



HIGH COURT OF AUSTRALIA

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Details of Filing

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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

**OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY GENERAL FOR
NEW SOUTH WALES (INTERVENING)**

PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

No inconsistency with implied freedom established (NSW [12]-[14])

1 The Plaintiffs have failed to establish that Pt 5.3B of the *Criminal Code* (Cth) has no valid operation by reason of the implied freedom of political communication.

1.1. The regulation-making power that is conferred from the combined operation of s 5 of the *Criminal Code Act 1995* (Cth) and the definition of “*prohibited hate group*” in s 114A.2(1) of the *Criminal Code* (Cth) should be read, in the conventional way, as not purporting to authorise making regulations that would offend the implied freedom.

- *Wotton* (2012) 246 CLR 1 (**JBA 13/62**) at [9]-[10], [21]-[23].

1.2. Given that and given that the regulation-making power is plainly capable of being exercised without offending the implied freedom (eg, in relation to organisations that do not and do not propose to engage in political communication but are instead focused on advocating violence against a particular ethnic group), the regulation-making power is not invalid by reason of the implied freedom. Nor are the other provisions in Pt 5.3B that regulate that power or prescribe consequences of its exercise.

1.3. Any question of whether a particular regulation offends the implied freedom may be dealt with in proceedings that challenge the validity of that regulation as *ultra vires* the regulation-making power. But there is no such challenge here. Any such challenge would need to grapple, *inter alia*, with s 114A.4(1)(b): one of the conditions precedent to the exercise of the regulation-making power. Where there are “*reasonable grounds*” for concluding that specifying an organisation as a prohibited hate group is “*reasonably necessary*” to protect the Australian community in the requisite sense as required by that paragraph as a precondition to exercising the regulation-making power, it is unlikely that specifying such an organisation would offend the implied freedom and therefore fall outside the regulation-making power.

Part 5.3B does not offend Chapter III (NSW [40]-[41])

2 Chapter III does not make it impermissible for a member of the executive to determine, as a step in a statutory decision-making process, that he or she is satisfied that conduct constituting a criminal offence has been engaged in. Requiring the AFP Minister to be

satisfied on reasonable grounds that an organisation has engaged in a hate crime (or prepared or planned to engage in, assisted the engagement in or advocated a hate crime) as a precondition to the regulation-making power being exercised does not involve the AFP Minister conclusively determining that a person or organisation has any criminal liability or imposing criminal punishment in relation to any such liability.

- eg, *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 (**JBA 4/25**) at [63].

Date: 9 September 2026

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Scott Robertson

Christine Ernst