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 REPLY

PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II REPLY SUBMISSIONS

Introduction

2. The respondent submits that the appellant "does not explain how his alternative construction better advances the statutory purpose of protecting the informed choices of individual voters".[1] That issue only becomes relevant if there are two available constructions. The appellant's position is that there is only one available construction: the one for which he contends.

3. In any event, the respondent's position reduces to the notion that because a larger penalty will always be a greater deterrent, the construction which leads to a larger penalty is always to be preferred. That is at odds with the acknowledgement in the cases that the purpose of a civil penalty provision is to put a price on contravention sufficient to deter[2] (as opposed to some overweening amount which will go beyond mere deterrence).

Purpose, history, text and context

4. It may be accepted, as the respondent submits, that:

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[1] RS [10].

[2] As to which see RS [23].

(a) Part XXA and section 321D are intended to promote transparency at elections by assisting voters to identify the authors of communications;

(b) that objective is important to the functioning of representative democracy;

(c) section 321D was intended to provide a medium-neutral set of standards in place of the previous regime.

5. Those matters, however, do not displace the plain meaning of the text.

6. Similarly the solitary line from the revised explanatory memorandum to the effect that the penalty imposed "is commensurate with similar Commonwealth regulatory regimes" does not assist the respondent. It is not clear which Commonwealth regulatory regimes might be meant. Civil penalty regimes cover a broad range of subject matter and conduct, from requiring a person to supply their name and address to an inspector under migration legislation (60 penalty units)[3] to imposing a penalty for importing food which poses a risk to human health (120 penalty units).[4]

Statutory text

7. The respondent adheres to the approach in the Full Court that subsections 321D(1) and (5) are to be construed as components of a single concept. That is to be distinguished from the requirement of orthodoxy that each of them be construed in the context of the other.

8. The respondent's resort to parsing (at RS [20] – [22]) is effectively to avoid the clear signals that the structure of the provision sends, as well as to avoid the fact that "the communication" is used in a particular way throughout the table in subsection (5); that is, to refer to the thing that carries the message rather than each occasion on which someone receives the message.

9. The respondent argues that subsection (5), in using the words "the communication", plainly picks up the "communication event" mentioned in subsection (1). It is important to note that the text of subsection (5) itself – as distinct from the table – does not use the word "communication" at all. Within the table, "the communication" is plainly attached to the mode of delivery of the message rather than the event of communication. It is only by citing item 4 of the table in isolation that one can avoid such a conclusion.

10. On the plain text of the statute, the statutory requirement is met by a single act, that being when the required particulars are notified. Put another way, the requirement is met when the notifying entity includes the required particulars in the message to be communicated. The respondent does not explain why it logically follows that an omission to fulfil that

[3] Section 140XE of the *Migration Act 1958* (Cth).

[4] Section 9A(2) of the *Imported Food Control Act* (Cth).

requirement occurs multiple times. There is only one opportunity, before the message is communicated, for the requirement either to be fulfilled or ignored.

11. Ultimately, the respondent does not grapple with the appellant's argument regarding the structure of section 321D; that is, the structure indicates a separation between the concept of when the section is engaged, and the obligation that is imposed when the section is engaged. The structure and layout of the provision is part of the means of expression.[5]

12. The choice to separate the "gateway" and the "obligation" should be seen as a deliberate choice by the legislature to have those questions considered independently. That is not to deny that each needs to be read in the context of the other, merely to say that the legislature has plainly indicated that they ultimately address different, albeit related, questions.

Civil penalty context

13. The respondent submits that there is a general system of law governing civil penalties.[6] That body of law explains, in broad terms, the purpose of the civil penalty regime, particularly in contrast to broader purposes of criminal offence provisions. The civil penalty regime focusses on deterrence. Criminal punishment also pays attention to concepts of retribution.

14. The fact that contravention of section 321D is a civil penalty regime does not assist in resolving the issue on this appeal. As already submitted, the fact that one construction levies a much larger theoretical maximum does not resolve the question of what Parliament thought was a penalty sufficient to deter.

15. The respondent refers to statements in the cases that a civil penalty "must be fixed with a view to ensuring that the penalty is not such as to be regarded by [the] offender or others as an acceptable cost of doing business".[7] Those cases are about assessing the penalty within the bounds of what the legislature has already set as the maximum penalty. They do not assist in identifying the legislative intent behind section 321D.

16. It is also to be noted that civil penalties provisions occur in an array of statutes across different domains. The respondent does not demonstrate that there is some orthodoxy of a "per person approach to civil penalty provisions"[8] merely by demonstrating that in statutes directed towards commercial conduct and devoted to deterring profit making conduct, that approach has been taken. Those statutes are differently drafted.

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[5] As to which, see *Patman v Fletcher's Fotographics Pty Ltd* (1984) 6 IR 471 at 474-5, *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 89 NSWLR 633 at [105], *Re Collins; Ex parte Hockings* (1989) 167 CLR 522 at 525.

[6] RS [23].

[7] *Singtel Optus Pty Ltd v Austrailan Competition and Consumer Commission* (2012) 287 ALR 249 at 265 [62]; approved in *Australian Building and Construction Commission v Pattinson* (2022) 274 CLR 450 at 460 [17].

[8] RS [26].

17. At AS [37] – [38] (which the respondent does not address), the appellant identifies the difficulties in drawing a complete analogy between section 321D and prohibitions such as that in section 33 of the *Australian Consumer Law*, because they operate in different domains and because they are textually different. In addition to the points made there, it may be observed that section 321D seeks to deter people from expressing views without taking responsibility for them, rather than from earning illegitimate profits.

18. Because the person who fails to notify is not someone who – at least usually – will be chasing a financial gain, the amount which will make a failure to comply with section 321D economically irrational may well be much less. Because of those important differences, comparisons between civil penalty regimes in different fields of regulation require great care.

Definition of "electoral matter"

19. The respondent (at RS [38] – [40]) attempts to make good the proposition that, in respect of a single message communicated to a mass audience, the communicator has not one dominant purpose vis-à-vis the whole audience, but a separate dominant purpose vis-à-vis each member of the audience.

20. The patent unreality of it aside, that proposition demonstrates the unlikeliness of the respondent's preferred construction. The respondent, in pursing proceedings for civil penalties would be required to prove, in respect of each audience member, the characteristics of that audience member which demonstrated that the dominant purpose in respect of that audience member was to influence the way that audience member votes (assuming an entitlement to vote).

21. That stands alongside the more general problem which necessarily attends the respondent's position. On his construction, the extent of deterrence will depend upon the number of persons it proves to have actually seen the particular message. It will be much easier, therefore, to levy very large penalties for email communications than communications involving billboards or television advertisements.

22. The respondent criticises the appellant for "once again … wrongly ... assuming that 'the communication' means the message'". As indicated above,[9] that is not an assumption but a conclusion reached from applying orthodoxy and giving "the communication" a consistent meaning throughout the table in subsection (5). The respondent suggests that the appellant seeks to read those words in isolation,[10] before urging the Court to read item 4 of the table in isolation from the other items of the table. Then he focusses on the use of the definite article in the words "the communication" to suggest an reference back to subsection (1), which does not use the words "the communication".

[9] At paragraphs 8 and 9.

[10] RS [31].

Anomalies

23. At RS [42] – [43], the respondent embraces the view expressed by Perry J that, in circumstances where the precise number of recipients of the communication cannot be proven, the law authorises the Court to infer the number of contraventions and assess penalties accordingly. For the reasons set out in the appellant's principal submissions, the cases that her Honour cited do not support that proposition; indeed one of them[11] stands against it.

24. It is also contrary to basic notions of justice. Boiled down, it is to say that, in the absence of direct evidence of persons who had (say) viewed a television advertisement, the Court could accept evidence of ratings data, make a finding in respect of each hypothesised viewer as to the dominant purpose of the communication vis-à-vis that viewer, and then having come to a view about which communications had the necessary dominant purpose, infer a number of contraventions accordingly.

25. The likelihood that Parliament intended such a situation must be low.

Adequacy of maximum penalty

26. The respondent's position is effectively: the bigger penalty, the greater the deterrence, therefore the more likely that Parliament intended the respondent's construction. That is really to say that Parliament intended an unlimited maximum penalty. There are circumstances under other civil penalty provisions in which that has been the outcome and that is a matter of which Parliament may be taken to have been aware at the time of enacting section 321D, but other matters will also have been within the Parliament's awareness at that time.

27. Those will have included the fact that not every participant in the electoral system (in fact hardly any of them) is a cartoon billionaire only likely to be deterred by a practically unlimited financial penalty. The vast majority of participants are likely to be persons for whom a possible penalty of $25,200 is more than enough to deter. Given the lack of any opportunity to profit, a potential penalty of that amount is likely to make the failure to give particulars an economically irrational choice.

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[11] *ABCC v CFMEU* (2017) 254 FCR 68.