HIGH COURT OF AUSTRALIA

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Form 27D—Respondent's submissions

Note: See rule 44.03.3.

IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

BETWEEN: **ANDREW LAMING**

Appellant

and

ELECTORAL COMMISSIONER OF THE AUSTRALIAN ELECTORAL COMMISSION

Respondent

RESPONDENT'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. This appeal raises a single issue about what constitutes a separate contravention of s 321D(5) of the *Commonwealth Electoral Act 1918* (Cth) (the **Act**). Mr Laming contravened that provision by communicating electoral matter in three different posts on a Facebook page, without notifying his name and town or city as required. Those posts were then viewed by, and hence communicated to, different people on 28 occasions.

3. The sole issue in this appeal is whether, on its proper construction, s 321D(5) was contravened on each of the 28 occasions when a post was communicated to a different person (as the Full Court found), or was only contravened on each of the three occasions when Mr Laming published those posts on the Facebook page, regardless of how many people viewed each post (as the primary judge found).

4. For the reasons given below, the Full Court's construction was plainly correct, having regard to statutory text, context, history and purpose.

PART III: SECTION 78B NOTICE

5. No notice need be given under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: FACTS

6. There are no contested facts, but two matters should be noted further to paragraphs 6-8 of the Appellant's submissions (**AS**). *First*, not only was Mr Laming a member of the House of Representatives during the relevant period, he was also a candidate in the federal election held on 18 May 2019: see *Electoral Commissioner of the Australian Electoral Commission v Laming (No 2)* [2023] FCA 917 (**PJ**) at [9(4)].

7. *Second*, the primary judge found that the Fifth Post (PJ [11]) was viewed by 14 different people and was then shared by nine of those people, as a result of which it was unknown how many persons may have viewed it (PJ [219]). The Commissioner is content to proceed in this appeal on the basis that this post was communicated by Mr Laming to 14 different people, without seeking to identify further contraventions which arose from its sharing. The Full Court proceeded on the same basis: see *Electoral Commissioner of the Australian Electoral Commission v Laming* (2024) 304 FCR 561 (**FCJ**) at [32].

PART V: ARGUMENT

(a) Introduction

8. At first instance, the learned primary judge (Rangiah J) held that Mr Laming contravened s 321D(5) of the Act three times, once for each occasion on which he published a non-compliant post on the Facebook page entitled "Redland Hospital: Let's fight for fair funding" (PJ [234]-[236]). This was so, his Honour held, regardless of how many people each of those posts was communicated to (PJ [231]). That is the construction which Mr Laming advances on this appeal (AS [2], [11(a)]).

9. On appeal, the Full Court of the Federal Court (Logan, Perry and Meagher JJ) held that the primary judge had erred and that, on its proper construction, s 321D(5) had been contravened on each of the 28 occasions when one of those posts was communicated to a different person (FCJ [89]).[1] In doing so, it addressed the errors in the primary judge's construction, as well as the similar errors in the subsequent decision in *Electoral Commissioner v McQuestin* [2024] FCA 287 (O'Bryan J). As explained further below, the Full Court's construction advances the underlying purpose of s 321D in protecting the informed voting choice of each elector; it respects the language of the key statutory concept of "electoral matter that is communicated to a person"; and it coheres with the broader system of civil penalties as a means of securing effective deterrence.

10. Mr Laming's submissions criticise specific aspects of the Full Court's reasons. None of the criticisms is made good. On the contrary, they largely involve assuming the answer to the very point in issue. And more fundamentally, Mr Laming does not explain how his alternative construction better advances the statutory purpose of protecting the informed choices of individual voters. On his construction, any anonymous political publication — no matter how many thousands or millions of voters it reaches, no matter how harmful its content may be to their informed voting choices, no matter how well-established and well-resourced the political participant behind it — would result in a single contravention of the provision with its penalty capped accordingly (in this case at $25,200). As will be seen, this is a most unlikely outcome in view of the mischief Parliament sought to remedy and the language it chose to use.

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[1] Justice Perry delivered the principal reasons in respect of the construction issue (FCJ [59]-[102]). Justice Logan agreed with Perry J in respect of the construction issue (FCJ [1], subject to additional observations at FCJ [3]-[12]), as did Meagher J (FCJ [105]).

(b) Part XXA of the Act — purpose, history, text and context

11. **Purpose:** Section 321D is located in Part XXA of the Act.[2] The object of that Part is made explicit in s 321C(1): "to promote free and informed voting at elections" (emphasis added). It does that by enhancing, amongst other things: the *transparency* of the electoral system "by allowing voters to know who is communicating electoral matter" to them; and the *accountability* of persons participating in public debate relating to electoral matter "by making those persons responsible for their communications" (sub-ss (1)(a) and (b)). The Part aims to achieve its object by, amongst other things, "requiring the particulars of the person who authorised the communication of electoral matter to be notified if … the matter is communicated by, or on behalf of, a disclosure entity" (sub-s (2)(a)(iii)) and by "ensuring that the particulars are clearly identifiable, irrespective of how the matter is communicated" (sub-s (2)(b)).

12. The importance of transparency and accountability to free and informed voting has been well understood since the earliest days of the Federation. In ***Smith v Oldham*** (1912) 15 CLR 355 at 358, Griffith CJ considered it obvious "that the freedom of choice of the electors at elections may be influenced by the weight attributed by the electors to printed articles, which weight may be greater or less than would be attributed to those articles if the electors knew the real authors". His Honour regarded it as "notorious" that electors "may be less likely to be misled or unduly influenced if they know the authority upon which they are asked to rely". Accordingly, his Honour held, at 358-9, that Parliament was entitled to decide that "no one should be allowed by concealing his name to exercise a greater influence than he could command if his personality were known".

13. This is of great practical importance to a system of representative democracy which depends, of course, on the voting choices of each individual voter. As Isaacs J explained separately in *Smith v Oldham* at 362, "[t]he vote of every elector is a matter of concern to the whole Commonwealth". So much must now be seen as fundamental, with this Court repeatedly recognising that "each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters".[3]

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2 Compilation 68 of the Act (registered 12 March 2019) is used here, as it was below (FCJ [62]-[63]).

3 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 571 (the Court), cited with approval in *Unions NSW v New South Wales* (2019) 264 CLR 595 at 607 [14] (Kiefel CJ, Bell and Keane JJ).

14. **History:** Part XXA was inserted into the Act by the *Electoral and Other Legislation Amendment Act 2017* (Cth) (the **Amending Act**) in order to address shortcomings in the existing authorisation provisions which had been identified by the Joint Standing Committee on Electoral Matters (**JSCEM**).[4] The authorisation-type provisions at the time of the 2016 federal election took the form of five criminal offence provisions located with other offences in Part XXI of the Act ("Electoral Offences").[5] Each provision had a confined sphere of operation, addressing a particular medium for publishing political messages.[6] None of the provisions resembled the current s 321D. In particular, none turned upon the concept of electoral matter being "communicated to a person", which is central to the operation of s 321D. The JSCEM recommended that the offence provisions be replaced with a new, consistent and comprehensive set of authorisation provisions.[7] This led directly to the introduction of a new regime in the Amending Act.[8]

15. In introducing that regime, Parliament was motivated by concerns (discussed at some length in the JSCEM Report) that the pre-existing authorisation provisions were outdated and had not kept pace with technological change, such that "those who wished to hide their identity from voters could do so by communicating via media — including modern technologies — not covered by the … authorisation regime".[9] At least two difficulties were specifically identified. The *first* was that several "modern campaign techniques like robocalls and bulk SMS messages" were not subject at all to the authorisation regime.[10] The *second* was that, where the pre-existing provisions did apply, there were "inconsistencies" in application — for example, there were different requirements for broadcast media and internet advertising, and for different types of printed matter.[11] The new Part XXA was therefore intended to extend the pre-existing provisions and harmonise their requirements across communication mediums by introducing a single,

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4 See JSCEM, Parliament of Australia, *The 2016 Federal Election: Interim Report on the Authorisation of Voter Communication* (Report, December 2016) (**JSCEM Report**).

5 See *Commonwealth Electoral Act 1918* (Cth) as at 2 July 2016 (compilation 62, registered 1 July 2016).

6 The five provisions addressed printed electoral matter and videos (s 328), internet advertising (s 328A), how-to-vote cards (s 328B), headings in periodicals (s 331) and the depiction of electoral matter on roadways, footpaths, buildings, vehicles, vessels and in other places (s 334).

7 See, eg, JSCEM Report at [2.30]-[2.31], [2.43], [2.66]-[2.67].

8 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 March 2017 (**Second Reading Speech**) at 3792-93. See also **Revised Explanatory Memorandum**, *Electoral and Other Legislation Amendment Bill 2017* (Cth) at 2 [2].

9 Second Reading Speech at 3792.

10 Second Reading Speech at 3793. See also JSCEM Report, particularly at [2.4], [2.8]-[2.11] and [2.18].

11 Second Reading Speech at 3793. See also JSCEM Report, particularly at [2.66] and [2.79]-[2.80].

technologically neutral provision that covered the field.[12] It would thereby enable "voters to assess the credibility of the information they rely on when forming their political judgement and casting a vote", so as to "support[ ] free and informed voting at elections, an object that is essential to Australia's system of representative democracy".[13]

16. Parliament chose to render its new authorisation provision enforceable through a civil penalty regime in order to assist the Commissioner in ensuring compliance.[14] The civil penalties introduced with that regime were considered by Parliament to be "commensurate with penalties payable under similar regulatory regimes".[15]

17. **Statutory text:** The principal operative provision in Part XXA is s 321D. It relevantly provides as follows:

> (1) This section applies in relation to electoral matter that is communicated to a person if:
>
> …
>
> (c) the matter is communicated by, or on behalf of, a disclosure entity (the ***notifying entity***) (and the matter is not an advertisement covered by paragraph (a), nor does the matter form part of a sticker, fridge magnet, leaflet, flyer, pamphlet, notice, poster or how-to-vote card).
>
> …
>
> *Notifying particulars*
>
> (5) The notifying entity must ensure that the particulars set out in the following table, and any other particulars determined under subsection (7) for the purposes of this subsection, are notified in accordance with any requirements determined under that subsection.

Required particulars		
Item	**If …**	**the following particulars are required …**
…		
4	the communication is any other communication authorised by a disclosure entity who is a natural person	(a) the name of the person; (b) the relevant town or city of the person
…		

> …
>
> Civil penalty: 120 penalty units.

[12] See Second Reading Speech at 3793. See also Revised Explanatory Memorandum at 2 [1] and [4] and 16 [48]; JSCEM Report, particularly at [2.102], [2.104] and [2.108]; and FCJ [67], [69].

[13] Second Reading Speech at 3794. See also Revised Explanatory Memorandum at 22-23 [66]-[68] as to why the relevant particulars were specified.

[14] Second Reading Speech at 3794.

[15] Revised Explanatory Memorandum at 5 [4], see also 24 [75]; and see FCJ [73].

18. Consistently with the purpose and history just described, s 321D is framed as a single obligation which covers the communication of all forms of electoral matter and makes uniform provision for the particulars to be notified with that electoral matter. This is done by identifying the specific electoral matter to which the notification obligation applies (sub-s (1)) and imposing a requirement, sanctioned by a civil penalty, to ensure that notification occurs (sub-s (5)).

19. A critical aspect of the statutory language here is the legislative focus on the *event* of something being "communicated to a person", and on "electoral matter" as the *subject* of that event (i.e. that which is communicated).

10 20. As it appears in sub-s (1), "communicated" is the present tense, passive form of the verb "to communicate". The ordinary meaning of that verb relevantly includes "to give to another as a partaker", "to impart knowledge of", and "to convey one's feelings, thoughts, etc., successfully to others".[16] That usage is underscored by the fact that s 321D(1) explicitly requires the communication of electoral matter "*to a person*" (emphasis added). Thus, as both the primary judge and the Full Court recognised, the legislative concept involves "the transmission of information from one person to another person" (FCJ [90]; PJ [227]-[229]).

21. As the opening words of sub-s (1) make plain, "electoral matter" is that which is communicated. This is also made clear by the definition in s 4AA(1) of the Act, namely
20 "matter communicated or intended to be communicated for the dominant purpose of influencing the way electors vote in an election". In addition, the use of the word "matter" indicates that "electoral matter" is concerned with the information or content conveyed, regardless of the specific medium by which it is conveyed.[17]

22. Turning then to sub-s (5), the obligation is predicated upon, and picks up, the existence of the elements in sub-s (1). It does not repeat the key words from sub-s (1), "electoral

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16 *Macquarie Dictionary* (online as at 16 March 2025) "communicate" (defs 1, 2, 3); see also PJ [227]. Ordinary meaning is to be considered because the definition of "communicate" in s 321B of the Act does not assist in ascertaining its meaning in the present context — the definition merely excludes the supply of listed carriage services (FCJ [69], [88]).

17 See *Macquarie Dictionary* (online as at 16 March 2025) "matter" (def 6) and Revised Explanatory Memorandum at 16 [48]. Notably, when the Act employs the term "electoral matter", it generally does so as an uncountable noun, without a definite or indefinite article ("the" or "an"). Beyond s 321D, see, eg: ss 4AA; 286A; 287AB(1); 287E(c); 302A; 302CA; 302D(1C); 302E(1)(f)(ii); 302F; 305B(6)(b); 314AC(4)(b); 314B; 321C; 351(5); and 385A. In some of these provisions, the preceding article "the" is used, but that is because specific reference is being made to the same "electoral matter" identified earlier in the provision: see, eg: ss 4AA; 321C(2)(a); and 321D. Note also the somewhat different usage of "an electoral matter" in s 383(2A) and (2B) of the Act.

matter" or "communicated to a person". Rather it simply refers to "the communication" as a way of referring back to what was specified in sub-s (1), namely the event of particular electoral matter having been communicated to a person. Where such an event of communication has occurred, and s 321D therefore applies, the question that arises is whether the notifying entity ensured that the particular communication of electoral matter to a person contained the particulars required by s 321D(5). If the notifying entity has not ensured that *that* communication of electoral matter to *that* person notifies the relevant particulars, then the notifying entity will have breached s 321D(5) in respect of *that* "communication" event.

23. **Civil penalty context:** It is significant that s 321D(5) is a civil penalty provision. Parliament can be taken to have enacted it with an understanding of the general system of law governing civil penalties.[18] As such, s 321D is to be understood as intended to serve a protective purpose by ensuring that wrongdoers, and would-be wrongdoers, are adequately deterred.[19] That requires putting a price on contravention which is sufficiently high to ensure that the penalty cannot be seen as the acceptable cost of doing business, but is rather seen as an economically irrational choice.[20]

24. To achieve this, Parliament imposed a maximum penalty of 120 penalty units in respect of each contravention of s 321D(5), which, at the time, amounted to $25,200 (FCJ [31] and [73]). As noted at paragraph 16 above, Parliament considered this to be a civil penalty provision with "substantial fines" that would be "commensurate with penalties payable under similar regulatory regimes".

25. It is commonplace for Parliament to create civil penalty provisions (including with much larger maximum penalties than those under the Act) which may result in a large number of separate contraventions and a correspondingly large, even vast, theoretical maximum penalty.[21] There are well-settled principles for addressing such situations, to ensure that

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18 See *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 at [23]-[24] and [64] (French CJ, Kiefel, Bell, Nettle and Gordon JJ); *Australian Building and Construction Commissioner v* ***Pattinson*** (2022) 274 CLR 450 at [14]-[18], [66] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

19 *Pattinson* (2022) 274 CLR 450 at [9] and [15]-[18].

20 *Pattinson* (2022) 274 CLR 450 at [17] and [66].

21 See, for example, the regimes discussed in the following authorities. *ACCC v* ***Reckitt-Benckiser*** *(Australia) Pty Ltd* (2016) 340 ALR 25 concerned "at least 5.9 million" contraventions of s 33 of the Australian Consumer Law, being Schedule 2 to the *Competition and Consumer Act 2010* (Cth), with each contravention attracting a maximum penalty of $1.1 million (at [2]-[3]). The Court concluded that the resulting overall maximum penalty was so great that "in a practical sense … there was no maximum

a penalty is appropriate to secure deterrence, but is not imposed at a level that goes beyond this; indeed, if the Court were to impose a penalty greater than that which was appropriate to achieve deterrence, it would fall into error.[22] In that way, Parliament ensures that courts have the scope to impose penalties which are adequate to deter the full spectrum of possible contravening conduct, while understanding that courts will not impose penalties greater than are required to do so.

26. In that context, there is nothing surprising about Parliament having enacted a provision which would permit a court to impose a penalty sufficient to deter a political party or participant (of whatever sophistication, size or resources) from anonymously communicating electoral matter (no matter how egregious or misleading it may be) in whatever circumstances (no matter how deliberate, calculated or repeated) to any person. Nor, given the focus on protecting the informed vote of each elector, is there anything surprising in the fact that, where the person communicates electoral matter to two or more persons, there would be two or more contraventions of the statutory norm, particularly given that mass and automated communications using modern technology were a central focus of the new provisions. Again, that kind of "per person" approach to civil penalty provisions — in which the necessary protection is seen to operate at the level of each individual affected or involved — is commonplace.[23]

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penalty" (at [3], and see also [156]-[157]). *ASIC v* ***La Trobe Financial*** *Asset Management Ltd* [2021] FCA 1417 concerned contraventions of s 12DB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth), which, during the relevant period, carried maximum pecuniary penalties of between $1.8 million and more than $15 million per contravention (at [114]-[118]). Justice O'Bryan found that there was "no meaningful overall maximum penalty given the potential number of individual contraventions and the time over which they occurred" (at [125]). *Australian Communications and Media Authority v Jones (No 4)* [2023] FCA 834 concerned s 15(2A) of the *Interactive Gambling Act 2001* (Cth), which provided a maximum penalty of 7,500 penalty units for each contravention (at [34], [38]). Justice Thomas found that the provision was contravened 395 times, representing a contravention per day, such that the maximum penalty was over $3 billion (at [40]). *ASIC v* ***AustralianSuper*** *Pty Ltd* [2025] FCA 102 concerned contraventions of (inter alia) s 52(2) of the *Superannuation Industry (Supervision) Act 1993* (Cth) which had a maximum penalty of up to $660,000 during the period (at [186]) and which had been breached over 90,000 times, once in respect of each affected member (see at [132]-[134] and [187]). Justice Hespe stated that this raised the "aggregate maximum penalty to a number well beyond what this Court would ever impose" (at [187]).

22 *Pattinson* (2022) 274 CLR 450 at [10] and [40]-[42] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ) and [111] (Edelman J); see also *Reckitt-Benckiser* (2016) 340 ALR 25 at [152] (the Court).

23 For example, see s 29 of the Australian Consumer Law discussed in *ACCC v Hillside (Australia New Media) Pty Ltd (No 2)* [2016] FCA 698 at [15]-[17] (Beach J); s 12DB of the *Australian Securities and Investments Commission Act 2001* (Cth) discussed in *La Trobe Financial* [2021] FCA 1417 at [91] (O'Bryan J); former s 187AB(1) of the *Workplace Relations Act 1996* (Cth) discussed in *Ponzio v B&P Caelli Constructions Pty Ltd* (2007) 158 FCR 543 at [73]-[79] (Lander J) and [135] (Jessup J); and s 52(2)(c) of the *Superannuation Industry (Supervision) Act 1993* (Cth) discussed in *ASIC v AustralianSuper Pty Ltd* [2025] FCA 102 at [133]-[134] (Hespe J).

(c) The reasons of the Full Court

27. The above statutory construction considerations were well understood and carefully discussed by the Full Court in coming to its preferred construction. It paid close attention to the statutory purpose and history.[24] It carefully examined the text of s 321D and explained how sub-ss (1) and (5) must be read together — with sub-s (1) serving as the "gateway" that identifies an actual event of a communication of electoral matter by a notifying entity to a recipient and sub-s (5) requiring that particulars be notified with the electoral matter that is the subject of that event.[25] And it explained how its construction of s 321D cohered with the broader system of law for civil penalties and avoided absurd and unlikely outcomes that would arise on the contrary construction.[26]

(d) Mr Laming's submissions

28. Mr Laming's submissions focus on seven particular criticisms of Perry J's reasons, corresponding to the seven matters of purpose, text and context which her Honour examined. Before addressing them, a broader feature of Mr Laming's submissions should be noted.

29. Mr Laming's submissions do not explain how his construction *best* achieves the statutory purpose (cf s 15AA of the ***Acts Interpretation Act*** *1901* (Cth)). He seemingly accepts that the purpose of s 321D, considered in light of its history, is as summarised at paragraphs 11 to 16 above (and as found by the Full Court). Yet he does not seek to explain how his construction can be seen as the Parliamentary choice which best protects the informed vote of each elector by deterring political participants from communicating electoral messages to them without revealing who stands behind that messaging. That would remain an obstacle for him even were he to make good any of his criticisms. For the reasons set out below, he does not.

30. **Meaning of "communication" — AS [18]-[20]:** Mr Laming gives an acontextual and erroneous meaning to the words "the communication" as they appear in item 4 of the Table in s 321D(5). He says that this is a reference to "a thing which displays a message" (AS [14(c)(iii)] and [19]). On his approach, "the communication" in sub-s (5) is a noun to describe the medium by which information is communicated, rather than a noun to

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24 See at FCJ [4]-[7] (Logan J) and [64]-[66], [69] and [95]-[97] (Perry J).
25 See at FCJ [90]-[91] (Perry J).
26 See at FCJ [98]-[101] (Perry J).

describe the event or occasion (described in sub-s (1)) of something having been communicated.

31. It may be accepted that the word "communication" *can* be used in such a sense. It may also be accepted that the opening words in column 2 of the Table in s 321D(5) — "the communication is …" (emphasis added) — might, if read in isolation or in a different context, convey that sense of a communication as a "thing", like a sticker or fridge magnet. However, both text and context deny that possibility here.

32. *First*, sub-s (5) does not give, or attempt to give, free-standing meaning to the word "communication". Rather, by referring to "the communication", it signifies (through the use of the definite article) that it is referring to a "communication" identified elsewhere in the provision. Obviously enough, it is referring back to "the communication" already identified in sub-s (1). And as already explained, sub-s (1) unambiguously describes a communication in the sense of an event which has occurred, not as a thing.

33. Mr Laming implicitly appears to accept that "communicated to a person" in sub-s (1) is a reference to the event of an actual communication of electoral matter, as the Full Court found. However, he disputes that "the communication" in the Table in sub-s (5) is a reference back to that event (AS [19]). Thus, on his approach, "communicated" is used in sub-s (1) as a noun to describe an action or event, and then is used in a quite different sense in sub-s (5) as a noun to describe a thing. For that reading to be correct, the same term must have been used in the same provision in two quite different ways. That confounding and confused usage is not one that could be attributed to Parliament.

34. *Second,* Mr Laming's reading ignores the fact that Parliament can be seen throughout the Act to have chosen and used a different term to describe the thing that is communicated — it uses "electoral matter" for this purpose, not "communication". So much is clear from the opening words of s 321D(1): "electoral matter" (i.e. the thing which is the actual information or content) "that is communicated to a person" (i.e. the event by which that thing is transmitted to a person). The same distinction appears in the definition of "electoral matter" in s 4AA. And the relationship between the terms "electoral matter" and "communicated" is further reinforced by the consistent way in which they are collocated, and work together, throughout Part XXA and the Act more broadly. On almost all occasions when the Act uses the phrase "electoral matter", it does so in the

context of that matter having been "communicated"[27] or being the subject of a "communication" event.[28] Those statutory references reinforce that "electoral matter" refers to the substance of what is being or has been transmitted, and that "communication" refers to the actual event of transmission.

35. It is because Mr Laming needs to read "the communication" in sub-s (5) as being completely separate and distinct from the obviously different usage in sub-s (1) that he strains to resist the Full Court's conclusion that those subsections should be read together (AS [18]-[20]). This leads him to go so far as to say that there is "simply no textual indication" that sub-s (1) works both as a gateway to the provision and as an element of the obligation imposed by sub-s (5) (AS [20]). The error in that submission is patent. Subsection 321D(1) commences with the words "This section applies in relation to…", thus serving as a gateway; absent there being electoral matter communicated to a person in the way described, the obligation in sub-s (5) cannot arise at all. And in so providing, sub-s (1) sets out essential elements of a contravention: there must be electoral matter; it must have been communicated to a person; and it must have originated from a "notifying entity" in one of the ways specified in sub-paragraphs (1)(a)-(c). The Full Court was right to have read these two subsections of a single provision together in the way it did.

36. It is important to underline this erroneous reading of "the communication" in Mr Laming's submissions because it is essential to his entire argument. Unless he is right about this, Mr Laming is left with no sensible basis to say that the statutory norm attaches to the publication (i.e. the thing by which the electoral matter is conveyed) rather than each particular occasion on which electoral matter is communicated to a person (i.e. the event). The centrality of this to his case can be seen in the very way he phrases the issue to be decided (at AS [11]) and the conclusion he draws (at AS [15] and [16]). He there treats "the communication" as meaning the publication or message (i.e. the thing). But this assumes the very point he needs to, but does not, demonstrate. Without having made this first point good, Mr Laming's remaining criticisms provide no basis for saying that the primary judge's construction best achieves the purpose of the Act.

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27 See, eg: s 4AA(1); in Part XXA, see ss 321B (definition of "authorises"; definition of "communicate"), and 321C(1)(a), (2)(a)(iii), (3)(a); and elsewhere in the Act, see ss 286A, 287AB, 302A, 302CA, 302D(1C), 302E(1)(f)(ii), 302F(1)(e), (2)(d), 305B(6)(b), 314AC(4)(b) and 314B(1)(c), (2), (3)(b)(ii).

28 See, eg: s 4AA(2)-(5); in Part XXA, see ss 321B (definition of "address", sub-par (b)(iii), definition of "authorises", definition of "relevant town or city"), and 321C(1)(b)-(c), (2)(a)(ii); and elsewhere in the Act see ss 351(5), 383 (note following sub-s (2A)(e)) and 385A.

37. **Section 23(b) of the *Acts Interpretation Act* — AS [21]-[22]:** This submission does not require an answer. Justice Perry addressed the point because it was part of the error in the reasoning of the primary judge (see FCJ [80], [92]-[93]); her Honour cannot be criticised for so doing. Mr Laming's submission that it is a "red herring" is premised on his assumption that when a "person has received the message … the relevant inquiry then is as to whether the notifying entity has notified the particulars in respect of the thing containing the message" (AS [22]). But, as already explained, the assumption is false because "the communication" is *not* "the thing containing the message" but, rather, the event of the message having been communicated.

38. **Definition of "electoral matter" — AS [23]-[26]:** As explained by Perry J, and consistently with the note following s 4AA(2) of the Act, the definition of "electoral matter" makes clear that "the communication of information to one person may be for the dominant purpose of influencing the way that that elector votes so as to fall within the definition, while the communication of precisely the same information to another person may be for a different dominant purpose" (FCJ [94]). Because the same words, used at the same time, may potentially be communicated to different persons for different purposes, the Act requires that each communication of electoral matter be considered separately.

39. Once again, in taking issue with this reasoning, Mr Laming wrongly assumes the point he needs to make good by assuming that "the communication" means "the message", i.e. the thing to be communicated. He considers that, as there can only be one "act of creating the message for dissemination to multiple persons at once", it "can only logically involve one dominant purpose" (AS [25]). That would be so if the provision proscribed only the single act of "creating the message". But it does not. It proscribes the failure to include particulars when electoral matter is "communicated to a person". In this way, if an electoral message in an email is communicated to Person A without particulars, that event may be a contravention; and if it is also communicated to Person B without particulars, that event may too be a contravention, and similarly for Person C, Person D and so on.

40. Whether or not any of these separate communication events is a contravention will depend on whether the communication of that electoral matter was for the dominant purpose of influencing the vote of Person A, and the vote of Person B, and so on. Because of the way "electoral matter" is defined in s 4AA(1), the statutory proscription expressly contemplates that a different "dominant purpose" might exist for different recipients, and

thereby requires the regulator to demonstrate that dominant purpose in respect of each recipient.

41. Mr Laming says that this would give rise to an absurdity in the case of a television or newspaper advertisement because it would necessitate an inquiry into "the identity of each and every person who saw the advertisement" (AS [26]). That is wrong because it confuses what has to be proved with the method of proving it. In such a case the very circumstances are likely to make the identity of each viewer or reader irrelevant — the inference is likely to be inescapable that the advertisement was intended to be communicated for the dominant purpose of influencing the way electors vote in that election. But that does not deny that a single communication may be sent to multiple people for different purposes. For example, a promotional email from a political party campaigning for animal rights in a federal election may have been sent to ten constituents for the dominant purpose of influencing their vote, while simultaneously having been copied to five members of an overseas animal rights organisation in order to make them aware of the communication.

42. **Anomalies — AS [30]-[36]:** Mr Laming argues at AS [30]-[36] that Perry J failed in some way to appreciate that an anomaly would arise on her Honour's construction, because it may in some cases not be possible to prove with precision how many people received the non-compliant communication. There is nothing anomalous or difficult about this. As Perry J accepted at FCJ [99], this is a commonplace evidentiary problem in civil penalty cases. Where it arises, the Court does the best that it can, by evidence and inference, to ascertain the number of contraventions. If it cannot do so, it finds that that number cannot be ascertained. That does not indicate a Parliamentary intention that there can only be one contravention in such cases; rather, it is something to be accommodated in the penalty analysis, including, in some circumstances, by grouping contraventions as a course of conduct.

43. Mr Laming contends that her Honour did not have authority for that conclusion (AS [33]-[35]). However, he misunderstands the authorities to which he refers, which show that there is no absurdity associated with imposing penalties in cases where it is not possible to precisely quantify the number of contraventions. Other examples could also be

given.[29] Mr Laming also submits that, in any case, it is not possible to use analytical tools such as a course of conduct to impose a penalty for an unquantified number of contraventions if there has been a fully contested trial.[30] That proposition is denied by s 85 of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth), which permits a court to make a single civil penalty order against a person for multiple contraventions of a civil penalty provision. It is also inconsistent with long-established penalty practice.[31]

44. **Adequacy of the maximum penalty — [28]-[29] and [39]-[42]:** Finally, Mr Laming submits that Perry J was wrong to point to the likely inadequacy of the maximum penalty on the primary judge's construction. But, contrary to AS [28], there is no "absurdity" to the theoretical maximum penalties that may be imposed on the Commissioner's case. As already explained, that kind of situation is readily addressed by courts in imposing civil penalties. Parliament can be taken to have understood as much.

45. Mr Laming criticises Perry J's statement at FCJ [101] that a person might well consider that payment of a single maximum penalty of $25,200 "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" (AS [39]-[41]). It is commonplace to consider such possibilities when considering whether and how a provision might address (or fail to address) the underlying mischief to which Parliament was responding. Here, that mischief was known to include mass messaging to voters using modern electronic means of communication, and so her Honour did no more than consider the likely effects of the competing constructions in the kind of situation that Parliament was seeking to address.

46. Indeed, while arguing that $25,200 would be adequate to deter in most cases, Mr Laming himself accepts that "there are some in the community who would not miss $25,200" (AS [41]). That is undoubtedly correct. It is far from difficult to imagine a very well-resourced individual participant in the political process who would see such an amount as a "cost of doing business" if it allowed them to undertake widespread political messaging of a misleading kind without disclosing its origin. The Full Court's

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29 See, eg, *ACCC v* ***Coles Supermarkets*** *Australia Pty Ltd* (2015) 327 ALR 540 at [82] and [85] (Allsop CJ) (see also [17]-[20]) and *ACCC v Samsung Electronics Australia Pty Ltd* [2022] FCA 875 at [44]-[45] (Murphy J).

30 This appears to be a proposition advanced in reliance on *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68 at [148]-[149]. There is an irreconcilable tension in the propositions laid out in those two paragraphs, but that does not need to be resolved in the present case.

31 See, eg, *Coles Supermarkets* (2015) 327 ALR 540 at [18] and [82] (Allsop CJ) and *Reckitt-Benckiser* (2016) 340 ALR 25 at [139]-[145] (the Court) (see also [3], [7], [43], [157]).

construction would afford scope to deter such conduct; Mr Laming's would not. That being so, it is difficult to see how it best achieves the statutory objective of protecting the informed vote of every elector.

PART VI: ESTIMATE OF TIME

47. The Commissioner estimates that up to 1 hour and 15 minutes will be required to present his oral argument.

Dated: 17 March 2025

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Tim Begbie
T: (02) 6253 7521
tim.begbie@ags.gov.au

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Sarah Zeleznikow
T: (03) 9225 6436
E: sarahz@vicbar.com.au

ANNEXURE TO RESPONDENT'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	ss 4AA, 286A, 287AB, 287E, 302A, 302CA, 302D, 302E, 302F, 305B, 314AC, 314B, Pt XXA, ss 351, 383, 385A	Act as in force at the date of the Fifth Post (being the final Facebook post in issue).	5 May 2019
2.	*Commonwealth Electoral Act 1918* (Cth)	Compilation No. 62	Pt XXI	Act as in force at the time of the 2016 federal election, containing the previous form of authorisation provisions.	2 July 2016
3.	*Acts Interpretation Act 1901* (Cth)	Compilation No. 36	ss 15AA, 23(b)	Act as in force at the date of the Fifth Post.	5 May 2019
4.	Australian Consumer Law, being Schedule 2 to the *Competition and Consumer Act 2010* (Cth)	Compilation No. 114	ss 29, 33	Law as in force at the time of the last admitted contravention of s 29 in *ACCC v Samsung Electronics Australia Pty Ltd* [2022] FCA 875.	5 October 2018

				Sections 29 and 33 have not been amended since their introduction. As such, s 33 was in an identical form at the time of *ACCC v Reckitt-Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25.	
5.	*Australian Securities and Investments Commission Act 2001* (Cth)	Compilation No. 72	s 12DB	Act as in force at the time of the last admitted contravention of s 12DB in *ASIC v La Trobe Financial Asset Management Ltd* [2021] FCA 1417.	19 May 2020
6.	*Electoral and Other Legislation Amendment Act 2017* (Cth)	As enacted	All	Act which amended the *Commonwealth Electoral Act 1918* (Cth) to introduce Part XXA.	N/A
7.	*Interactive Gambling Act 2001* (Cth)	Compilation No. 20	s 15(2A)	Act as in force at the time of the last contravention of s 15(2A) in *Australian Communications and Media Authority v Jones (No 4)* [2023] FCA 834.	13 April 2022
8.	*Regulatory Powers (Standard*	Compilation No. 1	Pt 4	Act as in force at the date of the three Facebook posts.	24 December 2018, 7 February

	Provisions) Act 2014 (Cth)				2019 and 5 May 2019
9.	*Superannuation Industry (Supervision) Act 1993* (Cth)	Compilation No. 115	ss 52(2), 54B(1)	Act as in force at the time of the last admitted contravention of s 52(2)(c) in *ASIC v AustralianSuper Pty Ltd* [2025] FCA 102.	11 May 2023
10.	*Workplace Relations Act 1986* (Cth)	No. 86 of 1988	s 187AB	Act as in force at the time that the contravening payments were made in *Ponzio v B&P Caelli Constructions Pty Ltd* (2007) 158 FCR 543.	August 2003