No. NSD 372 of 2023

Mehreen Faruqi v Pauline Hanson

RESPONDENT'S CLOSING SUBMISSIONS

CONTENTS

For convenience, these submissions include material from (and replace) the respondent's opening submissions of 8 April 2024.

Noting the Commonwealth's contention that the Constitutional issues are not engaged until the other issues are resolved submission (Cth submissions of 19 April 2024 (**CS**) at [1]), the issues are dealt with in the above order.

To the extent that the Court concludes that there is no claim established against the respondent, a question may arise as to whether the Court should go on to consider the constitutional questions, as that should only be done if it is necessary to do justice in the given case and to determine the rights of the parties: see, eg, *ICM Agriculture v The Cth* (2009) 240 CLR 140, at [141].

The respondent's position is the same as taken by the Commonwealth on this issue.

A. SUMMARY

1. These submissions begin with interpretation of the Act:

   (a) the Act is directed only to serious or profound conduct;

   (b) so far as groups of people are concerned, there is a difference between acts directed at an individual and acts directed at a group;

   (c) where the communication is directed at a group, it is necessary for the group to be affected as a group, which is to say that most of the group must be likely to be affected, in the serious or profound way required by the Act.

2. To the extent the applicant relies on a "group" under s 18C, all but one of the pleaded groups (people of colour) are not eligible groups under the provision.

3. The respondent's tweet did not breach s 18C(1)(a) of the Act because:

   (a) the respondent's tweet was not reasonably likely to have a sufficiently serious impact on the applicant, especially given the provocative content and timing of the applicant's own tweet and the identity of the applicant and respondent as politicians;

   (b) the respondent's tweet was not reasonably likely to have a sufficiently serious impact on the group or groups of people identified by the applicant, because:

      (i) the tweet was obviously directed at the applicant, on the basis of her own tweet, and would have been so understood;

      (ii) it was not reasonably likely that most or many of the group or groups would have been offended etc, especially not in a serious or profound way.

4. The respondent's tweet was not made "because of" one of the grounds in s 18C(1)(b) because it was made for the "true reason" of being a response to the applicant's tweet, which included the respondent's views about the applicant's conduct in attacking the late Queen - the applicant's position as an immigrant was only material used by the respondent to demonstrate the applicant's hypocrisy, as the respondent saw it.

5. The respondent was entitled to a defence or exemption under s 18D because:

   (a) her tweet was a fair comment on the applicant's tweet, which made clear the basis of her opinions, and reflected her genuine beliefs;

   (b) it was reasonable given the circumstances and the message that the respondent wished to convey, and it was in good faith for the same reasons.

6. The relief sought by the applicant is not appropriate in the circumstances.

7. The provisions of Part IIA of the *Racial Discrimination Act* are beyond the legislative power of the Commonwealth.

8. The provisions of Part IIA of the *Racial Discrimination Act* offend the implied freedom of communication on political matters because:

   (a) those provisions impose a substantial burden on the implied freedom;

   (b) the purpose of the provisions is not compatible with the implied freedom, depending on which purpose is identified;

   (c) alternatively, the provisions are not reasonably appropriate and adapted to advance the legitimate object of the provisions.

B. INTERPRETATION OF PART IIA OF THE RACIAL DISCRIMINATION ACT

9. 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

10. The respondent accepts as correct the statement of legal principles set out at **CS** [4]-[14], drawing particular attention to **CS** [9], in relation to the need to affect most of the identified group at the required statutory level (serious offence etc) and makes the following additional submissions.

"group of people"

11. In any case where an alleged contravention of s 18C claimed, it is convenient to ask three questions:

(a) is this a case where it is relevant to consider a "*group*" under s 18C, as opposed to the applicant;

(b) if it is, has the applicant defined a "*group*" in a way that meets the requirements of s 18C;

(c) if so, how should the impact of the impugned act on the "*group*" be considered?

12. Starting with the first question, and noting the legal principles at CS [9], in relation to "group of people":

(a) in every, or nearly every case, the impugned act will be a public communication – words or other conduct that carries a message to others;

(b) in many cases, the message will be clearly directed or targeted at a particular *individual*; in other cases, the message will clearly be directed or targeted at a particular *group*, while in some (but only some) cases, it may be both;

(c) in considering whether a particular act was reasonably likely to have the statutory effect on a group of people, this dimension to the message may be highly relevant.

13. Thus, in *Eatock v Bolt* (2011) 197 FCR 261, Bromberg J said at [246]:

> A distinction between an identified person and a group of people is found in the words of s 18C(1)(a). The provision acknowledges that conduct may be reasonably likely to offend a "person" on the one hand or a "group of people" on the other. It seems to me that the reference to a "person" must be intended as a reference to an identified person (or persons) that the conduct in question was directed at. In that respect, the provision is addressing an act directed to an identified individual or individuals. In contrast, the reference to "a group of people" is dealing with a class to whom the conduct was directed in a general sense.

14. Moving to the second question, what qualifies multiple people as a "*group of people*" for the purpose of s 18C? There are two requirements:

(a) *First*, the applicant must be a member of the group. In *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 at [13], Kiefel J held that the analysis under s 18C(1)(a) begins with the "*perspective under consideration, which is to say the*

hypothetical person in the applicant's position or *the group of which the applicant is one*."

(b) *Second*, the group in s 18C(1)(a) must be defined by the relevant race, colour, national or ethnic origin that was the ground of the act in s 18C(1)(b). That is because:

(i) Section 18C(1)(a) refers to a "*a group of people*". In a statute about racial discrimination, a group of people must mean a group of people sharing a race, colour, national or ethnic origin, as opposed to other characteristics (e.g. gender, religion, occupation, or marriage status).

(ii) Further, s 18C(1)(b) refers to a group that is defined by race, colour, national or ethnic origin. This meaning of "*group*" throws light on what qualifies as a group in s 18C(1)(a). If it were otherwise – and group of people in s 18C(1)(a) can be literally any group of people – s 18C would employ two different definitions of the same words ("*group of people*") in the provision. That is a result that Parliament is unlikely to have intended: *Tabcorp Holdings Ltd v Victoria* (2016) 90 ALJR 376 at 387 [65] (French CJ, Kiefel, Bell, Keane and Gordon JJ). This is further confirmed by the use of the words "*the* group" in (b), meaning the group referred to in (a).

15. Read otherwise, s 18C could be contravened based on the reaction of any member of the audience for the act in question, so long as (b) was satisfied. That would be a very strange outcome and so far as the respondent is aware has not been held to be the correct approach to s 18C in any case.

16. Moving to the third question, how is impact of the impugned act on the group assessed? The starting point is that the statutory language of s 18C(1)(a) ("reasonably likely … to offend … a group of people") directs attention to their reaction *as a group*, not as some individuals within that group, which in turn supports that most of the group must (objectively) be likely to be so affected. A very real issue will arise where a public act is explicitly directed at a particular individual whether *most* of any particular group (that is, the group) would be reasonably likely to be affected in the required statutory way (even if it may be possible that some individuals in that group may be). Put another

way, the fact that some individuals might experience the statutory effect does not establish that the group would.

S 18C(1)(b)

17. 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].

18. 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 (see below).

Section 18D

19. 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.

20. In general, the respondent accepts as correct the statements of principle at **CS** [15]-[23], except in relation to the subjective requirements of "good faith", as to which submissions are made below, and otherwise makes the following further submissions.

21. 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

22. "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

23. 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.

24. 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.

25. Having regard to **CS** [20], the respondent accepts that *Toben v Jones* (2003) 128 FCR 515 could be read as inconsistent with that notion of "good faith", at least as far as the judgments of Kiefel J and Allsop J are concerned. Accordingly, the respondent's

primary submission is a formal submission. However, the respondent's second submission is that the approach taken by Carr J at [44] should be treated as the limit of the requirement of "good faith", namely,

> 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*. (Emphasis added.)

26. 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].

27. Thus, Carr J (and Kiefel J and Allsop J who agreed on this point) saw the objective element of the "good faith" requirement as (a) depending on the reasonable knowledge that the expressed views would be offensive and (b) 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.

28. 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.

29. 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).

30. 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]).

31. In summary, the "good faith" requirement should be limited only to the requirement of reasonableness. 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).

"Fair comment" in s18D(c)(ii)

32. In relation to s 18D(c)(ii) specifically, the requirement that the act be said or done "in making or publishing … *a fair comment* on any event or matter" has, not surprisingly, been treated as broadly corresponding with the notion in the law of defamation, meaning that it has to be based on true facts which are sufficiently referred to or notorious: see CS [23] and the authorities there cited.

33. The requirement in s 18D(c)(ii) that the expressed belief be genuinely held by the person making the comment similarly reflects the notion of "fair comment" in the law of defamation, which is not concerned with whether the comment is objectively "fair" but whether it was an honest opinion: see, for example, *Joseph v Spiller* [2010] UKSC 53; [2011] 1 AC 852 at [3] (fourth proposition), and [117] (defence should be renamed "honest comment").

34. The need to set out the basis for the comment (to the extent it is not otherwise apparent to the audience) also helps signal to the audience that what is being expressed is an expression of opinion or belief – that is the comment. Setting out the basis for an opinion is quite distinct from *the reason* for making a comment (as to which, see below).

C. THE RESPONDENT DID NOT BREACH s 18C

A) Who is the group?

35. The applicant has run her case in two ways:

    (a) as an "individual" case (that is, she relies on the likelihood of offence, insult, humiliation and intimidation to her); and

    (b) as a "group" case (she relies on the likelihood of these states of mind of eight different groups pleaded in the concise statement at [10]).

36. Given this choice, it is important at the outset to assess whether any of the groups pleaded by the applicant even qualify as a "*group*" under s 18C. The respondent's position is that only "*people of colour*" do; the rest do not.

37. The first requirement is that the applicant must be a member of a group. Because of that, it is not open to the applicant to rely on the following three groups:

    (a) Persons with migrant heritage, born in Australia: the applicant was not born in Australia.

    (b) Persons who by virtue of their appearance have been incorrectly identified as migrants: the applicant has not been "*incorrectly*" identified as a migrant, because she is a migrant.

    (c) Persons with visible signs or expressions of religion: there appears to be no evidence that the applicant exhibits visible signs or expressions of Islam.

38. The second requirement is that the group relied on for the purpose of proving s 18C(1)(a) must be defined by the relevant race, colour, national or ethnic origin that was the ground of the act in s 18C(1)(b). Because of that, it is not open to the applicant to rely on the following seven groups:

    (a) Migrants to Australia: This group of people shares neither a race, colour, national origin nor an ethnic origin. Rather, the group is a large collection of people with a wide array of these characteristics (none of which are shared by the mere fact of being a migrant). Nor does the group have a national origin defined as "*not*

born in Australia". National origin is not the same thing as nationality – its meaning in the context of other provisions of the Act has been considered, including in *Commonwealth of Australia v Stamatov* [1999] FCA 105, per Tamberlin J at [31]-[34] and the cases there cited.

(b) Persons with migrant heritage, born in Australia: This group of people shares neither a race, colour, national or ethnic origin.

(c) Persons who by virtue of their appearance have been incorrectly identified as migrants: The same observation in (b) holds true.

(d) Muslim people: Muslims are united by adherence to a religion, which is neither a race, colour, national origin or ethnic origin.

(e) Persons with visible signs or expressions of religion: The same observation in (b) holds true.

(f) Persons who have been told to "go back to where they came from" or variations of that phrase due to their race, colour or national or ethnic origin: The same observation in (b) holds true.

(g) Persons who have experienced racism: The same observation in (b) holds true.

39. That leaves "person of colour" as the only possible group on which the applicant can rely in proving the elements created by s 18C(1)(a) and (b). However, in the event the court takes a different view, the submissions will engage in the analysis of the application of s 18C(1)(a) and (b) as if the pleaded groups qualified.

(A) 18C(1)(a)

40. The respondent's behaviour, viewed in context, was not sufficiently serious to fall within s 18C(1)(a). 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. "*All the circumstances*" 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, (e) the fact that the respondent's tweet set out the applicant's tweet in full and both in form and content was directed to that particular conduct.

41. The question under this paragraph is whether the respondent's act in publishing her tweet of 9 September 2022, including the applicant's tweet of the same day (see CB 17) was "reasonably likely, in all the circumstances, to offend etc another person or group of people". It is convenient to consider this in two parts: (a) reasonably likely effect on the applicant and (b) reasonably likely effect on a "group of people".

Not reasonably likely to offend etc <u>the applicant</u>

42. Consistently with the objective nature of the inquiry, the question is not whether the applicant was in fact offended etc, but whether she was reasonably likely to be so, and at the serious or profound level required by the provision (as interpreted).

43. The context is important. The applicant had just made an objectively provocative tweet, given the death of the Queen. The applicant gave evidence that she carefully considered the words used in her tweet before posting (T56.4-5) and wanted to put "*something on the political agenda which should be discussed in our country*": T58.9-13. Objectively, and subjectively in this case, a person making such a tweet would understand it was provocative, indeed highly so, and by making it on Twitter at that particular time, she was inviting comment upon it, including by those who might hold very different views and who might be her political opponents.

44. The evidence is that before the respondent made her tweet, the applicant received a great deal of public response to her own tweet on that day, much of it highly critical. That can hardly have come as a surprise to the applicant in the circumstances (or objectively, to a person in her position). While the applicant characterises the respondent's tweet as "*a direct attack from a colleague in my workplace*" (CB60, [81]), that is a very partial characterisation, because the workplace was an adversarial one, and the attack was a criticism which was, on any view, part of the political process, involving self-evidently political communications by rival politicians. Further, the attack did not occur "in the workplace".

45. The Court should approach the applicant's evidence of her reaction to the respondent's tweet with considerable caution in relation to the objective inquiry as to what was

reasonably likely. The applicant's evidence revealed that she held views of what amounted to "hate speech" that were at odds with the plain meaning of the Act: CB 52 [20] was revealed to be highly personalised such that "my race, my background" did not apply equally to people of other colours or backgrounds, such as White Anglo-Saxons: T49.29-43. Even more significant is the evidence of the applicant (CB 54-55 at [28]-[36]) which as confirmed in cross-examination, reflected a propensity to find offence where objectively there was no ground for it: T42.29-32. These considerations illustrate the reasons why an objective test was included in s 18C, and why it is critical that it be applied, independently of the subjective views and feelings of any particular individual.

46. Other reasons to approach Senator Faruqi's evidence with caution are:

(a) her unwillingness to accept the obvious basis for Senator Hanson to say Senator Faruqi was "not happy" (T68.16-.47);

(b) her claim that "colour" was implicit in Senator Hanson's tweet which self-evidently involved no such notion (T68.45; 69.7.10:); and

(c) her claim that her view was there was no place for offensive conduct or comments in day to day political discourse, having regard to her own political comments e.g. in relation to Prime Minister Morrison (T82.43-.46).

47. Objectively, Senator Faruqi had been in public office since 2013 and had engaged in robust and sometimes highly charged political debate over various social media platforms (Twitter, Facebook and Instagram) throughout her political career: T51.45-46. In her book and other public comments she frequently "called out" people for being White and sought to comment on or criticise them, including for that characteristic: T53.14-46. The conduct she now complains of was part of that process, in particular it was a response to a highly political and provocative communication about a matter of great public interest that day. Prior to Senator Hanson's tweet, the applicant received over 50 pages of comments (Ex R1) overwhelmingly critical of her conduct and in some instances expressing the same sentiment later published by Senator Hanson.

48. The applicant was lambasted at about 3:30 pm (still prior to Senator Hanson's tweet) in an article published on *Sky News* which cited strong criticism of the applicant's conduct in publishing her tweet from a number of sources (Ex R2).

49. Similarly, the leader of her party, Adam Bandt, who had published a tweet about the death of the Queen in far more moderate terms than the applicant, was rhetorically invited to leave the country by another Federal member of Parliament (Ex R4). The overwhelming sentiment toward calls for a Republic *on that day* in connection with the death of the Queen was hostile and to the effect that "if you don't like it here, leave" (irrespective of where you come from).

50. In any event, the Court should be cautious in accepting at face value the applicant's evidence as to the effect of the Senator Hanson's tweet on her, having regard to her claims that the tweet "*had had a silencing effect on*" her: CB 57 [57] – see T71.4ff.

51. Part of the circumstances were the medium employed by the respondent (and the applicant). Using Twitter, within a few hours of the applicant's tweet, on a very current topic, proved a context which a longer, more detailed criticism (e.g. in a newspaper article the next day) would have lacked. 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 on 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' ".

52. 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).

53. In those circumstances, the respondent's public act in publishing her tweet was not reasonably likely to have the statutory effect on the applicant, at the required level of seriousness, to breach s 18C(1)(a).

54. A further aspect of the applicant's evidence (and case) was that the respondent's tweet was somehow more offensive, because of the history which the applicant considered the respondent had on racial issues. Viewed objectively (as required by s 18C), this does not withstand scrutiny. A racially charged criticism (if it was) would be expected to be more likely to be taken seriously and to "strike home" if it came from a different type of speaker – e.g. a politician without such a history.

Not reasonably likely to offend etc a "group of people"

55. The respondent's tweet was in form and substance a response to the applicant's tweet. Appearing less than 5 hours later, it contained the whole of the applicant's tweet, making clear to whom the respondent's comments were directed, and in respect of what, that is, why. It was explicitly addressed to the applicant, and criticised her strongly: "*your* attitude … when *you* … *you* took … it's clear *you're* not happy … pack *your* bags". What was being criticised was "*your* attitude" – evidently the *applicant's* attitude as displayed by the applicant's tweet which the respondent set out in full for readers to see.

56. While the respondent's tweet was public, it was *not* directed explicitly or by implication at a group of people – the tweet targeted the applicant and very plainly did so *because of* what the applicant had written in her own tweet. It would have been reasonably understood in that way and there was, objectively speaking, no "group" dimension to it.

57. The categories proposed by the applicant are various and wide-ranging but taking them together (or one by one), it was not reasonably likely in the circumstances that *most* or even many of that category (or those categories) would have been offended etc, because many in those categories would have understood that the respondent's tweet was *about the applicant*, and more particularly was about the *applicant's conduct in having made her tweet criticising the Queen*.

58. Objectively, many, perhaps most, readers – whether they shared, or disagreed with, or were neutral about, the applicant's criticism of the Queen and call for political action – would have understood the provocative nature of her views in the circumstances, and would have understood the respondent's response to be about the applicant and *not about them*. It is, put simply, just not a group case at all.

59. If the individual categories are considered, some may be rejected out of hand, given the relevant objective threshold. Category (a) persons of colour, (e) Muslims and (f) persons with visible signs or expressions of religion are such. Nothing in the respondent's tweet, including the text of the applicant's tweet, refers to such matters, directly or by inference. The mere fact that the applicant may fall within such categories is completely insufficient to meet the objective threshold, in circumstances where they are neither expressly nor implicitly referred to.

60. Nor are the remaining categories (b), (c), (d), (g) or (h) sufficient *in all the circumstances* to overcome the threshold. Although the respondent's tweet referred to the applicant having immigrated to Australia, the basis for raising that fact (in the context of the applicant's attack on the Queen on which the respondent would be seen to be commenting) would have been apparent to people in those categories – that is a charge of hypocrisy against the applicant for having benefitted in many ways from the very "racist empire" which the applicant had just decried. Whatever *some* individual members of the categories might have made of that, the notion that "the group" would have been offended, is not established, given the specific direction of the respondent's criticism to the applicant and her conduct. When to that is added the evidently political nature of both Tweets, and the provocative nature of the applicant's tweet, the Court would not conclude that any of these groups would, as a group, have the statutory effect required by s 18C(1)(a). 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.

61. Reasonable 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, especially in the context provided by the Queen's death, and would bear in mind the nature of tweets (see above).

62. These conclusions are not altered by the evidence of the 9 witnesses called by the applicant as to their personal reaction to the respondent's tweet (see CB 111-206). The applicant does not rely on this evidence as a representative sample or survey of such reactions, and it does not substantially assist the proof of the relevant matters: see, in the context of consumer protection, *Unique International College Pty Ltd v Australian Competition and Consumer Commission* [2018] FCAFC 155; 266 FCR 631 at [161]-[162].

63. Even considered in isolation, the evidence is of a limited kind. The evidence of some of the witnesses (Anna Sri, Coco-Jacinta Cherian, Daniel Levy) is not from migrants at all, that of Mr Levy is not even from a child of migrants. The evidence of many of the witnesses proceeds from grounds that have nothing, in context, to do with the respondent's tweet, eg "colour" (Ms Sri, Ms Cherian, Mr Yunis, and in part Mr Mandivengeri), or Judaism or xenophobia (Mr Levy). With no disrespect to such witnesses, feelings of offence on reading the respondent's tweet, seem to be lie outside the reasonably expected reaction to such material.

64. Nor does the expert evidence adduced by the applicant assist:

(a) The evidence of Jennifer Wingard is of minimal (if any) utility. The task of the Court is to consider the effect of the tweet in all the circumstances. In contrast, Dr Wingard's evidence is focussed on the general meaning of the phrase "*go back to where you came from*". There is no evidence to attribute the same understanding of that meaning to the groups in question in this case, let alone in the particular circumstances of the case. To the extent that Dr Wingard opines on the meaning of the phrase in the context she was given, she makes clear that **she** sees no other way of reading the tweet in the way she describes: CB 1749 [32]. The evidence does not allow that particular reading of the respondent's tweet to be attributed to members of the groups, especially because Dr Wingard reviewed a large amount of material extrinsic to the respondent's tweet to reach that view. Even assuming Dr Wingard's reading could be attributed to group members, it does not follow that some, most or all members of the groups were reasonably likely to have a state of mind in s 18C(1)(a) because they read the respondent as attempting to "*redefine [the applicant] as a dangerous, Muslim immigrant*". Dr Wingard's evidence does not assist the applicant.

(b) The evidence of Professor Reynolds is also of minimal utility for the purpose of this element. The thrust of her opinion was that "*a person who shares any or some of the group attributes who read [the respondent's tweet] and/or was told words to the effect of "go back to where you came from" will be impacted*", and that it was likely those people to experience prejudice and racism, associated with significantly poorer physical and mental health: CB 1720 [35]. In cross-examination, Dr Reynolds said that the group the subject of that opinion was "*Muslim women in the Australian context*": T128.7-9. That renders the opinion fairly useless proof of this element, since (i) Muslims are not an eligible group for the purpose of s 18C(1)(a); and (ii) Islam was not a characteristic that in any way motivated the respondent's tweet, as she did not even know the applicant was Muslim (which will be discussed in further detail below).

(c) The evidence of Professor Paradies had application beyond Muslim women in Australia, but ultimately confronted the same hurdle confronting the other expert evidence, which is that whether the respondent's tweet (like any other act impugned under s 18C) was reasonably likely to have the requisite state of mind is fact-specific. So much was accepted by Dr Paradies: T100.24-30. In this case, the notion that it is reasonably likely that this group (or one or more of these groups), *as a group*, would respond with serious or profound offence, insult or worse, by reason either of vicarious racism (i.e. observing the respondent's tweet directed to the applicant) or specifically because of the use of the phrase "piss off back to Pakistan" directed to the applicant is highly counter-intuitive, and ought not be regarded as established. That material may provide a context for understanding the evidence of some of the third-party witnesses called by the applicant but not for drawing conclusions as to the likely response of any one or more of the groups nominated by the applicant.

65. Further if the tweet were to be capable of being offensive to a person other than the applicant (on a prohibited ground) that would seem to be immigrants from Pakistan, as that is the only national origin referred to. However, that is not one of the pleaded categories in the applicant's Concise Statement at [10]. The only one of the pleaded categories which could conceivably be engaged would be (b) migrants to Australia, although the assumption is that such a group is homogenous, whereas the Court has no

safe basis to conclude that migrants from places other than Pakistan might be offended by the suggestion that the applicant, a migrant, should return to Pakistan. In fact, the notion that migrants in Australia would have a response "*as a group*" to this Tweet is startling. It is easy to conclude that many migrants might have endorsed Senator Hanson's sentiments against the applicant and far from feeling offended by Senator Hanson's tweet would rather have been critical of Senator Faruqi's conduct on that day.

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, the Court would not 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. 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)

68. The applicant's case on s 18C(1)(b) must fail.

69. With two exceptions, the respondent gave unchallenged evidence that she did not ask for her tweet to be posted because of the applicant's race, colour, or national or ethnic origin: CB 2081 [37]. The exceptions are that the cross-examiner only challenged this evidence to the extent that he put to the respondent that one reason she asked for the tweet to be posted was because the applicant was "*from Pakistan*" (T171.1-5) and perhaps, impliedly from the large amount of questions about it, was because the applicant is a Muslim.

70. However:

(a) "*People from Pakistan*" is not a group that the applicant has pleaded, nor a group that her expert witnesses were asked to consider. It is not open to the applicant to run this case.

(b) "*Muslims*" are not protected under s 18C for the reasons given earlier. In any event, the attack on the respondent's denial that the applicant's religion had anything to do with the posting of the tweet was wholly unmeritorious (and the basis for such an attack unclear).

71. The conduct of the cross-examination has important implications for proof of this element, and consequently, the whole case. If the Court accepts the respondent's submission that of the applicant's pleaded groups, the applicant can only rely on her membership in the group "*people of colour*", then the respondent must win this case. In common with many other of the pleaded categories, it was not put to the respondent that one motive for directing the posting of the tweet was that the applicant was a person of colour (that is, not white). That being so, the applicant must be left to "*people from Pakistan*" and "*Muslims*", which are not the same thing, and in the context of this case, suffer the fatal deficiencies outlined in the previous paragraph.

72. Notwithstanding above, these submissions will proceed to engage with the merits of the "*people from Pakistan*" and "*Muslims*" cases on s 18C(1)(b).

"because of the race etc of the applicant"

73. The core problem with the applicant's allegation that the respondent was motivated to direct the posting of the tweet at all by the applicant being a Muslim is that the applicant has fallen far short of proving that the respondent knew she was a Muslim. The respondent gave evidence that she did not know that the applicant was a Muslim at the relevant time: T149.25-31. Although it was put to the respondent that she was lying about this, there is quite literally no evidence to contradict it. In particular:

(a) the applicant affirmed long affidavits in these proceedings, but never testified to personal contact with the respondent before 9 September 2022;

(b) there is no evidence that the applicant wore attire that would have identified her to the respondent as a Muslim;

(c) the applicant's own expert, Dr Wingard, was briefed with a large volume of documents and undertook her own research into the respondent, but expressly said that she "*found no evidence of Senator Hanson Publicly recognizing Senator Faruqi as Muslim*".

(d) it is clear that the applicant's legal representatives have thoroughly combed the respondent's record of statements, and they have not identified any such evidence either.

74. In the absence of evidence, then, the cross-examiner relied on tenuous propositions to undermine the respondent's evidence that she was unaware of the applicant's religion. They were:

(a) The respondent did not say she did not know the applicant was Muslim in her affidavit. However, there is nothing surprising about this. The respondent explained the reasons that she composed the tweet and flatly denied an alternative reason of being motivated by race, ethnicity, national or ethnic origin, against a context of then being faced with eight different groups pleaded by the applicant. It is not surprising that she did not go into further detail as to why she did not ask for the posting of the tweet, in the same way she did not explain why membership of other pleaded groups did not motivate her. To say that "*one of the fundamental things about this case is the suggestion that this was done in part because Senator Faruqi was a Muslim*" (T58.41-47) is to equate the respondent's view of what is important in this case, unfairly, with the view of a lawyer for the applicant. It is clear by now that they are entirely different.

(b) The respondent would have, or may have, known that the population of Pakistan was 97% Muslim. But this is knowledge that is not to be attributed to the ordinary person. Given the applicant's main case theory is that the respondent is a racist xenophobe, it is strange that in this aspect of the case the applicant (without evidence) attributes the respondent with a degree of geopolitical knowledge that only the most cosmopolitan of people would have.

75. Finally, to the extent that witness demeanour is worth something, it is obvious from the respondent's demeanour in giving evidence that she was wildly confused about why the applicant's religion was relevant to the tweet, and why she would put her lack of knowledge of the applicant's religion at the time of the tweet into her affidavit if it was irrelevant to her. She was not shaken from that evidence.

76. In the total absence of evidence to contradict the respondent that she did not know the applicant was a Muslim, the Court cannot make the grave finding that the respondent has lied about that her knowledge of the applicant's religion, and by extension, that the applicant's status as Muslim was a reason for the respondent to make the tweet.

77. Based on how the cross-examination was conducted, that leaves the theory that the respondent was motivated to compose the tweet by the fact that the applicant was from Pakistan. The problem for the applicant, however, is that she was never challenged on the following evidence at CB 2081 [32]:

> What I was saying [by "it's clear you're not happy, so pack your bags and piss off back to Pakistan"] was if she thought Australia was such a terrible place (because she made a public statement that it was a racist empire built on stolen lives, land and wealth of colonised peoples), then she should go somewhere else. I said the words "*back to Pakistan*" because that's where she happened to be from. If she were from the UK, I would have said "*piss off back to the UK*". If she were from New Zealand, I would have said "*piss off back to New Zealand*". If she were born in Australia, I would have said "*piss off somewhere else*" or chosen a country that I thought fit what she was saying and said "*piss off*" there.

78. The effect of this evidence is that the respondent would have engaged in the impugned act, regardless of where the applicant was from (including from Australia). That is terminal for the applicant's "*from Pakistan*" case on s 18C(1)(b). The closest the cross-examiner came to this topic – and it was far away - was to ask in an open-ended way whether the respondent had ever said in the past that a person from Australia who is unhappy with Australia, or a white migrant from Australia who is unhappy with Australia, should leave (T159.22-29). The respondent answered that she could not recall to the former and the answer was "*probably*" to the latter. Again, the respondent was not even challenged on these answers. But for the avoidance of doubt, the respondent

was correct on the latter; she told a white male senator (Derryn Hinch) who had previously migrated from New Zealand to "*go back to New Zealand and pick up your manners*": Exhibit R5.

79. Consequently, the applicant has fallen far short of proving that her origin in Pakistan was a reason for the respondent to direct the posting of the tweet.

80. The applicant's case on s 18C(1)(b) fails.

D. THE RESPONDENT WAS ENTITLED TO A DEFENCE UNDER s 18D

81. 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.

82. 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.

83. In assessing whether this defence is established, it is important to appreciate that the respondent was almost completely unchallenged on her evidence going to the defence in s 18D. This has important implications for whether the applicant's challenge to the defence succeeds.

Fair comment

84. The applicant has now conceded that the respondent's comment was on a matter of public interest and also that it was an expression of a genuine belief held by her. As to the other requirements of fair comment, the basis for the comment is fairly set forth in the respondent's tweet, including of course, the content – and implicitly, the timing – of the applicant's own tweet. The factual matters referred to by the respondent (the applicant's immigration, citizenship, multiple home ownership and position in Parliament) are all proved true, and the fact that the applicant was not happy was a

reference to the content of the applicant's tweet. The truth of the facts which formed the basis of the comment was confirmed in cross-examination of the applicant: T65-68.

85. Because Senator Hanson included as part of the basis of her comment the whole of Senator Faruqi's tweet in her own tweet – which quite apart from the timing of both tweets, made apparent the key context was the death of the Queen and Senator Faruqi's response to hit – readers of Senator Hanson's tweet could readily grasp that her communication was an expression of opinion (that is, a comment) and could form their own views about the issues, given they also were provided with Senator Faruqi's tweet. This is consistent with the respondent's unchallenged evidence that she knew and believed that most people would be outraged by a politician, with her high paying job and multiple properties, complaining about a racist empire built on stolen wealth: CB 2080 [28].

86. Because readers would understand it was an opinion, they would treat it accordingly, understanding that they were free to agree or disagree (just as they were free to agree or disagree with Senator Faruqi's tweet). This is, of course, directly analogous to "fair comment" at common law (or honest opinion as it is now called – see e.g. s 31 of the *Uniform Defamation Act*).

"reasonably"

87. These considerations were also relevant to reasonableness. Senator Hanson laid before readers the basis of her opinion, and enabled readers to form their own views, to the extent they cared to engage in the issues.

88. 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. This was not disproportionate to what was needed to carry out the exercise of responding powerfully and effectively to Senator Faruqi's public statement. The reference to Senator Faruqi coming to Australia and enjoying benefits in Australia, and for that matter, the rhetorical assertion that she should leave, was not *gratuitous* reference to an irrelevant matter (offensive or otherwise) – rather it was setting out for the reader (and for Senator Faruqi) the basis of Senator Hanson's honestly held opinion:

see **CS** [17]. If the Court were to consider it could have been done more reasonably, or in a way that was more acceptable, that is beside the point: see **CS** [18].

89. 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.

90. As Senator Hanson explains in her evidence (but as is evident on the face of the applicant's Tweet), Senator Faruqi chose to make her Tweet upon the death of the Queen. As Senator Faruqi accepted in cross-examination (but as is obvious in any event on the face of her tweet given its timing), Senator Faruqi's tweet involved an intentional step to put something on the political agenda (T58.9-.13) which she knew would get a response (T58.18), wanting fand intending or people to debate it (T58.26; 60.36; 61.5-.6), conscious of her timing (T58.46), expressing her political views (T60.38), knowing that may people in Australia would not agree with her views, and knowing that they would find it offensive that she expressed her views at that time on that day (T60.40-.45). She accepted (and objectively this must have been obvious to any politician who made such a tweet at such a time that she wasn't surprised when she immediately started receiving severe criticism for her tweet – that is, in the hours before Senator Hanson's tweet: T61.8-.10.

91. The respondent was *highly* offended by the applicant's Tweet ("disgusted"), including because of its timing, but also because it was misleading in key respect (CB 2079 [24])s and because it was hypocritical, as the respondent viewed itCB 2078-2079 [21]-[24]. This evidence is unchallenged and ought to be accepted.

92. Part of the reasonableness of the respondent's conduct was the fact that (as the applicant accepted: T79.39-80.11) there was no power imbalance between them. In circumstances where one Senator had spoken publicly, in a manner inviting response, it was reasonable to respond quickly, directly and powerfully. There was nothing in the nature of "bullying" occurring – this was two equal political opponents engaged in public debate:

and Senator Faruqi's later characterisation of it as bullying (see T84.9-.26) should not be accepted as objectively accurate.

93. What amounts to "reasonable" conduct in response to such a tweet by a rival political with such content and with that particular timing (both as to Senator Faruqi's tweet and also Senator Hanson's tweet) might be very different from what might be reasonable in other contexts. 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. As stated above, the respondent gave unchallenged evidence that in Australia (CB 2079 [27] – CB 2080 [28]):

(a) Even if people think we should become a republic, they often still like the Royal family and respect their place in Australia's history. Most people saw the Queen as part of the Australian character.

(b) Most people hate lack of self-awareness in politicians. Many people in Australia can only dream of being in Parliament being paid hundreds of thousands of dollars per year and owning multiple properties. They feel like most politicians are in it for themselves and won't do anything that will actually helped.

Based on this analysis, the respondent gave unchallenged evidence that she knew and believed that most members of the public would be outraged by a politician, with her high paying job and multiple properties, was complaining about a racist empire built on stolen wealth: CB 2080 [28]. That is consistent with her own experience as being from a working class background and undergoing cycles of poverty as a young single mother, which meant that sometimes she only had enough food to feed her children: CB 2076 [9]. The respondent also gave unchallenged evidence that she represents the majority in Australia who would be outraged by the applicant's conduct and wanted to make a public statement to say what she believed they would be thinking: CB 2080 [29]. To use the vernacular, the respondent was "calling out" the applicant, and it was reasonable to use robust language and rhetoric to do so, even if there may have been other reasonable ways to do it as well. That is, *par excellence*, legitimate political speech.

94. 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 would) but it was reasonable in its content and expression *in the circumstances*.

"Good faith" (beyond honesty)

95. The applicant had accepted that the respondent honestly believed the things she said. That would satisfy the primary interpretation of "good faith" in s18D for which the applicant contends.

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

97. 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).

98. 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.

99. 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 may be 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 this higher 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. If she had framed her tweet without rhetoric, it could not have communicated the extent of her anger. This test is clear involves a question of degree but bearing in mind the circumstances in which the respondent's tweet was made, the Court would conclude that it was still consistent with the conscientious approach referred to by French J in *Bropho*.

E. CONSTITUTIONAL VALIDITY: LEGISLATIVE POWER

100. 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.)

101. 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*. 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.

F. CONSTITUTIONAL VALIDITY: IMPLIED FREEDOM

102. The impugned legislation in the present case is not the Act itself, but Part IIA thereof, and particularly ss 18B-18D, taken together. It is not possible to consider the validity of s 18C in isolation from either s 18B or s 18D.

103. Part IIA of course has to be read as part of the RDA as a whole, but the provisions are essentially self-contained, and markedly different to the other provisions in the Act dealing with racial discrimination, notably ss 9 to 16 (the **unlawful discrimination provisions**). One striking distinction is that the unlawful discrimination provisions refer both generally to doing an "act" (s 9) and to various other more specific conduct (ss 11 to 16), none of it is particularly directed to *communication,* far less public communication. In particular cases, the conduct might involve such conduct but that is far from necessary – the central concern is about imposing conditions or limitations on people on the ground of race etc.

104. This has two important consequences in the context of the implied freedom. First, Part IIA may burden the implied freedom to engage in political communication to a much greater degree that the unlawful discrimination provisions. Second, a different purpose may be identified in construing Part IIA than in relation to the unlawful discrimination provisions.

Principles

105. Subject to the following additions and qualifications, the respondent accepts the correctness of the principles set out at **CS** [25]-[37].

106. The provisions of s Part IIA 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.

107. As CS [31] notes, statutory purpose is discerned through ordinary processes of statutory construction: Hayne J in Monis at [125]. While that corresponds to the "mischief", the question is at what level of generality that should be understood.

108. 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].

109. The specificity of purpose can be seen in *Brown v Tasmania* (2017) 261 CLR 328, per Kiefel CJ, Bell and Keane JJ at [101]:

> It is important, however, to be clear about the purpose of the Protesters Act. It is not correctly stated simply as the protection of the interests of business just as it is not the prevention of protests. It is the protection of businesses and their operations, here forest operations, from damage and disruption from protesters who are engaged in particular kinds of protests. This is the mischief to which the statute is directed.

110. 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].

111. 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).

112. As to **CS** [36], where the burden imposed by the impugned provisions in large (as submitted below in the case of Part IIA), establishing that there is an equally practicable alternative must be substantially easier.

113. 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.

114. As to **CS** [37], if the hurdle is high, it is not insurmountable.

115. In considering the validity of Part IIA, 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.

116. Once it is accepted that a provision imposes even a slight burden, (a) that burden must be justified and (b) the persuasive burden of doing so rests on the polity imposing the burden: *Unions NSW v New South Wales* (2019) 264 CLR 595 (***Unions No 3***) at [30]-[31]. The Court must be satisfied of facts on which the State's justification for the burden depends: *Unions No 3* at [31]. As noted at CS [27] and [29], while the extent of the burden does not matter for the first (threshold) question, it should still be examined because a slight burden is more easily justified than a substantial one: see *Brown* at [118]; *Tajjour* at [151] (per Gaegler J)

117. A direct burden is harder to sustain than an indirect one: see *Monis*, at [64], [342]; *McCloy* at [252]-[253] (per Nettle J).

118. The extent of the burden on the implied freedom includes the impact on the *effectiveness* of communication: *Brown* at [117] (restrictions might prevent communication of images of protesters pointing to claimed damage to the natural environment). See also *Farm Transparency* per Gaegler J at [80] (dissenting judgment) re visual images.

119. A holding that impugned provisions violate the implied freedom does not, of course, immunise the conduct from other (valid) legislative restrictions. In the present case, laws against criminal conspiracy, incitement to violence, use of a carriage service to harass and so on.

120. Finding that the provisions offend the implied freedom does not affect other restrictions on political communications – e.g. laws against criminal conspiracy, incitement to violence, use of a carriage service to harass and so on.

121. The vagueness of laws does not render them invalid on that account alone, but that character is part of what is taken in to account in applying the relevant principles: *Brown* at [149]; cf **CS** [82].

122. The holding by Hely J in *Jones v Scully* (2002) 120 FCR 243 at [240] that ss 18C and 18D did not infringe the implied freedom ought not inhibit this Court from forming its own assessment. In Jones, the party arguing for invalidity was a litigant in person, and the issue of the implied freedom seems to have had only a limited focus in the issues in the case – it is dealt with only at [235]-[240] (not in fact apparently including [237]). His Honour does not seem to have assisted with any detailed argument, for example, as to relevance of the limits to s 18D (discussed only at [240]), nor is any submission recorded as to the impact of s 18A. In addition of course, since Jones was decided, the High Court has refined the applicable test in relation to the implied freedom and has had occasion to discuss its application, including the relevance of invective and insult in political speech as elsewhere noted in these submissions.

Question 1: does Part IIA burden the implied freedom (and what is the extent of the burden)?

123. The expression "effectively burden" "means nothing more complicated than that the effect of the law is to prohibit, or put some limitation on, the making or the content of political communication": *Monis v R* (2013) 249 CLR 92 at [108], per Hayne J.

124. It is relatively straight-forward to conclude that Part IIA burdens the implied freedom, but as the *extent* of the burden may also be relevant (especially to Question 3) and the fact of the burden is contested by the applicant (AOS [63]-[66]), although not by the Commonwealth (CS [39]), it is an issue to be addressed in a little detail.

125. 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.

126. Section 18C makes it unlawful for a person to do "*an act*" in certain circumstances. Given that the act has to offend etc, it must be directed, at least in its practical operation wholly, or very substantially, to communication, for it is the transmission of a message which will be able to have the statutory effect, at least in most cases (and the respondent cannot bring to mind any case which concerned an "act" which was not communication).

127. Further it is an act otherwise than in private – that is to say, s 18C is substantially concerned with regulating public communication. Further, s 18C relates to the effect of communication, which centres on its content.

128. By making certain communication illegal, it permits private individuals to invoke the jurisdiction of this Court, to seek declaratory and compulsive orders as provided in s 46PO of the *Australian Human Rights Commission Act* 1986 (Cth) (given that "unlawful discrimination" is defined in s 3 of that Act to include any act which is unlawful under Part IIA of the RDA.

129. The fact of, and extent of the burden flows from four matters:

    (a) Many topics of public communication may be political communication;

    (b) Many of those topics may fall within the potential operation of s 14C;

    (c) If breach is to be avoided, political communication may have to curtailed or its effectiveness muted;

    (d) The practical operation of the provisions, including their civil nature which (a) lowers the standard of proof and (b) places their invocation in the hands of any person, not professional prosecutors.

130. **Public communication often is, or involves, political communication**: this seems self-evident. Modern political communication is not conducted only on the floor of Parliament. **Media conferences** by Ministers, and shadow Ministers, and members of Parliament are daily events; **media releases**, **public speeches** (with the media in attendance), **advertising campaigns**, and **social media posts** across a range of social

media platforms are ubiquitous. Every party, and independents as well, are constantly seeking to engage the public directly (via social media and public appearances) and through the mass media. People other than politicians also engage in public political communication: non-governmental organisations, independent protesters, unaffiliated members of the public expressing political views on social media or elsewhere, may all engage in such communication; the protest rally calling for political action on a wide range of issues, dominates recent modern life.

131. **Public political communication may relate to 18C matters** (race … ethnic origin): the range of matters that may be the subject of discussion, debate and contest and touch on 18C matters is extensive, in fact, pervasive, and at any particular time may include, for example (at the Commonwealth or State level):

(a) Immigration, and its benefits or disadvantages to Australia, the levels at which it should be set, and whether there should be preference given to migrants with certain skills, or language proficiencies or from certain regions;

(b) Multiculturalism, and all that may be associated with it;

(c) Foreign policy, including appropriate political responses to overseas events such as wars or conflicts;

(d) Domestic protests about such foreign events;

(e) Terrorism, its prevalence, its causes and appropriate responses, including ;

(f) Aboriginal and Torres Strait Islander people, their culture, social disadvantage and measures appropriate in response;

(g) Representation of Aboriginal and Torres Strait Islander people e.g. the Voice to Parliament;

(h) Domestic violence, and its prevalence and nature in different social settings and cultural groups;

(i) Religious conflict, where aligned or associated with particular ethnic groups or national origins;

(j) Legal or social consideration of people of diverse sexual orientation, where ethnicity or cultural issues (and overlapping religious issues) may affect such matters;

(k) Welfare policy, including its treatment of immigrants, and disadvantage they may face;

(l) Housing policy, including the impact of immigration, both overall levels, and immigration from particular regions and to particular places in Australia;

(m) Defence policy, including where threats to Australia may lie now, and in the future, both overseas and domestically, and any question of foreign influence or espionage associated with any particular foreign power (which may be associated with particular national origins or ethnic groups);

(n) White privilege and its role in the selection of political candidates;

(o) Crime, its prevalence and its prevention and suppression, including ethnic groups which may be involved in particular types of crime (both in Australia and overseas), and appropriate policing measures;

(p) People trafficking and border control (whole elections have seemed to turn on such matters);

(q) And so on.

132. It may not be only explicit references to race, colour etc that may give rise to breach of s 18C, or especially *claims* of such breach. Discussion, especially robust discussion, involving notions of "civilisation" or "civilised values" or "Western values", or the criticism of certain practices as "uncivilised" or "barbaric" or "savage" may trigger a claim, or a discussion of "progress": see Forrester et al, *No Offence Intended: Why 18C is Wrong* (2016), at pp.197-198.

133. **Consideration of effective burden must include s 18B and s 18D**. Section 18B means that public political discussion on topics like those set out above needs to be made on the basis that if *a* reason for an offensive etc political communication is one of the prohibited grounds, then it does not matter if it was not the main or predominant reason.

This involves those who speak publicly having to "second guess" their motivation and considering how it is possible it might be characterised for the purpose of a civil claim.

134. Section 18D of course offers *some* protection, but of a highly qualified kind because:

(a) There is no defence available on the ground of truth, substantial or otherwise (cf *Defamation Act* 2005 (NSW), s 25, and the common law of defamation), a defence which is not liable to be defeated no matter what the intention or state of mind of the publisher may have been;

(b) There is no defence available on the basis of replying to a public attack, either on oneself, or another person (unlike in the law of defamation: see, for example, *Harbour Radio Pty Ltd v Trad* (2012) 247 CLR 31, at [33]-[35], which is available in respect of mass publications, and is defeated only by proof of express malice, not lack of reasonableness);

(c) There is no defence available of common law qualified privilege within an election period, unlike at common law: *Roberts v Bass* (2002) 212 CLR 1 at [63], [79], in which context reasonableness need not be shown and malice is not established merely by having an intention to harm one's political opponent: *Roberts v Bass* at [11]-[12], per Gleeson CJ;

(d) There is, effectively, a defence of fair comment (and similar defences) but subject to the requirements of "good faith" and "reasonableness".

135. It is no surprise that the applicant in the present matter did not sue the respondent for defamation; the range of defences available would have been formidable, including of course "fair comment", unrestricted by requirements of "good faith and "reasonableness', and common law reply to attack.

136. The High Court's decision in *Lange* involved an acceptance that the law of defamation in New South Wales, including s 22 of the then Defamation Act (now s 30 of the 2005 Act) was appropriate and adapted to meet the requirements of the implied freedom, but that was in circumstances where that law included not merely the defence of publication which was reasonable in circumstances (s 22) but also the other defences of truth, common law qualified privilege and so on: see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 569.5-573.5.

137. If the notion of "good faith" is interpreted as contended for by the Commonwealth and the applicant, the protection provided by s 18D is limited, requiring the political discussion to be constrained by the contours of the potential to give offence etc.

Avoiding breach of s 18C may limit political discussion or weaken its effectiveness

138. 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.

139. 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.)

140. 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.

141. And his Honour said at [105]:

> [104] Regulating political statements for the purpose of preventing the intimidation of participants in debates on political and governmental matters is an end that is compatible with the system of representative government laid down by the Constitution. …
>
> [105] The use of insulting words is a common enough technique in political discussion and debates. No doubt speakers and writers sometimes use them as weapons of intimidation. And whether insulting words are or are not used for the purpose of intimidation, fear of insult may have a chilling effect on political debate. However, as I have indicated, insults are a legitimate part of the political discussion protected by the Constitution. An unqualified prohibition on their use cannot be justified as compatible with the constitutional freedom. Such a prohibition goes beyond anything that could be regarded as reasonably appropriate and adapted to maintaining the system of representative government.

142. 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".

143. 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.

144. 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.

145. At [122], his Honour observed:

> [t]o suggest that a law which limits political communication is valid only because there can or will be "as much" or "equivalent" political discourse (because, for example, there are other ways to make the same political point) makes one or both of two assumptions. It assumes that it is right to hold the impugned law to be within power or it consigns some restrictions on political communication to a netherworld of unimportance. Assuming the answer to the constitutional question is as wrong as it is to ignore the answer that is given to the question. The very purpose of the freedom is to permit the expression of unpopular or minority points of view. Adoption of some quantitative test inevitably leads to reference to the "mainstream" of political discourse. This in turn rapidly merges into, and becomes indistinguishable from, the identification of what is an "orthodox" view held by the "right-thinking" members of society. And if the quantity or even permitted nature of political

> discourse is identified by reference to what most, or most "right-thinking", members of society would consider appropriate, the voice of the minority will soon be stilled. This is not and cannot be right.

146. 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.
>
> (Emphasis added.)

147. In *Brown v Tasmania*, Kiefel CJ, Bell and Keane JJ noted that they had not used the term "chilling effect' in concluding that the legislation there in question was invalid, but that it had been noted in the jurisprudence of the Court: see at [151]. In relation to Part IIA, the notion seems directly applicable – those who would speak publicly on political matters may not speak, or may speak less effectively, for fear of the invocation of the provisions.

148. 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.

149. While political communications might peak shortly prior to State or Commonwealth elections, they are routine parts of daily Australian political life. Together with reports of Parliamentary proceedings, they represent the raw material from which the Australian voting public assess politicians and parties and decide for whom to vote.

150. 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.

151. 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).

152. 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).

153. At CS [41]-[43], the Commonwealth contends that the extent of the burden is very small. That submission does not grapple with the wide range of political subject in which race etc might be raised, and offence caused (see above), nor the role of emotion and even insult and offence in political argument (see above).

154. Further, because a claim under 18C is civil in nature, it may be agitated by private citizens whose motivations and judgments may be quite different from those of professional prosecutors acting on behalf of the State. Marginal, weak or even hopeless cases may be brought and cause great anxiety and cost, amplified by the fact that if the matter proceeds to Court hearing and succeeds, the legal costs of the complainant will usually have to be met. Even success in court may be fraught, with irrecoverable costs, loss of time and distraction all increasing the burden. Given the open textured nature of many of the elements of Part IIA, including the defences under s 18D, predicting outcomes may be difficult, striking out weak claims problematic, and certainty of success not guaranteed.

155. That leads to another aspect of the burden, namely the burden of proof. If Part IIA created a criminal offence the elements of the offence (that is the s 18C elements) would likely need to be proved on a criminal standard, but the s 18C only requires proof at the civil standard. In fact, because of the prevailing interpretation of "reasonably likely… to offend etc" in s 18C(1)(a) as not meaning "more likely than not", the burden is considerable.

156. The converse of the submission at CS [41] is that a person seeking to write or speak publicly on political matters which touch on race, migration etc (see above) must consider a large range of matters, some difficult of evaluation, before having considerable confidence that doing so may not permit a claim (weak, moderate or strong) to be brought against the speaker under Part IIA including such matters as (a) who might read or hear; (b) what background might they have; (c) how might they reasonably react to what was said; (d) as a practical matter, how might they actually react, so as potentially lead them to invoke Part IIA; (e) what does self-examination reveal to the writer as to his or her motives in writing or speaking, including not just the main reason or reasons, but even subsidiary ones; (f) was the act of publishing reasonable (g) was the act of publishing based on true facts (g) depending on the interpretation given to "good faith", was the action conscientious having regard to the purposes of IIA and/or the RDA; (h) was the subject matter one of public interest.

157. All this in circumstances where the political discussion may be in real time, or close to it – for example, an interview or a question from the audience.

158. The burden on those who would speak on political matters imposed by Part IIA is substantial.

Question 2: is the purpose of s Part IIA legitimate?

159. The first step in answering question 2 is to identify the relevant purpose of Part IIA. This is not always an easy exercise, and different possibilities are properly considered.

The purpose of Part IIA

160. As a starting point, the mischief is not, as such "racial discrimination" – as noted above, that is a concern of other (preexisting) provisions of the Act, but not Part IIA.

161. At **CS [44],** reference is made to authority on the question of the purpose of these provisions, most particularly *Toben*. In *Toben*, the constitutional question was not the implied freedom but legislative power *per se* under the external affairs power. The discussion by Carr J at [19] does not amount to a finding of the purpose of the provisions, but rather a finding that the provisions could be seen an implementing the relevant international instrument. The concluding words of [19] might be thought to suggest a

purpose of "deterring public expression of offensive racial prejudice which might lead to acts of racial hatred or discrimination".

162. In *Bropho*, French J referred at [70] to the "balance struck by the Bill" and quoted from the Second Reading Speech (as reproduced as CS [46]). In *Kaplan*, Mortimer J considered at [105] said:

> As French J (as his Honour then was) explained in *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16; 135 FCR 105 at [70] , the legislative intention behind s 18C (and 18D) in the second reading speech introducing these provisions was "to close a gap in the legal protection available to the victims of extreme racist behaviour", and to balance the principles of free speech against the need for this protection.

163. The respondent's primary position on the purpose, derived from a consideration of its terms, is that it is *the prevention of public conduct causing offence based on a persons race, colour or national or ethnic origin*, or more shortly, the prevention of racially offensive conduct (**first purpose**).

164. The discussion of purpose in *Bropho* and *Kaplan* (and the second reading speech) seem directed at a greater level of generality, that is, they seem directed to a question of Parliamentary intention – the reason why provisions having a particular purpose were enacted.

165. However, if the Court considers that the first purpose is too, specific then It is submitted that those judgments identify the purpose of Part IIA as being to *protect against extreme racist behaviour while balancing the needs of free speech* (**second purpose**).

166. Alternatively, this material could be regarded as identifying the purpose as *preventing the promotion of racial hatred and racial violence* (**third purpose***)*.

167. For completeness, one may note the somewhat similar purpose contended for by the Commonwealth at **CS** [44], being *to deter and eliminate, and thus protect members of the public from, racial hatred and discrimination* (fourth purpose). For reasons already given, discrimination is not a purpose of Part IIA (**Cth purpose**). For the same reason the purpose is not correctly identified as the elimination of racial discrimination per se, as suggested by Hely J in *Jones v Scully*, by Hely J at [239].

168. Finally, one may note the purposes proposed by the applicant at **AOS** [66] (**applicant's purposes**). Those are cast as such a high level of generality as to be divorced from the legislation. They are more general than the rejected purposes in *Brown* (see above) and at least as general as those in *Clubb*, without being grounded in explicit purpose clauses.

169. Nor is the purpose correctly identified as the elimination of racial discrimination simpliciter: cf Stating the purpose is that form does not really shed light on the operation and effect of Part IIA.

Is the purpose of Part IIA legitimate?

170. The answer to this question may be greatly influenced by the identification of the purpose in question. Put shortly, the second purpose appears compatible, and the third purpose is probably compatible, but the others are not.

171. 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.

172. At the heart of this proposition is that "[t]he very purpose of the freedom is to permit the expression of unpopular or minority points of view" – per Hayne J in Monis at [122]. Such views may cause offence but the freedom to advance them is needed for the maintenance of the prescribed system of representative and responsible government.

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

173. If the Court reaches 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.

174. 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.

175. 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.

176. 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

177. 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.

178. Having regard to the various purposes identified above, suitability would be established for the first purpose and the applicant's purposes. However, there is an issue whether Part IIA, extending as it does to (serious) offence and insult, is rationally connected to the other purposes. It is submitted that the provisions fall short, at least for the second purpose and the third purpose.

179. The position with the Commonwealth purpose is complicated by its inclusion of the notion of discrimination. If (contrary to the above submissions) that were found to be part of the purpose, then Part IIA could be seen to be compatible with such a purpose.

180. Whether the balance is adequate is a different matter.

Necessity

181. Part IIA could achieve the second purpose by simply excluding political communication from the ambit of the provision, either in unqualified terms, or subject to some qualification. 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). Because part of the purpose is the balancing of the needs of freedom of speech, excluding political communication *per se*, or excluding political communication other than political communication which was reasonably likely to promote racial hatred or racial violence, would advance such a purpose at least as well and arguably better, while imposing a reduced burden on the implied freedom.

182. The latter type of exclusion would advance the third purpose as well, while not imposing the same burden on the implied freedom.

183. 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

184. 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).

185. 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.

186. The extent of the burden on the implied freedom is discussed above in relation to question 1. It is extensive given matters including: (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 and (g) the fact that the decision to bring proceedings resides with any person who may claim offence, potentially even political rivals. 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. In fact, the conduct regulated is all public communication, regardless of medium or audience.

187. 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.

188. 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.

189. 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.

190. And the inclusion of s 18B further tips the balance. There seems no need at all to prohibit acts done where race etc play only a small part in their motivation (something only in the back of a person's mind), and the burden of prohibiting such acts seems proportionally greater.

G. RELIEF

191. The relief sought by the applicant is set out in the originating application at CB 4. Because of how the applicant puts her case in relation to relief, there are two factual issues that must be addressed before the prayers for relief are addressed specifically:

(a) whether the respondent's tweet caused the applicant to be "*subject to a torrent of abusive phone calls, social media posts and hate mails (including death threats, misogynistic and racially and sexually violent content)*"; and

(b) the extent to which the respondent's tweet caused any harm to the applicant.

Causation of abuse

192. The Court would not accept this claim is true.

193. The starting point is that the applicant bears the onus of proving the claim true. Given the gravity of the allegation, it is one that demands a high degree of actual persuasion to be proven true: see the authorities cited in *Lehrmann v Network Ten Pty Ltd (Trial Judgment)* [2024] FCA 369 at [98]-[104] (Lee J).

194. For a number of reasons, the applicant has fallen far short of proving this claim true.

195. *First*, the applicant had received hundreds of critical comments on her tweet before the respondent even posted her tweet: Exhibit R1. Many of these comments expressed sentiments contained in the respondent's tweet. To take but a few examples of a long list of them:

(a) "*naahh .. we don't want her ... she lied when she took the oath in our parliament*" on page 4;

(b) "*if our country offends you so much, why did you move here?*" on page 5;

(c) "*who's making you stay?*" on page 7;

(d) "*Didn't you migrate here? Seems a bit disingenuous doesn't it…*" on page 7;

(e) "*Why does Australia allow people like you to emigrate here. Show some respect*" on page 7;

(f) "*And you are here in Australia because …….*" on page 9;

(g) "*Yet you are a willing (paid) participant in 'the system' aren't you?*" on page 10;

(h) "*Hey Mehreen if Australia is such a bad place, why did you emigrate here?*" on page 11;

(i) "*From the woman who swore allegiance to the queen. Get out of the senate #hateful #hypocrite*" on page 13;

(j) "*Didn't you swear allegiance to #QueenElizabeth? Hypocrite #hateful*" on page 13;

(k) "*Aren't you earning money from the same legal system derived from the monarchy ? That's strange*" on page 14;

(l) "*Your a disgrace, how shameful, you need to resign, your happy to take the taxpayer money*" on page 15;

(m) "*maybe she needs to go back to Pakistan and help the women there … because Aussie women HERE don't need her kind of hate and vitriol*";

This criticism (again, all preceding the respondent's tweet) also occasionally reached the higher registers of racism and misogyny. For example, one commentator said that the applicant should get into the "*cunt bin*": page 44. That makes it very difficult to attribute later abuse of this character to the respondent's tweet.

196. *Second*, before the respondent's tweet, the media had began criticising the applicant for her tweet: Exhibit R2. In particular, *Sky News* ran an article headlined "'*Unhinged and insensitive': Greens Senator Mehreen Faruqi slammed over 'appalling' tweet claiming Queen led 'racist empire'*", which also attracted a significant number of adverse comments.

197. *Third*, the applicant has given evidence that she has been told to "*go back to where she came from*" (or other comments in that vein) well before the events the subject of this case: see, eg, CB 55 [39], T 51.10-30. She had said publicly that it had happened hundreds and hundreds of times before Senator Hanson's tweet: T82.16. That is

evidence that suggests that it is a sentiment that constituents are inclined to express, independent of the respondent's tweet.

198. *Fourthly*, the preceding events render it impossible to attribute the criticism and the abuse that the applicant received to the respondent's tweet. After the respondent posted her tweet, there were a number of reasons that critics may have engaged in critical and/or abusive communication with the applicant, namely (i) the applicant's tweet; (ii) media criticism and (iii) the respondent's tweet. But the evidence does not allow the court to attribute this criticism and abuse to the respondent's tweet. The evidence of critical and abusive communications following the respondents' tweet falls into two categories:

(a) The first is critical and abusive communications that do not make reference to the respondent or her tweet. This category encapsulates a large number of criticism and abusive communications made after the respondent's tweet in evidence. Given the competing potential causes, the Court could not be persuaded on the balance of probabilities that the cause or a cause was the respondent's tweet. If anything, based on what was occurring before the respondent had even posted her tweet, it is more likely that the applicant's own conduct triggered this category of communications.

(b) The second is critical and abusive communications that do make reference to the respondent or her tweet. These communications are obviously evidence that the authors were aware of the respondent's tweet. But they are not evidence that the authors were *actuated* by the respondent's tweet to engage in communication that carried the same sting as the respondent's tweet, or a sting of different category (e.g. misogyny or violence). There is simply no evidence that would permit the Court to know whether the authors in this category were actuated by the respondent's tweet to criticise or abuse the applicant, or simply referred in that communication to the respondent's tweet to support criticism and/or abuse that would have been made without it, especially given the barrage of criticism and abuse that had started hours before the respondent's tweet was posted.

199. The consequence is that the applicant fails in her attempt to attribute the critical and abusive material she received to the respondent's tweet.

The extent to which the respondent's tweet caused harm to the applicant

200. The second issue is the extent to which the respondent's tweet caused harm to the applicant.

201. In assessing the applicant's credit on this issue, this is a case where demeanour must give way to plausibility. Making every allowance for the fact that people can have variant reactions to insult, or that one insult can push someone over the edge, the applicant's extreme evidence of the impact on her by the respondent's tweet cannot be accepted. At the time of 9 September 2022, the applicant was a resilient politician who had faced severe criticism many times before, and who did not place much stock in the views of the respondent. Against that context, and having regard to the fairly low-level offensiveness of the respondent's tweet, the applicant would like the court to believe that because of the respondent's tweet:

(a) she has literally jumped out of a moving car (T82.1-6);

(b) years later, she has sleepless nights: CB 81 [87];

(c) she has woken from sleep in great distress: CB 62 [91];

(d) she has started using the parliamentary workplace support service: CB 60 [76]; and

(e) she feels an emotional toll every day (CB 60 [76]), and she speaks to her husband about the tweet almost every day (CB 61 [88]).

202. While the applicant may in her own mind attribute these events to the respondent's tweet, it is not plausible that the respondent's tweet is responsible. One indication of that point is the emphasis in the applicant's evidence on the criticism and abuse that she believed was caused by the respondent's tweet: see, eg, CB 57 [53] ("*toxicity it created*"); CB 57 [55]-[57]; CB 61 [86] ("*[m]any months after the tweet, the social media posts and emails continue about this*"), CB 63 [102] ("*it has also unleashed a frenzy of other vile and abusive responses*), [104] ("*I felt this was an unleashing of hateful remarks because of who I am*"), CB 65 [119] ("*[t]here is also the threat of physical violence, and there was a clear threat of physical violence to me after this tweet*). It is much more likely that to the extent that the applicant has suffered mental

harm, it is because of the backlash that the applicant received, which, for the reasons given above, are not attributable to the respondent's tweet.

203. With the backlash removed from the equation, the Court would conclude that the harm suffered by the applicant as a result of the respondent's tweet is low. This is a matter that goes into the balance of facts that should be taken into account when deciding relief.

Prayers for relief

204. **Prayer (a)** seeks two distinct orders, a declaration and a direction (in substance an injunction).

205. As to the first, the declaration sought is that the respondent had committed unlawful offensive behaviour. If undefended breach is established, a declaration would be appropriate (subject to the constitutional argument), but it should be framed by reference to the conduct in question, and the provision breached.

206. As to the second, it is not appropriate to make any such order, beyond the specific conduct, that is the post in question (that is, a "take down"). And as to that, given that the post in question has already been the subject of extensive separate reporting and also inquiry in Parliament, there is no utility in such an order.

207. **Prayer (b)** seeks that the respondent be restrained from using a particular phrases. This is not appropriate because it prejudges the circumstances in which such use might occur, which might be in circumstances where a defence under s 18D was available, even if it were held not to be available in present circumstances, or where the phrase might not be offensive etc to the particular person or group concerned. The situation is quite different from, for example, a defamation case where a particular allegation had been the subject of an unsuccessful truth defence, or a misleading conduct case where particular claims had been found to be misleading.

208. **Prayer (c)** seeks a "take down" order in terms, as to which, see above.

209. **Prayer (d),** in the general terms drafted, does not identify the conduct in question and would do little to advance the purposes of Part IIA. It is in any event inappropriate, and amounts to nothing except seeking to shame the respondent.

210. **Prayer (e)** is deeply problematic. It requires the respondent to make a payment to an unascertained third party to be chosen by the applicant. It might have goals or methods which the respondent opposed. The same considerations which make ordering apologies inappropriate (except by consent) apply, as to which see *Wotton v Queensland (No 5)* [2016] FCA 1457 at [1550]-[1596]; *Bharatiya* v Antonio [2022] FCA 428 at [58]. In terms of s 46PO(4)(b), such an order would not be a "reasonable act" to require the respondent to undertake. That is especially so when the identification of the donee is at the caprice of the applicant.

211. Further, to the extent that such an order is a substitute or proxy for an order for compensation, the amount is greatly excessive. In assessing damages for defamation, conduct by the plaintiff provoking the publication is relevant to mitigation: see *Cassell & Co Ltd v Broome* [1972] UKHL 3; [1972] AC 1027; *Coxon v Wilson* [2016] WASCA 48 at [16]-[27] per Buss JA; [62]-[65] per Murphy JA and Corboy J. Such considerations apply with considerable force in this case – the applicant's conduct in making her tweet was highly provocative; any monetary award (including to a third party) should be greatly mitigated as a consequence. It is more appropriate that none be made at all.

212. Further support for this is that it is evident from the applicant's evidence in re-examination that the applicant's motive for bringing the proceedings was political: see T86.37-87.2, including that the proceedings reflected a desire to "highlight" matters, including "Senator Hanson's brand of racism".

213. Nor should the Court be tempted to make an award of damages by way of compensation to the applicant, in circumstances where the applicant has not sought them. The making of any particular order under s 46PO is discretionary, and a decision not to seek an order is a powerful reason not to make such an order, even assuming (which the respondent does not concede is correct) that the power to do so is enlivened, when it is not sought.

214. If the applicant succeeds, the only relief that should be granted is an appropriately worded declaration.

215. In relation to costs, the respondent would seek to be heard after delivery of judgment in this matter.

K P Smark SC	S T Chrysanthou SC	T Smartt
(02) 9132 5713	(02) 9132 5711	(02) 8915 2337
smark@smark.com.au	sue@chrysanthou.com.au	smartt@tenthfloor.org

Counsel for the respondent

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