

HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL, BELL AND KEANE JJ

UNIONS NSW & ORS

PLAINTIFFS

AND

STATE OF NEW SOUTH WALES

DEFENDANT

Unions NSW v New South Wales
[2013] HCA 58
18 December 2013
S70/2013

ORDER

The questions asked by the parties in the Special Case dated 12 August 2013, as amended, be answered as follows:

Question 1

Is s 96D of the Election Funding, Expenditure and Disclosures Act 1981 (NSW) invalid because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution?

Answer

Yes.

Question 2

Is s 95G(6) of the Election Funding, Expenditure and Disclosures Act 1981 (NSW) invalid because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution?

Answer

Yes.

Question 3

Do ss 7A and 7B of the Constitution Act 1902 (NSW) give rise to an entrenched protection of freedom of communication on New South Wales State government and political matters?

Answer

Unnecessary to answer.

Question 4

If so, is s 96D of the Election Funding, Expenditure and Disclosures Act 1981 (NSW) invalid because it impermissibly burdens that freedom, contrary to the New South Wales Constitution?

Answer

Unnecessary to answer.

Question 5

Further, if the answer to question 3 is "yes", is s 95G(6) of the Election Funding, Expenditure and Disclosures Act 1981 (NSW) invalid because it impermissibly burdens that freedom, contrary to the New South Wales Constitution?

Answer

Unnecessary to answer.

Question 6

Is s 96D of the Election Funding, Expenditure and Disclosures Act 1981 (NSW) invalid under s 109 of the Commonwealth Constitution by reason of it being inconsistent with s 327 of the Commonwealth Electoral Act 1918 (Cth)?

Answer

Unnecessary to answer.

Question 7

Is s 96D of the Election Funding, Expenditure and Disclosures Act 1981 (NSW) invalid under s 109 of the Commonwealth Constitution by reason of it being inconsistent with Pt XX of the Commonwealth Electoral Act 1918 (Cth)?

Answer

Unnecessary to answer.

Question 8

Is s 96D of the Election Funding, Expenditure and Disclosures Act 1981 (NSW) invalid because it impermissibly burdens a freedom of association provided for in the Commonwealth Constitution?

Answer

Unnecessary to answer.

Question 9

Who should pay the costs of the special case?

Answer

The defendant should pay the plaintiffs' costs.

Representation

B W Walker SC with N J Owens for the plaintiffs (instructed by Holding Redlich Lawyers)

M G Sexton SC, Solicitor-General for the State of New South Wales and J K Kirk SC with A M Mitchelmore for the defendant (instructed by Crown Solicitor (NSW))

Interveners

N J Williams SC with C L Lenehan for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

W Sofronoff QC, Solicitor-General of the State of Queensland with G J D del Villar for the Attorney-General of the State of Queensland, intervening (instructed by Crown Law Qld)

S G E McLeish SC, Solicitor-General for the State of Victoria with A D Pound for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor)

G R Donaldson SC, Solicitor-General for the State of Western Australia with C S Bydder for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor (WA))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Unions NSW v New South Wales

Constitutional law – Implied freedom of communication on governmental and political matters – Section 96D of *Election Funding, Expenditure and Disclosures Act* 1981 (NSW) ("EFED Act") prohibits political donations unless made by individual enrolled on roll of electors – Section 95G(6) of EFED Act aggregates expenditure by political party and affiliated organisations for purposes of cap on electoral communication expenditure – Whether political communication at State level can effectively burden federal implied freedom of communication – Whether ss 96D and 95G(6) effectively burden implied freedom of communication – Whether ss 96D and 95G(6) connected to legitimate end.

Words and phrases – "implied freedom of communication on governmental and political matters", "legitimate end".

Constitution, ss 7, 24, 96, 128.

Election Funding, Expenditure and Disclosures Act 1981 (NSW), Pt 5, Div 2, Pt 6, ss 83, 95G(6), 96D.

Election Funding, Expenditure and Disclosures Regulation 2009 (NSW), cl 34A.

1 FRENCH CJ, HAYNE, CRENNAN, KIEFEL AND BELL JJ. Division 2 of Pt 6 of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ("the EFED Act") requires the annual disclosure to the Election Funding Authority of New South Wales ("the Authority") of all political donations received and all electoral expenditure incurred by or on behalf of a party, an elected member, a group or a candidate¹. A "party" is defined as a body or organisation having as one of its objects or activities the promotion of the election to State Parliament or a local council of a candidate endorsed by it². A third-party campaigner³ is required to disclose political donations received and certain expenditure⁴. Political donations of \$1,000 or more must be disclosed if made by a major political donor⁵.

2 A "political donation" is essentially any gift made to or for the benefit of a party, elected member, candidate or group or to a third-party campaigner⁶. "Gift" is defined widely and includes annual or other subscriptions made to a party by a member, or by a person or entity (including an industrial organisation) for affiliation with the party, and amounts paid by way of fund raising⁷.

3 Political donations are subject to general caps provided for in Div 2A of Pt 6. The cap for political donations to a registered party or a group in a financial year is \$5,000 and to an unregistered party, an elected member, a candidate or a third-party campaigner is \$2,000⁸. It is subject to indexation⁹. There is a general

1 *Election Funding, Expenditure and Disclosures Act 1981* (NSW), s 88(1).

2 *Election Funding, Expenditure and Disclosures Act 1981*, s 4(1).

3 Defined to mean persons – other than parties, elected members, groups or candidates – who incur electoral communication expenditure exceeding \$2,000: *Election Funding, Expenditure and Disclosures Act 1981*, s 4(1).

4 *Election Funding, Expenditure and Disclosures Act 1981*, s 88(1A).

5 *Election Funding, Expenditure and Disclosures Act 1981*, s 88(2); "major political donor" is defined in s 84(1).

6 *Election Funding, Expenditure and Disclosures Act 1981*, s 85.

7 *Election Funding, Expenditure and Disclosures Act 1981*, ss 84(1), 85(2), 85(3).

8 *Election Funding, Expenditure and Disclosures Act 1981*, s 95A(1).

9 *Election Funding, Expenditure and Disclosures Act 1981*, s 95A(5).

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prohibition on the acceptance of political donations that exceed the applicable cap¹⁰.

4 Division 2B of Pt 6 provides for caps on electoral communication expenditure for State election campaigns. "Electoral expenditure" is expenditure for or in connection with promoting or opposing a party or candidate or for the purpose of influencing voting at an election¹¹. "Electoral communication expenditure" more specifically includes expenditure on advertisements, the production and distribution of election material, the internet and telecommunications¹². It is not necessary to detail how caps are applied to electoral communication expenditure. An example will suffice. The applicable cap for a party that endorses candidates in a general election to the Legislative Assembly of New South Wales is \$111,200 multiplied by the number of electoral districts in which a candidate is endorsed¹³. It is unlawful for a party, group, candidate or third-party campaigner to incur electoral communication expenditure for a State election campaign during a capped expenditure period¹⁴ if it exceeds the applicable cap¹⁵.

5 The EFED Act makes provision in Pt 5 for public funding of State election campaigns from an Election Campaigns Fund. It provides for funding of specified percentages of the total actual electoral communication expenditure incurred by a party or candidate within ranges of the applicable expenditure cap. Again, it is not necessary to detail these provisions.

10 *Election Funding, Expenditure and Disclosures Act* 1981, s 95B(1).

11 *Election Funding, Expenditure and Disclosures Act* 1981, s 87(1).

12 *Election Funding, Expenditure and Disclosures Act* 1981, s 87(2).

13 *Election Funding, Expenditure and Disclosures Act* 1981, s 95F(2); *Election Funding, Expenditure and Disclosures (Adjustable Amounts) Notice* (NSW), Sched 1, cl 2(1).

14 Defined to mean, for Legislative Assembly elections, the period from and including 1 October in the year before which the election is to be held (and in any other case the period from and including the day the writs for the election are issued) to the end of polling day for the election: *Election Funding, Expenditure and Disclosures Act* 1981, s 95H.

15 *Election Funding, Expenditure and Disclosures Act* 1981, s 95I(1).

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6 The Authority is required¹⁶ to publish, on a website maintained by it, disclosures of reportable political donations¹⁷ and electoral expenditure together with any other information it considers relevant. Copies of disclosures are to be maintained for a period of years and are to be available for public inspection¹⁸.

7 The general scheme of Pt 6, clearly enough, is to regulate the making of political donations to parties, candidates, elected members and others in New South Wales by limiting the amount or value of what may be given to them by any one person, organisation or other entity. It does not permit large individual donations. There is an obvious connection between the need to fund advertising and other methods of communication in connection with election campaigns, and political donations. Part 6 therefore also seeks to limit the amount which may be spent on such communication in the period leading up to an election. To offset, to an extent, the limit on funds available to parties and others, Pt 5 provides some public funding for the purposes of election campaigns. Additionally, the EFED Act enables the public as well as the Authority to scrutinise the donations and their sources and the electoral communication expenditure that is made.

8 The general purpose of these provisions is not in dispute. In its defence, the defendant describes that purpose as being to secure and promote the actual and perceived integrity of the Parliament of New South Wales, the government of New South Wales and local government bodies within New South Wales. More specifically, it identifies the potential risk to integrity as arising from the exercise of undue, corrupt or hidden influences over those institutions, their members or their processes. Donations are identified as a method of exercising such influence. The risks to integrity are significantly increased, the defendant further explains, where there is a need to raise large amounts of money in order effectively to compete with rivals in connection with election campaigns.

16 *Election Funding, Expenditure and Disclosures Act* 1981, s 95(1).

17 Defined as a political donation of \$1,000 or more: *Election Funding, Expenditure and Disclosures Act* 1981, s 86(1).

18 *Election Funding, Expenditure and Disclosures Act* 1981, s 95(4).

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The provisions in question – the issues

9 Provisions of these kinds are not limited to New South Wales. They have counterparts in legislation of the other States and Territories¹⁹. The plaintiffs accept that the EFED Act seeks to address the problems identified and that its general objects are legitimate. The plaintiffs do not, however, accept that those purposes are furthered by the two provisions in issue in these proceedings. These two provisions were inserted by the *Election Funding, Expenditure and Disclosures Amendment Act 2012* (NSW) and commenced in March 2012.

10 The first is s 96D, which appears in Div 4 of Pt 6. Sub-section (1) of s 96D provides:

"It is unlawful for a political donation to a party, elected member, group, candidate or third-party campaigner to be accepted unless the donor is an individual who is enrolled on the roll of electors for State elections, the roll of electors for federal elections or the roll of electors for local government elections."

11 It will be recalled that the only restriction placed upon the making of political donations by the other provisions of the EFED Act is the cap on the amount that can be paid by any person, organisation or other entity in a financial year. Section 96D effectively denies the making of a political donation by anyone other than an elector by prohibiting acceptance of a donation from any source other than an elector. It therefore prohibits a donation being made by any individual who is not qualified to vote or who is qualified but not enrolled to vote, and any corporation, organisation or other entity. The following three sub-sections in s 96D create offences where an individual, corporation or other entity seeks to evade the effects of s 96D(1).

12 The other provision which the plaintiffs seek to impugn is s 95G(6), which effectively aggregates the amount spent by way of electoral communication expenditure by a party and its affiliates for the purposes of the capping provisions:

"Electoral communication expenditure incurred by a party that is of or less than the amount specified ... for the party ... is to be treated as

19 See, for example, *Electoral Act 2002* (Vic), Pt 12; *Electoral Act 1992* (Q), Pt 11; *Electoral Act 1907* (WA), Pt VI; *Electoral Act* (NT), Pt 10; *Electoral Act 1992* (ACT), Pt 14.

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expenditure that exceeds the applicable cap if that expenditure and any other electoral communication expenditure by an affiliated organisation of that party exceed the applicable cap so specified for the party."

13 An "affiliated organisation" of a party is defined, by s 95G(7), to mean a body or other organisation:

"that is authorised under the rules of that party to appoint delegates to the governing body of that party or to participate in pre-selection of candidates for that party (or both)."

14 Each of the second, third and sixth plaintiffs is authorised to appoint delegates to the annual conference of the Australian Labor Party (NSW Branch) and to participate in the preselection of that party's candidates for State elections. Each of the plaintiffs intends to make donations to the Australian Labor Party, the Australian Labor Party (NSW Branch), other political parties or the first plaintiff and to incur electoral communication expenditure within the meaning of the EFED Act to the extent permitted by law.

15 Section 83 of the EFED Act, which appears at the commencement of Pt 6, provides that the Part applies only in relation to State and local government elections and elected members of Parliament or councils. Other provisions more directly seek to address the potential effect of the EFED Act with respect to federal election campaigns. Section 95B(2) provides for an exception to the general prohibition, in s 95B(1), on a person accepting a political donation which exceeds the applicable cap on political donations. The exception arises where the political donation is to be paid into, or held as an asset of, an account kept exclusively for the purpose of a federal or local government election campaign. Clause 34A of the Election Funding, Expenditure and Disclosures Regulation 2009 (NSW) ("the Regulations"), which was introduced by an amendment shortly prior to the hearing of this matter²⁰, extends the exemption to all political donations which are paid or made for the purpose of a federal election campaign.

16 These exceptions draw attention to the essential premise of the plaintiffs' case. It is that ss 96D and 95G(6) impermissibly burden the freedom of communication on political or governmental matters (referred to as "political communication" in these reasons) which is implied in the Commonwealth

20 Election Funding, Expenditure and Disclosures Amendment (Political Donations) Regulation 2013 (NSW).

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Constitution. Further questions are stated for the opinion of this Court and concern whether a similar freedom can be found in the *Constitution Act 1902* (NSW) and whether s 96D is inconsistent with Commonwealth legislation respecting election funding. These questions may be put to one side for present purposes.

The freedom of communication – applicable in a State context?

17 In *Australian Capital Television Pty Ltd v The Commonwealth*²¹ ("ACTV"), it was said that the concept of representative government in a democracy signifies government by the people through their representatives: in constitutional terms, a sovereign power residing in the people, exercised by the representatives. *Lange v Australian Broadcasting Corporation*²² confirmed that the implied freedom of political communication is an indispensable incident of that system of representative government for which the Constitution provides. The Constitution does so by directing that the members of the two Houses of Parliament shall be directly chosen by the people of the Commonwealth and States. Sections 7 and 24 and related sections of the Constitution are therefore to be seen as protecting the freedom of political communication in order that people are able to exercise a free and informed choice as electors²³.

18 In *Lange*, it was also said²⁴ that the freedom of political communication is limited to what is necessary for the effective operation of the system of representative and responsible government provided for by the Constitution. The defendant seized upon this statement as indicating that the freedom might not apply to restrictions on political communication arising in the course of a State election. The defendant submitted that communication on matters of this kind occurring in that context might not illuminate or affect the choice to be made by electors at federal elections or the opinions they may form as to governance at the federal level.

19 The statement drawn from the reasons in *Lange* must also be understood in context. The Court was there explaining that the freedom is not absolute, a

21 (1992) 177 CLR 106 at 137-138; [1992] HCA 45.

22 (1997) 189 CLR 520; [1997] HCA 25.

23 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560.

24 (1997) 189 CLR 520 at 561.

point which had been made in other judgments upon which the defendant relies. In *APLA Ltd v Legal Services Commissioner (NSW)*²⁵, Gleeson CJ and Heydon J observed that the freedom was not a general freedom of communication of the kind protected by the United States Constitution. The point sought to be made in *Lange* and in *APLA*²⁶ was that legislation which restricts the freedom is not invalid on that account alone. It will be invalid where it so burdens the freedom that it may be taken to affect the system of government for which the Constitution provides and which depends for its existence upon the freedom. *Lange* confirmed that if certain conditions concerning the operation and effect of the legislation or the freedom are met, legislation which restricts the freedom may nevertheless be valid.

20 That contextual correction having been made, it remains necessary to consider the defendant's contention. The defendant concedes, as well it might, that there may be an overlap in the discussion of political and governmental matters at a State and federal level and that it may be difficult to separate those kinds of issues. In *Hogan v Hinch*²⁷, it was also argued that the freedom of political communication is limited to communication at the Commonwealth level. French CJ noted²⁸ that this may appear, logically, to be a consequence of the source of the freedom, the Commonwealth Constitution, but that it is not of great practical assistance. The reality is that there is significant interaction between the different levels of government in Australia and this is reflected in communication between the people about them.

21 That political communication at a State level may have a federal dimension may be seen from provisions of the Commonwealth Constitution itself. Section 96, which provides for funding by the Commonwealth to the States, is perhaps the most obvious example²⁹. Issues about whether the federal

25 (2005) 224 CLR 322 at 350 [27]; [2005] HCA 44.

26 See also *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 244-245 [179] per Gummow and Hayne JJ; [2004] HCA 41; *Monis v The Queen* (2013) 87 ALJR 340 at 367 [103], 394 [267]; 295 ALR 259 at 289, 327; [2013] HCA 4.

27 (2011) 243 CLR 506; [2011] HCA 4.

28 *Hogan v Hinch* (2011) 243 CLR 506 at 543 [48].

29 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 75; [1992] HCA 46; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 (Footnote continues on next page)

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government should fund areas of State responsibility such as education and health abound and are often agitated at both State and federal levels.

22 The use of co-operative executive³⁰ and legislative arrangements, including through the Council of Australian Governments and Ministerial Councils, makes it difficult to identify subjects not capable of discussion as matters which do or could potentially concern a federal governmental or political matter³¹. Social, economic and political matters in Australia are increasingly integrated³².

23 In *Coleman v Power*³³, it was recognised that the conduct of State police officers might have national repercussions. McHugh J observed³⁴ that because of the integration of federal and State criminal law, the manner in which State police officers enforce those laws may influence the evaluation by the public of the performance of federal Ministers. Gummow and Hayne JJ³⁵ said that because of the necessarily close co-operation between federal and State forces, "there is evident strength in the proposition that an allegation that a State police officer is corrupt might concern a government or political matter that affects the people of Australia"³⁶.

24 In Australia, there are also national political parties which operate across the federal divide and at federal, State, Territory and local government levels.

at 216-217; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 571-572.

30 *Coleman v Power* (2004) 220 CLR 1 at 78 [197]; [2004] HCA 39; *Wotton v Queensland* (2012) 246 CLR 1 at 15 [27]; [2012] HCA 2.

31 *Hogan v Hinch* (2011) 243 CLR 506 at 543 [48].

32 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 571-572; *Wotton v Queensland* (2012) 246 CLR 1 at 15 [26].

33 (2004) 220 CLR 1.

34 *Coleman v Power* (2004) 220 CLR 1 at 45 [80].

35 *Coleman v Power* (2004) 220 CLR 1 at 78 [197].

36 See also *Coleman v Power* (2004) 220 CLR 1 at 88-89 [229] per Kirby J.

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, as the plaintiffs point out, support for a party at State level may influence a person's support for it more widely and at the federal level³⁷.

25 The complex interrelationship between levels of government, issues common to State and federal government and the levels at which political parties operate necessitate that a wide view be taken of the operation of the freedom of political communication. As was observed in *Lange*³⁸, these factors render inevitable the conclusion that the discussion of matters at a State, Territory or local level might bear upon the choice that the people have to make in federal elections and in voting to amend the Constitution, and upon their evaluation of the performance of federal Ministers and departments³⁹. In *Roberts v Bass*⁴⁰, it was recognised that "statements made by electors or candidates or those working for a candidate, during an election, to electors in a State electorate, concerning the record and suitability of a candidate for election to a State Parliament ... are at the heart of the freedom of communication protected by the Constitution."⁴¹

26 These matters explain the broad concluding statement in *Lange*⁴²:

"This Court should now declare that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia."

37 See also Twomey, "The Application of the Implied Freedom of Political Communication to State Electoral Funding Laws", (2012) 35 *University of New South Wales Law Journal* 625 at 629.

38 (1997) 189 CLR 520 at 571-572.

39 See also *Levy v Victoria* (1997) 189 CLR 579 at 643-644; [1997] HCA 31.

40 (2002) 212 CLR 1 at 29 [73] per Gaudron, McHugh and Gummow JJ; [2002] HCA 57.

41 See also *Roberts v Bass* (2002) 212 CLR 1 at 58 [159] per Kirby J.

42 (1997) 189 CLR 520 at 571.

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The freedom – sources of communication

27 The statement in *Lange* set out above not only recognises that, generally speaking, political communication cannot be compartmentalised to either that respecting State or that respecting federal issues. It also implies that a free flow of communication between all interested persons is necessary to the maintenance of representative government.

28 In *ACTV*, Brennan J⁴³ spoke of the need for there to be a free flow of political communication in order that electors can form judgments. Mason CJ observed⁴⁴ that freedom of communication could not be understood as confined to communications between electors and elected representatives, candidates or parties. It cannot be so confined because the efficacy of representative government depends upon free communication between all persons and groups in the community. An elector's judgment on many issues will turn upon free public discussion, often in the media, of the views of all those interested.

29 In a passage from Archibald Cox's text⁴⁵, to which Mason CJ referred in *ACTV*⁴⁶, it was said that:

"Only by uninhibited publication can the flow of information be secured and the people informed ... Only by freedom of speech ... and of association can people build and assert political power".

Likewise, in *Buckley v Valeo*⁴⁷ the United States Supreme Court spoke of the need to ensure the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

43 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 160.

44 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 139.

45 *The Court and the Constitution*, (1987) at 212.

46 (1992) 177 CLR 106 at 138.

47 424 US 1 at 14, 49 (1976), citing *Roth v United States* 354 US 476 at 484 (1957).

30 Political communication may be undertaken legitimately to influence others to a political viewpoint. It is not simply a two-way affair between electors and government or candidates. There are many in the community who are not electors but who are governed and are affected by decisions of government. Whilst not suggesting that the freedom of political communication is a personal right or freedom, which it is not⁴⁸, it may be acknowledged that such persons and entities have a legitimate interest in governmental action and the direction of policy. The point to be made is that they, as well as electors, may seek to influence the ultimate choice of the people as to who should govern. They may do so directly or indirectly through the support of a party or a candidate who they consider best represents or expresses their viewpoint. In turn, political parties and candidates may seek to influence such persons or entities because it is understood that they will in turn contribute to the discourse about matters of politics and government.

The freedom and State electoral laws

31 In the Australian constitutional context, the freedom of political communication operates as a restraint upon the exercise of legislative power by the Commonwealth and the States. The defendant submits that the constitutional context in which the freedom arises includes the constitutional premise, emerging from ss 106 and 107 and recognised by the principle in the *Melbourne Corporation* case⁴⁹, that the States are to continue as independent polities with their own constitutions and their own legislative functions. It follows, the defendant submits, that the freedom should not impair a State's capacity to exercise its constitutional functions: the process for elections dictated by State legislation should be regarded as unaffected by the freedom. That is to say, the defendant submits that the freedom does not operate in respect of the EFED Act.

32 The Solicitor-General for Victoria, intervening in support of the defendant, saw the matter somewhat differently – as involving a tension or "clash" between the freedom implied from the Constitution and the *Melbourne Corporation* principle, which is also drawn from it. In his submission, the

48 See below at [36].

49 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 82; [1947] HCA 26: "The foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities."

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Melbourne Corporation principle operates to protect the ability of the States to make their own laws regarding the functioning of political parties in the State, including laws bearing upon the discussion of political matters relevant to electors. It is necessary, in order to resolve the clash between the freedom and the principle, that a test different from that stated in *Lange* be applied to the EFED Act.

33 Each of the defendant and Victoria relied for support for their arguments on what was said by Gaudron J in *Muldowney v South Australia*⁵⁰. Her Honour proposed that:

"the freedom which inheres in the Australian Constitution and which extends to matters within the province of the States does not operate to strike down a law which curtails freedom of communication in those limited circumstances where that curtailment is reasonably capable of being viewed as appropriate and adapted to furthering or enhancing the democratic processes of the States." (footnote omitted)

In Victoria's submission, the test that a State law be "reasonably capable of being viewed as appropriate and adapted" allows a greater latitude to the State in the enactment of its electoral laws. Pressed, Victoria suggested that this might entail the recognition by the Court of some discretion in the State legislature.

34 Neither the approach suggested by Gaudron J to the characterisation of a State law⁵¹ nor the allowance of what is sometimes called the grant to the legislature of a margin of appreciation⁵² has been accepted by a majority of this Court⁵³. The latter is a large question and has not been seriously debated since the decision in *Lange*. In any event, there is a more fundamental difficulty with the argument which draws upon the *Melbourne Corporation* principle in an

50 (1996) 186 CLR 352 at 376; [1996] HCA 52.

51 See also *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 339, 388; [1994] HCA 44; *Langer v The Commonwealth* (1996) 186 CLR 302 at 318, 334; [1996] HCA 43.

52 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 158-159; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 325.

53 *Levy v Victoria* (1997) 189 CLR 579 at 598; *Coleman v Power* (2004) 220 CLR 1 at 48 [89], 78 [196], 82 [212].

endeavour to quarantine State legislation from the operation of the freedom. There is no constitutional principle which accepts that the States can legislate to affect the Commonwealth Constitution, including its implications. What was proposed by Gaudron J in the passage in *Muldowney* referred to above was immediately qualified by the words, "[a]t least that is so if it does not interfere with the democratic processes of the Commonwealth." And, as Victoria accepted, if the provisions of the EFED Act in question are considered to have a wider effect upon political discussion generally, then the *Melbourne Corporation* principle may not be relevant. That concession is properly made. The EFED Act does affect the freedom. This is so despite the attempt of s 83 and cl 34A of the Regulations to quarantine the effect of the EFED Act.

Section 96D – a burden on the freedom?

35 The first question posed by *Lange*⁵⁴ is whether s 96D effectively burdens the freedom of political communication either in its terms, operation or effect. It requires consideration as to how the section affects the freedom generally⁵⁵.

36 In addressing this question, it is important to bear in mind that what the Constitution protects is not a personal right⁵⁶. A legislative prohibition or restriction on the freedom is not to be understood as affecting a person's right or freedom to engage in political communication, but as affecting communication on those subjects more generally. The freedom is to be understood as addressed to legislative power, not rights, and as effecting a restriction on that power. Thus the question is not whether a person is limited in the way that he or she can

54 (1997) 189 CLR 520 at 567.

55 *Wotton v Queensland* (2012) 246 CLR 1 at 31 [80].

56 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 150; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 125, 149, 162, 166-167; [1994] HCA 46; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 326; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560; *Hogan v Hinch* (2011) 243 CLR 506 at 554 [92]; *Wotton v Queensland* (2012) 246 CLR 1 at 31 [80]; *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 87 ALJR 289 at 329 [166]; 295 ALR 197 at 245; [2013] HCA 3; *Monis v The Queen* (2013) 87 ALJR 340 at 393-394 [266]; 295 ALR 259 at 326.

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express himself or herself⁵⁷, although identification of that limiting effect may be necessary to an understanding of the operation of a statutory provision upon the freedom more generally. The central question is: how does the impugned law affect the freedom?

37 The plaintiffs submit that the making of a political donation is a form of political communication which the legislation denies. If the submission is to be understood as referring to a restriction effected by the EFED Act upon the right of particular persons and entities to make communications, it may blur the distinction referred to above concerning the freedom.

38 In any event, the question whether s 96D limits the freedom is simply resolved. That section effects a restriction upon the funds available to political parties and candidates to meet the costs of political communication by restricting the source of those funds. The public funding provided by the EFED Act is not equivalent to the amount which may be paid by way of electoral communication expenditure under the Act. It is not suggested that a party or candidate is likely to spend less than the maximum allowed. The party or the candidate will therefore need to fund the gap. It follows that the freedom is effectively burdened. The concession made by the defendant, that there is an indirect burden which is more than inconsequential, is inevitable.

39 The same conclusion as to the first limb of *Lange* was reached in *ACTV* regarding the restrictions placed upon political advertising. Regardless of the legitimacy of its purpose (which may have been to effect a level playing field), the legislative restriction in *ACTV* was, critically, held to impair the freedom⁵⁸, thus requiring further consideration as to whether the restriction was justified.

40 The identification of the extent of the burden imposed on the freedom is not relevant to this first enquiry. The defendant's submissions that s 96D places "no material burden" on the freedom, that it is "not substantial" and that its significance is "greatly reduced" by reason of the availability of public funding

57 As observed by Professor Twomey in "The Application of the Implied Freedom of Political Communication to State Electoral Funding Laws", (2012) 35 *University of New South Wales Law Journal* 625 at 628, citing *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 451 [381] and *Wotton v Queensland* (2012) 246 CLR 1 at 31 [80].

58 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 131-132.

and the existence of expenditure caps are beside the point⁵⁹. Questions as to the extent of the burden and whether it is proportionate to the legitimate purpose of a statutory provision arise later in connection with the second limb enquiries⁶⁰. The question at this point is simply whether the freedom is in fact burdened.

41 It must be acknowledged that the general scheme of the EFED Act also effects burdens on the freedom because it places a ceiling on the amount of political donations which may be made and on the amount which may be expended on electoral communications. But the provisions having these effects, and their connection to the general anti-corruption purposes of the EFED Act, are not in issue. Conversely, the connection of ss 96D and 95G(6) to those purposes is. Indeed, as will be seen, that is the critical issue concerning the validity of those provisions.

42 The existence of s 83 in the EFED Act and the enactment of cl 34A in the Regulations⁶¹ in an attempt to quarantine political donations made for federal election campaign purposes acknowledge that s 96D in its operation and effects will burden the freedom. Given the many contexts in and levels at which political communication occurs, as previously discussed⁶², these provisions cannot effectively prevent that burden. That they may ameliorate it to some extent is not an answer.

43 The defendant concedes that the provisions effect a burden because it must. Its principal argument is that s 96D meets the conditions for validity stated in the second limb of the *Lange* test.

Section 96D – its purpose

44 Where a statutory provision effectively burdens the freedom, the second limb of the *Lange* test, upon which the validity of s 96D may be seen to depend,

59 *Monis v The Queen* (2013) 87 ALJR 340 at 370 [124], 396 [277]-[278]; 295 ALR 259 at 293, 329.

60 *Monis v The Queen* (2013) 87 ALJR 340 at 407 [343]; 295 ALR 259 at 344-345.

61 See above at [15].

62 At [20]-[25].

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asks⁶³ whether the provision is reasonably appropriate and adapted, or proportionate, to serve a legitimate end in a manner which is compatible with the maintenance of the prescribed system of representative government. The enquiry whether a statutory provision is proportionate in the means it employs to achieve its object may involve consideration of whether there are alternative, reasonably practicable and less restrictive means of doing so⁶⁴.

45 It is the defendant's contention that s 96D meets the condition of proportionality. It submits that the test of proportionality is to be understood as giving legislatures within the federation "a margin of choice as to how a legitimate end may be achieved". It has already been observed in these reasons⁶⁵ that this view has not garnered the support of a majority of this Court and that the question has not been the subject of substantial argument. Nor was it in this case.

46 In any event, the point where the question might arise for consideration is not here reached. Before consideration can be given to the defendant's argument, it is necessary to address the first enquiry which arises on the second limb of the *Lange* test. It concerns the identification of a legitimate statutory purpose for the provision in question. It is not possible to consider whether the prohibitions effected by s 96D are a proportionate response until the object which it seeks to achieve is identified.

47 The identification of the true purpose of a statutory provision which restricts a constitutionally guaranteed freedom is not often a matter of difficulty. More commonly, the ultimate question as to the validity of the provision turns upon whether the provision unreasonably burdens the freedom in the pursuit of that purpose. The statutory purpose to which the measures are directed is usually evident. The resolution of the question whether the provision unreasonably burdens the freedom then falls to be resolved by the enquiries which follow.

48 In the context of the freedom of trade and commerce, to which s 92 of the Constitution refers, the purposes of the legislative measures in question in

63 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567; *Coleman v Power* (2004) 220 CLR 1 at 50 [93], 51 [95]-[96], 78 [196], 82 [211].

64 *Monis v The Queen* (2013) 87 ALJR 340 at 408 [347]-[348]; 295 ALR 259 at 345-346.

65 At [34] above.

*Castlemaine Tooheys Ltd v South Australia*⁶⁶ were found to be the conservation of energy resources and the amelioration of litter problems. In *Betfair Pty Ltd v Western Australia*⁶⁷, it was not doubted that the provisions addressed perceived problems relating to the integrity of the racing industry in Western Australia. The legislation failed in that case because a complete prohibition was not necessary to achieve its objects.

49 In *ACTV*, which concerned the freedom here in question, members of the Court were prepared to assume that the purpose of the provisions was to safeguard the integrity of the political process by reducing pressure on political parties and candidates to raise substantial sums of money, thus lessening the risk of corruption and undue influence⁶⁸. Likewise, the similar anti-corruption purposes of the EFED Act are not doubted.

50 In *Monis v The Queen*⁶⁹, the approaches to the identification of the purpose and scope of the statutory provision there in question, which made the use of postal services for the purpose of offensive communications an offence, differed somewhat. Nevertheless, the discussion in the reasons in *Monis* as to the provision's purpose serves to confirm the importance that the identification of statutory purpose has to the resolution of the second limb of the *Lange* test. And as Hayne J observed⁷⁰, the identification of the statutory purpose in connection with the application of that test is arrived at by the ordinary processes of statutory construction. 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 construction, to be connected to those purposes and to further them in some way.

51 The plaintiffs accept that it is the legitimate aim of the EFED Act to regulate the acceptance and use of political donations in order to address the

66 (1990) 169 CLR 436 at 472, 479; [1990] HCA 1.

67 (2008) 234 CLR 418; [2008] HCA 11.

68 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 144 per Mason CJ, 154-155 per Brennan J, 188-189 per Dawson J.

69 (2013) 87 ALJR 340; 295 ALR 259.

70 *Monis v The Queen* (2013) 87 ALJR 340 at 370 [125]; see also at 403 [317] per Crennan, Kiefel and Bell JJ; 295 ALR 259 at 294, 338-339.

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possibility of undue or corrupt influence being exerted. However, it is the plaintiffs' submission that s 96D does nothing calculated to promote the achievement of those legitimate purposes. There is no purpose to the prohibition, other than its achievement. It is therefore simply a burden on the freedom without a justifying purpose. These submissions should be accepted.

52 The terms of s 96D do not reveal any purpose other than that political donations may not be accepted from persons who are not enrolled as electors, or from corporations or other entities. The context of the other provisions of Pt 6 does not illuminate the purpose of s 96D, rather they point up its absence of evident purpose and lack of connection to the scheme of Pt 6.

53 In contrast to the general, practical provisions for capping of political donations and electoral communication expenditure, s 96D is selective in its prohibition. Yet the basis for the selection was not identified and is not apparent. By contrast, the connection of the other provisions of Pt 6 to the general purposes of the EFED Act is evident. They 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 scrutiny⁷¹, are obviously directed to the mischief of possible corruption. The same cannot be said of s 96D, in its wide-ranging prohibition on the sources of donations.

54 In argument, the identification by the defendant of a relevant purpose for the nature and scope of s 96D's prohibition proved elusive. The defendant pointed to the general purposes of the EFED Act, but was not able to explain how the prohibitions effected by s 96D were connected to them, let alone how the prohibitions could be said to further them. The defendant could point only to corporations as a justifiable target of s 96D. In its defence it pleads that, by reason of their character and size, corporations are more likely to represent a threat to integrity. It alleges that corporations are more likely to pursue self-interest and that their boards are obliged to act in that way. Further, a corporation may do so in a manner inconsistent with the views of its members.

55 If the latter is a concern of the EFED Act, it in no way expresses or addresses it. It does not, for example, seek to regulate the making of donations by requiring the concurrence of shareholders. If corporations were in truth the

71 See above at [6].

sole target of s 96D, questions might arise as to whether a complete prohibition respecting donations of any amount from any corporation was justified. But clearly the purpose of s 96D cannot lie in regulating corporate activities. The terms of s 96D are not directed to corporations alone. They extend to any person not enrolled as an elector, and to any organisation, association or other entity. General concerns about corporate activities, as distinct from specific concerns about the activities of any entity (or individual) who is prepared to exert influence corruptly in pursuit of self-interest, cannot explain the purpose of s 96D.

56 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. It might be assumed that many of them will have a legitimate interest in political matters, as discussed earlier in these reasons⁷². Why then was it considered necessary to prohibit donations from these sources, but not from electors? More importantly, how does it further the anti-corruption purposes of the EFED Act?

57 Section 96D is not the only prohibition on the persons or entities from whom donations may be accepted. Division 4A of Pt 6 contains provisions which make it unlawful for a "prohibited donor" to make a political donation and for a person to accept a donation from such a person. A prohibited donor is a property developer, or a tobacco, liquor or gambling industry business entity⁷³. Division 4A was inserted in 2009⁷⁴. The prohibition on donations from property developers which it contained was extended with effect from 1 January 2011⁷⁵ to the other prohibited donors listed above, at the same time as provision was made for caps on electoral communication expenditure. But the EFED Act does not identify corporations, industrial organisations and other entities and persons not enrolled as electors as having interests of a kind which requires them to be the subject of an express prohibition. And there is nothing in the EFED Act which permits an assumption of that kind to be made.

72 At [30].

73 *Election Funding, Expenditure and Disclosures Act 1981*, s 96GAA.

74 *Election Funding and Disclosures Amendment (Property Developers Prohibition) Act 2009* (NSW).

75 *Election Funding and Disclosures Amendment Act 2010* (NSW).

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58 The history which may explain or support the targeting of the "prohibited donors" in Div 4A was not addressed in any detail in argument. It was not necessary to do so because the validity of the provisions of Div 4A is not in issue. Save for its submissions concerning corporations, the defendant did not seek to explain s 96D by analogy to the provisions of Div 4A. In particular, it did not seek to liken the interests of industrial organisations, such as the plaintiffs, to those of the prohibited donors.

59 Section 96D stops just short of a complete prohibition upon political donations. A complete prohibition might be understood to further, and therefore to share, the anti-corruption purposes of the EFED Act. On the other hand, if challenged, it would be necessary for the defendant to defend a prohibition of all donations as a proportionate response to the fact that there have been or may be some instances of corruption, regardless of source. In any event, a complete prohibition is not the course taken in s 96D. The result is that the purpose of its wide, but incomplete, prohibition is inexplicable.

60 In the result, further consideration of the application of the second limb of the *Lange* test to s 96D is forestalled. It cannot be undertaken because it is not possible to attribute a purpose to s 96D that is connected to, and in furtherance of, the anti-corruption purposes of the EFED Act. The second limb of the *Lange* test cannot be satisfied. The burden imposed by s 96D on the freedom cannot be justified. Section 96D is invalid.

Section 95G(6) – its burden and purpose

61 Section 95G(6) also effects a burden on freedom of political communication in restricting the amount that a political party may incur by way of electoral communication expenditure in a relevant period. It does this by deeming the amount of electoral communication expenditure made by industrial organisations (and other organisations) with which it is affiliated as having been made by that party for the purposes of the applicable cap. The party affected by the provision is the Australian Labor Party (NSW Branch), with which industrial organisations, including the second, third and sixth plaintiffs, are affiliated. The defendant does not contest the effects that s 95G(6) has; rather it seeks to justify them as reasonable. However, before consideration can be given to that question, it is again necessary to identify the purpose of s 95G(6) and its connection to the anti-corruption purposes of the EFED Act.

62 In its defence the defendant identifies the purpose of s 95G(6) as being to render efficacious the cap on expenditure. It claims that it is legitimate to ensure that the effectiveness and fairness of the generally applicable caps are not

circumvented. Implicit in the notion of circumvention is that s 95G(6) is concerned with expenditure derived in fact by a single source, notwithstanding that it may be made by two legally distinct entities. The criterion chosen to identify the single source is affiliation in the way defined: namely, that an organisation is authorised under the rules of the party to appoint delegates to the governing body of the party or to participate in the preselection of candidates for that party⁷⁶.

63 It may be wondered how, logically, it could be said that affiliation of this kind is effective to identify an industrial organisation as the same source of funds for the making of electoral communication expenditure. Moreover, it would appear to assume that the objectives of all expenditure made by the party on the one hand and the organisation on the other are coincident. The criterion applied for the operation of s 95G(6) may be useful to identify industrial organisations as affiliates of political parties, but it does not reveal why or how they are to be treated as the same organisation for the purposes of expenditure on electoral communications. These observations may, however, be put to one side.

64 It may be inferred that it is the purpose of s 95G(6) to reduce the amount which a political party affiliated with industrial organisations may incur by way of electoral communication expenditure and likewise to limit the amount which may be spent by an affiliated industrial organisation. What cannot be deduced is how this purpose is connected to the wider anti-corruption purposes of the EFED Act, or how those legitimate purposes are furthered by the operation and effect of s 95G(6). Industrial organisations are identified in the EFED Act as potential donors to political parties or candidates, and as likely to themselves expend monies on political communication. They are not identified as prohibited donors and the defendant did not seek to justify s 95G(6) and the targeting of industrial organisations and the parties with whom they are affiliated by analogy with the provisions of Div 4A. There is therefore nothing in the provision to connect it to the general anti-corruption purposes of the EFED Act.

65 Absent a legislative purpose for s 95G(6) which is conformable with those of the EFED Act, no further consideration can be given as to whether the provision is justified. The provision is invalid.

76 *Election Funding, Expenditure and Disclosures Act 1981*, s 95G(7).

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Answers to questions stated

66 Given the conclusions reached with respect to the first two stated questions, it is unnecessary to answer the questions which follow. The questions stated for the opinion of the Court, as amended, should be answered as follows.

Question 1: Is s 96D of the *Election Funding, Expenditure and Disclosures Act* 1981 (NSW) invalid because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution?

Answer: Yes.

Question 2: Is s 95G(6) of the *Election Funding, Expenditure and Disclosures Act* 1981 (NSW) invalid because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution?

Answer: Yes.

Question 3: Do ss 7A and 7B of the *Constitution Act* 1902 (NSW) give rise to an entrenched protection of freedom of communication on New South Wales State government and political matters?

Answer: Unnecessary to answer.

Question 4: If so, is s 96D of the *Election Funding, Expenditure and Disclosures Act* 1981 (NSW) invalid because it impermissibly burdens that freedom, contrary to the New South Wales Constitution?

Answer: Unnecessary to answer.

Question 5: Further, if the answer to question 3 is "yes", is s 95G(6) of the *Election Funding, Expenditure and Disclosures Act* 1981 (NSW) invalid because it impermissibly burdens that freedom, contrary to the New South Wales Constitution?

Answer: Unnecessary to answer.

Question 6: Is s 96D of the *Election Funding, Expenditure and Disclosures Act* 1981 (NSW) invalid under s 109 of the Commonwealth

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Constitution by reason of it being inconsistent with s 327 of the *Commonwealth Electoral Act 1918* (Cth)?

Answer: Unnecessary to answer.

Question 7: Is s 96D of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) invalid under s 109 of the Commonwealth Constitution by reason of it being inconsistent with Pt XX of the *Commonwealth Electoral Act 1918* (Cth)?

Answer: Unnecessary to answer.

Question 8: Is s 96D of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) invalid because it impermissibly burdens a freedom of association provided for in the Commonwealth Constitution?

Answer: Unnecessary to answer.

Question 9: Who should pay the costs of the special case?

Answer: The defendant should pay the plaintiffs' costs.

67 KEANE J. In 2012 amendments were made to the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ("the EFED Act") to impose restrictions on political donations, and limits upon expenditure, in relation to elections to the New South Wales Parliament.

68 In these proceedings, the plaintiffs challenge the validity of:

- s 96D, which proscribes political donations to political parties by corporations, industrial associations and individuals who are not on the roll of electors for State, federal or local government elections; and
- s 95G(6), which aggregates a political party's expenditure on electoral campaign funding with the expenditure incurred by that party's affiliates for the purposes of determining whether a political party has exceeded the applicable cap on electoral campaign expenditure.

69 Pursuant to s 18 of the *Judiciary Act 1903* (Cth), questions as to the validity of these provisions were reserved by order of the Chief Justice for the determination of the Full Court. The material facts are set out in the Special Case agreed by the parties.

70 The plaintiffs submitted that s 96D and s 95G(6) impermissibly burden political communication contrary to the Constitution. For the reasons that follow, that submission should be accepted, and the questions reserved for determination by the Court should be answered accordingly.

71 The plaintiffs also argued that the impugned provisions of the EFED Act infringe a limitation on freedom of political communication implied by the *Constitution Act 1902* (NSW), and that they are invalid under s 109 of the Constitution by reason of their inconsistency with electoral laws of the Commonwealth. Because the plaintiffs' principal submission should be accepted, it is unnecessary to deal with these additional arguments.

The impugned provisions

72 Sections 96D and 95G(6) are contained in Pt 6 of the EFED Act. Section 83 states that Pt 6 "applies in relation to: (a) State elections and elected members of Parliament, and (b) local government elections and elected members of councils".

73 The provisions of Pt 6 deal with four related topics: the disclosure of political donations and electoral expenditure; the capping of political donations; the proscription of political donations by certain persons; and the capping of expenditure on election campaigns. Some brief reference to the provisions of the EFED Act relating to each of these topics, as well as to the provisions of Pt 5 relating to public funding of State election campaigns, is necessary for an appreciation of the arguments agitated by the parties.

Disclosure

74 In Div 2 of Pt 6, s 88(1)(a) provides for disclosure of "political donations received or made, and electoral expenditure incurred, by or on behalf of ... a party (whether or not a registered party)". Section 88(1A) provides that disclosure is also required of "electoral communication expenditure incurred by a third-party campaigner" during the "capped expenditure period" of the electoral cycle (defined by s 95H of the EFED Act), and "political donations received by [a] third-party campaigner during the relevant disclosure period".

75 The expression "political donation" is defined by s 85 to include "a gift made to or for the benefit of" a party, an elected member, a candidate or a group of candidates; and "[a]n amount paid by a person as a contribution, entry fee or other payment to entitle that or any other person to participate in or otherwise obtain any benefit from a fund-raising venture or function". Section 85(1)(d) includes within the definition of "political donation":

"a gift made to or for the benefit of an entity or other person (not being a party, elected member, group or candidate), the whole or part of which was used or is intended to be used by the entity or person:

- (i) to enable the entity or person to make, directly or indirectly, a political donation or to incur electoral expenditure, or
- (ii) to reimburse the entity or person for making, directly or indirectly, a political donation or incurring electoral expenditure."

76 Section 85(3) provides that the term "political donation" includes an "annual or other subscription paid to a party", either by a "member of the party", or by "a person or entity (including an industrial organisation) for affiliation with the party". Section 85(3A)(a) provides that "a disposition of property to a NSW branch of a party from the federal branch of the party" is taken to be a gift for the purposes of s 85.

77 The term "party" is defined by s 4(1) of the EFED Act to mean:

"a body or organisation, incorporated or unincorporated, having as one of its objects or activities the promotion of the election to Parliament or a local council of a candidate or candidates endorsed by it or by a body or organisation of which it forms a part."

78 The term "third-party campaigner" is defined by s 4(1) of the EFED Act to mean:

"an entity or other person (not being a registered party, elected member, group or candidate) who incurs electoral communication expenditure during a capped expenditure period ... that exceeds \$2,000 in total."

79 The term "registered party" is defined by s 4(1) to mean a "party registered ... for the purposes of" the EFED Act.

Donations

80 Section 95B(1) provides that it is "unlawful ... for a person to accept a political donation to a party, elected member, group, candidate or third-party campaigner if the donation exceeds the applicable cap on political donations."

81 The proscription in s 95B(1) is directed at the receipt of money for the purposes of electoral campaigns for State Parliament. Section 95B(2) provides that the capping of donations does not apply to political donations "to be paid into (or held as an asset of) an account kept exclusively for the purposes of federal or local government election campaigns." This point is reinforced by s 95AA(2), which provides that a reference in Div 2A "to an election is a reference that relates to a State election"; and a reference "to an elected member, or to a candidate or other person is a reference that relates to a member of [the New South Wales] Parliament or to a candidate or other person in connection with a State election."

82 Section 95A prescribes the applicable caps on political donations. It is sufficient to note that s 95A(1) provides that:

"The applicable cap on political donations is as follows:

- (a) \$5,000 for political donations to or for the benefit of a registered party,
- (b) \$2,000 for political donations to or for the benefit of a party that is not a registered party,
- (c) \$2,000 for political donations to or for the benefit of an elected member,
- (d) \$5,000 for political donations to or for the benefit of a group,
- (e) \$2,000 for political donations to or for the benefit of a candidate,
- (f) \$2,000 for political donations to or for the benefit of a third-party campaigner."

83 Section 95A(4) provides that "a candidate's contribution to finance his or her own election campaign is not a political donation and is not included in the applicable cap on political donations to the candidate."

Proscribed political donations

84 Section 96D provides as follows:

- "(1) It is unlawful for a political donation to a party, elected member, group, candidate or third-party campaigner to be accepted unless the donor is an individual who is enrolled on the roll of electors for State elections, the roll of electors for federal elections or the roll of electors for local government elections.
- (2) It is unlawful for an individual to make a political donation to a party, elected member, group, candidate or third-party campaigner on behalf of a corporation or other entity.
- (3) It is unlawful for a corporation or other entity to make a gift to an individual for the purpose of the individual making a political donation to a party, elected member, group, candidate or third-party campaigner.
- (4) Annual or other subscriptions paid to a party by a person or entity (including an industrial organisation) for affiliation with the party that are, by the operation of section 85(3), taken to be gifts (and political donations to the party) are subject to this section. Accordingly, payment of any such subscription by an industrial organisation or other entity is unlawful under this section.
- (5) Dispositions of property between branches of parties or between associated parties that are, by the operation of section 85(3A), taken to be gifts (and political donations to the parties) are not subject to this section."

85 It may be noted that, notwithstanding ss 85, 96D(5) and 95AA(2), the proscriptions in sub-ss (1) to (4) of s 96D apply to donations to political parties which have federal branches.

86 It should also be noted that Div 4A of Pt 6 makes it unlawful for a "prohibited donor"⁷⁷ – namely "a property developer", "a tobacco industry business entity", or "a liquor or gambling industry business entity" – to make a political donation⁷⁸.

77 *Election Funding, Expenditure and Disclosures Act 1981 (NSW)*, s 96GAA.

78 *Election Funding, Expenditure and Disclosures Act 1981 (NSW)*, s 96GA.

Expenditure

87 Section 95I(1) provides that:

"It is unlawful for a party, group, candidate or third-party campaigner to incur electoral communication expenditure for a State election campaign during the capped expenditure period for the election if it exceeds the applicable cap on electoral communication expenditure."

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

89 Section 87(2) defines "electoral communication expenditure" as "electoral expenditure" of the following kinds:

- "(a) expenditure on advertisements in radio, television, the Internet, cinemas, newspapers, billboards, posters, brochures, how-to-vote cards and other election material,
- (b) expenditure on the production and distribution of election material,
- (c) expenditure on the Internet, telecommunications, stationery and postage,
- (d) expenditure incurred in employing staff engaged in election campaigns,
- (e) expenditure incurred for office accommodation for any such staff and candidates (other than for the campaign headquarters of a party or for the electorate office of an elected member),
- (f) such other expenditure as may be prescribed by the regulations as electoral communication expenditure".

90 It is to be noted that, by virtue of the definitions of "electoral expenditure" and "electoral communication expenditure", the proscription of electoral communication expenditure in excess of the cap is a proscription of expenditure which is directly connected with political communication.

91 Section 95F, together with s 95G, states the applicable caps on electoral communication expenditure for State election campaigns. It is not necessary to set out s 95F in full. It is sufficient to note that:

"(2) **Parties with Assembly candidates in a general election**

For a State general election, the applicable cap for a party that endorses candidates for election to the Assembly is \$100,000 multiplied by the number of electoral districts in which a candidate is so endorsed.

...

(6) **Party candidates in Assembly general election**

For a State general election, the applicable cap for a candidate endorsed by a party for election to the Assembly is \$100,000.

...

(10) **Third-party campaigners**

For a State general election, the applicable cap for a third-party campaigner is:

- (a) \$1,050,000 if the third-party campaigner was registered under this Act before the commencement of the capped expenditure period for the election, or
- (b) \$525,000 in any other case.

...

(12) **Additional cap for individual Assembly seats**

The applicable cap for parties and third-party campaigners is subject to an additional cap (within the overall applicable cap) in relation to State general elections, or by-elections in more than one electorate, for electoral communication expenditure incurred substantially for the purposes of the election in a particular electorate, being:

- (a) in the case of a party – \$50,000 in respect of each such electorate, or
- (b) in the case of a third-party campaigner – \$20,000 in respect of each such electorate.

(13) For the purposes of subsection (12), electoral communication expenditure is only incurred for the purposes of the election in a

particular electorate if the expenditure is for advertising or other material that:

- (a) explicitly mentions the name of a candidate in the election in that electorate or the name of the electorate, and
- (b) is communicated to electors in that electorate, and
- (c) is not mainly communicated to electors outside that electorate."

92 Sub-sections (1) and (2) of s 95G provide for the aggregation of electoral communication expenditure by associated political parties, that is to say, parties which⁷⁹:

- endorse the same candidate for a State election, or
- endorse candidates included in the same group in a periodic Council election, or
- form a recognised coalition.

93 Section 95G(6) provides that electoral communication expenditure of political parties and organisations affiliated with them is to be aggregated, thereby limiting the amount of electoral communication expenditure able to be incurred in total by the party and the affiliated organisation. Sub-sections (6) and (7) of s 95G provide:

"(6) **Aggregation of expenditure of parties and affiliated organisations**

Electoral communication expenditure incurred by a party that is of or less than the amount specified in section 95F for the party ... is to be treated as expenditure that exceeds the applicable cap if that expenditure and any other electoral communication expenditure by an affiliated organisation of that party exceed the applicable cap so specified for the party.

- (7) In subsection (6), an *affiliated organisation* of a party means a body or other organisation, whether incorporated or unincorporated, that is authorised under the rules of that party to appoint delegates to the governing body of that party or to participate in pre-selection of candidates for that party (or both)."

79 *Election Funding, Expenditure and Disclosures Act 1981 (NSW)*, s 95G(1).

Public funding

94 Part 5 of the EFED Act establishes an "Election Campaigns Fund" ("the Fund") to be kept by the Election Funding Authority of New South Wales in respect of State elections⁸⁰. The evident purpose of Pt 5 is to reduce the dependence of political parties on funding from private sources. Section 57 provides for the circumstances in which a party will be eligible to receive a payment in respect of State or local government elections out of the Fund.

95 Eligible parties and candidates are entitled to receive public funding proportionate to their "actual expenditure", which is defined⁸¹ as "the total actual electoral communication expenditure incurred" by a party or candidate. The amounts are as follows:

- For an "eligible Assembly party", up to 75% of its electoral communication expenditure cap⁸².
- For party candidates for the Assembly, up to 30% of their electoral communication expenditure cap⁸³.
- For Assembly independent candidates, up to 45% of their electoral communication expenditure cap⁸⁴.

The validity of s 96D

96 The plaintiffs' challenge to the validity of s 96D was advanced on two bases: first, that a political donation is itself a form of political communication which may not be prohibited; and secondly, that the prohibition on political donations by individuals who are not on the electoral roll as well as corporations and other entities such as industrial organisations is an impermissible burden upon the freedom of political communication within the federation.

80 *Election Funding, Expenditure and Disclosures Act 1981 (NSW)*, s 56.

81 *Election Funding, Expenditure and Disclosures Act 1981 (NSW)*, ss 58(1), 61.

82 *Election Funding, Expenditure and Disclosures Act 1981 (NSW)*, s 58.

83 *Election Funding, Expenditure and Disclosures Act 1981 (NSW)*, s 60.

84 *Election Funding, Expenditure and Disclosures Act 1981 (NSW)*, s 60.

Donation as communication

97 The plaintiffs submitted that making a political donation constitutes a political communication on the basis that "actions as well as words can communicate ideas."⁸⁵

98 Decisions of the United States Supreme Court were cited by the plaintiffs to support the propositions that, from the perspective of the donor, a political donation "serves as a general expression of support for the candidate and his views"⁸⁶, and from the point of view of the donee, the acceptance of a donation is an expression of the willingness of a candidate to be associated with, and to accept the support of, the donor. Thus, in *Colorado Republican Federal Campaign Committee v Federal Election Commission*⁸⁷, Thomas J observed:

"Whether an individual donates money to a candidate or group who will use it to promote the candidate or whether the individual spends the money to promote the candidate himself, the individual seeks to engage in political expression and to associate with like-minded persons."

99 In relation to sub-ss (1), (3) and (4) of s 96D, the plaintiffs relied upon *Citizens United v Federal Election Commission*⁸⁸ to argue that political communications by corporations and industrial organisations should not be treated differently from those of enrolled voters simply because such organisations are not natural persons entitled to vote.

100 This ground of the plaintiffs' challenge to the validity of s 96D should be rejected for reasons which reflect a substantial difference in the constitutional arrangements of the Commonwealth and the United States.

101 The First Amendment to the United States Constitution provides that "Congress shall make no law ... abridging the freedom of speech". The First Amendment guarantees a right of free speech⁸⁹. It is a personal right to express one's views on any topic, whether that be to participate in the market place of

85 *Levy v Victoria* (1997) 189 CLR 579 at 594; [1997] HCA 31.

86 *Buckley v Valeo* 424 US 1 at 21 (1976).

87 518 US 604 at 638 (1996).

88 175 L Ed 2d 753 (2010).

89 *New York Times Co v Sullivan* 376 US 254 (1964); *Citizens United v Federal Election Commission* 175 L Ed 2d 753 at 782, 815, 867 (2010).

ideas⁹⁰ or to pursue the self-realisation involved in the free expression of one's views⁹¹. In light of the decision in *Citizens United*, it seems that this personal right extends to corporations as well as natural persons.

102 The United States decisions shed little direct light on the path to the resolution of the issues of concern here. That is hardly surprising, given that, as Heydon J noted in *Monis v The Queen*⁹², "the framers of [the Constitution], after carefully examining the United States Constitution, deliberately decided not to transpose its First Amendment, either in whole or in part."

103 In Australia, the limitation upon governmental power arises from ss 7, 24, 64 and 128 of the Constitution as a matter of necessity to ensure their effective operation⁹³. In *Lange v Australian Broadcasting Corporation*⁹⁴, this Court explained that:

"ss 7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors."

104 The text of the relevant sections of the Constitution should be noted to make the point that political communication within the federation is free in order to ensure the political sovereignty of the people of the Commonwealth, who are required to make the political choices necessary for the government of the federation and the alteration of the Constitution itself.

105 Section 7 of the Constitution provides relevantly in relation to the composition of the upper house of the Commonwealth Parliament that:

"The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate."

90 *Abrams v United States* 250 US 616 at 630 (1919); *New York State Board of Elections v Lopez Torres* 552 US 196 at 208 (2008).

91 *Citizens United v Federal Election Commission* 175 L Ed 2d 753 at 868 (2010).

92 (2013) 87 ALJR 340 at 390 [248]; 295 ALR 259 at 322; [2013] HCA 4.

93 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560-561; [1997] HCA 25.

94 (1997) 189 CLR 520 at 560.

106 Section 24 provides relevantly in relation to the composition of the lower
house that:

"The House of Representatives shall be composed of members directly
chosen by the people of the Commonwealth".

107 Section 64 provides for the appointment of Ministers of State for the
Commonwealth, and relevantly that:

"no Minister of State shall hold office for a longer period than three
months unless he is or becomes a senator or a member of the House of
Representatives."

108 Section 128 provides the sole means of altering the Constitution, and
relevantly that:

"The proposed law for the alteration [of the Constitution] ... shall be
submitted in each State and Territory to the electors qualified to vote for
the election of members of the House of Representatives."

109 The limitation on governmental power which is indispensable⁹⁵ to the
effective operation of these provisions of the Constitution does not create a
personal right akin to that created by the First Amendment to communicate in
any particular way one might choose⁹⁶. In *Monis*⁹⁷, Crennan, Kiefel and Bell JJ
explained:

"Sections 7 and 24 of the Constitution do not ... confer personal rights on
individuals; rather they preclude the curtailment of the protected freedom
by the exercise of legislative or executive power." (footnote omitted)

110 The Constitution does not guarantee that those who wish to express their
support for a candidate by making a donation may express themselves in that

95 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106
at 146, 174, 236; [1992] HCA 45; *Levy v Victoria* (1997) 189 CLR 579 at 623;
Monis v The Queen (2013) 87 ALJR 340 at 373 [143]; 295 ALR 259 at 298.

96 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560; *APLA
Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 451 [381];
[2005] HCA 44.

97 (2013) 87 ALJR 340 at 395 [273]; 295 ALR 259 at 328.

particular way. As Hayne J observed in *APLA Ltd v Legal Services Commissioner (NSW)*⁹⁸:

"in deciding whether the freedom has been infringed, the central question is what the impugned law does, not how an individual might want to construct a particular communication".

111 Accordingly, one may say that, if s 96D is not an effective burden on political communication within the federation, the circumstance that it prevents a supporter of a candidate or party from expressing that support by making a political donation will not render it invalid. As Brennan J said in *Australian Capital Television Pty Ltd v The Commonwealth ("ACTV")*⁹⁹:

"[T]he extent of any relevant limitation of legislative power is the scope of the relevant freedom. But, unlike freedoms conferred by a Bill of Rights in the American model, the freedom cannot be understood as a personal right the scope of which must be ascertained in order to discover what is left for legislative regulation".

112 Section 96D leaves open many (and more explicit) ways for support for a candidate or party to be expressed by those minded to do so other than by the making of a donation. Section 96D proscribes the making of donations, not publicising the support which the making of donations might be taken to imply. Viewed from the perspective of the donor, the proscription hardly seems a significant restriction upon the donor's ability to express support for a candidate or political party. But that is not the relevant perspective from which to consider the issue. The constitutionally protected interest is that of the people of the Commonwealth in the free and informed exercise of the political choices required of them by ss 7, 24 and 128 of the Constitution; and the relevant question is whether the flow of pertinent information to and from them might be diminished by a restriction upon the making of political donations. How that question is to be answered does not depend on the proposition that a political donation is a form of political expression by the donor.

Disfavoured donations

113 The plaintiffs' challenge to the validity of s 96D on the ground that it proscribes political donations by certain classes of donor requires consideration of two broad and related issues: first, as already noted, whether s 96D impermissibly burdens the freedom of political communication within the federation; and, secondly, whether the provisions of the EFED Act which purport

⁹⁸ (2005) 224 CLR 322 at 451 [381].

⁹⁹ (1992) 177 CLR 106 at 150.

to confine its operation to State and local government elections preserve its proscriptive effect, notwithstanding the freedom of political communication within the federation. This second issue will be referred to as the "quarantine question".

114 As to the first of these issues, the decision of this Court in *Lange*¹⁰⁰ established the framework for analysis of whether a law of the Commonwealth, a State or a Territory is invalid as impermissibly trenching upon the freedom of communication derived from ss 7, 24, 64 and 128 of the Constitution. This framework was modified in *Coleman v Power*¹⁰¹; but it remains convenient to refer to it as "the *Lange* test". It was most recently accepted as authoritative in the decisions of this Court in *Hogan v Hinch*¹⁰², *Wotton v Queensland*¹⁰³ and *Monis*¹⁰⁴. In the present case, no party or intervener sought to call into question the authority of the *Lange* test.

115 A law will be invalid under the *Lange* test if:

- (a) the law effectively burdens freedom of communication about government or political matters either in its terms, operation or effect, and
- (b) it is not reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people.

116 The arguments of the parties in relation to each limb may conveniently be summarised and considered in turn.

An effective burden?

117 The plaintiffs submitted that s 96D effectively burdens political communication by limiting the sources of funds otherwise available to political

100 (1997) 189 CLR 520 at 567-568.

101 (2004) 220 CLR 1 at 51 [95]-[96], 78 [196], 82 [211]; [2004] HCA 39.

102 (2011) 243 CLR 506 at 542-543 [47], 554 [92]; [2011] HCA 4.

103 (2012) 246 CLR 1 at 15 [25]; [2012] HCA 2.

104 (2013) 87 ALJR 340 at 360 [61], 366-367 [102]-[106], 387-388 [236], 396 [276]; 295 ALR 259 at 279, 288-289, 318, 329.

parties, candidates and third-party campaigners to engage in political communication and by discriminating between those sources. The plaintiffs noted that the facts agreed in the Special Case establish that the greater part of the donations to the major political parties in the period from 1 July 2008 to 30 June 2011 were not from individuals. The plaintiffs also noted that the provisions for public funding pursuant to Pt 5 of the EFED Act were enacted prior to the introduction of the prohibition in s 96D and so cannot be seen as in some way "offsetting" the reduction in donations in consequence of s 96D. In any event, Pt 5 of the Act provides for only partial reimbursement of electoral communication expenditure.

118 The defendant submitted that s 96D imposes no effective burden on political communication, in that s 96D does not restrict any communication by the entities or persons that it prohibits from making political donations voicing support for, or opposition to, any party or candidate or any of their policies.

119 Ironically, the defendant's submission, echoing the plaintiffs' reliance on the First Amendment, replicates the confusion of a personal right of individual expression with the free flow of political communication within the federation. The question whether political communication is effectively burdened is not answered in the negative by the circumstance that an individual is permitted to "construct a particular communication"¹⁰⁵. The issue is as to the effect of the proscriptions upon the free flow of political communication within the federation. And whether the proscriptions burden that flow is not a complicated question. As to the first limb of the *Lange* test, in *Monis*¹⁰⁶ Hayne J said that:

"[t]he expression 'effectively burden' means nothing more complicated than that the effect of the law is to prohibit, or put some limitation on, the making or the content of political communications."

120 Given that the evident purpose of s 96D is to limit the funds available to political campaigns, there is an air of unreality about the defendant's contention that s 96D does not burden political communication or that its effect is not substantial¹⁰⁷. Section 96D proscribes political donations by corporations, entities including industrial associations, and individuals other than enrolled electors. The facts agreed in the Special Case establish the importance of funding from corporations and industrial associations to campaigning.

105 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 451 [381].

106 (2013) 87 ALJR 340 at 367 [108]; 295 ALR 259 at 290.

107 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 200 [40]; [2004] HCA 41; *Hogan v Hinch* (2011) 243 CLR 506 at 555-556 [95].

121 Campaigning is an essential aspect of political communication. Further, the provisions of Pt 5 of the EFED Act in relation to the Fund do not provide for the full reimbursement of the funds devoted to campaigning. No doubt some political communication occurs without the need for payment; but, equally, there can be no doubt that a restriction on the availability of donations will substantially diminish the extent of political communication.

122 That being so, it is necessary, under the *Lange* framework, to turn to consider whether the burden is "reasonably appropriate and adapted to serve a legitimate end in a manner that is compatible with the maintenance of the constitutionally prescribed system of government and the freedom of political communication which is its indispensable incident."¹⁰⁸

Appropriate means adapted to a legitimate end compatible with the freedom of political communication

123 The defendant submitted that s 96D is part of a regulatory scheme directed to protecting the integrity of the State electoral and governmental system. That end was said to be not only compatible with, but supportive of, representative democracy. In the course of oral argument, counsel for the defendant elaborated upon this submission, arguing that, for the purposes of the second limb of the *Lange* test, the ends pursued by s 96D were: first, a step towards the absolute prohibition of donations to political parties; and, secondly, the alleviation of concerns as to secret or undue influence by donors over candidates and parties, in that some bodies, by virtue of their character and size, are more likely to present a threat to the integrity of the electoral process than individuals. Further, there is the possibility of the pursuit by corporations and industrial associations of political agenda different from those of their shareholders or members. In this latter regard, the defendant argued that such bodies may make political donations which are inconsistent with the views of significant portions of their membership.

124 It is not to the point, the defendant argued, to question whether the impugned provisions have established "the most desirable or least burdensome regime to carry out the legitimate ends"¹⁰⁹ because, in respect of political judgments of this kind, the legislature enjoys a margin of choice as to how a legitimate end may be achieved.

125 The plaintiffs submitted in relation to sub-ss (1) and (2) of s 96D that concerns as to secret or undue influence upon candidates and parties afford no rational basis to differentiate between permitted donations and those which are

¹⁰⁸ *Monis v The Queen* (2013) 87 ALJR 340 at 378 [175]; 295 ALR 259 at 304.

¹⁰⁹ *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 305 [360].

proscribed. In this regard, it was said that there is no reason to think that concerns as to the purchase of secret or undue influence by donations vary depending on whether the donor is an enrolled voter or not.

126 As to sub-ss (3) and (4) of s 96D, the plaintiffs submitted there are no facts agreed in the Special Case which establish that political donations from corporations or industrial organisations are more likely to represent a threat to the integrity of representative government than donations from other classes of donor. And there is no basis on which judicial notice could be taken of such a fact. The defendant countered that, while the existence of threats to public integrity can be difficult to prove by particular facts, the existence of such threats cannot be doubted¹¹⁰.

127 The defendant's contention that s 96D is justified as a step towards a comprehensive prohibition on all political donations must be rejected for reasons which may be stated briefly. One must deal with the law as it is, not as it might be. Either s 96D is justifiable in its own terms or it is not: today's law cannot be justified by the future possibility of proscriptions as yet unwritten.

128 The defendant's second contention must also be rejected, but for reasons which require a more elaborate explanation.

129 It may be said at the outset of this explanation that the application of the second limb of the *Lange* test is not without its difficulties. These difficulties arise, in part, by reason of the indefinite and highly abstract language in which it is expressed, as is illustrated by the division of opinion on the application of the second limb of the *Lange* test in *Monis*. Further, to the extent that the second limb of the *Lange* test might be seen to contemplate the striking down of one legislative measure because a different, less burdensome, measure might have been available, it would seem to countenance a form of decision-making having more in common with legislative than judicial power.

130 The language in which the second limb of the *Lange* test is cast draws upon the language of Marshall CJ in *McCulloch v Maryland*¹¹¹. There, speaking of the relationship of means to ends required to sustain a legislative choice of means to achieve a given end, Marshall CJ wrote:

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that

110 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 129-130, 144-145, 159-160, 175, 239.

111 17 US 316 at 421 (1819).

end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

131 The talismanic language of Marshall CJ must be understood in its context, and particularly in light of the statement which followed four paragraphs later in his Honour's reasons¹¹²:

"[W]here the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here [scil, in this Court] to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power."

132 This statement prompts the observation that the second limb of the *Lange* test is, in contrast to the case with which Marshall CJ was dealing, concerned to determine whether a law is "prohibited": the constitutional guarantee operates as an implied prohibition on the exercise of the law-making power otherwise available to the State. In addition, it is apparent that Marshall CJ did not countenance a judicial judgment as to the extent to which one measure, rather than another, less drastic measure, may be necessary to pursue the legitimate (and possibly competing) ends of government¹¹³. A similar perspective is evident in the remarks of Dixon J in *Australian Communist Party v The Commonwealth*¹¹⁴, where his Honour said that, while questions as to the extent and operation of a power to legislate "must be decided by the Court, the reasons why it is exercised, the opinions, the view of facts and the policy upon which its exercise proceeds and the possibility of achieving the same ends by other measures are no concern of the Court." Further, Marshall CJ was addressing the relationship of means to ends in the context of the scope of legislative power conferred on Congress; he was not concerned with the impact of the United States Constitution on the exercise of State legislative power.

133 It might be said that where a State law is impugned, the question for the Court can only be whether the impugned law can reasonably be said to be

112 17 US 316 at 423 (1819).

113 See also *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 159-160; Campbell and Crilly, "The Implied Freedom of Political Communication, Twenty Years On", (2011) 30 *University of Queensland Law Journal* 59 at 74.

114 (1951) 83 CLR 1 at 198; [1951] HCA 5.

compatible with the free flow of political communication within the federation. In *Coleman v Power*¹¹⁵, McHugh J, speaking of a State law, said:

"Ordinarily ... serious interference with ... political communication would itself point to the inconsistency of the objective of the law with the system of representative government."

134 It must be acknowledged, however, that no party or intervener advanced an argument to that effect in this case; and so it is the formulation in the second limb of the *Lange* test which must be applied. In any event, the difficulties which might sometimes attend the application of the second limb of the *Lange* test, or asks whether it can reasonably be said that the impugned law is compatible with the free flow of political communication indispensable to the free and informed choices required of the people of the Commonwealth by the Constitution¹¹⁶, the answer would be the same: subject to the quarantine question, the prohibitions in s 96D cannot be sustained.

135 In assessing the strength of the arguments agitated by the parties, the primary consideration must be that the flow of political communication within the federation is required to be kept free in order to preserve the political sovereignty of the people of the Commonwealth. This must be so, both for legislatures which enact measures which affect the flow of political communication within the federation, and for the courts called upon to rule upon the compatibility of those measures with the requirements of the Constitution. In *ACTV*¹¹⁷, Mason CJ said that ultimately:

"it is for the Court to determine whether the constitutional guarantee has been infringed in a given case. And the Court must scrutinize with scrupulous care restrictions affecting free communication in the conduct of elections for political office for it is in that area that the guarantee fulfils its primary purpose." (footnote omitted)

136 The caps imposed by ss 95A and 95I are apt to effect a reduction in the quantity of political communication, but it was not suggested that they fell foul of the second limb of the *Lange* test. In that regard, ss 95A and 95I operate across the board, and while they may limit the influence of donations on candidates and parties, they may reasonably be seen to enhance the prospects of a

115 (2004) 220 CLR 1 at 52 [98].

116 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 144.

117 (1992) 177 CLR 106 at 144.

level electoral playing field. No party or intervener was disposed to deny that these provisions are compatible with the freedom of political communication. They can be seen to be appropriate and adapted to ensure that wealthy donors are not permitted to distort the flow of political communication to and from the people of the Commonwealth¹¹⁸.

137 In contrast, s 96D proscribes donations from certain sources but not others. In proscribing some sources of funding for political communication, it thereby favours other sources in terms of the flow of political communication. This discrimination is apt to distort the flow of political communication within the federation. The legislation in question in *ACTV* was held to be invalid on the basis of the discriminatory character of its proscription of some sources of political communication relating to electoral campaigning¹¹⁹. No party or intervener sought to call into question the decision in *ACTV*.

138 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. In *ACTV*, Mason CJ said¹²⁰:

"the need to raise substantial funds in order to conduct a campaign for election to political office does generate a risk of corruption and undue influence, that in such a campaign the rich have an advantage over the poor and that brief political advertisements may 'trivialize' political debate.

...

The enhancement of the political process and the integrity of that process are by no means opposing or conflicting interests".

139 More recently, Campbell and Crilly have written of the difficulty of coming¹²¹:

118 *Harper v Canada (Attorney General)* [2004] 1 SCR 827 at 868 [62].

119 (1992) 177 CLR 106 at 131-132, 145-146, 171-173, 218, 236.

120 (1992) 177 CLR 106 at 144-145. See also at 154-156 per Brennan J; *Monis v The Queen* (2013) 87 ALJR 340 at 373 [143]; 295 ALR 259 at 298.

121 "The Implied Freedom of Political Communication, Twenty Years On", (2011) 30 *University of Queensland Law Journal* 59 at 78.

"to grips with the inequities and distortions of campaign finances, a realm in which there are vast political expenditures provided by individuals, corporations, unions and taxpayers, on a scale which, proportionate to the population's size, is amongst the highest in the world. This not only disregards the ideal of political equality central to democratic values, but also encourages methods of campaigning and propagandising which are rightly seen by their subjects as insultingly uninformative and non-argumentative, a type of political communication which is neither free nor inviting."

140 Section 96D does not aid in the work done by ss 95A and 95I. Rather, it is itself apt to distort the flow of political communication within the federation by disfavoured some sources of political communication and thus necessarily favouring others.

141 In addition, the proscriptions in s 96D do not reflect a calibrated balancing of legitimate ends as contemplated by the second limb of the *Lange* test. In this latter regard, the proscriptions in s 96D are very broad; they are not calibrated to give effect to the rationale identified by the defendant by criteria adapted to target the vices said to attend the disfavoured sources of political communication. The sources of political communication which are favoured by their omission from the scope of s 96D may well be attended by the same vices as the defendant identified as justifying s 96D.

142 Corporations are familiar and accepted sources and conduits of political information. Their familiarity, variety and ubiquity serve to highlight the unqualified impact of the sweeping proscription in s 96D. In *The Constitutional Corporation: Rethinking Corporate Governance*¹²², Professor Stephen Bottomley noted that:

"The significance of corporations in modern society is not confined to the private business sector. Corporate forms of organisation are now commonplace in the non-business and non-profit sectors, including social groups and religious organisations, sports and recreational clubs, educational institutions, professional firms, and welfare organisations. ... [C]orporations now feature in all aspects of social, political and economic life – private and public, business and non-business, large and small enterprise. ... [T]he connection between citizens and their national and global communities is increasingly mediated ... through the activities of corporations." (footnote omitted)

122 (2007) at 2-4.

143 In addition, many corporations are small and closely held and so are not distinguishable from the individuals who stand behind them in terms of their potential for exercising secret or undue influence upon candidates or political parties through donations.

144 There is also no evident basis, in terms of the rationale suggested by the defendant, to differentiate between individuals who are enrolled to vote and those who are not as sources of political communication. To disfavour political communication sourced in funds provided by individuals on the sole ground that they are not on the roll of electors is to fail to appreciate two matters. First, unenrolled individuals may be among the governed whose interests are affected by governmental decisions. Secondly, and more importantly, the freedom of political communication within the federation is not an adjunct of an individual's right to vote, but an assurance that the people of the Commonwealth are to be denied no information which might bear on the political choices required of them.

145 Thus, in *ACTV*¹²³, Mason CJ made the point that the electors, who must make the political choices required by the Constitution, may be assisted by the views of those within the community who are not entitled to vote:

"Freedom of communication in relation to public affairs and political discussion cannot be confined to communications between elected representatives and candidates for election on the one hand and the electorate on the other. The efficacy of representative government depends also upon free communication on such matters between all persons, groups and other bodies in the community. That is because individual judgment, whether that of the elector, the representative or the candidate, on so many issues turns upon free public discussion in the media of the views of all interested persons, groups and bodies and on public participation in, and access to, that discussion¹²⁴."

146 This point is relevant to the prohibitions upon political donations by unenrolled individuals, corporations and industrial organisations. The legitimacy of the suppression, complete or partial, of political communication generated from funds provided by such sources must be determined, not by reference to the

123 (1992) 177 CLR 106 at 139.

124 Lord Simon of Glaisdale made the point in *Attorney-General v Times Newspapers Ltd* [1974] AC 273 at 315, when he said: "People cannot adequately influence the decisions which affect their lives unless they can be adequately informed on facts and arguments relevant to the decisions. Much of such fact-finding and argumentation necessarily has to be conducted vicariously, the public press being a principal instrument."

political agenda of individuals or corporations or the individuals behind the corporate veil or industrial association, but by reference to the indispensable entitlement of the people of the Commonwealth to free access to information which might be pertinent to the exercise of their political sovereignty.

147 In *ACTV*¹²⁵, Mason CJ described the legislation there held to be invalid as "discriminatory in the respects already mentioned." In that regard, the "respects already mentioned" by his Honour were prohibitions which¹²⁶:

"directly exclude potential participants in the electoral process from access to an extremely important mode of communication with the electorate. Actual and potential participants include not only the candidates and established political parties but also the electors, individuals, groups and bodies who wish to present their views to the community."

148 To appreciate the compelling force of that view one need only reflect on the relevance of advocacy by individuals or corporations on behalf of "undocumented immigrants" to the political choices to be made by the electors of the Commonwealth.

149 One need reflect only a little further to appreciate, as well, that advocacy as to the appropriate location of centres for the detention of such immigrants might well be of concern in State or local government elections. This last reflection is relevant as well to the issue whether the provisions of the EFED Act which seek to confine its operation to State or local government elections are effective to preserve s 96D.

The quarantine question

150 The defendant argued that ss 83 and 95AA(2) of the EFED Act ensure that s 96D does not restrict political communication protected under the Constitution.

151 The plaintiffs argued that the restrictions on funding political communications in New South Wales elections will affect the flow of information which is indispensable to the making of the free and informed choices required by the Constitution of the people of the Commonwealth. It was observed that, in Australia, the major political parties operate at federal, State, Territory and local government levels, each seeking to further their objects through the election of members to both State and Commonwealth legislatures and local governments.

125 (1992) 177 CLR 106 at 146.

126 (1992) 177 CLR 106 at 145. See also at 131-132.

152 There is ample authority for the plaintiffs' submission. In *Stephens v West Australian Newspapers Ltd*¹²⁷, Mason CJ, Toohey and Gaudron JJ said that "the freedom of communication implied in the ... Constitution extends to public discussion of the performance, conduct and fitness for office of members of a State legislature."

153 In *Lange*, the Court said¹²⁸:

"[T]he discussion of matters at State, Territory or local level might bear on the choice that the people have to make in federal elections or in voting to amend the Constitution, and on their evaluation of the performance of federal Ministers and their departments. The existence of national political parties operating at federal, State, Territory and local government levels, the financial dependence of State, Territory and local governments on federal funding and policies, and the increasing integration of social, economic and political matters in Australia make this conclusion inevitable."

154 And, in *Hogan v Hinch*¹²⁹, French CJ said:

"significant interaction between the different levels of government in Australia ... makes it difficult to identify subjects not capable or potentially capable of discussion as matters which are or should be or could be of concern to the national government."

155 The defendant's argument casts ss 83 and 95AA(2) of the EFED Act in the legendary role of King Cnut, who, for all his sovereign power within his realm, could not prevent the flow of the tide into it. Sections 83 and 95AA(2) of the EFED Act confine the operation of s 96D to conduct which occurs in relation to elections to the New South Wales Parliament or local council elections in New South Wales; but they cannot ensure that political communications are of exclusively local significance. Just because a communication occurs in the course of a State or local government election, it does not follow that it might not also be pertinent to the choices required by the Constitution of the people of the Commonwealth.

156 It may be said that it would be difficult, as a matter of drafting, to proscribe only such donations as fund those communications which are not

127 (1994) 182 CLR 211 at 232; [1994] HCA 45.

128 (1997) 189 CLR 520 at 571-572. See also *Roberts v Bass* (2002) 212 CLR 1 at 29 [73], 58 [159]; [2002] HCA 57.

129 (2011) 243 CLR 506 at 543 [48].

pertinent to those choices; but to say that is merely to acknowledge the unreality of the suggestion that s 96D, even confined by ss 83 and 95AA(2), is not apt to have an adverse effect upon the free flow of political communication within the federation.

157 The famous aphorism of Mr Thomas P (Tip) O'Neill, the Speaker of the United States House of Representatives, that "all politics is local" was a statement of practical politics, not constitutional principle. It may be accepted that not all political communications, however parochial their content may be, are inevitably linked to the political choices to be made by the people of the Commonwealth. As a matter of fact, some political communications will be of exclusively local concern without federal ramifications. A candidate for election to a local council may focus his or her campaign exclusively on local issues. But the proscriptions in s 96D are not targeted at particular communications within a campaign; they are targeted at donations which fund campaigning which is directed at electors who happen to be among the people of the Commonwealth who are required to make the choices contemplated by ss 7, 24 and 128 of the Constitution¹³⁰.

158 When a question arises as to whether legislation trenches upon the freedom of political communication, it is necessary to bear in mind that what is at stake is the political sovereignty of the people of the Commonwealth. It may be said that whether information is pertinent to the exercise of the political choices required of the people of the Commonwealth is a question which only the people of the Commonwealth can answer. But, as a practical legal matter, that question must be answered by this Court¹³¹. While the Court must accept that "[c]ommunications on political and governmental matters [as] part of the system of representative and responsible government ... may be regulated in ways that enhance or protect the communication of those matters"¹³², the Court must also ensure that the regulation is compatible with the maintenance of the federation's system of representative and responsible government. Where political and governmental information which flows to and from the electorate in State and local government campaigns (that electorate being part of the people of the Commonwealth) *might* be pertinent to the political choices required of the people of the Commonwealth, the sources and conduits of that information must be kept

130 cf *Commonwealth Electoral Act 1918* (Cth), s 93 and *Parliamentary Electorates and Elections Act 1912* (NSW), ss 22, 23.

131 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 144.

132 *Coleman v Power* (2004) 220 CLR 1 at 52 [97].

open and undistorted. Thus, in *Lange*¹³³, the Court said, speaking particularly of s 128 of the Constitution, that:

"by directly involving electors in the States and in certain Territories in the process for amendment of the Constitution, [s 128] necessarily implies a limitation on legislative and executive power to deny the electors access to information that *might* be relevant to the vote they cast in a referendum to amend the Constitution." (emphasis added)

159 It is telling that neither in the Special Case, nor in the course of argument, was a practical example given of a political communication which might relate exclusively to the election of a candidate to the New South Wales Parliament or to a local government in New South Wales with no bearing upon the political choices required of the people of the Commonwealth by the Constitution. While it is possible to conceive of a campaign for election to a local council where the entire campaign is exclusively focused on matters of parochial interest, s 96D is not confined by ss 83 and 95AA(2) to such campaigns. Rather, it is targeted at the funding of campaigns which might be pertinent to the political choices of the people of the Commonwealth.

The validity of s 95G(6)

160 As has been noted, the plaintiffs did not challenge the validity of the caps on political expenditure imposed by s 95I(1); rather they attacked the validity of the aggregating provision in s 95G(6). Once again, it was accepted on all sides that the validity of this provision is to be determined by reference to the application of the *Lange* test.

An effective burden?

161 The plaintiffs submitted that s 95G(6) impermissibly burdens the freedom of political communication (in terms of the first limb of the *Lange* test) in three ways. First, it limits the amount that a political party and any affiliated organisation may spend on electoral communication expenditure, thereby diminishing the type or amount of political communication in which either may engage. Secondly, the amount an affiliated organisation is permitted to incur on electoral communication expenditure is dependent on the amount spent by the party. If one affiliated organisation wishes to incur electoral communication expenditure, then it will need to limit its own spending to ensure that the spending does not cause the aggregate to exceed the party's cap. Thirdly, s 95G(6) has a chilling effect on incurring electoral communication expenditure because the party's cap and the spending limit of affiliated organisations can only be known at the end of the capped expenditure period.

133 (1997) 189 CLR 520 at 561.

162 The defendant contended that s 95G(6) does not impose a burden on the
freedom of political communication but identifies a particular relationship in
respect of which the legislature has determined that the electoral communication
expenditure of more than one participant in the electoral process should be
aggregated.

163 In terms of the first limb of the *Lange* test, the defendant's last-mentioned
contention makes the point that the extent of political communication is to be
restricted on the ground that it is funded by political allies with a given level of
formal association. Section 87 of the EFED Act expressly defines electoral
communication expenditure in terms of political campaigning. Accordingly,
sub-ss (6) and (7) of s 95G will have the practical effect of reducing the total
flow of political communication which would otherwise emanate from a party
and its affiliates. It may be accepted that, as the defendant submitted, the
aggregation provision amplifies the effect of the caps on electoral expenditure.
But to say that is necessarily to recognise a burdening of political communication
so far as the first limb of the *Lange* test is concerned, and to fail to recognise the
discriminatory nature of that burden so far as the second limb of the *Lange* test is
concerned.

*Appropriate means adapted to a legitimate end compatible with the freedom of
political communication*

164 In relation to whether the aggregation provision is justified under the
second limb of the *Lange* test, the defendant sought to justify s 95G(6) as being
appropriate and adapted to preventing the operation of s 95I(1), the validity of
which is not contested, being circumvented. The criteria established by s 95G(7)
for "affiliated organisations" require formal arrangements between the
organisation and the political party with respect to fundamental party processes:
the composition of its governing body and the pre-selection of candidates.
Affiliated organisations are, in the defendant's submission, a meaningful and
significant part of the political party. It was said to be irrelevant that affiliated
organisations may not always agree on all issues with the party leadership.

165 The plaintiffs countered that the ability of an affiliated organisation to
appoint delegates to the governing body of a political party, or to participate in
the pre-selection of candidates, is neither the legal nor practical equivalent of
control of the political communications emanating from that political party.
Further, the ability of an organisation to appoint delegates to the governing body
of a political party, or to participate in the pre-selection of candidates, does not
mean there is an identity of opinions or objectives between the party and the
affiliate.

166 In addition, the defendant argued that individuals who are members of
affiliated organisations are left at liberty to act individually or in concert to make
expenditure to communicate politically. That may be so, but to say that is, once

again, to view the issue as if it were concerned with the vindication of a personal right of free expression in the individual members of affiliated organisations. In truth, the issue is whether the provision which restricts the free flow of political communication is justifiable in terms of the indispensable need to maintain the free flow of political communication within the federation. Further, to seek to justify the aggregation provision by reference to the possibility that political communication emanating from a political party may not accurately reflect the views of the members of the affiliate once again confuses notions of personal rights of expression of the membership with the interest of the people of the Commonwealth which is protected by the implied freedom.

167 The effect of sub-ss (6) and (7) of s 95G is that certain sources of political communication are treated differently from others. For example, third-party campaigners are not subject to the aggregation provisions. The effect of this differential treatment is to distort the free flow of political communication by favouring entities, such as third-party campaigners, who may support a political party, but whose ties are not such as to make them affiliates under the rules of that party even though they may promulgate precisely the same political messages. Political communication generated by electoral communication expenditure by organisations affiliated with a party is disfavoured relative to political communication by entities which, though actively supportive of, and indeed entirely ad idem with, a given party, are not affiliated with it. To discriminate between sources of political communication in this way, in the sense of the term used by Mason CJ in *ACTV*¹³⁴ and discussed above in relation to s 96D, is to distort the flow of political communication.

168 This distortion of political communication cannot be regarded as appropriate and adapted to enhance or protect the free flow of political communication within the federation. In this regard, s 95G(6) is not calibrated, even in the most general terms, so as to target only sources of political communication affected by factors inimical to the free flow of political communication throughout the Commonwealth.

The quarantine question

169 For the reasons set out in relation to s 96D, s 83 does not quarantine the operation of s 95G(6) so as to preserve its effectiveness notwithstanding the implied freedom.

134 (1992) 177 CLR 106 at 145-146.

Conclusions and orders

170 The questions reserved for determination should be answered as follows:

1. Is section 96D of the *Election Funding, Expenditure and Disclosures Act* 1981 (NSW) invalid because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution?

Answer: Yes.

2. Is section 95G(6) of the *Election Funding, Expenditure and Disclosures Act* 1981 (NSW) invalid because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution?

Answer: Yes.

3. Do sections 7A and 7B of the *Constitution Act* 1902 (NSW) give rise to an entrenched protection of freedom of communication on New South Wales State government and political matters?

Answer: Unnecessary to answer.

4. If so, is section 96D of the *Election Funding, Expenditure and Disclosures Act* 1981 (NSW) invalid because it impermissibly burdens that freedom, contrary to the New South Wales Constitution?

Answer: Unnecessary to answer.

5. Further, if the answer to question 3 is "yes", is section 95G(6) of the *Election Funding, Expenditure and Disclosures Act* 1981 (NSW) invalid because it impermissibly burdens that freedom, contrary to the New South Wales Constitution?

Answer: Unnecessary to answer.

6. Is section 96D of the *Election Funding, Expenditure and Disclosures Act* 1981 (NSW) invalid under section 109 of the Commonwealth Constitution by reason of it being inconsistent with section 327 of the *Commonwealth Electoral Act* 1918 (Cth)?

Answer: Unnecessary to answer.

7. Is section 96D of the *Election Funding, Expenditure and Disclosures Act* 1981 (NSW) invalid under section 109 of the Commonwealth Constitution

by reason of it being inconsistent with Part XX of the *Commonwealth Electoral Act 1918* (Cth)?

Answer: Unnecessary to answer.

8. Is section 96D of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) invalid because it impermissibly burdens a freedom of association provided for in the Commonwealth Constitution?

Answer: Unnecessary to answer.

9. Who should pay the costs of the Special Case?

Answer: The defendant.

