



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

WHITE AUSTRALIA PARTY INC.

First Plaintiff

THOMAS ANTHONY SEWELL

Second Plaintiff

and

THE COMMONWEALTH OF AUSTRALIA

First Defendant

THE ATTORNEY-GENERAL OF THE COMMONWEALTH

Second Defendant

DEFENDANTS' OUTLINE OF ORAL ARGUMENT

PART I: CERTIFICATION

This outline of oral argument is in a form suitable for publication on the internet.

PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

The statutory scheme (DS [7]-[8])

1. Part 5.3B responds to serious harms caused by organisations that engage in hate crimes as defined (ss 114A.1 and 114A.3). The offence provisions (Div 114B) operate only in relation to a prohibited hate group specified by regulation. The preconditions to a regulation include politically-neutral advice from the Director-General of Security (s 114A.5) and politically-accountable evaluation by the AFP Minister (s 114A.4), both of which set a high threshold and which can be judicially reviewed in an administrative-law challenge to a regulation.

2. Part 5.3B is distinguishable from the legislation held invalid in the *Communist Party Case* both because it targets organisations by enacting prospective offences rather than by dissolution and confiscation and because of the amenability of a regulation to judicial review.

Implied freedom of political communication (DS [29]-[57])

3. ***Re-opening McCloy:*** It is not necessary to re-open and overrule *McCloy*, which did not decide that structured proportionality was an essential or mandatory tool of analysis.

4. ***Appropriate level of analysis:*** The Plaintiffs challenge only the enabling statutory provisions. That form of challenge should only succeed if there is no valid operation of the law. The Plaintiffs cannot establish that.

5. ***Regulation is a valid application of Part 5.3B:*** As both the Director-General (SCB2/519-529) and AFP Minister (SCB2/530-553) found in unchallenged determinations, the First Plaintiff is a neo-Nazi organisation that has engaged in violent conduct and violent rhetoric calculated to inspire violent conduct. Its claim to be a “political party” is a cynical attempt to attract legal protection for prohibited hate speech.

6. ***Burden:*** The burden of the Regulation is *incidental*, arising from the criminal proscription of conduct in relation to the First Plaintiff. It is *incremental*, because of unchallenged laws which already proscribe the hate speech engaged in by the alter egos of the First Plaintiff. It is *viewpoint neutral*, because the proscription of the First Plaintiff, as for any particular organisation, is the outcome of a process hedged by limitations to prevent partisan abuse.

7. **Purpose:** The legitimate purpose of Part 5.3B 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: *Farmer v Minister for Home Affairs* (2025) 99 ALJR 1408 at [54]-[55] (Gageler CJ, Gordon and Beech-Jones JJ), [108] (Edelman J), [245]-[246] (Jagot J) (**JBA Tab 67**).

8. That purpose has additional importance because it pursues compliance with Australia's international legal obligations.

9. **Justification:** Three headline factual conclusions should be drawn from the special case:

(a) The law responded to an emerging and growing security threat posed by organisations disseminating extremist views and ideologies: **SC Pt G [70]-[74] and SCB3/880, 889-891, 904, 980-981, 1109, 1111; SC Pts L2, K [122.4], [122.7], [143.4], [144], [148], [149]-[151]**. There was a growing incidence of hate crimes: **SC Pt L.1 [93]-[95]**. There was an undermining of social cohesion: **SC Pt L.1.1 [164]-[173]**.

(b) Organisations, distinct from the individuals who comprise them, pose a distinctive threat, which justifies the disruption of the organisation over and above the proscription of individual conduct: **SC Pt H [78]-[90]**.

(c) The crimes and other serious conduct enabled by hate groups cause serious harm, including harm that is inimical to the freedom of political communication, which is premised on equal opportunity to participate in public and civic life regardless of race or other intrinsic personal characteristics: **SC Pt J [106]-[108] (and [23], [179]); SC Pt M [180]-[199]; SC Pt K.8.1 [163]**.

10. There is a clear evidentiary basis for the legislatively perceived mischief of extremist ideologies inducing violence and other harms, and those extremist ideologies spreading despite existing laws. Part 5.3B goes no further than necessary, because the existence and operation of the organisation itself is the source of the harm. It is not only consistent with the implied freedom, but positively advances it. An equivalent justification has been upheld by the European Court of Human Rights: see especially *Vona v Hungary* (35943/10, ECtHR 2013).

Chapter III (DS [58]-[61])

11. Part 5.3B does not authorise any non-judicial determination of criminal guilt. Further, it responds to particular kinds of harmful conduct, which is not always offending conduct.

12. The law responds to a group's conduct by a regulation which engages the application of prospective offence provisions, a characteristically legislative rather than judicial response. Legislative detriment is not necessarily punishment: *Ravbar v Commonwealth* (2025) 99 ALJR 1000 at [409] (Jagot J) (**JBA Tab 76**); *Duncan v New South Wales* (2015) 255 CLR 388 at [46] (the Court) (**JBA Tab 36**).

13. Alternatively, the law is justified by reference to a non-punitive purpose, being the protection of the community from the serious harms caused by racist hate groups.

Head of power (DS [13]-[28])

14. *External affairs*: Art 4(b) of CERD has a preventative purpose that requires prophylactic measures, and requires extremist political parties to be prohibited, consistent with the resolution of debate on that very point in the drafting of the treaty and with the subsequent view of the Committee on the Elimination of Racial Discrimination: SC [222]-[224], SCB9/3505.

15. The definition of hate crimes in s 114A.3 ensures that the law only reaches organisations that have engaged in conduct that can be described as promoting or inciting racial discrimination within its broad treaty meaning.

16. The chapeau to Art 4 does not qualify the obligation in Art 4(b), but permits States flexibility as to the manner in which the obligation may be implemented.

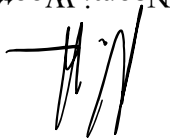
17. A sufficient connection with a head of power can be supplied by executive satisfaction (at least where reviewable by a court): *Thoms v Commonwealth* (2022) 276 CLR 466 at [38] (Kiefel CJ, Keane and Gleeson JJ), [66]-[71] (Gordon and Edelman JJ) (**JBA Tab 57**).

18. *Nationhood*: There is an implied power to protect the nation which extends beyond narrow conceptions of sedition, or response to economic shocks, to protecting the people of the Commonwealth from a social crisis of racial hatred that poses a threat to the security of the Commonwealth and the system of representative democracy. Part 5.3B addresses emergent threats by operating only where there is a specification, which is made upon reviewable satisfaction as to the threat, informed by ASIO advice: cf *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 (**JBA Tab 45**). Part 5.3B addresses a threat that is national in scope, given the geographical dispersion of hate groups and the role of the internet.

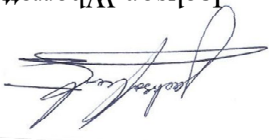
Dated: 8 September 2026



Brendan Lim



Naomi Wootton



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