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Registrar

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Federal Court of Australia
District Registry: New South Wales
Division: General

No. NSD 1698/2024

PAULINE HANSON
Appellant

MEHREEN FARUQI
First Respondent

ATTORNEY-GENERAL OF THE COMMONWEALTH
Second Respondent

POST-HEARING REPLY SUBMISSIONS OF THE SECOND RESPONDENT

(filed in accordance with Order 6 of the Orders made on 11 December 2025)

A. INTRODUCTION.....	1
B. APPLICATION OF SECTION 15A – HEAD OF POWER	1
C. APPLICATION OF SECTION 15A – IMPLIED FREEDOM	1

A. INTRODUCTION

1. These submissions respond to the post-hearing submissions filed on behalf of the appellant (AS).

B. APPLICATION OF SECTION 15A – HEAD OF POWER

2. There is no difficulty of the kind raised in AS [4]. The “another person or a group of people” in s 18C(1)(a) can be partially disapplied so as to operate to the extent that this provision is supported by the immigration power. That will be so at least where the person or group of persons has, as one of their relevant defining characteristics, the fact that they are immigrants or former immigrants. That, together with the purpose of s 18C of achieving social cohesion, establishes a sufficient connection with the immigration head of power.
3. Whether there may be other valid operations of s 18C supported by the immigration head of power does not arise for determination and should not, therefore, be determined. And the fact that there may be such other valid operations does not fall into the objections raised in AS [4]. That a court cannot determine how to read down (ie interpret) a statute so as to preserve its validity is an important reason why reading down (ie interpretation) might not be an available response to a finding of constitutional invalidity. But there is no difficulty in principle with there being multiple valid operations because those operations each demonstrate a sufficient connection to the head of power for their own reasons. It is not necessary to seek to identify every valid operation of the law in question: see and compare *R v Hughes* (2000) 202 CLR 535 at [42].

C APPLICATION OF SECTION 15A – IMPLIED FREEDOM

4. The starting point is that partial disapplication should only be engaged in to the extent that doing so avoids constitutionally invalid operations of the law and preserves constitutionally valid operations of the law. Section 15A does not authorise partial disapplication that is either under-inclusive (ie, leaving some invalid operations in effect) or over-inclusive (ie, taking away operations of a law by partial disapplication that are, in fact, valid). Once that is appreciated, it must follow that the correct boundary in principle for partial disapplication is to disapply the law to the extent that, and only to the extent that, it imposes an unjustifiable burden on the freedom. To go beyond that would be to disapply the statute beyond what s 15A authorises when engaged in partial

disapplication, while to do less than that would not solve the constitutional problem found to exist.

5. The difference between Gageler J and Gordon J in *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 should not, therefore, be understood as a difference in principle as to how far a reading down, severance or partial disapplication can go. Any difference should be understood to reflect how that reading down, severance or partial disapplication ought to be identified and expressed in the particular circumstances of a case.
6. In any and every case, the extent of partial disapplication is and can only be to the extent of unjustified burdens on the freedom (because anything more would excise valid operations of the law). And in a given case, it may be possible to identify particular instantiations of that boundary in more specific ways. This is illustrated by *Tajjour v New South Wales* (2014) 254 CLR 508. In that case, s 93X of the *Crimes Act 1900* (NSW) provided that a person who “habitually consorts with convicted offenders” and “consorts with those convicted offenders after having been given an official warning in relation to each of those convicted offenders” is guilty of an offence. Gageler J held at [178] that s 93X could be read down by reference to the “clear constitutional limitation” (see at [171]) supplied by the implied freedom so as to have “no application in so far as the section would apply to consorting which is or forms part of an association for a purpose of engaging in communication on governmental or political matter”. Association for a purpose of engaging in communication on governmental or political matter was the particular instantiation of the general limit that the law should be disapplied to the extent of the unjustified burden on the freedom.
7. Whether to express the partial disapplication at the higher level of abstraction (reflecting the constitutional limit itself) or at a more specific level of abstraction (particular instantiations where it can be seen that a burden will be unjustified) will depend on the circumstances of the case, including the facts, the pleadings and the relief sought by the parties. Generally speaking, it would be unnecessary and therefore inappropriate to seek to identify every set of invalid operations of the law.
8. The appellant identifies two partial disapplications for consideration: (1) 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

and (2) political communication generally. Such examples of partial disapplication are open and available only ***if*** (and this is a significant “if”) they reflect the Court’s conclusions about why s 18C is otherwise invalid.

9. The Commonwealth has already addressed (2) in chief and issue is joined with the appellant. As to (1), it must seriously be doubted (and the Court should not conclude) that parliamentarians engaged in political communication cannot be captured by s 18C. Parliamentarians are not entirely free from defamation and other analogous laws, and in so far as they wish to express views about other parliamentarians (as in this case) they have a substantial alternative available to them that is free from limitation by s 18C, which is to make their statements in proceedings in Parliament. But if the Court were to conclude that this was the relevant reason why s 18C is invalid, then there is no reason in principle why this could not be the partial disapplication arrived at.

Date: 17 December 2025



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