HIGH COURT OF AUSTRALIA

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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 WA)
Filing party:	Interveners
Date filed:	21 Aug 2026

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY M50 of 2026

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 WESTERN AUSTRALIA (INTERVENING)

PART I: CERTIFICATION

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

PARTS II AND III: INTERVENTION/LEAVE TO INTERVENE

2. The Attorney General for the State of **Western Australia** intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the defendants.

PART IV: ARGUMENT

A. Introduction

3. These submissions are limited to the second and third questions of law raised by the Special Case, namely:

   (a) *Question 2*: Is Pt 5.3B of the *Criminal **Code*** (Cth) invalid on the basis that it impermissibly burdens the implied freedom of political communication?

   (b) *Question 3*: Is Pt 5.3B of the Code invalid on the basis that it infringes Ch III of the *Constitution*?

4. These questions will be unnecessary to answer if the Court finds that the first question of law raised by the Special Case should be answered "yes".

5. Western Australia agrees with the defendants that s 5(1) of the ***Criminal Code Act*** *1995* (Cth) and s 114A.4 of the Code could be exercised to specify organisations that do not purport to be political parties and which do not engage in, or propose to engage in, political communication (DS [32]). Indeed, that may be expected to be their main area of operation. In the present case, it may therefore be appropriate for the Court to treat Question 2 of the Special Case as focusing on the validity of the provisions of Pt 5.3B in their application by the *Criminal Code (Prohibited Hate Group – White Australia)* ***Regulations*** *2026* (Cth).[1] This is particularly so where the critical restrictions on communication in issue are imposed by Pt 5.3 Div 114B by reference to the specification of the first plaintiff in the Regulations.

6. For the reasons which follow Western Australia respectfully submits that both Question 2 and Question 3 should be answered "no".

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[1] Compare ***Ravbar*** *v Commonwealth* (2025) 99 ALJR 1000, [30] (Gageler CJ), [147] (Gordon J), [226]-[228] (Edelman J), [430]-[433] (Beech-Jones J).

B. Pt 5.3B does not impermissibly burden the implied freedom of political communication

7. The implied freedom of political communication is a limit on legislative and executive 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 representative government for which the *Constitution* provides, a system which depends for its existence upon that freedom.[2]

8. The implied freedom is not a personal right,[3] is not unlimited and is not absolute.[4] Further, if there is no freedom to make or receive a particular form of political communication because making it is independently unlawful, then there is no freedom that can be burdened.[5] For example, there is no freedom to engage in a hate crime (as defined in s 114A.3 of the Code) or offensive behaviour based on racial hatred (as defined in s 18C of the ***Racial Discrimination Act*** *1975* (Cth)) to communicate a political message.[6]

9. The test applied to assess whether legislation contravenes the implied freedom of political communication is divided into three questions. **First**, does the law effectively burden the implied freedom either in its terms, operation or effect? **Second**, 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? **Third**, is the law reasonably appropriate and adapted to advance that purpose in a manner that is compatible with the maintenance of that constitutionally

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[2] ***Farmer*** *v Minister for Home Affairs* (2025) 99 ALJR 1408, [36]-[37] (Gageler CJ, Gordon and Beech-Jones JJ). See also [225] (Jagot J).

[3] *Farmer*, [1], [37], [45] (Gageler CJ, Gordon and Beech-Jones JJ) and the authorities there cited, [185] (Gleeson J), [226] (Jagot J).

[4] ***Unions NSW*** *v New South Wales* (2013) 252 CLR 530, [18]-[19] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Farmer*, [37] (Gageler CJ, Gordon and Beech-Jones JJ) and the authorities there cited, [67]-[68], [83] (Edelman J), [226] (Jagot J).

[5] ***Brown*** *v Tasmania* (2017) 261 CLR 328, [109] (Kiefel CJ, Bell and Keane JJ), [181], [186], [188] (Gageler J), [259] (Nettle J), [304], [357], [391]-[398], [411] (Gordon J), [491], [556]-[559], [565]-[567] (Edelman J); *Farm Transparency International Ltd v New South Wales* (2021) 277 CLR 537, [37] (Kiefel CJ, Keane J), [158] (Gordon J), [233] (Edelman J).

[6] *Hanson v* ***Faruqi*** [2026] FCAFC 96, [133], [188] (the Court), The plaintiff does not challenge the validity of any of the offence provisions referred to in the definition of hate crime in s 114A.3 of the Code (cf PS [77]-[78]).

prescribed system of government?[7] If the first question is answered "yes", and if either of the second or third questions is answered "no", the law is invalid.

Pt 5.3B effectively burdens the implied freedom

10. A law will effectively burden the implied freedom if its effect is to prohibit, or put some limitation on, the making or the content of political communications (and/or the association of persons for the purposes of making such communications).[8] The inquiry is qualitative, not quantitative.[9] It requires consideration of whether the law, in its terms, operation or effect, affects the free flow of communication on government or political matters generally.[10] This extends not only to communication on government or political matters between electors and government or candidates; but also to communication on such matters between electors; and between electors and other persons who may seek to influence the outcome of an election.[11]

11. Pt 5.3B of the Code contains Divs 114A, 114B and 114C. Division 114A provides for a process for an organisation to be specified as a prohibited hate group by a regulation made by the Governor General. Division 114B creates certain offences for being involved in or with a prohibited hate group in various ways. Division 114C contains general provisions relating to those offences.

12. It may be accepted that membership of, participation in the activities of, recruiting for, training members or officers of, or the provision of funding, resources or support to, an organisation of a type which may be specified as a prohibited hate group pursuant to Pt 5.3B may involve engaging in, or facilitating, political communication which is not a hate crime or otherwise unlawful.[12]

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7 See *Hopper v Victoria* (2026) 100 ALJR 582, [27] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ) for the most recent statement of the test identified in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561-562, 567-568 (the Court), as modified and refined in *Coleman v Power* (2004) 220 CLR 1, [93], [95]-[96] (McHugh J, Gummow, Hayne and Kirby JJ agreeing), ***McCloy*** *v New South Wales* (2015) 257 CLR 178, [2] (French CJ, Kiefel, Bell and Keane JJ) and *Brown*, [88], [104] (Kiefel CJ, Bell and Keane JJ), [155]-[156] (Gageler J), [236], [271], [277]-[278] (Nettle J), [316]-[325] (Gordon J).

8 *Monis v The Queen* (2013) 249 CLR 92, [108] (Hayne J); *Unions NSW*, [119] (Keane J); *McCloy*, [126] (Gageler J); *Ravbar*, [39] (Gageler CJ), [435] (Beech-Jones J, Gleeson J agreeing).

9 *Unions NSW*, [40] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); ***Tajjour*** *v New South Wales* (2014) 254 CLR 508, [145] (Gageler J).

10 *Unions NSW*, [30], [35] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

11 *Farmer*, [40] (Gageler CJ, Gordon and Beech-Jones JJ), [176]-[177] (Gleeson J).

12 Noting that conduct (including assembly) can amount to political communication where it is a means of communicating a message within the scope of the freedom: *Levy v Victoria* (1997) 189 CLR 579, 594 (Brennan CJ), 613 (Toohey and Gummow JJ), 623 (McHugh J), 641 (Kirby J).

13. In this way, the offence provisions in Div 114B prevent members and officers of an organisation which is declared to be a prohibited hate group from making, participating in, or receiving, political communication in their capacity *as members and officers* of the organisation (individually or collectively) and from associating for such purpose.[13] They also effectively prevent such an organisation from receiving funds, resources or support, or using its property, to engage in political communication or make political donations.[14] An organisation specified as a prohibited hate group is thereby practically prohibited from engaging in political communication *as an organisation*.[15]

14. The mere specification of an organisation as a prohibited hate group following the process in Div 114A has no immediate effect, and by itself does not affect the free flow of political communication. It is the specification *combined with* the criminal liability which attaches as a result of that specification by operation of Div 114B which may effectively burden the implied freedom of political communication in the ways identified above. While the burden imposed by Pt 5.3B is indirect (contrary to PS [61] and [63]-[64], its provisions do not target political parties, political donations or political communication), it is more than inconsequential.[16]

Pt 5.3B has a legitimate purpose

15. The object or purpose of a law is what the law is designed to achieve in fact, which is akin to what mischief the law is designed to address.[17] The purpose should be expressed at an appropriate level of generality, which is almost always higher than the meaning of the words of the provisions.[18]

16. The objects of Pt 5.3B of the Code are stated in s 114A.1. The first object is a protective object which includes seeking to protect the Australian community, or parts of it, from various types of harm and from the promotion of violence by prohibiting organisations

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[13] Cf *Farmer*, [48], [51] (Gageler CJ, Gordon and Beech-Jones JJ), [240] (Jagot J); *Ravbar*, [37]-[38] (Gageler CJ), [231]-[232] (Edelman J), [307] (Gleeson J), [347]-[351], [354] (Jagot J), [445]-[446] (Beech-Jones J).

[14] Cf *Unions NSW*, [38] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Ravbar* [37]-[38] (Gageler CJ), [232]-[233] (Edelman J), [307] (Gleeson J), [353]-[354] (Jagot J), [434], [445]-[446] (Beech-Jones J).

[15] Contrast *Babet v Commonwealth* (2025) 99 ALJR 883, [103] (Gordon J).

[16] *Unions NSW*, [38] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

[17] *McCloy,* [132] (Gageler J).

[18] *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1, [183] (Gordon J), [204] (Edelman J); ***Alexander*** *v Minister for Home Affairs* (2022) 276 CLR 336, [242] (Edelman J); ***NZYQ*** *v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137, [40] (the Court).

that engage in, prepare or plan to engage in, or assist the engagement in, or advocate engaging in, hate crimes.

17. A "hate crime" is defined in s 114A.3 to include certain conduct directed to individuals or groups distinguished by, or because of, their race or national or ethnic origin, which would constitute an offence (or would have constituted an offence if engaged in after a relevant offence provision commenced).[19] The conduct the subject of the relevant offences involves advocating for or threatening force or violence against a person or group or advocating for or threatening damage to or destruction of the property of a person or group. It also involves certain public conduct involving disseminating ideas of superiority over, or hatred of, a person or group, or inciting hatred in circumstances that would cause a reasonable person or member of a group to be intimidated, to fear harassment or violence or fear for their safety. A hate crime also includes certain conduct, or the threat of certain conduct, which involves, or would or could involve, serious harm to persons or serious damage to property of persons of (or perceived to be of) a particular race or national or ethnic origin.[20]

18. The second object of Pt 5.3B is to give effect to Australia's obligations under Arts 20 and 26 of the ***I****nternational* ***C****ovenant on* ***C****ivil and* ***P****olitical* ***R****ights* and Arts 4(a) and (b) of the *International* ***C****onvention on the* ***E****limination of all Forms of* ***R****acial* ***D****iscrimination*.

19. Having regard to: the stated objects of Pt 5.3B in s 114A.1; the background to and content of the obligations imposed by arts 20 and 26 of the ICCPR and arts 4(a) and (b) of the CERD (as set out in DS [15]-[22]); the definition of hate crime in s 114A.3; and the terms and effect of the remaining provisions in Pt 5.3, the purpose of Pt 5.3B is accurately expressed in DS [44]. That is, its purpose is to protect the Australian community from organisations that engage in conduct that seriously harms the community and poses a threat to the security of the Commonwealth and the system of representative democracy.

20. The purpose of Pt 5.3B cannot be reduced to protecting social cohesion (PS [70]),[21] or curbing political disagreement and debate inside Australia[22] (communication which

[19] Section 114A.3(1), (2).

[20] Section 114A.3(5).

[21] Cf ***Jarrett*** *v New South Wales* (2026) 428 ALR 94, [6], [124], [133]-[136] (the Court); *Farmer*, [244]-[245] (Jagot J).

[22] *Farmer*, [55] (Gageler CJ, Gordon and Beech-Jones JJ).

involves offence, insult, controversy and agitation (PS [68]-[69], [72])), or protecting the community from "the social, psychological and emotional consequences of political expression" (PS [61]). The process for specifying an organisation as a prohibited hate group begins with a requirement that the Director-General of Security be satisfied of the existence of activities likely to increase the risk of *violence* (*Cf* PS [77]-[79]).[23] Hate crimes are not "orthodox debate and political advocacy" or "orthodox political communication" – they are unlawful conduct. Properly construed, the provisions of Pt 5.3B reflect the protective purpose stated in [19] above.

21. This protective purpose is readily seen as compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.[24] It promotes the rule of law.[25] Further, the protection of the community or a segment of the community from material harm promotes its members' sense of safety and wellbeing and their ability to participate in community life, including by exercising their own freedom of political communication on governmental and political matters.[26]

Pt 5.3B is reasonably appropriate and adapted

22. Determining whether a law is reasonably appropriate and adapted to advance its legitimate purpose in a manner compatible with the maintenance of the constitutionally prescribed system of government can be done by considering whether the law is suitable, necessary and adequate in its balance.[27] For the purposes of this assessment, it is important to have regard to the nature and extent of the law's burden on the implied freedom as the sufficiency of the justification required for a burden requires some correspondence with its extent.[28]

23. Superficially, Pt 5.3 may be seen as having a greater impact on an organisation specified as a prohibited hate group than the legislation considered in *Ravbar* had on the CFMEU or the legislation considered in *Jarrett* had on public assemblies (*Cf* PS [71], [82]). There is no administrator of a prohibited hate group who can engage in

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23 Section 114A.5(1).

24 *Farmer*, [54]-[55] (Gageler CJ, Gordon and Beech-Jones JJ), [245]-[246] (Jagot J); *Faruqi*, [147], [153]-[154] (the Court).

25 ***Australian Communist Party*** *v Commonwealth* (1950) 83 CLR 1, 193 (Dixon J).

26 *Farmer*, [246] (Jagot J); *Faruqi*, [154] (the Court); SC, [179], [180]-[195],]-[222].

27 *McCloy*, [2] (French CJ, Kielfe, Bell and Keane JJ); *Clubb v Edwards* (2019) 267 CLR 171, [6], [69]-[74] (Kiefel CJ, Bell and Keane JJ), [266]-[275], [277] (Nettle J); *Ravbar*, [238]-[247] (Edelman J), [309]-[316] (Gleeson J), [343]-[345] (Jagot J), [470]-[474] (Beech-Jones J).

28 *Brown*, [118] (Kiefel CJ, Bell and Keane JJ), [201] (Gageler J), [325] (Gordon J) and the authorities there cited; *Unions NSW*, [40] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

political communication or make donations to political parties on its behalf if satisfied they are in the best interests of its members having regard to its objects[29] and Pt 5.3B does not simply restrict the areas in which a prohibited hate group may assemble.

24. However, the process and criteria for specification of a prohibited hate group mean that Pt 5.3B primarily burdens communications that constitute hate crimes (and/or which would otherwise contravene s 18C of the Racial Discrimination Act). It only incrementally burdens "orthodox political communication" and, having regard to the facts in the Special Case, it only burdens communications by a small number of organisations with no evident history of involvement in politics (*Cf* PS [6]-[7], [12], [58]-[59]).[30] At a systemic level,[31] the burden on the implied freedom is neither deep nor wide.[32]

25. Like the provisions considered by the Court in *Farmer*, Pt 5.3B is "viewpoint-neutral" in its operation (*Contra* PS [65]), although it may be accepted that, in its practical operation, it is more likely to impact differentially on persons expressing "non-mainstream" political views.[33]

26. Further, in this case, any effect on political communication is the indirect consequence of the Governor-General making a prohibited hate group regulation specifying an organisation under s 114A.4 of the Code. The consequence is indirect because freedom of political communication might be inhibited by conduct which amounts to an offence against the provisions of Div 114B of the Code, even if that conduct does not amount to a hate crime as defined by s 114A.3 or conduct that is otherwise unlawful. Any freedom of political communication which is inhibited is only inhibited to the extent it is connected to an organisation which has been specified as a prohibited hate group.

27. Relatedly, the offence provisions of Div 114B only apply to persons connected with an organisation which has been specified as a prohibited hate group and they target intentional conduct by a person who knows that an organisation is a prohibited hate

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29 Cf *Ravbar*, [56] (Gageler CJ), [110], [112], [114] (Gordon J), [234]-[236] (Edelman J), [354]-[355] (Jagot J), [447]-[457] (Beech-Jones J, Gleeson J agreeing).

30 Contrast *Ravbar* [231]-[232] (Edelman J), [307] (Gleeson J), [347], [349] (Jagot J), [436]-[445] (Beech-Jones J). See [2]-[12], [27]-[37], [39]-[45], [47]-[63] of the Special Case. The first plaintiff's attempt to register as a political party in April this year does not change that assessment.

31 Cf *McCloy*, [119], [125] (Gageler J); *Comcare v Banerji* (2019) 267 CLR 373, [20] (Kiefel CJ, Bell, Keane and Nettle JJ).

32 Cf *Ravbar*, [230]-[232] (Edelman J).

33 *Farmer*, [57] (Gageler CJ, Gordon and Beech-Jones JJ).

group or is reckless as to whether it is one.[34] The specification of a prohibited hate group is not "unconstrained" (*Cf* PS [80]). The process and the criteria for specification provided for in Div 114A ensure that specifications are not lightly made.

28. Relevantly, the Director-General of Security must first be satisfied an organisation has engaged in activities or advocated for the engagement in politically motivated violence or in the promotion of communal violence and provide advice to the AFP Minister to that effect.[35] The AFP Minister must then be satisfied on reasonable grounds of the matters specified in s 114A.4(1), and engage with the Attorney-General and Leader of the Opposition in the House of Representatives as required by s 114A.6. It is only after these processes have occurred that the Governor-General can make a prohibited hate group regulation under s 114A.4 of the Code and s 5(1) of the Criminal Code Act.

29. Once made, a regulation is reviewable by the Parliamentary Joint Committee on Intelligence and Security under s 114A.9 and it is a disallowable legislative instrument that may be disallowed by either House of the Commonwealth Parliament in accordance with Pt 2 Ch 3 of the *Legislation Act 2003* (Cth).

30. Additionally, s 114A.8 provides a process for the de-listing of a prohibited hate group if the AFP Minister ceases to be satisfied that it is reasonably necessary for the organisation to be specified as a prohibited hate group to protect the Australian community or part of it against harm of the kinds referred to in s 114A.1(1)(a). Upon a de-listing declaration being made, the regulation specifying the prohibited hate group ceases to have effect.[36]

31. Members and officers of a prohibited hate group remain free to make, participate in, or receive political communication as individuals so long as the communication is not independently unlawful (*Cf* PS [82]).[37] Similarly, they remain free to regroup and reorganise to pursue political aims or participate in political debate as a new organisation or by participating in some other existing organisation, so long as the organisation does not satisfy the criteria for specification as a prohibited hate group.[38]

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[34] Code, ss 114B.1(1)(a), (c), 114B.1(2)(a), (c), 114B.2(1)(a), (c), 114B.3(1)(a), (c), 114B.3(2)(a), (c), 114B.4(1)(a), 114B.4(3), 114B.5(1)(a), (c), 114B.5(2)(a), (c), 114B.6(1)(a), (c), 114B.6(2)(a), (c).

[35] Code, s 114A.5.

[36] Code, s 114A.8(4).

[37] Compare *Ravbar*, [110] (Gordon J Steward J agreeing), [232] (Edelman J) [446] (Beech-Jones J, Gleeson J agreeing); *McCloy* [13] (French CJ, Kiefel, Bell and Keane JJ).

[38] Compare *Ravbar*, [113] (Gordon J, Steward J agreeing), [232] (Edelman J) [446] (Beech-Jones J, Gleeson J agreeing).

The specification of an organisation as a prohibited hate group does not proscribe any of its policies (*Contra* PS [80]).

32. Given the purpose of Pt 5.3B is to protect the Australian community from organisations that engage in conduct that seriously harms the community, it must be accepted that the specification of an organisation as a prohibited hate group, and the consequences which follow for persons connected with a prohibited hate group, have a rational connection to that purpose. All other things being equal, by proscribing the conduct the subject of ss 114B.1 to 114B.6, less hate crimes will be committed by those groups. Pt 5.3B may therefore be regarded as "suitable".

33. It may also be regarded as "necessary". There are no obvious and compelling alternatives of achieving the same protective purpose of Pt 5.3B. The plaintiffs submit that procedural fairness could be afforded or merits review could be available before an organisation is specified as a prohibited hate group.[39] However, this submission overlooks that the specification of an organisation as a prohibited hate group, by itself, has no effect. Persons whose conduct falls within the offence provisions of Div 114B still need to be prosecuted for that conduct. In any proceedings for an offence, they will be afforded procedural fairness, the defences and exceptions provided for in Div 114B will apply and they will be entitled to collaterally attack the validity of the regulation specifying the prohibited hate group on administrative law grounds. Further, giving the power of proscription itself to a court (as suggested in PS [74]) would not reduce the impact of any proscription made on a prohibited hate group.

34. In relation to the plaintiffs' submission that "conduct could be prosecuted directly",[40] there are no offence provisions analogous to those provided for in Div 114B that exist independently of the proscription of a prohibited hate group. Further, the ambit of the conduct which is required before an organisation is specified as a prohibited hate group is an organisation engaging in, *preparing or planning to engage in, assisting the engagement in, or advocating engaging in* conduct constituting a hate crime.[41] While some of this conduct, which does not necessarily require a hate crime to have been committed, may be prosecuted as a separate offence of inciting or conspiring to

[39] PS [74].
[40] PS [74].
[41] Section 114A.4(1)(a)(i) and (ii).

commit a hate crime, some of it may fall short of constituting an attempt or aiding and abetting and may not otherwise be able to be "prosecuted directly".[42]

35. Further, to the extent that the plaintiffs' submission is intended to suggest that the law should simply provide for individuals to be prosecuted for hate crimes directly (*Cf* PS [81]), it overlooks that the purpose of Pt 5.3B is to protect the Australian community from certain *organisations*. Just as a union exists so that its members' interests as workers are "better represented by combining and deploying their collective efforts and assets to pursue their common objectives",[43] hate groups are able to use their organisational structure, megaphone and purse[44] to spread racist hate more extensively, including through the use of the internet and social media, by creating a greater appearance of legitimacy for unlawful conduct and taking advantage of "mob mentality" and peer pressure.[45]

36. The same observation applies to the plaintiffs' submission that the criteria in Pt 5.3B could be limited to organisations which promote and incite racial discrimination within Article 4(b) of CERD. Limiting the reach of Pt 5.3B in this way would significantly narrow its ability to achieve the protective purpose of its provisions. The examples proffered by the plaintiffs are not obvious and compelling alternatives.

37. In enacting Pt 5.3B, the Commonwealth Parliament was responding to a significant increase in demonstrations of racial hatred and racially motivated violence, including the Bondi attack.[46] Given that hate crimes cause profound damage to Australian society and impinge upon the freedom of the victims of such crimes to participate in society and exercise their freedom of political communication, the purpose of Pt 5.3B is not only legitimate, but also compelling.

38. The provisions of Pt 5.3B are "adequate in the balance" given the high threshold criteria which is required to be satisfied before an organisation can be specified as a prohibited hate group and the process that must be taken before a prohibited hate group regulation can be made, as outlined above.

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42 Code, ss 11.1, 11.2, 11.4, 11.5.
43 *Ravbar*, [445] (Beech-Jones J).
44 Cf *Ravbar*, [232] (Edelman J).
45 Special Case [70], [77]-[88], [113]-[163].
46 Special Case [15]-[20], [26], [91]-[105], [164]-[179]; Special Case Book (volume 2) 380-381.

39. The compelling purpose of Pt 5.3B and the expected benefits of promoting the participation of those who would otherwise be the victim of hate crimes in the constitutionally prescribed system of government are not outweighed by the indirect, non-discriminatory incremental burden it imposes upon the freedom of political communication.

40. It follows that Question 2 should be answered "no".

C. Pt 5.3B does not infringe Chapter III of the *Constitution*

Pt 5.3B does not empower the executive to adjudicate and punish criminal guilt

41. It is uncontroversial that a Commonwealth law purporting to empower the executive to adjudge and/or punish criminal conduct will contravene Chapter III of the *Constitution*.[47] Further, a Commonwealth law which empowers the executive to impose a detriment of a nature and severity which warrants prima facie characterisation as penal or punitive, will contravene Chapter III unless the law is reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose.[48] It is a "single question of characterisation" as to whether any power to impose a detriment conferred by a law is properly characterised as punitive and therefore as exclusively judicial.[49] It is a question of substance and not mere form.[50]

42. The plaintiffs allege that Pt 5.3B of the Code confers upon the executive (in particular the AFP Minister) judicial power to adjudicate criminal guilt because s 114A.4(1)(a) empowers them to determine whether an organisation has engaged in, prepared or planned to engage in, assisted the engagement in, or advocated engaging in, conduct constituting a hate crime.[51] They also contend Pt 5.3B empowers the AFP Minister to impose punishment extending to the "extinguishment and exile" of the first plaintiff, and "consequential incarceration" of its members and supporters and/or more generally

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47 *Chu Kheng **Lim** v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ, Gaudron J agreeing).

48 *NZYQ*, [39] (the Court); *EGH19 v Commonwealth* (2026) 100 ALJR 400, [14] (Gageler CJ and Gleeson J).

49 ***YBFZ** v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1, [16] (Gageler CJ, Gordon, Gleeson and Jagot JJ), citing *Jones v Commonwealth* (2023) 280 CLR 62, [43] (Kiefel CJ, Gageler, Gleeson and Jagot JJ). See also *NZYQ*, [44] (the Court); ***Benbrika** v Minister for Home Affairs* (2023) 280 CLR 1, [35]-[36] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

50 *Lim*, 27 (Brennan, Deane and Dawson JJ, Gaudron J agreeing).

51 PS [84], [87]-[90], [98]-[99].

that a range of "punitive consequences follow immediately and automatically upon the Minister's determination".[52]

43. Properly construed, section 114A.4(1) does none of those things.

44. The AFP Minister being satisfied on reasonable grounds of the criteria in s 114A.4(1) (not all of which involve commission of an offence)[53] by itself has no immediate legal effect.[54] The Governor-General is not obliged to make a prohibited hate group regulation merely because the AFP Minister is relevantly satisfied. The satisfaction of the AFP Minister is merely a statutory precondition to the exercise of the Governor-General's regulation making power. In accordance with s 114A.6, the AFP Minister must also obtain the Attorney-General's agreement to a proposed regulation and arrangements must be made for the Leader of the Opposition in the House of Representatives to be briefed in relation to the proposed regulation. Further, as set out in [30]-[31] and [34] above, once made, a regulation specifying an organisation as a prohibited hate group is reviewable, disallowable, revocable and subject to collateral attack in any prosecution for an offence under Div 114B.

45. The AFP Minister is not performing any function akin to that of a court in forming the state of satisfaction required by s 114A.4. The AFP Minister's consideration of whether they are satisfied of the criteria in s 114A.4 is made based on advice from another executive officer (s 114A.5(1)) and other information provided to, or obtained by, them (s 114A.5(3)). It is properly regarded as a step in an administrative process which may result in a regulation being made by the Governor-General which then operates through the provisions of Div 114B to create new legal obligations for the future. The AFP Minister's exercise of power is not itself a final and determinative adjudication of existing rights or liabilities. It lacks all the hallmarks of an exercise of judicial power.[55]

46. Further, the concept of "exile" is not relevant in this context and an organisation specified as a prohibited hate group is not "extinguished" or "annulled" (PS [93]-[94])

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52 PS [84], [87], [91]-[97], [99].

53 See [35] above.

54 Contrast *Alexander*, [70]-[79] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing), [157]-[166] (Gordon J).

55 *New South Wales v Wojciechowska* (2025) 99 ALJR 1125, [16] (the Court); *Attorney-General (Cth) and Breckler* (1999) 197 CLR 83, [35]-[36] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Precision Data Holdings Ltd and Wills* (1991) 173 CLR 167, 191 (the Court).

by the making of a regulation. This is demonstrated by the provisions of Pt 5.3B itself, which allow for an organisation to be delisted as a prohibited hate group.[56]

47. Nor is there any "consequential incarceration" of, or other immediate or automatic punitive consequence for, an organisation's members and supporters by reason of the making of a prohibited hate group regulation under s 114A.4(1) alone.

48. Although it is an element of each of the offences set out in Div 114B that the organisation is a prohibited hate group,[57] the specification of an organisation as a prohibited hate group does not by itself create any criminal liability or expose anyone to punishment. Each offence set out in Div 114B has additional elements apart from the relevant organisation being a prohibited hate group, and defences are available for some of these offences.[58] An officer, member or supporter of a prohibited hate group can only be convicted of, and punished for, an offence against Div 114B if a prosecutor proves they are guilty of such an offence beyond reasonable doubt[59] in a court of competent jurisdiction. An accused will be afforded procedural fairness in this separate criminal process.

49. Pt 5.3B does not impose punishment simply by creating the offences in Div 114B. While the creation of these offences operates in conjunction with the specification of an organisation as a prohibited hate group to prevent the organisation from operating, this does not involve any evident interference with basic rights that may attract characterisation as "prima facie punitive".

50. Individuals do not have any *right* to be members of an organisation.[60] As noted in [8] above, the implied freedom of political communication (and allied freedom of association) is not a personal right. Moreover, contrary to PS [92]-[93] none of the offence provisions or other provisions in Pt 5.3B transfer control of the property of an organisation to anyone else or involve the acquisition of that property by the Commonwealth executive.[61]

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56 Section 114A.8. See also Special Case [2]-[4], [38].

57 Sections 114B.1(1)(b), 114B.1(2)(b), 114B.2(1)(b), 114B.3(1)(b), 114B.3(2)(b), 114B.4(1)(b), 114B.5(1)(b), 114B.5(2)(b), 114B.6(1)(b), 114B.6(2)(b).

58 See sections 114B.2(2), 114B.5(3), 114B.7.

59 Code, s 13.2.

60 Cf *YBFZ*, [12]-[14], [18] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

61 Cf *Ravbar*, [157] (Gordon J, Gleeson and Beech-Jones JJ agreeing), [255]-[257] (Edelman J), [295]-[303] (Steward J), [408] (Jagot J, Gageler CJ agreeing).

51. The plaintiffs claim that the specification of an organisation as a prohibited hate group "can only be described" as punitive "akin" to the Ministerial powers considered in the decisions of this Court in *Alexander* and *Benbrika*. However, the present case is far removed from the factual circumstances of both of those cases, neither of which involved an organisation.

52. In *Alexander*, this Court considered the characterisation of provisions of the *Australian Citizenship Act 2007* (Cth) that empowered the Minister to determine that a person ceased to be Australia citizen in circumstances where the Minister was satisfied that certain conduct, that amounted to elements of the commission of an offence, demonstrated that the person "had repudiated their allegiance to Australia". A majority of this Court held that the power for a Minister to make such a declaration was punitive and amounted to an invalid exercise of exclusively judicial power.[62]

53. In *Benbrika*, this Court considered the characterisation of different provisions of the *Australian Citizenship Act 2007* (Cth) that empowered the Minister to determine that a person ceased to be an Australian citizen if that person was convicted (and sentenced) of one or more specified offences. A majority of this Court held that, although the relevant provision did not confer a power upon the Executive to adjudicate criminal guilt, it nonetheless infringed Ch III as it conferred upon the Executive a power to punish criminal guilt.[63]

54. Both *Alexander* and *Benbrika* were concerned with whether a power that involved a determination of whether an individual ceased to be an Australian citizen was a punitive power. This contrasts markedly from the impugned power in s 114A.4(1), which confers a power on the AFP Minister to be satisfied on reasonable grounds that an organisation has engaged in, prepared or planned to engage in, or assisted the engagement in, conduct constituting a hate crime, or advocated for such conduct to occur. Again, the AFP Minister's satisfaction, by itself, has no legal implications. The AFP Minister's satisfaction is a prerequisite to the designation of an organisation as a prohibited hate group, which in turn is a prerequisite before a person can be prosecuted under Div 114B.

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62 *Alexander*, [75], [82] (Kiefel CJ, Keane and Gleeson JJ), [163], [173] (Gordon J), [251] (Edelman J).

63 *Benbrika*, [40]-[48] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [67]-[70] (Gordon J), [93]-[101] (Edelman J). Cf [140]-[145] (Steward J).

55. It may be accepted that harsh consequences might follow for persons who continue to be members of an organisation which is the subject of a prohibited hate group regulation. However, a harsh consequence cannot by itself convert a law which has a plainly non-punitive purpose into a law imposing punishment.[64] To the extent that the power of the AFP Minister in s 114A.4(1) could be considered as prima facie penal or punitive, it is nevertheless reasonably capable of being seen to be necessary for the legitimate and non-punitive purpose of Pt 5.3B set out above.

Pt 5.3B is not a Bill of Attainder or Pains and Penalties

56. Pt 5.3B is not a Bill of Attainder or a Bill of Pains and Penalties (*Contra* PS [103]). It does not directly determine that any individual has breached an antecedent standard of conduct or impose any penalty on them as a consequence.[65] It does not specify the first plaintiff or any other organisation or individual. As noted above, individuals may only be convicted of an offence against one of the provisions of Div 114B if prosecuted before a court.

57. It follows that Question 3 should be answered "no".

PART V: LENGTH OF ORAL ARGUMENT

58. It is estimated that oral argument for Western Australia will take no more than 15 minutes.

Dated: 21 August 2026

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[64] *Alexander*, [245] (Edelman J); *Ravbar*, [259] (Edelman J).

[65] *Australian Communist Party*, 173-174 (Latham CJ); *Ravbar*, [154] (Gordon J, Gleeson and Beech-Jones JJ agreeing), [413] (Jagot J, Gageler CJ agreeing).

ANNEXURE TO SUBMISSIONS OF THE ATTORNEY GENERAL FOR THE STATE OF WESTERN AUSTRALIA (INTERVENING)

Pursuant to Practice Direction No 1 of 2024, Western Australia sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in its submissions.

No.	Description	Version	Provision(s)	Reasons for providing this version	Applicable date(s)
Constitutional provisions					
1.	*Commonwealth Constitution*	Current	Ch III	Currently in force	All relevant times
Statutory provisions					
2.	*Australian Citizenship Act 2007* (Cth)	Compilation No C29 (18 September 2020 to 7 December 2023)	All	Version considered in *Alexander* and *Benbrika*	At time of decisions in *Alexander* and *Benbrika*
3.	*Criminal Code Act 1995* (Cth)	Current	s 5; Sch, ss 11.1, 11.2, 11.4, 11.5, 13.2, 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
5.	*Judiciary Act 1903* (Cth)	Current	s 78A	Currently in force	All relevant times
6.	*Legislation Act 2003* (Cth)	Current	Ch 3, Pt 2	Currently in force	All relevant times
7.	*Racial Discrimination Act 1975* (Cth)	Current	s 18C	Illustrative purposes	N/A
International conventions					
8.	*International Convention on the Elimination of all Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January	Current	Art 4	Currently in force	All relevant times

	1969); [1975] ATS 40				
9.	*International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); [1980] ATS 23	Current	Arts 20, 26	Currently in force	All relevant times