



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
SYDNEY REGISTRY

BETWEEN:

JOHN SHI SHENG ZHANG

Plaintiff

and

THE COMMISSIONER OF POLICE

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First Defendant

JOHN MOTTLEY

Second Defendant

JOSEPH KARAM

Third Defendant

MICHAEL ANTRUM

Third Defendant

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**ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA
(INTERVENING)
OUTLINE OF ORAL SUBMISSIONS**

Part I:

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

Part II:

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The dispute regarding the purpose of the Provisions

2. The parties disagree on the purpose pursued by the Provisions and its legitimacy. That disagreement is largely informed by the differing construction of the Provisions they each contend for.

3. The Attorney-General for the State of South Australia (intervening) (South Australia) submits that if, as the Plaintiff contends, the Provisions capture inadvertent failures to disclose foreign influence and in that extended operation cannot be understood to pursue the purpose identified by the Commonwealth, then the Provisions are capable of being understood as serving the purpose of promoting transparency with respect to engaging in political or governmental processes or exercising democratic or political rights or duties. South Australia submits that such a purpose is legitimate (SA [5], [32]).

10 **Provisions that have the *effect* of preventing non-transparent communications may be understood as pursuing the *purpose* of promoting transparency**

4. In identifying the purpose pursued by the Provisions as “the prevention of any potential undisclosed or non-transparent foreign influence over Australian political or governmental processes, or over Australian democratic political rights or duties, regardless of whether that influence is malicious, harmful to, or in conflict with, the interests of Australia” the Plaintiff has impermissibly conflated the effect of the Provisions with their purpose (SA [8]) and has focused unduly on the prohibitory effect of the Provisions.
5. The Provisions have the *effect* of encouraging undisclosed or non-transparent communications to occur in a manner that is open and that gives confidence to the parties to such communications that they have been apprised of relevant information.
- 20 6. To the extent that the Provisions have the extended operation contended for by the Plaintiff, the effect of the prohibition contained in the Provisions may be regarded as inherently more likely to encourage transparent conduct than to discourage that conduct altogether.

The promotion of transparency with respect to engaging in political or governmental processes or exercising democratic or political rights or duties is legitimate

7. The legitimacy of a purpose of promoting transparency by requiring the attribution of influence in an electoral context is supported by authority (SA [21]-[27]); *Smith v Oldham* (1912) 15 CLR 355 (JBA Part C, Vol 5, Tab 31, p2120); *Harper v Canada (Attorney-General)* [2004] 1 SCR 827 (JBA Part D, Vol 2, Tab 44, p3153).
- 30 8. There is no reason in principle why a law that requires the attribution of influence beyond an electoral context, and serves the purpose of promoting transparency in

relation to engaging in political or governmental processes, or exercising democratic or political rights or duties, might not equally serve a legitimate end (SA [27]-[31]).

9. Just as electors may be influenced in their electoral choices if they know the “real circumstances” underlying assertions of fact, opinion and advice, including the source of those assertions, so too may Ministers and other executive decision-makers. An understanding of “who stands behind” a particular communication may also be seen to be important to the representative functions performed by Members of Parliament and political parties.
10. It is unclear on what basis the Plaintiff suggests that the concept of disclosure of influence found in the Provisions may be said to be “nebulous” (PR [13]); on the contrary, the Provisions are expressly tied to conduct that may “influence a political or governmental process of the Commonwealth a State or a Territory” or “the exercise ... of an Australian democratic or political right or duty”.
11. Even if the significance of a transparency purpose was to lessen the further one moved away from, for example, an electoral context (PR [13]), it does not follow that the purpose might thereby become illegitimate. The test of compatibility is only concerned with identifying whether a purpose *impedes* our system of representative and responsible government. Any lessening of the importance of a transparency purpose would only become relevant to the third stage of the inquiry, the adequacy of balance stage.
12. Far from impeding our system of representative and responsible government, a purpose that promotes transparency of foreign influence in connection with political or governmental processes, or the exercise of democratic or political rights or duties, preserves and enhances our constitutionally prescribed system of government. That purpose is necessarily legitimate (SA [32]).

Dated: 7 April 2021

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M J Wait SC

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