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

PLAINTIFFS' REPLY

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The nature of the burdens on political communication

1. In defining the "burdens" on political communication required by the first limb of the *Lange* test, aside from the admitted extent of each burden, NSW contends that the further impact of each of the impugned provisions discernable by reference to the practical consequences of making a political donation is irrelevant.[1] That argument rests upon the premise that such a burden can only exist if the law "directly touch[es]" or restricts "some significant action of communication to electors".[2]

2. That premise is erroneous. A burden on political communication may be discerned not only from the legal operation of the law, but also by reference to the law's practical effect.[3] Thus, in *Unions NSW* this Court found a burden on political communication through restriction of the funding available to parties and candidates for the making of political communications. The plaintiffs' contention is that there is a similar practical effect upon political communication by targeting a means by which members of the community may create for themselves an opportunity more effectively to communicate a message to a party or candidate.

3. By becoming known to a candidate or party, a donor may increase the visibility of his or her message, in the eyes of both the recipient of the donation and potentially subsequent persons with whom the recipient communicates. Participation of members of the community in the political funding process can thereby affect the content of political messages which parties and candidates then communicate. By targeting one of the means by which a member of the community may seek to become better known to political actors (i.e. by donations), the impugned provisions reduce the effectiveness of future communication from those community members to parties and candidates, and interfere with the processes by which parties and candidates determine the messages they will communicate.

4. Notwithstanding the attempts at misdirection by NSW and various interveners, there is no element of "individual rights" in this analysis.[4] It does not proceed by reference to what any one person ought to be able to do. It is a matter of the conditions which must exist for the constitutional freedom of communication to operate effectively. The key condition is opportunity. It lies at the foundation of a free marketplace of ideas. Opportunities to influence are essential to creating a real opportunity to agitate for change in who governs and how. That applies as between community members and political parties and candidates, as much as between community members, or parliamentarians, or otherwise.

5. The Commonwealth's disavowal of "Darwinian struggle"[5] overlooks the fundamentally competitive nature of the implied freedom of political communication. Such freedom necessarily gives greater power to those who are better able to communicate, such as the media (compare the rejection of the Commonwealth's argument in *ACTV*). Freedom of communication definitionally involves an advantage to those better able to communicate. In former times, when much political speech occurred in speakers' corners like the Sydney Domain on Sundays, persons with greater oratorical skills were able to exert disproportionate influence compared with those possessing lesser oratorical skills.[6] It is unhelpful to describe this type of natural consequence as "sovereignty of the few".

6. The "level playing field" argument – the notion that well-financed parties or candidates are able to communicate to the public more effectively – is also irrelevant. The caps on expenditure (Pt 6 Div 2B) achieve what Parliament has determined to be appropriate restrictions on the volume of the parties' and candidates' voices in public debate. In contrast to the competition for media air-time, those seeking access to a candidate or party do not "drown out" other voices. Access thus does not detract from the constitutional "direct choice" of representatives.

7. It should also be noted that it was voting power to which Professor Harrison Moore was referring when he spoke of securing to the people "a share, and an equal share, in political power".[7] It must be appreciated that the "equality" to which he was referring was geographic equality, particularly as

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[1] NSW submissions paras 29-32.
[2] NSW submissions paras 31, 32.
[3] *Tajjour v New South Wales* (2014) 88 ALJR 860 at 875 [33] per French CJ.
[4] Cf NSW submissions paras 30, 77.
[5] Commonwealth submissions para 18. Cf *Combet v Commonwealth* (2005) 224 CLR 494 at 530-531 [29] per Gleeson CJ.
[6] See also *ACTV* (1992) 177 CLR 106 at 239-240 per McHugh J.
[7] *The Constitution of the Commonwealth of Australia*, 1st ed (1902) at 329; 2nd ed (1910, reprinted 1997) at 616.

between the States in the Senate.[8] When Mason CJ referred in *ACTV* to Professor Harrison Moore's statement,[9] his Honour was merely making the now well-accepted point that freedom of speech is anterior to the exercise of the (geographically equal) voting power required by the Constitution. The content of the protected freedom, and the conditions which must exist to ensure its effectual operation, are another matter.

8. In the end, whatever access political donors may have to candidates or parties, and whatever role they may have played before or as a candidate or party determines what policies they support, it is the popular vote which determines whether those policies are given effect. That does not deny that it is a precondition to the effective anterior process of free communication that anyone who wishes to communicate a message will need to create an opportunity to do so.

9. That is why targeting a means of creating such opportunities cannot be a legitimate end. New South Wales has not effectually responded to the proposition that access and opportunities to seek political influence, and the means of doing so, are an indispensable part of the milieu in which public political debate occurs. Rather, NSW seems to assume (as do some interveners) that all access and potential influence – whether capable of attracting the description "corrupt" or not – is inherently evil (and, indeed, that more is more evil).

"Public confidence" in the political process

10. New South Wales places much weight upon "concerns", held largely by persons unknown, about the appearance of political donations from prohibited donors or in relatively large amounts.[10] In respect of Div 4A, NSW refers to "concerns about the actual and perceived susceptibility of [elected members] to influence from property developers".[11] Notably absent is any reference to corruption. Rather, the concern is that it is undesirable that property developers should be able, and be seen to be able, to advance their interests through the political process. That reflects the terms of Div 4A.

11. Similarly, in relation to the donation caps provisions, the relevant "concern" appears to be that "through large donations, donors purchase access that is not available to ordinary citizens ... and this access can result in actual or the perception of undue influence".[12] The pejorative and misleading use of words like "purchase" is not without significance. Again, the concern is not about corruption, but about some people potentially being directly known to politicians, thus increasing their opportunity to gain political influence, which opportunity others may not have. The purpose of access is political communication. Notwithstanding the protestations of tabloid journalists, access to politicians is not per se improper. A perception by unspecified persons that it is would not make it so. Impeding that access by legislation is not made legitimate by attaching to it the specious epithet "undue".[13]

12. These points illustrate that one ought not to use the expression "public confidence" in the political process as a euphemism for some section of the public approving of particular political participants or policies. The constitutional system of government is not undermined by advancing unpopular causes; rather, such causes ought to be able to be advanced at least as vigorously as any other. True public confidence, in the system itself, will be enjoyed to the extent that that is possible.

13. New South Wales suggests that it is permissible to seek to avoid the "perception of compromised integrity", because such a perception is "antithetical to the proper conduct of representative and responsible government".[14] This seems to be based on the view expressed by Mr Roden QC, in his 1990 report, that if "a system ... allows public officials to receive money or benefits, directly or indirectly, from people with whom they are dealing in an official capacity" then it is "impossible to expect people to have confidence in" that system.[15]

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[8] That is clear from the reference in the preceding sentence to uniform Commonwealth taxation, in the context of a discussion of federalism and responsible government as a means of protecting individual rights. See ibid, 2nd ed at 615, see further 612ff.
[9] (1992) 177 CLR 106 at 139-140.
[10] NSW submissions paras 38, 44, 73.
[11] NSW submissions para 38.
[12] NSW submissions para 73(a), quoting Special Case para 61, SCB vol 1 p 79.
[13] The fact that some interveners treat "undue" influence as a tacit form of quid pro quo corruption (Victoria submissions para 14; SA submissions para 37) illustrates the unsatisfactorily slippery nature of that concept as a touchstone of constitutional validity.
[14] NSW submissions para 46.
[15] Ibid, quoting SCB vol 2 p 569.

14. Mr Roden QC's statement was made in the context of persons who were already elected (and some unelected public servants), and who were already "dealing in an official capacity" with their benefactors.[16] Plainly, that is a different situation to the making of reportable donations to candidates or parties for their use in election campaigns.

15. More generally, NSW does not explain why the maintenance of public confidence has constitutional importance, in and of itself. The only intelligible rationale which is given is that supplied by the Commonwealth, which refers to preventing a "sense of lassitude" or potential loss of participation.[17] However, that way of putting the matter appears to be no more than a reflection of the attitudes of those who, for whatever reason, choose not to engage with the democratic process (in any of the range of ways available to them) as actively as they could in response to a state of affairs which they dislike.

16. This goal of preventing political "lassitude" is sought to be achieved, not by some positive programme of civic education or consultation, but by prohibitions on conduct which have significant impacts on minorities within the community. Given that the "lassitude" submission amounts to an assertion by government that it is seeking to improve political debate by imposing a burden on it, close scrutiny must be directed to what is prohibited and to how it is allegedly likely to alienate the community.[18]

17. A belief that a political candidate or party sympathizes with one's moral or economic adversary does not alienate one from the political system; it alienates one from that candidate or party. Indeed, it may – and even should – provide such a person with an impetus to pursue competing political opportunities or points of view. Thus, it cannot be political access or influence, much less a means to gain it, which leads to the kind of alienation which may legitimately be prevented. It can only be corruption, in the sense of conduct which is intended to detract from a public official's discharge of his duties of office, which could lead to discontent with the system itself.

18. That the impugned provisions go beyond addressing corruption, and quash all opportunities to gain political access or influence by means of proscribed donations, whether corrupt or not, makes plain the true sense in which NSW invokes the mantra of "public confidence". It is neither more nor less than a restatement of the partisan perception that it is undesirable for other kinds of person to have opportunities to gain political access by means of donations.

Division 4A: the legitimacy of singling out prohibited donors

19. In support of its attempt to single out property developers as legitimate targets of Div 4A, NSW refers to the value of land and the existence of a regulatory framework relating to its use. However, the melodramatic assertion that regulation may "enrich or destroy"[19] a property developer also applies to many other class of business the value of which is dependent upon regulation. That provides no basis to distinguish property developers from other prohibited donors,[20] nor for that matter from classes of person who are not prohibited donors. All the examples given in submissions in chief[21] are pertinent. Particularly good examples are pharmaceutical companies, nursing homes and taxi owners.

20. New South Wales then attempts to bolster its eight recorded instances of – more accurately, investigations into – putatively corrupt conduct involving the property development sector, by reference to statistics about complaints made to ICAC.[22] However, statistics about complaints being made provide no basis for an inference about the merits of those complaints. On the contrary, the overwhelming majority of those complaints led nowhere.[23]

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[16] See SCB Vol 2 p 480.
[17] Commonwealth submissions para 54; see also Victoria submissions fn 59; cf NSW submissions para 82.
[18] Cf *ACTV* (1992) 177 CLR 106 at 145 per Mason CJ.
[19] NSW submissions para 42.
[20] The plaintiffs only seek relief in relation to the invalidity of Div 4A in its application to them. However, reference to the other classes of prohibited donors highlights the wider manner in which NSW has gone about singling out unpopular persons to be subject to the prohibitions. The even more obvious invalidity of the prohibition of donations from those other classes must be relevant to the analysis of the provisions in their application to the plaintiffs, because the provisions of the EFED Act are to be read together as a single expression of the will of Parliament, and the construction issue arises before the question of severance is reached. Cf *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 34 [46], 69 [155]-[158], 99 [273]-[274], 138 [401].
[21] Plaintiffs' submissions in chief para 72.
[22] NSW submissions para 44; SC para 57, Annexures 27-29 (SCB vol 1 p 78, Vol 2 pp 904-924, 926-938, Vol 3 pp 940-964).
[23] For example, in 2005-06, 790 complaints were made to ICAC under s 10 of the ICAC Act; 718 matters were closed with "no further action" by ICAC", and 104 closed with no action warranted by the subject agency. In 2007-08, when 946 complaints

21. There are three further difficulties with that submission. First, there is no evidence that ICAC's categories of "local government" and "building/development applications" complaints concern conduct of property developers. Secondly, the types of conduct alleged in those complaints extend to such matters as negligence, harassment, employment and staff management, and some vague category of "breach of policy or procedure".[24] Thirdly, the evidence about the numbers of investigations commenced tells a different story. In 2005-06, only 13 investigations were commenced in relation to "local councils", and there was just one investigation on the topic of "property and planning".[25]

22. The assertion by NSW that there is "good reason to think"[26] that corruption is more widespread than the evidence actually discloses has no foundation and is disingenuous. However, it is useful insofar as it shows the kind of campaign by which a government could demonize a class of person, by publicly spreading meritless allegations, thereby irrationally creating the very kind of "concerns" which NSW says warranted introducing Div 4A. Thus a government could insinuate itself into power, by setting up circumstances which allegedly give rise to a "legitimate end" and legislating in response.

Division 4A: want of proportionality

23. None of the submissions of NSW, or of any of the interveners, grapple directly with the plaintiffs' essential point in relation to the proportionality of Div 4A. Putting aside the illegitimacy of the wider end of preventing property developers from gaining political access by means of donations (for which "promoting public confidence" and "preventing undue influence" are mere euphemisms), the only other end Div 4A could serve is the narrower end of preventing corruption as such. If it does serve that end, then the burden it imposes on political communication is disproportionate because it goes beyond what is necessary to achieve it. The core of *Lange*'s second limb is not the availability of hypothetical alternative means, it is the principle of reasonable necessity (the former being merely one means of proving the latter).[27]

24. The real issue is whether it is necessary to prevent *all* political donations from an entire class of person, in order to prevent *some* donations from members of that class from being associated in *some* particular circumstances with corruption. It cannot be expected that a donation of any size is capable of corrupting. The circumstances associated with the making of a donation cannot give rise to corruption unless the donor's interests are capable of being affected by the recipient. In any event, corrupt conduct would be caught by the common law and by the *Crimes Act* 1900 (NSW) s 249B.

25. If a relationship of the exercise of public power is to be regulated to prevent corruption, the relationship needs to exist, for exercise of that power to be able to affect the subject's interests.[28] It may be accepted that, for example, regulation is warranted for a local council of an area in which a developer owns land and takes steps to develop it. But decisions of Parliament are legislative, not individual, and are the work of many hands. Property developers may be affected by decisions of the Minister for Local Government, but those decisions are not made as a member of Parliament.[29]

26. Division 4A prohibits dealings occurring before any such relationship is formed, irrespective of the extent of the dealing or the circumstances then existing, or the probability of the possible future relationship being corrupted. However, that does not suffice to show that Div 4A has a prophylactic objective. A prohibition of conduct serves to prevent that conduct as much as penalize it. That which is prohibited may be prevented, but that which is not prohibited is not prevented. The limitation of s 96GB(1)(a) to corporations, and the bizarre "close associate" provisions, deny a prophylactic purpose. This is not just a matter of the legislation not completely achieving its end.[30] Rather, the terms of Div 4A are not rationally consistent with an inference that the actual prohibitions imposed were necessary to prevent corruption from occurring, since they plainly do not prevent corruption from occurring. The statutory end is discerned through construction, not divination. The legislature should be inferred to have set out to achieve that which it has in fact achieved.

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were made to ICAC under s 10, ICAC closed 608 with "no further action", and no action was warranted by the agency in a further 144: SCB Vol 2 p 923 (cf p 911), Vol 3 p 963 (cf p 950).

[24] See especially SCB Vol 2 pp 913, 915; 930-932, 935; Vol 3 pp 951, 954, 956.

[25] SCB Vol 2 p 921.

[26] NSW submissions para 43.

[27] *Tajjour* (2014) 88 ALJR 860 at [113]; cf WA submissions paras 24-25 (which are, with respect, incorrect; as is para 46).

[28] Cf s 147 of the EPA Act, and Ch 14 Pt 2 of the *Local Government Act* 1993 (NSW).

[29] Cf *Whitlam v Australian Securities and Investments Commission* (2003) 57 NSWLR 559 at [158]-[159].

[30] NSW submissions para 50.

Division 2A: want of proportionality

27. New South Wales infers that the plaintiffs accept "the legitimacy of the end of reducing the risk to the actual or perceived integrity of government processes".[31] The plaintiffs dispute whether that statement of the supposed "end" has any content at all. It sounds grand, but it is really meaningless in itself. In particular, for the reasons given above, the euphemism of "public confidence" has neither relevant content nor an intelligible rationale.

28. Again, the submissions by NSW and the interveners fail to deal with the essential point of proportionality, responding only to minor illustrative submissions. The real issue of proportionality, reasonable necessity, arises only if Div 2A has the intelligible end of preventing corruption. If it does have that end, then it plainly goes beyond what is required to achieve that end. Corruption is about motive and effect. The intention with which a political donation may be made, and the surrounding circumstances and particular relationship between donor and recipient, are distinct from the act of making the donation, and capable of being proscribed effectively. Having failed to address those considerations, Div 2A cannot be seen as reasonably appropriate and adapted to that end.

29. Victoria's submission concerning the alternative means of publicity[32] is answered by the logical effect of such publicity. If a person who has an interest in a particular governmental decision makes a large publicised donation, that publicity is a factor militating against a favourable decision. This, in turn, is likely to discourage a donation made with that expectation. Indeed, this shows why such matters of perception should properly be left to the self-regulating processes of political debate. Once such conduct is made subject to a prohibition, if it continues to occur then it will do so in the shadows, rather than in the light of publicity and the robust scrutiny and debate which necessarily follows. That is equally applicable to Div 4A and s 96E.

Section 96E: want of proportionality

30. The question of proportionality is not answered by an abstract assertion that the burden is "incidental and slight".[33] The question is about proportionality between the burden and achieving the law's end.

31. The end NSW proffers seems to boil down to "enabling the ready expression of benefits in monetary terms".[34] That end is sought to be achieved by prohibiting anything other than monetary benefits. However, if and to the extent that a mechanism is needed for that purpose, there is such a mechanism in place, under s 84(4) of the EFED Act. Under s 117(1)(a1), regulations may be made to strengthen that process, which can go so far as to effectively compel the provision of a satisfactory valuation for in-kind donations. That has been done, in reg 37 of the *Election Funding, Expenditure and Disclosures Regulation 2009* (NSW), which permits the relevant authority to appoint an independent valuer to provide a conclusive valuation for an in-kind donation. No reason has been given why more is required than that process, which NSW may further strengthen if it thinks fit, and the Electoral Commission may administer in as strict (or as lax) a manner as it wishes.

32. As to the submission by the Commonwealth that s 96E also serves an end of preventing corruption through a relationship of dependence,[35] that submission is met by the qualification in s 96E(1)(a) "for use solely or substantially for election campaign purposes" (and, in s 96E(1)(b) and (c), similar limitations by reference to the definition of "electoral expenditure"). This limits the duration of any relationship to correspond with election campaign periods. Thus s 96E's end cannot be to prevent ongoing dependence; the only plausible end (legitimate or not) is that proposed by NSW.

Dated: 16 March 2015

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[31] NSW submissions para 69.
[32] Victoria submissions para 33.
[33] NSW submissions para 101.
[34] NSW submissions para 96.
[35] Commonwealth submissions paras 68 to 72.