

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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DENNIS JAMES FISHER

Applicant

COMMONWEALTH OF AUSTRALIA and others named in the schedule

First Respondent

Applicant's outline of argument¹

(filed pursuant to order 1 of the Honourable Court dated 13 February 2023 and 14 February 2023)

The applicant and the represented persons

1. The applicant is an Indigenous person who would be qualified to apply for and receive the age pension, but for his age (**SC [8]-[14]**). This is because the *Social Security Act* requires that he be 67 (**the pension age**) to qualify for an age pension (**AS [17]-[18]**). The applicant represents Indigenous men who, like him, also turned 65 in 2022 and would qualify for the age pension, but for the requirement to attain the pension age (**SC [19]**).

- *Social Security Act 1991* (Cth), ss 23(5A), 43 (**the impugned law**) (**JBA T124**).

The relevant human right

2. The age pension has been a discrete and established form of social security in Australia since 1908 (**AS [20]**). The right to apply for and receive the age pension is a human right which is the subject of s 10 of the *Racial Discrimination Act* (**the s 10 right**) (**AS [8]-[12]**, **Reply [65]-[75]**).

- *Racial Discrimination Act 1975* (Cth), s 10 (**JBA T117**); *International Convention on the Elimination of all Forms of Racial Discrimination*, Art 5(e)(iv) (**JBA T171**); *Universal Declaration of Human Rights*, Art 22 (**JBA T180**); *International Covenant on Economic, Social and Cultural Rights*, Art 9 (**JBA T173**).

The life expectancy gap

3. The Life Tables published by the Australian Bureau of Statistics (**ABS**) are official statistics that establish that the life expectancy of Indigenous men in Australia who turn 65 in 2022 will be at least three years less than the life expectancy of their non-Indigenous counterparts (**SC [22]-[24]** and **[26]-[27]**).

¹ Referring to the Special Case (**SC**), the applicant's submissions (**AS**) and reply submissions (**Reply**).

- Life Tables for Aboriginal and Torres Strait Islander Australians, (**SC**, “**SC-01**”, Table 1, Table 18).
 - *Australian Bureau of Statistics Act 1975* (Cth), s 6; *Census and Statistics Act 1905* (Cth) ss 8, 10, 11, 14 and 15; *Appropriation Act (No 1) 2022-2023* (Cth), Sch 1 (Services for which money is appropriated, Australian Bureau of Statistics).
4. The life expectancy gap and the more limited enjoyment is a function of race and is a result of the structural, social, cultural and other determinants of health of Indigenous persons (**SC [29]-[91]**),
 5. A consequence of the life expectancy gap is that the applicant and the represented persons, as Indigenous persons, enjoy the s 10 right to a more limited extent than non-Indigenous persons in Australia.

The proper approach to section 10

6. Section 10 is concerned with the practical *operation and effect* of the impugned law on, or in relation to, the relevant right (**AS [34]-[48], Reply [7]-[11]**).
 - *Western Australia v Ward* (2002) 213 CLR 1, 99 [105] (Gleeson CJ, Gaudron, Gummow and Hayne JJ) (**JBA T68**); *Maloney v The Queen* (2013) 252 CLR 168 at [11] (French CJ), [76], [84] (Hayne J), [148] and [161] (Kiefel J), [204] (Bell J), [338] (Gageler J) (**JBA T34**); *Sahak v Minister for Immigration and Multicultural Affairs* (2002) 123 FCR 525, [6]-[9] (North J) (**JBA T57**); *Hamzy v Commissioner of Corrective Services NSW* (2022) 400 ALR 507, [23]-[29], [39] (Basten J) (**JBA T26**).
7. There is no principled basis for reading down, or reading any limitation into, the operation of s 10 once it is established on the balance of probabilities that, by reason of a provision of a law, persons of a particular race or ethnic origin etc. enjoy a right the subject of s 10 to a more limited extent than persons of another race or origin etc. (**Reply [5], [12]-[23]**).
8. There may be circumstances where, in relation to a facially neutral law, it may be appropriate to determine whether the more limited enjoyment of the relevant right has a sufficient connection to race, ethnic origin etc to warrant the application of s 10. That is not an issue in this case as the more limited enjoyment of the s 10 right is a function of race (**SC [29]-[91], Reply [24]-[28]**).
 - Cf. *Maloney v The Queen* (2013) 252 CLR 168, [203]-[204] (Bell J) (**JBA T34**).
9. There is no anomaly in s 10 applying to a facially neutral law such as the impugned law. That is so because the impugned law, in treating unequals equally, is inconsistent with the right to equality before the law protected by s 10.

- *Convention*, Art (2)(1)(c) (**JBA T171**); *Maloney v The Queen* (2013) 252 CLR 168, [10] (French CJ), [299] (Gageler J) (**JBA T34**).
- *Street v Queensland Bar Association* (1989) 168 CLR 461, 571 (**JBA T60**); *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 478 (Gaudron and McHugh) (not in JBA) (a law is discriminatory if “it treats equally things that are unequal”); *Gerhardy v Brown* (1985) 159 CLR 70, 128-129 (Brennan J) (**JBA T23**).

10. The applicant’s approach to s 10 is consistent with authority and:

10.1 the objects of the *Racial Discrimination Act*, construed liberally as is required (**AS [5]-[6]**); and

10.2 the concept of discrimination to which the Act is directed, including indirect discrimination (**AS [49]-[56], Reply [29]-[34]**).

By reason of

11. The more limited enjoyment of the s 10 right is by reason of the practical effect and operation of the impugned law specifying the same “pension age” for the applicant and his non-Indigenous counterparts, in circumstances where there is the material gap in life expectancy (**AS [61]-[69], Reply [61]-[64]**).

12. Alternatively, the applicant’s more limited enjoyment of the s 10 right is by reason of the amendments made to the *Social Security Act* in 2009, which increased the pension age for men of the applicant’s age to 67 years (**AS [70]-[72]**).

- *Social Security and Other Legislation Amendment (Pension Reform and Other 2009 Budget Measures) Act 2009* (Cth), s 3, Sch 11, item 1 9 (**JBA T125**).

Represented persons have same interest

13. The applicant and the represented persons have the same interest in the determination of the questions of law before the Court in this proceeding (**AS [73]-[74], Reply [86]-[93]**).

- *O’Donnell v Commonwealth of Australia* [2021] FCA 1223, [20], [40], [44] (Murphy J) (**JBA T47**).

Date: 17 February 2023

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