1 IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S204 of 2018

BETWEEN:

UNIONS NSW
First Plaintiff

NEW SOUTH WALES NURSES AND MIDWIVES' ASSOCIATION
10 Second Plaintiff

ELECTRICAL TRADES UNION OF AUSTRALIA, NEW SOUTH WALES BRANCH
Third Plaintiff

AUSTRALIAN EDUCATION UNION
Fourth Plaintiff

NEW SOUTH WALES LOCAL GOVERNMENT,
20 **CLERICAL, ADMINISTRATIVE, ENERGY, AIRLINES & UTILITIES UNION**
Fifth Plaintiff

HEALTH SERVICES UNION NSW
Sixth Plaintiff

and

STATE OF NEW SOUTH WALES
30 Defendant

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

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Intervener's submissions
Filed on behalf of the Attorney-General for
State of Queensland
Form 27C

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PART I: Internet publication

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

PART II: Basis of intervention

2. The Attorney-General for the State of Queensland ('Queensland') intervenes in these proceedings pursuant to s 78A of the *Judiciary Act 1903* (Cth), not in support of any party.

PART III: Reasons why leave to intervene should be granted

3. Not applicable.

PART IV: Submissions

4. Queensland's submissions are limited to making good the following propositions:

   (a) If it is necessary to decide the point, this Court should find that there is no limit on the legislative power of New South Wales which requires that the word 'substantially' in s 7(2)(a) of the *Electoral Funding Act 2018* (NSW) ('the EF Act') be construed as meaning 'having more than an insubstantial or incidental connection with'.[1]

   (b) As to justification of burdens on the implied freedom, it is not the case that a burden will only be justified if it passes all three steps of structured proportionality. To treat justification as synonymous with structured proportionality would be to constitutionalise the tools of analysis. Moreover, even within the discourse of proportionality, the concept of principled balancing formulas recognises that tests for justification may satisfy the requirements of proportionality, even though the formulas do not proceed through all limbs of structured proportionality. However, if the Court does engage in structured proportionality, it must do so 'consistently with the limits of the judicial function'. Among other things, that means that the final limb involves asking whether the measure is 'grossly disproportionate'.

[1] Cf Written submissions of the Commonwealth Attorney-General, 2-3 [7].

Construction of s 7(2)(a) of the EF Act

5. Section 7(2)(a) excludes from the definition of 'electoral expenditure', 'expenditure incurred substantially in respect of an election of members to a Parliament other the NSW Parliament'. The Commonwealth Attorney-General submits that the word 'substantially' in s 7(2)(a) should be construed to mean 'having more than an insubstantial or incidental connection with'.[2] This construction is said to conform the EF Act's operation with the limits of New South Wales' legislative power, 'having regard to the exclusivity of Commonwealth legislative power with respect to federal elections'.[3] The Commonwealth submits that this exclusivity has the result that 'State electoral laws cannot touch or concern federal elections more than incidentally'.[4] On 6 November 2018, the Commonwealth Attorney-General issued a notice under s 78B of the *Judiciary Act 1903* in relation to these issues.

6. For the reasons the Commonwealth Attorney-General now gives,[5] the question raised in the s 78B notice need not, and therefore should not,[6] be determined in this matter. The defendant accepts that the expenditure cap effectively burdens the freedom.[7] That burden must be justified.[8] The Commonwealth Attorney-General's construction of s 7(2)(a) cannot make a difference to the result of the justification analysis, because communications about candidates in a State election 'are at the heart of the freedom of communication protected by the *Constitution*'.[9]

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[2] Written submissions of the Commonwealth Attorney-General, 2-3 [7].
[3] Written submissions of the Commonwealth Attorney-General, 3 [8].
[4] Written submissions of the Commonwealth Attorney-General, 3 [8].
[5] Written submissions of the Commonwealth Attorney-General, 3 [9].
[6] *Lambert v Weichelt* (1954) 28 ALJ 282, 283 (Dixon CJ, delivering the judgment of the Court); *Knight v Victoria* (2017) 261 CLR 306, 324-325 [32]-[33] (the Court).
[7] Written submissions of the defendant, 16 [52].
[8] *Brown v Tasmania* (2017) 261 CLR 328, 369 [127] (Kiefel CJ, Bell and Keane JJ) ('*Brown*').
[9] *Unions NSW v New South Wales* (2013) 252 CLR 530, 550 [25] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) ('*Unions [No 1]*'). It is, however, unclear on what basis the Commonwealth Attorney-General submits (at 4 [10]) that the purpose of s 7(2)(a) is unrelated to the implied freedom, and is instead to 'respond to the separate limitation on State legislative power that arises from the Commonwealth's exclusive power to regulate federal elections.' Section 7(2)(a) indicates that the New South Wales legislature considered that expenditure incurred substantially in respect of elections other than New South Wales elections, should not be caught be the expenditure cap. That says nothing about the existence of any constitutional limit on the legislative powers of the New South Wales Parliament.

7. However, even if it were necessary to consider the correctness of the Commonwealth Attorney-General's construction of s 7(2)(a), it would remain unnecessary, and undesirable, to consider in this matter whether the Commonwealth's power in relation to federal elections is 'exclusive'. The construction of s 7(2)(a) advanced by the Commonwealth is underpinned by the contention that 'State electoral laws cannot touch or concern federal elections more than incidentally'. Regardless of whether or not the Commonwealth's power over federal elections is exclusive, that contention ought to be rejected, because it is contrary to both authority and principle.

8. Further, even if it be the case that the Commonwealth's legislative power over federal elections is exclusive, it is also undoubtedly 'for the people of the State, and not for the people of the Commonwealth, to determine what modifications, if any, should be made ... to the electoral processes which determine what government the State is to have'.[10]

Overlap of matters eliciting electoral regulation by the Commonwealth and States

9. In Australia, federal elections are conducted in States, State electors are also federal electors, and '[s]ocial, economic and political matters ... are increasingly integrated'.[11] Moreover: [12]

> there are national political parties which operate across the federal divide and at federal, State, Territory and local government levels. They must deal with issues at various levels and, where necessary, co-ordinate responses. The presentation of policy or governmental action to the public at one level may be influenced by the ramifications for its acceptance at another. And ... support for a party at State level may influence a person's support for it more widely and at the federal level.

10. Consequently, the Commonwealth and the States each have, in respect of their own electoral processes, a legitimate regulatory concern with a large range of matters which are also of concern to the other polity.

11. It may be right that although 'the Court has rejected any attempted demarcation between federal and State topics of political discussion', it remains possible to draw a workable

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[10] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 242 (McHugh J) ('*ACTV*').
[11] *Unions [No 1]* (2013) 252 CLR 530, 549 [22] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[12] *Unions [No 1]* (2013) 252 CLR 530, 550 [24]-[25] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

line between State and federal elections'.[13] But, in the context of legislative power, the distinction only goes so far. The power to make laws with respect to federal elections in ss 10, 31 and 51(xxxvi), is a power to prescribe 'the processes of choice to which ss 7 and 24 allude'.[14] In exercise of that power the Commonwealth may,[15] for example, enact laws regulating political donations, expenditure and disclosure. Such laws concern 'elections', but the indivisible nature of political discussion means that they are likely to regulate persons, things or transactions which are also of concern to the States. In other words, the facts which produce the indivisibility – the commonality of participants and issues in federal and State elections – have the result that Commonwealth and State *electoral* laws will frequently seek to regulate the same persons, things or transactions.[16]

Independent and concurrent powers

12. The nature of any 'exclusivity' of the Commonwealth's power over federal elections therefore must be considered in a particular context. That context is one in which each polity, in the regulation of matters 'necessary to [its] separate political existence',[17] has a legitimate concern in the same persons, things or transactions. Further, 'the nature of the matters permits the existence of two separate laws in regard to them, each of which may embrace the whole matter',[18] subject, of course, to s 109. Put another way, the powers in relation to federal and State elections concern 'parallel but different'[19] subject matters, although laws made in exercise of the powers may apply to the same things.

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[13] Written submissions of the Commonwealth Attorney-General, 4 [10] (emphasis in original).
[14] *Re Nash [No 2]* (2017) 92 ALJR 23, 30 [35] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).
[15] Subject to constitutional limits, including the implied freedom of political communication.
[16] A similar point has been recognised in Canada, albeit in a context not involving electoral laws. In *Ontario Public Service Employees' Union v Attorney-General (Ontario)* [1987] 2 SCR 2, the Supreme Court upheld an Ontario law which forbade Ontario public servants from running for federal election without taking a leave of absence. Justice Beetz, delivering the reasons of four members of the Court held (at 54-55) that 'if Ontario wanted to ensure the impartiality of its public servants, it had no choice but to include political activities in the federal field in the impugned provisions. The alternative would have made it miss its target altogether.' The law's 'target' was to maintain an apolitical public service.
[17] PH Lane, *Lane's Commentary on the Australian Constitution* (LBC Information Services, 2nd ed, 1997) 92, §12(7), citing Inglis Clark, *Studies in Australian Constitutional Law* (1905) 90, 91. See also W Harrison Moore, *The Constitution of the Commonwealth of Australia* (G Partridge & Co, 1910) 510-511.
[18] PH Lane, *Lane's Commentary on the Australian Constitution* (LBC Information Services, 2nd ed, 1997) 92, §12(7), citing Inglis Clark, *Studies in Australian Constitutional Law* (1905) 90, 91.
[19] *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211, 221 (Mason J).

13. Powers of this kind have sometimes been described as 'independent and concurrent',[20] notwithstanding that strictly, the subject matter of the Commonwealth power might be described as 'exclusive' to the Commonwealth. There are a number of powers of this kind in the *Constitution*.[21]

14. For example, s 51(ii) confers on the Commonwealth an undoubtedly 'exclusive' power to make laws imposing taxation for 'federal purposes'.[22] The States may make laws, applying to the same persons or things, on the 'parallel but different' subject matter of taxation for 'State purposes'. The State power is 'something quite distinct which does not legally (although it may economically) compete with the Commonwealth power'.[23]

15. In *R v Winneke; Ex parte Gallagher*,[24] Mason J appeared to class the powers to make laws establishing federal and State Royal Commissions in the same category. His Honour noted, with respect correctly, that s 109 might still operate (albeit infrequently) as between such laws.[25]

16. Another example is the Commonwealth's power in s 77(iii), read with s 75(iv), to confer federal diversity jurisdiction on State courts.[26] The power is 'exclusive', yet it does not deny to State Parliaments the power to confer a parallel State jurisdiction, over the same matters between residents of different States, on its courts.[27] Instead, where jurisdiction of both kinds is conferred, the question is resolved by s 109.[28]

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[20] *Victoria v Commonwealth* (1957) 99 CLR 575, 614 (Dixon CJ) ('*Second Uniform Tax Case*'), citing W Harrison Moore, *The Constitution of the Commonwealth of Australia* (G Partridge & Co, 1910).
[21] In addition to the powers discussed, other examples may include paragraphs (xxx) and (xxxi) of s 51. As to s 51(xxxi) see *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211, 221 (Mason J).
[22] *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208, 232 (Griffith CJ); *Victoria v Commonwealth* (1957) 99 CLR 575, 617 (Dixon CJ); *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 686 (Evatt J); *Allders International Pty Ltd v Commissioner of State Revenue (Vic)* (1996) 186 CLR 630, 646-647 (Dawson J, albeit in dissent as to the result).
[23] *Second Uniform Tax Case* (1957) 99 CLR 575, 614 (Dixon CJ), citing W Harrison Moore, *The Constitution of the Commonwealth of Australia* (G Partridge & Co, 1910), 510-511.
[24] (1982) 152 CLR 211.
[25] (1982) 152 CLR 211, 221-222 (Mason J).
[26] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 406 [229] (Gummow J); *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 618 [20] (Gleeson CJ, Gummow and Hayne JJ).
[27] *Burns v Corbett* (2018) 92 ALJR 423, 443-444 [80]-[81] (Gageler J); 455-456 [137]-[141], 456-457 [144]-[146] (Nettle J); 462-3 [178]-[180] (Gordon J). See also *Rizeq v Western Australia* (2017) 91 ALJR 707, 712 [6] (Kiefel CJ), 721 [67] (Bell, Gageler, Keane, Nettle and Gordon JJ).
[28] *Felton v Mulligan* (1971) 124 CLR 367, 411-412 (Walsh J, with whom Barwick CJ agreed at 372-373). See also *Burns v Corbett* (2018) 92 ALJR 423, 457 [145]-[146] (Nettle J).

17. Like other words, 'exclusive' is capable of bearing different connotations in different contexts. The above examples demonstrate that a Commonwealth power may be described as 'exclusive', and yet not abstract from State legislative power the persons, things or transactions within the reach of the Commonwealth power.[29]

If the Commonwealth's power is exclusive, authority suggests a test of 'sole or dominant characterisation'

18. Contrary to the Commonwealth Attorney-General's submissions, the unanimous reasons of the Court in *Bourke v State Bank of New South Wales* ('*Bourke*')[30] suggest that, if there is an area of exclusivity in relation to federal elections, a State law will enter that area and be invalid, only if it can be said to have the sole or dominant character of a law with respect to federal elections.

19. The unanimous Court in *Bourke* identified two potential tests for giving effect to a conferral of exclusive power on one polity within a federation. The first test rendered invalid laws of the other polity which had the 'sole or dominant characterisation' of the excluded matter.[31] The second test rendered invalid laws of the other polity which 'touched or affected' the excluded subject matter 'in any way'.[32] Each was rejected in the context of s 51(xiii). The first test would have done too little to give effect to the words of s 51(xiii), as it would have left the Commonwealth free to legislate on the topic of State banking, by making general laws with respect to banking.[33] Conversely, the second test would have abstracted too much from Commonwealth legislative power and conflicted with the 'intended generality of other grants of legislative power contained in s 51'.[34]

20. Importantly, it was because neither of these tests could be applied that the Court concluded that the States do *not* have an exclusive power over State banking.[35] Here,

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[29] For that reason, the proposition relevant in the context of s 52(i), that 'the denial is measured by the grant', is inapplicable in this context: cf *Worthing v Rowell* (1970) 123 CLR 89, 113 (Menzies J).
[30] (1990) 170 CLR 276.
[31] (1990) 170 CLR 276, 286 (the Court).
[32] (1990) 170 CLR 276, 288 (the Court).
[33] (1990) 170 CLR 276, 287 (the Court).
[34] (1990) 170 CLR 276, 288 (the Court).
[35] (1990) 170 CLR 276, 288 (the Court).

however, it is contended that the Commonwealth's power over federal elections is exclusive.[36] For that reason, it is necessary to consider the tests said by a unanimous Court in *Bourke*, to be relevant in that context.

21. The second of the tests in *Bourke* is clearly inapplicable here: a conclusion that State laws could not 'touch or affect federal elections in any way' would be inconsistent with the settled position that justified State laws may, validly, affect federal elections by restricting the flow of communication necessary for the choice of electors in federal elections.[37]

22. That leaves the first test identified in *Bourke*, one of 'sole or dominant characterisation'. Such a test is erroneous in the ordinary context of the characterisation of Commonwealth laws,[38] but that does not mean it is inapplicable where the question is whether a State law transgresses a boundary. So much follows from *Bourke*, where the Court set out Barwick CJ's observations in *Victoria v Commonwealth* ('the *Pay-roll Tax Case*'):[39]

> [W]hen a law may possibly be regarded as having either of two subjects as its substance, one of which is within Commonwealth power and the other is not, a decision must be made as to that which is in truth the subject matter of the law. Although usually not an appropriate course in determining whether a law is a law on an enumerated topic, in such a case, the decision of what is the subject matter of the law may be approached somewhat in the manner the validity of a law claimed to be within one of the two mutually exclusive lists in the Canadian Constitution is determined. The law must be upon one or other of the subjects. It cannot be on both.

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[36] Written submissions of the Commonwealth Attorney-General, 3 [8] and footnote 10.
[37] See, for example, *McCloy v New South Wales* (2015) 257 CLR 178 ('*McCloy*'); *Tajjour v New South Wales* (2014) 254 CLR 508.
[38] See, for example, *New South Wales v Commonwealth* (2006) 229 CLR 1, 72 [51] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
[39] (1971) 122 CLR 353, 372-373 (Barwick CJ), quoted at *Bourke* (1990) 170 CLR 276, 286-287 (the Court). The law in Canada, to which Barwick CJ referred, remains that a provincial law in relation to a provincial matter may validly affect a federal matter, provided the 'pith and substance' of the law is the provincial matter, not the federal matter. See, for example, *Rogers Communications Inc v Châtequguay* [2016] 1 SCR 467, 485-486 [35]-[37], 489 [47], 490 [50] (Wagner and Côté JJ).

23. As the Court noted in *Bourke*, the Chief Justice's comments 'have greater force' when understood in the context of exclusive powers, rather than ordinary characterisation.[40] Further, its application here would be consistent with other authority in this Court,[41] including, as discussed below, *Smith v Oldham* ('*Smith*').[42]

24. On the test suggested by *Bourke*, of 'sole or dominant characterisation', the exclusivity of the Commonwealth's power with respect to federal elections has no consequence for the construction of s 7(2)(a) of the EF Act. On no view can the sole or dominant characterisation of the impugned law be said to be the regulation of federal elections.

The Commonwealth's proposed test is inconsistent with authority and principle

25. The Commonwealth Attorney-General's primary contention in this case is that, because the Commonwealth's power over federal elections is exclusive, 'State electoral laws cannot touch or concern federal elections more than incidentally'. Regardless of the answer to the question of 'exclusivity', that proposed limit on State legislative power is contrary to authority and principle.

26. The Commonwealth seeks support for the proposed limit by drawing a comparison with 'the absence of Commonwealth power with respect to State banking'.[43] The comparison is, with respect, unhelpful, and the suggested test wholly inapt. As discussed above, the test adopted for s 51(xiii) in *Bourke* was framed as it was because the States do not have 'exclusive' power to make laws with respect to State banking.[44]

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[40] (1990) 170 CLR 276, 287. In *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169, Stephen J noted at 194 that Barwick CJ's suggestion of a sole characterisation test 'may perhaps be attributable to the particular circumstances of that case, in which one character of the law there impugned was that of a law with respect to the power or functions of a State.' See also *Commonwealth v Tasmania* (1983) 158 CLR 1, 152 (Mason J).

[41] For example, in *R v Brisbane Licensing Court; Ex parte Daniell* (1920) 28 CLR 23, a Queensland Act required that a local option vote in relation to liquor licences be held on the same day as the Senate election in 1917. A Commonwealth law prohibited State referenda being held on the same day as an election for the Senate or House of Representatives. The Queensland law, in substance, was not a law with respect to federal elections, but by requiring a referendum to be held on the same day as a Senate election, it clearly 'touched or concerned' federal elections more than incidentally. It was argued, in reliance on *Smith*, that the Commonwealth's power over federal elections was exclusive. Yet the Court delivered a single set of reasons which did not refer to exclusive power and decided the case under s 109.

[42] (1908) 6 CLR 41.

[43] Written submissions of the Commonwealth Attorney-General, 3 [8] and footnote 12.

[44] (1990) 170 CLR 276, 288 (the Court). See also *Attorney-General (Vic) v Andrews* (2007) 230 CLR 369, 391 [11] (Gleeson CJ).

27. In *Bourke*, the Court unanimously held that the only satisfactory solution to the problem presented by the words of s 51(xiii) ('banking, other than State banking') was to conclude that 'there *is no exclusive State power* to make laws with respect to State banking'.[45] Instead, s 51(xiii) required that 'when the Commonwealth enacts a law which can be characterised as a law with respect to banking, that law does not touch or concern State banking, except to the extent that any interference with State banking is so incidental as not to affect the character of the law as one with respect to banking other than State banking'.[46] The Court went on:[47]

> ... these are the tests used in the familiar process of characterisation. But they are employed in the context of an embracing Commonwealth power expressed as one to make laws with respect to banking other than State banking. They are not employed in the context of an exclusive State legislative power with respect to State banking. So, if a law is not one with respect to banking, it is not subject to a restriction that it must not touch or concern State banking.

28. In other words, the test adopted in *Bourke* is peculiarly adapted to the task of determining whether a Commonwealth law might be characterised as a law with respect to the subject matter of 'banking, other than State banking'.[48] The problem there was not one of one polity within a federation being given an 'exclusive' power over a particular subject matter, as the last sentence in the quote above emphatically demonstrates. Rather, the words 'other than State banking' were simply a 'limitation upon the power with respect to banking'.[49]

29. Thus the conclusion that the Commonwealth's power is exclusive, if it be right, logically cannot lead to the adoption of the test in *Bourke* here.

30. The application here of the *Bourke* test is also not supported by *Smith v Oldham*, the primary authority upon which the Commonwealth Attorney-General relies for the

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[45] (1990) 170 CLR 276, 288 (the Court) (emphasis added).
[46] (1990) 170 CLR 276, 288-289 (the Court).
[47] (1990) 170 CLR 276, 289 (the Court).
[48] See also *Attorney-General (Vic) v Andrews* (2007) 230 CLR 369, 392 [12]-[14] (Gleeson CJ); 407 [79] (Gummow, Hayne, Heydon, Crennan JJ), making the same point in relation to the analogous test for s 51(xiv), the Commonwealth's power to make laws for 'insurance, other than State insurance'.
[49] (1990) 170 CLR 276, 290. The words in s 51(xiv) of 'insurance, other than State insurance', similarly do not give the States exclusive power to make laws with respect to State insurance: *Attorney-General (Vic) v Andrews* (2007) 230 CLR 369, 391 [11] (Gleeson CJ).

proposition that the Commonwealth's power over federal elections is exclusive.[50] In *Smith*, the Court held valid a Commonwealth law, which required that commentary on a candidate, political party or issue in a federal election, and published in the period between the issue and return of the writs, be signed by the author. The appellants argued that law was outside power because it related to the conduct of newspapers, a subject matter said to be within the 'reserved powers of the States'.[51] That submission was rejected.[52] Perhaps because of the appellants' reliance on reserved powers, each judge commented that the power to enact s 181AA was in fact 'exclusive' to the Commonwealth.

31. There is, however, nothing in *Smith* (or the other authorities cited by the Commonwealth Attorney-General[53]) which supports the contention that 'State electoral laws cannot touch or concern federal elections more than incidentally'. On the contrary, such a test is inconsistent with the reasons given in *Smith* for describing the power as 'exclusive'. One reason was that the States had 'no concern' in federal elections.[54] As discussed above, however, the States clearly do have concern with many things which 'touch and concern federal elections more than incidentally'. Another reason given in *Smith* for the power of the Commonwealth being 'exclusive' was that the colonies did not possess power over federal elections prior to federation, and were given none by the *Constitution*.[55] That reasoning does not justify excluding from State legislative power those persons, things and transactions, the characteristics of which touch or concern both federal and State elections.

32. Moreover, to the extent *Smith* is authority that the Commonwealth power is exclusive, the reasoning suggests the application here, of a 'sole or dominant characterisation' test. At the time *Smith* was decided, whether a Commonwealth law was within a head of power turned on the law's 'true nature and character', a test which drew upon decisions

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[50] (1912) 15 CLR 355. With respect, none of the other High Court authorities referred to by the Commonwealth Attorney-General (at 3 [10], footnote 10) do more than state, without analysis, that the Commonwealth's power as to federal elections is exclusive.
[51] (1912) 15 CLR 355, 356.
[52] (1912) 15 CLR 355, 361 (Barton J).
[53] See written submissions of the Commonwealth Attorney-General, 3 [8], footnotes 10 and 12.
[54] (1912) 15 CLR 355, 358 (Griffith CJ), 361 (Barton J).
[55] (1912) 15 CLR 355, 360 (Barton J).

of the Privy Council in relation to the Canadian Constitution.[56] The *obiter dicta* in *Smith* may therefore be understood to suggest that what is 'exclusive' to the Commonwealth, is the power to make laws the 'substantial' or 'true nature and character' of which, is federal elections.

33. Principle also tells against the translation of the *Bourke* test to this context. In *Bourke*, there was a reasoned basis for asking, as a first step in the analysis, whether the law could be characterised as a law with respect to banking generally. There is, however, no basis at all for first asking the analogous question of whether the State law is about 'elections' generally, for the basic reason that the States' legislative powers are not enumerated. Yet the Commonwealth Attorney-General proposes a restriction on State legislative power limited to 'State electoral laws'.[57] If that limit were omitted, as principle suggests it must be, the consequences of the Commonwealth's test are extremely wide. For example, it would appear to render invalid State criminal laws applying to the conduct of persons at polling booths for a federal election.

34. Nor is there any secure basis[58] for an implication which would render invalid all State laws 'touching or concerning' federal elections 'more than incidentally'. The ability of the Commonwealth to rely on s 109 of the *Constitution* to displace State laws removes any need for such an implication.[59]

Even if the Bourke test were correct, it produces no consequences for s 7(2)(a)

35. Finally, even if a test of the kind articulated in respect of s 51(xiii) in *Bourke* did apply here, no consequences would follow for the construction of s 7(2)(a). *Bourke* still

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[56] See, for example, *R v Barger* (1908) 6 CLR 41, 65, 73, 77 (Griffith CJ, Barton and O'Connor JJ).
[57] Written submissions of the Commonwealth Attorney-General, 3 [8].
[58] Any implication must be securely based in the text or structure of the Constitution: see *ACTV* (1992) 177 CLR 106, 134-135 (Mason CJ); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 453 [389] (Hayne J), [469]-[470] (Callinan J); *McCloy* (2015) 257 CLR 178, 283 [318] (Gordon J). At least where an implication is structural, it must be logically or practically necessary for the preservation of the constitutional structure: see *ACTV* (1992) 177 CLR 106, 135 (Mason J); *McGinty v Western Australia* (1996) 186 CLR 140, 169 (Brennan CJ).
[59] *Burns v Corbett* (2017) 92 ALJR 423, 446 [94]-[95] (Gageler J), 457 [146] (Nettle J), 462 [175], 463 [179] (Gordon J), 479 [260] (Edelman J). See also *Ontario Public Service Employees Union v Attorney-General (Ontario)* [1987] 2 SCR 2, 19 (Dickson CJ), rejecting the application of the 'interjurisdictional immunities' doctrine on the basis it was unnecessary because 'the federal Parliament always has a powerful weapon – its own legislation. If the Parliament does not approve of the application of a provincial law to a matter within federal jurisdiction it can easily legislate to prevent the unwanted application'.

requires a test of *characterisation*. Laws frequently apply to different classes of persons or things, but they do not for that reason change their character.[60] Instead, the question turns on the nature of the rights, duties, powers, and privileges, which the law changes, regulates or abolishes.[61]

36. The New South Wales law imposes a duty on particular persons not to incur expenditure over a particular amount during a capped State expenditure period. Where it applies to expenditure which has a more than insubstantial or incidental connection with federal elections, it does so because that expenditure is also relevant to New South Wales elections. Hence, even where it applies to such expenditure, the law cannot be characterised as a law with respect to federal elections.

The implied freedom: The test for justification

37. *Lange v Australian Broadcasting Commission* requires that 'any effective burden on the [implied] freedom must be justified.'[62] A majority in both *McCloy* and *Brown* suggested that 'the answer to whether this is so is found by proportionality testing',[63] at least, 'unless some other means of justifying the burden was identified.'[64] For their Honours, it would appear that any justification analysis which does not proceed through all three steps of structured proportionality would 'lead to unjustified outcomes.'[65] Certainly, that appears to have been the plurality's reason for not embracing the Commonwealth's proposed calibrated test in *Brown*.[66]

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[60] *Pidoto v Victoria* (1943) 68 CLR 87, 108-109 (Latham CJ); *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 186 (Latham CJ, noting that income tax laws may 'apply to clergymen and to hotelkeepers as members of the public; but no-one would describe an income tax law as being, for that reason, a law with respect to clergymen or hotelkeepers').

[61] *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, 561 [12] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ). See also *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1, 7 (Kitto J).

[62] *Brown* (2017) 261 CLR 328, 369 [127] (Kiefel CJ, Bell and Keane JJ) (emphasis removed).

[63] *McCloy* (2015) 257 CLR 178, 213 [68] (French CJ, Kiefel, Bell and Keane JJ).

[64] *Brown* (2017) 261 CLR 328, 370 [130] (Kiefel CJ, Bell and Keane JJ), albeit in the context of necessity testing. See also *Clubb v Edwards; Preston v Avery* [2018] HCATrans 208 (10 October 2018) lines 5423-5432 (Kiefel CJ).

[65] Jochen Von Bernstorff, 'Proportionality Without Balancing: Why Judicial Ad Hoc Balancing is Unnecessary and Potentially Detrimental to the Realisation of Individual and Collective Self-determination' in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing, 2014) 63, 64.

[66] *Brown* (2017) 261 CLR 328, 369 [128] (Kiefel CJ, Bell and Keane JJ).

38. However, treating structured proportionality as the only means of justifying a burden would effectively elevate a tool of analysis to a constitutional rule, even though structured proportionality does not emerge from the Constitution itself.[67] In that event, the tools of analysis would 'themselves take over, ceasing to be a means to an end and becoming the end itself'.[68]

39. Moreover, structured proportionality cannot be treated as synonymous with justification. Whether a law is justified is a question of judgment.[69] Structured proportionality does not remove the element of judgment required, nor does it 'remove the need for reasoned elaboration of that judgment'.[70] To hold otherwise would be to hold that all of the burdens upheld in implied freedom cases prior to *McCloy* were not fully justified. Moreover, the approaches to justification adopted by Gageler J[71] and Gordon J[72] do not fail to explain why a law is either upheld, or held invalid.

40. Further, even if all burdens must be proportionate to be justified, it does not follow that the Court must engage in structured proportionality in all cases. For example, adopting suitability as the criterion of justification for slight burdens is an example of what Professor Barak calls 'principled balancing formulas'. The purpose of these formulas is to provide an intermediate step between the abstraction of the 'basic balancing rule' (which weighs the marginal social importance of maintaining the constitutional right at stake against the marginal social importance of the law that detracts from it) and the 'specific balancing rule' (which is the application of the basic balancing rule in an individual case). These principled balancing formulas 'express the principled consideration which underlies the constitutional right and the justification of its limitation' in certain categories of contexts.[73] The formulas 'determine the conditions

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[67] Cf *McCloy* (2015) 257 CLR 178, 213 [68] (French CJ, Kiefel, Bell and Keane JJ); *Brown* (2017) 261 CLR 328, 376 [159] (Gageler J), 476-477 [473] (Gordon J).
[68] *Brown* (2017) 261 CLR 328, 466 [433] (Gordon J), quoting Professor Anne Twomey, 'Proportionality and the Constitution' (Speech delivered at the ALRC Freedoms Symposium, 8 October 2015).
[69] *McCloy* (2015) 257 CLR 178, 281-282 [309] (Gordon J).
[70] *McCloy* (2015) 257 CLR 178, 238 [151] (Gageler J).
[71] *Brown* (2017) 261 CLR 328, 378-379 [164]-[165] (Gageler J).
[72] *Brown* (2017) 261 CLR 328, 431-433 [315]-[325] (Gordon J).
[73] Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012) 543.

that the limiting law must satisfy for the limitation to be proportional *stricto sensu*.'[74] Importantly, the process of identifying a principled balancing formula against which laws limiting a right might be tested is, in itself, a process of 'balancing'.[75]

41. Thus, to adopt suitability as a criterion of justification for slight burdens is to express the view that where the risk posed to the constitutionally prescribed system of government is low, the marginal social importance of maintaining free political discourse will be offset by the marginal social importance of the effect of any law that is rationally connected to a legitimate purpose. That is not to say that a slight burden need not be fully justified.[76] Rather, it is to adopt a criterion for justification which produces the same answers as full structured proportionality, but without requiring courts to engage in contested value judgments unnecessarily.

42. If, however, the tools of analysis offered by structured proportionality prove useful in an appropriate case, they should nonetheless be applied without undue granularity. To the extent they can be, necessity and adequacy of balance should be applied in a broad-gauged way that leaves a 'domain of selections' to the legislature,[77] rather than as a search for scientific exactitude that admits of only one right answer, or a very narrow range of right answers.

43. In the context of the final limb, that means that a law should be regarded as adequate in its balance, unless its effect on the implied freedom is 'grossly disproportionate' to the importance of achieving its legitimate purpose.[78] Indeed, a standard of gross disproportionality may inhere in the qualification – unique to the Australian context –

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[74] Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012) 543.

[75] Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012) 544. See also *McCloy* (2015) 257 CLR 178, 236-237 [146]-[148] (Gageler J).

[76] Cf *Brown* (2017) 261 CLR 328, 369-370 [127]-[131] (Kiefel CJ, Bell and Keane JJ).

[77] *McCloy* (2015) 257 CLR 178, 217 [82] (French CJ, Kiefel, Bell and Keane JJ) in the context of necessity testing.

[78] See *Davis v Commonwealth* (1988) 166 CLR 79, 100 (Mason CJ, Deane and Gaudron JJ); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 101-102 (McHugh J); *Brown* (2017) 261 CLR 328, 422-423 [290] (Nettle J). However, with respect, Nettle J's consideration in the adequacy of balance stage of proportional alternatives that had been rejected at the necessity stage (at 425 [295]) involves an unduly granular approach to strict proportionality, which lies at odds with the reason for adopting a standard of 'gross disproportionality'.

that the balance be 'adequate'.[79] If there is a value judgment which is 'consistent[] with the limits of the judicial function',[80] it is this coarse-grained value judgment.

PART V: Time Estimate

44. Queensland estimates that 30 minutes will be required for the presentation of its oral argument.

Dated 26 November 2018.

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[79] Shireen Morris and Adrienne Stone, 'Before the High Court: Abortion Protests and the Limits of Freedom of Political Communication: *Clubb v Edwards; Preston v Avery*' (2018) 40 *Sydney Law Review*, n 75 (forthcoming).

[80] *McCloy* (2015) 257 CLR 178, 195 [2(B)(3)] (French CJ, Kiefel, Bell and Keane JJ). See also at 219-220 [89]-[90].