Details of Filing

File Number:	M50/2026
File Title:	White Australia Party Inc. & Anor v. The Commonwealth of A
Registry:	Melbourne
Document filed:	Form 27C - Intervener's Submissions (A-G of Tas)
Filing party:	Interveners
Date filed:	21 Aug 2026

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 THE STATE OF TASMANIA (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 the State of Tasmania (**Tasmania**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the Defendants.

PART IV: SUBMISSIONS

A. QUESTION 1: HEAD OF POWER

3. In relation to the first question stated for the opinion of the Full Court, Tasmania agrees with the Defendants' submission that Part 5.3B of the *Criminal Code* (Cth) is supported by the external affairs power (**DS [13]-[22]**). The first question may be answered on that basis without any need to consider whether Part 5.3B is supported by the implied nationhood power. Tasmania does not seek to make submissions regarding any reliance the Defendants might place upon the implied nationhood power.

B. QUESTION 2: IMPLIED FREEDOM

4. The Plaintiffs argue that Part 5.3B impermissibly burdens the implied freedom of political communication. They argue that the statutory scheme "empowers the Executive permanently to destroy a political association and criminalise membership, support and participation in it" and to "eliminate a political speaker from the constitutional system" (**PS [59]**). However, properly characterised, Part 5.3B is not directed to political associations, political parties or political speakers, but to organisations which engage in or encourage hate crime. Its focus is upon protecting the community from harm and from the promotion of violence arising from the conduct of such groups. It does so by enabling such organisations to be specified by regulation, thereby enlivening offence provisions for any persons involved in or supporting the activities of such an organisation in the manner set out in Division 114B.

5. The implied freedom cannot be used as a means to undermine[1] the very system of representative and responsible government which it has been identified to protect.[2]

6. The test to be used in assessing whether the implied freedom of political communication has been infringed was recently described in *Hopper v Victoria*:[3]

> Whether an impugned law is invalid for impermissibly burdening the implied freedom of political communication falls to be assessed by reference to three well-established questions: (1) Does the impugned law effectively burden freedom of communication about governmental or political matters in its terms, operation or effect? (2) 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? (3) Is the impugned law reasonably appropriate and adapted to advance that purpose in a manner that is compatible with the maintenance of that constitutionally prescribed system of government?

---

1 As relevant to the Plaintiffs, see **SC [45], [47.1] and [49]**.

2 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

3 [2026] HCA 11; 100 ALJR 582 at 592 [27] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ); referring to *Babet v The Commonwealth* [2025] HCA 21; (2025) 99 ALJR 883 at 895 [38], 900-901 [72], 922 [173], 931 [219], 932 [224]; *Ravbar v The Commonwealth* [2025] HCA 25; (2025) 99 ALJR 1000 at 1017 [27], 1031 [101], 1053 [212], 1097 [425]; *Farmer v Minister for Home Affairs* [2025] HCA 38; (2025) 99 ALJR 1408 at 1421 [39].

Burden

7. It is well accepted that a law will "effectively burden" the implied freedom if "the effect of the law is to prohibit, or put some limitation on, the making or the content of political communications".[4] That may be assessed by comparing "the practical ability of a person or persons to engage in political communication with the law; and the practical ability of that same person or those same persons to engage in political communication without the law".[5]

8. In the context of Part 5.3B, assessing whether an effective burden exists will largely depend upon the operation of the offence provisions in Part 5.3B and what it is that the persons to whom those provisions might apply are prevented from doing compared to what those same persons were able to do lawfully[6] prior to the enactment of Part 5.3B or to the making of a prohibited hate group regulation.

9. The question is then whether the offence provisions operate to restrict a person's ability to communicate on political matters if a person is unable to: direct the activities of a prohibited hate group; be one of its members; recruit persons to join the organisation; be involved in training activities; receive, collect or makes funds available to it; or provide support or resources to such a group.

10. In so far as the restrictions contained in the offence provisions in Division 114B are enlivened by a regulation, it is possible that the operation of Part 5.3B might, in some of its operations, burden the freedom of political communication.

Legitimate purpose

11. The purpose of a law will be constitutionally legitimate if it is compatible with the maintenance of the constitutionally prescribed system of government.[7]

---

4 *Farmer v Minister for Home Affairs* [2025] HCA 38; 99 ALJR 1408 at 1421 [40] (Gageler CJ, Gordon and Beech-Jones JJ); *Ravbar v Commonwealth of Australia* [2025] HCA 25; 99 ALJR 1000 at 1017-1018 [32] (Gageler CJ); *Monis v The Queen* (2013) 249 CLR 92 at 142 [108] (Hayne J).

5 *Farmer v Minister for Home Affairs* [2025] HCA 38; 99 ALJR 1408 at 1449 [191] (Gleeson J); *Brown v Tasmania* (2017) 261 CLR 328 at 365 [109] (Kiefel CJ, Bell and Keane JJ), 383 [181] (Gageler J).

6 *Levy v Victoria* (1997) 189 CLR 579 at 622 (McHugh J); *Babet v The Commonwealth* (2025) 99 ALJR 883 at 906-907 [97]-[102] (Gordon J), 928-929 [202]-[203] (Edelman J), 929 [205], 930 [209] (Steward J).

7 *Farmer v Minister for Home Affairs* [2025] HCA 38; 99 ALJR 1408 at 1424 [53] (Gageler CJ, Gordon and Beech-Jones JJ).

12. It is therefore necessary to identify the purpose of Part 5.3B. The purpose of a law has been described as "what the law is designed to achieve in fact" or the "mischief the law is designed to address".[8]

13. The purpose of Part 5.3B is clear from s 114A.1. The expressly stated purpose is to protect the Australian community from various types of harm and from the promotion of violence and to give effect to certain international obligations.

14. The obvious focus is upon protection against conduct comprising or directed to the commission of hate crimes. Notably, an organisation cannot be specified in a regulation unless the AFP Minister is 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 advocated engaging in conduct constituting a hate crime (s 114A.4(1)(a)). The AFP Minister must also be satisfied that specifying an organisation "is reasonably necessary to protect the Australian community or part of the Australian community against harm of any one or more of the kinds referred to in paragraph 114A.1(1)(a)".

15. The AFP Minister will be informed, in that regard, by the advice provided by the Director-General under s 114A.5 which, in turn, depends upon the Director-General being satisfied of the matters in s 114A.5(1) (that the organisation has engaged in activities which would or are likely to increase the risk of politically motivated violence or the promotion of communal violence; or that the organisation has advocated or engaged in politically motivated violence, or engaged in the promotion of communal violence; or engaged in activities indicating a risk that it may advocate for or engage in politically motivated violence or engage in the promotion of communal violence in the future[9]).

16. That the purpose of Part 5.3B should be understood to be protective in nature is also confirmed by the extrinsic materials noted by the Defendants (**DS [42- 43]**).

8 *Farmer v Minister for Home Affairs* [2025] HCA 38; 99 ALJR 1408 at [54] (Gageler CJ, Gordon and Beech-Jones JJ).

9 The terms "politically motivated violence" and "promotion of communal violence" are defined in s 114A.5(6) to have the meanings given by s 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth).

17. This Court has recognised that preventing or impeding criminal conduct is a legitimate purpose.[10] Similarly, a purpose which protects Australians from the types of harm and from the promotion of violence mentioned in Part 5.3B is a legitimate purpose compatible with the maintenance of the system of representative government. The system of representative government which the implied freedom protects does not tolerate violence in its pursuit of democratic ideals. People in a democratic country might fairly expect that its government will take steps to protect them against harm. This is not a case of legislative power being used for the purpose of stifling political debate or curbing political disagreement.[11] Part 5.3B is plainly not directed to impeding political discourse which is not "polite, agreeable or reassuring" (**PS [72]**). The statutory conditions for an exercise of the regulation-making power are pitched at a far higher level with a distinct focus upon serious conduct of a criminal nature.

Justification

18. The next step in the analysis is to ask whether the means contained in Part 5.3B are reasonably appropriate and adapted to achieving that legitimate purpose in a manner that is compatible with the maintenance of the constitutionally prescribed system of government.[12] The nature and extent of the burden assumes importance at this stage.[13]

19. Part 5.3B is reasonably appropriate and adapted to advance the purpose of protecting the community against harm arising from hate crimes and related conduct. The means employed by Part 5.3B to hamper the ability of an organisation specified in a regulation to engage in hate crimes and to thereby protect the community is an appropriate response to the identified risk of harm. In particular, the offence provisions in Division 114B (which could operate to burden political communication in limited circumstances), are

---

[10] *Tajjour v New South Wales* (2014) 254 CLR 508.

[11] *Farmer v Minister for Home Affairs* [2025] HCA 38; 99 ALJR 1408 at 1424 [55] (Gageler CJ, Gordon and Beech-Jones JJ).

[12] *Farmer v Minister for Home Affairs* [2025] HCA 38; 99 ALJR 1408 at 1421 [39], 1424 [57] (Gageler CJ, Gordon and Beech-Jones JJ), [165] and [193]-[194] (Gleeson J)); *Babet v The Commonwealth* [2025] HCA 21; (2025) 99 ALJR 883 at 896-897 [49] (Gageler CJ and Jagot J), 901 [72] (Gordon J), 936 [242] (Beech-Jones J); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-562, 568-569, 575 (the Court); *McCloy v New South Wales* (2015) 257 CLR 178; *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at 23 [46] (Kiefel CJ, Keane and Gleeson JJ); *Brown v Tasmania* (2017) 261 CLR 328 at 368 [123] (Kiefel CJ, Bell and Keane JJ); 416 [278] (Nettle J); *Clubb v Edwards* (2019) 267 CLR 171 at 200-202 [70]-[74] (Kiefel CJ, Bell and Keane JJ), 264 [266] (Nettle J), 311 [408], 330 [463] (Edelman J); *Comcare v Banerji* (2019) 267 CLR 373 at 400 [32] (Kiefel CJ, Bell, Keane and Nettle JJ).

[13] *Babet v The Commonwealth* [2025] HCA 21; (2025) 99 ALJR 883 at 908 [105] (Gordon J).

rationally connected to the identified legitimate purpose because they operate to prevent, or at least to significantly impede, the activities of groups which engage in, support or advocate for the engagement in conduct constituting a hate crime. Those provisions go no further than is required to meet that purpose.

20. The operation of Part 5.3B is closely controlled by the requirement in s 114A.5 for advice from the Director-General, before a group is specified as a prohibited hate group, and for the AFP Minister to be satisfied of the matters in s 114A.4. It therefore has a very narrow reach. It targets limited circumstances and, having regard to the meaning of "hate crime" in s 114A.3, is only likely to impact those persons who are part of or who support organisations involved in or which advocate conduct which is criminal in nature.

21. In so far as Part 5.3B imposes any burden on the implied freedom, in light of the materials contained in the Special Case,[14] the burden is not unjustified, in the sense of being "undue".[15]

22. The views expressed by Hayne J in *Tajjour v New South Wales*,[16] in reaching a conclusion that the prohibition upon habitually consorting with convicted offenders in s 93X of the *Crimes Act 1900* (NSW) did not infringe the implied freedom of political communication, may be adapted to the present circumstances to support a conclusion that Part 5.3B does not infringe the freedom. His Honour said the following:[17]

> Section 93X does not impose an undue burden on political communication. In particular, s 93X does not prohibit the expression or dissemination of any political view or any information relevant to the formation of or debate about any political opinion or matter. Rather, the section prohibits some kinds of association between certain persons. It therefore limits the occasions on which political views and information can be formed, expressed or disseminated by or between those persons.

23. Similarly, in relation to Part 5.3B, nothing in that Part prohibits a person from expressing or disseminating political views or information relevant to the formation of or debate about a political opinion or matters. Instead, it prohibits certain actions relating to the

---

14 See, particularly **SC [78] – [90]** ('Risk of Harmful Crimes Increased by the Presence of Hate Groups'); **SC [106] – [108]** ('Presence of Hate Groups Poses Increased Risks to Particular Groups'); **SC [164] – [179]** ('Social Cohesion'); and **SC [216] – [229]** ('Australia's International Obligations').

15 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568-569, 575; *Tajjour v New South Wales* (2014) 254 CLR 508 at 566 [91] (Hayne J); 580 [149] (Gageler J).

16 *Tajjour v New South Wales* (2014) 254 CLR 508 at 566 [91] (Hayne J).

17 *Tajjour v New South Wales* (2014) 254 CLR 508 at 566 [91] (Hayne J).

membership, management and activities of a particular type of group. Those who are, have been, or would seek to be members of such an organisation otherwise remain as free as anyone else to express or communicate whatever views they wish on political matters, provided that they (like anyone else) do so within the confines of the law. That they cannot do so as members of a prohibited hate group reflects the legitimate purpose of reducing the likelihood of conduct leading to, encouraging or involving hate crimes which may harm the community by making it harder for groups to engage in and promote such conduct.

24. The plurality in *Tajjour* said that the provision which was in question in that case was targeted, albeit indirectly, to the prevention of crime and that "[c]onvicted offenders who are not able to associate amongst themselves and with others on a regular basis may find it more difficult to organise criminal activities and enlist others to participate in such activities".[18] For similar reasons, the means in Part 5.3B are capable of advancing the clear objects of the Part. Given the seriousness of the concerns to which the Part is directed, the means chosen by Parliament to address those concerns are not disproportionate to the purpose of the law. Disrupting organisations which operate with intent to harm (whether or not that organisation is or seeks to be a registered political party) is an appropriate response to the associated risks to the community and is not incompatible with maintaining the constitutionally prescribed system of government.

C. QUESTION 3: CHAPTER III

25. In relation to the third question stated for the opinion of the Court, Tasmania submits that Part 5.3B does not infringe Chapter III of the Constitution.

26. The Plaintiffs assert that the scheme of Part 5.3B confers upon the Executive of the Commonwealth powers of adjudication and punishment, such that the Executive assumes functions which Chapter III commits exclusively to courts (**PS [84], [87]**), relying principally on *Lim*[19] and *Alexander*.[20] The Plaintiffs' submissions mischaracterise the assessment undertaken in s 114A.4 and s 114A.5 as the adjudication of guilt; and incorrectly treat any detriment arising under Part 5.3B as punishment.

---

18 *Tajjour v New South Wales* (2014) 254 CLR 508 at 571 [111] (Crennan, Kiefel and Bell JJ).
19 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.
20 *Alexander v Minister for Home Affairs* (2022) 276 CLR 336.

27. The constitutional limitation identified in *Lim* has recently been described in the following terms:[21]

> Expressed at a level of generality appropriate to encompass its application in each of *Alexander*, *Benbrika [No 2]* and *Jones*, as well as in *YBFZ*, the constitutional limitation identified in *Lim* is therefore that 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 reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose.

28. Tasmania submits that any detriment arising as a result of an exercise of the power to specify an organisation as a prohibited hate group is not of a nature or severity which warrants prima facie characterisation of Part 5.3B as penal or punitive. Put simply, it does not affect any person's liberty or bodily integrity. It is well understood that the rationale for the *Lim* principal rests in "the fundamental value accorded to the liberty of the individual".[22] Despite the application of the *Lim* principle in *YBFZ*[23] to restrictions on liberty which fell short of detention, the focus remained on interferences with liberty and bodily integrity. None of those considerations arise from an exercise of the power to specify an organisation as a prohibited hate group.

29. In any event, Part 5.3B is reasonably capable of being seen as necessary for legitimate and non-punitive purposes.

Not a punitive purpose

30. To the extent that an exercise of the power to specify an organisation as a prohibited hate group may result in detriment to any organisation or person, such detriment is not for a punitive purpose.[24]

---

21 *EGH19 v Commonwealth of Australia* [2026] HCA 7; (2026) 100 ALJR 400 at 410 [14] (Gageler CJ and Gleeson J).

22 *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 368 [73] (Kiefel CJ, Keane and Gleeson JJ).

23 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40; (2024) 99 ALJR 1.

24 *Ravbar v The Commonwealth* [2025] HCA 25; (2025) 99 ALJR 1000 at 1040 [157] (Gordon J); *Jones v The Commonwealth* (2022) 280 CLR 62 at 82 [43] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

31. The purpose of the scheme is protective. That is clear from the objects stated in s 114A.1, as well as the criteria which operate as preconditions to the exercise of the Governor-General's power to specify an organisation as a prohibited hate group.

32. Notably, the exercise of the power to specify an organisation is not contingent upon a determination of criminal guilt. Instead, it is contingent upon the Director-General's satisfaction (in the first place) of the matters in s 114A.5 and the AFP Minister's satisfaction (in the second place) of the matters in s 114A.4. Whilst some (but not all) of those considerations relate to past conduct, there is no requirement or need to assess criminal guilt, nor is there any requirement to consider whether past conduct should be punished. It is important that the criteria also focus on the risk of future violent conduct or promotion of the same.

33. Further, the power may only be exercised if the AFP Minister is satisfied, on reasonable grounds, that doing so is reasonably necessary to protect the Australian community or part of the Australian community against harm of one of the kinds referred to in the objects (s 114A.4(1)(b)).

34. The need for the Director-General's satisfaction regarding the matters in s 114A.5 again reflects the protective purpose of the power.

35. The mere fact that legislation makes conduct a criminal offence is clearly not a punishment. That is so even when a new offence might leave some people with no lawful option but to take (or not take) certain actions in order to avoid the risk of prosecution. The creation of new offences is a policy choice, which belongs to the Parliament as the representative of the Australian people.[25]

36. It may be accepted that the means by which the protective purpose is achieved results in a prohibited hate group essentially being rendered unable to function, which likely results in detriment to the organisation and those people whose actions may fall within the offence provisions in Part 5.3B as members, supporters and affiliates of the organisation. The detriment has no punitive purpose and is reasonably capable of being seen to be

---

25 *Ravbar v The Commonwealth* [2025] HCA 25; (2025) 99 ALJR 1000 at 1060 [247] (Edelman J).

necessary to achieve the protective purpose. In this case, that conclusion is supported by the extensive material in the Special Case.[26]

37. The Plaintiffs' reliance on *Alexander* is misplaced. A key aspect of the reasoning in *Alexander* was that the Minister's determination under the impugned provision would "deprive Mr Alexander of his entitlement to enter and live at *liberty* in Australia".[27] Further, in that case it was found that the primary purpose of the impugned provision was retribution, hence its character was punitive.[28] That contrasts to the present matter, where the scheme's clear purpose is protective and to give effect to Australia's obligations under specified international conventions.

PART V: ESTIMATE OF TIME

38. It is estimated that Tasmania will require no more than 10 minutes for the presentation of oral argument.

Dated 21 August 2026

Sarah Kay
Solicitor-General of Tasmania
Office of the Solicitor-General
(03) 6165 3614
sarah.kay@justice.tas.gov.au

Jenny Rudolf
Counsel for the Attorney-General (Tas)
Office of the Solicitor-General
(03) 6165 3614
jenny.rudolf@justice.tas.gov.au

---

26 See footnote [14] above.

27 *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 375 [96] (emphasis added), 355 [26] (Kiefel CJ, Keane and Gleeson JJ).

28 *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 368-368 [75] Kiefel CJ, Keane and Gleeson JJ).

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

ANNEXURE TO INERVENER'S SUBMISSIONS (ATTORNEY-GENERAL FOR THE STATE OF TASMANIA)

No.	Description	Version	Provision(s)	Reasons for providing this version	Applicable date(s)
Commonwealth					
1.	The Constitution	Current	Ch III	Currently in force	N/A
2.	*Criminal Code*	Current	Part 5.3B	Currently in force	N/A
3.	*Australian Security Intelligence Organisation Act 1979*	Current	section 4	Currently in force	N/A