

NOTICE OF FILING

Details of Filing

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Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Federal Court of Australia
District Registry: Victoria
Division: General

No: VID545/2021

DENNIS JAMES FISHER

Applicant

COMMONWEALTH OF AUSTRALIA and others

Respondents

FIRST RESPONDENT'S OUTLINE OF ARGUMENT

(filed pursuant to order 1 of the Honourable Court dated 13 February 2023)

Question 2: RS B to I¹

1. The Applicant and other represented persons do not enjoy a right to a more limited extent than non-Indigenous men by reason of a provision of the *Social Security Act 1991* (Cth) (**SSA**), within the meaning of s 10(1) of the *Racial Discrimination Act 1975* (Cth) (**RDA**).

“by reason of ... a provision of a law”: RS C to E; Reply A to C²

2. A disparate impact of the pension age on the Applicant and other represented persons arising from an average life expectancy gap between Indigenous and non-Indigenous men is not “by reason of” a provision of the SSA: **RS C to E**.
3. Properly construed, s 10(1) of the RDA is concerned with a provision of a law that distinguishes between people of a particular race, and other people, and confers different entitlements or restrictions on each cohort affecting their rights. The distinction, caused by the law, must divide people of a particular race from others. The distinction between races may be made expressly in the impugned law. It may also be caused indirectly, through the use of a neutral criterion deliberately chosen to target a particular race, or which has the effect of distinguishing a particular race from others.
4. Section 10(1) is not engaged by provisions which adopt a neutral criterion for enhancing or restricting people’s rights simply because, based on statistical averaging, a “disparate impact” on people of a particular race arises from factors operating outside the law. The Applicant relies on the connection between race and the life expectancy gap between Indigenous men of certain ages and other

¹ “RS B to I” = Respondent’s Submissions dated 29 August 2022, sections B to I.

² “Reply A to C” = Applicant’s Reply Submissions dated 10 October 2022, sections A to C.

men in the same age cohort. The connection between race and life expectancies is not disputed, but it does not trigger s 10(1) of the RDA.

5. The impugned provisions of the SSA do not through operation or effect create a distinction between a particular race and others. They merely distinguish between men who are above and below a certain age.
6. The Commonwealth's construction of s 10(1) is supported, and the Applicant's construction is not supported, by:
 - a. the text of s 10(1), properly construed in its context and in light of its purpose and the consequences of the Applicant's construction: **RS D; Reply A5, A6, B;**
 - b. case authorities on s 10(1), including the High Court decisions in *Gerhardy v Brown*, *Western Australia v Ward*, *Mabo v State of Queensland*, and *Maloney v The Queen*, and intermediate appellate and first instance decisions: **RS E.1, E.2, E.4; Reply A1-A4, A7, C;**
 - c. international and other jurisprudence: **RS E.3; Reply [33]-[34].**

***“enjoy a right to a more limited extent”*: RS F to I**

7. A disparate impact of the pension age on the Applicant and other represented persons arising from an average life expectancy gap between Indigenous and non-Indigenous men does not mean that they “enjoy a right to a more limited extent” than non-Indigenous men: **RS F to I; Reply D to F.**
8. First, the relevant right for the purpose of s 10(1) is the right to social security. The right to social security comprises a range of benefits which protect against circumstances of economic vulnerability that are not limited to old age. The right to the age pension conferred by the impugned provisions of the SSA cannot be considered in isolation from the broader range of benefits that make up the right to social security, having regard to the ordinary meaning of social security, the social security network which is actually in existence in Australia, the problems which arise for the provisions of the SSA if the right to social security is not considered consistently with its ordinary meaning, and the understanding of social security in international jurisprudence. As the Applicant's claim is presented, the Court cannot be satisfied that there is any more limited extent of enjoyment of the right to social security: **RS G; Reply D.**
9. Second, even considered in isolation, enjoyment of the right to the age pension is not assessed by the duration over which it is held. The provisions of the SSA, their legislative history, and the international jurisprudence demonstrate that its purpose is to support the economic needs of people after the age set by

Parliament for their anticipated working lives to come to an end; and not to provide pension benefits by reference to anticipated life expectancy. The Applicant's assessment of the enjoyment of the right to receive an age pension by the duration over which it is received has anomalous and far-reaching consequences. Again, as the Applicant's claim is presented, the Court cannot be satisfied that there is any specific limitation on the extent of enjoyment of the right to social security: **RS H; Reply E.**

10. Third, and in any event, the life expectancy data on which the Applicant bases his case does not provide an adequate evidential basis to conclude that the Applicant and other represented persons enjoy the right to a more limited extent than their non-Indigenous counterparts. The Applicant's alternative submission that s 10 of the RDA is engaged by s 3 and item 1 of Schedule 11 of the *Social Security and Other Legislation Amendment (Pension Reform and Other Budget Measures) Act 2009* (Cth), which increased the pension age from 65 to 67 for all Australians, does not overcome the evidentiary issues addressed in RS I, and must fail for the same reasons set out in RS D to H as a matter of legal principle: **RS I; Reply F and H.**

Question 3: RS J

11. If the answer to question 2 is no, then question 3 does not arise. If question 3 arises, the Court's answer would need to extend to Indigenous men born in 1957 generally, including those who presently satisfy the qualification and payability criteria for the age pension, and those who may do so in future before turning 67. Section 10(1), in terms, operates on the enjoyment of a right by "persons of the first-mentioned race", not a subset of those persons: **RS J; Reply H.**

Question 1: RS K

12. The Applicant and other represented persons do not have "the same interest" in the proceeding, within the meaning of r 9.21 of the *Federal Court Rules*. The interests of such persons depend on them making a future claim for the age pension and satisfying the requisite criteria at that future time. They do not come within the rule for the same reasons as held by the High Court in *Campbells Cash and Carry v Fostif*: **RS K; Reply G.**

Date: 16 February 2023

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