HIGH COURT OF AUSTRALIA

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Details of Filing

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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

THE COMMONWEALTH OF AUSTRALIA
First Defendant

THE ATTORNEY-GENERAL OF THE COMMONWEALTH
Second Defendant

SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES (INTERVENING)

PART I — CERTIFICATION

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

PARTS II & III — INTERVENTION

2. The Attorney General for New South Wales (**NSW**) intervenes in this proceeding pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the Defendants (**Commonwealth**).

PART IV — ARGUMENT

A. SUMMARY

3. NSW submits:

   (a) As to Question 1 of the special case, if the Court is satisfied that Part 5.3B is a law with respect to external affairs, then it is unnecessary to decide whether the law would also be supported by an implied nationhood power of the kind for which the Commonwealth contends.

   (b) Question 2 of the special case should be answered "no". Part 5.3B of the *Criminal Code* (Cth) does not impermissibly burden the implied freedom of political communication.

   (c) Question 3 of the special case should be answered "no". Part 5.3B does not infringe Chapter III of the Constitution.

B. HEAD OF POWER

4. NSW does not seek to be heard on whether Part 5.3B of the *Criminal Code* (Cth) is supported by a head of power, save for the following.

5. Consistently with prudential considerations,[1] if the Court finds that Part 5.3B is supported by the external affairs power then, as the Commonwealth submits (**CS [23]**), it is unnecessary to determine, and the Court should not determine, whether it would also be supported by an "implied nationhood" power. The boundaries of such a power are largely unexplored.[2] In delineating those boundaries, care must be taken not to disturb the "distribution of powers carefully effected by the Constitution" as between the Commonwealth and the States.[3] There is reason to

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1 ***YBFZ** v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 17 [47] (Gageler CJ, Gordon, Gleeson and Jagot JJ); *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at 248 [57] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

2 *Commonwealth v Tasmania* (1983) 158 CLR 1 at 252 (Deane J); *Victoria v Commonwealth (**AAP Case**)* (1975) 134 CLR 338 at 362 (Barwick CJ).

3 *AAP Case* (1975) 134 CLR 338 at 378 (Mason J). See also *AAP Case* at 398 (Mason J) and 364 (Barwick CJ); *Commonwealth v Tasmania* (1983) 158 CLR 1 at 252 (Deane J); *Davis v*

be circumspect in endorsing too broad a conception of Commonwealth power to respond to threats "under some general rubric such as 'national concern' or 'national emergency'", absent an express head of legislative power other than s 51(xxxix).[4]

6. It follows that, if Part 5.3B is supported by s 51(xxix), it is unnecessary to consider whether it is also be supported by the posited "implied legislative power to protect the Commonwealth against threats that would undermine it as a nation": **CS [23]**. As noted at **CS fn 18**, that prudential approach is consistent with that taken by this Court in *Government of the Russian Federation v Commonwealth*.[5]

C. IMPLIED FREEDOM

7. The implied freedom of political communication is a "qualified limitation on legislative power implied in order to ensure that the people of the Commonwealth may 'exercise a free and informed choice as electors'".[6] The implied freedom "is not unlimited and is not absolute".[7] It is a limit on power that "invalidates a law that so burdens freedom of communication on governmental or political matters that the impugned law may be taken to affect the system of government for which the Constitution provides, a system which depends for its existence upon that freedom".[8]

Commonwealth (1988) 166 CLR 79 at 93-94 (Mason CJ, Deane and Gaudron JJ), 103-104 (Wilson and Dawson JJ) and 117-119 (Toohey J).

4 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at [10] (French CJ), citing *Australian Communist Party v Commonwealth (Communist Party Case)* (1951) 83 CLR 1 at 187 (Dixon J).

5 (2025) 99 ALJR 1562; [2025] HCA 44 at 1571 [25] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ) and 1588 [111] (Edelman J).

6 ***McCloy*** *v New South Wales* (2015) 257 CLR 178 at [2] (French CJ, Kiefel, Bell and Keane JJ), quoting ***Lange*** *v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

7 ***Farmer*** *v Minister for Home Affairs* (2025) 99 ALJR 1408 at 1421 [37] (Gageler CJ, Gordon and Beech-Jones JJ), citing *Unions NSW v New South Wales* (2013) 252 CLR 530 (***Unions No 1***) at 548 [18]-[19] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

8 *Farmer* (2025) 99 ALJR 1408 at 1421 [37] (Gageler CJ, Gordon and Beech-Jones JJ).

8. The question of whether an impugned law impermissibly burdens the freedom is a now "orthodox and familiar inquiry",[9] which falls to be assessed by reference to three questions:[10]

(d) Does the impugned law effectively burden freedom of political communication about governmental or political matters in its terms, operation or effect?

(e) Is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

(f) Is the impugned law reasonably appropriate and adapted to advance that purpose in a manner compatible with the maintenance of that constitutionally prescribed system of government?

C1. Burden

9. The first step in the analysis is the "threshold"[11] issue of whether the impugned law effectively burdens the freedom of communication about government and political matters.[12] No question of constitutional invalidity arises unless the Plaintiffs can demonstrate an effective burden on the freedom.[13]

10. To ask whether a law "effectively burdens" freedom of political communication is to ask whether "the effect of the law is to prohibit, or put some limitation on,

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9 ***Ravbar*** *v Commonwealth* (2025) 99 ALJR 1000; [2025] HCA 25 at 1017 [27] (Gageler CJ).

10 ***Hopper*** *v Victoria* (2026) 100 ALJR 582; [2026] HCA 11 at 592 [27] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ), 603 [84] (Edelman J); *Ravbar* (2025) 99 ALJR 1000; [2025] HCA 25 at 1017 [27] (Gageler CJ), 1031 [101] (Gordon J), 1053 [212] (Edelman J), 1097 [425] (Beech-Jones J); *Farmer* (2025) 99 ALJR 1408; [2025] HCA 38 at 1421 [39] (Gageler CJ, Gordon and Beech-Jones JJ).

11 ***Babet*** *v Commonwealth* (2025) 99 ALJR 883; [2025] HCA 21 at 900 [72], 907 [104] (Gordon J); ***LibertyWorks*** *Inc v Commonwealth* (2021) 274 CLR 1 at 28 [63] (Kiefel CJ, Keane and Gleeson JJ).

12 ***Brown*** *v Tasmania* (2017) 261 CLR 328 at 360 [90] (Kiefel CJ, Bell and Keane JJ).

13 *Babet* (2025) 99 ALJR 883; [2025] HCA 21 at 931 [219] (Gleeson J); *Brown* (2017) 261 CLR 328 at 369 [127] (Kiefel CJ, Bell and Keane JJ); *Unions NSW v New South Wales* (2019) 264 CLR 595 (***Unions No 2***) at 654 [162] (Edelman J).

the making or the content of political communications".[14] This question falls to be answered by reference to the legal and practical operation of the law.[15]

11. If a burden is identified, the nature and extent of that burden informs the justification analysis.[16] A slight burden will be more readily justified than a substantial one.[17] Identifying the nature and extent of the burden imposed by the impugned law "serves to focus and to calibrate the inquiry" as to whether the impugned laws are reasonably appropriated and adapted to serve a legitimate end.[18] In this regard, it is only the incremental burden imposed by a law that requires justification.[19] The relevant burden "lies in the incremental effect of [a] law on the real-world ability of a person or persons to make or to receive communications which are capable of bearing on electoral choice".[20]

12. For the reasons given at **CS [31]-[32]**, Part 5.3B does not, of itself, burden the implied freedom of political communication. The arguments advanced by the Plaintiffs are, in substance, complaints about the exercise of the regulation-making power under s 5(1) of the *Criminal Code Act 1995* (Cth). The Plaintiffs do not, however, challenge the making of the *Criminal Code (Prohibited Hate Group—White Australia) Regulations 2026* (Cth) (the **Regulations**). Their challenge is to the validity of Part 5.3B as a whole.

13. That the Plaintiffs do not challenge the validity of the Regulations is significant.

14 *Farmer* (2025) 99 ALJR 1408 at 1421 [40] (Gageler CJ, Gordon and Beech-Jones JJ), quoting *Monis v The Queen* (2013) 249 CLR 92 at 142 [108] (Hayne J).

15 ***Tajjour*** *v New South Wales* (2014) 254 CLR 508 at 578 [145] (Gageler J); *Brown* (2017) 261 CLR 328 at 382 [180] (Gageler J), 398 [237] (Nettle J); *Unions No 2* (2019) 264 CLR 595 at 654 [162] (Edelman J).

16 *LibertyWorks* (2021) 274 CLR 1 at 28 [63] (Kiefel CJ, Keane and Gleeson JJ), 53 [136] (Gordon J); ***Farm Transparency*** *International Ltd v New South Wales* (2022) 277 CLR 537 at [26], [36] (Kiefel CJ and Keane J), [175] (Gordon J).

17 *Brown* (2017) 261 CLR 328 at [128] (Kiefel CJ, Bell and Keane JJ).

18 *Hopper* (2026) 100 ALJR 582 at [28] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ); *Farm Transparency* (2022) 277 CLR 537 at 588 [156] (Gordon J). See also *Tajjour* (2014) 254 CLR 508 at 580-581 [151] (Gageler J); *Brown* (2017) 261 CLR 328 at 378 [164] (Gageler J).

19 See **CS [30]** and the authorities there cited.

20 *Brown* (2017) 261 CLR 328 at 386 [188] (Gageler J).

14. Prudential considerations make it inappropriate to address, in the abstract, "whether a burden imposed through the exercise of a statutory discretion is justified across the range of potential outcomes of the exercise of that discretion".[21] Part 5.3B would not be invalid merely because it conferred a statutory discretion which might unlawfully be exercised in a particular case. Unless the Court were satisfied (which it would not be) that the statutory discretion could not in any circumstances be validly exercised (for example, to specify a group with no interest in communicating on government or political matters), Part 5.3B would not be constitutionally invalid. Instead, purported exercises of the statutory discretion would be subject to judicial review in the usual way. Once this is appreciated, it is apparent that the Plaintiffs' challenge to the validity of Part 5.3B as a whole fails at the threshold.

15. Even if, however, the Plaintiffs had cast their challenge at the level of the Regulations, that challenge would fail as the regulation-making power under s 5(1) of the *Criminal Code Act 1995* (Cth) was relevantly exercised conformably with the implied freedom.

16. There are a number of features of Part 5.3B that limit the extent of the incremental burden imposed by the Regulations. Several limbs of the definition of a "hate crime" are tethered to conduct that is already an offence under a law of the Commonwealth, a State or a Territory: subs-ss 114A.3(1), (2). In the context of New South Wales, the relevant law is s 93ZAA of the *Crimes Act 1900* (NSW): *Criminal Code* (Cth), s 114A.3(3)(a). Section 93ZAA(1) makes it an offence publicly to incite hatred towards another person or group of persons on the ground of race, by a public act, where that public act would reasonably cause the target to fear for their safety, or to fear harassment, intimidation or violence. Insofar as s 114A.3(5) characterises as a "hate crime" certain categories of conduct without expressly requiring that conduct to constitute an offence, the nature of the conduct to which the subsection is directed (e.g. causing death or serious harm to a person,

21 *Palmer v Western Australia* (2021) 272 CLR 505 at 547 [123] (Gageler J).

or serious property damage) is such that it is likely to overlap substantially with existing criminal offence provisions, or otherwise be unlawful.

17. Further, the preconditions for the making of a regulation under Part 5.3B are focused on the *conduct* of the organisation rather than the *content* of its communications. A burden on political communication will more readily be justified by "laws which…incidentally restrict political communication" than by "laws which prohibit or regulate communications which are inherently political or a necessary ingredient of political communication".[22] Part 5.3B, read with the Regulations, falls into the former category. The specification of an entity as a "prohibited hate group" is predicated on particular states of satisfaction having been reached with respect to the conduct of the organisation:

(a) The Director-General of Security must be satisfied that the organisation has advocated for or engaged in certain activities, as specified in s 114A.5(1).[23]

(b) The AFP Minister must be satisfied on reasonable grounds that the organisation has engaged in, prepared or planned to engage in, or assisted the engagement in, conduct constituting a hate crime, or has advocated engaging in conduct constituting a hate crime: s 114A.4(1)(a). Each limb of the definition of a "hate crime" refers to specified "conduct", being conduct which is either expressly unlawful or of a level of seriousness that it is likely to be so: see [16] above.

18. Further, the Minister's assessment as to the reasonable necessity of specification is based on an objective assessment of harm – namely, whether a specification is reasonably necessary to protect the Australian community (or parts thereof) against one or more of the harms specified in s 114A.1(1)(a).

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[22] *Wotton v Queensland* (2012) 246 CLR 1 at 16 [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ). See also *Hogan v Hinch* (2011) 243 CLR 506 at 555-556 [95]-[96] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 169 (Deane and Toohey JJ).

[23] Advice from the Director-General to this effect is a precondition to the AFP Minister making a recommendation under s 114A.4(1): s 114A.5(2).

19. In those circumstances, the central criterion by reference to which Part 5.3B operates is not the viewpoint of the organisation, but the conduct in which it has engaged or advocated, and the harm that may flow from that conduct. The Plaintiffs' submission that "the law singles out communication by reference to its viewpoint" does not engage with these core features of the legislation: cf **PS [65]**.

20. The Plaintiffs' submission that Part 5.3B is "discriminatory" should also be rejected: cf **PS [65]**. Part 5.3B is readily distinguishable from a law which targets "protestors"[24] or a law which discriminates between established political actors and non-established participants in the political system:[25] cf **PS fn 31**. The Plaintiffs' submissions do not clearly identify the class of persons at whom the impugned law is said to be directed. To the extent that it is posited to be "political associations engaged in political advocacy" (**PS [63]**), that is incorrect. The statutory test is neutral as to whether organisations are "political". Nor does it target "political advocacy". It is not a form of political advocacy to "publicly incit[e] hatred" of another person or a group of persons "because of the race or national origin of the target" (s 114A.3(2)) or to cause serious harm or damage to a person or their property because of a belief that they are "distinguished by race or national or ethnic origin" (s 114A.4(5)(b)).

21. Insofar as the "discrimination" is said to follow from the "anticipated effect" (**PS [65]**) of the conduct, that is not referable to the identity of any particular class of person engaging in that conduct or to whether the conduct is "political". Rather, the assessment required by s 114A.4(1)(b) is as to the reasonable necessity of specifying the organisation as a prohibited hate group in order to protect against the harm identified in s 114A.4(1)(a). That assessment is neutral as to whether the organisation is "political" or engaged in "political" advocacy.

22. In any event, even if the law had a differential operation with respect to some (unspecified) class of persons or organisations, the fact that a law operates differentially does not of itself mean that it effects a greater burden on the

[24] See, e.g., *Brown* (2017) 261 CLR 328 at 361 [92] (Kiefel CJ, Bell and Keane JJ).

[25] See, e.g., *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 145-146 (Mason CJ).

freedom.[26] Rather, the differential operation of a law serves "to identify the group targeted by a law and informs the assessment of the restrictions imposed by the law upon the ability of those persons to communicate on matters of politics and government".[27]

23. For the reasons that follow, the burden effected by Part 5.3B and the Regulations is reasonably appropriate and adapted to the legitimate end served by the impugned laws.

C2. Legitimate purpose

24. The purpose of a law is to be ascertained objectively, by reference to ordinary principles of statutory construction.[28] The purpose of legislation is "the ultimate goal or end to be achieved", and is conceptually distinct from the reasons for pursuing that purpose, the means used to achieve that purpose, or the foreseeable or actual effect of the legislation.[29] It corresponds to the mischief to which a provision is directed.[30] For constitutional purposes, "the level of generality at which the purpose of a law is best described will depend on what constitutional analysis is being undertaken".[31] In the implied freedom context, a particular distinction is drawn "between the purpose of a law and the specific means utilised to give effect to that purpose".[32] In assessing whether a law is reasonably

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26 *Brown* (2017) 261 CLR 328 at 361 [94] (Kiefel CJ, Bell and Keane JJ).

27 *Brown* (2017) 261 CLR 328 at 361 [95] (Kiefel CJ, Bell and Keane JJ).

28 *Hopper* (2026) 100 ALJR 582 at 595 [45] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ); *Ravbar* (2025) 99 ALJR 1000 at 1043-1044 [172]-[173] (Edelman J); *Brown* (2017) 261 CLR 328 at 362 [96] (Kiefel CJ, Bell and Keane JJ), 391 [208] (Gageler J); *McCloy* (2015) 257 CLR 178 at 212 [67] (French CJ, Kiefel, Bell and Keane JJ); *Unions No 1* (2013) 252 CLR 530 at 557 [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Monis v The Queen* (2013) 249 CLR 92 at 147 [125] (Hayne J).

29 *Ravbar* (2025) 99 ALJR 1000 at 1044 [173] (Edelman J).

30 *Hopper* (2026) 100 ALJR 582 at 595 [45] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ); *Ravbar* (2025) 99 ALJR 1000 at 1044 [173] (Edelman J), 1103 [459] (Beech-Jones J); *LibertyWorks* (2021) 274 CLR 1 at 71 [183] (Gordon J); *Unions No 2* (2019) 264 CLR 595 at 657 [171] (Edelman J); *Brown* (2017) 261 CLR 328 at 363 [101] (Kiefel CJ, Bell and Keane JJ), 392 [208] (Gageler J), 432 [321] (Gordon J).

31 ***Alexander*** *v Minister for Home Affairs* (2022) 276 CLR 336 at 378 [104] (Gageler J).

32 *Hopper* (2026) 100 ALJR 582 at 595 [45] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ), citing *McCloy* (2015) 257 CLR 178 at 205 [40] (French CJ, Kiefel, Bell and Keane JJ). See also

appropriate and adapted, it is necessary to "separate the means adopted from the end that it is designed to pursue".[33]

25. Where "legislation includes an express statement of statutory objects, identification of legislative purpose must start with the objects so stated, and as illuminated, to the extent their expression might be obscure or ambiguous, by the statutory context".[34] Further, where there are statutory objects that are stated expressly, "an additional object that is not only unexpressed but also constitutionally impermissible should not lightly be inferred".[35]

26. A legitimate purpose is one that is compatible with the system of representative and responsible government mandated by the Constitution, in the sense that it "does not impede the functioning of that system and all that it entails".[36] It is not necessary, in this context, to identify a positive relationship between the object of the law and the maintenance of the constitutionally prescribed system of government. A purpose may (and often will) be entirely unrelated to the system of representative and responsible government, and will be legitimate provided it is not incompatible with that system.[37]

27. For the reasons given at **CS [40]-[50]**, it may readily be concluded that the purpose pursued by Part 5.3B is legitimate in the presently relevant sense.

28. The Plaintiffs' submission that the purpose of the law is to protect from harm arising from the "presence of organisations" (**PS [67]**) applies a gloss to the stated purpose in s 114A.1(1)(a) and pays little regard to the operation of Part 5.3B.

Brown (2017) 261 CLR 328 at 362-363 [100] (Kiefel CJ, Bell and Keane JJ), 416 [277] (Nettle J); *Ravbar* (2025) 99 ALJR 1000 at 1034 [121] (Gordon J).

33 *Brown* (2017) 261 CLR 328 at 432-433 [322] (Gordon J). See also *Tajjour* (2014) 254 CLR 508 at 584 [163] (Gageler J).

34 *Unions No 2* (2019) 264 CLR 595 at 627 [79] (Gageler J).

35 *Unions No 2* (2019) 264 CLR 595 at 627 [79] (Gageler J), quoted in *Hopper* (2026) 100 ALJR 582 at 595 [45] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ) and *Ravbar* (2025) 99 ALJR 1000 at 1022 [59] (Gageler CJ).

36 *McCloy* (2015) 257 CLR 178 at 203 [31] (French CJ, Kiefel, Bell and Keane JJ); see also at 194 [2(B)(2)].

37 *Hopper* (2026) 100 ALJR 582 at 613 [136] (Gleeson J); *Brown* (2017) 261 CLR 328 at 363 [102] (Kiefel CJ, Bell and Keane JJ), 432 [321] (Gordon J).

Section 114A.1(1)(a) identifies the first of two objects of Part 5.3B as being to protect the community against the categories of harm there specified, "and from the promotion of violence, by prohibiting organisations that engage in, prepare or plan to engage in, or assist the engagement in, or advocate engaging in, conduct constituting a hate crime". It is clear from that expression of the purpose that it is the *conduct* of organisations, not their mere "presence", that is the identified source of harm.

29. Consistently with that, it is not the mere "presence" or existence of an organisation that can found the state of satisfaction that may enliven the power to make a prohibited hate group regulation. An organisation can only be specified as a prohibited hate group if it has engaged in or advocated the conduct referred to in s 114A.4(1)(a) and if specifying the organisation as a prohibited hate group is reasonably necessary to protect the Australian community against one of the identified forms of harm (s 114A.4(1)(b)). Further, in reaching that state of satisfaction the Minister will be informed by advice provided by the Director-General of Security connecting the activities or advocacy of the organisation to a risk of politically motivated or communal violence: s 114A.5(1).

30. The Plaintiffs gain no assistance from the decision of the Court of Appeal of the Supreme Court of New South Wales in ***Jarrett*** *v New South Wales*.[38] *Jarrett* concerned a challenge to the validity of a law which restricted all forms of public assembly in a nominated geographical area, without reference to the purpose of the public assembly and its actual anticipated impact on social cohesion.[39] In upholding that challenge, the Court of Appeal rejected as illegitimate a purpose of promoting "social cohesion" in the sense of "a degree of calm and protection from dissent and disharmony associated with political activity of others".[40] The Court of Appeal concluded that the "particular conception" of social cohesion it discerned in the legislative purpose was not compatible with the constitutionally prescribed system of responsible and representative government,

38 (2026) 402 FLR 126; [2026] NSWCA 62.

39 (2026) 402 FLR 126 at 129-130 [2]-[4] (Bell CJ, Ward P and Free JA).

40 (2026) 402 FLR 126 at 163 [143] (Bell CJ, Ward P and Free JA).

because it rested on the "notion that the community can and should be protected from political expression" that might be "upsetting, inflammatory and divisive".[41]

31. As the Court of Appeal emphasised, its conclusion was confined to this "particular usage" of "social cohesion" and "should not be understood as signifying that, as a general proposition, maintaining social cohesion is not a legitimate legislative objective".[42] Its reasoning was confined to the particular legislative scheme under which for several weeks "it was not possible to obtain authorisation to hold a public assembly of *any* kind, in relation to *any* topic, subject matter or cause in large areas of Sydney and its surrounding suburbs".[43]

32. There is no analogy between the purpose served by Part 5.3B and the Court's reasoning as to the statutory purpose in *Jarrett*. To characterise a prohibited hate group specification as simply a "permanent" extension of a "temporary restriction on political assembly" is flawed: cf **PS [71]**. It rests on a superficial reading of the reasoning in *Jarrett* and is, in fact, in tension with it. A key concern of the Court of Appeal was that the impugned law discouraged, indiscriminately, "*all forms* of public assembly… irrespective of the purpose of the public assembly and the actual impact (if any) such an assembly may have on social cohesion".[44] In contrast, a prohibited hate group specification is directed to a *particular* group, having regard to the reasonable necessity of specifying that organisation by reference to the particular harms mentioned in s 114A.1(1). That assessment is in turn informed by an analysis of the conduct of that particular organisation in accordance with s 114A.4, having regard to the advice provided by the Director-General of Security under s 114A.5(1).

33. The balance of the Plaintiffs' submissions on "purpose" raise matters which are more appropriately addressed at the third stage of the implied freedom analysis. The submission, expressed absolutely, that the Constitution "does not permit" government to remove actors whose views are "offensive, distressing, divisive

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41 (2026) 402 FLR 126 at 163 [143] (Bell CJ, Ward P and Free JA); see also at 168 [159]-[160].

42 (2026) 402 FLR 126 at 163 [143] (Bell CJ, Ward P and Free JA).

43 (2026) 402 FLR 126 at 130 [4] (Bell CJ, Ward P and Free JA).

44 (2026) 402 FLR 126 at 130 [6] (Bell CJ, Ward P and Free JA).

and psychologically harmful" (**PS [68]-[69]**) is unfounded. It misunderstands the import of this Court's decision in *Monis v The Queen* (2013) 249 CLR 92, as explained by Gageler J in *Clubb v Edwards* (2019) 267 CLR 171 as follows:

> *Coleman*[45] and *Monis* should not be understood as authority for the proposition that a purpose of curtailing unsolicited, unwelcome, uncivil or offensive speech is incompatible with the constitutionally prescribed system of representative and responsible government. … [T]he better explanation of those decisions is that protecting against unwanted or offensive communication is a permissible purpose the capacity of which to justify a burden on freedom of political communication can vary in different contexts. In some contexts, the purpose of protecting against unwanted or offensive communication can be insignificant. In other contexts… the purpose of protecting against unwanted or offensive communication can be compelling.

34. Many of the submissions which the Plaintiffs frame by reference to "purpose" are better understood as alleging a *disconformity* between the purpose the law pursues and the means used to give effect to that purpose. These are considerations "appropriately left to the justification stage".[46]

C3. Justification

35. The third step in the analysis is to ask whether Part 5.3B and the Regulations are reasonably appropriate and adapted to advance the legitimate statutory purpose identified at **CS [44]**.[47] The impugned law is readily justified by reference to that purpose, for the reasons given at **CS [51]-[57]**. The Plaintiff's submissions to the contrary (**PS [73]ff**) proceed on a misidentification of the relevant statutory purpose as "preventing hate crimes" as opposed to protecting the Australian community from *organisations* that engage in conduct that seriously harms the community (see **CS [44]**).

36. Question 2 of the special case should be answered "no".

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45 (2004) 220 CLR 1.

46 *Hopper* (2026) 100 ALJR 582 at 595 [48] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ), citing *Brown* (2017) 261 CLR 328 at 393-394 [215]-[217] (Gageler J).

47 *Hopper* (2026) 100 ALJR 582 at 595-596 [49] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ), 618-619 [164] (Gleeson J); *Farmer* (2025) 99 ALJR 1408 at 1421 [39] (Gageler CJ, Gordon and Beech-Jones JJ), 1460 [243] (Jagot J); *Lange* (1997) 189 CLR 520 at 561-562 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

D. CHAPTER III

37. Part 5.3B is not invalid by reason of the constitutionally mandated separation of the executive and judicial power of the Commonwealth. To the submissions advanced at **CS [58]-[61]**, NSW adds the following.

38. The stated basis for the Plaintiffs' challenge is that Part 5.3B "confers upon the Executive of the Commonwealth powers of adjudication and punishment" which are exclusively judicial functions, such that the law is inconsistent with "the separation of judicial power established by *Boilermakers*[48]": **PS [84]-[85]**. The challenge proceeds on several erroneous premises, including the following.

39. *First*, the submission that Part 5.3B effects a "consequential incarceration of [an organisation's] members and its supporters" (**PS [84]**) mischaracterises the effect of Part 5.3B. Part 5.3B does not effect the incarceration of any individual. Rather, it has the effect of criminalising certain conduct in connection with an organisation once that organisation has been declared a prohibited hate group. A criminal penalty does not follow "immediately and automatically upon the Minister's determination": cf **PS [90]**. The question of whether a given person, following the making of the Regulations, commits one of the offences in Division 114B is a matter that will fall to be determined by a court, in the future, having regard to the elements of the relevant offence and to any available defences. Similarly, the question of penalty will be a matter for judicial determination. The Plaintiffs' submission that a "judicial finding of criminal guilt is replaced by ministerial opinion" (**PS [90]**) misstates the effect of Part 5.3B.

40. The Plaintiffs take issue with the anterior determination that an organisation has engaged in or advocated conduct constituting a hate crime (s 114A.4(1)(a)): **PS [98]**. That overlooks the well-established proposition that it is not an exercise of judicial power for the executive to make its own inquiry and form its own

48 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

opinion about whether a criminal offence has been committed as a step along the way in exercising a statutory power.[49]

41. Accordingly, Part 5.3B does not engage the central concern in *Chu Kheng **Lim** v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 173 CLR 1 that, other than exceptionally, a penal or punitive detriment should be imposed only by "a court exercising judicial power, in the performance of the exclusively judicial function of adjudging and punishing criminal guilt".[50] Since that "constitutional baseline" is not departed from, there is no occasion to consider whether any putative departure is "reasonably capable of being seen as necessary for a legitimate and non-punitive purpose".[51]

42. *Secondly* and relatedly, the Plaintiffs' attempted characterisation of Part 5.3B as a bill of attainder is in error: **PS [103]**. The reason Chapter III prohibits a bill of attainder is that it is a concern of the separation of powers to avoid "trial by legislature".[52] As such, the prohibition "proscribes legislative punishment of specified persons — not of whichever persons might be judicially determined to fit within properly general proscriptions duly enacted in advance".[53] It is engaged by the "legislature adjudging the guilt of a specific individual or specific individuals or imposing punishment upon them".[54] It is not engaged by a law that does not specify any individuals.[55] Nor is it engaged by a law that "leaves it to the courts to determine whether the person charged has engaged in the conduct complained of and whether that conduct is an infringement of the rule

49 *Alexander* (2022) 276 CLR 336 at 380 [109] (Gageler J); *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 at 371-372 [33] (French CJ, Hayne, Kiefel, Bell and Keane JJ), 380 [63] (Gageler J).

50 ***EGH19*** *v Commonwealth* (2026) 100 ALJR 400; [2026] HCA 7 at 411 [19] (Gageler CJ and Gleeson J).

51 *EGH19* (2026) 100 ALJR 400; [2026] HCA 7 at 411 [19] (Gageler CJ and Gleeson J).

52 ***Polyukhovich*** *v Commonwealth* (1991) 172 CLR 501 at 536 (Mason CJ), quoting *United States v Brown*, 381 US 437 (1965) at 442 (Warren CJ).

53 *Polyukhovich* (1991) 172 CLR 501 at 536 (Mason CJ), quoting Laurence Tribe, *American Constitutional Law*, 2nd ed (1988) at 642.

54 *Polyukhovich* (1991) 172 CLR 501 at 536 (Mason CJ).

55 *Ravbar* (2025) 99 ALJR 1000 at 1040 [154] (Gordon J, with whom Gleeson J at 1072 [305] and Beech-Jones J at 1097 [423] agreed).

prescribed".[56] That is precisely the effect of the offence provisions in Division 114B.

43. Question 3 of the special case should be answered "no".

PART V — ESTIMATE OF TIME

44. It is estimated that up to 15 minutes will be required to present NSW's oral argument.

Dated 21 August 2026

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[56] *Polyukhovich* (1991) 172 CLR 501 at 536 (Mason CJ).

ANNEXURE TO INTERVENER'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date(s)
1.	Constitution	Current	ss 51(xxix), 51(xxxix), Ch III	Currently in force	All relevant times
2.	*Crimes Act 1900* (NSW)	Current	s 93ZAA	Currently in force	All relevant times
3.	*Criminal Code Act 1995* (Cth)	Current	s 5; Sch, Pt 5.3B	Currently in force	All relevant times
4.	*Criminal Code (Prohibited Hate Group—White Australia Regulations 2026* (Cth)	Current	All	Currently in force	All relevant times