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 SUBMISSIONS

PART I FORM OF SUBMISSIONS

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

PART II ISSUES PRESENTED BY THE APPEAL

2. Is there a contravention of section 321D of the *Commonwealth Electoral Act 1918* (Cth) (**CEA**) on each occasion a person causes the publication of electoral matter, or on each occasion when a person views electoral matter?

PART III SECTION 78B NOTICES

3. The appellant does not consider that any notice under section 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV DECISIONS BELOW

4. The decision of the primary judge on issues of liability and quantum is not reported. It has been published as *Electoral Commissioner of the Australian Electoral Commission v Laming (No 2)* [2023] FCA 917 (**PJ**).

5. The reasons of the Full Court are reported as *Electoral Commissioner of Australian Electoral Commission v Laming* (2024) 304 FCR 561 (**FCJ**). The Full Court did not publish separate reasons in respect of costs, those orders being made by consent on 8 October 2024.

PART V FACTS

6. The appellant was, between 6 December 2018 and 18 May 2019, a member of the House of Representatives and the administrator of a public Facebook page entitled "Redland

Hospital: Let's fight for fair funding". On 24 December 2018, 7 February 2019 and 5 May 2019 respectively, he posted content to the Facebook page.

7. The respondent alleged that each of the posts constituted 'electoral matter' within the meaning of section 4AA(1) of the CEA such that they were required to contain the particulars specified by section 321D(5). The appellant conceded below that if the posts were electoral matter, they did not include the required particulars such that he had contravened section 321D in respect of each post.

8. It was common ground before the primary Judge and the Full Court that the three posts had been viewed by (respectively) six, eight and 14 people (that is, a total of 28 people across the three posts).

9. The primary Judge (Rangiah J) held that the appellant contravened section 321D each time he made a post, rather than on each occasion any of the posts was viewed by a person.[1] The Full Court (Logan, Perry and Meagher JJ) allowed an appeal by the respondent, holding that section 321D was contravened on each occasion a post was viewed by a person, such that although the appellant had only authored and published three Facebook posts, he had nonetheless contravened section 321D on 28 occasions. Their Honours accordingly determined to re-exercise the discretion as to penalty and doubled the fine imposed on the appellant compared to that which had been imposed by the primary Judge.

PART VI ARGUMENT

Proper construction of section 321D

10. Section 321D identifies the circumstances in which a certain obligation is imposed and then defines the obligation. The obligation is a requirement that the person who creates a communication (**Communicator**) notify certain particulars in "the communication" identified by reference to the table to subsection (5).

11. The issue in the appeal can be put as follows. If the Communicator fails to notify particulars in accordance with subsection (5), does that person contravene that obligation:

    (a) once when the Communicator creates the communication and causes it to be conveyed (**Appellant's Construction**); or

    (b) each time a person (**Recipient**) receives the communication (**Respondent's Construction**)?

12. The task of construing section 321D involves examination of the text of the provision, its context, and its purpose. Authority demonstrates that the task is aided by considering the manner in which the legislature has expressed itself.[2] This Court has found

[1] PJ [214]-[236]

[2] Acknowledging that matters such as punctuation, grammar and layout cannot override central considerations such as the clear meaning of the text, read in context and with regard to purpose.

grammatical analysis useful in some circumstances.[3] Although punctuation has been deprecated as a relevant consideration in older cases, that is not sustained in more modern authority.[4] Choices as to the manner in which a provision is laid out provide similar guidance.[5]

13. In this case, the structure reveals a logical pathway involving two steps:

(a) defining when the obligation is imposed; and

(b) stating the content of the obligation.

14. Contrary to the reasoning in the Full Court, the structure of the provision makes it plain that those are distinct steps. In that connection it may be noted that:

(a) in defining when the obligation is imposed, subsection (1) focusses on:

(i) the fact that electoral matter has been communicated; and

(ii) certain characteristics of the electoral matter (including the manner in which it is communicated);

(b) subsections (2) to (4) regulate the circumstances in which section 321D applies;[6] and

(c) in stating the content of the obligation, subsection (5):

(i) identifies the requirement to notify particulars "set out in the following table";

(ii) identifies the precise nature of the particulars by reference to a kind of "communication";

(iii) in doing so, makes plain that the "communication" is a thing which displays a message (for example, a sticker, fridge magnet, leaflet etc) which is plainly distinguishable from each occasion on which the message is viewed by a Recipient.

15. As to when section 321D(5) will apply, a person only has one opportunity to ensure that the particulars are included prior to the communication being conveyed to a recipient. That is the occasion on which the "notifying entity" is obliged to "ensure that the particulars … are notified".

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[3] *Chew v The Queen* (1992) 173 CLR 626 at 630 per Mason CJ, Brennan, Gaudron and McHugh JJ. *Re Dingjian; ex parte Wagner* (1995) 183 CLR 232 at 362 per Gaudron J. See also *Meller v Low* (2000) 48 NSWLR 517 at [10] per Simpson J and *Hanlon v The Law Society* [1981] AC 124 at 198 per Lord Lowry.

[4] *Hanlon v The Law Society* [1981] AC 124 at 198 per Lord Lowry and see the discussion in P Herzfeld and T Prince, *Interpretation* (3rd Ed, 2024) at [5.50].

[5] *O'Neill v Williamson (No 2)* [2008] VSC 340 at [21] per Cavanough J

[6] In that section 321D(2) is intended to prevent a person who authorises a communication from avoiding liability by interposing an intermediary, and sub-sections (3) and (4) set out exceptions to the provision's application by medium and place or purpose.

16. It follows that it is counter-intuitive to conclude that section 321D imposes an obligation to ensure that the notifying particulars are included each time the communication is received by a Recipient as distinct from the one occasion on which the Communicator actually omits to meet the obligation.

Difficulties with the Full Court's analysis of section 321D

17. The Full Court considered that there were seven textual and contextual matters that required a different result. Those are identified in the reasons of Perry J.

18. *First*, her Honour reasoned that subsection (1) set out both a threshold and a component of the obligation set out in subsection (5):[7]

> … Subsection (1) is critical: it is the gateway provision in the sense that the substantive obligation imposed by s 321D(5) is engaged ***only*** where the electoral matter in question is "communicated to a person" for the purposes of s 321D(1) …
>
> … the reference to "the communication" in item 4 [of the table in subsection (5)] is plainly a reference back to the electoral matter communicated to a person in accordance with the gateway criteria in s 321D(1) … In other words, read together, ss 321D(1) and (5) define the scope and nature of a singular obligation imposed on a disclosing entity, being to ensure that matter is communicated to a person by such an entity contains the requisite particulars …
>
> (underlining added)

19. Her Honour did not set out any rationale for the conclusion that the words "the communication" in item 4 of the table was a reference to the electoral matter communicated to a person in subsection (1). There are obvious reasons why the opposite conclusion should be preferred, including that:

(a) the words "the communication" in subsection (5) are directly connected to the thing carrying the message rather than the abstract information communicated by the thing;

(b) contrary to her Honour's reasoning, there are strong contextual indications that the legislature intended subsections (1) and (5) to be regarded as addressing the related, but conceptually different questions of when the obligation is to be imposed and what the obligation actually is, those indications including:

(i) the separation of the concepts within the structure of the provision; and

(ii) the qualifications and explanations of subsection (1) contained in subsections (2) – (4).

20. If, as her Honour found, section 321D(1) was "a core component of the conduct which constitutes a breach of s 321D", one might expect it to *first*, regulate conduct in some way (it does not) and *second*, to be collocated with the sub-section that *does* regulate

[7] FCJ at [90].

conduct and impose obligations (it is not). There is simply no textual indication that subsection (1) is to act both as a "gateway" *and* as an element of the obligation imposed by subsection (5).

21. *Secondly*, her Honour rejected the reasoning of the learned primary judge that subsection (1) should be construed as applying to electoral matter "communicated to a person [or persons]" by reference to section 23(b) of the *Acts Interpretation Act 1901*.

22. The point is a red herring. It does not matter whether subsection (1) refers to receipt of a message by a single person or a number of persons. Once one person has received the message (assuming none of the exceptions in subsections (3) or (4) apply), the section is engaged. The relevant inquiry then is as to whether the notifying entity has notified the particulars in respect of the thing containing the message.

23. *Thirdly*, her Honour considered that the definition of "electoral matter" in section 4AA of the Act was a matter of context that gave support to the construction she preferred.[8] Her Honour focussed on section 4AA(2) which provided that for the purposes of determining whether matter is electoral matter, "each creation, recreation, communication of recommunication of matter is to be treated separately".

24. Her Honour reasoned that because one consideration in section 4AA(1) as to whether something constituted electoral matter was the dominant purpose for which it was being communicated, section 4AA "therefore addresses the possibility that the communication of information to one person may be for the dominant purpose of influencing the way that that elector votes … while the communication of precisely the same information to another person may be for a different dominant purpose".[9]

25. That logic works where the Communicator recreates the message many times with a view to conveying it to different individuals or groups on each of those recreations, but it does not work where the Communicator creates the message in contemplation of it being disseminated to multiple persons at once. As with the act of notifying particulars, the act of creating the message for dissemination to multiple persons at once can only logically involve one dominant purpose.

26. Her Honour's view requires one to accept that the Communicator's purpose shifts depending upon the identity of the Recipient, even though the Communicator may well have been unable to identify any particular Recipient at the time of creating the message. It also gives rise to absurdity. For example, where the electoral matter is contained in a television or newspaper advertisement which did not include the required particulars it would be necessary to inquire into the identity of each and every person who saw the advertisement to determine whether, in each case, the dominant purpose was to influence the way electors vote in a federal election such that there had been a contravention of section 321D(5).

27. *Fourthly*, her Honour adverted to the express objects of Part XXA:[10]

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[8] FCJ at [94]

[9] FCJ at [94]

[10] FCJ at [95]

> … this construction would best promote the object of Pt XXA as set out in s 321C "to promote free and informed voting at elections" including by enhancing transparency so as to allow voters to know who is communicating electoral matters …

28. The effect of her Honour's reasoning in that connection is that the object will be more effectively promoted by Respondent's Construction because the penalties will be much greater. Obviously penalties will be greater under the Respondent's Construction but the absurdity of the theoretical maximum penalties tells strongly against a legislative intention consistent with the Respondent's Construction.

29. On the Appellant's Construction, a contravener will be liable for a penalty of up to $25,200. If the contravention is proven at a trial, the contravener will usually be liable for the Commissioner's costs. That is hardly a trivial outcome and her Honour did not point to any basis for concluding that a penalty of $25,200 is not a sufficient deterrent even in cases involving a very large number of Recipients.

30. *Fifthly*, her Honour pointed to anomalies that would arise in the operation of the section:[11]

> … For example … if twenty separate emails were sent by a notifying entity from an anonymised address to twenty electors … there would be twenty separate communications … However, on the primary judge's construction, there would only be one communication to a person and, therefore, only one contravention … if precisely the same text were sent instead to the same twenty electors via a group email.

31. Against this, her Honour acknowledged an anomaly identified by the learned primary judge, that being:[12]

> … a person who took out an advertisement containing electoral matter in a national newspaper to have engaged in only one contravention, but for a person who published electoral matter to ten identifiable people to have engaged in ten contraventions …

32. Her Honour rejected that as a competing anomaly, instead accepting the respondent's submission that:[13]

> … in such cases the Court does the best that it can by reference to the evidence and the drawing of inferences, to ascertain the number of contraventions which have occurred and, if it cannot, finds that the precise number cannot be ascertained …

33. Her Honour cited the decisions of the Full Court in *ACCC v Reckitt Benckiser (Australia) Pty Ltd* (**Reckitt**)[14] and *ABCC v CFMEU*[15] in support of that statement. Neither case in

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[11] FCJ at [98]

[12] PJ at [232], FCJ at [81]

[13] FCJ at [99]

[14] (2016) 340 ALR 25.

[15] (2017) 254 FCR 68.

fact supports that statement. The third case on which her Honour relied was that of *ACCC v Birubi Art Pty Ltd (in liq) (No 3)*,[16] but that was a decision at first instance relying on *Reckitt*.

34. The passages from *Reckitt* cited by her Honour are focussed on application of the course of conduct principle. It is apparent from the reasons at first instance that the number of contraventions was never established by evidence or really ascertained at all.[17] The possible number of contraventions was hypothesised as being perhaps "those 5.9 million consumers who bought the product and were likely to be misled".[18]

35. Similarly, *ABCC v CFMEU* was a case in which the number of contraventions was not identified and the parties had indicated their contentedness to proceed without identifying the precise number of contraventions. The Full Court held that the Court could not impose a single penalty in respect of multiple contraventions of the relevant statutory provision unless by agreement of the parties, but that it may be appropriate to do so with the agreement of the parties where the pleadings and facts reveal that the total number of contraventions cannot be ascertained.

36. Essentially, her Honour's reasoning under this heading was that the absurdities of the Respondent's Construction can be cured by techniques that, on the authorities, are only available in certain circumstances. On a fully contested trial of such contraventions, those techniques are not available.

37. *Sixthly*, her Honour drew an analogy between section 321D and civil penalty provisions in respect of prohibitions such as that in section 33 of the *Australian Consumer Law*. Taking section 33 of the ACL as an example, there are at least three material distinctions to be drawn with section 321D:

    (a) it is cast in terms of a negative obligation to refrain from doing something whereas section 321D imposes a positive obligation;

    (b) there is a private right of action in respect of contraventions of section 33 which must be an important matter of context in construing that provision and thereby working out what constitutes a contravention of it (because the provision falls to be construed by reference to the loss suffered by particular individuals), but section 321D does not found any private right of action;

    (c) section 33 regulates the truth and accuracy of statements of conduct, whereas section 321D is conspicuously limited to identifying the Communicator.

38. It may also be noted that provisions such as section 33 of the ACL are stated in quite simple terms. In contradistinction to that, section 321D adopts the more complex structure already identified above. It would have been easy, if the legislature intended section 321D to operate in the same way as provisions such as section 33 of the ACL, to draw it in similar terms.

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[16] (2019) 374 ALR 776.

[17] *Reckitt* at [24].

[18] *Ibid*.

39. *Finally*, her Honour warned that if the Appellant's Construction were correct:

> … [that] would have the result that the same maximum penalty of $25,200 for a natural person would apply irrespective of whether or not the communication was, for example, to one person or 500,000 electors …

40. Her Honour then asserted that:

> … it is difficult to reconcile that construction with the primary purpose of the civil penalty regime, being general and specific deterrence. An individual might well consider that payment of the maximum penalty would be a small price to pay for the publication of a post on social media that reaches potentially hundreds of thousands, or even millions, of electors.

41. Her Honour did not have any basis past, perhaps, some kind of judicial notice, for forming that view. If judicial notice can be taken of such a fact, it can also be taken of the fact that, whilst there are some in the community who would not miss $25,200, the great majority of them, including a substantial number of participants in the electoral process, would find that a very substantial amount to part with.

42. For all but a handful of participants in the electoral process the publication of electoral matter is not connected to any financial gain. It is difficult to fathom why, even for a publication disseminated very widely, a $25,200 penalty would not be a significant incentive to include one's name and address in a communication of electoral matter.

PART VII ORDERS SOUGHT

43. The appellant seeks the following orders:

(a) the appeal be allowed;

(b) paragraphs 1 and 4 – 6 of the orders made by the Full Court of the Federal Court of Australia on 23 August 2024 be set aside and instead it be ordered that:

(i) the appeal to that court be dismissed;

(ii) each party bear his own costs of the appeal, cross-appeal and notice of contention in that court;

(c) the respondent pay the appellant's costs of this appeal.

PART VIII ESTIMATE OF TIME

44. The appellant estimates that he will require one hour to present his oral argument.

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ANNEXURE TO APPELLANT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1	*Commonwealth Electoral Act 1918* (Cth)	Compilation no.68 (8 March 2019 to 30 November 2020)	ss 4AA, 321C, 321D	Act in force at the date of the last Facebook post in issue. The compilations applicable to the previous posts (nos.66 and 67) are not materially different.	5 May 2019 (date of the last Facebook post)