



HIGH COURT OF AUSTRALIA

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Form 27C—Intervener’s submissions

Note: See rule 44.04.4.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

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WHITE AUSTRALIA PARTY INC.

First Plaintiff

THOMAS ANTHONY SEWELL

Second Plaintiff

and

COMMONWEALTH OF AUSTRALIA

First Defendant

ATTORNEY-GENERAL OF THE COMMONWEALTH

Second Defendant

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SUBMISSIONS FOR LEAVE TO BE HEARD
AS AMICUS CURIAE

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Part I: CERTIFICATION

1. These submissions are suitable for publication on the internet.

Part II: BASIS FOR APPLICATION FOR LEAVE TO BE HEARD

2. The Free Speech Union (FSU) seeks leave to intervene as *amicus curiae*, to make submissions in respect of Ground 2 of the Special Case (SC), and to address:
 - a. the extent and characterisation of the burden which Pt 5.3B of the *Criminal Code* (Cth) (**the Code**) places upon the implied freedom of political communication (**implied freedom**); and
 - 10 b. the adoption, as part of the proportionality analysis, of a doctrine of calibrated scrutiny for significant burdens on the implied freedom of political communication.
3. In circumstances where FSU raises points of general importance that may assist the Court in resolving the proceedings, including by reference to arguments in consideration of matters for which assistance may not otherwise be provided, FSU submit that their presence as *amicus* will be of assistance to the Court.

Part III: WHY LEAVE SHOULD BE GRANTED

- 20 4. The FSU respectfully submits the Court should grant its application to appear and present submissions as *amicus curiae* on the basis that the Court would be “significantly assisted by the submissions of the *amicus* and that any costs to the parties or any delay consequent on agreeing to hear the *amicus* is not disproportionate to the expected assistance”.¹ That is so for the following reasons.
5. First, FSU is a non-partisan and non-political community-based organisation dedicated to promoting, protecting and defending freedom of speech in Australia. The protection of free speech is its sole area of legal and policy focus. FSU has been involved for several years in the making of submissions to Parliament,²

¹ *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37, [4] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); and see, *Levy v Victoria* (1997) 189 CLR 579, 604-605 (Brennan CJ).

² See for example, Free Speech Union of Australia, *Submission to the Queensland Parliament, Inquiry into the Fighting Antisemitism and Keeping Guns out of the Hands of Terrorists and Criminals Amendment Bill 2026* (Submission No 33); Free Speech Union of Australia Limited, *Submission to the Legislative Assembly Committee on Community Services, Inquiry into Measures to Prohibit Slogans that Incite Hatred* (Submission No 69); Free Speech Union of Australia Limited, *Submission to the Senate Environment and Communications Legislation Committee, Inquiry into the Online Safety*

including recently with respect to Pt 5.3B of the *Criminal Code* (Cth),³ and its officeholders have assisted parties in free-speech related proceedings in the past.⁴ Further, FSU relies upon the affidavit of Reuben Kirkham dated 31 July 2026 in detailing the organisation's history and standing. This expertise means it is well-placed to assist the Court in this case, including in bringing international and comparative legal materials to the Court's attention where appropriate.

6. Second, FSU's submissions address matters and arguments not directly addressed in the submissions of the Plaintiffs, or other parties including interveners. While the FSU supports the relief sought by the Plaintiffs, declaring that the impugned provisions are invalid for their burden on the implied freedom, it does so from a different perspective.
7. If leave to intervene is granted, the FSU will make the following submissions.

Part IV: ARGUMENT

8. With respect to **Ground 2** of the Special Case, FSU will separate its submissions in the following fashion based on the test in *Lange* and as modified by *McCloy* and subsequent decisions:
 - a. *First*, FSU will characterise the burden by reference to the terms, operations and effects of the law. FSU will also show that the extent of the burden is heightened when applied to political parties, which are essential to the function of our constitutionally prescribed system of representative and responsible government. FSU will endeavour to show this by reference to the history and tradition of those conventions in our constitution. Ultimately, FSU will submit that the burden the law places upon the implied freedom is characterised as significant in these proceedings.
 - b. *Second*, FSU will address the issue of legitimate purpose and whether the law is compatible with the maintenance of the constitutionally

Amendment (Strengthening Enforcement for the Social Media Minimum Age) Bill 2026 (Submission No 27).

³ Free Speech Union of Australia Limited, Submission to the Parliamentary Joint Committee on Intelligence and Security, Review of the Exposure Draft Legislation: Combatting Antisemitism, Hate and Extremism Bill 2026 (Submission No 71, January 2026).

⁴ Dr Reuben Kirkham, the Director of FSU, represented the applicant in *Baumgarten and eSafety Commissioner* (Guidance and Appeals Panel) [2025] ARTA 59.

prescribed system. On this, FSU will argue that the Plaintiffs are right as to their conclusion on this limb, though FSU differ as to their reasons. FSU will submit that the expansion of the statutory language to permit proscription of political parties to achieve the law's purpose, hyperextends it in such a fashion that it undermines the constitution in a manner that is not compatible with its maintenance. FSU submit otherwise that if political parties were excluded from its operation, that the law would satisfy the second limb of the *Lange* test.

- 10 c. *Third*, FSU separate their submissions in two respects as to the question of proportionality. On the former, FSU will submit that the Court should adopt and apply a calibrated standard of scrutiny in cases where there is a significant burden of the implied freedom. FSU will show that this is a development of the existing doctrine that is tailored narrowly to those rare circumstances where the burden of a law is significant. By construction, FSU will submit that such burdens should be presumptively unconstitutional, unless the Commonwealth can show the law is necessary to protect a constitutionally indispensable interest. On the latter, FSU will submit that on the three indicia of proportionality set out in *McCloy*, the law imposes a burden which is disproportionate.
- 20 9. In conclusion, the relief sought by the Plaintiffs is appropriate and correct in relation to Ground 2.

First Limb - Burden

10. In considering the existence of a burden on the implied freedom, the Court looks to the nature and extent of the burden imposed by the impugned law by reference to the legal effect and practical operation of the provisions.⁵ That the law “effectively burdens” freedom of political communication in its legal or practical operation is characterised as “nothing more complicated than that the effect of the law is to prohibit, or put some limitation on, the making or the content of political communications”.⁶ This includes also the right of the public to receive such
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⁵ *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 (“*Farm Transparency*”) at [124] (Gordon J).

⁶ *Monis v R* (2013) 249 CLR 92 295 ALR 259; [2013] HCA 4 (*Monis*) at [108]; *Ravbar v Commonwealth* (2025) 423 ALR 241, 256 (*Ravbar*) at [32] (Gaegler CJ).

communications.⁷ The inquiry of the Court at to “the character of the law assessed and expressed by reference to its tendency” to burden political communication and is “qualitative not quantitative”.⁸ That the assessment is qualitative, not merely quantitative, is a recognition of the high value placed by the Court on the protection of minority views within the political process.⁹

11. Consideration of the burden, by careful and perceptive analysis, is necessary as it will inform the subsequent assessments as to the laws justification.¹⁰ It is submitted that upon such an analysis, the Court would characterise the burden as significant.

10 ***Terms & Operations of the Act***

12. In consideration of the terms, the Court would look to three factors in the text of the law in characterising the operation.
13. ***First***, the law widely defines both the range of impugned conduct, and organisations it may proscribe. When considered as a whole, the terms of the law create a framework through which the Executive is granted a wide discretion in the making of civil proscriptions against organisations (ss 114A.4 – 114A.9), with criminal prosecutions to follow for members of those organisations he proscribes (ss 114B.1 – 114B.7).
14. The definition of “*hate crime*” provided for in s 114A.3 is separated by reference
20 to three parts, all of which are defined as crimes against an individual or group based on their “*race or national or ethnic origin*”. In characterising the burden, the Court would also consider the Note provided by the Legislature that the conduct, at least with respect to ss (5) is directed at “serious conduct or the threat of serious conduct of a criminal nature.”
15. The definition of “*organisations*” is widely cast to capture both incorporated and unincorporated bodies, without express limitation for political parties, such as the Plaintiffs.
16. The proscriptions are made by the Governor-General on advice from the Minister, on satisfaction that the organisation has “*engaged in, prepared or planned to*

⁷ *Brown v Tasmania* (2017) 261 CLR 328 349 ALR 398; [2017] HCA 43 (*Brown*) at [180].

⁸ *Tajjour v New South Wales* (2014) 254 CLR 508; 313 ALR 221; [2014] HCA 35 (*Tajjour*) at [145] - [146].

⁹ *Tajjour* at [145].

¹⁰ *Tajjour* at [147]

engage in, or assisted the engagement in, conduct constituting a hate crime” (s 114A.4(1)(a)(i)), or “*has advocated (whether or not in Australia) engaging in conduct constituting a hate crime...*” s 114A.4(1)(a)(ii) (**the impugned conduct**).

17. The breadth of the impugned conduct in the law is perhaps most clearly characterised by this latter definition, which includes advocacy for ‘engaging in’ a hate crime ‘whether or not in Australia’. The definition of ‘organisation’ gives light to the operation of this provision, as it encompasses and includes those that are (i) based outside Australia, or (ii) comprised of non-citizens, or (iii) part of a larger organisation (s 114A.2(1)).

10 18. **Second**, the wide discretion afforded to the Minister. On construction, the definitions and the operative language of s 114A.4(1)(a)(ii), the Minister might thereby reach a state of satisfaction that an organisation established in Australia ought to be proscribed based entirely on the retrospective conduct of individuals (*including non-citizens*) advocating for engaging in a hate crime in another country, prior to the commencement of the law.

19. In proscribing an organisation, the Court would note that whether the Minister is “*satisfied on reasonable grounds*” that the organisation has either “*engaged in*” or “*advocated for*” the commission of the impugned conduct, is a matter for which they:

20 a. **Do not require proof of a conviction.** Pursuant to s 114A(4) relevantly provides that (emphasis added), “*A **person does not need to have been convicted** of a hate crime in order for the AFP Minister to be satisfied **an organisation** has engaged in conduct of a kind mentioned in paragraph (1)(a)*”. The Court would assume given the statutory context, that the Parliament intended the word ‘person’ takes on its established legal meaning,¹¹ and therefore would “*include a body politic or corporate as well as an individual*”.¹² The result being, that the Minister may, in the absence of any prior conviction by a Ch III court, reach a state of satisfaction that an organisation has “engaged” in the impugned conduct, by reference to the conduct of specific individuals. This is the quintessential definition of effective guilt (*for the organisation*) by

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¹¹ *Davies v Western Australia* (1904) 2 CLR 29, 42-43 (Griffith CJ).

¹² *Acts Interpretation Act 1901* (Cth), s 2C.

association (*to those individuals*). One can imagine the wide range of organisations that can be impugned by the Minister merely for the conduct of its members, all while there is no mechanism by which it can effectively insulate itself from proscription. The result is that community organisations, media, non-profit associations and political parties of every kind are at risk given how widely the law is drafted.

10 b. **Are not required to afford procedural fairness.** The terms of s 114A.4(5) establish that the Minister does not have any obligation of procedural fairness in deciding whether or not such a state of satisfaction is reached. The organisation is (i) not notified of the process against it, (ii) not to be provided any of the evidence relied upon by the Minister in coming to its decision; (iii) not afforded any opportunity to be heard in respect of the proscription.

c. **May consider retrospective conduct.** Per s 114A.4(2), in reaching their state of satisfaction, they may consider impugned conduct that is alleged to have occurred prior to the commencement of the law.

20 20. A condition precedent to the giving of such advice to the Governor-General, pursuant to s 114A.6(2), is that the Minister has received written advice from the Director-General of Security recommending the proscription of the organisation. However, the advice of the Director-General of Security is also not subject to procedural fairness (per s 114A.6(5)), and the Minister is entitled to account for other “*information in addition*” to the written advice they receive per s 114A.6(3).

21. The law does not define what facts or materials the Minister might rely upon in reaching their state of satisfaction about the impugned conduct, save for the necessity of advice from the Director-General (s 114A.6(2)). However, the scope and quality of the advice, and the “*information*” that might otherwise inform the Director-General’s own state of satisfaction in giving their advice, is entirely without express statutory basis as to its criterion.

30 22. **Third**, having had regard to the broad power to produce civil proscriptions of an organisation pursuant to Division 114A, the terms of Division 114B create a range of criminal offences for individuals who have any involvement in supporting a proscribed organisation (s 114B.1 – 114B.6). Special regard should be paid to the penalties imposed by the Legislature to these offences. For example, the offences

of directing, funding, training or recruiting for proscribed organisations, attract a penalty ranging between 10- and 15-years imprisonment for each offence (ss 114B.1, 114B.3-114B.5). For those who by association are simply members of such an organisation, the penalty is 7 years imprisonment (s 114B.2). These criminal provisions do not require any proof of a hate crime. Instead, criminal liability attaches to conduct undertaken in connection with the administration or support of an organisation proscribed by the Executive. The listing mechanism therefore transforms conduct that would otherwise constitute ordinary political association, advocacy or even nominal membership, into a category of serious criminal offending punishable by severe penalties.

23. Taken together, these provisions do not merely regulate isolated acts but operate to dismantle an organisation's capacity to exist as a participant in political discourse. Once the Executive lists an organisation by regulation, every essential function of collective political advocacy becomes criminal: leadership, membership, recruitment, financial support and organisational assistance.

24. By consequence, the effect of the provisions substantially burdens political communication by eliminating the organisation from public political discourse. The offences punish individuals for joining the organisation, attending meetings, recruiting supporters, contributing resources, funding political activities, coordinating campaigns and publicly advocating the organisation's political programme. The predictable consequence is that the organisation cannot effectively disseminate its views, organise supporters or participate in political discussion concerning matters such as immigration, race, citizenship and national identity, all of which are matters falling within the constitutional conception of political communication within our representative democracy.¹³

The Special Role of Political Parties

25. The burden is heightened when the Executive exercises its powers to proscribe political parties. This can be most acutely characterised by reference to the facts of

¹³ *Levy v State of Victoria* [1997] HCA 31; 146 ALR 248, 251; see also, *Tajjour* at [141];

the Plaintiff's case,¹⁴ which provides a useful example of the law's practical effect, and therefore of the burden it may have generally on the freedom.¹⁵

26. In establishing a system of representative government, the Court has found that the Australian people intended to create a democratic "government by the people through their representatives".¹⁶ For the reasons that follow, FSU submits that political parties are intrinsic to this system of representative government, such that any restriction on the freedom to form, associate with, or advocate for, a political party would constitute a significant burden on the implied freedom.
27. Discovering the functions of the Constitution's text and structural design requires investigation into the context in which they were enacted.¹⁷ In considering this constitutional context, the Court would look to the history and tradition of government in Australia.¹⁸
28. The Constitution embodies a system of representative and responsible government, which can only be understood subject to the constitutional conventions existing in United Kingdom at the time the Constitution was passed.¹⁹ Within that tradition, the Executive forms a government responsible to the majority in Parliament, which implies as a matter of operation, the existence of a system of political parties. The function of political parties of course, is dependant upon their ability to organize, to hold meetings, recruit and to advocate in order to secure the support of electors.
29. At the time of Federation, this had been the orthodox understanding of the operation of the English political system for over a century.²⁰ Political parties were so fundamental to the operation of representative government, that the procedure of the House of Commons was described to be one "which was designed to help an opposition, enabled the opposition to make its voice heard".²¹ Sir William Holdsworth went so far as to say that "... the fact that the opposition existed as an

¹⁴ *Criminal Code (Prohibited Hate Group—White Australia) Regulations 2026* (Cth).

¹⁵ *Wotton v Queensland* (2012) 246 CLR 1; 285 ALR 1; [2012] HCA 2 (*Wotton*) at [80]; see also *Brown* at [90].

¹⁶ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 108 ALR 577 (*ACTV*) at 593.

¹⁷ Randy Barnett and Evan Bernick, 'The Letter and the Spirit: A Unified Theory of Originalism' (2018) 107(1) *Georgetown Law Journal* 1, 34.

¹⁸ Randy Barnett and Lawrence Solum, 'Originalism after Dobbs, Bruen and Kennedy: the Role of History and Tradition' (2023) 118(2) *Northwestern University Law Review* 433, 480.

¹⁹ *Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd* (1920) 28 CLR 129, 146.

²⁰ Sir William S. Holdsworth, *A History of English Law – Volume 10* (Methuen & Co Ltd, 1938) 468.

²¹ *Ibid* at 583.

organized body, ensured a continuous and a reasoned criticism of the government's activities".²²

30. By the 1890's, the Australian public bristled with lively discussion of party politics.²³ This included robust public debates about the conduct of parties,²⁴ as well as the benefits (*and downsides*) of the party system.²⁵ It was generally acknowledged by the public during Federation, that much like the office of Prime Minister, the role of political parties was crucial to the operation of responsible government in Australia.²⁶ Of course, since the 1977 referendum,²⁷ s 15 of the Constitution has also expressly recognised the necessity and existence of political parties for the function of representative government.
31. It follows that the Australian public at the time of Federation in adopting the constitution, would have understood the conventions of representative and responsible government as functional only by reference to the operation of political parties. This understanding persisted and developed as part of the Australian political tradition through the 20th century, and up to the present day – such that we have always defined representative and responsible government within our constitutional system, by reference to the existence of robust competition between numerous political parties.
32. The spirit of the conventions relating to our representative and responsible government are not only a recognition of electors having a right to directly vote and be represented in our parliamentary democracy by candidates of their choice;²⁸ but also, the right of electors to hear, read and to consider the political opinions, advocacy and platforms of every political party which seeks support for itself in contending for political supremacy. To this end, the Court has already found that

²² Ibid.

²³ See for example, 'The Council and the Conference', *The Daily Telegraph* (Sydney, online, 4 December 1895) 4 <http://nla.gov.au/nla.news-article238545326>; and 'Woman's World', *The Brisbane Courier* (Brisbane, online, 12 November 1894) 7 <http://nla.gov.au/nla.news-article3590923>.

²⁴ See, 'The Council and the Conference', *The Daily Telegraph* (online, 4 December 1895) 4 <http://nla.gov.au/nla.news-article238545326>.

²⁵ See, 'Party Government', *The Reporter* (online, 16 June 1893) 2 <http://nla.gov.au/nla.news-article90365030>.

²⁶ Patrick Weller, 'Parliamentary Democracy in Australia' (2004) 57(3) *Parliamentary affairs* 630.

²⁷ *Constitution Alteration (Senate Casual Vacancies) 1977* (Cth).

²⁸ *Ruddick v The Commonwealth* (2022) 275 CLR 333 at 347-348 [18]-[19], 350 [26], 388 [148], 398 [174]; *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 199 [85].

the “equality of opportunity to participate in the exercise of political sovereignty is an aspect of the representative democracy guaranteed by our *Constitution*”.²⁹

33. Given the special role of political parties for the continued operation of representative and responsible government, a law that permits the Executive to proscribe a party and render its leaders, organizers and supporters liable for prosecution ought to be characterized as producing a significant burden on the implied freedom.

Second Limb – Constitutional Compatibility

- 10 34. Compatibility requires consideration of whether the purpose served by the law is one that does not impede the functioning of the system of representative and responsible government and all that it entails.³⁰ The Court has recently found that when discerning this element, “the purpose is that which the law is designed to achieve in fact” and that “[t]he purpose must also be both legitimate *and* non-punitive.”³¹
35. FSU submit that consistent with the authorities of this Court, the purpose of the law and its legitimacy would be gleaned not only from its stated objects, but also its operations and effects.³² Even if a legislature has no express intention to undermine representative and responsible government, a “statute enacted by it,
20 under the forms of law, may, by its necessary operation, be destructive” of constitutional limits that safeguard that system.³³ The stated purpose must be compatible with the Constitutionally prescribed system of government, as should the manner in which the law pursues that purpose.³⁴
36. The stated purpose of the law is found in s 114A.1, which is relevantly to (i) implement Articles 20 and 26 of the ICCPR and Articles 4(a) and (b) of the ICERD, and (ii) to protect the Australian community from harms associated with organisations that “engage in” or “advocate engaging in” a hate crime. FSU accept

²⁹ *McCloy v New South Wales* (2015) 257 CLR 178 (McCloy) at 207 [45].

³⁰ *McCloy* at [31]; *Farm Transparency* at [29] (Kiefel CJ and Keane J).

³¹ *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37; 280 CLR 137; 415 ALR 254 at [40].

³² *Hanson v Faruqi* [2026] FCAFC 96 at [143].

³³ *Minnesota v. Barber*, 136 U.S. 313 (1890).

³⁴ *McCloy* at [2], [126], [129], [220], [306].

that the stated objects of the law are on their face, for purposes compatible with the maintenance of our system of representative and responsible government.³⁵

37. Nonetheless, FSU concur with the Plaintiff's conclusions (PS [67]-[72]) that the law is not for a legitimate purpose. Though, FSU's reasons for this conclusion differ.

38. FSU submit that the law lacks legitimacy with respect to the second limb because it impedes the functioning of representative and responsible government by including political parties within its operative definitions. For other private organisations, FSU submit that (*subject to considerations of proportionality*), it is supported by history and tradition, for the Legislature to empower the Executive to proscribe organisations generally for protection of the public.

39. Prior to Federation, it had been the case that Parliament over the previous two centuries had enacted laws targeting private political associations and delegated limited powers to the Crown to proscribe named groups, on the basis they were deemed to be subversive, seditious and a risk to the public order.³⁶ For the public at the time of Federation, these laws would have been rare and justified only by reference to extreme necessity to prevent subversion and treason.

40. By contrast, a political party is one which, rather than subvert, seeks to engage within the system of representative and responsible government, by putting their views to electors and standing for election. While its policy platform might even be proposing radical changes to that system of constitutional government,³⁷ judgment as to the probity and popularity of a particular policy is reserved to the electors in directly choosing their representatives at regular and free elections. It is not compatible with such a system, for the Executive to be empowered to consider a rival political party's advocacy "dangerous" to Australia, and by arbitrary process, issue a general proscription that deprives electors of the right to join, support and consider that party at an election.

³⁵ *Lange* at CLR 561–2, 567; ALR 107–8, 112.

³⁶ See for example, the *Unlawful Societies Act 1799* (39 Geo III c 79); *Local Disturbances (Ireland) Act 1833* (3 & 4 Wm IV c 4); *Prevention of Crime (Ireland) Act 1882* (45 & 46 Vict c 25).

³⁷ As was analogously the case with the Communist Party of Australia, for example, see *Communist Party Dissolution Act 1950* (Cth): "... the basic theory of communism, as expounded by Marx and Lenin, engages in activities or operations designed to... establish a dictatorship of the proletariat".

41. For this reason, FSU submit based on the operation of the law as it effects political parties, is not compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. As in *Brown*, the law represents an “overreach of means over ends” and thereby “operates more widely than its purpose requires”.³⁸
42. If, in the alternative, the definition of “organisation” was read down to exclude political parties, FSU would concur instead with the Commonwealth, that the law would satisfy the second limb of *Lange*.

10 **Third Limb - Proportionality**

43. In the event the Court considers that the law satisfies the second limb, FSU will divide its submissions as to proportionality into two parts.
44. **First**, FSU argue that the level of judicial scrutiny imposed as part of the third limb of *McCloy*, should correspond with the seriousness of the constitutional burden. And that in cases where elements fundamental to the system of representative government are to be burdened or distorted, the onus of justification should shift to the Commonwealth.
45. **Second**, FSU submit that by application of the established principles set down in *Lange*, *McCloy* and subsequent cases, the law is disproportionate in its burden of
20 the implied freedom.

Calibration of Scrutiny

46. From the earliest rulings of the Court, it was considered that if the purpose of a law is the restriction of political communication by reference to the character of ideas or information, it will be “extremely difficult to justify”.³⁹ Laws which burden the freedom in a direct, as opposed to incidental way, or which regulate the content as opposed to the manner of communication, have been found to be more difficult to justify.⁴⁰

³⁸ *Brown* at [109].

³⁹ *ACTV* at [46].

⁴⁰ *Hogan v Hinch* [2011] HCA 4; (2011) 243 CLR 506 at [95]-[96]; *Wotton v State of Queensland* [2012] HCA 2; (2012) 246 CLR 1 at [30]; *Attorney-General (SA) v Corporation of City of Adelaide* [2013] HCA 3; (2013) 249 CLR 1 at [46]; and *Chubb* at [180]-[181].

47. While the Court had previously indicated a preference for a strict approach to structured proportionality,⁴¹ it has more recently indicated that this approach is a “useful tool of analysis” in determining proportionality.⁴²

48. Thus, the concept of calibrated scrutiny is not novel for the Court’s consideration. In *Brown*, Gageler J (*as his Honour then was*) observed that:⁴³

10 ... not every law which effectively burdens freedom of political communication poses the same degree of risk to the efficacy of electoral accountability for the exercise of legislative and executive power. For that reason not every law which effectively burdens freedom of political communication in pursuit of a legitimate purpose demands the same degree of justification, and concomitantly not every law which effectively burdens freedom of political communication needs to be subjected to the same intensity of judicial scrutiny.

49. Similarly, in *Ravbar*, there was support for the view that there is no inconsistency between the doctrine of structured proportionality and “calibrating the degree of scrutiny to the purpose of the law and the means the law uses to achieve its purpose”.⁴⁴

20 50. In *Smith*, the NSW Court of Appeal applied this method of analysis in recognising that “the more significant the burden the greater the degree of justification required” and that the “burden of proof and persuasion in this respect lies on the party defending the validity of the law.”⁴⁵

51. This recognises within the implied freedom doctrine, not only that there is room for the degree of justification to be calibrated based on the characterisation of the burden imposed by the law, but also that in cases where the burden is significant, it is incumbent upon the State or Commonwealth to actively justify its burden.

30 52. In this case, in alignment with their earlier submissions with respect to the significant character of the burden on the implied freedom, and particularly its potential for prejudice to the function of the party system which is inherent to the operation of our conventions of representative and responsible government, FSU submit that the Court would apply an elevated degree of judicial scrutiny.

⁴¹ *LibertyWorks Inc v The Commonwealth* [2021] HCA 18; 391 ALR 188 at [46] (Kiefel CJ, Keane and Gleeson JJ).

⁴² *Farm Transparency* at [172] (Gordon J); *Babet v Commonwealth* [2025] HCA 21; (2025) 423 ALR 83 at [49], [72], [242].

⁴³ *Brown* at [164] (Gageler J).

⁴⁴ *Ravbar* at [344] (Jagot J).

⁴⁵ *Smith v Blanch* [2025] NSWCA 188; 118 NSWLR 70 at [142].

53. Specifically, where a law, in its terms, operation or practical effect, imposes a substantial burden upon political communications protected by the Constitution—particularly where it discriminates between political actors or viewpoints, restricts electors’ capacity to participate effectively in the electoral process, or suppresses the ability of political organisations to form, maintain and communicate with the electorate—the burden can be sustained only where the Parliament demonstrates that the law is strictly necessary to protect a constitutionally indispensable interest.
54. A constitutionally indispensable interest of the Commonwealth is an interest that is essential to the fundamental preservation, security or effective functioning of the constitutional system of government established by the Constitution, without the protection of which the Commonwealth could not discharge the constitutional responsibilities entrusted to it.
55. The Court would, in such cases determine that a significant burden on the freedom would be constitutionally permissible only where the Commonwealth demonstrates that its law is necessary to protect an interest indispensable to the constitutional system of representative and responsible government. In all other cases, applying a higher standard of scrutiny, the significant burden would be presumptively unconstitutional.
56. As a development to the doctrine of proportionality, FSU submit, in rare cases (*such as this one*) where the burden was so highly characterised, that the question of whether the law is for the protection of a fundamental and constitutionally indispensable interest, would be considered as part of the proportionality analysis of the third limb of *McCloy*.
57. In this case, FSU submit that the answer to such a question would be ‘no’. There is nothing in the terms, operations or effects of the law which indicates it is enacted for the preservation, security or effective functioning of the constitutional system of government in a way that is fundamental. The law is, taken at its highest, for the advancement of the usual interest of every Australian government; namely, the promotion of general law and order.
58. It does not, in FSU’s submission, therefore, have sufficient justification for the significant burden it places upon the implied freedom.

Proportionality Analysis

59. Applying the Court's test for proportionality, FSU submit that the Plaintiffs is right in their assertion that the law is disproportionate in its burden of the implied freedom.
60. With respect to **suitability**, the law departs from a rational connection because the means it adopts to achieve its purpose are strained or ill-suited to that end. For example, the provisions in defining the impugned conduct do not distinguish between communicative advocacy and hate crimes; nor between individual and collective responsibility.
- 10 61. The law grants to the Executive a vast discretion to proscribe organisations. This is indicative of the most restrictive means that can be contemplated – one which permits, for example, no procedural fairness, no prior notice to the affected organisations, and no standards of evidence in reaching the required state of satisfaction.
62. The statutory mechanism under Division 114A, operates by suppressing the organisation as a vehicle through which the prohibited views and advocacy might be expressed, rather than by targeting any demonstrated causal link between particular communications and unlawful harm. The provisions thereby prohibit the communicative and associational activities of the organisation, without requiring
20 any connection between the particular conduct criminalised and the anticipated harm. Thus, where the stated purpose of the law is the protection of Australians from harm and the upholding of international obligations, it would be open for the Court to characterise the law as being rationally disconnected in parts, from its purposes.
63. The law is also not **necessary** because the Commonwealth has not demonstrated that the suppression of the organisation's existence, membership, support and communicative activities is required to achieve the legislative purpose. Moreover, there are obvious and reasonably practicable alternatives that would address the purported purposes while imposing a substantially lesser burden on political
30 communication. This includes specific and targeted prohibitions directed at incitements of violence or unlawful conduct, threats, intimidation, recruitment for criminal activity, provision of material assistance for unlawful purposes, or conduct-based regulation of organisations that engage in such activities.

64. The mere expression, association or dissemination of hateful political views does not itself demonstrate that the organisation must be extinguished as a participant in political debate. The question might be asked, why is it necessary to criminalise membership, association and political communication, rather than criminalising specific harmful conduct that the organisation may facilitate?
65. A less restrictive approach would have been for the Parliament to afford effective due process and procedural fairness to the affected organisations prior to proscription, and clearer standards for which the Executive must be satisfied in reaching the state of satisfaction for the making of Regulations proscribing an organisation. Further to this, if there was no intention to widen the burden to include proscription of political parties, the law could have been narrowly tailored to clarify those organisations as exempt.
66. In each respect, the law if more narrowly tailored could have ensured the legislative purpose was achieved with a lesser and more proportionate burden on the implied freedom.
67. Calibrated to the degree of burden, FSU submit in light of the various less restrictive and less burdensome ways that the law could have been tailored, that the Court would consider it is not necessary to achieve its stated purpose.
68. Viewed as a whole, FSU submit as to the final criteria that the Court would find the provisions fail the requirement of **adequacy in their balance** because the importance of the legislative objective, however substantial, does not justify the breadth of the burden imposed upon political communication.
69. Part 5.3B does not merely regulate harmful conduct or prevent unlawful acts; it permits the proscription of political parties from participation in public discourse by criminalising membership, association, recruitment, support and the organisational activities through which political ideas are communicated.
70. The restriction therefore disproportionately burdens fundamental functionaries within our system of representative government, through which citizens collectively organise and seek to influence political debate.
71. Against that significant burden, the Commonwealth must demonstrate a significant justification for suppressing those channels. This justification must be of the kind referred to above in paragraphs [46] – [58]. Even if this submission is not accepted, the Commonwealth would still need to present a significant justification calibrated

to meet such a high burden. Absent a demonstrated connection between its burdens on the organisation's existence and continued communicative activities, and upholding a constitutionally indispensable interest, the restriction imposed is disproportionate in the strict sense to the purpose it seeks to serve.

Conclusion on Ground 2

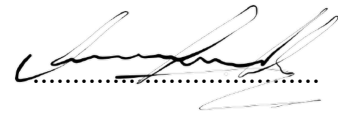
72. For the foregoing reasons, FSU submit that the relief sought by the Plaintiffs in respect of Ground 2 ought to be granted, such that the law would be declared invalid for its disproportionate burden of the implied freedom.

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Part V: ESTIMATE OF TIME

73. If the Court grants leave for the FSU to appear in the proceedings as amicus, and will be assisted by oral submissions, counsel anticipates that oral argument will take no more than 30 minutes.

Date: 31 July 2026



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ANNEXURE TO INTERVENER'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
12, 1995	Criminal Code Act 1995 (Cth)	30 June 2026 to current	Part 5.3B	- Act in force at the relevant time. - for illustrative purposes only	Not Applicable.
2, 1901	Acts Interpretation Act 1901 (Cth)	28 March 2026 to current	Section 2C	for illustrative purposes only	Not Applicable