IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

NO S211 OF 2014

BETWEEN: **JEFFERY RAYMOND MCCLOY**
First Plaintiff

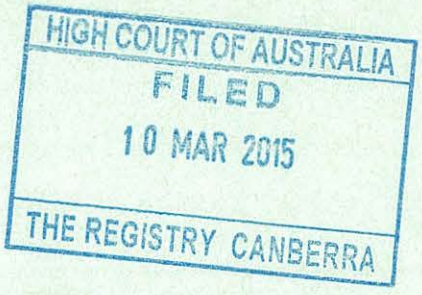
MCCLOY ADMINISTRATION PTY LIMITED
Second Plaintiff

NORTH LAKES PTY LIMITED
Third Plaintiff

AND: **STATE OF NEW SOUTH WALES**
First Defendant

INDEPENDENT COMMISSION AGAINST CORRUPTION
Second Defendant

ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA (INTERVENING)



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PART I FORM OF SUBMISSIONS

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

PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes as of right under s 78A of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) generally in support of the first defendant (**NSW**).

PART IV LEGISLATIVE PROVISIONS

3. The Commonwealth adopts the statement of applicable legislative provisions of the plaintiffs (which has been accepted by NSW).

PART V ARGUMENT

SUMMARY OF COMMONWEALTH SUBMISSIONS

4. The Commonwealth advances the following propositions.

   4.1. Understanding and application of the *Lange/Coleman* test[1] is governed by a systemic or functional conception of the implied freedom. The overall question is: does the law so burden, restrict or distort the free flows of political communication between the governed, the candidates and the elected representatives that it is incompatible with the continued existence of a political community in which the people exercise the sovereignty inherent in ss 7, 24, 62, 64, 128 and related provisions of the Constitution?

   4.2. Each of the *Lange/Coleman* questions is to be approached in light of this principle. Relevantly here, the second *Lange/Coleman* question is properly regarded as a framework for a multi-factorial analysis which brings to account the objective purpose of the law; the legislative means by which that end is sought to be achieved and the relationship between those matters, each assessed by reference to this underlying principle.

   4.3. That analysis reveals that the systemic information flows indispensable to the exercise of sovereignty by the people may reasonably be considered to be *enhanced* rather than impermissibly burdened by Division 2A of Part 6 and s 96E of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (**EFED Act**). The burden imposed by those provisions on the implied freedom is readily justified and they are not invalid.

   4.4. An important step in that analysis is a rejection of a narrow notion of 'quid pro quo corruption' as the *only* end that may be addressed by Australian electoral finance law dealing with donations. Increasingly, but not

[1] The term *Lange/Coleman* test or questions will be used here to refer to the two part test for validity identified in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (***Lange***) at 567 as modified in *Coleman v Power* (2004) 220 CLR 1 (***Coleman***).

exclusively, such a view has come to dominate United States (**US**) jurisprudence. It has no place here. The Court should also reject the notion (also apparent in the US authorities) that the act of donation has some communicative value in itself which directly attracts the freedom, or (seemingly related to that idea) the plaintiffs' contention that there is a form of constitutionally protected right or capacity to use donations to 'buy influence'.

4.5. The Commonwealth does not address the validity of Division 4A of Part 6 and confines itself to submissions on general principle as regards that aspect of the case.

SYSTEMIC NATURE OF THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION

5. During the 20 year period since the implied freedom of political communication was first recognised, its systemic and structural nature has been increasingly emphasised.[2] **First**, the implied freedom is directed to preserving the efficacy of the features of the institutional landscape provided for by the provisions of the Constitution from which it is implied. That is, those providing for representative and responsible government[3] and also s 128. **Secondly**, it is purely utilitarian – it exists only to serve that systemic or functional object, and has no independent life of its own.[4] **Thirdly**, the application of the accepted two-stage *Lange/Coleman* test is ultimately governed by this understanding of the implied freedom: it is a 'functional reflection' of the nature of the implied freedom.[5]

6. As regards the last point, while well established, the *Lange/Coleman* test is not a piece of constitutional text. Rather, it is an analytical tool to help answer the ultimate question posed by the interaction between the constitutional implication and a given law. That is, does the law so burden, restrict or distort the free flows of political communication between the governed, the candidates and the elected representatives that it is incompatible with the continued existence of a political community in which the people exercise the sovereignty inherent in:

   6.1. the direct choice guaranteed by ss 7, 24 and 128 of the Constitution; and

   6.2. the formal relationship established between the executive government and the Parliament by ss 62 and 64 and related provisions establishing the system of responsible government?

7. Putting the inquiry in that form requires some further explanation of the notion of the sovereignty of the people.

8. In *Unions NSW*, all members of the Court explained the system of representative and responsible government by reference to that terminology.

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2 *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 at 555-556 [44] per French CJ, Gummow, Hayne, Crennan and Bell JJ (***Aid/Watch***); *Wotton v Queensland* (2012) 246 CLR 1 (***Wotton***) at 13 [20] and 15 [25] per French CJ, Gummow, Hayne, Crennan and Bell JJ; *Monis v R* (2013) 249 CLR 92 (**Monis**) at 129 [62] per French CJ; *Unions NSW v NSW* (2013) 88 ALJR 227 (***Unions NSW***) per the joint reasons at 234 [28].

3 Principally ss 7, 24, 62 and 64.

4 *Unions NSW* at 245 [104] per Keane J; and *Tajjour v New South Wales* (2014) 88 ALJR 860 (***Tajjour***) at 892 [140] per Gageler J.

5 *Tajjour* at 892 [144] per Gageler J.

That is, as the plurality explained, a 'sovereign power residing in the people, exercised by the representatives' (see at [17] referring to Mason CJ's reasons in *Australian Capital Television Pty Ltd v Commonwealth* (***ACTV***[6])). Similarly, Keane J observed that political communication within the federation is free in order to ensure the political sovereignty of the people of the Commonwealth, who are required to make the political choices necessary for the government of the federation and the alteration of the Constitution itself (at [104]).

9. In some cases, of which this is one, it is necessary to look more closely at what that political sovereignty might entail. Three points should be made.

10. **First**, as Mason CJ observed in *ACTV* (at 138), the exercise of the freedom includes an opportunity for the people to 'influence the elected representatives'.[7] Indeed, more recently it has been recognised that the system 'postulates for its operation' communication in the nature of agitation for legislative and political changes.[8]

11. **Secondly**, that at least partially explains the emphasis this Court has placed upon the multi-dimensional nature of the required information flows, and the Court's refusal to confine temporally the freedom to election periods.[9] The freedom is one both to *receive* and *disseminate* information that might ultimately bear upon the electoral choice; it is engaged by communications *between* electors as well as those *to* electors;[10] and it is also engaged by communications *between* electors and legislators and the officers of the executive.[11] Moreover, as was held in *Unions NSW*, gags on the political communication of persons other than voters may equally engage the freedom, for that assures that the sovereign people are denied no information that may be required for that exercise of sovereignty.[12]

12. **Thirdly**, the corollary of the point made at [10] above regarding agitation is that the governors 'have a responsibility to take account of the views of the people on whose behalf they act' (*ACTV* at 138 per Mason CJ[13]). A similar idea is captured in the minority opinion in *McCutcheon v Federal Election Commission* (***McCutcheon***[14]) where Breyer J referred to an 'essential speech-to-government-action tie'. And to like effect, Professor Birch observed that one of the things expected of a responsible government is that it should be 'responsive to public demands', although that will necessarily involve arranging compromises between the conflicting demands of sections of the public and should not be understood to preclude the initiation of unpopular policies considered to be for the good of the polity.[15]

13. A failure to meet the 'responsibility' identified by Mason CJ, or successfully to

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6 (1992) 177 CLR 106 at 137.

7 See also the joint reasons in *Unions NSW* at 234 [30].

8 *Aid/Watch* at 556 [45].

9 *Lange* at 561.

10 As Gageler J observed in *Tajjour* at 892 [141].

11 *Aid/Watch* at 555-556 [44]; *Wotton* at 13 [20].

12 See at 251 [144]-[149] per Keane J and see also 234-235 [30] in the joint reasons.

13 See also *ACTV* per Brennan J at 159, McHugh J at 232-233.

14 572 US ___ (2014) slip op at 6.

15 AH Birch, *Representative and Responsible Government* (1964, Allen and Unwin) pp 17-21.

chart a course through the competing demands sketched by Professor Birch, sounds only in political consequences. But the important point for present purposes is that the system of government (of which the freedom is an indispensable incident[16]) is premised upon the assumption that there will be a capacity to discern the views of the people as a whole, and not merely a segment of them. As Keane J observed in *Tajjour*, the purpose of the freedom is to ensure to the people of the Commonwealth 'free communication ... as *equal participants* in the exercise of political sovereignty'.[17] Thus, the freedom should be understood as allowing for legislative choices directed to ensuring that a few voices do not drown out all others. If the people have little or no capacity to be heard by their representatives, they are not truly sovereign.

14. In contrast, the argument of the plaintiffs proceeds from the proposition that the freedom guarantees *un*equal individual 'participation rights', which cannot be touched by any Australian legislature. Those submissions (at PS [42] and [98]) start with a premise that donations may be more than just a source of funding to enable a free flow of communications from candidates and governors to the governed. Depending on the facts of each case, a donation might be one of the many available means by which the governed seek to influence policy formation by the governors. And it may generate closer ties (cf PS [96]-[98]). But the donation is still only an anterior step towards communicating a political message, not the message itself. Even the US Supreme Court, which has accepted that a donation has some general expressive quality for First Amendment purposes (see further at [36] below), concedes that the 'transformation of contributions into political debate involves speech by someone other than the contributor'.[18] It is the *communication* that follows the establishment of a tie that is constitutionally relevant; the 'essentially commercial' activity[19] of donation that precedes that tie is not.

15. The error in the plaintiffs' submissions arises when the plaintiffs go the further step of urging that such activity attracts the protection of the freedom or a 'corollary' of it (see at PS [92]). In advancing that submission, the plaintiffs have cherry-picked words from a longer passage in Archibald Cox's text, which was extracted both by Mason CJ in *ACTV* and in the joint reasons in *Unions NSW*. The important point made there was that:

> Only by freedom of speech...can people build and assert political power, including the power to change the men who govern them.[20]

16. As was said by Mason CJ in *ACTV*, that sentence is to be understood as a 'striking comment' on Professor Harrison Moore's statement that the 'great underlying principle' of the Constitution was that the rights of individuals were 'sufficiently secured by ensuring each an equal share in political power'[21] (emphasis added – that appears in a passage immediately following Professor

16 See eg *Unions NSW* at 232 [17]; *Lange* at 560.

17 At 901 [197] (emphasis added).

18 *Buckley v Valeo* 424 US 1 (1976) (***Buckley***) at 21.

19 See *APLA Ltd v Legal Services Commissioner* (2005) 224 CLR 322 at 351 [28] per Gleeson CJ and Heydon J.

20 A Cox, *The Court and the Constitution* (1987, Houghton Mifflin Company) p 212, extracted in *ACTV* at 138 and in *Unions NSW* at 234 [29].

21 At 139-140.

Moore's observation that, as compared to the US Constitution, 'guarantees of individual right are conspicuously absent'[22]). As Mason CJ went on to say, absent freedom of communication, there would be scant prospect of the exercise of that power (being political power, shared equally). That relates back to the point made by his Honour immediately before to the effect that, absent freedom of communication, representative government would fail to achieve its purpose:

> namely, government by the people through their representatives; government would cease to be responsive to the needs and wishes of the people and, in that sense, would cease to be truly representative.[23]

17. So, far from suggesting that there exists a free-standing 'power' or 'right' in richer individuals to 'buy influence over the people who govern them', those passages from *ACTV* are to be understood as identifying, in functional terms, the essential elements required to guarantee the constitutionally prescribed system identified above in which 'the people' (not particular segments of 'the people') are sovereign.

18. To make out their case, the plaintiffs rely implicitly on a translation of the majority position in recent First Amendment cases to our very different context. The difficulties involved in seeking to transplant that jurisprudence are identified in detail at [34]-[56] below. But the short point is that the step the plaintiffs advocate should not be taken because the end result of such an approach would not be sovereignty of the people but sovereignty of the few – those wealthy enough to impose their will over all others. This form of Darwinian struggle is not mandated by our Constitution and might properly be regarded as anathema to it.

THE INQUIRY UNDER THE SECOND LIMB

19. This case turns largely on the application of the second limb of the *Lange/Coleman* test, which should be understood by reference to the fundamental matters of principle identified at [5]-[18] above.

20. There is force in Keane J's suggestion in *Unions NSW* that the question for the Court in relation to the second limb might be whether it can reasonably be said that the impugned law is compatible with the free flow of political communication indispensable to the free and informed choices required of the people of the Commonwealth by the Constitution.[24] Having regard to what has been said above regarding political sovereignty, the Commonwealth would submit that the question might indeed be reformulated somewhat more broadly. Specifically, one should ask whether it can reasonably be said that the impugned law is compatible with the free flow of political communication indispensable to the exercise of political sovereignty by the people of the Commonwealth inherent in ss 7, 24, 62, 64, 128 and related provisions. That reformulation would capture what is required for both *electoral choices* and the *effective representation of the people* by the members of the Parliament and the Commonwealth Executive.

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22 HW Moore, *The Constitution of the Commonwealth of Australia* (1902, John Murray) p 329.

23 At 139.

24 At 248-249 [129]-[134].

21. Each of those formulations reflects the systemic nature of the freedom and the constitutional interests it seeks to protect. They are tailored to the ultimate inquiry identified above, and at a minimum provide a useful check on the result in a given case. They assist in avoiding the difficulties identified by Keane J in *Unions NSW* at [129], related to the indefinite and highly abstract language in which the second question is expressed and the possibility that the second limb may unwittingly invite decision-making having more in common with legislative rather than judicial power.

22. Those difficulties arise if the second *Lange/Coleman* question is approached in a formulaic fashion and without regard to the underlying purpose of the inquiry. Correctly applied, the second question involves a multi-factorial analysis which brings to account the objective purpose of the law, the legislative means by which that end is sought to be achieved and the relationship between those matters, each assessed by reference to that underlying principle. The examination is directed to the sufficiency of the justification for the burden identified under the first question.[25] Four important consequences follow.

23. **First**, legislation should not be invalidated solely on the basis that the Court considers that there are alternative, reasonably practicable and less restrictive means of achieving the same permissible ends.[26] That would lead directly to the troubling result referred to above – decision-making having more in common with legislative than judicial power.[27] Counterfactual exploration of that nature also risks descending into a lower level test than is appropriate, potentially requiring the second guessing of the merits of the legislation and the weighing up of finely balanced (and potentially competing) policy considerations and the allocation of resources upon which there may be competing claims.[28]

24. It is true that the joint reasons in *Unions NSW* observed that such matters may be relevant. But, as the passage from *Monis* to which their Honours there referred demonstrates,[29] that proposition is hedged all around with significant caveats. First, and most fundamentally, one does not use that analysis as a Trojan horse to develop some hypothetically more limited field of operation for the law that is not consistent with its objective purpose, discerned by orthodox methods of construction. The Court cannot substitute its own preferred policy outcomes without usurping the role of the legislature.[30] The observations of Professor Barak are apposite:

> [T]he legislator determines the statutory purposes it is interested in fulfilling. This can be determined, according to its discretion, at different levels of intensity. Assuming that both options satisfy the necessity test

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25 *Tajjour* at 893 [149] per Gageler J.

26 Cf *Tajjour* at 888 [113]-[116] per Crennan, Kiefel and Bell JJ.

27 *Unions NSW* at 248 [129] per Keane J. See also *Magaming v R* (2013) 87 ALJR 1060 (***Magaming***) at 1080-1081 [107]-[108] per Keane J.

28 *Attorney General for SA v Adelaide City* (2013) 249 CLR 1 (***Corneloup***) at 43 [65]; *Unions NSW* at 249 [132].

29 See *Unions NSW* at fn 64, referring to *Monis* at 214-215 [347]-[348].

30 *Tajjour* at 876 [36] per French CJ (in dissent in the result); and see, by way of analogy, *Attorney-General for the Northern Territory v Emmerson* (2014) 88 ALJR 522 at 541 [85].

– the legislator is free to choose any of them.[31]

25. As such, once it is concluded that the law is reasonably calibrated to a particular objective purpose, being one that is not incompatible with the maintenance of the constitutionally prescribed system of government, there should be little room for consideration by the Court of 'less restrictive alternatives'. The approach of Hayne J in *Tajjour* at [81], [83] and [89]-[90] illustrates the limitations that should be applied to the analysis and reflects Professor Barak's point.

26. **Secondly**, regardless of the weight that the Court accords any analysis of less restrictive means, the putative alternative measure must be 'equally [as] practicable' as the law in question[32] – necessitating a conclusion by the Court that the alternative scheme will in fact achieve the same result as the impugned scheme.[33] That cautionary qualification serves to emphasise that consideration of alternatives remains no more than a 'tool of analysis', not an essential stage in the second step through which one must invariably pass (once the requirement of rational connection is satisfied).[34]

27. To apply this reasoning to the factual context of this case: in an area such as electoral finance, there will inevitably be a range of overlapping, complementary and sometimes even conflicting ends which different Parliaments, at different times, may pursue to varying degrees and by varying combinations of devices through their chosen regimes. Electoral finance illustrates what will often be true of representative and responsible government more generally: as Gleeson CJ noted in *Mulholland v AEC,*[35] those concepts have an irreducible minimum content, but community standards as to their most appropriate forms of expression change over time, and vary from place to place.

28. The table referred to in footnote 62 of the plaintiffs' submissions (comparing Commonwealth, State and Territory election funding and donations disclosure rules)[36] illustrates that point. So too do the variations, over time, in Commonwealth electoral finance laws. There were modest expenditure limits that came into force very shortly after Federation under Part XIV of the *Commonwealth Electoral Act 1902* (Cth) and which were continued under Part XVI of the *Commonwealth Electoral Act 1918* (Cth) until repealed in 1980.[37] Indeed, measures of that nature have an even longer history in the tradition of representative government, commencing with the *Corrupt and Illegal Practices*

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31 Aharon Barak, *Proportionality: Constitutional rights and their limitations* (2012, Cambridge University Press) p 407.

32 *Tajjour* at 876 [36] per French CJ, 885 [90] per Hayne J, 888-889 [114]-[116] per Crennan, Kiefel and Bell JJ; *Monis* at 214 [347] per Crennan, Kiefel and Bell JJ and *Rowe v Electoral Commissioner* (2010) 243 CLR 1 (***Rowe***) at 134 [437]-[438] per Kiefel J referring to *Uebergang v Australian Wheat Board* (1980) 145 CLR 266 (***Uebergang***) at 306 per Stephen and Mason JJ.

33 As suggested by Mason J's reference in *North Eastern Dairy Co Ltd v Dairy Industry Authority (NSW)* (1975) 134 CLR 559 (***NEDCO***) at 608 to 'achieving a similar result' and see *Rowe* at 134 [438] per Kiefel J. See also *Tajjour* per Hayne J at 884 [81], [83] and 885 [89]-[90].

34 *Tajjour* per French CJ at 876 [36] (in dissent in the result) and cf 888-889 [113]-[116] per Crennan, Kiefel and Bell JJ.

35 (2004) 220 CLR 181 at 192 [20], 194 [26]; see also 217 [86], 239 [163], 271 [262], 272 [266], 305 [360]; and *Attorney-General (Cth) (Ex Rel McKinlay) v Commonwealth* (1975) 135 CLR 1 at 56 per Stephen J.

36 A copy of this table is reproduced at **Annexure A** to these submissions.

37 By the *Commonwealth Electoral Amendment Act 1980* (Cth).

Prevention Act 1883 (46 & 47 Vict c 51).[38] The validity of such restrictions has not directly been considered by this Court. However, the Court has expressly referred to the limitations that (until 1980) operated at a Commonwealth level, without suggesting that they raised any question of validity.[39]

29. The fact that no such regime now exists at the Commonwealth level,[40] or that wide differences exist between the regimes adopted by the various Australian polities, illustrates that the Constitution does not mandate any particular regime in this area. To the extent the *Lange/Coleman* analysis includes consideration of whether alternative less restrictive means were available to a Parliament, the Court must be astute to recognise that the alleged alternatives may not be as effective in achieving the particular mix of ends the Parliament has settled on, and thus may not be relevant alternatives.

30. Moreover, the existence of less restrictive alternatives and whether such measures are 'equally practicable' in that sense are likely to involve questions of constitutional fact.[41] Generally (and without suggesting that there exists some form of 'onus'[42]) it falls to the party asserting the existence of such measures to put before the Court the material that would allow it to conclude that there are less restrictive means available and that those means are 'as practicable'.[43] Reaching such a conclusion requires a high level of satisfaction on the part of the Court[44] – the alternative means must be 'obvious and compelling'.[45] Again, that follows from the point made above regarding the proper role of the Court.[46] And so, the Court will generally be reluctant to speculate upon the possible terms and effects of a 'hypothetical law'.[47]

31. Fewer difficulties may be presented where a polity, particularly an Australian polity, has actually adopted the putative alternative approach.[48] But even if that is so, the scope for use of that reasoning is limited. A comparison with an alternative measure directed to the end which is asserted may, for example, assist the Court in concluding that the impugned measure is not in fact directed to that end at all and imposes a burden on the freedom without any (real or explicable) justifying purpose.[49] But there is otherwise little use that can be

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38 See section 8(1) and schedule 1.

39 *McGinty v Western Australia* (1996) 186 CLR 140 (***McGinty***) at 283-284 per Gummow J and *Mulholland* at 207-208 [65] per McHugh J.

40 Note, in that regard, Hayne J in *Tajjour* at 884 [81], [82].

41 *Rowe* at 134 [438] per Kiefel J; *Uebergang* at 306 per Stephen and Mason JJ.

42 See eg *Maloney v R* (2013) 87 ALJR 755 (***Maloney***) at 71 [45] per French CJ and 832 [354]-[355] per Gageler J.

43 *Uebergang* at 306 – it may, in practical terms, be regarded as a persuasive burden (*Maloney* at 832 [355] per Gageler J).

44 *Monis* at 193-194 [280] and 214 [347] per Crennan, Kiefel and Bell JJ referring to *Betfair v Western Australia* (2008) 234 CLR 418 (***Betfair No 1***).

45 *Monis* at 214 [347]; *Tajjour* at 876 [36].

46 *Magaming* at 1080 [105] per Keane J.

47 See eg *Corneloup* at 86 [207] per Crennan and Kiefel JJ (Bell J agreeing at 90 [224]) and cf *NEDCO* at 608, 616 per Mason J, 622 per Jacobs J.

48 See *Betfair No 1* at 478-479 [107] per Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ (referring to arrangements with the Victorian regulatory authority) and 479-480 [110]-[112] per Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ (referring to the Tasmanian legislation).

49 See the joint reasons in *Unions NSW* at 238 [51], [53] and 239 [57]-[59] and note the submission recorded in *Betfair No 1* at 480 [113].

made of that analytical 'tool', particularly where the nature and intensity of the burden to be justified is comparatively low.

32. **Thirdly**, regard to the principles identified above explains the proposition that a comparatively stricter degree of scrutiny should be applied where the measure has a 'direct' effect upon protected communications in the sense discussed in *Hogan*,[50] as opposed to those laws that only impose an incidental restriction by prescribing the time, place, manner or conditions of a communication covered by the freedom.[51] That nuanced approach is a common sense proposition derived from the observation that a measure of the former description will more probably impede, and to a comparatively greater degree, the flows of political communication indispensable to the exercise of sovereignty by the people than the latter. As Gageler J noted in *Tajjour* (at [151]), that gives rise to a spectrum of possibilities, depending on the nature and the intensity of the relevant burden: at one end, the establishment of a sufficient justification may require close scrutiny congruent with a search for compelling justification. At the other, establishment of sufficient justification may require no more than demonstration that the means adopted by the law are rationally related to a permissible end.

33. **Fourthly**, these principles demonstrate why any bifurcation of the second *Lange/Coleman* question would be inappropriate. The Court cannot consider the relationship between the means adopted in the law and the constitutional imperative without bringing into view the object of the law: for some statutory objects (eg security of the nation at a time of war) will justify very large incursions on the freedom – see McHugh J's example in *Coleman*.[52] As such, rather than requiring a second separate inquiry, the observations of Crennan, Kiefel and Bell JJ in *Monis*[53] and *Tajjour*[54] may be better understood as reflecting the fact that the whole of the inquiry is a framework for determining whether the impugned law is compatible with the free flow of political communication indispensable to the political sovereignty of the people. It will not be so if the burden on those flows of information is determined to be too great. And so the (singular) question is whether the burden discerned at the first step is 'undue', meaning 'unjustified'.[55]

CAMPAIGN FINANCE LAWS UNDER THE FIRST AMENDMENT TO THE US CONSTITUTION

34. Campaign finance laws have been the subject of extensive First Amendment jurisprudence.[56] The usual caveats expressed by this Court as regards the use that may be made of First Amendment jurisprudence in the context of the implied freedom apply equally to those authorities, which is itself a difficulty for the plaintiffs' extensive reliance upon them.[57] Moreover, there are two areas of stark contrast with that body of authority, which both support that general proposition and assist in identifying two fundamental errors that infect the

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50 *Hogan v Hinch* (2011) 243 CLR 506 at 555-556 [95] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ. See also *Wotton* at 16 [30] per French CJ, Gummow, Hayne, Crennan and Bell JJ.

51 *ACTV* at 143 per Mason CJ and at 234-235 per McHugh J.

52 At 52 [98].

53 *Monis* at 193-194 [277]-[282].

54 At 888-889 [112]-[116].

55 *Tajjour* per Gageler J at 893 [149].

56 See eg the various authorities referred to by Breyer J in *McCutcheon* at 4-13.

57 See eg PS at [22], [93], [98] and cf, eg, Keane J in *Unions* at 245 [102].

plaintiffs' submissions.

The correct perspective for examining validity: donations are instrumental, not intrinsically protected

35. The first key difference with the First Amendment campaign finance authorities concerns the proper perspective from which to view the issue of validity. In the US, as has been noted a number of times by this Court, the inquiry is cast in terms of individual rights, reflecting the fact that the speech of individuals is protected per se. The plaintiffs implicitly invite this Court to adopt that approach, which is self evidently at odds with the systemic focus of the implied freedom.

36. The First Amendment confers a personal right to express one's views on any topic.[58] It operates in the area of political donations to safeguard an individual's right to participate in the public debate through political expression and political association. In *Buckley* the Court explained that when an individual contributes money to a candidate, she or he exercises both of those rights: the contribution both serves as a 'general expression of support for the candidate and his views' and 'serves to affiliate a person with a candidate'.[59]

37. The position in Australia is different. As was reiterated by all members of the Court in *Unions NSW*, the freedom does not confer personal 'rights' upon individuals.[60] There is, as Brennan J observed in *ACTV*,[61] an analogy to be drawn in that regard with the approach to the freedom guaranteed by s 92 – which similarly serves a systemic or functional purpose.[62] The implied freedom no more confers upon an individual a right to express or receive information than s 92 confers upon an individual a right to engage in interstate trade. The implied freedom may, of course, invalidate a particular law that burdens an individual's communications. But it is only in that 'limited sense' that the activities of such an individual are a 'surrogate' for the subject matter of the freedom.[63]

38. As such, it is wrong to seek to emphasise the circumstances of particular individuals; their particular communications; or, in this case, the attempt by particular individuals to use their wealth to buy 'political influence' (PS [97], [98] and see also PS [22], [23]). It is wrong to do so because it risks confusing the *constitutional issue* with the effect of the law upon individual speakers, recipients and other participants in the system.[64]

39. The correct perspective requires consideration of the flows of information necessary to sustain the political sovereignty of the people of the Commonwealth. How that question is to be answered does not, as Keane J said in *Unions NSW* (at [112]), depend upon the proposition that a political donation

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58 See *Unions NSW* at 245 [101] per Keane J and the authorities there referred to. See also *McCutcheon* at 14 (per Roberts CJ)

59 At 21-22.

60 At 236 [36] and at 246 [110]-[112].

61 At 150.

62 Being the preservation of national unity and the creation and fostering of national markets: *Betfair No 1* at 452 [12], 474 [88], 477 [102] per Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ.

63 Cf *Betfair Pty Limited v Racing New South Wales* (2012) 249 CLR 217 (***Betfair No 2***) at 267 [44] per French CJ, Gummow, Hayne, Crennan and Bell JJ.

64 Such matters are only material insofar as they are relevant to standing or may assist in identifying the area of communication affected by the impugned provisions: *Wotton* at 31 [80] per Kiefel J.

is a form of political expression by the donor. The other members of the Court in *Unions NSW* did not decide that issue (by reason of their conclusions at [38]). However, they did observe that the plaintiffs' submission on 'donative speech' in that case may blur the distinction between what is protected by the freedom and 'personal rights'.[65]

40. Both sets of reasons in *Unions NSW* suggest that the primary relevance of a restriction upon political donations for the purposes of the freedom (and the focus of the inquiry for the purposes of the second *Lange* question) is that donations may be seen as instrumental in *facilitating* the necessary flows of information: accepting, as McHugh J observed in *ACTV,*[66] that virtually every means of communicating ideas in today's mass society requires the expenditure of money. But, as a *form of communication in themselves*, donations are essentially private transactions conveying nothing about the underlying basis for the support[67] and thus are at best equivocal. A bigger donation does not convey more political speech than a smaller one.

41. To the extent that the plaintiffs' submissions are to be read as seeking to characterise a *donation itself* as intrinsically protected (PS [42]-[43]), that is not a perspective required by or reflected in the Constitution. Nor does the Constitution support a characterisation of donations as a species of protected participatory act by which a wealthy individual must have an unfettered ability to 'build and assert political power' (PS [22]-[23], [95]-[101]). The *correct* systemic perspective brings into focus the matters identified above: that is, that a representative system of government (in which the people are sovereign) is premised upon the assumption that there will be a capacity to discern the views of the people as a whole, and not merely a segment of them.

The correct conception of permissible ends: broader than merely preventing quid pro quo corruption

42. The permissible end or governmental interest that will support limits on campaign contributions has, over time, come to be narrowly drawn in the US by a majority of the Supreme Court. A key proposition underlying the plaintiffs' argument is that a similar approach should be taken here. That is at odds with the doctrinal matters identified above and should be rejected.

43. The US Supreme Court has traditionally drawn a distinction between 'contribution limits' (limits upon the quantum of political donations) and 'expenditure limits' (limits operating directly upon a person's capacity to expend money to engage in political speech).[68] As regards the former, the Supreme Court held in *Buckley* that contribution limits are permissible so long as the government could demonstrate that they were 'closely drawn' to match a 'sufficiently important' interest.[69] It accepted that that was satisfied, as regards the legislation before it, by the governmental interest in guarding against both the giving of 'large contributions ... to secure political quid pro quo's [sic] from current and potential officeholders'[70] (quid pro quo corruption), and the

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65 See at 236 [36], [37].

66 At 239 (by reference to *Buckley* at 19).

67 A point accepted even in the US: see *Buckley* at 20-21.

68 *Buckley* at 20-21.

69 Ibid 25.

70 Ibid 26.

appearance of corruption flowing from public awareness of this potential for abuse.[71] It further held that there is a legitimate governmental interest in preventing attempts to circumvent other contribution limits 'through prearranged or coordinated expenditures amounting to disguised contributions'.[72]

44. In later cases, that governmental interest in avoiding 'corruption' was held to extend to matters such as the prevention of 'undue influence on an office-holder's judgement'[73] and to avoiding the risk of privileged access to and pernicious influence upon elected representatives.[74] Such a conception would be broad enough to encompass 'clientelism', which conceives of the mischief as an ongoing patron-client relationship, and focuses not necessarily upon the enrichment of individual politicians, but on continued office-holding on condition that party politicians distribute public jobs, favours or privileged access in exchange for electoral support.[75] It also encompasses the notion that there may be a broader threat posed by politicians becoming too compliant with the wishes of large contributors.[76]

45. However, the reasons of the majority in the more recent decision in *McCutcheon* (which are relied upon by the plaintiffs) adopt a narrower approach. It was said that quid pro quo corruption – or 'direct exchange of an official act for money'[77] – was the *only* form of corruption that could be targeted by a measure regulating political speech.[78] That is, the government can only legislate to prevent the occurrence or appearance of acts of bribery.

46. The approach in Australia is different (contra PS [88]-[102]). Specifically, there is support in the case law for the proposition that the permissible ends for electoral finance regulation include:

    46.1. protecting the electoral process from secret or undue influence (which will be explained below), or the appearance of such matters – that is, a broadly conceived **anti-corruption end**;

    46.2. minimising the distortion of the political process – at the level of both election by the people and representation of the people in Parliament – in favour of those who can afford to make larger political donations (a **level playing field end**);[79] and

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71 Ibid 27.

72 Ibid 47.

73 *Federal Election Commission v Beaumont* 539 US 146 (2003) at 155-156.

74 *McConnell v Federal Election Commission* 540 US 93 (2003).

75 S Issacharoff, 'On Political Corruption' (2010) 124 Harv Law Rev 118 at 127-128, 138.

76 *Nixon v Shrink Missouri Government PAC* 528 US 377 (2000) at 389.

77 *McCutcheon* at 2-3 per Roberts CJ.

78 Ibid at 2-3 and at 19.

79 In addition to the cases cited below, there is historical support for this objective. Writing about the *Corrupt and Illegal Practices Prevention Act 1883* (UK), on which the first Commonwealth electoral expenditure limits were modelled (see [28] above), J Renwick Seager said: 'if its provisions are honestly carried out, the length of a man's purse will not, as now, be such an important factor; and the way will be opened for many men of talent, with small means, to take part in the government of the country, who have been hitherto deterred from seeking a seat in the House of Commons by the great expense which a contest entails. It is to be hoped, that not only will the House of Commons thus gain by the addition to its ranks of talented members, but that the people themselves will be gainers, by having their sense of patriotism increased, inasmuch as most of the work of the election will have to be of a voluntary character; and the electors will feel that a great public duty is put upon

46.3. as a logical consequence of accepting these permissible objects – preventing circumvention of them (an **anti-circumvention end**).

47. Support for the first of these ends is apparent from the reasons of Mason CJ in *ACTV* dealing with Part IIID of the *Broadcasting Act 1942* (Cth): see at 144. His Honour there accepted that, in the context of the Australian system of government, the 'need to raise substantial funds in order to conduct a campaign for political office does generate a risk of corruption and undue influence' (emphasis added), which he characterised as amongst the 'shortcomings or possible shortcomings in the political process': at 144-145. Importantly, he also observed that a further 'shortcoming' was that 'in such a campaign the rich have an advantage over the poor…'. His Honour accepted that each of those shortcomings (as well as the problems associated with brief political advertising trivialising political debate) may well justify some measures operating directly to restrict broadcasting of political advertisements and messages in a federal election campaign (at 145), a measure that would almost certainly be found invalid under the First Amendment.[80] Brennan J (in dissent in the result) took a similar view of the relevant mischief, noting that freedom of political discussion on performance in public office can be 'neutralized by covert influences', particularly by the 'obligations which flow from financial dependence'. His Honour observed that the 'financial dependence of a political party on those whose interests can be served by the favours of government' could cynically turn public debate into a cloak for bartering away the public interest.[81]

48. Support for the second end is apparent in the reasons of Deane and Toohey JJ, who (at 175) accepted that some form of control on spending on political communication at the Commonwealth level may be justified by reference to the need to observe a 'level playing field' and ensure some balance in the presentation of different points of view. Likewise, McHugh J accepted that various measures, including 'limitations on contributions', could be justified by the need to create a 'level playing field' for communication of political messages.[82] In contrast, the majority in *McCutcheon* directly rejected the proposition that it was an 'acceptable governmental objective to level the playing field'.[83]

49. More directly on point, in *Unions NSW*, Keane J expressed the obiter view that analogous provisions of the very scheme in issue in this case (ss 95A and 95I) could be seen to be appropriate and adapted to the object of ensuring that 'wealthy donors are not permitted to distort the flow of political communication to and from the people of the Commonwealth'. His Honour indicated that pursuit

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them; and that they are not merely assisting in a business which is to result in lining their own pockets in return for the social elevation or aggrandisement of the candidate'. Seager, *The Corrupt and Illegal Practices Prevention Act, 1883, With Introduction and Full Index* (1883, PS King & Son, London) p 3. This explanation reflects another strand of the level playing field end – namely, the need to ensure a level playing field at the level of candidacy for office.

80 Nowak and Rotunda, *Constitutional Law* (2009, 8th ed, West) pp 1491-1492.

81 At 159. See also McHugh J at 239 (characterising the mischief as 'the conduct of contributors and public officials in colluding to give political preference or favour in return for campaign contributions').

82 At 239 (see also Brennan J at 155, 156). Although not entirely clear, the legitimacy of the pursuit of an object of that nature was seemingly endorsed in the joint reasons in *Unions NSW* at 236 [39] – in discussing the legislation impugned in *ACTV*, their Honours said '[r]egardless of the legitimacy of its purpose (which may have been to effect a level playing field)…' (emphasis added).

83 572 US ___ (2014) slip op at 18.

of that end was an aspect of the broader end of 'the protection of the electoral process from secret or undue influence' and that such an end was a legitimate one that was compatible with the implied freedom of political communication (at [138], [139]). Of course, s 95A is a key provision of the donation capping provisions in Division 2A of Part 6 of the EFED Act which the plaintiffs impugn. And, as with the former Commonwealth scheme, s 95I even more directly impacts upon political communication by capping expenditure on it.

50. In making those observations in *Unions NSW*, Keane J referred to a passage from the decision of the Canadian Supreme Court in *Harper v Canada*,[84] where Bastarache J discussed the 'egalitarian model of elections', which (similar to the level playing field approach) involves restricting the (wealthy) voices that dominate political discourse so that others may be heard as well. That, Bastarache J said, 'enables voters to be better informed; no one voice is overwhelmed by another'. Later Bastarache J further developed that idea, saying (at [72]):

> Where those having access to the most resources monopolise the election discourse, their opponents will be deprived of a reasonable opportunity to speak and be heard. This unequal dissemination of all points of view undermines the voter's ability to be adequately informed of views. In this way, equality in the political discourse is necessary for meaningful participation in the electoral process and ultimately enhances the right to vote.

51. Bastarche J's analysis equally supports the view that equality in the political discourse is necessary for meaningful representation of the people by elected members of Parliament.

52. To return to Breyer J's observations (in dissent) in *McCutcheon* on the systemic matters underpinning the First Amendment, 'corruption' in the broader sense (ie encompassing the influence or sense of obligation that necessarily results from large donations to candidates and elected representatives):

> ...breaks the 'necessary chain of communication' between the people and their representatives. It derails the essential speech-to-government-action tie. Where enough money calls the tune, the general public will not be heard...That is one reason why the Court has stressed the constitutional importance of Congress' concern that a few large donations not drown out the voices of the many.[85]

53. Elected representatives and candidates cannot absorb an infinite amount of information. Large donations (even those not aptly described as 'undue' or 'corrupt' in a narrow sense) can distort the system from which the freedom has been implied. They do so through the very process of influence the plaintiffs embrace (PS [96], [97]). Accordingly, legislation directed to preventing corruption in that broad sense, or to enhancing equal participation or ensuring that a few voices do not drown out all others, is, par excellence, a constitutionally permissible end. Not only is it 'compatible' with the maintenance

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84 *Harper v Canada (Attorney General)* [2004] 1 SCR 827 at 868 [62] per Bastarache J. Of course, Australia has far more in common with Canada than the US by reason of their more closely comparable traditions of representative government: *McGinty* at 268 per Gummow J.

85 572 US ___ (2014) slip op at 6 per Breyer J.

of the constitutionally prescribed system of representative government, it is directed to enhancing that very same object. A like point was made by Breyer J in *McCutcheon*, observing that the governmental interest in preventing 'corruption' (in a non-narrow sense) is 'rooted in the constitutional effort to create a democracy responsive to the people – a government where laws reflect the views, ideas and sentiments, the expression of which the first amendment protects'.[86]

54. For similar reasons, the object of avoiding the appearance of corruption (in that broader sense) – or, put differently, of promoting confidence in the constitutionally prescribed system – is no less important and no less compatible with the freedom.[87] For if that confidence is lost, the people will come to perceive that their voices will simply not be heard by their elected representatives and will have no influence upon political debate.[88] That, in turn, stands to produce a sense of political lassitude, which will sap the institutional features of the constitutional landscape to which the freedom is directed of all meaningful content. A Parliament can reasonably take the view that the system may need to be supplemented by conditions that are 'conducive to the flow of information needed or desired for the formation of political opinions'[89] (including, critically, confidence in the system).

55. Accordingly, this Court should reject the proposition implicit in the plaintiffs' submissions that it should follow the narrow approach of the majority in *McCutcheon*. It should rather now be accepted that the broad anti-corruption end, the level playing field end and the anti-circumvention end are each compatible with the implied freedom of political communication.

56. The first and second ends are distinct, although there may be some overlap on the facts. Indeed, that is illustrated by the material in the Special Case suggesting that it may sometimes be difficult to discern the difference between a bribe and a large campaign contribution: SCB 75, para [50]. However, for the reasons given above, the potential distortion secured by large donations is, in itself, at odds with the notion of the political sovereignty of the people.

Division 2A of the EFED Act

First step

57. It is admitted by the defendants that the impugned provisions of Division 2A of Part 6 of the EFED Act effectively burden the implied freedom. That burden primarily arises because the provisions restrict the source of funds for parties, candidates and representatives to communicate with the governed. To the extent that a restriction on the means by which the community supports or effectuates changes in particular policies (PS [42]) is regarded as an additional aspect of the burden, this would not change the analysis. However the burden is characterised, it is not in any real sense a direct restriction of political communication per se; it restricts conduct that is a step towards political

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86 See at 7.

87 Note, in that regard, the reference to the promotion of 'perceived integrity' at 231 [8] of the joint reasons in *Unions NSW*. Nowhere did their Honours suggest that that was not a legitimate end.

88 See *McCutcheon* at 7 per Breyer J.

89 See Brennan J in *ACTV* at 159 (emphasis added).

communication. As such, the burden is of a minimal nature, or at the low end of the spectrum identified by Gageler J in *Tajjour* (at [151]). This assumes importance at the second stage of the inquiry.

Second step, part 1 – the ends are permissible

58. The ends served by the impugned provisions are to be determined by the proper construction of the statute. Insofar as Division 2A deals with donations to particular recipients (see ss 95A(1) and (2), 95B and 96HA), and calculates the applicable donation caps by aggregating amounts given to the members, candidates or groups of the same party (s 95A(3) and (6)), those ends are as follows:

    58.1. Removing the ability to make large scale political donations to a party or candidate, thereby preventing the mischief of possible corruption: see, identifying that as the general purpose to which the provisions of Part 6 capping political donations are connected, *Unions NSW* at [53] in the joint reasons.[90]

    58.2. Minimising the distortion of the political process in favour of those who can afford to make larger political donations (the level playing field end). (As submitted above, this is a distinct end, although the facts giving rise to each end may overlap.)

    58.3. Promoting confidence in an electoral system in which financial influence is limited overall. That object is apparent when one considers Division 2A in the context of other important features of the Act, including the limits on political communication expenditure (Part 6, Division 2B), the provision for public funding (Part 5) and the requirements regarding the disclosure of political donations and electoral expenditure (Part 6, Division 2).

59. Each of those is a permissible end. The plaintiffs erroneously proceed from an assumption that only an attenuated version of the first end is permissible; and that the second end is impermissible. Whilst they apparently accept that the third end is permissible (see PS [106]), they significantly understate its importance by characterising it as an essentially 'cosmetic objective' (PS [106]). The true position is that maintenance of public confidence in the electoral system is essential to ensuring that system's ongoing operation.

60. The 'party aggregation cap' provisions are also directed to the secondary purpose of guarding against circumvention of the single recipient cap.

Second step, part 2 – the means adopted are sufficiently tailored to those ends

61. One starts from the proposition that the objects identified at [58] and [60] above are not only permissible, they are essentially congruent with the functional purpose of the implied freedom. They do not come at 'too great a cost' to the system of representative and responsible government.[91] Indeed, they may be seen to positively *add* protective capital to that system. Further, Division 2A

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90 Considered together with the provision for public funding in Part 5, the scheme may be understood to both remove the ability to make and the need for such donations (a matter which their Honours seem to have had in mind).

91 *Tajjour* per Gageler J at 896 [163].

need not be justified against an end narrowed to the 'prevention of quid pro quo corruption' approach endorsed in the US authorities (cf PS [88]-[102]). The logic of the plaintiffs' argument seems to be that *no* cap on political donations, whatever its size, is constitutionally permissible unless such cap 'target[s] ... actual instances of corruption' in that narrow sense (PS [105]). In other words, everyone should have an almost unlimited right to buy access to and influence over candidates and elected representatives, in circumstances where their large donations will necessarily put them in a position to have a heavy hand in shaping representatives' policy positions, as long as there is not a bribery arrangement. For the reasons discussed earlier, that cannot be right.

62. Parliament has considerable flexibility as to the means it adopts to achieve the ends described at [58] and [60] above. Indeed, that potentially includes a total ban on all forms of political donation. Such a possibility was left open in the joint reasons in *Unions NSW* (at [59]). On the question there raised as to whether such a measure would be a 'proportionate response' to the relevant mischief, it would be open in an appropriate case to conclude that it would be, provided the scheme included other components to preserve the necessary flow of communication, for example appropriate public funding and/or free access to communications platforms. Again, that follows from the observation that, in an Australian constitutional context, the primary relevance of political donations is in facilitating the flows of protected communications necessary for the political sovereignty of the people. The current scheme involves a lesser restriction.

63. Further, the scheme effects no relevant discrimination of the kind identified by Mason J in *ACTV* or by Keane J in *Unions NSW*. Division 2A operates in a uniform and non-discriminatory manner upon all relevant participants (donors and donees). As to the supposed discriminatory effect upon recipients (PS [111]), there is simply insufficient material to support that assertion: cf the material before the Court in *Unions NSW* and the self-evident effects of the legislation in *ACTV*. Further, it is erroneous to assume that *any* form of 'singling out' (as the plaintiffs would put it) or differential treatment amounts to discrimination of a *relevant kind*. Mason CJ rather made plain that he was concerned with a particular form of substantive discrimination: a differential effect that favours some political views over others. That is, as Keane J put it in *Unions NSW*, an effect that distorts the flow of political communication. It suffices to say that Division 2A does precisely the opposite. And in any event, having money is not relevantly a political view. The plaintiffs' argument is really just a further iteration of their incorrect submission that the implied freedom guarantees some form of unfettered 'right' to contribute as much money as they see fit to political candidates.

64. Finally, and critically, there is nothing in the Special Case that would suggest that the quantum of the caps in s 95A prevents candidates or parties from amassing the necessary resources for effective advocacy.[92]

65. Having reached these conclusions, the various quibbles as to whether the legislation is overbroad, or under-inclusive, or perhaps both simultaneously, can be put to one side. And so too can the question of less restrictive means – for example, the plaintiffs' suggested alternative of imposing additional disclosure

92 Cf *Randall v Sorrell* 548 US 230 (2006) at 253.

requirements (PS [107]). For, once the Court is satisfied that this scheme:

65.1. serves objects directed to the enhancement of the freedom;

65.2. does not distort the flow of communication (because it is relevantly non-discriminatory); and

65.3. does not effectively prevent candidates or parties from amassing the necessary resources for effective advocacy,

it is clear that there is a rational connection between the scheme and the (constitutionally permissible) objects – as regards both the single recipient donation caps, and the 'aggregated caps' (cf PS [108]). And in circumstances where the burden is at the low end of the spectrum identified by Gageler J in *Tajjour* (see [57] above), that is sufficient to conclude the matter.

66. Division 2A is not invalid. Question 2 should be answered 'no'.

Section 96E of the EFED Act

67. Properly construed, the prohibition on certain 'in kind' or indirect campaign contributions to a party, elected member, group or candidate above a prescribed monetary threshold in s 96E is rationally connected to the four permissible objects identified above.

68. Contrary to what is asserted at PS [116]-[124], there is an obvious explanation for the particular approach taken to those contributions. Indeed, that is exemplified by the allegations that are subject of the plaintiffs' pleaded case – see SCB 24, para [10] of the pleading, which appears to engage s 96E(1)(b). Matters such as the payment of Mr Grant's wage and other payments of 'electoral expenditure' (see the definition in s 87) stand to put donors in a position of greater control and influence over the day to day activities of elected members and candidates during election campaigns, as compared to that which would be obtained through the making of a fungible money donation. Mr Grant effectively became the second plaintiff's 'employee'.

69. The same is true of the other categories of in-kind contributions in s 96E. For example, the ongoing use of a car or office accommodation (s 95E(1)(a)) might be understood to come with conditions or expectations as to the future conduct of the candidate. And the selective waiver of payment for electoral expenditure for advertising could be deployed to exercise de facto control over the content of political messages.[93]

70. Each of those categories is united by a common characteristic: the capacity to apply one's property to create ongoing and potentially insidious political relationships, which penetrate to the internal workings of a political campaign.

71. By prohibiting such contributions that exceed $1000 in value, the Parliament has sought to avoid the possibility that wealthy people could distort the political process by leveraging those matters into some form of overbearing influence.

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93 The question of the proscription, by regulation, of indirect campaign contributions involving other categories of goods and services (s 96E(1)(d)) does not arise in this matter. To the extent that potentially includes in-kind donations other than for electoral purposes (see PS [114]), similar questions of control and influence would still arise.

Such influence may readily evolve into a relationship of dependence (see again Brennan J's observations in *ACTV*), exacerbated by the actual or perceived threat of withdrawal of in-kind contributions. That has a rational connection with the broadly understood anti-corruption object; the object of achieving a level playing field; and the object of promoting confidence in an electoral system in which financial influence is limited overall. Alternatively, it is a more refined, and equally permissible, aspect of those ends.

72. Further, the practical operation of s 96E is to require that such contributions as do not fall within the exceptions be made in money form or not at all. A provision of that nature is readily regarded as serving the object of avoiding the circumvention of the caps in Division 2A (as to which see above) and also the caps on electoral communications expenditure (Division 2B) and the disclosure provisions (Division 2), recognising that such donations may pose particular difficulties in relation to valuation and monitoring. The supposed temporal disjunction between the enactment of s 96E and Division 2A is simply not to the point.[94]

73. And, for essentially the same reasons given above, the burden imposed by those measures is sufficiently justified. Indeed the position is *a fortiori* given that all that is involved over and above Division 2A is a requirement that the donation take a *particular form*. That involves an additional burden that will have no more than a marginal effect upon the protected flows of political communication. The conclusion that it serves a rational end supplies sufficient justification. Again, the existence or otherwise of alternative means of achieving that end is of marginal relevance having regard to the nature of the ends and the very mild burden. And in any event, that to which the plaintiffs point (a requirement to supply a reliable valuation) would be ineffective in avoiding the potential problem of de facto control. Further, matters such as the necessity for additional administrative machinery, the practical issues in implementing such a scheme (including, in particular, difficult questions as to valuation methodology) and the risk of non-compliance point to the fact that the plaintiffs' suggested alternative is not equally as practicable as the impugned law. It would be a different scheme and not a relevant comparison: see Hayne J in *Tajjour* at [89], [90].

74. Section 96E is not invalid. Question 3 should be answered 'no'.

Division 4A of the EFED Act

75. The Commonwealth does not put submissions as to the validity of Division 4A.

76. As a matter of principle, a Parliament (State or Commonwealth) can validly prohibit identified classes of donors from making political donations, including for the purpose of safeguarding the integrity of political governance by excluding the potential for the exercise of undue or corrupt influence in areas of particular vulnerability.

77. Furthermore a particular prohibition could be valid even if it was directed to only some possible or likely sources of corruption or undue influence.

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94 *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 88 ALJR 722 at 726 [25] and the authorities there referred to.

78. However, a ban on donations from persons in identified business sectors - particularly property developers - raises questions because it necessarily disfavours funding from one category of electors, or section of the governed, in comparison with others. Measures of that nature, with their concomitant distortion of the free flow of political communication, will tend to attract the higher end of the spectrum identified by Gageler J in *Tajjour* at [151].

PART VI ESTIMATED HOURS

79. It is estimated that 45 minutes will be required for the presentation of the oral argument of the Commonwealth.

10 Dated: 10 March 2015

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Annexure A

Working Paper 1 – Overview of Australian Election Funding and Donations Disclosure Laws

Panel of Experts
Dr Kerry Schott (Chair)
Mr Andrew Tink AM
The Hon John Watkins

August 2014

Annexure A - Summary of Commonwealth, State and Territory election funding and donations disclosure rules

	CTH	ACT	NSW	QLD	VIC	WA	NT	SA	TAS
Donations bans and caps	Yes - cap on anonymous donations of more than $12,800: *Commonwealth Electoral Act 1918* (Cth) s 306.	Yes - annual cap of $10,000 for donations to parties and candidates: *Electoral Act 1992* (ACT) s 205I. Cap of $1,000 on anonymous donations: s 216A. Ban on corporate donations to parties and candidates: s 205I(4). Anonymous donations of less than $250 are banned if the total of such small anonymous gifts received for the financial year would be more than $25,000: s 222.	Yes - annual cap of $5,700 for donations to parties and groups; $2,400 for candidates and third-party campaigners: *Election Funding, Expenditure and Disclosures Act 1981* (NSW) s 95A. Cap of $1,000 on anonymous donations and in-kind campaign contributions: ss 96E and 96F. Ban on property developer, tobacco, gambling and liquor entity donations: Div 4A. Ban on donations from unenrolled individuals and entities without an ABN: s 96D.	Yes - cap on anonymous donations of $12,800 or more to parties and $200 or more to candidates: *Electoral Act 1992* (Qld) s 271. Donations of foreign property are prohibited: s 270.	Yes - $50,000 cap on donations from casino and gambling licensees: *Electoral Act 2002* (Vic) s 216.	Yes - cap on anonymous donations of $2,100 or more: *Electoral Act 1907* (WA) s175R.	Yes - cap on anonymous donations of $200 or more to candidates and $1,000 or more to parties: *Electoral Act* (NT) s 197.	No.	No.

	CTH	ACT	NSW	QLD	VIC	WA	NT	SA	TAS
Expenditure limits	No.	Yes - For parties, the limit is $60,000 (adjusted for inflation) x number of endorsed candidates contesting the election, up to a maximum of 25. The expenditure limit for a party that contests all electorates is $1,500,000 (adjusted for inflation). The limit for independent candidates and third-party campaigners is $60,000: Div 14.2B	Yes - s 95F sets limits on 'electoral communication expenditure' by parties, groups, candidates and third-party campaigners for general elections and by-elections. The expenditure limit for a party that endorses candidates in all 93 districts for the 2015 State election is $10,341,600.	No.	No.	No.	No.	No.	Yes - $15,000 limit for Legislative Council elections only. Candidates must declare expenditure to demonstrate compliance with the cap. Political parties and third parties are prohibited from incurring electoral expenditure for Legislative Council elections: *Electoral Act 2004* (Tas) ss 160 and 162.

	CTH	ACT	NSW	QLD	VIC	WA	NT	SA	TAS
Public funding	Yes - direct entitlement scheme. Candidates and Senate Groups that receive at least 4% of first preference votes (FPVs) are eligible. The current funding rate is $2.56 per FPV: Pt XX, Div 3.	Yes - direct entitlement scheme. Parties and independent candidates who receive at least 4% of FPVs are eligible. The funding rate for the 2012 election was $2.00 per FPV: s 207. Administrative funding is also available at the rate of $5,000 per elected member on a quarterly basis: s 215C.	Yes - reimbursement scheme. Parties and candidates who receive at least 4% of FPVs are reimbursed approx. 75% of actual electoral communication expenditure from the Elections Campaign Fund: Pt 6, Div 5. Parties are also entitled to Administration Funding based on no. of elected members (max. 2014 entitlement is $2.37M): Pt 6A Div 2. Parties that are ineligible for Administration Funding may apply for Policy Development Funding: Pt 6A, Div 3.	Yes - reimbursement scheme. Parties and candidates who receive at least 6% of FPVs are eligible. The current max. funding rate is $2.90 per FPV for parties, and $1.45 per FPV for candidates: s 225. Policy Development Funding is also available to parties with at least 1 elected member: s 239.	Yes - reimbursement scheme. Threshold is 4% of FPVs. The max. funding rate is $1.20 per FPV, adjusted for inflation: ss 211-214.	Yes - reimbursement scheme. Threshold is 4% of FPVs. The current max. funding rate is $1.77 per FPV: s 175LC.	No.	No.	No.

	CTH	ACT	NSW	QLD	VIC	WA	NT	SA	TAS
Donations disclosure rules	Yes - parties, associated entities, and third parties who incur electoral expenditure must lodge annual returns, including details of donations of more than $12,800. Donors to parties must report annually on donations of more than $12,800. Candidates, donors to candidates, and Senate groups must disclose details of donations of more than $12,800 after each election: Pt XX, Divs 4-5A	Yes - donations of $1,000 or more must be reported within 7 days if received in the lead up to an election: s 216A. Annual and post-election returns detailing donations and expenditure are also required. 'Political donations' include membership fees and entry fees for fund-raising events if they exceed $250: s 232.	Yes - parties, groups, elected members, candidates, third-party campaigners and major political donors must lodge annual returns, including details of donations of $1,000 or more: s 92. 'Political donations' include membership fees, intra-party transfers, and entry fees for fund-raising events: s 85(2).	Yes - parties, donors to parties and associated entities must lodge annual returns incl. details of all donations of $12,800 or more: ss 201A and 265. Candidates, donors to candidates and third-party campaigners must disclose the details of all donations of $12,800 or more after each election: s 261, 263 and 264.	No.	Yes - parties and associated entities must lodge annual returns, including details of donations of $2,100 or more: ss 175N-175NA. Candidates, grous and third-party campaigners must disclose details of donations of $2,100 or more after each election: ss 175O-Q.	Yes - parties, donors to parties and associated entities must lodge annual returns incl. details of donations of $1,500 or more: s 194. Candidates and donors to candidates must disclose details of all donations of $200 or more after each election: s 191. Third-party campaigners must disclose details of all donations of $1,000 or more after each election: s 192.	None at State level. Local government candidates must lodge a return with the relevant council's CEO disclosing the total amount of donations valued at $500 or more, and the details of all donors: *Local Government (Elections) Act 1999* (SA), s 81.	No.