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Important Information

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No: NSD1698 of 2024

PAULINE HANSON
Appellant

MEHREEN FARUQI & ORS
First Respondent

FARUQI'S POST-HEARING REPLY TO HANSON

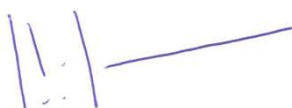
1. Hanson adopts a primary position and a fallback position. Her primary position is that ss 18B-18D are wholly invalid (T302.15-17 and T296.32-44). Her fallback position is that they are valid but do not apply to this case. She recognises that the fallback position is self-serving (T302.44-46)—indeed, she accepts it would be going too far for the Court to hold that the provisions simply do not apply to this case specifically (HS [7]). So, she floats a menu of “*possible disapplication[s]*” that are broad enough to include this case yet narrow enough to exclude as many others as possible. Evidently, the whole point of the exercise is to achieve a goldilocks rationale that leaves ss 18B-18D in force yet puts this case out of their reach.
2. The exercise is misguided. It suffers from two fundamental flaws. *First*, it is tendentious. It requires the Court to reason backwards from a conclusion (*viz*, that ss 18B-18D are valid but do not apply here) to a plausible justification for that conclusion. That approach is anathema to the judicial method (the correct methodology is explained at CS [13]). *Secondly*, none of the “*possible disapplication[s]*” Hanson advances survives scrutiny. The three she floated in the hearing have been addressed already: FS [7]-[12]. It remains only to address the additional three she has put forward in writing.
3. The first is to hold that ss 18B-18D do not apply to “*any ‘unjustified burden’ on freedom of political communication*” (HS [9]). Hanson herself accepts that this option has “*difficulties*” (HS [8]). It has never been adopted by the High Court or, indeed, any Court. It has only ever been suggested by single judge, once. It has been (rightly) deprecated by Gageler J (as his Honour then was) for several reasons (*Farm Transparency* at [97]-[102]), with which Gleeson J agreed (at [272]-[273]). And it leads to the very kind of ruling that Hanson herself says is beyond the pale, i.e., a case-specific ruling that ss 18B-18D do not apply to this case because prohibiting “*the Hanson Tweet*”—not racial abuse generally, but “*the Hanson Tweet*” specifically—is “*not justified*” (HS [10]). In other words, it would involve creating a ‘Hanson Tweet’ exception to ss 18B-18D. Clearly, that cannot be done: *Farm Transparency* at [102] (Gageler J).

4. The second option to hold is that ss 18B-18D do not apply to elected politicians: HS [12]. Again, there are four flaws with this option. *First*, it is diametrically opposed to the purpose of the freedom (cf HS [12]); far from preserving a “free flow” of communication “between electors and government or candidates”, it would disrupt that flow by preventing electors from communicating in the same way as the people they have elected. *Secondly*, it has no analogue in *Deripaska* (cf HS [13]); as Kennett J recognised in the hearing (T301.8-11), this case is “the opposite of cases like *Deripaska*”. *Thirdly*, it is by no means likely to “turn the national temperature down” (cf HS [14]-[15]); only a moment’s reflection is needed to realise that a ‘politicians-privilege’ to engage in racial abuse is apt to inflame rather than soothe the public mood and to “detract” from rather than enhance “the Court’s standing”: *Clubb* at [35] (Kiefel CJ, Bell and Keane JJ). *Fourthly*, it is impossible to hold that ss 18B-18D do not apply to politicians yet “leave for another day” whether they apply to everyone else; if the Court were to carve out politicians from the ambit of s 18B-18D, it would need to explain why they, as opposed to some other more broadly or narrowly defined group, are regarded by the *Constitution* as excused from the general application of the laws. Hanson offers no such explanation; she simply notes that politicians remain “subject to State and Territory anti-vilification laws” and “accountable to the electorate at the ballot box” (HS [17]). That may be so, but it does not explain why they, but not others, ought to be regarded as immune from ss 18B-18D.
5. The third option is to hold that ss 18B-18D do not apply to political communication at all. Hanson contends that “this is an orthodox course available to the Court” (HS [18]), but that is not so. The option was suggested by McHugh J in *Coleman*, but it did not command a majority there; it has not commanded a majority ever: see *Tajjour* at [89]-[91]; *Clubb* at [288]; *Farm Transparency* at [54], [259]; *Comcare v Banerji* at [36], [201]. In any event, *Coleman* did not involve racially abusive speech. Like *Monis*, it is distinguishable on that score. To equate political invective with racial abuse is wrong: see *Sunol v Collier (No 2)* at [67], [73] (Allsop P), [87] (Basten JA). The latter is especially pernicious, as the drafters of ICERD, and the enactors of ss 18B-18D, recognised. Regardless, excising political communication from the ambit of ss 18B-18D is triply flawed in that: (1) it treats the implied freedom as an absolute right to say anything in political discourse, which has never been the law: *Farmer* at [38]; (2) it goes much further than would be necessary to render any burden justifiable: see CS [12], [14]-[15]; and (3) it tends to imply that “State and Territory laws that prohibit racial vilification” do not apply to political communication, which would leave the regulation of racial abuse in political discourse free from legislative control (cf HS [16]).

6. Finally, Hanson derides Faruqi’s concluding point as “*alarmist*”, “*grossly overstated*”, “*irrelevant*” (HS [17], [28]). That is wrong. The point focuses on the importance of the end that ss 18B-18D serve, which alone makes it relevant to this Court’s task. But the point is deeper. Striking the right balance between freedom of speech and protection against racial abuse is hard. When enacting ss 18B-18D, the Parliament gave earnest consideration to where the balance should be struck: Authorities Bundle, tabs 65-69. Rather than persuade her colleagues to alter that balance through legislative amendment, Hanson asks this Court to hem in ss 18B-18D in various ways, each calculated to ensure she wins this case. This Court’s role, however, is not to devise a more “*nuanced*” scheme than Parliament chose to enact within its “*domain of selections*” (cf HS [21], [27]; *McCloy* at [82] (French CJ, Kiefel, Bell and Keane JJ)). It is to decide whether ss 18B-18D are “*reasonably appropriate and adapted to advance a legitimate purpose*”. The provisions merit that description. Holding that they do not and are, therefore, invalid or inapplicable to political discourse would have profound implications. It would not just mean that Hanson can send the Hanson Tweet. It would render Parliament powerless to enact its own carefully calibrated scheme à la 18B-18D, to eradicate racial abuse within the Australian community, to “*strengthen ... social cohesion*” and to give the “*broadest ... protection [to] peoples such as Sikhs, Jews, and Muslims*”: Authorities Bundle, tab 66, p 4464-4466. Allsop P’s observations in *Sunol v Collier (No 2)* at [73] are apposite here:

The degree to which a Parliament is entitled to entrench upon communications of a political or governmental character must depend, in part, upon the nature and importance of the end to which the law must be reasonably adapted. Certain subject matters are of a character that care needs to be taken in discussion of them in order that forces of anger, violence, alienation and discord are not fostered. Race, religion and sexuality may be seen as examples of such. Racial vilification of the kind with which the Federal Court dealt in *Toben v Jones* [2003] FCAFC 137; 129 FCR 515 is capable of arousing the most violent and disturbing passions in people. If it were to be carried on for political purposes it would make the effect on people no less drastic. ... A diverse society that seeks to maintain respectful and harmonious relations between racial and religious groups and that seeks to minimise violence and contemptuous behaviour directed towards minorities ... is entitled to require civility or reason and good faith in the discussion of certain topics. Those topics are, at least in the first instance, for Parliament to choose, although it will always be for the courts to apply the laws and the Constitution.

7. Focusing on the importance of the legitimate end that ss 18B-18D serve—and highlighting the consequences of holding them invalid or inapplicable to politics—is neither “*alarmist*” nor “*overstated*”. It deserves wise and sober reflection, particularly now.



S HOLT KC



J TAYLOR



J UNDERWOOD



J TENG