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No: NSD1698 of 2024

PAULINE HANSON
Appellant

MEHREEN FARUQI & ANOR
First Respondent

POST-HEARING SUBMISSION OF THE APPELLANT

A. INTRODUCTION

1. Hanson files these submissions in response to the Commonwealth's submissions filed on 2 December 2025 (CS) and Faruqi's submissions filed on 4 December 2025 (FS).

B. APPLICABLE PRINCIPLES

2. Hanson agrees with the Commonwealth's statement of principles governing the interpretation and application of s 15A of the *Acts Interpretation Act* 1901 (Cth) (AIA): CS [3] to [8]. For consistency, these submissions will adopt the language of "*partial disapplication*" for the operation of s 15A which severs invalid *operations* of a provision (as opposed to severing particular *words*) — what, until recently, has been known as "*reading down*".

C. APPLICATION OF SECTION 15A – HEAD OF POWER

3. Hanson agrees with CS [9]; if there is no head of power to support ss 18B to 18D, no reading down of any kind will enable ss 18B to 18D to survive in any of their operations; the correct result would be to sever ss 18B to 18D from the rest of the RDA.
4. Hanson disagrees, however, with CS [10], which asserts that if the Court concludes that the immigration power, but not the external affairs power, would support ss 18B to 18D, those sections could be disapplied to the extent that they are not supported by the immigration power. Impermissibly, any such partial disapplication could only result in the provisions being only "*with respect to*" immigration by "*adopting any one or more of a number of several possible limitations*": *Pidoto v Victoria* (1943) 68 CLR 87 at 111 (Latham CJ), approved in *Victoria v The Commonwealth* (1996) 187 CLR 416 at 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

5. These possible limitations include: interpreting or disapplying “*the person*” in s 18C(1) so that it reads or applies as “*an immigrant*”, interpreting or disapplying “*another person or a group of people*” so that it reads or applies as “*an immigrant or a group of immigrants*”, or interpreting or disapplying “*race, colour or national or ethnic origin*” in s 18C(1)(b) so that it reads or applies as “*a national origin of a place other than Australia*”. But the only lodestar that could guide the Court to one or more of these options is a bare policy choice – a choice the Court cannot make. Thus, if the Court concludes that the external affairs power does not support ss 18B to 18D, the immigration power cannot save those provisions from complete invalidity.

D. APPLICATION OF SECTION 15A OF THE AIA – THE IMPLIED FREEDOM

6. Hanson agrees with the Commonwealth and Faruqi that the Court must decide the issue of whether ss 18B to 18D infringe the implied freedom in at least some of their operations before applying s 15A of the AIA (or any other power to engage in disapplication) to read down, sever or disapply ss 18B to 18D: FS [5]; CS [1].
7. Hanson also agrees with the Commonwealth that, when articulating any reduced application of ss 18B to 18D, the Court must to some extent do so at a level of generality that goes beyond the circumstances of a single case: CS [12]. However, as explained further below, a permissible disapplication could nonetheless be narrow.

D.1 Partial disapplication limited to unjustified burdens on political communication

8. At CS [13], the Commonwealth contends for a partial disapplication of the kind perhaps favoured by Gordon J in *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at [123], [191] but definitely rejected by Gageler J in that case (Gleeson J agreeing) at [97]-[102]. Gordon J perhaps considered that one could disapply an invalid provision to any “*unjustified burden*” on freedom of political communication; Gageler J identified difficulties with this approach, preferring instead to disapply the provision at issue to any conduct in the course of political communication. Among the difficulties to which Gageler J pointed is that an approach disapplying a provision to any “*unjustified burden*” on the freedom would require a “*judicial assessment of whether the burden it imposes is or is not justified in its application to the particular circumstances thrown up by the facts of a particular case*” (at [102]). Applied here, it would require a determination by the Court as to whether an operation of ss 18B to 18D which prohibits the Hanson Tweet is an “*unjustified burden*” on freedom of political communication. The Commonwealth has not identified how

that is to be determined or what position the Commonwealth takes.

9. For these reasons, the Court should prefer the approach of Gageler J that any partial disapplication should cover acts in the course of political communication (or some subset thereof) as discussed below. Gageler J's reasoning in *Farm Transparency* reflected his Honour's earlier more detailed analysis in *Tajjour v New South Wales* (2014) 254 CLR 508 at [168]–[178]. His Honour there explained that disapplying a consorting offence in cases of association for the purposes of political communication was the way to avoid the provision imposing an unjustified burden on freedom of political communication, no narrower disapplication to only cases of “*unjustified burdens*” being possible.
10. But if the Court *were* minded to adopt a disapplication of only “*unjustified burdens on political communication*”, an operation of ss 18B to 18D which prohibits the Hanson Tweet would be such a burden. It was a public communication by an elected representative, commenting on a public communication of another elected representative, prompted by an event of considerable current political significance (the death of the Sovereign), dealing with matters of real contemporary political importance. In all the circumstances, prohibition of the Hanson Tweet was not justified, whether by reference to the object of eliminating racial discrimination or otherwise.

D.2. Partial disapplication limited to some forms of political communication

11. A disapplication of the kind favoured by Gageler J in *Tajjour* and *Farm Transparency* is achieved by holding that the “*act*” to which s 18C refers cannot be an act in the course of political communication. But it would be open to the Court to decide the case by holding that “*an act*” in s 18C cannot be some narrower category of political communication that includes the Hanson Tweet, and leave the full scope of any unjustified burden for another day.
12. One possible narrowing, in addition to the categories canvassed by Hanson at the hearing (T300.29; T300.32-33 T300.45-301.1-23), is “*political communication by sitting members or senators of the Commonwealth Parliament to members of the Australian community who do not hold office under the Constitution*”. This category of political communication is tied closely to the purpose of the freedom, being the “*free flow of communications on government or political matters generally*”, including the “*two-way affair between electors and government or candidates*”: see *Farmer v Minister for Home Affairs* (2025) 99 ALJR 1408 at [40] (Gageler CJ, Gordon and Beech-Jones JJ). This disapplication would not catch political communication between people who are not Commonwealth parliamentarians (basically, the

overwhelming majority of political communication caught by s 18C) or political communication between Commonwealth parliamentarians without members of the public present (which substantially addresses concerns about racial abuse in the workplace: FS [9]). On this approach, whether the implied freedom immunises these other kinds of political communication from s 18C can be left to another day.

13. In *Deripaska v Minister for Foreign Affairs* (2024) 184 ALD 393, Kennett J took an analogous approach in dealing with an argument that the *Autonomous Sanctions Regulations* 2011 (Cth) infringed Chapter III of the Constitution, because, in essence, they prevented a designated person from retaining an Australian lawyer: see [41]-[43]. His Honour found that two of those regulations were not to be understood to have application that would subvert the exercise of jurisdiction under s 75(v) of the Constitution ([74]), with the effect that “*at least*” the Regulations did not prevent a designated person from being represented in order to challenge the designation. Kennett J also expressly found at [74] that “[*t*]he scope of the relevant exclusion may go further” and noted that there was a “*wide field for argument in future cases*” ([77]), citing *Tajjour* at [172] (Gageler J). The Full Court dismissed the appeal: *Deripaska v Minister for Foreign Affairs* (2025) 308 FCR 175 (noting that the High Court’s judgment is reserved).
14. In a high-profile (and highly-charged) case between prominent politicians, the Court may consider a narrowly framed disapplication to be an appropriate course of judicial restraint. It would be consistent with not formulating “*a rule of constitutional law broader than required by the precise facts to which it is to be applied*” and avoiding “*the risk of premature interpretation of statutes on the basis of inadequate appreciation of their practical operation*”: *Zhang v Commissioner of the Australian Federal Police* (2021) 273 CLR 216 at [22] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ). To go further than is necessary to resolve this case “*may create the appearance of an ‘eagerness’ that may detract from the Court’s standing*”: *Clubb v Edwards* (2019) 267 CLR 171 at [35] (Kiefel CJ, Bell and Keane JJ). By contrast, judicial parsimony would serve to “*turn the national temperature down, not up*”: see *Trump v Anderson*, 601 U.S. 100 (2024) at 100 (Barrett J; Sotomayor, Kagan and Jackson JJ concurring).

15. In contrast, Faruqi’s position, if accepted, would mean turning the thermostat up to maximum heat. According to her, the provisions must be struck down in full or not at all: FS [11]. Hanson agrees with the Commonwealth that the Court’s choice is not this stark: CS [13]. Many of Faruqi’s complaints advanced in favour of her falsely dichotomous approach are about treating politicians and non-politicians, or political settings and non-political settings, differently. These complaints are premised on the false assumption that the Court necessarily has to decide, definitively, that certain categories of political communication outside this case are, or are not, immune from s 18C. But the Court need not form any conclusion at all about factual scenarios outside a narrow operation of ss 18B to 18D and a narrow disapplication. It thus does not assist to point to asserted anomalies flowing from treating certain categories of political communication differently. These are issues for courts to grapple with in the future against concrete factual scenarios, if and when they are raised.
16. There are a number of more specific answers to Faruqi’s complaints. *First*, Faruqi objects to exclusions that distinguish between political communication in political settings, and non-political settings, because they imply that “*a person could racially abuse another person in a political setting but not otherwise*”: FS [9]. However, all that relevant exclusion implies is that a particular Commonwealth law that catches some but not all forms of racial abuse (and many other types of political communication that are not racial abuse) is beyond the power of the Commonwealth Parliament. It leaves in place the significant number of State and Territory laws that prohibit racial vilification: see, eg, s 67A of the *Discrimination Act* 1991 (ACT); s 20C of the *Anti-Discrimination Act* 1977 (NSW); s 124A of the *Anti-Discrimination Act* 1991 (Qld); s 4 of the *Racial Vilification Act* 1996 (SA); s 19 of the *Anti-Discrimination Act* 1998 (Tas); s 195N of the *Crimes Act* 1958 (Vic); and ss 80A to 80D of the *Criminal Code Act Compilation Act* 1913 (WA). It also leaves in place criminal laws that prevent the intentional or reckless causation of mental harm (such as s 13 of the *Crimes (Domestic and Personal Violence) Act* 2007 (NSW)) and the tort in *Wilkinson v Downton* (1897) 2 QB 57. Even if Faruqi’s alarmist policy claim were relevant to the Court’s task of applying the Constitution (which it is not), it is grossly overstated.
17. *Secondly*, Faruqi objects to exclusions that depend on the “*professional*” identity of the speaker: FS [10]. She complains that this criterion would permit an elected politician to direct racial abuse at a political challenger, while denying them the ability to respond in kind: FS [10]. Assuming for present purposes that an ability to respond in kind is necessary for an even “*playing field*” (FS [10]), Faruqi’s point still fails. In her hypothetical, the affected

individuals remain not just subject to State and Territory anti-vilification laws, but also accountable to the electorate at the ballot box. If, despite these obvious legal and political risks, this hypothetical political candidate remains determined to respond in kind, that conduct may well be immune from s 18C by reason of the implied freedom. Again, if the Court prefers a narrow disapplication sufficient only to resolve this case, that will be an issue for another day, if and when the issue arises.

D.3. Partial disapplication extending to all political communication

18. As noted above, Gageler J's approach in *Tajjour* and *Farm Transparency* was to disapply the provisions at issue to conduct in the course of political communication. Consistently with this approach, the Court could disapply s 18C to "*an act*" in the course of engaging in political communication. In *Coleman v Power* (2004) 220 CLR 1, McHugh J adopted this approach: his Honour read down "*insulting*" so that the provision excluded "*insulting words uttered in discussing or raising matters concerning politics and government in or near public places*" (at [110]). This is an orthodox course available to the Court.
19. Compared to a narrower disapplication of the kind discussed above, this option trades some judicial restraint for more certainty. Certainty was one reason that in *Clubb*, Kiefel CJ, Bell and Keane JJ decided whether a statutory provision impugned by the plaintiffs in *Clubb* infringed the implied freedom, even though it was not necessary to resolve the case. Among other considerations, the likelihood of the question arising again was "*obvious*", so "*considerations of judicial economy [did] not strongly favour adhering to [the usual practice of not deciding more than was necessary to resolve a case]*": *Clubb* at [39] (Kiefel CJ, Bell and Keane JJ). In this case, if the Court holds definitively that political communication is outside s 18C and non-political communication is inside s 18C, then there is reduced scope for future litigation about the application of s 18C to political communication, and members of the public will have more clarity about where they stand in relation to s 18C.
20. Faruqi and the Commonwealth advance several unmeritorious objections to this course.
21. *First*, Faruqi and the Commonwealth say the breadth of "*political communication*" means that it cannot be correct that the unjustified burden extends to all political communication: CS [15]; FS [8]. This is true. But, for the reasons explained by Gageler J in *Tajjour* and *Farm Transparency*, if a disapplication limited to "*unjustified burdens on political communication*" is not permissible, then the only form of disapplication which would capture unjustified burdens on political communication is a disapplication extending to any conduct in the course

of political communication. It is true, as Faruqi argues, that the Commonwealth Parliament *can* enact laws burdening the freedom, because the implied freedom is not a personal right nor an absolute one: FS [8]. But it does not follow that the Court can adopt a disapplication which is as nuanced as legislation which the Parliament could, but has chosen not to, enact.

22. *Secondly*, Faruqi argues that disapplying the provisions to any conduct in the course of political communication would leave in force a law substantially different from that which Parliament decided to enact: FS [8]. That is wrong. The objection to disapplication that it would leave in force a law substantially different from the one that Parliament decided to enact is not engaged simply because the law after disapplication has a smaller scope of operation than the law as enacted. That is the inevitable consequence of the operation of s 15A. This objection is engaged only when, because of the proposed disapplication or severance, the law would operate in those circumstances where it is able to operate in a manner different from the way it would have operated in those circumstances if it were able to operate fully. That is not so here. In cases not involving political communication, ss 18B to 18D would operate in precisely the same manner as they operate at present: see similarly *Deripaska* at [61]–[62] (Kennett J).
23. *Thirdly*, Faruqi argues that disapplying ss 18B to 18D to conduct in the course of political communication would render s 18C “*hopelessly vague*” because of uncertainty about what “*political communication*” means: FS [8]. This concern is more imagined than real. The High Court has defined political communication as “*communication on governmental or political matters generally*”: *Farmer* (2025) 99 ALJR 1408 at [40] (Gageler CJ, Gordon and Beech-Jones JJ), [165] (Gleeson J agreeing). It has also given a significant number of examples about what the phrase means: see, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 571–572 (the Court). To the extent there are edge cases, that is an inevitable consequence of any legal rule and not an objection to disapplication: see *Tajjour* at [171] (Gageler J); *Deripaska* at [86] (Full Court).

D.4. Sever parts of s 18C(1)(a)

24. Hanson agrees with CS [16]–[17] that, if the Court accepts Hanson’s submissions as to the purpose of the provisions being illegitimate, severance of “*offend*”, “*insult*” and/or “*humiliate*” from s 18C(1)(a) would not cure that difficulty. A provision prohibiting only conduct reasonably likely to “*intimidate*” — in the sense of putting someone in fear for their safety, especially by threats or violence — appears to be quite a different law to the one that, even according to the Commonwealth’s submissions, the Commonwealth sought to enact.

Thus, Hanson’s preferred approach is the disapplication of the provisions to conduct in the course of political communication (or a subset thereof), as explained above.

D.5. Read down “because of” in s 18C(1)(b)

25. Hanson agrees with CS [18]. However, Hanson’s primary submission is that this would not render ss 18B to 18D valid and that disapplication of the kind for which Hanson contends is required. If this disapplication is adopted, Hanson’s unchallenged evidence as to her reason for making the Hanson Tweet would mean the sections do not apply.

D.6. Faruqi’s “concluding point”

26. It remains necessary to deal with Faruqi’s “concluding point”, the nub of which is that if the Court strikes down ss 18B to 18D as unconstitutional, all Parliaments in Australia will be “powerless, forever, absent a constitutional amendment, from enacting laws in the form of ss 18B-18D to give effect to the Convention and the awful wisdom upon which it was based”: FS [14]. But if the Court holds that ss 18B to 18D are invalid because they are not supported by a head of power, that will be because they do not actually give effect to the ICERD.
27. If the Court were to hold that these provisions are partially invalid, because some operation infringes the implied freedom – despite Faruqi being the only party now insisting that any unconstitutional operation requires the wholesale invalidation of ss 18B to 18D – nothing would prevent the Commonwealth Parliament from enacting a revised scheme more tightly directed to the legitimate purpose of preventing racial hatred. The prevention of racial vilification is a legitimate purpose for the purpose of the implied freedom: see, by analogy, *Sunol v Collier (No 2)* [2012] NSWCA 44 at [52] (Bathurst CJ), [55] (Allsop P agreeing).
28. The more fundamental problem with Faruqi’s “concluding point” is that it is a political argument irrelevant to the Court’s task of interpreting and applying the Constitution. Approached from the correct perspective, for all the reasons Hanson has previously given, ss 18B to 18D do not withstand constitutional scrutiny.

Dated: 12 December 2025



S.T. Chrysanthou



P.D. Herzfeld



T. Smartt



R. P. Harvey