risk of inspiring individuals to prepare for or support serious violence fuelled by racial hatred" (**SCB2 548**). He said that "[s]pecifying WA is the only effective way to prevent WA from continuing to engage in activities that heighten racial hostility and instability within the community and result in violence fuelled by racial hatred" (**SCB2 550**). The Minister was also satisfied that "[t]here are significant risks of psychological harm across Australian community groups arising directly from hate crimes conducted by WA and the public dissemination of racist ideology"

(**SCB2 550**). The Minister referred specifically to "[t]he public display of Nazi symbols and the use of Nazi slogans [which] represent an ideology responsible for genocide and mass violence, designed to harm targeted communities through intimidation" and "create fear among communities who have historically been targeted by racist violence" (**SCB 550**).

12. ***Regulations***: The *Criminal Code (Prohibited Hate Group—White Australia)* ***Regulations*** *2026* (Cth) were made on 15 May 2026 and commenced the next day.

B QUESTION 1: HEAD OF POWER

13. ***External affairs***: Section 51(xxix) of the Constitution supports laws implementing Australia's international obligations. To be valid, a law need not translate an international instrument into municipal law directly. Rather, the international obligation being implemented must be stated with "sufficient specificity to direct the general course to be taken" and "the law must be reasonably capable of being considered appropriate and adapted to implementing the treaty".[5] The second requirement involves a "high threshold proportionality test": it is "not necessary for the Court to be persuaded that the particular provisions were in fact appropriate and adapted to the designated purpose", that being "a matter for the Parliament".[6] "It is enough that the legislative judgment could reasonably be made or that there is a reasonable basis for making it".[7] The latitude afforded to Parliament has often been emphasised.[8]

14. The nature of a treaty obligation is discerned by settled interpretive principles contained in the *Vienna Convention on the Law of Treaties* (**VCLT**) which, being relevantly declaratory of customary international law, apply also to treaties concluded before the VCLT entered into force.[9] The treaty must be interpreted in accordance with the ordinary meaning of its terms, in their context and in the light of its object and purpose (Art 31), with recourse to "supplementary means of interpretation" including the preparatory work (Art 32). "Consideration of the historical context of a treaty, including related treaty instruments and the travaux préparatoires

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5 *Victoria v Commonwealth* (1996) 187 CLR 416 at 486-487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). See recently *Zurich Insurance Company Ltd v Koper* (2023) 277 CLR 164 at [19] (Kiefel CJ, Gageler, Gleeson and Jagot JJ); *G Global 120E T2 Pty Ltd v Commissioner of State Revenue (Qld)* (2025) 99 ALJR 1465 at [46] (the Court).

6 *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1 at [57] (French CJ).

7 *Richardson v Forestry Commission* (1988) 164 CLR 261 at 296; see also 289 (Mason CJ and Brennan J), 300, 303-304 (Wilson J), 342 (Gaudron J). See also *Commonwealth v Tasmania* ***(Tasmanian Dam Case)*** (1983) 158 CLR 1 at 232 (Brennan J).

8 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 646 (Latham CJ), 660 (Starke J), 674-675 (Dixon J), 695-696 (Evatt and McTiernan JJ); *Airlines of New South Wales v New South Wales (No 2)* (1965) 113 CLR 54 at 136 (Menzies J); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 232-233 (Mason J); *Tasmanian Dam Case* (1983) 158 CLR 1 at 103 (Gibbs CJ), 232 (Brennan J), 260 (Deane J).

9 *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* (2023) 275 CLR 292 at [38] (the Court).

to the treaty, is an important aspect of that interpretative process".[10] The intention of Art 32 was "frequent and quite normal recourse to *travaux préparatoires* without any too nice regard for the question whether the text itself is clear".[11] "Considerable weight should be given to the interpretations adopted by an independent body established to supervise the application of the treaty".[12] Relevantly, those bodies are the Committee on the Elimination of Racial Discrimination (**Racial Discrimination Committee**) for the *International Convention on the Elimination of All Forms of Racial Discrimination* (**CERD**) and the Human Rights Committee for the *International Covenant on Civil and Political Rights* (**ICCPR**).

15. ***CERD, Art 4(a) and (b)***: One object of Pt 5.3B is to give effect to treaty obligations under Arts 4(a) and (b) of the CERD (s 114A.1(1)(b)(ii)). Article 4(a) obliges State Parties to "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof". Article 4(b) imposes specific additional obligations to "declare illegal and prohibit organizations … which promote and incite racial discrimination", and to "recognize participation in such organizations … as an offence punishable by law". The term "racial discrimination" is defined to mean "any distinction, exclusion, restriction or preference based on race, colour, descent, 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 human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life" (Art 1(1)).

16. Part 5.3B is reasonably capable of being considered appropriate and adapted to implementing those obligations. Textually, the definition of "hate crime" in s 114A.3 is limited to offences or conduct directed to individuals or groups distinguished by, or because of, race or national or ethnic origin, which therefore falls within the CERD's definition of "racial discrimination". Part 5.3B does not need to adopt the "treaty criterion" precisely (contra

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[10] *Evans v Air Canada* (2025) 99 ALJR 941 at [6] (the Court). See also *CSL Australia Pty Ltd v Tasmanian Ports Corporation Pty Ltd* (2026) 100 ALJR 703 at [4] (Gageler CJ, Gleeson and Jagot JJ), [73] (Gordon and Edelman JJ).

[11] *Evans v Air Canada* (2025) 99 ALJR 941 at [8] (the Court).

[12] *CRI026 v Republic of Nauru* (2018) 92 ALJR 529 at [22] (Kiefel CJ, Gageler and Nettle JJ), citing *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* [2010] ICJ Rep 639 at [66]. See also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates)* [2021] ICJ Rep 71 at [101] (referring to the Racial Discrimination Committee).

PS [38]-[40]). Part 5.3B enables the prohibition of both the activities proscribed by Art 4(a) as well as the organisations that "promote and incite" that conduct consistent with Art 4(b).

17. The background to the CERD confirms that Pt 5.3B is a valid implementation of Art 4.[13] The CERD was precipitated by a global outburst of antisemitic incidents, including swastika paintings, which a United Nations Sub-Commission described as "reminiscent of the crimes and outrages committed by the Nazis prior to and during the Second World War" (**SC [217.2]-[217.3]**). That Sub-Commission recommended "further measures to combat racial and national hatred" after receiving information from governments and NGOs about the widespread operation of antisemitic groups in numerous countries (**SC [217.6]-[217.7]**).

18. In the travaux, there are many references to the specific need to prohibit organisations (**SC [218.2], [218.4], [218.7]**). The Soviet Union's representative said that, before the Second World War, the International League for the Rights of Man "had drawn attention to the threat presented by Hitlerite institutions and had recommended that they should be banned and stigmatized", which was not heeded by the League of Nations and had led to a "catastrophe" (**SCB8 3096**). Article 4(b) was adopted despite concerns raised by the United States, the United Kingdom, Canada and France about the impacts on freedom of speech and association (**SCB8 3094, 3111, 3114, 3116, 3121**). There is nothing in the travaux to suggest that the chapeau to Art 4 required the inclusion of any "carve-out" for particular kinds of speech (contra **PS [41]**). As the Racial Discrimination Committee has explained, the chapeau does not abrogate the clear obligations imposed by Art 4(b) (**SCB9 3272, 3302-3304, 3308, 3319, 3381, 3505-3506**).

19. Indeed, the Racial Discrimination Committee takes the view that: having regard to the preventative or prophylactic purpose of Art 4, State Parties must be vigilant to declare illegal and prohibit organisations that promote or incite racial discrimination at the earliest moment; the protection of persons from being victims of racist hate speech serves to prevent the victims' free speech from being silenced; and measures short of prohibiting organisations as required by Art 4(b) (for example, penalising the members of such organisations for their activities) are inadequate to address the harms that those organisations have the potential to cause (**SC [221]-[222]**). The Committee has expressed concern about the failure of State Parties, including Australia, to implement their obligations under Art 4(b) (**SC [223]**). The Committee has also specifically commented on the failure of State Parties to prohibit political parties, and expressed concerns about extremist political parties, in numerous countries (**SC [224]**).

[13] See also *Toben v Jones* (2003) 129 FCR 515 at [98] (Allsop J).

20. The Full Court of the Federal Court has held that Art 4 of the CERD, as well as Art 20(2) of the ICCPR, enable prophylactic measures. In *Toben v Jones*,[14] Carr J (Kiefel J relevantly agreeing and Allsop J generally agreeing) said it was "clearly consistent with the provisions of the [CERD] and the ICCPR that a State Party should legislate to 'nip in the bud' the doing of offensive, insulting, humiliating or intimidating public acts which are done because of race, colour or national or ethnic origin before such acts can grow into incitement or promotion of racial hatred or discrimination". Another Full Court very recently approved this reasoning.[15]

21. ***ICCPR, Arts 20 and 26***: Part 5.3B also implements Arts 20 and 26 of the ICCPR (read with Art 2(2)), which require State Parties to prohibit "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" and "discrimination … on any ground such as race, colour, … national or social origin".

22. The Human Rights Committee has construed Art 20(2) as "clearly" covering the dissemination of antisemitic material (**SCB11 4246, [8(b)]**; see also the definition provided by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression at **SCB11 4532, [44(b)]**). That accords with Manfred Nowak's view that Art 20(2) "may be sensibly interpreted only in light of its object and purpose, i.e., taking into consideration its ***responsive character*** with regard to the Nazi racial hatred campaigns" and that what the drafters "had in mind was to combat the horrors of fascism, racism and National Socialism at their roots, i.e., to prevent the public incitement of racial hatred and violence within a State or against other States or peoples".[16] Similarly, "discrimination" in Art 26 has been interpreted broadly (**SCB11 4276, [7]**), and includes hate speech (**SCB11 4404, [25]; 4421, [27]**). Nowak has observed that it is "most difficult to conceive of an advocacy of national, racial or religious hatred that does not simultaneously incite discrimination".[17] Part 5.3B is a valid ***means*** of prohibiting conduct of the kind addressed by those treaty obligations, even though it goes further than mere prohibition of such conduct.

23. ***Power to protect the nation***: Only if it is necessary to decide,[18] Pt 5.3B is supported by the implied legislative power to protect the Commonwealth and its people against threats that

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14 (2003) 129 FCR 515 at [20] (Carr J), [50] (Kiefel J), [79] (Allsop J).

15 *Hanson v **Faruqi*** [2026] FCAFC 96 at [125] (Perry, Kennett and Bennett JJ).

16 Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (NP Engel, 2nd rev ed, 2005) 475 (emphasis in original). This treatise has been relied upon by this Court: see *Maloney v The Queen* (2013) 252 CLR 168 at [151] (Kiefel J), [215], [220], [222] (Bell J), [280] (Gageler J); *Minister for Immigration and Border Protection v WZAPN* (2015) 254 CLR 610 at [95] (Gageler J).

17 Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (NP Engel, 2nd rev ed, 2005) 475.

18 *Government of the Russian Federation v Commonwealth* (2025) 99 ALJR 1562 at [25] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), [111] (Edelman J).

would undermine it as a nation.[19] This power enables legislation which proscribes or seeks to prevent violent or subversive activities that can properly be regarded as being a threat to the nation, including violence directed at the people of the nation or its political components.

24. A majority of the Court accepted the existence of this power in the *Communist Party Case*.[20] For example, Dixon J held that the Commonwealth has power "to protect its own existence and the unhindered play of its legitimate activities" (at 188).[21] However, his Honour said that, while the power is "wide", it did not extend to legislation that is "not addressed to suppressing violence or disorder or to some ascertained and existing condition of disturbance and yet does not take the course of forbidding descriptions of conduct or of establishing objective standards or tests of liability upon the subject, but proceeds directly against particular bodies or persons by names or classification or characterization" (at 192). McTiernan J said that "[i]t cannot be doubted that the Commonwealth could make laws, punitive or preventive, for dealing with [the Australian Communist Party] on the basis of their activities, if their activities are shown to be of the required description" (at 212), but the law did not have that character.

25. The power, as Fullagar J said, "may be found to expand very considerably in time of domestic emergency" (at 261). The Court more recently accepted that the implied nationhood power enables response to national emergencies or crises.[22] Views differ whether the power is an independent implied head of power or derived from s 61 of the Constitution read with s 51(xxxix).[23] The source and scope of the power was left open in *Thomas v Mowbray*.[24]

26. The harms to which Pt 5.3B is directed are harms which pose an existential threat ***to the nation***—the nation understood, not merely as a shell to be filled by whomever speaks the

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19 This Court has held legislation to be supported by the power: see *Burns v Ransley* (1949) 79 CLR 101 at 109-110 (Latham CJ), 111 (Rich J), 116 (Dixon J); *R v Sharkey* (1949) 79 CLR 121 at 135 (Latham CJ), 150-151 (Dixon J), 157-158 (McTiernan J), 163 (Webb J). See also *Victoria v Commonwealth (AAP Case)* (1975) 134 CLR 338 at 397 (Mason J); *Church of Scientology* (1982) 154 CLR 25 at 54 (Gibbs CJ); *State Chamber of Commerce and Industry v Commonwealth (Second Fringe Benefits Case)* (1987) 163 CLR 329 at 357 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ); *Tasmanian Dam Case* (1983) 158 CLR 1 at 252 (Deane J).

20 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 188, 192 (Dixon J), 212 (McTiernan J), 231 (Williams J), 259, 261, 266 (Fullagar J), 275 (Kitto J). Latham CJ dissented, but also accepted the existence of a "power to make laws to protect the existence of constitutional government": see 141-142.

21 See also *Davis v Commonwealth* (1988) 166 CLR 79 at 118 (Toohey J); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at [126] (Gummow and Hayne JJ).

22 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at [9] (French CJ), [233], [241]-[242] (Gummow, Crennan and Bell JJ). See also *Williams v Commonwealth* (2012) 248 CLR 156 at [466] (Crennan J).

23 In *Communist Party Case* (1951) 83 CLR 1, Dixon and Fullagar JJ inclined to the former view (at 188 and 260), while McTiernan and Williams JJ inclined to the latter (at 212 and 231).

24 (2007) 233 CLR 307 at [6] (Gleeson CJ), [145] (Gummow and Crennan JJ), [233] (Kirby J), [407] (Hayne J), [582] (Callinan J), [650] (Heydon J).

loudest or most threateningly, but as a cohesive society bound by commitments to democratic principles and the rule of law and in which all members have a fair opportunity to participate in civic life regardless of race, colour, descent, or national or ethnic origin. The groups Pt 5.3B targets threaten the constitutionally prescribed system of representative and responsible government because they: challenge the fundamentals of liberal democracy by making extremist views more acceptable (**SC [136.1], [174.3]**); undermine the rule of law by encouraging the commission of hate and other crimes by their members and increasing the risk of lone wolf attacks by individuals (**SC [85], [86], [136.1], [174.2]**); and intimidate particular individuals and groups and dissuade them from full participation in Australian public and civic life (**SC [179], [180]-[195]**). The threat to democracy posed by hateful rhetoric has been recognised by other courts, including the Supreme Court of Canada (**SC [185]** and [54] below).

27. The threat is national in scope (**SC [75]-[77]**). ASIO has assessed that "[n]ationalist and racist violent extremists are located in all Australian states and territories", and that "[c]ompared with other forms of violent extremism, this threat is more widely dispersed across the country—including in regional and rural areas" (**SC [75]**). The threat is accelerated by the internet and online platforms, which enable a "borderless environment" for extremist groups nationally and globally and are "the world's most potent incubator of extremism" (**SC [77], [140], [141.2], [143.1]**; see also **[113]-[118], [129]-[140], [152]-[163]**). Responding to this threat is peculiarly within the capacity and resources of the Commonwealth, in particular through ASIO and the AFP (**SC [200]-[213]**; see also **[140]-[144], [165]-[173]**). Moreover, Pt 5.3B responds to the threat in circumstances of an *emergency*, being the rapid rise of unsuppressed racial hatred and racially motivated violence which manifested in the Bondi attack and the subsequent proliferation of hatred (**SC [24]-[25], [91]-[105], [164]-[179]**).

28. A group can be specified only where the Director-General provides advice under s 114A.5. The relevant threshold is advocacy of or engagement in politically motivated or communal violence, or activities demonstrating a propensity for such conduct. Further, both the Director-General's satisfaction, as well as the AFP Minister's satisfaction, are jurisdictional facts reviewable by a court in administrative law proceedings challenging a regulation. Part 5.3B is thus readily distinguished from the legislation considered in the *Communist Party Case* (contra **PS [28], [48], [52]**). It *is* "addressed to suppressing violence or disorder or to some ascertained and existing condition of disturbance", *does* "take the course of forbidding descriptions of conduct or of establishing objective standards or tests of liability upon the subject", and *is* a "preventive" law for dealing with hate groups "on the basis of their activities".

C QUESTION 2: IMPLIED FREEDOM OF POLITICAL COMMUNICATION

29. **Burden**: A law imposes an "effective burden" on the implied freedom, and thus requires justification, if it "limits political communication to any extent".[25] Identifying the *nature and extent* of the burden is critical, to "focus and calibrate" the justification inquiry[26] and to dictate the "level of justification required" of the defendant polity.[27] Identifying the nature and extent of the burden requires attention to the impact of the law on political communication *generally,* not on the particular communication in which a particular plaintiff wishes to engage.[28] Burden is not characterised by reference only to the effect on particular individuals or groups.[29] The wider, systemic lens means that the smaller the class of persons whose political communication is affected by a law, the lesser that law's burden.[30] Even a law that significantly restricts the ability of an individual or group to engage in political communication will not infringe the implied freedom if its effect on political communication as a whole is justified.[31]

30. The character of the burden is identified not by reference to particular elements of the law in isolation, but having regard to the impugned law as a whole.[32] Relevant are: (a) the extent to which the law leaves other forms of political communication unaffected;[33] and (b) whether parts of the impugned law reduce or ameliorate the burden, including by promoting or facilitating political communication.[34] Equally, the character of the burden is identified bearing in mind other laws that may simultaneously burden the implied freedom. The burden that requires justification is only the "incremental burden" that the impugned law imposes *over and above* the existing (validly imposed) law.[35]

31. ***Part 5.3B does not itself burden the implied freedom***: The Plaintiffs' challenge is directed at the level of the statute, to Pt 5.3B of the *Criminal Code.* Part 5.3B does not of itself

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[25] *Comcare v **Banerji*** (2019) 267 CLR 373 at [29] (Kiefel CJ, Bell, Keane and Nettle JJ).

[26] ***Hopper** v Victoria* (2026) 100 ALJR 582 at [28] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ). See also *Ruddick v Commonwealth* (2022) 275 CLR 333 at [82] (Gageler J); *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at [156] (Gordon J).

[27] ***Clubb** v Edwards* (2019) 267 CLR 171 at [369] (Gordon J).

[28] ***LibertyWorks** Inc v The Commonwealth* (2021) 274 CLR 1 at [77] (Kiefel CJ, Keane and Gleeson JJ), [135] (Gordon J).

[29] ***Brown*** (2017) 261 CLR 328 at [90] (Kiefel CJ, Bell and Keane JJ).

[30] *LibertyWorks* (2021) 274 CLR 1 at [74] (Kiefel CJ, Keane and Gleeson JJ).

[31] *Banerji* (2019) 267 CLR 373 at [20] (Kiefel CJ, Bell, Keane and Nettle JJ).

[32] See, eg, *Wotton v Queensland* (2012) 246 CLR 1 at [36] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

[33] *LibertyWorks* (2021) 274 CLR 1 at [74] (Kiefel CJ, Keane and Gleeson JJ); ***McCloy** v New South Wales* (2015) 257 CLR 178 at [93] (French CJ, Kiefel, Bell and Keane JJ).

[34] See *McCloy* (2015) 257 CLR 178 at [13], [24] (French CJ, Kiefel, Bell and Keane JJ), [159] (Gageler J).

[35] *Brown* (2017) 261 CLR 328 at [109] (Kiefel CJ, Bell and Keane JJ), [181], [188] (Gageler J), [259] (Nettle J), [304], [357], [393], [397], [411], [419]-[420] (Gordon J), [557]-[563], [565] (Edelman J).

"limit political communication to any extent" (*cf* **PS [62]** and **FSU [24]**).[36] It is *only* the making of a prohibited hate group regulation under s 5(1) of the *Criminal Code Act* (read with s 114A.2(1)) that could, in a given case, impose a burden on political communication.

32. The Plaintiffs do not challenge the Regulations. The Plaintiffs therefore assume the burden of showing that the empowering provisions have *no valid operation*.[37] If the empowering provisions *could be* validly exercised, then the Court should not strike them down. At least because the empowering provisions could be exercised to specify groups with no discernible interest in communicating on government or political matters, they are capable of being justified across a range of potential outcomes of their exercise[38] (without any need to speculate whether the provisions are valid in all their potential applications). The challenge to Pt 5.3B as framed necessarily fails at this point of the inquiry. The Court could decide the case on that basis—respecting the Plaintiffs' decision not to challenge the Regulations—which would incentivise plaintiffs to conform their forensic choices to the Court's well-publicised prudential approach.

33. The balance of these submissions proceeds on the alternative basis that the Court considers it appropriate to decide the validity of Pt 5.3B in its application to the Regulations by hypothesising whether the Regulations, if made as primary legislation, would infringe the implied freedom, with the hypothetical consequence that they are beyond power. Even if that is the appropriate level of analysis, the challenge still fails.

34. ***Nature and extent of the burden***: The Plaintiffs' case on burden involves two false premises. The *first* is that burden in this case is to be assessed as though the "specified organisation" is in substance "a political party" or a "political association" (**PS [64]**). For the reasons at [4]-[5] above, that is not an appropriate characterisation of the First Plaintiff. Even if the burden must take its character from the practical impact on the First Plaintiff's ability to engage in the political process, it must equally take its character from the practical circumstance that that political project is a cover for continuing the activities of NSN/EAM and a violent neo-Nazi ideology, the suppression of which is readily justifiable.

35. The *second* false premise is that the communication engaged in by the First Plaintiff and its members is "protected by the Constitution" (**PS [63]**), that is, as though the whole of the

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[36] The Defendants oppose the application to intervene as amicus curiae filed by the FSU for the reasons provided to the Registry by email dated 7 August 2026. In response to that email, the Deputy Registrar asked the parties to address the submissions made by any intervener in their submissions.

[37] ***Palmer*** *v Western Australia* (2021) 272 CLR 505 at [65]-[68] (Kiefel CJ and Keane J), [123] (Gageler J), [201]-[202] (Gordon J), [219]-[220] (Edelman J); ***Ravbar*** *v Commonwealth* (2025) 99 ALJR 1000 at [228] (Edelman J).

[38] See *Palmer* (2021) 272 CLR 505 at [123] (Gageler J).

restrictions which are placed on them are to be attributed to Pt 5.3B (and the Regulations). That approach is wrong, because the communication routinely engaged in by the First Plaintiff and its members (see **SC [39]-[68]** and [5] above) is independently unlawful under provisions the validity of which are not challenged: see the definition of "hate crime" in s 114A.3, including the offences listed in s 114A.3(1)(a), and those covered s 114A.3(2), including the State/Territory provisions listed in s 114A.3(3).

36. The incremental burden imposed by Pt 5.3B read with the Regulations is more modest. *First,* the First Plaintiff *as an organisation* is deprived of the capacity to engage in political communication (because the activities criminalised by Div 114B would substantially undermine the operation of the group). *Secondly,* the members of the First Plaintiff cannot associate or communicate *as members*.[39] Lawful communication can still be engaged in by members individually or as members of other organisations. In the context of political communication generally, a small class of persons, and communication, is affected.

37. Further, the burden is not directed to communication or publication about governmental or political matters, or communication at all.[40] Whether a person contravenes Div 114B depends upon the capacity in which, and the manner in which, that person acts—not upon the content of anything that person says. Part 5.3B does not impose a burden upon "communication which target[s] ideas or information", or upon the "character" of such ideas or information, but at most upon "an activity or mode of communication by which ideas or information are transmitted".[41] It is the disruption of *the organisation* that burdens communication *by it* and by would-be members *as members*, but communication by individuals including would-be members is otherwise left untouched.

38. The burden is content-neutral: it is not directed to any particular points of view, or communication about specified topics, nor can it be described as "discriminatory" (*cf* **PS [65]**).[42] While any given regulation will target a particular hate group, the empowering provisions first require politically neutral advice from the Director-General as to their satisfaction that the activities of the group "would or are likely to increase the risk of politically motivated violence, or the promotion of communal violence" (s 114A.5(1)(a)(ii)) as well as ultimate satisfaction of the politically accountable Minister as to the group's involvement in

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39 See *Ravbar* (2025) 99 ALJR 1000 at [39] (Gageler CJ), [435] (Beech-Jones J).

40 *Hopper* (2026) 100 ALJR 582 at [30] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ).

41 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 143 (Mason CJ); see also at 234-235 (McHugh J).

42 See ***Farmer*** *v Minister for Home Affairs* (2025) 99 ALJR 1408 at [249]-[250] (Jagot J).

hate crimes (see s 114A.4(1)) and the need to prevent the objective harm caused by the group's continued operation (s 114A.4(1)(b)). Part 5.3B does not allow, in any way, proscription based on the political persuasion of the ideas or class of ideas that are espoused by the group in question (*cf* **PS [77]-[79]**).[43] So much is exemplified by the fact that the only other prohibited hate group is Hizb ut-Tahrir, an international Islamist movement (see **SC [27]**).

39. The extent of the burden is mitigated by the obligation on the AFP Minister to make a declaration which has the effect of ceasing a prohibited hate group regulation if the Minister ceases to be satisfied that it is reasonably necessary: s 114A.8(1). Any prohibition under the regulations is therefore limited not only in subject-matter but also duration, by reference to the continued existence of the state of affairs that warrants it.

40. **<u>Legitimate purpose</u>**: Identifying the purpose of a law—the "mischief" to which it is directed—is a process of construction, which starts with any express objects, elucidated where necessary by other aspects of text or context.[44] A purpose is legitimate unless it is incompatible with the maintenance of the constitutionally prescribed system of representative and responsible government.[45] While identifying purpose is a question of construction, assessment of the significance of the purpose may depend upon the Court's satisfaction "of the existence of facts on which the [polity's] justification for the burden depends".[46]

41. Section 114A.1(1) identifies a purpose of Pt 5.3B as being to "protect the Australian community or part of the Australian community" against specified forms of harm. The identification of the statutory purpose at a level of specificity appropriate to the constitutional analysis in this case is assisted by recourse to other aspects of the text and context. Along with the express emphasis on "conduct constituting a hate crime" in the explication of "harm" in s 114A.1(1)-(2), the pre-requisite to the making of a regulation in s 114A.4(1) requires satisfaction on the part of the AFP Minister that the organisation "has engaged in, prepared or planned to engage in, or assisted the engagement in, *conduct constituting a hate crime*" or "advocated *engaging in conduct constituting a hate crime*" (emphasis added). There is also a pre-requisite that the Director-General be satisfied that the organisation's *activities* entail certain risks of politically motivated or communal violence (s 114A.5(1)).

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43 The various criticisms of definitions of antisemitism at **PS [78]-[79]** are irrelevant and beside the point.

44 *Unions NSW v New South Wales* (2019) 264 CLR 595 (***Unions (No 2)***) at [79] (Gageler J). See also *Hopper* (2026) 100 ALJR 582 at [45] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ); ***Alexander*** *v Minister for Home Affairs* (2022) 276 CLR 336 at [119] (Gageler J).

45 *Brown* (2017) 261 CLR 328 at [102]-[104] (Kiefel CJ, Bell and Keane JJ), [207] (Gageler J).

46 *Unions NSW v New South Wales* (2023) 277 CLR 627 at [31] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ).

42. The Revised Explanatory Memorandum is similarly focused on the *conduct* which emanates from hate groups and the consequences of that conduct. It explained that the reforms were "necessary to address the rising levels of antisemitic and other hate speech, violence and extremism in Australia" (at 2 [1]), that the amplification of racial hate by such organisations "threatens the lives and safety of the Australian community" (at 13 [38]) including "the safety and security of persons or groups distinguished by a certain attribute" (at 16 [57]), that the law "target[s] conduct likely to foster violence" (at 27 [135]), "directly impacts the group's ability to grow and spread violent extremist and hateful rhetoric and engage in conduct constituting a hate crime" (at 27 [138]), and responds to the "severity of the danger posed by prohibited hate groups" (at 28 [143]). It further recognised that the conduct engaged in by prohibited hate groups "prevents targeted groups and their members from fully and safely participating in our democracy and society" and "poses challenges to Australia's security" (at 62 [101]).

43. In her Second Reading Speech,[47] the Attorney-General emphasised that the Bill "targets those that support violence, in particular violence targeted at a person because of their immutable attributes", conduct which "is the seed of extremism, the roots of terrorism" (at 125); that it targets "serious conduct of a serious nature" and that the threshold of the Director-General's satisfaction is "deliberately high", and ensures the "definition is tied to security risk and public safety, not mere commentary, and not mere offence", that the line "is drawn where it should be drawn: at serious harm—harm of a kind that meets a criminal standard threshold", and that the Bill was designed to "combat hate, dismantle extremist networks and prevent violence before it occurs" (at 126).

44. The purpose must therefore be understood to be concerned with the *protection* of the community from particular types of *conduct,* in three ways. The first is protecting the community from conduct that seriously harms the community or parts thereof. The second is protecting the security of the Commonwealth more generally against such conduct. The third is protecting the system of representative democracy from such conduct. Adopting an appropriate level of specificity for the constitutional analysis in this case, the purpose is best described as **protecting the Australian community from organisations that engage in conduct that seriously harms the community, and poses a threat to the security of the Commonwealth and the system of representative democracy.** That statement of purpose should be amplified by reference to s 114A.1(1)(b), recording the object of giving effect to Australia's international

[47] Commonwealth, *Parliamentary Debates*, House of Representatives, 20 January 2026 at 125-128 (Hon Michelle Rowland, Attorney-General).

legal obligations. The legitimacy and importance of the purpose is advanced by the circumstance that it has been pursued in compliance with such obligations.[48]

45. The Plaintiffs' attempt to read the objects provision as though the object is to protect the community from forms of disagreeable political speech or from the *mere* existence of hate groups in society seriously misconstrues the statute (*cf* **PS [68]-[72]**). Nothing in Pt 5.3B is directed to the expression of particular speech. Whether an organisation may be specified depends on an assessment of the risk it poses by its conduct; Pt 5.3B would operate in the same way on organisations which engage in no political speech at all. It is also directly contradicted by the extrinsic material (see Second Reading Speech at 126, quoted at [43] above).

46. The suppressed premise of the Plaintiffs' submission is that Nazi ideology is legitimate political speech. It is not. History demonstrates why it is not. And the Australian Constitution does not require that space be made for neo-Nazi organisations—at the ballot box or otherwise.

47. ***Legitimacy and significance of the identified purpose***: The purpose of Pt 5.3B is plainly compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. The protection of persons from serious harm is legitimate.[49] The protection of the security of the Commonwealth is legitimate.[50] And the protection of the system of representative democracy (for example, by enhancing equal participation) is not only consistent with the constitutionally prescribed system, it positively enhances it.[51]

48. The purpose is also a compelling "powerful public, protective purpose" which assumes a "special importance" at the justification stage.[52] *First,* historical experience demonstrates that the spread of ideologies rooted in racial hatred and discrimination can manifest in catastrophic violence and prejudice to the security of nation states (see **SC [217.2]-[217.4]**).[53] In Australia, the Bondi attack which targeted the Jewish community killed 15 people and injured many more (**SC [15]**, **[20]**); and the Christchurch attack of 15 March 2019, committed by an Australian citizen who was associated with right-wing extremism (**SC [89]**), killed 51 people (**SC [69]**).

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48 See, by analogy, *R v Keegstra* [1990] 3 SCR 697 at 750, 754; *Canada (Human Rights Commission) v Taylor* [1990] 3 SCR 892 at 919-920.

49 Compare, for example, *Clubb* (2019) 267 CLR 171 at [60] (Kiefel CJ, Bell and Keane JJ), [197] (Gageler J). See also *Farmer* (2025) 99 ALJR 1408 at [54]-[55] (Gageler CJ, Gordon and Beech-Jones JJ), [246] (Jagot J).

50 See *Clubb* (2019) 267 CLR 171 at [196] (Gageler J); *Ravbar* (2025) 99 ALJR 1000 at [174] (Edelman J).

51 See *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at [261] (Callinan J). See also the authorities cited in footnotes 64 and 65 below.

52 *LibertyWorks* (2021) 274 CLR 1 at [85] (Kiefel CJ, Keane and Gleeson JJ).

53 See also the Court's own knowledge of society as permitted by, eg, *Maloney v The Queen* (2013) 252 CLR 168 at [351] (Gageler J); *Thomas v Mowbray* (2007) 233 CLR 307 at [621]-[639] (Heydon J).

49. *Secondly,* the incitement and spread of racial hatred and discrimination has an inherent tendency to escalate into acts that threaten lives, national security and social cohesion (**SC [78]-[88]**, **[90]**, **[179]**). ASIO has repeatedly assessed that the Christchurch attack "has been drawn on for inspiration by right-wing or ideologically motivated extremists, both in Australia and internationally" (**SC [69]**). As the Revised Explanatory Memorandum records of the Bondi attack, conduct of that kind "does not occur in isolation", but "often begins with dehumanising rhetoric and escalates over time into acts that threaten lives, national security and social cohesion" (at 62 [101]).[54] The significance of the threat posed to the security of the Commonwealth by hate groups has grown in recent years (**SC [70]-[71], [91]-[105]**, **[164]-[179]**), amplified by the volume and reach achieved via online platforms (**SC [109]-[139]**).

50. *Thirdly,* hate groups and the concomitant spread of racist rhetoric and discrimination prevent the targeted groups and individuals from fully and safely participating in democracy, including by discouraging the exchange of political ideas (**SC [106]-[108]**, **[179]**, **[180]-[199]**; see also [42] above and [54] below).

51. **<u>Justification</u>**: The compelling nature of the purpose of Pt 5.3B (and the Regulations) is one which may "justify very large incursions on the freedom"[55] and the burden is "more readily justified … than might otherwise be the case".[56] Part 5.3B and the Regulations are reasonably appropriate and adapted to that compelling purpose, for these reasons.

52. *First,* the mischief to which they are directed is grave and worsening (**SC [100]-[105]**). In his 2025 Threat Assessment, the Director-General stated that he expected "nationalist and racist violent extremists to continue their efforts to 'mainstream' and expand their movement" and that the "greatest threat of violence comes from individuals on the periphery of these organised groups" (**SC [103]**). In 2026, he said he was "gravely concerned" by the "temperature and trajectory" of the terrorism threat, that "the likelihood of violence has increased", and that social media is "creating a permissive environment for violence" (**SC [105]**).

53. *Secondly*, the risk of conduct which Pt 5.3B aims to prevent is generated by the existence *as such* of the organisation (and in the context of the Regulations, WA). Radicalisation is "almost universally acknowledged as a group phenomenon in which social relations and networks play a key role in preparing people to commit extremist violence", and "participation

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54 See also Commonwealth, *Parliamentary Debates*, House of Representatives, 20 January 2026 at 125 (Hon Michelle Rowland, Attorney-General).

55 *McCloy* (2015) 257 CLR 178 at [84]; see also at [86] (French CJ, Kiefel, Bell and Keane JJ).

56 *Clubb* (2019) 267 CLR 171 at [99] (Kiefel CJ, Bell and Keane JJ).

in a group enables a range of processes that may facilitate the use of violence, including a solidifying of dehumanising thinking, an increased perception of crisis and belief in the use of violence as a legitimate tool" (**SC [84]**). Peer-reviewed studies have shown, for example: (a) in the United States hate crimes are much more likely to occur in counties with active white supremacist chapters, the presence of which is associated with 285 more hate crimes per 10,000 residents (**SC [80]**), and (b) 62% of lone actor terrorists had contact with clearly radical, extremist or terrorist individuals and 31% were recognised members or participants in such groups; "even marginal or passive participation … can have significant influences on the adoption and maintenance of the motive to commit acts of extremist violence" (**SC [81]**). Group dynamics—peer pressure, internalised codes of honour, "group extremity shift"—push members to more extreme actions (**SC [78], [79], [83]**). ASIO's assessments are to similar effect and assess the greatest threat of violence from individuals on the periphery of nationalist and racist violent extremist groups (**SC [87]**). Scholars recognise a "wider ecosystem of sympathisers, supporters, and ideologically adjacent individuals", which "creates conditions conducive to spontaneous or stochastic acts of violence" (**SC [90]**).

54. *Thirdly,* the burden is readily justified because the affected class of communication has the potential to undermine the constitutionally prescribed system of government, with the effect of preserving and enhancing that system.[57] This is demonstrated by the preconditions upon the making of a prohibited hate group regulation, which require satisfaction of the risk posed by the relevant organisation.[58] There is a close analogy with legislation safeguarding the integrity of the electoral process, which the Court has held to enhance the constitutionally prescribed system.[59] As Part F of the Special Case demonstrates (**SCB1 82-94**) the communication engaged in by the First Plaintiff (through its membership) routinely involves the hatred and denigration of people of particular races or religions. The potential for speech of this kind to *undermine* democratic processes is well-recognised by courts in other jurisdictions.[60] The Full Court of the Federal Court has recently accepted that the "experience of racism can cause exclusion from public life, marginalisation, restriction, exclusion, inhibition and self-censorship, all of which

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[57] *McCloy* (2015) 257 CLR 178 at [45] (French CJ, Kiefel, Bell and Keane JJ).

[58] Sections 114A.4 and 114A.5 of the *Criminal Code.* Compare *Farmer* (2025) 99 ALJR 1408 at [250] (Jagot J), observing that a focus on the risks posed by a visa applicant, "if anything, tend[s] to enhance rather than undermine the form of representative and responsible government which the Constitution entrenches".

[59] See, eg, *Unions (No 2)* (2019) 264 CLR 595 at [31] (Kiefel CJ, Bell and Keane JJ), [71]-[72] (Gageler J), [189]-[190] (Edelman J); *Babet v Commonwealth* (2025) 99 ALJR 883 at [90] (Gordon J).

[60] See, eg, in the Canadian constitutional context: *R v Keegstra* [1990] 3 SCR 697 at 763-766 and *Saskatchewan (Human Rights Commission) v Whatcott* [2013] 1 SCR 467 at [104], [114]-[117], [120] (the Court). See also *Sangathan v Union of India* [2014] INSC 180 at [7] (Chauhan J); *Qwelane v South African Human Rights Commission* [2021] ZACC 22 at [1], [78] (the Court).

can cause the victims of racism to be marginalised and disengaged from the political process".[61] Racially motivated groups and racist rhetoric limit full participation in public life by the targeted individuals and groups: **SC [186]-[199]**.

55. *Fourthly,* the means adopted meet the mischief at the point at which the facts in the Special Case demonstrate it is generated. Because it is the existence, growth and operation of the organisation that elevates the risk, Div 114B attaches consequences to membership of the group, to directing its activities, to recruiting for it, to training connected with it, to providing it with support or resources, and to the movement of funds to or from it. It thereby deprives the organisation of those capacities—to grow, to resource itself and to recruit—which are the source of the risk of conduct from which Pt 5.3B is designed to protect the community. That answers directly the rhetorical question as to necessity posed at **FSU [64]**.

56. *Fifthly,* the scheme is closely confined. Specification requires the written advice of the Director-General and the AFP Minister's satisfaction that it is reasonably necessary (ss 114A.4, 114A.5), which are both jurisdictional facts reviewable by a court in an administrative law challenge to a regulation. Also, specification is by disallowable instrument subject to parliamentary scrutiny; the Parliamentary Joint Committee on Intelligence and Security has reviewed the listings of WA and Hizb ut-Tahrir and found no reason to disallow either listing (**SC [30]**).[62] And a specification does not outlast the state of affairs that warrants it: s 114A.8(1) (*cf* **PS [81]** suggesting that the listing is "immune from fairness or review"). The alternative tailoring posed at **FSU [65]** of excluding so-called "political parties" would render the law ineffective to achieve its purpose. That is exemplified by the conduct of the Plaintiffs, who perceive that "political party status" will confer legal protection on their hate speech (**SC [49], [51]**). It is also consistent with the historical context for the CERD (**SC [217.6]**), the travaux (**SC [218.2.3]**) and the views of the Racial Discrimination Committee (**SC [224]**) specifically addressing the harms caused by antisemitic political parties.

57. *Sixthly,* the Plaintiffs gain no succour from the fact that the burden is incremental upon pre-existing criminal laws (*cf* **PS [81]**). The overlap is with offences directed at individuals for discrete criminal acts. It is not with any law directed at the *organisational risk* identified at [53] above. Moreover, mere criminalisation of discrete conduct (**SC [214]**) has been demonstrably inadequate to deal with the rising threat of hate groups—the AFP, for example, has stated that

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61 *Faruqi* [2026] FCAFC 96 at [185]-[186] (Perry, Kennett and Bennett JJ); see also at [154]. See also *Sunol v Collier (No 2)* (2012) 289 ALR 128 at [86] (Basten JA).

62 Parliamentary Joint Committee on Intelligence and Security, *Review of the Listing of White Australia as a Prohibited Hate Group under the Criminal Code* (August 2026).

the activity of NSN did not "actually hit a threshold in terms of criminal offending, but the behaviour is concerning in terms of them pushing towards the line": **SC [64]**. Various other measures were in place (**SC [214]-[215]**) throughout the period in which the incidence of hate crime rose (**SC [91]-[99]**), in which the Director-General repeatedly voiced his assessment of the threat (**SC [100]-[105]**), and in which the Bondi attack occurred (**SC [15]**, **[20]**).

D QUESTION 3: CHAPTER III

58. The test for whether a non-judicial power is punitive has two stages.[63] The first stage asks whether the power has a "prima facie punitive character (by default or otherwise)". If so, at the second stage, the power will be punitive unless it is "reasonably capable of being seen to be necessary (in the relevant sense of 'reasonably appropriate and adapted' …) for a legitimate and non-punitive purpose". Part 5.3B is not properly characterised as punitive, at either stage.

59. Part 5.3B is not prima facie punitive. Specifying a prohibited hate group exposes individuals to various offences associated with the group. Whether any person commits any offence will be determined by a court in accordance with the ordinary criminal procedure. Those offences fasten upon conduct that occurs *after* the group is specified, rather than purporting to punish members of the group for conduct that occurred only before specification.

60. Part 5.3B does not interfere with human life, bodily integrity, or liberty (which is plainly the case in respect of the First Plaintiff, a body corporate).[64] Contrary to **PS [99], [101]**, there is no analogy to *Alexander*.[65] Part 5.3B does not acquire any property of a prohibited hate group or make it liable to forfeiture (contra **PS [92]-[93]**). Forfeiture is "confiscation of property as a penalty or sanction for unlawful conduct".[66] The "mere fact of an interference with the control of property does not itself make the law prima facie punitive".[67] Section 114B.5 creates offences relating to dealing with the funds of a prohibited hate group, but it does not confiscate property. In fact, the group's funds may be used for a small number of specified purposes.

61. Even if Pt 5.3B were prima facie punitive, the power is reasonably capable of being seen as reasonably appropriate and adapted to a non-punitive purpose, for the same reasons that the law does not impermissibly burden the implied freedom (discussed above). Although

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63 ***YBFZ*** *v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at [18] (Gageler CJ, Gordon, Gleeson and Jagot JJ).
64 *YBFZ* (2024) 99 ALJR 1 at [12] (Gageler CJ, Gordon, Gleeson and Jagot JJ).
65 (2022) 276 CLR 336.
66 *Ravbar* (2025) 99 ALJR 1000 at [412] (Jagot J, Gageler CJ agreeing at [15]).
67 *Ravbar* (2025) 99 ALJR 1000 at [157] (Gordon J, Gleeson J agreeing at [305] and Beech-Jones J agreeing at [423]), [407] (Jagot J, Gageler CJ agreeing at [15]), *cf* [256] (Edelman J).

specification of a group may involve an assessment by the AFP Minister under s 114A.4 that an organisation, or its members, have engaged in criminal conduct (*cf* **PS [87]-[90]**), the operation of Pt 5.3B "does not adopt, and does not fasten upon" any actual or alleged breaches of some "antecedent standard of conduct" in the relevant sense.[68] Nor is it any part of the purpose to exact "retribution" for the conduct of an organisation or its members.[69] An assessment by the Minister that an organisation or its members may have engaged in hate crimes, for example, does not result in the "legislative imposition … of punishment", nor does it impose any "legal burden" on any persons.[70] It is not an "adjudgment of guilt" (contra **PS [98]**). Rather, as discussed above, it merely opens the gate for the making of a legislative instrument which engages new norms of conduct. Equally, Pt 5.3B is not a bill of attainder or a bill of pains and penalties (contra **PS [103]**). It does not involve a "legislative determination of breach by some person of some antecedent standard of conduct", nor the "legislative imposition on that person … of punishment consequent on that determination of breach".[71] In particular, s 114B.2 does not make the historical fact of membership a crime; a person only commits a crime if *they* decide not to take reasonable steps to cease to be a member as soon as practicable.[72] Further, the class of persons to which the section may apply depends upon the particular groups specified and the conduct and knowledge of particular individuals.[73]

E CONCLUSION ON SPECIAL CASE QUESTIONS

62. The questions should be answered: (1) No; (2) No; (3) No; (4) None; (5) The Plaintiffs.

PART VI: ESTIMATE OF TIME

63. The Defendants estimate that they will require 4 hours for oral argument.

Dated: 14 August 2026

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[68] ***Duncan*** *v New South Wales* (2015) 255 CLR 388 at [43]-[44] (the Court).
[69] *Cf Benbrika v Minister for Home Affairs* (2023) 280 CLR 1 at [23] (Kiefel CJ, Gageler, Gleeson and Jagot JJ); *YBFZ* (2024) 99 ALJR 1 at [137] (Edelman J).
[70] *Duncan* (2015) 255 CLR 388 at [43]-[44] (the Court).
[71] *Duncan* (2015) 255 CLR 388 at [43]. See also *Ravbar* (2025) 99 ALJR 1000 at [155] (Gordon J, Gleeson J agreeing at [305] and Beech-Jones J agreeing at [423]), [409] (Jagot J, Gageler CJ agreeing at [15]).
[72] *Communist Party of United States v Subversive Activities Control Board*, 367 US 1 (1961) 86-88; *cf Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 649 (Dawson J).
[73] *Cf Ravbar* (2025) 99 ALJR 1000 at [154] (Gordon J, Gleeson J agreeing at [305] and Beech-Jones J agreeing at [423]).

ANNEXURE TO THE DEFENDANTS' SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date(s)
		Australian legislation			
1.	Constitution	Current	ss 51(xxix), 51(xxxix), 61; Ch III	Currently in force	All relevant times
2.	*Australian Security Intelligence Organisation Act 1979* (Cth)	Current	ss 7, 8(4), 9, 10, 13, 20	Currently in force	All relevant times
3.	*Commonwealth Electoral Act 1918* (Cth)	Current	ss 4, 126	Currently in force	All relevant times
4.	*Communist Party Dissolution Act 1950* (Cth)	As enacted	All	Act considered in the *Communist Party Case*	At time of decision in the *Communist Party Case*
5.	*Criminal Code Act 1995* (Cth)	Current	s 5; Sch, Pt 5.3B; Dictionary	Currently in force	All relevant times
6.	*Criminal Code (Prohibited Hate Group—White Australia Regulations 2026* (Cth)	Current	All	Currently in force	All relevant times
		International conventions			
7.	*International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195	Current	Arts 1, 4	Currently in force	All relevant times

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date(s)
	(entered into force 4 January 1969); [1975] ATS 40				
8.	*International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); [1980] ATS 23	Current	Arts 2, 20, 26	Currently in force	All relevant times
9.	*Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980); [1974] ATS 2	Current	Arts 4, 31, 32	Currently in force	All relevant times