

# HIGH COURT OF AUSTRALIA

GAGELER CJ

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WHITE AUSTRALIA PARTY INC. & ANOR

PLAINTIFFS

AND

THE COMMONWEALTH OF AUSTRALIA & ANOR

DEFENDANTS

[2026] HCASJ 17

*Date of Hearing: 3 June 2026*

*Date of Judgment: 4 June 2026*

M50 of 2026

## ORDERS

- 1. The interlocutory application filed on 18 May 2026 is dismissed.*
- 2. The costs of the application are costs in the cause.*

### Representation

P E King with M S Sharify for the plaintiffs (instructed by Paladin Lawyers)

B K Lim SC with J G Wherrett and N A Wootton for the first and second defendants (instructed by Australian Government Solicitor)



1 GAGELER CJ. The first plaintiff, the White Australia Party Inc ("the Party"), is a voluntary incorporated association which was registered under the *Associations Incorporation Reform Act 2012* (Vic) ("the Victorian Act") on 20 December 2025. As of 15 May 2026, the Party had 1,778 members. The second plaintiff, Mr Sewell, is a member of the Party and its National President.

2 The first defendant is the Commonwealth of Australia. The second defendant is the Attorney-General of the Commonwealth, who administers the *Criminal Code* (Cth) under the *Criminal Code Act 1995* (Cth).

3 On 20 January 2026, the Commonwealth Parliament enacted the *Combating Antisemitism, Hate and Extremism (Criminal and Migration Laws) Act 2026* (Cth) ("the Act"). Section 3 of and Sch 1 to the Act operated on 22 January 2026 to insert Pt 5.3B into the *Criminal Code*.<sup>1</sup>

4 The objects of Pt 5.3B of the *Criminal Code* are expressed to include protection of the Australian community "against social, economic, psychological and physical harm ... and from the promotion of violence, by prohibiting organisations that engage in, prepare or plan to engage in, or assist in the engagement in, or advocate engaging in, conduct constituting a hate crime".<sup>2</sup> The design of Pt 5.3B is that Div 114A prescribes a process for the making by the Governor-General, and review by the Parliamentary Joint Committee on Intelligence and Security, of regulations by which an organisation can be specified to be a "prohibited hate group".<sup>3</sup> Specification of an organisation by regulations made in accordance with that process enlivens the operation of a range of offence provisions in Div 114B.

5 On 15 May 2026, the Governor-General in Council made the *Criminal Code (Prohibited Hate Group – White Australia) Regulations 2026* (Cth) ("the Regulations") which specified the Party to be a prohibited hate group for the purposes of Pt 5.3B of the *Criminal Code*. The Explanatory Statement for the Regulations described the effect of the specification as being to prevent the Party "from legitimately operating in Australia through the criminalising of particular forms of engagement with [it]".<sup>4</sup>

6 By virtue of the specification of the Party as a prohibited hate group for the purposes of Pt 5.3B of the *Criminal Code*, a person commits an offence under

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1 See item 13 of Sch 1 to the Act.

2 Section 114A.1(1)(a) of the *Criminal Code*.

3 See s 114A.2(1) (definition of "prohibited hate group") of the *Criminal Code*.

4 Australia, House of Representatives, *Criminal Code (Prohibited Hate Group – White Australia) Regulations 2026*, Explanatory Statement at 3.

Div 114B, amongst other circumstances, if the person, knowing the Party to be a prohibited hate group: "intentionally directs the activities of [the Party]";<sup>5</sup> "intentionally is a member of [the Party]" (other than if the person proves that the person took all reasonable steps to cease to be a member as soon as practicable after the person knew it to be a prohibited hate group);<sup>6</sup> "intentionally recruits [another] person to join, or participate in the activities of, [the Party]";<sup>7</sup> or "receives funds from, or makes funds available to, [the Party] (whether directly or indirectly) intending the receipt or provision of the funds to assist the [Party] to expand or to continue to exist"<sup>8</sup> (other than in specified circumstances which include if the person proves that the person received the funds solely for the purpose of the provision of legal representation for a person in proceedings relating to Pt 5.3B).<sup>9</sup>

7 In a proceeding commenced in the original jurisdiction of this Court on 18 May 2026, the plaintiffs seek by way of principal relief a declaration that s 3 of and Sch 1 to the Act are invalid together with a writ of prohibition, or alternatively an injunction, permanently restraining the defendants from taking any step under or giving effect to Pt 5.3B of the *Criminal Code* with respect to the plaintiffs. The plaintiffs claim that the impugned provisions of the Act are unsupported by any affirmative legislative power of the Commonwealth Parliament. They claim that the impugned provisions are in that respect relevantly indistinguishable from the *Communist Party Dissolution Act 1950* (Cth) which was held invalid in *Australian Communist Party v The Commonwealth*.<sup>10</sup> They claim, further or in the alternative, that the impugned provisions impair the implied freedom of political communication and are incompatible with Ch III of the *Constitution*.

8 On 21 May 2026, Jagot J made procedural orders designed to result in questions of law raised in the proceeding being determined by the Full Court of the High Court by way of a special case to be heard in the fortnight commencing 7 September 2026.

9 By an interlocutory application filed in the proceeding on the day of its commencement, the plaintiffs seek orders designed to preserve the status quo

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5 Section 114B.1(1) of the *Criminal Code*.

6 Section 114B.2 of the *Criminal Code*.

7 Section 114B.3(1) of the *Criminal Code*.

8 Section 114B.5(1)(a)(ii) of the *Criminal Code*.

9 Section 114B.5(3)(a) of the *Criminal Code*.

10 (1951) 83 CLR 1.

pending the final determination of the proceeding. That is the application which I now determine.

10 The first of the orders sought by the plaintiffs in the interlocutory application is framed as an order "restraining the operation" of the Regulations. An order of that nature – restraining on an interlocutory basis the purported statutory operation of a purported exercise of delegated legislative power – is without precedent. It is not an injunction, which is an "order by which a court commands a person to do or refrain from doing some particular act".<sup>11</sup> Like an "interlocutory declaration", it is "a form of order not known to the law".<sup>12</sup> At least in the absence of specific statutory authorisation, it is an order of a nature that is incapable of being made in the exercise of judicial power. Pithily expressed in the words of Mr Kirk SC recorded and accepted by Payne JA in *Council of the City of Ryde v Azizi*,<sup>13</sup> "you can injunct people"; "[y]ou can't injunct an Act".

11 The second of the orders sought by the plaintiffs in the interlocutory application is framed in more orthodox terms as an interlocutory injunction restraining the defendants from "giving effect to, enforcing, or relying upon" the Regulations. Further or in the alternative, it is framed somewhat more elusively as an interlocutory injunction restraining the defendants from "taking any steps under Pt 5.3B ... against [the Party] that would prevent the operation of [the Party]".

12 For the source of power to make an interlocutory injunction of the nature sought, the plaintiffs rely primarily on s 75(v) of the *Constitution* and alternatively on s 32 of the *Judiciary Act 1903* (Cth). To justify the making of an interlocutory injunction on either of those jurisdictional bases, it is incumbent on the plaintiffs to demonstrate: first, that the proceeding raises a serious question to be determined; and second, that the balance of convenience favours the grant of the order pending that determination.<sup>14</sup>

13 The defendants do not dispute the existence of a serious question to be determined in the proceeding in respect of the consistency of the Act with the

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11 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 231 [60].

12 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 590 [128]; *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317 at 363 [143]. Cf *Factortame Ltd v Secretary of State for Transport* [1990] 2 AC 85 at 142-143.

13 [2019] NSWSC 1605 at [170]-[175]. See also *Council of the City of Ryde v Azizi* [2021] NSWCA 120 at [3] and *Harding v Sutton* [2021] VSC 741 at [140]-[146].

14 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at 81-84 [65]-[72].

implied freedom of political communication. At issue between the parties as to the appropriateness of an interlocutory injunction of the nature sought is the balance of convenience.

14 The now settled principle concerning the assessment of the balance of convenience in a case in which the constitutional validity of legislation is challenged is that stated by Mason A-CJ in *Castlemaine Tooheys Ltd v South Australia*:<sup>15</sup> "[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".

15 The unreported decision of Dixon J granting and continuing interlocutory injunctions in *Australian Communist Party v The Commonwealth*, upon which the plaintiffs principally rely, is not in tension with this principle.<sup>16</sup> The provisions of the *Communist Party Dissolution Act* that were ultimately successfully challenged in that case included provisions which: declared the Australian Communist Party to be an unlawful association and to be dissolved by force of that Act;<sup>17</sup> authorised the Governor-General to appoint a receiver of the property of the Australian Communist Party;<sup>18</sup> and stated the duty of the receiver to be to "take possession of [its] property ..., to realize that property, to discharge [its] liabilities ... and to pay or transfer the surplus to the Commonwealth".<sup>19</sup>

16 The application for interlocutory injunctions heard and determined by Dixon J was explained by him to be based on "the contention that if before the question of its validity [could] be decided, the Act [were] carried into execution,

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15 (1986) 161 CLR 148 at 155-156. See *Davids Holdings Pty Ltd v Byrnes* (1987) 71 ALR 251 at 251; *Richardson v Forestry Commission* (1988) 164 CLR 261 at 275-276; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 66 ALJR 214 at 217; 104 ALR 389 at 393; *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at 82 [66]; *Government of the Russian Federation v The Commonwealth* (2023) 97 ALJR 545 at 549 [27]; 410 ALR 223 at 228.

16 (Unreported, High Court of Australia, 2 November 1950), reproduced as [1950] HCASCF 10.

17 Section 4(1) of the *Communist Party Dissolution Act*.

18 Section 4(2) of the *Communist Party Dissolution Act*.

19 Section 15(1) of the *Communist Party Dissolution Act*.

an exercise of the Court's jurisdiction to pass upon the validity of the Act [would] be rendered useless".<sup>20</sup> His Honour explained in that context:<sup>21</sup>

"What I have to do in a matter of this description is to exercise a discretion where two competing considerations exist. On the one hand there is a presumption in favour of the validity of the Act. On the other hand a court ought not to allow the exercise of its jurisdiction to be made nugatory by allowing irrevocable and irreparable measures to be taken against parties challenging the validity of a statute before there is time to decide the question. It depends upon the extent to which the jurisdiction would be defeated or impaired."

17 Having regard to the competing considerations so identified, Dixon J ordered the continuation until the determination of the proceeding or until further order of interlocutory injunctions by which he had earlier restrained the Commonwealth and its officers from taking steps to invoke other provisions of the *Communist Party Dissolution Act*,<sup>22</sup> being steps to: declare organisations affiliated with the Australian Communist Party to be an unlawful association;<sup>23</sup> declare a member of the Australian Communist Party to be a person engaged or likely to engage in activities prejudicial to the security and defence of the Commonwealth, or to the execution or maintenance of the *Constitution* or the laws of the Commonwealth,<sup>24</sup> leading to their immediate disqualification from holding certain offices and the immediate vacation of such offices as they might hold;<sup>25</sup> and obtain a search warrant in respect to the plaintiffs except in respect of books, papers, documents and records.<sup>26</sup> His Honour further ordered that the receiver of the property of the Australian Communist Party who had been appointed by the

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20 *Australian Communist Party Case v The Commonwealth* (unreported, High Court of Australia, 2 November 1950) at 1.

21 *Australian Communist Party Case v The Commonwealth* (unreported, High Court of Australia, 2 November 1950) at 3. See generally Lindell, "Interlocutory Injunction Granted in the *Australian Communist Party Case*", in Griffiths and Stellios (eds), *Issues in Australian Constitutional Law: Tributes to Professor Leslie Zines* (vol 2, 2024) 171.

22 *Australian Communist Party v The Commonwealth* (orders of Dixon J, High Court of Australia, 21 October 1950), reproduced as [1950] HCASCF 6.

23 Section 5(2) of the *Communist Party Dissolution Act*.

24 Section 9(2) of the *Communist Party Dissolution Act*.

25 Sections 10 and 11 of the *Communist Party Dissolution Act*.

26 cf s 22 of the *Communist Party Dissolution Act*.

Governor-General be restrained from acting in the performance of his duties other than in respect of taking possession of books, papers, documents and records relating to or in the possession or control of the<sup>27</sup> Australian Communist Party.<sup>28</sup>

18 Consistently with the principle subsequently stated by Mason A-CJ in *Castlemaine Tooheys Ltd v South Australia, Australian Communist Party v The Commonwealth* can be seen to have been a case in which there were found to have been "compelling grounds" for not deferring to a legislative enactment pending final determination of its constitutional validity. The compelling grounds lay in the "irrevocable and irreparable measures" which were open to be taken in the interim, in the absence of the interlocutory injunctions granted, to divest the Australian Communist Party and its affiliates of property and to deprive officers of the Australian Communist Party of their livelihoods.

19 Of significance to an assessment of the relevance of *Australian Communist Party v The Commonwealth* to the present case is that Dixon J declined, in the exercise of his discretion, to widen the interlocutory injunctions which he granted so as to restrain the Commonwealth and its officers from taking proceedings for offences under the Act.<sup>29</sup> The offences the prosecution of which his Honour declined to restrain included offences constituted by: becoming, continuing to be, or performing any act as an officer or member of the Australian Communist Party;<sup>30</sup> contributing or soliciting anything to be used for its benefit;<sup>31</sup> or taking part in any of its activities.<sup>32</sup> His Honour's decision in that respect is in total harmony with the view later expressed by Mason A-CJ in *Castlemaine Tooheys Ltd v South Australia* that "[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

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27 Section 15(2)(f) of the *Communist Party Dissolution Act*.

28 Section 15 of the *Communist Party Dissolution Act*. See *Australian Communist Party v The Commonwealth* (orders of Dixon J, High Court of Australia, 21 October 1950).

29 *Australian Communist Party Case v The Commonwealth* (unreported, High Court of Australia, 2 November 1950) at 2-3.

30 Section 7(1)(a) of the *Communist Party Dissolution Act*.

31 Section 7(1)(b) of the *Communist Party Dissolution Act*.

32 Section 7(1)(d) of the *Communist Party Dissolution Act*.

under constitutional challenge, more particularly when the statute is designed to protect and safeguard a recognizable public interest".<sup>33</sup>

20 Drawing on the language of Dixon J in *Australian Communist Party v The Commonwealth*, the plaintiffs identify four main respects in which the Party and its members would suffer "irrevocable and irreparable" prejudice by reason of the operation of the impugned provisions in the absence of the interlocutory injunctive relief they seek. The difficulty for the plaintiffs is that the interlocutory injunctive relief they seek against the defendants would not remove or ameliorate that prejudice.

21 The first respect in which the Party and its members would suffer irrevocable and irreparable prejudice is said to be "the immediate criminalisation of lawful political membership and activity for 1,778 members". The second and third, which flow from the first, are said to be "the destruction of [the Party] as a functioning political association" and "the chilling and suppression of protected political communication in matters of public importance".

22 Undoubtedly, Mr Sewell and other current members of the Party are in jeopardy of committing offences if they choose to maintain their membership or participate in activities of the Party pending the final determination of the proceeding. Those, however, are risks inherent in the existence of the impugned provisions for so long as their validity remains undetermined. The risks would not be lessened by any temporary restraint of their enforcement or implementation. Mr Sewell, other current members of the Party, and the Party itself are in that respect in no different position from the plaintiffs in *Australian Capital Television Pty Ltd v The Commonwealth*<sup>34</sup> who Mason CJ described as needing to "decide for themselves whether they [were] justified, on the basis of the legal advice they received, in refusing to comply with the statutory provisions [which they sought to impugn]".

23 The fourth respect in which the plaintiffs say the Party and its members face "irrevocable and irreparable" prejudice is by reason of a risk of cancellation of the Party's incorporation and consequent forfeiture of its property under the Victorian Act. The plaintiffs point to a notice given to the Party on 26 May 2026 by the Registrar of Incorporated Associations under s 135(1) of the Victorian Act which refers to the Act and the Regulations and expresses the opinion that the Party is not "in operation" within the meaning of that section. The notice requires the Party to

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33 (1986) 161 CLR 148 at 156. See also *Polyukhovich v The Commonwealth* (1990) 64 ALJR 589 at 591; 95 ALR 502 at 506 and *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at 82 [66].

34 (1992) 66 ALJR 214 at 217; 104 ALR 389 at 394.

show cause within 28 days why its incorporation should not be cancelled in the exercise of the discretion conferred on the Registrar by that section.

24 This risk of cancellation of the Party's incorporation under s 135 of the Victorian Act is real and substantial. But it is a risk which could not be ameliorated by the interlocutory injunctions which the plaintiffs seek against the defendants or any variation of those injunctions. The risk could only be ameliorated by an injunction granted in an appropriately constituted proceeding against the Registrar. Were the Registrar to manifest an intention to refuse to await and abide by the final determination in this proceeding of the constitutional validity or invalidity of the impugned provisions, such a proceeding could readily be brought against the Registrar in the original jurisdiction conferred on this Court under s 76(i) of the *Constitution* by s 30(a) of the *Judiciary Act*.

25 To be added for completeness is that there is no suggestion, on the part of the plaintiffs or on the part of the defendants, that the practical operation of Pt 5.3B is to prevent the Party or Mr Sewell from continuing to engage and instruct its legal representatives to prosecute this proceeding to its conclusion.<sup>35</sup>

26 Accordingly, this is not a case in which compelling grounds have been shown for refusing to defer to the legislative enactment pending judicial determination of a challenge to its validity. The balance of convenience is against the grant of an interlocutory injunction of the nature sought.

27 The application for interlocutory orders is to be dismissed. The costs of the application are to be costs in the cause.

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35 cf *Deripaska v Minister for Foreign Affairs* [2026] HCA 14.