IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S211/2014

BETWEEN:

JEFFERY RAYMOND McCLOY
First Plaintiff

and

McCLOY ADMINISTRATION PTY LIMITED
Second Plaintiff

and

NORTH LAKES PTY LIMITED
Third Plaintiff

and

STATE OF NEW SOUTH WALES
First Defendant

and

INDEPENDENT COMMISSION AGAINST CORRUPTION
Second Defendant

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

I. INTERNET PUBLICATION

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

II. BASIS OF INTERVENTION

2. The Attorney-General for the State of Queensland intervenes in these proceedings pursuant to s 78A of the *Judiciary Act 1903* (Cth).

III. REASONS WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

IV. STATUTORY PROVISIONS

4. The relevant provisions are set out in the annexure to the plaintiffs' submissions.

V. SUBMISSIONS

(a) The limited role of rational connection

5. The Attorney-General for Queensland intervenes in support of the defendants and adopts the submissions of the defendants.

6. In addition to adopting the submissions of the defendants, the Attorney-General develops in more detail in these submissions the threshold role of 'rational connection', where necessary, in terms of the second limb of the *Lange* analysis.

7. It is well established that the 'first inquiry' which arises on the second limb of the *Lange* test 'concerns the identification of a legitimate statutory purpose for the provision in question'.[1] The identification of that purpose is arrived at by the ordinary processes of statutory construction.[2]

8. *Unions NSW v New South Wales* ('*Unions NSW*') does not hold that in every case the defendant has to meet an additional threshold requirement of a 'rational connection' between a legitimate purpose and an impugned provision before there is further consideration of the second limb of *Lange*. Nor does *Unions NSW* give the concept of a 'rational connection' the wide meaning that the plaintiffs appear to attribute to it.

9. In *Unions NSW*, the Court was relevantly concerned with a challenge to the validity of s 96D of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ('the EFED Act'). The defendant submitted that s 96D served the general anti-corruption purposes of the EFED Act. Yet any relationship between those purposes and s 96D

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1 *Unions NSW v New South Wales* (2013) 88 ALJR 227 at 237 [46] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) ('*Unions NSW*'); *Tajjour v New South Wales* (2014) 88 ALJR 860 at 893 [148] (Gageler J) ('*Tajjour*').

2 *Unions NSW* (2013) 88 ALJR 227 at 238 [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

was obscure. Given that fact, French CJ, Hayne, Crennan, Kiefel and Bell JJ observed:[3]

> Where, as here, the general purposes of the EFED Act are relied upon to justify the restrictive measures of s 96D, that section must be understood, by a process of statutory construction, to be connected to those purposes and to further them in some way.

10. The purpose of s 96D, however, proved impossible to discern by the ordinary process of statutory construction. As the joint judgment remarked:[4]

> It is not evident, even by a process approaching speculation, what s 96D seeks to achieve by effectively preventing all persons not enrolled as electors, and all corporations and other entities, from making political donations.

11. The joint judgment therefore concluded that the purpose of the wide but incomplete prohibition in s 96D was 'inexplicable'.[5] Because that was so, the Court could not proceed to ask whether the means adopted were 'reasonably appropriate and adapted' to serve a legitimate end.[6] The analysis required by the second *Lange* question was therefore 'forestalled'.[7]

12. As the joint reasons in *Union NSW* demonstrate, the requirement to show a 'rational connection' only arose because it was not otherwise evident how s 96D could be related to the legitimate end claimed by the defendant, and ordinarily not a matter of difficulty.[8] The absence of any rational connection with the general anti-corruption objects of the EFED Act demonstrated that s 96D served no legitimate end, thereby avoiding the need for further consideration of the second limb of *Lange*. 'Rational connection', in short, was only a tool for determining if a provision had a legitimate end.

13. If, however, there is no patent 'disconnect' between the impugned provision and a legitimate end, no separate requirement to show a 'rational connection' will arise. In such circumstances, to ask whether the impugned provision is 'rationally connected' to the legitimate end would be superfluous. More importantly, it would conflate issues going to the identification of a legitimate end with those addressed to whether the provision is 'reasonably appropriate and adapted' to serving that end. As French CJ observed of the plaintiffs' submissions in *Tajjour v New South Wales* (*'Tajjour'*):[9]

> Tajjour and Hawthorne argued that s 93X casts so wide a net that it could not be said to be reasonably adapted to serve a legitimate end. That aspect of their written submissions *tended to conflate the question whether the section serves a legitimate*

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3 *Unions NSW* (2013) 88 ALJR 227 at 238 [50].
4 *Unions NSW* (2013) 88 ALJR 227 at 238-239 [56].
5 *Unions NSW* (2013) 88 ALJR 227 at 239 [59].
6 *Unions NSW* (2013) 88 ALJR 227 at 239 [60].
7 *Unions NSW* (2013) 88 ALJR 227 at 239 [60].
8 *Unions NSW* (2013) 88 ALJR 227 at 237 [47].
9 *Tajjour* (2014) 88 ALJR 860 at 877-878 [42] (emphasis added). See also Gageler J at 893 [149].

> *end with the proportionality question. While the net cast by s 93X is wide enough to pick up a large range of entirely innocent activity, it clearly does apply to conduct which is properly regarded as likely to result in the formation, maintenance and extension of criminal networks*... Wide as its net may be, the proposition that s 93X serves a legitimate end must be accepted.

14. Furthermore, even in cases where the test of 'rational connection' is relevant, it only requires consideration of whether the provision is 'connected' to the suggested purposes and 'furthers' them in some way.[10]

15. That requirement has a low threshold, met by showing that the provision is 'capable of advancing that purpose'.[11]

16. The existence of a 'rational connection' is not denied because a provision goes further than some might think desirable, or not as far as others might think desirable.[12] Any other view of 'rational connection' would mean that it subsumes the proportionality analysis in the second limb of *Lange*. *Unions NSW* cannot be read as intending such a result.[13]

17. Yet, that is precisely the approach adopted by the plaintiffs for example at paragraphs [56] –[65] of their submissions.

18. Two practical instances serve to illustrate why it is a matter for parliament and not for a court to determine the desirability of the means of legislative response to a particular mischief.

19. One such illustration is the legislative response to slavery in the United Kingdom in the eighteenth and nineteenth centuries. The British Parliament ultimately abolished slavery in the colonies by the *Slavery Abolition Act 1833* (UK) 3 & 4 Will IV, c 73, notwithstanding that slavery had been held to have no common law or statutory status in England in *Somerset v Stewart*.[14] In the lead up to the abolition of slavery in the colonies the British Parliament had enacted the *Abolition of the Slave Trade Act 1807* (UK) 47 Geo 3 Sess 1, c 36. Arguably, its most potent provision, section V, was not directed at abolishing slavery, nor prohibiting the trade, but rather depriving the slavers, and perhaps more importantly the ship owners and charterers, of the ability to insure the voyage.

20. A more contemporary illustration is the governmental response in Australia to the deleterious health impact of cigarette smoking. The legislative response has not been to ban the production, sale and consumption of cigarettes. Rather, amongst other things, the response has been to impose hefty taxation on cigarettes to thereby make

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10 *Unions NSW* (2013) 88 ALJR 227 at 238 [50], [54]; see also at 248-249 [130]-[132] (Keane J).

11 *Tajjour* (2014) 88 ALJR 860 at 888 [112] (Crennan, Kiefel and Bell JJ); see also at 883 [78], 884 [81] (Hayne J).

12 *Tajjour* (2014) 88 ALJR 860 at 888 [112] (Crennan, Kiefel and Bell JJ); see also at 884 [82] (Hayne J).

13 *Unions NSW* (2013) 88 ALJR 227 at 237 [46].

14 (1772) 98 ER 499; (1772) Lofft 1.

them less affordable and by price disincentive reduce the prevalence of cigarette smoking.

21. What both matters illustrate is that there are many, no doubt often contestable, legislative responses to a particular mischief. Certainly in the Australian experience, the proper balance is found in, once a law is seen to provide a means capable of addressing that mischief, leaving questions of desirability the province of parliament, checked only by the requirement of the second limb of the *Lange* analysis.

10 22. It is respectfully submitted, thus, that 'rational connection' ought not be equated with the requirement of 'suitability' found in other constitutional systems, and that the reference in *Tajjour* of Crennan, Kiefel and Bell JJ at [110] should not be taken as one holding there is such equality, but rather as a reference to a comparator conception. The basis of this submission is as follows.

23. First, the requirement of 'suitability' enables courts to ask whether measures are based on 'arbitrary, unfair or based on irrational considerations': see, for example, *R v Oakes* [1986] 1 SCR 103 at 139. No Australian authority, however, has suggested that 'rational connection' enables a court to make these kinds of judgments.[15]

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24. Secondly, the 'suitability' test is unnecessary and could be wholly subsumed within the test of 'necessity'. As Barak has pointed out, the only purpose of 'suitability' seems to be to dispose of those cases where the means chosen by the limiting law 'do advance the law's purpose, but only to a very limited extent'. [16]

25. Thirdly, and relatedly, the requirement of rational connection expressed in *Unions NSW* and *Tajjour* is concerned with whether the law is capable of furthering a legitimate end. That is respectfully not able to be reconciled with the notion that a law that furthers the end only to a slight extent fails to have a rational connection.

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(b) Application to the plaintiffs' challenge

26. The propositions above cannot be reconciled with the plaintiffs' treatment of 'rational connection'. The plaintiffs claim that Division 4A of Part 6 of the EFED Act has no rational connection to a legitimate end primarily because the definition of 'close associates' in s 96GB is under-inclusive: it does not cover individuals and partnerships or others who may have the capacity to control 'property developers' as defined.[17] The plaintiffs, however, have failed to construe Division 4A in its wider statutory context. The extrinsic materials demonstrate that combating the perception of undue influence
40 and restoring public confidence in the planning development process was the mischief to which ss 96GA and 96GB(1) and (2) were directed. Thus, in the Legislative Council, the Attorney-General, the Hon John Hatzistergos, explained:[18]

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15 *Tajjour* at 893 [150] (Gageler J).

16 Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) at 315-316.

17 Plaintiffs' submissions, paras 55-61.

18 New South Wales, *Parliamentary Debates*, Legislative Council, 3 December 2009 at 20570.

> The Government has made it quite clear that it is time to end speculation about the influences of donations on major developments in New South Wales. To that end, it is acknowledged that the donations have cast a shadow over the good work of the Government and have tainted the decent public servants who run our planning system...This legislation will go some way to restoring the confidence of the public in the Government's first-rate planning system, which, regrettably, has been maligned by the accusations and imputations that have effectively raised perceptions that somehow donations have influenced outcomes.

27. The special case also records a long history of reports from the Independent Commission Against Corruption ('ICAC') and parliamentary committees concerning donations by property developers to local governments and State officials, and the concerns about corruption and undue influence that these donations generated.[19] These extrinsic materials, coupled with the prohibition on property developers making political donations in s 96GA, reveal the object of Division 4A. They make it apparent that the relevant object, or end, is to secure the integrity of the electoral process by combating the perception of corruption and undue influence in the planning development process.

28. Once that end is established by the process of statutory construction, the next question is whether it is legitimate. Contrary to the plaintiffs' submissions, the answer is plainly 'yes'. In *Unions NSW*, Keane J said:[20]

> It cannot be doubted that the protection of the integrity of the electoral process from secret or undue influence is a legitimate end the pursuit of which is compatible with the freedom of political communication.

29. No member of the Court has suggested otherwise. It follows that there is no basis for the plaintiffs' contention that Division 4A is invalid because it lacks a rational connection to a legitimate end.

30. The plaintiffs' attempts to use a 'rational connection' test to invalidate Division 2A should also be rejected. The purposes of Division 2A of Part 6 of the EFED Act are apparent. The donation caps are imposed in order to remove the ability of persons to make large-scale donations to political parties, thereby reducing the influence of such donations in the electoral process and the risk of possible corruption. At the same time, the caps help to create 'a level electoral playing field'.[21]

31. Such purposes or ends are legitimate. In *Unions NSW*, every member of the Court acknowledged this point. The joint judgment described the purpose of the provisions of Part 6 (which includes Division 2A), with the exception of s 96D, as follows:[22]

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19 Special Case Book ('SCB'), Vol 1 at 74-79 [48]-[59].
20 *Unions NSW* (2013) 88 ALJR 227 at 250 [138].
21 *Unions NSW* (2013) 88 ALJR 227 at 249-250 [136] (Keane J).
22 *Unions NSW* (2013) 88 ALJR 227 at 238 [53].

> [Those provisions] seek to remove the need for, and the ability to make, large-scale donations to a party or candidate. It is large-scale donations which are most likely to effect influence, or be used to bring pressure to bear, upon a recipient. These provisions, together with the requirements of public scrutiny, are obviously directed to the mischief of possible corruption.

32. Justice Keane, moreover, saw no difficulty with s 95A operating so as prevent wealthy donors from distorting the flow of political communication to and from the people of the Commonwealth.[23]

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33. The plaintiffs' submissions about the lack of a rational connection reduce to this proposition: Division 2A is invalid because any attempt to reduce the influence of the wealthy in the State electoral process is incompatible with the constitutionally prescribed system of representative and responsible government.[24] Quite apart from the Australian authority that contradicts such a proposition, however, there is nothing in the text or structure of the Commonwealth Constitution that supports it. The constitutionally prescribed system of representative and responsible government is not inconsistent with everyone, wealthy or of limited means, being subject to uniform caps on political donations at a State level.[25]

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34. The plaintiffs' submissions regarding s 96E of the EFED Act are, respectfully, also flawed. When s 96E is construed within the context of the EFED Act as a whole, its primary purpose or end is evident: to prevent the circumvention of the caps in Division 2A of Part 6. It would be anomalous, and self-defeating, for a legislature to prohibit the donation of money beyond certain amounts but to allow unrestricted donations of office accommodation, vehicles, computers and other property, as well as services such as advertising. The fact that there is a mechanism for disclosing political donations in Division 2 of Part 6 does not detract from that purpose, for disclosure alone would still allow the caps to be circumvented.[26]

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35. Given the end of s 96E that is disclosed by the process of statutory construction, there can be little doubt about its legitimacy.[27]

36. Accordingly, the plaintiffs' reliance on a 'rational connection' test is respectfully misplaced. The impugned provisions all have legitimate ends. For the reasons developed by the defendants, moreover, the provisions are reasonably appropriate and adapted to those ends in a manner compatible with the maintenance of the constitutionally prescribed systems of representative and responsible government.

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23 *Unions NSW* (2013) 88 ALJR 227 at 249-250 [136].

24 Plaintiffs' submissions, paras 93-102.

25 Furthermore, the widespread use of caps in democracies around the world (see SCB, Vol 1 at 79-80 [63]-[64]) demonstrates as settled the view among mature democracies that they do not have deleterious effects suggested by the plaintiffs.

26 The fact that the prohibition on indirect campaign contributions was inserted first makes no difference since s 96E must now be read with Division 2A: see *Commissioner of Stamps v Telegraph Investment Company Pty Ltd* (1995) 184 CLR 453 at 463.

27 The legitimate end of preventing circumvention of valid contribution limits is well recognised in the United States jurisprudence: see *Federal Election Commission v Beaumont* 539 US 146 at 155 (2003) (Souter J, with whom Rehnquist CJ, Stevens, O'Connor, Ginsburg and Breyer JJ joined).

37. The questions in the special case should be answered accordingly.

VI. ESTIMATE OF TIME REQUIRED FOR ORAL ARGUMENT

38. The Attorney-General estimates that 20 minutes should be sufficient to present her oral argument.

Dated: 9 March 2015

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