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A handwritten signature in blue ink that reads "Sia Lagos". The signature is fluid and cursive, with the first letters of "Sia" and "Lagos" being capitalized and prominent.

Registrar

Important Information

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No: NSD1698 of 2024

PAULINE HANSON
Appellant

MEHREEN FARUQI & ORS
First Respondent

POST-HEARING SUBMISSIONS OF THE FIRST RESPONDENT

A. OVERVIEW

1. Gageler CJ and Edelman J have described the availability of ‘possible disapplication’ as a basis to avoid determining whether provisions infringe the implied freedom: see *Tajjour v New South Wales* (2014) 154 CLR 508 at [172] (Gageler J); *Clubb*¹ at [146] (Gageler J), [441] (Edelman J); *Farm Transparency* at [101] (Gageler J); see also Tristan, “*The High Court's Prudential Approach to Constitutional Adjudication: When Is It Necessary to Resolve a Constitutional Question?*” (2024) 47(1) UNSW Law Journal 211. For example, in *Clubb*, their Honours held that the question whether the impugned provisions infringed the implied freedom could be avoided because (1) there was no evidence that Mrs Clubb’s speech was political and (2) even if it were, the impugned provisions could be partially disapplied to that extent. But their Honours were clear that the prudential technique they deployed was available only where the speech in question was non-political: see esp [146]. That is not this case: see PJ [330]. Here, the question whether ss 18B-18D infringe the implied freedom cannot be eschewed. It must be confronted and determined, and only if the Court holds that the provisions are invalid, does any question of severance, reading down, or disapplication arise.
2. Our primary submission is that ss 18B-18D do not infringe the implied freedom because they do not impose an “unjustifiable burden” on the implied freedom; accordingly, no possibility of severance, reading down, or disapplication arises. Our secondary submission is that, if the Court holds to the contrary, none of the proposed ‘disapplications’ “floated” by Hanson are tenable, with the result that the provisions must be struck down in full. Thus, in this context, the Court faces a binary question: are the provisions valid or are they not? We submit they are valid for the reasons given by Stewart J (at [308]-[378]).

¹ These submissions adopt the abbreviations used in the submissions filed to date.

3. We agree with Commonwealth’s submissions in every respect, save one. We respectfully disagree that ss 18B-18D can be severed so that they apply only where race is the dominant or sole reason for the impugned act. To re-craft the provisions in such a substantial way “would cross the line between adjudication and legislation” (*Clubb* at [431] (Edelman J)) and represent “tinker[ing] with legislative design in order to improve on the product of democratic choice” (*Clubb* at [207] (Gageler J)); see also *Pidoto v Victoria* (1943) 68 CLR 87 at 109 (“Such an application of the *Acts Interpretation Act* appears to me to require the Court to perform a feat which is in essence ‘legislative and not judicial’” (Latham CJ)).²

B. THE PRIMARY SUBMISSION

4. If the provisions do not infringe the implied freedom—either because they do not burden the freedom at all (eg, *Mullholland v Australian Electoral Commission* (2004) 220 CLR 181) or because they burden it but in a way that is reasonably appropriate and adapted to advance a legitimate purpose consistent with the maintenance of the constitutionally prescribed system of government (eg, *Farmer v Minister for Home Affairs* (2025) 99 ALJR 1408)—there is no need to disapply the provisions or read them down, because they will have no invalid meaning or operation that the techniques of disapplication and reading down are necessary to cure.
5. Accordingly, whether ss 18B-18D infringe the implied freedom is a threshold question that the Court must confront and determine before turning to consider any possibility of reading down or disapplication. Here, that means the Court must first decide whether Stewart J below and Hely J in *Jones v Scully* were wrong to conclude that ss 18B-18D do not unjustifiably burden the implied freedom. Only if the Court holds that their Honours were wrong, may the Court then turn to consider whether to read the provisions down or disapply them in some way.
6. We join with the Commonwealth in submitting that both judges were right to conclude that the provisions do not “unjustifiably burden” the implied freedom, with the result that the provisions are constitutional. Thus, there is no occasion for the Court to read down or disapply the provisions.

C. THE SECONDARY SUBMISSION

7. None of the ‘disapplications’ “floated” by Hanson are workable, with the result that the Court is left with a binary choice between whether the provisions are valid or not. Notably, Hanson has not advanced any positive submission that ss 18B-18D should be read down or disapplied. Her

² In any event, if the Act were redrafted as hypothesised, the appropriate order would be to remit the matter to Stewart J for determination as to whether the sole or dominant reason for Hanson’s act was Faruqi’s race.

position is that they are wholly invalid (see T302.15-17 and T296.32-44). However, she is content for the Court to read down or disapply them, “provided that [she] win[s]” (T302.46). In that context, she “floated” (T302.47) three alternatives, namely, that the Court may ‘disapply’ the provisions to (1) “conduct in the course of political communication” (T300.29) (2) “communications that are part of the political process” (T300.32-33) and (3) “communications by politicians”. None of these is tenable.

8. The first is flawed at four levels. *First*, it treats the implied freedom as an absolute personal right to engage in political communication that the legislature is incapable of regulating. That is wrong. “The implied freedom is not a ‘personal right’, is not unlimited and is not absolute”: *Farmer* at [38] (Gageler CJ, Gordon, and Beech-Jones JJ). The Parliament is entitled to regulate political communication, provided it does so to advance a legitimate end and adopts means that are reasonably appropriate and adapted to the attainment of that end. The notion that the Parliament is powerless to regulate political communication (cf T299.28-30) is heretical. As Gageler J explained in *Clubb* at [196], “*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”—all will depend on the nature and intensity of the legitimate purpose being pursued. Relevantly, his Honour went on to conclude (at [213]) that the burden imposed by the law (a prohibition on protest, an ancient form of political communication) was “not undue”, particularly because the law’s purpose—the protection of women from unwanted or offensive communications when seeking pregnancy-related medical advice or procedures—was “compelling”. So, too, is the purpose of ss 18B–18D “compelling”. *Secondly*, the proposal would denude the provisions of a substantial field of operation well in excess of what would be needed to render the burden they impose on the implied freedom justifiable. As the Commonwealth has submitted, the proposal would not, therefore, be a proper exercise of the interpretive rule laid down by s 15A (2RS[15]). *Thirdly*, it would leave in force a law substantially different from that which Parliament decided to enact. For that reason, the judicial technique of disapplication cannot be deployed: *Clubb* at [431]-[432] (Edelman J). *Fourthly*, the proposal would generate intractable uncertainty as to what falls within and without the provisions’ scope. After all, “political communication” is an essentially contested concept, and “the phrase ‘government or political matters’ is imprecise”: *Clubb* at [363] (Gordon J). Relatedly, not all communication about a politically controversial topic (including race) is relevantly political, and so protected by the implied freedom: *Clubb* at [29]-[31] (Kiefel CJ, Bell and Keane JJ), [249] (Nettle J), [363] (Gordon J). Holding that the provisions do not apply to “political communication” would render them hopelessly vague.

9. The second alternative is effectively indistinguishable from the first, so it suffers from the same fundamental flaws. It would also lead to absurd results. It would imply that a person could racially abuse another person in a political setting but not otherwise. It would be the height of irony if the lone setting in which the implied freedom allowed racial abuse to proliferate was the political sphere—the very sphere that the implied freedom is meant to protect and in which racist speech can do the most harm.
10. The third alternative has the virtue of clarity but the vice of inequality. Hanson has not pointed to any case where the implied freedom adheres differently based on the professional occupation of the speaker. It would make politicians exempt from the laws that bind everyone else. That cannot be condoned. It would allow an elected politician to racially abuse an opponent aspiring to unseat her or him at an election yet prohibit the aspirant from responding in kind. In this way, it would slant the political playing field in favour of incumbents. It would destroy the ideal of “equality of opportunity to participate in the exercise of political sovereignty” that the implied freedom is meant to guarantee: see *McCloy* at [45] (French CJ, Kiefel, Bell and Keane JJ) and the cases cited. It would intensify rather than ameliorate the burden that ss 18B-18D impose. Further, it would be contradictory to what the implied freedom protects, namely, political communication “as a whole”, not all communications *by* political actors, and not the “ability of an individual or group of persons to engage in political communication” (emphasis added): *Comcare v Banerji* (2019) 267 CLR 373 at [20] (Kiefel CJ, Bell, Keane and Nettle JJ). In any event, it ought not be overlooked that Hanson has an absolute privilege to speak as she likes in Parliament: see T297.7-12.
11. Ultimately, none of the proposed ‘disapplications’ floated by Hanson pass constitutional muster. If the Court concludes that ss 18B-18D unjustifiably burden the implied freedom, the Court has no alternative but to strike them down in full. If the Court concludes that the provisions do not unjustifiably burden the implied freedom, then that is the end of the matter.

D. A CONCLUDING POINT

12. Hanson frames her case around the proposition ss 18B-18D render “some things are unsayable” (T299.5). She contends that, for this reason, the provisions should be declared unconstitutional. Framing the issue in this way misconceives the nature of the implied freedom as a limitation on legislative power and eschews the purpose of the provisions. That purpose is illuminated by the mischief to which the Convention on the Elimination of All Forms of Racial Discrimination was directed. This mischief was identified by Allsop J in *Toben v Jones*. His Honour observed at [98] (emphasis in original):

... By this time in the twentieth century, the nations of the world had experienced a century stained by, amongst other catastrophes, racial slaughter, pogroms, forced removal and relocations of whole peoples, religious and ethnic genocide, and were undergoing the trauma involved in the break-up and disintegration of colonial empires and national and regional political structures based on racial characteristics. The unexpected recrudescence, in the winter of 1959-60, of some of the most recent and horrific manifestations of racist behaviour enlivened the world community to act swiftly and (with an inevitable degree of variation in political perspective) unanimously, to take steps towards the *elimination* of the perceived evil. The perceived evil was all forms of racial discrimination and racial prejudice, the manifestation of which had been, in recent generations, at times horrifically violent and strident, at times overt, and at times less overt and less brutal, but nevertheless insidiously pervasive. In any form, it was recognised, by all nations in the international community, to strike at the dignity and equality of all human beings.

13. His Honour's observations reflect an acknowledgment of the melancholy truth that the holding of racial prejudice and the expression of racial abuse is a perennial problem, one that the world community perceived to require constant vigilance, lest its insidious effects be allowed to spiral. When the United Nations resolved in 1960 to condemn racial discrimination (Part C, tab 81), it had been only 15 years since the discovery of the camps in central Europe. The world community knew only too well that racial discrimination was dangerous and poisonous (not to be likened to "argy-bargy" or political cut and thrust) and, as a result, they acted with alacrity in drafting and adopting a worldwide convention to eliminate racial discrimination in all its forms. They acted not out of some concern to ensure decorum or politesse; they acted because of their knowledge of where racial discrimination, left unchecked and unregulated by law, could lead.
14. In 1995, our nation's Parliament chose to give effect to Australia's obligations under the Convention by enacting ss 18B-18D. In doing so, it acted to safeguard Australia's political community from the pernicious effects of racism that had literally destroyed other political communities in the recent past. Hanson seeks a ruling from this Court that the *Constitution* renders the Commonwealth Parliament³ powerless, forever, absent a constitutional amendment, from enacting laws in the form of s 18B-18D to give effect to the Convention and the awful wisdom upon which it was based. The submission is an extraordinary one; it must be faced up to. The Court should reject it.



S HOLT KC



J TAYLOR



J UNDERWOOD



J TENG

³ Indeed, all legislatures and executives in Australia, since the implied freedom binds all.