HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M10/2025

BETWEEN:

PAUL HOPPER
First Plaintiff

MELISSA LOWE
Second Plaintiff

and

THE STATE OF VICTORIA
Defendant

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

PART I: CERTIFICATION

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

PART II: INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth).

PART III: ISSUES

3. In summary, the Commonwealth makes the following submissions:

3.1. ***First***, a cap on political donations creates an indirect burden on political communication. However, a donation cap should not be analysed as a de facto expenditure cap, at least where political donations are not the only source of funds that can lawfully be used for political expenditure. Further, exceptions to a donation cap (such as the nominated entity exception) lessen rather than increase the burden on political communication, although the resultant differential operation of that (lower) burden may be relevant to whether the burden can be justified.

3.2. ***Secondly***, laws that differentiate between political parties and other regulated political actors will not be discriminatory if they are appropriate and adapted to a relevant difference. An exception to a donation cap that exempts transfers of property to a registered political party from a single entity nominated by that party that operates for the principal benefit of the members of the party is appropriate and adapted to such a difference. This is because political parties have historically been unincorporated associations that are dependent on other entities to hold and grow their assets. A nominated entity exception therefore does not point to a donation cap having any purpose other than reducing the risk of political corruption and undue influence. That purpose is legitimate.

3.3. ***Thirdly***, whether a donation cap (taken together with a nominated entity exception) infringes the implied freedom of political communication depends on whether the differential burden on political communication that results from that exception is appropriate and adapted to its legitimate purpose.[1] In light of significant differences between the relevant Commonwealth legislative regime and Pt 12 of

[1] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (***Lange***) at 561-562 (the Court).

the *Electoral Act 2002* (Vic) (**Act**), the Commonwealth has no interest in — and therefore does not address — that question.

PART IV: ARGUMENT

4. The plaintiffs' challenge to Pt 12 focusses on two elements: the **general cap** on political donations found in s 217D; and one of the exceptions to the general cap, being the **nominated entity exception** in paragraph (j) of the definition of "gift" in s 206(1).

5. The plaintiffs seem to accept (correctly) that the general cap, without the nominated entity exception, would be constitutionally permissible: see **PS [40], [48]-[49]**. It is the second element — the nominated entity exception — that is said to cause Pt 12 to infringe the implied freedom of political communication (with the asserted consequence that it should be severed): **PS [52]**.

A THE STATUTORY SCHEME

A.1 The general cap

6. Section 217D imposes a general cap on political donations in the period between general elections. The cap applies to political donations to, or for the benefit of, a wide range of political actors: registered political parties, candidates, groups (candidates whose names are grouped on a ballot-paper), elected members, associated entities (certain entities associated with a registered political party other than any nominated entity), third party campaigners, and nominated entities (together, the **regulated actors**): s 217D(1). A "political donation" is relevantly defined as a "gift" to a regulated actor: s 206(1).

7. A political donation to a candidate, elected member or group endorsed by a registered political party, or to the party's nominated entity, is also counted towards the party's cap: s 217D(6). Donations made by a donor (other than any "small contributions"[2]) to the same regulated actor are aggregated: s 217E. The general cap is indexed, and is presently $4,970: ss 206(1) and 217Q.

A.2 Exceptions to the general cap

A.2.1 Nominated entity exception

8. Sub-division 2 of Div 4A of Pt 12 concerns "nominated entities". Only registered

[2] Defined to mean a political donation that is equal to or less than the value of $50: s 206(1).

political parties may appoint an entity as a nominated entity: s 222F(1). Each party may only appoint one nominated entity, which may not be shared with another party: s 222F(4)(a) and (c). An entity will only be eligible for appointment if:

8.1. it and each of its officers have never been convicted of an offence under Pt 12 (s 222F(4)(b));

8.2. it does not have voting rights in the registered political party (s 222F(2)(c) and (3)(b)); and

8.3. it is an incorporated body that 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: s 222F(3).[3]

9. Paragraph (j) of the definition of "gift" in s 206(1) provides that a "gift" does not include "a gift made by a registered political party to the nominated entity of the registered political party or received by a registered political party from the nominated entity of the registered political party". By reason of that exception, transfers of funds in either direction between a registered political party and its nominated entity are not included within the general cap.

A.2.2 Other exceptions

10. In addition to the nominated entity exception, Pt 12 also contains exceptions to the general cap for:

10.1. "small contributions", being contributions made to, or for the benefit of, a regulated actor that are equal to or less than $50 (as indexed)[4] (the **small contribution exception**): s 217D(9)-(10); and

10.2. personal contributions by a candidate or elected member to their own electoral campaign (the **personal contribution exception**): s 217D(5).

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[3] In its terms, s 222F(3) applies only in relation to entities first appointed "before 1 July 2020". However, Victoria concedes (**DS [4], [47]**) that this temporal requirement is invalid and should be severed. The effect of that concession is that s 222F(2)(b) and (c) and 222F(3) overlap.

[4] The "small contribution" amount is presently $61: s 217Q.

11. Other matters are also excluded from the definition of "gift" (and therefore the definition of "political donation") in s 206(1), relevantly including dispositions of property made "by will" and volunteer labour (paragraph (k)).

A.3 The relationship between the general cap and political expenditure

12. The political expenditure of regulated actors is limited to the amounts held in that actor's State campaign account: s 207F(6). Political donations received by each regulated actor must be paid into their State campaign account: s 207F(2). However, political donations are not the only amounts that may be paid into a State campaign account and used as political expenditure. Of particular note, public funding paid in accordance with Div 2 of Pt 12 must also be paid into a regulated actor's State campaign account: s 212(4A). Amounts paid in public funding can be significant: see, eg, **SCB 105-106 [69]-[70], 109 [76]-[77], 110 [82]-[83]**. In the case of the major political parties, for example, the amounts received as public funding in the previous election period were far greater than the amounts received from their respective nominated entities: see **SCB 107 [74]** and **109 [76]**; **109-110 [78]** and **110 [79]**; **110 [81]** and **110 [82]**. The same Act that introduced the general cap also significantly increased the amount of public funding available, thereby providing an alternative source of funding to "offset" the burden on political communication resulting from the general cap: see **DS [19]**.

13. Certain sources of funds may <u>not</u> be paid into a State campaign account, such as: amounts for "Commonwealth electoral purposes" (s 207F(3)); amounts received by registered political parties as annual membership subscriptions, affiliation fees, and levies (s 207F(4)); and amounts received by registered political parties and/or independent elected members as administrative expenditure funding (s 207GG(1)-(2)) and policy development funding (s 215A(6)(a)) (together, the **prohibited amounts**).

14. Part 12 does not contain any cap on political expenditure. The general cap — by restricting political donations — restricts the availability of <u>one</u> source of funding that might be deployed by a regulated actor as political expenditure in an election cycle. However, amounts that are neither a prohibited amount nor subject to the general cap may be paid into a regulated actor's State campaign account, and may thereafter be used for political expenditure without limit. In addition to the amounts paid to the registered political parties as public funding or by their nominated entities, this also includes amounts that candidates and elected members contribute to their own campaigns, such as

the second plaintiff's contributions to her campaign in the previous election period: see **SCB 105 [67.8]**.

B THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION

15. The implied freedom of political communication is a qualified limitation on legislative and executive power, implied principally from ss 7 and 24 of the Constitution, to ensure that the people of the Commonwealth may "exercise a free and informed choice as electors".[5] It is a freedom from action that unjustifiably burdens communication on the subjects of politics and government more generally. As the freedom exists only as an incident of the system of representative and responsible government provided for by the Constitution, it is not absolute.[6] It restricts legislative and executive power only to the extent necessary for the effective operation of that system.[7]

B.1 The burden

16. As stated at **PS [30]**, the first step in the implied freedom analysis is asking whether a law, in its legal or practical operation, imposes an "effective burden" on the implied freedom. The threshold to satisfy that requirement is not high. A "law which prohibits or limits political communication to any extent will generally be found to impose an effective burden on the implied freedom of political communication".[8] Nevertheless, the nature and extent of any burden must be identified, because it informs the level of justification required at later stages of the analysis.[9] For that reason, the Commonwealth makes the following submissions concerning burden.

17. ***First,*** the general cap clearly burdens political communication: **PS [31]; DS [16]**. While donations are not themselves political communication,[10] a donation cap

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5 *Lange* (1997) 189 CLR 520 at 560 (the Court); *Farmer v Minister for Home Affairs* (2025) 99 ALJR 1408 (***Farmer***) at [36] (Gageler CJ, Gordon and Beech-Jones JJ).

6 *Farmer* (2025) 99 ALJR 1408 at [37] (Gageler CJ, Gordon and Beech-Jones JJ).

7 *Comcare v Banerji* (2019) 267 CLR 373 (***Banerji***) at [20] (Kiefel CJ, Bell, Keane and Nettle JJ).

8 *Banerji* (2019) 267 CLR 373 at [29] (Kiefel CJ, Bell, Keane and Nettle JJ). See also *Farmer* (2025) 99 ALJR 1408 at [40] (Gageler CJ, Gordon and Beech-Jones JJ), [194] (Gleeson J).

9 *Brown v Tasmania* (2017) 261 CLR 328 (***Brown***) at [118] (Kiefel CJ, Bell and Keane JJ), [201]-[202] (Gageler J), [325] (Gordon J); *Farmer* (2025) 99 ALJR 1408 at [57] (Gageler CJ, Gordon and Beech-Jones JJ); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (***ACTV***) at 169 (Deane and Toohey JJ).

10 *McCloy v New South Wales* (2015) 257 CLR 178 (***McCloy***) at [25] (French CJ, Kiefel, Bell and Keane JJ), [162] (Gageler J).

nevertheless burdens political communication indirectly (**DS [16]**; cf **PS [36]**) by restricting the funds available to regulated actors to pay for political communication.[11]

18. ***Secondly,*** the suggestion (**PS [32], [51]**; **SOC [59]**) that the general cap in combination with s 207F imposes an "effective" or "de facto" cap on political expenditure is incorrect. The general cap restricts one source of funds that might be used as political expenditure. It does not restrict the availability of public funding to meet electoral communication expenditure under Div 2 of Pt 12 of the Act, which can be a very significant source of funding. That public funding is relevant to assessing the nature and extent of the burden on political communication that arises from Pt 12.[12] The general cap likewise does not restrict the availability of amounts that are neither prohibited amounts nor subject to the general cap, including a candidate's own funds. Those points are sufficient to demonstrate that the attempt to equate the general cap (on donations) with a cap on political expenditure should be rejected.

19. ***Thirdly,*** the plaintiffs treat both the general cap and the nominated entity exception as burdening political communication: ie they treat the nominated entity exception as increasing the burden effected by the general cap: **PS [48]**. That is incorrect because, while the general cap burdens political communication, the nominated entity exception lessens that burden. It does so by placing certain dispositions of property outside the definition of "gift" in s 206(1) and therefore outside the general cap. By allowing registered political parties with a nominated entity to receive more funds to pay for political communication than would otherwise be permitted, the nominated entity exception reduces the overall burden on political communication. Yet, by focussing on the nominated entity exception, the plaintiffs suggest that the implied freedom is impermissibly infringed not by the element of the scheme that actually imposes the burden, but by one of several elements that selectively lessen it.

20. It is true that the effect of the nominated entity exception is to increase the differential operation of the remaining burden effected by the general cap. Nevertheless, it is that

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[11] *Unions NSW v New South Wales* (2013) 252 CLR 530 (***Unions (No 1)***) at [38] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

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

burden that must be justified, rather than some additional burden said to arise from the nominated entity exception. In that regard, the following three points are important.

21. ***First***, whether the differential operation of the general cap can be justified must be assessed having regard to all of the relevant elements of the scheme (including the simultaneous amendments that introduced increases to public funding[13]), rather than by focusing on one part of the scheme in isolation.

22. ***Secondly***, both the legal and practical operation of the general cap and the nominated entity exception are "viewpoint-neutral".[14] That is, the burden does not "target ideas or information".[15] It applies equally, irrespective of the political views of the registered political parties, and is more readily justified for that reason.[16] As Gordon J said in *McCloy*, the provisions "operate in a uniform manner as between all donors and all recipients" regardless of their political affiliation.[17]

23. ***Thirdly***, while the effect of the nominated entity exception is that the general cap has a differential operation as between registered political parties and other regulated actors, that differential operation is not accurately characterised as "discriminatory" if the registered political parties to whom the exception applies are in a relevantly different position to other regulated actors. To the contrary, it would be discriminatory to treat equally those who are not equals, thereby failing to account for relevant differences.[18] There are several relevant differences between political parties and other regulated actors.

23.1. One difference is that political parties, if they hope to form government, "must incur the expense of mounting a campaign in every electorate on all issues".[19] They must also campaign on a statewide basis, rather than just locally. Both of those considerations provide reasons why differential treatment between parties and other regulated entities (for example, in the amount of expenditure caps)

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13 Div 2 of Pt 12.

14 *Farmer* (2025) 99 ALJR 1408 at [57] (Gageler CJ, Gordon and Beech-Jones JJ); *Ruddick v Commonwealth* (2022) 275 CLR 333 (***Ruddick***) at [83] (Gageler J).

15 *ACTV* (1992) 177 CLR 106 at 143 (Mason CJ).

16 *Brown* (2017) 261 CLR 328 at [95] (Kiefel CJ, Bell and Keane JJ), [202] (Gageler J); *Clubb v Edwards* (2019) 267 CLR 171 at [54]-[56] (Kiefel CJ, Bell and Keane JJ), [372]-[373] (Gordon J).

17 *McCloy* (2015) 257 CLR 178 at [334].

18 See, eg, *Austin v Commonwealth* (2003) 215 CLR 185 at [118] (Gaudron, Gummow and Hayne JJ).

19 *Unions NSW v New South Wales* (2019) 264 CLR 595 (***Unions (No 2)***) at [29] (Kiefel CJ, Bell and Keane JJ); also [88]-[91] (Gageler J).

may be permitted.

23.2. Another difference, explained further at [28]–[30] below, is that some political parties — being unincorporated entities — have structured their affairs so that assets that they have raised (sometimes over a long period of time) are held by legal entities that operate for the principal benefit of the members of those parties: **DS [41]; SCB 1221, 1223**. As was recognised in the Second Reading Speech for the Electoral Legislation Amendment Bill 2018 (Vic), the nominated entity exception was "introduced to address the operational and organisational structures that may exist for registered political parties in Victoria", which may "use a separate entity to hold and maintain assets for the party".[20] The close relationship between registered political parties and nominated entities is emphasised by the numerous provisions summarised in **DS [43]** and **[45]**. In those circumstances, an exception that permits registered political parties to use the funds of a nominated entity to communicate their political message is closely akin to the personal contribution exception (ie s 217D(5)), which permits candidates to use their own funds for political expenditure without any limitation arising from the general cap. In that regard, it is significant that Australian electoral systems have never insisted that all political parties and candidates start from a baseline of financial equivalence. Indeed, it has been a well-known feature of several recent federal elections that one party has spent substantially more than all others in seeking to have its candidates elected. In those circumstances, to permit political parties ongoing access to funding previously raised and held by nominated entities that operate for their principal benefit is not to discriminate against other regulated actors. As was observed in *Mulholland*, "[p]erfect calibration" of the playing field, even as between candidates, is not a condition of validity for an electoral law.[21]

24. Finally, even if a law is "discriminatory", it is not presumptively invalid.[22] Nor, as the plurality explained in *Brown*, is it necessarily the case that "[a] law effecting a discriminatory burden on the freedom" effects a "greater burden on the freedom".[23]

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[20] Victoria, *Parliamentary Debates*, Legislative Assembly, 10 May 2018, p 1350 (**SCB 167**). See also Explanatory Memorandum, Electoral Legislation Amendment Bill 2018, p 18 (**SCB 138**).

[21] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 (***Mulholland***) at [241] (Kirby J); see also at [11] (Gleeson CJ), [63] (McHugh J), [333] (Callinan J).

[22] *Brown* (2017) 261 CLR 328 at [92] (Kiefel CJ, Bell and Keane JJ).

[23] *Brown* (2017) 261 CLR 328 at [94] (Kiefel CJ, Bell and Keane JJ).

While "discrimination" bears upon whether a burden on political communication is justifiable, a discriminatory law will not be invalid on implied freedom grounds if it is appropriate and adapted to the attainment of a proper objective.[24]

B.2 Legitimate purpose

25. A legitimate purpose is a purpose "compatible with the maintenance of the constitutionally prescribed system of representative and responsible government".[25] A conclusion that a law does not pursue a legitimate purpose will only be reached in a "rare case".[26] To invalidate a law "at the threshold" is a large step,[27] because to do so marks out a purpose that Parliament may never validly pursue, irrespective of the means
10 adopted. Such a conclusion is not lightly reached in any legislative area, still less in the area of electoral law. That follows because, as this Court has repeatedly recognised, electoral law is an area where the Constitution permits "scope for variety" and Parliaments — including State Parliaments — have a "wide leeway of choice".[28]

26. The purpose of a law is "the public interest sought to be protected and enhanced"[29] by the law or what it "can be seen to be designed to achieve in fact".[30] It is ascertained through ordinary processes of statutory construction, paying attention to the "whole text and context" of the law,[31] relevant historical background, and the "mischief to which the statute is directed".[32] Where a law expressly states its purpose, the task of identifying the law's purpose must commence with that statement.[33] As the plaintiffs accept (**PS [42]**),

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[24] *Unions (No 2)* (2019) 264 CLR 595 at [84] (Gageler J), citing *Mulholland* (2004) 220 CLR 181 at [147] (Gummow and Hayne JJ). So much is illustrated by the results in *McCloy* (2015) 257 CLR 178 and *Spence v Queensland* (2019) 268 CLR 355 (***Spence***).

[25] *Brown* (2017) 261 CLR 328 at [104] (Kiefel CJ, Bell and Keane JJ), [156] (Gageler J).

[26] *Monis v The Queen* (2013) 249 CLR 92 at [281] (Crennan, Kiefel and Bell JJ). See also *Ravbar v Commonwealth* (2025) 99 ALJR 1000 (***Ravbar***) at [177]-[178] (Edelman J).

[27] *Brown* (2017) 261 CLR 328 at [121] (Kiefel CJ, Bell and Keane JJ).

[28] *Babet v Commonwealth* (2025) 99 ALJR 883 (***Babet***) at [90] (Gordon J); *Ruddick* (2022) 275 CLR 333 at [149]-[150], [152] (Gordon, Edelman and Gleeson JJ); *Mulholland* (2004) 220 CLR 181 at [63] (McHugh J), citing *Attorney-General (Cth); ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 56 (Stephen J).

[29] *Babet* (2025) 99 ALJR 883 at [32] (Gageler CJ and Jagot J). See also *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 (***YBFZ***) at [245] (Beech-Jones J); *Ravbar* (2025) 99 ALJR 1000 at [41] (Gageler CJ).

[30] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 at [40] (the Court); *Spence* (2019) 268 CLR 355 at [60] (Kiefel CJ, Bell, Gageler and Keane JJ); *Farmer* (2025) 99 ALJR 1408 at [54] (Gageler CJ, Gordon and Beech-Jones JJ).

[31] *YBFZ* (2024) 99 ALJR 1 at [16] (Gageler CJ, Gordon, Gleeson and Jagot JJ); *McCloy* (2015) 257 CLR 178 at [132] (Gageler J); *Brown* (2017) 261 CLR 328 at [96] (Kiefel CJ, Bell and Keane JJ).

[32] *Ruddick* (2022) 275 CLR 333 at [133] (Gordon, Edelman and Gleeson JJ); *Ravbar* (2025) 99 ALJR 1000 at [459] (Beech-Jones J).

[33] *Unions (No 2)* (2019) 264 CLR 595 at [79] (Gageler J); see also at [172] (Edelman J).

where a statement of this kind exists, an additional unexpressed and constitutionally impermissible purpose should not be lightly inferred.[34]

27. The defendant has identified the purpose of s 217D in particular as being to reduce the "risk of corruption or undue influence … which can arise from elected office holders finding themselves beholden to those … whose funding … contributed to the office holders' electoral success", which it defines as the "anti-corruption purpose": **DS [28]**. The plaintiffs accept that such a purpose is legitimate: **PS [38]**. However, they assert that s 217D actually pursues the unexpressed and constitutionally impermissible purpose of placing the "legacy parties in a privileged position over independent candidates" or new political parties in respect of the sources of funds available for political expenditure, and so "suppress[es] obstruction or opposition": **PS [41]**. In view of the principles set out above, the Court should be very slow to accept that contention.[35] That is particularly so because, as **DS [32]-[33]** points out, the argument about "privileging" is really asserting nothing more than differential treatment. Such treatment does not itself bespeak an illegitimate purpose, but rather raises a question to be resolved as part of the justification analysis.[36]

28. The plaintiffs argue that, because Pt 12 operates differently between registered political parties and other regulated actors, it must have an undisclosed, discriminatory purpose (**PS [35], [40]**). The argument rests on the false premise that political parties and other regulated actors are relevantly alike. But, as this Court has repeatedly recognised, political parties in Australia have historically been, and typically continue to be, "unincorporated associations organised geographically by State and Territory".[37] The parties that have nominated entities are all unincorporated associations: **SCB 86-87 [10]**. This status sets them apart from other regulated actors because, not being legal persons,[38] they cannot "hold property" themselves.[39] Instead, they have historically depended — and continue to depend — on associated "holding companies or trusts"

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[34] *Unions (No 2)* (2019) 264 CLR 595 at [79], [81] (Gageler J); see also at [172] (Edelman J); *Ravbar* (2025) 99 ALJR 1000 at [59] (Gageler CJ).

[35] *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at [119] (Gageler J).

[36] *Unions (No 2)* (2019) 264 CLR 595 at [91] (Gageler J).

[37] *Spence* (2019) 268 CLR 355 at [2] (Kiefel CJ, Bell, Gageler and Keane JJ); see also at [206] (Gordon J).

[38] *Freeman v McManus* [1958] VR 15 (***Freeman***) at 18 (O'Bryan J); *Green v Bradbury* (2011) 191 FCR 417 at [61] (Emmett J).

[39] *Freeman* [1958] VR 15 at 18-19 (O'Bryan J).

to manage their fundraising and investments.[40] It is these entities, rather than the parties themselves, that hold the funds raised and invested by members for their parties over many decades.[41]

29. By contrast, natural persons (such as the plaintiffs) and incorporated entities (such as the political party founded by the first plaintiff and others (**SCB 85 [4.1]**) are legal persons. They can hold property on their own account. They therefore have no need to do so through companies or trusts, and no need to "donate" money to themselves before they can use it on political expenditure. Instead, they can use whatever funds they own for political expenditure without engaging any limit under Pt 12, and without needing to rely on the nominated entity exception to gain access to those funds.

30. Given the above difference, the nominated entity exception is not inconsistent with the legitimate purpose of the general cap, and does not support the alleged unexpressed and constitutionally impermissible purpose of placing the "legacy parties in a privileged position over independent candidates": cf **PS [41]**. The factual difference between the position of registered political parties and other regulated actors explains why the nominated entity exception exists, and why it does not undermine the purpose of the general cap. Specifically, it ensures that registered political parties who have raised funds and arranged for them to be held in structures that — at the time of doing so — allowed those funds to be returned to them for use on political expenditure would not suddenly find themselves unable to use any of those funds for that purpose because of the introduction of the general cap.

31. A further difficulty with the plaintiffs' argument is that it addresses purpose at the wrong level of generality. It does so because, as addressed above, the burden on political communication that must be justified is the burden that arises from the general cap, rather than from the nominated entity exception. It is therefore an error to seek to attribute an illegitimate purpose to the nominated entity exception in isolation: cf **PS** [**42**]. Instead, the question is whether the general cap, together with all relevant exceptions, has a legitimate purpose. In addressing that issue, the following aspects of the scheme

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[40] Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (Federation Press, 2nd ed, 2019) at 119.

[41] Electoral Review Expert Panel, *Report on Victoria's Laws on Political Finance and Electronic Assisted Voting* (November 2023) at 97: **SCB 1223**.

(as it relates to the nominated entity exception) are significant:

31.1. The general cap applies to all regulated actors. The difference between registered political parties and other regulated actors is relevantly confined to one source of political donations.

31.2. Irrespective of how many holding companies or trusts a registered political party has in fact,[42] it may only appoint one nominated entity: see [8] above.

31.3. The nominated entity must be an incorporated body that has a relevant relationship with the registered political party. Specifically, it must be operated, or established and maintained, or be the trustee of a trust established and maintained, for the principal benefit[43] of the members of the registered political party: see [8.3] above.

31.4. The nominated entity is — like all regulated actors — itself subject to the general cap, and political donations that it receives are also counted toward the registered party's cap: see [6] above. In effect, therefore, there is no difference in the operation of Pt 12 between donations made to a registered political party and those made to the nominated entity of that party.

31.5. The nominated entity exception is one of several exceptions to the general cap. Other exceptions include the small contribution exception, the personal contribution exception, and dispositions of property made "by will", which are excluded from the definition of "gift" (and therefore from the definition of "political donation"): see [11] above. That Pt 12 does not prevent a wealthy candidate from spending more on political expenditure than a candidate with more limited personal financial resources does not mean that Pt 12 does not pursue the legitimate purpose of "reduc[ing] corruption or undue influence", because permitting candidates to use their own assets to fund political expenditure is not inconsistent with that purpose. The same is true of the nominated entity exception.

32. Rather than suggesting an unexpressed and illegitimate purpose other than reducing the

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[42] As to the Victorian Liberal Party, see, eg, the description of Vapold Pty Ltd in *Alston v Cormack Foundation Pty Ltd* (2018) 358 ALR 263 at [109] (Beach J).

[43] Victoria concedes that the words in s 222F(3) that would on their face have confined this exception to nominated entities where the nomination was made before 1 July 2020 is invalid: **DS [4]**.

"risk of corruption and undue influence", the above features evince a particular understanding of that risk. Specifically, they suggest that Parliament was concerned to address a risk presented by donations that have three particular features, being that: they were made in **future**, in **large** amounts, and by **unrelated** donors. To elaborate:

32.1. The risk appears to be understood as a risk posed by **future** donations to regulated actors rather than funds they have already accumulated. This is because the scheme caps donations to nominated entities and individual candidates, without simultaneously capping political expenditure by regulated actors. In other words, the scheme must have deliberately contemplated that nominated entities and individual candidates are permitted to engage in higher amounts of political expenditure than they receive as political donations (or by way of public funding), provided they can fund that additional expenditure from their existing assets.

32.2. The risk appears to be understood only as a risk of **large** donations, because the scheme excludes small contributions from the cap.

32.3. The risk appears to be understood as a risk of payments of the relevant kind from **unrelated** donors, because the scheme exempts payments to a political party from one entity with a sufficiently close relationship with it (just as it exempts payments from an individual candidate to their own campaign).

33. As a matter of principle, there is nothing illegitimate in a law that seeks to reduce a risk of corruption and undue influence understood in these terms.

B.3 Justification

34. As Pt 12 effectively burdens political communication in pursuit of a legitimate purpose, its validity depends upon whether it is reasonably appropriate and adapted to advancing that identified purpose in a manner that is compatible with the maintenance of the constitutionally prescribed system of government.[44]

35. The Commonwealth legislative scheme differs from Pt 12.[45] In those circumstances,

[44] *Farmer* (2025) 99 ALJR 1408 at [38] and [57] (Gageler CJ, Gordon and Beech-Jones JJ); *Lange* (1997) 189 CLR 520 at 561-562 (the Court).

[45] See Pt XX of the *Commonwealth Electoral Act 1918* (Cth), as amended by the *Electoral Legislation Amendment (Electoral Reform) Act 2025* (Cth). Most significantly, the Commonwealth scheme imposes

the Commonwealth has no legal interest in, and makes no submissions concerning, the justification analysis as it relates to Pt 12.

PART V: ESTIMATE OF TIME

36. The Commonwealth may require up to 30 minutes for oral argument.

Dated: 5 December 2025

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electoral expenditure caps, on a range of bases, on a registered political party and its nominated entity, which share a common expenditure cap (see, eg, s 302AMA read with the definition of 'expenditure group' in s 302ALF(1)(a)(v)), as well as on independent candidates, members, senators and other political actors (see generally Sub-divs D – F of Div 3AB of Pt XX).

ANNEXURE TO THE SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

Pursuant to Practice Direction No 1 of 2024, the Commonwealth sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provision(s)	Reasons for providing this version	Applicable date or dates
Constitutional provisions					
1.	*Constitution* (Cth)	Current	-	Currently in force	All relevant dates
Legislative provisions					
2.	*Commonwealth Electoral Act 1918* (Cth)	Compilation No 79 (21 February 2025 to present)	Pt XX	Currently in force	All relevant dates
3.	*Electoral Act 2002* (Vic)	Version 65 (10 February 2025 to present)	Pt 12	Currently in force	All relevant dates
4.	*Electoral Legislation Amendment (Electoral Reform) Act 2025* (Cth)	As enacted (20 February 2025 to present)	Sch 4	Amends Pt XX of the *Commonwealth Electoral Act 1918* (Cth)	20 February 2025 (date of enactment)
5.	*Judiciary Act 1903* (Cth)	Compilation 51 (11 December 2024 to present)	Section 78A	Currently in force	All relevant dates