IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S211 of 2014

BETWEEN:

JEFFERY RAYMOND MCCLOY AND ORS
Plaintiffs

and

STATE OF NEW SOUTH WALES AND ANOR
Defendants

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

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Filed on behalf of: Attorney General for the State of Victoria

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PART I: CERTIFICATION

1. These submissions are suitable for publication on the internet.

PART II: BASIS OF INTERVENTION

2. The Attorney-General for Victoria intervenes in this proceeding pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the defendants.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

4. The plaintiffs have referred to the relevant constitutional and legislative provisions.

PART V: ARGUMENT

Summary of argument

5. In summary, the Attorney-General for Victoria submits that the aims sought to be achieved by the New South Wales Parliament in the impugned laws before the Court are legitimate and that the State has legislated for those aims consistently with the implied freedom of political communication. In particular:

   (a) the prohibition on political donations by property developers in Div 4A of Pt 6 of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (**EFED Act**) are valid. They are reasonably appropriate and adapted, or proportionate, to the legitimate end identified by the Parliament of New South Wales in light of that State's history and experience in relation to corruption in the area of property development decisions of minimising the actuality and appearance of corruption and undue influence in the electoral process and the institutions of representative government thought to arise from political donations being made by property developers and their close associates (Question 1);

   (b) the caps on political donations in Div 2A of Pt 6 of the EFED Act are valid. They are reasonably appropriate and adapted, or proportionate, to the legitimate end of minimising the occurrence and appearance of corruption and undue influence in the electoral process and the institutions of representative government thought to arise from the making of large political donations (Question 2);

(c) the prohibition on the making or receipt of certain indirect campaign contributions in s 96E of the EFED Act is valid. It is calculated to avoid circumvention of Div 2A of Pt 6 of the EFED Act (Question 3).

The EFED Act

6. The EFED Act adopts a range of measures to regulate funding and expenditure as part of the electoral processes at State and local government levels in New South Wales.[1] Part 4 provides for a system of registration of candidates, groups of candidates and third-party campaigners. Part 5 provides for public funding of electoral communication expenditure in State election campaigns from an Election Campaign Fund. Part 6 provides for public disclosure of certain political donations (in Div 2), caps on political donations for State elections (in Div 2A), caps on electoral communication expenditure for State election campaigns (in Div 2B), the management of donations and expenditure by parties and candidates (in Div 3), prohibitions on political donations by certain categories of prohibited donors (in Div 4A) and miscellaneous offences (in Div 5). Part 6A provides for public funding of administrative and policy development expenditure.

7. Since the prohibitions on political donations by certain categories of prohibited donors in Div 4A of Pt 6 constitute an additional measure calculated to address a particular instance of the conflict of interest sought to be addressed by the generally applicable caps on political donations in Div 2A, it is desirable to begin by addressing the validity of the provisions of Div 2A.

Division 2A of Pt 6 of the EFED Act: caps on political donations (Question 2)

8. Division 2A of Pt 6 of the EFED Act applies to State elections only.[2] The operative provision is s 95B, which makes it unlawful for a person to accept a political donation to a party, elected member, group, candidate or third-party campaigner if the donation exceeds the applicable cap. The applicable caps are set out in s 95A(1) and are indexed.[3] For the purposes of the caps, political donations of less than the applicable cap made within the same financial year are aggregated with other donations made by

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1 See also the summary in *Unions NSW v New South Wales* (2013) 88 ALJR 227; 304 ALR 266; [2013] HCA 58 at [73]-[95] per Keane J.

2 EFED Act, s 95AA.

3 EFED Act, s 95A(5).

the same person or entity[4] as are political donations made by the same person or entity to elected members, groups or candidates of the same party.[5] A candidate's contribution to finance his or her own election campaign is not a political donation and is not included in the applicable cap.[6] Party membership fees and party levies are exempted.[7]

The first limb of the *Lange* test

9. It follows from *Unions NSW v New South Wales*[8] that s 95B imposes an indirect burden on the freedom of political communication. The identification of the extent of the burden imposed on the freedom is relevant to the second, not the first limb of the *Lange* test.[9] However, it is important to define the *manner* in which s 95B burdens the freedom.

10. The joint reasons in *Unions NSW* reiterated that in applying the *Lange*[10] test "it is important to bear in mind that what the Constitution protects is not a personal right"[11] and that the relevant consideration is how the relevant provisions affect the freedom generally.[12] Thus, it was held in that case that s 96D of the EFED Act, which prohibited political parties and candidates from accepting political donations from persons or entities who were not on the electoral roll, imposed an indirect burden on the freedom because it "effects a restriction upon the funds available to political parties and candidates to meet the costs of political communication by restricting the

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4 EFED Act, s 95A(2).

5 EFED Act, s 95A(3).

6 EFED Act, s 95A(4).

7 EFED Act, s 95D.

8 [2013] HCA 58, (2013) 88 ALJR 227, 304 ALR 266.

9 *Unions NSW* (2013) 88 ALJR 227; 304 ALR 266; [2013] HCA 58 at [40] (French, Hayne, Crennan, Kiefel and Bell JJ).

10 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

11 (2013) 88 ALJR 227; 304 ALR 266; [2013] HCA 58 at [36] (French, Hayne, Crennan, Kiefel and Bell JJ), referring to *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 150; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 125, 149, 162, 166-7; *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 326; *Lange* (1997) 189 CLR 520 at 560; *Hogan v Hinch* (2011) 243 CLR 506 at 554 [92]; *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at 73-74 [166]; *Monis v The Queen* (2013) 249 CLR 92 at 189 [266].

12 *Unions NSW* (2013) 88 ALJR 227; 304 ALR 266; [2013] HCA 58 at [35] (French, Hayne, Crennan, Kiefel and Bell JJ), referring to *Wotton v Queensland* (2012) 246 CLR 1 at [80] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

source of those funds" which were not wholly met by public funding.[13] Section 95B imposes a similarly indirect burden on the freedom of political communication: it restricts the funds available to political parties and candidates to meet the costs of political communication, here by limiting the amount of money that may be received from any one source. It does not directly burden the ability of electors, candidates, political parties or others to communicate regarding political matters.

The second limb of the *Lange* test: the legitimate ends of Div 2A

11. New South Wales in its Defence identifies two legitimate aims of s 95B (and therefore Div 2A).[14] The first is that s 95B is directed towards reducing the risks to the actual and perceived integrity of the Parliament, the State Government and local government entities in NSW which are considered to arise from the solicitation and receipt of large political donations to fund election campaigns. The second is that the section seeks to reduce those risks in a manner that minimises actual or perceived distortion of political communication in favour of those who can afford to make larger political donations. Either of these two legitimate aims is sufficient to ensure the validity of Div 2A .

12. Turning to the first legitimate aim, it was accepted in *Unions NSW* that the legitimate aim of Pt 6 of the EFED Act is to regulate the acceptance and use of political donations in order to address the possibility of corruption or undue influence being exerted.[15] It is apparent from the terms of Div 2A that it is directed towards and rationally connected to that same aim. The prohibition of political donations in excess of specified, relatively modest amounts is capable of furthering that aim by seeking to deter corruption or undue influence, and the appearance of the same, arising from the making of donations of much larger amounts. Indeed, the joint judgment in *Unions NSW* contrasted s 96D with the "general, practical provisions for capping of political donations and electoral communication expenditure", observing that:

> "the connection of the other provisions of Pt 6 [ie, the capping provisions] to the general purposes of Pt 6 of the EFED Act is evident. They seek to remove the need for, and the ability to make, large-scale donations to a party or candidate. It is large-

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13 *Unions NSW* (2013) 88 ALJR 227; 304 ALR 266; [2013] HCA 58 at [38] (French. Hayne, Crennan, Kiefel and Bell JJ).

14 Defence of the First Defendant dated 8 October 2014, para 62.

15 *Unions NSW* (2013) 88 ALJR 227; 304 ALR 266: [2013] HCA 58 at [40] (French. Hayne. Crennan, Kiefel and Bell JJ). [138] (Keane J).

> scale donations which are most likely to effect influence, or be used to bring pressure to bear, upon a recipient."[16]

13. The plaintiffs submit that the end served by Div 2A is not to proscribe corrupt donations, because its terms do not refer to corruption and there is no basis to infer that the making of even a very large donation necessarily entails any kind of *quid pro quo* (in the sense of the direct exchange of money for favourable treatment).[17] That is an unnecessarily narrow definition of corruption.[18] But in any event, it does not follow that, because s 95B is not by its terms expressly limited to *quid pro quo* corruption, that the provision is not directed, at least in part, to corruption of that kind. Although, of course, not all large political donations are made explicitly or implicitly in return for favourable treatment, a prohibition on large donations is calculated to reduce the risk and the perception of that occurring.

14. In any event, s 95B serves a wider purpose. In addition to *quid pro quo* corruption, and the perception of such corruption, s 95B is also directed toward preventing the occurrence and appearance of undue influence garnered through the making of large political donations. There can be no doubt that this is a legitimate aim. It is not, as the plaintiffs suggest,[19] a question of degree or value judgment about what level of influence is "undue". *Any* instance of public decision-making being influenced by the fact that a person whose interests might be affected by the decision has made a substantial political donation to the decision-maker or his or her party or group is necessarily undue. As Mason CJ said in *Australian Capital Television Pty Ltd v Commonwealth*, "the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people."[20] They must exercise their public powers

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16 *Unions NSW* (2013) 88 ALJR 227; 304 ALR 266; [2013] HCA 58 at [53] (French, Hayne, Crennan, Kiefel and Bell JJ).

17 Plaintiff's submissions, para 89.

18 In *McCutcheon v Federal Election Commission* 572 US __ (2014), Slip opinion of Roberts CJ, for the majority, at 19, a majority of five Justices held that the United States Congress may permissibly limit speech in order to target only "a specific type of corruption – '*quid pro quo*' corruption" as well as the appearance of such corruption. The four dissenting Justices considered that corruption included both *quid pro quo* corruption and garnering undue influence over an officeholders's judgment and the appearance of such influence: Slip opinion of Breyer J, dissenting, at 3-11.

19 Plaintiff's submissions, para 94.

20 (1992) 177 CLR 106 at 138.

solely in the public interest and upon the merits of any particular proposal, not in the private interest.

15. This is a legitimate aim for the New South Wales Parliament to pursue. As Brennan J said in *ACTV*:[21]

> "[T]he salutary effect of freedom of political discussion on performance in public office can be neutralized by covert influences, particularly by the obligations which flow from financial dependence. 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."

16. The plaintiffs accept that s 95B pursues the purpose of preventing any person from gaining political influence by way of making political donations,[22] but submit that that is not a legitimate purpose. This argument begins from the premise that it is a corollary of the freedom of political communication that "people will be free to 'build and assert political power'",[23] by means which might legitimately include the payment of money (in the form of political donations) for access to and influence over candidates, elected members of Parliament and political parties. From that premise, the plaintiffs draw the conclusion that a law which seeks to constrain the degree of political power and influence that any one person may exercise is inconsistent with the freedom itself and therefore pursues an illegitimate end.[24] But there is no implied constitutional freedom of building and asserting political power. There are several flaws in the argument.

17. First, the premise is a false one. It relies upon a misconception of the purpose for which Mason CJ in *ACTV*[25] and the joint judgment in *Unions NSW*[26] quoted the following passage from a text by the eminent American lawyer Archibald Cox:[27]

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21 (1992) 177 CLR 106 at 159. See also at 156, where his Honour said that "if performance of the duties of members of the Parliament were to be subverted by obligations to large benefactors or if the parties to which they belong were to trade their commitment to published policies in exchange for funds to conduct expensive campaigns, no curial decree could, and no executive action would, restore representative democracy to the Australian people." See also *Blount v Securities and Exchange Commission* 61 Fed R 3d 938 at 942 (United State Court of Appeals, District of Columbia Circuit): political campaign contributions "may also be a cover for what is much like a bribe: a payment that accrues to the private advantage of the official and is intended to induce him to exercise his discretion in the donor's favor, potentially at the expense of the polity he serves."

22 Plaintiffs' submissions, para 90.

23 Plaintiffs' submissions, paras 23, 92.

24 Plaintiffs' submissions, para 93.

25 (1992) 177 CLR 106 at 139.

> "Only by uninhibited publication can the flow of information be secured and the people informed ... Only by freedom of speech ... and of association can people build and assert political power."

18. In *ACTV*, Mason CJ equated this statement with Professor Harrison Moore's statement that "[t]he great underlying principle" of the Australian Constitution was that the rights of individuals were sufficiently secured by ensuring each an equal share in political power[28] and went on to say that "[a]bsent freedom of communication, there would be scant prospect of the exercise of that power."[29] Mason CJ was using the passage from Cox's text to explain why freedom of political communication was essential to the genuine exercise of the "political power" vested in the people of the Commonwealth by those provisions of the Constitution that require the members of the House of Representatives and the Senate to be "directly chosen by the people" and provide for electors to vote in referenda.[30] It is in that sense that the quotation from Cox's text should be understood, whatever may have been its original intention.

19. The same passage was quoted in *Unions NSW* for a similar purpose and with the same understanding of the concept of the "political power" of the people in the context of the joint judgment's explanation of why the freedom of communication cannot be confined to communications between electors and elected representatives, candidates or parties. As their Honours said, "[a]n elector's judgment on many issues will turn on free public discussion ... of the views of those interested."[31] The implication of a freedom of political communication was necessary to enable the people to enjoy the genuine exercise of the political power reposed in them by the Constitution. The implied freedom does not then give rise to a further implication of a freedom "to 'build and assert political power'" and influence, whether conceived as a freedom from legislative interference with such a freedom or as a personal right to such a freedom. Neither Mason CJ in *ACTV* nor the joint judgment in *Unions NSW* can be taken as suggesting that it does.

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26 *Unions NSW* (2013) 88 ALJR 227; 304 ALR 266; [2013] HCA 58 at [29] (French, Hayne, Crennan, Kiefel and Bell JJ).

27 A Cox, *The Court and the Constitution* (Houghton Mifflin, Boston, 1987), 212

28 *ACTV* (1992) 177 CLR 106 at 139-140, citing Harrison Moore, *The Constitution of the Commonwealth of Australia*, (1st ed, 1902), 329.

29 *ACTV* (1992) 177 CLR 106 at 140.

30 Constitution, ss 7, 24, 128.

31 *Unions NSW* (2013) 88 ALJR 227; 304 ALR 266; [2013] HCA 58 at [28] (French, Hayne, Crennan, Kiefel and Bell JJ).

20. Secondly, although the plaintiffs do not allege that a political donation is itself a form of political communication or that the provisions of Div 2A restrict a donor's ability to communicate, the submission that the freedom of political communication entails a freedom "to 'build and assert political power'"[32] erroneously casts the freedom of political communication as a personal right. For example, the plaintiffs' submissions go on to assert that Div 2A "is a strike against the ability of those providing the funds to obtain an opportunity to communicate".[33]

21. Thirdly, *quid pro quo* corruption and undue influence cannot be neatly compartmentalised. The distinction between the two may in practice be very difficult to discern, both as a matter of fact and as a matter of public perception. It must therefore be legitimate for Parliament to seek to minimise the occurrence and appearance of undue influence as a means of preventing the actuality and appearance of corruption.

22. Fourthly, the plaintiffs' conception of "influence" stops short of addressing the sort of influence which s 95B is designed to counteract. The plaintiffs' conception of "influence" appears to be limited to an "opportunity to be heard" in the formulation of policy.[34] In this context, they rely on the statement in the recent decision of the United States Supreme Court in *McCutcheon v Federal Election Commission* that "[i]ngratiation and access ... are not corruption".[35] More than the usual caution in relation to American authority must be exercised at this point. The Court in *McCutcheon* was sharply divided 5:4. The minority justices took a very different view as to whether the First Amendment precluded legislation or regulation that targeted the garnering of access to and influence over elected officials or political parties.[36] Earlier decisions, not overruled by *McCutcheon*, upheld campaign finance restrictions

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32 Plaintiff's submissions, paras 23, 92.

33 Plaintiff's submissions, para 102.

34 Plaintifs' submissions, paras 96, 102.

35 572 US __ (2014), slip op of Roberts CJ, for the majority, at 2, quoting *Citizens United v Federal Election Commission* 558 US 310 at 360 (2010).

36 *McCutcheon* 572 US __ (2014), slip op of Breyer J, for the minority, at 3-11.

targeting not only *quid pro quo* corruption, but also undue influence on an officeholder's judgment.[37]

23. In any event, however, s 95B is not directed towards preventing access and influence merely in the form of an opportunity to be heard. As explained above, s 95B is directed towards reducing the risks and perception of public power being exercised improperly in favour of private interests as a result of donors gaining access to and influence over candidates, elected members, groups and parties by means of the payment of money, rather than on the merits and in the public interest. This understanding of undue influence extends beyond the influence of large donations upon public decision-making. It includes the influence that such donations may have on policy formulation by political parties and candidates. That is why the sort of influence which s 95B seeks to counteract cannot be equated to the influence that a party member or a media organisation may have on the formation of party policy or any of the other reasons why, in the plaintiffs' submissions, a person may acquire "political influence".[38]

24. Fifthly, by reducing the risks and perception that wealth can buy access and influence over public decision-making and policy formulation, the donation caps promote the second aim pleaded by New South Wales — minimising the actual or perceived distortion of political communication in favour of wealthy donors. This aim is consistent with the recognition in other jurisdictions that freedom of speech may legitimately be restricted in order to promote the equal dissemination of diverse points of view. For example, in *Harper v Canada (Attorney-General)*, Bastarache J, for the majority, explained that the election advertising restrictions in issue in that case reflected "the egalitarian model of elections adopted by Parliament as an essential component of our democratic society":[39]

> "This model is premised on the notion that individuals should have an equal opportunity to participate in the electoral process. Under this model, wealth is the main obstacle to equal participation... Thus, the egalitarian model promotes an electoral process that requires the wealthy to be prevented from controlling the electoral process to the detriment of others with less economic power. The state can

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37 See *Federal Election Commission v Beaumont* 539 US 146, 155-156 (2003); and *McConnell v Federal Election Commission* 540 US 93, 143-144 (2003).

38 Plaintiff's submissions, paras 95-99.

39 [2004] 1 SCR 827 at 868 [62].

> equalize participation in the electoral process in two ways... First, the State can provide a voice to those who might otherwise not be heard... The Act does so by reimbursing candidates and political parties and by providing broadcast time to political parties. Second, the State can restrict the voices which dominate the political discourse so that others may be heard as well. In Canada, electoral regulation has focussed on the latter by regulating electoral spending through comprehensive election finance provisions. These provisions 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. In contrast, the libertarian model of elections favours an electoral process subject to as few restrictions as possible."[40]

25. Similarly, in *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport*, in which restrictions on political advertising were upheld, Lord Bingham said:

> "The fundamental rationale of the democratic process is that if competing views, opinions and policies are publicly debated and exposed to public scrutiny the good will over time drive out the bad and the true prevail over the false. It must be assumed that, given time, the public will make a sound choice when, in the course of the democratic process, it has the right to choose. But it is highly desirable that the playing field of debate should be so far as practicable level. This is achieved where, in public discussion, differing views are expressed, contradicted, answered and debated... It is not achieved if political parties can, in proportion to their resources, buy unlimited opportunities to advertise in the most effective media, so that elections become little more than an auction."[41]

26. Fostering "equal dissemination of points of view"[42] is conducive to the ability of electors to exercise a genuine and fully informed choice in State and local government elections. This is an end that is consistent with, and indeed enhances, the constitutionally prescribed system of representative government that the freedom of political communication exists to protect. Thus it was open to the New South Wales Parliament to impose caps on political donations as a means of minimising the actual and perceived influence of wealthy donors on policy formulation and public debate.

The second limb of the *Lange* test: proportionality

27. The extent of the burden imposed by s 95B on the freedom of political communication and whether it is proportionate in the means it employs to achieve its legitimate purpose are relevant to the second limb of the *Lange* test.[43] That enquiry "may

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40 [2004] 1 SCR 827 at 868 [62].

41 [2008] 1 AC 1312 at 1346 [28].

42 *Harper v Canada (Attorney-General)* [2004] 1 SCR 827 at 868 [63] (Bastarache J).

43 *Unions NSW* (2013) 88 ALJR 227; 304 ALR 266; [2013] HCA 58 at [40] (French, Hayne, Crennan, Kiefel and Bell JJ).

involve consideration of whether there are alternative, reasonably practicable and less restrictive means of achieving the object of the provision."[44] However, as Gageler J said in *Tajjour v New South Wales*,[45] "their presence or absence will not necessarily be decisive. The weight they will be accorded will vary with the nature and intensity of the burden to be justified." For these reasons, it is important to begin consideration of this second step in this limb of the *Lange* test by identifying the extent of the burden imposed by s 95B.

28. It may be acknowledged that a restriction on the funds available to candidates and political parties to engage in political communication constitutes a burden on the freedom, since much of the communication necessary to enable the people to exercise a genuine choice in elections to the Commonwealth Parliament must take place through institutions like political parties and the mass media.[46] Nevertheless, the following factors suggest that the extent of the burden imposed by s 95B is limited:

(a) First, s 95B does not regulate the amount, the content or the means of political communication. It "does not prohibit the expression or dissemination of any political view or any information relevant to the formation of or debate about any political opinion or matter."[47] To the extent it burdens political communication, it does so only indirectly, by potentially reducing the funds available to candidates and parties to engage in political communication.

(b) Secondly, to the extent that s 95B reduces the funds available to candidates and political parties, it is at least partly offset by the limits imposed in Div 2B of Pt 6 of the EFED Act upon electoral communication expenditure and by the regime for partial public funding of such expenditure in Pt 5.

(c) Thirdly, the figures in the Special Case suggest that between April 2003 and April 2007 and between July 2008 and June 2014, total donations received by the major parties exceeded, and in most cases far exceeded, the total electoral

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44 *Unions NSW* (2013) 88 ALJR 227; 304 ALR 266; [2013] HCA 58 at [44] (French, Hayne, Crennan, Kiefel and Bell JJ).

45 (2014) 88 ALJR 860, 313 ALR 221; [2014] HCA 35 at [152]; cf at [113]-[116] (Crennan, Kiefel and Bell JJ).

46 See *ACTV* (1992) 177 CLR 106 at 211-212 (Gaudron J), 231 (McHugh J), both referring to *Attorney-General v Times Newspapers* [1974] AC 273 at 315.

47 *Tajjour v New South Wales* (2014) 88 ALJR 860, 313 ALR 221; [2014] HCA 35 at [91] (Hayne J).

communication expenditure incurred by them.[48] The figures suggest that s 95B (which came into force in 2010) had little, if any, practical effect on the funds available for political communication at the last State election.

(d) Fourthly, the fact that s 95B imposes a cap on donations, with an express exemption for party membership, may in fact enhance political communication, by prompting candidates and parties to seek political donations from a larger number of donors and to encourage other forms of support such as party membership.

29. The plaintiffs' submissions on proportionality should be considered against this understanding of the extent of the burden, and rejected.

30. First, the plaintiffs submit that the provisions of Div 2A lack proportionality because they go further than targeting instances of actual corruption and instead serve "a wider cosmetic objective" of targeting "a perceived lack of integrity".[49] That is more than a cosmetic objective. The perception of integrity in the exercise of public powers is important.[50] Public confidence in the institutions of government and the political process is critical to the proper functioning of the system of representative and responsible government for which the Constitution provides. As was recognised in *Buckley v Valeo*, "the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions" are "[o]f almost equal concern as the danger of actual *quid pro quo* corruption".[51] It remains the case in the United States that preventing the appearance, as well as the actuality, of corruption of this kind is a sufficiently compelling justification for placing limits on political donations.[52]

31. Secondly, the plaintiffs submit that the end to which s 95B is directed can be achieved through the less restrictive means of public disclosure.[53] Consistently with the observations made by Gageler J in *Tajjour*, referred to above, the significance of the

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48 Special Case, paras 18-19, 30 and 34.

49 Plaintiffs' submissions, para 105-106.

50 Cf *Ebner v Official Trustee* (2000) 205 CLR 337.

51 *Buckley v Valeo* 424 US 1, 27 (1976) (the Court).

52 *McCutcheon v Federal Election Commission* 572 US __ (2014), slip opinion of Roberts CJ, for the majority, at 19.

53 Plaintiff's submissions, paras 106, 109.

postulated alternatives should be considered in light of the limited and indirect nature of the burden described above. Further, the Court has observed on several occasions that the proposed alternative means must be equally as effective as the means actually chosen by the Parliament and must be obvious and compelling.[54] Australian Parliaments pursuing legitimate public policy objectives identified by them in response to local needs and concerns should not be restricted to lowest common denominator outcomes.

32. This is particularly important in the context of electoral finance laws. The regulation of electoral financing is a notoriously complex area[55] and has taken many varied forms in different jurisdictions, both within Australia[56] and internationally. In these circumstances, the range of reasonable alternatives open to Australian Parliaments to address a legitimate end of great importance to the public interest[57] is wide. "The creation of special offences, disclosure of contributions by donors as well as political parties, public funding, and limitations on contributions" were all remedies referred to by McHugh J in *ACTV*[58] as being available to overcome the evil of political preference or favour being given in return for campaign contributions. Alternative approaches to the ones chosen by the Parliament are unlikely to stand out as obvious and compelling.

33. The alternative means proposed by the plaintiffs does not lie in the disclosure regime for which the EFED Act already provides, but in a "strengthened" regime involving an increase in the prominence and promptness of disclosure of donations and disclosure of other dealings between donors and recipients. Disclosure is not "obviously" as effective at preventing instances of actual corruption and undue influence. It may not reduce the public perception of corruption and undue influence: the public may be left with evidence of potential conflicts of interest — a large donation, a subsequent

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54 See, most recently, *Tajjour v New South Wales* (2014) 88 ALJR 860. 313 ALR 221; [2014] HCA 35 at [36] (French CJ), [113]-[114] (Crennan, Kiefel and Bell JJ); *Monis v The Queen* (2013) 249 CLR 92 at 214 [347] (Crennan, Kiefel and Bell JJ); *Momcilovic v The Queen* (2011) 245 CLR 1 at 214 [556] (Crennan and Kiefel JJ); *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 134 [438] (Kiefel J).

55 See eg *ACTV* (1992) 177 CLR 106 at 154 (Brennan J), referring to a Senate committee report on the regulation of political advertising expenditure; and *Harper* [2004] 1 SCR 827 at 879 [87] (Bastarache J) ("The difficulties of striking this balance are evident").

56 See B Holmes, 'Political Financing: regimes and reforms in Australian states and territories', Parliament of Australia, Department of Parliamentary Services, 19 March 2012. Victoria does not have laws corresponding to those under challenge (but see *Electoral Act 2002* (Vic), s 216).

57 *ACTV* (1992) 177 CLR 106 at 175 (Deane and Toohey JJ).

58 *ACTV* (1992) 177 CLR 106 at 239 (McHugh J).

government decision that favourably impacted the interests of the donor — with little or no means of ascertaining whether it reflected any corruption or undue influence. The sceptical assumption that the recipient's judgment was tainted by the influence of money is left open[59] and, as the facts in the Special Case suggest, may well be justified in the circumstances. Further, the detail of how the "strengthened" regime postulated would be implemented in practice is not stated. It is by no means an "obvious and compelling" alternative.

34. Thirdly, the plaintiffs submit that s 95B lacks proportionality because it does not go far enough to achieve its object comprehensively.[60] The fact that a legislative measure is less restrictive of the freedom of political communication than it might have been may suggest that, in truth, it is not directed toward the legitimate end which is asserted in support of it.[61] However, it does not support a conclusion that the measure is disproportionate. In any event, the fact that the EFED Act does not require disclosure of other dealings between donors and recipients of donations does not suggest that the provisions of Div 2A are under-inclusive. It was open to the Parliament to take the view that the need for disclosure of such dealings was obviated by the donation caps. Further, the fact that the EFED Act does not seek to prevent otherwise powerful persons such as media organisations from exercising their political power and influence in other ways is irrelevant. As stated above, that kind of influence does not give rise to the same risks of corruption and undue influence arising from the payment of money to candidates, elected members and parties as those to which s 95B is directed.

35. Fourthly, the plaintiffs challenge the aggregation provision in s 95A(3), which aggregates the political donations made by a single person or entity to elected members, groups or candidates of the same party. This imposes an indirect burden on the freedom additional to that imposed by s 95B. It is, however, clearly designed to avoid circumvention of the applicable caps. Thus it is reasonably and appropriately adapted to achieving the same legitimate end as the individual donation caps.

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59 Cf *Nixon v Shrink Missouri Government PAC* 528 US 377 at 390 (2000) ("[T]he cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.")

60 Plaintiffs' submissions, paras 107.

61 Cf *Austin v Michigan Chamber of Commerce* 494 US 652, at 677.

36. Finally, the plaintiffs submit that the donation caps discriminate against a minority of donors who might otherwise have donated amounts in excess of the caps and against political parties and candidates who might otherwise have attracted greater financial support from fewer sources.[62] These submissions should be rejected. The donation caps in Div 2A apply equally to all potential donors.

Division 4A of Pt 6 of the EFED Act: prohibition on the making of political donations by property developers (Question 1)

Division 4A: Legitimate aim

37. Division 4A of Pt 6 of the EFED Act prohibits the making and acceptance of political donations by or on behalf of a 'prohibited donor'. The term 'prohibited donor' is defined in s 96GAA to mean a 'property developer', a 'tobacco industry business entity' or a 'liquor gambling industry business entity' and includes industry representative organisations the majority of whose members are prohibited donors. The term 'property developer' is defined in s 96GB(1) to mean 'a corporation engaged in a business that regularly involves the making of relevant planning applications by or on behalf of the corporation in connection with the residential or commercial development of land, with the ultimate purpose of the sale or lease of the land for profit' and includes a person who is a 'close associate' of such a corporation. The term 'close associate' is defined in s 96GB(3) to include directors or officers of a corporation, related bodies corporate and persons with greater than 20% of the voting power of a corporation or the spouses of such persons. A 'relevant planning application' is defined in s 96G(3) to have the same meaning as in s 147 of the *Environmental Planning and Assessment Act 1979* (**EPA Act**).

38. The plaintiffs seek a declaration that the whole of Div 4A is invalid. However, the focus of the inquiry should be on the prohibition on the making and acceptance of political donations by and from property developers. As Barwick CJ said in *Harper v Victoria*:[63]

> "[T]he question of validity or applicability will only de dealt with at the instance of a person with a sufficient interest in the matter; and, in my opinion, in general, need only be dealt with to the extent necessary to dispose of the matter as far as the law affects that person."

62 Plaintiffs' submissions, paras 110-111.

63 (1966) 114 CLR 361 at 371.

39. The validity of the prohibitions on property developers is not affected by the validity or invalidity of the prohibitions on other categories of prohibited donors. The history and structure of Div 4A,[64] which applied only to property developers when first introduced[65] and was extended to other persons and entities by the introduction of the term 'prohibited donor' and a category-based definition of that term,[66] illustrates that, in so far as the application of the prohibition to particular categories of 'prohibited donors' may be invalid, those categories could be severed from the definition.

40. At least in so far as it applies to property developers, and in the context of the history and experience of New South Wales in relation to corruption in the area of property development decisions,[67] Div 4A is directed towards and capable of promoting the achievement of the legitimate aim of Pt 6 of the EFED Act, accepted in *Unions NSW*,[68] of regulating the acceptance and use of political donations in order to address the possibility of undue or corrupt influence being exerted.

41. The definition of 'property developer' in s 96GB(1) and of 'relevant planning application' in s 96GB(3) directs attention to the EPA Act. Section 147 of that Act requires the disclosure of reportable political donations made by persons with a financial interest in a relevant planning application made to the Minister, the Director-General of the relevant State government department or a council.[69] The definition of 'relevant planning application" includes certain formal requests to the Minister, a council or the Director-General[70] and applications for development consent[71] which are to be determined by a 'consent authority'.[72] The latter expression is itself defined as a council or, in certain cases, a Minister, the Planning Assessment Commission, a joint regional planning authority or a public authority other than a council.[73]

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64 This history of Div 4A was summarised in *Unions NSW* (2013) 88 ALJR 227: 304 ALR 266: [2013] HCA 58; at [57] (French, Hayne. Crennan. Kiefel and Bell JJ).

65 See *Election Funding and Disclosures Amendment (Property Developers Prohibition) Act 2009* (NSW).

66 See *Election Funding and Disclosures Amendment Act 2010* (NSW), Sch 1, items 28-30.

67 Special Case, paras 48-59.

68 (2013) 88 ALJR 227: 304 ALR 266: [2013] HCA 58 at [40] (French, Hayne. Crennan, Kiefel and Bell JJ).

69 EPA Act, subss 147(3), (4).

70 EPA Act, subs 147(2)(a).

71 EPA Act, subs 147(2)(d).

72 EPA Act, s 76A.

73 EPA Act, s 4(1), definition of 'consent authority'.

42. The EPA Act thus draws local and, potentially, State government officers into an individualised, discretionary decision-making process capable of having a significant effect on the financial interests of applicants and their close associates. Where applicants or their close associates have made political donations to the decision-makers themselves or their political parties, the decision-maker may be placed in a situation of conflict of interest. It was open to the New South Wales Parliament, in light of the history referred to above (at para 40), to regard this as an acute example of the general conflict of interest created by the making of political donations, as discussed above in relation to Div 2A. By prohibiting all political donations, of whatever amount, by persons or entities with a direct or indirect financial interest in relevant planning applications to persons or entities in a position to influence, directly or indirectly, the outcome of such applications, Div 4A is squarely directed towards and capable of furthering the end of minimising the risk and the perception of corruption or undue influence that has arisen in this context in New South Wales.

43. The fact that an applicant's interests are capable of being affected by individualised exercise of public power by the executive arm of government distinguishes the relevant provisions from other generally applicable forms of regulation referred to by the plaintiffs, such as taxation and prohibitions on certain forms of commercial arrangements like cartels.[74] Property developers may not be the only class of persons whose financial interests may be directly affected by individual decision-making by the executive. Nevertheless, the facts set out in the Special Case[75] reinforce, rather than establish, the conclusion that the provisions of Div 4A are aimed at the potential for corruption and undue influence that has been identified by the New South Wales Parliament in the context of property development decisions in that State rather than, as the plaintiffs suggest, "socially undesirable persons".[76]

44. That is not to say that such provisions are a necessary feature of a regime directed at reducing the possibility of undue or corrupt influence — indeed Victoria and the other States and Territories have no such legislative provisions. Rather, it is to say that the enactment of provisions of this kind is a constitutionally permissible choice for a State

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74 Plaintiffs' submissions, para 63.

75 Special Case, paras 48-59.

76 Plaintiffs' submissions, para 65.

or Territory Parliament in a federal context; and this is particularly so in the present case in light of the facts set out in the Special Case.

45. Those facts provide evidence of the occurrence in New South Wales of multiple instances of corruption or undue influence in the planning process as well as attesting to a public perception of, and concern about, corruption or undue influence in that process. The plaintiffs submit that the utility of such evidence is limited because it identifies only eight such instances, all of which concern corruption by local government officials or unelected State public servants.[77] This submission is misconceived. Once the existence of the very problem to which the legislation is directed is established by the evidence, it is not for the Court to assess the degree to which the problem arises. One is compelled to ask, how many examples would be needed? And, as the United States Supreme Court said in *Buckley v Valeo*, "the scope of such pernicious practices can never be reliably ascertained".[78]

46. Further, to the extent that the examples in the Special Case are limited to the activities of local government officers, it is relevant to recall that the application of the implied freedom of political communication to State laws is itself dependent upon the significant interaction between the different levels of government in Australia,[79] including the existence of national political parties which operate at federal, state, territory and local government levels.[80] In that context, the potential for corruption or undue influence or the perception of it may properly be seen by the Parliament to arise from political donations made at the State level by persons with a financial interest in decision-making at the local government level.

Division 4A: Proportionality

47. For many of the same reasons as discussed above in relation to Div 2A, Div 4A is reasonably and appropriately adapted, or proportionate, to its legitimate end in a

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77 Plaintiffs' submissions, paras 68-70.

78 424 US 1 at 27 (1976) (the Court). See also See also *Blount v Securities and Exchange Commission* 61 Fed R 3d 938 at 942 (United State Court of Appeals, District of Columbia Circuit): "no smoking gun is needed where, as here, the conflict of interest is apparent, the likelihood of stealth great, and the legislative purpose prophylactic."

79 *Unions NSW* (2013) 88 ALJR 227; 304 ALR 266; [2013] HCA 58: at [20] (French, Hayne, Crennan, Kiefel and Bell JJ).

80 Ibid, [24].

manner which is compatible with the maintenance of the constitutionally prescribed system of representative government. For the reasons given above, the burden imposed on the freedom of political communication is indirect and limited in its extent. In light of the facts set out in the Special case, it was open to the New South Wales Parliament to select a complete prohibition on donations from property developers as a reasonable and appropriate mechanism for achieving the legitimate end discussed above. As noted in relation to s 95B, Parliaments pursuing legitimate public policy objectives in response to local circumstances should not be restricted to lowest common denominator outcomes.

48. The only alternative proposed by the plaintiffs is to confine the prohibition to the making of political donations "with some form of intention corruptly to solicit favour."[81] Such conduct may very well be unlawful in any event. But difficulties of proof mean that it would clearly not be as effective in deterring corruption as a total prohibition on donations by property developers, and would not be effective at all in deterring instances of undue influence falling short of *quid pro quo* corruption or in ensuring public confidence in the political process and the institutions of government.

Section 96E of Pt 6 of the EFED Act: indirect campaign contributions (Question 3)

49. Section 96E, in Div 4 of Pt 6 of the EFED Act, makes it unlawful for a person to make, or to accept, certain types of "indirect campaign contributions", including the provision of office accommodation, vehicles, computers or other equipment for no or inadequate consideration and the payment or waiver of expenditure upon electoral advertising. It does not include volunteer labour or gifts not in excess (in total) of $1,000.[82]

50. The section is evidently designed to prevent the political donation caps in Div 2A from being circumvented. As such, it pursues the same legitimate end as the applicable caps on political donations and is reasonably and appropriately adapted, or proportionate, to that end.

51. Section 96E does not effect any substantial restriction upon the freedom of political communication additional to the donation caps because the kinds of indirect campaign

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81 Plaintiffs' submissions, para 79.

82 EFED Act, s 96E(3).

contributions covered by the section would largely be caught by the definition of "political donation" in s 85. The net effect upon the ability of political parties, candidates and elected members to fund their electoral communication expenditure would be no different whether or not these indirect contributions were permitted: political donations, whether in money or in kind, could not exceed the applicable caps. Section 96E nevertheless assists in the enforcement of the caps by prohibiting the making of donations in forms which, as New South Wales puts it in its Defence,[83] are less susceptible to detection and quantification. The efficacy of the alternative means suggested by the plaintiff, provision of a reliable valuation by the donor or the recipient, is unwieldy and dependent upon the valuation in fact being reliably accurate. The interest that both donors and recipients may have in under-valuing such indirect contributions suggests that this approach would not be as effective and may in itself pose new concerns about integrity in the political process.

PART VI: ESTIMATE OF TIME FOR ORAL ARGUMENT

52. Approximately 20 minutes is likely to be required for oral submissions.

Dated: 10 March 2015

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[83] Defence of the First Defendant dated 8 October 2014, para 70(a)(i).