



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 Ruddick

Plaintiff

and

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Commonwealth of Australia

Defendant

**OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW
 SOUTH WALES (INTERVENING)**

Part I: Publication

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

Part II: Argument

Question 2: The Limiting Words

- 20 2. *The limiting words in ss 7 and 24 are not engaged in this case.* Subject to constitutional limits such as those imposed upon the formal expansion of its powers (in s 128) and the requirement imposed by the limiting words in ss 7 and 24 that it be “directly chosen by the people” of, respectively, the States and the Commonwealth, the national Parliament is free to exercise its enumerated powers in a way that reinforces its legitimacy by securing and improving its political authority and standing amongst those people. To exercise power in that way, as was the case here, does not engage the limiting words in ss 7 and 24 because it is intended to reinforce Parliament’s legitimacy amongst the people by ensuring they make a true electoral choice: **DS [14], [20]**.

30 **Question 1: The Implied Freedom**

3. *What is required to justify a law turns on the circumstances of the case.* Whether evidence is required to justify a law that burdens the implied freedom of political

communication—and what kind—turns upon the circumstances of the case: Unions NSW v New South Wales (2019) 264 CLR 595 (“**Unions NSW**”) at [117] per Nettle J. This is simply to apply the common law method, which illuminates the soundness of general principles with reference to specific factual scenarios.

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4. ***The onus may be discharged by reference to the facts of the case.*** The facts of the case can themselves illustrate the soundness of the general principle at issue and speak to its justification. That is because those facts can be demonstrative of the very mischief the legislation is directed to solve and, when considered in the light of assumptions inherent in the society of which this Court forms a part, render the solution ‘obvious’: see eg Unions NSW cf [101] per Gageler J, [117] per Nettle J; Comcare v Banerji (2019) 267 CLR 373 at [24], [36] per Kiefel CJ, Bell, Keane and Nettle JJ; Clubb v Edwards (2019) 267 CLR 171 at [82] per Kiefel CJ, Bell and Keane JJ. This is also a part of the reason why a lack of direct evidence is not always decisive: Brown v Tasmania (2017) 261 CLR 328 at [288] per Nettle J.
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5. ***The onus may be discharged by reference to factual possibilities as opposed to factual certainties.*** It is not always possible for Parliament to compile a complete empirical picture of a problem before legislating to address a mischief: **DS [26]**. The facts giving rise to a case can reveal that the law is justified precisely because it represents a reasonable response to a subject-matter in which there are uncertainties and multiple possible outcomes: Palmer v Western Australia (2021) 95 ALJR 229 at [76]-[80] per Kiefel CJ and Keane J: **DS [30]**.
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6. ***Perfect information was not required in the present case.*** That approach to justification assists to reveal why the impugned provisions serve a legitimate purpose and are suitable, necessary and adequate in their balance. The exercise should take into account the difficulty in obtaining perfect information as to the reason for the confusion.

Dated: 14 February 2022



M G Sexton SC SG

M W R Adams