IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S70 of 2013

BETWEEN:

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 ON BEHALF OF THE DEFENDANT

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Part I: Publication of Submissions

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

Part II: Issues in the Proceedings

2. The issues raised in the proceedings are the questions stated in the Special Case ("SC"). The answers for which the defendant contends are as follows:

    1. No.
    2. No.
    3. No.
    4. Unnecessary to answer. In the event that question 3 is answered affirmatively, the answer to this question is "No".
    5. Unnecessary to answer. In the event that question 3 is answered affirmatively, the answer to this question is "No".
    6. No.
    7. No.
    8. No.
    9. The plaintiffs.

3. The issues raised are addressed in the argument below in the following order:

    a. The terms of the Election Funding, Expenditure and Disclosures Act 1981 ("the Act");

    b. The implied freedom derived from the Commonwealth Constitution does not apply with respect to the State electoral provisions at issue;

    c. There is no entrenched guarantee of freedom of political communication under the Constitution Act 1902 (NSW);

    d. No s 109 inconsistency arises with respect to s 96D;

    e. Section 96D does not impermissibly burden any applicable freedom;

    f. Any guarantee of freedom of association adds nothing to the analysis;

    g. Section 95G(6) does not impermissibly burden any applicable freedom.

4. The plaintiffs' submissions ("PS") at [102] identify that they seek declarations of the invalidity of ss 96D and s 95G(6). The issue of relief is not before the Full Court – the questions are. However, the plaintiffs' statement confirms that it is not in dispute that if any issue of invalidity does arise, the two impugned provisions are severable, and no broader issue of invalidity arises.

Part III: Notice

5. Notice has sufficiently been given under s 78B of the Judiciary Act 1903 (Cth).

Part IV: Material Facts

6. The defendant agrees that the material facts are set out in the Special Case.

Part V: Constitutional and Legislative Provisions

7. The defendant accepts the plaintiffs' statement of applicable provisions.

Part VI: Argument

A. The Electoral Funding, Expenditure and Disclosures Act 1981 (NSW)

8. The plaintiffs have challenged one section and one sub-section of the Act. The validity of the two impugned provisions cannot be assessed without reference to the significance and effect of those provisions in their statutory context. The Act regulates electoral funding and expenditure in a detailed, multi-faceted and intertwining manner. Four features of the statutory scheme are notable and relevant:

   i. The imposition of limitations on making/accepting political donations (s 96D being one of these);

   ii. The imposition of disclosure requirements;

   iii. The imposition of caps on electoral communication expenditure during, in particular, the months leading up to a general State election (s 95G(6) being one aspect of this);

   iv. Provision of public funding for parties, members and candidates.

Limitations on political donations

9. Part 6 of the Act applies to both State elections and elected members of the State Parliament, and to local government elections and elected members of local councils, save that Divs 2A and 2B apply only to State elections: s 83. Divisions 2, 3, 4 and 4A impose requirements on participants in the State and local government electoral processes with respect to making, accepting and disclosing political donations, and accounting for those disclosures. Part 6 imposes three kinds of restrictions on donations: on amounts (Div 2A), on certain types of donation (Div 4 – including the impugned s 96D), and on donations from persons associated with certain kinds of businesses: Div 4A.

10. Division 2A imposes a cap on the amount of political donations that can be made per person per financial year for the benefit of a registered party ($5,000), an unregistered party ($2,000 – thus encouraging registration), elected members ($2,000), a group ($5,000), a candidate ($2,000) and a third party campaigner ($2,000): s 95A(1). These amounts, like other relevant monetary amounts in the Act, are indexed: s 95A(5). It is convenient and sufficient, however, to refer here to the amounts set out in the Act.

11. A "political donation" covers gifts made (directly or indirectly) to or for the benefit of a party, elected member, candidate or group of candidates; amounts paid by persons as a contribution, entry fee or other payment to entitle a person to participate in or otherwise obtain any benefit from a fund-raising venture or function; and an annual or other subscription paid to a party by a member of the party or a person for affiliation with the party: s 85. For the purposes of the donation caps, a party subscription (as defined in s 95D(2)) is to be disregarded, provided it does not exceed the maximum subscription (as defined in s 95D(3): eg, $2,000 for membership of a party).

12. Section 95A includes a number of aggregation provisions the purpose of which is to ensure that a person cannot circumvent the cap by making more than one donation in a financial year (s 95A(2)), or by making more than one donation to elected members, groups or candidates of the same party: s 95A(3) and (6). It is unlawful for a person to accept a political donation to a party, elected member, group, candidate or third-party campaigner if the donation exceeds the applicable cap: s 95B(1). However, that prohibition is subject to a number of exceptions, including:

   a. if the donation (or the part exceeding the cap) "is to be paid into (or held as an asset of) an account kept exclusively for the purposes of federal or local government election campaigns" (s 95B(2)); and

b. if a donation exceeds a cap because of the aggregation of political donations made to other persons and the person who received the donation did not know and could not reasonably have known of the political donations made to the other persons (s 95B(5)).

13. Division 4 of Part 6 contains prohibitions on making and/or accepting certain political donations. The donations are proscribed by reference to either:

a. their source: see s 96D (donors other than individuals enrolled on the federal, State or local government roll), s 96EA (donor is a party, or elected member or candidate endorsed by a party and the candidate or group of candidates is not endorsed by that or any other party), and s 96F (donor does not identify his or her name or address to the person accepting the donation);

b. their nature: s 96E (indirect campaign contributions such as provision of office accommodation or full or part payment for electoral expenditure for advertising or other purposes to be incurred by a party, elected member, group or candidate); or

c. the conditions of their receipt: s 96G (receipt of a reportable loan without recording the terms and conditions of the loan and the name and address of the person making the loan).

14. Division 4A of Part 6 specifies certain persons, collectively defined as "prohibited donors", from making political donations and prohibits acceptance of such donations. Prohibited donors are property developers or donors involved in the tobacco, liquor or gaming industries: s 96GAA. In light of s 96D, the ongoing significance of Div 4A is to prohibit donations from individuals associated with the identified types of business.

Disclosure requirements

15. The disclosure and publication regime in Div 2 of Part 6 applies not only to parties, elected members, groups of candidates and individual candidates, but also to major political donors (as defined in s 84) and third-party campaigners. The latter term is defined in s 4 to mean "an entity or other person (not being a registered party, elected member, group or candidate) who incurs electoral communications expenditure during a capped expenditure period...that exceeds $2,000 in total".

16. The Division requires relevant persons to disclose political donations and/or electoral expenditure during the "relevant disclosure period", being each 12-month period ending on 30 June (s 89; for the disclosure requirements see s 88(1)). Major political donors are required to disclose reportable political donations (ie those exceeding $1000 – see s 86) made during that period: s 88(2). Third-party campaigners are required to disclose electoral communication expenditure incurred in a capped expenditure period during the relevant disclosure period and political donations it receives for the purposes of incurring that expenditure: s 88(1A). The Election Funding Authority ("Authority") is required to publish on its website the disclosures of reportable political donations and of electoral expenditure: s 95.

Caps on electoral communication expenditure

17. Division 2B of Part 6 imposes caps on electoral communication expenditure. The caps apply only to electoral communication expenditure during a "capped expenditure period", which is defined in s 95H. Where, as will most often be the case, a general election is held following the expiry of the Legislative Assembly by effluxion of time, the capped expenditure period is the period from and including 1 October in the year before which the election is to be held to the end of the polling day: s 95H(b). Polling day is generally the fourth Saturday in March: Constitution Act 1902, s 24A; Parliamentary Electorates and Elections Act 1912 ("PEE Act"), ss 74A-74B. The expenditure is taken to be incurred

"when the services for which the expenditure is incurred are actually provided or the goods for which the expenditure is incurred are actually delivered": s 95J.

18. Section 87(1) defines "electoral expenditure" as "expenditure for or in connection with promoting or opposing, directly or indirectly, a party or the election of a candidate or candidates or for the purpose of influencing, directly or indirectly, the voting at an election". As for "electoral communication expenditure":

    a. it is electoral expenditure of any of the kinds listed in s 87(2)(a) to (f), including on "advertisements in radio, television, the Internet, cinemas, newspapers, billboards, posters, brochures, how-to-vote cards and other election material" (para (a)), the production and distribution of election material (para (b)), employing staff engaged in election campaigns (para (d)) and office accommodation for any such staff (para (e)); but

    b. it does not include expenditure on the items in paragraphs (g) to (j) of s 87(2); nor expenditure incurred substantially in respect of an election to other Parliaments, or expenditure on certain internal party processes (s 87(3)); nor does it include "expenditure incurred by an entity or other person (not being a registered party, elected member, group or candidate) if the expenditure is not incurred for the dominant purpose of promoting or opposing a party or the election of a candidate or candidates or influencing the voting at an election": s 87(4).

19. Section 95F of the Act imposes electoral communication expenditure caps:

    a. on parties fielding in more than 10 Assembly seats, the cap applies at a rate of $100,000 per seat, thus potentially up to $9.3m (see s 95F(2)-95F(4));

    b. for parties fielding only in the Council, or in 10 or fewer Assembly seats, up to $1.05m (s 95F(3) and (4));

    c. for groups of candidates in the Council, $1.05m (s 95F(5));

    d. for independent candidates in the Assembly or in the Council, $150,000 (s 95F(7) and (8));

    e. for party candidates in the Assembly, $100,000, but their party may spend (within the party's overall cap) an additional amount of $50,000 directed specifically to that seat (s 95F(6) and (12)-(13));

    f. in by-elections, $200,000 for all candidates (s 95F(9));

    g. for third-party campaigners, $1.05m if registered, or $525,000 if not, and $20,000 for by-elections in either case (s 95F(10)-(11)).

20. Like Div 2A, Div 2B contains provisions designed to avoid circumvention of the electoral communication expenditure cap. Section 95G of the Act provides for the aggregation of the applicable expenditure caps under s 95F as follows:

    a. where two or more registered parties are "associated" (as defined in s 95G(1), where that definition includes "a recognised coalition...") and are endorsing candidates in the same electoral district – then the parties share the $100,000-per-seat cap with respect to that seat (s 95G(2)(a));

    b. the expenditure of party candidates for the Council (or candidates for an associated party) is to be aggregated with that of the party (s 95G(4));

    c. for associated parties fielding in 10 or less Assembly seats, the $1.05m party cap is shared (s 95G(2)(b));

d. where two or more candidates are endorsed by the one party, or associated parties, in the same electoral district – then the candidates themselves share their $100,000 cap (s 95G(3));

e. for by-elections, a party candidate's expenditure and the expenditure of the party is aggregated (s 95G(5));

f. a party's expenditure and that of any affiliated organisation of that party are aggregated for the purposes of the party's cap (s 95G(6)).

21. The plaintiffs have only targeted the last of these aggregation provisions. The definition of "affiliated organisation" in s 95G(7) provides that it means "a body or other organisation, whether incorporated or unincorporated, 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)".

Public funding of State election campaigns

22. Part 5 of the Act makes provision for the public funding of State election campaigns through the Election Campaigns Fund established under s 56 (the "EC Fund"). Part 6A makes provision for funding of administration and policy development.

23. As to the former, registered parties and candidates are entitled, subject to certain eligibility requirements, to receive a percentage of their "actual expenditure" during the capped expenditure period, which is "the total actual electoral communication expenditure incurred by a party, irrespective of whether it was incurred in connection with an Assembly general election or with a periodic Council election or with both of those elections": s 58(1). That expenditure is calculated by reference to the applicable expenditure cap under Part 6 Div 2B: s 58(1).

24. In the case of parties, the eligibility criteria are that it have at least one candidate elected, or alternatively that its candidates satisfy a 4% threshold of first preference votes (being 4% of the total number of first preference votes in all electoral districts in which the candidates were duly nominated in the Assembly general election, or 4% of the total number of first preference votes in that election in the case of a periodic Council election): s 57. Candidates are subject to a similar requirement, namely election to the Assembly or Council or achievement of the 4% threshold of first preference votes: s 59(3).

25. The total amount available to the Authority to meet electoral communication expenditure associated with the 2011 State general election was $28.575m: SC [54]. The relevant proportions payable under the Act are as follows:

a. for parties, up to 75% of their electoral communication expenditure cap (s 58);

b. for party candidates for the Assembly, up to 30% of their cap (s 60);

c. for independent candidates for the Assembly, up to 45% of their cap (ibid);

d. for all candidates for the Council, up to 75% of the applicable cap (ibid).

26. In addition to the EC Fund, Part 6A of the Act makes provision for the reimbursement of administration and operating expenses, on a calendar year basis, to eligible registered political parties and independent members of Parliament through the establishment of the Administration Fund. Provided a registered party has endorsed at least one candidate who was elected at a State election (s 97E), or an elected member of Parliament was not an endorsed candidate of any party at the State election and is not a member or representative of any party (s 97F), the Authority may make distributions from the Administration Fund. Expenditure for which payments may be made does not include electoral expenditure but otherwise includes conferences, seminars, meetings or similar functions at which the policies of the eligible party or elected member are discussed, providing information to

the public or a section of the public about the eligible party or elected member, and providing information to members and supporters of the eligible party or elected member (see s 97B).

27. If there is only one elected member endorsed by the party, the maximum amount that can be distributed from the Administration Fund is $200,000 (s 97E(3)(a)). The same amount is payable to an independent member under s 97F (s 97F(3)). Accommodating economies of scale, where a party has three or more elected members the maximum amount payable is $450,000 plus $83,000 for each elected member in excess of three members up to a maximum of 25 members: s 97E(3)(c), (d). In the case of the major political parties the amounts paid from the Fund are substantial: see SC [59].

28. Where a party is not eligible for payments from the Administration Fund, provided it is registered and the Authority is satisfied that it operates as a genuine political party, it is entitled to receive payments from the Policy Development Fund established under s 97H of the Act: s 97I. A party so eligible may receive payments for the amount of actual policy development expenditure incurred during the relevant calendar year, which excludes electoral expenditure but includes expenditure on providing information to the public about the party or to its members and supporters, and for conferences, seminars, meetings or similar functions at which the party's policies are discussed: s 97C(1). The rate payable is 25c per first preference vote at the previous State election: s 97I(4). Newly registered parties can receive $5,000 for their first eight years: s 97I(5).

Other regulation of electoral donations and expenditure

29. Division 3 of Part 6 imposes restrictions on the use of political donations as well as administration requirements in relation to funds so received.

30. Division 5 of Part 6 contains miscellaneous provisions, including offence provisions. Section 96HA(1) of the Act provides that a person who does any act that is unlawful under Part 6 Div 2A or 2B is guilty of an offence "if the person was, at the time of the act, aware of the facts that result in the act being unlawful". The maximum penalty for an offence is 200 penalty units (for a party) or 100 penalty units (for persons other than a party): s 96HA(2). The same element of knowledge applies in relation to the offence, in s 96I, of doing any act that is unlawful under Div 3, 4 or 4A. Where a person accepts a political donation that is unlawful because of a provision of Part 6, s 96J provides that the amount of the donation is payable to the State by the person who accepted it and may be recovered by the Authority as a debt due to the State. If the person knew it was unlawful at the time of acceptance, the amount of the donation is doubled.

B. The federal implied freedom does not relevantly apply here

31. In Lange v Australian Broadcasting Corporation (1997) 189 CLR 520 at 560-561, the implied freedom was described as "concerning political or government matters which enables the people to exercise a free and informed choice as electors" in a federal election or referendum. The range of matters capable of such characterisation is broad, and there may be an overlap between political issues at the federal and State levels: see eg Hogan v Hinch (2011) 243 CLR 506 at [49] per French CJ. But those propositions do not resolve the question of whether a State law governing political donations and campaign expenditure in the context of State elections can affect the capacity of the people to exercise a free and informed choice in a federal election or referendum.

32. Public affairs and political discussion within Australia are not "indivisible" in the manner alleged by the plaintiffs: Statement of Claim at [50], [57], [63], [68], [74], [76], [77], [80], [81]. Whilst there may be an overlap, not all political communication at State, Territory or local level is amenable to protection by the implied freedom: note Lange at 571-572. The nature and extent of the freedom is governed by the necessity which requires it: see

Lange at 561, 567; Coleman v Power (2004) 220 CLR 1 at [89] per McHugh J, at [227] per Kirby J, at [292] per Callinan J; Mulholland v AEC (2004) 220 CLR 181 at [88] per McHugh J, [179] per Gummow and Hayne JJ; APLA Ltd v Legal Services Commissioner (2005) 224 CLR 322 at [27] per Gleeson CJ and Heydon J, [66] per McHugh J. Neither the existence of "national political parties" (PS [26]), nor the limited and largely obsolete role of State parliaments in connection with the composition of the Senate and matters connected to Commonwealth elections (PS [27]), supports the conclusion that making a political donation at the State or local level to which Part 6 of the Act applies (s 83) can illuminate the choice for electors at federal elections or in amending the Constitution, or the administration of federal government: cf Lange at 571; Levy v Victoria (1997) 189 CLR 579 at 607.

33. There is an associated but distinct question of whether State laws regarding the conduct of State elections are outside the ambit of the implied freedom on the basis of a principle somewhat similar to that established in Melbourne Corporation v The Commonwealth (1947) 74 CLR 31 in respect of Commonwealth legislative power. Regard may be had to "the general nature and structure of the constitutional framework which the constitution erects" in considering implications drawn from the Commonwealth Constitution: see Work Choices Case (2006) 229 CLR 1 at [194] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ. Given the "constitutional context in which the freedom arises" (Wotton v Queensland (2012) 246 CLR 1 at [79] per Kiefel J), in its operation as a constraint on State legislative power the implied freedom should not impair a State's capacity to exercise its constitutional functions. Rather, the implied freedom should be consistent with the "constitutional premise of the States continuing as independent bodies politic with their own Constitutions and representative legislatures" having legislative, executive and judicial functions, emerging from ss 106 and 107 of the Constitution inter alia: see ACTV v The Commonwealth (1992) 177 CLR 106 at 242 per McHugh J; Work Choices at [194]; Fortescue Metals Group Ltd v Commonwealth [2013] HCA 34 at [130] per Hayne, Bell and Keane JJ (French CJ and Kiefel J relevantly agreeing).

34. The conduct of State elections is a function confined to the States and is in many ways at the heart of their constitutional roles: see ACTV at 163-164 per Brennan J (dissenting as to the validity of most of the impugned provisions), 242 per McHugh J. State electoral laws are in a different position from, for example, anti-discrimination laws, because they are centrally concerned with how one of the three branches of government – the legislature – is established. Three members of the Court in Muldowney v South Australia (1996) 186 CLR 352 were of the view that implications drawn from provisions of the Commonwealth Constitution concerning federal elections did not affect the validity of s 126 of the Electoral Act 1985 (SA), Dawson J explaining that such implications "do not prescribe the mode of State elections": at 370; see also Brennan CJ at 365-366, Toohey J at 374 (Gummow and McHugh JJ not deciding); note also McGinty v Western Australia (1996) 186 CLR 140 at 175-176, 189, 210, 250-251. Roberts v Bass (2002) 212 CLR 1 at [73] is not authority to the contrary, the respondent South Australian MP in that case not contesting that Lange applied to State elections: see at [159] per Kirby J.

35. As set out above, the Act regulates funding and expenditure in relation to the conduct of State elections – a fundamental function of the defendant as a State – in a highly detailed manner. Its impugned provisions are outside the ambit of the implied freedom in the Commonwealth Constitution. In the alternative, if the constitutional freedom of political communication does apply, it is not infringed by the impugned provisions for the reasons addressed below in Parts E and G of these submissions.

C. No entrenched freedom under the Constitution Act 1902 (NSW)

36. The Constitution Act 1902 (NSW) contains no provisions equivalent to ss 7 and 24 of the Commonwealth Constitution or comparable to the entrenched Western Australian

constitutional provisions upon which this Court's implication of a freedom of political communication in the WA State constitution was based: cf Stephens v West Australian Newspapers Ltd (1994) 182 CLR 211 at 232-233, 236. No party in Stephens challenged the existence of such an implied freedom: at 232. Similarly, in Muldowney the South Australian Solicitor General conceded that there arose out of the State constitution a limitation on State legislative power in like manner to the implied freedom under the Commonwealth Constitution. Justice Dawson appeared (at 370) to reject this concession, albeit stating that the South Australian parliament could not, in general, "validly legislate in a manner which is incompatible with the exercise by electors of a genuine choice". Chief Justice Brennan found it unnecessary to examine the concession: at 367. Nor did Toohey J (at 374), Gaudron J (at 378) or Gummow J – with whom McHugh J agreed (at 388) – do so.

37. There is insufficient basis in the entrenched provisions of the NSW Constitution Act for implying a freedom of political communication. There are some obvious assumptions in the NSW Constitution Act, such as the holding of elections for both Houses at regular intervals, but unlike the Commonwealth Constitution, the regulation of those elections, including questions of the parameters of political debate, are left to the NSW Parliament to determine, subject to any questions of entrenchment.

38. The absence of an express statement as to the direct election of members of the Legislative Assembly and Legislative Council cannot be discounted as irrelevant to the capacity to imply an entrenched freedom in the NSW Constitution Act, in circumstances where the freedom implied in the Commonwealth Constitution is clearly founded on "the requirements of ss 7, 24, 64, 128 and related sections of the Constitution": Lange at 571; cf PS [68]. In McGinty at 291, Gummow J observed that "there is nothing in the federal constitutional structure which renders it unrealistic and impractical to accept that, compatibly with the federal structure, from time to time the doctrine of representative government may have an adaptation to one or more of the States which does not correspond to that for the Commonwealth".

39. Further, to put the point another way, the relevant restriction is on expressly or impliedly repealing or amending the entrenched provisions: ss 7A(1)(b) and 7B(1)(a). Sections 95G(6) and 96D are not laws for that purpose or with that effect. Their operation leaves the terms and operation of the entrenched provisions intact.

40. Even if there was a basis for implying a relevant freedom of political communication from the entrenched provisions of the NSW Constitution Act, it would by no means follow that ss 95G(6) or 96D of the Act are laws whose enactment necessitated compliance with ss 7A or 7B of the NSW Constitution Act, on the basis that they are laws "respecting the constitution, powers or procedure of the Parliament of the State" for the purposes of s 6 of the Australia Acts: cf PS [69].

41. As the plurality recognised in Attorney-General (WA) v Marquet (2003) 217 CLR 545 at [77], "[n]ot every matter which touches the election of members of a Parliament is a matter affecting the Parliament's constitution". Their Honours did not doubt the authority of Clydesdale v Hughes (1934) 51 CLR 518 at 528 for the proposition that "a law which merely changes the qualifications of members of the Legislative Council does not effect a change in the constitution of that body within the meaning of [the WA manner and form provision]": Western Australia v Wilsmore (1982) 149 CLR 79 at 102-103 per Wilson J, with whom Gibbs CJ and Mason J agreed. Both a prohibition on certain persons making political donations (s 96D), and a law identifying a relationship in respect of which electoral communication expenditure of more than one participant in the electoral process is to be aggregated (s 95G(6)), are significantly more remote from features giving the NSW Parliament its representative character than the question of qualification of members of a Legislative Council addressed in Clydesdale or the laws regarding electoral districts

and regions at issue in Marquet: see A Twomey, "The Application of the Implied Freedom of Political Communication to State Electoral Funding Laws" (2012) 35 UNSW Law Journal 625 at 641.

42. In the alternative, if there is any entrenched State freedom of political communication, it is not infringed by the impugned provisions for the reasons addressed below.

D. No s 109 inconsistency arises with respect to s 96D

Commonwealth Electoral Act 1918, Pt XX, Divs 4 and 5A

43. Part XX of the Commonwealth Electoral Act 1918 ("CE Act") deals with election funding and financial disclosure. It is clear from the definition of "election" in ss 287 and 303 that it is concerned with elections for the House of Representatives and the Senate. Likewise, "political party" is defined in s 4 of the CE Act as "an organization the object or activity, or one of the objects or activities, of which is the promotion of the election to the Senate or to the House of Representatives of a candidate or candidates endorsed by it".

44. The CE Act is essentially directed to the regulation of federal elections. Its financial disclosure provisions are directed to participants therein, whether as a registered political party or a third party incurring political expenditure as described in s 314AEB. Conversely, s 96D of the Act only applies in relation to State elections and elected members of State Parliament, and local government elections and elected councillors: s 83.

45. Division 4 of Pt XX of the CE Act is concerned with disclosure of donations, and this duty is placed by s 304 on the agent of candidates for House of Representatives or Senate elections in the case of donations over $10,000 made during the disclosure period for an election ("disclosure period" is defined in s 287). Under s 305B, gifts over $10,000 in a financial year to a registered political party or the State branch of a registered political party must be disclosed by the donor in a return to the Electoral Commission. Division 5A requires annual returns by registered political parties (and other persons to whom s 314AEB applies) in relation to donations received over $10,000 during a financial year from persons or organisations: see s 314AB.

46. The issue raised in the plaintiffs' first s 109 argument, relying on the "permission created by, or underpinning" Divs 4 and 5A of Pt XX of the CE Act (PS [80]), is really one of construction of the respective laws: see Jemena Asset Management (3) Pty Ltd v Coinvest Ltd (2011) 244 CLR 508 at [45]. Central to the existence of inconsistency, whether direct or indirect, is the intention of the Commonwealth Parliament, properly construed: Momcilovic v The Queen (2011) 245 CLR 1 at [111] per French CJ, [258], [261] per Gummow J, [315] per Hayne J.

47. Unlike Colvin v Bradley Brothers Pty Ltd (1943) 68 CLR 151, s 96D of the Act does not prohibit what the CE Act permits: cf PS [80]. It is possible for a donor to obey both s 96D and the Cth Act. The CE Act simply provides that if a gift to a registered political party or one of its State branches is made in a particular amount within a particular period, it must be disclosed. It does not in its terms or by implication grant permission by positive authority to make such a gift notwithstanding another law to the contrary. Simply attaching a consequence if a particular thing is done does not, without more, confer permission to do the thing in question.

48. The mere coexistence of two laws capable of simultaneous obedience does not, of itself, give rise to inconsistency. Such inconsistency may arise where State law imposes an obligation greater than that for which federal law provides: see eg Blackley v Devondale Cream (Vic.) Pty Ltd (1968) 117 CLR 253 at 258-259 per Barwick CJ. Whether or not it will do so "depends upon the intention of the paramount Legislature to [legislate]

completely, exhaustively, or exclusively" in relation to the "conduct or matter" the subject of the Commonwealth law: Ex parte McLean (1930) 43 CLR 472 at 483 per Dixon J.

49. No such intention is discernable from the terms, context or legislative history of Div 4 or 5A of Pt XX of the CE Act. Those Divisions are not directed to regulation of the amount of political donations or the character of the donor. They do not lay down the whole legislative framework within which political donations may be made: see Commercial Radio Coffs Harbour v Fuller (1986) 161 CLR 47 at 57-58. To do so with respect to State electoral processes, would give rise to Melbourne Corporation issues as referred to above.

50. Division 4 of Pt XX was first enacted in 1983, in conjunction with the amendments that first introduced a system of public funding for federal elections, disclosure being referred to as "[a]n essential corollary of public funding ... Unless there is disclosure the whole point of public funding is destroyed": Second Reading Speech for the Commonwealth Electoral Legislation Amendment Bill 1983, House of Representatives, Hansard, 2 November 1983, p 2215.9, Mr Kim Beazley. When s 305B (which unlike ss 304 and 305A is not confined to gifts made in the disclosure period for a federal election) was added to Div 4 in 1995, reference was simply made in the relevant extrinsic materials to bringing reporting requirements for donors "into line with the reporting requirements of political parties". Again, the policy objectives underpinning the CE Act were said to be "to force disclosure of donations to candidates or their parties that might appear to influence a parliamentarian or a political party's position in the parliament": Second Reading Speech for the Commonwealth Electoral Amendment Bill (No 2) 1994, House of Representatives, Hansard, 9 March 1995, p 1949.3, Mr Frank Walker. No intention to legislate exhaustively or exclusively in relation to the making of such donations is discernible from this amendment or the other provisions of Div 4 upon which the plaintiffs rely.

51. Nor can such an intention be discerned from the history of Div 5A, first enacted in 1991 with the purpose of ensuring "comprehensive financial disclosure by political and third parties" and repealed and replaced in 1992 in order to "enable parties latitude in respect of minor expenditure or income": Second Reading Speech for the Commonwealth Electoral Amendment Bill 1992, House of Representatives, Hansard, 4 June 1992, pp 3646.7, 3647.8, Mr Gary Johns. The disclosure threshold in s 314AC was raised from $1,500 to $10,000 and indexed pursuant to the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006 (Cth).

Commonwealth Electoral Act 1918, s 327

52. Section 327(1) of the CE Act prohibits a person from hindering or interfering with the free exercise or performance of "any political right or duty that is relevant to an election under this Act". The prescribed penalty is $1,000, or imprisonment for six months, or both. On the proper construction of s 327, the enactment of s 96D of the Act did not interfere with a relevant political right or duty for the purposes of s 327(1) and did not discriminate against the plaintiffs for the purposes of s 327(2): cf PS [82(a)]. There is no inconsistency between the State and federal laws.

53. The language and purpose of s 327 discloses a contrary intention preventing the construction of "person" in that section to include a body politic (or, as the plaintiffs appear to contend (PS [81]), a State parliament): see Acts Interpretation Act 1901 (Cth), s 2(2). The language of s 327, particularly that of s 327(2), is not apt to refer to the passage of legislation by a State parliament. To the extent to which the Queensland Court of Appeal impliedly held to the contrary in Local Government Association of Queensland (Inc) v State of Queensland [2003] 2 Qd R 354, that decision should not be followed by this Court. Section 327 is "concerned with intimidatory or other practices which tend to overbear the freedom of will of the person exercising the right or duty": Re Cusack (1985)

66 ALR 93 at 95 per Wilson J. It could not prevent the State Parliament from enacting legislation. The section should be construed subject to the Constitution, bearing in mind that s 109 does not permit "a bare attempt to exclude State concurrent power from a subject the Federal legislature has not effectively dealt with": see Wenn v Attorney General (Vic) (1948) 77 CLR 84 at 120 per Dixon J (Rich J agreeing), Acts Interpretation Act 1901 (Cth), s 15A.

54. Further, it is clear that the implied freedom of political communication in the Commonwealth Constitution does not confer any personal right on an individual: Lange at 560; Mulholland at [107]-[109] per McHugh J, [184] per Gummow and Hayne JJ; Monis v R (2013) 87 ALJR 340 at [266] per Crennan, Kiefel and Bell JJ. The implied freedom is not a "political right or duty" protected by s 327. Justice Dowsett's reasoning to the contrary in Hudson v Entsch (2005) 216 ALR 188 at [48]-[49] is incorrect and should not be followed by this Court. As Dowsett J noted (at [47]), when it enacted what is now s 327(1) in 1983, it is unlikely that the Commonwealth Parliament contemplated the implied freedom discussed in Lange.

55. Even if the Court is of the view that s 327(1) protects the implied freedom under the Commonwealth Constitution, as noted above (at [38]), s 96D applies in relation to State and local government elections and those elected therein. For the reasons developed above, State laws concerning the conduct of State elections do not fall within the ambit of the implied freedom under the Commonwealth Constitution.

56. As for s 327(2), it operates where a person discriminates against another person on the ground of the making of a political donation, by conduct of a specified type. The defendant repeats its submission at [53] above as to the construction of "person" in this subsection.

57. To discriminate against someone "is 'to make an adverse distinction with regard to; to distinguish unfavourably from others'": Fortescue at [111] per Hayne, Bell and Keane JJ. The concept involves comparison, and in undertaking that task "it is necessary to identify a comparator that will enable identification of some relevant difference in treatment of cases that are alike, or some relevant identity of treatment of cases that are different": Fortescue at [112], see also at [35] per French CJ. Where unfavourable discrimination is alleged "it may be necessary to examine 'the relevance, appropriateness, or permissibility of some distinction by reference to which such treatment occurs, or by reference to which it is sought to be explained or justified'": Fortescue at [112]; see also Austin v Commonwealth (2003) 215 CLR 185 at [118] per Gaudron, Gummow and Hayne JJ.

58. The basis for the plaintiffs' claim of discrimination under s 327(2) is unclear, but appears to be their subjection, by State legislation, to a prohibition to which persons on the electoral roll are not subject: PS [82]. Any differential treatment of donors of that type is the product of a distinction which is appropriate and adapted to the attainment of a proper objective of the NSW Parliament, for the reasons set out below with respect to the analysis on the second limb of Lange. In any event, the requirements of State law do not coerce the plaintiffs or subject them to detriment for the purposes of s 327(2)(c) or (d).

E. Section 96D imposes no impermissible burden on freedom of communication

First limb of Lange – no, or limited, burden on the freedom

59. Section 96D is one of a range of measures in the Act which acts to regulate and restrict the making and acceptance of political donations, with respect to the amount, nature, conditions of grant, and source. Section 96D is one of a number of restrictions on the source of political donations, along with ss 96EA, 96F and Part 6 Div 4A.

60. Its effect is that parties, members, candidates and third party campaigners cannot accept donations from persons/entities not on the State, local or federal electoral rolls. Thus it

will in general – and without trying to be exhaustive – prevent donations being accepted from non-citizens, from minors, from people lacking capacity, from some prisoners, and from bodies corporate: see PEE Act, s 22-25; Local Government Act 1993 (NSW), ss 266, 269-271; CE Act, ss 93-96.

61. Section 96D is not directed to restricting communication by any of those persons or entities (it is thus more restricted than the provision held invalid in Citizens United v Federal Election Commission 558 US 310 (2010)). They, or their representatives, are free to discuss matters in the media, to send letters, to distribute pamphlets, to set up websites, or to run advertisements. Of course, if they spend more than $2,000 on electoral communication expenditure during a capped expenditure period then in doing so they will become subject to the requirements applicable to third party campaigners, but those provisions still allow substantial latitude, and they are not under challenge here. No person or entity is constrained by s 96D from voicing support for, or otherwise publicly associating themselves with, a party or candidate and the policies of the party or candidate. Nor are they prohibited from voicing their displeasure. Direct communication between those not on the roll and those who are is a matter that the Act leaves unregulated. Moreover, there is no prohibition on employees or members of corporations making donations – including by doing so in some kind of co-ordinated, public fashion.

62. The plaintiffs argue that s 96D burdens the protected freedom in two ways (PS [39]-[49]): directly, by prohibiting an activity which itself is said to be form of political communication; and indirectly, by limiting the funds available to parties (and others) to publicise their views. With respect to the claimed direct imposition, no relevant or material burden is imposed on the constitutional freedom. The plaintiffs themselves suggest, drawing upon Buckley v Valeo, 424 US 1 (1976), that the making of a donation constitutes no more than "a general expression of support": PS [16]. In the case of s 96D, it is an expression of support for a State or local government registered party, or elected member, or candidate or group. Little is communicated to electors by such a general expression: "While contributions may result in political expression if spent by a candidate or association ... the transformation of contributions into public debate involves speech by someone other than the contributor" (FEC v Beaumont, 539 US 146 (2003) at 161-2). If any message is communicated by the donor this could also be expressed by mere words. Such a general expression does not materially illuminate the choice for electors at federal elections, nor does it throw light on the administration of federal government. The same may be said of the recipient's acceptance of a political donation: cf PS [17].

63. Further, a donation is not inherently communicative to electors. It is an act performed, of itself, in the private sphere. If the giver or the receiver chooses to publicise it, that is by use of words, which are not restricted. Although the plaintiffs assert that the communicative aspect is enhanced by the public disclosure requirements in the Act (PS [18]), details of donations over $1,000 are only required to be made public within eight weeks of the end of June each year (see ss 89, 91, 95). That regulatory requirement for transparency does not elevate the past act of making a donation into some significant action of communication to electors.

64. As for the claimed indirect burden, s 96D is intended to, and does, restrict a source of political funding. In that respect there may be some indirect burdening of political communication. But the section cannot be viewed in isolation. Generous and substantial public funding has been provided, which ameliorates the various restrictions placed on political donations by the Act. Further, the ever-increasing competitive need to raise donations has been subject to regulatory control by the provisions capping expenditure. These aspects of the Act greatly reduce the significance of any burden placed on freedom of political communication.

65. The fact that the Act included provision for public funding before the insertion of s 96D does not render that funding irrelevant for the purposes of determining the question of whether the impugned provisions infringe the implied freedom (cf PS [44]). The validity of the provisions must be judged in the context in which they now apply. And when the Parliament amended the Act, it can be taken to have intended to produce a cohesive whole: note Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355 at [69]-[70]. Constitutional validity does not depend on assessing subjective intentions of legislators from time to time.

66. For these reasons, there is no material burden on the constitutionally protected freedom, or alternatively any burden is incidental and not substantial. Further, for reasons which overlap with those put in Part B above, even if (contrary to those submissions) the freedom implied from the Constitution can be burdened by s 96D (or s 95G(6)), that burden is slight and far-removed from any significant effect on federal electoral matters.

The purposes pursued are legitimate and compatible with the constitutional system

67. The purposes of s 96D can be ascertained from its terms and the effects it is directed to achieving. As discussed above with respect to the first limb, its effect is to restrict donations being accepted by persons/entities not on the State, local or federal rolls. It does so in a context where it is notorious in this country and around the world that the costs of parties and candidates participating in election campaigns continues to rise, in particular because of the costs of forms of electronic advertising; that such advertising carries with it the potential to sway election results (or at least that is the perception), which is why parties and candidates compete with each other to raise funds; that such raising of funds carries with it the potential for undermining the integrity of governmental processes, or the creation of an appearance of such; that such undermining is antithetical to the proper conduct of representative and responsible government; and that the perception of compromised integrity can tend to undermine public confidence in that form of government. Threats to integrity can take a range of forms, from overt corruption, to much more subtle, but still insidious, forms of influence – for example, a Minister being more willing to meet with representatives of a business if that corporation has made a donation to the party; or the perception that a business would have a better chance of getting its position heard by a Minister if it is a party donor.

68. It does not appear that the plaintiffs dispute these propositions. The existence of these threats to public integrity can be difficult to prove by particular facts (note Citizens United at 455 and 459 per Stevens J), but have not generally been doubted: see eg ACTV at 129-130 and 144-5 per Mason CJ, 159-11 per Brennan J, 175 per Deane and Toohey JJ, 239 per McHugh J.

69. The concerns outlined can be addressed in a range of ways, including limitations on donations, limitations on expenditure, disclosure requirements, and public funding. These various means will address the concerns in somewhat different ways, and with somewhat different effects. The Act adopts all of those means to various degrees.

70. Section 96D is part of a larger suite of measures in the Act closely regulating political donations. By regulating what and how donations may be made, those measures are evidently directed to seeking to minimise the potential, and the perception for potential, for persons and entities to exercise undue, corrupt or hidden influence over the Parliament of NSW, the Government of NSW and local government bodies within NSW, and their members and processes.

71. The particular focus of s 96D is on donations from particular persons/entities. Why those? Slightly different considerations may arise for different types of person. Presumably no concern could arise about excluding persons lacking capacity. The plaintiffs have not made complaint about the exclusion in general of non-citizens (being an exclusion which

applies in federal American law, the validity of which does not appear to have been challenged: see Citizens United per Stevens J at 419-424, note Kennedy J at 362). Nor has any serious argument been addressed to the position of minors. The plaintiffs' focus is on bodies corporate (which here will be called corporations, but so as to encompass eg companies and trade unions).

72. The effect of s 96D is to impose a substantial limit on who can make donations. Indeed, one of the main bases of the plaintiffs' attack is that at least the major parties are primarily reliant on corporate donations, and that the section "would have a severe impact on the amount of funds available to all of the major political parties": PS [43]. This is not disputed – if any party or candidate wishes to raise money now, beyond public funding, then it will be incumbent on them to persuade electors to donate. The reduction in the source of funding has a similar effect to a cap on expenditure: the effect of both methods is that those engaging in the political process have less money to spend. A law that has that effect thereby reduces the competitive pressure for campaign funds.

73. That the Parliament has not chosen to pursue this means to the ultimate degree by banning political donations altogether is not a sound basis for constitutional attack, at least so long as the result of the partial ban is not such as to distort or undermine the operation of the constitutionally prescribed system of government. No such distortion has been identified or arises here. Just as "no legislation pursues its purposes at all costs" (Construction, Forestry, Mining and Energy Union v Mammoet Australia Pty Ltd (2013) 87 ALJR 1009 at [41]), so, too, it is unsurprising that Parliament may choose to pursue a legitimate purpose only to some extent, taking account of competing imperatives and practical consequences. Parliament has allowed electors – those who are the constitutional focus – to continue to make (limited) donations.

74. Moreover, the character and size of corporations raises particular integrity concerns. Incorporation brings substantial legal and economic benefits to incorporators. It provides legal benefits such as separate legal personality, perpetual succession, and limited liability (and potentially also tax advantages). It provides an effective and efficient means to combine endeavours, and to aggregate and accumulate resources. The benefits of incorporation are evidenced by the prevalence and significance of corporations in modern life. Yet a corporation then pursues its own self-interest. Indeed, boards are in general obliged to act in that manner. The size of resources gathered may have little or nothing to do with the popularity – internally or externally – of the political views held or expressed by the corporation: Citizens United at 465 per Stevens J. Large mining companies in Australia, for example, are not well-resourced because their boards and management accurately reflects political or philosophical views held in the wider Australian populace.

75. Any political donation made by a corporation will likely reflect the view of the board or management of that corporation as to where the corporation's interests lie. The act of making a political donation is not likely to be undertaken as an act of pure altruism: see I Ramsay et al, "Political Donations by Australian Companies" (2001) 29 Federal Law Review 179 at 180, 188-189, 196-7 (SCB v 5, tab SC58, pp 2243, 2251-2252, 2259-2260). Nor is it likely to reflect some philanthropic desire to contribute to or improve public debate or public policy. Of course, many donations made by individuals will also be made out of perceived self-interest. What distinguishes donations by corporations is the likelihood that that is so, the resources available to make such donations, the disconnection between the resources available and the popularity of its views, and the disconnection between being a potential elector and seeking to influence political parties or candidates. Corporations are not the objects of the constitutional freedom – a point developed below (with respect to the "undue burden" issue).

76. The plaintiffs are wrong to suggest that "an expression of opinion by a corporation or association is thus, in a meaningful sense, an expression of the collective opinion of the

constituent members": PS [33]. Decisions on political donations will in general fall to the board or management of a corporation, not to its members. The interest of the corporation as determined by the board or management is distinct from that of its individual members. The goals pursued and statements made may not even reflect the personal views of the person or persons pursuing those goals or making those statements: Citizens United at 467 per Stevens J; see also Ramsay et al, SCB v 5 pp 2254-2255. Although boards or controllers may ultimately be answerable to the members for actions they take on behalf of the corporation, that is in general a weak form of control. The threat of removal because management made a political donation it perceived to be in the corporation's self-interest is not likely to be a significant one. Litigation is not a practical form of control for most members: see Ramsay et al, SCB v 5 p 2259-2261.

77. A further concern arises with respect to corporations. By reason of their separate legal identity they are susceptible to use as a means of circumventing spending limits. In the context of the Act, for example, but for s 96D a number of companies could be employed by a person (or group of people) to make a series of donations to a party, or a candidate, thereby exceeding the caps imposed on individual donations in s 95A. A corporation could itself engage in the same type of conduct, through the creation of subsidiary companies. In both cases the person/s or parent company is able to extend their sphere of influence beyond the legislatively sanctioned limits, in a manner which of necessity brings into question the integrity of the recipient – which may be a political party but may just as easily be individual candidates or elected Members of Parliament.

78. For these types of reasons, corporations have been subject to specific electoral regulation in the United States, which has long been upheld (see FEC v Beaumont, 539 US 146 at 152-156, and that decision itself; Citizens United at 432-446 per Stevens J, dissenting), at least until the recent 5-4 decision in Citizens United. There is a similar prohibition on corporate donations (and not dissimilar donation caps) at the federal level in Canada: Canada Elections Act (S.C. 2000, c. 9), ss 404(1), 405. The plaintiffs place great weight on the majority judgment in Citizens United. Yet it must be recalled that the freedom of political communication under the Constitution is different from freedom of communication under other constitutions, such that ideas relating to or arising out of other constitutions "have little relevance to the freedom of communication under the Commonwealth Constitution": Coleman at [48] per McHugh J; see also ACTV at 136 per Mason CJ, 182-183 per Dawson J; Theophanous v Herald and Weekly Times Ltd (1994) 182 CLR 104 at 125 per Mason CJ, Toohey and Gaudron JJ, at 157, 159-160 per Brennan J; APLA at [69]; Monis at [326]. The majority decision in Citizens United overturned previous authority, illustrating that reasonable minds have disagreed on these issues even in a jurisdiction with a very strict approach to burdens on communication.

79. This Court is, self-evidently, not bound by Supreme Court majorities; those authorities are only of value to the extent they are analogous and their arguments persuasive. The law at issue in Citizens United burdened communication directly, not donations. It may be that the Supreme Court will come back to review its decision in FEC v Beaumont, which held that a prohibition on donations by corporations and other associations is permissible (note, incidentally, that on 8 October 2013 the Supreme Court heard argument in McCutcheon v FEC, on the validity of federal aggregate limits on donations to candidates). The fact remains that Citizens United did not overturn that decision. The existence of political action committees, as discussed in FEC v Beaumont, essentially served to illustrate that there were other means by which corporations can contribute to political debate (cf PS [60]). That is also true here – including by corporations seeking, if they wish, to encourage, co-ordinate and facilitate their members making donations to a particular party, candidate or third party campaigner.

80. In summary, the objects of s 96D are to restrict political donations where all political donations (which are not de minimis) have the potential to create integrity concerns, where it is legitimate to address that concern in part (so long as no undue distortion results), and where there are in any case particular concerns that arise with respect to donations from corporations.

Proportionality of the means and the ends – necessity

81. The plaintiffs submit at PS [54(d)] that the State has selected an irrelevant criterion, because even if donations under the cap are capable of threatening integrity, s 96D prohibits donations with no real potential to do so, and does not prohibit donations by others which may. Yet all material donations have the potential to create integrity concerns. That does not mean the Parliament is required to ban all donations, or do nothing. No undue distortion of the constitutional system has been identified by the plaintiffs resulting from imposing a limited ban. Further, it is not suggested that s 96D will solve all the integrity concerns – it is just one part of a complex scheme. The criterion selected is not irrelevant – there are distinguishing features of (relevantly) corporations which can reasonably be seen to warrant distinctive treatment.

82. The plaintiffs also point at PS [62] to three claimed alternative means:

a. Increased and generally applicable disclosure requirements – yet whilst disclosure requirements can play an important role in promoting transparency, they do not directly affect either the need for parties to raise money (the role of expenditure caps), nor the influence that may accrue, or be seen to accrue, from donations;

b. Generally applicable requirements for disclosure of subsequent dealings – the same answer applies;

c. Additional generally applicable restrictions on donations – this is an ironic point for the plaintiffs to suggest, given that they also complain of the detriment to parties/candidates from restricting their prime source of donations. In any event, as put above, it is legitimate for the Parliament to travel just part way down this regulatory path. Further, the imposition of lower caps would not preclude the use by a person, group or controlling company of a range of companies in order to make political donations.

Compatibility of the law with the constitutionally prescribed system – no undue burden

83. The nature and extent of any burden on the constitutionally protected freedom is limited, for the reasons outlined above with respect to the first Lange limb. The section does not directly restrict political communication. It does not directly touch upon communications concerning government or political matters between electors and legislators and the officers of the Executive, and between electors themselves, on matters of government and political matters, described by the Court in Lange as "an indispensable incident" of the constitutional system: Lange at 559-560; Aid/Watch Inc v Federal Commissioner of Taxation (2010) 241 CLR 539 at [44].

84. Section 96D is part of a complex regulatory scheme directed to protecting the integrity and efficacy of the State electoral and governmental system. Seeking to achieve that end is not only compatible with any constitutional requirement, it is supportive and strengthening of it. There is no undue burden imposed. The provision is directed toward achieving the same end that the implied freedom serves to protect – maintenance and protection of the integrity of the democratic electoral process. Such a law would not readily be found impermissibly to burden the protected freedom.

85. It is important not to isolate the implied freedom from the system of government which it serves to maintain: Muldowney at 374 per Toohey J. As noted above, the nature and

extent of the freedom is governed by the necessity which requires it. The effect of ss 1, 7, 8, 13, 24, 25, 28 and 30 of the Constitution is to ensure that the Parliament of the Commonwealth will be representative of the people of the Commonwealth: Lange at 557. Voting in elections for Parliament "lies at the very heart of the system of government for which the Constitution provides": Roach v Electoral Commissioner (2007) 233 CLR 162 at [81] per Gummow, Kirby and Crennan JJ; Rowe v Electoral Commissioner (2010) 243 CLR 1 at [1] per French CJ. But that voting is done by people.

86. Sections 7 and 24 of the Constitution expressly require the members of the Senate and the House of Representatives to be directly chosen at elections by the people of the States and of the Commonwealth respectively: Lange at 557. The "'choice by the people' of parliamentary representatives is a constitutional notion signifying individual citizens having a share of political power through a democratic franchise": Rowe at [121] per Gummow and Bell JJ, at [347] per Crennan J; Roach at [83] per Gummow, Kirby and Crennan JJ. The underlying principle of the Constitution is that citizens have "each a share, an equal share, in political power": ACTV at 139-140 per Mason CJ, quoting Harrison Moore.

87. Corporations are not electors. They are not part of "the people". They are only relevant insofar as they may have instrumental value in contributing to the free and informed choices of electors. No doubt there may be some such instrumental value, but that does not detract from the point that they are not the object of the freedom. Further, given the very limited and indirect nature of any restriction imposed on communication by corporations, there is no significant effect on the instrumental value of discussion being promoted by corporations. And, as put above, the effect on parties and candidates must be seen in the overall statutory context (only two provisions of which are challenged by the plaintiffs), including the ameliorating public funding.

88. Some room must be allowed for legislative judgment here (this point is also relevant to the "necessity" issue addressed above). It is difficult to enact a regulatory scheme in this area, let alone one which is beyond all criticism. It is easy to do nothing: Agreement in Principle Speech for the Election Funding, Expenditure and Disclosures Amendment Bill 2011, Legislative Assembly, Hansard, 12 September 2011, p 5433.8, Mr Barry O'Farrell. No doubt where there are substantial burdens imposed on the constitutionally protected freedom, this Court should consider the claimed justifications carefully. But there is no perfect scheme. Competing imperatives must be balanced. It is not for the court to assess whether the impugned provisions have established "the most desirable or least burdensome regime to carry out the legitimate ends": Coleman at [100] per McHugh J, [328] per Heydon J. The reasonably appropriate and adapted test gives legislatures within the federation a margin of choice as to how a legitimate end may be achieved: ACTV at 159 per Brennan J (see also Cunliffe v The Commonwealth (1994) 182 CLR 272 at 325); Coleman at [100]; Monis at [347]; note also AG (SA) v Corporation of the City of Adelaide (2013) 87 ALJR 289 at [65].

89. Too rigorous a standard of review can lead to legislative inaction. Yet, in this area, a failure to address integrity concerns would be greatly detrimental to the proper operation of representative and responsible government.

90. One of the striking features of the plaintiffs' attack in this case is that the section is said – with some basis – to disadvantage the established major parties, which have been very reliant on corporate donations: PS [43]. That fact is a sharp distinction to the scheme held invalid in ACTV. The plaintiffs suggest that the public funding is "not tied in any meaningful way to the level of support for parties or candidates": PS [64(c)]. That argument makes no attempt to engage with the relevant provisions, and is wrong. The plaintiffs then suggest, inconsistently, that eligibility criteria make it unlikely that new parties would be entitled to funding, and that new parties must fund their outward cash-

flows until they become entitled to funding (ibid). There are innumerable different ways a funding model can be established. This scheme provides some funds to new parties, and after that provides funding by reference to first preference votes achieved at the last election. That is a reasonable approach, consonant with democratic principles. All parties, not just new ones, have to estimate their likely success at the polls in judging how much funding they will then be likely to receive. The scheme here is no surreptitious attempt to benefit incumbents. It is a significant, general reform.

F. Freedom of association adds nothing to analysis here

91. There is no free-standing, independent "freedom of association" arising under the Constitution. Any such freedom would exist only as a corollary to the implied freedom of political communication, and the same test of infringement and validity would apply: see Wainohu v New South Wales (2011) 243 CLR 181 at [112], French CJ and Kiefel J agreeing at [72]. Accordingly, the outcome of the plaintiffs' primary argument will determine this issue. In any event, the only additional arguments put here are misguided. Section 96D does not prohibit people making a collective donation, as they may still co-ordinate their actions (cf PS [74]). The prohibition on affiliation fees is simply an aspect of the donation ban. As for PS [75], this constitutional argument appears to come down to a preferred pronoun.

G. Section 95G(6) imposes no impermissible burden on freedom of communication

First limb of Lange – a limited burden

92. Division 2B of Part 6 of the Act operates to impose caps on electoral communication expenditure during the capped expenditure period in State election campaigns. The caps are identified in s 95F. Section 95G provides a series of aggregation provisions.

93. In its terms, s 95G(6) does not impose a burden on the freedom of political communication. Rather, the section identifies a particular relationship in respect of which the legislature has determined that electoral communication expenditure of more than one participant in the electoral process should be aggregated. Other relationships come in for similar treatment, as identified in Part A above. The particular effect of s 95G(6) is to aggregate electoral communication expenditure of parties and "affiliated organisations", for the purposes of the overall party caps (set out in s 95F(2) and (4)) and the electorate-specific party cap (in s 95F(12)). If the combined expenditure of a party and any affiliated organisation(s) exceeds the applicable cap, the party engages in unlawful conduct: s 95I. Depending on what the party knew at the time the expenditure which involved the party in exceeding the cap was incurred, the party may also commit an offence: s 96HA.

94. The aggregation provisions in s 95G are an incident of imposing expenditure caps on, relevantly, political parties. A likely and intended effect of those caps is to limit the ever-increasing, and ever more expensive, expenditure on advertising. It may thus be accepted that the caps, and thus also the aggregation provisions, impose some burden on freedom of political communication with respect to parties, and also with respect to those persons/entities who or which are taken to be aggregated (assuming, contrary to Parts B and C above, that there is some relevant freedom at work).

95. The burden imposed by the impugned provision is limited. The plaintiffs do not challenge the validity of the expenditure caps, nor any aggregation provision except s 95G(6). That provision is just one mechanism within the broader scheme. Further, affiliated organisations remain free to express their views on government and political matters during the capped expenditure period; they are also able spend money on the activities identified in s 87(2)(g)-(j); see also cl 5, Election Funding, Expenditure and Disclosures Regulation 2009. Outside the capped expenditure period the electoral communication expenditure of affiliated organisations is unconfined.

Second limb of Lange – the burden is proportionate to a legitimate end

96. The object of the caps is to reduce the risk to the integrity of the electoral process, as outlined above in respect of s 96D, by limiting expenditure in the immediate lead up to, and during, election campaigns. That limits the need to raise ever greater sums of money, a competitive need which not only gives rise to integrity concerns, but which tends to distract from the more important functions of parties and candidates in a system of representative government (a feature noted by the NSW Legislative Council Select Committee on Electoral and Political Party Funding in its report Electoral and Political Funding in New South Wales, 2008, at [8.8]). The minimisation of such distraction is facilitated by the EC Fund in Part 5 of the Act, pursuant to which parties and candidates can claim substantial proportions of their actual electoral communication expenditure, calculated by reference to the caps.

97. Of course, any expenditure caps must be imposed in a neutral and fair manner, which do not unduly advantage one set of voices over another. Conversely, expenditure caps assist in ensuring that better resourced voices do not drown out the others, to the detriment of electors becoming informed and best able to exercise their electoral choice: note Harper v Canada [2004] 1 SCR 827 at [23], [86]-[87].

98. The use of such caps is not novel: the Commonwealth imposed limits on candidates' expenditure in Commonwealth elections between 1902 and 1980: Commonwealth Electoral Act 1902 (Cth), Part XIV (limits were repealed by the Commonwealth Electoral Act 1980 (Cth)).

99. In any event, no challenge is made to the expenditure caps. Further, the plaintiffs have appropriately accepted that "where there exists a generally applicable cap, it is legitimate to ensure that the effectiveness and fairness of those generally applicable caps are not circumvented by reason of matters of form rather than substance": further particulars letter, SCB v 5, tab SC57, pp 2210-2211, [16]. So much follows as a matter of constitutional logic. Were aggregation provisions not in place, parties could and would use close affiliates or proxies to mount campaigns on their behalf, potentially in a co-ordinated fashion, so as to avoid the effect of the expenditure limitations (and likely also avoiding the donation caps). For one party to do so would be unfair to other parties, which would then lead to other parties following suit, leading to the breakdown of the scheme. That being so, the issue becomes simply whether the criteria of aggregation selected are ones which can reasonably be considered appropriate and proportionate to avoiding circumvention. They can be, and are.

100. In order to constitute an "affiliated organisation" for the purposes of s 95G(6), a party, body or other organisation must be authorised under the rules of a registered party to appoint delegates to the governing body of the party, or to participate in the pre-selection of candidates (or both): s 95G(7). Those criteria represent a close relationship. The provision is triggered by the existence of formal arrangements between the organisation and the party with respect to fundamental elements of a party's processes: the composition of its governing body and the pre-selection of its candidates. These matters go to the heart of the governance, the political identity, and the political representation, of the party. Affiliated organisations are, in a meaningful and significant sense, a part of the party.

101. No doubt the affiliated organisation may not always agree on all issues with the party leadership or with party candidates (cf PS [96(b)]). But that human commonplace does not undermine the strength of the link. The involvement of the affiliate in the affairs of the party, through participation in the governing body or pre-selection of candidates, suggests at least a substantial degree of commonality in the respective policy positions of the organisation and the party. And the affiliation of the organisation provides it with a substantive opportunity to influence future policy direction, which can only be

implemented if the party with which it is affiliated holds office. In the unlikely event that the affiliated organisation found itself significantly at odds with the party, or considered the burden imposed by being subject to aggregation unacceptable, then the remedy is simple: disaffiliate.

102. The facts before the Court in this case illustrate these propositions. Of the six plaintiffs, three are affiliated with the ALP (the AMWU, the USU and the TWU: see SC [2]-[12]). There is no evidence the other three plaintiffs are affiliated with any political party. Thus two of the five unions, and the State peak union body, are not subject to aggregation of the caps. If the other three plaintiffs choose to remain affiliated to the ALP, that is no doubt because of their commitment to that party and their wish to be involved in its party processes.

103. The links between the three affiliated unions (together with other such unions) and the NSW ALP are strong. That party is "made up of: affiliated trade unions; and individual members": Rules, SCB v 2, tab SC12, p 460, [A.3]. At least 50% of delegates to that party's annual conference must be union delegates: ibid, p 475, [B.26(a)]. That conference is "the supreme policy making and governing body" of the party (ibid, p 470, [B.2]; as to other links, see eg rules [A.44], [B.8], and [Q.1]-[Q.3]). The three affiliated plaintiffs accept they are each authorised to appoint delegates to the annual conference, and to participate in the pre-selection of the party's candidates for State elections: SC [4(i)], [6(i)] and [12(b)].

104. The aggregation rules, in general, including s 95G(6), are neutral in their terms and effects. No suggestion has been made by the plaintiffs that the aggregation rules are one-sided or partisan. Nor could that be said in light, for example, of s 95G(1)(c).

105. The plaintiffs suggest that there will be a chilling effect on communication because the party and the affiliated organisations will not necessarily know how much each is spending: PS [91]. Yet given the necessarily close links between affiliates, it is not unduly burdensome to require a degree of planning and co-ordination. A careful eye must be kept on electoral communication expenditure in any event by all parties and third party campaigners to comply with the terms of the caps.

106. The plaintiffs submit that the criteria of affiliation are too broad, because they do not "equate to control of the political party": PS [96(b)]. That may be so, but they do equate to links so close as to be significantly intertwined, such that it is reasonable to aggregate. The plaintiffs also argue that the criteria leave out of account other types of participation in parties that may constitute influence or control: ibid. They do not give examples. In any event, again, the fact that it might be possible for the Parliament to have been more comprehensive is no basis for asserting invalidity, in the absence of any undue distortion being caused by the less burdensome regime.

Part VIII: Time estimate

107. The defendant estimates that it will require some three hours to present its argument.

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