SUPREME COURT OF VICTORIA

COURT OF APPEAL

S EAPCI 2021 0125

DIANA ASMAR & ORS (according to the attached Schedule)	Applicants

v

The Honourable ANTHONY ALBANESE & ORS (according to the attached Schedule)	Respondents

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JUDGES:	T FORREST, WHELAN JJA and FORBES AJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	31 January 2022
DATE OF JUDGMENT:	25 February 2022
MEDIUM NEUTRAL CITATION:	[2022] VSCA 19
JUDGMENT APPEALED FROM:	[2021] VSC 672 (Ginnane J)

ASSOCIATIONS AND CLUBS – Political parties – Australian Labor Party – Intervention in Victorian branch by National Executive – Victorian branch 'registered political party' under *Commonwealth Electoral Act 1918* (Cth) and *Electoral Act 2002* (Vic) – Whether intervention valid – Whether Victorian branch subject to National Constitution – Appeal dismissed – *Hall v Job* (1952) 86 CLR 639, *Williams v Hursey* (1959) 103 CLR 30 applied – *Commonwealth Electoral Act 1918* (Cth) ss 130, 287, 287A, 288, 292F, 296–8.

ASSOCIATIONS AND CLUBS – Jurisdiction of the courts – Political parties – Australian Labor Party – Victorian branch rules create trusts – National Executive conducted pre-selection of electoral candidates for Victorian branch – Constituent documents expressly provide that provisions not legally enforceable – Whether disputes concerning pre-selection and administration of trusts justiciable – *Cameron v Hogan* (1934) 51 CLR 358, *Baldwin v Everingham* [1993] 1 Qd R 10, *Butler v Mulholland [No 2]* [2013] VSC 662 applied, *Setka v Carroll* (2019) 58 VR 657 distinguished – *Commonwealth Electoral Act 1918* (Cth) ss 166, 169B.

APPEARANCES:	Counsel	Solicitors
For the Applicants	Mr R Merkel QC with Mr E Nekvapil, Ms C Mintz and Ms K Brown	Robinson Gill
For the 1st to 9th, 11th and 14th to 24th Respondents	Mr P G Willis SC with Mr A D Lang, Mr J H Kirkwood and Mr G Jegatheesan	Holding Redlich
For the 10th, 12th and 13th Respondents	No appearance (written case filed adopting the written case of the 1st to 9th, 11th and 14th to 24th Respondents)	
For the 25th and 26th Respondents	No appearance	

T FORREST JA
WHELAN JA
FORBES AJA:

1 This proceeding concerns the pre-selection of Australian Labor Party candidates in Victorian electorates for the forthcoming federal election.

2 The Australian Labor Party is an unincorporated association. Its constituent document is called the 'ALP National Constitution' (the 'National Constitution'). There are related unincorporated associations in each state and territory. The association in Victoria is called the 'Australian Labor Party, Victorian Branch'. Its constituent document is called the 'Australian Labor Party Victorian Branch Rules' (the 'Branch Rules').

3 Normally, ALP[1] candidates for federal seats in Victoria would be pre-selected in accordance with a process set out in the Branch Rules. That did not happen in the pre-selections which are the subject of this proceeding. Instead, the candidates were pre-selected, or purportedly pre-selected, under a provision of the National Constitution.

4 The applicants contend that the pre-selections under the National Constitution were unauthorised and of no legal effect. They issued this proceeding seeking declarations to that effect and injunctions restraining their implementation.

5 At first instance, the applicants failed. All of their claims, except one, were held by the trial judge to be not justiciable; that is, they raised disputes which the courts will not adjudicate. One claim was held to be justiciable, but that claim failed because the judge held that the applicants' relevant contentions in relation to it were not made out. The trial judge found that, if the non-justiciable claims had been justiciable, they would also have failed.

6 The applicants now seek leave to appeal. The application was brought on

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[1] Names of the various Australian Labor Party political entities have potential significance in this proceeding but, where the name is not significant, we use the abbreviation 'ALP'.

urgently, given that there is to be a federal election sometime between now and the end of May. The application for leave was argued on the basis that, if leave were granted, the substantive appeal would be determined without further argument.

Brief factual background

7 Before the trial judge, there were factual disputes. The trial judge made findings in relation to them. Those findings are no longer in contest. Accordingly, the relevant factual background can be dealt with very briefly.

8 In June 2020, there were media reports of extensive 'branch stacking' within the Victorian ALP. The reports particularly focused upon the activities of two Victorian Ministers, Mr Adem Somyurek and Ms Marlene Kairouz.

9 On 16 June 2020, the Premier of Victoria and leader of the parliamentary ALP in Victoria, Mr Daniel Andrews, wrote to the National Executive, a body existing under the National Constitution, requesting what was described as 'National Executive oversight' of the Victorian Branch.

10 Under the National Constitution, a body named the National Conference is the supreme governing authority, and the National Executive is the chief administrative authority, subject to the National Conference. Under the Branch Rules, a body named the State Conference is the supreme governing body, and a committee named the Administrative Committee has the function (amongst other things) of carrying out State Conference decisions.

11 In response to the matters raised by the Victorian Premier, the National Executive passed a series of resolutions as follows:

(a) On 16 June 2020, it passed a resolution referred to as the 'Administration Resolution'. In that resolution, the National Executive resolved to exercise 'its powers under Rule 16(f)(ii) to appoint Steve Bracks and Jenny Macklin as administrators of the Victorian Branch'. It further resolved that all committees of the Victorian State Conference were suspended and that all officials and staff of the Victorian Branch were to report to the administrators. One of the

committees so suspended, or purportedly suspended, was the Administrative Committee. The resolution foreshadowed that the National Executive would exercise its powers to conduct pre-selections for the next federal and state elections.

(b) On 14 September 2020, it passed a resolution referred to as the 'Amendment Resolution'. This resolution was expressed to be 'further to' the resolution of 16 June 2020. Under this resolution, the Branch Rules were 'adapted' and temporary rules applicable during the period of administration were inserted into the Branch Rules.

(c) On 29 January 2021, it passed a resolution referred to as the 'Further Amendment Resolution' pursuant to which the Branch Rules were substantially amended by the adoption of 'Transitional Rules'. The amended Rules, amongst other things, provided for an 'Interim Governance Committee', and in r 26.6.2 provided that, for a period commencing on 1 February 2021, that committee would replace the administrators 'and perform all the functions of the Administrative Committee and the Party Officers'.

(d) On 4 May 2021, it passed a resolution referred to as the 'Pre-selection Resolution'. The National Executive noted the resolution of 16 June 2020 that had resolved, among other things, that 'it would exercise its powers under Rule 16(f)(iii) to conduct all Victorian pre-selections for the next federal election', and it resolved accordingly 'pursuant to Rule 16(f)(iii) (further or alternatively, pursuant to Rule 16(d))' that the pre-selection for 22 specified federal divisions would be conducted by the National Executive in accordance with a specified timetable.

12 The references to rr 16(d) and 16(f) are references to clauses in the National Constitution.

13 Clause 16(d) provides:

> Subject only to National Conference, the National Executive may exercise all powers of the Party on its behalf without limitation, including in relation to the state branches and other sections of the Party.

14 Clause 16(f) provides:

> Without limiting the plenary powers of the National Executive under clause 16(d), if in the opinion of the National Executive any state branch or section of the Party is acting or has acted in a manner contrary to the National Constitution, the national platform or a decision of National Conference, as interpreted by the National Executive, the National Executive may:
>
> (i) overrule the state branch or section;
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> (ii) intervene in the state branch or section, and take over and direct the conduct of its affairs; and
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> (iii) conduct any preselection that would otherwise have been decided by the state branch or section.

15 The factual disputes previously referred to, which the trial judge rejected and which are not persisted in, included contentions that the National Executive had not formed the opinion referred to in cl 16(f) or, if it did, that it had no proper basis.

16 Since 4 May 2021, the National Executive has pre-selected ALP candidates for the 22 federal seats, and has pre-selected additional ALP candidates for the forthcoming federal election. Should the applicants succeed in relation to the 22 pre-selections which are the subject of this proceeding, they seek leave to rely on additional evidence concerning the additional pre-selections for the purpose of determining the appropriate relief.

17 Given that there is no longer any factual dispute, the issues now are whether the National Executive had power to act as it did, and whether the applicants' contentions in that respect are justiciable.

The relevant proceedings, the relief sought, and the parties

18 The proceeding in which the applicants seek leave to appeal (the 'Asmar proceeding'[2]) went to trial on a generally indorsed writ and a document headed 'Plaintiffs' Concise Statement'.[3] It was heard by Ginnane J together with a related

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[2] S ECI 2021 01465.

[3] Application Book ('AB') E9–E13.

proceeding instituted by Ms Kairouz.[4] Ginnane J delivered judgment in the Asmar proceeding on 19 October 2021,[5] and delivered judgment in the Kairouz proceeding the same day.[6]

19 The only relief sought in the generally indorsed writ in the Asmar proceeding concerned the Pre-selection Resolution. One reason why that resolution was said to be invalid was because it was based upon the 'National Intervention' which was said to be wholly invalid, void and/or of no effect. The claim brought by Ms Kairouz sought relief in relation to the Administration Resolution, the Amendment Resolution, and the Further Amendment Resolution, but not the Pre-selection Resolution.

20 Both the identity and the description of the plaintiffs in the Asmar proceeding changed during the course of the proceeding. Most recently, five of the plaintiffs (the fourth, fifth, sixth, eleventh and twelfth plaintiffs) have sought to be removed as applicants. All parties have consented to their removal, save for the twenty-fifth and twenty-sixth respondents. The twenty-sixth respondent, Labor Services & Holdings Pty Ltd, advised it did not wish to participate in the application, reserving its position on costs. The twenty-fifth respondent also advised that he did not intend to participate in the application. An order removing the fourth, fifth, sixth, eleventh and twelfth applicants will be made.

21 Those plaintiffs who remain applicants for leave are as follows. The first applicant, Ms Asmar, is an individual described as a member of 'the Victorian Branch of the Australian Labor Party' and as a member of one of its affiliated unions. Ginnane J made an order appointing her as a representative on behalf of members of the Australian Labor Party, Victorian Branch and members of affiliated trade unions, other than the defendants. He did so to ensure that the proceeding was constituted in such a way that all relevant persons should be bound, recognising that the order

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4 S ECI 2021 00274.

5 *Asmar v Albanese [No 4]* [2021] VSC 672 ('Reasons').

6 *Kairouz v Bracks [No 2]* [2021] VSC 671.

did not mean that the first applicant represented the view or opinion on the relevant issues held by all members of the Victorian Branch.[7]

22 The second applicant is a member of the Administrative Committee. Ginnane J ordered that she represent all members of that committee other than the defendants.[8]

23 The other three individual applicants (the seventh, ninth and tenth) are each described as a 'member of the Party', as a member of a specified affiliated union, and as the representative of the members of that union. The last-named applicant (the thirteenth) is an affiliated union, the United Firefighters Union of Australia.

24 The respondents are the members of the National Executive, trustees referred to in r 21 of the Branch Rules, and the members of the Interim Governance Committee.

25 As indicated, the generally indorsed writ in the Asmar proceeding sought relief only in relation to the Pre-selection Resolution, whereas the relief sought in the Kairouz proceeding concerned the Administration Resolution, the Amendment Resolution, and the Further Amendment Resolution. The matters relied upon in the two proceedings significantly overlapped and, whilst the relief sought in the Asmar proceeding only concerned the Pre-selection Resolution, in that context the plaintiffs in the Asmar proceeding also contended that the other resolutions were invalid.

26 Ms Kairouz's claims all failed and no appeal has been brought from that determination.

27 The application for leave to appeal confirms that the relief sought in this proceeding is still only relief concerning the Pre-selection Resolution. The dismissal of the Kairouz proceeding and of the claims based on factual issues determined against the plaintiffs in the Asmar proceeding means that the only basis upon which

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7 Reasons [356]–[364], [366].

8 Ibid [365]–[366].

it is now said that the Pre-selection Resolution is invalid is because the National Executive had no power to make it. The reasons why that is contended to be so include the contention that the other resolutions are also invalid.

Issues determined by the trial judge that remain relevant

28 The Reasons of the trial judge are extensive. They address a number of issues which are no longer relevant.

29 After introducing and describing the nature of the relevant disputes, the trial judge set out the factual background concerning the 'branch stacking' allegations and the resolutions of the National Executive which were passed in response to them.[9]

30 The trial judge then turned to the issue of justiciability. The issue arises here principally by reason of the High Court decision in 1934 in *Cameron v Hogan*.[10]

31 *Cameron v Hogan* concerned the ALP's refusal to approve, endorse or submit to ballot the nomination of Mr Edmund Hogan, who was the Premier of Victoria at the time, as its candidate at a State election and its resolution to exclude him from the party. Mr Hogan commenced proceedings in the Victorian Supreme Court alleging that the refusal of his nomination for pre-selection and his expulsion was wrongful. At first instance, it was held that the ALP's actions were in breach of contract. He recovered only nominal damages. On appeal, however, the High Court held that Mr Hogan's claims were not justiciable, that is, his claim for relief was not appropriate or capable of being settled or decided by a court of law.

32 The trial judge addressed the High Court decision in *Cameron v Hogan*, observing that the decision was binding on him, and quoting several passages from the judgment of the plurality constituted by Rich, Dixon, Evatt and McTiernan JJ,

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9 Reasons [24]–[44].

10 (1934) 51 CLR 358; [1934] HCA 24.

and a passage from the judgment of Starke J.[11] The principle drawn from the decision was said to be that the courts do not become involved in the internal disputes of voluntary associations, including political parties.

33 The trial judge said that the High Court had described an exception to the principle which they had applied in rejecting Mr Hogan's claim, which the judge referred to as 'the proprietary interest exception'. In this respect, the trial judge set out the provisions of r 21 of the Branch Rules pursuant to which property was said to be held on various trusts. The trial judge said that the plaintiffs contended that the relevant resolutions had unlawfully interfered with the administration of the trusts. The plaintiffs relied upon a decision in *Rendall-Short v Grier*[12] as illustrating the operation of this exception.[13]

34 Ginnane J set out the various contentions of the parties concerning the trusts and the effect of the impugned resolutions upon them.[14] The judge relevantly concluded as follows:

> I accept that the plaintiffs who are members of the ALP have the right and standing to bring proceedings claiming that the National Executive's Administration Resolution and the actions taken under it unlawfully interfered with the administration of the trusts on which the Victorian Branch property is held. I accept that such a claim is justiciable and that they have standing to bring it. They are beneficiaries of the trusts, or are to be treated as beneficiaries to the extent that the trusts are non-charitable objects trusts. As such, they have an interest in the trusts sufficient to sue for their due administration.[15]

35 Whilst the trial judge held that the claims based upon unlawful interference with the administration of the trusts were justiciable, he held that the plaintiffs had failed to establish that there had been unlawful interference with the administration of the trusts.[16] He reached this conclusion for two reasons.

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11 Reasons [46]–[49].

12 [1980] Qd R 100.

13 Reasons [51]–[69].

14 Reasons [65]–[75].

15 Reasons [83] (citations omitted).

16 Reasons [87]–[92].

36 First, the judge held that the 'main effect' of the Administration Resolution was that the powers normally exercised by the Administrative Committee or the Victorian Branch officers were to be exercised by the administrators, with the trustees under r 21 reporting to them rather than to the Administrative Committee. The judge observed that, in his view, this was similar to the case of an administrator being appointed to a business or other entity. He concluded that he did not consider that any of the effects of the Administration Resolution unlawfully interfered with the administration of the trusts. The judge said that there was no allegation of any misapplication or misuse of trust funds and that the complaint was entirely based upon the suspension of the state committees.

37 The second reason why the trusts claims failed was because those claims depended on a conclusion that what was done was a contravention of the Branch Rules. The judge foreshadowed that he was to reject that contention later in his judgment, holding that the Branch Rules were to be read as allowing for and acknowledging the powers contained in the National Constitution, and as therefore incorporating and allowing for the exercise of power by the National Executive.

38 Before us, senior counsel for the applicants began his oral submissions by saying that there were two 'pathways' which, if either was successful, should result in leave being granted and the appeal being allowed. The first 'pathway' was the claim of unlawful interference with the trusts provided for by r 21 of the Branch Rules. It was contended that there were three steps in this 'pathway'. First, the Administration Resolution, the Further Amendment Resolution, and the Pre-selection Resolution were not authorised by the Branch Rules. Second, the resolutions purported to transfer control from internal management to external management. Third, the resolutions amounted to 'external usurpation' which constituted unlawful interference with the administration of the trusts. Thus, as the matter was put to us by the applicants, when considering the application of the trust exception, the first step is a consideration of whether the judge was correct in his second reason for rejecting the trust claims, namely, that the National Executive

resolutions were authorised under the applicable constituent documents.

39 The judge dealt with other contentions put by the applicants at trial as to why their claims were justiciable which were not emphasised in the submissions before us. These contentions concerned an assertion that the applicants had contractual claims, an assertion strikingly inconsistent with provisions of both the Branch Rules and the National Constitution as will be seen, and a contention that *Cameron v Hogan* was to be distinguished insofar as the applicants made claims as affiliated unions.[17] Neither of these matters was the subject of significant reliance before us.

40 The judge then addressed what was contended before us to be the second 'pathway' whereby the applicants' appeal ought to succeed. This 'pathway' was principally founded upon the provisions of the *Commonwealth Electoral Act 1918* (Cth) (the 'Commonwealth Electoral Act') and, to a lesser extent, the *Electoral Act 2002* (Vic) (the 'Victorian Electoral Act').

41 The judge began his analysis of this issue by referring to the plaintiffs' reliance on *Baldwin v Everingham*,[18] a judgment in which Dowsett J relied upon the effect of amendments to the Commonwealth Electoral Act to distinguish *Cameron v Hogan*.

42 The trial judge set out provisions of the Commonwealth Electoral Act relied upon before him. In substance, what was submitted was that the trial judge ought to follow *Baldwin v Everingham* in distinguishing *Cameron v Hogan* on the basis that the Electoral Acts had created a position where political parties were no longer organisations of a 'strictly personal nature', but were organisations having a constitutional role in the electoral system.[19]

43 The trial judge addressed in detail[20] the decision in *Baldwin v Everingham* and

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17 Reasons [93]–[120].

18 [1993] 1 Qd R 10.

19 Reasons [121]–[137].

20 Reasons [138]–[151].

subsequent relevant decisions, including *Scandrett v Dowling*,[21] *Coleman v Liberal Party of Australia, New South Wales Division [No 2]*,[22] *Barker v Australian Labor Party*,[23] *Butler v Mulholland [No 2]*[24] and *Setka v Carroll*.[25]

44 The judge analysed the submissions made and the authorities referred to.[26] He preferred the reasoning of Riordan J in *Setka v Carroll* to that of Dowsett J in *Baldwin v Everingham*. Whilst he did not accept that the Electoral Acts constituted a proper basis for distinguishing *Cameron v Hogan*, he did adopt Robson J's conclusion in *Butler v Mulholland [No 2]*. In that regard, the trial judge said that, where a dispute existed as to the identity of a political party's 'authorised agent', a court is likely to decide the issue by making an appropriate declaration to enable the Electoral Acts to operate in respect of that party. The judge held that the court's intervention would only be warranted in what was an otherwise internal dispute in a political party where the issues sought to be determined had a 'direct bearing' on the proper application and operation of the Electoral Acts.

45 A further ground for distinguishing *Cameron v Hogan* put to the trial judge was developments in the law concerning the availability of declaratory relief.[27] The trial judge rejected a submission that that constituted a proper basis for distinguishing *Cameron v Hogan*.[28]

46 In relation to the issue of justiciability, the trial judge's relevant conclusion was as follows:

> I conclude that, although the plaintiffs' trust claims are justiciable, they do not succeed because neither the Administration Resolution nor the actions of the Administrators taken under that Resolution unlawfully interfered with the

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21 (1992) 27 NSWLR 483.

22 (2007) 212 FLR 271; [2007] NSWSC 736.

23 [2018] VSC 596.

24 [2013] VSC 662.

25 (2019) 58 VR 657; [2019] VSC 571.

26 Reasons [156]–[166].

27 Reasons [167]–[170].

28 Reasons [175].

> administration of the trusts. None of the plaintiffs' other grounds for establishing the justiciability of their claims by bringing them within exceptions to the principle in *Cameron v Hogan*, or seeking to distinguish it from the facts of this case, succeed. The conclusion that the trust claim is justiciable does not make the plaintiffs' other claims justiciable, as those other claims are not sufficiently connected with the trusts claims.[29]

47 The trial judge's conclusions that the claims other than the trust claims were not justiciable, and that the trust claims were not made out, meant that the plaintiffs' claims failed. He nevertheless then addressed the plaintiffs' non-trust claims in case he should be found to have been in error on the issue of justiciability.

48 The trial judge said that, before addressing the specific claims, it was necessary for him to consider issues raised about the structure of the ALP, the relationship between the National Constitution and the Branch Rules, and the issue of whether the national body and the state branch are separate entities.[30]

49 The judge said that the plaintiffs contended that the Victorian Branch was autonomous and self-governing and, although affiliated with the 'Federal ALP', was separate and independent from it. The defendants contended that the Victorian Branch was a 'constituent unit' of the Australian Labor Party and was subject to the provisions of the National Constitution.[31]

50 The trial judge set out a number of provisions of the National Constitution and the Branch Rules, summarised the parties' submissions, and addressed a decision of the Full Court of the Supreme Court of Queensland in *Burton v Murphy*[32] where a similar issue had been raised.[33]

51 *Burton v Murphy* concerned the Queensland ALP and 'national intervention' in that state. The relevant rules at that time were different, in form at least, to those before us; and in that case evidence had been led as to the manner in which the

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29 Reasons [176].

30 Reasons [182].

31 Reasons [184]–[185].

32 [1983] 2 Qd R 321.

33 Reasons [187]–[225].

national body and the state body had in fact conducted their affairs. At least one of the judges (WB Campbell J) considered that evidence to be significant. The Full Court of the Supreme Court of Queensland concluded that the Federal rules were binding on the Queensland branch and that the National Executive had been acting within its powers in the intervention.

52 The judge referred to similar conclusions as to the structure of the ALP reached by Pagone J in *Jackson v Bitar*[34] and by Riordan J in *Setka v Carroll*.[35]

53 The judge concluded that the reasoning in *Burton v Murphy* was applicable to the relationship between the National Executive and the Victorian Branch.[36] The judge said:

> In my opinion, the Victorian Branch of the ALP is not a separate, autonomous and self-governing organisation or a separate political party. Nor is there a state party and a national party. Rather, the Victorian Branch is part of the national body, a branch of a larger association.[37]

54 The judge considered it to be significant that the word 'branch' was used in the name 'Australian Labor Party, Victorian Branch'.[38] In that respect, he referred to and relied upon the High Court decisions in *Williams v Hursey*[39] and in *Hall v Job*.[40]

55 The judge said that a person 'who is or becomes a member of the Victorian body also becomes part of the national body',[41] that '[m]embers of state and territory branches are members of the ALP', that the National Conference is the 'supreme governing authority' whose decisions are binding on every member and section of the party, and that the National Constitution is also binding on all sections and

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34 [2011] VSC 11.

35 Reasons [226]–[227].

36 Reasons [228].

37 Reasons [230].

38 Reasons [231]–[233].

39 (1959) 103 CLR 30; [1959] HCA 51.

40 (1952) 86 CLR 639; [1952] HCA 57.

41 Reasons [231].

members of the party.[42]

56 The judge rejected the argument that the fact that the Victorian Branch was separately registered as a political party under the Commonwealth Electoral Act meant that the Victorian Branch was a separate entity. The judge referred to s 130 of the Commonwealth Electoral Act which, he said, expressly envisaged that a political party may be registered under the Act notwithstanding that a political party related to it has been registered.[43]

57 The judge concluded his analysis of the structure of the ALP and the relationship between the national and state bodies as follows:

> For those reasons, I conclude that the Victorian Branch of the ALP is not a separate political party nor is it a separate legal entity. It is a branch of a national organisation. As a result, the Victorian Branch Rules are to be read with, and in many instances are subject to the provisions of the National Constitution, including cls 16(d) and 16(f). This conclusion is of general significance in the determination of this proceeding especially in deciding the scope of the National Executive's powers contained in cls 16(d) and (f).[44]

58 Leaving to one side the issue of justiciability, this conclusion is the critical one in relation to the applicants' claims as they were advanced before us.

59 Rejection of this conclusion is said to be the 'first step' on the trust 'pathway' to success in the application and appeal.

60 The other 'pathway' to success in the appeal relies on the Electoral Acts, both as the basis for distinguishing *Cameron v Hogan*, and as a basis for concluding that the entities are separate, although related, political parties. This 'pathway' also relies upon a rejection of the conclusion that the relevant resolutions were authorised upon a proper construction of the Branch Rules and the National Constitution.

61 As indicated, before the trial judge, there were substantial factual issues raised upon the basis of which it was alleged that the relevant resolutions were invalid. The

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[42] Reasons [234].

[43] Reasons [236].

[44] Reasons [237].

trial judge dealt with those contentions at length.[45] Those matters are no longer relied upon.

62 The applicants had also contended that, even if the National Constitution applied, the actions taken were not authorised by the provisions of the National Constitution.

63 In the course of addressing the factual contentions advanced in support of the proposition that the resolutions were invalid, the trial judge rejected two matters relied upon by the plaintiffs, which were also relied upon before us, which assumed that the National Constitution applied. The first was that an expression used in cl 16(d) of the National Constitution, 'powers of the Party', was restricted to powers of the 'Federal Party'. The judge found that the expression extended to all of the party's powers.[46] The second was a contention, similar to one accepted by Riordan J in *Setka v Carroll*, that the power to conduct pre-selections under cl 16(f)(iii) was a power which had to be exercised in accordance with the Branch Rules governing pre-selection. The judge also rejected that contention.[47]

64 Finally, the judge addressed discretionary grounds relied upon by the defendants in support of a submission that the plaintiffs ought to be denied relief even if they established their claims. The defendants particularly relied upon delay. The trial judge rejected that on the basis that the plaintiffs did not know until 4 May 2021 of the manner in which pre-selection by the National Executive would be conducted. The judge observed that 'it was the Preselection Resolution that precipitated' the proceeding. He said it was that resolution which the plaintiffs considered 'particularly affected their interests and justified the commencement of this proceeding'.[48]

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45 Reasons [238]–[350].

46 Reasons [269].

47 Reasons [348]–[349].

48 Reasons [353].

Proposed grounds of appeal and relief sought

65 The proposed grounds of appeal are as follows:

1. The primary judge erred in failing to find that:

   a. the National Executive's Administration Resolution (J [39]), Further Amendment Resolution (J [43]) and Pre-selection Resolution (J [44]), [318]), and the conduct giving effect to those resolutions:

      i. constituted an unlawful interference with the due administration of the trusts established under r 21 of the Rules of the Victorian ALP (the **Victorian Rules**);

      ii. was not authorised by, and had no legal operation or effect under, the Victorian Rules or the National Constitution of the Federal ALP (but, in particular, cll 16(d) and 16(f)(iii) of that constitution);

   b. the passing of and giving effect to the Pre-selection Resolution had no legal effect as a decision or conduct of the Victorian ALP for the purposes of the *Commonwealth Electoral Act 1918* (Cth) (**Cth Act**);

   c. the applicants were entitled to the declaratory and injunctive relief they sought in respect of the Pre-selection Resolution.

2. The primary judge erred in finding that:

   a. the Victorian ALP is not a separate entity to the Federal ALP, for the purposes of the construction of the Victorian Rules; and

   b. as a consequence the powers exercised by the National Executive of the Federal ALP under cll 16(d) and 16(f)(iii) of the National Constitution in passing, and giving effect to, the resolutions referred to in Ground 1 overrode any provisions in the Victorian Rules that would otherwise be applicable.

3. The primary judge erred in failing to find that the applicants' claims in respect of the declaratory and injunctive relief they sought constituted a justiciable controversy being a matter that involved the exercise of federal jurisdiction by reason of those claims arising under, or being sufficiently connected with, the Cth Act.

4. The primary judge erred in failing to distinguish the present case from *Cameron v Hogan* and *Burton v Murphy*.

66 As was the position on the generally indorsed writ, the application for leave to appeal seeks declarations declaring void only the Pre-selection Resolution (and other resolutions made since 4 May 2021 having the same effect as that resolution).

The declaration sought declaring the Pre-selection Resolution invalid, void and of no effect includes the assertion that it is invalid because it was based upon the Administration Resolution and the Further Amendment Resolution which are themselves invalid, void and of no effect.

The key issue — Is the Victorian Branch subject to the National Constitution?

67 Whilst the applicants do make submissions as to the proper construction of the provisions of the National Constitution upon which the National Executive relied, the more fundamental contention upon which they rely, and the critical issue in the determination of this application and appeal, is whether the judge was correct in his conclusion that the Victorian Branch is not a separate, autonomous and self-governing organisation, or a separate political party; that members of state and territory branches are members of the Australian Labor Party; and that the National Constitution is binding on all sections and members of the party.

68 The applicants contend that this conclusion is erroneous for two reasons. First, it is submitted that the Branch Rules are complete and prescriptive. The 'Federal ALP' has no power to displace them. The power to intervene must be found in the Branch Rules considered discretely, without reference to the National Constitution, and no such power exists. Second, it is submitted that the Commonwealth Electoral Act and the Victorian Electoral Act recognise the separate and distinct roles and legal personalities of the 'Federal ALP' and the 'Victorian ALP'.

69 Both in principle, and as a matter of logic, one would ordinarily address the justiciability question first, as the judge did. This might be thought to be particularly so in this case because each of the constituent documents, the National Constitution in cl 2 and the Branch Rules in r 23, adopt the principle of non-justiciability in terms reflecting the decision in *Cameron v Hogan*. Each of these organisations have clearly expressed their desire not to create legal relationships based upon the National Constitution and the Branch Rules, and not to have disputes as to those constituent documents determined by the courts. However, notwithstanding these provisions,

the judge found that certain aspects of these disputes are justiciable. The trial judge accepted that the complaint as to interference with the administration of the trusts provided for in the Branch Rules was justiciable and, as will be seen, in our opinion, he was correct to do so. Further, he held, citing Robson J's judgment in *Butler v Mulholland [No 2]*, that an issue having a direct bearing on the proper application and operation of the Electoral Acts was justiciable. Again, in our view, he was correct to do so. Thus, for reasons we set out below, some aspects of the applicants' claims are justiciable. The justiciability issue, and its application to these disputes, is a potentially complex and controversial one. But, if the judge is correct in his construction of the Branch Rules and the National Constitution, the applicants must fail regardless of how this potentially complex and controversial issue is determined. As we consider that the judge was correct on that issue, in the unusual circumstances of this proceeding, we consider it best to address the issue of construction of the Branch Rules and the National Constitution first.

70 Before addressing the submissions made on this issue, it is necessary to set out the relevant provisions of the Branch Rules, the National Constitution, and the Electoral Acts, particularly the Commonwealth Electoral Act.

The Branch Rules

71 The Branch Rules, as they were prior to the resolutions complained of, begin by specifying the relevant name. Rule 1 provides as follows:

> 1. **NAME**
>
> 1.1. The Australian Labor Party, Victorian Branch.

72 Rule 2 is headed 'PLATFORM'. This rule has provisions as to 'Origins' (r 2.1), 'Objectives' (r 2.2), 'Principles of Action' (r 2.3), 'Membership and Organisation' (r 2.4) and 'Membership Pledge' (r 2.5). All of these rules refer to the origins, objectives, principles of actions, membership and organisation, and membership pledge of the 'Australian Labor Party'. The references to the 'Australian Labor Party' in these provisions are clearly not references to the Victorian Branch, or any discrete

branch, of that party. This is clear from the context but is perhaps most obviously demonstrated in r 2.4.1 which provides that membership of the Australian Labor Party is open to 'all residents of Australia', in r 2.4.2 which provides that Australian Labor Party policy is made by the 'National Conferences', and in r 2.4.3 which separately addresses party policy 'within the State and Territories'. The membership pledge in r 2.5, which is required of '[m]embers of the Australian Labor Party', is a pledge to faithfully uphold that entity's 'Constitution, Rules and Platforms'. The reference in the membership pledge to the Constitution must, in our view, be a reference to the National Constitution. No alternative construction was postulated.

73 As will be seen, the provisions as to 'Origins', 'Objectives', 'Principles of Action' and 'Membership and Organisation' substantially replicate equivalent provisions in the National Constitution.

74 Rule 2 concludes with a 'Values Statement' in r 2.6 which, by way of contrast to the earlier provisions, does appear to be specifically referrable to 'Victorian Labor'.

75 Rule 3 addresses affirmative action. Its particular provisions are not significant in the current context, save for r 3.6.1 which expressly provides that the National Executive has the responsibility and power to 'enforce' the affirmative action provisions 'generally and specifically to determine the outcome in any Public Office preselection in order to ensure that this Rule is complied with'. The existence of an express power to intervene in this particular context is relied upon by the applicants to support the contention that there is no general power to intervene.

76 Rule 4 is a definition provision. There is a definition of 'Member' as being a 'Central Branch member or/and a Local Branch Member'. 'Party' is defined to mean 'the Australian Labor Party, Victorian Branch'.

77 Rule 5 is headed 'COMPOSITION OF PARTY'. Rule 5.1.1 provides that the party shall consist of affiliated trade unions and individual members. Rule 5.3.1 provides that individual membership shall be open to any person of 14 years of age or over. Rule 5.5.1 provides that a person may become a local branch member by

joining a local branch in the federal electorate in which he/she lives. Rule 5.6.1 provides for membership application forms. Under r 5.6.10, the Administrative Committee has a discretion whether to accept or reject each application for membership. Provision is made for renewal of membership and for resignation in rr 5.10 and 5.13 respectively. Rule 5.14.1 provides that, if a member breaches the membership pledge as listed on the membership application or renewal form by nominating against an endorsed Labor candidate, membership is to be forfeited. Rule 5 also contains provisions which appear to be directed at the prevention of 'branch stacking'.

78 In the course of the hearing before us, an issue arose as to the terms of the requisite membership application and renewal forms, and of the pledge each applicant for membership or renewal must make. A renewal form tendered in the trial[49] was identified as containing the relevant terms. That form contains the membership pledge as set out in r 2.5 (uphold the 'Constitution') and as referred to in r 5.14.1 (expulsion for breach by nominating against an endorsed candidate).

79 Rule 6 provides for an annual State Conference, and for special State Conferences convened by the Administrative Committee. The powers of the State Conference are set out in r 6.2. Rule 6.2.1 provides that the State Conference is the 'supreme policy-making and governing body of the Party'. Rule 6.2.2 designates specific powers including:

> Subject to National Rules, to make and interpret Platform and Policy and to amend and interpret the Rules of the Party …

Rule 6.2.2.3 gives State Conference the power to receive and consider reports from various officers and committees and from the 'National delegates'.

80 Rule 6.4 governs the conduct of business at State Conferences. Rule 6.4.6 contains detailed provisions for amendment of the Rules. Rule 6.4.7 provides that no change may be made to the platform or policy of the party and 'no recommendations

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[49] We were told the form had been tendered in the Kairouz proceeding. The trial judge ordered that the Kairouz proceeding and the Asmar proceeding be heard together and that evidence in one be evidence in the other: Reasons [18].

shall be made to National Conference or Executive' unless certain specified notices are given, among other things. Rule 6.4.8 also refers to State Conference's capacity to 'make recommendations to National Conference or Executive'. Rule 6.4.10 provides:

> No motion which is inconsistent with National Platform or Policy shall be presented to Conference in the form 'That it be the Platform/Policy of the Victorian Branch that …' Any such motion shall be in the form 'That State Conference recommends to the Federal Conference/Executive that …'

81 Rule 7.2 governs the election of party officers by the State Conference. There are three party 'Officers', a President and two Vice-Presidents. Rule 7.3 governs the election of delegates and proxy delegates to the 'National Conference'.

82 Rule 8 provides for committees of State Conference, including the Administrative Committee. The Administrative Committee has wide powers, including the power to carry out the decisions of State Conference and, between Conferences, to resolve disagreements 'concerning the Platform and Policy of the Party'. Provision is made in r 8.4 for a Public Office Selection Committee.

83 Rule 18 governs selection for public office. The procedure set out involves the Administrative Committee and the Public Office Selection Committee. No role for any national body is provided for.

84 Rule 19 governs party elections including elections for committees of State Conference and for 'Federal Executive and National Conference delegates'.

85 Rule 20 provides for the establishment by the Administrative Committee of a Disputes Tribunal. Rule 20.5 sets out disciplinary offences. The disciplinary offences include a failure to comply with 'the National Constitution' in r 20.5.1.3.2 and a failure to comply with 'the National Platform or Policy' in r 20.5.1.3.4. Rule 20.12.2 provides that decisions of the Disputes Tribunal are final 'subject only to the National Rules'.

86 Rule 21 is headed 'FINANCE, PROPERTY, TRUSTEES AND AUDITORS'.

87 Rule 21.1.1 relevantly provides that all property of the Party shall be vested in

three trustees, being the 'Officers of the Party for the time being'. The rule provides that all funds shall be applied 'to the management and conduct of the Party and furtherance of its aims and objectives'.

88 Rule 21.1.2 provides that all property of any 'Branch, Conference or Assembly' shall vest in the same trustees who shall 'hold such property on behalf of and for the purposes of the members of such Branch, Conference or Assembly'. Again, the income and property is to be applied solely towards the promotion of the objects of the Party.

89 Provision is made by r 21.2 for a trust fund called the 'Capital Investment Fund'. The trustees are the same as in r 21.1. The purposes of the fund are specified, one of them being 'making a loan to the Federal Branch or another State Branch of the ALP'.

90 Rule 21.3 provides for a further trust named the 'Labor Services & Holdings Trust'. This trust has a corporate trustee and a trust deed.

91 Rule 23 is headed 'RULES NOT ENFORCEABLE IN LAW' and is in the following terms:

> 23.1. It is intended that these Rules and everything done in connection with them, all arrangements relating to them (whether express or implied) and any agreement or business entered into or payment made by or under them, will not bring about any legal relationship, rights, duties or outcome of any kind, or be enforceable by law, or be the subject of legal proceedings. Instead all arrangements, agreements and business are only binding in honour.
>
> 23.2. Without limiting Rule 23.1, it is further expressly intended that all disputes within the Party, or between one member and another that relate to the Party be resolved in accordance with these Rules and the National Constitution and not through legal proceedings.
>
> 23.3. By joining the Party and remaining members, all members of the Party consent to be bound by Rule 23.

92 Rule 24 is headed 'REVOCATION OF MEMBERSHIP'. The rule states that the National Executive resolved on 29 April 2011 that a specified rule 'is added with immediate effect at the end of the rules of each State and Territory Branch'. The

specified rule is then set out. It addresses the position where membership is revoked because of a conviction. The final paragraph of this rule relevantly reads:

> Rule 24 will be repealed in its entirety once the National Executive has approved the inclusion of paragraph 1 into Rules 4.18 and Rules 8.1.2, pursuant to paragraph 3.

The provisions of rr 4.18 and 8.1.2 indicate that that was done.

The National Constitution

93 Clause 1 of the National Constitution is a definition provision.

94 'ALP', 'Labor', and 'Party' are all said to mean the party named in cl 10, which provides that the name of the party shall be 'The Australian Labor Party'.

95 The expression 'member' is defined as including 'Victorian Central Branch members'. The expression 'financial' in relation to membership is defined as including life members and other members deemed to be financial 'under state branch rules'.

96 Clause 2 is headed 'Legal Status of National Constitution'. It provides as follows:

> (a) It is intended that the National Constitution and everything done in connection with it, all arrangements relating to it (whether express or implied) and any agreement or business entered into or payment made or under the National Constitution, will not bring about any legal relationship, rights, duties or outcome of any kind, or be enforceable by law, or be the subject of legal proceedings. Instead all such arrangements, agreements and business are only binding in honour.
>
> (b) Without limiting clause 2(a), it is further expressly intended that all disputes within the Party, or between one member and another that relate to the Party be resolved in accordance with the National Constitution and the rules of the state branches and not through legal proceedings.
>
> (c) By joining the Party and remaining members, all members of the Party consent to be bound by this clause.

97 As indicated previously, the National Constitution sets out 'Origins', 'Objectives', 'Principles of action' and 'Membership and organisation' (cls 3–9) in

substantially the same terms as those set out in the Branch Rules.

98 Clause 13 provides that the Party shall consist of 'branches in each state'.

99 Clause 14 deals with the structure of the Party organisation. The 'supreme governing authority' of the Party is the National Conference. The National Executive is the 'chief administrative authority of the Party, subject only to the National Conference'.

100 Clause 15 deals with the National Conference. Amongst other things, it provides that all 'members of the state branch shall be eligible to be elected as delegates from that state'.

101 Clause 16 provides for the powers of the National Executive. The powers which are relevant for the purpose of this proceeding are to be found in cl 16(d) and (f).[50] The relevant resolutions themselves expressly relied upon cl 16(f), and in one case on cl 16(d) in the alternative.

102 Clause 18 provides for the election of the National President and two National Vice-Presidents. It provides that '[a]ll financial Party members at the time nominations close are eligible to vote'.

103 Clause 19 deals with affirmative action. Clause 20 establishes the National Labor Women's Network. It provides that '[e]very woman member of the Party is automatically a member of the National Labor Women's Network'.

104 Clause 22 deals with finance. It requires 'each state branch' to pay a yearly sum to the National Executive.

105 Clause 23 is headed 'Policy'. It provides:

> Policy at the national and state level shall be determined by the national and state conferences respectively. Such decisions shall be binding on every member and every section of the Party, or of the relevant state branch.

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50 See [13]–[14] above.

106 Clause 27 deals with the election of the leader of the Federal Parliamentary Labor Party. The leader must be elected by 'a ballot of eligible Party members', and a ballot of the members of the Federal Parliamentary Labor Party. The clause defines 'eligible Party member' as 'a financial Party member at the time nominations open who has not subsequently resigned or been expelled'.

107 Clause 30 deals with the National Appeals Tribunal. One of the matters the tribunal is responsible for is hearing appeals by members, affiliated unions and constituent units of the party that relate to 'compliance with the National Constitution' or 'enforcement of the rights and objections of members, affiliated unions and constituent units under the National Constitution'.

108 Part D of the National Constitution is headed 'NATIONAL PRINCIPLES OF ORGANISATION'. Clause 31 provides that these principles are 'intended to be binding specifically on state branches and implemented through their rules'.

109 Clause 34(a) provides for membership in the following terms:

> Membership of the ALP is open to all residents of Australia who are prepared to accept its objectives and who have associations with no other political party or proscribed organisation. This right to join shall not be impaired other than in circumstances in which it can be demonstrated clearly that an individual cannot meet the requirement outlined above.

110 Clause 35 deals with recruitment and contains provisions which appear to be directed at the issue of 'branch stacking'. It contains a number of provisions about steps that 'must' be taken by state branches.

111 Clause 40 deals with pre-selections, but it does so in limited terms. It provides that any member who meets the membership eligibility requirements shall be entitled to participate.

112 Clause 46 provides that all state branch rules must be revised in accordance with the National Principles of Organisation. Clause 47 provides as follows:

> Pursuant to clause 16(d), the National Executive is empowered to amend the rules of any state branch as required to implement the National Principles of Organisation.

Commonwealth Electoral Act

113 The Commonwealth Electoral Act provides for the registration of political parties and for their public funding.

114 The trial judge referred to the legislation that amended the Commonwealth Electoral Act in 1983,[51] introducing the registration of political parties and their public funding, the recognition and identification of candidates' political affiliations, and the disclosure of expenditure and donations for political parties and candidates.[52] The new legislation created the role of the 'registered officer' of a political party. That role, in effect, was to communicate relevant decisions of the registered political party to the Electoral Commission.

115 Section 4 defines a 'political entity' as a registered political party and, amongst other things, 'a State branch (within the meaning of Part XX) of a registered political party'. The expression 'political party' is defined as an organisation the object or activity of which is the promotion of election to the Senate or the House of Representatives of a candidate or candidates endorsed by it.

116 The registration of political parties is provided for by pt XI (ss 123–141).

117 Section 123(1) defines an 'eligible political party' as (in addition to another requirement) a political party that is 'established on the basis of a written constitution (however described) that sets out the aims of the party'.

118 Section 125 provides that the Electoral Commissioner must establish and maintain a register of political parties.

119 Section 126 provides for applications for registration. An application can be made by the 'secretary of the party', by a member of parliament or by 10 members of the party. Section 126(2) requires the application to be in writing and to be signed by the applicant and by 'the person who is to be the registered officer of the party'. The

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51 *Commonwealth Electoral Legislation Amendment Act 1983* (Cth).

52 Reasons [125].

application must have the name of the party, the name and address of the person who is to be the registered officer of the party, and a statement as to whether the party wishes to receive money under div 3 of pt XX. The application is to be accompanied by a 'copy of the constitution of the party'.

120 The constitution of a registered political party is referred to in the definition of 'eligible political party' in s 123(1) and is referred to in s 126(2). No further reference to the constitution of the political party is made in the Commonwealth Electoral Act.

121 The position of 'registered officer of the party', who must be named in and sign the application for registration, is an important one under the Act. Section 126(2B) provides that a person must not, at a particular time, be the registered officer of more than one registered political party.

122 Section 130 of the Act is headed 'Different levels of party may be registered'. It provides:

> The Electoral Commission may register an eligible political party notwithstanding that a political party that is related to it has been registered.

123 The process of registration is governed by ss 132 and 133. The required particulars are entered in the register. Changes to the register are provided for by s 134. The name of the registered officer is one of the particulars which must be registered and which can be changed. Applications to change the register, including changing the registered officer, can be made by the secretary of the party, all members of the Commonwealth Parliament who are members of the party or, in the case of a political party other than a parliamentary party, three members of the party. The Electoral Commission is empowered to determine whether the requested change should be made. If the requested change is to alter the name of the registered officer, then the existing registered officer must be given notice and provision is made for the existing registered officer to submit reasons as to why the change should not be made.

124 Section 136 provides that a registered political party is liable to deregistration

if it has been registered for more than four years and during that time has not endorsed a candidate for any election, or if a period of four years has elapsed since the polling day in the last election for which the party endorsed a candidate.

125 Section 141 makes provision for review of decisions made by the Electoral Commission including review of decisions as to registration of a political party and applications for changes to the register.

126 Part XIV (ss 162–181C) deals with nominations.

127 Section 162 provides that no person shall be capable of being elected as a Senator or member of the House of Representatives unless duly nominated. A nomination form is provided for by s 166 and that form must be signed either by 100 electors entitled to vote, or by the registered officer of the registered political party by which the candidate has been endorsed.

128 Section 169 provides that the registered officer of a registered political party may request that the name of the party be printed on the ballot paper, adjacent to the name of an endorsed candidate.

129 Section 169B is headed 'Verification of party endorsement'. It relevantly provides as follows:

> (1) For the purposes of this Act, subject to subsection (2), a person shall be taken to have been endorsed as a candidate in an election by a registered political party if:
>
> (a) the candidate is nominated by the registered officer of the party; or
>
> (b) the name of the candidate is included in a statement, signed by the registered officer of the party, setting out the names of the candidates endorsed by the party in the election and lodged with the Electoral Commissioner before the close of nominations for the election; or
>
> (c) the Electoral Commissioner is satisfied, after making such inquiries as the Electoral Commissioner thinks appropriate of the registered officer of the party or otherwise, that the candidate is so endorsed.

130 Section 176 provides for the declaration of nominations. Where the candidate is endorsed by a registered political party, the declaration must name the party.

131 Part XX (ss 286A–321A) deals with election funding and financial disclosure. Registered political parties are entitled to claim and receive election funding.

132 Section 287 is a definition section for this part. It includes a definition of 'federal party' which is defined as a registered political party that has 'a federal branch' and '2 or more State branches that are registered political parties'. The expression 'State branch' is defined as a 'branch or division of the party that is organised on the basis of a particular State or Territory'. Section 287A concerning campaign committees has a definition of 'relevant State branch' which provides that, if a party has two or more State branches, the 'relevant State branch' is the State branch of the party for the State or Territory in which the election is held.

133 The Commonwealth Electoral Act does not require that registered political parties be incorporated. Neither the Australian Labor Party nor the Australian Labor Party, Victorian Branch is incorporated. Section 287C provides that for the purposes of the Act 'expenditure is taken to be incurred by or with the authority of an entity that is not a legal person if the expenditure is incurred by or with the authority of any member, agent or officer (however described) of the entity who, acting in his or her actual or apparent authority, incurred the expenditure'.

134 Division 2 of pt XX provides for the appointment and regulation of persons called 'agents' and 'financial controllers'. Pursuant to s 288, a political party is required to have an agent for the purposes of this part and, where the party carries on activities in two or more States or Territories, it shall also have an agent in each of those States and Territories. Sub-section (3) provides that the agent of a political party in respect of a State or Territory in which the party has a State branch shall be appointed by the State branch. Section 291 provides that the Electoral Commission is to keep a register of these agents. Section 292E requires each 'political campaigner and associated entity' to nominate a 'financial controller'. Section 292F refers to an

appointment of an agent or financial controller 'by a political party or the State branch of a political party'.

135 Subdivisions BA and C of div 3 of pt XX provide for the payment of election funding. For a registered political party that is a State branch of a federal party, under ss 296 and 297, an initial payment of $10,000 is to be paid to, and claims for election funding in excess of $10,000 are to be made by:

(a) the agent of the State branch, where the agent of the federal party has agreed that the State branch may receive the amount; or

(b) the agent of the federal party, where the agent of the federal party has not agreed that the State branch may receive the amount.[53]

136 Provision is made for claims for election funding and for the determination of claims by the Electoral Commissioner. Section 298 refers to claims by 'the agent of a federal party … in relation to the State branch of the federal party'.

137 Division 5 of pt XX provides for disclosure of electoral expenditure and div 5A requires the agent or financial controller of each registered political party to provide an annual return to the Electoral Commission.

138 Part XXII (ss 352–381) provides for a Court of Disputed Returns. The

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[53] Section 296 regulates an initial payment of $10,000. Section 296(2) relevantly provides as follows for the payment of that amount:

(a) for a registered political party:
  (i) that is a State branch of a federal party; and
  (ii) that the agent of the federal party has agreed may receive the amount;
  the agent of the State branch; or
(b) for a registered political party:
  (i) that is a State branch of a federal party; and
  (ii) that the agent of the federal party has not agreed may receive the amount;
  the agent of the federal party; …

Section 297 provides for claims for election funding in excess of $10,000. Section 297(1) relevantly provides that such claims must be made by:

(a) for a registered political party:
  (i) that is a State branch of a federal party; and
  (ii) that the agent of the federal party has agreed may receive the election funding;
  the agent of the State branch; or
(aa) for a registered political party:
  (i) that is a State branch of a federal party; and
  (ii) that the agent of the federal party has not agreed may receive the election funding;
  the agent of the federal party; …

applicants contended that a dispute as to whether a particular candidate had been validly endorsed by a registered political party could not be determined after an election in the Court of Disputed Returns because the endorsement process in s 169B, through nomination by the registered officer, operates as a 'deeming' provision.

The Victorian Electoral Act

139 The applicants did not place great emphasis upon the provisions of the Victorian Electoral Act. It was submitted that the 'scheme' is essentially the same as under the Commonwealth Electoral Act and issues arising under the Commonwealth Electoral Act, which it was submitted would be justiciable, could also arise under the Victorian Electoral Act in the context of a Victorian election in the same way. Specific reference was made to s 69 concerning the nomination of candidates, including endorsement by a registered political party, and to s 148 which provides that a person must not provide false or misleading information under the Act.

Is the Victorian Branch subject to the National Constitution?— Submissions

140 The applicants principally relied upon the provisions of the Commonwealth Electoral Act in support of their contention that the claims made in the proceeding are justiciable, and that the analysis of Dowsett J in *Baldwin v Everingham*, where he had distinguished *Cameron v Hogan* on the basis of the statutory recognition of political parties, ought to be adopted.

141 But the applicants also relied upon the Electoral Acts, particularly the Commonwealth Electoral Act, in support of the submission that the judge had been wrong to find that the Victorian Branch is not a separate, autonomous and self-governing organisation. In that context, the applicants relied upon the fact that the 'Australian Labor Party' was registered as a political party under the Commonwealth Electoral Act on 31 May 1984 and that the 'Australian Labor Party, Victorian Branch' was separately registered as a political party under the Commonwealth Electoral Act on 13 June 1985. The 'Australian Labor Party,

Victorian Branch' has at all material times been registered as a political party under the Victorian Electoral Act.

142 The applicants submitted that the separate registration of the Australian Labor Party, Victorian Branch under the Commonwealth Electoral Act supported their contention that the Victorian Branch is a separate, autonomous and self-governing organisation, that federal intervention could only be valid if it were authorised under the Branch Rules, and that the Branch Rules contain no such authorisation.

143 The applicants submitted that it is against the Commonwealth and the Victorian statutory 'schemes' for a registered political party to be governed by a constitution other than the one upon which it is itself based and upon which it has sought registration, or to be the subject of 'outside control' by a third party in a manner not provided for by that constitution.

144 In the course of argument, senior counsel for the applicants was asked whether members of the 'Australian Labor Party, Victorian Branch' were members of the 'Australian Labor Party'. The initial response was that that was a 'difficult question' and that, on a 'fair reading' of the Branch Rules, there was 'no basis on which it could be concluded that when you sign up to become an individual member of the Victorian branch you've applied to and become a member of the federal branch'. It was submitted that in any event it made no difference. Later, after an adjournment and the production of the renewal form containing the member's pledge, senior counsel for the applicants clarified the position in the following terms:

> [W]e would accept it's open to infer that an applicant for Victorian branch ALP … membership accepts that on becoming an ALP member they will also become a federal ALP member.

The submission was repeated that the fact that a person becomes a member of both bodies upon application to the state branch did not affect the relevant arguments as to the Victorian Branch's separate, autonomous and self-governing status.

145 The applicants relied upon the detailed, comprehensive and prescriptive nature of the Branch Rules. It was submitted that the Branch Rules are manifestly 'complete' and that, where there is a role for the federal ALP, the rules specifically provide for it. In that respect, reference was made to r 3.6.1 (national power to enforce affirmative action), r 20.12.2 (Disputes Tribunal subject to National Rules), and r 23.2 (Branch Rules and National Constitution not enforceable in law).

146 It was submitted by the applicants that under the Branch Rules the task of conducting pre-selections is the responsibility of state bodies, particularly the Administrative Committee and the Public Office Selection Committee. There is no role for any national body.

147 The applicants submitted that the judge had been wrong to rely upon decisions of other courts in different contexts, in particular the decision in *Burton v Murphy*, to conclude that the National Constitution could override the Branch Rules. It was submitted that the judge had also been wrong in giving significance to the word 'branch' which, it was submitted, 'should not be ascribed any overriding metaphorical significance'.

148 When asked whether Victorian ALP members had the right to vote for national officeholders and the leader of the Federal Parliamentary Labor Party under cls 18 and 27 of the National Constitution, senior counsel for the applicants submitted that they 'may well' have the right to vote, but that that is a right conferred separately by the National Constitution.

149 The respondents submitted that the Victorian Branch is a 'constituent unit' of the Australian Labor Party. It was submitted that this is clear from history, authority, language and operation of the National Constitution and the Branch Rules. Reliance was placed upon the decision in *Burton v Murphy*. It was submitted that the use of the term 'branch' was 'determinative', citing the High Court decisions in *Hall v Job* and *Williams v Hursey*, and that both the Branch Rules and the National Constitution reflect in their terms that the ALP is a federal association.

Is the Victorian Branch subject to the National Constitution?— Analysis

150 The fact that the 'Australian Labor Party, Victorian Branch' is registered as a political party under the Victorian Electoral Act does not seem to us to be a matter of significance. It is neither consistent nor inconsistent with each of the contending positions.

151 The fact that the 'Australian Labor Party, Victorian Branch' is registered as a political party under the Commonwealth Electoral Act, as is the 'Australian Labor Party', is a factor which would support the applicants' analysis, save for the fact that the Commonwealth Electoral Act specifically recognises and provides for the kind of national and state branch structure which the trial judge found to exist here.

152 Section 130 of the Commonwealth Electoral Act provides that an eligible political party may be registered notwithstanding that a political party related to it has been registered. So, related political parties can each be registered. Other provisions recognise the existence of federal structures in which both state and national bodies are separately registered. It seems to us that this is expressly recognised in s 287 in the definition of 'federal party' and 'State branch', in s 287A in the definition of 'relevant State branch', in s 288 in relation to the appointment of agents, in s 292F in relation to the appointment of agents and the nomination of financial controllers, in ss 296 and 297 in relation to the payment of and claims for electoral funding, and in s 298 in relation to claims for electoral expenditure.

153 The process of 'endorsement' is an important one under the Commonwealth Electoral Act and the provisions concerning nomination and endorsement assign a central role to the registered officer of the political party. A registered officer can only be a registered officer of one registered political party at a time.

154 The constitution of a registered political party has a very limited role under the Commonwealth Electoral Act. A political party must have a written constitution which sets out its aims (s 123(1)). A copy of that constitution must accompany an application for registration (s 126(2)). Nothing more is required or provided for.

There is no requirement to register amendments or to request a change in registration if the constitution is changed. The submission that the 'scheme' of the Commonwealth Electoral Act requires registered parties to be governed in accordance with their constitution without 'outside' interference both begs the question (what is 'outside' interference?), and is not founded on the provisions of the Act.

155 The Electoral Acts are important in determining the justiciability question to which we will turn below. But, in our view, they do not assist in determining the question of whether the Branch Rules and, if applicable, the National Constitution empower the National Executive to act as it did. We accept the applicants' contention that, at least in the first instance, that issue must be determined by an examination of the Branch Rules.

156 The comprehensive character of the Branch Rules, the specific reference made to the National Executive having responsibility for the enforcement of the affirmative action provisions in r 3.6.1, and the absence of any express incorporation of a more general power of intervention, are considerations in favour of the applicants' approach. There are, however, powerful considerations to the contrary in the Branch Rules. In our opinion, they result in the conclusion that the trial judge's analysis was correct.

157 The name given to the organisation is the 'Australian Labor Party, Victorian Branch'. The use of the term 'branch' cannot be ignored or minimised.

158 The High Court has recognised that a 'branch' may be 'merely a section of the total membership', existing 'as an integral part of a larger organization'.[54]

159 The use of the term 'branch' supports a conclusion that this organisation is a part of a larger one, that larger one being the 'Australian Labor Party'.

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[54] *Hall v Job* (1952) 86 CLR 639, 650; [1952] HCA 57; *Williams v Hursey* (1959) 103 CLR 30, 54–5; [1959] HCA 51.

160 The provisions of the Branch Rules (r 2.1–2.4) concerning 'Origins', 'Objectives', 'Principles of Action' and 'Membership and Organisation' also support a conclusion that this 'branch' is a part of the larger organisation called the 'Australian Labor Party'.

161 The membership pledge (r 2.5, r 5.14, and the application and renewal forms) is another factor which in our view supports the judge's analysis. Members of the 'Australian Labor Party, Victorian Branch' pledge themselves to uphold the 'Constitution'. This can only be a reference to the National Constitution. No alternative construction was contended for.

162 Under the Branch Rules, a failure to comply with the National Constitution is a disciplinary offence (r 20.5.1.3.2).

163 So, the Branch Rules describe the organisation as a 'branch' of the Australian Labor Party; the national body is one whose origins, objectives, and principles the Branch Rules expressly adopt; the Branch Rules require each applicant for membership to pledge to uphold the National Constitution; and the Branch Rules provide that a failure to comply with the National Constitution is a disciplinary offence.

164 There are many references in the Branch Rules to the National (or Federal) Executive, to the National Conference, to National Rules, to the National Platform or Policy, and to other national bodies such as, for example, the National Policy Committee. Many matters otherwise within the purview of state organisations are expressly said to be subject to national rules or national bodies. All of this fortifies the conclusion that the 'Victorian Branch' is indeed a branch.

165 The existence and terms of r 24 are instructive. The provision by its terms and by its presence as a part of the Branch Rules demonstrates the National Executive's authority to impose a rule upon the state branch. The fact that the rule only operated until equivalent provisions were introduced elsewhere into the Branch Rules does not detract from the significance of the fact that the Branch Rules themselves

expressly demonstrate the National Executive's overriding authority.

166 Notwithstanding some prevarication on the point, it seemed to be conceded that upon becoming a member of the 'Australian Labor Party, Victorian Branch' a person ipso facto becomes a member of the 'Australian Labor Party'. Whether or not it was conceded, that seems to us to be clearly the position under the Branch Rules in light of the provisions referred to. Once that is accepted, the contention that the Branch Rules ought not to be read together with the National Constitution, each member having simultaneously joined both bodies in the one application, becomes untenable, in our opinion.

167 Our conclusion is that the Branch Rules, considered discretely, make it clear that this organisation is a branch, that is, a constituent part, of the national body. The Branch Rules and the National Constitution must be read together.

168 Once one turns to the National Constitution the conclusion that the judge's analysis of the structure of the ALP was correct becomes irresistible.

169 The National Constitution proceeds on the basis that all state branch members are members of the Australian Labor Party and are bound as such by the National Constitution. The definitions of 'member' and 'financial' in the National Constitution clearly indicate that Victorian Branch members are members of the Australian Labor Party. Clause 13 of the National Constitution provides that the party 'consists' of branches in each state. Clauses 18 and 27 provide for members, which must include Victorian members, to vote for national office-bearers and the leader of the Federal Parliamentary Labor Party.

170 Clause 14 of the National Constitution provides that the National Conference shall be the 'supreme governing authority' of the party and that its decisions shall be binding upon every member and every section of the party. Clause 14 also provides that the National Executive shall be the 'chief administrative authority' of the party, subject only to the National Conference.

171 The powers and duties of the National Executive are set out in cl 16. Clause 16(c) provides that decisions of the National Executive 'are binding on all sections and members of the ALP subject only to appeal to National Conference'. Clause 16(f), which we have previously quoted in full, provides that, in addition to the 'plenary powers' of the National Executive under cl 16(d), if in the opinion of the National Executive any state branch or section of the party is acting or has acted in a manner contrary to the National Constitution, the National Platform or a decision of National Conference, as interpreted by the National Executive, the National Executive has power to overrule the state branch, to intervene and take over and direct the conduct of its affairs, and to 'conduct any preselection that would otherwise have been decided by the state branch or section'. Clause 16(d) contains the 'plenary powers' to exercise 'all powers of the Party' without limitation 'including in relation to the state branches'.

172 There can be little doubt when the National Constitution is read together with the Branch Rules that the National Executive, provided it acts in accordance with the applicable provisions of the National Constitution, has the power to intervene and take over the conduct of the affairs of state branches and to conduct pre-selections.

173 Accordingly, in our opinion, the trial judge did not err in finding that the Australian Labor Party, Victorian Branch is not a separate entity to the Australian Labor Party and did not err in concluding that the National Executive had power to intervene under provisions of the National Constitution which were binding on the Victorian Branch.

Resolutions invalid for other reasons

174 The next issue to be addressed is whether the exercise of power by the National Executive was invalid for reasons other than that the Victorian Branch was not subject to the National Constitution. Four contentions were relied upon in support of a conclusion that the resolutions were nevertheless invalid. First, it was contended that cl 2 of the National Constitution meant that an exercise of power

under cl 16 could not be effective in law. Second, it was contended that the reference in cl 16(d) to 'powers of the Party' restricted the exercise of power to powers of the federal party and that the same restrictions applied to cl 16(f). Next, it was submitted that Riordan J's conclusion in *Setka v Carroll*, that where the national body intervened on an expulsion it was still required to carry out the expulsion in accordance with the Branch Rules, also applied here so that an intervention on pre-selection was required to be carried out in accordance with the Branch Rules. Finally, relying particularly on cl 47, it was submitted that national intervention could only be validly undertaken by way of amendment of the Branch Rules.

175 The contention that cl 2 of the National Constitution meant that the resolutions were invalid, or ineffective, was not easy to follow. In the written case it was put as follows:

> In any event the National Constitution, being expressly unenforceable and non-binding, cannot provide authority for, nor can it give legal effect to, the impugned conduct, which for the reasons already given was not authorised by, and was in breach of, the Victorian Rules.

176 We accept that both the Branch Rules and the National Constitution state as clearly as they can that they wish to adopt the non-justiciability principle. However, as will be seen, there are certain issues which the court does have to adjudicate, notwithstanding these provisions. Once the court embarks on that exercise, it must determine the matter by construction of the Branch Rules and the National Constitution. The only alternative is to apply *Cameron v Hogan* and not determine the dispute at all. The submission, as quoted, may be simply a different way of formulating, or a different submission founded on, the proposition that national intervention was invalid because it was not authorised under the Branch Rules considered discretely.

177 The second contention, relying on the reference to 'powers of the Party' in cl 16(d), has to be rejected for two reasons. First, the National Executive could have acted under cl 16(d), and in specifying the procedure for the 22 seats in the Pre-selection Resolution it relied upon that provision as an alternative, but it in fact

purported to act under cl 16(f). Clause 16(f) does not contain the reference to 'powers of the Party' which is relied on. Second, once it is accepted that the Victorian Branch is a 'branch', the suggested inherent limitation in the National Executive's powers, namely, a limitation to powers of the 'federal ALP', is not there.

178 Clause 47 of the National Constitution reads as follows:

> Pursuant to clause 16(d), the National Executive is empowered to amend the rules of any state branch as required to implement the National Principles of Organisation.

179 In substance, what is submitted is that this provision means that the only means by which the National Executive can relevantly act is by way of amending the state rules. The short answer to that contention is that cl 16(f) provides otherwise in clear terms. Under cl 16(f), the National Executive can take over and direct the conduct of the branch's affairs and it can conduct any pre-selection that would otherwise have been decided by the state branch.

180 In *Setka v Carroll*, Riordan J dismissed a proceeding commenced by an ALP member facing expulsion. He did so on the basis that the dispute was not justiciable. He observed that, if the dispute had been justiciable, he would have held that the National Executive acting under cl 16(d) would have to follow the expulsion procedures contained in the Branch Rules. Whether those observations are correct or not, the position here is that cl 16(f) expressly provides for the exercise of power by the National Executive in terms which cannot be said to be subject to any provisions of the Branch Rules. The National Executive expressly is given power to 'take over and direct the conduct' of the state branch's affairs, and to conduct any pre-selection that would 'otherwise' have been decided by the state branch. There is no warrant in these provisions for the implication of an obligation to follow the procedures set out in the Branch Rules.

Conclusion on the application for leave to appeal and appeal

181 Given these conclusions, whilst we would grant leave to appeal on each of the proposed grounds, the appeal must be dismissed. The application to rely on

additional evidence, concerning pre-selections in addition to the initial 22, is contingent on success in the appeal and will be dismissed.

182 The issue of justiciability, which occupied considerable attention before the trial judge and before us, cannot alter this outcome. Nevertheless, we now turn to the issue of justiciability, and the two 'pathways' to success in the appeal relied upon on behalf of the applicants before us in that context.

Justiciability — Review of relevant authorities

183 The relevant consideration begins with the High Court decision in *Cameron v Hogan*, to which reference has already been made. The trial judge quoted extensively from the judgment of the plurality,[55] and from the judgment of Starke J.[56] For present purposes, it suffices to say that the High Court held that a member of a voluntary association could not maintain an action on the basis of alleged exclusion from the association in breach of the association's rules, nor could a member maintain an action for any other breach of an association's rules including the rules for pre-selection, unless the member could establish interference with a relevant proprietary right, or the member could establish that the rules were contractually binding.

184 The contractually binding exception can be immediately put to one side here, given the provisions of cl 2 of the National Constitution and r 23 of the Branch Rules.

185 One aspect of the judgment of the plurality in *Cameron v Hogan* which needs to be noted, in the light of subsequent decisions, is that the plurality referred with apparent approval to a decision of Isaacs J in *Edgar and Walker v Meade*.[57]

186 What may be characterised as the 'proprietary right or interest' exception to the non-justiciability principal in *Cameron v Hogan* was held to be applicable in a

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55 Reasons [47], [49].

56 Reasons [48].

57 (1916) 23 CLR 29; [1916] HCA 70. The plurality at (1934) 51 CLR 358, 372 quoted a passage from Isaacs J's judgment at (1916) 23 CLR 29, 43.

judgment of Lucas J in the Supreme Court of Queensland in *Rendall-Short v Grier*. In that case, a voluntary association (not a political party) proposed to transfer the entirety of its assets to an incorporated body. The rules of the association required that the income and property be applied to the promotion of the association's specified charitable objects. Lucas J held:

> The plaintiffs as members have the right to require the committee of management to apply the income and property of the association in promotion of its objects. I can see no basis upon which a right of such a nature could be considered as anything other than a 'right of a proprietary nature'.[58]

187 *Burton v Murphy*, to which reference has already been made, was decided by the Full Court of the Supreme Court of Queensland in 1981. *Burton v Murphy* concerned an intervention by the National Executive of the ALP into the Queensland branch of a character similar to that in issue on this proceeding. No point as to justiciability was taken before the Full Court and, in a footnote to Douglas J's judgment, the relevant passage from the judgment at first instance by Lucas SPJ (who had decided *Rendall-Short v Grier*) which addressed the justiciability issue was set out.[59] Lucas SPJ explained in that passage that the position was considered to be relevantly the same as that which had existed in *Rendall-Short v Grier* because one of the declarations and one of the injunctions sought were 'directed towards the receipt of moneys and the entitlement to property of the Interim Administrative Committee'. The passage footnoted also stated that the defendants had not relied on *Cameron v Hogan*. The Interim Administration Committee in that case appears to have had a similar role in the intervention to that of the administrators and the Interim Governance Committee in this proceeding.

188 The issue of justiciability in relation to disputes within political parties took a significant new turn with the decision of Dowsett J in the Supreme Court of Queensland in *Baldwin v Everingham*.[60]

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58 [1980] Qd R 100, 110.

59 [1983] 2 Qd R 321, 325.

60 [1993] 1 Qd R 10.

189 *Baldwin v Everingham* concerned a dispute within the Liberal Party in relation to the pre-selection of a candidate for a federal seat. Dowsett J analysed the reasoning in *Cameron v Hogan* in detail. He recognised that he was bound by it. He referred to the fact that disputes involving the due disposal and administration of property were justiciable, citing *Rendall-Short v Grier* and *Burton v Murphy.* He observed that 'very considerable difficulty' lay in the way of establishing an enforceable contract.[61]

190 Dowsett J, however, distinguished *Cameron v Hogan* in relation to political parties. He did so on the basis of their recognition and registration under the Commonwealth Electoral Act since 1983.

191 His Honour referred to and quoted at some length the judicial criticisms which had been made, sometimes in quite strong terms, of the policy behind the principle in *Cameron v Hogan*.[62] He then said:

> However if *Cameron v Hogan* applies fairly to the circumstances of the present case, then I must apply it, leaving matters of policy for determination by the High Court itself. The question for my determination is whether or not *Cameron v Hogan* does apply to the present circumstances. If it were not for the statutory recognition of political parties to which I have referred in some detail, I would be compelled to the conclusion that the case does so apply. I can see no other basis for distinction between the Labor Party as it was in the 1930s and the Queensland Branch of the Liberal Party as it now is.[63]

192 A significant reason why Dowsett J concluded that he could properly distinguish *Cameron v Hogan* was because of the reference made in *Cameron v Hogan* to the judgment of Isaacs J in *Edgar and Walker v Meade*. In that case, Isaacs J was concerned with the rules of a trade union registered under the provisions of the *Commonwealth Conciliation and Arbitration Act 1904* (Cth). Dowsett J quoted a passage from *Edgar and Walker v Meade* which followed the passage the High Court had quoted in *Cameron v Hogan*, as referred to above. In the passage Dowsett J quoted, Isaacs J described the union as a 'creature' of the federal parliament and concluded

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61 Ibid 15.

62 Ibid 17–18

63 Ibid 18.

that the organisation was therefore not in the same position as a voluntary club.

193 Dowsett J recognised that the legislative recognition of unions and of political parties was not in the same terms. He said:

> It may be conceded that the Act more closely controlled the affairs of registered organisations than does the *Commonwealth Electoral Act* regulate the affairs of registered parties. The former legislation conferred a status at least akin to incorporation and there was clear recognition that disputes between the organisation and its members would be justiciable.[64]

194 Dowsett J nevertheless considered that 'statutory recognition' had been the important consideration in *Edgar and Walker v Meade*, rather than the 'quasi-corporate status' conferred by the industrial legislation.[65] Dowsett J's relevant conclusion was as follows:

> In the end, I conclude that the reasoning which led Isaacs J to consider that the issues in *Edgar and Walker v Meade* were justiciable should lead me to conclude that disputes concerning the rules of political parties registered under the *Commonwealth Electoral Act* are now also justiciable. This conclusion differs from the conclusion in *Cameron v Hogan* not because changing policy considerations dictate a different result, but rather because the Commonwealth Parliament, in conferring legislative recognition upon political parties has taken them beyond the ambit of mere voluntary associations.[66]

195 One feature of the case before us which is particularly striking in this context is the presence of cl 2 in the National Constitution and r 23 in the Branch Rules. They have earlier been quoted in full. There is no material before us which indicates when these rules were introduced. A decision of Windeyer J in the New South Wales Supreme Court in *Sullivan v Della Bosca*[67] reveals that a rule relevantly similar to these existed in the rules of the New South Wales branch of the ALP in 1999. Whereas the decision of Mullighan J in the South Australian Supreme Court in *Clarke v Australian Labor Party*[68] reveals that a similar provision was not in the rules of the

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64 Ibid 20.

65 Ibid.

66 Ibid.

67 [1999] NSWSC 136.

68 (1999) 74 SASR 109; [1999] SASC 365.

South Australian branch at that time.[69] Whilst the material before us does not reveal when these provisions were introduced to the National Constitution and the Branch Rules, there can be little doubt as to why they were introduced. A clearer declaration of an intention to have the principle in *Cameron v Hogan* apply could hardly be formulated.

196 *Clarke v Australian Labor Party* concerned an allegation by a state parliamentary member of the ALP that a large number of members had been admitted in contravention of the rules, and that the state executive had unlawfully sought to validate the admission retrospectively. The admission of the members threatened the plaintiff's re-endorsement. Mullighan J applied Dowsett J's reasoning in *Baldwin v Everingham* in relation to the Commonwealth Electoral Act to the *Electoral Act 1985* (SA). In doing so, he addressed a number of criticisms of Dowsett J's analysis, in particular, that he had failed to identify the significant differences which existed between the industrial legislation which was the subject of Isaacs J's decision in *Edgar and Walker v Meade*, and the legislation providing for the registration of political parties. Mullighan J concluded that these criticisms were not justified and that Dowsett J had not misunderstood the differences in the respective legislation. The critical feature was, according to Mullighan J, the 'legislative recognition' of political parties. Mullighan J referred to relevant provisions of the Commonwealth Electoral Act, to which reference has been made earlier, and, in particular, to the provisions concerning election funding. Mullighan J concluded that Dowsett J's analysis was correct and should be followed.[70]

197 Palmer J in the Supreme Court of New South Wales considered the issue in detail in *Coleman v Liberal Party of Australia, New South Wales Division [No 2]*.[71] That case concerned a dispute within the Liberal Party over pre-selection for a federal seat. Palmer J concluded that Dowsett J's analysis was correct.

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69 See reliance on a National Conference resolution referred to at ibid 124 [47].

70 Ibid 136–9 [73]–[91].

71 (2007) 212 FLR 271; [2007] NSWSC 736.

198 Pagone J in *Jackson v Bitar*[72] determined an interlocutory application concerning a pre-selection dispute within the ALP over a State seat. He referred to the justiciability issue but said he did not have to decide it. Kennedy J in *Barker v Australian Labor Party*[73] also determined a pre-selection dispute within the ALP concerning a State pre-selection saying it was unnecessary to determine justiciability, although she briefly analysed the authorities and concluded that 'the better view' was that the dispute was justiciable.

199 A significant first instance decision in this context is Robson J's decision in *Butler v Mulholland [No 2]*.[74]

200 *Butler v Mulholland [No 2]* concerned a dispute between members of the Democratic Labor Party ('DLP'). In substance, there were two factions; those associated with Mr Butler, and those associated with Mr Mulholland. Disputes between these factions included disputes as to who were the relevant officeholders of the DLP. These disputes had led to controversy over the registration by the Victorian Electoral Commission both of the party and of the registered officer of the party.[75] The claims made and the relief sought in that proceeding were, at least in part, specifically directed at issues of registration arising under the Victorian Electoral Act.

201 Robson J analysed the decision in *Cameron v Hogan* and the various authorities decided thereafter, in particular, *Baldwin v Everingham*, *Clarke v Australian Labor Party* and *Coleman v Liberal Party of Australia, New South Wales Division [No 2]*. The issue of justiciability was not a controversial one before him. Both of the contending parties urged him to resolve the stand-off and determine who were the validly appointed officers of the DLP.[76]

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72 [2011] VSC 11.

73 [2018] VSC 596.

74 [2013] VSC 662.

75 Ibid. The registration issues are referred to at [25], [31], [35], [38], [50], [60], [65]–[66].

76 Ibid [91].

202 Robson J's relevant conclusion in relation to justiciability was as follows:

> Under the Victorian [Electoral] Act, in relation to a political party, 'the secretary' means the person who holds the office (however described) the duties of which involve responsibility for carrying out of the administration, and for the conduct of the correspondence, of the party. Under the Victorian [Electoral] Act, a registered political party must nominate a person to be the registered officer of the political party. The application for registration of the party must be signed by the secretary of the political party and the application must set out the name and address of the person who is to be the registered officer of the political party for the purpose of the Act.
>
> It can be seen, therefore, that the identity of the secretary and his authority to make an application to the Commission for registration of the political party are important issues for the proper working of the Victorian [Electoral] Act.
>
> In my opinion, the issue of who is the Secretary of the DLP in the Victorian State branch is a justiciable issue. Similarly, the Secretary can only act with the authority given to him under the Constitution of the DLP and in accordance with the instructions of the State Executive. The membership of the State Executive is therefore an important issue, which it is in the public interest to resolve. In my opinion, the determination of the issue of who constitutes the State Executive is also justiciable.[77]

203 The next decision of note is Riordan J's decision in *Setka v Carroll*.

204 The issue in *Setka v Carroll* was the National Executive's power to expel a Victorian ALP member. The National Executive proposed to expel the member acting under cl 16(d) of the National Constitution. The member sought a declaration that the National Executive could not expel him otherwise than in accordance with r 20 of the Branch Rules.

205 Riordan J analysed Dowsett J's judgment, and his reliance upon the decision in *Edgar and Walker v Meade*, concluding that Dowsett J had not been justified in relying on Isaacs J's decision in the way in which he had. Riordan J observed that the ratio of *Cameron v Hogan* was that the plaintiff had no cause of action. He said that Dowsett J had not explained how legislative recognition had given rise to a cause of action or an otherwise ascertainable and enforceable legal right.[78]

206 Riordan J accepted the correctness of Robson J's decision in *Butler v*

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77 Ibid [103]–[105].

78 *Setka v Carroll* (2019) 58 VR 657, 674–83, [34]–[60]; [2019] VSC 571.

Mulholland [No 2]. He said that that was an example of the Court exercising jurisdiction for the limited purpose of protecting the objects of an electoral Act.[79]

Justiciability — The trial judge's analysis

207 As previously indicated, the trial judge accepted the existence of the 'proprietary interest' exception, as exemplified by *Rendall-Short v Grier*, and also accepted that Robson J had been correct in concluding that the dispute before him in *Butler v Mulholland [No 2]* was justiciable. Otherwise, the trial judge considered that Riordan J's analysis in *Setka v Carroll* was correct. Relevantly, the trial judge concluded:

> The funding of, and conferral of rights and imposition of obligations on political parties required a legislative scheme to ensure that the applicant for registration was a genuine political party, to gain legislative authority for providing funding for them and to ensure accountability for that funding. But those measures do not make internal disputes in the political party justiciable. I accept that where a dispute exists of the kind presented by *Butler v Mulholland (No 2)*, as to the identity of the political party's authorised agent, a court is likely to decide the issue by making an appropriate declaration to enable the Electoral Acts to operate in respect of that party. But that decision does not create a principle of wider application extending to all disputes within a political party or between a branch and the national body. In my opinion, to justify the Court's intervention in an internal dispute in a political party, the issue sought to be determined must have a direct bearing on the proper application and operation of the Electoral Acts. The plaintiffs' claims do not have that character. A disputed issue does not become justiciable by a party relying on the Electoral Acts if the dispute has little connection with their operation. The plaintiffs' claims in this case do not have a direct connection to the application or operation of the Electoral Acts.[80]

Justiciability — Application of the principles here

208 *Cameron v Hogan* is a binding High Court authority. It must be followed by all Australian courts unless and until departed from by a decision of the High Court itself.[81]

209 The two constituent documents in issue here, in cl 2 of the National

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[79] Ibid 680, [50].

[80] Reasons [161].

[81] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 164 [178]; [2007] HCA 22.

Constitution and in r 23 of the Branch Rules, adopt — indeed embrace — the non-justiciable principle.

210 The so-called 'proprietary right or interest' exception is recognised in *Cameron v Hogan*, and is well established. The trial judge was correct to recognise it here.

211 Absent further consideration by the High Court, in our opinion, Dowsett J's analysis in *Baldwin v Everingham* ought not to be relied upon as a basis for concluding that all disputes within political parties are justiciable. The basis upon which Dowsett J distinguished *Cameron v Hogan* was the recognition of political parties under the Commonwealth Electoral Act. Any qualification of the principle in *Cameron v Hogan* based upon this and similar legislation must be confined strictly to disputes which really do bear upon the matters addressed by the legislation. The dispute before Robson J in *Butler v Mulholland [No 2]* was, in our opinion, a dispute of that character. The dispute before Riordan J in *Setka v Carroll* was not. Thus, in our opinion, Robson J was correct to treat the dispute before him as justiciable, and Riordan J was correct to treat the dispute before him as not justiciable.

212 Disputes as to pre-selection are more difficult. Since Dowsett J's decision, they have generally been treated as justiciable.

213 It seems to us that pre-selection disputes in relation to federal parliamentary elections would generally have the necessary direct connection with the Commonwealth Electoral Act to render them justiciable. This is because of the close connection between such disputes and the provisions of the Commonwealth Electoral Act governing nomination and endorsement, and electoral funding. The registered officer is a role created by the legislation and one that plays no part (in that capacity) in the internal processes of pre-selection of candidates. Under the legislation, the registered officer has a central role in both the nomination of candidates (s 166) and their recognition as candidates endorsed by the registered political party (s 169B). The registered officer's role is to act as the conduit for communicating internal party decisions to the Electoral Commissioner and the

voting public. The purposes of the legislation would be significantly undermined if an endorsement which was invalid under the governing constitution of a registered party was to be given effect because it was immune from challenge.

214 That seems to us to be the position generally, but there are two considerations which are peculiar to the case before us. They are the presence of cl 2 of the National Constitution and r 23 of the Branch Rules; and the fact that, in contrast to the position before Robson J in *Butler v Mulholland [No 2]*, here there is no dispute as to who the relevant registered officer is.[82]

215 We consider that the pre-selection dispute in this case is justiciable, notwithstanding those two considerations.

216 The dispute is justiciable notwithstanding cl 2 of the National Constitution and r 23 of the Branch Rules because the critical consideration is not the organisations' intentions as set out in those provisions, but rather the need to ensure that the provisions of the Commonwealth Electoral Act are not undermined by endorsements which are not in accordance with the registered party's internal processes.

217 The identity of the registered officer may not be in dispute here, but the validity of the pre-selection process which is the necessary precursor to the nomination and endorsement of candidates by the registered officer under the Act is in dispute.

218 It remains then to consider whether the applicants, had they succeeded in their contention that the Victorian Branch is separate and autonomous and that the national intervention is invalid, and had their pre-selection claims and their trust claims, or one of them, been held to be justiciable, ought to have succeeded.

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[82] That was confirmed in the course of submissions.

The pre-selection claims

219 If the exercise of power by the National Executive were invalid, and if pre-selection disputes were held to be justiciable, the issue would have to be decided in favour of the applicants.

220 If the pre-selection dispute were held not to be justiciable, the applicants would only have their trust claims.

The trust claims

221 The trust claims would need to be determined only if our conclusion as to the separate status of the Victorian Branch were rejected, and the pre-selection claims were held to be non-justiciable. The trust claims are justiciable.

222 Rule 21 creates, or refers to, four trusts, in our opinion.

223 Rule 21.1.1 purports to create a trust over 'all property' of the party. The trustees are designated to be the 'Officers of the Party for the time being'. No beneficiaries are specified. The rule provides that all funds are to be applied to the management and conduct of the party and the furtherance of its aims and objectives.

224 Rule 21.1.2 purports to create a trust in relation to property of any 'Branch, Conference or Assembly'. This paragraph vests the property in the same trustees and provides that it is to be held 'on behalf of and for the purposes of the members of such Branch, Conference or Assembly'. The income and property is to be applied solely towards the promotion of the objects of the party.

225 Rule 21.2 creates a trust called the 'Capital Investment Fund'. The trustees are the same. There are provisions governing the purposes to which the fund may be applied. They are all purposes directed at furthering interests of the party. No beneficiaries are specified.

226 Rule 21.3 refers to the Labor Services & Holdings Trust. This trust has a corporate trustee, Labor Services & Holdings Pty Ltd. It is constituted under a trust

deed. The trust deed names the beneficiaries as 'all of the members … at the relevant time and from time to time' of the 'Australian Labor Party — Victorian Branch Association'. There is a specified vesting day within the perpetuity period.

227 We heard no argument on this issue, and the trial judge only briefly referred to it,[83] but the provisions of rr 21.1 and 21.2 potentially raise an issue as to whether these trusts are non-charitable purpose trusts.

228 As was explained by the High Court in *Bacon v Pianta*,[84] trusts of the kind provided for in rr 21.1 and 21.2 raise two related problems. If they are to be construed as trusts for a purpose, they are invalid because the purpose is not charitable; and if they are to be construed as trusts for the members from time to time, they may infringe the rule against perpetuities.

229 One way in which courts have addressed the undesirability of finding that trusts of this kind are invalid is to treat the relevant 'trustee' obligations as contractual.[85] Rule 23 of the Branch Rules would seem to constitute a significant impediment to such an approach here. An alternative solution is the adoption of Goff J's narrow construction of what constitutes a non-charitable purpose trust in *Re Denley's Trust Deed*.[86] That approach has not been adopted generally in Australia because of its perceived inconsistency with the High Court authority in *Bacon v Pianta*.[87]

230 As these issues were not argued before us, other than noting that this issue would have had to be addressed if specific relief in relation to the trusts been sought, we put them to one side.

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83 Reasons [56].

84 (1966) 114 CLR 634, 638; [1966] HCA 44.

85 *Neville Estates Ltd v Madden* [1962] 1 Ch 832, 849; *Bacon v O'Dea* (1989) 25 FCR 495, 504–5; *Alston v Cormack Foundation Pty Ltd* (2018) 358 ALR 263, 323–4 [267]–[269]; [2018] FCA 895.

86 [1969] 1 Ch 373.

87 See, eg, *Strathalbyn Show Jumping Club Inc v Mayes* (2001) 79 SASR 54, 65 [49]; [2001] SASC 73 (Bleby J).

231 The trial judge held that the plaintiffs had not established that the National Executive, or the administrators, had unlawfully interfered with the administration of the trusts. The judge said that the 'main effect' of the Administration Resolution was that the powers normally exercised by the Administrative Committee or the branch officers were to be exercised by the administrators with the trustees reporting to them, rather than to the Administrative Committee. The administrators had acted to replace two shareholders and directors of the corporate trustee of the Labor Services & Holdings Trust, but the judge observed that that involved no change to the trustee itself. The judge said that the plaintiffs did not point to any misapplication or misuse of trust funds.

232 As indicated, the judge held that the trust claims were not made out, in any event, as the National Executive's exercise of power had been valid. The judge said:

> The provisions of the Victorian Branch Rules dealing with the trusts on which Branch property is held, must be read subject to the powers of the National Executive in respect of the Branch.[88]

233 In this latter conclusion, in our opinion, the judge was correct for the reasons we have already given. We turn to the conclusion that, assuming the intervention was not valid, relevant interference had not been made out.

234 For a reason which is not apparent — it may be because of the way the matter was put to him — on this issue the judge focused entirely on the Administration Resolution. Even if what the judge said about that resolution was correct, the Further Amendment Resolution went much further than the Administration Resolution. The Further Amendment Resolution had the effect of investing in the Interim Governance Committee 'all the functions … of the Party Officers'. Thus, the functions of the Party Officers as trustees under r 21 were purportedly transferred to the Interim Governance Committee. If the intervention was invalid, that would be unlawful interference in the administration of the trusts.

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88 Reasons [92].

235 Notwithstanding this conclusion, if the national intervention had been held to be invalid, we would have refused equitable relief on the trust claims on discretionary grounds. The factors which would have led us to that conclusion are as follows.

236 First, no relief is sought directed to what is alleged to be the unlawful interference with the administration of the trusts. Reference is made in one of the declarations sought to the invalidity of the Further Amendment Resolution, but that reference is by way of explanation ('because') as to why the Pre-selection Resolution was invalid. Only the Pre-selection Resolution is sought to be declared invalid and to be the subject of an injunction. This must be a deliberate forensic choice. If all of the relief sought in the generally indorsed writ and in the application for leave to appeal were granted, what is contended to have been the unlawful interference with the trusts would be the subject of no declaration or other order. A contrast might be drawn with the relief sought in *Burton v Murphy*.

237 A second, and related, factor is that there was unreasonable delay in instituting the proceeding in reliance on the trust claims (if it can be said that this proceeding does that). The trial judge rejected delay as a disabling factor on the basis that the plaintiffs did not know until 4 May 2021 of the manner in which pre-selection by the National Executive would be conducted. The judge observed that 'it was the Preselection Resolution that precipitated' the proceeding. He said it was that resolution which the plaintiffs considered 'particularly affected their interests and justified the commencement of this proceeding'. As we are now considering the trust claims on the assumption that the pre-selection claims are non-justiciable, the judge's reason for rejecting delay as a disabling factor does not seem to us to be applicable. The Further Amendment Resolution was passed on 29 January 2021. As the judge observed, the applicants did not institute proceedings until the passage of the Pre-selection Resolution some four months later. Apart from anything else, this delay reveals that the applicants have no real concerns about the trusts; their concerns are about the pre-selections.

238 Finally, cl 2 of the National Constitution and r 23 of the Branch Rules have continuing relevance here. These organisations do not want court determination of their internal disputes. There is no allegation that any funds have been misapplied or that the assets are under any form of threat, in contrast to the position in *Rendall-Short v Grier*. In these circumstances, the Court's discretion should not be exercised so as to circumvent the express terms of the constituent documents.

Conclusion

239 For the above reasons, we will grant the applicants leave to appeal, but dismiss the appeal, and dismiss the application to rely on additional evidence.

SCHEDULE OF PARTIES

DIANA ASMAR, on behalf of herself as a member of the Victorian Branch of the Australian Labor Party and as a member of the Victoria No. 1 Branch of the Health Services Union ('HSU'), and in a representative capacity on behalf of all individual members of the Victorian Branch of the Australian Labor Party and members of affiliated Trade Unions of the Victorian Branch of the Australian Labor Party, except for those members of the Victorian Branch of the Australian Labor Party or of affiliated unions of the Victorian Branch of the Australian Labor Party who are respondents in this proceeding	First Applicant
HIBA SALEM, on behalf of herself as a member of the Administrative Committee of the Victorian Branch of the Australian Labor Party and in a representative capacity on behalf of all members of the Administrative Committee of the Victorian Branch of the Australian Labor Party as at 16 June 2020, except for those members of the Administrative Committee who are respondents in this proceeding	Second Applicant
**********	Third Applicant
MICK MYLES, on behalf of himself as a member of the Party and as a member of the Victorian Divisional Branch of the Construction and General Division of the Construction, Forestry, Maritime, Mining and Energy Union ('CFMMEU Construction and General Division Victoria'), and in a representative capacity on behalf of CFMMEU Construction and General Division Victoria and its members	Fourth Applicant
BEN DAVIS, on behalf of himself as a member of the Party and as a member of the Victorian Branch of the Australian Workers' Union ('AWU Victoria'), and in a representative capacity on behalf of AWU Victoria and its members	Fifth Applicant
PAUL HEALEY, on behalf of himself as a member of the Party and as a member of the Victorian No. 2 Branch of the Health Services Union ('HSU Victoria 2'), and in a representative capacity on behalf of HSU Victoria 2 and its members	Sixth Applicant

EARL SETCHES, on behalf of himself as a member of the Party and as a member of the Victorian Branch of the Plumbing Division of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia ('CEPU Plumbing Division Victoria'), and in a representative capacity on behalf of CEPU Plumbing Division Victoria and its members	Seventh Applicant
**********	Eighth Applicant
PETER MARSHALL, on behalf of himself as a member of the Party and as a member of the Victorian Branch of the United Firefighters Union ('UFU Victoria') and in a representative capacity on behalf of UFU Victoria and its members	Ninth Applicant
PAUL CONWAY, on behalf of himself as a member of the Party and as a member of the Victorian Branch of the Australasian Meat Industry Employees Union ('AMIEU Victoria'), and in a representative capacity on behalf of AMIEU Victoria and its members	Tenth Applicant
SHANE STEVENS, on behalf of himself as a member of the Party and as a member of the Victorian Divisional Branch of the Maritime Union of Australia Division of the Construction, Forestry, Maritime, Mining and Energy Union ('CFMMEU Maritime Victoria'), and in a representative capacity on behalf of CFMMEU Maritime Victoria and its members	Eleventh Applicant
LUBA GRIGOROVITCH, as a member of the Party and as a member of the Victorian Branch of the Australian Rail, Tram and Bus Industry Union ('RTBU Victoria'), and in a representative capacity on behalf of RTBU Victoria and its members	Twelfth Applicant
THE UNITED FIREFIGHTERS UNION OF AUSTRALIA	Thirteenth Applicant
and	
The Honourable ANTHONY ALBANESE, in his capacity as a member of the National Executive of the Australian Labor Party	First Respondent
Senator TIM AYRES, in his capacity as a member of the National Executive of the Australian Labor Party	Second Respondent
STEVEN BAKER, in his capacity as a member of the National Executive of the Australian Labor Party	Third Respondent

NICK CHAMPION, in his capacity as a former member of the National Executive of the Australian Labor Party	Fourth Respondent
KATE DOUST, in her capacity as a member of the National Executive of the Australian Labor Party	Fifth Respondent
GERARD DWYER, in his capacity as a member of the National Executive of the Australian Labor Party	Sixth Respondent
DAVID GRAY, in his capacity as a member of the National Executive of the Australian Labor Party	Seventh Respondent
ROSE JACKSON, in her capacity as a member of the National Executive of the Australian Labor Party	Eighth Respondent
TIM JACOBSON, in his capacity as a member of the National Executive of the Australian Labor Party	Ninth Respondent
GRAEME KELLY, in his capacity as a member of the National Executive of the Australian Labor Party	Tenth Respondent
Senator SUE LINES, in her capacity as a member of the National Executive of the Australian Labor Party	Eleventh Respondent
TARA MORIARTY, in her capacity as a member of the National Executive of the Australian Labor Party	Twelfth Respondent
BOB NANVA, in his capacity as a member of the National Executive of the Australian Labor Party	Thirteenth Respondent
MICHAEL O'CONNOR, in his capacity as a member of the National Executive of the Australian Labor Party	Fourteenth Respondent
MICHAEL RAVBAR, in his capacity as a member of the National Executive of the Australian Labor Party	Fifteenth Respondent
AMANDA RISHWORTH, in her capacity as a member of the National Executive of the Australian Labor Party	Sixteenth Respondent
WENDY STREETS, in her capacity as a member of the National Executive of the Australian Labor Party	Seventeenth Respondent
SHANNON THRELFALL-CLAREK, in her capacity as a member of the National Executive of the Australian Labor Party and in her capacity as a Trustee under rules 21.1 and 21.2 of the Australian Labor Party Victorian Branch Rules	Eighteenth Respondent

Senator RAFF CICCONE, in his capacity as a member of the National Executive of the Australian Labor Party	Nineteenth Respondent
SUSIE BYERS, in her capacity as a member of the National Executive of the Australian Labor Party and the Interim Governance Committee of the Victorian Branch of the Australian Labor Party, and in her capacity as a Trustee under rules 21.1 and 21.2 of the Australian Labor Party Victorian Branch Rules	Twentieth Respondent
LINDA WHITE, in her capacity as a member of the National Executive of the Australian Labor Party and as a member of the Interim Governance Committee of the Victorian Branch of the Australian Labor Party	Twenty-First Respondent
**********	Twenty-Second Respondent
MICHAEL DONOVAN, in his capacity as a member of the National Executive of the Australian Labor Party and as a member of the Interim Governance Committee of the Victorian Branch of the Australian Labor Party	Twenty-Third Respondent
LLOYD WILLIAMS, in his capacity as a member of the National Executive of the Australian Labor Party and as a member of the Interim Governance Committee of the Victorian Branch of the Australian Labor Party	Twenty-Fourth Respondent
JAMES McWHINNEY, in his capacity as Trustee under rules 21.1 and 21.2 of the Australian Labor Party Victorian Branch Rules	Twenty-Fifth Respondent
LABOR SERVICES & HOLDINGS PTY LTD, in its capacity as Trustee under rule 21.3 of the Australian Labor Party Victorian Branch Rules	Twenty-Sixth Respondent