



## HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA  
MELBOURNE REGISTRY

No. M50/2026

BETWEEN:

**WHITE AUSTRALIA PARTY INC**  
First Plaintiff

and

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**THOMAS ANTHONY SEWELL**  
Second Plaintiff

and

**THE COMMONWEALTH OF AUSTRALIA**  
First Defendant

and

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**THE ATTORNEY-GENERAL OF THE COMMONWEALTH**  
Second Defendant

**SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE  
STATE OF SOUTH AUSTRALIA (INTERVENING)**

## **Part I: PUBLICATION OF SUBMISSIONS**

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

## **Part II: INTERVENTION**

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2. The Attorney-General for the State of South Australia (**South Australia**) intervenes in these proceedings pursuant to s 78A of the *Judiciary Act 1903* (Cth) to advance submissions that are generally in support of the defendants.

## **Part III: LEAVE TO INTERVENE**

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3. Not applicable.

## **Part IV: SUBMISSIONS**

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- 10 4. The Plaintiffs challenge the validity of Pt 5.3B of the *Criminal Code Act 1995* (Cth) (**Code**) on the grounds that (i) it is not a law with respect to any head of Commonwealth legislative power, (ii) it impermissibly burdens the implied freedom of political communication, and (iii) it infringes Ch III of the *Constitution*. For the reasons that follow, South Australia submits that each of these grounds should be rejected and that Pt 5.3B is valid.

### **Part 5.3B is supported by a head of Commonwealth legislative power**

5. For the reasons advanced by the Commonwealth,<sup>1</sup> South Australia contends that Pt 5.3B is supported by the external affairs power contained in s 51(xxix) of the *Constitution* when read together with the *International Covenant on Civil and Political Rights* and the *International Convention on the Elimination of all Forms of Racial Discrimination* to which Australia is a signatory. In particular, South Australia embraces the Commonwealth's submission that:<sup>2</sup>

The ... horrors of National Socialism ... 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.

6. If the Court accepts the Commonwealth's submission on this issue then it will be unnecessary for the Court to consider whether Pt 5.3B can also be supported by an "implied legislative power to protect the Commonwealth and its people against threats that would undermine it as a nation."<sup>3</sup>

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<sup>1</sup> Written Submissions of the Commonwealth, [13]-[22].

<sup>2</sup> Written Submissions of the Commonwealth, [6].

<sup>3</sup> Written Submissions of the Commonwealth, [23]-[28].

7. For the reasons advanced below, South Australia accepts that the Commonwealth does possess a very limited power to protect against existential threats to the Commonwealth as a body politic. However, South Australia does not accept the Commonwealth's submission that such a power is an implied legislative power.

### The power to maintain the Constitution

8. This Court has accepted that the legislative power of the Commonwealth conferred by s 51(xxxix), together with the executive power of the Commonwealth, conferred by s 61, supports legislation that (i) criminalised treason and sedition,<sup>4</sup> (ii) established a corporation and gave it certain powers for the purposes of celebrating Australia's bicentenary,<sup>5</sup> and, (iii) refunded tax payments in order to stimulate the Australian economy in the face of the global financial crisis.<sup>6</sup>
9. With respect, the precise source of the power that supports these laws has not always been clearly elucidated.<sup>7</sup> Importantly, however, it should be noted that a majority of this Court has never endorsed the existence of an "implied" or "inherent" nationhood power, of either a legislative<sup>8</sup> or executive kind.<sup>9</sup>
10. In the absence of a clear identification of the source of power that should be understood to have supported the legislation referred to above, South Australia contends that these laws should be understood to be supported by the conferral of executive power for the "maintenance of the Constitution" to which s 61 expressly extends.<sup>10</sup> This approach is not dependent upon the

<sup>4</sup> *Burns v Ransley* (1949) 79 CLR 101, 109-110 (Latham CJ) (**Burns**); *R v Sharkey* (1949) 79 CLR 121, 135, 137-138 (Latham CJ), 157-158 (McTiernan J), 163 (Webb J) (**Sharkey**); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 156 (Latham CJ), 211-212 (McTiernan J), 230 (Williams J), 233 (Webb J), 275 (Kitto J) (**Communist Party Case**); *Davis v Commonwealth* (1988) 166 CLR 79, 102 (Wilson and Dawson JJ) (**Davis**).

<sup>5</sup> *Davis* (1988) 166 CLR 79.

<sup>6</sup> *Pape v Commissioner of Taxation* (2009) 238 CLR 1 (**Pape**).

<sup>7</sup> Winterton called it "vague" in G Winterton, 'The Relationship between Commonwealth Legislative and Executive Power' (2004) 25 *Adelaide Law Review* 21, 33 and "vague and amorphous" in G Winterton, *Parliament, The Executive and The Governor General: A Constitutional Analysis*, (Melbourne University Press, 1983), 32; Peter Lane has described it variously as "dangerous", "shadowy", a "nationhood allusion" and "will-o'-the-wisp notion": Peter Lane, *Lane's Commentary on the Australian Constitution* (2<sup>nd</sup> ed, 1997), 130-1; Anne Twomey wrote that "Just as an explorer might search for the source of the Nile, so one might search, most likely in vain, for a clear source of the nationhood power", in the Foreword to P Stephenson, *Nationhood, Executive Power and the Australian Constitution* (2022), v.

<sup>8</sup> *Communist Party Case* (1951) 83 CLR 1, 188 (Dixon J).

<sup>9</sup> *Victoria v Commonwealth* (1975) 134 CLR 338, 362 (Barwick CJ), 397 (Mason J) (**AAP Case**); *Pape* (2009) 238 CLR 1, 63-64 [133] (French CJ). By contrast this terminology has been frequently used in academic literature: see the instances collected in A Twomey, 'Pushing the Boundaries of Executive Power – *Pape*, the Prerogative and Nationhood Powers' (2010) 34 *Melbourne University Law Review* 313, 317, fn 32.

<sup>10</sup> *AAP Case* (1975) 134 CLR 338, 406 (Jacobs J); *Davis* (1988) 166 CLR 79, 92-95 (Mason CJ, Deane and Gaudron JJ), 102-103 (Wilson and Dawson JJ), 119 (Toohey J); *Pape* (2009) 238 CLR 1, 83 [215] (Gummow, Crennan and Bell JJ).

drawing of any constitutional implication or any attempt to isolate those matters that might be said to be inherent in the creation of the Commonwealth. Rather, it involves interpreting the text of s 61 in light of the fact that the *Constitution* brought into existence a new polity, the Commonwealth.<sup>11</sup> As Justices Wilson and Dawson said in *Davis*:<sup>12</sup>

10 We are unable to conceive of an implication of the kind described that would not be sufficiently and accurately described in terms of s 61 supported by s 51(xxxix). Indeed, the execution and maintenance of the Constitution and the laws of the Commonwealth are concepts which seem to us to comprehend all that is to be implied ‘from the existence and nature of the Constitution as the foundation of a body politic.’ ... [W]e ... think it desirable to deprecate speaking of implied powers as distinct from the proper scope of the executive power conferred by s 61 lest the use of the term tend to suggest the existence of some new or independent source of power.

The “maintenance” of the *Constitution* in this context means the protection and advancement of the *Constitution*.<sup>13</sup>

11. The *Constitution* referred to in s 61 does not mean simply the document or instrument itself.<sup>14</sup> In *Sharkey*, Chief Justice Latham observed of s 51(xxxix), read with s 61, that<sup>15</sup>

Laws which are directed to the protection and maintenance of the legal and political organization of the Commonwealth and of the Commonwealth in its legal and political relations may properly be enacted under this power.

20 12. So understood, the laws referred to above can be understood to have served the purpose of “maintenance of the Constitution”. Laws of sedition and treason can be seen to be protection of the *Constitution* because, “[t]he survival of the Constitution [is] ... a matter most incidental to the execution of power under it” and “[t]o prevent persons associating together for the purpose of destroying the Constitution is a matter incidental to maintaining it.”<sup>16</sup> As Justices Wilson and Dawson observed in *Davis*, “subversion, sedition and the like are matters of a very special kind, striking, as they do, at the very foundation of the Constitution”.<sup>17</sup>

<sup>11</sup> *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 441 (Isaacs J); *AAP Case* (1975) 134 CLR 338, 119 (Toohey J).

<sup>12</sup> *Davis* (1988) 166 CLR 79, 102-103 (Wilson and Dawson JJ).

<sup>13</sup> G Winterton, *Parliament, The Executive and The Governor General: A Constitutional Analysis*, (Melbourne University Press, 1983), 28.

<sup>14</sup> See *Burns* (1949) 79 CLR 101, 115 (Dixon J).

<sup>15</sup> *Sharkey* (1949) 79 CLR 121, 135 (Latham CJ).

<sup>16</sup> *Communist Party Case* (1951) 83 CLR 1, 259-260 (Fullagar J), quoting *R v Hush; ex parte Devanny* (1932) 48 CLR 487, 506 (Rich J). See also *Burns* (1949) 79 CLR 101, 109-110 (Latham CJ); *Sharkey* (1949) 79 CLR 121, 135, 137-138 (Latham CJ), 148 (Dixon J), 157-158 (McTiernan J), 163 (Webb J); *Communist Party Case* (1951) 83 CLR 1, 156 (Latham CJ), 211-212 (McTiernan J), 230 (Williams J), 233 (Webb J), 275 (Kitto J).

<sup>17</sup> *Davis* (1988) 166 CLR 79, 102 (Wilson and Dawson JJ).

13. The legislation considered in *Davis* can be seen to have served the purpose (in part) of advancing the *Constitution*, in marking a significant event in the history and development of the institutions and political organisation of the polity.<sup>18</sup>

14. The laws that authorised the repayment of taxes in the context of the Global Financial Crisis that were considered in *Pape* can also be seen to have been directed to the maintenance of the *Constitution* in the face of the dire circumstances that presented themselves at that time. In their joint judgment, Justices Gummow, Crennan and Bell likened the circumstances to that of a natural disaster.<sup>19</sup> The unchallenged evidence before the Court was that the crisis was on a scale that had not been seen for half a century: “the most severe and rapid deterioration in the global economy since the Great Depression” and “the most significant economic crisis since the Second World War.”<sup>20</sup>

15. The express extension of the executive power of the Commonwealth to the “maintenance of the Constitution” should be seen to be the source of power which, combined with s 51(xxxix), supported the legislation discussed above. Once this is appreciated, the notion of an implied nationhood power (with all of its attendant ambiguity)<sup>21</sup> falls away.

16. Having located a textual foundation to support laws of the kind identified above, there are several important points to note about the breadth and depth of the power conferred by s 61 for the “maintenance of the Constitution”.

#### 20 Breadth of the “maintenance of the Constitution” power

17. As to breadth, there is no warrant for construing the power to maintain the *Constitution* as a power to take action with respect to matters of “national interest or concern”<sup>22</sup> or “more generally for the protection and advancement of the nation”.<sup>23</sup> The “maintenance of the Constitution” is a much narrower concept. The power

<sup>18</sup> It may be accepted similarly the power to maintain the *Constitution* might be understood as empowering the adoption of national flags and symbols: *Davis* (1988) 166 CLR 79, 111 (Brennan J).

<sup>19</sup> *Pape* (2009) 238 CLR 1, 89 [233] (Gummow, Crennan and Bell JJ).

<sup>20</sup> *Pape* (2009) 238 CLR 1, 26-27 [19] (French CJ), 88 [230] (Gummow, Crennan and Bell JJ).

<sup>21</sup> The “implied nationhood power” has been criticised on this basis by: L Zines and J Stellios, *The High Court and the Constitution* (7<sup>th</sup> ed, 2022), 495-7 (“The concept of ‘nationhood’ is an extremely vague notion from which to draw principles and rules relating to governmental power...”); A Twomey, ‘Pushing the Boundaries of Executive Power – Pape, the Prerogative and Nationhood Powers’ (2010) 34 *Melbourne University Law Review* 313, 317-318.

<sup>22</sup> *AAP Case* (1975) 134 CLR 338, 362 (Barwick CJ), 102 (Wilson and Dawson JJ). The notion of nationhood is not inherent in s 61. Rather, that provision speaks of a polity, the Commonwealth, which existed both before and after nationhood was attained: *Pape* (2009) 238 CLR 1, 190 [539] (Heydon J in dissent), criticising the reasons of Justice Brennan in *Davis* (1988) 166 CLR 79, 110.

<sup>23</sup> *Davis* (1988) 166 CLR 79, 110 (Brennan J).

conferred by s 61 extends to the protection or advancement of the *Constitution*, but as the case law which has developed in relation to s 61 demonstrates, that will only extend to the protection of the Commonwealth from attacks to its constitutional foundation or to its very existence as a polity, and the advancement of the *Constitution* through relatively benign activities such as the Bicentenary celebrations,<sup>24</sup> and such symbolism as the national flag.<sup>25</sup>

18. Further, as has frequently been acknowledged, the breadth of the executive power conferred by s 61 must be construed consistently with the federal character of the *Constitution*.<sup>26</sup> For this reason, the limitation identified by Justice Mason in the *AAP Case* (that is, “it cannot otherwise be carried on for the benefit of the nation”)<sup>27</sup> is an important limitation on the scope of this aspect of the power conferred by s 61.

19. When considering the “cannot otherwise be carried on” limitation, regard must be had not only to the plenary legislative power of the States and Territories, but also to the cooperative features of the *Constitution*, including, not only s 96<sup>28</sup> but also ss 51(xxxvii) and 51(xxxviii). Accordingly, ends that could be achieved by the grant of money on condition by s 96, or by federal cooperation by referral of powers pursuant to s 51(xxxvii) or concurrence pursuant to s 51(xxxviii) may not be the subject of action pursuant to s 61, at least in the absence of urgent necessity.<sup>29</sup>

20. Finally, the extent of the “maintenance of the Constitution” power must also be read in light of s 119 of the Constitution, and the expressly consensual nature of Commonwealth assistance there provided for.<sup>30</sup>

#### Depth of the “maintenance of the Constitution” power

21. The executive power conferred by this aspect of s 61 of the *Constitution* can, in very rare circumstances, take coercive form. For instance, in the case of an emergency threat of

<sup>24</sup> *Davis* (1988) 166 CLR 79.

<sup>25</sup> *Davis* (1988) 166 CLR 79, 111 (Brennan J).

<sup>26</sup> *AAP Case* (1975) 134 CLR 338, 396-398 (Mason J), 111 (Brennan J).

<sup>27</sup> *AAP Case* (1975) 134 CLR 338, 397 (Mason J); *Davis* (1988) 166 CLR 79, 94 (Mason CJ, Deane and Gaudron JJ).

<sup>28</sup> *AAP Case* (1975) 134 CLR 338, 398 (Mason J).

<sup>29</sup> It is not apparent from the reported decision in *Davis* that questions of the practical capacity of the States to undertake activities of the kinds in issue in that case were pressed by the intervening States. In *Pape*, “[t]he intervening States [did] not seriously dispute that only the Commonwealth has the resources available to respond promptly to the present financial crisis on the scale exemplified by the Bonus Act. The submissions of the interveners appear to have been moved more by apprehension of a wide reading of the scope of s 61”: *Pape* (2009) 238 CLR 1, 91 [241] (Gummow, Crennan and Bell JJ).

<sup>30</sup> Section 119 provides that, “The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.” *Sharkey* (1949) 79 CLR 121, 151 (Dixon J).

treason or a natural disaster, the executive power of the Commonwealth would extend to taking such coercive steps as are necessary to defend against the relevant threat to the body politic.<sup>31</sup> However, given the purposive nature of this power, the existence of an occasion for the maintenance of the *Constitution* will not support coercive legislation enacted pursuant to s 51(xxxix) unless it is reasonably capable of being seen to be appropriate and adapted to the nature of the threat. As noted above, the combined operation of ss 51(xxxix) and 61 can be seen to support the creation of coercive offences prohibiting treason and sedition. On the other hand, the coercive operation of s 51(xxxix) in support of measures designed to advance the *Constitution* could only ever be understood to be appropriate and adapted if they are merely facilitative or regulatory in nature.<sup>32</sup>

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22. A useful measure of the depth of the executive power of the Commonwealth to maintain the *Constitution* (indeed, possibly the safest guide),<sup>33</sup> is the scope of those prerogative powers of the Crown which are vested in the Commonwealth by s 61.<sup>34</sup> Whilst those prerogatives are of narrow, and diminishing, scope,<sup>35</sup> each of the laws upheld under ss 51(xxxix) and 61 may be understood to be supported thereunder.

23. If we first consider laws of sedition and treason, the common law has long recognised that reciprocal obligations arise in organised polities: the duty of the sovereign is to govern and protect; the duty of the governed is allegiance and subjection to the sovereign in accordance

<sup>31</sup> In making this submission, South Australia should not be understood as accepting the correctness of the decision of the Full Court of the Federal Court in *Ruddock v Vardalis* (2001) 110 FCR 491 (*Tampa*). On the contrary, South Australia submits that the coercive action considered in that case could not be characterised as being necessary to meet a threat to the body politic. In any event, the reasoning of Chief Justice Black that the *Migration Act 1958* (Cth) had abrogated any non-statutory power to take steps outside of that legislative framework was, with respect, correct: 501-504 [33]-[42]. Doubt appears to have been cast upon the correctness of *Tampa* in several of the judgments in *CPCF v Minister for Immigration* (2015) 255 CLR 514, 567 [149] (Hayne and Bell JJ), 597-600 [266]-[277] (Kiefel J).

<sup>32</sup> *Davis* (1988) 166 CLR 79, 96-101 (Mason CJ, Deane and Gaudron JJ), 115-117 (Brennan J); *Plaintiff M68* (2016) 257 CLR 42, 93 [122] (Gageler J).

<sup>33</sup> J Thomson, 'Executive Power, Scope and Limitations: Some Notes From a Comparative Perspective' (1983) 62 *Texas Law Review* 559; G Winterton, Parliament, *The Executive and the Governor-General: A Constitutional Analysis* (1983), 31-33; G Winterton, 'The Relationship between Commonwealth Legislative and Executive Power' (2004) 25 *Adelaide Law Review* 21, 29-30; B Selway 'All at Sea' (2003) 31(3) *Federal Law Review* 495, 505-6; J Spigelman, 'Public Law and the Executive' (2010) 69(4) *Australian Journal of Public Administration* 345, 351; Catherine Greentree, 'The Commonwealth Executive Power: Historical Constitutional Origins and the Future of the Prerogative' (2020) 43(3) *University of New South Wales Law Journal* 893, 903-904; N Condylis, 'Debating the Nature and Ambit of the Commonwealth's Non-Statutory Executive Power' (2015) 39 *Melbourne University Law Review* 385, 400-402.

<sup>34</sup> *Barton v Commonwealth* (1974) 131 CLR 477, 498 (Mason J). See also *R v Kidman* (1915) 20 CLR 425, 436 (Griffith CJ); *Communist Party Case* (1951) 83 CLR 1, 230 (Williams J); *Pape* (2009) 238 CLR 1, 60 [127] (French CJ).

<sup>34</sup> *Barton v Commonwealth* (1974) 131 CLR 477, 498 (Mason J). See also *R v Kidman* (1915) 20 CLR 425, 436 (Griffith CJ); *Communist Party Case* (1951) 83 CLR 1, 230 (Williams J); *Pape* (2009) 238 CLR 1, 60 [127] (French CJ).

<sup>35</sup> Cf *Pape* (2009) 238 CLR 1, 60 [127] (French CJ).

with the constitution and laws of the country.<sup>36</sup> Offences such as sedition and treason strike at the fundamental basis of the polity by directly undermining it or exciting disaffection against the sovereign, government, or constitution to disturb the “public internal tranquillity” or the peace, order and good government of the state.<sup>37</sup>

24. The celebration of Australia’s Bicentenary may be seen to be a modern outworking of the well-established tradition of marking significant state events and anniversaries, such as coronations, jubilees, and other official ceremonies such as state funerals.<sup>38</sup> The incorporation of a company to organise such activities in *Davis* can be seen as an incidental means of doing so, and in any event the prerogative extends to the establishment of corporations.<sup>39</sup>

25. Finally, the laws upheld in *Pape* can be characterized as the exercise of the prerogative powers that the Executive has to respond swiftly and determinatively in a state of national emergency. As Justices Gummow, Crennan and Bell say in *Pape*:<sup>40</sup>

The Executive Government is the arm of government capable of and empowered to respond to a crisis be it war, natural disaster or a financial crisis on the scale here. This power has its roots in the executive power exercised in the United Kingdom up to the time of the adoption of the Constitution but in form today in Australia it is a power to act on behalf of the federal polity.

26. South Australia makes no submission about whether Part 5.3B of the Code can be supported by ss 51 (xxxix) and 61. However, South Australia submits that if it can be so supported then it will be incumbent on the Commonwealth to demonstrate that Part 5.3B is necessary to protect the Commonwealth from an existential threat, which cannot be achieved in the collective and cooperative exercise of the plenary legislative power of the various States and Territories.

### **Part 5.3B does not impermissibly burden the implied freedom of political communication**

27. For the reasons advanced by the Commonwealth,<sup>41</sup> South Australia contends that Pt 5.3B does not impermissibly burden the implied freedom of political communication.

<sup>36</sup> J Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (1820), 7; *Calvin’s Case* (1609) 7 Co Rep 1a, 4b; 77 ER 377, 382; *Joyce v Director of Public Prosecutions* [1946] AC 347, 366 (Lord Jowitt LC).

<sup>37</sup> See eg *Sharkey* (1949) 79 CLR 121, 158 (McTiernan J), see also 137-138 (Latham CJ), 159-160 (Williams J), 163 (Webb J); *Burns* (1949) 79 CLR 101, 109-110 (Latham CJ), 115 (Dixon J).

<sup>38</sup> The accession of the monarch being automatic by operation of law, “coronation is but a Royal ornament and solemnization”: *Calvin’s Case* (1609) 7 Co Rep 1a, 10b; 77 ER 377, 389a.

<sup>39</sup> J Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (1820), 122-123.

<sup>40</sup> *Pape* (2009) 238 CLR 1, 89 [233] (Gummow, Crennan and Bell JJ). See also *Burmah Oil Co Ltd (Burma Trading) Ltd v Lord Advocate* [1965] AC 75; *Attorney-General v De Keyser’s Royal Hotel Ltd* [1920] AC 508.

<sup>41</sup> Written Submissions of the Commonwealth, [29]-[57].

28. Further, South Australia contends that the present case may present an appropriate vehicle by which the Court may reconsider the correctness of its earlier decision of *McCloy*.<sup>42</sup> The Plaintiffs advance a case which is directed, at least in part, to the test formulated by a majority of this Court in *McCloy*.<sup>43</sup> For the reasons that follow, to the extent that it is necessary to do so,<sup>44</sup> South Australia seeks leave to reopen, and invites the Court to overrule, the decision in *McCloy*.

The decision in *McCloy* should be reopened

29. Applying the *John* factors,<sup>45</sup> South Australia submits that *McCloy* should be reopened. First, whilst it must be accepted that the application of structured proportionality was “carefully worked out in a significant succession of cases”,<sup>46</sup> the weight attributable to this factor is greatly diminished when it is seen that structured proportionality is not “embedded”<sup>47</sup> in the implied freedom jurisprudence, and accordingly its abandonment would be unlikely to have any consequences for previously decided cases.

30. Second, it is accepted that the joint judgment of Chief Justice French and Justices Kiefel, Bell and Keane represented a unified majority endorsement of structured proportionality in *McCloy*.<sup>48</sup> However, that methodology was not accepted by all six members who upheld the impugned laws as valid.<sup>49</sup> Justices Gageler and Gordon instead expressed serious reservations regarding the adoption of structured proportionality testing in the Australian

<sup>42</sup> *McCloy v New South Wales* (2015) 257 CLR 178 (**McCloy**).

<sup>43</sup> Plaintiffs’ Submissions, [61(c)], [73], [75], [81], fns 35 and 36; Notice of a Matter Arising Under the Constitution, [2.4].

<sup>44</sup> Justices Edelman and Steward have expressed the view that the structured proportionality test endorsed by a majority of this Court in *McCloy* has become a doctrinal test such that it should not be departed from unless and until it is formally overruled: *Babet v Commonwealth* (2025) 423 ALR 83, 134 [183]-[184] (Edelman J), 141 [211] (Steward J) (**Babet**); *Ravbar v Commonwealth* (2025) 423 ALR 241, 308 [225] (Edelman J) (**Ravbar**).

<sup>45</sup> *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438-439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ) (**John**).

<sup>46</sup> *John* (1989) 166 CLR 417, 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ). On the development of structured proportionality prior to *McCloy*, see *Babet* (2025) 423 ALR 83, 131 [175] (Edelman J), citing *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 140 [458]-[460] (Kiefel J); *Wotton v Queensland* (2012) 246 CLR 1, 32 [83] (Kiefel J); *Monis v The Queen* (2013) 249 CLR 92, 213-214 [344]-[347] (Crennan, Kiefel and Bell JJ); *Tajjour v New South Wales* (2014) 254 CLR 508, 571 [113] (Crennan, Kiefel and Bell JJ); Kiefel, ‘Proportionality: A Rule of Reason’ (2012) 23 *Public Law Review* 85, 93.

<sup>47</sup> See *Babet* (2025) 423 ALR 83, 133 [179] (Edelman J), 145 [228] (Gleeson J). For the reasons that are developed below, South Australia submits that the test of structured proportionality should be replaced with a reasonable necessity test. The key difference between those tests is that reasonable necessity testing would not engage the adequacy in the balance step of the structured proportionality test. Given that no case has turned on the application of the adequacy in the balance step, it is difficult to understand how abandonment of structured proportionality would call into question earlier decisions.

<sup>48</sup> *McCloy* (2015) 257 CLR 178, 194-195 [2] (French CJ, Kiefel, Bell and Keane JJ).

<sup>49</sup> The majority upholding the impugned laws comprised French CJ, Kiefel, Bell, Keane, Gageler and Gordon JJ: *McCloy* (2015) 257 CLR 178, 196 [5], 200 [22], 221 [94] (French CJ, Kiefel, Bell and Keane JJ), 240-241 [161], 249 [189], 252 [199]-[200] (Gageler J), 290 [345], 295-297 [370]-[382] (Gordon J).

constitutional context.<sup>50</sup> These reservations have persisted, explicitly or implicitly, in the implied freedom jurisprudence of this Court since *McCloy*<sup>51</sup> (including by members of the Court who have felt obliged to apply structured proportionality unless and until it is formally overruled).<sup>52</sup>

31. Third, *McCloy* has yielded no useful result and has in fact led to considerable inconvenience. This is so because despite pursuing the laudable aims of promoting judicial transparency and legal certainty,<sup>53</sup> it has proven in its application to be productive of opacity and ambiguity.<sup>54</sup> This problem is in itself exacerbated by doubts about the status of structured proportionality as either a “tool of analysis” or a “doctrinal test”.<sup>55</sup> Not only does this present complexity for lower courts and litigants,<sup>56</sup> but also for those advising government about the lawfulness of legislative proposals.<sup>57</sup>

32. Fourth, *McCloy* has not been acted on independently in a manner that militates against reconsideration. Given that application of the structured proportionality test is unlikely to have altered the outcome of litigation concerning the implied freedom,<sup>58</sup> it is difficult to understand how its reconsideration would be likely to materially disturb the rights or interests of citizens or polities.

<sup>50</sup> *McCloy* (2015) 257 CLR 178, 234-237 [141]-[148] (Gageler J), 257-258 [221]-[222], 280-281 [309]-[311], 288-289 [338]-[339] (Gordon J). While noting that differences had emerged as to “whether the second limb of the *Lange* test necessitates the consideration of “strict proportionality””, Nettle J did not consider it necessary to “attempt to resolve such differences” in *McCloy*: 267-268 [254]-[255].

<sup>51</sup> *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 71 [101] (Gageler J) (*Murphy*); *Brown v Tasmania* (2017) 261 CLR 328, 376-379 [157]-[166] (Gageler J), 464-468 [429]-[438] (Gordon J) (*Brown*); *Clubb v Edwards*; *Preston v Avery* (2019) 267 CLR 171, 308-311 [400]-[404] (Gordon J) (*Clubb*); *Comcare v Banerji* (2019) 267 CLR 373, 440 [161] (Gordon J); *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1, 78-79 [202] (Edelman J) (*LibertyWorks*); *Ruddick v Commonwealth* (2022) 275 CLR 333, 369-370 [83] (Gageler J); *Unions NSW v New South Wales [No 3]* (2023) 277 CLR 627, 655-656 [71]-[72] (Edelman J); *Babet* (2025) 423 ALR 83, 134 [182]-[184] (Edelman J); *Ravbar* (2025) 423 ALR 241, 305-306 [215]-[219] (Edelman J); *Farmer v Minister for Home Affairs* (2025) 425 ALR 116, 146 [109] (Edelman J) (*Farmer*); *Hopper v Victoria* (2026) 428 ALR 691, 714 [86]-[87] (Edelman J) (*Hopper*).

<sup>52</sup> *Babet* (2025) 423 ALR 83, 134 [183]-[184] (Edelman J), 141 [211]-[212] (Steward J); *Ravbar* (2025) 423 ALR 241, 308 [225] (Edelman J).

<sup>53</sup> *McCloy* (2015) 257 CLR 178, 200-201 [23], 216 [74] (French CJ, Kiefel, Bell and Keane JJ); *Palmer v Western Australia* (2021) 272 CLR 505, 552 [141] (Gageler J) (*Palmer*); *Hopper* (2026) 428 ALR 691, 714 [86] (Edelman J).

<sup>54</sup> *Clubb* (2019) 267 CLR 171, 224 [159] (Gageler J); *Ravbar* (2025) 423 ALR 241, 306 [218] (Edelman J) 327 [291] (Steward J).

<sup>55</sup> *Ravbar* (2025) 423 ALR 241, 306 [217]-[218] (Edelman J), 327 [291] (Steward J). Cf *Babet* (2025) 423 ALR 83, 97 [49] (Gageler CJ and Jagot J), 102-102 [72] (Gordon J), 141 [213] (Gleeson J), 148 [242] (Beech-Jones J).

<sup>56</sup> *Ravbar* (2025) 423 ALR 241, 306 [219] (Edelman J); Jemimah Roberts, ‘Uncertain and Unstructured: The Implied Freedom of Political Communication after *Babet*, *Ravbar* and *Farmer*’ (2026) 0(0) *Alternative Law Journal* 1, 4.

<sup>57</sup> What was initially extolled as a virtue (*McCloy* (2015) 257 CLR 178, 216 [74] (French CJ, Kiefel, Bell and Keane JJ)), can now be seen to be a weakness of structured proportionality (*Ravbar* (2025) 423 ALR 241, 327 [293] (Steward J)).

<sup>58</sup> *Babet* (2025) 423 ALR 83, 133 [179] (Edelman J), 145 [228]-[229] (Gleeson J).

33. For these reasons, South Australia submits that taken together the *John* factors weigh heavily in favour of reopening *McCloy*. However, in weighing the relevant factors, of which the *John* factors are not exhaustive,<sup>59</sup> matters of principle should be afforded the greatest weight.<sup>60</sup> For the reasons that follows, South Australia submits that *McCloy* is plainly wrong.

The decision in *McCloy* should be overruled

10 34. In *McCloy* a majority of this Court held that determination of whether a law that burdens the implied freedom of political communication in pursuit of a legitimate object is reasonably appropriate and adapted to that legitimate object involves “proportionality testing” (which is referred to, in these submissions, as “structured proportionality”) comprising three stages:<sup>61</sup>

34.1. First, is the law *suitable*, “as having a rational connection to the purpose of the provision.”

34.2. Second, is the law *necessary*, “in the sense that there is no obvious and compelling alternative, reasonably practical means of achieving the same purpose which has a less restrictive effect on the freedom”.

34.3. Third, is the law *adequate in its balance*, “a criterion requiring value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.”

20 35. South Australia submits that structured proportionality is flawed for, at least, the following three reasons. First, the test of *suitability* is perfunctory and superfluous; a law that fails at this stage would also fail at the necessity stage.<sup>62</sup>

36. Second, the *adequate in the balance* stage provides insufficient guidance as to the weighing process that it proposes.<sup>63</sup> As such, the “value judgment”<sup>64</sup> that it calls for goes further than judicial evaluation and scrutiny, which have long been accepted as necessary in constitutional adjudication, and thereby invites incursion into the realm of policy

<sup>59</sup> Justice James Edelman, ‘Overturning *Al-Kateb v Godwin*: Unanswered Questions About the Rules of Precedent’ (Speech, Sir Harry Gibbs Memorial Oration, 25 May 2024) 5.

<sup>60</sup> *Vunilagi v The Queen* (2023) 279 CLR 259, 311 [162] (Edelman J).

<sup>61</sup> *McCloy* (2015) 257 CLR 178, 194-195 [2] (French CJ, Kiefel, Bell and Keane JJ).

<sup>62</sup> *Clubb* (2019) 267 CLR 171, 308 [400] (Gordon J); *Babet* (2025) 423 ALR 83, 133 [180]-[181] (Edelman J); *Ravbar* (2025) 423 ALR 241, 305 [215], 307 [221] (Edelman J); *Hopper* (2026) 428 ALR 691, 714 [86]-[87] (Edelman J).

<sup>63</sup> *Brown* (2017) 261 CLR 328, 465 [432], 467 [435] (Gordon J).

<sup>64</sup> *McCloy* (2015) 257 CLR 178, 219-220 [89] (French CJ, Kiefel, Bell and Keane JJ).

preferences.<sup>65</sup> The objection has been framed as the problem of “incommensurability”.<sup>66</sup> The basic rule of balancing has even been criticised by Professor Barak as “too abstract.”<sup>67</sup>

37. Third, structured proportionality is too rigid.<sup>68</sup> Its prescriptive terms finds no adequate foothold in the text and structure of the *Constitution*.<sup>69</sup> Further, its structured nature frustrates principled considerations from “permeat[ing] the entirety of the analysis.”<sup>70</sup> As Chief Justice Gageler has observed: “Constitutional analysis ... cannot be reduced to the application of some pre-determined all-encompassing algorithm”.<sup>71</sup>

38. For these reasons, South Australia submits that *McCloy* should be overruled in so far as it endorsed the test of structured proportionality.

10 39. South Australia submits that instead, this Court should embrace a test of reasonable necessity, for the purpose of determining whether a law that burdens the implied freedom of political communication is reasonably appropriate and adapted to a legitimate end. That form of appropriate and adapted testing has been endorsed by numerous judges of this Court.<sup>72</sup>

40. Necessity testing jettisons the structured stages of *suitability* and *adequate in the balance*. As noted above, it asks whether, “there is no obvious and compelling alternative,

<sup>65</sup> *McCloy* (2015) 257 CLR 178, 236 [145] (Gageler J); *Brown* (2017) 261 CLR 328, 375-376 [160] (Gageler J), 467 [436] (Gordon J); Adrienne Stone, ‘The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication’ (1999) 23(3) *Melbourne University Law Review* 668, 689-691; Leslie Zines, ‘Federalism and Administrative Discretion in Australia, with European Comparisons’ (2000) 28(2) *Federal Law Review* 291, 302; Patrick Elias, ‘Reflections on Judicial Power and Human Rights’ in Alan Bogg, Jacob Rowbottom and Alison L Young (eds), *The Constitution of Social Democracy: Essays in Honour of Keith Ewing* (Bloomsbury, 2020) 3, 10.

<sup>66</sup> Stavros Tsakyrakis, ‘Proportionality: An Assault on Human Rights?’ (2009) 7(3) *International Journal of Constitutional Law* 468, 471-475. For opposing views, see Aharon Barak, ‘Proportionality and Principled Balancing’ (2010) 4(1) *Law & Ethics of Human Rights* 1, 15-16.

<sup>67</sup> Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012), 542, quoted in *McCloy* (2015) 257 CLR 178, 236-237 [146] (Gageler J); *Brown* (2017) 261 CLR 328, 464-465 [430] (Gordon J), quoting Sir Anthony Mason, ‘The Use of Proportionality in Australian Constitutional Law’ (2016) 27 *Public Law Review* 109, 121.

<sup>68</sup> *McCloy* (2015) 257 CLR 178, 234-235 [142], 238 [152] (Gageler J); *Murphy* (2016) 261 CLR 28, 71 [101] (Gageler J); *Brown* (2017) 261 CLR 328, 465-466 [433] (Gordon J), citing Anne Twomey, ‘Proportionality and the Constitution’ (Speech, ALRC Freedoms Symposium, 8 October 2015); *Murphy* (2016) 261 CLR 28, 71 [101] (Gageler J); *Chubb* (2019) 267 CLR 171, 305 [391], 308-309 [401], 309-310 [404] (Gordon J); *Palmer* (2021) 272 CLR 505, 553-555 [144]-[147] (Gageler J).

<sup>69</sup> *Chubb* (2019) 267 CLR 171, 306 [393] (Gordon J); *Babet* (2025) 423 ALR 83, 132-133 [178] (Edelman J), 141 [212] (Steward J).

<sup>70</sup> *McCloy* (2015) 257 CLR 178, 237 [149] (Gageler J).

<sup>71</sup> *Brown* (2017) 261 CLR 328, 376 [161] (Gageler J).

<sup>72</sup> *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 200 [40] (Gleeson CJ) (*Mulholland*); *McCloy* (2015) 257 CLR 178, 234-235 [142], 236 [145], 239 [155] (Gageler J); *LibertyWorks* (2021) 274 CLR 1, 78-79 [202] (Edelman J); *Babet* (2025) 423 ALR 83, 134-135 [183]-[185] (Edelman J); *Ravbar* (2025) 423 ALR 241, 308 [224]-[225] (Edelman J); *Farmer* (2025) 425 ALR 116, 184-185 [258] (Jagot J). The test has also been endorsed in the context of s 92 jurisprudence: *Betfair Pty Ltd v Western Australia [No 1]* (2008) 234 CLR 418, 477 [102]-[103] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ) (*Betfair [No 1]*); *Palmer* (2021) 272 CLR 505, 549-550 [131] (Gageler J).

reasonably practical means of achieving the same purpose which has a less restrictive effect on the freedom”. Importantly, however, that inquiry must be calibrated:<sup>73</sup>

In the application of that standard, much turns on identification of the precise nature and degree of the restriction which each of the impugned provisions imposes on political communication. Much also turns on the identification and characterisation of the end each is designed to achieve.

41. Application of a reasonable necessity test has the consequence that:<sup>74</sup>

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The implied constitutional freedom is a constraint on legislative design. It limits legislative options. The consequence of the implied constitutional freedom is that there are some legitimate ends which cannot be pursued by some means, the result of which in some circumstances is that some ends will not be able to be pursued to the same extent as they might have been pursued absent the implied constitutional freedom. Means which come at too great a cost to the system of representative and responsible government established by the *Constitution* must be abandoned or refined. Means which are overbroad may need to be narrowed.

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42. Reasonable necessity testing is an evaluative task.<sup>75</sup> However, by contrast to structured proportionality, it does not arrogate to the judicial branch the assessment of whether a legitimate end is outweighed by the implied freedom. Rather, both the function of the political branches to select the legitimate ends to be pursued, and the function of the judiciary to scrutinise the means by those ends are pursued, are preserved.<sup>76</sup>

### **Part 5.3B does not infringe Ch III of the *Constitution***

43. For the reasons advanced by the Commonwealth,<sup>77</sup> South Australia agrees that Pt 5.3B is not *prima facie* punitive and, therefore, does not infringe Ch III of the *Constitution*. If, however, it is necessary for the Court to consider whether Pt 5.3B is “reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose”,<sup>78</sup> then South Australia submits that the present case invites consideration of the role that the notion of legitimacy plays in applying that test.

<sup>73</sup> *McCloy* (2015) 257 CLR 178, 239 [156] (Gageler J). As to the critical role of calibration see: *Mulholland* (2004) 220 CLR 181, 200-201 [40]-[41] (Gleeson CJ); *McCloy* (2015) 257 CLR 178, 237 [150] (Gageler J); *Brown* (2017) 261 CLR 328, 377 [164]-[165] (Gageler J); *Clubb* (2019) 267 CLR 171, 229-230 [175]-[178] (Gageler J), 305 [391] (Gordon J); *Unions NSW v New South Wales [No 2]* (2019) 264 CLR 595, 621-622 [65] (Gageler J) (*Unions [No 2]*); *Babet* (2025) 423 ALR 83, 135 [186] (Edelman J); *Ravbar* (2025) 423 ALR 241, 341 [344] (Jagot J); *Hopper* (2026) 428 ALR 691, 700 [28] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ).

<sup>74</sup> *Tajjour v New South Wales* (2014) 254 CLR 508, 585 [163] (Gageler J).

<sup>75</sup> *McCloy* (2015) 257 CLR 178, 280-281 [309] (Gordon J); *Clubb* (2019) 267 CLR 171, 308-309 [400]-[401] (Gordon J); *Palmer* (2021) 272 CLR 505, 551 [136], 554-55 [147]; (Gageler J); *Betfair [No 1]* (2008) 234 CLR 418, 477 [102] (Gleeson CJ).

<sup>76</sup> *Clubb* (2019) 267 CLR 171, 337 [478] (Edelman J); *Palmer* (2021) 272 CLR 505, 598 [267] (Edelman J).

<sup>77</sup> Written Submissions of the Commonwealth, [59]-[60].

<sup>78</sup> *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137, 157 [39] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ) (*NZYQ*).

44. In *Lim* it was held that “putting to one side exceptional cases ... the involuntary detention of a citizen in custody by the State is penal or punitive in character”.<sup>79</sup> Since *Lim* was decided, it has been recognised that the kinds of detriment the imposition of which may be characterised as punitive extends well beyond detention in custody. Other kinds of detriment that have been recognised as punitive have been the stripping of citizenship,<sup>80</sup> the imposition of curfews,<sup>81</sup> and electronic monitoring.<sup>82</sup> It may be that the central concern of Ch III in designating the task of adjudicating and punishing criminal guilt exclusively upon courts is the protection of life, bodily integrity, and liberty from arbitrary interference.<sup>83</sup> However, it is not suggested in the authorities that the relevant notion of detriment is constrained by these notions.<sup>84</sup> Indeed, on one view, the imposition of any, non-trivial, detriment might potentially amount to punishment.<sup>85</sup>

45. Subsequent to the acknowledgment in those cases that followed *Lim* that the constitutional limitation identified in *Lim* was not confined to laws authorising detention, the limitation has been articulated in the following terms:<sup>86</sup>

[A] Commonwealth law purporting to impose a detriment of a nature and severity which warrants prima facie characterisation as penal or punitive other than through the exercise by a court of the judicial power of the Commonwealth in the performance of the function of adjudging and punishing criminal guilt, will contravene Ch III of the *Constitution* unless the law is reasonable capable of being seen to be necessary for a legitimate and non-punitive purpose.

46. Two things should be noted about the notion of a legitimate purpose as it bears upon the application of the *Lim* principle. First, the notion of legitimacy is separate and additional to the notion of non-punitive.<sup>87</sup> Non-punitive purposes are purposes other than the “purposes of punishment”.<sup>88</sup> Legitimacy, by contrast, looks to the nature of the public interest sought

<sup>79</sup> *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ) (**Lim**).

<sup>80</sup> *Alexander v Minister for Home Affairs* (2022) 276 CLR 336, 368-369 [75], 371 [82] (Kiefel CJ, Keane and Gleeson JJ), 402 [173] (Gordon J), 427-429 [247]-[253] (Edelman J).

<sup>81</sup> *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1, 18 [52] (Gageler CJ, Gordon, Gleeson and Jagot JJ) (**YBFZ**).

<sup>82</sup> *YBFZ* (2024) 99 ALJR 1, 20 [63] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

<sup>83</sup> *YBFZ* (2024) 99 ALJR 1, 10 [9], 11 [12], [14] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

<sup>84</sup> *YBFZ* (2024) 99 ALJR 1, 56-57 [241]-[243] (Beech-Jones J).

<sup>85</sup> *YBFZ* (2024) 99 ALJR 1, 37 [141] (Edelman J); *Ravbar* (2025) 423 ALR 241, 359 [408] (Jagot J).

<sup>86</sup> *EGH19 v Commonwealth* (2026) 100 ALJR 400, 410 [14] (Gageler CJ and Gleeson J).

<sup>87</sup> *NZYQ* (2023) 280 CLR 137, 157 [40] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

<sup>88</sup> *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582, 592 [22] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ). See also, in the context of the implied freedom: *Unions [No 2]* (2019) 264 CLR 595, 658 [175], 674 [222] (Edelman J) and in the context of s 92 of the Constitution: *Palmer* (2021) 272 CLR 505, 530 [62] (Kiefel CJ and Keane J), 538 [97]-[98] (Gageler J), 575 [205] (Gordon J), 599 [269] (Edelman J).

to be protected and enhanced.<sup>89</sup> Second, the requirement of legitimacy must be understood to form part of a wholistic test by which the purpose of an impugned law may be characterised.<sup>90</sup>

47. It has been said in some of the post-*Lim* authorities that a Commonwealth law will only be reasonably capable of being seen to be necessary for the legitimate purpose of protecting the community from harm where the harm which it is directed to ward against can be said to be “grave and specific”.<sup>91</sup> Whilst this may be accepted, it should be noted that this high standard has been required in those cases where the detriment in question amounted to detention in custody, or detriments held to be materially equivalent.<sup>92</sup>

10 48. Whilst criteria of gravity and specificity will always be relevant to an assessment of legitimacy, they should not be taken to amount to a fixed threshold standard applicable irrespective of the nature and extent of the detriment. Rather, the extent of the gravity and specificity of the harm must be calibrated within the rubric of the broader wholistic inquiry. As Justice Beech-Jones recently noted:<sup>93</sup>

The more severe the detriment and the more closely it is associated with punishment, the narrower the range of legitimate purposes for imposing the detriment and the more difficult it will be to characterise the power to impose it as reasonably capable of being seen as necessary for such a purpose.

20 49. It follows that whilst a grave and specific threat of harm may be required to legitimise a law that imposes detention, a more moderate and generalised harm may sustain the legitimacy of a law that imposes a lesser form of detriment.

50. In the present case, it is plain that the relevant detriments imposed by Part 5.3B, if any, are of a different order to those that accompany detention. Accordingly, it is not necessary to justify such detriments by reference to a grave and specific harm.

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<sup>89</sup> *Brown* (2017) 261 CLR 328, 390 [209] (Gageler J), quoting *Cunliffe v Commonwealth* (1994) 182 CLR 272, 300 (Mason CJ).

<sup>90</sup> *YBFZ* (2024) 99 ALJR 1, 56 [239] (Beech-Jones J).

<sup>91</sup> *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, 113-114, 115-116 (Gageler J); *Garlett v Western Australia* (2022) 277 CLR 1, 53 [145], [148] (Gageler J), 71 [190] (Gordon J); *EGH19* (2026) 100 ALJR 400, 416-417 [47] (Gageler CJ and Gleeson J), 425 [85] (Gordon J).

<sup>92</sup> *YBFZ* (2024) 99 ALJR 1, 23 [82] (Gageler CJ, Gordon, Gleeson and Jagot JJ). Cf *EGH19* (2026) 100 ALJR 400, 416-417 [47] (Gageler CJ and Gleeson J), 425 [85] (Gordon J).

<sup>93</sup> *YBFZ* (2024) 99 ALJR 1, 56 [239] (Beech-Jones J).

**Part V: TIME ESTIMATE**

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51. It is estimated that up to 30 minutes will be required for the presentation of South Australia's oral argument.

Dated: 21 August 2026



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IN THE HIGH COURT OF AUSTRALIA  
MELBOURNE REGISTRY

No. M50/2026

BETWEEN:

**WHITE AUSTRALIA PARTY INC**  
First Plaintiff

and

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**THOMAS ANTHONY SEWELL**  
Second Plaintiff

and

**THE COMMONWEALTH OF AUSTRALIA**  
First Defendant

and

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**THE ATTORNEY-GENERAL OF THE COMMONWEALTH**  
Second Defendant

**ANNEXURE**  
**PROVISIONS REFERRED TO IN THE SUBMISSIONS OF THE**  
**ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA**  
**(INTERVENING)**

| No. | Description                         | Version | Provisions                                                   | Reason for providing this version | Applicable date or dates |
|-----|-------------------------------------|---------|--------------------------------------------------------------|-----------------------------------|--------------------------|
| 1.  | <i>Constitution</i>                 | Current | ss 51(xxix), 51(xxxix), 51(xxxvii), 51(xxxviii), 61, 96, 119 | In force at all relevant times    | All relevant times       |
| 2.  | <i>Criminal Code Act 1995 (Cth)</i> | Current | Pt 5.3B                                                      | In force at all relevant times    | All relevant times       |