

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, GLEESON AND JAGOT JJ

ANDREW LAMING

APPELLANT

AND

ELECTORAL COMMISSIONER OF THE
AUSTRALIAN ELECTORAL COMMISSION

RESPONDENT

Laming v Electoral Commissioner of the Australian Electoral Commission
[2025] HCA 31
Date of Hearing: 9 April 2025
Date of Judgment: 13 August 2025
B75/2024

ORDER

1. *Appeal allowed.*
2. *Set aside orders 1, 4, 5 and 6 of the orders made by the Full Court of the Federal Court of Australia on 23 August 2024 and, in their place, order that the appeal be dismissed.*
3. *Set aside the order made by the Full Court of the Federal Court of Australia on 8 October 2024 and, in its place, order that each party pay their own costs of the appeal, the cross-appeal and the notice of contention before the Full Court.*
4. *The respondent pay the appellant's costs of the appeal to this Court.*

On appeal from the Federal Court of Australia

Representation

N H Ferrett KC with J R Moxon for the appellant (instructed by Bell Dore Solicitors)

T M Begbie KC with S Zeleznikow for the respondent (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Laming v Electoral Commissioner of the Australian Electoral Commission

Parliamentary elections (Cth) – Communication of electoral matter – Where s 321D(5) of *Commonwealth Electoral Act 1918* (Cth) requires "notifying entity" to ensure certain "particulars" notified – Where s 321D applies in relation to electoral matter that is "communicated to a person" – Where "electoral matter" posted on Facebook page on three occasions – Where failure on each occasion to ensure required "particulars" included in post – Where each post seen by several people who viewed Facebook page – Whether s 321D(5) contravened on each occasion person viewed post or on each occasion post made available for viewing.

Words and phrases – "authorisation", "civil penalty provision", "communicated", "communication", "conduct", "contravention", "deterrence", "digital", "disclosure entity", "dominant purpose", "electoral advertisement", "electoral matter", "federal election", "free and informed voting", "impressions", "notifying entity", "particulars", "political communication", "political entity", "proportionality", "reach", "statutory construction", "text, context and purpose".

Acts Interpretation Act 1901 (Cth), ss 15AA, 23(b), 33(3A).

Commonwealth Electoral Act 1918 (Cth), Pt XXA, ss 4AA, 321B, 321C, 321D, 321E.

The issue

1 The narrow issue of statutory construction in the present appeal is whether s 321D(5) of the *Commonwealth Electoral Act 1918* (Cth), a civil penalty provision,¹ which requires a "notifying entity" to ensure that certain "particulars" are notified in "electoral matter", is contravened by a single failure to ensure that the particulars are notified provided the "electoral matter" is communicated to one person and irrespective of the number of people to whom the "electoral matter" is communicated or is contravened on each and every occasion the "electoral matter" is communicated to a person.

2 The question arises in a context where the appellant, Mr Laming, posted "electoral matter" on the "Redland Hospital: Let's fight for fair funding" Facebook page on three occasions: 24 December 2018, 7 February 2019, and 5 May 2019. On each occasion he failed to ensure that the required "particulars", comprising his name and the town or city in which he lived, were included in the post. Each such post was communicated to (meaning seen by) several people who viewed the Facebook page: six people in the case of the 24 December 2018 post, eight people in the case of the 7 February 2019 post, and 14 people in the case of the 5 May 2019 post.

The Courts below

3 In a civil penalty proceeding brought against Mr Laming by the Electoral Commissioner in the Federal Court of Australia the primary judge (Rangiah J) held that Mr Laming contravened s 321D(5) of the *Commonwealth Electoral Act* on three occasions (being the occasion of each post to Facebook by Mr Laming). The primary judge imposed penalties of \$10,000 for the 24 December 2018 post, \$5,000 for the 7 February 2019 post, and \$5,000 for the 5 May 2019 post.² The Electoral Commissioner appealed. The Full Court of the Federal Court of Australia (Logan J and Perry J with whom Meagher J agreed) held that Mr Laming had contravened s 321D(5) on at least 28 occasions, being each occasion on which a post had been communicated (by being seen by a person). The Full Court set aside the penalties imposed by the primary judge and instead imposed penalties of

1 *Regulatory Powers (Standard Provisions) Act 2014* (Cth), s 79(2) and *Commonwealth Electoral Act 1918* (Cth), s 384A.

2 *Electoral Commissioner of the Australian Electoral Commission v Laming* [No 2] [2023] FCA 917.

\$20,000 for the 24 December 2018 post, \$10,000 for the 7 February 2019 post, and \$10,000 for the 5 May 2019 post.³

4 Mr Laming applied for and was granted special leave to appeal on the sole ground that the Full Court erred in finding that s 321D(5) "was contravened on each occasion that a person viewed a post published by [him] on ... Facebook ... rather than finding a contravention occurred when [he] caused a post to be" to be made available for viewing. The appeal must be upheld on that ground.

5 The primary judge's construction of s 321D of the *Commonwealth Electoral Act* is correct. As will be explained, the correct construction, that s 321D(5) is engaged by any failure to ensure that the required "particulars" are notified in "electoral matter" provided that the "electoral matter" is communicated to one person and otherwise irrespective of the number of people to whom the "electoral matter" is communicated, accords with the text, context and purpose of the provision in a manner which the construction adopted by the Full Court does not.

The background to the statutory provisions

6 Sections 321B-321H were inserted into the *Commonwealth Electoral Act* by Sch 1 to the *Electoral and Other Legislation Amendment Act 2017* (Cth). Schedule 1 also contained provisions repealing ss 328 to 328B of that Act. Section 328, for example, made it an offence for a person to "print, publish or distribute or cause, permit or authorize to be printed, published or distributed, an electoral advertisement, handbill, pamphlet, poster or notice unless" certain information appeared "at the end thereof".

7 These amendments were consequential on recommendations in a report of the Joint Standing Committee on Electoral Matters ("the JSCEM").⁴ In this report the JSCEM recognised the importance of authorising electoral material to provide "clear context for the message and [to allow] voters to have confidence in the message or point of view expressed in that material" while ensuring that "the person or organisation putting the information into the public domain is

3 *Electoral Commissioner of the Australian Electoral Commission v Laming* (2024) 304 FCR 561.

4 Australia, Joint Standing Committee on Electoral Matters, *The 2016 Federal Election: Interim Report on the authorisation of voter communication* (2016).

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accountable for that information".⁵ The report identified that there had been a shift from traditional communication methods to social media and SMS which had "significantly changed the landscape for the modern political campaign".⁶ The perceived problem was that the legislation had "not kept up with modern methods of communication".⁷

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The report recognised that communications technology was "rapidly evolving" so that "SMS, email, 'robo-calling' and variations as yet unimagined will continue to be employed".⁸ The report recorded that view of the JSCEM that the "current requirements for authorisation for print and broadcast do not appropriately cover many new forms of communications of electoral materials".⁹ The JSCEM concluded that the legislation "requires amendment so that it can evolve to deal with new, digital forms of communication that have changed the landscape of political campaigns".¹⁰ It recommended that there be a "level playing field with

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- 5 Australia, Joint Standing Committee on Electoral Matters, *The 2016 Federal Election: Interim Report on the authorisation of voter communication* (2016) at 2 [1.9].
 - 6 Australia, Joint Standing Committee on Electoral Matters, *The 2016 Federal Election: Interim Report on the authorisation of voter communication* (2016) at 3 [1.15].
 - 7 Australia, Joint Standing Committee on Electoral Matters, *The 2016 Federal Election: Interim Report on the authorisation of voter communication* (2016) at 7 [2.1].
 - 8 Australia, Joint Standing Committee on Electoral Matters, *The 2016 Federal Election: Interim Report on the authorisation of voter communication* (2016) at 8 [2.8]-[2.9], quoting Orr, *The Law of Politics* (2010) at 181.
 - 9 Australia, Joint Standing Committee on Electoral Matters, *The 2016 Federal Election: Interim Report on the authorisation of voter communication* (2016) at 10 [2.18].
 - 10 Australia, Joint Standing Committee on Electoral Matters, *The 2016 Federal Election: Interim Report on the authorisation of voter communication* (2016) at 25-26 [2.102].

regulation applying to all forms of electoral advertising" based on the principles of "accountability, traceability and consistency".¹¹

9 The Second Reading Speech for the *Electoral and Other Legislation Amendment Bill 2017* (Cth) recorded that the Bill addressed the recommendations of the JSCEM in its report.¹² The Bill was said to promote "free and informed voting at elections and referendums by allowing electors to know who is communicating with them" by "extending current authorisation requirements and harmonising existing requirements across communication mediums".¹³

10 The Revised Explanatory Memorandum for the Bill records that the Bill "applies the electoral authorisation requirements to modern communication channels", "requires all paid electoral advertising (which includes distribution or production) to be authorised, no matter the source", and "replaces the current criminal non-compliance regime with a civil penalty regime to be administered by the Australian Electoral Commission".¹⁴ The Revised Explanatory Memorandum, in respect of s 321D(5), says that the "amount of the relevant penalty is calculated in accordance with section 4AA of the *Crimes Act 1914*, and is commensurate with similar Commonwealth regulatory regimes".¹⁵ These regimes are not identified.

The statutory provisions

11 Section 321C(1) specifies that the objects of Pt XXA (into which ss 321B-321H were inserted) are to promote free and informed voting at elections by enhancing: (a) the transparency of the electoral system, by allowing voters to know who is communicating electoral matter; (b) the accountability of those persons participating in public debate relating to electoral matter, by making those persons responsible for their communications; and (c) the traceability of communications

11 Australia, Joint Standing Committee on Electoral Matters, *The 2016 Federal Election: Interim Report on the authorisation of voter communication* (2016) at 26 [2.105], [2.108].

12 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 March 2017 at 3793.

13 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 March 2017 at 3794.

14 Australia, Senate, *Electoral and Other Legislation Amendment Bill 2017*, Revised Explanatory Memorandum at 2 [4].

15 Australia, Senate, *Electoral and Other Legislation Amendment Bill 2017*, Revised Explanatory Memorandum at 24 [75].

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of electoral matter, by ensuring that obligations imposed by this Part in relation to those communications can be enforced. According to s 321C(2):

"This Part aims to achieve these objects by doing the following:

- (a) requiring the particulars of the person who authorised the communication of electoral matter to be notified if:
 - (i) the matter is an electoral advertisement, all or part of whose distribution or production is paid for; or
 - (ii) the matter forms part of a specified printed communication; or
 - (iii) the matter is communicated by, or on behalf of, a disclosure entity;
- (b) ensuring that the particulars are clearly identifiable, irrespective of how the matter is communicated."

12 Section 321C(3) is in these terms:

"This Part is not intended to detract from:

- (a) the ability of electoral matters to be communicated to voters; and
- (b) voters' ability to communicate with each other on electoral matters."

13 Section 321D is the key provision. Section 321D(1) relevantly provides that:

"This section applies in relation to electoral matter that is communicated to a person if:

- (a) all of the following apply:
 - (i) the matter is an electoral advertisement;
 - (ii) all or part of the distribution or production of the advertisement was paid for;
 - (iii) the content of the advertisement was approved by a person (the *notifying entity*) (whether or not that person is a person who paid for the distribution or production of the advertisement); or

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- (b) both of the following apply:
- (i) the matter forms part of a sticker, fridge magnet, leaflet, flyer, pamphlet, notice, poster or how-to-vote card;
 - (ii) the content of the matter was approved by a person (the ***notifying entity***); or
- (c) the matter is communicated by, or on behalf of, a disclosure entity (the ***notifying entity***) (and the matter is not an advertisement covered by paragraph (a), nor does the matter form part of a sticker, fridge magnet, leaflet, flyer, pamphlet, notice, poster or how-to-vote card)."

14 Section 321D(2) identifies the relevant "notifying entity" in certain circumstances which are not material to the present case.

15 Section 321D(3) and (4) provide that s 321D does not apply in relation to certain "electoral matter".

16 Section 321D(5) appears as follows (in part):

"The notifying entity must ensure that the particulars set out in the following table, and any other particulars determined under subsection (7) for the purposes of this subsection, are notified in accordance with any requirements determined under that subsection.

Required particulars		
Item	If ...	the following particulars are required ...
...
3	the communication is a sticker, fridge magnet, leaflet, flyer, pamphlet, notice, poster or how-to-vote card authorised by a disclosure entity who is a natural person	(a) the name of the person; (b) the address of the person; (c) the name of the printer who printed the communication; (d) the address of the printer
4	the communication is any other communication authorised by a disclosure entity who is a natural person	(a) the name of the person; (b) the relevant town or city of the person
...
...	"	

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17 Section 321D(7)(b)(i) enables the Electoral Commissioner, by legislative instrument, to determine particulars for the purposes of s 321D(5).

18 "Electoral matter" is defined in s 4AA in these terms:

"(1) ***Electoral matter*** means matter communicated or intended to be communicated for the dominant purpose of influencing the way electors vote in an election (a ***federal election***) of a member of the House of Representatives or of Senators for a State or Territory, including by promoting or opposing:

(a) a political entity, to the extent that the matter relates to a federal election; or

(b) a member of the House of Representatives or a Senator.

...

(2) For the purposes of subsection (1), each creation, recreation, communication or recommunication of matter is to be treated separately for the purposes of determining whether matter is electoral matter.

..."

19 Otherwise, s 321B defines, relevantly, "address", "authorises", "conduct" and "disclosure entity". "[A]uthorised", which appears in the table to s 321D, is defined in these terms:

"***authorises***: a person authorises the communication of electoral matter if:

(a) if the content of the matter is approved before the matter is communicated – the person approves the content of the matter; or

(b) otherwise – the person communicates the matter."

Construction of statutory provisions

Contextual and purposive considerations

20 It may be accepted that the imposition of a civil penalty for contravention of s 321D(5) is intended to deter non-compliance so that the expressly stated objects of s 321D, as identified in s 321C(1), may be achieved. However, the

argument of the respondent, accepted by the Full Court,¹⁶ that the maximum penalty of \$25,200 is inadequate to achieve deterrence if the number of contraventions is the number of times the notifying entity failed to comply with s 321D(5) (provided that the non-complying "electoral matter" was in fact communicated to one person as required by s 321D(1)) does not follow and cannot be supported.

21 To the contrary, the context of s 321D, the regulation of "electoral matter", involves a quintessential form of political communication. Fundamental aspects of the Australian legal and political system, specifically that freedom of political communication is an indispensable incident of "the principle of responsible government – the system of government by which the executive is responsible to the legislature" which has been said to be "not merely an assumption upon which the actual provisions are based ... [but] an integral element in the Constitution",¹⁷ constitute the critical context in which s 321D is to be construed.

22 This context explains why s 321C(3) expressly provides that Pt XXA is not to detract from the ability of persons to communicate "electoral matter". It also explains why s 321C(2) expressly provides how Pt XXA is to achieve its objects. The explanation of how the objects are to be achieved includes that the required particulars are to be notified *if*, relevantly, "the matter *is communicated* by, or on behalf of, a disclosure entity" and by "ensuring that the particulars are clearly identifiable, *irrespective of how the matter is communicated*".¹⁸

23 Given the specific purpose of the provisions was to create a "level playing field" by subjecting all forms of communication to the same regulation,¹⁹ and the notorious fact that electronic communications can be easily re-communicated to a mass audience irrespective of the intention of the person responsible for the original communication, it is understandable that the Parliament would confine the

16 *Electoral Commissioner of the Australian Electoral Commission v Laming* (2024) 304 FCR 561 at 584-585 [101].

17 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 135; see also at 138-140. See also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559-560; *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 at 555-556 [44].

18 Emphasis added.

19 Australia, Joint Standing Committee on Electoral Matters, *The 2016 Federal Election: Interim Report on the authorisation of voter communication* (2016) at 26 [2.105], [2.108]; *Commonwealth Electoral Act*, s 321C(2)(b).

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number of contraventions to the number of times a notifying entity failed to comply with s 321D(5). If the Parliament had not done so, persons attempting to engage in the political process could be exposed to penalties based on contraventions numbering in the hundreds, thousands, or millions depending not on the notifying entity's failure to comply with s 321D(5) in respect of its intended recipients or audience, but on the mere happenstance of re-transmission by electronic methods or modes of communication by any recipient with the requisite dominant purpose so that the "electoral matter" remains "electoral matter" as re-transmitted.

24 While the objects identified in s 321C(1) are of fundamental importance to the proper functioning of Australian democracy and the "vote of every elector is a matter of concern to the whole Commonwealth",²⁰ the legislation should not be construed on the basis of assumptions that: (a) those subject to its provisions are rogue actors intent on exploiting any loophole in the regulation; or (b) the achievement of the purposes of the legislation is to be secured at any cost, including the exposure of notifying entities to crippling penalties by reason of the number of contraventions, one effect of which would be to discourage political communication by contemporary methods given the lack of control of the notifying entity over the ultimate audience numbers.

25 Section 321C(2) and (3), reflecting the importance of the implied constitutional freedom of political communication, speak against the respondent's approach of assuming that the greatest number of potential contraventions, carrying the greatest maximum penalty, is an object of the legislation or the best way in which the legislation might achieve its goals.

26 This context of political communications also exposes why no meaningful analogy can be drawn between s 321D and consumer protection or industrial legislation. The concept that a civil penalty, as the respondent would have it, puts a "price on contravention which is sufficiently high to ensure that the penalty cannot be seen as the acceptable cost of doing business, but is rather seen as an economically irrational choice" makes sense in many contexts both commercial and protective, but does not resonate in the context of political communications in a political system which depends on free political communications and in which compliance is to be encouraged and non-compliance deterred, but not at any price as s 321C(3) makes clear.

27 Moreover, in the political context, the maximum amount of a penalty is not an effective gauge of the deterrent effect of the provision. The mere fact of a contravention of s 321D(5) being found by a court could be expected to have

20 *Smith v Oldham* (1912) 15 CLR 355 at 362.

material reputational and other effects of potential significance to those subject to its terms.

28 While, as the respondent put it, a "'per person' approach to civil penalty provisions – in which the necessary protection is seen to operate at the level of each individual affected or involved – is commonplace", that circumstance must be understood to be a manifestation of the proper construction of the particular statutory provisions creating the civil penalty provision. It is not an "approach" which exists as a matter of principle separate from the particular statutory provisions in each case.

29 No doubt a "per failure" approach to s 321D(5) means that the number of contraventions will vary with different types of communications. In some cases ascertaining the number of contraventions based on the number of failures to comply with s 321D(5) may involve some complexity. To the extent the proper construction of s 321D(5) involves anomalies and arbitrariness, the principle that civil penalty regimes are to be applied having regard to "concepts familiar in criminal sentencing such as totality, parity and course of conduct"²¹ would be expected to have a substantial ameliorating effect.

30 With these important matters of context in mind the proper construction of s 321D(5) is apparent.

Textual considerations

31 The definition of "electoral matter" in s 4AA as matter "communicated or intended to be communicated" for the specified dominant purpose identifies the matter that is "electoral matter". Section 321D(1) specifies the "electoral matter" in relation to which s 321D(5) potentially applies. If matter is not "communicated or intended to be communicated" for the specified dominant purpose, or is otherwise excluded from the scope of "electoral matter" by either s 4AA(5) (specifying exceptions to "electoral matter") or s 321D(3) or (4) (specifying exceptions to s 321D), then s 321D(5) does not apply to that matter.

32 Therefore, if matter is "electoral matter" within the scope of s 4AA, then for s 321D(5) to apply to that "electoral matter", the requirements of s 321D(1) must be satisfied and the exceptions specified in s 321D(3) and (4) must not apply to that "electoral matter". The requirements in s 321D(1) are that the "electoral

21 *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450 at 469 [45].

matter" is "communicated to a person" and one of para (a), (b) or (c) of s 321D(1) applies.

33 The requirement that the "electoral matter" is "communicated to a person" in s 321D(1) is to be understood as involving a fact or circumstance that must exist for s 321D to apply. The required fact or circumstance, being that "electoral matter" is "communicated to a person", involves proof of a past event of "electoral matter" being "communicated to a person". In circumstances where "communicated" is not a defined term but takes its ordinary meaning (as the past participle of the regular verb "to communicate"), s 321D(1) is to be understood as requiring that the "electoral matter" was imparted, transmitted, given to, conveyed to, or expressed to a person. Once it is established, by applying s 321D(1) to the facts, that s 321D applies, s 321D(1) has no further function. Its function, of identifying when s 321D(5) may apply, is performed.²² While this does not mean that s 321D(1) no longer forms part of the context of s 321D(5) (it clearly does), it is necessary to recognise the distinct function of each provision. Once it is recognised that s 321D(1) performs a gateway function, it is apparent that the fact of the "electoral matter" having been communicated to a person is a requirement that must be satisfied for s 321D(5) to apply, and no more.

34 The obligation imposed on a notifying entity by s 321D(5) under pain of civil penalty is to ensure that the particulars set out in the table to s 321D(5) are notified in accordance with any requirements determined under s 321D(7)(b)(i). The table in s 321D(5) is repetitive because it distinguishes between a disclosure entity that is not a natural person (items 1 and 2), a disclosure entity who is a natural person (items 3 and 4), an entity that is not a disclosure entity or a natural person (items 5 and 6) and a natural person who is not a disclosure entity (items 7 and 8).

35 It is apparent that the table of particulars in s 321D(5) distinguishes between types of "communication". In the first type the communication *is* "a sticker, fridge magnet, leaflet, flyer, pamphlet, notice, poster or how-to-vote card". In the second type the communication *is* "any other communication". From the language used, it is manifest that the word "communication" is being used as a noun in s 321D(5), to describe a thing. The thing (sticker or otherwise) is capable of performing a communicative function, but no part of s 321D(5) attaches to the performance of that communicative function. That is, s 321D(5) is not expressed as a prohibition on communicating electoral matter without the required particulars. The reason for this is that the communicative function, to the extent required, has already been

22 See, to the same effect, *Electoral Commissioner v McQuestin* [2024] FCA 287 at [48]-[54].

performed for s 321D(1) to have been satisfied (by the fact or circumstance of communication of "electoral matter" to "a person").

36 On the terms of s 321D(5), it is the notifying entity's failure to ensure that the particulars are notified as required which constitutes the contravention. Such a failure can only occur before an act of communication, but it is not an element of a contravention that "the communication" is "communicated". Rather, the fact or circumstance of "electoral matter" having been "communicated" to a person must already have been established for any question of contravention of s 321D(5) to arise. For the fact or circumstance of having been "communicated" to be an element of the contravention, it would be necessary for that element to appear in the table to s 321D(5) (eg, in item 4 "the communication is any other communication authorised by a disclosure entity who is a natural person [*and which has been communicated to a person or persons*]"). Those words do not appear, however.

37 In the present case, there is now no dispute that the requirements of s 321D(1) were satisfied. That is, each post by Mr Laming on Facebook was "electoral matter", it was "communicated to a person", and the matter was communicated by Mr Laming who was a disclosure entity in accordance with s 321D(1)(c). Thereafter, to ascertain a contravention, it is the terms of s 321D(5) which govern.

38 The relevant item in the table to s 321D(5) is item 4. That is because Mr Laming is a natural person and because each post to Facebook was not a sticker, fridge magnet, leaflet, flyer, pamphlet, notice, poster or how-to-vote card within item 3 but was "any other communication" within item 4. The obligation imposed on Mr Laming was to ensure that the particulars set out in the table as applicable to that form of communication (his name and the town or city in which he lived) were notified in accordance with any requirements determined under s 321D(7)(b)(i) in each post.

39 In the context of the table to s 321D(5), a "communication" is simply a thing capable of performing a communicative function. This follows from the distinctions in the table between specified things ("is a sticker, fridge magnet, leaflet, flyer, pamphlet, notice, poster or how-to-vote card") and non-specified things ("is any other communication"). In context, the distinction is between things which are traditional forms of political messaging and things which are new forms of political messaging.

40 There is no inconsistency between s 321D(1) requiring as a gateway to s 321D(5) that "electoral matter" in fact be "communicated" to a person (using "communicated" as the past participle of the verb "communicate", meaning imparted, transmitted, given to, conveyed to, or expressed to a person) and

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s 321D(5) using "communication" as a noun ("*the communication is ...*"). On this basis, a post to Facebook is a "communication" in the same way that a sticker or a fridge magnet is a "communication". The contravention in respect of each such "communication" is failing to notify the particulars set out in the table to s 321D(5) in accordance with the requirements determined in accordance with a legislative instrument under s 321D(7)(b)(i). Nothing in s 321D(5), however, involves the "communication" in fact having been "communicated to" a person (in the sense of imparted, transmitted, given to, conveyed to, or expressed to a person), as that required fact or circumstance must have already occurred to satisfy s 321D(1).

41 It is not to the point that "electoral matter" is defined in s 4AA(1) to mean matter communicated or intended to be communicated for a specified dominant purpose. Nor does it matter that s 4AA(2) provides that, for the purposes of s 4AA(1), "each creation, recreation, communication or recommunication of matter is to be treated separately for the purposes of determining whether matter is electoral matter". These provisions operate only for the relevant purpose of identifying whether a particular matter communicated or intended to be communicated is "electoral matter" within the meaning of s 321D(1).

42 Neither s 15AA nor s 23(b) of the *Acts Interpretation Act 1901* (Cth) assist the respondent's construction.

43 By s 15AA of the *Acts Interpretation Act*, in "interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation". As explained, however, the expressly stated objects of s 321D do not exist in a vacuum, as s 321C(2) and (3) expose. The assumption that the provisions seek to achieve their expressly stated objects at any price is particularly inapt for these provisions.

44 By s 23(b) of the *Acts Interpretation Act* "words in the singular number include the plural and words in the plural number include the singular". Accordingly, it would be open to read "a person" in s 321D(1) as "persons". That, however, would not be material to the construction of s 321D(5) because, even if s 321D(1) referred to "persons", the plural would include the singular (person) so that s 321D(1) would be satisfied by a communication to a single person in any event. The key to understanding s 321D(1), as noted, is that it is the gateway, and its requirements must be satisfied, before s 321D(5) applies. And the key to s 321D(5) is that its focus is the fact of non-compliance by non-notification of the particulars, not the fact of communication.

Gageler CJ
Gleeson J
Jagot J

14.

Conclusion and orders

45 For these reasons, the Full Court erred in its construction of s 321D(5) of the *Commonwealth Electoral Act*. The primary judge's construction was correct. Accordingly, as sought by the appellant, the appeal must be allowed, orders 1 and 4-6 made by the Full Court on 23 August 2024 must be set aside, and in their place it be ordered that the appeal be dismissed. In respect of costs, it is necessary to set aside the order made by the Full Court on 8 October 2024 and in its place order that each party pay their own costs of the appeal, the cross-appeal and the notice of contention before the Full Court. The respondent is to pay the appellant's costs of the appeal to this Court.

46 GORDON J. The appellant, Mr Andrew Laming, was elected as a member of the House of Representatives in the Commonwealth Parliament for the electorate of Bowman in 2016. He was a candidate in the federal election held on 18 May 2019. In the six months prior to the 2019 election, Mr Laming posted a series of posts on a Facebook page called "Redland Hospital: Let's fight for fair funding" ("the Facebook page"). A total of 28 people viewed the posts.

47 Section 321D(5) of the *Commonwealth Electoral Act 1918* (Cth) ("the Electoral Act") required Mr Laming, as the "notifying entity", to ensure that certain particulars were notified with each post on the Facebook page. Before the primary judge, the respondent in this Court – the Electoral Commissioner of the Australian Electoral Commission ("the Commissioner") – sought declarations and pecuniary penalties against Mr Laming for contraventions of s 321D(5) of the Electoral Act on the basis that Mr Laming had failed to disclose his name and relevant town or city in accordance with the requirements of the *Commonwealth Electoral (Authorisation of Voter Communication) Determination 2018* (Cth).²³

48 The primary judge held that three of the five posts (namely, posts on 24 December 2018, 7 February 2019 and 5 May 2019) contravened s 321D(5) of the Electoral Act and ordered Mr Laming to pay a penalty of \$10,000 for the 24 December post and \$5,000 for each of the other two posts. In doing so, the primary judge rejected the Commissioner's contention that a contravention occurred each time one of the posts was viewed by a different person. The Commissioner appealed that decision to the Full Court of the Federal Court of Australia on the basis that the primary judge erred in finding that each post constituted a single contravention of s 321D(5), rather than finding that Mr Laming contravened s 321D(5) each time a post was viewed by a person. The Full Federal Court upheld the appeal and found that "there was a contravention on each occasion that the post was communicated to a different person by reason of that person viewing the post". The Full Federal Court, finding 28 contraventions, imposed a total penalty of \$40,000, comprising \$20,000 for the 24 December 2018 post; \$10,000 for the 7 February 2019 post; and \$10,000 for the 5 May 2019 post.

49 Mr Laming appealed the Full Federal Court's decision to this Court on the ground that the Full Federal Court erred in holding that there was a contravention on each occasion that the posts were viewed. For the reasons that follow, the appeal should be allowed. On the proper construction of s 321D, there was a contravention on each occasion that Mr Laming caused a post to be published on Facebook, not on each occasion that the posts were viewed.

23 Electoral Act, s 321D(7).

Legislative framework

50 This appeal concerns the proper construction of s 321D(5) of the Electoral Act.

51 Section 321D is located in Pt XXA. Part XXA is headed "Authorisation of electoral matter". Section 321C sets out the objects of Pt XXA, and how the Part aims to achieve the stated objects, in these terms:

"(1) The objects of this Part are to promote free and informed voting at elections by enhancing the following:

- (a) the transparency of the electoral system, by allowing voters to know who is communicating electoral matter;
- (b) the accountability of those persons participating in public debate relating to electoral matter, by making those persons responsible for their communications;
- (c) the traceability of communications of electoral matter, by ensuring that obligations imposed by this Part in relation to those communications can be enforced.

(2) This Part aims to achieve these objects by doing the following:

- (a) requiring the particulars of the person who authorised the communication of electoral matter to be notified if:
 - (i) the matter is an electoral advertisement, all or part of whose distribution or production is paid for; or
 - (ii) the matter forms part of a specified printed communication; or
 - (iii) the matter is communicated by, or on behalf of, a disclosure entity;
- (b) ensuring that the particulars are clearly identifiable, irrespective of how the matter is communicated.

(3) This Part is not intended to detract from:

- (a) the ability of electoral matters to be communicated to voters; and
- (b) voters' ability to communicate with each other on electoral matters."

52 Section 321D(1) is the "gateway" to the substantive obligation imposed by s 321D(5). It provides the circumstances in which s 321D(5) applies. Section 321D(1) relevantly provides:

"This section applies in relation to electoral matter that is communicated to a person if:

...

- (c) the matter is communicated by, or on behalf of, a disclosure entity (the *notifying entity*) (and the matter is not an advertisement covered by paragraph (a), nor does the matter form part of a sticker, fridge magnet, leaflet, flyer, pamphlet, notice, poster or how-to-vote card).

Note 1: For paragraph (1)(c), matter may be communicated on behalf of an entity whether or not the entity pays for the communication of the matter.

Note 2: Examples of matters that may be covered by this section include internet advertisements, bulk text messages and bulk voice calls containing electoral matter."

53 Section 321D(5) is the focus of this appeal. That sub-section, a civil penalty provision, imposes a substantive obligation on notifying entities in the following terms:

"The notifying entity must ensure that the particulars set out in the following table, and any other particulars determined under subsection (7) for the purposes of this subsection, are notified in accordance with any requirements determined under that subsection."

54 Four aspects of s 321D(5) and its context are particularly important. First, a Note to s 321D(5) provides that "[a] person may contravene this subsection if the person fails to ensure that particulars are notified or if the particulars notified are incorrect".

55 Second, the particulars are set out in the table referred to in, and following, s 321D(5). The table contains eight items. The required particulars vary according to the form of communication and the nature of the notifying entity (for example, where the communication is authorised by a disclosure entity who is a natural person). Items 3 and 4 are set out below and provide:

Required particulars			
Item	If ...	the following particulars are required ...	
...	
3	the communication is a sticker, fridge magnet, leaflet, flyer, pamphlet, notice, poster or how-to-vote card authorised by a disclosure entity who is a natural person	(a)	the name of the person;
		(b)	the address of the person;
		(c)	the name of the printer who printed the communication;
		(d)	the address of the printer
4	the communication is any other communication authorised by a disclosure entity who is a natural person	(a)	the name of the person;
		(b)	the relevant town or city of the person

Item 4 is applicable to this appeal.

56 Third, the obligation in s 321D(5) only applies where the communication is in relation to "electoral matter".²⁴ "Electoral matter" is defined in s 4AA(1):

"Electoral matter" means matter communicated or intended to be communicated for the dominant purpose of influencing the way electors vote in an election (a **federal election**) of a member of the House of Representatives or of Senators for a State or Territory, including by promoting or opposing:

- (a) a political entity, to the extent that the matter relates to a federal election; or
- (b) a member of the House of Representatives or a Senator."

57 Section 4AA(2) then provides that, for the purposes of s 4AA(1), "each creation, recreation, communication or recommunication of matter is to be treated separately for the purposes of determining whether matter is

²⁴ Electoral Act, s 321D(1).

electoral matter". The Note to s 4AA(2) provides, by way of example, that matter that is covered by an exception (such as a news report²⁵) when originally communicated may become electoral matter if recommunicated for the dominant purpose referred to in s 4AA(1).

58 Finally, s 321E provides for the geographical scope of s 321D. Section 321E(1) relevantly provides that a person does not contravene s 321D unless the conduct constituting the alleged contravention occurs wholly or partly in Australia²⁶ or the conduct constituting the alleged contravention occurs wholly outside Australia and a result of the conduct occurs wholly or partly in Australia.²⁷

Construction

59 This appeal concerns a difficult question of construction of s 321D in its application to posts on a Facebook page. As will be explained, I consider the preferable view to be that a contravention of s 321D is determined by reference to the act of the contravener – namely, in this case, by the act of publishing posts on Facebook – as opposed to the acts of the recipients in viewing the posts. In other words, there is a contravention each time a person publishes the electoral matter by posting a post on Facebook, not each time a person views the post.

Text

60 First, the text of s 321D(5) suggests that there is one act of contravention which is determined by reference to the conduct of the contravener, not by reference to the acts of the recipients. Section 321D(5) provides that the "notifying entity must ensure" that certain particulars are notified in accordance with certain requirements. The focus of the provision is on the act of the notifying entity and their positive obligation to "ensure" that the identified particulars are notified with the electoral matter. As such, the operation of the provision turns on a unilateral act on the part of the notifying entity. It is an obligation that can only be performed prior to or at the point that the electoral matter is published, uploaded or broadcast – that is, prior to the communication being received by any other person.

61 The required "particulars" are set out in the table referred to in s 321D(5), which prescribes the required particulars by reference to different types of communication. The language used in the table to identify the different types of communication is in the following style: "the communication is a sticker".

25 Electoral Act, s 4AA(5)(a).

26 Electoral Act, s 321E(1)(a)(i).

27 Electoral Act, s 321E(1)(b)(i).

The reference to "the communication" in the table referred to in s 321D(5) is not a phrase devoid of content. The better view is that "the communication" in s 321D(5) – for example, the sticker, or, in this case, the post – is the method of communication of the "electoral matter that is communicated" referred to in s 321D(1). Section 321D(1) is followed by, in effect, a definition of "the communication" in the table referred to in s 321D(5) (being that the communication is a sticker, the communication is a fridge magnet, etc). In other words, each "communication" in the table is defined by reference to a mode of communication, not the event of communication itself.

62 It is not the case that "the communication" thereby has two different meanings within s 321D. Rather, variations on the phrase "the communication" are used in s 321D in different places and in different ways, as necessitated by their different contexts and grammatical forms: unlike s 321D(5), s 321D(1) does not use the noun "communication", but rather uses the past participle "communicated".

63 Note 2 to s 321D(5) provides that "[a] person may contravene this subsection if the person fails to ensure that particulars are notified or if the particulars notified are incorrect", reinforcing the view that the contravention is the failure by the contravener to do something. The notifying entity has one opportunity to do, or not do, the act that constitutes the contravention. The act or omission that constitutes the contravention occurs when the electoral matter is published, uploaded or broadcast because that is the point at which a notifying entity can and must *ensure* the inclusion of the required particulars.

Context

64 Section 321D(1) does not undermine, but reinforces, the construction adopted. Section 321D(1) provides that the "section applies in relation to electoral matter that is communicated to a person if [certain criteria are satisfied]". It may be accepted that communication is a bilateral act; it involves both the giving and receiving of information. The ordinary meaning of "to communicate" includes "to give to another as a partaker", "to impart knowledge of", and "to convey one's feelings, thoughts, etc, successfully to others".²⁸ As recognised by the Full Federal Court, the concept ordinarily involves "the transmission of information from one person to another person".

65 Section 321D(1) may be understood as providing the field of operation of the obligation under s 321D(5) or the circumstances in which the obligation under s 321D(5) arises. In that sense, s 321D(1) must be satisfied, and so is an "element" of the obligation under s 321D(5). Put in different terms, s 321D(5) can be read as: "[In circumstances where electoral matter is communicated to a person such that s 321D(1) is satisfied,] [t]he notifying entity must ensure that

28 *Macquarie Dictionary*, online, "communicate", meanings (1)-(3).

the particulars ... are notified ..." Similarly, Note 2 to s 321D(5) may be read as: "A person may contravene [s 321D(5)] if the person fails to ensure that particulars are notified or if the particulars notified are incorrect [in circumstances where electoral matter is communicated to a person such that s 321D(1) is satisfied]." In that way, s 321D(1) and (5) may be read together and operate together. The obligation, performed unilaterally, is to ensure the notification of particulars, prior to or at the point of communication. The contravention is, and occurs at the point of, the failure to do so.

66 This appeal concerns posts on a Facebook page. In *Fairfax Media Publications Pty Ltd v Voller*,²⁹ a defamation case, Gageler J and I observed that "[e]ach appellant became a publisher of each comment posted on its public Facebook page by a Facebook user as and when that comment was accessed in a comprehensible form by another Facebook user".³⁰ We held that there was participation in the publication process when a person "having contracted with Facebook for the creation and ongoing provision of its public Facebook page, post[ed] content on the page the effect of which was automatically to give Facebook users the option (in addition to 'Like' or 'Share') to 'Comment' on the content by posting a comment which ... was automatically accessible in a comprehensible form by other Facebook users".³¹

67 Accepting that defamation law is a different area of law seeking to address a different liability, the construction of s 321D(1) of the Electoral Act and the understanding of "communicated" is consistent with the bilateral nature of publication in defamation law, where the publisher makes matter available and a third party has it available for their comprehension.³² As Steward J observed in *Voller*, "[t]he act of posting on a public Facebook page starts an electronic conversation, whether long or short, with potentially millions of other Facebook users".³³ On the other hand, it may be different if the notifying entity sent an email to multiple named recipients. In that case, the act of communication – the act of making matter available for comprehension by a third party – is practically and necessarily different to a post on a Facebook page. In sending an email to multiple recipients, it may be argued that the notifying entity has sent the same electoral

29 (2021) 273 CLR 346.

30 (2021) 273 CLR 346 at 376 [98].

31 (2021) 273 CLR 346 at 376 [98].

32 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at 600 [26]-[27]; *Google Inc v Duffy* (2017) 129 SASR 304 at 404 [359]; *Voller* (2021) 273 CLR 346 at 355 [23], 364 [61].

33 *Voller* (2021) 273 CLR 346 at 401-402 [165].

matter multiple times, where each act of communication via the email had a specific intended recipient, and so each act of communication via the email had its own purpose.³⁴

68 Section 4AA of the Electoral Act does not require or even support a different construction. That section accommodates and envisages that there can be multiple separate communications of the same matter, with differing dominant purposes, thus reinforcing that communication is a bilateral act which depends on the participation of both the giver and receiver of information. However, the fact that there may be separate communications for separate recipients does not alter the fact that the text of s 321D provides that the obligation to provide the stated particulars is a unilateral act.

69 Section 321D(7)(b)(i) provides that the Commissioner may, by legislative instrument, determine requirements or particulars for the purposes of s 321D(5). In effect, this means that the Commissioner can determine additional particulars to those *already* provided in the table referred to in s 321D(5). Section 321D(7)(b)(i) can, in that limited way, be seen as an extension of s 321D(5). The Note to s 321D(7)(b) provides that the "[r]equirements or particulars may be determined by reference to *classes of communications*, and different requirements or particulars may be determined for different *classes of communications* (see subsection 33(3A) of the *Acts Interpretation Act 1901*)" (emphasis added). It is significant that the Note states that particulars may be determined by reference to "classes of communications", reinforcing the view that "the communication" in the table referred to in s 321D(5) is referring to a mode, or "class", of communication and that different classes may have different requirements because of the attributes of a particular class of communication.

70 Next, s 321E, headed "Extended geographical application of section 321D", provides for the geographical application of s 321D. The provision distinguishes between the "conduct constituting the alleged contravention" and the "result" of that conduct. For example, s 321E(1)(b) provides that a person does not contravene s 321D unless, among other things, "the *conduct* constituting the alleged contravention occurs wholly outside Australia and a *result of the conduct* occurs: (i) wholly or partly in Australia" (emphasis added). "[C]onduct" is defined in s 321B as "an act or an omission to perform an act". "[R]esult" is not defined in the Electoral Act. Nonetheless, the fact that s 321E distinguishes between the conduct contravening s 321D and the result of that conduct shows that there is a distinction and that that distinction is not unimportant. In other words, the act constituting the contravention is separate from, and not the same as, the effect or result of that act.

34 See Electoral Act, s 4AA(2).

71 It is readily comprehensible that a "result" of a contravention of s 321D is the viewing of the matter. Section 321E(1)(b) provides for the situation where the act contravening s 321D (such as publication) occurs outside Australia, but the matter is viewed inside Australia. It is difficult to see what else could be meant by a "result" of a contravention of s 321D. The *act* of publishing, broadcasting or putting into the world the matter is the contravention, which is separate to the receiving, viewing or hearing of the matter, which is the *result*.

Purpose

72 As we have seen, the objects of Pt XXA are to "promote free and informed voting at elections by enhancing ... (a) the transparency of the electoral system, by allowing voters to know who is communicating electoral matter; (b) the accountability of those persons participating in public debate relating to electoral matter, by making those persons responsible for their communications; [and] (c) the traceability of communications of electoral matter, by ensuring that obligations imposed by this Part in relation to those communications can be enforced".³⁵

73 Part XXA "aims to achieve these objects by ... (a) requiring the particulars of the person who authorised the communication of electoral matter to be notified [and] (b) ensuring that the particulars are clearly identifiable, irrespective of how the matter is communicated".³⁶ This is consistent with this Court's finding in *Smith v Oldham*³⁷ that electors "may be less likely to be misled or unduly influenced if they know the authority upon which they are asked to rely".

74 The construction that I prefer is consistent with those objectives. But so is the Commissioner's construction. Both constructions involve penalising persons who do not notify the required particulars with electoral matter. Both deter anonymous publication of electoral matter. Both promote free and informed voting at elections. The only substantive difference between the competing constructions in respect of their achievement of the objects of Pt XXA is that the Commissioner's construction provides scope for a larger maximum penalty. Undoubtedly, a higher maximum penalty means greater deterrence of wrongdoing, and therefore, in theory, better ensures that s 321D(5) is complied with, thus better promoting free and informed voting.

35 Electoral Act, s 321C(1). cf *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181; *Ruddick v The Commonwealth* (2022) 275 CLR 333.

36 Electoral Act, s 321C(2).

37 (1912) 15 CLR 355 at 358.

75 However, merely because a competing construction may result in a larger maximum penalty does not necessarily mean it is the intended construction. Of course, increasing a penalty will increase its deterrent value. But Parliament chose a specific, and limited, maximum penalty. The identified maximum penalty is what Parliament intends to be sufficient deterrence.³⁸ The purpose of a penalty is sufficient deterrence, not maximum deterrence.

76 Parliament has chosen the maximum penalty for s 321D(5). It is a penalty that, while not an overwhelmingly large sum, is, objectively speaking, a not insignificant amount of money. It is not so low as to suggest that Parliament must have intended it to apply "per viewer" of the contravening matter, particularly for those matters broadcast en masse. Further, the Court can take into account the number of people who viewed the contravening matter when determining what penalty to impose in the particular case.³⁹ The adopted construction achieves the objects of Pt XXA. It is consistent with Parliament's purpose for Pt XXA. That it may result in a lower maximum penalty than the competing construction is an insufficient basis to prefer the competing construction.

77 The extrinsic materials state clearly, and at length, that the purpose of the introduction of Pt XXA was to ensure that the rules regarding the authorisation of electoral matter applied consistently to all forms of communication, across all technological media.⁴⁰ The focus was not on introducing a "per person" or "per voter" approach to contraventions. Prior to the introduction of Pt XXA,⁴¹ the authorisation requirements under the Electoral Act only applied to printed and

38 See *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450 at 457 [9]-[10], 459-460 [15]-[18].

39 Section 384A of the Electoral Act provides that each civil penalty provision of the Electoral Act is enforceable under Pts 4 and 6 of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) ("the Regulatory Powers Act"). Section 82(6) of the Regulatory Powers Act provides that, in determining the pecuniary penalty, the court must take into account, among other things, "(a) the nature and extent of the contravention" and "(c) the circumstances in which the contravention took place".

40 See Australia, Joint Standing Committee on Electoral Matters, *The 2016 Federal Election: Interim Report on the authorisation of voter communication* (2016), especially at 19-23 [2.66]-[2.90]; Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 March 2017 at 3793-3795; Australia, Senate, *Electoral and Other Legislation Amendment Bill 2017*, Revised Explanatory Memorandum at 2 [1], [4], 16 [48].

41 Inserted by the *Electoral and Other Legislation Amendment Act 2017* (Cth).

video recorded advertisements;⁴² paid electoral advertisements on the internet;⁴³ how-to-vote cards;⁴⁴ and headings to electoral advertisements in newspapers, magazines and other periodicals.⁴⁵ The authorisation requirements did not apply to electoral advertising using telephone, text messaging or social media.⁴⁶

78 Part XXA was clearly and expressly introduced to ensure that the authorisation requirements applied consistently to all technological media. The first paragraph of the Joint Standing Committee on Electoral Matters' report's chapter on "Authorisation of electoral materials" is in the following terms:⁴⁷

"This chapter focuses specifically on issues raised about authorisation of communications to voters in electoral materials. Significant concerns were raised about how changes in technology have led to the change in the way voter communications are delivered to the public. Additionally, considerable concerns were raised that current legislation is inconsistent, and has not kept up with modern methods of communication."

79 Facebook itself was considered, with the report citing the following observations:⁴⁸

"we live in a world where mainstream sources of media are trusted less and less. People are drawing their information from a variety of sources and if people are targeting a number of those sources, whether they be text messages or Facebook pages, at the right demographic with the right messages, even if they are untrue, the propensity of people to weigh that up against what they are hearing from traditional media is becoming less

42 Electoral Act, s 328, as in force on 1 July 2016.

43 Electoral Act, s 328A, as in force on 1 July 2016.

44 Electoral Act, s 328B, as in force on 1 July 2016.

45 Electoral Act, s 331, as in force on 1 July 2016.

46 Australia, Joint Standing Committee on Electoral Matters, *The 2016 Federal Election: Interim Report on the authorisation of voter communication* (2016) at 20 [2.72].

47 Australia, Joint Standing Committee on Electoral Matters, *The 2016 Federal Election: Interim Report on the authorisation of voter communication* (2016) at 7 [2.1].

48 Australia, Joint Standing Committee on Electoral Matters, *The 2016 Federal Election: Interim Report on the authorisation of voter communication* (2016) at 9 [2.14] and 22 [2.87].

and less. I think the effectiveness of lines of communication like that is only increasing and if people are not using them responsibly then we leave ourselves open to a lot of trouble.

...

Different vehicles and different platforms have their own challenges because of the nature of the number of characters you can send or on forwarding material through Facebook et cetera. But, as a general principle, the Electoral Act should protect the right of the electors to know who is sending them messages. I think that in all of these cases there will be a way forward to identify who is sending you a message and then you can make a judgement about it. I do not think that technology has got to the point where it is inconceivable to make it plain who it is from."

80 With this background in mind, the significance of the introduction of the words "communicated to a person" in s 321D(1) lies not in the fact that they embrace the recipient of the communication; it is that they are technologically neutral.

Orders

81 I agree with the orders of Gageler CJ, Gleeson and Jagot JJ.

EDELMAN J.

Thwarting the Commonwealth Parliament's intention

82 Suppose that a political campaigner distributed 1,000 pamphlets containing electoral material that failed to comply with a statutory requirement, such as the inclusion of the name of the person authorising the pamphlet. Subject to any defences, the political campaigner would have committed 1,000 offences under the relevant provisions of the *Commonwealth Electoral Act 1902* (Cth) and the *Commonwealth Electoral Act 1918* (Cth), in the forms in which the relevant provisions existed from 1902 until 2018.⁴⁹ Of course, notions of proportionality, including limiting the criminal penalty to what was deserved, and associated principles such as the totality, consistency or parity, and course of conduct principles, would prevent the political campaigner from being penalised by an amount which is 1,000 times the penalty for a single offence. But the *Commonwealth Electoral Act* (in any of its iterations before 2018) did not deem the distribution of 1,000 pamphlets to be a single offence.

83 In 2018, the legislation that created the various forms of the offence discussed above was amended and rewritten by what can be described as "the Digital Amendments". The report which provoked the Digital Amendments described how concerns had arisen that "electoral material is communicated through new means without the requirement to authorise" and that "[p]eople are drawing their information from a variety of sources ... whether they be text messages or Facebook pages".⁵⁰ The Digital Amendments created a civil contravention which responded to the concern that "those who wished to hide their identity from voters could do so by communicating via media—including modern technologies—not covered by the ... authorisation regime".⁵¹ A note in the amended legislation gave examples of "matters that may be covered" by the

49 *Commonwealth Electoral Act 1902* (Cth), s 180(a); from 1918 to February 1984: *Commonwealth Electoral Act 1918* (Cth), s 161(a); from February 1984 to 2018: *Commonwealth Electoral Act 1918* (Cth), s 160(1)(a), later renumbered s 328(1)(a) by the *Commonwealth Electoral Legislation Amendment Act 1984* (Cth).

50 Australia, Joint Standing Committee on Electoral Matters, *The 2016 Federal Election: Interim Report on the authorisation of voter communication* (2016) at 7 [2.2], 9 [2.14].

51 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 March 2017 at 3793.

provision, including "bulk text messages and bulk voice calls containing electoral matter".⁵²

84 If the appellant's submissions in this case were to be accepted, then a political campaigner who transmitted 1,000 text messages by a "bulk text message" or who transmitted a bulk email copied, or blind copied, to 1,000 people, without disclosing the name and relevant town or city of the person who authorised the communication, would commit only one contravention of the applicable provision (that is, s 321D of the *Commonwealth Electoral Act 1918* (Cth) ("the *Commonwealth Electoral Act*"). The Digital Amendments would have had the effect that, by adapting a regime designed in a non-digital era for a digital era, the commission of 1,000 offences would become only one civil contravention. The effect of the Digital Amendments, if the appellant's submissions were to be accepted, would be that the attempt by the Commonwealth Parliament to modernise the *Commonwealth Electoral Act* would have badly backfired. I do not accept that the words of the Digital Amendments were so poorly expressed that the modernisation attempt by the Commonwealth Parliament gutted the effect of the *Commonwealth Electoral Act* in this respect.

85 In the present appeal, the medium of communication used by the appellant was a public page on the social networking website, Facebook. Three infringing "posts" were made on that public page, which was administered by the appellant. To generalise from the finding of fact explained most clearly in relation to the first post, those posts were transmitted to various devices or end systems where they were accessed by a number of unique Facebook profiles belonging to individual users. Specifically, in respect of each of the posts found to have contravened s 321D of the *Commonwealth Electoral Act*, the 24 December 2018 post was transmitted to and received by six people, the 7 February 2019 post was transmitted to and received by eight people, and the 5 May 2019 post was transmitted to and received by 14 people. In total, for these three posts combined, the cumulative number of occasions the posts were transmitted to and received by a unique Facebook user was 28.

86 Prior to the Digital Amendments, there is no doubt that if the appellant had handed out an infringing pamphlet to six people, another to eight people, and a third to 14 people then, subject to any defences, the appellant would have committed 28 offences. The enforcement of the offences would have been particularly impactful if those to whom the pamphlets had been provided had either requested the information or had provided a general request for information of that nature. The contraventions in this case were the digital equivalent of this. The packets of data comprising the three Facebook posts were transmitted to devices

52 *Commonwealth Electoral Act 1918* (Cth), s 321D(1) note 2.

or end systems used, respectively, by six, eight, and 14 people who either clicked on or "followed" the Facebook page.

87 The text of the Digital Amendments reveals, reflects, and gives effect to their modernising purpose. No amount of anguished linguistic analysis of verbs, tenses, and gerunds should require the Digital Amendments to be interpreted in a way that so thoroughly thwarts the intention of the Commonwealth Parliament by allowing a horse and cart to be driven through the operation of the Digital Amendments. The purpose of the Commonwealth Parliament's amendments did not fundamentally miscarry. This appeal should be dismissed.

The facts in outline

88 The facts and background to this appeal are set out in detail in other reasons for decision and can be summarised briefly. The appellant was the administrator of a public Facebook page. Before the primary judge, the Electoral Commissioner of the Australian Electoral Commission ("the Electoral Commissioner") alleged that five posts made by the appellant on the Facebook page entitled "Redland Hospital: Let's fight for fair funding" ("the posts") were "electoral matter" within the meaning of s 321D of the *Commonwealth Electoral Act* and, by failing to disclose his name and relevant town or city, the appellant had contravened s 321D(5) in respect of each post.

89 The primary judge held that only three of the posts contravened s 321D(5). The three contravening posts were made by the appellant on 24 December 2018, 7 February 2019, and 5 May 2019 ("the contravening posts"). The requirements for contravention that were met by these three posts included that they were communicated for the "dominant purpose of influencing the way electors vote in an election (a federal election) of a member of the House of Representatives or of Senators for a State or Territory".⁵³ These findings of contravention were not challenged on appeal. Rather, the issues on appeal to the Full Court of the Federal Court of Australia were confined to issues concerning the penalties imposed in relation to the contravening posts.

90 Each of the contravening posts was publicly available due to the public setting of the Facebook page. Although there is some discrepancy with the agreed statement of facts which was not explained on this appeal, the first contravening post was found to have had a reach of, or unique views by, six people, the second had a reach of eight people, and the third had a reach of 14 people. The concept of "reach" or "unique views" is explained in the next section of these reasons.

53 *Commonwealth Electoral Act*, s 4AA(1).

Analogies with digital use: a Luddite's guide

91 This appeal was rife with misleading analogies between circumstances that fell within the terms of the *Commonwealth Electoral Act* prior to the Digital Amendments and circumstances that fell within that legislation after the Digital Amendments. Several basic points must be made in simple terms. First, the sending and receipt of bulk text messages, emails, or instant messages via an application is not analogous to creating and placing for public viewing a bumper sticker on a car, a magnet on a fridge, or a corflute in front of a house. In the examples of digital communication to separate people, there is a digital transfer of packets of data to a device or end system accessed by each person. Content is thus separately received and accessed by each recipient even if the content of that digital file (including images, text, and sounds) is identical to the content provided to many others. If an analogy must be drawn, then the more apt analogy is with the creation and bulk distribution to multiple people of pamphlets or brochures. The analogy is not with the creation and public viewing of a single bumper sticker, fridge magnet, or corflute.

92 The same reasoning applies where the digital communication is a post to a public Facebook page accessed by the profile of another Facebook user rather than a text message, email, or other instant message sent to another. A post on a public Facebook page is not like a sticker or fridge magnet that sits in some digital world waiting to be seen by ethereal beings.

93 It is important to understand the digital operation of Facebook by reference to the concept of "reach" which was described by the primary judge by reference to the evidence of Mr Pennekamp, a witness who runs a digital marketing agency. The "reach" of a post is the number of unique individuals who have accessed a post through their Facebook profiles. In order for each of those individuals to have accessed the post, there must have been a transfer, to the device or end system used or accessed by the individual, of the packets of data that comprise the images, text, and sounds on the public page. The reach of a post is not the number of times that the recipient sees the post. The post might appear several times on the recipient's screen. Or there might also be ten people standing around the recipient's screen when the post is displayed. Nevertheless, the reach remains at only one user (the recipient). This was described by the primary judge as a "unique (individual) view[]".⁵⁴

94 In order to avoid misleading analogies, the concept of "reach" must be distinguished from a broader concept of "impressions" which is the number of times that a post is shown on screens. A post that "reaches" a single recipient might have multiple impressions. For instance, the post might be shown several times

54 *Electoral Commissioner of the Australian Electoral Commission v Laming [No 2]* [2023] FCA 917 at [67].

within a short period on the recipient's Facebook feed. The "reach" can roughly be described as the digital equivalent of a print-on-demand pamphlet being provided to a single person even if it is read by dozens of people. The "impressions" would be the dozens of people who read the pamphlet.

95 The Full Court's finding of 28 contraventions relied upon the concept of "reach". It appears, at least from the primary judge's findings about the first contravention, that the notion of the reach of the posts extending to each of the six, eight, and 14 people to whom each Facebook post was communicated was based upon those individuals having "clicked on" or "followed" (effectively an advance request for information or content) the public Facebook page.⁵⁵ The analogy in a non-digital world is if those people had requested or subscribed in advance to a pamphlet.

96 There was no suggestion in the reasons of the primary judge or the Full Court of the Federal Court that any of the contraventions based upon reach arose from what the primary judge described as "promoted posts (paid advertisements) or suggested posts, based on what Facebook's algorithm has determined the user may be interested in".⁵⁶ But even if that were the case, the analogy with multiple pamphlets would still hold. A promoted post with a reach of 28 individuals would be the equivalent of 28 identical pamphlets delivered by an advertising agency to 28 individuals who may not have wished to receive it but who the agency knows have some interest in the subject matter.

The progenitor provisions prior to the Digital Amendments

97 In 1902, the *Commonwealth Electoral Act 1902* (Cth) provided in s 180(a) for a criminal offence as follows:

"[a]ny publication of any electoral advertisement hand-bill or pamphlet or any issue of any electoral notice without at the end thereof the name and address of the person authorizing the same, and on the face of the notice the name and address of the person authorizing the notice".

98 For more than 100 years, this provision, or a provision in similar terms, remained in the successors to the *Commonwealth Electoral Act 1902*.⁵⁷ In 1983,

55 *Electoral Commissioner of the Australian Electoral Commission v Laming* [No 2] [2023] FCA 917 at [160].

56 *Electoral Commissioner of the Australian Electoral Commission v Laming* [No 2] [2023] FCA 917 at [65].

57 *Commonwealth Electoral Act 1918* (Cth), s 161(a) (as made); *Commonwealth Electoral Legislation Amendment Act 1983* (Cth), s 114, inserting s 160(1)(a) into

the provision was repealed and reformulated in s 160 (later renumbered s 328) of the *Commonwealth Electoral Act 1918* (Cth) as follows:⁵⁸

"[a] person shall not print, publish or distribute or cause, permit or authorize to be printed, published or distributed, an electoral advertisement, handbill, pamphlet or notice unless ... the name and address ... of the person who authorized the advertisement, handbill, pamphlet or notice appears at the end thereof".

99 In 2006, the prohibition in s 328 was supplemented by a new prohibition in s 328A, creating an offence directed at the "[p]ublication of electoral advertisements on the Internet".⁵⁹ A person committed the offence where the person published, or caused, permitted, or authorised the publication of, a paid electoral advertisement on the internet that was intended to affect voting at an election, and the name and address of the person who authorised the advertisement did not appear at the end of the advertisement. Both ss 328 and 328A remained in force until the commencement of the Digital Amendments in 2018.

100 The purpose of these progenitor provisions was explained by this Court in *Smith v Oldham*.⁶⁰ In that case, Griffith CJ described s 180 of the *Commonwealth Electoral Act 1902* (Cth) as "not in an unusual form" for the not uncommon offence provisions for the previous half century "requiring advertisements, pamphlets and other election literature to bear the name of the printer and of the person by whose authority it is issued".⁶¹ His Honour described the purpose of such provisions as follows:⁶²

"It is a notorious fact that many persons rely upon others for their guidance, especially in forming their opinions. It is obvious, therefore, that the freedom of choice of the electors at elections may be influenced by the

the *Commonwealth Electoral Act 1918* (Cth), renumbered s 328(1)(a) by the *Commonwealth Electoral Legislation Amendment Act 1984* (Cth), s 5.

58 *Commonwealth Electoral Legislation Amendment Act 1983* (Cth), s 114, inserting s 160(1)(a) into the *Commonwealth Electoral Act 1918* (Cth), renumbered s 328(1)(a) by *Commonwealth Electoral Legislation Amendment Act 1984* (Cth), s 5.

59 *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth), s 3, Sch 1, item 87.

60 (1912) 15 CLR 355.

61 *Smith v Oldham* (1912) 15 CLR 355 at 358.

62 *Smith v Oldham* (1912) 15 CLR 355 at 358.

weight attributed by the electors to printed articles, which weight may be greater or less than would be attributed to those articles if the electors knew the real authors."

Isaacs J added that "[t]he vote of every elector is a matter of concern to the whole Commonwealth".⁶³

101 Unsurprisingly, it was not suggested on this appeal, nor could it have been suggested, that printing, publishing, or distributing 1,000 pamphlets that violated the progenitor provisions of the *Commonwealth Electoral Act* would have involved anything less than 1,000 offences. Just as the "bilateral nature of publication underpins the long-established common law rule that every communication of defamatory matter founds a separate cause of action",⁶⁴ so too the bilateral nature of publication would have founded a separate offence for each pamphlet that was provided to a different person.

The reason for the Digital Amendments

102 After the 2016 federal election, the Joint Standing Committee on Electoral Matters issued an *Interim Report on the authorisation of voter communication* ("the JSCEM Report"). The JSCEM Report described how:⁶⁵

"concern has arisen when electoral material is communicated through new means without the requirement to authorise. This places in doubt the integrity of the material being disseminated to the public and is at odds with the overarching purpose of authorisation which exists to ensure that electors know the source of any electoral advertising they receive."

103 The Committee concluded that "the current requirements for authorisation for print and broadcast do not appropriately cover many new forms of communications of electoral materials".⁶⁶ The Committee recommended that a consistent approach be taken with some flexibility provided for different formats

63 *Smith v Oldham* (1912) 15 CLR 355 at 362.

64 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at 600 [27], referring to *Duke of Brunswick v Harmer* (1849) 14 QB 185 [117 ER 75]; *McLean v David Syme & Co Ltd* (1970) 72 SR (NSW) 513 at 519-520, 528.

65 Australia, Joint Standing Committee on Electoral Matters, *The 2016 Federal Election: Interim Report on the authorisation of voter communication* (2016) at 7 [2.2].

66 Australia, Joint Standing Committee on Electoral Matters, *The 2016 Federal Election: Interim Report on the authorisation of voter communication* (2016) at 10 [2.18].

(after receiving evidence of the unique characteristics of some "[n]ew media" such as Twitter) where "reasonably possible", so as not to "interfere with the purpose of the communication, which is to communicate with electors".⁶⁷

104 Section 321D was part of the Digital Amendments introduced by the enactment of the *Electoral and Other Legislation Amendment Bill 2017* (Cth) ("the Bill"). The Revised Explanatory Memorandum indicated that the purpose of the Bill was to "implement[] the Government response to the recommendations of the JSCEM Report", including to "appl[y] the electoral authorisation requirements to modern communication channels".⁶⁸ The offence provisions of ss 328 and 328A were repealed⁶⁹ and replaced with a civil penalty provision, s 321D.⁷⁰ The Revised Explanatory Memorandum indicated that in order "to fall within the scope of the requirement", "electoral matter must be communicated to a person" but, if that requirement were met, it was intended that "[a]ny method of communication is covered".⁷¹

105 In his Second Reading Speech for the Bill, the Minister for the Environment and Energy, Mr Frydenberg, indicated that the effect of the Bill was "to harmonise authorisation requirements applying to electoral communication across different channels, addressing gaps and inconsistencies wherever possible".⁷² In doing so, the objects of the Bill were: to "address[] the recommendations made by the first interim report of the Joint Standing Committee on Electoral Matters inquiry into the 2016 federal election"; to "promote[] free and informed voting at elections and referendums by allowing electors to know who is communicating with them"; and to protect the "strong public interest in ensuring voters are aware of who is communicating with them without adversely impacting public debate".⁷³ In his

67 Australia, Joint Standing Committee on Electoral Matters, *The 2016 Federal Election: Interim Report on the authorisation of voter communication* (2016) at 23-25 [2.91]-[2.99].

68 Australia, Senate, *Electoral and Other Legislation Amendment Bill 2017*, Revised Explanatory Memorandum at 2 [2], [4].

69 *Electoral and Other Legislation Amendment Act 2017* (Cth), s 3, Sch 1, item 11.

70 *Electoral and Other Legislation Amendment Act 2017* (Cth), s 3, Sch 1, item 10.

71 Australia, Senate, *Electoral and Other Legislation Amendment Bill 2017*, Revised Explanatory Memorandum at 16 [48].

72 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 March 2017 at 3793.

73 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 March 2017 at 3792-3794.

Second Reading Speech in the Senate, the Assistant Minister for Social Services and Multicultural Affairs, Mr Seselja, referred to the findings of the JSCEM Report that "current authorisation requirements have not kept pace with technological change".⁷⁴

Rewriting history?

106 The history of the Digital Amendments thus makes it clear beyond peradventure that the purpose of the Digital Amendments was to modernise the progenitor provisions so that they would apply to all forms of communication in a digital era. But the appellant's interpretation of s 321D of the *Commonwealth Electoral Act* was contrary to this history and purpose.

107 The appellant argued that a single "bulk" electronic communication, such as a single email sent to ten recipients, should be treated as only a single communication. By contrast, the appellant accepted that "where the Communicator recreates the message many times with a view to conveying it to different individuals or groups on each of those recreations", there would be multiple contraventions.

108 On the appellant's interpretation, therefore, the email sent to ten recipients would involve only one contravention but the bulk photocopy of a pamphlet that is dropped in ten letterboxes would involve multiple contraventions. The appellant asserted that the difference arose because in the instance of the digital communication "the Communicator creates the message in contemplation of it being disseminated to multiple persons at once". The premise of this difference was said to be that "[o]nce one person has received the message ... [s 321D] is engaged". Modern technology would mean that the instantaneous delivery to ten email recipients would be only one contravention but the slower delivery of ten pamphlets would be ten contraventions. For the reasons below, the text of s 321D does not require the conclusion that the purpose of the Commonwealth Parliament misfired so badly.

The text and interpretation of s 321D in light of its history and purpose

109 The relevant terms of s 321D are set out in the reasons of Gageler CJ, Gleeson and Jagot JJ. The offence provision in s 321D(5) relevantly provides:

74 Australia, Senate, *Parliamentary Debates* (Hansard), 7 September 2017 at 6734. See also Australia, Joint Standing Committee on Electoral Matters, *The 2016 Federal Election: Interim Report on the authorisation of voter communication* (2016) at v, 2 [1.6].

"The notifying entity must ensure that the particulars set out in the following table ... are notified in accordance with any requirements determined under ... subsection [(7)]."

110 The required particulars in the table to which reference is made in s 321D(5) are divided according to categories which describe "the communication". In each category, "communication" is used as a noun. The categories are relevantly divided by means which include whether "the communication" is tangible (a sticker, fridge magnet, leaflet, flyer, pamphlet, notice, poster, or how-to-vote card) or "any other communication". Plainly, the categories concerned with "any other communication" were intended to include digital communications.

111 The required particulars differ according to the category of "the communication" but the particulars generally include those contained in the progenitor provisions. For example, in all instances, the name of the notifying entity must be provided. In some instances, the address of the notifying entity must be provided. Other particulars required in some categories include the name and address of the printer who printed the communication.

112 Section 321D(1) provides for the circumstances in which s 321D applies. It specifies that s 321D "applies in relation to electoral matter that is communicated to a person" with the section only applying to such electoral matter if the electoral matter falls into one of various categories. One such category of electoral matter, which spans both digital and non-digital forms of communication, is electoral advertisements that meet various requirements.⁷⁵ Another category, relating to tangible forms of communication, is where "the [electoral] matter forms part of a sticker, fridge magnet, leaflet, flyer, pamphlet, notice, poster or how-to-vote card; [and] the content of the matter was approved by [the notifying entity]".⁷⁶

113 Although s 321D(1) might leave open the possibility that the notifying entity could be further liable if a leaflet, flyer, or pamphlet were photocopied by the recipient (not acting as an agent of the notifying entity) and communicated to another person, that possibility is excluded by s 4AA(2) which requires each recreation and communication of matter to be treated separately for the purpose of determining whether it is "electoral matter". The required dominant purpose "of the communication"⁷⁷ or of the "matter communicated or intended to be communicated"⁷⁸ must be the dominant purpose of the person doing the

75 *Commonwealth Electoral Act 1918* (Cth), s 321D(1)(a). See also s 4AA.

76 *Commonwealth Electoral Act 1918* (Cth), s 321D(1)(b).

77 See *Commonwealth Electoral Act 1918* (Cth), s 4AA(3).

78 *Commonwealth Electoral Act 1918* (Cth), s 4AA(1).

communication. This is obviously because "the communication" (leaflet, flyer, or pamphlet) is not capable of having the dominant purpose itself. The dominant purpose can only be that of the person who engages in the act of communication.

114 A third category is where the electoral matter does not satisfy the requirements of the category of electoral advertisements and does not form part of any of the listed tangible forms of communication but "the [electoral] matter is communicated by, or on behalf of, a [notifying entity]".⁷⁹ Like the categories of required particulars in s 321D(5) concerning "any other communication", this final category of electoral matter is plainly intended to include digital forms of communication. A note to s 321D(1) provides that:⁸⁰

"Examples of matters that may be covered by this section include internet advertisements, bulk text messages and bulk voice calls containing electoral matter."

115 It can immediately be seen that s 321D is structured in a way that divides between the manner of communicating electoral matter by: (i) the traditional category of tangible forms of communication (such as where "the communication" is a pamphlet and the electoral matter that "is communicated" by or on behalf of the notifying entity forms part of the pamphlet); and (ii) generally intangible forms of communication (such as where "the communication" is an email or text message and the electoral matter that "is communicated" by or on behalf of the notifying entity forms part of the email or text message). But that structure plainly is one of convenient exposition rather than substantive effect since the category of electoral advertisements encompasses advertisements by both digital and non-digital forms of communication.

116 The term "communicate" is not defined in the *Commonwealth Electoral Act*. The definition section for Pt XXA (of which s 321D forms a part), in s 321B, provides only an exclusion from the scope of "communicate": "a carriage service provider does not communicate electoral matter merely because the carriage service provider supplies the listed carriage service used to communicate the matter". The word "communicate", used as a verb in s 321D(1), must bear its relevant, contextual, ordinary meaning.

117 The relevant, contextual, ordinary meanings of communicate, from *communicare* (to make common), in relation to something tangible or intangible are virtually indistinguishable. The meaning is "[t]o share",⁸¹ "to give to another

79 *Commonwealth Electoral Act 1918* (Cth), s 321D(1)(c).

80 *Commonwealth Electoral Act 1918* (Cth), s 321D(1) note 2.

81 *Oxford English Dictionary*, 2nd ed (1989), vol 3 at 578, "communicate", sense 4.

as a partaker",⁸² or "to impart".⁸³ Possibly some slight shade of a different meaning in relation to something intangible is to "transmit".⁸⁴ The more specialist meaning in relation to computers is "to exchange data".⁸⁵ The essence of this ordinary meaning of communicate is to transfer or share information from one person to another.

118 In light of the history, purpose, and structure of s 321D, the ordinary meaning of "communicate", and the impossibility of any rational contention that the categories of "the communication" in s 321D(5) are to be treated differently based upon the means by which the matter is communicated, there is only one principled interpretation of s 321D. That principled interpretation relevantly treats "the communication" in s 321D(5) as being each separate form of transmission of information. Consistently with s 321D, a separate contravention occurs each time a form of transmission of information "applies" so that non-complying electoral matter "is communicated to a person". Hence, there is a contravention on each occasion that electoral matter is imparted or transmitted by, or on behalf of, a notifying entity (whether through electronic or physical means) to another person without the inclusion of the relevant particulars.

119 This interpretation means that the requirements of s 321D will not be met if any "communication" within s 321D(5) (that is, any individual transmission of digital or non-digital information) is not received by another. A pamphlet that is printed but never distributed has not been "communicated to a person". An email that bounces back has not been "communicated to a person". A Facebook post that is posted but removed before it has any reach has not been "communicated to a person". The mere act of posting information on Facebook is no more a contravention than the mere act of printing a pamphlet that is never provided to any recipient. There is no sense of the word "communication" (other than perhaps in a quantum universe) in which matter that is never provided or transmitted to another is communicated.

120 On the other hand, where the requirements of s 321D are otherwise met and no exception applies, the number of contraventions will be the same whether the

82 *Macquarie Dictionary*, 9th ed (2023), vol 1 at 322, "communicate", sense 1. See also *Oxford English Dictionary*, 2nd ed (1989), vol 3 at 577, "communicate", sense 1.

83 *Oxford English Dictionary*, 2nd ed (1989), vol 3 at 577, "communicate", senses 1, 3a; *Macquarie Dictionary*, 9th ed (2023), vol 1 at 322, "communicate", sense 1.

84 *Oxford English Dictionary*, 2nd ed (1989), vol 3 at 577, "communicate", sense 1; *Macquarie Dictionary*, 9th ed (2023), vol 1 at 322, "communicate", sense 1.

85 *Macquarie Dictionary*, 9th ed (2023), vol 1 at 322, "communicate", sense 9.

method of communication involves the receipt by six people of electoral matter by the following means: imparting six pamphlets to six different people; transmitting an email to six different people (whether the email is transmitted to each person as carbon copies or as staggered transmissions); transmitting a text message to six different people; and, in this case by reference to the first contravention, transmitting a Facebook post to six different people.

Deterrence and the injustice of present authority

121 The interpretation above is narrower than the broadest form of the Electoral Commissioner's submission. That broad submission was that a contravention occurs every time that any of the forms in which a communication is made is "seen". Hence, the Electoral Commissioner argued, a single contravening corflute erected outside a house by a notifying entity could involve 1,000 contraventions if 1,000 cars drove past the house and the corflute was seen by 1,000 drivers. By analogy, a single contravening fridge magnet seen by 50 people at a party would involve 50 contraventions.

122 That submission should not be accepted. The progenitor provisions of the *Commonwealth Electoral Act* never created multiple offences in this way. The notions in those progenitor provisions of printing, publishing, or distributing were tied to the particular tangible things that were printed, published, or distributed. The viewing by multiple people of infringing content in a single tangible thing did not create additional offences. So too, the reference in s 321D(1) to "electoral matter that is communicated to a person" is tied by s 321D(5) to "the communication" which is a tangible or intangible creation. The viewing by multiple people of infringing content in a single digital transmission does not create additional offences. In the digital world, this distinction is one between "reach", as relied upon by the primary judge as described above, and "impressions".

123 Nevertheless, the Electoral Commissioner argued, with the support of the reasons of the Full Court,⁸⁶ that the broad interpretation was required due to the inadequacy of the maximum penalty of \$25,200, in some cases, as general deterrence against contraventions. For instance, it might be thought that a maximum penalty of \$25,200 would be more than sufficient deterrence against a contravening text message, email, or Facebook post that might be transmitted to a single person. The effect of the Electoral Commissioner's submission about deterrence is that a penalty of \$25,200 would be inadequate deterrence against transmitting a contravening text message, email, or Facebook post to 1,000, 10,000, or perhaps even 100,000 recipients. The Electoral Commissioner submitted that such an approach would not provide sufficient scope for effective

⁸⁶ *Electoral Commissioner of the Australian Electoral Commission v Laming* (2024) 304 FCR 561 at 565-566 [14]-[15], 570-571 [38], 584-585 [101], [105].

general deterrence, particularly for deterrence of "the most egregious breaches by the most deliberate – perhaps, repeating – contraveners with resources that make \$25,000 a rounding error".

124 The reason that this submission should not be accepted is that if this Court were to interpret the scope of a civil penalty provision by reference to a perception that the level set by Parliament was inadequate then the Court would heap injustice upon injustice. That is due to the unfortunate state of the jurisprudence on civil penalties developed by this Court.

125 In the context of a different civil penalty regime,⁸⁷ and restating this Court's general principles concerning civil penalties,⁸⁸ this Court held in *Australian Building and Construction Commissioner v Pattinson*⁸⁹ that it was impermissible to consider whether the penalty was proportionate to the seriousness of the contravention when assessing the "appropriate" civil penalty. In that case, I expressed my grave regret for the state of the present jurisprudence on deterrence. I continue to hold that regret. Notions of "just desert", a core element of justice, have been marginalised in the pursuit of deterrence⁹⁰ with only particular instances of that broad principle retained (in the form of the totality, consistency or parity, and course of conduct principles) as a bulwark against the flood of injustice arising from disproportionate penalties.⁹¹

126 The damage to justice done by the approach of this Court to civil penalties is great: "problems run deep in maintenance of the prevailing jurisprudence on civil penalties which is based almost entirely on deterrence".⁹² The decision of this

87 *Fair Work Act 2009* (Cth), s 546(1).

88 *The Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 at 506 [55], quoting *Trade Practices Commission v CSR Ltd* (1991) ATPR ¶41-076 at 52,152; *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157 at 195-196 [116].

89 (2022) 274 CLR 450 at 467 [39], 468 [42], 469 [44].

90 Compare *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450 at 478 [80], 481-482 [89]-[91].

91 *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450 at 469-470 [45].

92 Game and Palaniappan, "Proportionality by Another Name in the Imposition of Civil Penalties", in Kayis, Gluer and Walpole (eds), *The Law of Civil Penalties* (2023) 50 at 65. See also Boncardo and Bromberg, "Civil Penalties in Industrial

Court in *Pattinson*, and its predecessors, have had few friends or supporters among those commentators who have carefully considered the subject. The consequences of the decision in *Pattinson* have even been the subject of concerns expressed extra-judicially.⁹³ Some commentators have pointed to anomalies and uncertainty that have arisen from the decision.⁹⁴ Other commentators have made powerful and cogent arguments for reform.⁹⁵

127 Whether or not this Court should re-open that jurisprudence if an application to do so were made is unnecessary to decide in this appeal. The simple point is that the present injustice created by the jurisprudence of this Court concerning deterrence should not be turbocharged by any further use of deterrence to expand the conduct that will amount to a contravention in a civil penalty regime by means of what the Electoral Commissioner described as an interpretative principle of ensuring "sufficient" deterrence. For these reasons, therefore, I agree with Gageler CJ, Gleeson and Jagot JJ that considerations of deterrence should generally be irrelevant in the interpretation of the scope of a civil penalty regime.

Conclusion and how to restore the intention of Parliament

128 In my view, the intention of Parliament was not to treat as a single contravention conduct that would previously have amounted to 1,000 pre-digital offences, such as the distribution of 1,000 pamphlets. Instead, when electoral matter is communicated digitally through Facebook rather than by pamphlet, with a reach of 1,000 people and for the dominant purpose of influencing the way electors vote in a federal election, the intention of Parliament was that there should be 1,000 contraventions. The reasoning of Gageler CJ, Gleeson and Jagot JJ in this appeal rejects that conclusion. It may be impossible to distinguish the approach of their Honours to the contravening posts from the approach that would be taken to bulk emails, text messages, or other instant messages sent digitally with a reach of

Law", in Kayis, Gluer and Walpole (eds), *The Law of Civil Penalties* (2023) 261 at 275-276; Ramsay and Webster, "The Origins, Evolution and Merits of the Civil Penalty Regimes Enforced by ASIC" (2024) 40 *Company and Securities Law Journal* 261 at 281.

93 See Muys and Fischbein, "Beyond all Proportion: High Court in *ABCC v Pattinson* Affirms Primacy of Deterrence in Fixing Civil Penalties" (2024) 32 *Australian Journal of Competition and Consumer Law* 60 at 68.

94 See, eg, Fisse, "Australian Cartel Law: Recent Developments – First Set of Two Sets" (2023) 51 *Australian Business Law Review* 70 at 84-85.

95 See, eg, Gleeson and Sharma, "Course of Conduct and Totality in Civil Penalties", in Kayis, Gluer and Walpole (eds), *The Law of Civil Penalties* (2023) 93 at 108.

1,000 people. In each case, packets of digital data are sent, en masse, containing an identical message.

129 The remedy to restore the intention of the Commonwealth Parliament must now lie with the Commonwealth Parliament itself. If the Commonwealth Parliament seeks to treat digital communications in the same way as it treated non-digital communications immediately prior to the commencement of the Digital Amendments in 2018, it is now necessary for s 321D of the *Commonwealth Electoral Act* to be made clearer. Section 321D will need to provide expressly for that which I consider to be implicit in the present terms of the provision. A further express provision could be added which contains words that make it clear that when the other requirements of the provision are satisfied, a contravention will occur by a notifying entity each time an unauthorised message is sent by, or on behalf of, the notifying entity, and received by another person, irrespective of whether the form of that communication is tangible or digital.

130 Unless or until any amendment is made by the Commonwealth Parliament, there will now be a radical change in the digital equivalent of the treatment, which has endured for more than a century, of a political campaigner who would have committed 1,000 offences by dropping 1,000 contravening pamphlets in letterboxes. The political campaigner of today will commit only a single contravention by an electronic message transmitted and received by 1,000, 10,000, 100,000 or 1,000,000 unique profiles on Facebook, or on TikTok, Reddit, or any other social media. The same reasoning applies, by necessary analogy, to transmissions by text message or email; indeed, as is plain from the passages quoted from the JSCEM Report in the introduction to these reasons, Facebook posts were intended to be treated in the same way as text messages. The democratic roadblock presented by today's interpretation of s 321D, from which I dissent, can be appreciated without speaking of the penalty of \$25,200 for a single contravention of that provision having become "an acceptable cost of doing business".⁹⁶

96 *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450 at 460 [17], quoting *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249 at 265 [62]. See also *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 at 659 [66].

