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

**No. NSD 1698/2024**

**PAULINE HANSON**  
Appellant

**MEHREEN FARUQI**  
First Respondent

**ATTORNEY-GENERAL OF THE COMMONWEALTH**  
Second Respondent

**POST-HEARING SUBMISSIONS OF THE SECOND RESPONDENT**

**(filed in accordance with Order 1 of the Orders made on 25 November 2025)**

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## A. INTRODUCTION

1. If this Court were to conclude that ss 18B to 18D of the *Racial Discrimination Act 1975* (Cth) (**RDA**), on their face, exceed Commonwealth legislative power, then an issue would arise at that point (and only at that point<sup>1</sup>) as to whether ss 18B to 18D can have some valid operation, and, if so, whether the first respondent's claim succeeds having regard to that remaining field of valid operations. Ascertaining the extent of validity depends on s 15A of the *Acts Interpretation Act 1901* (Cth) (**AIA**), applied in the specific context of the constitutional head of power or limitation at issue.
2. These submissions set out the principles that apply to s 15A in **Part B** and then consider potential applications of these principles to this case depending on the conclusions which this Court might reach as to the invalidity of ss 18B to 18D (**Part C and Part D**).

## B. SECTION 15A OF THE AIA

3. Section 15A of the AIA provides:

Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.

4. Section 15A “reverse[s] the presumption that a statute is to operate as a whole, so that the intention of the legislature is to be taken prima facie to be that the enactment should be divisible and that any parts found constitutionally unobjectionable should be carried into effect independently of those which fail”: *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 371.
5. Section 15A can be given effect in different ways, which have often been collected under the general rubric of “reading down” or “severance”. Edelman J in particular has proposed the nomenclature of “severance”, “reading down”, and “partial disapplication” in *Clubb v Edwards* (2019) 267 CLR 171 at [415]-[425], which is a useful framework to consider the potential consequences of invalidity in this case although the argument does not ultimately depend on the application of these labels.

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<sup>1</sup> See eg *ACMA v Today FM (Sydney) Pty Limited* (2015) 255 CLR 352 at [66] (Gageler J).

6. “Reading down” is the process of the court preferring an interpretation of a provision that renders it constitutionally valid over one which would render it invalid. It “applies ordinary language techniques by which the essential meaning of the words of a statutory clause is understood”: *Clubb* at [417]. It results in a construction of a term that applies consistently in all cases, even where that results in a provision having a narrower operation than would be required by the limits of constitutional power. This is illustrated by *Coleman v Power* (2004) 220 CLR 1 at [188]-[200], [254]-[256], as discussed by Gageler J in *Clubb* at [142].
7. “Severance” permits a court “to strike down part of a statute that is beyond power, leaving the remainder of the statute operative”: *Clubb* at [418]. It is relevant where “it is found that particular clauses, provisos or qualifications, which are the subject of distinct or separate expression, are beyond the power of the legislature”: *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 652, quoted in *Clubb* at [141]. By this technique, words, clauses or entire sections or parts may be struck out (or blue-pencilled), leaving the balance of a statute to operate in accordance with its terms.
8. “Partial disapplication” (which is sometimes called “reading down” or severance after giving a provision a “distributive operation”: see, eg, *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at [122]-[123]) is relevant where “a provision which, in relation to a limited subject matter or territory, or even class of persons, might validly have been enacted, is expressed to apply generally without the appropriate limitation, or to apply to a larger ... class of persons than the power allows”: *Poole* at 652, quoted in *Clubb* at [141] (using the terminology of “severance”); see also *Pape v FCT* (2009) 238 CLR 1 at [250]. Partial disapplication does not alter the “essential meaning” of a provision, but simply confines its application: *Clubb* at [424]-[425]. In other words, it does not “alter the statement of the obligation”, but simply takes some cases “outside the scope of its operation”: *Clubb* at [151], see also [347], [442]. Thus, where a provision is partially disappplied, that does not affect the application of that provision to persons, subject-matters or circumstances to which it continues to apply: *Clubb* at [429]. The language of “partial disapplication” is somewhat new but the technique is not. It has been applied before: see, eg, *Newcastle and Hunter River Steamship Co Ltd v A-G (Cth)* (1921) 29 CLR 357 at 370; *R v Hughes* (2000) 202 CLR 535 at [43]; *Jumbunna Coal Mine NL v Victorian Coal Miners’ Association* (1908) 6 CLR 309 at 364.

**C. APPLICATION OF SECTION 15A – HEAD OF POWER**

9. If the Court concludes that there is no head of power to support ss 18B to 18D, then no reading down of any kind will enable ss 18B to 18D to survive in any of their operations; the correct result would be to sever ss 18B to 18D from the rest of the RDA.
10. If the Court concludes that the immigration power but not the external affairs power would support ss 18B to 18D, those sections would be partially disapplied to the extent that the immigration power did not support them (the Commonwealth does not propose that the immigration power would support ss 18B to 18D in all of their operations). The Court would then have to consider whether the respondent can succeed having regard to the more limited range of valid operations of ss 18B to 18D.

**D APPLICATION OF SECTION 15A – IMPLIED FREEDOM**

11. In applying s 15A to ascertain whether ss 18B to 18D continue to have any valid operations if they are found to infringe the implied freedom of political communication, the Court cannot lose sight of two basal principles. The first principle is that the freedom is infringed by *unjustified* burdens on the freedom, not burdens that *are justified* because they are reasonably appropriate and adapted to the achievement of a legitimate purpose. The second principle is that a “burden” on the freedom is *not* to be conflated with the operation of the statute in an individual case. Evidence of how the statute operates in individual cases (such as the appellant’s case) can illustrate the practical effect of ss 18B to 18D, but the relevant question in step one of the *Lange* analysis is the extent to which they burden the freedom generally across all the potential operations of the provision: see **Brown v Tasmania** (2017) 261 CLR 328 at [90]; **Comcare v Banerji** (2019) 267 CLR 373 at [20]. To proceed otherwise would risk treating the implied freedom as a personal right: cf *Brown* at [90]; *Comcare v Banerji* at [19].
12. It follows from these principles that (a) any reading down, severance or partial disapplication must go only so far as necessary to avoid any *unjustified burden* on the freedom and not more (see *Farm Transparency* at [123]) and (b) the unjustified burden must be identified at a level of generality that goes beyond *the circumstances of a single case*. Put another way, if the Court is going to read down, sever or partially disapply ss 18B to 18D so as to conclude that the appellant has not contravened these provisions in their valid operations (and thereby dismiss the first respondent’s proceedings against her), that must be because ss 18B to 18D burden the freedom to an unjustifiable extent

in a category of case to which the present case can be seen to belong (ie for a reason of more general application that then applies to this case). The judicial task is to discern the principled scope of that category, rather than proceeding as if there can be a category of one confined to the facts of this case.

#### **D.1 Partial disapplication to the extent of unjustified burden**

13. If the Court concludes that ss 18B to 18D infringe the implied freedom, then the Commonwealth submits that the correct application of s 15A is to partially disapply them to the extent of any unjustified burden on the freedom: see also *Farm Transparency* at [123], [191] (Gordon J, in dissent in the result) and cf Gageler J at [98]-[102] (Gleeson J agreeing – also in dissent). If adopting this approach, it will be necessary for the Court to identify with precision the operations of ss 18B to 18D that unjustifiably burden the implied freedom so that the limit is clear, and so it can then be determined whether the appellant’s tweet fell within that range of invalid (and thus disapplied) operations. Put another way, what is the reason for the conclusion that the burden of ss 18B to 18D on the implied freedom across all their operations is unjustified, and does that reason apply to the respondent’s case?

#### **D.2 No partial disapplication of political communication generally**

14. The appellant has argued that ss 18B to 18D are invalid because it is possible for the Parliament simply to have excluded political communication from their reach. That argument might lead the Court to consider whether ss 18B to 18D could be read down to exclude political communication or partially disapplied whenever a respondent was engaged in political communication in doing the impugned act.
15. The Commonwealth submits that confining the operation of ss 18B to 18D in these ways – either by reading down “an act” so as to mean acts that are not political communication, or partially disappling s 18C where an act is political communication – is that they go further than what s 15A requires. It assumes that ss 18B to 18D are invalid whenever a respondent is engaged in political communication, which the Commonwealth submits cannot be right given the breadth of what can constitute “political communication”. It is clear that there can be acts done in the course of communicating about government and political matters that Parliament has the power to prohibit in furtherance of a legitimate purpose. Interpreting ss 18B to 18D so as not to apply to *any* political communication would thus travel beyond what is necessary to

ensure that ss 18B to 18D do not pose an “unjustified burden” on the freedom: see *Farm Transparency* at [123]. It would fail to comply with the command in s 15A to give an enactment such valid operation as is not in excess of Commonwealth legislative power.

### **D.3 Severance of “offend”**

16. In her concise response at [39] (**AB Part A, Tab 3 at 36**), the appellant contended for severance of one or more of the words “offend”, “insult” and “humiliate” from s 18C(1)(a) of the RDA. Illustrating the effect of severance, the result would be that s 18C(1)(a) remains on the statute books as if the relevant words were struck out.
17. The Commonwealth submits that it is not apparent that any of the arguments advanced on appeal would lead the Court to conclude that there is an unjustified burden on the implied freedom of a kind or extent that would lead the Court to conclude that severance of any of these words would excise the invalid operations of the statute so as to leave in place valid operations only. The Commonwealth submits that the claimed severance is not, therefore, a result which this Court would reach on the arguments advanced.

### **D.4 Dominant or sole reason**

18. Another argument advanced by the appellant was that ss 18B to 18D are invalid because the Parliament should have confined the operation of s 18C to circumstances where race was the dominant or sole reason for the act. If the Court were to accept that argument, then that could be achieved through partial disapplication only with great artificiality and awkwardness, given s 18B and the existing case law on ss 18B and 18C. The better approach would be to sever s 18B and to read down s 18C(1)(b) to interpret “because of” in s 18C(1)(b) as meaning for the dominant or sole reason of. Illustrating the difference between reading down and severance on the one hand and partial disapplication on the other, that would leave s 18C having that meaning (and without s 18B) in every case to which the RDA is sought to be applied.

**Date: 2 December 2025**



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