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WHITE AUSTRALIA PARTY V COMMONWEALTH: THE CONSTITUTIONALITY OF PROSCRIBING ‘PROHIBITED HATE GROUPS’

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In White Australia Party v Commonwealth, the High Court of Australia has heard a constitutional challenge to part 5.3B of the Criminal Code Act 1995 (Cth). Part 5.3B provides an executive regime for the Commonwealth to proscribe ‘prohibited hate groups’. The plaintiff challenges the regime on three grounds: first, that the provisions are unsupported by any affirmative legislative power and are indistinguishable from the Communist Party Dissolution Act 1950 (Cth), invalidated in Australian Communist Party v Commonwealth; second, that the regime violates the implied freedom of political communication; and third, the regime is incompatible with Chapter III of the Australian Constitution. This article summarises and analyses the issues before the High Court. As part 5.3B is likely to be supported by the external affairs power, the third step of the test for the implied freedom and the Chapter III argument are likely to be the primary points of contention. Nonetheless, notwithstanding part 5.3B’s significant constitutional and principled issues, this article argues that the Commonwealth has reasonable prospects of success – the Court is probably unlikely to find it contrary to the implied freedom.

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I INTRODUCTION

The Full Court of the High Court has heard *White Australia Party v Commonwealth*, a constitutional challenge to part 5.3B of the *Criminal Code Act 1995* (Cth) (*'Criminal Code'*).¹ Part 5.3B, inserted into the *Criminal Code* by section 3 of and schedule 1 to the *Combatting Antisemitism, Hate and Extremism (Criminal and Migration Laws) Act 2026* (Cth) (*'Combatting Antisemitism Act'*), creates an executive regime for the Commonwealth to proscribe 'prohibited hate groups'.² The proscription regime was introduced following the horrors of the antisemitic terror attack at Bondi Beach on 14 December 2025,³ and against the backdrop of rising antisemitism and increasingly brazen neo-Nazi and white supremacist activity in Australia.⁴ In the period preceding the new laws and the Bondi Beach attacks, media reporting documented numerous instances of neo-Nazi rallies, antisemitism, and racially motivated violence across the country.⁵

The plaintiff, the White Australia Party, is the rebranded successor to the National Socialist Network and European Australia Movement.⁶ On 15 May 2026, the Governor-General in Council made the *Criminal Code (Prohibited Hate Group – White Australia) Regulations 2026* (Cth), which specified the White Australia Party to be a prohibited hate group for the purposes of part 5.3B⁷ – its effect being to prevent the party 'from legitimately operating in Australia through the criminalising of particular forms of engagement with [it]'.⁸ Subsequently, the party seeks a declaration from the High Court that section 3 of and schedule 1 to the *Combatting Antisemitism Act* are constitutionally invalid, on three primary grounds.⁹

First, the party claims that the impugned provisions are unsupported by any affirmative legislative power of Parliament and are indistinguishable from those in

1 *White Australia Party v Commonwealth* [2026] HCASJ 17 [8] (Gageler CJ) (*'White Australia Party'*).

2 *Ibid* [3] (Gageler CJ).

3 Explanatory Memorandum, *Combatting Antisemitism, Hate and Extremism (Criminal and Migration Laws) Bill 2026* (Cth) 62 [101].

4 See, eg, Australian Security Intelligence Organisation, *ASIO Annual Threat Assessment 2025* (Web Page, 19 February 2025) <<https://www.oni.gov.au/news/asio-annual-threat-assessment-2025>>.

5 See, eg, Denis Muller, 'Neo-Nazis and Racist Rallies: Why It's Important the Australian Media Call Them for What They Are', *The Conversation* (online, 2 September 2025) <<https://theconversation.com/neo-nazis-and-racist-rallies-why-its-important-the-australian-media-call-them-for-what-they-are-264329>>; Alex Gallagher, 'From Fringe to Frontline: How Australia's Far-Right Gained Mainstream Attention in 2025', *SBS* (online, 21 January 2026) <<https://www.sbs.com.au/news/article/the-rise-of-far-right-extremism-australia-2025/8skg4ekwe>>; Michael Workman, Matt Martino and Hanan Dervisevic, 'Unmasking the Men Who Attended a Neo-Nazi Protest Outside NSW Parliament', *ABC News* (online, 13 November 2025) <<https://www.abc.net.au/news/2025-11-13/unmasking-nsw-parliament-house-nsn/106005186>>.

6 Australian National Security, 'White Australia', *Listed Prohibited Hate Groups* (Web Page, 16 May 2026) <<https://www.nationalsecurity.gov.au/what-australia-is-doing/prohibited-hate-groups/listed-prohibited-hate-groups/white-australia>>.

7 *White Australia Party* (n 1) [5] (Gageler CJ).

8 Explanatory Statement, *Criminal Code (Prohibited Hate Group – White Australia) Regulations 2026* (Cth) 3.

9 *White Australia Party* (n 1) [7] (Gageler CJ). See also White Australia Party, 'Plaintiff's Submissions on Interlocutory Application', Submission in *White Australia Party v Commonwealth*, M50/2026, 27 May 2026, [3].

the *Communist Party Dissolution Act 1950* (Cth), held by the High Court to be invalid in *Australian Communist Party v The Commonwealth* ('*Communist Party Case*').¹⁰ Second, the party claims that the provisions violate the implied freedom of political communication.¹¹ Third, the party argues that the provisions are incompatible with Chapter III of the *Constitution*, in vesting punitive powers in the executive.¹²

Although Australians might assume that the *Constitution* enshrines a right to free speech, the *Constitution* recognises no such right.¹³ The High Court, however, has recognised the existence of an implied freedom of political communication ('implied freedom'), derived from the structure of representative and responsible government established under sections 7 and 24 of the *Constitution*.¹⁴ This implied freedom does not confer a personal right to free expression; it functions as a restriction on legislative and executive power, protecting political communication from unjustified governmental interference.¹⁵

In June 2026, Gageler CJ dismissed the White Australia Party's application for interlocutory orders, which sought to suspend the effects of the party's proscription until the constitutional challenge was determined.¹⁶ Nonetheless, the substantive constitutional challenge to the legislation has proceeded. This article analyses the three primary issues before the High Court. It first outlines the proscription regime in Part II. Part III considers the heads of legislative power issue, giving primary attention to the external affairs power, treating the defence power as an alternative rather than the central basis of validity. Parts IV and V examine the implied freedom and consider the three-stage test for the implied freedom, focusing on the severity and character of the burden on political communication imposed by the impugned provisions. Finally, Part VI considers whether proscription amounts to an exercise of judicial power. Given that the external affairs power likely supports part 5.3B, the article identifies the third limb of the test for the implied freedom – whether the law is 'reasonably appropriate and adapted' – and the Chapter III grounds of the challenge as the primary points of contention.

10 *White Australia Party* (n 1) [7] (Gageler CJ). See also White Australia Party, 'Plaintiff's Statement of Claim', Submission in *White Australia Party v Commonwealth*, M50/2026, 29 May 2026, [23].

11 *White Australia Party* (n 1) [7] (Gageler CJ). See also White Australia Party, 'Plaintiff's Statement of Claim', Submission in *White Australia Party v Commonwealth*, M50/2026, 29 May 2026, [28].

12 *White Australia Party v Commonwealth* [2026] HCASJ 15 [3] (Jagot J). See also White Australia Party, 'Plaintiff's Statement of Claim', Submission in *White Australia Party v Commonwealth*, M50/2026, 29 May 2026, [34].

13 See, eg, *Comcare v Banerji* (2019) 267 CLR 373, 395 [20] (Kiefel CJ, Bell, Keane and Nettle JJ) ('*Comcare*').

14 See, eg, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 ('*ACTV*'); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

15 *Comcare* (n 13) [20] (Kiefel CJ, Bell, Keane and Nettle JJ).

16 *White Australia Party* (n 1) [26]–[27] (Gageler CJ).

II THE ‘PROHIBITED HATE GROUPS’ PROSCRIPTION REGIME

Division 114A in part 5.3B of the *Criminal Code* provides a process for the making of regulations by which an organisation can be proscribed or ‘specified’ as a ‘prohibited hate group’.¹⁷ Section 114A.4(1) of the *Criminal Code* provides that the Australian Federal Police Minister must be satisfied on reasonable grounds that:

- (a) the organisation:
 - (i) has engaged in, prepared or planned to engage in, or assisted the engagement in, conduct constituting a hate crime; or
 - (ii) has advocated (whether or not in Australia) engaging in conduct constituting a hate crime, other than an offence against section 80.2A, 80.2B, 80.2BC or 80.2BE (advocacy offences); and
- (b) specifying the organisation as a prohibited hate group is reasonably necessary to protect the Australian community or part of the Australian community against harm of any one or more of the kinds referred to in paragraph 114A.1(1)(a).

Section 114A.3 defines ‘hate crime’, providing:

- (1) A ***hate crime*** is conduct (whether engaged in before or after this section commences):
 - (a) that would constitute any of the following offences:
 - (i) an offence under Subdivision C of Division 80 (urging or threatening violence and offences against groups or members of groups), other than section 80.2, 80.2C or 80.2D, to the extent that the targeted group (within the meaning of the offence) is distinguished by race or national or ethnic origin;
 - (ii) an offence under section 80.2H or 80.2HA (publicly displaying prohibited symbols and giving Nazi salute); or
- ...
- (2) A ***hate crime*** is also conduct (whether engaged in before or after this section commences):
 - (a) that involves publicly inciting hatred of another person (the ***target***) or a group of persons (the ***target group***) because of the race or national or ethnic origin of the target or target group and that:
 - (i) would constitute an offence against a provision of a law of the Commonwealth; or
 - (ii) would constitute an offence against a provision of a law of a State or a Territory as is in force at the commencement of this section, being a provision specified in subsection (3), to the extent that the offence relates to race or national or ethnic origin; or
 - (iii) if engaged in before a provision referred to in subparagraph (i) or (ii) commenced – would have constituted an offence against the provision had the provision been in force at the time the conduct was engaged in; and
 - (b) that would, in all the circumstances, cause a reasonable person who is the target, or a member of the target group, to be intimidated, to fear harassment or violence, or to fear for their safety.

17 *Criminal Code Act 1995* (Cth) s 114A.4 (‘*Criminal Code*’).

The proscription of an organisation as a ‘prohibited hate group’ enlivens a range of offences in division 114B of the *Criminal Code*, with penalties ranging from seven to fifteen years’ imprisonment for a range of conduct, including membership of the group, directing its activities, recruiting for the group, and getting funds to, from, or for the group.¹⁸ Significantly, proscription does not require the organisation or its members to have been convicted by a court,¹⁹ or that the conduct constituting a ‘hate crime’ be unlawful when it occurred.²⁰ It is sufficient for the Minister to be satisfied on reasonable grounds that the group has engaged in or been associated with *conduct constituting* a hate crime.²¹ It is the Minister’s satisfaction, rather than a judicial determination, that enlivens an organisation’s proscription, and there is no need for the Minister to observe procedural fairness.²²

The Minister must also be satisfied on reasonable grounds that the proscription is reasonably necessary to protect the Australian community from social, economic, psychological, and physical harm.²³ This is a low threshold as ‘psychological harm’ is notably broad, including psychological harm caused generally by the group’s continued presence in Australia, rendering the condition self-fulfilling in practice.²⁴ That said, the legislation does contain several safeguards. The Director-General of Security may provide written advice to the Minister recommending proscription on the basis that the group has engaged or is engaging in activities likely to increase the risk of politically motivated or communal violence, or has advocated for or engaged in such violence, or that there is a risk that it might do so in the future.²⁵ The Attorney-General must also agree to the proscription, and the Leader of the Opposition must be briefed.²⁶

Part 5.3B is similar to, and was clearly modelled on, division 102 in part 5.3 of the *Criminal Code*, which provides a process to proscribe terrorist organisations. However, while ‘terrorism’ is itself difficult to define,²⁷ division 102 targets an arguably narrower class of conduct – ‘terrorist acts’²⁸ – whereas part 5.3B operates to control groups that engage in conduct constituting ‘hate crimes’, a broader category of conduct.²⁹ The post-Bondi legislative development that comes in the form of part 5.3B is, therefore, not simply the creation of further offences directed to expression deemed harmful. It is the addition of an organisation-level

18 Ibid div 114B.

19 Ibid s 114A.4(4).

20 Ibid s 114A.4(2).

21 Ibid s 114A.4(1).

22 Ibid s 114A.4(5).

23 Ibid s 114A.4(1)(b).

24 Ibid s 114A.1(2).

25 Ibid s 114A.5.

26 Ibid s 114A.6.

27 Leonard Weinberg, Ami Pedahzur, and Sivan Hirsch-Hoefler, ‘The Challenges of Conceptualizing Terrorism’ (2010) 16(4) *Terrorism and Political Violence* 777.

28 *Criminal Code* (n 17) s 102.1(2).

29 Norman Fairclough, *Analysing Discourse: Textual Analysis for Social Research* (Routledge, 2003) 14–5. See also Elyse Methven, Derick Luong and Thalia Anthony, Submission No 126 to Legislative Assembly Committee on Law and Safety, Parliament of New South Wales, *Measures to Prohibit Slogans that Incite Hatred* (12 January 2026) 6.

proscription regime that can trigger criminal liability for membership, recruitment, funding, and other forms of association, including where the underlying conduct has not been adjudged unlawful by a court.³⁰ These features make the provisions in part 5.3B exceptional and create complex issues of principle and constitutional law. Given that various contemporary political parties have made statements on race and immigration that could be construed as hateful and conducive to the incitement of hate crimes,³¹ such groups could possibly be eligible for proscription, creating a risk that a government could use part 5.3B to suppress political opposition (including political parties in Opposition) and democratic freedoms. Civil liberties groups, academics, and lawyers have expressed legitimate concerns about the legislation's vague thresholds and potential to support government overreach, and the fact that significant criminal liability may attach to associative conduct through executive designation rather than judicial determination.³²

III HEADS OF LEGISLATIVE POWER

In its challenge, the White Australia Party argues that part 5.3B is unsupported by any head of legislative power, specifically that the external affairs, defence, nationhood, and corporations powers are not applicable.³³ It argues that the impugned provisions are indistinguishable from those in the *Communist Party Dissolution Act 1950* (Cth), held to be invalid in *Communist Party Case*.³⁴ In that case, the Australian Communist Party argued that the law dissolving the party was not validly supported by a head of legislative power.³⁵ The Commonwealth, however, argued that the law was supported by the defence and implied nationhood powers.³⁶ The High Court found that neither power supported the law, notably finding that the defence power was concerned with 'external enemies' and 'an extra-Australian nation or organism'.³⁷

However, in the current matter, the White Australia Party faces two main issues which support the Commonwealth's case. Indeed, the Commonwealth

30 *Criminal Code* (n 17) s 114A.3(2).

31 See, eg, Ali Mamouri and Feithi Mansouri, 'Pauline Hanson's No "Good" Muslims Comment Shows How Normalised Islamophobia Has Become in Australia', *The Conversation* (online, 25 February 2026) <<https://theconversation.com/pauline-hansons-no-good-muslims-comment-shows-how-normalised-islamophobia-has-become-in-australia-276639>>.

32 See, eg, Anne Twomey, Submission No 134 to Joint Committee on Intelligence and Security, Parliament of Australia, *Review of the Exposure Draft Legislation: Combatting Antisemitism, Hate and Extremism Bill 2026* (15 February 2026) 4; Law Council of Australia, Submission No 95 to Joint Committee on Intelligence and Security, Parliament of Australia, *Review of the Exposure Draft Legislation: Combatting Antisemitism, Hate and Extremism Bill 2026* (15 February 2026) 11; Danielle Ireland-Piper, Submission No 141 to Joint Committee on Intelligence and Security, Parliament of Australia, *Review of the Exposure Draft Legislation: Combatting Antisemitism, Hate and Extremism Bill 2026* (15 February 2026) 2.

33 White Australia Party, 'Plaintiff's Statement of Claim', Submission in *White Australia Party v Commonwealth*, M50/2026, 29 May 2026, [24]–[25].

34 *Ibid* [26].

35 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 8.

36 *Ibid* 20.

37 *Ibid* 194 (Dixon J); 259 (Fullagar J).

denied all the plaintiff's pleadings.³⁸ First, part 5.3B expressly relies on the external affairs power. Section 114A.1 provides that one of part 5.3B's objectives is to give effect to Australia's obligations under articles 20 and 26 of the *International Covenant on Civil and Political Rights* ('ICCPR') and articles 4(a) and 4(b) of the *Convention on the Elimination of All Forms of Racial Discrimination* ('CERD'). Articles 20 and 26 of the ICCPR require the prohibition of incitement of racial hatred and the protection of people against racial discrimination. Moreover, article 4(b) of CERD requires State parties to 'declare illegal and prohibit organisations ... which promote and incite racial discrimination', and to 'recognise participation in such organisations ... as an offence punishable by law'.

Article 4(a) of CERD also requires State parties to prohibit the provision of any assistance to racist activities, including their financing. A proportionality test applies with respect to the implementation of treaties: the law must be 'reasonably capable of being considered appropriate and adapted to implementing the treaty or convention obligations'.³⁹ Part 5.3B appears capable of being considered appropriate and adapted to implementing article 4 of CERD. Part 5.3B directly gives effect to the obligations under article 4 of the CERD by establishing a mechanism for the Commonwealth to prohibit and proscribe organisations that engage in or advocate for conduct constituting hate crimes distinguished by race or national or ethnic origin, and by criminalising membership of and participation in such organisations. The regime's scope – targeting organisations connected to racially motivated hatred and violence – directly corresponds with the subject matter of the treaty obligations it purports to implement, and its mechanisms are directed at achieving the specific outcomes mandated by article 4. The Commonwealth provisions are drafted in terms that closely track the language of article 4 of CERD. Indeed, Gageler CJ remarked during the proceedings, '[y]ou do not have to change, for example, very much to get to this treaty [CERD]'.⁴⁰

That said, as already noted, part 5.3B is not limited to conduct previously adjudged unlawful, and the Minister may rely on conduct that was not unlawful when engaged in.⁴¹ It also permits proscription of an organisation where the Minister considers it reasonably necessary to prevent a broad range of harms.⁴² Therefore, an important question is whether those features remain reasonably capable of being considered 'appropriate and adapted' to Australia's treaty obligations. Nonetheless, the external affairs power is likely to sustain the regime, but the breadth of the statutory provisions and the absence of a judicial determination make the conclusion less straightforward than the statutory statement of objects in section 114A.1 of the *Criminal Code* alone suggests.

38 Commonwealth of Australia, 'Defendants' Defence', Submission in *White Australia Party v Commonwealth*, M50/2026, 12 June 2026, [23]–[27].

39 *Commonwealth v Tasmania* (1983) 158 CLR 1, 131 (Mason J). See also HP Lee, 'A Federal Human Rights Act and the Reshaping of Australian Constitutional Law' (2010) 33(1) *University of New South Wales Law Journal* 88, 94.

40 *White Australia Party v Commonwealth* [2026] HCATrans 47 (9 September 2026) [7200] (Gageler CJ).

41 *Criminal Code* (n 17) s 114A.3.

42 *Ibid* s 114A.4(1)(b).

Second, while the High Court in the *Communist Party Case* found that the defence power did not support the impugned law dissolving the Australian Communist Party, the Court has since significantly expanded the defence power's scope in *Thomas v Mowbray* ('*Thomas*') in relation to its application to counterterrorism and the protection of the nation's people from domestic security threats.⁴³ The majority of the High Court held that the defence power extends to matters concerning national security and the risk of internal violence within Australia, and was not confined to external threats.⁴⁴ Given that part 5.3B imposes controls on organisations that incite hatred and violence towards vulnerable communities in Australia, the legislation may fall within the expanded post-*Thomas* conception of the defence power.⁴⁵

The link between hate group activity (particularly from neo-Nazi and white supremacist groups) and violence is well-documented,⁴⁶ and the High Court may find that the proscription of organisations that foment such violence is supported by the defence power, being proportionate to the purpose of protecting Australians from national security threats.⁴⁷ However, it remains open to the Court to confine the terrorism cases to their unique context and to decline to extend the defence power to threats that, while very serious, may not rise to the level of terrorism. That said, the validity of part 5.3B need not depend on resolving that issue if the external affairs power is sufficient in supporting the provisions.

IV THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION

The test for the implied freedom has evolved through a series of High Court decisions.⁴⁸ The foundational test was established in *Lange v Australian Broadcasting Corporation* ('*Lange*')⁴⁹ and subsequently refined in *McCloy v New South Wales* ('*McCloy*')⁵⁰ and *Babet v Commonwealth* ('*Babet*').⁵¹ It is a tripartite inquiry, with the Court inquiring:

1. Does the law effectively burden freedom of communication about government or political matters?

43 (2007) 233 CLR 307, 363 [146] (Gummow and Crennan JJ) ('*Thomas*').

44 Ibid.

45 See, eg, *White Australia Party* (n 1) [4]. See also *Criminal Code* (n 17) s 114A.1(1)(a).

46 See, eg, Julia Ebner, Christopher Kavanagh, and Harvey Whitehouse, 'Assessing Violence Risk among Far-Right Extremists: A New Role for Natural Language Processing' (2023) 36(7) *Terror Political Violence* 944; Legal and Constitutional Affairs References Committee, Parliament of Australia, *Right Wing Extremist Movements in Australia* (Report, December 2024) 17–34 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/RWExtremists23/Report>.

47 See proportionality test in *Thomas* (n 43) 359–60 [135] (Gummow and Crennan JJ).

48 Derick Luong, 'Criminalising "Globalise the Intifada" and "From the River to the Sea": Will the Constitution Allow It?' (2026) 45 *University of Queensland Law Journal* 167, 170.

49 (1997) 189 CLR 520, 567–8 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) ('*Lange*').

50 (2015) 257 CLR 178, 193 [2] (French CJ, Kiefel, Bell, and Keane JJ) ('*McCloy*').

51 (2025) 423 ALR 83 ('*Babet*').

2. Is the purpose of the law ‘legitimate’, in the sense of being compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?
3. Is the law reasonably appropriate and adapted to advance that aim?⁵²

A law will be constitutionally invalid where the first limb is satisfied and either the second or third limb is not.⁵³ The majority of the High Court in *McCloy* introduced a structured proportionality test for the third limb, which examined whether the challenged provision was: (a) suitable; (b) necessary; and (c) adequate in balance.⁵⁴ However, the majority of the High Court in the 2025 case of *Babet* resiled from this approach, characterising structured proportionality as one available ‘tool of analysis’ among others, rather than a mandatory part of the inquiry.⁵⁵ Judges who do not apply structured proportionality instead often employ what Gageler CJ has referred to as a ‘calibrated scrutiny test’, which considers various contextual factors.⁵⁶ Relevant considerations include whether the impugned law is content-neutral or content-based,⁵⁷ regulates communication that is ‘inherently political’ or only ‘incidentally’ restricts political discourse,⁵⁸ or targets specific categories of expression.⁵⁹ While some judges favour the more structured *McCloy* proportionality analysis, others prefer a less rigid, context-specific ‘calibrated scrutiny’ inquiry.⁶⁰

V DOES PART 5.3B VIOLATE THE IMPLIED FREEDOM?

A Burden on Political Communication

Part 5.3B ultimately criminalises various forms of association with a proscribed organisation. The criminalisation of political membership and association constitutes a significant burden on political communication by imposing criminal restrictions on freedom of political association – a form of political communication. The Commonwealth has properly conceded that part 5.3B burdens the implied freedom.⁶¹

B Legitimate Purpose

The objects of part 5.3B include protection of Australian communities ‘against social, economic, psychological and physical harm ... and from the promotion of

52 Ibid.

53 Ibid.

54 *McCloy* (n 50) 179.

55 *Babet* (n 51) [49] (Gageler CJ and Jagot J).

56 *Tajjour v New South Wales* (2014) 254 CLR 508, 580 [151] (Gageler J).

57 *McCloy* (n 50) 269 (Nettle J), 282 (Gordon J).

58 Ibid.

59 Ibid 238 [150] (Gageler J). See also Rosalind Dixon, ‘Calibrated Proportionality’ (2020) 48(1) *Federal Law Review* 92, 96.

60 Dixon (n 59) 92–3.

61 Commonwealth of Australia, ‘Defendants’ Defence’, Submission in *White Australia Party v Commonwealth*, M50/2026, 12 June 2026, [31].

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'.⁶² It is difficult to argue that part 5.3B's purpose of protecting the Australian community from harm, hate-motivated violence, and the promotion of violence is not legitimate and compatible with the maintenance of Australia's system of representative and responsible government.

In *Farmer v Minister for Home Affairs* ('Farmer'), which concerned an implied freedom challenge to aspects of the 'character test' in the migration context, the High Court held that the exclusion of people who were likely to 'incite discord' was a legitimate purpose to the extent it meant it would prevent harmful dissension or strife, including intimidation, vilification, or victimisation in Australia.⁶³ However, the Court also held that it is insufficient if only the feelings or sensitivities of the Australian community and its members were hurt or adversely affected.⁶⁴ In other words, Parliament cannot use its legislative power to curb political disagreement and debate inside Australia.⁶⁵ The purpose of legislation must be directed at preventing material harm to Australian communities, rather than for the mere promotion of social cohesion through controlling disagreement and debate.⁶⁶

Moreover, Stewart J in *Faruqi v Hanson* and the Full Court of the Federal Court of Australia in *Hanson v Faruqi* (currently under appeal to the High Court) found that sections 18C and 18D of the *Racial Discrimination Act 1975* (Cth) serve a legitimate purpose compatible with Australia's system of responsible and representative government.⁶⁷ The objective of those provisions, as found by Stewart J at first instance – 'to deter and eliminate, and thus protect members of the public from, racial hatred and discrimination' – satisfied the second limb of the implied freedom test.⁶⁸ As part 5.3B was enacted to achieve an analogous objective – protecting vulnerable communities from racially motivated hatred and violence – the Court would likely conclude that the provision pursues a legitimate purpose.

That said, the New South Wales ('NSW') Court of Appeal has struck down anti-protest laws in *Jarrett v New South Wales* ('Jarrett') on the basis that they violated the implied freedom.⁶⁹ *Jarrett* concerned NSW legislation introduced following the 2025 Bondi Beach attacks, which imposed geographic restrictions on public assemblies.⁷⁰ The Court found that these laws violated the implied

62 *White Australia Party* (n 1) [4] (Gageler CJ). See also *Criminal Code* (n 17) s 114A.1(1)(a).

63 (2025) 99 ALJR 1408, 1409 ('Farmer').

64 *Ibid.*

65 *Ibid.* See also *Jarrett v New South Wales* [2026] NSWCA 62.

66 *Farmer* (n 63) 1409.

67 *Faruqi v Hanson* [2024] FCA 1264 ('Faruqi'). See also *Hanson v Faruqi* [2026] FCAFC 96 (Perry, Kennett, and Bennett JJ) ('Hanson').

68 *Faruqi* (n 67) [342]–[345] (Stewart J). It should be noted that the Full Federal Court has found that sections 18C and 18D have a slightly different purpose in *Hanson* (n 67): 'protecting people against harm (in the form of serious offence, humiliation or intimidation) inflicted because of their race': at [147] (Perry, Kennett and Bennett JJ). See other examples where protection against discrimination and harm has been held as a legitimate purpose: *Clubb v Edwards* (2019) 267 CLR 171, 198 [60] (Kiefel CJ, Bell and Keane JJ), 235–6 [197] (Gageler J), 260–1 [258] (Nettle J); *ACTV* (n 14) 169 (Deane and Toohey JJ).

69 [2026] NSWCA 62 [143] (Bell CJ, Ward P, Free JA).

70 *Ibid.*

freedom, because their purpose – promoting ‘social cohesion’ and shielding community members from political expression deemed ‘upsetting, inflammatory and divisive’ – did not constitute a legitimate purpose.⁷¹ The Court’s reasoning establishes that protecting the community from emotional distress or offence occasioned by political demonstrations cannot, standing alone, justify their restriction.

The stated purpose of part 5.3B is broad, including the protection of the Australian community against ‘social, economic, psychological and physical harm’ in its scope.⁷² ‘Psychological harm’ is a particularly capacious concept.⁷³ That said, part 5.3B differs from the NSW laws invalidated in *Jarrett*: it is legislated for the legitimate purpose of preventing harms associated with ‘hate crimes’, not merely for the promotion of social cohesion and the prevention of distress or offence.⁷⁴ Part 5.3B’s purpose is not for the prevention of mere offence or hurt feelings, but also the prevention of material psychological harm – such as fear, intimidation, and mental trauma – resulting from the presence and activities of organisations connected to hate crimes.⁷⁵ So construed, the purpose of part 5.3B likely satisfies the *Farmer* requirement that the legislative aim be directed at preventing material harm to the Australian community.⁷⁶

C Reasonably Appropriate and Adapted

The third step of the test for the implied freedom is the most likely to be contested. The breadth of part 5.3B, the severity of the criminal consequences, and the discretion afforded to the Minister are particularly significant to the analysis that arises on the third limb. If the Court adopts structured proportionality analysis, it will inquire whether there is an ‘obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom’.⁷⁷ Several features of part 5.3B may indicate invalidity.

First, the proscription regime does not require the Minister to consider procedural fairness, does not require a judicial determination or that a member of the organisation be convicted of a ‘hate crime’, and permits proscription based on conduct that may have retrospectively been lawful.⁷⁸ The question that subsequently arises is whether this exceptional mechanism is ‘reasonably necessary’ when there are arguably existing offences in the *Criminal Code* and state legislation that likely capture these groups, such as the offences in sections 80.2A and 80.2B of the *Criminal Code* prohibiting the advocating of force or violence against groups distinguished on protected characteristics such as race,

71 Ibid [4], [143].

72 *Criminal Code* (n 17) s 114A.1(1)(a).

73 See, eg, *Farmer* (n 63) 1418 [20]; *Tame v New South Wales* (2002) 211 CLR 317.

74 *Criminal Code* (n 17) s 114A.1(1)(a).

75 Ibid.

76 *Farmer* (n 63) 1461 [247].

77 *McCloy* (n 50) 195 [2] (French CJ, Kiefel, Bell and Keane JJ).

78 *Criminal Code* (n 17) ss 114A.5(2)–(5).

religion, sex, and sexual orientation, carried out recklessly as to whether force or violence will occur.⁷⁹

The existence of alternative offences, which are arguably less onerous than part 5.3B as they do not criminalise associative conduct and do not involve executive proscription of organisations, may indicate that the proscription regime in part 5.3B is not ‘necessary’ in the structured proportionality sense. In *Lees v New South Wales*, the Supreme Court of NSW found that the impugned law was not reasonably ‘necessary’ due to the existence of similar, less onerous laws.⁸⁰ A similar analysis might apply to part 5.3B. If the harms the legislation seeks to prevent can be addressed through existing offences targeting harmful expression and incitement of hate, the additional step of proscribing political organisations and providing associational liability might not be reasonably necessary.

Second, the severity of the criminal consequences may not be adequate in balance against the burden on political communication. The offences attract significant criminal penalties, ranging from seven to fifteen years’ imprisonment.⁸¹ Part 5.3B criminalises not only directing or funding a proscribed organisation, but also membership.⁸² The breadth of the membership offence – which applies to any person who ‘intentionally is a member’ of a proscribed organisation, knowing it to be a prohibited hate group – captures individuals whose only connection to the organisation may be passive membership or political affiliation.⁸³ This is a departure from traditional criminal law doctrine, where liability typically attaches to some form of culpable conduct rather than mere status.⁸⁴

As a result, the High Court could find that a more narrowly written law could achieve the same legitimate purpose without imposing such a significant burden on political communication. The Minister’s discretion on matters ordinarily determined by a court after hearing evidence – such as whether conduct constitutes a ‘hate crime’ – represents a significant departure from traditional criminal law doctrine and process.⁸⁵ The scope of the Minister’s discretion, which does not require evidence, a hearing, or procedural fairness, may support the argument that part 5.3B is not reasonably adapted or appropriate.⁸⁶ It also sharpens the external affairs issue: if ministerial satisfaction can trigger serious criminal consequences on the basis of conduct that has not been judicially determined to be unlawful, the Court may scrutinise whether the statutory mechanism remains sufficiently connected to the treaty obligations relied upon.

79 See, eg, Andi Yu, ‘Neo-Nazi Thomas Sewell, 13 Others Face Court Over Alleged Camp Sovereignty Protest Camp Attack’, *ABC News* (online, 10 February 2026) <<https://www.abc.net.au/news/2026-02-10/thomas-sewell-neo-nazi-camp-sovereignty-melbourne-court/106326988>>. For the state legislation, see, eg, *Crimes Act 1900* (NSW) s 93ZAA; *Criminal Code Act 1899* (Qld) s 52A; *Crimes Act 1958* (Vic) s 195N(1).

80 [2025] NSWSC 1209, [152]–[157] (Mitchelmore J).

81 *Criminal Code* (n 17) s 114A.4(4).

82 *Ibid* s 114B.2.

83 *Ibid*.

84 Darryl Brown, ‘Federal Mens Rea Interpretation and the Limits of Culpability’s Relevance’ (2012) 75(2) *Law and Contemporary Problems* 109, 109.

85 *Ibid*.

86 *Criminal Code* (n 17) s 114A.4(5).

That said, several considerations support the validity of part 5.3B. The High Court has generally demonstrated a reluctance to question the political judgment and policy of Parliament on matters concerning freedom of expression and national security.⁸⁷ The *nature* of the burden – whether it is direct or incidental – will also be significant at the third step, as laws that directly target political communication require more compelling justification than those that burden communication only incidentally.⁸⁸ Controls on speech that directly target certain political content and impose a direct burden on political communication have been held by the High Court to require ‘compelling justification’.⁸⁹

In *Wotton v Queensland* (‘*Wotton*’), the High Court reasoned that laws which impose merely incidental restrictions on political communication, as opposed to those which directly and substantially restrict it, are less vulnerable to constitutional challenge.⁹⁰ On this, part 5.3B does not prohibit specific political communications; it criminalises associative conduct with respect to specific proscribed organisations. This may enable the Commonwealth to successfully argue that any burden on political communication posed by part 5.3B is incidental to the prevention of ‘hate crimes’ carried out by ‘hate groups’, making the legislation more amenable to the implied freedom.⁹¹ That said, it could be plausibly argued that the burden may be incidental in relation to some conduct, but direct in relation to political affiliation and organisational activity. The Court’s assessment will accordingly depend on how the law is characterised and on whether the statutory safeguards sufficiently distinguish dangerous organisational activity from repugnant but otherwise previously lawful political association.

D Judicial Deference and the Likely Outcome

It is well documented in academic literature that judges tend to defer to the legislature when applying the second and third steps of the implied freedom test, especially in the context of national security (and properly so, it is added).⁹² In *Comcare v Banerji*, Edelman J stressed that ‘freedom of political communication is not a trump over other values that are sought to be implemented in legislation that gives effect to government policy’,⁹³ whilst also noting that ‘in Australia the

87 Rebecca Ananian-Welsh and Nicola McGarrrity, ‘National Security: A Hegemonic Constitutional Value?’ in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 274.

88 *ACTV* (n 14) 169 (Deane and Toohey JJ); *Hogan v Hinch* (2011) 243 CLR 506, 555–6 [95] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

89 See, eg, *Levy v Victoria* (1997) 189 CLR 579, 647 [6] (Kirby J), citing *ACTV* (n 14) 143 (Mason CJ).

90 (2012) 246 CLR 1, 16 [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

91 *Ibid.*

92 Samuel Murray, ‘The Public Interest, Representative Government and the Legitimate Ends of Restricting Political Speech’ (2008) 43(1) *Monash University Law Review* 1, 3. For deference more generally, see also Dan Meagher, ‘The Brennan Conception of the Implied Freedom: Theory, Proportionality and Deference’ (2011) 30(1) *University of Queensland Law Journal* 119, 120–32; Murray Wesson, ‘Crafting a Concept of Deference for the Implied Freedom of Political Communication’ (2016) 27(2) *Public Law Review* 101, 103–7; Sarah Sorial and Shireen Morris, ‘Does it Exist? *LibertyWorks* and Australia’s Shrinking Implied Freedom of Political Communication’ (2023) 42(1) *University of Queensland Law Journal* 1, 12, 19–20; Evelyn Douek, ‘All Out of Proportion: The Ongoing Disagreement about Structured Proportionality in Australia’ (2019) 47(4) *Federal Law Review* 551, 552, 558–61.

93 *Comcare* (n 13) 442 [165] (Edelman J).

boundaries of freedom of speech are generally the province of parliament'.⁹⁴ The conception of free speech as a personal right does not apply in Australian law – freedom of expression in Australia is firmly demarcated by parliamentary policy and judgment.

Ultimately, while part 5.3B raises several complex constitutional and principled issues, it appears to have reasonable prospects of surviving the implied freedom challenge. The provisions are legislated for the legitimate purpose of preventing violence and harm, and are likely to be found to be appropriate and adapted for that purpose. Given that antisemitism, racial hatred, and ideological extremism are significant, pressing, and harmful problems in Australia, and there has been a rise in recent high-profile incidents of neo-Nazi violence and activity, the High Court very much could and *should* rule in favour of the Commonwealth and find the laws consistent with the implied freedom. This is especially so given the political sensitivity of the issues at hand – it should be expected that the High Court will be reluctant to question the policy and political judgment of Parliament on pressing national security threats that pose material harm to vulnerable communities in Australia. That said, while the Court will likely give significant weight (and properly so) to Parliament's assessment of the seriousness of the risks, that institutional respect to Parliament does not answer the constitutional issues created by the breadth of the statutory framework and the absence of procedural safeguards.

VI DOES PART 5.3B VIOLATE CHAPTER III?

The third ground of the White Australia Party's challenge concerns Chapter III of the Constitution, which vests the judicial power of the Commonwealth exclusively in the courts established under Chapter III.⁹⁵ The separation of powers doctrine, as illustrated in *R v Kirby; Ex parte Boilermakers' Society of Australia* ('*Boilermakers*'), provides that judicial power cannot be conferred upon, or exercised by, a body that is not a Chapter III court.⁹⁶ The corollary of this principle, as articulated in *Chu Kheng Lim v Minister for Immigration* ('*Lim*'), is that the adjudgment and punishment of criminal guilt is an exclusively judicial function.⁹⁷ The legislature cannot authorise the executive to impose what is, in substance, criminal punishment upon a person without a prior judicial determination of guilt.⁹⁸

As noted earlier, the Minister's decision to proscribe an organisation as a 'prohibited hate group' enlivens a range of offences in division 114B.⁹⁹ Proscription of an organisation does not require the organisation or its members to

94 Ibid 442 [164].

95 White Australia Party, 'Plaintiff's Statement of Claim', Submission in *White Australia Party v Commonwealth*, M50/2026, 29 May 2026, [34].

96 (1956) 94 CLR 254, 254 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

97 (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ) ('*Lim*').

98 Ibid.

99 *Criminal Code* (n 17) div 114B.

have been convicted by a court,¹⁰⁰ or that the conduct constituting a ‘hate crime’ be unlawful when it occurred.¹⁰¹ It is the Minister’s satisfaction, rather than a judicial determination, that enlivens criminal liability for the members of a proscribed group.¹⁰² The plaintiff’s argument is essentially that the Minister’s proscription of an organisation as a ‘prohibited hate group’ is, in substance, an exercise of judicial power.¹⁰³ In other words, proscription effectively adjudges the criminal guilt of the organisation and its members – or, at a minimum, imposes a punitive consequence – without a prior judicial determination.¹⁰⁴

If the High Court finds that the proscription regime is punitive in nature, the regime would be contrary to the *Lim* principle – that the adjudgment and punishment of criminal guilt is an exclusively judicial function that cannot be conferred upon the executive.¹⁰⁵ The threshold question, therefore, is whether proscription constitutes ‘punishment’. On one view, proscription does not itself impose punishment on any individual. It does not adjudge any person guilty of an offence, nor does it impose a sentence of imprisonment or fine.¹⁰⁶ Rather, it establishes a factum – the status of an organisation as a ‘prohibited hate group’ – which has legal consequences provided by law.¹⁰⁷ Those consequences can only be imposed upon individuals through the subsequent operation of the offences in division 114B, the elements of which must be proved in a court exercising judicial power in accordance with ordinary criminal processes.

On this characterisation, proscription is analogous to the legislative or executive declaration of a ‘criminal organisation’ considered in *Kuczborski v Queensland* (‘*Kuczborski*’), where the majority of the High Court held that such a declaration ‘creates a factum, in relation to an entity, which has consequences provided by law’ and does not amount to an impermissible direction to the courts.¹⁰⁸ *Kuczborski* involved a Chapter III challenge to Queensland’s ‘anti-bikie’ laws that were introduced with the objective of discouraging membership of the Hells Angels Motorcycle Club and similar organisations.¹⁰⁹ The joint judgment of Crennan, Kiefel, Gageler, and Keane JJ (as majority judges) emphasised that the declaration of an organisation as a ‘criminal organisation’ by regulation did not purport to adjudge or punish the criminal guilt of any person.¹¹⁰ Their Honours reasoned that the ‘only legal effect of a declaration is to establish an ingredient of an offence, the contravention of which must still be proved in the ordinary way’.¹¹¹

100 Ibid s 114A.4(4).

101 Ibid s 114A.4(2).

102 Ibid s 114A.4(5).

103 White Australia Party, ‘Plaintiff’s Statement of Claim’, Submission in *White Australia Party v Commonwealth*, M50/2026, 29 May 2026, [34]–[35].

104 Ibid.

105 *Lim* (n 97) 27 (Brennan, Deane and Dawson JJ).

106 See, eg, *Kuczborski v Queensland* (2014) 254 CLR 51, 73–4 [40] (French CJ) (‘*Kuczborski*’).

107 *Kuczborski* (n 106) 73–4 [40] (French CJ).

108 Ibid.

109 Ibid 51.

110 Ibid 120 [234] (Crennan, Kiefel, Gageler, and Keane JJ).

111 Ibid 120 [235].

A court trying an offence retained its ordinary judicial functions: finding facts, applying the law, and determining guilt.¹¹²

The majority further held that it was within the competence of the legislature to ‘determine and provide ... a contingency on the occurrence of which the court shall come under a duty to impose a particular penalty or punishment’,¹¹³ and that the ‘mere circumstance that the stipulated contingency may be established by the opinion of the legislature or executive does not mean that the stipulation is an exercise of judicial power’.¹¹⁴

However, the White Australia Party will expectedly seek to distinguish part 5.3B from the regime considered in *Kuczborski*. It could be argued that ‘hate crimes’ are, in general, less well-defined than the serious organised crime offences targeted by the anti-bikie laws.¹¹⁵ The Minister is determining that an organisation has engaged in conduct constituting ‘hate crimes’ (which can be difficult to define, as noted in Part II) without the safeguards of judicial process: the presumption of innocence, the rules of evidence, and the requirement of proof beyond reasonable doubt. This could be argued to be a more significant intrusion upon the judicial function than the declaration of a ‘criminal organisation’ in *Kuczborski*, where the underlying concept of ‘serious criminal activity’ was defined by reference to more well-established indictable offences punishable by at least seven years’ imprisonment.¹¹⁶

Notwithstanding these issues, the Chapter III challenge faces significant hurdles. The reasoning in *Kuczborski* supports the proposition that legislative or executive prescription of an element of an offence is ‘commonplace’ and ‘presents no threat to the institutional integrity of the courts’.¹¹⁷ As Hayne J observed, the ‘legislative prescription of an element of an offence’ by regulation is analogous to the legislative or regulatory prescription of what drugs may not lawfully be possessed or sold.¹¹⁸ A court adjudicating on the trial of a division 114B offence still performs characteristically judicial functions: it determines whether the accused was a member of the proscribed organisation, whether the accused had the requisite knowledge, and imposes punishment in accordance with law. The proscription itself does not impose punishment on any individual; it merely establishes a precondition for the operation of offences that must be proved through ordinary judicial processes. While part 5.3B does raise legitimate concerns about the scope of executive power and the absence of procedural safeguards, the Court is likely to hold that part 5.3B does not confer judicial power on the executive, consistently with the majority’s reasoning in *Kuczborski*.¹¹⁹

112 Ibid.

113 Ibid 121 [236], citing *Palling v Corfield* (1970) 123 CLR 52, 58 (Barwick CJ).

114 *Kuczborski* (n 106) 121 [237] (Crennan, Kiefel, Gageler, and Keane JJ).

115 Explanatory Notes, Serious and Organised Crime Legislation Amendment Bill 2016 (Qld) 4–5.

116 *Kuczborski* (n 106) 135 [291]–[292] (Bell J).

117 Ibid 96 [131] (Hayne J).

118 Ibid.

119 *Kuczborski* (n 106).

VII CONCLUSION

White Australia Party v Commonwealth may prove to be one of the most significant constitutional challenges to Commonwealth legislation in recent times. The case requires the High Court to consider the scope of the implied freedom in protecting political association and organisational activity, as well as the constitutional limits of executive proscription. These are issues of enduring importance. The plaintiff in the current matter, nevertheless, faces significant obstacles. First, part 5.3B is likely supported by the external affairs power as it implements Australia's obligations under article 4 of *CERD* to prohibit organisations that promote and incite racial hatred. Second, the High Court is unlikely to invalidate part 5.3B on the basis that it violates the implied freedom. Part 5.3B's purpose of protecting communities from hate crimes is a legitimate legislative purpose. Moreover, on the question of whether the laws are reasonably appropriate and adapted, the Court has typically been deferential to Parliament, especially on matters concerning national security, and the laws' purpose of protecting Australians from racially motivated hatred and violence is a pressing national security imperative.¹²⁰ Third, the plaintiff's Chapter III challenge is unlikely to succeed. Consistent with the majority's reasoning in *Kuczborski*, proscription under part 5.3B likely does not itself adjudge or punish the criminal guilt of any person; it establishes a factum which operates as an element of offences that must still be proved through ordinary judicial processes.

Nonetheless, part 5.3B of the *Criminal Code* raises substantial constitutional and principled concerns. The exclusion of procedural fairness, the retrospective operation, and the criminalisation of mere membership in a proscribed organisation may impose burdens that are not reasonably necessary or adequate in balance, particularly given the existence of alternative offences targeting harmful expression and incitement. Moreover, even if the primary legislation survives constitutional challenge, the Minister's decision to proscribe certain organisations under part 5.3B may be subject to future *Wotton*-style administrative law challenges. Ultimately, the question before the High Court is where to draw the line between the need to protect vulnerable communities from harm and the freedom to engage in political activity and association, notwithstanding its repugnant character. The High Court's decision will have ramifications for Australian society for years to come, extending well beyond the immediate fate of the White Australia Party.

120 Ananian-Welsh and McGarrity (n 87) 274; Murray (n 92) 3.