



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
MELBOURNE REGISTRY**

BETWEEN:

PAUL HOPPER

First Plaintiff

MELISSA LOWE

Second Plaintiff

and

STATE OF VICTORIA

Defendant

DEFENDANT'S SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. Within Pt 12 of the *Electoral Act 2002* (Vic), s 217D imposes a “general cap” on political donations. The proceeding concerns the validity of the “nominated entity exception” in sub-paragraph (j) of the definition of “gift” in s 206(1), which excepts transfers from a nominated entity to a registered political party from the general cap. The criteria for appointment of a nominated entity differ between entities appointed at any time (s 222F(2)) and entities first appointed before 1 July 2020 (s 222F(3)).
3. Save to the extent identified in the next paragraph, s 217D imposes a justified burden on the implied freedom of political communication, in pursuit of the legitimate purpose of reducing the risk of undue influence in the electoral process. The nominated entity exception, operating with the *appointment criteria* in s 222F(2) and s 222F(3), is consistent with that purpose, and does not cause the burden imposed by s 217D to be unjustified. It permits registered political parties, like independent candidates such as the Plaintiffs, to fund political expenditure from assets which may be regarded as their own, as well as political donations and, where eligible, public funding.
4. The Defendant accepts, however, that there are no facts in the Special Case (SC) that would enable the Court to conclude that the *time limitation* in s 222F(3) is the product of a distinction that is appropriate and adapted to the attainment of a legitimate purpose. The Defendant therefore submits that the Court should answer Question 1: “No, except to the extent that the nominated entity exception operates with the words ‘if the first appointment of an entity as the nominated entity of a registered political party is made before 1 July 2020’ in s 222F(3)”. Those words are severable.

PART III: SECTION 78B NOTICE

5. The Plaintiffs have given notice under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: MATERIAL FACTS

6. The facts stated in the Plaintiffs’ submissions dated 24 October 2025 (PS) at [4] are not in dispute. Other material facts are addressed at the appropriate point in argument below.

PART V: ARGUMENT

A. THE FREEDOM OF POLITICAL COMMUNICATION

7. The implied freedom of political communication is an “indispensable incident” of the constitutionally prescribed system of representative and responsible government at the Commonwealth level.¹ The freedom is indispensable to that system of government because there must be a “free flow of political communication” so that electors can form judgments relevant to the maintenance of the system:² ultimately, this involves electors having “a free and informed choice” in casting a vote as to their representatives in the Commonwealth Parliament (and, indirectly, as to who constitutes the Commonwealth Executive) and in casting a vote to amend the Constitution.³
8. Where it is alleged that a Commonwealth statute impermissibly impairs the freedom, there are three stages to the analysis required to determine whether the allegation is made out: *first*, whether the law places an “effective burden” upon political communication; *secondly*, whether that burden is “explained” by the law pursuing a “legitimate” purpose; and *thirdly*, whether that burden is “justified”.⁴ As explained in more detail below, each stage involves a number of more specific inquiries. Ultimately, a burden will be impermissible if it is not explained by a legitimate purpose or if it is not justified.
9. The analysis is the same where it is alleged that a *State* statute is inconsistent with the freedom. The “complex interrelationship between levels of government, issues common to State and federal government and the levels at which political parties operate”⁵ means that discussion of matters at a State level “might bear on the choice that the people have to make in federal elections or in voting to amend the Constitution, and on their evaluation of the performance of federal Ministers and their departments”.⁶

B. STAGE 1: BURDEN

10. The first question is whether the impugned law “effectively burdens” the freedom of political communication. The expression “effectively burdens” means “nothing more

¹ *Farmer v Minister for Home Affairs* [2025] HCA 38 at [36] (Gageler CJ, Gordon and Beech-Jones JJ).

² See *Unions NSW v New South Wales* (2013) 252 CLR 530 (*Unions (No 1)*) at [27]-[28] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

³ See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560-561 (the Court).

⁴ See *McCloy v New South Wales* (2015) 257 CLR 178 at [126]-[132] (Gageler J); *Farmer* [2025] HCA 38 at [39] (Gageler CJ, Gordon and Beech-Jones JJ).

⁵ *Unions (No 1)* (2013) 252 CLR 530 at [25]; see also at [27] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

⁶ *Lange* (1997) 189 CLR 520 at 571 (the Court). See also *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 (*ACTV*) at 142 (Mason CJ), 216-217 (Gaudron J). Cf *Unions NSW v New South Wales* (2019) 264 CLR 595 (*Unions (No 2)*) at [66] (Gageler J); *Spence v Queensland* (2019) 268 CLR 355 at [80] (Kiefel CJ, Bell, Gageler and Keane JJ).

complicated than that the effect of the law is to prohibit, or put some limitation on, the making or the content of political communications”.⁷ That requires “consideration as to how the impugned law — in its terms, operation or effect — affects the free flow of communication on governmental or political matters generally”.⁸ Both the legal operation and the practical effect of the impugned law must be examined.⁹

B.1 The importance of the nature and extent of the burden

11. The implied freedom is of such importance that “any effective statutory burden upon it must be justified”.¹⁰ That is why the extent and nature of the burden is not relevant to the “threshold question as to *whether* justification is required”.¹¹ Nonetheless, it is often convenient to consider the nature and extent of the burden at the outset, because both matters inform the subsequent inquiry as to justification that occurs at the third stage of the analysis.¹² That is because some burdens are more difficult to justify than others. For example, a burden that is “substantial” (as to the extent that communication restricted) or “direct” (in the sense of being targeted at political communication) will ordinarily require a stronger justification than a burden that is “slight” or “incidental” or “indirect”.¹³
12. A stronger justification may also be required for a burden that is “discriminatory” or, more neutrally, “differential”.¹⁴ That more neutral expression is preferable because to say a burden is “discriminatory” tends to imply that it is necessarily one that cannot be justified.¹⁵ But that is not so: whether a differential burden is justified is the question to be resolved at the justification stage of the analysis.¹⁶ The answer to that question ought not be pre-empted by adopting a pejorative label (such as “discriminatory” or “privileging” or “marginalising”) at any earlier stage in the analysis (ie, when considering burden or purpose). That is consistent with the position in other constitutional contexts,

⁷ *Farmer* [2025] HCA 38 at [40] (Gageler CJ, Gordon and Beech-Jones JJ), [194] (Gleeson J).

⁸ *Farmer* [2025] HCA 38 at [40] (Gageler CJ, Gordon and Beech-Jones JJ).

⁹ See *Farmer* [2025] HCA 38 at [42], [48] (Gageler CJ, Gordon and Beech-Jones JJ), [193] (Gleeson J); *Raybar v Commonwealth* (2025) 99 ALJR 1000 at [27], [32] (Gageler CJ), [434] (Beech-Jones J); *Babet v Commonwealth* (2025) 99 ALJR 883 at [38] (Gageler CJ and Jagot J).

¹⁰ *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1 at [45] (Kiefel CJ, Keane and Gleeson JJ).

¹¹ *LibertyWorks* (2021) 274 CLR 1 at [63] (Kiefel CJ, Keane and Gleeson JJ) (emphasis added).

¹² *Farmer* [2025] HCA 38 at [57] (Gageler CJ, Gordon and Beech-Jones JJ).

¹³ See *Brown v Tasmania* (2017) 261 CLR 328 at [118] (Kiefel CJ, Bell and Keane JJ), [164] (Gageler J), [291] (Nettle J), [478] (Gordon J). See also *Hogan v Hinch* (2011) 243 CLR 506 at [95]-[96] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

¹⁴ See *Clubb v Edwards* (2019) 267 CLR 171 at [54]-[56], [102], [127] (Kiefel CJ, Bell and Keane JJ), [174], [183] (Gageler J), [372] (Gordon J); *Babet* (2025) 99 ALJR 883 at [42], [48] (Gageler CJ and Jagot J), [250] (Beech-Jones J).

¹⁵ See *Unions (No 2)* (2019) 264 CLR 595 at [84] (Gageler J).

¹⁶ See *Unions (No 2)* (2019) 264 CLR 595 at [84] (Gageler J).

where it has repeatedly been recognised that the “essence of the notion of discrimination” lies in “the unequal treatment of equals or the equal treatment of those who are not equals, *where the differential treatment and unequal outcome is not the product of a distinction which is appropriate and adapted to the attainment of a proper objective*”.¹⁷

13. A burden might have a differential operation if it operates particularly in favour of, or against, “political communication expressive of a particular political view”.¹⁸ Relevantly for present purposes, a burden might also have that character if it operates differently upon different participants in the electoral process. It has been said that a law imposing a burden of that kind requires “close scrutiny”: see **PS [35]**.¹⁹
14. Even so, the differential operation of a burden may be more readily justified in some cases than in others. For example, as was the position in New South Wales when each of *McCloy* and *Unions (No 1)*, *(No 2)* and *(No 3)* were decided, a cap on political donations may be fixed (uncontroversially) at a higher amount for political parties and groups than for individual candidates.²⁰ The Court in *McCloy* and *Spence* upheld the validity of laws that treated property developers differently from other political donors, “[t]aking account of the nature of the business activities of property developers and ‘the nature of the public powers which they might seek to influence in their self-interest’”.²¹ In contrast, the Court in *Unions (No 1)* held invalid a law that prohibited political donations from donors not on the electoral roll, and in *Unions (No 2)* held invalid an expenditure cap on third party campaigners that was different to the cap on parties and candidates.
15. *ACTV* is a more complex example. There, the burden was a prohibition on “political advertisements” on television and radio during the “election period” other than during allocated publicly funded time slots (“free time”). The burden operated differentially in two distinct ways. *First*, only candidates and parties could be allocated free time (meaning all other participants in the electoral process could not politically advertise on television

¹⁷ *Austin v Commonwealth* (2003) 215 CLR 185 at [118] (Gaudron, Gummow and Hayne JJ) (emphasis added). See also *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388 at [89] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); *Palmer v Western Australia* (2021) 272 CLR 505 at [98] (Gageler J), [184] (Gordon J).

¹⁸ *Brown* (2017) 261 CLR 328 at [199] (Gageler J). See also *ACTV* (1992) 177 CLR 106 at 143 (Mason CJ); *Clubb* (2019) 267 CLR 171 at [174] (Gageler J).

¹⁹ *Babet* (2025) 99 ALJR 883 at [42] (Gageler CJ and Jagot J), [250] (Beech-Jones J).

²⁰ See *Electoral Funding, Expenditure and Disclosures Act 1981* (NSW), s 95A(1); *Electoral Funding Act 2018* (NSW), s 23(1). See further *Unions (No 1)* (2013) 252 CLR 530 at [3], [41] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *McCloy* (2015) 257 CLR 178 at [11] (French CJ, Kiefel, Bell and Keane JJ); *Unions (No 2)* (2019) 264 CLR 595 at [7] (Kiefel CJ, Bell and Keane JJ); *Unions NSW v New South Wales* (2023) 277 CLR 627 (*Unions (No 3)*) at [3]-[4] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ).

²¹ *Spence* (2019) 268 CLR 355 at [93] (Kiefel CJ, Bell, Gageler and Keane JJ).

and radio during the period). *Secondly*, 90% of the available free time was required to be allocated to parties represented in the previous Parliament that were contesting the upcoming election with more than a certain number of candidates. That left only 10% of the free time to other parties and candidates, to be allocated in a way that was “heavily weighted in favour of any other political parties or existing independent senators”, such that it was “possible that an independent candidate who was not a member of the previous Parliament ... would be unsuccessful in any application for free time”.²² Any analysis of *ACTV* must account for both dimensions of the burden.²³

B.2 The burden imposed by s 217D

16. *An indirect burden*: The Defendant accepts that, by imposing the “general cap” on political donations, s 217D imposes an effective burden on the implied freedom.²⁴ However, it is important to be precise about the nature and extent of that burden. The making of a political donation is not *itself* an act of political communication: “mere payment of money” is not a form of communication and thus the “mere fact of making a political donation communicates nothing”.²⁵ Thus, s 217D does not impose any direct legal or practical limitation on the making or the content of political communication by any person. The Plaintiffs, correctly, do not suggest otherwise: **PS [31]**. Rather, s 217D operates to impose an *indirect* practical limitation on the ability of individuals, groups and entities (**regulated entities**) to engage in some modes of political communication²⁶ — namely, those modes of communication that are preceded or conditioned by the expenditure of money: cf **PS [36]**.²⁷ That practical limitation arises in the following way:
- (1) under s 207F(1), the relevant registered person of a regulated entity must keep a “State campaign account”, consisting of a separate account or accounts with an authorised deposit-taking institution for the purpose of State elections;
 - (2) under s 207F(2), the relevant registered person must ensure that each political donation received by the regulated entity is paid into the State campaign account;

²² *ACTV* (1992) 177 CLR 106 at 171-172 (Deane and Toohey JJ), see also at 145-146 (Mason CJ), 220-221 (Gaudron J).

²³ Cf *Unions (No 1)* (2013) 252 CLR 530 at [137] (Keane J); *McCloy* (2015) 257 CLR 178 at [137] (Gageler J); *Unions (No 2)* (2019) 264 CLR 595 at [85] (Gageler J).

²⁴ Defence at [59.1]-[59.2]. See *Unions (No 1)* (2013) 252 CLR 530 at [41] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *McCloy* (2015) 257 CLR 178 at [24] (French CJ, Kiefel, Bell and Keane JJ).

²⁵ *McCloy* (2015) 257 CLR 178 at [162] (Gageler J), see also at [25] (French CJ, Kiefel, Bell and Keane JJ).

²⁶ See *Unions (No 1)* (2013) 252 CLR 530 at [38] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See also *Unions (No 2)* (2019) 264 CLR 595 at [15] (Kiefel CJ, Bell and Keane JJ); *McCloy* (2015) 257 CLR 178 at [223] (Nettle J), [342] (Gordon J); *Ravbar* (2025) 99 ALJR 1000 at [434] (Beech-Jones J).

²⁷ Cf *Unions (No 1)* (2013) 252 CLR 530 at [121] (Keane J).

- (3) under s 207F(6), the relevant registered person must ensure that no amount of money for “political expenditure”²⁸ is paid by the regulated entity unless it is paid from the State campaign account;
 - (4) by limiting the amount of money that a person can donate to a regulated entity, s 217D directly limits the amount of money that may be paid into the State campaign account; and
 - (5) because political expenditure must be paid for out of the State campaign account, s 217D indirectly limits the amount of “political expenditure” that can be incurred.
17. On that analysis, it is inaccurate to say that s 207F imposes an “effective cap on political expenditure” and, therefore, incorrect to say that s 207F itself imposes any burden that is distinct from that imposed by the general cap in s 217D, or that any burden imposed by Pt 12 is “direct”: **PS [32], [36]**. Section 207F does not place any ceiling (legal or practical) on the amount that may be spent on political expenditure. To the contrary, *any* amount that is received into the State campaign account may be spent on political expenditure.²⁹
 18. Relatedly, it is also important to recognise that funds *other* than political donations may be paid into the State campaign account. Public funding received under Div 2 must be paid into the recipient’s State campaign account (s 212(4A)). Indeed, the only prohibitions on what must not be paid into a State campaign account are amounts kept for Commonwealth electoral purposes (s 207F(3)), certain annual fees and levies paid to registered political parties (s 207F(4)), administrative expenditure funding received under Div 1C (s 207GG(1)), and policy development funding received under Div 2A (s 215A(4)). That means, for example, that a candidate is not prohibited from placing their *own* personal money into the State campaign account (up to any amount they choose) and using that money to pay for political expenditure.³⁰
 19. ***Public funding reduces the burden:*** The extent of the indirect burden is “ameliorated” by public funding.³¹ Recognising that the general cap would reduce how much money

²⁸ “Political expenditure” is defined in s 206(1) to mean “any expenditure for the dominant purpose of directing how a person should vote at an election, by promoting or opposing— (a) the election of any candidate at the election; or (b) a registered political party; or (c) an elected member,” subject to certain exceptions that are not presently relevant.

²⁹ Cf *Unions (No 1)* (2013) 252 CLR 530 at [41] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

³⁰ See s 217D(5): “A contribution by a candidate at an election or an elected member to their own campaign is not included in the general cap in respect of that candidate or member”. See also SC-30 at 1189.

³¹ *McCloy* (2015) 257 CLR 178 at [13], see also at [24] (French CJ, Kiefel, Bell and Keane JJ), [159] (Gageler J); *Unions (No 1)* (2013) 252 CLR 530 at [38], [40] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

regulated entities could raise by political donations, the *Electoral Legislation Amendment Act 2018* (Vic) (**2018 Amendment Act**) “significantly” increased the amount of public funding available to reimburse registered political parties’ and candidates’ campaign expenses.³² The Expert Panel described the increased public funding allowances as “generous” and noted that providing eligible registered political parties and candidates with an alternative source of funding was able to “offset[] the potential reduction in privately-donated campaign funds following the introduction of the general cap”.³³

- (1) For eligible recipients (who received at least 4% of the total number of first preference votes or who were elected at the previous election), the public funding entitlement increased from \$1.79 per first preference vote for the 2018 State election to \$6 for each first preference vote for election to the Legislative Assembly, subject to indexation,³⁴ and \$3 for each first preference vote for election to the Legislative Council, subject to indexation,³⁵ for subsequent elections (s 211(2A)).
 - (2) The 2018 Amendment Act also provided for eligible recipients to receive “advance payment” of an amount equal to their public funding entitlement for the previous general election before the next general election (s 212A). Public funding is required to be paid into the recipient’s State campaign account and is therefore available to be used to incur political expenditure (s 212(4A)).
20. These public funding entitlements provide context for the financial benefits registered political parties may receive from nominated entities: cf **PS [22]**. The Victorian electoral system is substantially publicly funded. The public funding received by the Liberal Party of Australia (Victorian Division) and the Australian Labor Party – Victorian Branch in respect of the 2022 State election far exceeded the sums each party received from their respective nominated entity (SC [76], [79]). The Second Plaintiff has received public funding to partially reimburse her for political expenditure incurred in respect of the 2022 State election (SC [69]) and advance public funding for the 2026 State election (SC [70]). She is therefore in a materially different position now as compared to her first campaign.
21. **A differential burden:** The State accepts that the indirect burden imposed by s 217D upon registered political parties with a nominated entity is different to the burden imposed upon

³² SC-30 at 1215; Victoria, *Parliamentary Debates*, Legislative Council, 22 June 2018 at 3045-3047 (Mr Jennings).

³³ SC-30 at 1188, 1214-1217.

³⁴ Equal to \$7.01 per first preference vote for 2023-2024: SC-30 at 1216.

³⁵ Equal to \$3.50 per first preference vote for 2023-2024: SC-30 at 1216.

other regulated entities (including registered political parties without a nominated entity).³⁶ Again, it is important to be precise about how that differential burden arises:

- (1) a “political donation” is defined in s 206(1) to mean “a gift” to any of the entities there listed, including a registered political party and a candidate at an election;
- (2) a “gift” as defined in s 206(1) does not include what would otherwise be a “gift” (including a payment of money) “received by a registered political party from the nominated entity of the registered political party” (**nominated entity exception**);
- (3) accordingly, money received by a registered political party from its nominated entity is not a “political donation”;
- (4) because such money is not a political donation, the general cap does not limit the amount of money that the nominated entity may transfer to the registered political party, and the money need not be paid into the State campaign account;
- (5) however, there is no prohibition on such money being paid into the State campaign account and, therefore, any amount of money that a nominated entity transfers to its registered political party may be spent on political expenditure; and
- (6) only a registered political party may appoint a nominated entity under s 222F and there is no equivalent to the nominated entity exception for other regulated entities.

22. Within that context, s 222F(2) and (3) specify the criteria for the appointment of a nominated entity by a registered political party:

- (1) Section 222F(2) provides for the appointment of an entity that is: (a) “controlled”³⁷ by the registered political party; (b) that operates, or is established and maintained, or is the trustee of a trust established and maintained, for the *sole* benefit of its members; and (c) that does not have voting rights in the registered political party.
- (2) Section 222F(3) provides that, despite subsection (2), if the first appointment of an entity as the nominated entity of a registered political party is made before 1 July 2020, an entity may be appointed as a nominated entity if it: (a) operates, or is established and maintained, or is the trustee of a trust established and maintained, for the *principal* benefit of the members of the registered political party; and (b) does not have voting rights in the registered political party.

³⁶ See Defence at [59.3.4].

³⁷ Within the meaning of s 50AA of the *Corporations Act 2001* (Cth).

23. The only parties to appoint a nominated entity before 1 July 2020 were the three major political parties (SC [20]-[25]). The practical result is that, through the nominated entity exception, the major parties may receive funds, above the general cap, from their nominated entity irrespective of whether that entity meets the requirements of s 222F(2) or s 222F(3). Any registered political party in existence before 1 July 2020 (**pre-July 2020 parties**) was legally entitled to appoint a nominated entity that met the criteria in s 222F(3), so long as the appointment was made before that date. That puts pre-July 2020 parties, including the major parties, in a different position from other registered political parties, which can only appoint a nominated entity that meets the criteria in s 222F(2).
24. In summary, the two differential aspects of the burden imposed by s 217D are as follows:
- (1) because of the nominated entity exception: parties with a nominated entity may receive funds, above the general cap, which may be used for political expenditure from a source (their nominated entity) that is not available to any other regulated entity (because they cannot, or have not, appointed a nominated entity);
 - (2) because of s 222F(3): parties which appointed a nominated entity before that date may receive funds, above the general cap, which may be used for political expenditure from a source (a nominated entity that meets the criteria in s 222F(3)) that, since 1 July 2020, has not been available to any other registered political party (because only the criteria in s 222F(2) apply from that date).
25. However, the way in which the two differential aspects of the burden operate in practice should not be overstated. In particular, the Plaintiffs make much of the wealth of the nominated entities that have been appointed: **PS [21]-[22], [33]**. However, it is unrealistic to imply that *all* of the “assets and funds” of the nominated entities, which have been invested and accumulated by those entities in pursuit of long-term objectives, are “available” to be given to their respective registered political parties “without constraint” and used to fund political expenditure for a single election.
- (1) Labor Services & Holdings Trust is a trust established to “provide *all necessary services, support and infrastructure to the Party* and any other entity established and controlled by the Party” (SC [44]). Its assets must be applied for those purposes.
 - (2) The National Party Foundation’s assets largely comprise investments held with Morgan Stanley Wealth Management (SC [54]). Those investments have been

financed by loans from the National Party of Australia – Victoria and that income is reinvested for the benefit of the members of the party (SC [55]-[57]).

- (3) In respect of the 2022 State election, the Liberal Party of Australia – Victorian Division received approximately \$1,772,129 from the Cormack Foundation (SC [74]). That amount translates to approximately \$15,545³⁸ per candidate endorsed by the party in the 2022 State election. On a per candidate basis, those receipts are significantly *less* than the value of political donations the Second Plaintiff in fact lawfully raised for the 2022 State election (\$175,255: SC [67.8]) and the Second Plaintiff’s public funding entitlements for the 2022 and 2026 State elections (\$57,442.99 in respect of each election: SC [68]-[69]).
26. Finally, despite acknowledging that the general cap may “disproportionately” affect some electoral participants, the Expert Report stated that there was little evidence to suggest that it had prevented candidates from raising sufficient funds to finance effective electoral campaigns.³⁹ That finding informs the practical effect of the law and the extent of the differential burden on political communication.

C. STAGE 2: EXPLANATION

27. The second stage of the analysis involves identifying the law’s purpose and assessing whether it is “legitimate”. The purpose of a law is that which the law is “designed to achieve in fact”, akin to the “mischief” it is designed to address.⁴⁰ It is to be identified by reference to the text and context (understood widely) of the provision.⁴¹ For a purpose to be “legitimate”, it must be “compatible with the system of representative government for which the *Constitution* provides”.⁴² If the law has an illegitimate purpose, the burden on the freedom cannot be explained in the requisite sense, and the law will be invalid.

C.1 The anti-corruption purpose

28. The purpose of Pt 12 of the *Electoral Act* is to enhance the integrity of the State electoral system.⁴³ Within that scheme, s 217D serves the specific purpose of reducing the “risk of corruption or undue influence in the government of the State which can arise from elected office holders finding themselves beholden to those persons or entities whose funding, or

³⁸ \$1,772,129/114 candidates ≈ \$15,545 per candidate. See SC [64].

³⁹ SC-30, pp 1188-1189.

⁴⁰ *Farmer* [2025] HCA 38 at [54] (Gageler CJ, Gordon and Beech-Jones JJ).

⁴¹ See *Ravbar* (2025) 99 ALJR 1000 at [41]-[45] (Gageler CJ), [117]-[120] (Gordon J), [172]-[174] (Edelman J), [370] (Jagot J), [459] (Beech-Jones J).

⁴² *McCloy* (2015) 257 CLR 178 at [2] (French CJ, Kiefel, Bell and Keane JJ).

⁴³ See 2018 Amendment Act, s 1(a)(ii).

whose withholding of funding, contributed to the office holders' electoral success"⁴⁴ (**anti-corruption purpose**).

29. The Plaintiffs accept the anti-corruption purpose finds "some support" in the extrinsic materials: **PS [39]**. That understates the position. Section 217D is found in Div 3B of Pt 12, and the Explanatory Memorandum to the Bill that inserted Div 3B expressly identifies the purpose of that Division as being "to provide a cap on political donations that may be received between general elections, to minimise the influence of single donors".⁴⁵ That explanation is short-hand for the anti-corruption purpose: where "single donors" are limited to making only small donations (i.e. donations up to the general cap), the risk of "single donors" being able to exercise undue influence over an elected office-holder is reduced because the office-holder is less likely to find themselves beholden to that person, because their electoral success is unlikely to stand or fall on the giving or withholding of a small donation by a "single donor". The Attorney-General made the same point in the second reading speech, stating that the general cap would "reduc[e] the potential for those with 'deep pockets' to try and exert greater influence".⁴⁶
30. It is true that the second reading speech also refers to the cap ensuring a "level playing field" and providing for "equal participation in the electoral process". However, that ought to be understood as a reference to a possible incidental *effect* of s 217D, rather than its *purpose*. The metaphor of a "level playing field" is concerned with the amount of money *expended* on political communication and, in particular, with "preventing wealthy voices from dominating political discourse".⁴⁷ An "expenditure cap" can therefore more readily be understood as directed to the purpose of "levelling the playing field": the significance of a person's wealth will be reduced, if not eliminated, by a cap which places a ceiling on what a person can *spend* on political communication.⁴⁸ In contrast, a *donation* cap like s 217D is concerned with the amount of money *received* by participants in the electoral process. Of course, as illustrated above, the amount of money received by participants might *indirectly* limit the amount of money that those participants have available to spend on political communication. But the fact that a donation cap such as s 217D might indirectly contribute to that outcome — and the fact that Parliament

⁴⁴ *Unions (No 2)* (2019) 264 CLR 595 at [71] (Gageler J), citing *McCloy* (2015) 257 CLR 178 at [36] (French CJ, Kiefel, Bell and Keane JJ), [181] (Gageler J).

⁴⁵ Explanatory Memorandum, Electoral Legislation Amendment Bill 2018 at 35 (SC-1 at 71).

⁴⁶ Victoria, *Parliamentary Debates*, Legislative Assembly, 10 May 2018 at 1351 (Mr Pakula).

⁴⁷ *McCloy* (2015) 257 CLR 178 at [182] (Gageler J).

⁴⁸ See *Unions (No 2)* (2019) 264 CLR 595 at [82]-[83] (Gageler J).

implicitly recognised its potential contribution to that outcome — is not the same as saying that the donation cap had the objective *purpose* of achieving that outcome.⁴⁹

C.2 Legitimacy of the anti-corruption purpose

31. The Plaintiffs accept that the anti-corruption purpose is “legitimate”: **PS [38]**. Not only is that purpose compatible with the constitutionally prescribed system of government, it supports and enhances that system.⁵⁰ However, the Plaintiffs contend that s 217D does not, in truth, have that purpose or, alternatively, that it has an “additional and nefarious” purpose.⁵¹ Their submission involves two large steps: *first*, that at least one purpose of the “nominated entity provisions” is to “place the legacy parties in a privileged position over independent candidates or new RPPs in respect of the sources of funds that are available to be used for political expenditure” (**PS [41]**); and *secondly*, that this purpose should be attributed to s 217D (**PS [42]**). Even if it is assumed that an additional incompatible purpose would result in invalidity notwithstanding the existence of a legitimate purpose,⁵² the Plaintiffs’ argument cannot be accepted.
32. The problem with the *first* step in that argument is a problem that affected a similar argument in *Unions (No 2)* and that is identified at [12] above: namely, that the notion of “privileging” has “embedded within it a notion of want of justification”; stripped of its pejorative connotation, “privileging” means nothing more than “differential treatment and unequal outcomes”.⁵³ As Gageler J said in *Unions (No 2)*:⁵⁴

Once it is recognised that “differential treatment and unequal outcomes may be the product of a legislative distinction which is appropriate and adapted to the attainment of a proper objective”, it becomes apparent that the compatibility of the “privileging” and “marginalising” of which the plaintiffs complain with maintenance of the constitutionally prescribed system of representative and responsible government cannot be determined without further analysis.

33. To assert that a law has the purpose of “privileging” the major parties is to assert a conclusion that *any* differential operation of the law is not appropriate and adapted to a

⁴⁹ See *McCloy* (2015) 257 CLR 178 at [40] (French CJ, Kiefel, Bell and Keane JJ); *Farm Transparency v New South Wales* (2022) 277 CLR 537 at [34] (Kiefel CJ and Keane J), [171] (Gordon J); *Ravbar* (2025) 99 ALJR 1000 at [173]–[174] (Edelman J).

⁵⁰ See *McCloy* (2015) 257 CLR 178 at [93] (French CJ, Kiefel, Bell and Keane JJ), [344] (Gordon J).

⁵¹ See *Unions (No 2)* (2019) 264 CLR 595 at [73] (Gageler J); cf at [5] (Kiefel CJ, Bell and Keane JJ).

⁵² This argument has not yet been determined by a majority of the Court: eg, compare *Ravbar* (2025) 99 ALJR 1000 at [117]–[140] (Gordon J), [177]–[179] (Edelman J), [392] (Jagot J).

⁵³ *Unions (No 2)* (2019) 264 CLR 595 at [84] (Gageler J).

⁵⁴ *Unions (No 2)* (2019) 264 CLR 595 at [84] (Gageler J), quoting *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [147] (Gummow and Hayne JJ).

proper objective, so as to collapse the questions of legitimate purpose and justification. As in *Unions (No 2)*, “[t]he latter question is the real question in the present case”.⁵⁵

34. Further, even if it is assumed that the first step in the Plaintiffs’ argument is correct, the argument fails at the *second* step: there is no basis to identify a purpose of the nominated entity provisions (however they are identified) and then to attribute that purpose to s 217D. As the Plaintiffs accept, it is “extraordinary step” to infer that s 217D “has an unexpressed and constitutionally impermissible purpose”.⁵⁶ Here, to infer the existence of such an object it would be necessary to disregard the express statement of purpose in the 2018 Amendment Act, as well as the extrinsic materials,⁵⁷ and to conclude, in effect, that the entirety of Div 3B of Pt 12 was designed not to achieve the anti-corruption purpose, but was instead enacted as an elaborate charade designed, in fact, to give the major parties an electoral advantage.
35. In these circumstances, this is not a case where it is helpful, at the “purpose” stage of the analysis, to consider “how closely the legal operation of the law conforms to an asserted purpose”: it is not an “extreme case”, where the asserted disconformity between means and ends is “so great as to admit of the conclusion that the law cannot be explained as having the asserted purpose”.⁵⁸ To the contrary, the anti-corruption purpose is entirely “plausible”, meaning that this is a case where, consistently with *ACTV*, *Unions (No 1)* and *Unions (No 2)*, “examination of how well the legal operation of the law conforms to that purpose can ... more profitably be left to be examined at the stage of asking whether the law is reasonably appropriate and adapted to advance that purpose”.⁵⁹

D. STAGE 3: JUSTIFICATION

36. Where a legitimate purpose has been identified, the final stage of the analysis is to determine whether the burden imposed by that law is “justified”, which is to be determined by asking whether “the means (the manner in which the law pursues that purpose) are reasonably appropriate and adapted to advance that purpose in a manner that is compatible with the maintenance of the constitutionally prescribed system of

⁵⁵ *Unions (No 2)* (2019) 264 CLR 595 at [92] (Gageler J).

⁵⁶ *Unions (No 2)* (2019) 264 CLR 595 at [81] (Gageler J); see also at [79] and **PS [42]**.

⁵⁷ Cf *Ravbar* (2025) 99 ALJR 1000, where the extrinsic materials were said to support the identification of an illegitimate purpose: see [125]-[139] (Gordon J).

⁵⁸ *Brown* (2017) 261 CLR 328 at [215] (Gageler J).

⁵⁹ *Brown* (2017) 261 CLR 328 at [216], see also at [217] (Gageler J); *Unions (No 2)* (2019) 264 CLR 595 at [36]-[37] (Kiefel CJ, Bell and Keane JJ), [154] (Gordon J).

government”.⁶⁰ The Defendant “bears the persuasive onus of establishing that justification”.⁶¹ That assessment *may* be undertaken using the “tool of analysis” known as “structured proportionality”.⁶² As noted earlier, it is at this stage that the nature and extent of the burden assume importance.

D.1 Reasonably appropriate and adapted

37. Here, for the reasons given at [21]-[26] above, the Defendant accepts that the general cap in s 217D imposes a “differential” burden in two distinct ways: (1) as between registered political parties and other regulated entities, by operation of the nominated entity exception; and (2) within that exception, as between pre-July 2020 parties that appointed a nominated entity before that date and other registered political parties, by operation of s 222F(3) as compared to s 222F(2). In the context of a proceeding brought by two candidates, neither of whom represents a registered political party (see SC [4.3]), it is convenient to begin by analysing the first differential aspect of the burden, operating with s 222F(2).
38. ***The nominated entity exception, with s 222F(2):*** The first differential aspect of the burden, operating with s 222F(2), is not accurately described as “discriminatory”. It does not treat equals unequally. The nominated entity exception treats registered political parties differently from other regulated entities, including independent candidates, *because* parties are relevantly different from those other entities. The exception is the product of a distinction which is appropriate and adapted to the attainment of a proper objective.
39. *First*, treating registered political parties differently to other regulated entities is not inherently problematic. For example, it is permissible to treat parties differently from third party campaigners in the context of expenditure caps, not because parties “occupy a constitutionally distinct position”,⁶³ but because “parties must incur the expenses of mounting a campaign in every electorate on all issues, so their expenditure is much greater than third-party campaigners, who may pick and choose who, what, where and how they seek to influence election outcomes”.⁶⁴ In addition to the scope of their electoral operations, parties (particularly the major parties) may also be distinguished from

⁶⁰ *Farmer* [2025] HCA 38 at [57], see also at [39] (Gageler CJ, Gordon and Beech-Jones JJ), [243] (Jagot J).

⁶¹ *Unions (No 3)* (2023) 277 CLR 627 at [31] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ).

⁶² *Babet* (2025) 99 ALJR 883 at [49] (Gageler CJ and Jagot J), [72] (Gordon J), [242] (Beech-Jones J); *Ravbar* (2025) 99 ALJR 1000 at [29] (Gageler CJ), [343] (Jagot J), [427] (Beech-Jones J).

⁶³ *Unions (No 2)* (2019) 264 CLR 595 at [39]-[40] (Kiefel CJ, Bell and Keane JJ).

⁶⁴ *Unions (No 2)* (2019) 264 CLR 595 at [29] (Kiefel CJ, Bell and Keane JJ), see also at [88]-[91] (Gageler J).

independent candidates by their intention to form a government.⁶⁵ The Victorian branches of the Labor and Liberal parties endorsed, respectively, 128 and 117 candidates for election in the 2022 Victorian State election (SC [65]). It is uncontroversial that both parties aimed to win government at the election and therefore ran Statewide campaigns.

40. For the same reason, in the context of donations caps, it is not necessarily impermissible to treat registered political parties differently from other regulated entities, including from independent candidates who only seek to influence a single election outcome (their own). Other political donation schemes adopt that distinction in capping donations. For example, political donations in New South Wales are capped at \$6,100 for donations to registered parties and groups and \$2,700 for donations to other regulated entities, including candidates.⁶⁶ In contrast, the general cap imposed by s 217D applies equally to the different types of regulated entities,⁶⁷ despite their “functional distinctions”.⁶⁸ Those distinctions are instead accommodated by the nominated entity provisions.
41. *Secondly*, registered political parties may be unincorporated associations. The *Electoral Act* does not seek to regulate the internal affairs of political parties.⁶⁹ The Victorian branches or divisions of the three major parties are unincorporated associations. There are practical reasons why those parties (and others) may have chosen to adopt and maintain that organisational structure.⁷⁰ Equally, because legal title to the assets of an unincorporated association must either be held by individual members or by separate, incorporated entities, there are practical reasons why a registered political party would establish a corporate vehicle to hold its assets and assume liabilities.⁷¹
42. *Thirdly*, the criteria in s 222F(2) envisage an entity that is, for relevant purposes, an extension of the registered political party. An entity appointed under that provision must be controlled by, and operate for the sole benefit of, its registered political party. The paradigm example is a corporate trustee, controlled by the members of an unincorporated registered political party, that holds assets on trust for the party. The nominated entity exception was intended to “acknowledge[] [those] existing arrangements between

⁶⁵ *Unions (No 2)* (2019) 264 CLR 595 at [89]–[90] (Gageler J).

⁶⁶ *Electoral Funding Act 2018* (NSW), s 23(1). The applicable caps are subject to indexation.

⁶⁷ A political donation to a candidate or elected member who has been selected or endorsed by a registered political party is included as a donation to the registered political party: s 217D(6).

⁶⁸ *Unions (No 2)* (2019) 264 CLR 595 at [90] (Gageler J).

⁶⁹ *Camenzuli v Morrison* (2022) 107 NSWLR 439 at [64] (the Court); *Asmar v Albanese (No 4)* (2021) 67 VR 202 at [160] (Ginnane J).

⁷⁰ See *Cameron v Hogan* (1934) 51 CLR 358; *Camenzuli v Morrison* (2022) 107 NSWLR 439.

⁷¹ For example, the Rules of the Australian Labor Party – Victorian Branch require it to do so (SC [62]).

political parties and separate entities that manage financial commitments and maintain assets for the sole benefit of the registered political party”.⁷²

43. The intention that a nominated entity would be treated as an extension of its registered political party is also reflected in: (a) the reciprocal nature of the nominated entity exception — a transfer of property from a registered political party *to* its nominated entity is also not a “gift”; (b) the requirement that a political donation to a nominated entity must also be counted as a donation to the registered political party for the purposes of the general cap (s 217D(6)(d)); and (c) the administrative arrangement whereby the registered officer of a registered political party is also taken to be the agent of the party’s nominated entity (s 207C) and is therefore required to comply with various administrative requirements, including maintaining a State campaign account (s 207F(1)), and providing disclosure returns (s 216(4)) and annual returns (s 217L) to the Commission, on its behalf.
44. That conception of a nominated entity also explains the specific anti-circumvention offence in s 218B(2), which makes it an offence for a person to enter into a “scheme” under which an entity receives a gift before its appointment as a nominated entity, if the receiving of the gift by the entity would have constituted an offence against Pt 12 if the entity had been the nominated entity of the registered political party at the time the gift was received,⁷³ and provided that the “scheme” was entered into with the intention of circumventing a prohibition or requirement of Pt 12 (including the prohibitions against making or accepting political donations in excess of the general cap). Section 218B(2) does not prevent a registered political party from establishing an entity to hold the party’s assets on trust for the party and appointing that entity as its nominated entity. It therefore does not prevent newer registered political parties from establishing nominated entities on an equal footing with pre-existing entities appointed under s 222F(2) (**PS [34]**). The limiting factor is the existing assets of the party. For the same reasons, the nominated entity exception, operating with s 222F(2), also treats registered political parties consistently with independent candidates, who may use their own assets to fund political expenditure (s 217D(5)). In this way, although s 222F(2) creates a legal distinction

⁷² Explanatory Memorandum, Electoral Legislation Amendment Bill 2018, 18 (SC-1 at 54). See also Victoria, *Parliamentary Debates*, Legislative Assembly, 10 May 2018, 1350 (Mr Pakula): “A nominated entity is a new class of entity, introduced to address the operational and organisational structures that may exist for registered political parties in Victoria. Gifts between a nominated entity and its registered political party will be exempt from the scheme, and provide for registered political parties that use a separate entity to hold and maintain assets for the party, or provide services for the party.”

⁷³ Section 218(5A) provides that it is an offence for a person knowingly to make or accept a political donation that is unlawful under, relevantly, Div 3B of Pt 12, which includes s 217D.

permitting only registered political parties to appoint a nominated entity, it does not result in a practical distinction.

45. *Fourthly*, the general cap applies to political donations to nominated entities (s 217D(1)(g)) and, as noted above, a political donation to a nominated entity must also be counted as a donation to the party for the purposes of the cap (s 217D(6)(d)). Nominated entities are subject to the same disclosure regime as parties (s 216(4)) and funds transferred between nominated entities and parties must be disclosed in the parties' annual returns (s 217I) (cf **PS [40]**). Nominated entities are prohibited from receiving donations from foreign donors (s 217A) or anonymous donations above the "disclosure threshold" (s 217B). A registered political party cannot therefore use its nominated entity to circumvent the prohibitions imposed on the registered political party by Pt 12 or to increase its access to private donations subject to the general cap.
46. For those reasons, the relationship between registered political parties and nominated entities cannot be equated with the relationship between regulated entities and private donors. There is no "privileging" of parties in respect of the *sources* of funds available for political expenditure. Once it is recognised that the nominated entity exception is not truly discriminatory, there is no reason to conclude that the first differential aspect of the burden is unjustified or that the indirect burden imposed by s 217D is not otherwise reasonably appropriate and adapted to the anti-corruption purpose.
47. **Section 222F(3):** In relation to the first differential burden imposed by the donation cap, each of the points set out at [38]-[46] above with respect to s 222F(2) also applies to s 222F(3). Having regard to the criterion in s 222F(3)(a) that the entity must operate, or be established and maintained, for the *principal* benefit of the members of the registered political party, the third point made above applies with less force, but such an entity can still fairly be regarded as an extension of the party.⁷⁴ Further, the "principal benefit" criterion does not give rise to a risk of undue influence or clientelism: **PS [40], [46]-[47]**. There are no facts in the Special Case which suggest any — necessarily *subsidiary* or *incidental* — interest that a nominated entity meeting this criterion has, or could have,

⁷⁴ See Victoria, *Parliamentary Debates*, Legislative Council, 22 June 2018, 3087 (Mr Jennings) (noting that the amendment was supported by the government "to make sure that there was reasonable access to assets and income management within political parties"). The word "principal" may be equated to "dominant", "prevailing" or "ruling": cf *Australian Securities and Investments Commission v Westpac Banking Corporation Ltd (No 2)* (2018) 266 FCR 147 at [1939] (Beach J).

separate from the interests of the members of the party, would give rise to a risk of undue influence or reduce the party to a “client” of its nominated entity.

48. However, the second differential aspect of the burden imposed by the donation cap involves the unequal treatment (different appointment criteria) of equals (registered political parties) due to the time limitation in s 222F(3). The Defendant accepts that there are no facts in the Special Case that would enable the Court to conclude that the different treatment of pre-July 2020 parties and new registered political parties is the product of a distinction which is appropriate and adapted to the attainment of a proper objective. The Defendant therefore accepts that the second differential aspect of the burden arising from the time limitation is properly characterised as “discriminatory” and is not otherwise justified on the material in the Special Case. However, the time limitation in s 222F(3) is severable.⁷⁵ If the time limitation in s 222F(3) is severed, the second differential aspect of the burden would fall away: *any* registered political party would be entitled to appoint a nominated entity that meets the criteria in s 222F(3). What would remain is the first differential aspect which is valid for the reasons explained above.

D.2 Structured proportionality

49. Because the Plaintiffs’ have advanced their case (at least in part) by reference to structured proportionality, the Defendant responds accordingly: see **PS [45]**. However, in doing so, the Defendant does not accept that it is *necessary* to use that tool to resolve the justification analysis in the circumstances of this case.
50. ***Suitability***: A law will be “suitable” if it “exhibits a rational connection to its purpose, and a law exhibits such a connection if the means for which it provides are capable of realising that purpose”.⁷⁶ The question is therefore whether s 217D is capable of achieving the anti-corruption purpose; is it capable of reducing the risk of undue influence or corruption by large single donors? The answer to that question must be “yes”.
51. As the Plaintiffs put it, a “cap on political donations may be in pursuit of a purpose of *reducing* the risk of corruption or undue influence”: **PS [40]** (emphasis added). The nominated entities exception does not destroy the capacity of the general cap to realise that purpose. The criteria for appointing a nominated entity (under s 222F(2) or (3)), and

⁷⁵ In accordance with s 6(1) of the *Interpretation of Legislation Act 1984* (Vic).

⁷⁶ *Comcare v Banerji* (2019) 267 CLR 373 at [33] (Kiefel CJ, Bell, Keane and Nettle JJ).

- the regulation of nominated entities, mean that the exception does not give rise to any real risk of a third party donor exerting corrupting or undue influence on an elected member.
52. Even if the general cap were somehow less *effective* at achieving the anti-corruption purpose *because* of the nominated entity exception (which is denied), that would not be sufficient to break the rational connection.⁷⁷ Taking the Plaintiffs’ case at its highest — that the nominated entity exception creates a risk of “clientelism” (PS [46]) — that submission hinges on the operation of s 222F(3) and fails to give weight to the effect of the requirement that an entity appointed under that provision must operate for the party’s principal benefit and not have voting rights in the party or to the provisions regulating nominated entities. The submission also elides the distinction between s 222F(2) and (3): PS [47]. At least insofar as the nominated entity exception operates by reference to s 222F(2), the exception does not detract from the anti-corruption purpose at all.
 53. **Necessity:** A law will be “necessary” if there is no “obvious and compelling” alternative, which is equally practicable and available and which would result in a significantly lesser burden on the implied freedom.⁷⁸ An alternative will not be “equally practicable” unless it is “as capable of fulfilling [the] purpose as the means employed by the impugned provision, ‘quantitatively, qualitatively, and probability-wise’”.⁷⁹
 54. The Plaintiffs advance two alternatives. The *first* alternative is a scheme that does not include the nominated entity exception at all. That would not result in a significantly lesser burden. The burden on regulated entities other than registered political parties would remain the same. They would continue to be able to fund political expenditure from donations up to the general cap, public funding (where they are entitled to it) and their own assets. Registered political parties, by contrast, would be denied the ability to fund political expenditure from funds which may be regarded as the party’s own assets held by entities controlled by and existing solely for the benefit of, or on trust for, the party. That would *add* to the burden imposed on registered political parties.
 55. The *second* alternative is a scheme that omits s 222F(3) in its entirety (PS [50]). For those same reasons that apply in relation to the first posited alternative, the second alternative would also not result in a significantly lesser burden and should be rejected. However,

⁷⁷ *Brown* (2017) 261 CLR 328 at [281] (Nettle J); *Taijour v New South Wales* (2014) 254 CLR 508 at [82] (Hayne J). See also *Ravbar* (2025) 99 ALJR 1000 at [221]-[222] (Edelman J).

⁷⁸ *Banerji* (2019) 267 CLR 373 at [35] (Kiefel CJ, Bell, Keane and Nettle JJ).

⁷⁹ *Tajjour* (2014) 254 CLR 508 at [114] (Crennan, Kiefel and Bell JJ). See also *Farm Transparency* (2022) 277 CLR 537 at [46] (Kiefel CJ and Keane JJ).

consistently with the acknowledgment at [48] above, the Defendant accepts that s 217D, operating *without the time limitation* in s 222F(3), would continue to fulfil the anti-corruption purpose without introducing any discriminatory element. The Defendant accepts that this variation to the Plaintiff’s second alternative — whereby the time limitation in s 222F(3) is omitted — is therefore a compelling and equally practicable alternative which is less restrictive on the implied freedom.

56. ***Adequacy in the balance:*** Where a law is otherwise suitable and necessary, it will be “adequate in its balance” unless the benefit it seeks to achieve is manifestly outweighed by the law’s adverse effect on the freedom.⁸⁰ For the reasons at [38]-[47] above, the nominated entity exception does not detract from the general operation of s 217D or the achievement of its anti-corruption purpose and, with the exception of the *time limitation* in s 222F(3), does not have a discriminatory impact on the freedom.

D.3 Conclusion on Special Case Questions

57. Question 1 in the Special Case should be answered: “No, except to the extent that the nominated entity exception operates with the words ‘if the first appointment of an entity as the nominated entity of a registered political party is made before 1 July 2020’ in s 222F(3)”. The Court should declare that s 222F(3) is invalid, but severable, to that extent, because, to that extent the provision is inconsistent with the implied freedom of political communication and Question 2 should be answered accordingly.

PART VI: ESTIMATE OF TIME

58. The Defendant estimates it will require approximately 2 hours for oral submissions.

Dated: 24 November 2025



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⁸⁰ *Banerji* (2019) 267 CLR 373 at [38] (Kiefel CJ, Bell, Keane and Nettle JJ); *LibertyWorks* (2021) 274 CLR 1 at [85] (Kiefel CJ, Keane and Gleeson JJ).

ANNEXURE TO DEFENDANT'S SUBMISSIONS

No	Description	Version	Provision	Reason for providing this version	Applicable dates
1.	<i>Commonwealth Constitution</i>	Current	-	Currently in force.	All relevant dates.
2.	<i>Corporations Act 2001</i> (Cth)	Compilation No 143 (9 July 2025 to present)	s 50AA	Currently in force.	All relevant dates.
3.	<i>Electoral Act 2002</i> (Vic)	Version 65 (10 February 2025 to present)	Pt 12	Currently in force.	All relevant dates.
4.	<i>Electoral Legislation Amendment Act 2018</i> (Vic)	As made	s 1	Amended Pt 12 of the Electoral Act.	-
5.	<i>Electoral Funding, Expenditure and Disclosures Act 1981</i> (NSW)	3 April 2013 to 23 June 2014	s 95A	In force when <i>Unions (No 1)</i> was decided.	18 December 2013
6.	<i>Electoral Funding Act 2018</i> (NSW)	31 October 2018 to 17 January 2019	s 23	In force when <i>Unions (No 2)</i> was decided.	25 January 2019
7.	<i>Electoral Funding Act 2018</i> (NSW)	16 December 2022 to 30 June 2023	s 23	In force when <i>Unions (No 3)</i> was decided.	15 February 2023
8.	<i>Interpretation of Legislation Act 1984</i> (Vic)	Version 31 (6 September 2023 to present)	s 6(1)	Currently in force.	-