

BETWEEN:

JEFFREY RAYMOND McCLOY
First Plaintiff

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McCLOY ADMINISTRATION PTY LTD
Second Plaintiff

NORTH LAKES PTY LTD
Third Plaintiff

and

STATE OF NEW SOUTH WALES
First Defendant

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INDEPENDENT COMMISSION AGAINST CORRUPTION
Second Defendant

**ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL
FOR SOUTH AUSTRALIA (INTERVENING)**



Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Basis for intervention

2. The Attorney-General for South Australia (**South Australia**) intervenes pursuant to s78A of the *Judiciary Act 1903* (Cth).

Part III: Leave to intervene

3. Not applicable.

Part IV: Applicable legislative provisions

4. South Australia adopts the Plaintiff's statement of the applicable legislative provisions.

10 **Part V: Submissions**

5. In summary, South Australia submits:

- i. Division 2A and s96E of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (**EFED Act**) do not infringe the implied freedom;
- ii. with respect to Div 4A, at the level of principle, the implied freedom of political communication does not preclude a State from legislating in a manner that identifies a particular class or group of persons or entities as objects of special regulation so long as such legislation serves an end itself compatible with the system of representative and responsible government and the law in its legal and practical operation is reasonably appropriate and adapted to achieve that end; and
- 20 iii. the fact that a legislative scheme may achieve certain ends by the enactment of more complete or comprehensive provisions does not mean that a scheme that is targeted but less comprehensive ceases to be reasonably appropriate and adapted to the achievement of those ends or is necessarily disproportionate.

A LEGISLATIVE SCHEME

6. The plaintiffs seek to invalidate Divs 2A and 4A and s96E in Pt 6 of the EFED Act. In summary, those provisions impose caps on political donations in relation to State elections (Div 2A), prohibit donations emanating from specified persons and corporations (Div 4A), and prohibit indirect campaign contributions to a party, elected member, group or candidate (s96E). Section 4A of the EFED Act identifies the objects of the Act in the following terms.

- 30 The objects of this Act are as follows:

- (a) to establish a fair and transparent election funding, expenditure and disclosure

scheme,

- (b) to facilitate public awareness of political donations,
- (c) to help prevent corruption and undue influence in the government of the State,
- (d) to provide for the effective administration of public funding of elections, recognising the importance of the appropriate use of public revenue for that purpose,
- (e) to promote compliance by parties, elected members, candidates, groups, agents, third-party campaigners and donors with the requirements of the election funding, expenditure and disclosure scheme.

10 7. Although s4A was introduced after the provisions in issue in this case were enacted that does not prevent the objects provision from having application as an aid to construction. Clearly, such a provision will not be determinative of statutory purpose,¹ which is always a matter of construction and thus a matter for judicial resolution. But the provision is part of the EFED Act and is to form part of the whole that is to be construed.

Division 2A - caps on political donations

- 20 8. Division 2A provides for the imposition of caps on “political donations”.² “Political donation” is defined in s85(1). The conceptual basis of the definition is supplied by the term “gift”, which is defined in s84(1) as a disposition of property,³ otherwise than by will, without consideration (or with inadequate consideration) in money or money’s worth and including the provision of a service for no or inadequate consideration, excluding volunteer labour. The statutory language therefore manifests an intention to capture the various forms in which “political donations” may be made.
9. Section 95AA of the EFED Act manifests an intention to confine the operation of Div 2A to the conduct of “State elections”, as defined in s4 of the EFED Act. Accordingly, the caps imposed on “political donations” by s95A(1) and the exclusion of self-financed campaigns by candidates in s95A(4) from the aggregation provisions in ss95A(2) and (3) have a confined operation in so far as they are targeted to State elections only. That targeting is reinforced in related provisions which exclude certain offence provisions applying to donations directed to non-State elections.⁴ That is not to deny that the implied freedom, which operates as an implication of the Constitution with

¹ *Wacando v Commonwealth* (1981) 148 CLR 1 at 15-16 (Gibbs CJ); *S v Australian Crime Commission* (2005) 144 FCR 431 at 439 [22] (Mansfield J); *Tickner v Bropho* (1993) 40 FCR 183 at 191-192 (Black CJ), 208-209 (Lockhart J), 215 (French CJ).

² EFED Act s95A(1).

³ Itself defined in s4 of the EFED Act to mean conveyance, transfer, assignment, settlement, delivery, payment or other alienation of property with a list of specific inclusions, which, amongst others, extend to the allotment of shares in a company, the creation of trusts, the grant or creation of a lease, mortgage, charge, servitude, licence, power, partnership or interest in property, or transactions intended to directly or indirectly diminish the value of one person’s property and increase the value of another person’s property.

⁴ E.g., EFED Act s95B(2).

respect to federal elections, may operate with respect to State electoral laws regulating State elections. So much must be accepted as a practical reality in which communication concerning State matters may reflect on matters at the Commonwealth level.⁵ Rather, it makes plain what is otherwise discernible from the text and context; that the matters sought to be regulated are targeted to State concerns and accordingly are closely drawn to minimise incidental impact on federal electoral matters.

10. The legislative means adopted to regulate the imposition of the caps is provided by ss95B(1), 95C(1) and 96HA.
11. Section 95B(1) renders it unlawful for a person to accept a political donation to a “party”, “elected member”, “group”, “candidate” or “third-party campaigner” in excess of the relevant cap imposed under s95A(1). Each of the above descriptors is defined in s4 of the EFED Act which in some cases involve interlocking definitional terms.⁶
12. Section 95C(1) renders it unlawful for a person to make or accept political donations to more than three third-party campaigners in the same financial year. “Third-party campaigners” are entities or persons who incur electoral communication expenditure during a “capped expenditure period” that exceeds \$2000 in total.⁷ The “capped expenditure period” is defined in s95H and in this case, the relevant period is as defined in s95H(a).⁸ The prohibition is limited in its scope by the terms of s95C(2). That is, the prohibition extends only so far as a donation to a third-party campaigner is picked up by s96AA, which itself renders it unlawful for third-party campaigners to make payments for “electoral communication expenditure”⁹ or to incur such expenditure unless the third-party campaigner complies with the requirements imposed by s96AA.
13. Thus, Div 2A prescribes the upper limit that may be directed in the form of a “political donation” to a party, elected member, group, candidate or third-party campaigner. The division operates to cap the amount of funds that are able to be sourced from a single person or entity and, in the case of third-party campaigners, limits the capacity of persons or entities to make contributions to more than three third-party campaigners in a defined period.

Division 4A - prohibition on political donations

14. Division 4A of Pt 6 prohibits political donations emanating from “prohibited donors”. The “prohibited donors” are identified in s96GAA as “property developers”, “tobacco industry business

⁵ *Unions NSW v New South Wales* (2013) 88 ALJR 227 (*Unions NSW*) at 233 [20]-[25].

⁶ For example, third party campaigner is defined in s4 to include an “entity” which s4 defines by reference to s84 which picks up incorporated or unincorporated body or the trustee of a trust.

⁷ EFED Act s4.

⁸ See special case at [2], [4]: Special Case Book (SCB) 65.

⁹ EFED Act s87.

entities” and “liquor or gambling industry business entities”. Each of those terms is defined in s96GB. Relevantly, “property developer” is defined in s96GB(1), which provides:

(1) Each of the following persons is a *property developer* for the purposes of this Division:

- (a) a corporation engaged in a business that regularly involves the making of relevant planning applications by or on behalf of the corporation in connection with the residential or commercial development of land, with the ultimate purpose of the sale or lease of the land for profit,
- (b) a person who is a close associate of a corporation referred to in paragraph (a).

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(2) Any activity engaged in by a corporation for the dominant purpose of providing commercial premises at which the corporation or a related body corporate of the corporation will carry on business is to be disregarded for the purpose of determining whether the corporation is a property developer unless that business involves the sale or leasing of a substantial part of the premises.

15. A “corporation” is identified as a “property developer” within the meaning of s96GB(1)(a) by reference to a business activity, namely, a business that “regularly involves the making of relevant planning applications”. “Relevant planning applications” is defined in s96GB(3) by reference to s147 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**). Relevantly, s147(2) of the EPA Act concerns applications that are directed to a Minister,¹⁰ or that relate to “State significant infrastructure” (which require ministerial approval),¹¹ or applications for development consent under Pt 4 of the EPA Act (which in some circumstances require ministerial approval or can give rise to ministerial directions).¹² As the terms of s96GB(1)(a) make plain, the relevant targets of the prohibition are corporations, not natural persons or partnerships, unless they are picked up under s96GB(1)(b).

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16. With respect to s96GB(1)(b), a “close associate” of a corporation is defined in s96GB(3) to mean:

- a director or “officer” of the corporation or a spouse of such a person;
- a “related body corporate” of the corporation;
- a person whose voting power in the corporation or a related body corporate is greater than 20% or the spouse of such a person;
- stapled entities of the corporation or a related body corporate; and
- if the corporation is a trustee, manager or responsible entity in relation to a trust, a person holds more than 20% of the units in the trust (if a unit trust) or is a

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¹⁰ EPA Act s147(2)(a) and (b).

¹¹ EPA Act s115W(1).

¹² EPA Act ss89D, 94E, 94EE.

beneficiary of a discretionary trust.

17. Both “officer” and “related body corporate” are defined by reference to the *Corporations Act 2001* (Cth).¹³
18. The exclusion in s96GB(2) ensures that corporations that develop their own premises are not “property developers” unless the corporation leases or sells a substantial part of the premises to an unrelated person or entity. A further specific exclusion is provided in s96GE (exclusion by determination). Section 96GD carves out an exclusion to the definition of “political definition” for the purposes of Div 4A by excluding annual subscriptions paid to a party by an individual as a member or for the individual’s affiliation with the party, unless it is a “reportable political donation” as defined in s86. The effect of the carve out is that membership and affiliation subscriptions will not amount to a political donation that is caught by Div 4A unless it is reportable.
19. Sections 96GB(2A) and (2B) operate in like manner, utilising the definitional concept of “close associate” set out above. However, in light of the pleadings¹⁴ and special case,¹⁵ it does not appear that ss96GB(2A) and (2B) are engaged in the present case.
20. The legislative means used to regulate the prohibition has the same structure as that employed in Div 2A. Sections 96GA(1) and (2) make it unlawful for a prohibited donor to make a political donation or for a person to make such a donation on behalf of a prohibited donor. Sections 96GA(4) and (5) make it unlawful for a prohibited donor to solicit another person to make a political donation or for a person to solicit another person on behalf of a prohibited donor to make a political donation. Section 96I makes it an offence to do an unlawful act under Div 4A.
21. As is clear from the above, there is no legal prohibition on property developers engaging in political communication themselves. Rather, Div 4A effects a financial barrier between property developers and candidates, parties, groups and elected members by precluding the former from financially contributing to the latter.

Section 96E - prohibition on indirect campaign contributions

22. Section 96E prohibits a person from making and/or accepting indirect campaign contributions to a party, elected member, group or candidate.¹⁶ Indirect campaign contributions capture the provision of office accommodation, vehicles, computers or other equipment as well as the payment by another person of electoral expenditure incurred by a party, elected member, group

¹³ *Corporations Act 2001* (Cth) s9 (“officer”), ss 9 and 50 (“related body corporate”).

¹⁴ Amended Statement of Claim at [2]-[12]; SCB 2-3; Defence [13(b)], [14(c)]; SCB 42.

¹⁵ Special case [1], [3], [5]; SCB 64-65.

¹⁶ EFED Act s96E(1) and (2).

or candidate. There are specific exclusions including, amongst other things, volunteer labour or gifts of a value not exceeding \$1000.¹⁷

23. By its terms, s96E restricts the provision of financial benefits that might not otherwise be captured by the caps imposed on political donations in Div 2A. So understood, it is an anti-avoidance provision. In the absence of s96E, the caps imposed under Div 2A could be undermined in a material and significant way through the provision of a range of benefits, including the assumption of debts relating to electoral communication expenditure. Further, the caps on electoral communication expenditure imposed under Div 2B may also be exposed to avoidance in the absence of s96E.

10 B THE IMPLIED FREEDOM

24. Whether a law infringes the implied freedom of political communication “falls to be determined within a standardised analytical framework”¹⁸ the terms of which, since *Lange v Australian Broadcasting Corporation*¹⁹ (*Lange*) and *Coleman v Power*,²⁰ are well settled.²¹ The terms of the two-stage test, enunciated in *Lange* and modified in *Coleman v Power*,²² are clear.

25. Relevantly, the first stage of the test is to ask whether the law, in its legal or practical operation, effectively burdens communication on governmental or political matters. This inquiry is directed to the character of the law and whether in its terms it imposes a burden on communication of the relevant kind.²³ As was made plain in *Unions NSW*,²⁴ the extent of the burden is not relevant to the first stage of the inquiry. The test is qualitative not quantitative.²⁵ Further, as *Unions NSW* re-emphasised, in addressing the first question “it is important to bear in mind that what the Constitution protects is not a personal right”.²⁶ The freedom is “addressed to legislative power, not rights,”²⁷ and thus operates as a restriction on that power.²⁸ So understood, the first inquiry

¹⁷ EFED Act s 96E(3).

¹⁸ *Tajjour v New South Wales* (2014) 88 ALJR 860 (*Tajjour*) at 892 [144] (Gageler J).

¹⁹ (1997) 189 CLR 520 at 567 (the Court).

²⁰ (2004) 220 CLR 1 at 50-51 [92]-[93], [95]-[96] (McHugh J), 78 [196] (Gummow and Hayne JJ), 82 [211] (Kirby J).

²¹ *Lange* (1997) 189 CLR 520 at 567 (the Court); *Coleman v Power* (2004) 220 CLR 1 at 50-51 [92]-[93], [95]-[96] (McHugh J), 78 [196] (Gummow and Hayne JJ), 82 [211] (Kirby J); *Hogan v Hinch* (2011) 243 CLR 506 at [47] (French CJ), Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ applied the same test at [94]-[97]. The test was stated in relevantly identical terms in *Wotton v Queensland* (2012) 246 CLR 1 at [25] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Tajjour* at 875 [32] (French CJ)).

²² (2004) 220 CLR 1 at 50-51 [92]-[93], [95]-[96] (McHugh J), 78 [196] (Gummow and Hayne JJ), 82 [211] (Kirby J).

²³ *Tajjour* at 892 [145] (Gageler J).

²⁴ *Unions NSW* at 236 [40] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

²⁵ *Tajjour* at 892 [145] (Gageler J).

²⁶ *Unions NSW* at 236 [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

²⁷ *Unions NSW* at 236 [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

²⁸ *Lange* at 561; *Unions NSW* at 236 [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Tajjour* at 892 [140] (Gageler J).

does not ask “whether a person is limited in the way he or she can express himself or herself”,²⁹ but how the impugned law affects the freedom of political communication.³⁰ The nature of the burden imposed by the law calibrates the inquiry at the second stage of the test mandated by *Lange*. Where the law operates directly to burden communication about political and governmental matters it will attract stricter scrutiny than a law which burdens such communications incidentally.³¹

- 10 26. The second stage of the test itself has two limbs of inquiry. The first limb requires the identification of the end sought to be achieved by the law and the analytical inquiry is whether the end sought to be achieved is legitimate. “Legitimacy” requires the end to be compatible with the system of representative and responsible government established by the Constitution.
27. As the reasons of Hayne J in *Monis v The Queen (Monis)*³² make plain, unlike some jurisdictions, the Australian Constitution does not expressly provide a list of the “ends” that are legitimate. Further, there may be difficulties equating “legitimacy” with being consonant with a law that is “within power”³³ because both the ends and the means must be compatible with the constitutionally prescribed system and with the implied freedom. The object or end “need not itself be the maintenance or enhancement of the system of representative and responsible government or of the freedom of political communication. But it must be compatible with them”.³⁴ It may also be profitable to refer to the general law because the implied freedom is to be understood and applied having regard to what may be learned from the general law.³⁵
- 20 28. In an appropriate case, it may also be profitable, if necessary for the purposes of validity,³⁶ to have recourse to materials to establish “constitutional facts”³⁷ in order to support an assertion going to the legitimacy of an end. Such materials “involve information which the Court should have in order to judge properly of the validity of this or that statute or of this or that application

²⁹ *Unions NSW* at 236 [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ);

³⁰ *Unions NSW* at 236 [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ);

³¹ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (*ACTV*) at 169 (Deane and Toobey JJ); *Levy v Victoria* (1997) 189 CLR 579 at 618-619 (Gaudron J); *Hogan v Hinch* (2011) 243 CLR 506 at [95] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Wotton v Queensland* (2012) 246 CLR 1 at 16 [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Tajjour* at 894 [151] (Gageler J).

³² (2013) 249 CLR 92 at 148 [128] and footnote 228 referring to Article 10(2) of the European Convention on Human Rights (1950).

³³ *Monis* at [132], [137] (Hayne J); cf *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 197 [33] (Gleeson CJ).

³⁴ *Monis* at 148 [128] (Hayne J).

³⁵ *Monis* at 149 [128] (Hayne J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 44-45 (Brennan J) and 95 (Gaudron J); *ACTV* at 217-218 (Gaudron J).

³⁶ *Lambert v Weichelt* (1954) 28 ALJR 282 at 283; *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [355] and the cases cited therein.

³⁷ See *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280 at 292 (Dixon CJ); *Breen v Sneddon* (1961) 106 CLR 406 at 413; *Gerhardy v Brown* (1985) 159 CLR 70 at 141-142 (Brennan J); *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 622 (Jacobs J); *Thomas v Mowbray* (2007) 233 CLR 307 at 522 [639] (Heydon J).

by the Executive Government of State or Commonwealth of some power or authority it asserts”.³⁸ “[I]f a criterion of constitutional validity consists in matter of fact, the fact must be ascertained by the court as best it can, when the court is called upon to pronounce upon validity.”³⁹ Reception of factual material ought ultimately turn on whether it is “sufficiently convincing to justify the conclusion that it supports a material constitutional fact”.⁴⁰

29. Certain ends have been identified as *legitimate* ends compatible with the implied freedom, including, amongst others: the protection of reputation;⁴¹ the prevention of physical injury;⁴² the prevention of violence in public places;⁴³ and the maintenance of a system for the continuing supervision of some sexual offenders who have served their sentences.⁴⁴ However, they are examples only and the list is not closed.⁴⁵

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30. The legitimacy of an end lies in the end’s connection to the system of representative and responsible government. To classify as “legitimate”, the connection between the end and the implied freedom must be explained in terms that identify how the end either serves, or is compatible with, the system of government for which the implied freedom is an indispensable element. As noted by Hayne J in *Monis*,⁴⁶ Dawson J’s rationale for “personal reputation” being a legitimate end in *Theophanous v Herald & Weekly Times Ltd*⁴⁷ is instructive. Dawson J said:⁴⁸

It is hardly surprising that representative government has been thought to co-exist with defamation laws for over ninety years, even though those laws curtail freedom of speech. Indeed, the protection of reputations, even the reputations of politicians or would-be politicians, may be thought to be in the interests of representative government, because the number and quality of candidates for membership of Parliament is likely to be appreciably diminished in the absence of such protection. (footnote omitted)

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31. In this case, the Court has the benefit of an objects clause, by which ss4A(a) and (c) identify the ends sought to be achieved. Section 4A(c) is a particular expression of what Mason CJ was prepared to assume with respect to the ends sought to be achieved by Part IIID of the *Broadcasting Act 1942* (Cth) the validity of which was in issue in *ACTV*. In *ACTV*, Mason CJ said: “I am prepared to assume that the purpose of Part IIID is to safeguard the integrity of the political process by reducing pressure on parties and candidates to raise substantial sums of money, thus

³⁸ *Breen v Sneddon* (1962) 106 CLR 406 at 411 (Dixon CJ).

³⁹ *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280 at 292 (Dixon CJ).

⁴⁰ *Thomas v Mowbray* (2007) 233 CLR 307 at 522 [639] (Heydon J).

⁴¹ *Lange* (1997) 189 CLR 520.

⁴² *Levy v Victoria* (1997) 189 CLR 579.

⁴³ *Coleman v Power* (2004) 220 CLR 1.

⁴⁴ *Hogan v Hinch* (2011) 243 CLR 506.

⁴⁵ *Monis* at [129].

⁴⁶ *Monis* at 149-150 [138].

⁴⁷ (1994) 182 CLR 104.

⁴⁸ (1994) 182 CLR 104 at 192.

lessening the risk of corruption and undue influence.”⁴⁹ In like vein, the ends sought to be pursued in Divs 2A and 4A and s96E of the EFED Act are similar and may be expressed in the following terms: “to establish a fair and transparent election funding, expenditure and disclosure scheme, which scheme safeguards the integrity of the political process by helping to prevent corruption and undue influence in the government of the State”.

32. So expressed, the focus turns to the EFED Act to discern if, properly construed, that end is evident in the terms of the statutory scheme. At this part of the inquiry the focus is restricted in the sense that the task is one of statutory construction.⁵⁰ That is, identifying the purpose of the law is a matter of construction, which is concerned with text and context. Context includes the historical background to the provision.⁵¹ However, as with any process of construction, one does not construe the text of a provision in isolation from the rest of the Act; it must be construed as a whole.⁵²

Reasonably Appropriate and Adapted

33. The second limb is essentially concerned with the “fit”⁵³ of the law; it is an inquiry directed to an evaluation of the means chosen to achieve the end and whether that “means is reasonably appropriate and adapted to achieving it in a manner compatible with the system of representative and responsible government.”⁵⁴ The use of the term “proportionality” does not change the nature of the analysis; proportionality in this context is classificatory⁵⁵ rather than doctrinal. In any event, irrespective of the appropriate descriptor, the analysis in every case is the same; it is whether the manner in which the burden on communication imposed by the law can be sufficiently justified.

34. The identification of the threshold beyond which an impugned law will be rendered invalid is informed by the character of the law. Where the law in its terms burdens political and governmental communications directly, the justification or “fit” will be held to a higher standard. The test applicable at this stage of the inquiry has been described by reference to proportionality and “reasonable necessity”,⁵⁶ and the Court has identified a generic process to guide the proportionality inquiry, relevantly:

The inquiry whether a statutory provision is proportionate in the means it employs to achieve

⁴⁹ *ACTV* at 144.

⁵⁰ *Unions NSW* at 238 [50]; *Momis* at 147 [125] (Hayne J), [317] (Crennan, Kiefel and Bell JJ).

⁵¹ *Momis* at 205 [317] (Crennan, Kiefel and Bell JJ).

⁵² *Project Blue Sky* (1998) 194 CLR 355 at 381-382 [70]; *Plaintiff S4 v Minister for Immigration and Border Protection* [2014] HCA 34 at [42] (French CJ, Hayne, Crennan, Kiefel and Keane JJ).

⁵³ *Tajjour* at 893 [149] (Gageler J).

⁵⁴ *Momis* at 153 [144] (Hayne J).

⁵⁵ *Tajjour* at 876 [35] (French CJ).

⁵⁶ *Tajjour* at 888 [113] (Crennan, Kiefel and Bell J).

its object may involve consideration of whether there are alternative, reasonably practicable and less restrictive means of doing so.⁵⁷

35. That statement referred back to *Monis* where Crennan, Kiefel and Bell JJ noted:⁵⁸

10 Where there are other, less drastic, means of achieving a legitimate object, the relationship with the legislative purpose may not be said to be proportionate, at least where those means are equally practicable and available. Given the proper role of the courts in assessing legislation for validity, such a conclusion would only be reached where the alternative means were **obvious and compelling**, as was the Tasmanian legislation in *Befair Pty Ltd v Western Australia*. In such circumstances the means could not be said to be reasonably necessary to achieve the end and are therefore not proportionate. (footnotes omitted; emphasis added)

36. The inquiry thus gives rise to a consideration of hypothetical laws - alternative means - which may have been employed to achieve the statutory objective and thus will inform the judgment made by the Court.⁵⁹ However, given the role of the Court is one limited to determining validity, the identification of alternative means will only result in invalidity where such means were “obvious and compelling.”⁶⁰ Thus, the appropriate test is not whether the means chosen are the least restrictive means. Rather, the test is whether there were less restrictive alternative means that were available to achieve the legislative object that were “obvious and compelling” and which, by inference, may have been more appropriately tailored to the statutory objective.

C APPLICATION

20 Division 2A

37. The caps imposed under Div 2A are part of a legislative scheme which provides for electoral finance to be sourced from a mix of public and private funding. The constituent elements of the scheme involve caps on electoral communication expenditure⁶¹ with reimbursement of electoral communication expenditure to the primary electoral participants (registered parties and candidates) calculated in accordance with the formulae set out in Div 2 of Part 5 of the EFED Act. The formulae represent a common approach to reimbursement, namely, the percentage of expenditure reimbursed reduces relative to the amount of expenditure incurred within the applicable cap on electoral communication expenditure.⁶² The reimbursement formula adopted is thus calibrated to account for the fact that a portion of electoral communication expenditure
30 incurred will be sourced from private donors but in circumstances where there are caps imposed on the amount of political donations that may be made to a party, group or candidate. Hence, the

⁵⁷ *Unions NSW* at 237 [44] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

⁵⁸ *Monis* (2013) 249 CLR 92 at 214 [347] (Crennan, Kiefel and Bell JJ).

⁵⁹ *Monis* at 153 [144] (Hayne J); *Coleman v Power* (2004) 220 CLR 1 at 53 [100] (McHugh J); *Thomas v Mowbray* (2007) 233 CLR 307 at 330-333 [19]-[27] (Gleeson CJ).

⁶⁰ *Unions NSW* at 237 [44]; *Monis* at 214 [347] (Crennan, Kiefel and Bell JJ).

⁶¹ Defined in EFED Act s87.

⁶² EFED Act ss58 and 60.

EFED Act evinces an intention of restricting the amount of private funds available for electoral communication expenditure and compensates for that restriction by making public funds available to parties, groups and candidates for electoral communication purposes. The end to be discerned from the statutory scheme as a whole is to provide for a level playing field with respect to expenditure on electoral communication. That end serves two related purposes. First, it safeguards the electoral process from a potential disproportionate influence that may accrue to a party or candidate by reason of private expenditure on electoral communication. Second, it protects the integrity and perceived integrity of the electoral process by removing the capacity of individuals, groups or corporate entities to obtain influence over parties or candidates on account of the financial support for a party or candidate. Electoral integrity may be impugned in circumstances where there is a potential for recipients of large donations to have a role in decision-making processes involving the commercial or private interests of their financial benefactors. In these circumstances, the influence resulting from the receipt of large donations may be perceived as “undue” or “disproportionate” and thus give rise to a perceived integrity issue that requires regulatory action. It is against these broader concerns that the legislative end sought to be achieved by Divisions 2A and 4A and s96E falls to be assessed.

First *Lange* question - burden imposed conceded

38. The defendant admits⁶³ that s95B imposes a burden on political communication and that if invalid, is not severable⁶⁴ from the rest of Div 2A. In these circumstances, the inquiry proceeds to the second *Lange* question.

Second *Lange* question - first limb: a legitimate end

39. As noted above,⁶⁵ the legitimate end being pursued is the establishment of a fair and transparent election funding, expenditure and disclosure scheme, which scheme safeguards the integrity of the political process by helping to prevent corruption and undue influence in the government of the State.

40. The prohibition imposed by s95B restricts donations emanating from the same source to be accepted by the persons and entities in s95B(1) beyond the capped amount. Coupled with the anti-avoidance measure effected by s95C, the intention is evident; it is to prevent large political donations and thereby prevent potential donors from obtaining a disproportionate or undue influence over parties, members, or candidates by funding large amounts of electoral communication expenditure. Capping political donations to parties, candidates, members or

⁶³ Defence at [60], SCB 48.

⁶⁴ Defence at [67], SCB 49.

⁶⁵ Paragraph [29].

groups safeguards the actual and perceived integrity of State elections. The scheme prevents the capacity of persons and entities from obtaining such a position of financial influence as to give rise to the potential for undue political or governmental influence. Safeguarding the integrity of the electoral process by preventing undue influence arising between financial benefactors and parties, members and candidates is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

Second *Lange* question - second limb: proportionality

10 41. Imposing capped amounts on political donations emanating from the same source as a means of securing the integrity of State electoral processes is a proportionate means of achieving the desired end. It is proportionate in so far as caps do not preclude the making of political donations; caps still permit donations to flow to participants in the electoral process and thus permit those same participants the capacity to incur electoral communication expenditure in the electoral process. The aggregation provisions and s95C are anti-avoidance provisions designed to ensure that the legislative purpose of securing electoral integrity by precluding the capacity for persons and entities to have a disproportionate influence over elected members are not undermined by channelling donations through other sources.

20 42. It is difficult to conceive of a hypothetical law that would secure the end sought to be secured by the EFED Act in a less restrictive means. It may be possible to conceive of caps of higher amounts, which would be less restrictive, but in order for a cap to achieve its "equalization" purpose it must be set at a rate that is meaningful for individual electors. That is, for the cap to be effective it must in some sense be relative to political donations made by electors without precluding others such as corporate entities and special interest groups from making political donations. Thus, the cap must be set at such a rate so as to permit donations to be made by all while precluding the potential for undue influence by some. Precisely where that cap is set is matter of legislative judgment.

Division 4A

43. With respect to Div 4A, South Australia confines its submissions to points of principle arising in relation to the second limb of the *Lange* test.

30 44. There is no reason in principle why the implied freedom should operate to preclude a State legislature from selecting or identifying a specified class of persons which it considers has the potential to undermine the integrity or perceived integrity of the electoral process and subjecting that class to a specific form of regulation. Much, if not all, will turn on the means chosen to effect the desired end.

45. To the extent that the plaintiffs' argument relies on the existence of "loopholes" in the scheme to undermine its validity, such a contention should be rejected.⁶⁶ It is too simplistic to submit that a scheme that provides less than complete and comprehensive coverage (e.g., one that permits an associated entity of a regulated entity to engage in the prohibited activity) is indicative of a lack of "rational connection"⁶⁷ between the end sought to be achieved and the means employed to achieve that end. There is no reason in principle why a specifically targeted scheme cannot reflect a hierarchy of concerns on the part of the legislature, which hierarchy is reflected in legislative design. So, for example, it may be the case that a particular sub-set of persons or entities within a broader class present the most acute case for remedial action. Targeting specific areas without comprehensively regulating an entire field may be the most rational and less restrictive means to achieve the end sought. No doubt each case must be determined on its merits, but the broad proposition that appears to be latent in the plaintiffs' submissions that the existence of loopholes or more comprehensive forms of regulation demonstrates a lack of proportionality between the means and end should be rejected. Whether a statutory scheme actually achieves the object it sets out to pursue is irrelevant to the inquiry.⁶⁸

Severance is available

46. In the event of invalidity, the provisions prohibiting political donations by "property developers" as provided by Div 4A are clearly severable from the rest of Div 4A and the EFED Act as a whole.⁶⁹ Severance clauses such as s 31 of the *ALA* operate as a rule of construction, not a rule of law.⁷⁰ The effect of such clauses is to reverse the presumption that a statute is to operate as a whole.⁷¹ The question in each case is whether there is a positive indication in the Act "that the legislature intended it to have either a full and complete operation or none at all."⁷² The terms of Div 4A of the EFED Act contain no such positive indication.

Section 96E

47. Section 96E prohibits the making or acceptance of "indirect campaign contributions" of the four kinds identified in s96E(1). In so doing, it assists in the regulation of the caps imposed under Div 2A.

⁶⁶ Plaintiffs' submissions at [50].

⁶⁷ *Tajjour* at 888 [112] (Hayne J).

⁶⁸ *Tajjour* at 884 [82] (Hayne J).

⁶⁹ *Acts Interpretation Act 1987* (NSW) (*ALA*) s31; *Pidoto v Victoria* (1943) 68 CLR 87 (*Pidoto*) at 108-110; *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 241 [596]-[598] (Kirby J).

⁷⁰ *Pidoto* at 110; *Tajjour* at 897 [170] (Gageler J).

⁷¹ *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 371 (Dixon J).

⁷² *Cam & Sons Pty Ltd v Chief Secretary (NSW)* (1951) 84 CLR 442 at 454 (Dixon, Williams, Webb, Fullagar and Kitto JJ).

First *Lange* question - burden conceded

48. The defendant admits⁷³ that s96E imposes a burden on communication.

Section 96E: Second *Lange* question - first limb: a legitimate end

49. Section 96E is an aid to the imposition of the caps brought about by Div 2A in that it precludes avoidance of those caps by providing indirect support by the provision of goods and services which otherwise would need to be funded by parties, groups and candidates. Section 96E also assists in the fulfilment of the disclosure obligations imposed under Div 2 of Pt 6. To that end, the purpose sought to be achieved by s96E is to assist in the fulfilment of the other objectives sought to be achieved by Divs 2 and 2A. That is, s96E operates to limit the capacity of parties, members and candidates to source funds for use as electoral communication expenditure other than through capped political donations. Accordingly, s96E is an additional though incidental burden on the freedom arising from the caps imposed under Div 2A. Assuming the end sought to be achieved by Div 2A is legitimate the same rationale applies to s96E. If Div 2A is held not have a legitimate end, the role that s96E serves in assisting disclosure requirements imposed by Div 2 gives s96E a legitimate end in and of itself.

Section 96E: Second *Lange* question - second limb: proportionality

50. It is difficult to conceive of an alternative form of s96E which fulfils its objectives by less restrictive means. The plaintiffs suggest that the provision of a valuation of any benefit provided to a party, member, group or candidate is an alternative. However, such a law is neither “obvious and compelling” nor necessarily less restrictive in terms of regulatory burden (transaction costs involved in valuations, prescription of criteria applicable to methods of valuation etc).

51. The prohibition brought about by s96E does not preclude the making of political donations within the capped limit; rather, it precludes the provision of benefits that may operate to undermine the effectiveness of the caps imposed by targeting classes of benefits most likely to be provided to the recipients identified.

⁷³ Defence at [68]-[69], SCB 49-50.

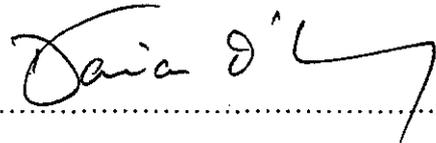
Part VI: Estimate of time for oral argument

52. South Australia estimates that 20 minutes will be required for the presentation of oral argument.

Dated: 10 March 2015



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