

HIGH COURT OF AUSTRALIA

JAGOT J

WHITE AUSTRALIA PARTY INC. & ANOR

PLAINTIFFS

AND

THE COMMONWEALTH OF AUSTRALIA & ORS

DEFENDANTS

[2026] HCASJ 15

Date of Judgment: 21 May 2026

M50 of 2026

ORDERS

- 1. The interlocutory application lodged on 15 May 2026 be accepted for filing.*
- 2. On the filing of the interlocutory application, the interlocutory application be dismissed.*

Representation

Paladin Lawyers for the plaintiffs

1 JAGOT J. These reasons briefly explain why I declined to deal with an
interlocutory application lodged by the plaintiffs at approximately 4.19pm on
Friday, 15 May 2026 but not accepted for filing on that date.

2 The principal relief sought in the interlocutory application was interlocutory
injunctions restraining the defendants from, in effect, making any regulation under
Pt 5.3B of the Schedule to the *Criminal Code Act 1995* (Cth) ("the *Criminal
Code*") specifying the first plaintiff ("the White Australia Party") as a "prohibited
hate group" and acting on any such regulation if made, until determination of the
substantive proceeding in this Court. The interlocutory application was supported
by an affidavit of Thomas Sewell, the second plaintiff and the National President
of the White Australia Party. According to the affidavit, the White Australia Party
has 1,778 registered members, was incorporated in Victoria as an incorporated
association on 20 December 2025, and on 25 April 2026 lodged an application
with the Australian Electoral Commission for registration as a non-parliamentary
political party.

3 At the same time that the plaintiffs lodged the interlocutory application and
affidavit they also lodged an application for a constitutional or other writ. The
principal relief sought in the application for a constitutional or other writ is a
declaration that the provisions of the *Combating Antisemitism, Hate and
Extremism (Criminal and Migration Laws) Act 2026* (Cth) ("the CAHECML Act")
amending Pt 5.3B of the *Criminal Code* are invalid as they purport to: (i) authorise
proscription of a political party contrary to *Australian Communist Party v The
Commonwealth*;¹ (ii) impair the constitutional implied freedom of political
communication; and (iii) vest punitive powers in the Executive contrary to the
separation of powers in Ch III of the *Constitution*.

4 At 5.58pm on Friday, 15 May 2026 the lawyers for the plaintiffs sent an
email to the Registry of the Court noting that the above documents had been lodged
but not yet accepted for filing. The email said that the "matter is of extreme
urgency", as the Minister for Home Affairs had that day announced that the White
Australia Party had been specified as a "prohibited hate group" under Pt 5.3B of
the *Criminal Code*, "with the listing to take effect at midnight tonight". According
to the email, if the listing applied to the White Australia Party, then all members
would "immediately commit criminal offences ... for continuing ordinary
membership and political activities".

5 The Registry referred the email and the documents to me as Duty Judge for
consideration. At my request the Registry forwarded an email in reply to the
lawyers for the plaintiffs, which, in part, said that:

1 (1951) 83 CLR 1.

2.

"In circumstances where the legal effect of the making of any regulation will depend on the constitutional validity of the legislative provision enabling the legislation [sic – regulation] to be made, Justice Jagot does not consider that any hearing of the interlocutory application before the regulation is made is necessary or appropriate.

The documents that you have lodged in DLS will be considered for filing on Monday 18 May 2026.

In order for the interlocutory application to be considered it is necessary that the interlocutory application, affidavit in support and application for constitutional or other writ must be served on the defendants.

On the basis that such service can be effected by 4pm on Monday 18 May 2026, Justice Jagot would be willing to list the matter for directions at a time convenient to all on or after Wednesday 20 May 2026."

6 Subsequently, the lawyers for the plaintiffs sent another email to the Registry attaching the *Criminal Code (Prohibited Hate Group – White Australia) Regulations 2026* (Cth) ("the Regulation"), which the Registry also forwarded to me as Duty Judge. The Regulation states in reg 4(1) that for "the purposes of the definition of prohibited hate group in subsection 114A.2(1) of the *Criminal Code*, the organisation known as White Australia is specified". Regulation 4(2) states that White Australia is also known as WA, WAP, and White Australia Party.

7 I declined to deal with the interlocutory application before midnight on Friday, 15 May 2026 on several bases.

8 First, the applicable principle, as identified by Mason A-CJ in *Castlemaine Tooheys Ltd v South Australia*,² is that "[i]n the absence of compelling grounds, it is the duty of the Court to respect, indeed, to defer to, the enactment of the legislature *until that enactment is adjudged ultra vires*".³ This reflects in part that unless and until held to be invalid by a court of competent jurisdiction on final hearing, laws are presumed to be valid and to reflect the will of Parliament.⁴ It reflects also both the onus of proof that is on a plaintiff ultimately to establish invalidity of the law and the recognition by the courts that, absent some compelling reason to do so, the courts ought not to interfere with the operation of a law

2 (1986) 161 CLR 148.

3 (1986) 161 CLR 148 at 155-156 (emphasis added).

4 eg, *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 161-162.

3.

apparently valid on its face merely because a person has instituted proceedings to invalidate the law.

9 Second, as Mason A-CJ also said in *Castlemaine Tooheys Ltd*, the fact that the challenged legislation imposes potential criminal liability on a person is not itself a "compelling ground" for interlocutory relief as "[i]n the ordinary course of affairs the courts should hesitate before interfering with the Executive Government's discretion to decide whether it should prosecute for offences against a statute, even a statute which is under constitutional challenge, more particularly when the statute is designed to protect and safeguard a recognizable public interest".⁵ If criminal proceedings are commenced, as Mason A-CJ further observed, the prosecution "would ordinarily be adjourned pending the determination of validity".⁶ To this is to be added, that any defendant to such a criminal proceeding would be able to challenge the validity of the legislation on which the prosecution is based.

10 Third, the affidavit in support of the interlocutory application disclosed that Mr Sewell had been on notice that the White Australia Party would be likely to be specified as a "prohibited hate group" under the *Criminal Code* as amended by the CAHECML Act since the enactment of that Act on 21 January 2026. Indeed, according to Mr Sewell's affidavit, on 13 January 2026, before the CAHECML Act commenced, the "National Socialist Network (NSN) was dissolved as a preemptive measure because its leaders, of whom [he] was one, feared imminent listing of the NSN as a prohibited hate group under the CAHECML Act". Despite being aware of the consequential likelihood of the White Australia Party being specified as a "prohibited hate group" since January 2026, it appeared that the White Australia Party had taken no action to challenge the validity of the relevant provisions of the CAHECML Act until the day on which the Minister for Home Affairs made the specification. That is, the circumstances of "urgency" on which the White Australia Party relied for the interlocutory relief it sought were of its own making.

11 Fourth, the lawyers for the plaintiffs must have been preparing the documents lodged on 15 May 2026 days, if not weeks, before that time. Yet the lawyers for the plaintiffs proposed that the Court deal with the interlocutory application on an *ex parte* basis having given no notice to any of the proposed defendants that the interlocutory relief would be sought. This was untenable. It was necessary for the proposed defendants (and, for that matter, the Court) to be given notice of the proposed interlocutory application in adequate time for the proposed defendants to be legally represented at any hearing of the application. On no basis would the Court have dealt with an interlocutory application seeking to restrain the

5 (1986) 161 CLR 148 at 156.

6 (1986) 161 CLR 148 at 156.

coming into force of a law on an ex parte basis and certainly not when the "urgency" for consideration had been the result of the plaintiffs' own delay.

12 Fifth, and in any event, it was not the case that the coming into force of the Regulation would have the effect of immediately making membership of the White Australia Party a criminal offence. Insofar as mere membership of a "prohibited hate group" is concerned, s 114B.2(2) of the *Criminal Code* provides that the offence provision "does not apply if the person proves that the person took all reasonable steps to cease to be a member of the organisation as soon as practicable after the person knew that the organisation was a prohibited hate group".

13 It was for these reasons that I declined to hear the plaintiffs' application for ex parte interlocutory relief before midnight on 15 May 2026. In order to ensure the integrity of the record of the Court it is necessary that the interlocutory application lodged on 15 May 2026, which was rejected for filing on Monday, 18 May 2026 (as by that time the plaintiffs had lodged an amended interlocutory application), be filed. Accordingly, I will direct the Registry to accept the interlocutory application lodged on 15 May 2026 for filing. As that interlocutory application has been overtaken by events, I will also order that, on filing, it be dismissed.

14 The orders made are:

- (1) The interlocutory application lodged on 15 May 2026 be accepted for filing.
- (2) On the filing of the interlocutory application, the interlocutory application be dismissed.