



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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Form 27F – Outline of oral submissions

Note: see rule 44.08.2.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: WHITE AUSTRALIA PARTY INC. & ANOR

AND: THE COMMONWEALTH OF AUSTRALIA & ANOR

PLAINTIFFS' OUTLINE OF ORAL SUBMISSIONS

Part I: I certify that this document is in a form suitable for publication on the internet.

Part II: Outline of propositions that the Plaintiffs intend to advance in oral argument.

1. The Court should issue a writ of prohibition and/or grant declaratory relief as claimed in the Constitutional Writ application, because one or more of questions stated to the Full Court should be answered in the manner and to the effect proposed by the Plaintiffs.

NO AFFIRMATIVE HEAD OF POWER

2. As to Question 1, there is no affirmative power in the Parliament of the Commonwealth to make Part 5.3B Criminal Code Act 1995 [as amended], because the Defendants have not demonstrated to the Court the onus being upon them that the two pleaded powers relied on support the challenged law.
3. The question is relevantly indistinguishable from the decision of this Court in the *ACP Case* and the stream principle applied by it.
4. Part 5.3B does not conform in its implementation to ICCPR and ICERD.
5. Part 5.3B is inconsistent with each of the Treaties and pleaded Articles.
6. The Defendants' fallback argument that Part 5.3B is relevantly 'prophylactic' should be rejected because the law is not of that character, undermines State law and the Federal compact, and ignores the Commonwealth's obligations as to civil and political rights.
7. The law fails to meet the requirement that its scheme be reasonably capable of being considered appropriate and adapted to implementing the treaties. A broader control mechanism by the Executive is not part of the scheme of either Treaty.
8. The law is not supported by the Nationhood power having been rejected on this ground in the *ACP Case*, because no subversion of the Commonwealth nor relevant civil unrest of which the Court should take judicial notice is alleged or demonstrated.

THE IMPLIED FREEDOM

9. Part 5.3B effectively burdens the implied freedom. It confers on the Minister a discretionary power to proscribe an organisation, criminalising its membership and activities and, in practical effect, destroying it.
10. Organisations and collective action are central to political communication. The power can be used to suppress political opinion on race, ethnicity and national origin. Those subjects are themselves central to governmental matters, including immigration, foreign affairs, defence and indigenous affairs.
11. The burden is wide. A member need not have committed a hate crime for the organisation to which they belong to be proscribed.
12. Nor need the organisation itself have committed a hate crime. It is enough that it has assisted, prepared, planned or advocated one: s 114A.4(1)(a). A single past instance of assistance suffices: s 114A.4(2), (3).
13. The burden is deep. The definition of hate crime is broad. It extends to conduct, or a threat of conduct, which 'would involve' creating a serious risk to the health or safety of a section of the public: s 114A.3(5)(a)(v). The targeted persons need not actually be distinguished by race or national or ethnic origin: s 114A.3(6).
14. No one need be heard on whether a hate crime occurred, or on any other issue. Part 5.3B excludes procedural fairness: ss 114A.4(5), 114A.5(5). The Minister's satisfaction may rest on classified advice from the Director-General which would not be before a court on judicial review.
15. The Director-General need not be satisfied that the organisation has engaged in or advocated violence. It is enough that its activities are 'likely to increase the risk' of violence: s 114A.5(1)(a). The violence need not come from the organisation being proscribed, that its mere presence may cause others to be violent towards the organisation for instance, is enough. Likewise, the Minister's criteria includes harm caused by the 'continued presence in Australia' of the organisation is enough: s 114A.1(2).
16. The law has no legitimate purpose. Political discourse in a democracy involves invective, offence and psychological harm to one's opponents. It involves social harm through dissent, unrest and civil disobedience. It also involves freedom to associate for political communication with others who have behaved harmfully in the past. Extinguishment of political association by ministerial fiat is the antithesis of that system.

17. As to the third limb, the burden is severe and the level of justification must rise to meet it. Obvious and compelling alternatives include:
- a. Directing the Minister's satisfaction under s 114A.4(1)(b) to the prevention of hate crimes, not to protection from 'social, economic, psychological' harm.
 - b. Removing s 114A.1(2), which treats the 'continued presence in Australia' of an organisation as a harm.
 - c. Not excluding procedural fairness. The exclusion serves no protective purpose.
 - d. Specification by a court or, at least, merits review of the decision to specify.
 - e. Exceptions to the definition of 'hate crime' for fair reporting and fair comment in the public interest, as in s 18D of the *Racial Discrimination Act 1975* (Cth).

AN IMPERMISSIBLE EXERCISE OF CHAPTER III POWER

18. As to Question 3, the Plaintiffs submit that Part 5.3B infringes Chapter III of the Constitution and is invalid on that basis.
19. The law empowers the Executive to determine whether conduct constituting a criminal offence that upholds standards to be expected of all Australians has occurred being an adjudicative finding traditionally reserved to courts. and then to impose punitive consequences on the assumption that finding is accepted.
20. That the critical element of each s 114B offence, the formal language of which disguises the substance of the adjudicative finding that the circumstantial element of each s 114B offence is the Ministerial inquiry and opinion to a civil standard that a prohibited hate group relevantly exists and is engaged, infringes Chapter III of the Constitution.
21. There is no relevant analogy between the Ministerial finding under Part 5.3B section 114A.4(1)(a)(i) with breach of a public license.
22. The law purports to determine existing rights, and apply legal standards with the result that an effectual binding declaration of rights becomes an element of all criminal offences under Div 114B.
23. The law is a bill of pains and penalties and/or punitive in substance not protective.

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