No. NSD 372 of 2023

Federal Court of Australia

Registry: New South Wales

Mehreen Faruqi

Applicant

Pauline Hanson

Respondent

RESPONDENT'S OUTLINE OF SUBMISSIONS

A. OVERVIEW

1. Read on the day Australians learned of the Queen's death, the respondent's Tweet was, and would have been seen as, a reply to the applicant's Tweet and as including its text. The way the respondent's Tweet would have been seen was as it appears at CB 17.

2. This exchange between two politicians has led one of them, the applicant, to commence proceedings under s 18C of the *Racial Discrimination Act* 1975 (Cth) (**the Act**).

B. INTERPRETATION OF RACIAL DISCRIMINATION ACT

3. The interpretation of the relevant provisions of the Act (ss 18B-18D) is necessary as a precursor to consideration of the validity of those provisions, and also their application.

Section 18C

4. The applicant's outline of submissions (**AOS**), at [15] seeks to rely on an interpretation of s 18C that limits it to conduct that "*profound and serious effects*": *Bropho* v HREOC (2004) 135 FCR 105 at [70] and the materials and authority there cited. See also *Jones v Scully* (2002) 120 FCR 243, per Hely J at [102]-[107], noting especially [106]-[107] in relation to political conduct; *Eatock v Bolt* (2011) 197 FCR 261 at [268]. The respondent contends that that interpretation is correct.

5. The meaning of "because of" in s 18C(1)(b) is straightforward, both as a matter of language and authority. It requires consideration of the true reason(s) for the conduct in question, including consideration of motive: *Toben v Jones* (2003) 129 FCR 515, per Kiefel J at [61]-[64]. However, because of s 18B, the "true reason" accommodates *any* reason, even if it is wholly subordinated to other reasons, such that it is not even a substantial reason. This is in striking contrast to the law of defamation (another area of the law in which a balance needs to be struck with freedom of expression), where the purpose for acts being done focuses on *predominant* motive: *Roberts v Bass* (2002) 212 CLR 1 at 41 [104].

6. If the relevant conduct contains or comprises true or partly true statements, that does not prevent them being offensive: *Jones v Scully*, per Hely J at [104]. That has significance for the implied freedom.

Section 18D

7. Section 18D, as it applies in this case provides:

> **18D Exemptions**
>
> Section 18C does not render unalwful anything said or done reasonably and in good faith:
> …
> (c) in making or publishing:
> …
> (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

8. Section 18D (as a defence to, or exemption from, s 18C) presupposes conduct which has profound and serious effects (see above). Thus, the existence of the provision contemplates that such conduct may exist; that is, it is possible reasonably and in good faith to engage in conduct which is profoundly and seriously offensive etc and which is made because of one of the grounds proscribed by s 18C(1)(b).

"Reasonably" in s 18D

9. The leading consideration of this term appears to be that of French J in *Bropho* where his Honour said in the course of a discussion at [78]-[82]:

> [79] There are elements of rationality and proportionality in the relevant definitions of reasonably. A thing is done "reasonably" in one of the protected activities in paras (a), (b) and (c) of s 18D if it bears a rational relationship to that activity and is not disproportionate to what is necessary to carry it out. It imports an objective judgment. In this context that means a judgment independent of that which the actor thinks is reasonable. *It does allow the possibility that there may be more than one way of doing things "reasonably". The judgment required in applying the section, is whether the thing done was done "reasonably" not whether it could have been done more reasonably or in a different way more acceptable to the Court.* The judgment will necessarily be informed by the normative elements of ss 18C and 18D and a recognition of the two competing values that are protected by those sections.
>
> …
>
> [81] The same kind of criterion may be applied to acts done in reports or comments on events or matters of public interest. A presentation of a report or comment which highlights, in a way that is *gratuitously* insulting or offensive, a matter that is irrelevant to the purported question of public interest under discussion may not be done "reasonably". A feature article on criminal activity said to be associated with a particular ethnic group would in the ordinary course be expected to fall within the protection of para (c). If it were written in a way that offered gratuitous insults by, for example, referring to members of the group in derogatory racist slang terms, then it would be unlikely that the comment would be offered "reasonably". (Emphasis added.)

10. "Reasonably" or "reasonableness", in relation to conduct, directs attention to all the circumstances in which the conduct occurs. Where s 18D(c)(ii) is concerned, namely "*comment"*, attention is directed to the *responsive* nature of the conduct. Further, in that context, controversy, including political controversy, may be supposed to be a central part of its field of operation (especially "*on any event or matter of public interest*"). That points to the nature of the "reasonableness" being referred to. After all, the point of a "comment" is to respond to, evaluate and criticise someone/something else. It is inherently responsive conduct, which can only be understood in the context of what is being commented upon. And what is "reasonable" for one politician responding publicly to another may be quite different to what is "reasonable" in other contexts.

"Good faith" in s 18D

11. The Explanatory Memorandum accompanying the introduction of s 18D is extracted in *Jones v Scully* at [127], including the following statement:

> It is not the intention of that provision to prohibit a person from stating in public what may be considered generally to be an extreme view, so long as the person

> making the statement does so reasonably and in good faith and genuinely believes in what he or she is saying.

12. The primary submission of the respondent on this aspect is that in the context of the exemption provision, already constrained by "reasonableness", the notion of "good faith" should be understood to be directed to subjective considerations, focussing on the honesty of the views expressed. That is because the terms of s 18C are unconstrained as to the circumstances of publication, other than that they be "otherwise than in private". They extend to people in all walks of life, regardless of whether they are discharging any particular office or duty.

13. The approach taken by the Full Court in *Toben v Jones* (2003) 128 FCR 515, seems at least broadly consistent that approach: see per Carr J at [44] where his Honour said:

> In the context of knowing that Australian Jewish people would be offended by the challenge which the appellant sought to make, a reasonable person acting in good faith would have made every effort to express the challenge and his views with as much restraint as was consistent with the communication of those views.

14. Kiefel J agreed on this point at [78], and Allsop J also expressed his general agreement and appears to have proceeded in a similar fashion, at [159]-[164].

15. Thus, Carr J took a composite approach to the two elements. It was also one in which the requirement of restraint was relative in two respects (a) it varied depending on the reasonable knowledge that the expressed views would be offensive and (b) it was limited to that degree of restraint as was consistent with the communication of those views (that is, "the challenge" being made). The relevant limits, beyond honesty, can be seen as flowing from the notion of reasonableness, although as noted above, what is "reasonable" for a politician responding publicly to another politician may call for careful assessment in the circumstances.

16. A more demanding interpretation of good faith was evident in *Bropho*. That was an appeal from an unsuccessful application to this Court for judicial review from a decision of HREOC. The appeal was dismissed by majority (French J and Carr J) who delivered separate judgments. Lee J dissented.

17. French J held that the notion of "good faith" in s 18D had a subjective element (honesty) but also an objective one requiring the taking of a "conscientious approach" to advancing the exercise of freedom of speech in a way designed to minimise the offence etc suffered

by the people affected by it: [96]-[102] esp at [101]-[102]. Carr J dealt with the requirement of reasonableness and good faith as a composite expression, and considered there was no error demonstrated when that was approached on an objective basis but without excluding the respondent's actual state of mind: at [173]-[178] esp [178]. There was accordingly no *ratio* in terms of the principles stated by French J, although Carr J observed (at [176]) that "[q]uestions of moral and ethical considerations would, of course, relate to good faith as well as reasonableness". Otherwise, Carr J's approach was similar to his approach in *Toben v Jones* (see above).

18. The analysis of the notion of "good faith" by French J in *Bropho* imposes too high a test. The line of authority relied on by his Honour in *Bropho* at [98]-[100] involved statutory contexts of a different kind where the person in question occupied a particular office or position, such that the imposition of additional duties within the notion of "good faith", such as a planning authority charged with planning decisions (as in *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) 44 FCR 290, relied on by French J at [98]-[100]).

19. In summary, the "good faith" requirement is best understood as a composite notion with reasonableness, adding to that notion only the requirement of honesty. In the alternative, the requirement should be understood as not going beyond a requirement of relative restraint of the kind indicated by Carr J in *Toben v Jones* (see above).

C. CONSTITUTIONAL VALIDITY: LEGISLATIVE POWER

20. The respondent accepts that the Court is bound to follow the Full Court decision in *Toben v Jones* which held that the relevant provisions of the Act are supported by the external affairs power. See also *Eatock v Bolt* at [194]. (As Allsop J noted in *Toben v Jones* at [147] there was no argument about the implied freedom of communication argued in that case and so *Toben* does not foreclose argument in this Court on that issue.)

21. In those circumstances, it is formally submitted that *Toben v Jones* was wrongly decided on this issue and that the relevant provisions of the Act are invalid as outside a valid exercise of power to legislate under s 51(xxix) of the *Constitution* (or any other source of legislative power in the *Constitution*). That contention, briefly, centres on the following matters:

(a) The provisions were said to be based on Article 4 of the *Convention for the Elimination of Racial Discrimination* (CERD);

(b) Article 4 of CERD most relevantly provided that States Parties:

> Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, …;

(c) Section 18C is civil in nature whereas article 4 of the *Convention for the Elimination of Racial Discrimination* (CERD) related to criminal offences;

(d) Article 4 of CERD was limited to conduct "based on racial superiority or hatred" or which was "incitement to racial discrimination" or violence or incitement to violence, whereas ss18B-18D is significantly broader;

(e) Sections 18B-18D do not sufficiently take into account the countervailing requirements of Article 5 of CERD and Article 19(2) and (3) of the *International Convention on Civil and Political Rights*, in relation to freedom of expression;

(f) Accordingly, the relevant provisions do not implement international conventions in a way which would give rise to a valid exercise of power.

D. CONSTITUTIONAL VALIDITY: IMPLIED FREEDOM

22. The provisions of s 18C are invalid because they impermissibly burden the freedom of communication about matters of government and politics which is implied in the *Constitution* (**the implied freedom**). The test for invalidity is as stated in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, as explained in *McCloy v New South Wales* (2015) 257 CLR 178 and *Brown v Tasmania* (2017) 261 CLR 328. This test was explained by Kiefel CJ, Bell and Keane JJ in *Clubb v Edwards* (2019) 267 CLR 171 at [5]-[6]:

> [5] The test to be applied was adopted in *McCloy* by French CJ, Kiefel, Bell and Keane JJ, and it was applied in *Brown* by Kiefel CJ, Bell and Keane JJ and Nettle J. For convenience that test will be referred to as "the *McCloy* test". It is in the following terms:
>
> 1. Does the law effectively burden the implied freedom in its terms, operation or effect?

2. If "yes" to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

3. If "yes" to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

> [6] The third step of the *McCloy* test is assisted by a proportionality analysis which asks whether the impugned law is "suitable", in the sense that it has a rational connection to the purpose of the law, and "necessary", in the sense that there is no obvious and compelling alternative, reasonably practical, means of achieving the same purpose which has a less burdensome effect on the implied freedom. If both these questions are answered in the affirmative, the question is then whether the challenged law is "adequate in its balance". This last criterion requires a judgment, consistently with the limits of the judicial function, as to the balance between the importance of the purpose served by the law and the extent of the restriction it imposes on the implied freedom.

23. In considering the validity of s 18C, the Court is concerned with how the provision applies generally, not merely with how it applies in this particular case, that is, it is a systemic inquiry: *Monis v The Queen*, per French CJ at [62]; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [381], per Hayne J. See to like effect, *Clubb* per Kiefel CJ, Bell and Keane JJ at [35], noting that the implied freedom is not a personal right but a restriction on legislative power.

Question 1: does s 18C burden the implied freedom?

24. It is relatively straight-forward to conclude that s 18C burdens the implied freedom, but as the *extent* of the burden may also be relevant (especially to Question 3) and is contested by the applicant (AOS [63]-[66]), it is an issue to be addressed in a little detail.

25. As s 18C makes certain conduct unlawful, that will burden the implied freedom if it applies to political communication. Political communication potentially includes all speech relevant to the development of public opinion on the whole range of issues an intelligent citizen should think about: *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 124 per Mason CJ, Toohey and Gaudron JJ.

26. Section 18C makes unlawful public language which is offensive or insulting. It can be readily seen that language of that kind may be part of political communication, a point that has been made in numerous judgments of the High Court on the implied freedom.

27. In *Levy v Victoria* (1997) 189 CLR 579, McHugh J said at 623:

> [t]he constitutional implication does more than protect rational argument and peaceful conduct that conveys political or government messages. It also protects false, unreasoned and emotional communications as well as true, reasoned and detached communications. To many people, appeals to emotions in political and government matters are deplorable or worse. That people should take this view is understandable, for history, ancient and modern, is full of examples of the use of appeals to the emotions to achieve evil ends. However, the use of such appeals to achieve political and government goals has been so widespread for so long in Western history that such appeals cannot be outside the protection of the constitutional implication.

28. A similar point (in a defamation context) was made by Kirby J in *Roberts v Bass* (2002) 212 CLR 1 at [171]:

> The purpose of federal, State and Territory elections in Australia is to ensure the selection of a chosen candidate or candidates to hold public office. The purpose of those who support candidates for such elections is necessarily to harm their opponents, at least electorally. Often, if not invariably, this purpose will involve attempts to harm the *reputation* of an opponent. In the nature of political campaigns in Australia, it is unrealistic to expect the genteel conduct that may be appropriate to other circumstances of privileged communication. Political communication in Australia is often robust, exaggerated, angry, mixing fact and comment and commonly appealing to prejudice, fear and self-interest. In this country, a philosophical ideal that political discourse should be based only upon objective facts, noble ideas and temperate beliefs gives way to the reality of passionate and sometimes irrational and highly charged interchange. Communications in this field of discourse including in, but not limited to, the mass media, place emphasis upon brevity, hyperbole, entertainment, image and vivid expression. (Emphasis in original.)

29. In *Coleman v Power* (2004) 220 CLR 1, the majority judgments stressed the interconnection between offensiveness and political communication, noting that offensiveness may be part of the impact of the message. McHugh J said at [81]:

> "The concession that the words used by the appellant were a communication on political or government matters was also correctly made. It is beside the point that those words were insulting to Constable Power. Insults are as much a part of communications concerning political and government matters as is irony, humour or acerbic criticism.

30. Gummow and Hayne JJ said at [197] that, "[i]nsult and invective have been employed in political communication at least since the time of Demosthenes".

31. And Kirby J said at [239]:

> One might wish for more rationality, less superficiality, diminished invective and increased logic and persuasion in political discourse. But those of that view must find another homeland. From its earliest history, Australian politics

> has regularly included insult and emotion, calumny and invective, in its armoury of persuasion. They are part and parcel of the struggle of ideas.

32. In *Monis v R* (2013) 249 CLR 92, Hayne J said at [85]:

> History, not only recent history, teaches that abuse and invective are an inevitable part of political discourse. Abuse and invective are designed to drive a point home by inflicting the pain of humiliation and insult. And the greater the humiliation, the greater the insult, the more effective the attack may be.

33. And his Honour said, at [220]:

> The elimination of communications giving offence, even serious offence, without more is not a legitimate object or end. Political debate and discourse is not, and cannot be, free from passion. It is not, and cannot be, free from appeals to the emotions as well as to reason. It is not, and cannot be, free from insult and invective. Giving and taking offence are inevitable consequences of political debate and discourse. Neither the giving nor the consequent taking of offence can be eliminated without radically altering the way in which political debate and discourse is and must be continued if "the people" referred to in ss 7 and 24 of the Constitution are to play their proper part in the constitutionally prescribed system of government.

34. Even reading s 18C down so as only to apply to "profound and serious" offence or insult (see above), the above observations remain apposite. Political communication could readily encompass debates about such matters as immigration, terrorism, foreign policy, indigenous affairs, welfare policy, multiculturalism and other topics of public interest could include comments, even offensive and insulting comments, for reasons which might include one of the proscribed grounds of race etc. Making such utterances unlawful would evidently burden the implied freedom.

35. Further the prohibited grounds or reasons in s 18C(1)(b) extend beyond race etc to *national origin*. Indeed, in the present case that is either the main or only ground engaged, given that the respondent's Tweet does not reference any of the other grounds. On one interpretation, a political comment which referred to a person or group's immigration status or history would be caught, which might be the topic of political discussion in a range of areas.

36. The extent of the burden is increased by s 18B. A person might engage in political discussion predominantly or even overwhelmingly because of reasons lying outside s 18C(1)(b) but still be caught by that provision, because of s 18B.

37. The exemption in s 18D does not remove the burden. The requirement of "reasonableness" is antithetical to the nature of political communication including the

acceptance (as noted in the judicial consideration set out above) that political communication may involve the giving and taking of offence, insult, humiliation, attempts to harm reputation, emotion and even irrationality. Such aspects may even be part of the effectiveness of the communication; excluding them is to burden the freedom. The requirement of "good faith" likewise leaves the burden substantially intact, especially if given a broad reading, with objective elements (see above).

38. Whichever way s 18D is interpreted (see above), it cannot (as presently drafted) operate to exempt *all* political communication, and it is therefore apparent that the provisions as a whole burden the implied freedom. An example of the burden, and of the limits of s 18D, arises where the person in question is responding to the political communication of another, including where that communication is, itself offensive or insulting (whether on one of the proscribed grounds or otherwise).

Question 2: is the purpose of s 18C legitimate?

39. The first step in answering question 2 is to identify the relevant purpose of s 18C. It may be accepted that s 18D (and s 18B) need to be considered together.

40. AOS [69] identifies the "immediate purpose" of s 18C and 18D as protecting people from racially abusive public acts, committed unreasonably and in bad faith. However, AOS [69] then goes on to identify further "overall" purposes. The question is why is the "immediate purpose" not in fact the purpose of the provisions?

41. In *Monis*, the High Court considered a provision making it an offence to use the postal service in a way that reasonable persons would regard as being menacing, harassing or offensive. French CJ considered that the purpose of such a provision was the prevention of the conduct which it prohibited: at [73]. Hayne J directed attention to the statutory text and considered that it was the "ostensible purpose" evident from that text which mattered, in that case being the prevention of offence to recipients of, and others handling, articles committed to a postal or similar service: [184]. See also at [125], noting that the end or ends that the impugned law seeks to achieve must be identified by the ordinary processes of statutory construction, in which the language actually employed in the text of the legislation is the surest guide. Heydon J indicated that he would answer the second question "no" broadly for the reasons given by French CJ at [72]-[74], thereby generally endorsing the approach just noted. In contrast, the plurality

(Crennan, Kiefel and Bell JJ) identified the purpose more broadly as "the protection of people from the intrusion of offensive material into their personal domain": at [324]. While more general than the purpose identified by the balance of the Court, it was still much more specific than the "overall purposes" advanced by the applicant at AOS [69].

42. In *Clubb*, the plurality identified the purposes of the relevant law as including protection against attempts to prevent the exercise of healthcare choices, and as preventing interference with privacy and dignity of members of the people of the Commonwealth: at [60]. In doing so, their Honours were however guided by the statutory language, which included *an express declaration of purpose* by reference to the preservation of the privacy and dignity of persons: at [47], [49], [58]. See, similarly, *Brown v Tasmania* (2017) 261 CLR 328, per Kiefel CJ, Bell and Keane JJ at [99]-[101].

43. The authorities thus suggest that the task is not an abstract evaluation in which any sufficiently generally expressed value will almost always be seen to be important (e.g. human dignity). Rather it a consideration of the practical operation of the law flowing from the statutory language.

44. Subject to two matters, the "immediate purpose" identified by the applicant reflects the nature of the provisions. Because s 18C's field of operation includes acts which are "likely to offend", the purpose would be better captured by the term "racially *offensive* acts", rather than "racially abusive acts". The second matter is that while it may be accepted that the exemptions in s 18D are relevant to purpose, it may not be apt to include the s 18D exemption in the purpose itself; it seems more correct to describe the purpose of the relevant provisions as the prevention of racial offensive conduct.

45. Whatever the precise version of this purpose, it is incompatible with the implied freedom. The reason, put shortly, is that (as has already been noted), political discussion may involve the causing of offence or involve insult, regardless of type (that is to say, whether racially based or otherwise). Further it may involve the stating of "hard truths" or hypotheses, and (as noted at the start of these submissions) truth or potential truth is no barrier to causing offence etc, even of a serious kind. The matter would be particularly stark if "offence" were given its ordinary meaning in s 18C, as it might be thought that much political discussion may involve an element of offence, at least to some. However, assuming the provision is confined to "profound and serious" harms,

the limited nature of the defences conferred by s 18D, being constrained by requirements of reasonableness and "restraint" (including under the concept of "good faith"), points to a simple conflict of purposes. In short, the purpose of preventing offence is incompatible with the purpose of enabling political discussion.

46. The same may not be true of an outlawing of intimidation (on any ground), or of conduct likely to incite violence, but s 18C is not so limited to such matters.

A broader purpose?

47. In the alternative, if a broader purpose is to be identified it would still be more closely linked to the statutory text than the "overall purposes" contended for by the applicant, and might be cast in terms of the elimination of racial discrimination. In *Jones v Scully*, Hely J at [239] considered that the relevant purpose of the provisions was the elimination of racial discrimination. However, stating the purpose is that form does not really shed light on the operation and effect of the provisions; it is more appropriately seen as the purpose of other provisions in the Racial Discrimination Act, notably, s 9, by which racial discrimination is made unlawful. In any event, such an obviously laudable objective is still potentially incompatible with the implied freedom, in the context of provisions such as s 18C, although that may be more apparent as part of the answer to Question 3.

Question 3: is s 18C adequate in its balance?

48. In answering question 3 of the *McCloy* test, the implied freedom must be given substantial weight. As French CJ, Kiefel, Bell and Keane JJ said in *McCloy* at [87]-[88]:

> Logically, the greater the restriction on the freedom, the more important the public interest purpose of the legislation must be for the law to be proportionate.
> …
> The methodology to be applied in this aspect of proportionality does not assume particular significance. Fundamentally, however, it must proceed upon an acceptance of the importance of the freedom and the reason for its existence.

49. Their Honours further observed at [91]:

> Deference to legislative opinion, in the sense of unquestioning adoption of the correctness of these choices, does not arise for courts. It is neither necessary nor appropriate for the purposes of the assessment in question. The process of proportionality analysis does not assess legislative choices except as to the extent to which they affect the freedom. It follows from an acceptance that it is the constitutional duty of courts to limit legislative interference with the freedom

> to what is constitutionally and rationally justified, that the courts must answer questions as to the extent of those limits for themselves.

50. Their Honours found the third stage of the test easy to apply in *McCloy*, concluding at [93]:

> In this case, the third stage of the test presents no difficulty .... The provisions do not affect the ability of any person to communicate with another about matters of politics and government nor to seek access to or to influence politicians in ways other than those involving the payment of substantial sums of money. The effect on the freedom is indirect.

51. In contrast, the application of s 18C to political communication could not be more direct, and the present case is a good example (although recalling that the question involved is systemic, not limited to the present facts). One senator makes a public statement about the political matters; another responds, criticising the first. The provisions of the RDA, if satisfied, declare the latter conduct to be illegal, and entitle the first senator to bring legal action for compensation accordingly.

Suitability

52. If one proceeds by reference to the *McCloy* test as explained in *Clubb* (see above), the first consideration would be whether the law was rationally connected to its purpose. Depending on the identified purpose, and the interpretation of the provisions (see above), that may not be straightforward, because of the extended reach of the provisions.

Necessity

53. Section 18C could achieve the same object whichever purpose is identified (see above) by excluding political communication from the ambit of the provision, either in unqualified terms, or subject to some limited qualification (e.g. the expression of honestly held views in the course of political communication). Such an exclusion could be in addition to the exemptions in place under s 18D (which of course may also apply to communications of a non-political kind).

54. In *Brown v Tasmania*, the plurality noted that existing legislation (the FMA) had not been shown to be ineffective to prevent the disruptions to which the impugned legislation (the Protesters Act) was directed: [143], and the concern was that any debatably greater effectiveness came at too high a cost to the implied freedom ([145]). That was, in effect, a finding that impugned legislation was not necessary. It may be

doubted that the operation of s 18C/18D would be much weakened by the exclusion of political communications. On that basis, the impugned provisions (in their present form) are not necessary in the relevant sense.

Adequate in balance

55. Even if provisions are thought to be "necessary", they may still be invalid because of an inadequacy in the balance between the importance of the purpose served by the law, and the extent of the restriction it imposes on the implied freedom: *Clubb* at [6] (above).

56. In *Brown*, part of the burden was the uncertainty or vagueness in which the impugned provisions were cast: [144]. The same might be said about s 18C, in that it involves a serious of concepts indefinite both in interpretation (see above) and application (see below). Without resort to the notion of a "chilling effect" (*Brown v Tasmania* at [151]) it is still relevant to consider the impact of making conduct unlawful in the generalised terms in which the present provisions are couched.

57. The extent of the burden on the implied freedom is discussed above in relation to question 1. It is extensive given: (a) the inclusion of offence and insult as criteria in s 18C, (b) the proscribed grounds or reasons (c) the extended causal notion included by s 18B, (d) the limits on the s 18D exemption, and (e) the role played by invective in political communication (as to which see above in relation to question 1) and (f) the fact that the proscribed grounds (race … national origin) may fairly obviously feature in political debate across a range of topics. The burden imposed might be unfavourably compared to provisions considered in *Clubb* which prohibited only a limited class of conduct and only within a very specific geographic area (*Clubb* at [100], [102]; in contrast s 18C applies to a broad range of conduct Australia-wide.

58. Next is the importance of the purpose(s) served by the law. In *Clubb*, for example, it was highly significant that the prohibited conduct involved, in effect, holding people "captive" to uninvited political messages, in circumstances of particular vulnerability: at [97]-[99]. That was evidently considered a highly important purpose. That may be contrasted with s 18C which may apply to political messages which are sought out (by readers) or courted (by the makers of other political statements). Whatever the general importance of the statutory purpose in the present case, its importance in the context of political communications seems *relatively* limited.

59. If (as suggested above) the purpose is protecting people from racially offensive public acts, the issue is why it is necessary to do so in a way which burdens political discussion either at all, or so significantly. Cast in terms of the language of the plurality in *Chubb* at [102], the overly broad nature of the provisions, including their lack of an exemption for political discussion, is manifestly disproportionate to the purpose of the legislation.

E. ALTERNATIVELY, THE RESPONDENT DID NOT BREACH SECTION 18C

(A) 18C(1)(a)

60. The respondent's behaviour, viewed in context, was not sufficiently serious to breach s 18C. Any offence (or even insult) it may have caused to the applicant or other persons was not of the kind with which the section is concerned. The context included (a) a singular event: the death of the Queen; (b) the identity of the applicant and respondent as Federal politicians (c) the applicant's own publication, within hours of the announcement of the Queen's death, criticising her and features of the Australian polity and (d) the mode of publication (Twitter) of both the respondent's publication and that to which it responded.

61. The respondent's conduct in that context was not reasonably likely to have the "profound and serious" character required by the section (as interpreted). Although it is a truism that every case is different, it is salutary to compare the respondent's Tweet with the conduct in other cases which has been found to have the required character: for example, *Jones v Scully*, *Toben v Jones*, *Eatock v Bolt* and *Clarke v Nationwide News* (2012) 201 FCR 389. Neither the mode or content of respondent's Tweet, nor the context in which it occurred, lends it comparable seriousness.

62. In terms of the hypothetical people affected under s 18C(1), they are (at the highest) people who are immigrants to Australia. There is no basis for adding further groups, most obviously people who are Muslims or people of colour (cf AOS [21]). Nothing in the circumstances of the respondent's Tweet invoked notions of religion or colour or race, and there is no basis to imply it. Given that race is not invoked, there is no basis to add a further group, being "people who have experienced racism" (cf AOS [21]).

63. One reason for that is the way it was "reasonably likely" that a Tweet would be understood. Twitter is a very different medium from newspaper articles or even

television or radio. In *Stocker v Stocker* [2020] AC 593, Lord Kerr considered some aspects of publications in Twitter and Facebook, emphasizing the importance of the medium as part of the context of the publication, at [39]-[46], including the observation in any earlier case, by reference to online bulletin boards that publications "are often uninhibited, causal and ill thought out; those who participate know this and expect a certain amount of repartee or 'give and take' ".

64. In *Bazzi v Dutton* [2022] FCAFC 84; 289 FCR 1, Rares and Rangiah JJ quoted with approval at [29] from the reasons of Lord Kerr in *Stocker* at [41]-[43]. Wigney J did likewise at [61], noting the "conversational" and "casual" nature of the medium. In *Kumova v Davison (No 2)* [2023] FCA 1, Lee J noted various features of Twitter's operation (at [36]-[43], referred to *Bazzi* and then said at [46]:

> In short, as with all questions as to meaning, context is everything. Several pointed things might be said about Twitter, but it is correct to observe that it is a conversational medium characterised by informality and, sometimes, the crude reduction of complex matters to their core elements. It would be wrong to engage in elaborate analysis of tweets; an impressionistic approach is required: *Bazzi v Dutton* (at 16 [62] per Wigney J).

65. Hypothetical readers (whether immigrants or not) would likely view the respondent's Tweet as a politically-themed response to the applicant's own politically-themed Tweet, in which the applicant's overseas origin was simply part of the background to the response being made. They would regard it as part of the "give and take" of debate between politicians.

66. In terms of "offend, insult, humiliate or intimidate" and notwithstanding the submissions (AOS [33]) and evidence (CB 64-65, [116]-[121]) of the applicant to the contrary, it is unlikely that the Court would be satisfied that the respondent's conduct was reasonably likely to "intimidate" hypothetical immigrants. It may likewise be doubted it could satisfy the "humiliation" threshold, especially given the context in which the conduct occurred – the applicant (as was her right) had made a public statement about the Queen, and the respondent has responded to it (as was her right, subject to s 18C). There was no inequality of power in an exchange of Tweets, or disclosure of "humiliating" information, in short, nothing of the usual indicia of humiliation.

67. That leaves the question of offence and insult. It may be accepted that, subjectively, the applicant was offended and perhaps insulted by the respondent's Tweet, as those terms

are usually understood. It may also be accepted that so far as offence was concerned, that may have been a reasonably likely outcome in that usual understanding, although there is a consideration that the applicant's own Tweet was provocative in content and timing and it can hardly have surprised the applicant that it was offensive to various members of the community, including the respondent, in the circumstances. It is far harder to see that offence or insult, at least at the "profound and serious" level was reasonably likely, in hypothetical readers (immigrant or otherwise).

68. Readers of the respondent's Tweet would see what it was responding to. They might agree or disagree with the *applicant's* sentiments, but they would understand them to be provocative. And accordingly, they would understand the *respondent's* Tweet to be "provoked" (even if they disagreed with it), not an attack "out of the blue".

69. If the reading down of s 18C to "profound and serious" matters is accepted (see above), then the respondent's Tweet does not meet that criterion, especially once it is appreciated that the only prohibited ground in s 18C(1)(b) that might be engaged is national origin. If s 18C is not read down to "profound and serious effects", then the element of "offence" would be made out, perhaps "insult" but not "humiliate" or "intimidate".

(B) 18C(1)(b)

70. The respondent accepts that because of the inclusion of the words "national origin" in s 18C(1)(b), that this sub-section is potentially satisfied. None of the other grounds are made out however – the notion that the Tweet was done because of the applicant's race or colour or ethnic origin is unsupported by the evidence. (Section 18B makes no difference in the circumstances of this case.) There is no more basis to conclude that the applicant's colour was any more relevant to the respondent's Tweet (or for that matter her religion, not that that is one of the relevant grounds) than her gender or height. The applicant's wealth may have been a basis, but that is not a prohibited ground.

71. It is however open to the Court, nevertheless, to find that s 18C(1)(b) was not satisfied, at least if the Court accepts the evidence of the respondent as to why she made the Tweet, at CB 2078-2081 [21]-[33] and [37]-[38]. Allowing for the operation of s 18B, the question is whether the Tweet was made because of, or for reasons including, one of the four prohibited grounds. The respondent referred in the Tweet to the applicant immigrating to Australia and becoming a citizen of Australia and then concluded by

telling her to "piss off back to Pakistan". All these matters form a central part of the respondent's Tweet. However, that does not mean that they are the (or a) *reason* for the Tweet. Those reasons are as summarised at CB 2081 [37], including the respondent's view that the applicant was behaving hypocritically in attacking the Queen and Australia. Put another way, she was not criticising the applicant for being from Pakistan, but for being a hypocrite, and so she did not make the Tweet "because" the applicant was from Pakistan, but because she was a hypocrite.

F. THE RESPONDENT WAS ENTITLED TO A DEFENCE UNDER SECTION 18D

72. The applicant's Tweet on the death of the Queen was clearly an event or matter of public interest. The Court can take notice of the profound public interest involved in the death of the Queen; the public views expressed by the applicant, a Senator, immediately on that event were themselves clearly also of public interest, especially having regard to their controversial character. (It is not apparent if this will be in dispute at hearing.)

73. The respondent's evidence is that her Tweet was an honest expression of her beliefs at the time: CB 2081 [33], and more generally CB 2078-2081 [18]-[38]. If that evidence is accepted, then the issues in relation to s 18D are whether the making of the Tweet was done reasonably and in good faith.

"reasonably and in good faith"

74. If, as contended above, the proper interpretation of "good faith" amounts to "honesty" or absence of malice, then the respondent's conduct clearly met the required standard. On the assumption that the Court found her conduct was honest, then the question (on this interpretation of the provisions) would come down to whether it was done reasonably.

75. Behaving "reasonably" is context specific. Thus:

(a) behaving reasonably on Twitter is different to behaving reasonably in a newspaper article, or at a public meeting;

(b) behaving reasonably as one politician to another is different to other contexts;

(c) commenting on a provocative publication differs from a non-responsive publication.

76. As the respondent explains in her evidence (but as is evident on the face of the applicant's Tweet), the applicant chose to make her Tweet upon the death of the Queen. The respondent was *highly* offended by the applicant's Tweet ("disgusted"), including because of its timing, but also because its content and specifically its hypocrisy, as the respondent viewed it: CB 2078-2079 [21]-[24].

77. If the Court accepts that evidence, then in assessing the circumstances in which the respondent made *her* Tweet, the message that the respondent wished to communicate to the public ("the challenge, per Carr J in *Toben v Jones*) is very relevant. That message (that the respondent was behaving hypocritically in attacking the Queen, and Australia, given all that the applicant had gained from coming to Australia) was to be expressed in the same mode as the applicant's publication – a Tweet, a style of publication expected to be marked by brevity, pungency and currency.

78. In those circumstances, the reference to the applicant coming from overseas to Australia was directly relevant to the point being made. Not everyone would agree with the cogency of the point (although some might) but it was reasonable in its content and expression *in the circumstances*.

79. To apply the language of French J in *Bropho* (in relation to the "reasonableness" requirement), the question is "*not whether it could have been done more reasonably or in a different way more acceptable to the court".* An offensive Tweet from the applicant (as viewed by the respondent), gave rise to an offensive Tweet from the respondent (as viewed by the applicant), although as argued above, not sufficiently offensive to breach s 18C). But if there were a breach of 18C, the return of fire by the respondent fell within the exemption.

"Good faith" beyond honesty

80. If "good faith" is interpreted as going beyond honesty, but in the composite way used by Carr J in *Toben v Jones* at [44], the respondent still met the required standard.

81. That is because she was in fact acting with as much restraint *as was consistent with the communication of her views* given that a key part of her views was just how angry she

was with the applicant's conduct in posting her Tweet, including because of the applicant's benefits from having immigrated to Australia, and the resulting hypocrisy, as assessed by the respondent. The reference to the applicant's status as an immigrant was not gratuitous or incidental to *that message* – it was central to it, and the expressed conclusion that "it's clear you're not happy, so pack your bags and piss off back to Pakistan" was too. In the context of a Tweet responding to the applicant's Tweet, something to that effect was needed get her message across, rather than some diluted or anemic version (which would not have been the same message, as explained in the context of the nature of political communication, above).

82. That did not mean that *any* expression of opinion in response to the applicant's Tweet would fall within 18D; the inclusion of *irrelevantly* offensive material would be problematic. In different circumstances (that is, shorn of the content and circumstances of the applicant's Tweet), different considerations might arise. However, in the present circumstances, s 18D was satisfied.

83. That leaves the question of the application of the more extended conception of "good faith", such as that developed by French J in *Bropho* at [101]-[102]. It will be recalled that required "a conscientious approach to advancing the exercising of the [implied] freedom in a way that is designed to minimise the offence [etc]". That is obviously more difficult to satisfy. There is an inherent tension between using communicating politically (especially in a medium like Twitter), in circumstances where a strong sense of disgust is part of the message to be communicated, and conscientiously minimising offence. The respondent still the met standard because she was not careless in what she said – she fully intended to advert to the applicant's hypocrisy (as she saw it) and she did not go further than she needed to consistent with communicating her message according to its tenor.

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