ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY **NO S 204 OF 2018**

BETWEEN:

UNIONS NSW
First Plaintiff

NEW SOUTH WALES NURSES AND MIDWIVES' ASSOCIATION
Second Plaintiff

ELECTRICAL TRADES UNION OF AUSTRALIA NEW SOUTH WALES BRANCH
Third Plaintiff

AUSTRALIAN EDUCATION UNION
Fourth Plaintiff

NEW SOUTH WALES LOCAL GOVERNMENT, CLERICAL, ADMINISTRATIVE, ENERGY, AIRLINES & UTILITIES UNION
Fifth Plaintiff

HEALTH SERVICES UNION NSW
Sixth Plaintiff

AND:

STATE OF NEW SOUTH WALES
Defendant

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH

Filed on behalf of the Commonwealth by:

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PART I FORM OF SUBMISSIONS

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

PARTS II AND III INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes under s 78A of the *Judiciary Act 1903* (Cth) in support of the defendant New South Wales.

PART IV ISSUES PRESENTED BY THE APPEAL

3. In summary, the Commonwealth advances the following propositions. **First**, the direct burden of ss 29(10) and 35 of the *Electoral Funding Act 2018* (NSW) (**EF Act**) on political communication is ameliorated, but not eliminated, by the exclusions in ss 7(2)(a) and 7(3). **Secondly**, a cap on electoral expenditure is a permissible means of pursuing ends that are compatible with the system of representative and responsible government. **Thirdly**, a law is not invalid merely because it treats third-party campaigners differently to political parties and candidates. There may be legitimate reasons justifying that differential treatment. Whether that is so should be tested in the ordinary way. **Fourthly**, the implied freedom accommodates wide legislative choice in determining the electoral process, and the analytical framework developed in *Lange v Australian Broadcasting Corporation*[1] and explained in *McCloy v New South Wales*[2] and *Brown v Tasmania*[3] (***Lange/McCloy* framework**) should be applied so as to leave room for different legislatures within the federation to try different means of achieving a fair and effective electoral process. **Fifthly**, an anti-aggregation provision that operates to prevent the circumvention of some other valid provision of an Act is a permissible means of reinforcing, and thus pursuing, the ends of that other provision.

4. Other than these propositions, the Commonwealth makes no submissions with respect to the application of the *Lange/McCloy* framework to the impugned provisions of the EF Act.

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1 (1997) 189 CLR 520, as modified in *Coleman v Power* (2004) 220 CLR 1 (***Coleman***) at 51 [95] (McHugh J), 78 [198] (Gummow and Hayne JJ), 82 [211] (Kirby J).
2 (2015) 257 CLR 178 (***McCloy***).
3 (2017) 261 CLR 328 (***Brown***).

(a) The burden of the EF Act's cap on electoral expenditure

5. The Commonwealth accepts that a cap on 'electoral expenditure' (as defined in s 7(1) of the EF Act) effects a direct burden upon political communication. Such a cap limits the funds that can be spent for or in connection with promoting or opposing a party or candidate, or for the purpose of influencing the voting at a NSW State election, and thereby restricts the amount of political communication that can be engaged in, more than incidentally.[4] In this regard, a cap on electoral expenditure is, if anything, a more direct burden on political communication than a cap on political donations.[5]

6. The burden on political communication is somewhat less than it first appears, because s 7(2)(a) of the EF Act excludes from 'electoral expenditure' any 'expenditure incurred substantially in respect of an election of members to a Parliament other than the NSW Parliament' and s 7(3) excludes 'expenditure incurred by an entity or other person (not being a party, an associated entity, an elected member, a group or a candidate) if the expenditure is not incurred for the dominant purpose of promoting or opposing a party or the election of a candidate or candidates or influencing the voting at an election' (i.e. a State election).

7. As acknowledged in *Unions (No 1)*, the effect of a provision like s 7(2)(a) is to 'ameliorate' the burden on political communication 'to some extent'.[6] It does so because expenditure that is incurred 'substantially in respect of' another election (including a federal election) is not included within the cap on electoral expenditure. The word 'substantially' is 'susceptible of ambiguity' and has 'a lack of precision'.[7] While the point may not need to be decided in this case for the reasons addressed below, the Commonwealth submits that 'substantially' in s 7(2)(a) should be understood as meaning

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4 See generally *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (***ACTV***) at 169 (Deane and Toohey JJ) and see *McCloy* (2015) 257 CLR 178 at 268 [252]-[253] (Nettle J); *Hogan v Hinch* (2011) 243 CLR 506 at 555 [95] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 (***Mulholland***) at 200 [40] (Gleeson CJ).

5 As to which see *McCloy* (2015) 257 CLR 178 at 221 [93] (French CJ, Kiefel, Bell and Keane JJ), 294-295 [367] (Gordon J).

6 *Unions NSW v New South Wales* (2013) 252 CLR 530 (***Unions No 1***) at 555 [42] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), see also at 547 [15] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 582-584 [150]-[159] (Keane J).

7 *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367 at 382 (Deane J).

'having more than an insubstantial or incidental connection with'. That construction is textually open, and it conforms with the EF Act's focus upon the government of the State (at both State and local levels).[8]

8. That construction also conforms the EF Act's operation with the limits of the legislative power of the New South Wales Parliament,[9] having regard to the exclusivity of Commonwealth legislative power with respect to federal elections.[10] Construing s 7(2)(a) with 'an eye to' that constitutional limit,[11] the Commonwealth submits that State electoral laws cannot touch or concern federal elections more than incidentally,[12] and that the word 'substantially' in s 7(2)(a) should be construed so as to ensure that the EF Act does not transgress that limit.

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9. The reason that the precise location of the boundary on the operation of the EF Act that arises from s 7(2)(a) need not be decided in this case is because, irrespective of the precise location of that boundary, some political communication of a kind that engages the implied freedom will be burdened by the EF Act. That follows from the practical 'reality' that 'there is significant interaction between the different levels of government in Australia'.[13] For that reason, even in its operation with respect to communications about State elections, the EF Act burdens political communication of a kind protected by the implied freedom. Furthermore, at least in most cases, the nature and extent of the burden on *those* communications (as opposed to the burden on *other* communications) is not affected by s 7(2)(a).[14] Accordingly, and consistently with *Unions (No 1)*, the analysis

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required to determine whether the burden on communications about State elections is

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8 See eg EF Act, s 3(c); Explanatory note, Electoral Funding Bill 2018 (NSW) at 1 [**SCB 2090**].

9 *Interpretation Act 1987* (NSW), s 31(1). See also *Tajjour v New South Wales* (2014) 254 CLR 508 (***Tajjour***) at 555-556 [49]-[52] (French CJ), 585-589 [168]-[178] (Gageler J).

10 See eg *Smith v Oldham* (1912) 15 CLR 355 at 358 (Griffith CJ), 360 (Barton J), 365 (Isaacs J). See also *Nelungaloo Pty Ltd v Commonwealth* (1952) 85 CLR 545 at 564 (Dixon J); *McGinty v Western Australia* (1996) 186 CLR 140 (***McGinty***) at 231 (McHugh J); *Rowe v Electoral Commissioner* (2010) 243 CLR 1 (***Rowe***) at 14 [8] (French CJ); *Murphy v Electoral Commissioner* (2016) 261 CLR 28 (***Murphy***) at 113 [261] n 326 (Gordon J); *Local Government Association of Queensland (Inc) v Queensland* [2003] 2 Qd R 354 at 364 [12] (McMurdo P), 378 [72] (Williams JA).

11 *Monis v The Queen* (2013) 249 CLR 92 at 210 [334] (Crennan, Kiefel and Bell JJ).

12 Compare the absence of Commonwealth power with respect to State banking: *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 at 288-289 (the Court); *A-G (Vic) v Andrews* (2007) 230 CLR 369 at 407 [79] (Gummow, Hayne, Heydon and Crennan JJ), 424-425 [140]-[142] (Kirby J).

13 *Unions No 1* (2013) 252 CLR 530 at 549 [20] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), see

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also at 582-584 [150]-[159] (Keane J).

14 The position may be different if State and federal elections overlap, as in that case the nature and extent of the burden on *regulated* communication might be affected by the ability of third-party campaigners to engage in communication that is *unregulated* (which may turn upon the operation of s 7(2)(a)).

justified is not affected by s 7(2)(a) of the EF Act.

10. Nevertheless, it is important to keep distinct the two quite separate limits on the legislative power of the New South Wales Parliament that have been identified above. Once those distinct limits are identified, it is not surprising that s 7(2)(a) does not prevent the EF Act from burdening political communication, because that is not its purpose. Its purpose is to respond to the separate limitation on State legislative power that arises from the Commonwealth's exclusive power to regulate federal elections. Its effectiveness for that purpose does not fall for decision in this case. Importantly, however, the fact that the Court has rejected any attempted demarcation between federal and State topics of political discussion does not mean that it is not possible to draw a workable line between State and federal elections. Out of abundance of caution, the Commonwealth issued an notice under s 78B of the *Judiciary Act 1903* (Cth) to ensure it was permitted to draw the above distinction. However, it accepts that the significance of that distinction should not be decided until it is squarely in issue.[15]

(b) Expenditure caps are not incompatible with the implied freedom

11. The plaintiffs do not contend that the imposition of caps on electoral expenditure is incompatible with the system of representative and responsible government, provided the cap is justifiable in pursuit of a legitimate end, and they were right not to do so. It is as well to address briefly why that is so, given that this is the first time that this Court has been called upon to determine the validity of such a cap.

12. As a matter of principle, what was said in *McCloy* of caps on donations is apt to apply to caps on expenditure with equal force: such legislative means 'preserve and enhance' the system of government for which the Constitution provides, in light of '[t]he risk to equal participation posed by the uncontrolled use of wealth',[16] by limiting the extent to which money can be brought to bear upon the electoral process. 'Legislative regulation of the electoral process directed to the protection of the integrity of the process is … prima facie, legitimate'.[17] Further, limits on expenditure in electoral campaigns have a long history, as

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[15] **NSWS [64]**. At present, it appears that the point will arise in *Spence v Queensland* (No B35 of 2018).
[16] *McCloy* (2015) 257 CLR 178 at 207 [45], 208 [47] (French CJ, Kiefel, Bell and Keane JJ).
[17] *McCloy* (2015) 257 CLR 178 at 206 [42] (French CJ, Kiefel, Bell and Keane JJ).

was recognised in *McCloy*.[18] That history tells strongly *against* a conclusion that legislatures cannot employ caps on electoral expenditure to pursue legitimate ends.[19]

(c) Differential treatment of political parties and candidates

13. Central to the plaintiffs' case is the contention that a legislature cannot deliberately treat one source of political communication less favourably than another: **PS [33]-[36], [43]**. Invoking the metaphor of a 'level playing field', they contend that such a purpose is the antithesis of levelling the playing field, and is inherently incompatible with the system of representative and responsible government for which the Constitution provides.

14. In response, New South Wales suggests that such differential treatment may be permissible in light of the 'distinctive constitutional significance' of candidates and parties 'as the subjects of the protected electoral choice': **NSWS [26]**.

15. In assessing that submission, the Constitution must be read as a whole. One of its defining design features is the 'spare' manner in which it prescribes representative government, which thus leaves it to the Commonwealth Parliament 'to determine the way in which the notion of representative government is to be given effect at the federal level'.[20] This point has been frequently made in the cases.[21] Thus, 'the Constitution makes allowance for the "evolutionary nature of representative government" ... "[which is] a dynamic rather than a static institution and one that has developed in the course of [the twentieth] century"'.[22] Accordingly, 'care is called for in elevating a "direct choice" principle to a broad restraint

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[18] *McCloy* (2015) 257 CLR 178 at 207-208 [46] (French CJ, Kiefel, Bell and Keane JJ). See also *ACTV* (1992) 177 CLR 106 at 155-156 (Brennan J). Such limits were established shortly after Federation, by Pt XIV of the *Commonwealth Electoral Act 1902* (Cth), and they continued under Pt XVI of the *Commonwealth Electoral Act 1918* (Cth) until they were repealed in 1980. Those provisions had historical antecedents that pre-dated Federation (the *Corrupt and Illegal Practices Prevention Act 1883* (UK)).

[19] See *Monis v The Queen* (2013) 249 CLR 92 at 188-189 [264]-[266] (Crennan, Kiefel and Bell JJ). See also, in a different context, the history of closing the roll in *Murphy* (2016) 261 CLR 28.

[20] *Murphy* (2016) 261 CLR 28 at 106 [243] (Nettle J), quoting *Rowe* (2010) 243 CLR 1 at 70 [200] (Hayne J); see also *Rowe* (2010) 243 CLR 1 at 130 [420] (Kiefel J).

[21] See eg *A-G (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 (***McKinlay***) at 56-57 (Stephen J); *McGinty* (1996) 186 CLR 140 at 182-184 (Dawson J), 283-284 (Gummow J); *Mulholland* (2004) 220 CLR 181 at 194-195 [26] (Gleeson CJ), 206-207 [63]-[65] (McHugh J); *Murphy* (2016) 261 CLR 28 at 113-114 [263] (Gordon JJ).

[22] *Mulholland* (2004) 220 CLR 181 at 213-214 [78] (McHugh J), quoting *McGinty* (1996) 196 CLR 140 at 279-280 (Gummow J).

upon legislative development of the federal system of representative government',[23] as to do so would be antagonistic to the constitutional design.

16. A cautious approach to constraining legislative innovation in developing an electoral system coheres with what Crennan, Kiefel and Bell JJ said as a general proposition in *Monis v The Queen*, namely that it 'will be a rare case where a conclusion of outright incompatibility will be reached'.[24] To conclude that a purpose is illegitimate is to prevent legislatures throughout the federation from pursuing that purpose, no matter the means crafted to pursue it. It cuts off the legislature at a point prior to any attempt at justification, marking out territory that parliaments are forbidden to enter in any circumstances.[25] That is not lightly to be countenanced in any area of legislation, but that is particularly true where laws with respect to elections are concerned, for it would stymie innovation in the very area where the constitutional design contains within it 'scope for variety'.[26]

17. Parties and candidates are, at least as a practical matter,[27] necessary actors in the contest of ideas that precedes the choices to be made under ss 7 and 24 at the federal level. For reasons developed further below (at [40] to [45]), that points to a need to protect parties and candidates from certain forms of mischief associated with electoral campaigning which are peculiar to them. The justifying purpose upon which NSW ultimately relies is addressed to mischief of that nature – 'levelling the playing field' in the sense of allowing third party campaigners to have a genuine voice in the debate, while guarding against their 'drown[ing] out' the voices of the direct electoral contestants: **NSWS [37]-[38]**.[28] That purpose is not only compatible with the constitutionally prescribed system of representative and responsible government, but it protects and enhances it, and is therefore properly described as 'important'[29] or 'compelling'.[30] To explain why, it is

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23 *Mulholland* (2004) 220 CLR 181 at 237 [156] (Gummow and Hayne JJ), quoted in *Murphy* (2016) 261 CLR 28 at 106 [243] (Nettle J), see also at 124 [305] (Gordon J). See also *Day v Australian Electoral Officer (SA)* (2016) 261 CLR 1 at 12 [19] (the Court).

24 (2013) 249 CLR 92 at 194 [281].

25 The law will fail 'at the threshold': *Brown* (2017) 261 CLR 328 at 368 [121] (Kiefel CJ, Bell and Keane JJ).

26 *Mulholland* (2004) 220 CLR 181 at 206 [63] (McHugh J), quoting *McKinlay* (1975) 135 CLR 1 at 56 (Stephen J).

27 *Mulholland* (2004) 220 CLR 181 at 192 [20] (Gleeson CJ).

28 See also NSW's defence: **SCB 94-95 [86] and 96-97 [91]**.

29 *A-G (Canada) v Harper* (***Harper***) [2004] 1 SCR 827 at 884 [101] (Bastarache J).

30 See, by way of analogy, *McCloy* (2015) 257 CLR 178 at 222 [98] (Gageler J); see also at 221 [93] (French CJ, Kiefel, Bell and Keane JJ).

necessary to say something further about the 'level playing field' metaphor.

(d) The 'level playing field' metaphor

18. The plaintiffs' appeal to the 'levelling the playing field' metaphor does not support the limitation on legislative power that they advance. As with the use of other metaphors in constitutional analysis,[31] the concept of a 'level playing field' requires careful analysis in order to avoid 'deduc[ing] from one's "own prepossessions" of representative democracy a set of irreducible standards against which the validity of Parliament's work may be tested'.[32] When that analysis is undertaken, it is apparent that the plaintiffs seek impermissibly to extend what was said in the domestic and foreign case law concerning the 'level playing field' objective beyond their intended meaning.[33] Furthermore, they do so in a way that is insensitive not only to 'the inherent strengths and weaknesses of institutional structures',[34] but also to the proper roles of the legislature and the judiciary in developing representative government in Australia.

Australian origins of the 'level playing field' metaphor

19. The 'level playing field' metaphor appears to have entered Australian constitutional discourse in *ACTV*, via the oral submissions put on behalf of the Commonwealth. The Commonwealth Solicitor-General identified the concept as putting the 'parties and the participants [in the electoral process] on the level footing of not competing to spend such large sums of money by the electoral advertising'.[35] That is, the 'level playing field' metaphor was concerned with a comparison between the position of political actors.

20. The Commonwealth's submission was referred to by Mason CJ, and by Deane and Toohey JJ, and largely dealt with in the terms in which it had been put, without detailed

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31 See eg *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 629 [159] (Keane J); *Pollentine v Bleijie* (2014) 253 CLR 629 at 651 [49] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 556 [54] (McHugh J), 580 [121] (Gummow and Hayne JJ).

32 *Murphy* (2016) 261 CLR 28 at 86 [177] (Keane J), quoting *McKinlay* (1975) 135 CLR 1 at 44 (Gibbs J).

33 See generally *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 94 [137] (Hayne, Crennan, Kiefel and Bell JJ); *Ogden Industries Pty Ltd v Lucas* (1968) 118 CLR 32 at 39.

34 *Murphy* (2016) 261 CLR 28 at 69 [93] (Gageler J). See also at 69 [89] (Gageler J), 123 [303] (Gordon J). See also *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] AC 1312 at 1347-1348 [33] (Lord Bingham).

35 See Transcript of Proceedings, *ACTV* (HCA No S6/1992, 17 March 1992) at 117 (emphasis added) and see also at 171 identifying the statutory purpose as 'providing a fair, honest playing field for those who are the participants in the electoral process'.

consideration of its possible metes and bounds. The Chief Justice assumed that the Commonwealth's 'claim[ed]' purpose was to be 'understood as offering equality of access to all in relation to television and radio'.[36] But, reflecting the terms in which the submission had been made, that observation was primarily directed to the position *amongst* political actors. In rejecting that asserted justification for the law, his Honour observed that it was 'obvious' that the impugned provisions gave 'preferential treatment' to political parties represented in the preceding Parliament (thus 'favour[ing] the status quo').[37]

21. It is true that Mason CJ also drew attention to the position of persons other than candidates and political parties who wish to participate in the electoral process. But the point that he made in that regard was that the impugned provisions allowed 'no scope for participation in the election campaign'[38] by those persons, other than by the limited means protected by the legislation. That, in turn, informed his Honour's later reasons for concluding that the law was invalid, which (under the *Lange/McCloy* framework) may be seen to be directed to the third question of justification rather than the second question of compatibility. So much is evident from Mason CJ's emphasis upon the practical operation of the prohibitions in reaching a conclusion of invalidity.[39] Thus, the manner in which the identified end was pursued did not permit 'meaningful access' and effected a 'severe restriction' on certain sources of political communication.[40] Nowhere did his Honour suggest that a law differentiating between political actors and third parties would, for that reason alone, be invalid.

22. The same is true of the reasons of Deane and Toohey JJ, who understood the 'level playing field' object to involve seeking to ensure 'some balance in the presentation of different points of view'.[41] Their Honours accepted that that object may support 'some form of control of spending on, or some degree of regulation of the use of, political communication'.[42] To that extent, their Honours were in accord with the dissenting

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36 *ACTV* (1992) 177 CLR 106 at 131-132.
37 *ACTV* (1992) 177 CLR 106 at 132 (Mason CJ); that also appears to have been the reasoning of McHugh J at 239.
38 (1992) 177 CLR 106 at 132 (emphasis added).
39 (1992) 177 CLR 106 at 146; *Brown* (2017) 261 CLR 328 at 361 [93] (Kiefel CJ, Bell and Keane JJ).
40 (1992) 177 CLR 106 at 146; see also at 132.
41 (1992) 177 CLR 106 at 175 (emphasis added).
42 (1992) 177 CLR 106 at 175.

reasons of Brennan J, who said that 'reducing the untoward advantage of wealth on the formation of political opinion'[43] was an 'important object' to be advanced, if there was power to do so by the laws of the Commonwealth. A (permissible) justifying purpose articulated in terms of achieving 'some' balance (or at eliminating 'untoward' advantage) self-evidently accommodates a degree of flexibility as to the treatment of those to be regulated. It certainly does not suggest that their Honours considered that Parliament was precluded from seeking to 'favour, or suppress' certain sources of political communication in achieving that balance, irrespective of its justification for doing so: contra **PS [33]**. Instead, Deane and Toohey JJ's reasons for holding the law invalid may likewise be understood to have been directed at the third question (justification) rather than the second question (compatibility), the law not being justified because its practical operation was to impose an 'effective ban' from the point of view of those excluded from the free time system.[44]

23. The Court returned to the 'level playing field' concept in *Mulholland*, where the appellant sought to rely upon Mason CJ's discussion of that concept in *ACTV* in aid of a submission that the legislation impugned in *Mulholland* (the '500 rule' and the 'no overlap rule') impermissibly discriminated *between* candidates in a manner that was incompatible with the requirements of ss 7 and 24 of the Constitution. In rejecting that submission, the Court made clear that '[p]erfect calibration' of the 'playing field', even as between candidates, was not a condition of validity for an electoral law.[45]

24. Neither *ACTV* nor *Mulholland* suggest that the 'level playing field' metaphor had any settled meaning or place within Australian constitutional doctrine. But it was at least tolerably clear that, to the extent that the concept was relevant to constitutional analysis, it did not require uniform treatment of all persons whom a law might affect (even as between candidates in a federal election).

Developments in Canada

25. Greater precision in the notion of what a 'level playing field' might entail in the context of electoral law emerged during the same period in the Canadian authorities. The plaintiffs seemingly accept (**PS [n 43]**) that the position in those authorities is different to

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[43] (1992) 177 CLR 106 at 156 (emphasis added); see also, at 161.
[44] (1992) 177 CLR 106 at 175.
[45] (2004) 220 CLR 181 at 264 [241] (Kirby J), 297 [333] (Callinan J); see also at 190 [11] (Gleeson CJ), 206 [63] (McHugh J).

that which they assert is the 'correct position' in Australia, for it is said that in Australia legislatures cannot treat political parties differently from third-party campaigners because to do so undermines 'equality of opportunity' and 'distort[s] the flow of political communication': **PS [43]**.

26. Two points should be made at the outset concerning the Canadian approach and the plainiffs' concession that their contentions depart from the Canadian position. **First**, it is significant that the constraints that the plaintiffs seek to draw from the 'level playing field' metaphor have not been discerned in a system with comparable historical traditions.[46] That does not bode well for the plaintiffs' suggestion that some hard edged constraint is to be derived from the metaphor. **Secondly**, the rationale for the Canadian approach appears to have been accepted by this Court in *McCloy,* as explained below.

27. The Canadian Supreme Court discussed the notion of levelling the playing field in *Canada (Attorney General) v Harper*.[47] Bastarache J noted that '[t]he Court's conception of electoral fairness ... is consistent with the egalitarian model of elections adopted by Parliament as an essential component of our democratic society. This model is premised on the notion that individuals should have an equal opportunity to participate in the electoral process'.[48] His Honour went on to explain that '[t]he state can equalize participation in the electoral process in two ways', the second of which was to 'restrict the voices which dominate the political discourse so that others may be heard as well', including by electoral finance laws that 'seek to create a level playing field for those who wish to engage in the electoral discourse. This, in turn, enables voters to be better informed; no one voice is overwhelmed by another'.[49]

28. The above passage was extracted in the joint reasons in *McCloy* and was seemingly there regarded as applicable to the '[e]quality of opportunity to participate in the exercise of political sovereignty', which is an aspect of the representative democracy guaranteed by our Constitution. The Court in *McCloy* also appeared to treat the Canadian position as entirely coherent with *ACTV* (cf **PS [33]**) – the plurality explaining that in *ACTV* it was accepted that the fact that a legislative measure is directed to ensuring that one voice does

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[46] *McGinty* (1996) 186 CLR 140 at 268 (Gummow J).
[47] [2004] 1 SCR 827 at 868 [62] (Bastarache J).
[48] *Harper* [2004] 1 SCR 827 at 868 [62] (Bastarache J).
[49] *Harper* [2004] 1 SCR 827 at 868 [62] (Bastarache J).

not 'drown out others' does not mean that measure is illegitimate for that reason alone. A similar point was made by Gageler J, also referring to *Harper* and noting that the system of government in Canada is 'closer' to that of Australia than that in the United States.[50]

29. Likewise, in *Unions (No 1)*, Keane J explained the then caps on donations and political expenditure (which, even then, treated different sources differently[51]) by reference to the discussion in *Harper* of the 'level playing field' – observing that those measures were appropriate and adapted to ensure that wealthy donors are not permitted to distort the flow of political communication to and from the people of the Commonwealth.[52] His Honour's reasons accommodate a degree of flexibility: the caps 'may reasonably be seen to enhance the prospects of a level electoral playing field'.[53]

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30. It follows that the relevant constitutional principle (both here and in Canada) does not involve the pursuit of some strict and formalistic notion of equality of *treatment* for its own sake, let alone with any form of mathematical precision. The animating idea is a functional one: the 'level playing field' is directed at a form of equality or balance in the *outcome* (more equal participation in discussion on relevant political matters) and for a *particular identified purpose* (enhancing the information available to those making electoral choices). The short point is that it is permissible to restrict certain voices – those that may otherwise dominate the debate – to make room for *all* to be heard and thereby ensure that electoral choice is as fully informed as possible. Legislatures are therefore not impotent to treat particular voices differently.

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31. That has an important consequence in the context of the current matter, which is revealed by the record in *Harper*. The Supreme Court's reference to a level playing field can be traced to the evidence given at trial by Professor Aucoin, who was director of research for the Royal Commission on Electoral Reform and Party Financing (which released a report in 1991 entitled *Reforming Electoral Democracy*). Professor Aucoin's evidence stated in part:

> The reduction of financial barriers entails measures to construct a *level playing field.* The establishment of a level playing field is meant to provide an equality of opportunity

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[50] *McCloy* (2015) 257 CLR 178 at 248 [182].

30 [51] The prohibition in s 95I of the EFED Act has to be read with the differential caps in s 95F.

[52] *Unions (No 1)* (2013) 252 CLR 530 at 579 [136], see fn 181.

[53] *Unions (No 1)* (2013) 252 CLR 530 at 579 [136] (emphasis added). The plaintiffs' reliance on those aspects of his Honour's reasons at **PS [33]** is therefore misplaced.

> for the *contestants*, namely, the candidates and political parties, to present their case to the voters and for the voters to hear their case. The key mechanisms for accomplishing this objective include both a *floor* and publically funded resources for candidates and political parties and a *ceiling* of spending limits for all those who seek to influence the election or defeat of candidates and parties. This ceiling encompasses not only the contestants themselves but all others who are participants, namely those who are defined as 'third parties'.[54]

32. Consistent with the submission made by the Commonwealth in *ACTV*, the focus in Professor Aucoin's understanding of the 'level playing field' is on the 'contestants' who are to have 'equality of opportunity'. While the Supreme Court in *Harper* seemingly took a somewhat broader view, referring to a level playing field for all 'those who wish to engage in electoral discourse', the Court was clearly of the view that the differential treatment of third party campaigners as compared to candidates and political parties was permissible in such a system. In that regard, the Court in *Harper* approved of its earlier decision in *Libman v Quebec (Attorney General)*,[55] where it observed that 'it is the candidates and political parties that are running for election', and held that limits on third party expenditure must be lower than those imposed on candidates and parties, or 'the impact of [third party] spending on one of the candidates or political parties to the detriment of the others could be disproportionate'.[56] Explaining the result in *Libman*, Bastarache J said in *Harper* that 'the third party limit must be low enough to ensure that a particular candidate who is targeted by a third party has sufficient resources to respond', noting that some parties may be small, third party campaigners may have lower overall expenses and can focus on more limited issues.[57] Relating that back to the notion of the level playing field, his Honour said that the 'limits allow third parties to inform the electorate of their message in a manner that will not overwhelm candidates, political parties or other third parties'.[58]

33. The same conception of equality is echoed in *Bowman v United Kingdom*,[59] where the United Kingdom unsuccessfully sought to defend its measure as ensuring equality as between candidates, and as a measure protective of them, because the level of the cap

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54 *Harper v Canada (Attorney General)* [2001] ABQB 558 at [254] (emphasis added).
55 [1997] 3 SCR 569 (***Libman***) at 600-601 [49]-[50] (the Court).
56 *Libman* [1997] 3 SCR 569 at 600 [50] (the Court).
57 *Harper* [2004] 1 SCR 827 at 891 [116].
58 *Harper* [2004] 1 SCR 827 at 891 [118].
59 (1998) 26 EHRR 1 at 10 [39]. See also *McCloy* (2015) 257 CLR 178 at 205 [39] (French CJ, Kiefel, Bell and Keane JJ), quoting *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] AC 1312 at 1346 [28] (Lord Bingham).

imposed was too low. The problem with the measure was not its purpose, but the manner in which that purpose was pursued.

34. Given the above, the Court should be slow to find that the Constitution marks off from any legislative consideration the differential treatment of third party campaigners from candidates and political parties, on the basis that such differential treatment is necessarily incompatible with the constitutional system of representative and responsible government, where that differential treatment is otherwise justified.

'Equal treatment' is not required

35. It also follows from the above that incompatibility of the impugned provisions with the system or representative and responsible government for which the Constitution provides is not established simply by observing that parties and candidates are 'deliberately' given a higher cap than third-party campaigners: cf **PS [44]**.

36. To the contrary, as submitted above by reference to *McCloy* and the reasons in *Harper*, the animating idea underpinning the concept of the 'level playing field' (making room for *all* to be heard) necessarily envisages that it may be necessary to treat particular voices *differently* to achieve that purpose. There can be no requirement to treat different participants in the political process in the same way *when they are relevantly different.*[60] Political parties have long been a fixture in the political and constitutional milieu of the Australian federation.[61] If, as the Commonwealth contends below (see also **NSWS [26]-[30], [39], [40]-[42]**), there are relevant distinctions between candidates and political parties, on the one hand, and third-party campaigners on the other, then there is no reason to rule out their differential treatment (or, indeed, to characterise it as discriminatory). Whether any *particular* differential treatment can be justified is a separate question.

37. While the plaintiffs call in aid [**PS [30]**] the observation in *Unions (No 1)* that '[t]here are many in the community who are not electors but who are governed and are affected by decisions of government' who have 'a legitimate interest in governmental action and the direction of policy',[62] it is important not to take this out of context. That observation was

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60 See, eg, *Austin v Commonwealth* (2003) 215 CLR 185 at 247 [118] (Gaudron, Gummow and Hayne JJ).

61 See *McKenzie v Commonwealth* (1984) 57 ALR 747 at 749 (Gibbs CJ); *Day v Australian Electoral Officer (SA)* (2016) 261 CLR 1 at [23]-[24] (the Court); *Mulholland* (2004) 220 CLR 181 at 192 [20], 196 [29] (Gleeson CJ), 213-214 [78]-[80] (McHugh J).

62 (2013) 252 CLR 530 at 551 [30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

made in response to legislation that purported to prohibit donations from all persons not enrolled to vote. In context, it was directed to explaining why the freedom can be burdened by a measure that imposes a burden only upon those who are not electors. To recognise and accept, first, that third-party campaigners in the Australian community have a legitimate interest in federal political affairs [cf **PS [35]**], and second, that a burden on that interest must be able to be justified if it is to survive analysis against the implied freedom, is to say nothing about whether third-party campaigners must be treated identically to those actually standing for election.

38. Indeed, if every source of political communication had to be treated equally, then the plaintiffs' argument proves too much. Absolute equality was not the position under the EFED Act, to which the plaintiffs would have New South Wales return (for they submit that a reasonably available alternative to the impugned provisions of the EF Act is for New South Wales to observe the 'relativities' under the former Act: **PS [53]**).

39. In that regard, it is instructive to consider the provision of public funding for electoral expenditure under both the present and former NSW schemes.[63] Both schemes are (or were) limited to candidates and political parties. Both therefore involved the fiscally *advantageous* treatment of those persons and entities by reference to the fact that they are necessary participants in the political process. Inevitably, those fiscal advantages enhanced their capacity to engage in political communication[64] as compared to third party campaigners, who receive no such funding. Differential treatment of that nature is, however, well accepted, even where distinctions are drawn amongst the contestants. Illustrating that point, in *Mulholland*[65] Gummow and Hayne JJ referred to the decision of the United States Supreme Court in *Buckley v Valeo*,[66] which held that federal laws providing for the public funding of those parties that attract more than a specified minimum percentage of the vote do not invidiously discriminate between candidates in violation of the First Amendment jurisprudence because the laws furthered 'sufficiently important governmental interests' (there, the public interest in not funding hopeless candidacies with large sums of public money, and against providing artificial incentives

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63 See Pt 5 of the EFED Act; *Unions No 1* (2013) 252 CLR 530 at 545 [5] (French CJ, Hayne, Crennan Kiefel and Bell JJ); EF Act, Part 4.

64 *Unions No 1* (2013) 252 CLR 530 at 554 [38] (French CJ, Hayne, Crennan Kiefel and Bell JJ).

65 *Mulholland* (2004) 220 CLR 181 at 234 [147].

66 424 US 1 at 95-96 (per Curiam) (1976).

to 'splintered parties and unrestrained factionalism'). Public funding provides 'apparent benefits' to representative government in the 'minimisation of reliance by parties on campaign contributions'.[67]

Differences between candidates, political parties and third party campaigners

40. For the following reasons, candidates for election, and the political parties into which they commonly group, *are* relevantly different from third-party campaigners,[68] with the result that there are at least four legitimate reasons for treating them differently (none of which rest upon attributing to them a particular status or privileged position).

41. **First**, engagement in the political process by putting forward or standing as a candidate necessarily involves direct engagement in a contest for electoral support. As was noted in *Libman*,[69] in that contest it cannot be presumed that equal numbers of third party individuals or groups will have equivalent financial resources or inclination to promote each candidate or political party (a position which is well illustrated by the experience in the United States[70]). As such, the effect of third-party electoral expenditure could 'disproportionately' skew the election in favour of one candidate over others. Reflecting the point made by Professor Aucoin (at [31] above), particularly in an environment of capped electoral expenditure, it is that vulnerability to unequal competition *amongst the candidates* which makes the position of candidates for election different to that of third-party campaigners, and points to the legitimate reason to treat candidates differently.

42. **Secondly**, related to the first matter, a candidate might have to spread his or her cap of electoral expenditure around to respond to multiple third-party campaigners. Again, that has significant potential consequences for the contest *amongst the candidates*.

43. **Thirdly**, Bastarache J's observations in *Harper* (as to the likelihood that many third-party campaigners may have comparatively lower overall expenses and can focus on more limited issues – see at [34] above) are equally potentially apposite here. It is therefore wrong to assume that candidates, political parties and third parties start from a baseline of financial equivalence.

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67 *Mulholland* (2004) 220 CLR 181 at 239 [162]
68 See EF Act, s 4 (definition of "third-party campaigner").
69 [1997] 3 SCR 569 at 601 [50].
70 *Citizens United v Federal Election Commission*, 558 US 310 at 471-472 (Stevens J, in dissent) (2010).

44. **Fourthly**, expenditure by third parties raises the same broader forms of corruption this Court referred to in *McCloy* (clientelism).[71] By contrast, no such issue arises as regards *expenditure* by the candidates and parties themselves (as opposed to donations that might finance that expenditure).

45. Those four matters can, in an appropriate case, support treating candidates and parties differently from third-party campaigners in order to achieve a legitimate end. That differential treatment may take the form of a lower cap for third-party campaigners to: rein in the risks of clientelism; ensure a functional equality of opportunity in the electoral contest amongst candidates; and ensure that candidates for election, through whom the will of the people is (or will be upon election) actually transformed into legislative action, are not overwhelmed by those of more numerous third parties.[72] It follows that a legislative purpose to treat candidates and political parties differently to third party camgaigners is not inherently illegitimate. The validity of such a measure taken for any of those purposes depends, instead, on whether it can be justified (whether using the analytical tools identified at the third step in *McCloy*, or otherwise).

Distortion

46. Similarly, to contend (**PS [43]**) that the flow of information in the Commonwealth is distorted merely because particular individuals or groups of individuals are treated differently proceeds from the same unsound premise that those individuals or groups must be treated equally. Unequal treatment of candidates, parties and third-party campaigners does not necessarily distort the flow of political communication (cf **PS [43]**). To the contrary, differential treatment may enhance the ultimate flow of information by, for example, ensuring that candidates and their parties (a) have sufficient opportunity to respond to matters raised by third-party campaigners (as well as responding to each other), and (b) can be heard over more numerous third-parties. To 'protect those who participate in the prescribed system ... will often impose burdens on communication yet

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[71] *McCloy* (2015) 257 CLR 178 at 204, [36] (French CJ, Kiefel, Bell and Keane JJ). See also *Citizens United v Federal Election Commission*, 558 US 310 at 448-449 (Stevens J, in dissent) (2010).

[72] See generally **SCB 1057-1059, 1417-1418**; *Harper* [2004] 1 SCR 827 at 891 [116] (Bastarache J); *Libman v A-G (Quebec)* [1997] 3 SCR 569 at 600-601 [49]-[50] (the Court).

leave the communications free'.[73]

(e) The implied freedom affords room for legislative choice

47. In *Unions (No 1)*, the joint judgment observed that the contention that legislatures should be granted 'a margin of choice as to how a legitimate end may be achieved' is one which has 'not garnered the support of a majority of this Court', although 'the question has not been the subject of substantial argument'[74] (including in that case).

48. While it is undoubtedly 'the constitutional duty of courts to limit legislative interference with the freedom to what is constitutionally and rationally justified', and therefore the 'courts must answer questions as to the extent of those limits for themselves',[75] there is no reason why the question of what limits can be 'constitutionally and rationally justified' cannot be sensitive to the considerable discretion and flexibility which has always been reserved to legislatures in crafting electoral processes, and in doing so giving life to Australian conceptions of representative government.[76] To the contrary, there is every reason in principle to apply the *Lange/McCloy* framework to electoral laws in a manner that accommodates legislative innovation, dynamism and flexibility. So much was recognised in *McCloy*, where the plurality accepted that it was 'the role of the legislature to select the means by which a legitimate statutory purpose may be achieved' and that, '[o]nce within the domain of selections which fulfil the legislative purpose with the least harm to the freedom, the decision to select the preferred means is the legislature's'.[77] Accordingly, proportionality review is 'not a prescription to engage in a review of the relative merits of competing legislative models. To a large extent, determination of what is necessary for the achievement of a legislative purpose must be left to the Parliament'.[78]

49. To accept the above propositions is not 'to endorse particular labels such as "deference",

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73 *Coleman* (2004) 220 CLR 1 at 52 [98] (McHugh J).
74 (2013) 252 CLR 530 at 556 [45] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
75 *McCloy* (2015) 257 CLR 178 at 220 [91] (French CJ, Kiefel, Bell and Keane JJ).
76 *Australian Communist Party v Commonwealth* ***(Communist Party Case)*** (1951) 83 CLR 1 at 262-263 (Fullagar J).
77 *McCloy* (2015) 257 CLR 178 at 217 [82] (French CJ, Kiefel, Bell and Keane JJ) (emphasis added). See also *Levy v Victoria* (1997) 189 CLR 579 at 598 (Brennan CJ); *Mulholland* (2004) 220 CLR 181 at 305 [360] (Heydon J); *Murphy* (2016) 261 CLR 28 at 53 [39] (French CJ and Bell JJ), 64 [72] (Kiefel J); *Brown* (2017) 261 CLR 328 at 418 [282] (Nettle J).
78 *Brown* (2017) 261 CLR 328 at 420 [286] (Nettle J). See also *Murphy* (2016) 261 CLR 28 at 55 [42] (French CJ and Bell JJ).

"margin of appreciation" or "zone of proportionality"'.[79] It is simply to recognise that the implied freedom exists, and falls to be applied in this case, within a constitutional context where this Court has frequently endorsed the existence of considerable legislative choice and flexibility. That leaves for another day the scope legislatures may have to enact laws to burden the freedom for ends unrelated to the electoral system.[80] '[I]n our system the principle of *Marbury v Madison* is accepted as axiomatic, modified in varying degree in various cases (but never excluded) by the respect which the judicial organ must accord to opinions of the legislative and executive organs'.[81]

50. An appreciation of the wide scope of legislative choice in this field assumes particular significance in evaluating some of the contentions advanced by the plaintiffs.

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51. ***First***, the plaintiffs accord New South Wales very limited choice when they contend that it should return to the levels of the caps and the 'relativities' previously found in s 95F of the EFED Act [**PS [53]**]. In effect, they contend that New South Wales is not to be permitted to adopt some different regime to strive to achieve its legitimate electoral purposes in a better way. It must persist with the EFED Act until its provisions can be shown to be so deficient that it cannot provide an obvious or compelling alternative measure. As it happens, the argument fails because a less burdensome and reasonably available alternative will suggest invalidity only if the alternative achieves the same ends *to the same extent*.[82] Here, a return to either the absolute levels or the relativities of the EFED Act would not achieve New South Wales's purposes under the EF Act to the same extent as the levels and relativities set by the EF Act [see also **NSWS [45]**]. However, the plaintiffs' argument is in any event conceptually problematic, because it accords to legislatures an inappropriately narrow band of discretion and flexibility.

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52. ***Second***, in an attempt to demonstrate that s 29(10) substantially burdens the freedom, the plaintiffs point to the fact that three third-party campaigners exceeded the $500,000 cap at the 2015 election [**PS [48]**]. That argument is misconceived. If no-one wished to exceed the cap, then it is doubtful it would burden political communication at all. The fact that some individuals wish to spend more than the cap shows, by way of illustration of the

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[79] Cf *Murphy* (2016) 261 CLR 28 at 124 [304] (Gordon J).
[80] See generally *Coleman* (2004) 220 CLR 1 at 52-53 [99]-[100] (McHugh JJ).
[81] *Communist Party Case* (1951) 83 CLR 1 at 262-263 (Fullagar J)
[82] See, eg, *Tajjour* (2014) 254 CLR 508 at 571-572 [115] (Crennan, Kiefel and Bell JJ); *Murphy* (2016) 261 CLR 28 at 61 [65] (Kiefel J); *McCloy* (2015) 257 CLR 178 at 293 [361] (Gordon J).

practical operation of the law, nothing more than that there is a burden that must be justified. It does not show that the cap is unreasonable, or that it substantially burdens the freedom. Moreover, one must be careful not to attribute too much weight to how the impugned provisions affect particular communicators, because the implied freedom is not 'a personal right the scope of which must be ascertained in order to discover what is left for legislative regulation'.[83] The legislature can take the lead and set a cap which limits what people may spend for electoral purposes, without any requirement to set such a cap so as to permit future expenditure at past levels.

53. ***Third***, the plaintiffs submit that there is 'no historical basis' for New South Wales's concern that third-party campaigners will overwhelm candidates and political parties with their electoral expenditure unless they are capped at a lower amount [**PS [45]**]. However, New South Wales drew upon and was informed by United States experience with political action committees [**SCB 1412, 1415-1416**]. Further, the increase in expenditure in 2015 [**SC [28]-[29]**] is itself evidence of a trend of increasing third-party electoral expenditure. In those circumstances, it cannot be said that New South Wales's concerns about third-party expenditure have no evidentiary foundation whatsoever. In this respect, *Rowe* is distinguishable, for in that case, according to a majority of the Court, there was no factual basis for the concern about electoral fraud as a justification for the disenfranchisement effected by the measure impugned in that case.[84]

54. As a matter of constitutional principle, a legislature cannot be required to wait for a problem to materialise before it is constitutionally permitted to take action. There is no reason why a legislature must always be reactive, as opposed to proactive, precautionary and preventative. They may 'respond to felt necessities',[85] including 'concerns' that 'are more based upon inference than on direct evidence', and 'it is not illogical or unprecedented for the Parliament to enact legislation in response to inferred legislative imperatives. More often than not, that is the only way in which the Parliament can deal prophylactically with matters of public concern'.[86] Further, it is important to recall that 'this Court cannot, and will not, assess whether the relevant law has in fact achieved, or

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[83] *McCloy* (2015) 257 CLR 178 at 202-203 [30] (French CJ, Kiefel, Bell and Keane JJ), citing *ACTV* (1992) 177 CLR 106 at 150 (Brennan J).
[84] (2010) 243 CLR 1 at 38 [75] (French CJ), 61 [167] (Gummow and Bell JJ), 120 [382] (Crennan J).
[85] *McCloy* (2015) 257 CLR 178 at 251 [197] (Gageler J).
[86] *McCloy* (2015) 257 CLR 178 at 262 [233] (Nettle J).

will in fact achieve, its intended end or object'.[87]

(f) Expenditure can be aggregated to prevent avoidance or circumvention of caps

55. An aggregation provision that operates to prevent the circumvention of some other provision can be said to share in the purpose or purposes of the latter.[88] While any additional burden effected by the aggregation provision requires separate justification, if the cap which it reinforces is itself valid, then there is no reason in principle why the aggregation provision would not advance a permissible purpose. Its validity would then turn on whether it was proportionate to that purpose.

PART IV ESTIMATED HOURS

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56. One hour will be required to present the Commonwealth's oral argument.

Dated: 21 November 2018

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87 *Tajjour* (2014) 254 CLR 508 at 563 [82] (Hayne J). See also *McCloy* (2015) 257 CLR 178 at 272 [265] (Nettle J).

88 See, eg, *McCloy* (2015) 257 CLR 178 at 200 [22] (French CJ, Kiefel, Bell and Keane JJ), 252 [199] (Gageler J), 296-297 [374]-[381] (Gordon J).