HIGH COURT OF AUSTRALIA

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Details of Filing

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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

PLAINTIFFS' OUTLINE OF ORAL ARGUMENT

Part I: CERTIFICATION

1. This outline of oral argument is in a form suitable for publication on the internet.

Part II: OUTLINE OF ARGUMENT

2. ***Legislative scheme***: Section 1(a)(ii) of the *Electoral Legislation Amendment Act 2018* (Vic) (**JBA Vol 2, Tab 10**) states that the object of the amendments which that law effected to Pt 12 of the *Electoral Act 2002* (Vic) (**JBA Vol 1, Tab 3**) is to "enhance the integrity of the electoral system by prohibiting political donations from certain sources and introducing a political donations disclosure and reporting scheme". Key provisions of Pt 12 include: Section 217D, which imposes for an election period a "**general cap**" of $4,970 on "political donation[s] made to, or for the benefit of" any regulated entity or person. Section 207F, which: (i) requires political donations to be paid into a "State campaign account" (sub-s (2)); and (ii) precludes political expenditure from other sources (sub-s (6)). Section 216, which requires donors to disclose information about political donations exceeding $1,240. Together, these provisions require disclosure of donations and impose an effective expenditure cap.

3. The most significant exception to these provisions is the **nominated entity exception** in sub-para (j) of the definition of "gift" in s 206, which enables unlimited funds to be transferred between a registered political party (**RPP**) and its nominated entity without requiring disclosure under s 216 or infringing the general cap. Significantly, there is no equivalent exception for gifts made by an "associated entity" to a RPP.

4. There are two distinct sets of criteria for appointment as a nominated entity. Under s 222F(2), an incorporated body is eligible to be a nominated entity if the body: (i) is controlled (within the meaning of s 50AA of the *Corporations Act 2001* (Cth)) by the RPP; (ii) operates *for the sole benefit* of the members of the RPP or is established and maintained, or is the trustee of a trust established and maintained, for the sole benefit of members of the RPP; and (iii) does not have voting rights in the RPP. Under s 222F(3), an entity having a greater degree of independence from its RPP might qualify. Under that sub-section, an incorporated body is eligible to be a nominated entity if the body: (i) was first appointed before 1 July 2020; (ii) operates *for the principal benefit* of the members of the RPP or is established and maintained, or is the trustee of a trust established and maintained, for the principal benefit of the members of the RPP; and (iii) does not have voting rights in the RPP. The legislative history of s 222F(3) demonstrates that this sub-section was included to enable three corporate entities that had traditionally supported the three legacy major parties to be appointed as their nominated entities: **SCB Vol 1, pp 138, 167, 178**.

5. Section 218B(1) makes it an offence to attempt to "enter into, or carry out, a scheme … with the intention of circumventing a requirement under" Pt 12. Section 218B(2) makes it clear

that a person commits an offence under s 218B(1) if they transfer gifts to an entity that exceed the general cap with a view to appointing that entity later as the nominated entity of a RPP. Accordingly, the only way for the nominated entity of a political party other than the three legacy parties to be capitalised is by way of donations subject to the general cap.

6. ***Key facts*** show that the three nominated entities are not mere extensions of their RPPs; these entities have their own objects, distinct from those of their RPPs, and are controlled by their own boards. The Cormack Foundation (the nominated entity for the Victorian Branch of the Liberal Party) is the most striking example of a nominated entity whose objects and activities diverge from those of its RPP. Only 25% of the shares in the foundation are held on trust for the Liberal Party (SC [35]-[37] (**SCB Vol 1, p 92**)) and the constitution of the foundation neither refers to the party nor requires the directors to be members of, or appointed by, the party: SC [33] (**SCB Vol 1, pp 90-91**).

7. The size of the nominated entities' assets, relative to the size of the total market for political donations in Victorian elections, is such that the practical effect of the nominated entity exception is to give the nominated entities the ability to defeat successful attempts by challengers to attract new donations or to divert donations from the legacy parties: **PS [22]**. As at 30 June 2024, the Cormack Foundation had assets of $89,656,938: SC [38.7] (**SCB Vol 1, p 92**). The foundation has made sizeable payments to the Liberal Party's Victorian Branch and other organisations, including: (i) payments to the Victorian Branch of $2,520,000 in FY19 and $1,500,000 in FY23 (being the financial years of the most recent State elections); and (ii) a payment of $500,000 to Advance Australia in FY24: SC [40], [43.1] (**SCB Vol 1, pp 93-94**). The nominated entities for the Victorian Branches of the ALP and the National Party also provide significant financial support to those RPPs: SC [46], [54], [58], [78], [81] (**SCB Vol 1, pp 95-96, 98-100, 109-110**).

8. ***Burden***: The relevant burden arises from the combined operation of the provisions described at [2]-[5] above. Due to the nominated entity exception, the burden has a differential effect as between the three legacy major parties and all other regulated persons and entities. This is because, as described at [3], [5] above, in order to meet the costs of political communications, the legacy parties can transfer unlimited funds to and from their nominated entities. All other regulated persons and entities are subject to the general cap and their donors must disclose their donations. By reason of its differential effect, the nominated entity exception distorts the free flow of political communication. That distortion is not meaningfully ameliorated by the public funding provided for by s 211(2A)-(3), which also favours the major parties.

- *Unions No 1* (2013) 252 CLR 530 at [38] (**JBA Vol 9, Tab 30**)
- *McCloy* (2015) 257 CLR 178 at [24] (**JBA Vol 7, Tab 22**)

9. ***Purpose***: A proper assessment of the purpose of the impugned provisions in Pt 12 of the *Electoral Act* must allow for the facts that: (i) the nominated entity exception operates to exempt RPPs from the general cap and disclosure requirements in respect of their nominated entities; and (ii) in particular, the broader eligibility criteria in s 222F(3) enable the appointment of a nominated entity that is not controlled by its RPP. A uniform cap on donations may serve the purpose of enhancing the integrity of the electoral process, but the selective operation of the nominated entity exception is not explicable by reference to that purpose. Indeed, there is a marked disconformity between the "anti-corruption purpose" asserted at **DS [28]** and the practical operation of the general cap with the nominated entity exception (because that exception gives rise to the very risk of clientelism that the Defendant asserts Pt 12 was intended to address). For these reasons, the true purpose of the impugned provisions, or at least a purpose, is the privileging of the incumbent parties over other regulated persons and entities in a manner amounting to an "abuse of incumbency": *Unions No 2* (2019) 264 CLR 595 at [85] per Gageler J (**JBA Vol 9, Tab 31**).

10. ***Justification***: Even if it were accepted that that the general cap as it operates with the nominated entity exception has a legitimate anti-corruption purpose, the impugned provisions cannot be justified because the means adopted to pursue that end are "inimical to equal participation by all the people in the political process": *McCloy* at [45] per French CJ, Kiefel, Bell and Keane JJ. The impugned provisions are not reasonably appropriate and adapted to advancing a legitimate end because the features of the provisions outlined above (see [3], [5], [7] above in particular) place the legacy parties in a privileged position over other regulated persons and entities for no good reason.

11. ***Severance***: Sub-para (j) of the definition of "gift" in s 206(1) is severable (alternatively, for the same reasons, the sub-paragraph is severable together with s 222F and all other references to "nominated entities" in the Act): **Defence [72]** (**SCB Vol 1, p 63**). The qualifying criteria in s 222F(3) are not severable. Even if the impugned provisions only infringe the implied freedom because of: (i) the time qualification in s 222F(3) (as the Defendant concedes at **DS [4], [48]**); or (ii) the lack of fit between the looser criteria in s 222F(3) and the asserted purpose of the law, s 222F(3) cannot be severed in whole or part because doing so would give remaining parts of s 222F and the nominated entity exception substantially different operation.

- *Spence* (2019) 268 CLR 355 at [89]-[90] (**JBA Vol 8, Tab 28**)
- *Bank Nationalisation Case* (1948) 76 CLR 1 at 371 (**JBA Vol 4, Tab 15**)

Dated: 3 February 2026

Ron Merkel SC **Brendan Lim SC** **Luca Moretti**