HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY **NO B75 OF 2024**

BETWEEN: **ANDREW LAMING**
Appellant

and

ELECTORAL COMMISSIONER OF THE AUSTRALIAN ELECTORAL COMMISSION
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

PART I INTERNET PUBLICATION

This outline is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

1. **Text**: The structure of s 321D addresses, first, whether the section is engaged (subss (1) – (4)). Then, if it is engaged, attention is directed to the content of the obligation imposed (subs (5)). The obligation – ensuring that particulars are notified – falls to be observed or defied only once (AS [10], [13]-[15], ARS [10]).

2. Subs (5) has a civil penalty attached. The Parliament has specified a maximum penalty. To prefer a construction which allows for the possibility of multiple contraventions in respect of one omission ignores that legislative decision (AS [15], ARS [10]).

3. The table in subs (5) uses the word "communication" as a noun, and to refer to the mode of communication rather than an individual receipt of information. The word should be given the same meaning in each line item (ARS [8]-[9]).

4. Subs (6) extends liability for contravention to accessories. It renders those persons liable if they have "engaged in the conduct or made the omission constituting the contravention". That focusses attention on the omission rather than on subsequent individual receipts of information after the omission has occurred.

5. The respondent's position – that the words "the communication" in line item 4 in the table in subs (5) refer to the communication contemplated in subs (1) – has a number of problems. It ignores that the word "communication" is being used in subs (5) as a noun to describe the thing containing the message. It ignores the fact that subs (1) does not use the word "communication". It requires reading subss (1) and (5) as jointly stating the norm of conduct, notwithstanding the lack of any compelling reason to depart from the apparently deliberate logical structure of s 321D (ARS [7]-[11]).

6. **Context (other provisions of the Act)**: Section 4AA defines "electoral matter" by reference to "matter communicated … for the dominant purpose of influencing the way electors [emphasis added] vote in an election". It directs attention to assessment on one occasion of the matter to be communicated. That raises no contextual basis for departing from the apparent plain meaning of s 321D (AS [23]-[26], ARS [19]-[21]).

7. More generally, the use of the word "communication" in other parts of the Act do not assist; particularly where, unlike in s 321D, the word is used as a verb. The presumption that a word will have the same meaning wherever used in an Act is a weak one (cf RS [21], [34]). It cannot override clear indicators of meaning within the statutory provision in question. One of those indicators will be the grammatical sense of the word.

8. **Context (civil penalties)**: The respondent points to certain domains (commercial and financial) where civil penalty provisions are accepted as being capable of being contravened very many times in the one course of conduct. The point has not been litigated in any of the cases cited by the respondent; rather, it has been assumed to be true. Those cases do not support the submission that there is a broad fabric of case law supporting what the respondent calls the "per person approach" applicable to *all* civil penalty provisions (RS[26], AS [37]-[38]; ARS [13]-[18]).

9. In any event, the cases cited by the respondent involve regulation of profit-making conduct where individual transactions – profit opportunities – are necessarily the primary focus, and, in respect of which, the wrongdoer is separately liable in damages to each person wronged. There is no private right of action for s 321D. As the respondent submits (RS[13]), s 321D is enacted against the long-accepted proposition that "the vote of every elector is a matter of concern to the whole Commonwealth". S 321D is concerned with vindicating the Commonwealth's interest in electors being able to hold communicators accountable. It does not constitute an avenue for electors to vindicate an individual interest in being properly informed (AS [37]-[38]).

10. The respondent's submission (RS[26]) that his preferred construction better addresses circumstances in which a powerful, wealthy participant anonymously communicates egregious or misleading electoral matter betrays a variety of problems with the respondent's approach. It seeks to have the 'per person approach' do what the Parliament's decision on maximum penalty expressly does: delimit the available penalty. It suggests that his maximal approach to penalties is necessary to address the truth of the content of the message when the legislation does not seek to regulate truth. It suggests, without identifying why, that what Parliament had in mind was the introduction of a materially different regime which focussed on participants with outsized resources (ARS [26]-[27]).

11. **Context (extrinsic material)**: The JSCEM report, the second reading speech and the explanatory memorandum indicate an intention to ensure that authorisation requirements are applied to all forms of communication. That is to be distinguished from an intention fundamentally to change the way in which failures to authorise are punished/deterred (ARS [4]).

12. **Difficulties with Full Court's analysis**: The appellant identifies in his principal submissions (AS[17] – [42]) the difficulties with the various factors taken into account by the Full Court in buttressing its decision. Those will be traversed briefly in oral argument.

13. Of particular concern is Perry J's statement, by reference to *Reckitt* and *ABCC v CFMEU*, that a regulator need not prove up each contravention because the Court can draw inferences as to the number of contraventions that have occurred. Neither case is authority for that proposition (AS [32]-[35]).

14. The point matters because it exposes a fundamental absurdity in the respondent's construction of s 321D: that (absent agreement of the kind identified in *ABCC v CFMEU*) the extent of penalty will be hamstrung by the extent to which the respondent can identify and obtain evidence from those who have received the message.

15. The much more likely legislative intention was that penalty could be analysed by reference not to the number of contraventions, but by reference to the mode of communication and the likely number of recipients. That gels with the object of deterrence because it makes it much more likely that the penalty will cohere with the likely result of such communication.

16. The other matter of particular concern is the proposition that some individuals would consider the stated maximum penalty a price worth paying to engage in the prohibited conduct. That is, again, to set at nought the legislative choice of a maximum penalty. The Parliament has made its judgment on that question. The Full Court was in no better position to come to a conclusion about what might constitute a sufficiently substantial penalty (AS [39]-[42], ARS [26]-[27])).

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