



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M50/2026

BETWEEN:

WHITE AUSTRALIA PARTY INC.
First Plaintiff

and

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THOMAS ANTHONY SEWELL
Second Plaintiff

and

THE COMMONWEALTH OF AUSTRALIA
First Defendant

and

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THE ATTORNEY-GENERAL OF THE COMMONWEALTH
Second Defendant

**OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE
STATE OF SOUTH AUSTRALIA (INTERVENING)**

Part I: CERTIFICATION

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

Part II: OUTLINE OF ORAL SUBMISSION

Part 5.3B is supported by s 51(xxix); there is no “implied” nationhood power

2. Pt 5.3B of the *Criminal Code Act 1995* (Cth) is supported by s 51(xxix) of the *Constitution* such that it is unnecessary to consider whether it can also be supported by an “implied legislative power to protect the Commonwealth and its people”: CS, [23]-[28].
3. If it is necessary to consider this question then, whilst the Commonwealth is empowered by s 61 to “maintain the Constitution”, and thereby protect the body politic against existential threats, that power is (i) not implied, (ii) does not extend to matters of national interest, and (iii) will rarely sustain coercive legislation.
4. An implied or inherent nationhood power, of the kind relied upon by the Commonwealth, has not been authoritatively recognised by a majority of this Court: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 (V5, T26), 156 (Latham CJ), 188 (Dixon J), 211-212 (McTiernan J), 230-231 (Williams J), 233 (Webb J), 259-260 (Fullagar J), 275 (Kitto J); *Victoria v Commonwealth* (1975) 134 CLR 338 (*AAP*) (V12, T59), 362 (Barwick CJ), 397 (Mason J), 406 (Jacobs J); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 (V10, T45), 63 [133] (French CJ), 89 [232]-[234] (Gummow, Crennan and Bell JJ). In fact, a majority of the Court in *Davis v Commonwealth* (1988) 166 CLR 79 (V8, T34), rejected the existence of such an implication: 92-95 (Mason CJ, Deane and Gaudron JJ), 102-103 (Wilson and Dawson JJ), 110-111 (Brennan J), 119 (Toohey J). The power to sustain the laws considered in *Australian Communist Party* (V5, T26), *Davis* (V8, T34) and *Pape* (V10, T45) should be understood to have been supported by the express conferral of executive power under s 61, to maintain the *Constitution*, and s 51(xxxix).
5. The breadth of the power to “maintain the Constitution” does not extend to matters of “national interest or concern” or the “protection and advancement of the nation”: *AAP*, 362 (Barwick CJ), 378 (Gibbs J), 398 (Mason J); *Davis*, 102 (Wilson and Dawson JJ), cf 110 (Brennan J). Further, the breadth of power conferred by s 61 must be construed consistently with the federal character of the *Constitution* such that the “cannot otherwise be carried on for the benefit of the nation” limitation incorporates consideration of the legislative power of the States and cooperative features of the *Constitution*: ss 51(xxxvii), 96 and 119.

6. As to depth, the power to maintain the *Constitution* can, read together with s 51(xxxix), take coercive form in rare circumstances where that coercion can be demonstrated to be appropriate and adapted to a threat to the polity: *Davis* (V8, T34), 96-101 (Mason CJ, Deane and Gaudron JJ), 115-117 (Brennan J). A useful measure of the depth of the executive power of the Commonwealth to maintain the *Constitution* (indeed, possibly the safest guide), is the scope of those prerogative powers of the Crown which are vested in the Commonwealth by s 61: G Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (Melbourne University Press, 1983) (V19, T103), 31-33.

7. South Australia makes no submission about whether Part 5.3B can be supported by ss 51 (xxxix) and 61.

Part 5.3B does not offend the implied freedom; *McCloy* should be reopened and overruled

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

9. To the extent that it is necessary to do so, South Australia seeks leave to reopen, and invites the Court to overrule, the decision in *McCloy v New South Wales* (2015) 257 CLR 178 (V9, T41).

10. *McCloy* (V9, T41) should be reopened. Serious reservations have persisted about structured proportionality since *McCloy* (V9, T41) was decided. Despite the aims of promoting judicial transparency and legal certainty, structured proportionality has been productive of opacity and ambiguity; a problem that has been exacerbated by doubts about the status of structured proportionality test. This is unsatisfactory for lower courts, litigants and those advising government. Structured proportionality is not “embedded” in the implied freedom jurisprudence of this Court such that its abandonment would not undermine the correctness of previously decided cases. And, for the following reasons, South Australia submits that *McCloy* (V9, T41) is plainly wrong: SA, [29]-[33].

11. *McCloy* (V9, T41) should be overruled. Structured proportionality is flawed for, at least, three reasons. First, the test of *suitability* is superfluous. Second, the *adequate in the balance* stage provides insufficient guidance as to the weighing process that it proposes. Third, its rigidity cannot be supported by the text and structure of the *Constitution*: SA, [34]-[38].

12. Structured proportionality should be replaced by a test of reasonable necessity for the purpose of determining whether a law that burdens the implied freedom of political communication is reasonably appropriate and adapted to a legitimate end. Reasonable necessity testing jettisons the structured stages of *suitability* and *adequate in the balance*. The inquiry about whether “there is no obvious and compelling alternative, reasonably

practicable means of achieving the same purpose which has a less restrictive effect on the freedom” is calibrated by reference to the nature and degree of the burden that the measure in question imposes and the legitimate end that it pursues: SA, [39]-[41].

13. Unlike structured proportionality which calls for a weighing of the legitimate end pursued by the legislature against the implied freedom of political communication, the test of reasonable necessity respects the respective roles of the political branches to select the legitimate ends to be pursued, and of the judiciary to scrutinise the means by which those ends are pursued: SA, [42].

Part 5.3B does not infringe Ch III; legitimacy

14. Pt 5.3B does not infringe Ch III of the *Constitution* because it is not *prima facie* punitive.

- 10 15. If, however, it is necessary for the Court to consider whether the detriment imposed by Pt 5.3B is “reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose”, then the present case invites consideration of the role that the notion of legitimacy plays in applying that test.

16. The kinds of detriment, the imposition of which may be characterised as punitive, is now understood to extend well beyond detention in custody (on one view, the imposition of any, non-trivial, detriment may potentially amount to punishment). Given this extension, and the fact that the inquiry into the legitimacy of a measure sits within a wholistic test of characterisation, a nuanced approach must be taken in relation to the kinds of public interests that may be legitimate: *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 (V17, T79), 56 [239] (Beech-Jones J).
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17. Whilst a legitimate end may need to be “grave and specific” to justify detention in custody (or materially equivalent detriments), a less compelling end may be sufficient to justify a lesser form of detriment. In other words, the gravity and specificity of the legitimate end pursued must be calibrated within the wholistic inquiry by reference to the nature and extent of the detriment imposed.

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