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Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	19/04/2024 2:12:00 PM AEST
Date Accepted for Filing:	19/04/2024 3:55:01 PM AEST
File Number:	NSD372/2023
File Title:	MEHREEN FARUQI v PAULINE HANSON
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

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No. NSD372 of 2023

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

MEHREEN FARUQI
Applicant

PAULINE HANSON
Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH

A. INTRODUCTION

1. The Commonwealth files these written submissions in support of the validity of ss 18C and 18D of the *Racial Discrimination Act 1975* (Cth) (**RDA**). The Commonwealth does not advance any submissions on whether the respondent contravened s 18C or whether s 18D applies. Contrary to the structure of the respondent's written submissions, the Court should only reach the constitutional questions if the respondent is found to contravene s 18C and found not to fall within s 18D. The Court should not **start** with the constitutional questions: see generally *Knight v Victoria* (2017) 261 CLR 306 at [32] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

2. Before assessing the constitutional validity of a law, it is necessary to identify its proper construction: see, eg, *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at [11] (Gummow, Hayne, Heydon and Kiefel JJ); ***Farm Transparency** International Ltd v New South Wales* (2022) 96 ALJR 655 at [139] (Gordon J). See also **RS [3]**. For that reason, these submissions begin with the proper construction of the impugned provisions of the RDA (Part B), before then dealing with the head of power challenge (Part C) and the implied freedom challenge (Part D).

B. CONSTRUCTION OF SECTIONS 18C AND 18D

B.1 Section 18C(1)

3. The Court should apply the following principles in relation to s 18C(1) of the RDA.

4. *First*, a contravention of s 18C(1) has three elements: ***Jones** v Scully* (2002) 120 FCR 243 at [95] (Hely J); ***Bropho** v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 at [63] (French J); ***Bharatiya** v Antonio* [2022] FCA 428 at [16]-[18] (Colvin J). See also **AS [16]**. The relevant act must be done "otherwise than in

private", the act must be "reasonably likely" to "offend, insult, humiliate or intimidate" and the act must be done "because of" the race, colour or national or ethnic origin of a person or group of people.

5. *Second*, as to the first element, s 18C(2) deems certain acts not to have been in private, and s 18C(3) provides an inclusive and non-exhaustive definition of "public place": *Bropho* (2004) 135 FCR 105 at [63] (French J).

6. *Third*, as to the second element, the words "offend, insult, humiliate or intimidate" take their ordinary English meanings: *Jones* (2002) 120 FCR 248 at [102]-[103] (Hely J); *Bropho* (2004) 135 FCR 105 at [67], [69] (French J).

7. *Fourth*, s 18C(1)(a) looks to the "the likely effect of the act upon a hypothetical person in the circumstances of the applicant or as a member of the relevant group": *Bharatiya* [2022] FCA 428 at [17] (Colvin J). This is an objective inquiry: *Bharatiya* [2022] FCA 428 at [14], [17] (Colvin J); ***Creek** v Cairns Post Pty Ltd* (2001) 112 FCR 352 at [12]-[13] (Kiefel J); ***Hagan** v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615 at [15] (Drummond J); *Bropho* (2004) 135 FCR 105 at [66] (French J); ***Clarke** v Nationwide News Pty Ltd* (2012) 201 FCR 389 at [46] (Barker J); *Jones* (2002) 120 FCR 243 at [98]-[99] (Hely J). See also **AS [18]**.

8. *Fifth*, s 18C(1)(a) only applies to conduct that has "profound and serious effects, not to be likened to mere slights": ***Constantinou** v Australian Federal Police* [2024] FCA 123 at [21] (O'Bryan J); *Creek* (2001) 112 FCR 352 at [16] (Kiefel J); *Bropho* (2004) 135 FCR 105 at [70] (French J); ***Kaplan** v Victoria (No 8)* [2023] FCA 1092 at [506] (Mortimer CJ); ***Eatock** v Bolt* (2011) 197 FCR 261 at [268] (Bromberg J). While there is "an aspect of gravity or severity inherent in the prohibition" (*Kaplan* [2023] FCA 1092 at [30] (Mortimer CJ)), "the effect need not be at the extreme level of 'racial hatred'": *Kaplan* [2023] FCA 1092 at [506] (Mortimer CJ). See also **AS [15]**; **RS [4].**

9. *Sixth*, in the operation of s 18C(1)(a) in respect of "a group of people", "an applicant need not prove the likely objective reaction or effect in the entire group, but must at least prove the likely objective reaction or effect in *most* of the group": *Kaplan* [2023] FCA 1092 at [513] (Mortimer CJ) (emphasis in original).

10. *Seventh*, as to the third element, what must be shown for s 18C(1)(b) is that "*a* reason for the conduct … was the race of the group found reasonably likely to have been offended, insulted, humiliated or intimidated": *Kaplan* [2023] FCA 1092 at [526]

(Mortimer CJ) (emphasis in original); ***Toben** v Jones* (2003) 129 FCR 515 at [30], [37] (Carr J). See also **AS [15]**; **RS [5]**. That is because s 18B provides that if an act is done for two or more reasons and one of the reasons is the race, colour or national or ethnic origin of a person (whether or not it is the dominant reason or a substantial reason for doing the act), then for the purpose of the Part (including s 18C) the act is taken to be done because of the person's race, colour or national or ethnic origin.

11. *Eighth*, in ascertaining the reasons for the conduct, s 18C(1)(b) looks to "the 'true basis' or 'true ground' of the relevant action": *Bharatiya* [2022] FCA 427 at [18] (Colvin J); *Kaplan* [2023] FCA 1092 at [526], [536] (Mortimer CJ). See also **RS [5]**.

12. *Ninth*, the requisite causal connection is between the conduct and the race of the person or group reasonably likely to be offended, insulted, humiliated or intimidated: *Kaplan* [2023] FCA 1092 at [524] (Mortimer CJ); *Bharatiya* [2022] FCA 427 at [19] (Colvin J).

13. *Tenth*, "[m]otive is not necessary, but in any given factual situation may be relevant, indeed centrally relevant": *Kaplan* [2023] FCA 1092 at [526] (Mortimer CJ); see *Toben* (2003) 129 FCR 515 at [151] (Allsop J). The provision "does not require that there be an intention to offend, insult, humiliate or intimidate another person or a group of people in order for an act to be unlawful": *Bharatiya* [2022] FCA 427 at [14] (Colvin J).

14. *Finally*, "the quality of offensiveness of statements might be used to deduce something about motive and in any given factual situation could perhaps supply the causal connection required by s 18C(1)(b)": *Kaplan* [2023] FCA 1092 at [541] (Mortimer CJ); *Toben* (2003) 129 FCR 515 at [67]. But "[t]he making of a statement which is likely to, or which does offend will not be sufficient to qualify it as motivated as s 18C(1)(b) requires": *Toben* (2003) 129 FCR 515 at [69] (Kiefel J). It should be recalled that "[s]ome statements which cause offence to a group may be made without a racially based motive and because of a lack of sensitivity or even thought towards others": *Toben* (2003) 129 FCR 515 at [69] (Kiefel J).

B.2 Section 18D

15. Section 18D of the RDA provides exemptions from the prohibition in s 18C. The Court should apply the following principles in relation to s 18D.

16. *First*, the onus of proof in relation to s 18D lies with the respondent: see *Eatock* (2011) 197 FCR 261 at [338]-[339] (Bromberg J); *Clarke* (2012) 201 FCR 389 at [116] (Barker J); *Toben* (2003) 129 FCR 515 at [41] (Carr J; Kiefel J agreeing).

17. *Second*, the exemptions in s 18D are only available in respect of things that are said or done "reasonably". There must be "a rational relationship" between what is said or done and an activity in s 18D(a) to (c) in the sense that it was said or done "for the purpose" of the activity and "in a manner calculated to advance the purpose": *Bropho* (2004) 135 FCR 105 at [79]-[80] (French J); *Clarke* (2012) 201 FCR 389 at [119]-[120] (Barker J). Further, what is said or done must not be "disproportionate to what is necessary to carry it [viz the activity in s18D(a) to (c)] out": *Bropho* (2004) 135 FCR 105 at [79] (French J), [139]-[140] (Lee J); *Clarke* at [122] (Barker J); *Eatock* at [349], [414], [439] (Bromberg J). For example, being "gratuitously insulting or offensive" in relation to "a matter that is irrelevant" to the activity in s 18D(a) to (c) may be unreasonable: *Bropho* (2004) 135 FCR 105 at [81] (French J); *Clarke* at [121] (Barker J). See also **RS [9]**.

18. *Third*, reasonableness in s 18D is ultimately an objective question: *Bropho* (2004) 135 FCR 105 at [79] (French J); *Comcare v* ***Martinez*** *(No 2)* (2013) 212 FCR 272 at [82] (Robertson J). It is "informed by the normative elements of ss 18C and 18D": *Bropho* (2004) 135 FCR 105 at [79] (French J). "[T]here may be more than one way of doing things 'reasonably'" and the question is "not whether it could have been done more reasonably or in a different way more acceptable to the Court": *Bropho* (2004) 135 FCR 105 at [79]; *Martinez* (2013) 212 FCR 272 at [82] (Robertson J). See also **RS [9]**.

19. *Fourth*, to come within s 18D, anything said or done must also be in "good faith". That has a subjective and an objective element: *Clarke* (2012) 201 FCR 389 at [133] (Barker J); *Eatock* at [346]-[348] (Bromberg J). Subjective good faith requires "subjective honesty and legitimate purposes": *Bropho* at [96]. Conduct lacks subjective good faith if, for example, the respondent sought "consciously to further an ulterior purpose of racial vilification", "dishonesty or the knowing pursuit of an improper purpose": *Bropho* (2004) 135 FCR 105 at [96], [101] (French J). Objective good faith requires "a conscientious approach to the task of honouring the values asserted by the Act … assessed objectively": *Bropho* (2004) 135 FCR 105 at [96], [101]-[102] (French J). For example, taking a "conscientious approach to advancing the exercise of that freedom in a way that is designed to minimise the offence or insult, humiliation or intimidation suffered by people affected by it" may be objectively in good faith,

whereas acting "carelessly disregarding or wilfully blind to its effect upon people who will be hurt by it or in such a way as to enhance that hurt" may lack objective good faith: *Bropho* (2004) 135 FCR 105 at [102] (French J).

20. *Contra* **RS [12]-[19]**, this Court should not approach the reasonableness and good faith requirement as a composite one. That is inconsistent with authority which this Court is required to follow. The judgments in *Toben* (2003) 129 FCR 515 at [44]-[46] (Carr J), [78] (Kiefel J), [159]-[170] (Allsop J) do not support the respondent's contention. To the contrary, the fact that Kiefel J and Allsop J in particular affirmed the primary judge's conclusion based on good faith alone tends to suggest that good faith is a separate criterion capable of meaningful consideration separate from reasonableness.

21. *Fifth*, in relation to s 18D(a), the expression "artistic work" "does seem to be used broadly": *Bropho* (2004) 135 FCR 105 at [104]. Artistic works "cover an infinite variety of expressions of human creativity": *Bropho* (2004) 135 FCR 105 at [106].

22. *Sixth*, in relation to s18D(b), "[a] matter of public interest is broadly defined as a matter of interest or concern to people at large": *Eatock* at [433] (Bromberg J). This exemption speaks to conduct "in the pursuit of a public benefit through the exercise of freedom of expression. … [A]n additional pursuit of public benefit, beyond freedom of expression, is contemplated by the provision. What the provision is concerned with is the public interest use to which the freedom of expression is exercised and not merely freedom of expression itself": *Eatock* (2011) 197 FCR 261 at [434] (Bromberg J). The exemption is assessed objectively: *Eatock* (2011) 197 FCR 261 at [435] (Bromberg J).

23. *Seventh*, in relation to s 18D(c)(ii), this applies to comments not statements of fact: *Eatock* (2011) 197 FCR 261 at [355] (Bromberg J). To be "fair" the comment must be "based upon true facts": *Creek* (2001) 112 FCR 352 at [32] (Kiefel J); *Eatock* (2011) 197 FCR 261 at [354] (Bromberg J). Those facts must be "expressly stated, referred to or notorious", and can be implicit: *Eatock* (2011) 197 FCR 261 at [355] (Bromberg J). The view expressed must also be genuinely held. That will not be so if the respondent "knew the comment was untrue, or was recklessly indifferent to the truth or falsity of the comment": *Eatock* (2011) 197 FCR 261 at [357] (Bromberg J).

C. HEAD OF POWER

24. The respondent makes the formal contention that ss 18C and 18D are unsupported by any head of Commonwealth legislative power, but, properly, the respondent has

accepted that this Court is foreclosed from accepting it: see **RS [20]-[21]; Reply [10]**. This Court is bound by Full Court authority to conclude that ss 18C and 18D are supported by the external affairs power: *Toben* (2003) 129 FCR 515 at [21] (Carr J), [50] (Kiefel J), [144]-[145] (Allsop J). That is enough to reject this challenge. See also **AS [59]-[61]**. That the Commonwealth has not responded to **RS [21(a)-(f)]** should in no way be understood as any admission as to their force. The Commonwealth will respond to those arguments if they are pressed before a court capable of accepting them.

D. IMPLIED FREEDOM OF POLITICAL COMMUNICATION

D.1 Principles

25. The implied freedom of political communication is a qualified limitation on legislative power to ensure that the people of the Commonwealth may "exercise a free and informed choice as electors": ***Lange*** *v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560 (the Court). It extends "only so far as is necessary to preserve and protect the system of representative and responsible government mandated by the Constitution": *Comcare v* ***Banerji*** (2019) 267 CLR 373 at [20] (Kiefel CJ, Bell, Keane and Nettle JJ).

26. Whether legislation infringes the implied freedom is to be answered by: *first*, determining whether it places an "effective burden" upon communication; and *second*, determining whether that burden is "justified": see *Lange* (1997) 189 CLR 520 at 567-568 (the Court); ***McCloy*** *v New South Wales* (2015) 257 CLR 178 at [5], [69] (French CJ, Kiefel, Bell and Keane JJ), [130]-[131] (Gageler J). The question of "justification" involves both an identification of the purpose of the law, and an assessment of whether the law is "proportionate" (or "reasonably appropriate and adapted") to achieve that purpose: *Lange* (1997) 189 CLR 520 at 562 (the Court); ***LibertyWorks*** *Inc v Commonwealth* (2021) 274 CLR 1 at [45]-[46] (Kiefel CJ, Keane and Gleeson JJ), [93] (Gageler J). A law will be proportionate if it is "suitable", "necessary" and "adequate in its balance": see, eg, ***Clubb*** *v Preston* (2019) 267 CLR 171 at [5]-[6] (Kiefel CJ, Bell and Keane JJ); *LibertyWorks* (2021) 274 CLR 1 at [46] (Kiefel CJ, Keane and Gleeson JJ), [93] (Gageler J), [134] (Gordon J), [200] (Edelman J), [247] (Steward J).

D.1.1 Effective burden

27. The question of whether and to what extent a law imposes an "effective burden" on political communication is a critical first step in the analysis. The answer to that

question does not depend upon a "quantitative" analysis about whether the law imposes a "big" or a "little" burden: ***Monis*** *v The Queen* (2013) 249 CLR 92 at [172]-[173] (Hayne J). It is a "qualitative" question to be answered by reference to the legal and practical operation of the law: ***Tajjour*** *v New South Wales* (2014) 254 CLR 508 at [145] (Gageler J), [200] (Keane J); ***Brown*** *v Tasmania* (2017) 261 CLR 328 at [84], [118] (Kiefel CJ, Bell, and Keane JJ), [180] (Gageler J), [237] (Nettle J), [316], [326] (Gordon J), [484]-[488] (Edelman J); *Clubb* (2019) 267 CLR 171 at [163] (Gageler J), [358] (Gordon J).

28. The question is to be answered "yes" if the "effect of the law is to prohibit, or put some limitation on, the making or the content of political communications": *Monis* (2013) 249 CLR 92 at [108] (Hayne J); *Unions NSW v New South Wales* (***Unions No 1***) (2013) 252 CLR 530 at [119] (Keane J). In that event, "the supervisory role of the courts is engaged to consider the justification for that restriction": *McCloy* (2015) 257 CLR 178 at [127] (Gageler J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 50 (Brennan J); *Farm Transparency* (2022) 96 ALJR 655 at [26] (Kiefel CJ and Keane J). That is why the extent of the burden is "not relevant to the threshold question as to whether justification is required": *LibertyWorks* (2021) 274 CLR 1 at [63] (Kiefel CJ, Keane and Gleeson JJ); *Brown* (2017) 261 CLR 328 at [127] (Kiefel CJ, Bell and Keane JJ); *Unions NSW v New South Wales (**Unions No 2**)* (2019) 264 CLR 595 at [162] (Edelman J).

29. Nevertheless, the extent of the burden must be examined because the burden step in the analysis is "more than a box to be ticked": *McCloy* (2015) 257 CLR 178 at [127] (Gageler J); *Brown* (2017) 261 CLR 328 at [237] (Nettle J); *LibertyWorks* (2021) 274 CLR 1 at [209]-[210] (Edelman J). A slight burden will be more readily justified than a substantial one. Indeed, the extent of the burden will often "assume some importance when considering what has to be justified and the questions to be addressed in that process": *LibertyWorks* (2021) 274 CLR 1 at [63] (Kiefel CJ, Keane and Gleeson JJ), [94] (Gageler J), [136] (Gordon J); *Banerji* (2019) 267 CLR 373 at [38] (Kiefel CJ, Bell, Keane and Nettle JJ), [161] (Gordon J); *Farm Transparency* (2022) 96 ALJR 655 at [26], [36] (Kiefel CJ and Keane J), [156], [175] (Gordon J).

30. The question of whether a law imposes an effective burden on the freedom requires consideration of whether and how the impugned law affects political communication generally, rather than how the law applies to political communication in which an

applicant wishes to engage: *Unions No 1* (2013) 252 CLR 530 at [35] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *LibertyWorks* (2021) 274 CLR 1 at [77] (Kiefel CJ, Keane and Gleeson JJ), [135] (Gordon J). That focus reflects the nature of the freedom. As McHugh J explained in *Levy v Victoria* (1997) 189 CLR 579 at 622, "our Constitution does not create rights of communication", but rather "gives immunity from the operation of laws that inhibit a right or privilege to communicate political and government matters". The reference to a "right or privilege" must be understood against the background that, under our common law system, persons have the right to do anything that is not prohibited or regulated by statute or the general law: *Brown* (2017) 261 CLR 328 at [186] (Gageler J), [557]-[558] (Edelman J).

D.1.2 Legitimate end

31. The purpose of the impugned provisions is the "mischief" to which they are directed: *Brown* (2017) 261 CLR 328 at [101] (Kiefel CJ, Bell and Keane JJ), [208]-[209] (Gageler J), [321] (Gordon J); *Clubb* (2019) 267 CLR 171 at [257] (Nettle J); *Unions No 2* (2019) 264 CLR 595 at [171] (Edelman J); *LibertyWorks* (2021) 274 CLR 1 at [183] (Gordon J). It is discerned through ordinary processes of statutory construction, having regard to text, context and, if relevant, historical background.

32. That purpose must be compatible with the system of representative and responsible government, in the sense that it "does not impede the functioning of that system and all that it entails": *McCloy* (2015) 257 CLR 178 at [31] (French CJ, Kiefel Bell and Keane JJ); *Farm Transparency* (2022) 96 ALJR 655 at [29] (Kiefel CJ and Keane J).

D.1.3 Suitability

33. The suitability enquiry looks into whether there is a "rational connection between the provision in question and the statute's legitimate purpose, such that the statute's purpose can be furthered": *McCloy* (2015) 257 CLR 178 at [80] (French CJ, Kiefel, Bell and Keane JJ). "[I]t does not involve a value judgment about whether the legislature could have approached the matter in a different way", and a law is unsuitable only if it "cannot contribute to the realisation of the statute's legitimate purpose": *McCloy* (2015) 257 CLR 178 at [80].

D.1.4 Necessity

34. The necessity enquiry "looks to whether there is an alternative measure available which is equally practicable when regard is had to the purpose pursued, and which is less

restrictive of the freedom than the impugned provision": *Farm Transparency* (2022) 96 ALJR 655 at [46] (Kiefel CJ and Keane J). This does not deny that it is the role of the legislature to select the means by which a legitimate statutory purpose may be achieved: *McCloy* (2015) 257 CLR 178 at [82] (French CJ, Kiefel, Bell and Keane JJ); *Unions No 2* (2019) 264 CLR 595 at [47] (Kiefel CJ, Bell and Keane JJ). It is "not a prescription to engage in an assessment of the relative merits of competing legislative models": *Brown* (2017) 261 CLR 328 at [282], [286] (Nettle J). There is a "domain of selections" that may further the legislative purpose while imposing a permissible burden on the implied freedom: *McCloy* (2015) 257 CLR 178 at [82] (French CJ, Kiefel, Bell and Keane JJ); *Unions No 2* (2019) 264 CLR 595 at [47] (Kiefel CJ, Bell and Keane JJ), [113] (Nettle J); *LibertyWorks* (2021) 274 CLR 1 at [202] (Edelman J). **All** of those legislative selections will satisfy the test of necessity.

35. Consequently, a law is not ordinarily to be regarded as unnecessary unless there is an **obvious and compelling** alternative which is **equally practicable and available** and would result in a significantly lesser burden on the implied freedom: *Banerji* (2019) 267 CLR 373 at [35] (Kiefel CJ, Bell, Keane and Nettle JJ); *Farm Transparency* (2022) 96 ALJR 655 at [253] (Edelman J).

36. An alternative will not be "equally practicable" unless it is "as capable of fulfilling [the] purpose as the means employed by the impugned provision, 'quantitatively, qualitatively, and probability-wise'": *Tajjour* (2014) 254 CLR 508 at [114] (Crennan, Kiefel and Bell JJ); *Farm Transparency* (2022) 96 ALJR 655 at [46] (Kiefel CJ and Keane J). Where the burden imposed by the impugned provisions is small, logically it may be difficult or impossible for an applicant to establish that an alternative imposes a significantly lesser burden: *Farm Transparency* (2022) 96 ALJR 655 at [254] (Edelman J).

D.1.5 Adequacy in balance

37. A law is to be "regarded as adequate in its balance unless the benefit sought to be achieved by the law is manifestly outweighed by its adverse effect on the implied freedom": *Banerji* (2019) 267 CLR 373 at [38] (Kiefel CJ, Bell, Keane and Nettle JJ); *LibertyWorks* (2021) 274 CLR 1 at [85] (Kiefel CJ, Keane and Gleeson JJ), [201] (Edelman J); *Farm Transparency* (2022) 96 ALJR 655 at [55] (Kiefel CJ and Keane J). The hurdle imposed by this step in the structured proportionality analysis is very high:

LibertyWorks (2021) 274 CLR 1 at [292] (Steward J). In this analysis, "[C]onsideration is given to the extent of the burden and the importance of the statutory purpose": *Farm Transparency* (2022) 96 ALJR 655 at [36] (Kiefel CJ and Keane J).

D.2 *Jones v Scully not plainly wrong*

38. In *Jones* (2002) 120 FCR 243 at [240], Hely J held that ss 18C and 18D did not infringe the implied freedom of political communication. This Court should follow that decision unless persuaded that Hely J was not only wrong but plainly wrong. For the reasons below, his Honour's conclusion was clearly not "plainly wrong"; it was in fact correct.

D.3 Effective burden

39. The Commonwealth accepts that ss 18C and 18D impose a burden on the implied freedom, because on some occasions the communications that are rendered unlawful by s 18C and are not exempted by s18D may be "political" in the requisite sense. That is sufficient to conclude that they do effectively burden the freedom. Hely J so concluded in *Jones* (2002) 120 FCR 243 at [239].

40. The Commonwealth thus disagrees with the conclusion (but not necessarily with the intermediate propositions) in **AS [64]-[67];** see also **Reply [11]**. The Commonwealth agrees that ss 18C and 18D ultimately enhance the system of representative and responsible government: see [52] below. But that does not mean that the freedom is not effectively burdened. The conduct made unlawful by s 18C and not exempted by s 18D is not so disconnected from matters relevant to the free and informed choice of the people as to conclude that these provisions impose no effective burden.

41. That said, what is the extent of the burden? The Commonwealth submits that the burden is very small. The class of communications rendered unlawful by s 18C and not exempted by s 18D is very small because that class must satisfy all of the following criteria (as understood in accordance with the principles set out in Part B above):

    41.1 the communication must have been in public;

    41.2 the communication must have been reasonably likely to offend, insult, humiliate or intimidate another person or group;

    41.3 the communication must have been made because of the race, colour or national or ethnic origin of that person or group;

41.4 the communication must not have been made reasonably and in good faith in the performance, exhibition or distribution of an artistic work;

41.5 the communication must not have been made reasonably and in good faith in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest;

41.6 the communication must not have been made reasonably and in good faith in making or publishing a fair and accurate report of any event or matter of public interest;

41.7 the communication must not have been made reasonably and in good faith in making or publishing a fair comment on any event or matter of public interest where the comment is an expression of a genuine belief held by the respondent.

See also **Reply [15]**.

42. Further, most communications of value to electors making free and informed choices would either fall outside the prohibition in s 18C or, more particularly, fall within the exemptions in s 18D, in particular s 18D(b) and (c): see similarly ***Sunol*** *v Collier (No 2)* (2012) 289 ALR 128 at [52], [71] (Bathurst CJ). Application of the requirement of reasonableness would take into account and accommodate the fact that political discourse in Australia's constitutional system can be robust: cf **RS [37]**. Being offensive in a sense that results in a contravention of s 18C does not mean that the relevant communication is necessarily unreasonable, otherwise s 18D would have no work to do.

43. Some judges have gone so far as to conclude that the residual class of communication prohibited by laws such as ss 18C and 18D are so far removed from the system of representative and responsible government as not to impose an effective burden on the freedom: see *Sunol* (2012) 289 ALR 128 at [89] (Basten JA); *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VR 207 at [113] (Nettle JA), [203] (Neave JA). While not the position advanced by the Commonwealth here, such reasoning underscores the very limited extent of the burden.

D.3 Legitimate end

44. The object of ss 18C and 18D is to deter and eliminate, and thus protect members of the public from, racial hatred and discrimination: *Toben* at [19] (Carr J; Kiefel J agreeing); *Jones* (2002) 120 FCR 243 at [239] (Hely J); *Bropho* (2004) 135 FCR 105 at [70] (French J); *Kaplan* [2023] FCA 1092 at [105] (Mortimer CJ). Cf **RS [44]**.

45. That statement of the statutory object, supported by authority, is one that is expressed at an "appropriate" level of generality for constitutional analysis: *NZYQ v Commonwealth* (2023) 97 ALJR 1005 at [39] (the Court). It is the blindingly obvious "public interest sought to be protected and enhanced by the law": *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at [102] (Gageler J).

46. Not only can that object be discerned from the statutory text, it was also clearly identified in the extrinsic materials. In the second reading speech, for example, the Attorney-General said that "[t]he Racial Hatred Bill is about the protection of groups and individuals from threats of violence and the incitement of racial hatred which leads inevitably to violence": Second Reading Speech, Racial Hatred Bill 1994 at 3336 (**CB 3828**). The Attorney-General went on to say that:

> In this bill, free speech has been balanced against the rights of Australians to live free of fear and racial harassment. Surely the promotion of racial hatred and its inevitable link to violence is as damaging to our community as issuing a misleading prospectus, or breaching the *Trade Practices Act*.

See Second Reading Speech, Racial Hatred Bill 1994 at 3337 (**CB 3829**).

47. Despite what is submitted in **RS [45]**, there can be no question that this object is legitimate in the requisite sense. **RS [45]** conflates means and ends in criticising the former as if those criticisms spoke to the legitimacy of the latter, which they do not. It is an approach which proceeds at the wrong level of generality in terms of the identification of the statutory object, which is not "of much use in constitutional analysis": *Alexander* (2022) 96 ALJR 560 at [103] (Gageler J).

48. In any event, Hely J found that the object served by the impugned provisions was legitimate in *Jones* (2002) 120 FCR 243 at [239], and this conclusion is not plainly wrong. And for the following reasons it is clearly correct.

49. The explanatory memorandum accompanying the Racial Hatred Bill 1994 (Cth) at 1 spoke to the importance of these provisions (**CB 3815**):

> The Bill is intended to strengthen and support the significant degree of social cohesion demonstrated by the Australian community at large. The Bill is based on the principle that no person in Australia need live in fear because of his or her race, colour, or national or ethnic origin. …
>
> …
>
> The Bill is intended to prevent people from seriously undermining tolerance within society by inciting racial hatred or threatening violence against individuals or groups because of their race, colour or national or ethnic origin.

50. Deterring and eliminating, and thus protecting members of the public from, racial hatred and discrimination preserves and protects the dignity of persons subject to racial hatred or discrimination. "[T]he protection of the dignity of the people of the Commonwealth, whose political sovereignty is the basis of the implied freedom**, is a purpose readily seen to be compatible with the maintenance of the constitutionally prescribed system of representative and responsible government**": *Clubb* (2019) 267 CLR 171 at [51] (Kiefel CJ, Bell and Keane JJ) (our emphasis).

51. In *Multiculturalism and the Law* (Report No 57) at [7.44] (**CB 3797**), the AHRC said:

> Laws prohibiting incitement of racist hatred and hostility protect the inherent dignity of the human person. In a multicultural society, values such as equality of status, tolerance of a wide variety of beliefs, respect for cultural and group identity and equal opportunity for everyone to participate in social processes must be respected and protected by the law. Laws prohibiting incitement to racist hatred and hostility indicate a commitment to tolerance, help prevent the harm caused by the spread of racism and foster harmonious social relations. Australia is a multicultural society. Its survival as a multicultural society demands that the communities that make up the Australian community can live in peace and harmony. Inciting hatred and hostility against sections of the community is an offence against the whole community and the whole community has an interest in ensuring that it does not happen.

52. Racial hatred and discrimination are subjects which are "capable of arousing the most violent and disturbing passions" and which can legitimately be regulated so as to preserve social cohesion: *Sunol* (2012) 289 ALR 128 at [73] (Allsop P). Avoiding the fostering of "anger, violence, alienation and discord" is legitimate in the requisite sense: *Sunol* (2012) 289 ALR 128 at [73] (Allsop P).

53. Indeed, deterring and eliminating racial hatred and discrimination positively promotes freedom of political communication because such conduct can, itself, discourage others from participating in the exchange of ideas: see *Sunol* (2012) 289 ALR 128 at [86] (Basten JA). As the Human Rights Commission (**HRC**) noted in *Proposal for Amendments to the Racial Discrimination Act to Cover Incitement to Racial Hatred*

and Racial Defamation: Report No 7 (November 1983) at [31] (**CB 3144**), "[e]quality of opportunity is unlikely to be a reality in an atmosphere of racial hatred or tension".[1] A law which **enhances** the free flow of political communication throughout the Federation in that way is plainly legitimate: see similarly *McCloy* (2015) 257 CLR 178 at [5], [45] (French CJ, Kiefel, Bell and Keane JJ) (dealing with the risk to equal participation in the political process posed by the uncontrolled use of wealth). As the Court there went on to observe, purposes of that nature "are not only compatible with the system of representative government; they preserve and enhance it" (at [47]). It is an *a fortiori* example of a purpose that is legitimate: *contra* **RS [45]**.

54. It is convenient here to respond to **RS [26]-[33]**, where the respondent makes the point, in the context of the issue of effective burden, that the causing of offence is not incompatible with political communication. The Commonwealth agrees that communication does not fall outside the category of "political communication" merely because it involves some level of insult, offence or invective. But the Court should not be left with any impression from the respondent's citations to ***Coleman** v Power* (2004) 220 CLR 1 and *Monis* (2013) 249 CLR 92 that it is necessarily illegitimate for an Australian legislature to regulate offensive conduct (correctly, the respondent does not make any such contention).

55. In *Monis* (2013) 249 CLR 92, French CJ (Heydon J agreeing) at [73] and Hayne J at [214] considered that, properly understood, the impugned law in that case merely had the purpose of regulating the civility of political debate by prohibiting offensive communications (cf [348]-[349] (Crennan, Kiefel and Bell JJ) and *Clubb* (2019) 267 CLR 171 at [196]). By contrast, ss 18C and 18D cannot be understood as being directed merely at civility and offensiveness. To understand them in that fashion would ignore the fact that s 18C only operates upon race-based acts.

56. In *Coleman* (2004) 220 CLR 1, the impugned law made it a crime for a person "in any public place or so near to any public place that any person who might be therein …

---

[1] To similar effect, in *Incitement to Racial Hatred: Issues and Analysis: Occasional Paper No 1* (October 1982) at 23 (**CB 3043**), the HRC noted that "racial hatred is widely taken to be one source of public disorder". It noted that racial hatred jeopardised "communal harmony" and that "[e]ven issues ostensibly free of emotion altogether … can have divisive effects when gratuitously used to enrich the soil in which the seeds of civil strife are known to flourish": *Incitement to Racial Hatred: Issues and Analysis: Occasional Paper No 1* (October 1982) at 23-24 (**CB 3043-3044**).

could … hear" to use "any threatening, abusive, or insulting words to any person". The High Court construed the words "abusive" and "insulting" so as to apply where the words are so hurtful as to be intended to, or reasonably likely to, provoke unlawful physical retaliation: see, eg, *Coleman* (2004) 220 CLR 1 at [193] (Gummow and Hayne JJ). Section 18C is not confined to acts that may result in a violent response. But that is not the only way for a regulation upon acts that may include speech acts to be valid. Nothing in *Coleman* (2004) 220 CLR 1 suggests otherwise. Again, what is presently important is that ss 18C and 18D cannot be understood as being directed merely at civility and offensiveness. They are directed at race-based acts.

57. Gageler J provided a useful analysis of *Monis* (2013) 249 CLR 92 and *Coleman* (2004) 220 CLR 1 in *Clubb* (2019) 267 CLR 171 at [196], which the Commonwealth commends to this Court:

> *Coleman* and *Monis* should not be understood as authority for the proposition that a purpose of curtailing unsolicited, unwelcome, uncivil or offensive speech is incompatible with the constitutionally prescribed system of representative and responsible government. Consistently with how the Supreme Court of the United States has treated the interest of an unwilling listener in avoiding unwanted communication, the better explanation of those decisions is that protecting against unwanted or offensive communication is a permissible purpose the capacity of which to justify a burden on freedom of political communication can vary in different contexts. In some contexts, the purpose of protecting against unwanted or offensive communication can be insignificant. In other contexts, of which the present in my opinion is one, the purpose of protecting against unwanted or offensive communication can be compelling.

See also *Cottrell v Ross* [2019] VCC 2142 at [225] (Chief Judge Kidd).

58. As submitted above, the object of deterring and eliminating (and thus protecting members of the public from) racial hatred and discrimination is likewise compelling.

D.4 Suitability

59. Sections 18C and 18D are plainly rationally connected to the legitimate end identified above. To adopt what Carr J (Kiefel J agreeing) said in *Toben* (2003) 129 FCR 515 at [20], the provisions "nip in the bud" the proscribed conduct "before such acts can grow into incitement or promotion of racial hatred or discrimination".

60. **RS [52]** does not expressly concede suitability (see also **Reply [15]**), but the respondent hardly offers up much argument on it, beyond suggesting the issue "may not be straightforward". That appears to rest upon the respondent's misconceived view of the

statutory purpose. Once that error is corrected, satisfaction of the suitability enquiry is entirely straightforward.

D.5 Necessity

61. The Commonwealth has requested particulars of the plaintiff's claim so as to be able to respond to whatever alternatives are propounded by the plaintiff. "[I]t does not follow from the need for the court to be persuaded that an impugned law is justified that the court must go in search of and be able to exclude as impracticable every possible alternative of conceivably lesser burden on the implied freedom, still less that a party seeking to uphold the impugned law is required to demonstrate that there are no such alternatives": *Clubb* (2019) 267 CLR 171 at [277] (Nettle J); *Brown* (2017) 261 CLR 328 at [288] (Nettle J).

62. Particulars have not been provided, but the respondent has addressed necessity at **RS [53]-[54]**. The alternative propounded is some form of exclusion for political communication. But to carve out political communication is not to achieve the purposes of ss 18C and 18D to the same extent and would not be as practicable: see *Tajjour* (2014) 254 CLR 508 at [90]-[91] (Hayne J); *Clubb* (2019) 267 CLR 171 at [288] (Nettle J). As such, the respondent has identified no obvious and compelling alternative measure that would bring into question the necessity of the law and the Court can proceed on the basis that the issue simply does not arise: *Clubb* (2019) 267 CLR 171 at [277] (Nettle J).

63. In any event, the very limited extent of any residual burden points to the fact that any alternative measure of the kind advanced by the respondent would not impose a **significantly** lesser burden: see again *Farm Transparency* (2022) 96 ALJR 655 at [254] (Edelman J). It would do no more than avoid burdening the few relevantly political communications that survive the gauntlet of the compounding criteria identified in para [41] above. That which remains can hardly said to be of great consequence to the constitutionally prescribed system of government which the implied freedom protects. The difference in burden would be insignificant.

D.6 Adequacy in balance

64. Sections 18C and 18D are adequate in their balance.

65. On the one hand, the protection of individuals from racial hatred and discrimination is of obvious importance – indeed, as noted above, that purpose can be seen to be directed,

in part, at preserving and enhancing participation in the very system of government from which the constitutional implication was discerned. "[A] powerful public, protective purpose assumes a special importance" in favour of validity: *LibertyWorks* (2021) 274 CLR 1 at [85] (Kiefel CJ, Keane and Gleeson JJ). **RS [58]-[59]** attempts to diminish that importance and should be rejected. In addition to the material referred to above in Section D.3 ([46], [49] and [51]), the Commonwealth draws attention to the following.

66. *First*, racial vilification and discrimination has been and remains a real problem.

67. In *Discussion Paper No 3: Proposed Amendments to the Racial Discrimination Act Concerning Racial Defamation*, the HRC noted that, in seven years, the Commissioner for Community Relations had received about 1700 complaints (or 25% of the total number) involving racist propaganda and racial defamation (**CB 3123**). The HRC said "[t]he sense of hurt and outrage conveyed by the complaints, and their volume, point to a social malaise that needs serious attention. Words do wound" (**CB 3123**).

68. The history of complaints to the Commissioner for Community Relations and the HRC was further described by the HRC in *Proposal for Amendments to the Racial Discrimination Act to Cover Incitement to Racial Hatred and Racial Defamation: Report No 7* (November 1983) at [6]-[23] (**CB 3138-3142**).

69. In December 1988, the National Inquiry into Racist Violence was announced, "motivated by a widespread community perception that racist attacks, both verbal and physical, were on the increase": Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (1991) at 6 (***Racist Violence Report***) (**CB 3191**). The Inquiry's definition of racist violence included not only physical attacks but also "verbal and non-verbal intimidation, harassment and incitement to racial hatred": *Racist Violence Report* at 15 (**CB 3200**). The Inquiry addressed the history of racist violence in Australia at 37-54 (**CB 3222-3241**) and the experience of racist violence for Indigenous Australians, those of different ethnicities and those opposed to racism at 69-224 (**CB 3256-3418**). It found at 18 (**CB 3203**) that "many cases of racist violence go unreported to authorities and agents who might have helped victims".

70. The Royal Commission into Aboriginal Deaths in Custody published its National Report in 1991. Among other things, it recommended legislation rendering vilification

unlawful, in part because of the educative force such a law would have: Royal Commission into Aboriginal Deaths in Custody, *National Report: Volume 4* at [28.3.46]-[28.3.47] (**CB 3761**).

71. *Freedom from Discrimination – Report on the 40th Anniversary of the Racial Discrimination Act: National Consultation Report* (2015) at 36-37 (**CB 3993-3994**) (**40th Anniversary Report**) documented lived experiences of racial vilification.

72. Quite apart from that material, even if racial vilification and discrimination had entirely abated, that would not mean that ss 18C and 18D were no longer adequate in their balance. Even then, they would serve an important prophylactic function in maintaining that state of affairs.

73. *Second*, racial vilification and discrimination have harmful effects on individuals.

74. In the *Racist Violence Report* at 16 (**CB 3201**), the National Inquiry into Racist Violence noted that "[m]any groups reported that continual exposure to abusive and insulting language had an adverse psychological effect on some victims, making them feel inferior and causing depression and insecurity". It noted at 259 (**CB 3454**) that "the emotional effects which are not so observable are, nevertheless, crippling". It said at 261 (**CB 3456**) that "[r]acist violence and harassment reduces self esteem, promotes insecurity and leads to victims being ashamed of their identity". It found at 261 (**CB 3456**) that "fear of racist violence and harassment can have an impact on such fundamental choices as where people live or work, whether they socialise outside the home and how they engage in their religious observances". It found at 267 (**CB 3462**) that "[e]vidence put to the Inquiry indicates that the real threat to social cohesion is the presence of racist violence, intimidation and harassment towards people of non-English speaking background".

75. In the 40th Anniversary Report at 38 (**CB 3995**), the HRC said (citations omitted):

> Numerous participants also highlighted the damaging social and civic effects of racial vilification. In addition to the harm that it can inflict on a person's wellbeing and sense of freedom, it can also undermine a sense of belonging to the community. For those on the receiving end, the experience of racial abuse can alienate them from Australian society – and feed a sense of disillusion and disempowerment. This accorded with the description of one community leader, who has observed that racial vilification is "a direct attack on the target's humanity and dignity", which undermines not only their "basic sense of safety and security" but also the "good standing" of targets in the broader community.

> Such findings are consistent with the research literature, which has considered and documented the harmful effects of racism. While it is difficult to measure or quantify, sociologists and social psychologists have highlighted the emotional trauma to individuals and communities that experience racial vilification. A considerable body of research has also identified links between discrimination and health effects including cardiovascular ill health, depression, smoking, diabetes and substance abuse.

76. The applicant's expert witnesses also give evidence in support of this proposition. Professor Paradies is Chair in Race Relations at Deakin University, and he gives evidence of the adverse health outcomes of racism: **CB 209-214**. Professor Reynolds has a PhD in social psychology, and she also gives evidence of the adverse health outcomes of racism: **CB 1716-1719**.

77. *Third*, the importance of the object pursued by ss 18C and 18D is reinforced by the fact that other jurisdictions have sought to regulate the incitement of racial hatred: see HRC, *Incitement to Racial Hatred: Issues and Analysis: Occasional Paper No 1* (October 1982) at 7-8 (**CB 3027-3028**); HRC, *Incitement to Racial Hatred: The International Experience: Occupational Paper No 2* (October 1982) (**CB 3054-3088**); *Proposal for Amendments to the Racial Discrimination Act to Cover Incitement to Racial Hatred and Racial Defamation: Report No 7* (November 1983) at [37]-[50] (**CB 3146-3149**).

78. *Fourth*, the importance of the object pursued by ss 18C and 18D must be understood in their international context, especially since they are valid laws of the Commonwealth because they are laws with respect to external affairs. Allsop J addressed that international context in *Toben* (2003) 129 FCR 515 at [91]-[113].

79. On the other hand, their burden on the implied freedom is small for the reasons advanced above: see [41]-[43] above. In addition to those matters, the Commonwealth makes the following additional points regarding the (minimal) extent of the burden.

80. *First*, ss 18C and 18D do not "prohibit people from expressing ideas or having beliefs, no matter how unpopular the views may be to many other people" (**CB 3829**). "[T]his provision is directed to the effects of conduct": *Kaplan* [2023] FCA 1092 at [505] (Mortimer CJ).

81. *Second*, the direct purpose of ss 18C and 18D is not to restrict political communication but to regulate acts that have certain profound and serious effects and that are engaged in for a particular reason (ie, because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group). That category of acts is

not necessarily political in nature: see, eg, *Sunol* (2012) 289 ALR 128 at [49]-[50] (Bathurst CJ); *contra* **RS [51]**. Indeed, in many cases, any effect on communication on governmental or political matters will be properly characterised as adventitious, even if it might not in every conceivable circumstance be trivial: *Tajjour* (2014) 254 CLR 508 at [155] (Gageler J – in dissent in the result).

82. *Third*, the terms of ss 18C and 18D are not so uncertain or vague as to render them inadequate in their balance: cf **RS [56]**. The vagueness and uncertainty to which the joint judgment in *Brown* (2017) 261 CLR 328 at [78]-[79] pointed must be understood in the specific statutory context which their Honours were considering: see at [78]-[86]. What their Honours were drawing attention to was the fact that, under the impugned Tasmanian legislation, the police had a power to give protestors a direction that would, in practice, bring a protest to an end, and that such directions may be given based on a mistaken (but reasonable) belief about the parameters of a business premises or business access area due to the vagueness of those terms which would serve to stifle political expression further beyond the strict operation of the law. This reasoning has no application to the present statutory regime. And, as their Honours made clear, vagueness or uncertainty is not otherwise some sort of free floating criterion of validity in Australia, unlike the position in the United States: at [147]-[151].

D.7 Reading down

83. If ss 18C and 18D infringe the implied freedom, a question would arise as to whether they could be read down, severed or disapplied consistently with s 15A of the *Acts Interpretation Act 1901* (Cth). That is a difficult question to address in the abstract, because it will depend on the extent of the invalidity found by the Court. The Commonwealth will seek to address this in oral submissions, at least at the level of general principle (the best course may be to invite further submissions on that issue, should any occasion for reading down arise).

E. CONCLUSION

84. If the Court reaches the constitutional issues raised by the parties, the Court should reject the challenge to the validity of ss 18C and 18D of the RDA.

Date: 19 April 2024

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