



HIGH COURT OF AUSTRALIA

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Details of Filing

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**IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY**

BETWEEN:

ANDREW LAMING
Appellant

and

**ELECTORAL COMMISSIONER OF THE
AUSTRALIAN ELECTORAL COMMISSION**
Respondent

ELECTORAL COMMISSIONER'S OUTLINE OF ORAL SUBMISSIONS

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT**(a) The scope of the dispute**

2. The central issue in this appeal is the meaning of “the communication” as it appears in item 4 of the table in s 321D(5) of the *Commonwealth Electoral Act 1918* (Cth) (the **Act**) (**Vol 1, Tab 3**). The Commissioner says that this refers back to the event described in s 321D(1) of electoral matter being “communicated to a person”. Mr Laming says that “the communication” refers to “the thing that carries the message” and not the event (AS [14(c)(iii)], AR [8]). On that basis he says that a contravention only occurred when he caused a Facebook post to be published, not when it was viewed by a person. The text, context, legislative history and purpose of the provision favour the former construction.

(b) Purpose (RS [11]-[16])

3. The purpose of the authorisation requirement in s 321D appears to be common ground between the parties (RS [11]-[16], AR [4]). That purpose finds direct expression in s 321C of the Act. This purpose reflects the long-recognised importance of protecting the informed vote of every elector in our system of representative democracy.
 - *Smith v Oldham* (1912) 15 CLR 355 at 358, 362-3 (**Vol 3, Tab 16**)
 - Act (No. 62), ss 323-327, 329-330, 335, 340 (**Vol 2, Tab 6**)
4. In securing this protection, s 321D responds to particular concerns which emerged following the 2016 federal election. The Joint Standing Committee on Electoral Matters (**JSCEM**) considered that legislative reform was needed to address the use of modern technology such as was used for bulk SMS messaging and “robo-calls” during that election campaign, and which exposed the inconsistent and outdated nature of the authorisation requirements which then existed.
 - JSCEM Report, v-vi, [1.6]-[1.9], [1.15], [2.1]-[2.4], [2.8]-[2.9], [2.18], [2.66]-[2.72], [2.100]-[2.108] (**Vol 5, Tab 30**)
 - 2RS, pp 3792-95 (**Vol 5, Tab 29**)

(c) Text (RS [17]-[22], [30]-[36])

5. Section 321D applies when “electoral matter” (the *thing* which is the subject of the provision) is “communicated to a person” (the *event* or *action* which is the subject of the provision) and one of paragraphs (1)(a) to (c) applies: s 321D(1). Mr Laming accepts that sub-s (1) is to be understood in this way. But he contends that the reference to “the communication” in item 4 of the table in sub-s (5) is a reference only to a “thing”, which must be considered separately from the event in sub-(1) (AR [8]-[12]). Such a reading is denied by a number of considerations.
6. *First*, that reading is inconsistent with the way in which “communicate/communication” and “electoral matter” are used in conjunction with one another throughout the Act. Used together in this way, it is impossible to read “communication” as a “thing” separate from the action of communicating or the event of a communication.
 - Act, ss 4AA, 286A, 287AB, 302A, 302CA, 302D, 302E, 302F, 305B, 314AC, 314B, Part XXA, 351, 383, 385A (**Vol 1, Tab 3**)
7. *Second*, to read “the communication” as referring only to “a thing” distinct from the event in s 321D(1) would confound the way in which ss 321D(1) and (5) work together.
8. *Third*, Mr Laming’s construction is inconsistent with the evident intention.
 - Revised Explanatory Memorandum, [44], [50], [62], [65], [70] (**Vol 5, Tab 33**)
9. *Fourth*, in any event, it is inconsistent with the ordinary meaning of “communication” to treat it as referring to a thing which is distinct from the event that it mediates.
 - Macquarie Dictionary, “communication”

(d) Context – civil penalties (RS [23]-[26], [42]-[46])

10. Parliament chose to replace the previous criminal offence provisions with a civil penalty regime. It thereby signified an intention that s 321D would protect the free and informed voting of electors by the effective deterrence of non-compliance with authorisation requirements and that this deterrence would be achieved through the application of the general law principles governing the imposition of civil penalties: *Pattinson* (2022) 274 CLR 450 [9], [14]-[18], [40]-[41], [66]-[68] (**Vol 3, Tab 11**); 2RS, p 3795 (**Vol 5, Tab 29**); Revised EM, p 2 [1] and [4], p 5 [4], p 24 [75] (**Vol 5, Tab 33**).
11. Understood in this context, s 321D does not give rise to any surprising consequences of the kind which Mr Laming advances. Rather, it can be seen to be consistent with ordinary provisions and principles recognised across numerous regimes.

12. *First*, contrary to AS [37]-[38] and AR [16]-[17], there is nothing surprising about the fact that, where a person communicates electoral matter to two or more persons, there would be two or more contraventions. Numerous civil penalty provisions regulate statements and representations by reference to what is conveyed to each individual recipient, rather than by reference to an anterior act of publishing.
13. *Second*, contrary to AS [26] and AR [20]-[21], [24], this does not create impossible evidentiary or practical burdens in civil penalty proceedings in relation to such contraventions.
14. *Third*, contrary to AS [28] and AR [26]-[27], a maximum penalty of \$25,200 in respect of each communication to a person in contravention of s 321D(5) does not lead to unfairness or absurdity. Far larger statutory maxima are commonly addressed without difficulty.
 - *Pattinson* at [3]-[5], [12]-[13] (**Vol 3, Tab 11**); *Reckitt-Benckiser* (2016) 340 ALR 25 at [1]-[3], [7], [85]-[87], [93]-[98], [145], [156]-[157] (**Vol 4, Tab 20**); *Coles Supermarkets* (2015) 327 ALR 540 at [1]-[5], [15]-[18], [82]-[85] (**Vol 4, Tab 19**)
15. On Mr Laming's construction every anonymous electoral publication — no matter how great the need for deterrence — would result in a single contravention. This means that there will be cases in which the statutory maximum for a single "publication" will be inadequate to achieve the deterrent purpose, as Mr Laming apparently accepts (AS [41], AR [27]). That cannot be what Parliament intended.
 - *McQuestin* [2024] FCA 287 (**Vol 4, Tab 23**)

Dated: 9 April 2025



Tim Begbie

Sarah Zeleznikow