# HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

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PAUL HOPPER & ANOR — PLAINTIFFS

AND

STATE OF VICTORIA — DEFENDANT

*Hopper v Victoria*
[2026] HCA 11
*Date of Hearing: 3 & 4 February 2026*
*Date of Judgment: 15 April 2026*
M10/2025

**ORDER**

*The questions stated for the opinion of the Full Court in the special case filed on 22 September 2025 be answered as follows:*

*Question 1:* *Is Pt 12 of the* Electoral Act 2002 *(Vic), operating with the nominated entity exception in para (j) of the definition of "gift" in s 206(1) of the* Electoral Act 2002 *(Vic), invalid (in whole or in part and, if in part, to what extent) because it impermissibly burdens the implied freedom of political communication, contrary to the Commonwealth* Constitution*?*

*Answer:* *Yes, in whole.*

*Question 2:* *What, if any, relief should be granted to the plaintiffs?*

*Answer:* *It should be declared that Pt 12 of the* Electoral Act 2002 *(Vic) is invalid.*

*Question 3:* *Who should pay the costs of the special case?*

*Answer:* *The defendant.*

**Representation**

R Merkel SC and B K Lim SC with L G Moretti for the plaintiffs (instructed by Ripple Legal Pty Ltd)

A D Pound SC, Solicitor-General for the State of Victoria, with T M Wood and J A Vogan for the defendant (instructed by Victorian Government Solicitor)

R C A Higgins SC with N A Wootton and J Forrest for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

## CATCHWORDS

## Hopper v Victoria

Constitutional law (Cth) – Implied freedom of communication about government or political matters – Where certain provisions of Pt 12 of *Electoral Act 2002* (Vic) imposed general cap on political donations from a single donor within election period with exception for gifts between registered political party and nominated entity of registered political party ("nominated entity exception") – Where s 222F of *Electoral Act* permitted registered political party to appoint nominated entity on two alternative sets of eligibility criteria – Where second set of eligibility criteria only available if first appointment of entity as nominated entity made before 1 July 2020 ("time limitation in s 222F(3)") – Where only major parties appointed entities as nominated entities before 1 July 2020 – Where nominated entities of major parties well-capitalised prior to operation of general cap – Where assets of nominated entities of major parties significantly exceed what could lawfully be raised by individual candidate or uncapitalised nominated entity subject to general cap – Where defendant conceded time limitation in s 222F(3) invalid – Whether Pt 12 in operation with nominated entity exception invalid – Whether aspects of Pt 12 severable.

Words and phrases – "candidate", "constitutionally prescribed system of representative and responsible government", "differential burden", "effective burden", "effective constraint", "election", "eligibility criteria", "general cap", "gift", "illegitimate purpose", "implied freedom of political communication", "impugned law", "impugned provisions", "indirect burden", "inextricable connection", "justified", "law", "legacy parties", "legal rule", "legislative purpose", "legitimate purpose", "level of generality", "major parties", "nominated entity", "nominated entity exception", "political donation", "political expenditure", "proper objective", "proportionality", "provision", "reasonably appropriate and adapted", "registered political party", "regulated person or entity", "risk of corruption and undue influence", "severance".

*Electoral Act 2002* (Vic), ss 3, 45(2)(c), 50(1)(a)(ii), 69A, Pt 4, Pt 12.
*Electoral Legislation Amendment Act 2018* (Vic), s 1(a)(ii).
*Interpretation of Legislation Act 1984* (Vic), ss 4(1)(a), 6(1), 38.
*Corporations Act 2001* (Cth), s 50AA.

1 GAGELER CJ, GORDON, JAGOT AND BEECH-JONES JJ. The plaintiffs contested the 2022 Victorian State election as independent candidates, in the districts of Werribee and Hawthorn respectively. The first plaintiff, Mr Paul Hopper, also contested the 2025 State byelection in the district of Werribee. He has established a political party, The West Party Inc ("the West Party"), which aims to be registered as a "registered political party" under Pt 4 of the *Electoral Act 2002* (Vic) and to run candidates in all of the western metropolitan districts of Melbourne in the 2026 State election. His nomination as the West Party's candidate in the district of Werribee in the 2026 State election has been accepted by the members of the West Party. The second plaintiff, Ms Melissa Lowe, has publicly announced her intention to again be an independent candidate in the 2026 State election in the district of Hawthorn. Each plaintiff is a "candidate" as defined in s 206(1) of the *Electoral Act* and is under an obligation to comply with Pt 12 of that Act.

2 Part 12 of the *Electoral Act* regulates political donations and election expenditure. This proceeding concerns the plaintiffs' contention that those provisions of Pt 12 that place a general cap on political donations and provide for its operation with an exception that permits a registered political party with a "nominated entity" to receive unlimited funds from its nominated entity ("the nominated entity exception") are invalid because they impermissibly burden the implied freedom of political communication. By the nominated entity exception, the funds flowing to a registered political party from its nominated entity are not subject to the general cap and may be used by the registered political party for political expenditure. The eligibility criteria for appointment of a nominated entity by a registered political party differ between nominated entities appointed at any time[1] and entities first appointed before 1 July 2020[2] ("the time limitation in s 222F(3)").

3 The defendant, Victoria, conceded that the time limitation in s 222F(3) could not be justified and is invalid because it impermissibly burdens the implied freedom of political communication but contended, save to that extent, that the general cap on political donations in its operation with the nominated entity exception in Pt 12 imposes a justified burden on the implied freedom of political communication in pursuit of a legitimate purpose. The Attorney-General of the Commonwealth, intervening, made confined submissions on aspects of the implied freedom analysis.

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**1** *Electoral Act*, s 222F(2).

**2** *Electoral Act*, s 222F(3).

4 The parties agreed a special case and agreed in stating questions of law for the opinion of the Full Court. The questions, and the answers to those questions, are as follows:

(1) Is Pt 12 of the *Electoral Act*, operating with the nominated entity exception in para (j) of the definition of "gift" in s 206(1) of the *Electoral Act*, invalid (in whole or in part and, if in part, to what extent) because it impermissibly burdens the implied freedom of political communication, contrary to the Commonwealth *Constitution*?

Answer: Yes, in whole.

(2) What, if any, relief should be granted to the plaintiffs?

Answer: It should be declared that Pt 12 of the *Electoral Act* is invalid.

(3) Who should pay the costs of the special case?

Answer: The defendant.

5 Question (1) reflects that although it was common ground, consistent with this Court's decisions, that a cap on political donations may be imposed without infringing the implied freedom of political communication,[3] the plaintiffs contended that in Pt 12 of the *Electoral Act* it is the general cap in its operation with the nominated entity exception that gives rise to an impermissible burden on the implied freedom.

6 Only Pt 12 of the *Electoral Act* refers to nominated entities. That Part does not provide for a standalone "nominated entity exception" but creates a scheme which identifies the criteria for an entity to be appointed the nominated entity of a registered political party, sets out the process for appointment of such an entity by a registered political party, and then subjects those entities to regulation.[4] The exception from the general cap for the flow of funds between a nominated

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**3** See, eg, *Unions NSW v New South Wales* ("*Unions NSW [No 1]*") (2013) 252 CLR 530; *McCloy v New South Wales* (2015) 257 CLR 178; *Unions NSW v New South Wales* ("*Unions NSW [No 2]*") (2019) 264 CLR 595; *Unions NSW v New South Wales (Unions NSW [No 3])* (2023) 277 CLR 627.

**4** The provisions throughout Pt 12 which refer to or address nominated entities were identified by the parties and are listed in the Annexure.

entity and its registered political party is not effected by any particular substantive section or sub-section, but rather through the definitions of "gift" and "political donation", which provide an aid to the construction of the substantive provisions in Pt 12.[5] The nominated entity exception can therefore only be understood in the context in which it appears – Pt 12 and, specifically, the general cap. The extent to which the nominated entity exception burdens the implied freedom, and the purpose it serves, cannot be explained independently of that context.

## Part 12 of the *Electoral Act*

7 Part 12 of the *Electoral Act* was amended by the *Electoral Legislation Amendment Act 2018* (Vic) ("the 2018 Amendment Act") to introduce a scheme regulating political donations and political expenditure. A stated purpose of the 2018 Amendment Act was to "enhance the integrity of the electoral system by prohibiting political donations from certain sources and introducing a political donations disclosure and reporting scheme".[6] There are a number of elements in the legislative scheme which must be explained.

8 Part 12 places restrictions and obligations on the following persons or entities ("regulated persons or entities"): a registered political party,[7] a candidate,

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**5** See, eg, *Gibb v Federal Commissioner of Taxation* (1966) 118 CLR 628 at 635; *Kelly v The Queen* (2004) 218 CLR 216 at 245 [84], 253 [103]; *Moreton Bay Regional Council v Mekpine Pty Ltd* (2016) 256 CLR 437 at 451 [61]; *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at 72 [185]. cf *Qantas Airways Ltd v Transport Workers' Union of Australia* (2023) 278 CLR 571 at 595 [32], 608 [80].

**6** 2018 Amendment Act, s 1(a)(ii).

**7** A political party that is registered under Pt 4 of the *Electoral Act*: s 3 definition of "registered political party". Each registered political party has a "registered officer": ss 45(2)(c) and 50(1)(a)(ii).

a group,[8] an elected member, a nominated entity of a registered political party,[9] an associated entity[10] and a third party campaigner.[11]

*Political donation*

9 A central element upon which Pt 12 operates is a "political donation", defined[12] as a "gift" to a regulated person or entity.[13] A "gift" is defined as "any disposition of property[14] otherwise than by will made by a person to another person without consideration in money or money's worth or with inadequate consideration"[15] and includes, for example, the provision of a service.[16] The definition also contains a list of exceptions.[17] One exception from the definition of "political donation", by para (j) of the definition of "gift", is "a gift made by a registered political party to the nominated entity of the registered

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**8** Two or more candidates whose names are grouped on a ballot-paper for a Legislative Council election in accordance with s 69A of the *Electoral Act*: s 206(1) definition of "group", read with s 69A.

**9** See [16]-[18] below.

**10** Defined to capture a range of entities: s 206(1) definition of "associated entity". See also [19] below.

**11** Any other person or entity that receives political donations or incurs political expenditure exceeding a total of $4,000 (indexed) in a financial year: *Electoral Act*, s 206(1) definition of "third party campaigner".

**12** *Electoral Act*, s 206(1) definition of "political donation".

**13** Paragraphs (e) and (f) of the definition of "political donation" qualify it such that a gift to an associated entity or third party campaigner is a political donation to the extent that the gift was used or intended to be used to enable the associated entity or third party campaigner to make a political donation or incur political expenditure, or to reimburse them for doing so.

**14** See *Electoral Act*, s 206(1) definition of "disposition of property".

**15** *Electoral Act*, s 206(1) definition of "gift".

**16** *Electoral Act*, s 206(1) para (a) of the definition of "gift".

**17** *Electoral Act*, s 206(1) paras (e)-(m) of the definition of "gift".

political party or received by a registered political party from the nominated entity of the registered political party".

*General cap*

10 The "general cap" on political donations in s 217D in Div 3B of Pt 12 provides that "[a] political donation made to, or for the benefit of," any regulated person or entity "must not exceed the general cap for the election period". The general cap is $4,000,[18] indexed each year. For the 2025-2026 financial year, it is $4,970.[19] The "election period" is the period commencing on the day after the general election in Victoria and ending on the next general election day.[20] A political donation to a candidate, elected member or group endorsed by a registered political party, or to a nominated entity of a registered political party, is counted as a donation to the registered political party for the purposes of the general cap.[21] A contribution by a candidate at an election or an elected member to their own election campaign is *not* included in the general cap.[22] "Small contributions", defined as a political donation of $50 or less (indexed), are disregarded in determining whether the general cap has been exceeded.[23]

11 It is unlawful for a regulated person or entity to accept a political donation if the donation would, or would when aggregated with other donations made by the same donor to the same regulated person or entity within the election period,[24] exceed the general cap.[25] A person who knowingly makes or accepts a political

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**18** *Electoral Act*, s 206(1) definition of "general cap".

**19** *Electoral Act*, ss 206(1) definition of "general cap" and 217Q.

**20** *Electoral Act*, s 206(1) definition of "election period".

**21** *Electoral Act*, s 217D(6).

**22** *Electoral Act*, s 217D(5).

**23** *Electoral Act*, ss 206(1) definition of "small contribution", 217D(9), 217E(4), 217Q.

**24** *Electoral Act*, s 217E(1)-(2).

**25** *Electoral Act*, s 217D(2).

donation that is unlawful is guilty of an offence.[26] A political donation that is accepted in contravention of Div 3B is forfeited to the State.[27]

*State campaign account*

12 Each regulated person or entity, by their registered officer or registered agent,[28] must keep a "State campaign account"[29] for the purpose of State elections.[30] Each of those persons and entities "must ensure that each political donation" received under Div 3 of Pt 12 is paid into the regulated person or entity's State campaign account,[31] as well as public funding in relation to political expenditure and electoral expenditure paid under Div 2 of Pt 12.[32] Certain amounts are prohibited from being paid into the State campaign account, including "any amount kept in any account for Commonwealth electoral purposes" by a regulated person or entity,[33] and annual subscriptions, affiliations and levies paid to registered political parties.[34]

13 No amount of money for "political expenditure" is to be paid by a regulated person or entity unless the amount is paid from the State campaign account.[35] "Political expenditure"[36] is relevantly defined as "any expenditure for the dominant purpose of directing how a person should vote at an election, by promoting or

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**26** *Electoral Act*, s 218(5A).

**27** *Electoral Act*, s 217G(1).

**28** See *Electoral Act*, Pt 12, Div 1A.

**29** *Electoral Act*, ss 206(1) definition of "State campaign account" and 207F.

**30** *Electoral Act*, s 207F(1).

**31** *Electoral Act*, s 207F(2).

**32** *Electoral Act*, s 212(4A).

**33** *Electoral Act*, s 207F(3).

**34** *Electoral Act*, s 207F(4)-(5), being amounts that correspond to the exceptions in paras (g)-(i) of the definition of "gift" in s 206(1).

**35** *Electoral Act*, s 207F(6).

**36** *Electoral Act*, s 206(1) definition of "political expenditure".

opposing ... (a) the election of any candidate at the election; or (b) a registered political party; or (c) an elected member".

*Real-time disclosure regime*

14 Division 3 of Pt 12 provides a "real-time disclosure regime" for political donations. Each political donation equal to or exceeding the disclosure threshold ($1,000, indexed at $1,240 for the 2025-2026 financial year) during a financial year must be the subject of a disclosure return by both the donor and the recipient to the Victorian Electoral Commission ("the Commission") within 21 days of the making of the political donation.[37] The Commission must publish a disclosure return of a political donation on its website within seven days of receiving the return.[38]

*Public funding*

15 Division 2 of Pt 12 provides for public funding of political expenditure and electoral expenditure. Public funding is available to registered political parties in respect of candidates endorsed by the party, as well as candidates not endorsed by a registered political party, where the relevant candidate received at least four per cent of the total number of first preference votes, or was elected, in the election.[39] The amount of public funding is calculated by reference to the number of first preference votes given for the candidate in the election.[40] An "eligible" recipient, being a registered political party or independent candidate who received public funding in the immediately preceding general election, may also receive "advance" payment of an amount equal to their public funding entitlement in that preceding general election for the following general election.[41]

*Nominated entity*

16 Appointment of a nominated entity by a registered political party and the entry of a nominated entity of a registered political party on the Register of Nominated Entities ("the Register") is addressed in Subdiv 2 of Div 4A of Pt 12.

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**37** *Electoral Act*, s 216(1) and (4).

**38** *Electoral Act*, s 217.

**39** *Electoral Act*, ss 211(3), 212(3)-(4).

**40** *Electoral Act*, s 211(2)-(2A).

**41** *Electoral Act*, s 212A(1)-(2), (7).

Section 222F(1) permits a registered political party to appoint an entity as its nominated entity. An independent candidate cannot appoint a nominated entity. Each registered political party may only have one nominated entity appointed at any time, and nominated entities may not be shared between political parties.[42] An entity may not be appointed as the nominated entity of a registered political party if the entity, or one of its officers, has been convicted of an offence under Pt 12.[43]

17 As stated earlier, there are two alternative sets of eligibility criteria for the appointment of a nominated entity of a registered political party. The first set of eligibility criteria is in s 222F(2), which is expressed to operate "[s]ubject to subsection (3)". Under s 222F(2), an entity is eligible for appointment if it is an incorporated body that: (a) is controlled, within the meaning of s 50AA of the *Corporations Act 2001* (Cth), by the registered political party; (b) operates for the sole benefit of the members of the registered political party, or is established and maintained, or is the trustee of a trust established and maintained, for the sole benefit of the members of the registered political party; and (c) does not have voting rights in the registered political party.

18 The second set of eligibility criteria is in s 222F(3), which is expressed to operate "[d]espite subsection (2)", and is only available "if the first appointment of an entity as the nominated entity of a registered political party is made before 1 July 2020" (namely, the time limitation in s 222F(3)). Under s 222F(3), an entity is eligible if it is an incorporated body that: (a) operates for the principal, rather than sole, benefit of the members of the registered political party, or is established and maintained, or is the trustee of a trust established and maintained, for the principal benefit of the members of the registered political party; and (b) does not have voting rights in the registered political party. There is no requirement that a nominated entity appointed by a registered political party before 1 July 2020 be controlled by the registered political party.

19 One further matter may be observed about the eligibility criteria for nominated entities. An "associated entity", also regulated by Pt 12, is defined to include "an entity that is controlled by one or more registered political parties" and "an entity that operates wholly, or to a significant extent, for the benefit of one or more registered political parties", but does not include "a nominated entity of

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**42** *Electoral Act*, s 222F(4)(a) and (c).

**43** *Electoral Act*, s 222F(4)(b).

a registered political party".[44] It may be observed that, without that express exclusion, the definition of "associated entity" would likely otherwise in its terms apply to a "nominated entity". Part 12 also defines a "third party campaigner" as any "other" entity that receives political donations or incurs political expenditure in excess of $4,000 (indexed) in a financial year. Consequently, an entity eligible for appointment as a nominated entity is regulated as an associated entity (or, failing that, possibly a third party campaigner) unless it is appointed a nominated entity.

20 Since amounts received by a registered political party from its nominated entity are not "political donations", they are not captured by the general cap and the real-time disclosure regime, and are not required to be paid into the party's State campaign account. However, there is also no prohibition on the party paying those amounts into its State campaign account.

21 There are anti-avoidance provisions in Pt 12 which apply to nominated entities. Section 218B(1) provides that it is an offence to "enter into, or carry out, a scheme, whether alone or with any other person, with the intention of circumventing a prohibition or requirement" under Pt 12. This is given specific application in relation to appointing a nominated entity by s 218B(2), which provides that a person commits an offence under s 218B(1) if the person enters into or carries out a scheme under which (a) "an entity that is not a nominated entity of a registered political party receives one or more gifts at a particular time"; (b) "after receiving the gift or gifts, the entity becomes the nominated entity of a registered political party"; (c) "the receiving of the gift or gifts by the entity would have constituted an offence against [Pt 12] if the entity had been the nominated entity of the registered political party at the time the gift or gifts were received"; and (d) "the person entered into the scheme with the intention of circumventing a prohibition or requirement under [Pt 12]". Section 218B thus makes it an offence to attempt to avoid the general cap by "pre-capitalising" an entity by way of gifts exceeding the general cap and then seeking that entity's appointment as a nominated entity.

**Nominated Entities**

22 Only three registered political parties ("the major parties") appointed a nominated entity before 1 July 2020, and each of those entities ("the Nominated Entities") was capitalised before ss 218B and 222F commenced. The assets and funds of the Nominated Entities significantly exceed what could be lawfully raised by any individual candidate through political donations up to the amount of

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**44** *Electoral Act*, s 206(1) definition of "associated entity".

the general cap. To varying degrees, the assets of the Nominated Entities significantly exceed what could be realistically raised over one or more electoral cycles by an uncapitalised nominated entity subject to the general cap.

23 Labor Services & Holdings Pty Ltd as trustee for Labor Services & Holdings Trust ("the LSH Trust"), the nominated entity of the Australian Labor Party – Victorian Branch, was entered on the Register on or around 8 October 2019. Pilliwinks Pty Ltd ("Pilliwinks"), the nominated entity of the National Party of Australia – Victoria, was also entered on the Register on or around 8 October 2019. Cormack Foundation Pty Ltd ("the Cormack Foundation"), the nominated entity of the Liberal Party of Australia (Victorian Division), was entered on the Register on or around 22 April 2020. The Nominated Entities, having been appointed before 1 July 2020, qualified for registration by the operation of the eligibility criteria in s 222F(3).[45] Other than the Nominated Entities, no other entity has at any time been entered on the Register.

24 At all material times, each Nominated Entity had substantial assets and funds that could be given – and were in fact given – to its registered political party. The Cormack Foundation had net assets of $89,656,938 as at 30 June 2024. In each of the 2017-2018 to 2023-2024 financial years, it had revenue of between $3,073,409 and $6,184,785, of which the majority comprised ordinary dividends. The Cormack Foundation donated substantial sums to the Liberal Party of Australia (Victorian Division): for example, in the 2022-2023 financial year (encompassing the 2022 State election held on 26 November 2022), it donated[46] $1,500,000. The constitution of the Cormack Foundation does not refer to the Liberal Party of Australia (Victorian Division), and at most only one quarter of the shares in the Cormack Foundation are held on trust for the party.[47] In the 2017-2018 to 2023-2024 financial years, between zero and 47 per cent of the Cormack Foundation's donations each year were made to the Liberal Party of Australia (Victorian Division).

25 The LSH Trust, as at 30 June 2024, had a net asset value of $3,125,665, including cash of $8,585,320 and liabilities including "unpaid distributions to

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**45** Whether or not those same entities might also have satisfied the eligibility criteria in s 222F(2): see also [39] below.

**46** Amounts received by the Liberal Party of Australia (Victorian Division) from the Cormack Foundation were described as donations in annual returns submitted to the Australian Electoral Commission.

**47** See also *Alston v Cormack Foundation Pty Ltd* (2018) 358 ALR 263.

beneficiaries" of $6,159,170. The beneficiaries of the LSH Trust are all members of the Australian Labor Party – Victorian Branch, and the trustee's directors are required to be the President, Senior Vice President and Junior Vice President of the Australian Labor Party – Victorian Branch and others determined by the party. The LSH Trust had similarly substantial net assets in each financial year between 2017-2018 and 2023-2024. In the 2022-2023 financial year (encompassing the 2022 State election), the Australian Labor Party – Victorian Branch received amounts totalling $4,598,000 from Labor Services & Holdings Pty Ltd as trustee for the LSH Trust.

26 Pilliwinks is governed by a memorandum of association that does not refer to the National Party of Australia – Victoria. Pilliwinks is the trustee of the National Party Foundation trust. The beneficiaries of that trust are wide-ranging, including not only the National Party of Australia – Victoria, but nine other entities, any "duly endorsed" candidate for election to, or elected member of, the Commonwealth, State and Territory Parliaments representing the National Party of Australia, "or the spouse of any such person", "any charitable institutions, bodies or organisations", and certain Victorian incorporated associations. In the 2017-2018 to 2023-2024 financial years, Pilliwinks had total receipts of $2,583,799 from Morgan Stanley Wealth Management Australia Pty Ltd. In the 2021-2022 financial year, the National Party of Australia – Victoria received $200,000 from Pilliwinks.

**Implied freedom of political communication**

27 Whether an impugned law is invalid for impermissibly burdening the implied freedom of political communication falls to be assessed by reference to three well-established questions:[48] (1) Does the impugned law effectively burden freedom of communication about governmental or political matters in its terms, operation or effect? (2) Is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? (3) Is the impugned law reasonably appropriate and adapted to advance that purpose in a manner that is compatible with the maintenance of that constitutionally prescribed system of government?

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**48** See, eg, *Babet v The Commonwealth* (2025) 99 ALJR 883 at 895 [38], 900-901 [72], 922 [173], 931 [219], 932 [224]; 423 ALR 83 at 95, 102, 130, 143, 144; *Ravbar v The Commonwealth* (2025) 99 ALJR 1000 at 1017 [27], 1031 [101], 1053 [212], 1097 [425]; 423 ALR 241 at 254-255, 273, 304, 364; *Farmer v Minister for Home Affairs* (2025) 99 ALJR 1408 at 1421 [39]; 425 ALR 116 at 128-129.

**Effective burden**

28 It is appropriate to consider the nature and extent of the burden imposed by the impugned law by reference to the legal effect and practical operation of Pt 12 in its operation with the nominated entity exception before considering whether the burden is justified, as this "serves to focus and to calibrate the inquiry" as to whether the impugned law is reasonably appropriate and adapted to serve a legitimate end.[49] Consideration of the constitutional validity of the nominated entity exception cannot be considered separate to, or divorced from, Pt 12.

29 The key provisions in Pt 12 that burden the implied freedom are ss 217D (the general cap) and 217E (the aggregation provision). Those sections together produce the effect that a regulated person or entity can only receive political donations up to the amount of the general cap from a single donor (or source). A cap on the amount in political donations from a single donor (or source) naturally corresponds with a reduction in the amounts to be paid into the State campaign account of that regulated person or entity,[50] the assumption being that, without that limit, some donors may be inclined to donate more than the cap. The regulated person or entity therefore has less funds available for the purposes of political expenditure.[51] In sum, the cap effects "a restriction upon the funds available to [regulated persons or entities] to meet the costs of political communication" by restricting the amounts that can be donated.[52]

30 The burden imposed by a cap on political donations is indirect.[53] Neither s 217D nor s 217E is "in terms directed to communications or publications about governmental or political matters", because neither is directed to

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**49** *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at 588 [156], quoting *Tajjour v New South Wales* (2014) 254 CLR 508 at 579 [147].

**50** See [12] above.

**51** See [13] above.

**52** *Unions NSW [No 1]* (2013) 252 CLR 530 at 554 [38]. See also *McCloy* (2015) 257 CLR 178 at 201 [24], 221 [93].

**53** *Unions NSW [No 1]* (2013) 252 CLR 530 at 554 [38]; *McCloy* (2015) 257 CLR 178 at 221 [93].

communications at all.[54] The act of making a political donation is not *itself* an act of communication.[55]

31 Contrary to the plaintiffs' submissions, the combined operation of the general cap (s 217D) and the requirement that political expenditure be paid from a State campaign account (s 207F(6)) does not alter the characterisation of the burden imposed as indirect. The plaintiffs contended, and Victoria did not seek to contradict, that the combined operation of those provisions is an "effective constraint" or limit on political expenditure. However, s 207F does not impose a "de facto cap" on political expenditure like the direct caps on electoral expenditure previously considered by this Court.[56] The *Electoral Act* prescribes no ceiling on the amount a regulated person or entity may spend on political expenditure; the restriction on the funds available to a regulated person or entity arises, as explained above, by the operation of the general cap.[57]

32 That burden is not insubstantial. The general cap, as indexed, is $4,970 for the 2025-2026 financial year.[58] Prior to the introduction of the cap, the *Electoral Act* only imposed a restriction on donations from certain casino and gambling licence holders, which were capped at $50,000.[59] Political donations were otherwise uncapped. The result of the general cap is that a regulated person or entity, who could previously lawfully receive uncapped political donations from almost any source, became subject to a $4,000 (indexed) cap on donations from a single donor, which applies over a multi-year period. Bearing out the substantial change effected by the general cap, it was an agreed fact that, in the 2022 State election, the second plaintiff would have received donations in excess of the general cap if lawfully permitted to do so, including donations and "in-kind campaign support" totalling between $50,000 and $200,000 from Climate 200,

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**54** cf *Farm Transparency* (2022) 277 CLR 537 at 588 [157].

**55** *McCloy* (2015) 257 CLR 178 at 201 [25], 241 [162], 283 [315].

**56** *Unions NSW [No 2]* (2019) 264 CLR 595 at 607-608 [15]; *Unions NSW [No 3]* (2023) 277 CLR 627 at 644 [30].

**57** See *Unions NSW [No 1]* (2013) 252 CLR 530 at 554 [38].

**58** See [10] above.

**59** *Electoral Act*, ss 206(1) definition of "relevant licence" and 216, as at 1 September 2017.

a community crowd-funded initiative which provides support to federal and State independent candidates, as well as donations from individual donors.

33 Victoria submitted, and it may be accepted, that the burden imposed by the general cap is ameliorated to some extent by public funding, and that the 2018 Amendment Act increased the amount of public funding available at least partly in recognition of the effect of the general cap.[60] However, and despite that increase, the public funding provided by the *Electoral Act*: (i) is not necessarily equivalent to the amount a registered political party or candidate might otherwise have raised by way of political donations prior to the imposition of the general cap; (ii) is generally paid in arrears; and (iii) has no impact on the burden in respect of regulated persons and entities other than registered political parties or independent candidates who satisfy the eligibility criteria.[61] It follows that the implied freedom remains effectively indirectly and not insubstantially burdened by the general cap.

*Differential burden*

34 It is the existence of the nominated entity exception to which the plaintiffs take issue, and it is the general cap *in its operation with* the nominated entity exception that, in the plaintiffs' submission, gives rise to an impermissible burden on the implied freedom.

35 In its legal and practical operation, the general cap in its operation with the nominated entity exception imposes a differential burden on the implied freedom. The differential nature of the burden has multiple aspects, each of which can incrementally contribute to a registered political party with a nominated entity obtaining a substantial benefit from the nominated entity exception not obtainable by other regulated persons or entities.

36 The first aspect of the differential burden arises from the nominated entity exception itself. The effect of the exception is to permit a registered political party, and no other regulated person or entity, to appoint an entity (which satisfies the eligibility criteria in s 222F) from whom the party may receive uncapped funding.

37 The second aspect of the differential burden arises from the time limitation in s 222F(3). A nominated entity appointed prior to 1 July 2020 did not have to

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**60** See, eg, Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 10 May 2018 at 1351.

**61** See generally [15] above.

satisfy the more stringent criteria in s 222F(2). Section 222F therefore treated registered political parties which had appointed a nominated entity before 1 July 2020 ("pre-July 2020 parties") differently from registered political parties seeking to appoint a nominated entity after that date ("post-July 2020 parties"). The result of that differential treatment is that the nominated entity exception operated differently for the pre-July 2020 parties and post-July 2020 parties, and therefore the general cap operated differently for nominated entities appointed prior to 1 July 2020 and those appointed after 1 July 2020. Victoria accepted each of these aspects of the differential burden.

38 The third aspect of the differential burden arises, as a matter of practical operation, from the existing assets of the entity appointed as a nominated entity. While, in its legal operation, the nominated entity exception permits a registered political party access to uncapped funding from a nominated entity, that access to uncapped funding only makes a difference if the nominated entity has significant funds to contribute to the party. Following the commencement of the 2018 Amendment Act, by s 218B it was no longer possible for a registered political party to create and capitalise a new entity, and then appoint that entity as a nominated entity. It was possible for a party to nominate an uncapitalised entity but, as noted, that entity would be subject to the general cap on the receipt of donations, restricting its capacity to raise funds. In that way, s 218B contributes to the *practical* burden presented by the nominated entity exception. A registered political party with a "pre-capitalised" entity eligible for appointment when the 2018 Amendment Act commenced could appoint that entity as its nominated entity and receive uncapped transfers from the existing assets of that entity (which had been accumulated without being subject to the general cap).

39 As a matter of practical operation, there is no dispute that only three parties have obtained the benefit of the nominated entity exception – the major parties.[62] All three parties appointed their nominated entities prior to 1 July 2020, and therefore could benefit from the broader criteria in s 222F(3) (although they did not necessarily do so[63]). All three parties also had relationships with entities that were eligible for appointment as nominated entities, and those entities each had substantial existing assets. In other words, the major parties obtained the benefit of all three aspects of the differential burden.

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**62** See [22]-[26] above.

**63** There are no facts in the special case which confirm whether each or any of the Nominated Entities satisfied the criteria in s 222F(2).

40 The burden imposed by Pt 12, through the imposition of the general cap operating with the nominated entity exception, is indirect and not insubstantial. The differential effect of the general cap in its operation with the nominated entity exception also means that the burden is, itself, differential in nature. However, a law effecting a differential burden on the freedom is not, for that reason alone, invalid; nor does a law effecting a differential burden necessarily effect a greater burden on the freedom.[64] Rather, the differential operation of a law "serve[s] to identify the group targeted by [the] law and informs the assessment of the restrictions imposed by the law upon the ability of those persons to communicate on matters of politics and government".[65]

## Legitimate purpose

41 The next question is whether the purpose of the general cap operating with the nominated entity exception is constitutionally legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of government. The purpose of Pt 12 of the *Electoral Act* can be discerned from one of the purposes of the 2018 Amendment Act: to "enhance the integrity of the electoral system by prohibiting political donations from certain sources and introducing a political donations disclosure and reporting scheme".[66]

42 Within that scheme, Victoria submitted that the general cap in s 217D serves the purpose of reducing "the risk of corruption or undue influence in the government of the State which can arise from elected office holders finding themselves beholden to those [persons or entities] whose funding, or whose withholding of funding, contributed to the office holders' electoral success" (the "anti-corruption purpose").[67] That conclusion is reinforced by the extrinsic materials to the 2018 Amendment Act. The Explanatory Memorandum stated that

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**64** *Brown v Tasmania* (2017) 261 CLR 328 at 361 [92], [94].

**65** *Brown* (2017) 261 CLR 328 at 361 [95].

**66** 2018 Amendment Act, s 1(a)(ii). See also Victoria, Legislative Assembly, *Electoral Legislation Amendment Bill 2018*, Explanatory Memorandum at 1-2; Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 10 May 2018 at 1348, 1350.

**67** *Unions NSW [No 2]* (2019) 264 CLR 595 at 623 [71], citing *McCloy* (2015) 257 CLR 178 at 204-205 [36], 248 [181].

the purpose of the general cap is "to minimise the influence of single donors",[68] and the second reading speech explained that the cap "will ensure a level playing field and provide equal participation in the electoral process, reducing the potential for those with 'deep pockets' to try and exert greater influence".[69]

43 As was explained by a majority of this Court in *Unions NSW v New South Wales* ("*Unions NSW [No 1]*"), "[t]here is an obvious connection between the need to fund advertising and other methods of communication in connection with election campaigns, and political donations".[70] "It is large-scale donations which are most likely to effect influence, or be used to bring pressure to bear, upon a recipient."[71] A cap on political donations is directed to the mischief involved in powerful donors exercising undue influence over elected officials by contributing substantial funds to their election campaigns. A purpose of reducing the risk of corruption and undue influence is a legitimate purpose.[72]

44 Unsurprisingly, the plaintiffs accepted that such a purpose is legitimate. They submitted, however, that in its legal operation, the purpose of the general cap in its operation with the nominated entity exception is to place the major parties in a privileged position over independent candidates or new registered political parties in respect of the sources of funds available to be used for political expenditure, which the plaintiffs said involves an "abuse of incumbency",[73] and that that purpose is illegitimate.

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**68** Victoria, Legislative Assembly, *Electoral Legislation Amendment Bill 2018*, Explanatory Memorandum at 35.

**69** Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 10 May 2018 at 1351.

**70** (2013) 252 CLR 530 at 545 [7].

**71** *Unions NSW [No 1]* (2013) 252 CLR 530 at 558 [53].

**72** See, eg, *McCloy* (2015) 257 CLR 178 at 204-205 [36], 208 [47], 248 [181], [184], 259 [224]-[225], 284-285 [322], 285 [324]-[325]; *Unions NSW [No 2]* (2019) 264 CLR 595 at 623 [71].

**73** *Unions NSW [No 2]* (2019) 264 CLR 595 at 628 [85].

45 The identification of the purpose of a law is a process of construction.[74] The purpose should be identified at a higher level of generality than the meaning of the words of the provision, focusing instead on the "mischief" to which the provisions are directed.[75] There is also, as a general proposition, a distinction between the purpose of a law and the specific means utilised to give effect to that purpose.[76] Further, and relevantly, that a law includes "an additional object that is not only unexpressed but also constitutionally impermissible should not lightly be inferred".[77]

46 The relevant statutory purpose is the purpose of the general cap. Once it is accepted that a law effectively burdens the freedom of political communication in its terms, operation or effect, it is the purpose of *that law* that must be compatible with the constitutionally prescribed system.[78] It is the general cap that imposes an effective and differential burden on the implied freedom. While other provisions in Pt 12 may contribute to the imposition of the differential burden – namely, para (j) of the definition of "gift", the anti-avoidance offence in s 218B and the time limitation in s 222F(3)[79] – they contribute to the imposition of the differential burden *by* the general cap.

47 Once the relevant statutory purpose is identified, a distinction must also be drawn between the end the law seeks to achieve (the anti-corruption purpose) and the means adopted in pursuit of that end (defining a "political donation" so as to

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**74** See, eg, *Monis v The Queen* (2013) 249 CLR 92 at 147 [125]; *Unions NSW [No 1]* (2013) 252 CLR 530 at 557 [50]; *McCloy* (2015) 257 CLR 178 at 212 [67]; *Brown* (2017) 261 CLR 328 at 362 [96], 391-392 [208].

**75** *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 394 [178]; *McCloy* (2015) 257 CLR 178 at 232 [132]; *Brown* (2017) 261 CLR 328 at 363 [101], 391-392 [208], 432 [321]; *Unions NSW [No 2]* (2019) 264 CLR 595 at 657 [171]; *LibertyWorks* (2021) 274 CLR 1 at 71 [183]. See also *Farmer* (2025) 99 ALJR 1408 at 1424 [54]; 425 ALR 116 at 132.

**76** See, eg, *McCloy* (2015) 257 CLR 178 at 205 [40]; *Brown* (2017) 261 CLR 328 at 362-363 [100], 416 [277], 432-433 [322]; *Ravbar* (2025) 99 ALJR 1000 at 1034 [121], 1044 [173]; 423 ALR 241 at 278, 291-292.

**77** *Unions NSW [No 2]* (2019) 264 CLR 595 at 627 [79]. See also *Ravbar* (2025) 99 ALJR 1000 at 1022 [59], 1045 [178]; 423 ALR 241 at 262, 293.

**78** See [27] above.

**79** See [36]-[38] above.

exclude certain kinds of transfers, including transfers between a registered political party and its nominated entity). This is not a case where the general cap has "no rational connection" to the asserted legitimate purpose.[80]

48 A conclusion about the purpose or purposes of the nominated entity exception, being one exception to the general cap, or a conclusion about the purposes of particular provisions with respect to nominated entities, does not ultimately assist the Court to identify the end sought to be achieved by the general cap. That end – the anti-corruption purpose – has been identified, and it is legitimate. Further questions as to any asserted disconformity between the legitimate anti-corruption purpose of the cap on the one hand, and the operation of the nominated entity exception (including the eligibility criteria in s 222F) on the other, are appropriately left to the justification stage.[81]

**Justification**

49 That leaves the third question: can the law be justified? Is the general cap in Pt 12 in its operation with the nominated entity exception reasonably appropriate and adapted to advance the legitimate anti-corruption purpose in a manner that is compatible with the maintenance of the constitutionally prescribed system of government which the implied freedom exists to protect? It was common ground that Victoria, as the polity imposing the burden on the implied freedom, bore the persuasive onus of establishing that the identified burden – indirect and not insubstantial[82] – is justified.[83]

50 Victoria did not seek to justify the burden in its entirety. Rather, Victoria conceded that an aspect of the differential burden could not be justified: specifically, that aspect of s 222F(3) which imposed a time limitation on the appointment of a nominated entity on the eligibility criteria in that sub-section (in other words, the time limitation in s 222F(3)). The time limitation in s 222F(3) gives rise to the second aspect of the differential burden discussed above:[84] the nominated entity exception, and therefore the general cap, operated differently

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**80** cf *Brown* (2017) 261 CLR 328 at 468 [440]. See also *Unions NSW [No 1]* (2013) 252 CLR 530 at 557-558 [51]-[53].

**81** See, eg, *Brown* (2017) 261 CLR 328 at 393-394 [215]-[217].

**82** cf *Farmer* (2025) 99 ALJR 1408 at 1424 [57]; 425 ALR 116 at 133.

**83** *Unions NSW [No 3]* (2023) 277 CLR 627 at 644 [31], 645 [33].

**84** See [37].

for political parties that appointed nominated entities prior to 1 July 2020 compared to political parties that appointed nominated entities after 1 July 2020. The former were able to take advantage of more relaxed criteria for appointing an entity from which they could receive donations that were not the subject of the general cap.

51 Victoria accepted that there were no facts in the special case that would enable this Court to conclude that this differential burden results from a distinction appropriate and adapted to the attainment of the identified legitimate purpose. In *Unions NSW v New South Wales (Unions NSW [No 3])*, a majority of this Court held s 29(11) of the *Electoral Funding Act 2018* (NSW) to be invalid where the State of New South Wales accepted its invalidity, on the basis that the State no longer sought to justify the burden imposed by the law.[85] While questions of the validity of a law cannot be decided by agreement of the parties, it is of significance, consistently with *Unions NSW [No 3]*,[86] that Victoria did not seek to discharge its persuasive onus of justifying the burden imposed by the impugned law to the extent the time limitation in s 222F(3) applies. It did not identify any facts on which this Court could be satisfied that the time limitation in s 222F(3) could be justified.[87] In this case, having identified that the general cap in its operation with the nominated entity exception imposes a burden on the implied freedom and that the general cap operating with the nominated entity exception serves a legitimate purpose, this Court cannot be satisfied that the time limitation in s 222F(3) can be justified by reference to that legitimate purpose.

52 The time limitation in s 222F(3) not being justified, this Court's conclusion must be that the general cap impermissibly infringes the implied freedom in its operation with the nominated entity exception to the extent that the time limitation in s 222F(3) applies, namely to the extent that different eligibility criteria were prescribed for the appointment of a nominated entity before and after 1 July 2020.

**Consequence of invalidity**

53 The question that remains is the consequence of that invalidity. Section 6(1) of the *Interpretation of Legislation Act 1984* (Vic) ("the Interpretation Act") is a severance clause that applies to every Victorian Act "unless a contrary intention

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**85** (2023) 277 CLR 627 at 644-645 [31]-[33].

**86** (2023) 277 CLR 627 at 645 [33].

**87** *Unions NSW [No 3]* (2023) 277 CLR 627 at 644 [31], 645 [33].

appears".[88] Its effect is to "reverse the presumption that a statute is to operate as a whole, so that the intention of the legislature is to be taken prima facie to be that the enactment should be divisible and that any parts found constitutionally unobjectionable should be carried into effect independently of those which fail".[89] Nevertheless, s 6(1) is "an interpretation provision to be applied strictly within the limits of judicial power".[90] It does not "authorize the Court, by adopting a standard criterion or test merely selected by itself, to redraft a statute or regulation so as to bring it within power and so preserve its validity".[91] Nor does it permit the Court to submit a statute to "major surgery",[92] in order to separate the "woof from the warp" and "manufacture a new web".[93]

54 Having regard to s 6(1), the relief sought by the plaintiffs includes, but is not limited to, severance of aspects of Pt 12, including if invalidity arose only from Victoria's concession. However, the plaintiffs also submitted that, if no aspects of Pt 12 could be severed, the Court could and should strike down Pt 12 in its entirety.

55 For the reasons that follow, the whole of Pt 12 is invalid. The unworkability of the parties' proposed options – severing parts of the eligibility criteria for nominated entities in s 222F, severing para (j) of the definition of "gift", or even severing the general cap itself – serves to demonstrate that, as a matter of construction, those provisions "form[] part of an inseparable context".[94] The provisions that give rise to the invalidity arising from Victoria's concession are related through a series of definitions that are used throughout Pt 12,

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**88** Interpretation Act, ss 4(1)(a) and 38 definition of "Act".

**89** *Bank of NSW v The Commonwealth* ("the *Bank Nationalisation Case*") (1948) 76 CLR 1 at 371, quoted in *Tajjour* (2014) 254 CLR 508 at 585 [169] and *Clubb v Edwards* (2019) 267 CLR 171 at 218 [141], 290 [340].

**90** *Spence v Queensland* (2019) 268 CLR 355 at 415 [87].

**91** *Pidoto v Victoria* (1943) 68 CLR 87 at 111. See also *Spence* (2019) 268 CLR 355 at 415 [87].

**92** *Spence* (2019) 268 CLR 355 at 415 [89]. See also *Bank Nationalisation Case* (1948) 76 CLR 1 at 372.

**93** *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 386, cited in *Spence* (2019) 268 CLR 355 at 416 [90].

**94** *Bank Nationalisation Case* (1948) 76 CLR 1 at 371.

making them impossible to sever without altering the operation of the remaining provisions in the Part.

*(1) The time limitation in s 222F(3)*

56 It is appropriate to commence with Victoria's submission on the consequences of the invalidity arising from its concession, a basis of invalidity accepted by the Court. Victoria submitted that the time limitation in s 222F(3) itself – namely, the words "if the first appointment of an entity as the nominated entity of a registered political party is made before 1 July 2020" – is severable, such that the remainder of Pt 12 could be upheld. That contention must be rejected. Merely severing the time limitation in s 222F(3) would not leave the operation of the remaining parts of the law unchanged.[95] Were s 222F(3) to be severed in the way Victoria contends, s 222F(2) and s 222F(3) would effectively provide for two different sets of eligibility criteria for a nominated entity, both of which apply at all times, and one of which is more stringent than the other. That is, s 222F(3) would require that the entity be an incorporated body that "operates for the *principal* benefit of the members of the registered political party; or ... is established and maintained ... for the *principal* benefit of the members of the registered political party" (emphasis added). Section 222F(2), on the other hand, would require that the entity be an incorporated body that "operates for the *sole* benefit of the members of the registered political party; or ... is established and maintained ... for the *sole* benefit of the members of the registered political party" (emphasis added). Section 222F(2) also imposes a further requirement that the body be "controlled, within the meaning of section 50AA of the [*Corporations Act 2001* (Cth)], by the registered political party", a requirement which is absent from s 222F(3). In other words, the eligibility criteria for a nominated entity in s 222F(2) would be different from and contrary to the criteria in s 222F(3). Merely severing the time limitation in s 222F(3) would leave in force two inconsistent criteria for a nominated entity. That is sufficient reason to conclude that the time limitation in s 222F(3) is not capable of severance.

57 Nor could it be said that, given the time limitation in s 222F(3) cannot be severed, s 222F(3) is invalid in its entirety and could be severed. Section 222F(2) and s 222F(3) are in terms interlinked: s 222F(2) provides that it is "[s]ubject to subsection (3)", and s 222F(3) provides that it operates "[d]espite subsection (2)". The express terms of the sub-sections, together with the history of the passage of

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**95** Interpretation Act, s 6(1).

the 2018 Amendment Act through Parliament,[96] disclose that the provisions were intended to stand as a package. And while it may be accepted that s 222F(2) and s 222F(3) might have operated in precisely the same way even without those introductory words, the plaintiffs also correctly observed that Victoria did not separately seek to justify the burden imposed on the implied freedom if s 222F(3) were severed. In other words, the practical effect of allowing s 222F(2) to stand alone might be a different differential burden that the State had not sought to justify. Section 222F(3) cannot be separately excised.

*(2) Paragraph (j) of the definition of "gift"*

58 A second option canvassed by the parties was severing para (j) of the definition of "gift".[97] Severing the exception provided by para (j) would render a gift by a nominated entity to its registered political party (and vice versa) a "political donation" for the purposes of Pt 12, and therefore subject to the general cap. That is, severance of that kind would, in effect, eliminate the nominated entity exception.

59 Severing para (j) of the definition of "gift" is also not without its difficulties. The first difficulty is that subjecting a "gift" between a nominated entity and its registered political party to the general cap would withdraw the incentive for a registered political party to appoint a nominated entity, but retain the scheme of regulation of nominated entities. A registered political party would still have the facility to appoint a nominated entity. By s 217D(6), a political donation to the nominated entity would still be considered a donation to the registered political party for the purposes of the general cap. Put another way, the appointment of the entity as a nominated entity exposes the entity (and its registered political party) to the application of s 217D(6).

60 In the result, the "carrot" of a nominated entity's exception from the general cap would be removed, and the appointment of a nominated entity would become *detrimental* to a registered political party's interests (as donations to that entity would thereafter be considered donations to the party for the purposes of

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**96** Victoria, Legislative Council, *Parliamentary Debates* (Hansard), 22 June 2018 at 3042, 3087.

**97** *Electoral Act*, s 206(1) definition of "gift". See [9] above.

the general cap). As a matter of practical effect, the nominated entity regime would become redundant.[98]

61 The second difficulty is that severing para (j) of the definition of "gift", and its consequential effect on the definition of "political donation", would have a widespread impact on the operation of Pt 12 (including but not limited to the provisions imposing the general cap). For example, donations from a registered political party to its nominated entity, or from a nominated entity to its registered political party, would be required to be disclosed pursuant to the real-time disclosure regime. That is not what Parliament intended.

62 The third difficulty is that the terms "gift" and "political donation" appear throughout Pt 12.[99] Severing para (j) of the definition of "gift" would amount to judicial recrafting of each of those provisions and, at a fundamental level, would invert the roles of the Court and the legislator: the Court would be redrafting Pt 12, and Parliament and administrators of the *Electoral Act* would be left to "reinterpret" Pt 12 in accordance with the Court's declaration.[100]

63 A further difficulty in severing para (j) of the definition of "gift" is that it would not leave "the remainder of the Act and the application of that provision to other persons, subject-matters or circumstances" unaffected.[101] Part 12 imposes a burden on the implied freedom by way of the general cap (the operation of which is affected by other provisions concerning nominated entities), and the differential aspect of that burden arising from the time limitation in s 222F(3) could not be justified. The plaintiffs did not separately contend, for example, that the real-time disclosure regime imposes a burden on the implied freedom that could not be justified. Altering the definition of "gift" therefore would impact the operation of provisions of Pt 12 which are not, of themselves, impugned.

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**98** See *Spence* (2019) 268 CLR 355 at 415 [89].

**99** See, eg, Div 1B s 207F, Div 2 s 212, Div 3 ss 216 and 217, Div 3A ss 217A, 217B, 217C, Div 3B ss 217D, 217E, 217G, Div 3C ss 217I and 217L, Div 4 ss 218 and 218B.

**100** See, eg, *Pidoto* (1943) 68 CLR 87 at 109, 111; *Bank Nationalisation Case* (1948) 76 CLR 1 at 372; *Tajjour* (2014) 254 CLR 508 at 586 [170].

**101** Interpretation Act, s 6(1).

*(3) The nominated entities provisions*

64 During the hearing, the parties suggested that the Court might need to go further than severing para (j) of the definition of "gift" to address the invalidity in Pt 12. The plaintiffs' contention was that the regime for nominated entities might be considered an inseparable package of obligations, such that it would be necessary to sever not only para (j) of the definition of "gift", but all references to a "nominated entity" in Pt 12. The parties filed a joint note identifying those provisions or parts of provisions of Pt 12 that would be declared invalid if the severable part of the *Electoral Act* was no less than the whole of the nominated entity exception. That note identified numerous provisions in Pt 12 that would be affected.[102] In some cases, it would merely be necessary to pencil out the words "nominated entity". In others, entire sections, sub-sections or paragraphs would need to be excised. Subdivision 2 of Div 4A would need to be wholly omitted.

65 On one view, this approach cures the defects in, or difficulties with, the option of severing para (j) of the definition of "gift". No redundant provisions would remain – all the provisions with respect to nominated entities would be severed. However, given the extent of the changes, excising the nominated entity exception would amount to "major surgery"[103] which would have the Court impermissibly separate the "woof from the warp" and "manufacture a new web".[104] That "new web" would have the Court, impermissibly, restructure and reorder the balance that the 2018 Amendment Act had struck in relation to nominated entities, and require the Court to assume (without any basis) that Parliament would have enacted the same scheme *without* the nominated entities regime.

66 Put another way, if the Court were to sever all references to nominated entities, then each of the Nominated Entities will likely fall within the definition of an "associated entity", or failing that potentially be a "third party campaigner". If that were to be the result, then the Court will have exposed each of the Nominated Entities to regulation as an associated entity or possibly a third party campaigner when that was the opposite of what Parliament intended.

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**102** The provisions listed in the Annexure.

**103** *Spence* (2019) 268 CLR 355 at 415 [89]. See also *Bank Nationalisation Case* (1948) 76 CLR 1 at 372.

**104** *Australian Railways Union* (1930) 44 CLR 319 at 386, cited in *Spence* (2019) 268 CLR 355 at 416 [90].

*(4) Division 3B*

67 The plaintiffs' final option was to sever Div 3B – the Division that imposes the general cap.[105] That submission cannot be accepted. Severance of Div 3B is not possible where provisions for increased public funding,[106] as well as the nominated entity exception itself, "constitute part of, and were intended only to operate in," the wider regime of a cap on political donations.[107]

*(5) Part 12*

68 It not being permissible to sever any provisions, parts of provisions, Divisions or Subdivisions of Pt 12 to preserve its validity, Pt 12 is wholly invalid. It is not a step that the Court takes lightly in seeking to determine how the Court recognises and reflects the invalidity in the relief that it grants, but the structure and content of Pt 12 compel that result. As Gageler J affirmed in *Clubb v Edwards*, "[c]omplexity can arise where severance might be effected in a variety of ways, the choice between which is argued to lie in the borderland between legislative and judicial power".[108] That is this case.

**Conclusion**

69 The plaintiffs are entitled to a declaration that Pt 12 of the *Electoral Act* is invalid. The questions of law stated for the opinion of the Full Court should be answered in the terms set out above.

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**105** Division 3B also aggregates political donations for the purposes of the general cap, limits political donations to third party campaigners and requires forfeiture of political donations accepted in contravention of the Division: ss 217E, 217F, 217G.

**106** See, eg, Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 10 May 2018 at 1351.

**107** cf *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 176.

**108** (2019) 267 CLR 171 at 221 [148], citing *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 502.

# ANNEXURE

| **Provision of Pt 12 of the *Electoral Act*** | **Words or aspects to be severed** |
|---|---|
| **Division 1 – Preliminary** | |
| s 206(1) definition of "associated entity" | "but does not include a nominated entity of a registered political party" |
| s 206(1) definition of "gift" | Paragraph (j) |
| s 206(1) definition of "nominated entity" | Whole definition |
| s 206(1) definition of "political donation" | Paragraph (g) |
| s 206(1) definition of "Register of Nominated Entities" | Whole definition |
| s 206(1) definition of "registered agent" | "a nominated entity," in para (b) |
| s 206(1) definition of "third party campaigner" | Paragraph (f) |
| **Division 1A – Register of Agents** | |
| s 207C | "or nominated entity" in the heading |
| s 207C(5) | Whole sub-section |
| **Division 1B – State campaign account** | |
| s 207F(1), (2), (3) and (6) | "nominated entity," wherever appearing |
| **Division 3 – Disclosure of political donations** | |
| s 216(2), (3), (5)(d) and (7) | "nominated entity," wherever appearing |
| s 216(4) | "a nominated entity" and "nominated entity," |
| s 216(8) | "a nominated entity," |
| **Division 3A – Prohibited political donations** | |
| s 217A | "a nominated entity," |

| **Provision of Pt 12 of the *Electoral Act*** | **Words or aspects to be severed** |
|---|---|
| s 217B | "nominated entity," or "a nominated entity," wherever appearing |
| s 217C(2) | "nominated entity," |
| **Division 3B – General cap on donations** | |
| s 217D(1)(g) | Whole paragraph |
| s 217D(6)(d) | Whole paragraph |
| s 217D(2),(3), (9) and (10) | "nominated entity," wherever appearing |
| s 217E(2) and (5) | "nominated entity," wherever appearing |
| s 217G(2) | "nominated entity," |
| **Division 3C – Annual returns and other information** | |
| s 217H | "nominated entity," |
| s 217L | Whole section |
| s 217O | "and nominated entities" in the heading |
| s 217O(1) | "or a nominated entity" |
| **Division 4 – Miscellaneous** | |
| s 218B(2) | Whole sub-section |
| **Division 4A – Powers of the Commission** | |
| *Subdivision 1 – General*: s 222B(1) | "nominated entity," |
| *Subdivision 2 – Register of Nominated Entities* (ss 222E-222I) | Whole Subdivision |

EDELMAN J.

**An impugned law and its legislative purpose inextricable from the other purposes in a regulatory scheme**

70 In 2018, Pt 12 of the *Electoral Act 2002* (Vic) was amended to reform the regime concerning electoral expenditure and political donations[109] ("the 2018 Amendments"). An integral part of the new regime is s 217D, which imposes a "general cap" on political donations.[110] Part of the scheme of regulation concerns entities nominated by registered political parties, called "nominated entities", which are entered on a Register of Nominated Entities.[111] Nominated entities and their registered agents come under substantial obligations under the *Electoral Act*, including disclosure requirements.[112]

71 Since political donations made to a nominated entity of a registered political party are subject to the general cap,[113] and are also included as a political donation to the registered political party for the purposes of the general cap,[114] the question arises: why would a registered political party appoint a nominated entity? The answer is that there is an exception to the general cap for a "gift ... received by a registered political party from the nominated entity of the registered political party".[115] This was described in this case as the "nominated entity exception". The nominated entity exception means that although donations to a nominated entity, after the commencement of the relevant 2018 Amendments, will count towards the general cap for registered political parties, a donation of existing assets of a nominated entity to the registered political party will not count towards the general cap.

72 Not all registered political parties can obtain this benefit. The laws (legal rules) which are central to achieving the benefit of uncapped donations from the existing assets of a nominated entity are contained in s 222F of the *Electoral Act*,

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**109** *Electoral Legislation Amendment Act 2018* (Vic).

**110** Presently set at $4,970: *Electoral Act*, s 206(1) (definitions of "general cap" and "political donation") read with s 217Q(1).

**111** See *Electoral Act*, s 206(1) (definition of "nominated entity").

**112** *Electoral Act*, ss 207F(1), 216(4), 217L.

**113** *Electoral Act*, s 217D(1)(g).

**114** *Electoral Act*, s 217D(6)(d).

**115** *Electoral Act*, s 206(1) (relevant part of the exception in para (j) to the definition of "gift").

which the 2018 Amendments inserted with effect from 1 August 2018.[116] Section 222F(2) of the *Electoral Act* provides for the eligibility criteria for appointment of a nominated entity of a registered political party. Those criteria include that the nominated entity is controlled by the registered political party and that the nominated entity (or the trust for which it is a trustee) operates or is established and maintained for the sole benefit of the members of the registered political party. In broad terms, s 222F(2) permits a nominated entity to be appointed where the nominated entity is controlled by, and very closely related in its objects to, the registered political party. It is that appointment as a nominated entity which triggers the operation of the provisions that regulate nominated entities and therefore also permits (by the nominated entity exception in the definition of "gift") the nominated entity to donate any of its existing assets to the registered political party which has appointed it without the donation counting towards the general cap.

73 Section 222F(3) of the *Electoral Act* was introduced because of a concern that s 222F(2) could not serve its purpose in relation to at least one of the major registered political parties, which had been receiving substantial political donations from the assets of an aligned entity that might not meet the strict requirements of s 222F(2). That party was the Liberal Party of Australia (Victorian Division) ("the Victorian Liberal Party"). It is also arguable that the terms of s 222F(2) might not have achieved its aims in relation to two other registered political parties which each received substantial political donations from the assets of aligned entities: the Australian Labor Party – Victorian Branch ("the Victorian Labor Party") and the National Party of Australia – Victoria ("the Victorian National Party"). Those three registered political parties were described by the plaintiffs to this special case as the "legacy parties" due to the legacy preserved only for them by s 222F(3).

74 For any registered political party which has a nominated entity appointed before 1 July 2020, s 222F(3) permits existing assets of the nominated entity to be donated to that registered political party without those donations counting towards the general cap, even if the nominated entity is not controlled by the registered political party, and even if the nominated entity operates or is established and maintained (or the trust for which it is a trustee is established and maintained) only for the principal, not the sole, benefit of the members of the registered political party. The only nominated entities that were appointed before 1 July 2020 were appointed by the legacy parties.

75 The issue in this special case is whether the purpose or effect of some or all of the laws in Pt 12 of the *Electoral Act* is inconsistent with the implied freedom of political communication in the *Constitution.* The analysis must begin with the

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**116** *Electoral Legislation Amendment Act 2018* (Vic), s 45, inserting new Div 4A in Pt 12.

identification of the particular law (legal rule) which was challenged by the plaintiffs. Although the plaintiffs described the law which was the subject of their challenge in different ways, their challenge was essentially directed to the purpose and effect of s 222F(3) of the *Electoral Act* in the context of Pt 12. That challenge was met with a concession by Victoria that the 1 July 2020 cut-off in s 222F(3) is a disproportionate means of giving effect to the purpose of the law.

76 Although the concession by Victoria seemed to concern disproportionality between, on the one hand, the extent of the burden on free political communication imposed by the means adopted in s 222F(3), and, on the other hand, the purpose of s 222F(3), Victoria never explained why the means adopted in s 222F(3) are not proportionate to the purpose of permitting only the three legacy parties to obtain donations from the existing assets of aligned entities separately from the general cap. Victoria's concession that s 222F(3) is partly invalid can only be understood as a concession of the illegitimacy of a purpose of s 222F(3).

77 That concession must be accepted in the circumstances of this special case, which include the limited argument concerning the purpose of s 222F(3) and, as Steward J explains, the limited materials before this Court. Because the illegitimate purpose of s 222F(3) is inextricably connected with the purpose of the other laws in Pt 12, all of the laws that make up the scheme of Pt 12 are infected by that illegitimate purpose and are invalid.

**The facts of the special case in outline**

78 The background to this special case, including the legislative provisions, is comprehensively set out in the joint reasons of Gageler CJ, Gordon, Jagot and Beech-Jones JJ. It is necessary only to make the following points.

79 Two central requirements of s 222F(2) of the *Electoral Act* before an entity is eligible to be appointed as the nominated entity of a registered political party are that: (i) the entity must be controlled by the registered political party, applying the strict control provision in s 50AA of the *Corporations Act 2001* (Cth); and (ii) the entity operates, or is established and maintained (or is the trustee of a trust that is established and maintained), for the sole benefit of the members of the registered political party.[117] If assets of a nominated entity had been acquired prior to the amendments to the *Electoral Act* taking effect in 2018, then the existing assets of the nominated entity could, after the commencement of the relevant 2018

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**117** *Electoral Act*, ss 222F(2)(a), 222F(2)(b).

Amendments, be donated to the registered political party that appointed the nominated entity without the donation counting towards the general cap.[118]

80 The Victorian Liberal Party has a nominated entity called Cormack Foundation Pty Ltd ("the Cormack Foundation"), which had net assets of $89,656,938 as at 30 June 2024. The Victorian Labor Party has a nominated entity called Labor Services & Holdings Pty Ltd as trustee for Labor Services & Holdings Trust ("the LSH Trust"), which had net assets of $3,125,665 as at 30 June 2024, including cash of $8,585,320. The Victorian National Party has a nominated entity called Pilliwinks Pty Ltd ("Pilliwinks"). As at 30 June 2024, Pilliwinks had a wealth management investment of $706,994 and a term deposit of $200,000. It also had receipts of $2,583,799 from Morgan Stanley Wealth Management Australia Pty Ltd in the 2018 to 2024 financial years.

81 Prior to the passage of the 2018 Amendments, in a decision of the Federal Court on 14 June 2018, Beach J rejected a claim which would have given "the [Victorian] Liberal Party a beneficial interest in 100% of the issued share capital of the Cormack Foundation".[119] The consequence of this decision was that the Cormack Foundation may not have been controlled by the Victorian Liberal Party and therefore may not have fallen within the terms of the proposed s 222F(2) which was being considered by the Victorian Parliament.

82 On 22 June 2018, in the Legislative Council, reference was made to the "conundrum that the [Victorian] Liberal Party ... faced in relation to its connection with the Cormack Foundation", and it was contemplated that amendments may be necessary to "accommodat[e] ... the needs of the [Victorian] Liberal Party".[120] A related concern might have been expressed about the LSH Trust. Although the terms of the trust deed for the LSH Trust require the trust fund to be held for the benefit of the members of the Victorian Labor Party, there is no obligation upon the trustee to deal with trust assets in accordance with decisions made by the Victorian Labor Party, and there may not be sufficient capacity for the Victorian Labor Party to determine the outcome of decisions about the financial and operating policies of the LSH Trust to establish control within the meaning of s 50AA of the *Corporations Act*. And the same might also be said of Pilliwinks, which has no obligation to deal with its assets in accordance with decisions made

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**118** *Electoral Act*, s 206(1) (relevant part of the exception in para (j) to the definition of "gift").

**119** *Alston v Cormack Foundation Pty Ltd* (2018) 358 ALR 263 at 268-269 [17]-[21].

**120** Victoria, Legislative Council, *Parliamentary Debates* (Hansard), 22 June 2018 at 3042.

by the Victorian National Party and whose many beneficiaries include, but are not limited to, the Victorian National Party.

83 The consequence of the concern with the extent of control by the Victorian Liberal Party over the Cormack Foundation was the insertion into the 2018 Amendments, originating in the Legislative Council before the passage of the 2018 Amendments, of what is now s 222F(3) of the *Electoral Act*.[121] Section 222F(3) provides for looser criteria for the eligibility for appointment of a nominated entity, including the exclusion of any criterion of control, provided that "the first appointment of an entity as the nominated entity of a registered political party is made before 1 July 2020". Prior to 1 July 2020, it was only the three legacy parties discussed above who had appointed a nominated entity.

**The centrality of legislative purpose and the impugned law to the implied freedom**

84 Since the unanimous decision of this Court in *Lange v Australian Broadcasting Corporation*,[122] the approach in this Court to applying the implied freedom of political communication has been developed,[123] and adapted,[124] to require three stages: (1) identification and assessment of any burden that the impugned law places on freedom of political communication; (2) assessment of whether all purposes of the impugned law are legitimate; and (3) assessment of the proportionality between the legitimate purpose of the impugned law and its effect in burdening freedom of political communication.

85 At each stage there are issues on which the precedent of this Court has waxed and waned. Most recently, the precedent of this Court has waned in relation to stage (3). The proportionality assessment at that stage has commonly been expressed at a high level of generality by asking whether the effect of the impugned law is reasonably appropriate and adapted to its purpose. The expression "reasonably appropriate and adapted" is equally as vague as the expression "proportionality". As this Court said in the circumstances of *Lange*, "there is no need to distinguish" between the formulation of "whether the law is reasonably

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**121** Victoria, Legislative Council, *Parliamentary Debates* (Hansard), 22 June 2018 at 3086-3087.

**122** (1997) 189 CLR 520 at 567-568.

**123** *McCloy v New South Wales* (2015) 257 CLR 178 at 193-195 [2].

**124** *Brown v Tasmania* (2017) 261 CLR 328 at 359 [88], 363-364 [104], 375-376 [156], 398 [236], 413 [271], 416-417 [277]-[278], 431-433 [316]-[325].

appropriate and adapted to the fulfilment of a legitimate purpose" and the expression "proportionality".[125]

86 In an attempt to introduce transparency into this approach, majority decisions of this Court for nearly a decade relied upon a test of structured proportionality which asked specific questions: (i) whether the impugned law was rationally connected with its purpose; (ii) whether the expected burden on free political communication imposed by the impugned law was reasonably necessary (with a wide latitude of choice which meant that it needed only to be reasonably capable of being seen as necessary[126]) to achieve its purpose; and (iii) whether the impugned law was adequate in its balance having regard to its purpose and effect. On any view, the first question in this structure is redundant. Since purpose is identified objectively, a purpose that is not rationally connected with the reasonably expected effect of the law cannot be the purpose of the law.[127] The third question also has little role to play.[128]

87 The inutility of the first question and little role for the third, together with the antipathy towards any test based upon structured proportionality now expressed by a majority of this Court,[129] may mean that a test based on structured proportionality should now be treated as dead. That would be a preferable approach to leaving structured proportionality as a mere tool, apparently without even precedential effect, to be deployed in unidentified ways and in unidentified cases.[130] But it remains to be seen whether it is necessary to throw the baby of transparency (the second question) out with the bathwater. Unless a majority of this Court abandons the remaining transparency for assessment of proportionality contained in the second question—whether the expected burden on free political communication imposed by the impugned law is reasonably capable of being seen

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**125** *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562.

**126** *Babet v The Commonwealth* (2025) 99 ALJR 883 at 925-926 [185]-[187]; 423 ALR 83 at 135.

**127** *Babet v The Commonwealth* (2025) 99 ALJR 883 at 924-925 [181]; 423 ALR 83 at 133.

**128** *Clubb v Edwards* (2019) 267 CLR 171 at 341-343 [491]-[495]; *Babet v The Commonwealth* (2025) 99 ALJR 883 at 925 [182]; 423 ALR 83 at 134.

**129** *Babet v The Commonwealth* (2025) 99 ALJR 883 at 896-897 [49], 901 [72], 936 [242]; 423 ALR 83 at 97, 102-103, 148; *Ravbar v The Commonwealth* (2025) 99 ALJR 1000 at 1017 [29], 1031 [101], 1080-1081 [343], 1097-1098 [427]; 423 ALR 241 at 255, 273, 341, 364.

**130** *Ravbar v The Commonwealth* (2025) 99 ALJR 1000 at 1055 [219]; 423 ALR 241 at 306.

as necessary to achieve the legitimate purpose of the law—that aspect should continue to be applied, potentially with further guidance,[131] to reduce the vagueness inherent in general references to "proportionality" or "reasonably appropriate and adapted".

88 Despite the waxing and waning of precedent in relation to all three stages of the application of the implied freedom, two matters have generally remained constant. First, although this is rarely made explicit when the approach to applying the implied freedom is set out, there is an anterior enquiry: what is the impugned law? Secondly, since the purpose of a law cannot be divorced from its meaning and therefore its effect, at each of the three stages there is a need to focus upon the purpose of that impugned law. It would be incoherent to identify and assess any burden that an impugned law places on free political communication but then to assess the legitimacy of the purpose of a different law. So too, it would be incoherent to assess the legitimacy of the purpose of an impugned law but to assess whether the means used by that impugned law are disproportionate to the purpose of a different law.

**The two matters that have remained constant: impugned law and purpose**

*Identifying the impugned law*

89 A law is a legal rule. An impugned statutory law is the legal rule which is challenged. The purpose of an impugned law is therefore the purpose of the law contained in the challenged statutory provision. As this Court expressed the point in *Lange*, the implied freedom invalidates a "law" that burdens freedom of political communication unless the "object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government".[132]

90 It is possible that the entirety of a statute might comprise a single law (legal rule), identified at the right level of generality. If so, then the relevant purpose of that law, if challenged, will be the purpose of the entire statute. More commonly, a challenged law (legal rule), identified at the right level of generality, will be contained in a section or a sub-section of a statute. Then the purpose of the challenged law will be the purpose of that section or sub-section. A purpose provision expressing the purpose of the entire statute might be relevant to ascertaining the purpose of the challenged law but it will almost invariably be expressed at too high a level of generality.[133] The usual scenario of a statute which

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**131** *Clubb v Edwards* (2019) 267 CLR 171 at 336-338 [476]-[480].

**132** *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562.

**133** *Unions NSW v New South Wales* (2019) 264 CLR 595 at 657 [172].

contains multiple laws (legal rules) should not be confused with the separate question of whether the purposes of some of those laws are so closely associated that the invalidity of one law will mean that all associated laws are invalid.

*Identifying the purpose of the impugned law*

91 Statutory interpretation is concerned with "the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered".[134] The construct of a reasonable (notional) legislature with purposes and other intentions is used to mimic the techniques of ordinary language processes of interpretation of meaning.[135] Since the purpose of Parliament in passing a law is Parliament's intended effect of the law (with that intended effect identified at the right level of generality), the exercise of identifying a legislative purpose necessarily involves the same techniques as interpretation of the intended meaning of legislation, although usually at a higher level of generality.[136]

92 In some cases involving disputes about the application of the implied freedom, it has been suggested that a law's legislative purpose might need only to be identified on a hypothetical or assumed basis, perhaps as a purpose proffered by a defendant.[137] If I had some eggs, I would have some eggs and toast for breakfast, if I had some toast. Just as hypothetical food does not necessarily reveal what is eaten for breakfast, so too a hypothetical purpose does not necessarily reveal the legislative purpose, which, as explained above,[138] must be used at each of the three stages of applying the implied freedom. The use of a hypothetical purpose does not therefore properly resolve the dispute. If the extent of the burden imposed by the means adopted by the law is found to be proportionate to the hypothetical purpose, the law might still be invalid if the extent of the burden imposed by the means is disproportionate to the properly identified purpose. And

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**134** *Zedra Trust Co (Jersey) Ltd v THG Plc* [2026] 2 WLR 479 at 491 [27].

**135** *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 271 CLR 495 at 529-531 [95]-[98]; *Automotive Invest Pty Ltd v Federal Commissioner of Taxation* (2024) 98 ALJR 1245 at 1266 [115]; 419 ALR 324 at 352-353; *Ravbar v The Commonwealth* (2025) 99 ALJR 1000 at 1043-1044 [172]-[174]; 423 ALR 241 at 291-292.

**136** *Brown v Tasmania* (2017) 261 CLR 328 at 391-392 [208]; *Unions NSW v New South Wales* (2019) 264 CLR 595 at 657 [171].

**137** *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 146, 175, 239; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 557 [49]; *Unions NSW v New South Wales* (2019) 264 CLR 595 at 613 [35].

**138** At [88] above.

even if there is found to be such disproportionality with the hypothetical purpose, the law might still be valid if the extent of the burden imposed by the means is proportionate to the *actual* purpose, properly identified at the right level of generality by the Court. The enquiry must therefore be into the actual, not hypothetical, purposes.[139]

93 The test for the legitimacy of the purpose of an impugned law is commonly expressed, consistently with the reasoning in *Lange*, as asking whether the purpose is "compatible with the maintenance of the constitutionally prescribed system of representative and responsible government". That explanation means nothing more than that Parliament's goal cannot be to achieve an effect that is contrary to an express or implied constitutional proscription or limitation. The test is not an open invitation to the judiciary to assess whether the purpose of an impugned law is sufficiently compatible with representative or responsible government in abstract terms. Rather, the issue is whether the purpose is consistent with "the effective operation of that system of representative and responsible government *provided for by the Constitution*".[140]

94 The most common allegation of illegitimacy at stage (2) of the implied freedom analysis is that Parliament has the burdening of free political communication as one of its *purposes* and not merely as the effect of some other purpose.[141] Since the purpose of a law is fundamental to the interpretation of its meaning, the meaning of a law with a purpose that is contrary to the *Constitution* would necessarily be derived in a manner that is contrary to the *Constitution*. A law with such an invalid purpose will therefore be invalid despite any other, valid purposes.[142]

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**139** *Ravbar v The Commonwealth* (2025) 99 ALJR 1000 at 1053 [214]; 423 ALR 241 at 305, referring to Chordia, *Proportionality in Australian Constitutional Law* (2020) at 175-176, Barak, *Proportionality: Constitutional Rights and their Limitations*, trans Kalir (2012) at 529-530, and Carter, *Proportionality and Facts in Constitutional Adjudication* (2021) at 23, 32.

**140** *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561 (emphasis added).

**141** *Ravbar v The Commonwealth* (2025) 99 ALJR 1000 at 1044 [174]; 423 ALR 241 at 292.

**142** *Ravbar v The Commonwealth* (2025) 99 ALJR 1000 at 1022 [58], 1038 [140], 1045 [177]-[179], 1065 [270]; 423 ALR 241 at 262, 283, 293, 320-321.

*Severing a law with an illegitimate purpose*

95 If the challenged legal rule (the impugned law)—identified at the right level of generality—is invalid, due to an illegitimate purpose or otherwise, then an issue can arise as to whether that legal rule is severable from other associated legal rules in the statute whose operation is affected by that law. The language of severance, and its metaphoric association with striking out words with a blue pencil,[143] is an attempt to describe a challenged law being disapplied in its entirety and removed from consideration of the legal meaning and application of other laws in the statute. There are limits to severance. If the collection of laws including the invalid law have inextricable purposes, forming part of an inseparable scheme of laws, then severance of the invalid law will not be possible.

96 The language of severance should be confined to the situation of an inextricable scheme of laws, although it is sometimes also used in a second sense to describe the disapplication of only part of the operation of a single legal rule (law).[144] But severance and partial disapplication have some things in common. Like the technique of partial disapplication, the judiciary has no common law power to sever one legal rule from other associated legal rules. It is sometimes said that the common law recognises a "presumption", capable of being reversed by Parliament, that a law has "either a full and complete operation or none at all".[145] In truth, the common law simply recognises the impermissibility of the judiciary applying only part of a statutory scheme of laws unless authorised by Parliament to do so.

97 That parliamentary authority to sever a law is found in s 6(1) of the *Interpretation of Legislation Act 1984* (Vic). That provision has been recognised as containing several of the different techniques which can be adopted by courts in fulfilling the implicit requirement to act, so far as possible, to save laws from invalidity. One technique is to engage in partial disapplication of "the application of" a "provision" (law). Another is to disapply, and therefore sever, the entire "provision", where the "provision" would otherwise have been construed as being in excess of the legislative power of the State of Victoria. This power of severance focuses attention upon whether Parliament's purpose for the challenged law was intended to be inextricable from the purposes of the associated laws in the sense that, despite the instruction in s 6(1), Parliament must be taken to have intended that the impugned law must operate together with those laws with which it is associated or not at all, so that the "provisions so associated form an entire law and

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**143** *Clubb v Edwards* (2019) 267 CLR 171 at 314 [418].

**144** See, for instance, *Clubb v Edwards* (2019) 267 CLR 171 at 217-219 [139]-[142].

**145** *Cam & Sons Pty Ltd v The Chief Secretary of New South Wales* (1951) 84 CLR 442 at 454. See also *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 652.

... no legislative intention exist[s] that anything less should operate as a law".[146] Provided that no such intention exists, the statutory command in s 6(1) of the *Interpretation of Legislation Act* (and like provisions) is, in effect, a general command, wherever possible, partially to disapply a law to the minimum degree necessary to remove invalidity, or to sever only invalid laws.

**The impugned law and its purpose in this case**

*The impugned law is s 222F(3)*

98 Mr Lim SC, in separate oral submissions for the plaintiffs, correctly and cogently identified that it was "appropriate to respond to the constitutional issue at the level of illegitimate purpose, rather than assuming in the State's favour the asserted legitimate purpose". But the plaintiffs were not as precise about the law within Pt 12 which was said to be invalid. There were several different ways in which the plaintiffs identified the law (legal rule) that they challenged.

99 First, the law challenged by the plaintiffs was described in their submissions and the central special case question as the entirety of Pt 12 of the *Electoral Act*, "operating with the nominated entity exception in sub-paragraph (j) of the definition of 'gift' in s 206(1)". But Pt 12 is obviously comprised of many laws. And most of those laws were not separately challenged. As a simple example, the plaintiffs made mention of the obligation in s 216(1) of disclosure by a donor making a relevant political donation in a financial year. But there was no suggestion that this obligation had an illegitimate purpose or that it employed means with a disproportionate burdening effect on political communication to achieve a legitimate purpose. Indeed, the plaintiffs accepted that it was only if all the laws in Pt 12 were inseverable from each other (presumably including the particular law or laws that were said to be invalid) that Pt 12 would be entirely invalid.

100 Secondly, the law challenged by the plaintiffs was, on other occasions, described as the nominated entity exception in para (j) of the definition of "gift" in s 206(1), a law which was said to be severable. But a true definition section is not a substantive provision or legal rule (ie, it is not itself a law) but is instead a means of interpreting a substantive provision.[147] As a true definition provision, the whole of s 206(1), including the exceptions, is used to interpret the substantive

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**146** *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 371.

**147** *Kelly v The Queen* (2004) 218 CLR 216 at 253 [103]; *Farshchi v The King* (2025) 100 ALJR 6 at 22 [59]; 426 ALR 185 at 202.

provisions; it is those substantive provisions which are laws that can be challenged.[148]

101 Thirdly, the law challenged by the plaintiffs was also described as "the general cap effected by the *Electoral Act* as it operates with the nominated entity exception". The most obvious problem with this description is that the general cap in s 217D, identified at the right level of generality, is comprised of numerous laws. For instance, one legal rule created by the general cap in s 217D is that a political donation made to, or for the benefit of, "a registered political party" must not exceed the general cap for the election period.[149] Another legal rule is to the same effect in relation to "a candidate at an election".[150] Another legal rule is to the same effect in relation to "a group".[151] And so on. The laws challenged by the plaintiffs could not have been those in s 217D, which were conceded by the plaintiffs to have legitimate purposes.[152] Those purposes are to reduce corruption and the excessive influence of donors over the political process: "to minimise the influence of single donors",[153] and to aim for "equal participation in the electoral process, reducing the potential for those with 'deep pockets' to try and exert greater influence".[154] The plaintiffs also did not suggest that s 217D employs means with a disproportionate burdening effect on political communication to achieve those purposes. As the Attorney-General of the Commonwealth correctly submitted in her written submissions intervening in this special case, the plaintiffs seemed "to accept (correctly) that the general cap, *without* the nominated entity exception, would be constitutionally permissible".[155] Indeed, even if any of the laws in s 217D had been

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**148** *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at 72 [185]; *Farmer v Minister for Home Affairs* (2025) 99 ALJR 1408 at 1418 [24], 1432 [96]-[98]; 425 ALR 116 at 124, 143-144.

**149** *Electoral Act*, s 217D(1)(a).

**150** *Electoral Act*, s 217D(1)(b).

**151** *Electoral Act*, s 217D(1)(c).

**152** See *McCloy v New South Wales* (2015) 257 CLR 178 at 204-205 [36], 208 [47], 248 [181], [184], 259 [224]-[225], 284-285 [322], 285 [324]-[325]; *Unions NSW v New South Wales* (2019) 264 CLR 595 at 623 [71].

**153** Victoria, Legislative Assembly, *Electoral Legislation Amendment Bill 2018*, Explanatory Memorandum at 35.

**154** Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 10 May 2018 at 1351.

**155** Emphasis in original.

challenged, it is arguable that any such law could have been severed from the remainder.

102 A fourth possibility, which was a narrower variant of the third way in which the plaintiffs put their case, is that the laws challenged were only the substantive laws which give effect to the nominated entity exception. On this possibility, the reference by the plaintiffs to other laws as they operate with the nominated entity exception was a blunt attempt simply to describe the context for interpreting the nominated entity exception. Of course, nominated entities are not themselves an exception to s 217D because donations to them are specifically included in s 217D(1)(g). The nominated entity exception, and the reason that a nominated entity would be appointed, is the exclusion from the general cap of any "gifts" from the *existing assets* of a nominated entity to a registered political party. The substantive laws challenged by the plaintiffs on this fourth possibility could only be the laws in s 222F, which enable the appointment of nominated entities, thus permitting a nominated entity to make donations to a registered political party from its existing assets, without falling within the general cap imposed by s 217D.

103 For these reasons, the real subject of the plaintiffs' challenge was the laws in s 222F that provide for the nomination and eligibility for appointment of an entity as a nominated entity. It is those laws which enable an entity to become a nominated entity and therefore to fall outside the limitations on political donations in s 217D in respect of donations from its existing assets to the relevant registered political party. The particular law in s 222F which was the focus of the plaintiffs' submissions was that contained in s 222F(3). The law contained in s 222F(3), with its legacy parties purpose and exclusion purpose, must be interpreted by reference to its context, including the general cap, the nominated entity provisions generally, and all the other contextual laws to which the plaintiffs made reference.[156] But it remains a legal rule capable of being challenged. All legal rules are understood in their context.

104 The plaintiffs' submissions concerning purpose therefore naturally focused upon what they described as the purpose of the "nominated entity provisions", asserting that the illegitimate purpose of the impugned law was "to place the legacy parties in a privileged position over independent candidates or new [registered political parties] in respect of the sources of funds that are available to be used for political expenditure". That submission could only refer to s 222F(3), or more precisely the law (legal rule) created by s 222F(3), which places those three legacy parties in that privileged position.

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**156** Including *Electoral Act*, ss 207F, 216, 217D, 218B.

*Section 222F(3) imposes a burden on free political communication with an illegitimate purpose*

105 The effect of s 222F(3) was to permit only the legacy parties to establish a nominated entity, which they did not control, which could make political donations from its existing assets to those parties free from the general cap. Victoria and the Attorney-General of the Commonwealth were therefore correct that, compared with the three legacy parties, a differential and greater burden on free political communication was placed on other registered political parties. But, subject to the concession discussed above, Victoria submitted that this burden was justified because it was a proportionate means of achieving a legitimate purpose.

106 The purpose of s 222F(3) was said by Victoria to be to "accommodate the range of organisational structures able to be adopted by parties" for the purpose of holding assets for those registered political parties. But that purpose is too narrow to reflect all of the goals of the Victorian Parliament. Section 222F(3) was intended not to be limited to the organisational structures of registered political parties, but to extend to nominated entities that may not be a part of those structures and may not even be controlled by the registered political parties.

107 The broader purpose of s 222F(3) is evident from the concerns expressed in the Legislative Council on 22 June 2018 in relation to the funding of the Victorian Liberal Party by an entity that might not fall within the application of s 222F(2). Hence, s 222F(3) was intended to apply *even if* the nominated entity was not, and never had been, controlled by the registered political party that appointed it. Although the choice of 1 July 2020 as the cut-off point for appointment of a nominated entity under the looser eligibility criteria in s 222F(3) was unexplained in the materials before this Court, the natural inference is that the period of almost two years after the passage of the 2018 Amendments was chosen to provide time for the three legacy parties to appoint their respective nominated entities.

108 As to other registered political parties, the special case records that the Australian Greens – Victoria is an incorporated political party. That party was entitled to transfer funds from its account held as an incorporated entity into its State campaign account for use for political expenditure without the transfer counting towards the general cap. That would be a transfer within its own organisational structure; it is not a "gift". But neither that party nor any other registered political party could establish an asset-rich nominated entity on or after 1 July 2020. Further, an anti-avoidance provision operated from November 2018 and created an offence, in effect, for any person to carry out a scheme to obtain donations for an entity in excess of the general cap for the purpose of having that entity appointed as a nominated entity for a registered political party.[157]

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**157** *Electoral Act*, s 218B.

109 The purposes of s 222F(3) were therefore broader than merely seeking to preserve the assets of the three legacy parties themselves. The purposes were twofold. First, a purpose was to maintain the ability of the three legacy parties to receive political donations not subject to the general cap from the existing assets (at the time the relevant 2018 Amendments took effect) of a nominated entity which they might not control. This purpose, colourfully described during the hearing as maintenance of the "war chest" of the legacy parties, can be called the "legacy parties purpose". Secondly, another purpose was to exclude all other registered political parties from obtaining such a war chest, at least from 1 July 2020. This purpose can be called the "exclusion purpose".

110 The submissions in this special case did not consider whether the legacy parties purpose and exclusion purpose of s 222F(3) were expressed at the right level of generality to represent the purpose of Parliament. Even assuming, for the purposes of these reasons, that the legacy parties purpose and exclusion purpose of s 222F(3) were expressed at the right level of generality, there were no substantial submissions concerning whether the exclusion purpose was legitimate (or, as Victoria described it, a "proper objective").

111 Victoria assumed that the legacy parties purpose was legitimate. The assumption that the legacy parties purpose was legitimate was perhaps made on the basis of the impossibility of a perfectly level playing field for all political parties and perhaps also due to the constitutional design of leaving a "wide range of choices over matters such as the type of electoral system and manner of voting, the size of any electoral districts, and whether voting is compulsory".[158] But as to the exclusion purpose, Victoria conceded that "there are no facts in the Special Case that would enable the Court to conclude that the different treatment of pre-July 2020 parties and new registered political parties is the product of a distinction which is [reasonably] appropriate and adapted to the attainment of a proper objective". More precisely, the special case did not reveal any basis upon which the exclusion of non-legacy parties from the benefits of a nominated entity under s 222F(3) was proportionate to a proper objective.

112 If Victoria's concession were intended to be a concession about lack of proportionality between the means adopted by s 222F(3) and the purpose of that law, then the concession is puzzling. The premise for such a conceded lack of proportionality was missing. Why were the means adopted by s 222F(3) in excluding the non-legacy parties from the benefits conferred by that provision not proportionate to the exclusion purpose of s 222F(3)? Not only does it appear that the means adopted in s 222F(3) were reasonably capable of being seen as necessary for the exclusion purpose, but it is hard to see how the purposes of s 222F(3) could have otherwise been achieved. The only submission by the plaintiffs concerning an alternative means was that Pt 12 could operate without *any* political party being

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**158** *Unions NSW v New South Wales* (2019) 264 CLR 595 at 658 [175].

able to receive donations from the existing assets of a nominated entity without the donation counting towards the general cap. But that suggested alternative means would not achieve the legacy parties purpose. It would deprive the legacy parties of their access to a historical and established source of donations.

113 It is not to the point to ask whether s 222F(3) would be disproportionate to the anti-corruption and anti-excess influence purposes of the *different* law concerning the general cap in s 217D. The purposes of the legal rule in s 222F(3) are not the purposes of the legal rules in s 217D. Of course, if (as will be seen below) the purposes of the legal rule in s 222F(3) were inseverable from the purposes of the legal rules in s 217D, then the laws contained in those provisions would fall to be treated in combination as an "entire law"[159] with combined purposes. The invalidity of any of the combined purposes would invalidate the "entire" law.

114 Victoria's concession can therefore only be understood as a concession that the exclusion purpose in s 222F(3) was not a "proper objective". Only if the exclusion purpose was illegitimate would it have made sense for Victoria to concede that the exclusionary means adopted by s 222F(3) were not proportionate to a "proper objective".

115 If there had been sufficient facts in the special case, it might have been argued by Victoria that, at a higher level of generality, the exclusion purpose should be characterised as limiting the legacy parties purpose in order to further the anti-corruption and anti-excess influence purposes, by preventing other registered political parties from obtaining uncapped funds from nominated entities that they do not control. Ultimately, however, the concession by Victoria should be accepted in circumstances in which there was no such argument made and there are insufficient facts in the special case to support the legitimacy of the exclusion purpose, at a higher level of generality, as concerned with anti-corruption and anti-excess influence rather than, for example, stifling the ability of new registered political parties to access uncapped funds of closely related, but uncontrolled, nominated entities. Such a purpose would be illegitimate.[160]

*Inseverability of s 222F(3) from the remainder of Pt 12*

116 The primary submission of Victoria was that s 222F(3) could be partially disapplied by notionally removing the words "if the first appointment of an entity as the nominated entity of a registered political party is made before 1 July 2020". The problem with that partial disapplication, however, is that it would alter one of the purposes of that sub-section (the exclusion purpose), which was to confine the

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**159** *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 371.

**160** Compare *Unions NSW v New South Wales* (2019) 264 CLR 595 at 661 [181].

benefits of a nominated entity under s 222F(3) to the legacy parties. As explained above, the existence of one illegitimate purpose will invalidate an entire law despite the existence of other, legitimate, purposes,[161] and amending or altering the purpose of a law is outside the scope of judicial power.[162]

117 Alternatively, Victoria submitted that all provisions in Pt 12 that relied upon the definition of "gift" could be partially disapplied by excluding the application (presumably in all substantive provisions) of para (j) of the definition of "gift" in s 206(1), concerning "a gift made by a registered political party to the nominated entity of the registered political party or received by a registered political party from the nominated entity of the registered political party". The other submissions of the parties then concerned the possibility of severance to increasing degrees: severance of s 222F(3) from the other laws in s 222F; severance of all the laws in Pt 12 concerning nominated entities (or partial disapplication to the extent to which those laws concerned nominated entities); severance of Div 3B (containing s 217D); or, at the most extreme, severance of all of the laws in Pt 12.

118 In this special case, it is unnecessary to determine which of the posited methods of partial disapplication or severance would best fulfil the statutory command in s 6(1) of the *Interpretation of Legislation Act* by the minimum degree of partial disapplication or severance. The difficulty with all of the proposed partial disapplications or severances apart from the most extreme (severance of all of the laws in Pt 12) is that the purposes of s 222F(3) are inextricably connected with the purposes of s 222F generally and the purposes of s 222F are inextricably connected with those of s 217D and, at a higher level of generality, the purpose of the provisions of Pt 12 of the *Electoral Act* generally, which is to regulate electoral expenditure and political donations.

119 The inextricable connection between the purposes of s 222F(3) and the purposes of s 222F arises because s 222F(3) was included by the Legislative Council on 22 June 2018 for the reason that the Victorian Parliament considered that s 222F(2) alone could not fully serve its purpose of allowing "parties to organise their affairs in a way that recognises their internal financial structures or what meets the needs of their party to administer their affairs".[163] The purposes of s 222F(3) and s 222F are also jointly reinforced by the anti-avoidance provision in s 218B, which prevents any registered political party, even during the period from November 2018 (when s 218B took effect) until 1 July 2020, from obtaining donations for an entity with the intention of later appointing that entity as the

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**161** At [94] above.

**162** At [96] above.

**163** Victoria, Legislative Council, *Parliamentary Debates* (Hansard), 22 June 2018 at 3042.

party's nominated entity, whose assets could be donated to the party without being subject to the general cap.

120 As for the close connection between the purposes of s 222F and the purposes of the regime in Pt 12, including s 217D, this can be seen in the reflection of the legacy parties purpose (of s 222F(3)) in para (j) of the definition of "gift" in s 206(1), which was to respect "the existing arrangements between political parties and separate entities that manage financial commitments and maintain assets for the sole benefit of the registered political party".[164] That paragraph has operation throughout Pt 12.

121 The close connection between the purposes of s 222F and the purposes of the regime in Pt 12 can also be seen in the significance of the legacy parties, which are the focus of s 222F(3). As the special case explains, those three registered political parties endorsed 258 of the 776 candidates who were endorsed by the 20 registered political parties at the 2018 Victorian election. In turn, the scheme of regulating political donations through the use of the concept of the nominated entity is a central and inextricable part of the operation of Pt 12. The legislative amendment in s 222F(3), therefore, was not a separate and severable legislative addition. The legacy parties purpose in s 222F(3) is such a significant qualification upon the general legislative anti-corruption and anti-excess influence purposes that the removal of the former would substantially change the intended operation of the latter. The provisions of Pt 12 are inextricably bound together by these purposes. The invalidity of the law in s 222F(3) has the consequence that all laws in Pt 12 are invalid.

## Conclusion

122 The questions in the special case should be answered as proposed in the joint judgment.

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**164** Victoria, Legislative Assembly, *Electoral Legislation Amendment Bill 2018*, Explanatory Memorandum at 18.

123 STEWARD J. As Gageler CJ, Gordon, Jagot and Beech-Jones JJ explain, the disposition of this special case turns entirely upon a concession made by the State of Victoria that the words "if the first appointment of an entity as the nominated entity of a registered political party is made before 1 July 2020" in s 222F(3) of the *Electoral Act 2002* (Vic) infringe the implied freedom of political communication. Gageler CJ, Gordon, Jagot and Beech-Jones JJ persuasively reason that these words cannot be severed from s 222F(3) without also severing s 222F(2); that s 222F cannot be severed from Subdiv 2 of Div 4A of Pt 12 of the *Electoral Act*; and that the concept of a nominated entity is so intertwined within Pt 12 that one cannot merely sever Div 3B of Pt 12 – which imposes the cap on donations – and at the same time also avoid a re-writing of the *Electoral Act*, consistently with Latham CJ's judgment in *Pidoto v Victoria*.[165] It follows that all of Pt 12 must be invalidated. I am thus grateful to Gageler CJ, Gordon, Jagot and Beech-Jones JJ.

124 But for that concession, this Court's jurisprudence concerning the implied freedom of political communication might have obliged me to prefer one legislative model for regulating the making of electoral donations over that which the Victorian Parliament has decreed. Let me explain.

125 Here, the plaintiffs contended that it was not the general cap on donations that offended the implied freedom, but the way in which the *Electoral Act* prevented a "level playing field" between candidates on the subject of electoral funding.[166] The choice made by the Victorian Parliament in 2018 to impose a general cap on donations pursuant to s 217D of the *Electoral Act*,[167] whilst preserving the traditional sources of funding for the Australian Labor Party, the Liberal Party of Australia and the National Party of Australia respectively in Victoria, being donations from well-capitalised nominated entities, was said to be a legislative selection that was not reasonably appropriate and adapted to the achievement of a legitimate end – here, that of reducing the risk of corruption and undue influence in the electoral process. That is because, as described by Gageler CJ, Gordon, Jagot and Beech-Jones JJ, a candidate who is not endorsed by one of the Labor, Liberal or National parties is practically prevented by the general cap in s 217D from accessing money from their own well-capitalised "nominated entity". The justification for that choice – namely, that nominated entities are, in reality, economic creatures of each of the three major parties – was said by the plaintiffs to be unsustainable. In contrast, if these parties had prior to 2018 built up their own store of capital, instead of using nominated entities for that

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**165** (1943) 68 CLR 87 at 109, 111.

**166** *Unions NSW v New South Wales* (2019) 264 CLR 595.

**167** Part 12 of the *Electoral Act* was relevantly amended by the *Electoral Legislation Amendment Act 2018* (Vic).

purpose, the plaintiffs would not have objected to the use of such legacy assets to fund – uncapped – elections in the future. The discrepancy between these outcomes was never resolved.

126 The problem is that the achievement of a perfect "level playing field" is, in reality, an unattainable ideal. Different parties, for example, will always have different capacities to raise monies for use in an election. As Nettle J observed in *Unions NSW v New South Wales*:[168]

> "the level playing field is comprised of a theoretically unlimited number of combinations and permutations of relativities within the range bordered by points at which the extent of disparity becomes unreasonable. And within that range, it is for the Parliament to make selections. It is only when and if a selection lies beyond the range of reasonable selection that it is invalid."

127 But, with respect, how is a judge of this Court to know what is within the "range of reasonable selection"?

128 What makes that task all the more difficult in these types of cases is that this Court invariably relies upon, and is practically confined to, agreed facts set out in a special case, and the drawing of inferences from those agreed facts. These heavily negotiated and compromised expressions of the facts are inevitably anodyne in nature, and are thus often of no, or little, assistance. In contrast, the Court does not receive the benefit of expert evidence as to, for example, how much it reasonably costs to undertake a campaign to win a seat in the Legislative Assembly in Victoria.

129 A good example of the problem in this case is one of the documents attached to the special case. It is the *Report on Victoria's Laws on Political Finance and Electronic Assisted Voting* dated November 2023. The report was written by a panel comprising three members: a former public servant, a former Labor member of the House of Representatives and a former Liberal Senator. One of the issues the panel was required to report upon was the merit of permitting registered political parties ("RPPs") to appoint nominated entities. The plaintiffs relied upon the opinion and recommendation of a majority of the panel that the exception applying to nominated entities appointed prior to 1 July 2020 should be reformed, as it was perceived to significantly benefit those three parties that had established and appointed nominated entities prior to the relevant date.[169] But the report also

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**168** (2019) 264 CLR 595 at 639 [113] (footnote omitted).

**169** Electoral Review Expert Panel, *Report on Victoria's Laws on Political Finance and Electronic Assisted Voting* (November 2023) at 95-96.

expressed a minority view, which disagreed with the need for any reform. The dissentient was of the view that:[170]

> "Existing rules for nominated entities recognise long-standing practices by RPPs that stretch back many decades. Those entities hold assets that generations of party members have accumulated and preserved for the RPP's long-term prosperity and in support of its ideals. Removing nominated entities may prevent those assets being used for those goals, potentially having a pernicious effect on the way in which RPPs conduct operations and support their members."

130 The Court was given no, or insufficient, material to resolve the issue of which view was more legitimate. Frankly, in many cases of this kind, it would be better to confront the evidentiary burden, and the fact-finding task, more squarely. In that respect, this Court has the power in an appropriate case to remit such a task to the Federal Court of Australia, as took place in *Palmer v Western Australia*.[171]

131 Another issue, which need not be confronted given Victoria's concession, is that the law which here indirectly burdened the implied freedom, namely s 217D of the *Electoral Act*, which imposed the general cap on donations, was not considered by any party to be itself invalid.[172] Rather, what was said to be objectionable was the law that excluded the general cap in respect of contributions made by nominated entities to RPPs.[173] Yet this exception, if anything, enhanced the capacity of those eligible RPPs, and their members and candidates, to make political communications; it did not reduce that capacity.[174]

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**170** Electoral Review Expert Panel, *Report on Victoria's Laws on Political Finance and Electronic Assisted Voting* (November 2023) at 97.

**171** (2021) 272 CLR 505; *Judiciary Act 1903* (Cth), s 44.

**172** cf *Unions NSW v New South Wales* (2019) 264 CLR 595.

**173** *Electoral Act 2002* (Vic), s 222F read with the definitions in s 206. In particular, s 206(1) relevantly defines a "political donation" as meaning a "gift" to certain persons and entities, but a "gift" does not include "a gift made by a registered political party to the nominated entity of the registered political party or received by a registered political party from the nominated entity of the registered political party": s 206(1) definition of "gift", para (j).

**174** To the extent that this law eroded any "level playing field", this was perhaps a matter that might otherwise have raised an inconsistency with the constitutional requirement of representative government – but perhaps only if it had been a federal enactment; cf *Ruddick v The Commonwealth* (2022) 275 CLR 333.

132 Thankfully, the foregoing issues did not need to be resolved, and this case can be decided on the narrow basis that followed from Victoria's concession. I therefore agree with the answers proposed by Gageler CJ, Gordon, Jagot and Beech-Jones JJ to the questions of law posed by the special case.

GLEESON J.

## Introduction

133 This proceeding was brought in anticipation of the 2026 Victorian State election, to be held in November 2026. In that election, the first plaintiff intends to run in the district of Werribee as a candidate of the recently formed West Party. The second plaintiff intends to seek election as an independent candidate in the district of Hawthorn. The special case asks whether Pt 12 of the *Electoral Act 2002* (Vic), entitled "Election expenditure and political donations", operating with the "nominated entity exception" in para (j) of the definition of "gift" in s 206(1) of the *Electoral Act*, is invalid (in whole or in part and, if in part, to what extent) because it impermissibly burdens the implied freedom of political communication, contrary to the *Constitution*.

134 The *Electoral Legislation Amendment Act 2018* (Vic) ("the 2018 Act") introduced the concept of a "nominated entity" into Victoria's political finance scheme, a unique feature which places the three major political parties[175] and their endorsed candidates at a significant advantage as to the sources of funds that they can spend on political communications for the purpose of winning votes at an election.[176] There are two sets of criteria for appointment as a nominated entity.[177] The particular advantage enjoyed by the nominated entities of the three major parties is created by the criteria for appointment which apply only to an appointment first made by a registered political party prior to 1 July 2020 ("the s 222F(3) criteria"), and which permit appointment of an entity having a greater degree of independence from its registered political party than the criteria under s 222F(2) for appointment as a nominated entity since that date. While other political donors are confined by a cap on political donations ("the general cap"),[178] designed to be the lowest cap in Australia,[179] the "nominated entity exception" when read with the s 222F(3) criteria frees the nominated entities of the three major parties, which were the only parties that nominated an entity prior to 1 July 2020, from the constraint imposed by the general cap.

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**175** The Liberal Party of Australia (Victorian Division), the Australian Labor Party – Victorian Branch and the National Party of Australia – Victoria.

**176** Electoral Review Expert Panel, *Report on Victoria's laws on political finance and electronic assisted voting* (2023) at 93.

**177** *Electoral Act*, s 222F(2)-(3).

**178** *Electoral Act*, s 217D.

**179** Victoria, Legislative Council, *Parliamentary Debates* (Hansard), 22 June 2018 at 3040.

135 The general cap extends to political donations made to a nominated entity, so that, while a registered political party has been and remains permitted to appoint a nominated entity after 1 July 2020 under the stricter criteria set out in s 222F(2), such a nominated entity[180] cannot accumulate political donations unconstrained by the cap in the way that donations were accumulated by the nominated entities of the three major parties prior to the application of the cap to those entities. Unlike some political finance laws that seek to "level the playing field" of public debate, with the aim that the free flow of political communications will not be distorted by voices that would "drown out" other voices that seek to be heard,[181] the "nominated entity exception" as it applies to the major parties therefore has the opposite effect of enabling the voices of those parties to be amplified.

136 The plaintiffs first contended that specified provisions in Pt 12, most particularly ss 216 and 217D when read with s 222F(3), but also ss 207F and 218B(1) ("the impugned provisions"), are constitutionally invalid because they burden the implied freedom for the illegitimate purpose of favouring the major parties over other persons and entities regulated by Pt 12 in a manner amounting to an "abuse of incumbency".[182] A State law that imposes a burden on the implied freedom is invalid if enacted for an illegitimate purpose, that is, a purpose that is incompatible with the maintenance of the constitutionally prescribed system of representative government that is protected by the implied freedom of political communication.[183]

137 If their first contention were to fail, the plaintiffs' second contention was that the provisions nevertheless cannot be justified as reasonably appropriate and adapted to advance a legitimate legislative purpose because they place the major parties in a privileged position over other regulated persons and entities for no good reason. Victoria conceded that the "time limitation" in s 222F(3), that is, the sub-section's application only to nominated entities first appointed "before 1 July 2020", affords discriminatory treatment in favour of the major parties that cannot be justified as "appropriate and adapted to the attainment of a proper objective".[184] That concession establishes the plaintiffs' secondary contention in relation to the "time limitation".

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**180** Of which there are, however, none.

**181** *McCloy v New South Wales* (2015) 257 CLR 178 at 206 [41]-[43]; *Unions NSW v New South Wales* ("*Unions NSW [No 2]*") (2019) 264 CLR 595 at 612 [31].

**182** cf *Unions NSW [No 2]* (2019) 264 CLR 595 at 628-629 [85].

**183** *McCloy* (2015) 257 CLR 178 at 194 [2(B)(2)]. See also *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 142.

**184** *Unions NSW [No 2]* (2019) 264 CLR 595 at 628 [84].

138 In making that narrow concession, Victoria declined to engage with the framework for analysis of the constitutional validity of laws that impose an effective burden on the implied freedom of political communication. Even so, as explained by the plurality, the consequence of Victoria's concession is to render the entirety of Pt 12 invalid because it is impossible to identify a lesser portion of Pt 12 that was intended to operate without the nominated entity exception.[185]

139 The far-reaching consequence of Victoria's narrow concession makes it unnecessary to determine the plaintiffs' first contention, which raises a question about the assessment of legislative purpose where the nominated entity exception preserves a degree of freedom of political communication for the major parties, but also substantially constrains the financial resources available to those who seek to influence election outcomes by funding political communications. In some cases, a differential constraint on political communications may be justified as appropriate and adapted to the attainment of a legitimate legislative purpose.[186] However, different treatment of participants in political debate, especially favourable treatment of political incumbents, raises questions about whether that different treatment demonstrates an illegitimate legislative purpose.[187]

**The impugned provisions**

140 Part 12 establishes a complex scheme affecting electoral expenditure and political donations in Victoria. Some of its provisions are analogous to laws that have been found by this Court to impose a burden on political communication and, consequently, questions may arise as to the constitutional validity of those provisions. However, many of the provisions of Pt 12 impose no such burden. Examples include the provisions for funding administrative expenditure of a registered political party or an independent elected member in Div 1C, public funding of political expenditure and electoral expenditure in Div 2 and policy development funding in Div 2A. Notwithstanding the breadth of the first question posed in the special case, the plaintiffs' case was not that the entirety of Pt 12 imposes a burden on the implied freedom. Instead, the burden sought to be impugned by the plaintiffs was said to arise from the combined operation of specified provisions in Pt 12, being ss 207F, 216, 217D and 218B(1), when read with s 222F(3).

141 It is an accepted premise of the Australian electoral system, at both the federal and State levels, that political parties and candidates require substantial

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**185** *Knight v Victoria* (2017) 261 CLR 306 at 325 [35].

**186** *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 234 [147]; *Unions NSW [No 2]* (2019) 264 CLR 595 at 628 [84].

**187** *Australian Capital Television* (1992) 177 CLR 106 at 146.

funding to compete effectively in political campaigns.[188] As originally enacted in 2002, Pt 12 introduced public funding of political parties and candidates and disclosure of election financials. The "basic purpose" of the new electoral funding and disclosure laws was explained to be to reduce the ability of private money to influence election outcomes and political decisions.[189] As originally enacted, Pt 12 prohibited certain political donations but otherwise imposed no cap on political donations.

142 Part 12 was substantially amended by the 2018 Act, which relevantly stated the purpose of that Act as being to "enhance the integrity of the electoral system".[190] The second reading speech for the 2018 Act identified the government's policy intentions as including "to reduce the reliance in our community on private sources of donations or the transference of money between private sources of money or vested interests and political parties; to make commensurate changes to the public funding regime; [and] to enable political parties to be able to campaign".[191] That is, public funding was increased to compensate for the reduction in funds expected to be available from private political donors.

143 The impugned provisions have a sweeping impact on fundraising for political communications by their operation in relation to seven categories of persons or entities who are likely to seek or receive "political donations", namely: registered political parties; candidates at an election; groups of candidates on a ballot-paper; elected members; nominated entities; associated entities; and third-party campaigners ("the regulated actors"). Each of these categories of persons or entities is defined in the *Electoral Act*. A "registered political party" means a political party that is registered under Pt 4 of the *Electoral Act*.[192] For the purposes of Pt 12, a "candidate" means a person who has been selected by a political party to be a candidate in an election or a person, other than a member of a political party, who has publicly announced an intention to be a candidate in an election.[193]

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**188** See, for example, *Unions NSW v New South Wales* ("*Unions NSW [No 1]*") (2013) 252 CLR 530 at 545-546 [8]; *McCloy* (2015) 257 CLR 178 at 196 [7].

**189** Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 21 March 2002 at 422.

**190** 2018 Act, s 1(a)(ii).

**191** Victoria, Legislative Council, *Parliamentary Debates* (Hansard), 22 June 2018 at 3040.

**192** *Electoral Act*, s 3 definition of "registered political party".

**193** *Electoral Act*, s 206(1) definition of "candidate"; see also s 3 definition of "candidate".

Each of the plaintiffs is a candidate within that definition. A "nominated entity", of a registered political party, means an entity the name and address of which is entered on the Register of Nominated Entities as the nominated entity of the registered political party.[194] An "associated entity" is defined to mean an entity having one of several specified relationships with a registered political party, including, for example, an entity that is controlled by one or more registered political parties, but not including a nominated entity of a registered political party. The definition of a "third party campaigner" covers any person or entity, other than the first six categories, that receives political donations or incurs political expenditure which exceeds a specified amount (now $4,970) in a financial year.[195]

144 An important concept in Pt 12 is "political expenditure". Subject to an exception that is not presently relevant, "political expenditure" is defined to mean any expenditure for the dominant purpose of directing how a person should vote at an election, by promoting or opposing the election of any candidate at the election; or a registered political party; or an elected member.[196] That is, "political expenditure" is directed to spending on a class of political communications of central importance to the implied freedom: communications intended to influence voting at elections.

*The general cap on donations*

145 The central provision in the plaintiffs' case is s 217D, in Div 3B of Pt 12, by which the general cap is imposed on political donations. A "political donation" is defined broadly as a "gift" to a regulated actor.[197] The definition of "gift" is broad, but has some important exceptions.[198] "Gift" means any disposition of property otherwise than by will made by a person to another without consideration in money or money's worth or with inadequate consideration, and extends to include certain transactions such as the provision of a service. The definition excludes certain payments such as annual subscription fees and annual affiliation fees. The "nominated entity exception" to the broad definition of "gift", in para (j), includes relevantly "a gift ... received by a registered political party from the nominated entity of the registered political party". Not being a "gift", and therefore not a "political donation", funds flowing from a nominated entity to its registered political party are not caught by the general cap on political donations in s 217D or by the requirements for disclosure of political donations in s 216. However,

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**194** *Electoral Act*, s 206(1) definition of "nominated entity".

**195** *Electoral Act*, s 206(1) definition of "third party campaigner".

**196** *Electoral Act*, s 206(1) definition of "political expenditure".

**197** *Electoral Act*, s 206(1) definition of "political donation".

**198** *Electoral Act*, s 206(1) definition of "gift".

funds flowing from a donor to a nominated entity remain a "gift" and therefore a "political donation" and subject to the general cap.

146 Section 217D(1) provides that political donations made to, or for the benefit of, a regulated actor must not exceed the general cap for the "election period". An election period is defined to mean the period commencing on the day after election day of the previous general election and ending on the next general election day,[199] and is ordinarily a period of approximately four years.[200]

147 The general cap was originally set at $4,000 for each regulated actor (now $4,970). In debate in the Legislative Council, the level of the cap was explained to have been increased to $4,000 from an initial proposal of $2,000 to accommodate "a number of community-based organisations [that] would never receive public funding for electoral reforms", with the aim of providing for freedom of expression while having "the most rigorous scheme in the country".[201] This explanation suggests that, for at least some regulated actors, the general cap may operate as a cap on political expenditure or political communications more generally.

148 Otherwise, the effect of the general cap on political donations may be contrasted with a cap on expenditure. The general cap is not designed to equalise regulated actors' spending on political communications. For example, by s 217D(5), a contribution by a candidate at an election or an elected member to their own election campaign is not included in the general cap in respect of that candidate or member. Thus, there is no restriction on the amount that a wealthy candidate can spend from their own funds on political expenditure, including funds that may have been accumulated from political donations received before the introduction of the general cap. The Solicitor-General for Victoria noted that the major parties are unincorporated entities and contended that the nominated entity exception treats the major parties consistently with independent candidates, who may use their own assets to fund political expenditure. If the submission was intended to imply that funds held by the nominated entities for the major political parties were "their own assets" in some way distinct from the kinds of funds which the general cap is designed to reduce, the special case did not support that implication.

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**199** *Electoral Act*, s 206(1) definition of "election period".

**200** *Constitution Act 1975* (Vic), ss 28(2), 38(2).

**201** Victoria, Legislative Council, *Parliamentary Debates* (Hansard), 22 June 2018 at 3041, 3047.

*Nominated entities*

149 A nominated entity may only be appointed by a registered political party,[202] must be an incorporated body, must not have voting rights in the registered political party,[203] and must satisfy certain requirements about its relationship with the registered political party. Those requirements are less strict if the first appointment is made before 1 July 2020.[204] Each of the major parties is a registered political party. The less strict requirement, in s 222F(3)(a), permits the appointment of an entity that operates (or is established and maintained, or is the trustee of a trust established and maintained) for the principal benefit of the members of the registered political party ("the principal benefit criterion"). The stricter requirement, in s 222F(2)(a)-(b), permits the appointment of an entity that is controlled, within the meaning of s 50AA of the *Corporations Act 2001* (Cth), by the registered political party and that operates (or is established and maintained, or is the trustee of a trust established and maintained) for the sole benefit of the members of the registered political party ("the control and sole benefit criteria"). Section 50AA(1) provides that an entity controls a second entity if the first entity has the capacity to determine the outcome of decisions about the second entity's financial and operating policies.[205]

150 Having taken advantage of the principal benefit criterion for appointment of a nominated entity prior to 1 July 2020, by appointing entities that had historically received political donations prior to the introduction of the general cap, each of the major parties has a well-capitalised nominated entity. No other registered political party has appointed a nominated entity. As a candidate for a newly established political party, the first plaintiff is denied the benefits of a nominated entity appointed in accordance with the principal benefit criterion. As an independent candidate, the second plaintiff is denied the opportunity to appoint a nominated entity altogether. To the extent that the regime's prospective operation favours existing parties, because they may have accumulated a war chest for political campaigning from uncapped political donations, the Solicitor-General submitted that this was a necessary feature of any statutory regime that attempts to introduce prospectively some restriction on the making and receipt of political donations in order to pursue an anti-corruption purpose.

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**202** *Electoral Act*, s 222F(1).

**203** *Electoral Act*, s 222F(2)(c), (3)(b).

**204** *Electoral Act*, s 222F(2)-(3).

**205** See also *Corporations Act*, s 50AA(2)-(4).

*State campaign account*

151 Section 207F, in Div 1B of Pt 12, requires certain persons to keep a separate account with an ADI[206] for the purpose of State elections, called a "State campaign account"; and precludes "political expenditure" from other sources. The requirement that political expenditure must be paid from a State campaign account is imposed on the registered officer of a registered political party and the registered agent of each of the other regulated actors, who "must ensure that no amount of money for political expenditure is paid for" by the regulated actor unless the amount is paid from the State campaign account.[207] To the extent that a registered political party wishes to incur political expenditure using funds from a nominated entity (or any other funds that are not political donations), those funds must be dealt with in accordance with s 207F.

*Disclosure of political donations*

152 Section 216, in Div 3 of Pt 12, provides for extensive and prompt disclosure of political donations by donors and regulated actors. Funds given to a regulated actor that are not political donations (such as funds that are caught by the nominated entity exception) are not subject to the requirements of s 216 but, as previously noted, their expenditure as political expenditure is regulated by the requirement to make such expenditure through a State campaign account.

*Offence provision*

153 Section 218B(1), in Div 4 of Pt 12, makes it an offence, punishable by 10 years imprisonment, for a person to enter into, or carry out, a scheme, whether alone or with any other person, with the intention of circumventing a prohibition or requirement under Pt 12.

**Burden imposed by the impugned provisions**

154 A threshold issue for determining the validity of any law alleged to infringe the implied freedom of political communication is whether the law effectively burdens that freedom in its terms, operation or effect.[208] This question concerns the effect of an impugned law upon the freedom, as distinct from whether the law limits a person in the way that they can express themselves, although the latter may

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**206** Defined in the *Interpretation of Legislation Act 1984* (Vic), s 38, as an authorised deposit-taking institution within the meaning of the *Banking Act 1959* (Cth).

**207** *Electoral Act*, s 207F(6).

**208** *McCloy* (2015) 257 CLR 178 at 194 [2(B)(1)]; *Ruddick v The Commonwealth* (2022) 275 CLR 333 at 391-392 [155]. See also *Unions NSW [No 1]* (2013) 252 CLR 530 at 555 [40].

inform the operation of a law upon the freedom more generally.[209] "The expression 'effectively burden' means nothing more complicated than that the effect of the law is to prohibit, or put some limitation on, the making or the content of political communications."[210] The extent of an effective burden may also require examination to identify "what has to be justified and the questions to be addressed" in determining whether an effective burden on the implied freedom is justified.[211]

155 State laws limiting and requiring disclosure of political donations, defined in various ways, have previously been found to impose an effective burden on the implied freedom.[212] Victoria accepted that the general cap imposes an effective burden on the implied freedom, which it characterised as an "indirect practical limitation" on the ability of regulated actors to engage in "modes of [political] communication that are preceded or conditioned by the expenditure of money". The impugned provisions form part of a scheme that is intended to strike a balance between "political campaigning and freedom of expression".[213] Victoria also noted that the extent of the burden is ameliorated by public funding.

156 The general cap is designed to place an effective burden upon the implied freedom by limiting the freedom of persons and groups to donate funds to regulated actors that would otherwise be used to fund "political expenditure", which is, quintessentially, expenditure on political communications. By restricting some sources of funding for political communication, the general cap "favours other sources in terms of the flow of political communication".[214] That is, where political communications involve expenditure, such as political advertising, persons or

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**209** *Unions NSW [No 1]* (2013) 252 CLR 530 at 554 [36].

**210** *Monis v The Queen* (2013) 249 CLR 92 at 142 [108]; *Unions NSW [No 1]* (2013) 252 CLR 530 at 574 [119]; *Farmer v Minister for Home Affairs* (2025) 99 ALJR 1408 at 1421-1422 [40]; 425 ALR 116 at 129.

**211** *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at 28 [63]. See also *Ravbar v The Commonwealth* (2025) 99 ALJR 1000 at 1072 [307], 1099 [436]; 423 ALR 241 at 330, 366.

**212** See *Unions NSW [No 1]* (2013) 252 CLR 530 at 554 [38], 560 [61], 574 [121], 585 [163]; *McCloy* (2015) 257 CLR 178 at 202-203 [30], 240 [158], 282 [314]; *Unions NSW [No 2]* (2019) 264 CLR 595 at 607-608 [15], 637 [108], 646 [138]-[139], 653 [160].

**213** Victoria, Legislative Council, *Parliamentary Debates* (Hansard), 22 June 2018 at 3041.

**214** cf *Unions NSW [No 1]* (2013) 252 CLR 530 at 578-579 [137].

entities who have access to unregulated sources of funding are placed at an advantage over those without such access.

157 The burden is illustrated by the adverse effect of the general cap on the second plaintiff's capacity to engage in political communications in the 2022 Victorian State election. In the election period for that election, she would have received donations in excess of the general cap if lawfully permitted to do so, particularly from Climate 200, a community crowd-funded initiative which provides monetary and in-kind support to certain federal and State community independent candidates. Climate 200 has stated that the general cap "greatly constrained" the amount of in-kind campaign support Climate 200 could provide to independent candidates in the 2022 Victorian State election, giving the example of not being able to offer free office space to a particular candidate because the value of the lease of the office for the duration of the election period exceeded the general cap.[215] The second plaintiff could have used additional political donations from Climate 200 to make political communications, or to free other funds that could be spent on political communications.

158 As earlier explained, the combined operation of the impugned provisions is to impose an effective expenditure cap in the case of a regulated actor that has no source of funds for political communications apart from political donations, or political donations and public funding (which is allocated by reference to particular criteria).

159 The effect of the impugned provisions on the implied freedom is indirect rather than direct, in that the general cap constrains the financial capacity of regulated actors to engage in political communication rather than imposing any more direct constraint upon the content of communications.[216] A monetary cap on such donations places "a restriction upon the funds available to political parties and candidates to meet the costs of political communication by restricting the source of those funds", which is an effective burden on the implied freedom because of its tendency to diminish the extent of political communication that would otherwise have occurred.[217] The disclosure requirement imposes a burden on the implied freedom by inhibiting donors who wish to make anonymous

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**215** Climate 200, *Submission to the independent review of Victoria's electoral and political donations system* (7 July 2023) at 6.

**216** *Unions NSW [No 1]* (2013) 252 CLR 530 at 554 [37]-[38], 572 [112]. See also *McCloy* (2015) 257 CLR 178 at 201 [25], 241 [162]-[163].

**217** *Unions NSW [No 1]* (2013) 252 CLR 530 at 554 [38]. See also *McCloy* (2015) 257 CLR 178 at 201 [24].

donations.[218] The requirement for political expenditure to be paid from a State campaign account imposes a burden on the source of the funds for political expenditure which is a limitation, albeit slight, on the making of a political communication.

*Aspects of the burden*

160 It is convenient to address aspects of the burden imposed by the impugned provisions at this point, recognising that these matters may also be relevant to the justification of an effective burden upon the implied freedom.[219]

161 Victoria accepted that the burden imposed by the general cap upon registered political parties with a nominated entity is different to the burden imposed upon other regulated actors, but submitted that this different treatment does not treat equals unequally except in one respect. The differential aspects of the burden acknowledged by Victoria are: (1) because of s 222F(3), the major parties, each of which appointed a nominated entity before 1 July 2020, may receive funds, above the general cap, which may be used for political expenditure from a source (a nominated entity that meets the principal benefit criterion) that, since 1 July 2020, has not been available to any other registered political party (because only the control and sole benefit criteria apply from that date) and (2) because of the nominated entity exception, parties with a nominated entity may receive funds, above the general cap, which may be used for political expenditure from a source (the nominated entity) that is not available to any other regulated actor (because they cannot appoint or have not appointed a nominated entity).

162 Victoria accepted that the first of these differential aspects of the burden involves the unequal treatment of equals (registered political parties) by favouring parties who could have first appointed a nominated entity before 1 July 2020 (including the major parties) in comparison with other registered political parties. By reason of the principal benefit criterion for the appointment of nominated entities in s 222F(3), the major parties have uncapped access to funds from entities that were not required to satisfy the control and sole benefit criteria that have applied to nominated entities since 1 July 2020. The effect is to permit three nominated entities to influence the political campaigning of the major parties by providing uncapped funds to the major parties, even though they would not satisfy the control and sole benefit criteria. Another aspect of the effect is to preserve whatever influence might have been earned by political donations made to the nominated entities prior to the introduction of the general cap. In contrast, new registered political parties, while protected from the risk of undue influence,

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**218** cf *LibertyWorks* (2021) 274 CLR 1 at 25 [54].

**219** *LibertyWorks* (2021) 274 CLR 1 at 28 [63]; *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at 551 [26].

appear to have no scope to accumulate war chests of the kind that are held by the major parties' nominated entities through political donations, because of the general cap.

163 The discriminatory and differential aspects of the identified burden of the impugned provisions on the implied freedom of political communication have significant potential to distort the free flow of political communications by enabling the major parties to outspend other regulated actors and to drown out other voices, including those that might otherwise make an effective response to information or comment communicated by a major party or the party's endorsed candidates.[220] As aspects of the burden that benefit the major parties, they warrant "close scrutiny" to assess both the purpose of the provisions that effect those aspects of the burden and, if that purpose is established as legitimate, justification of the relevant provisions as reasonably necessary for the achievement of that legitimate purpose.[221]

**Absence of justification for unequal burden caused by time limitation in s 222F(3)**

164 Having established that the impugned provisions impose an effective burden on the implied freedom of political communication, it would ordinarily be necessary to consider the justification for the imposition of that burden. The justification is assessed, first, by compatibility testing to determine whether the purpose of an impugned law is legitimate in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative government. If the purpose of the impugned law is demonstrated to be legitimate, then the proportionality of the law is assessed to decide whether it is reasonably appropriate and adapted to advance its identified legitimate purpose.[222]

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**220** Electoral Review Expert Panel, *Report on Victoria's laws on political finance and electronic assisted voting* (2023) at 96. See *Unions NSW [No 1]* (2013) 252 CLR 530 at 579 [140], 581 [147], quoting *Australian Capital Television* (1992) 177 CLR 106 at 145-146.

**221** *Australian Capital Television* (1992) 177 CLR 106 at 143, 169; *McCloy* (2015) 257 CLR 178 at 214 [70], 239 [153]-[155]; *Clubb v Edwards* (2019) 267 CLR 171 at 232 [183]; Dixon, "Calibrated Proportionality" (2020) 48 *Federal Law Review* 92 at 103-105.

**222** *McCloy* (2015) 257 CLR 178 at 194-195 [2(B)(3)]; *Brown v Tasmania* (2017) 261 CLR 328 at 363-364 [104], 368-370 [123]-[131]; *LibertyWorks* (2021) 274 CLR 1 at 22-24 [45]-[48]; *Farmer* (2025) 99 ALJR 1408 at 1421 [39]; 425 ALR 116 at 128-129.

165 However, Victoria did not seek to justify the burden of the impugned provisions in their entirety. Instead, Victoria made a narrow concession, but with very significant consequences. Having acknowledged the unequal treatment of the major parties and other registered political parties due to the limited time that was available to invoke the principal benefit criterion in s 222F(3), Victoria submitted that this Court would be unable to conclude that the different treatment of registered political parties could be justified as "the product of a distinction which is appropriate and adapted to the attainment of a proper objective".[223] It follows that the aspects of the burden imposed on the implied freedom of political communication by the general cap, when read with ss 222F(2) and 222F(3), similarly could not be justified. Accordingly, Victoria accepted that the general cap in its operation with the time limitation in s 222F(3) is constitutionally invalid.

166 The effect of Victoria's concession is to recognise that the favourable treatment of the major parties, by the inclusion of s 222F(3), involves an unjustified burden on the implied freedom, as regulated by the general cap on political donations. It is not to the point that there is little evidence to suggest that the general cap has prevented candidates from raising sufficient funds to finance effective electoral campaigns.[224]

167 Without an identified legitimate purpose, it is not possible to engage in proportionality testing of the time limitation in s 222F(3) to assess whether it is reasonably appropriate and adapted to advancing that purpose, including by applying the structured proportionality tests of suitability, necessity and adequacy in balance.[225] Similarly, it is not possible to engage in proportionality testing of the other impugned provisions that have been acknowledged by Victoria as imposing an effective burden on the implied freedom.

## Relief

168 Victoria submitted that the time limitation in s 222F(3) could be severed from the balance of s 222F(3), with the result that any registered political party would be entitled to appoint a nominated entity that meets the s 222F(3) criteria. However, for the reasons given by the plurality, it is impossible to avoid the conclusion that s 222F was "intended to operate fully and completely according to

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**223** cf *Unions NSW [No 2]* (2019) 264 CLR 595 at 628 [84].

**224** Electoral Review Expert Panel, *Report on Victoria's laws on political finance and electronic assisted voting* (2023) at 167.

**225** cf *Unions NSW [No 2]* (2019) 264 CLR 595 at 628 [84].

its terms, or not at all", and that the same conclusion applies to the entirety of Pt 12.[226]

169 The terms of s 222F, comprising a package of two sets of criteria for appointment of a nominated entity, tell strongly against Victoria's proposal that this Court invalidate only the time limit in s 222F(3). This is because the result would be that the principal benefit criterion in s 222F(3) would apply to all nominated entities, while the control and sole benefit criteria in s 222F(2) would become redundant, as all nominated entities who might satisfy those criteria would in any event satisfy the principal benefit criterion in s 222F(3). Where there is a less strict set of criteria for a limited time and thereafter a stricter set of criteria, the legislative intention that the stricter criteria should endure is obvious.

170 The legislative history of the inclusion of s 222F(3) reinforces the intention reflected in the structure of s 222F. The Explanatory Memorandum for the 2018 Act, referring to s 222F(2), identifies the exclusion of gifts between a nominated entity and its registered political party from the definition of "gift", and states that the exception "acknowledges the existing arrangements between political parties and separate entities that manage financial commitments and maintain assets for the sole benefit of the registered political party".[227] Evidently, it was discovered that not all "existing arrangements", which involved the major parties and separate entities that maintained assets for them, satisfied the control and sole benefit criteria in s 222F(2). Consequently, the less exacting s 222F(3) was added to achieve the aim of "acknowledg[ing] the existing arrangements", that is, ensuring that the major parties would retain access to funds held by separate entities for them. Invalidating only the time limit in s 222F(3) would alter the operation of s 222F to extend its application to all registered political parties, in a manner that was never intended by the legislature.

171 Furthermore, there is no portion of Pt 12 that can be isolated as intended to operate without the protection of the "existing arrangements" of the major parties. This includes the enhanced public funding provided for by Pt 12, as amended by the 2018 Act. Victoria did not submit that preserving Pt 12 in its terms prior to the 2018 Act might have been an appropriate form of relief, and the plaintiffs did not seek such an order.

172 I agree with the answers to the questions raised in the special case, and therefore with the orders, proposed by the plurality.

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**226** *Knight* (2017) 261 CLR 306 at 325 [35]. See reasons of Gageler CJ, Gordon, Jagot and Beech-Jones JJ at [55].

**227** Victoria, Legislative Assembly, *Electoral Legislation Amendment Bill 2018*, Explanatory Memorandum at 18.