IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

NO S70 OF 2013

UNIONS NSW
First Plaintiff

AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION KNOWN AS THE AUSTRALIAN MANUFACTURING WORKERS' UNION (AMWU)
Second Plaintiff

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

NEW SOUTH WALES NURSES AND MIDWIVES' ASSOCIATION
Fourth Plaintiff

NEW SOUTH WALES TEACHERS FEDERATION
Fifth Plaintiff

TRANSPORT WORKERS' UNION OF NEW SOUTH WALES
Sixth Plaintiff

AND

STATE OF NEW SOUTH WALES
Defendant

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

Filed on behalf of the Attorney-General of the Commonwealth (Intervening) by:

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PART I FORM OF SUBMISSIONS

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

PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes under s 78A of the *Judiciary Act 1903* (Cth) generally in support of the defendant (although not making submissions on the actual disposition of this matter).

PART IV LEGISLATIVE PROVISIONS

3. The Commonwealth adopts the statement of applicable legislative provisions of the plaintiffs.

PART V ISSUES PRESENTED BY THE APPEAL AND ARGUMENT

Summary

4. The Commonwealth makes the following submissions:

   4.1. The implication derived from the constitutionally-mandated system of representative and responsible government is confined by the text, context and purpose of the provisions that establish that system. United States decisions on the express terms of the First Amendment do not assist in ascertaining the scope of that implication, but distract from that task.

   4.2. The statutory scheme of which ss 95G(5) and 96D of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (**EFEDA**) form part has been drawn so as to avoid or minimise interference with the acceptance of political donations or the making of election-related expenditures for the purposes of federal elections. While the provisions nonetheless effectively burden freedom of communication about government or political matters in their terms, operation or effect, they do so for ends that are plainly legitimate or permissible.

   4.3. The Commonwealth does not make submissions as to whether those provisions are or are not reasonably appropriate and adapted to serve those permissible ends in a manner which is compatible with the system of representative and responsible government prescribed by the Constitution and the procedure prescribed by s128, but has identified matters relevant to the Court's consideration of that issue.

   4.4. Any implied freedom of association adds nothing to the plaintiffs' argument.

   4.5. Section 96D of the EFEDA is not inoperative by reason of s 109 of the Constitution and Pt XX and/or s 327 of the *Commonwealth Electoral Act 1918* (**Commonwealth Electoral Act**).

Introduction and general principles

5. **A confined implication:** As stated in *Aid/Watch Inc v Federal Commissioner of Taxation*,[1] the Constitution mandates a system of representative and responsible government, with a universal adult franchise, and s 128 establishes a mechanism for the amendment of the Constitution by which the proposed law to effect the amendment is to be submitted to the electors.[2] Communication between electors, legislators and the executive, and between electors themselves on matters of

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1 (2010) 241 CLR 539 (***Aid/Watch***) at 555-556 [44] per French CJ, Gummow, Hayne, Crennan and Bell JJ.

2 See *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 (***Lange***) at 560-561 per the Court.

government and politics is an indispensable incident of that system.[3] The implied limitation on the burdens that can validly be imposed on such communication extends only so far as to give effect to the Constitutional provisions which establish that system.[4] The inquiry as to the scope of the limitation is at a systemic level.[5] The terms of the inquiry are settled.[6]

6. **United States authorities not apposite:** In contrast to the implied freedom,[7] the US First Amendment jurisprudence deals with individual rights, and has been understood in a sense that is 'almost absolute'.[8] As Professor Freund[9] has observed,

> the Supreme Court has maximized the principle of maximum expression. On the premise that money talks, the expenditure cannot be limited...

Criticising that approach as 'faulty', Freund observes[10] that

> [t]he fact that money talks is the problem and not the answer ... we are dealing not with expression in a vacuum but in an adversary contest in which the legislature endeavours to make the contest fairer and more nearly equal so far as it may turn on the input of dollars.

7. In contrast, the implied freedom is circumscribed by the text, context and purpose from which it is derived and does not give rise to any 'absolute' immunity, or any constitutionally-protected individual rights.[11]

8. In sharp contrast to the US jurisprudence, the Australian and Canadian authorities have accepted that:

   8.1. unequal expenditure leading to unfair contests is a 'mischief'[12] which, within the limits of legislative power, Parliament may seek to remedy and

   8.2. legislative endeavours may be justified for constitutionally permissible objects (those objects being the counterparts to that mischief).[13]

The plaintiffs may disagree with particular incidents of the legislative remedy chosen by the NSW Parliament, and corporate interests may disagree with others. But those are matters within the province of that Parliament, except to the extent to which the legislation burdens freedom of

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3 See also *Wotton v Queensland* (2012) 246 CLR 1 (***Wotton***) at 13 [20] and 15 [25] per French CJ, Gummow, Hayne, Crennan and Bell JJ.

4 *Lange* at 561, 566-567.

5 *Monis v The Queen* (2013) 87 ALJR 340 (***Monis***) at 360 [62] per French CJ; *Levy v Victoria* (1997) 189 CLR 579 (***Levy***) at 622 per McHugh J; *Wotton* at 13 [20] and 15 [25] per French CJ, Gummow, Hayne, Crennan and Bell JJ.

6 *Wotton* at 15 [25] per French CJ, Gummow, Hayne, Crennan and Bell JJ.

7 *Lange* at 560; *Levy* at 625-626 per McHugh J; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 (***Mulholland***) at 223-224 [107]-[108] per McHugh J and 245 [180] per Gummow and Hayne JJ; *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 87 ALJR 289 (***Corneloup***) at 338 [222] per Crennan and Kiefel JJ (Bell J agreeing at 338 [224]).

8 *Monis* at 404 [326] per Crennan, Kiefel and Bell JJ and the authorities there collected.

9 'Storms Over the Supreme Court'69 ABAJ 1474, 1480 (1983).

10 'Storms Over the Supreme Court'69 ABAJ 1474, 1480 (1983).

11 See cases cited above, and *Levy*at 624 per McHugh J; *Coleman v Power* (2004) 220 CLR 1 (***Coleman***) at 28-29 [89] per McHugh J; *APLA v Legal Services Commissioner* (2005) 224 CLR 322 (***APLA***) at 361 [66] per McHugh J. That is dramatically illustrated by the 'national security' example given by McHugh J in *Coleman* at 32 [98].

12 *Heydon's Case* [1584] EngR 9; (1584) 3 Co Rep 7a at 7b [76 ER 637 at 638].

13 Using the notion of 'mischief' and 'objects' in the correlative sense suggested by Gummow J in *APLA* at 394 [178].

communication about federal government and political matters and goes beyond what is reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the system of government described above.

Construction of section 96D of the EFEDA

9. The first step in the analysis is one of statutory construction.[14] The existence of any burden and its extent or manner will turn upon the proper construction of the statute and the objective purpose will supply the putative constitutionally permissible end.[15] The construction of s 96D is also important for the purposes of the plaintiffs' s 109 argument (see below at [57]-[60]). The following matters are significant in ascertaining its scope and object.

10. *First*, at the level of context, the 'application' provision (s 83), dealing with the scope of Pt 6 as a whole, gives the Part a confined operation: 'This Part applies in relation to' State elections and elected members of Parliament (defined to mean "the Parliament of New South Wales" by s 4) and (other than Divs 2A and 2B) local government elections and elected members of councils.

11. *Secondly*, the primary prohibition, the act that is made unlawful by s 96D(1), is the act of accepting a donation, other than from an individual who is an enrolled elector. The act of donating is not prohibited by s 96D(1). While certain acts of donors are made unlawful by ss 96D(2) and (3), those provisions are essentially aimed at acts that would, in a circuitous fashion, avoid the primary prohibition on accepting political donations in s 96D(1).[16] Note also, by way of comparison, the terms of s 96GA(1): '[i]t is unlawful for a prohibited donor to make a political donation' (emphasis added) and the separate provision in s 96GA(3) making it unlawful 'to accept' such a donation.

12. *Thirdly*, s 96D(1) is to be construed in light of the cognate offence provision in s 96I. That provision imposes criminal liability upon '[a] person who does any act that is unlawful' under *inter alia* s 96D in certain specified circumstances. The person who necessarily does the primary act made unlawful by s 96D (that of accepting) is one of the specified donees mentioned in that provision: a 'party', 'elected member', 'group', 'candidate' or 'third party campaigner'.[17] It is that person who must possess the relevant *mens rea* of awareness of the facts that result in the act being unlawful. That awareness must exist at the time of that unlawful act. The provision for recovery of unlawful donations in s 96J is similarly directed at the person who accepts a donation: the amount recoverable under that provision is payable by the person who accepted it.

13. In contrast, a donor is not subjected to any obligation equivalent to that in s 96J. And the acts of a donor in making a donation caught by s 96D would only be relevantly penalised to the extent they involved aiding, abetting, counselling or procuring the commission of the principal offence by a donee.[18] Such accessorial liability requires that the 'aider' or 'abettor' know the essential facts that constitute the principal offence, matters which in this context are not to be assumed.

14. *Fourthly*, each of the donees exposed to potential criminal liability and a statutory obligation to pay money is defined in the EFEDA by reference to the subject matter of State elections or local government elections or the organs of State or local government.[19] The definition of 'political

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14 That analysis may not be strictly sequential: *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [11] per Gummow, Hayne, Heydon and Kiefel JJ.

15 *Monis* at 370, [125] per Hayne J.

16 The terms of s 96D(4) (which subsection was apparently included to overcome any implication that might otherwise arise by reason of s 95D(3)(b)), do not alter the clear words of s 96D(1).

17 The provision for recovery of unlawful donations in s 96J is similarly directed at the donee.

18 See s 351B of the *Crimes Act 1900* (NSW) and note s 111 of the EFEDA.

19 An 'elected member' is defined to mean a member of the State Parliament or a councillor of the council of a local government area: see s 4(1). It does not include an elected member of the federal

donation' in s 85(1) adopts a broadly similar taxonomy.[20]

15. *Fifthly*, at a level of generality, Pt 6 (in which s 96D appears) regulates the manner in which those donees accept,[21] disclose,[22] use[23] and manage[24] those donations.

16. *Sixthly*, the scheme has been drafted to avoid or minimise interference with the manner in which those persons accept or deal with political donations for the purposes of federal elections, a matter the plaintiffs' submissions overlook.[25] For example:

    16.1. Section 95B(2) carves out from the prohibition (in s 95B(1)) on accepting a donation exceeding the applicable cap[26] a 'donation [that] is to be paid into (or held as an asset of) an account kept exclusively for the purposes of federal...election campaigns'. The exclusive application of that prohibition to State elections is reinforced by s 95AA.

    16.2. The prohibition in s 95I on incurring 'electoral communication expenditure for a State election campaign' (emphasis added) exceeding the applicable cap similarly has no application to federal election campaigns. As with s 95B(1), the exclusive application of that part of the scheme to state elections is reinforced by s 95E (which is in similar terms to s 95AA).

    16.3. A similar approach is evident in the provisions of Div 3 of Pt 6, dealing with management of donations and expenditure. Amongst other things, Div 3 restricts the purposes for which political donations made to political parties, elected members, group or candidates may be used: ss 96(1),(2) and 96A(6). However, the permitted uses specifically include the use of those donations for the 'objects and activities of the party' (s 96(1)) or (in the case of elected members, groups and candidates) the party of which they are a member: s 96A(6)(b) read with s 96B(5)(b). Hence, where the objects of a party include the promotion of the election of candidates to the federal Parliament, the EFEDA does not impede use of donations for that purpose. Nor does it do so in respect of third party campaigners.

    16.4. A further aspect of Div 3 of Pt 6 is to require separate banking accounts to be used

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Parliament: see the definition of 'Parliament' in that section. The definitions of 'party', 'group' and 'candidate' in s 4(1) are each tied to their participation or potential participation in State or local government elections (albeit that, in the case of a party, the promotion of the election to Parliament or a local council of its endorsed candidates need only be 'one of its objects'). By a more convoluted route, the same is true of a 'third party campaigner': such a person must incur certain 'electoral expenditure' during a 'capped expenditure period' (see ss 4(1)). The term 'electoral expenditure' is, in turn, tied to the subject matter of an 'election' (see s 87(1)), defined in s 4 to mean a State election or a local government election. The definition of 'capped expenditure period' in s 95H similarly refers to State elections.

20 Although note in that regard that s 85(1)(d) potentially catches gifts made for the benefit of a wider class of persons than third party campaigners (note the terms 'intended to be used' and the use the of more broadly defined category of 'electoral expenditure').

21 Imposing caps on the amount that may be accepted by those persons as a political donation in Div 2A of Pt 6 and imposing various other restrictions in addition to s 96D upon the donations that may be accepted: see ss 96EA(2), 96F, 96G and 96GA(3).

22 Div 2 of Pt 6.

23 Div 2 of Pt 6 (to the extent they are used for 'electoral communication expenditure' – see the definition in s 87(2)).

24 Div 3 of Pt 6.

25 See eg PS [26]-[29], [36], [53], [64(a)].

26 Specified in s 95A.

where a party, elected member, group or candidate applies political donations to 'electoral expenditure': see ss 96(3) and 96A(3). Similar obligations apply to third party campaigners in respect of 'electoral communication expenditure'. But those terms are each defined so as to exclude expenditure incurred substantially in respect of an election of members to a Parliament other than the NSW Parliament: see s 87(3).

17. How then is s 96D (and ss 96I and 96J) 'applied' in relation to that subject matter, and not more broadly to subject matters other than those specified in s 83? Having regard to the textual and contextual matters above, the Commonwealth submits that the answer is as follows:

    17.1. Section 96D it is to be understood as referring only to donations of the kind to which Pt 6 applies, being those 'in relation to State elections and elected members of [State] Parliament, and local government elections and elected members of councils (other than Divisions 2A and 2B')(a **State Electoral Purpose**).

    17.2. Where a person accepts such a donation from a person other than an enrolled voter referred to in s 96D(1), with awareness of the facts that make that act unlawful that person commits an offence under s 96I (and is potentially exposed to the 'double penalty' provision in s 96J[27]).

18. That construction is supported by the extrinsic materials. During the second reading speech it was said that the 'general ban on corporate donations applies to both State and local government elections' and that the State Government was proposing to 'urge the Commonwealth Government to extend those reforms into the federal electoral context so that the same fundamental principles of accountability and transparency apply at every level of government in Australia'.[28] Nowhere was it suggested that s 96D was to be applied by the NSW legislature at the level of the federal government or in a federal electoral context.

19. The Commonwealth's proposed construction is also supported by the principle that the operation of general language in a statute should (unless a contrary intention appears) be confined to a subject matter under the 'effective control' of the relevant legislature: see the principle of construction identified by in *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391 at 423–424 Dixon J.[29] The NSW legislature has no such control over federal elections. Indeed, the Commonwealth's legislative power over federal elections has been said to be exclusive.[30] And as such, should s 96D be more broadly construed than as submitted by the Commonwealth, a real issue may arise as to whether it would need to be read down in any event to avoid invalidity. But,

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27 Although not entirely clear, it would appear that they would also need to know that the acceptance of the donation was unlawful at the time of accepting (in addition to being aware of the facts that result in the act being unlawful).

28 NSW, Parliamentary Debates, Legislative Council, 15 February 2013, 8168-8169 (Michael Gallacher).

29 And see also *Wanganui Rangitikei Electric Power Board v Australian Mutual Provident Society,* (1934) 50 CLR 581 at 600-601 per Dixon J and *Meyer Heine Pty Limited v China Navigation Co Limited* (1966) 115 CLR 10 at 30-32 per Taylor J. Although sometimes said to rest upon the notion that a statute should be construed in a manner so as to preserve its validity (see eg *Hunt v BP Exploration Co (Libya) Ltd* (1980) 144 CLR 565 at 570 per Barwick CJ and 571 per Stephen, Mason and Wilson JJ), the principle is better understood as arising from notions of comity. Those considerations apply equally as between the polities of the Federation as they do between nation states.

30 *Smith v Oldham* (1912) 15 CLR 355 (***Oldham***) at 358 per Griffith CJ, 359-340 per Barton J; *Nelungaloo Pty Ltd v The Commonwealth* (1952) 85 CLR 545 at 564 per Dixon J; *Rowe v Electoral Commissioner* (2010) 243 CLR 1 (***Rowe***) at 14 [8] per French CJ (citing *Oldham*).

properly construed, the EFEDA does not have a broader application of that nature and that issue does not arise.

20. The nature and object of the restriction imposed by s 96D is also to be understood in the context of the provision made by the EFEDA for:

    20.1. the capping of individual donations at a relatively low level for State elections: see Div 2A of Pt 6, particularly the prohibition in s 95B(1) and the applicable caps in s 95A(1)

    20.2. the limitations on electoral communication expenditure for State election campaigns imposed by Div 2B of Pt 6

    20.3. the public funding, under Pt 5 of the EFEDA, of State election campaigns. That funding is available to registered parties and candidates (subject to the eligibility requirements in ss 57(3) and 59(3)). The amount of that funding is set by ss 58 and 60 respectively as a proportion of the actual electoral communication expenditure incurred by a party or candidate within the applicable expenditure cap. The operation of that fund is described at [50]-[55] of the Special Case Book (**SCB**) and

    20.4. the disclosure requirements applicable to political donations and electoral expenditure imposed by Div 2 of Pt 6.

21. Construed in its proper context, s 96D is merely one element of a scheme the objective purpose of which may be described, at a level of generality, as being to safeguard the integrity of the State political process by reducing pressure on political parties and other individual actors in that process to raise substantial sums of money, thus reducing the risk of corruption and undue influence.

Is there a burden on political communication?

22. The central question, for the purposes of both *Lange/Coleman* questions[31] is what the impugned law does.[32] The focus must be upon the system of representative and responsible government at the federal level. And that focus points to the fact that the implied freedom is primarily concerned, not with individual acts of political self expression, but rather with the flows of information necessary to sustain that system.[33] That has two aspects:

    22.1. *First*, the flow of information between electors and elected representatives or candidates for election and between electors themselves on political matters necessary to ensure that the constitutionally protected choice at general elections or referenda is a true choice in the sense of an 'informed' one (thus maintaining representative government and the procedure required by s 128).[34] The focal point of that process is the elector, who is to be informed. The proper emphasis is on that person's access to the information relevant to that choice.[35]

    22.2. *Secondly*, the flow of information concerning the conduct of the executive branch necessary to ensure the workings of responsible government. That also involves a predominant concern with access to information by electors (and their representatives) to

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31 The term *Lange/Coleman* test or questions will be used here to refer to the two part test for validity identified in *Lange* at 567 per the Court as modified in *Coleman* at 51 [96] per McHugh J, 78 [196] per Gummow and Hayne JJ and 82 [211] per Kirby J.

32 *Monis* at 360 [62] per French CJ citing Hayne J in *APLA* at 451 [381].

33 See using essentially similar terminology *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 (***ACTV***) at 159 per Brennan J and 234 per McHugh J).

34 *Lange* at 560-561.

35 *Lange* at 560; *Monis* at 395 [273], 409 [352] per Crennan, Kiefel and Bell JJ.

allow them to evaluate the conduct of the executive branch.[36]

23. That understanding assists in discerning what is (and what is not) of consequence in terms of the burden a particular law imposes upon political communication. That is important because a burden that is so slight as to be inconsequential does not require an affirmative answer to the first question.[37]

24. The Commonwealth submits that it is the constraint on the ability of the actors identified in s 96D to access financial resources that they would otherwise have for the purpose of political communication for a State Electoral Purpose that presents the only burden of any consequence upon the freedom in the current matter.[38]

25. In making that submission, the Commonwealth does not suggest that the implied freedom extends to all communications about politics and government at all levels of government in Australia. It is rather concerned with those contained in the information streams identified above–those that are relevant to the evaluative processes and choices by electors at the federal level. And so, if the potentially affected communications are at the 'purely State level'[39], there will be no relevant impact upon the aspects of the system of government that the freedom protects. Accordingly, a communication about a matter concerning State legislation[40] or the actions of the executive of a State[41] will not, without more, amount to a communication about a government or political matter so as to engage the first limb.

26. However, a consequence of the 'increasing integration of social, economic and political matters in Australia' (and of the broad approach of the Court to the range of matters that may be characterised as 'governmental and political'[42]) is that State and local government electoral campaigns can and often will deal more broadly with issues relevant to government and politics at the Commonwealth level. Moreover, the existence of compulsory voting at both levels of government (and the largely overlapping qualifications for electors at each)[43] means that the electors at a State election will essentially be a subset of those at a federal election. It follows that for these reasons it cannot be said that the communications affected by s 96D are at the purely State level.

27. It may be accepted (for reasons developed further below) that the fact of making a donation 'at the State or local level ... will not illuminate the choice for electors at federal elections [or referenda under s128]'[44], but it is the practical financial constraint upon the protected flows of information identified above that is the matter of substance. The burden imposed on the freedom by that constraint is not so slight as to be inconsequential.

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36 *Lange* at 561.

37 *Monis* at 407 [343] per Crennan, Kiefel and Bell JJ (cf Hayne J at 367 [108]).

38 Note, in that regard, ss 96(3) and (5), restricting the potential sources of 'electoral expenditure' (s 87(1)) for a State election campaign to, *inter alia*, political donations and payments made under Pt 5.

39 *Wotton* at 15 [26] per French CJ, Gummow, Hayne, Crennan and Bell JJ.

40 *Levy* at 596 per Brennan CJ and 626 per McHugh J (although their Honours did not decide the matter on that issue) – cf 609 per Dawson J.

41 Cf *Coleman* at 95 [80] per McHugh J.

42 *Hogan v Hinch* (2011) 243 CLR 506 (***Hogan***) at 544 [49] per French CJ.

43 See s 245 of the Commonwealth Electoral Act, s 11B of the *Constitution Act 1902* (NSW), s 166 of the *Electoral Act 2002* (Vic), s 186 of the *Electoral Act 1992* (Qld), s 85 of the *Electoral Act 1985* (SA), s 156 of the *Electoral Act 1907* (WA), s 152 of the *Electoral Act 2004* (Tas), s 129 of the *Electoral Act 1992* (ACT), s 279 of the *Electoral Act 2004* (NT).

44 NSW [32].

28. The Commonwealth's submission also involves the rejection of the submission at NSW [33]-[34]. The short answer to that submission is that, regardless of whether the Commonwealth has power to make laws whose immediate object is to interfere with State electoral processes,[45] the States have no power to make laws which in their operation or effect impair the free and informed choices guaranteed by ss 7 and 24 of the Constitution. And that is so whether or not the State law may be characterised as an 'electoral law'. The reasons of Brennan CJ, Dawson and Toohey JJ in *Muldowney v South Australia*[46] (upon which NSW relies) are to be understood in the manner described below in connection with the second limb.

29. The first question should be answered 'yes' for those reasons.

Fiscal 'communication'

30. Reflecting the US jurisprudence upon which they are based, the plaintiffs' submissions (seeking to elevate the significance of what may be communicated by donations and acceptance of donations) place heavy emphasis on what may or may not be communicated by the financial transactions that are anterior to the flows of information that more directly affect electoral choices. That is irrelevant.

31. Asking whether such transactions do or do not constitute a form of political communication erroneously assumes that the implied freedom is primarily concerned with freedom of expression and fails to appreciate its systemic focus on the institutional features identified above.

32. In any case, the plaintiffs' submissions on fiscal 'communication' should be rejected for the following reasons. *First*, as submitted above, it is only the act of accepting a donation that is proscribed by s 96D. The act of donating (on which the plaintiffs principally rely) would only be subject to any form of sanction (if at all) via the accessorial liability provision in s 351B of the *Crimes Act 1900* (NSW).

33. *Secondly*, the act of acceptance (and, even if relevantly proscribed, the act of donation) are not forms of 'expressive' political communication with which the implied freedom is concerned.[47] They are rather essentially private transactions[48] between one of the donees to whom s 96D refers (who may, but need not be, an elector, elected representative or a candidate) and a person (who will necessarily not be an elector, and, at least as regards the specific application of the EFEDA of which the plaintiffs complain,[49] will not be an elected representative or a candidate[50]).

34. *Thirdly*, even if disclosed more broadly to electors, those acts are equivocal: they convey nothing more than that the 'party', 'elected member', 'group', 'candidate' or 'third party campaigner' has been willing to accept a 'political donation' falling within the broad terms of s 85(1) for a State Electoral Purpose. Indeed, even in the US authorities on which the plaintiffs rely, it has long been accepted that restrictions on campaign contributions involve only a 'marginal restriction upon the

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45 See *ACTV* at 242-244 per McHugh J and see also 163-164 per Brennan J (largely in dissent). See also s 394 of the Commonwealth Electoral Act and *R v Licensing Court of Brisbane; Ex parte Daniell* (1920) 28 CLR 23 at 30-31 per Knox CJ, Isaacs, Gavan Duffy, Powers, Rich and Starke JJ.

46 (1996) 186 CLR 352 (***Muldowney***).

47 Accepting that the implied freedom is not limited to verbal utterances and extends to the forms of expressive conduct identified by McHugh J in *Levy* at 622-623.

48 Note *Cunliffe v Commonwealth* (1994) 182 CLR 272 (***Cunliffe***) particularly at 327-328 per Brennan J and 336 per Deane J (see also 365 per Dawson J) – cf298-299 per Mason CJ.

49 See [77] of the Statement of Claim at SCB 21-22.

50 Note, as regards the position of natural persons not on the roll, that it is not in fact necessary for a person to be on the electoral roll as an elector to be elected to the Commonwealth House of Representatives or Senate (see s 163 of the Commonwealth Electoral Act read with the definition of 'elector' in s 4).

contributor's ability to engage in free communication', because they do not convey the 'underlying basis for the support'.[51] So understood, the acts of making or accepting a donation are not sufficiently clear to communicate 'information, opinions and arguments concerning governmental and political matters'[52] or 'ideas'[53] to those who discern them. They are outside the protected flows of information with which the freedom is concerned. In any event, s 96D does not proscribe either the disclosure of donations or the communication of messages of affiliation or support.

Is the law sufficiently tailored to a permissible end in a manner which is compatible with the maintenance of the constitutionally prescribed system of government?

Permissible or legitimate end

35. The requirement for a 'legitimate' end in the context of the second limb of the *Lange/Coleman* test involves measuring the objective purpose of the statute against the constitutional imperative. To the extent to which the word 'legitimate' means anything more than 'lawful' or 'within the scope of the powers of the Parliament', it may not add anything to the requirement of compatibility.[54]It is therefore sufficient if that purpose is a constitutionally permissible one, recognising that there are some ends that are incompatible with that imperative and therefore impermissible (for example, that of undermining the constitutionally prescribed system.[55]That involves an analysis that is similar to that applied in respect of other constitutional guarantees or freedoms. So a permissible purpose (or legitimate end) in the context of s 92 is one that is 'non-protectionist';[56] in the context of s 99 it is one that is 'non-preferential'.[57]

36. While it may be accepted that that does not mean that every object or end that falls within Commonwealth or State legislative power is permissible,[58] it will be a 'rare case' in which a conclusion of outright incompatibility will be reached.[59]

37. The authorities have identified very few ends that are inherently impermissible. The cases have rather identified an extensive and diverse range of ends that are permissible.[60] Indeed, apart from the hypothetical example of an object directed at undermining the prescribed system of government, only two (possibly) impermissible ends have been discerned by the Court to date. *First*, the promotion of civility of discourse was suggested to fall within that category by two

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51 *Buckley v Valeo* 424 US 1 (1976) at 20-21.

52 *Lange* at 571.

53 *Levy* at 594 per Brennan CJ.

54 *Mulholland* at 197 [33] per Gleeson CJ.

55 See *Coleman* at 50 [92] per McHugh J.

56 Cf the object identified in *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 (***Betfair No 1***) at 479 [108] per Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ.

57 *Permanent Trustee Australia Limited v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388 at 424-425 [91] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ; *Fortescue Metals Group v Commonwealth* (2013) 87 ALJR 935 (***Fortescue***) at 966 [124]-[125] per Hayne, Bell and Keane JJ.

58 *Monis* at 372-373 [132]-[141] per Hayne J.

59 *Monis* at 396 [281] per Crennan, Kiefel and Bell JJ.

60 See those collected by Hayne J in *Monis* at 371 [129], expressly observing that they were only 'examples of legitimate objects or ends that have so far been identified in the cases' and that the 'list is not closed'. In addition, one might add to that list national security (the example given in *Coleman* at 52, [98] per McHugh J) and the legitimate ends relating to the regulation of the public use of roads articulated in different ways by the members of the Court in *Corneloup* (see at 312 [66], [68] per French CJ, 323 [136] per Hayne J and 335 [203] per Crennan and Kiefel JJ with Bell J agreeing at 338 [224]).

members of the Court in *Coleman*.[61] However, that proposition did not find support in the reasons of the other members of the Court in that case.[62] *Secondly*, a divergence of views was expressed in *Monis* as to whether the protection of citizens from an intrusion of seriously offensive material into a person's workplace or home may provide a further (rare) example.[63] For the reasons that follow, no such doubts arise as to permissibility of the objects of s 96D.

The objects of s 96D are permissible

38. As submitted above, the broad object of the scheme in which s 96D appears may be characterised as safeguarding the integrity of the State political process by reducing pressure on political parties and other individual actors in that process to raise substantial sums of money, thus reducing the risk of corruption and undue influence.

39. That is, of course, a formulation that is similar to that identified by Mason CJ in *ACTV* as the objective purpose of Part IIID of the *Broadcasting Act 1942* (Cth).[64] His Honour there accepted that in the context of the Australian system of government, the need to raise such substantial funds 'does generate a risk of corruption and undue influence, in that in such a campaign the rich have an advantage over the poor...', which he characterised as amongst the 'shortcomings or possible shortcomings in the political process'.[65] His Honour also accepted that that identified mischief may well justify some measures operating to directly restrict broadcasting of political advertisements and messages in a federal election campaign.[66]

40. There is a long history of legislative measures directed to the 'shortcomings'or mischief to which Mason CJ referred. That includes the modest expenditure limits that came into force very shortly after Federation under Pt XIV of the *Commonwealth Electoral Act 1902* (Cth) and which were continued under Pt XVI of the Commonwealth Electoral Act until repealed in 1980.[67] Indeed, measures of that nature have an even longer history in the tradition of representative government, commencing with the *Corrupt and Illegal Practices Prevention Act 1883* (46 & 47 Victc. 51).[68] The validity of such restrictions is yet to be directly considered by this Court. However, it has expressly referred to the limitations that (until 1980) operated at a Commonwealth level, without suggesting that they raised any question of validity.[69] The observations of Deane and Toohey JJ in *ACTV*[70] also suggest that some form of control on spending on political communication at the Commonwealth

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61 Gummow and Hayne JJ at 78-79 [199] and see also Hayne J in *Monis* at 384 [214].

62 McHugh J, particularly at 34 [105], appears to allow for the possibility of a 'qualified prohibition' directed to such an end. Kirby J appears to have seen the question in terms of 'proportionality' rather than the existence of a permissible end (70 [237] and 77-78 [256]). Heydon J would have accepted promotion of standards of civilisation as a legitimate end (100-101 [324]). Although less clear, Callinan J was seemingly of the same view (89-90 [295] and 92-93 [299]-[300]). Gleeson CJ did not express a view on that issue.

63 At 408-409 [348]-[349] per Crennan, Kiefel and Bell JJ and cf French CJ at 362-363 [73]-[74] (with whom Heydon J generally agreed) and Hayne J at 385 [220].

64 At 144.

65 At 144-145.

66 At 145.

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

68 See s 8(1) and sch 1.

69 *McGinty v Western Australia* (1996) 186 CLR 140 at 283-284 (***McGinty***) per Gummow J and *Mulholland* at 202-203 [65] per McHugh J.

70 At 175.

level may be justified by reference to the need to create a 'level playing field' or to ensure some balance in the presentation of different points of view.

41. A similar approach is apparent in the jurisprudence of the Canadian Supreme Court, which has been prepared to accept, as a permissible legislative end amounting to a matter of pressing and substantial importance in a democratic society, the need to adopt an egalitarian model in the control of electoral expenditure (which is essentially akin to the 'level playing field' concept identified by Deane and Toohey JJ in *ACTV*).[71] In reasons resembling Mason CJ's observations in *ACTV*, the rationale for such limits has been identified as being to prevent the most affluent from monopolising election discourse and consequently depriving their opponents of a reasonable opportunity to speak and to be heard. Importantly, and reflecting the fact that Australia has far more in common with Canada than the United States by reason of their more closely comparable traditions of representative government,[72] that has been explained by the Canadian Supreme Court by reference to the notion of a free, fair and informed choice at elections:

> [the] 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.[73]

42. A measure that advances an object of that nature may be seen to enhance the system of representative government[74] (albeit here indirectly, in that s 96D operates at the State level) and would necessarily be a legitimate or permissible end. Of course, as the diverse examples collected from the jurisprudence demonstrate, the range of permissible ends is not limited to those associated with the maintenance or enhancement of the system of representative or responsible government.[75] However, they may be considered to be clear cases, which, in turn, is relevant at the second limb of the *Lange/Coleman* test.

43. Section 96D, and the related provisions dealing specifically with donations, may be regarded as serving a number of more precise objective purposes, being:

    43.1. to provide for, protect and promote confidence in an electoral system in which financial influence is limited overall (by capping donations at a relatively low level, limiting donations to those with a stake in the system, providing public funding for state election campaigns and placing caps on electoral communication expenditure) (the **first permissible object**)

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71 *Libman v Quebec* [1997] 3 SCR at 569 [41], [47] per the Court. In contrast, such a notion is seemingly considered entirely antithetical to the First Amendment in the US authorities (see further below).

72 *McGinty* at 268 per Gummow J.

73 *Harper v Canada* [2004] 1 SCR 827 at [72] per Bastarache J (Iacobucci, Arbour, Le Bel, Deschamps and Fish JJ concurring). See also s 404(1) of the *Elections Act Canada* (which prohibits any person other than a Canadian citizen or permanent resident making a political contribution) and ss 422 and 440 of the *Elections Act Canada* (which limit the amount a candidate or party can spend during an election). For a discussion of these provisions see Select Committee on Electoral and Political Party Funding, NSW Parliament, *Electoral and Political Party Funding in NSW* (2008) at 24-25 [4.14]-[4.23] and 29-32 [4.45] and Joint Standing Committee on Electoral Matters, NSW Parliament, *Public Funding of Election Campaigns* (2010) at 92-93 [5.41]-[5.44].

74 See, characterising the object of the legislation in issue in *ACTV* in that way, McHugh J in *Coleman* at 50-51 [94].

75 *Monis* at 371 [128]-[129] per Hayne J and see again the concern with legislative stultification identified above.

43.2. to protect the integrity of that electoral system and the integrity of the State Parliament from undue and disproportionate influence by corporations and other organisations (the **second permissible object**) and

43.3. to minimise the potential for donors to circumvent the cap on individual donations by channelling donations through multiple corporate bodies (the **third permissible object**).

44. Each of those objects is a more particular manifestation of the overarching permissible end identified above, reflecting the fact that the text and context of s 96D indicates that the NSW has taken up the possible 'remedies' identified by McHugh J in *ACTV* as being 'available' to Parliament as a cure for the mischief of corruption and undue influence - his Honour there referred to, *inter alia*, public funding, disclosure and limitations on contributions.[76]

45. In taking up the last mentioned possibility, the NSW Parliament has sought to limit contributions in two distinct steps: first, by using the electoral roll to delimit the class of potential contributors to those with an actual stake in the system. Secondly, by limiting the quantum of the contributions that may be made by each member of that class. Contrary to what appears to be suggested by the plaintiffs at PS [54] that does not involve an incoherent approach. In essence, the point is to reduce the amount of money being introduced into the political system from private sources by imposing a clearly defined upper limit on the total amount of potential donations to political parties and other relevant actors in the State political system. That will not be achieved in any meaningful way if the potential class of donors is open ended or subject to rapid fluctuation by the potential addition of multiple (and potentially related) corporate progeny. That two-step process, in combination with the provision for public funding and the cap on electoral communication expenditure, results in an electoral system in which the cumulative level of financial influence is limited (see the first permissible object). Indeed, the two steps may be regarded as complementary measures for a further reason, in that s 95D avoids the risk of circumventing the caps imposed by Div 2A of Pt 6[77] (see the third permissible object).

46. No difficulty arises in terms of a permissible end from the selection of enrolled voters as the class of persons from whom donations may be accepted. It is important to note the different characteristics of the juristic persons who are excluded by that criterion: as was said in the strong dissent in *Citizens United v Federal Election Commission*[78] such entities are not actually members of society and, because they may be managed and controlled by people or entities outside Australia, their interests may conflict in fundamental respects with the interests of electors. The NSW Parliament may legitimately determine that those differences warrant different treatment as regards political donations.

47. As to the second permissible object (protection from undue and disproportionate influence by corporations and other organisations) it is of course true that, even absent s 96D, Div 2A of Pt 6 would operate to ameliorate the fact that greater wealth tends to be concentrated in corporations and other associations as compared to individuals.[79] But, in light of the possibility of the rapid proliferation of juristic persons and of related entities being subject to common control, there

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76 See *ACTV* at 239.

77 A justification that is even accepted in the First Amendment jurisprudence: see eg *United States v Danielczyk* 683 F 3d 611 (2012) (cert denied 2013 LEXIS 1810) at 618 [10] (discussing the 'anti circumvention interest') and the authorities there referred to.

78 558 US 310 (2010) (***Citizens United***) at 394 per Stephens J (in which Ginsberg, Breyer and Sotomayor JJ joined).

79 See PS [54].

remains a real threat that those interests will come to have a disproportionate influence in the State electoral system. Indeed, the reduction in the level of individual donations achieved by Div 2A of Pt 6 stands to exacerbate such influences.

Answer to the second Lange/Coleman question

48. The answer to the second *Lange/Coleman* question (and thus the validity of s 96D) depends upon whether the legislative means adopted are proportionate (in the sense of sufficiently tailored) to achieving one or more of the permissible ends of s 96D just identified in a manner which is compatible with the system of representative and responsible government prescribed by the Constitution and the procedure prescribed by s 128. The Commonwealth does not seek to make submissions as to the outcome of that question. Instead, it makes general submissions as to the matters the Court might consider in that regard.

49. *First*, to the extent that the second *Lange/Coleman* question involves two proportionality tests (as suggested by Crennan, Kiefel and Bell JJ in *Monis*), they collapse into one. That is at least the case in this context, where the permissible end relates to the protection of the system of representative and responsible government (albeit at the State rather than the federal level). Asking whether the means adopted are proportionate to the objective purpose of the legislation is, in those circumstances, largely congruent with the second inquiry proposed by Crennan, Kiefel and Bell JJ.[80] The plaintiffs' suggestion that two inquiries are warranted in this case[81] should not be accepted.

50. At the root of that inquiry, and consistent with the systemic nature of the freedom, is the question identified by Brennan J in *Nationwide News Pty Limited v Wills* (1992) 177 CLR 1 at 50-51[82]: that is, does the impugned law substantially impair the opportunity for the Australian people to form the necessary political judgements. As submitted above, that requires consideration of the extent of the effect upon the particular protected information streams that are the focus of the implied freedom. It also brings to account the fact that, here, the object may be seen to be in furtherance of, and not derogation from, the constitutional system identified in *Aid/Watch* (albeit indirectly, in that the legislation operates primarily at the State level). That is a matter that weighs in favour of validity,[83] although not necessarily decisively as *ACTV* and *Rowe* demonstrate. Further, as Mason CJ's reasons in *ACTV* suggest,[84] it is relevant to consider what alternative avenues for informing electors are left intact by the impugned measure and whether those that are restricted are offered to some but not all on a discriminatory basis. Here, of course, the issue is a step removed from that considered in *ACTV*, in that it is the financial means of funding communication that is restricted.

51. *Secondly*, it follows from the submissions above regarding the proper construction of s 96D that the comparatively stricter degree of scrutiny applied in some cases concerning the implied freedom is not warranted here:

    51.1. In the first place, s 96D does not have a 'direct' effect upon protected communications in the sense discussed in *Hogan*.[85] For the reasons given above, the plaintiffs' submission

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80 At 396-397 [279]-[282].

81 See PS [64].

82 Referred to in *Monis* at 409 [352] per Crennan, Kiefel and Bell JJ.

83 *Mulholland* at 200-201 [41] per Gleeson CJ.

84 At 146.

85 At 555-556 [95] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ. See also *Wotton* at 16 [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

that s 96D directly restricts some form of fiscal communication should be rejected. Viewed as a matter of substance, it does no more than prescribe the time, place, manner or conditions of a communication covered by the freedom, in that such things are necessarily dictated by financial constraints in the Australian political context (eg whether they take place via some form of commercial media; if they are made via commercial television or radio, the time at which they are made and if in print, where in the newspaper they appear.)

51.2. It was also suggested by Mason CJ in *ACTV* that a stricter degree of scrutiny is warranted when the restrictions are directed at communications in connection with the electoral process itself.[86] However, while political donations may be used for 'electoral expenditure' for a State election campaign,[87] s 96D is not itself directed at such communications. In any event, the statements in *ACTV* are to be understood as directed to electoral communications in federal elections.

52. *Thirdly*, and related to the last point, it is significant that s 96D has a limited application, which does not extend to federal elections. For the reasons given above, that is not sufficient to avoid an affirmative answer to the first *Lange/Coleman* question. However, given its limited application, the relevantly affected flows of information to electors will have a specific and concentrated (non-federal) aspect, directed primarily to the evaluation of local representatives in elections for a separate governmental system.[88] In that localised adversarial contest, the significance of the interaction between the different levels of government[89] may be seen to diminish, particularly from the perspective of the elector who is the focal point of the relevant protected information flows (see above). And for that reason the plaintiffs are wrong to suggest that the current matter involves communication at the 'very centre' of political communication.[90]

53. *Fourthly*, it is necessary to say something further about the plaintiffs' contention (PS [62]) that there are less drastic means available by which the relevant legislative ends may be achieved. An 'essential qualification' to the proposition that such matters are relevant is that the putative alternative measure must be 'as practicable' as the law in question[91] – necessitating consideration of whether the alternative scheme is as efficacious as the impugned scheme[92] and whether it is 'feasible' from the perspective of those administering it.

54. The existence of less restrictive alternatives and whether such measures are 'as practicable' in that sense involve (or at least may involve) questions of constitutional fact.[93] Generally (and without

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86 See at 144, 145.

87 See the definition in s 87(1) – which includes, but is not limited to, expenditure on advertisements and see also ss 96(5)(a) and 96(3).

88 That is how the reasons of Brennan CJ (at 365-366) Dawson J (at 370) and Toohey J (at 374) in *Muldowney* are to be understood.

89 See *Hogan* at 543 [48] per French CJ.

90 PS [16] and footnote 2, the latter seeking to justify reliance on the US cases on that basis.

91 *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. See also *Monis* at 408 [347] per Crennan, Kiefel and Bell JJ.

92 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.

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

suggesting that there exists some form of 'onus'[94]) 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'.[95] Reaching such a conclusion requires a high level of satisfaction on the part of the Court[96] – the alternative means must be 'obvious and compelling'.[97] That, at least in part, follows from the fact that a conclusion that there are other less restrictive and equally efficacious and feasible means available may involve weighing up a number of different public policy considerations (a process the court is not necessarily well equipped to do).[98] And so, except in a clear case where the Court is comfortably able to apply the Court's 'knowledge of the society of which it is a part',[99] it will be reluctant to speculate upon the possible terms and effects of a 'hypothetical law'.[100] In contrast, less difficulties are presented where a polity, particularly an Australian polity, has actually adopted the putative alternative approach.[101] The plaintiffs do not point to any such scheme.[102] And the matters they identify are simply too vague and uncertain in application to be described as obvious and compelling alternatives that would be 'as practicable' as the law in question.

55. *Finally*, the plaintiffs' argument that the alternative source of funding made available under Pt 5 of the EFEDA is a 'red herring'[103] should not be accepted (to the extent it is put in relation to the second limb). It proceeds from an assumption about what Parliament 'intended' – that is, that the funding would only provide 'partial compensation' for the initial imposition of caps on donations. There are difficulties with that conception of Parliamentary 'intention' – it seemingly conflates the useful notion of objective statutory purpose with an unhelpful inquiry into the motivation of legislators. As explained in *Zheng v Cai*,[104] the Court undertakes quite a different inquiry and judicial findings of 'intention' are an expression of the constitutional relationships between the different arms of government with respect to the making, interpretation and application of laws. What can be discerned from a more orthodox consideration of the text and structure of the EFEDA, read as a whole, is that it evinces an object of reducing sources of private funding and providing an alternative (not necessarily 'compensatory') source of public funding. That submission is also at odds with the observations in *ACTV*, suggesting that (even in a federal election) Parliament may validly seek to

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

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

96 *Monis* at 396 [280] and 408 [347] per Crennan, Kiefel and Bell JJ referring to *Betfair No 1*.

97 *Monis* at 408 [347].

98 *Magaming v The Queen* [2013] HCA 40 at [105] per Keane J.

99 *NEDCO* at 622 per Jacobs J cited in *Thomas v Mowbray* (2007) 233 CLR 307 at 519 [633] per Heydon J.

100 See eg *Corneloup* at 336 [207] per Crennan and Kiefel JJ (Bell J agreeing at 338 [224]) and cf *NEDCO* at 608, 616 per Mason J, 622 per Jacobs J.

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

102 There does not appear to be such a scheme operating in any Australian States or Territories. For the donor disclosure schemes in Australian States and Territories see Divs 6 and 7 of Pt 11 of the *Electoral Act 1992* (Qld), Div 3 of Pt VI of the *Electoral Act 1907* (WA), Div 14.4 of Pt 14 of the *Electoral Act 1992* (ACT) and Pt 10 of the *Electoral Act 2004* (NT). No such scheme currently operates in Victoria, South Australia or Tasmania.

103 PS [44]-[48] and [64(c)].

104 (2009) 239 CLR 446 at 455-456 [28] per French CJ, Gummow, Crennan, Kiefel and Bell JJ.

restrict election expenditure so as to create a 'level playing field'.[105] Nowhere was it suggested that the level of the field had to be at the mean, median or perhaps highest level of historical expenditure so as to 'compensate' those affected.

Implied freedom of association

56. As to PS [72]-[76], any freedom of association implied in the Constitution exists only as a corollary to, and goes no further than, the implied freedom of political communication.[106] Accordingly, the plaintiffs' claims concerning this issue fall to be determined in the manner set out above (as is apparently accepted by the plaintiffs at PS [76]). As such, those submissions add nothing to the plaintiffs' argument on the implied freedom.

Section 109 of the Constitution

Part XX of the Commonwealth Electoral Act

57. Part XX of the Commonwealth Electoral Act regulates, but only to a limited extent, the making and disclosure of political donations to candidates in a federal election and to 'political parties' regulated by the Commonwealth Electoral Act (Div 4). In particular, s 305B, in Div 4 of the Commonwealth Electoral Act requires a person to report political gifts over a specified amount made by them to registered political parties, and s 306 prohibits anonymous gifts over a specified amount. A 'political party' is an organisation whose objects include promoting the election to the Commonwealth Parliament of endorsed candidates (s 4).

58. It is possible for a political organisation to be both a 'party' within the meaning of s 4 of the EFEDA, and a 'political party' regulated by (and registered under) the Commonwealth Electoral Act. It is also true that the provisions identified in PS [79] (upon which the plaintiffs' seemingly principally rely) refer to the 'State branches' of a registered political party.[107] But properly construed, those provisions of the Commonwealth Electoral Act do not confer any positive right or permission to make or receive donations for the State Electoral Purposes identified above (that being the subject matter upon which s 96D operates), let alone a right or permission conferred upon persons other than individuals. The provisions to which the plaintiffs point are rather a series of obligations and proscriptions, largely capable of application to donations made by both natural and non-natural persons,[108] but not conferring rights to receive or make a donation upon any person.

59. Those provisions bear no resemblance to those discussed in the only authority that the plaintiffs cite in support of their submissions on this point *(Colvin v Bradley Brothers Pty Ltd*[109]). For there, unlike here, there was an express permission conferred by the Commonwealth law through the federal award.[110] The State and the Commonwealth laws were therefore in 'direct collision'. Nor (unlike

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105 Deane and Toohey JJ at 175.

106 *Wainohu v New South Wales* (2011) 243 CLR 181 at 230 [112] per Gummow, Hayne, Crennan and Bell JJ and see also at 220 [72] per French CJ and Kiefel J; *Mulholland* at 234 [148] per Gummow and Hayne JJ, 297 [334]-[335] per Callinan J.

107 That term is defined in s 287(1) to mean, in relation to a political party, a branch or division that 'is organised on the basis of a particular State or Territory'.

108 Except for s 306B, which makes specific provision for a repayment of a gift made by a corporation that is wound up within one year.

109 (1943) 68 CLR 151.

110 See at 160 per Latham CJ, 161-162 per Starke J and 163 per Williams J.

Dickson v The Queen[111]) is there any 'negative implication' to be drawn from the Commonwealth Electoral Act from which the EFEDA might detract or which it might impair.[112] The fact that the obligations and proscriptions upon which the plaintiffs rely deal with corporate and individual donations in a largely indiscriminate fashion does not suggest that the Commonwealth law 'designedly' left an area of liberty which the operation of s 109 does not permit State law to close up. In particular, it does not suggest that the Commonwealth law, on its true construction, contained an implicit negative that might prevent States regulating donations accepted for purposes in the nature of the State Electoral Purposes. Nor is there otherwise to be discerned from the scheme of the Commonwealth Electoral Act an 'intention' (in the objective sense identified by Hayne J in *Momcilovic* at 133-134 [315]) on the part of the Commonwealth Parliament to express by its enactment the law governing that subject matter completely and exclusively.[113]

60. Accordingly, s 96D of the EFEDA is not inconsistent with Pt XX of the Commonwealth Electoral Act and s 109 is not engaged.

Section 327 of the Commonwealth Electoral Act

61. The plaintiffs rely upon two aspects of s 327 of the Commonwealth Electoral Act. In both respects, that reliance is misconceived.

62. As regards s 327(1) that subsection provides that it is an offence under the Commonwealth Electoral Act for a person to 'hinder or interfere with the free exercise or performance, by any other person, of any political right or duty that is relevant to an election under this Act'. But that provision has no relevant operation here.[114] There is no 'implied right' to free political communication guaranteed by the Constitution with which s 96D interferes: only an area of immunity which is 'negative' in nature.[115]The plaintiffs' submissions in that regard cannot avoid the clear statements in the authorities to the contrary, which are explained by the systemic nature of the implied freedom (see above).[116]

63. And nor is such a 'right' to be found in the common law principle of legality (to the extent the plaintiffs rely upon it). That principle conceives only of rights in a 'negative' sense, being a right to do anything subject to the provisions of the law.[117] Any such 'right' is neither 'hindered' nor the subject of 'interference' by the EFEDA in the sense contemplated by s 327(1). For the 'right' itself contemplates modification by law, albeit one employing clear and unequivocal language.[118]

64. Finally, s 96D is confined to the State Electoral Purposes and cannot otherwise operate upon any right or duty that is 'relevant to an election under' the Commonwealth Electoral Act. Accordingly, s 96D does not operate to alter or impair any right effectively guaranteed by s 327(1).

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111 (2010) 241 CLR 491 (***Dickson***).

112 See, explaining the result in *Dickson*, Gummow J in *Momcilovic v The Queen* (2011) 245 CLR 1 (***Momcilovic***) at 122 [276] and see also at 116 [261] (French CJ agreeing at 74 [110]).

113 *Momcilovic* at 116 [261] per Gummow J (French CJ agreeing at 74 [110]) and136-137 [326]-[328] per Hayne J.

114 Contra PS [82(a)].

115 See eg *Lange* at 560 referring to Brennan J's reasons in *Cunliffe* at 327.

116 Cf *Hudson v Entsch* (2005) 216 ALR 188 at 201 [47]-[49].

117 *Corneloup* at 324 [145] per Heydon J and *Monis* at 359 [60] per French CJ.

118 *Momcilovic* at 46-47 [43]-[45] per French CJ.

65. Nor, turning to s 327(2), does s 96D in its terms or operation discriminate against a person 'on the ground of the making by the other person of a donation to...a State branch of a political party'. The criterion selected by the legislation rather differentiates on the basis of the characteristics of particular donors. Any differential effect or adverse distinction that might constitute 'discrimination' is on that ground and not the ground of the making of a donation – the characteristic of not being an individual on the electoral roll is the reason *why* there is a difference in treatment or outcome.[119] The EFEDA does not impair or detract from any 'right' of non-discrimination effectively guaranteed by the Commonwealth Electoral Act or any duty or obligation imposed by the Commonwealth Electoral Act to avoid engaging in such conduct. Sections 327(2)(c) and (d) have no relevant operation which might engage s 109.

66. Further as regards ss 327(1) and (2), the enactment of a State law cannot be an act or conduct to which those offence provisions apply so as to give rise to an inconsistency with the Commonwealth law. It is outside the power of the Commonwealth Parliament to prohibit the Parliament of a State from exercising that Parliament's powers to enact laws.[120]To the extent the plaintiffs suggest otherwise[121], they are incorrect. Any such inconsistency would rather rest, for example, upon the notion that the State law authorised prosecutorial or enforcement actions that the Commonwealth Act proscribed[122] or from a form of negative implication regarding the relevant subject matter (that is, that having provided for effective protection against the impairment of those rights and the specified forms of discrimination, the Commonwealth Parliament did not intend that those protections be removed by another legislature).[123] But, for the reasons given above, no such inconsistency arises here.

Section 95G of the EFEDA

67. The issue presented by this aspect of the plaintiffs' claim does not concern the validity *per se* of the caps on 'electoral communication expenditure' in Div 2 of Pt 6 of the EFEDA. The plaintiffs rather put their claim on a narrower basis: challenging the application of the cap to the aggregate expenditure of a political party and its affiliated organisations. For the purposes of s 95G(6) an 'affiliated organisation' of a party is a body 'that is authorised under the rules of that party to appoint delegates to the governing body of that party or to participate in pre-selection of candidates for that party (or both)' (s 95G(7)).

Is there a burden on political communication?

68. Consistent with the Commonwealth's submissions regarding s 96D, the Commonwealth accepts that that provision (read in the context of Div 2B of Pt 6 as a whole), while limited to electoral communication expenditure in State elections, nevertheless also imposes a burden on political communication at the Commonwealth level. Accordingly, the first *Lange/Coleman* question should be answered 'yes'.

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119 See generally *Fortescue* at 962 [103], 964 [112]-[113] per Hayne, Bell and Keane JJ and the authorities there referred to.

120 See eg *Gerhardy v Brown* (1984) 159 CLR 70 (***Gerhardy***) at 93 per Mason CJ and120-121 per Brennan J and *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at464 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

121 PS [82]-[83].

122 Although see *Gerhardy* at 122 per Brennan CJ and *Western Australia v Ward* (2002) 213 CLR 1 at 97-98 [101]-[103] per Gleeson CJ, Gaudron, Gummow and Hayne JJ

123 Contra NSW [53].

Identification of permissible ends

69. Highlighting the difficulty with the plaintiffs' reliance upon the First Amendment authorities, it can be noted that the US Supreme Court has displayed a consistent antipathy towards limitations upon the spending of money for political campaigns - drawing a distinction between those measures (consistently held to be invalid) and measures limiting campaign contributions (generally held valid, subject to certain qualifications).[124] Indeed, as the plaintiffs acknowledge, even that distinction is now potentially undermined by the decision in *Citizens United*. But all of that merely demonstrates that the Australian (and the Canadian) traditions of representative government accommodate quite different requirements in this area. For, as submitted above, there is an extensive history of capped election expenditure in Australia and the Canadian Supreme Court has endorsed caps based upon the 'egalitarian model' in terms that resonate with the notion of the 'level playing field' discussed by Deane and Toohey JJ in *ACTV*.[125] As such, the Parliament (State or Commonwealth) may cap expenditure on political communication during an election campaign, including for the following permissible purposes:

    69.1. safeguarding the integrity of the political process by reducing pressure on parties and candidates to raise substantial sums of money, thereby lessening the risk of corruption and undue influence and

    69.2. minimising distortion of the political process based on successful raising of money alone and by wealthier persons and groups who have greater access to commercial media.

70. Those may be seen to be the objects of ss 95F and 95I(1) and related provisions. However, as noted above, the plaintiffs do not attack the validity of the caps provided for by the EFEDA *per se*. More specificity is required in identifying the statutory object or purpose served by s 95G (although the broader objects just identified inform that more specific object). The Commonwealth submits that that permissible purpose is that of minimising the risk of a party subverting the scheme of capped expenditure by spending through an affiliated organisation. It is ancillary to the objects underlying the caps on electoral communication. The criteria in s 95G(7) can be seen as directed to that purpose, because the criteria relate to an aspect of control of a party (appointing delegates to the governing body) and the defining characteristic of a party (the pre-selection and thus endorsement of candidates for election).

Is the law sufficiently tailored to a permissible end in a manner which is compatible with the maintenance of the constitutionally prescribed system of government?

71. Again, the answer to the second *Lange/Coleman* question (and thus the validity of s 96G) depends upon whether the legislative means adopted are proportionate (in the sense of sufficiently tailored) to achieving the end identified in a manner which is compatible with the system of representative and responsible government prescribed by the Constitution and the procedure prescribed by s 128. As with s 96D, the Commonwealth does not seek to make submissions as to the answer to that question. Its determination will require attention to matters that are substantially similar to the general matters identified above in the context of s 96D.

72. In addition, something should be said of the principal submission advanced by the plaintiffs on that issue (that the legislation selects a criterion that is both 'over and under inclusive': PS [96], [97] and [99]). As this Court's approach to the '500 rule' and 'no overlap rule' in *Mulholland* demonstrates, even in the area of federal elections (necessarily far more central to the purposes served by the

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124 See the discussion in *Randall v Sorrell* (2006) 548 US 230 at 242.

125 At 175.

implied freedom than the present matter) Parliament has some room for judgment in the selection of criteria to fulfil a permissible end. And as a consequence, invalidity does not necessarily follow even where selection of a particular criterion is 'to an extent arbitrary' and the reasons for its selection cannot be demonstrated by any 'logical process'.[126] Notably also, the plaintiffs do not identify any available alternative measure (in the sense discussed above) by which that permissible end might be achieved. Their criticisms are overstated.

PART VI ESTIMATED HOURS

73. The Commonwealth estimates that presentation of its oral argument will take approximately 45 minutes.

10

Dated: 16 October 2013

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20

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126 *Mulholland* at 187 [20] and 195-196 [41] per Gleeson CJ.