HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, GAGELER, KEANE, NETTLE AND GORDON JJ

JEFFERY RAYMOND McCLOY & ORS PLAINTIFFS

AND

STATE OF NEW SOUTH WALES & ANOR DEFENDANTS

McCloy v New South Wales
[2015] HCA 34
7 October 2015
S211/2014

ORDER

The questions stated by the parties in the special case dated 28 January 2015 and referred for the opinion of the Full Court be answered as follows:

Question 1

Is Division 4A of Part 6 of the Election Funding, Expenditure and Disclosures Act *1981 (NSW) invalid (in whole or in part and, if in part, to what extent) in its application to the plaintiffs because it impermissibly burdens the implied freedom on communication on governmental and political matters contrary to the Commonwealth Constitution?*

Answer

In so far as Division 4A prohibits the making by a property developer of a political donation or acceptance of a political donation from a property developer, it is not invalid. It does not impermissibly burden the implied freedom of communication on governmental and political matters contrary to the Constitution.

Question 2

Is Division 2A of Part 6 of Election Funding, Expenditure and Disclosures Act *1981 (NSW) invalid (in whole or in part and, if in part, to what extent) in its application to the plaintiffs because it impermissibly burdens the implied freedom of communication of governmental and political matters contrary to the Commonwealth Constitution?*

Answer

No.

Question 3

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

Answer

No.

Question 4

Who should pay the costs of the special case?

Answer

The plaintiffs.

Representation

D M J Bennett QC with I D Faulkner SC, A K Flecknoe-Brown and B A Mee for the plaintiffs (instructed by Toomey Pegg 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 first defendant (instructed by Crown Solicitor (NSW))

Submitting appearance for the second defendant

Interveners

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

G R Donaldson SC, Solicitor-General for the State of Western Australia with K A T Pedersen for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor (WA))

P J Dunning QC, Solicitor-General of the State of Queensland with A D Keyes for the Attorney-General of the State of Queensland, intervening (instructed by Crown Law (Qld))

M G Evans QC with D F O'Leary for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor (SA))

K L Walker QC with A D Pound for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor)

CATCHWORDS

McCloy v New South Wales

Constitutional law – Implied freedom of communication on governmental and political matters – Provisions of *Election Funding, Expenditure and Disclosures Act* 1981 (NSW) impose cap on political donations, prohibit property developers from making such donations, and restrict indirect campaign contributions – Whether provisions impermissibly burden implied freedom of political communication.

Words and phrases – "appropriate and adapted", "deference", "implied freedom of communication on governmental and political matters", "margin of appreciation", "proportionality".

Constitution, ss 7, 24, 62, 64, 128.
Election Funding, Expenditure and Disclosures Act 1981 (NSW), Pt 6, Divs 2A, 4A, s 96E.

FRENCH CJ, KIEFEL, BELL AND KEANE JJ.

Introduction

1 The *Election Funding, Expenditure and Disclosures Act* 1981 (NSW) ("the EFED Act") imposes restrictions on private funding of political candidates and parties in State and local government elections in New South Wales. The plaintiffs contend in this special case that provisions of the EFED Act, which impose a cap on political donations, prohibit property developers from making such donations, and restrict indirect campaign contributions, are invalid for impermissibly infringing the freedom of political communication on governmental and political matters (hereinafter "the freedom"), which is an implication from the Australian Constitution.

2 As explained in the reasons that follow, the question whether an impugned law infringes the freedom requires application of the following propositions derived from previous decisions of this Court and particularly *Lange v Australian Broadcasting Corporation*[1] and *Coleman v Power*[2]:

A. The freedom under the Australian Constitution is a qualified limitation on legislative power implied in order to ensure that the people of the Commonwealth may "exercise a free and informed choice as electors."[3] It is not an absolute freedom. It may be subject to legislative restrictions serving a legitimate purpose compatible with the system of representative government for which the Constitution provides, where the extent of the burden can be justified as suitable, necessary and adequate, having regard to the purpose of those restrictions.

B. The question whether a law exceeds the implied limitation depends upon the answers to the following questions, reflecting those propounded in *Lange* as modified in *Coleman v Power*:

1. Does the law effectively burden the freedom in its terms, operation or effect?

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1 (1997) 189 CLR 520; [1997] HCA 25.

2 (2004) 220 CLR 1; [2004] HCA 39.

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

If "no", then the law does not exceed the implied limitation and the enquiry as to validity ends.

2. If "yes" to question 1, are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government[4]? This question reflects what is referred to in these reasons as "compatibility testing".

The answer to that question will be in the affirmative if the purpose of the law and the means adopted are identified and are compatible with the constitutionally prescribed system in the sense that they do not adversely impinge upon the functioning of the system of representative government.

If the answer to question 2 is "no", then the law exceeds the implied limitation and the enquiry as to validity ends.

3. If "yes" to question 2, is the law reasonably appropriate and adapted to advance that legitimate object[5]? This question involves what is referred to in these reasons as "proportionality testing" to determine whether the restriction which the provision imposes on the freedom is justified.

The proportionality test involves consideration of the extent of the burden effected by the impugned provision on the freedom. There are three stages to the test – these are the enquiries as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses:

suitable — as having a rational connection to the purpose of the provision[6];

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4 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-562, 567.

5 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562.

6 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 558-559 [55]-[56]; [2013] HCA 58.

> *necessary* — in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;
>
> *adequate in its balance* — a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.
>
> If the measure does not meet these criteria of proportionality testing, then the answer to question 3 will be "no" and the measure will exceed the implied limitation on legislative power.

3 As noted, the last of the three questions involves a proportionality analysis. The term "proportionality" in Australian law describes a class of criteria which have been developed by this Court over many years to determine whether legislative or administrative acts are within the constitutional or legislative grant of power under which they purport to be done. Some such criteria have been applied to purposive powers; to constitutional legislative powers authorising the making of laws to serve a specified purpose; to incidental powers, which must serve the purposes of the substantive powers to which they are incidental; and to powers exercised for a purpose authorised by the Constitution or a statute, which may limit or restrict the enjoyment of a constitutional guarantee, immunity or freedom, including the implied freedom of political communication. Analogous criteria have been developed in other jurisdictions, particularly in Europe, and are referred to in these reasons as a source of analytical tools which, according to the nature of the case, may be applied in the Australian context.

4 Acceptance of the utility of such criteria as tools to assist in the determination of the limits of legislative powers which burden the freedom does not involve a general acceptance of the applicability to the Australian constitutional context of similar criteria as applied in the courts of other jurisdictions. It does not involve acceptance of the application of proportionality analysis by other courts as methodologically correct. The utility of the criteria is in answering the questions defining the limits of legislative power relevant to the freedom which are derived from *Lange*.

5 As explained in the reasons that follow, while the impugned provisions effectively burden the freedom, they have been enacted for legitimate purposes. They advance those purposes by rational means which not only do not impede the system of representative government provided for by the Constitution, but

enhance it. There are no obvious and compelling alternative, reasonably practicable means of achieving the same purpose. The provisions are adequate in their balance. The burden imposed on the freedom is therefore justified as a proportionate means of achieving their purpose. The substantive questions stated in the special case should be answered in favour of the validity of the impugned provisions and the plaintiffs should pay the costs of the special case.

The EFED Act

6 Provisions of the EFED Act were considered by this Court in *Unions NSW v New South Wales*[7]. That decision confirmed the operation of the freedom across State or Territory and federal divides and at all levels of government[8]. The submission that it did not apply to the EFED Act was rejected[9].

7 The general purpose of Pt 6 of the EFED Act was not in dispute in that case. In the joint judgment[10] it was accepted that this purpose is to secure and promote the actual and perceived integrity of the Parliament and other institutions of government in New South Wales. A risk to that integrity may arise from undue, corrupt or hidden influences over those institutions, their members or their processes. That risk arises largely from the need, on the part of political parties and candidates, for large donations in order to compete effectively in election campaigns[11].

8 Since the decision in *Unions NSW*, the EFED Act has been amended by the addition of an objects clause. Section 4A[12] provides:

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7 (2013) 252 CLR 530.

8 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 550 [25].

9 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 553 [34], 582-583 [155].

10 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 545 [8], 557 [49], 558 [53].

11 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 545-546 [8], 557 [49], 558 [53].

12 Inserted by the *Electoral and Lobbying Legislation Amendment (Electoral Commission) Act* 2014 (NSW), Sched 2 [4].

"The objects of this Act are as follows:

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

(b) to facilitate public awareness of political donations,

(c) to help prevent corruption and undue influence in the government of the State,

(d) to provide for the effective administration of public funding of elections, recognising the importance of the appropriate use of public revenue for that purpose,

(e) to promote compliance by parties, elected members, candidates, groups, agents, third-party campaigners and donors with the requirements of the election funding, expenditure and disclosure scheme."

9 Although the purpose of Pt 6 of the EFED Act was accepted as legitimate[13] in *Unions NSW*, in the sense referred to in *Lange*[14], the provisions of Pt 6 in question in *Unions NSW*[15] were held to be invalid because they could not be seen as rationally connected to that purpose.

10 This case concerns Div 2A of Pt 6 ("Div 2A"), Div 4A of Pt 6 ("Div 4A") and s 96E, which also appears in Pt 6 of the EFED Act. Part 6 applies to State and local government elections and to elected members of Parliament and councils, except Div 2A, which applies only to State elections and elected members of Parliament[16].

11 Section 95A(1), in Div 2A, provides general caps on the amount of political donations which a person can make to or for the benefit of a particular political party, elected member, group, candidate or third-party campaigner.

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13 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 546 [9], 579 [138].

14 (1997) 189 CLR 520 at 561-562.

15 *Election Funding, Expenditure and Disclosures Act* 1981 (NSW), ss 96D and 95G(6).

16 *Election Funding, Expenditure and Disclosures Act* 1981, s 83.

Political donations to a registered political party are limited to $5,000 in a financial year[17]. This cap (as well as the caps referable to the other categories of recipients) is subject to indexation[18]. For any cap, donations during a financial year are aggregated[19]. Subject to certain exceptions, it is unlawful for a person to accept a political donation which exceeds the applicable cap[20].

12 A political donation is essentially a gift[21]. However, a gift made in a private capacity to an individual for his or her personal use, which is not used, and is not intended by the individual to be used, for a purpose related to an election or to his or her duties as an elected member, is not a political donation[22]. A candidate's contribution to finance his or her own campaign is not included in the applicable caps on political donations[23]. A subscription which is below a prescribed amount, paid to a political party by an industrial organisation, member, entity or other person, is disregarded for the purposes of Div 2A[24].

13 Although not in issue in these proceedings, two other aspects of the scheme of the EFED Act should be mentioned. The provisions of Div 2A reduce the income available to candidates for election purposes. Division 2B of Pt 6 contains complementary provisions which cap "electoral communication expenditure". That term is defined[25] to include expenditure on advertisements and other matters associated with campaigning. The restriction on political donations is ameliorated, to some extent, by the provision made in Pt 5 for public funding of State election campaigns.

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

18 *Election Funding, Expenditure and Disclosures Act* 1981, s 95A(5), Sched 1, cl 2.

19 *Election Funding, Expenditure and Disclosures Act* 1981, ss 95A(2)-95A(3).

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

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

22 *Election Funding, Expenditure and Disclosures Act* 1981, s 85(4)(a).

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

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

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

14 Section 96E(1) prohibits the "indirect campaign contributions" which are there listed. They include the provision of office accommodation, vehicles, computers or other equipment for no or inadequate consideration for use solely or substantially for election campaign purposes, and payment by someone else of electoral expenditure incurred or to be incurred by a party, elected member, group or candidate. Sub-section (2) of s 96E prohibits the acceptance of any of the listed indirect campaign contributions.

15 Section 96GA, in Div 4A, prohibits the making or acceptance, directly or indirectly, of a political donation by a "prohibited donor" or the soliciting of a person by or on behalf of a "prohibited donor" to make a political donation. "Prohibited donor" is defined by s 96GAA to mean:

> "(a) a property developer, or
>
> (b) a tobacco industry business entity, or
>
> (c) a liquor or gambling industry business entity,
>
> and includes any industry representative organisation if the majority of its members are such prohibited donors."

The special case, as the plaintiffs acknowledge, is limited to the prohibition in Div 4A applying to property developers, not the other two classes of "prohibited donors". A "property developer" is defined in s 96GB(1) as:

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

The other two classes of prohibited donors are also, in part, defined as corporations and their close associates[26].

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26 *Election Funding, Expenditure and Disclosures Act* 1981, ss 96GB(2A), 96GB(2B).

16 A "relevant planning application"[27] has the same meaning as in the *Environmental Planning and Assessment Act* 1979 (NSW) ("the EPA Act"), which covers a wide range of planning related applications under that Act[28].

17 A "close associate" of a corporation is defined[29] to include a director or officer of the corporation or the spouse (which includes a de facto partner) of that person; a related body corporate of the corporation; a person whose voting power in the corporation or related body corporate is more than 20 per cent, or their spouse; or, when a corporation is a trustee, manager or responsible entity in relation to a trust, a person who holds more than 20 per cent of the units in a unit trust or is a beneficiary of a discretionary trust.

18 The third plaintiff is a "property developer" within the meaning given to that term by the EFED Act. The first plaintiff is a director and "close associate" of the third plaintiff and therefore himself a "property developer" within the meaning of the EFED Act.

19 The first plaintiff made donations of money to candidates for the March 2011 New South Wales State election. The second plaintiff, a corporation of which the first plaintiff is a director, made an "indirect campaign contribution" within the meaning of the EFED Act by way of payment towards the remuneration of a member of the campaign staff of a candidate for that election. Each of the plaintiffs intends, if permitted by law, to make donations in excess of $5,000 to the New South Wales division of a particular political party or to other political parties.

20 The plaintiffs challenge the validity of Div 2A, Div 4A and s 96E. They submit that the ability to pay money to secure access to a politician is itself an aspect of the freedom and therefore the subject of constitutional protection. To the extent that the freedom may be abridged by laws which are proportionate to a legitimate end, one which is consistent with the system of representative government for which the Constitution provides[30], the plaintiffs submit that these provisions are not of that kind.

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27 *Election Funding, Expenditure and Disclosures Act* 1981, s 96GB(3).

28 *Environmental Planning and Assessment Act* 1979 (NSW), s 147.

29 *Election Funding, Expenditure and Disclosures Act* 1981, s 96GB(3).

30 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-562, 567.

The questions in this case

21 The following questions are stated by the parties for the opinion of the Court:

> "1. Is Division 4A of Part 6 of the *Election Funding, Expenditure and Disclosures Act* 1981 (NSW) invalid (in whole or in part and, if in part, to what extent) in its application to the plaintiffs because it impermissibly burdens the implied freedom on communication on governmental and political matters contrary to the Commonwealth Constitution?
>
> 2. Is Division 2A of Part 6 of *Election Funding, Expenditure and Disclosures Act* 1981 (NSW) invalid (in whole or in part and, if in part, to what extent) in its application to the plaintiffs because it impermissibly burdens the implied freedom of communication of governmental and political matters contrary to the Commonwealth Constitution?
>
> 3. Is s 96E of the *Election Funding, Expenditure and Disclosures Act* 1981 (NSW) invalid in its application to the plaintiffs because it impermissibly burdens the implied freedom of communication of governmental and political matters contrary to the Commonwealth Constitution?
>
> 4. Who should pay the costs of the special case?"

22 Section 96E is merely an anti-avoidance provision. Its purpose is to prevent political donations being made to a monetary value larger than the applicable cap by indirect means. Its validity depends upon that of Div 2A.

The effect on the freedom

23 The constitutional basis for the freedom is well settled. The Court was not invited by any party to reconsider the basis for the implication. *Lange* is the authoritative statement of the test to be applied to determine whether a law contravenes the freedom. All parties accepted that the *Lange* test was to be applied in this case to determine whether the impugned provisions of the EFED Act are consistent with the freedom. The only question, then, is as to what is required by the *Lange* test. In that regard, whether the impugned provisions are consistent with the freedom is to be determined, not by a side by side comparison of the challenged provisions with the text of ss 7, 24, 64 and 128 of the Constitution, nor by a determination of whether the impugned provisions are reasonably necessary in the pursuit of a purpose adjudged to be sufficiently

important, nor by an impressionistic judgment as to whether the impugned provisions are consistent with the freedom. The *Lange* test requires a more structured, and therefore more transparent, approach. In the application of that approach it is necessary to elucidate how it is that the impugned law is reasonably appropriate and adapted, or proportionate, to the advancement of its legitimate purpose.

24 Central to the questions posed by *Lange*[31] is how the EFED Act affects the freedom. In *Unions NSW*, it was accepted by the parties, and by the Court, that the provisions of the EFED Act effect a burden on the freedom[32]. A restriction on the funds available to political parties and candidates to meet the costs of political communication, which operates by restricting the source of those funds, effectively burdens the freedom because, even with the public funding which is provided for, a party or candidate will have to fund any shortfall[33]. The restrictions imposed by the general capping provisions of Div 2A, and the prohibitions upon political donations from property developers in Div 4A and upon indirect campaign contributions in s 96E, burden the freedom in this sense. It is, then, incumbent upon New South Wales to justify that burden, by reference to the requirements drawn from *Lange*.

25 The plaintiffs contend that the provisions in question have a further effect on the freedom, namely upon the ability of donors to make substantial political donations in order to gain access and make representations to politicians and political parties. They accept, as they must, that the act of donation is not itself a political communication, but they submit that donors are entitled to "build and assert political power" and that this is an aspect of the freedom which has been recognised by this Court. Political influence may be acquired by many means, they say, and paying money to a political party or an elected member is but one.

26 The words quoted by the plaintiffs and repeated above are taken from a passage in Archibald Cox's text[34], which was referred to by Mason CJ in

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31 (1997) 189 CLR 520 at 567, see also at 561-562; as those questions were amended by *Coleman v Power* (2004) 220 CLR 1 at 51 [95]-[96], 78 [196], 82 [211].

32 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 555 [43], 574 [120]-[121].

33 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 554 [38].

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

Australian Capital Television Pty Ltd v The Commonwealth[35] ("*ACTV*") and by the joint judgment in *Unions NSW*[36]:

> "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".

In *Unions NSW*[37] this passage was referred to in order to explain the need for an unfettered exchange of ideas. It was said that persons other than electors have a legitimate interest in matters of government and may seek to influence who should govern. This was in the context of a provision which purported to restrict donors to being individuals who are enrolled as electors.

27 In *ACTV*, Mason CJ[38] referred to the last sentence in the passage quoted as a "striking comment" on Professor Harrison Moore's statement[39] that "'[t]he great underlying principle' of the Constitution was that the rights of individuals were sufficiently secured by ensuring each an equal share in political power" (footnote omitted).

28 Neither the passage from Archibald Cox nor the use made of it by this Court supports the plaintiffs' argument that the ability to make substantial donations is part of the freedom. To the contrary, guaranteeing the ability of a few to make large political donations in order to secure access to those in power would seem to be antithetical to the great underlying principle to which Professor Harrison Moore referred.

29 In any event, what the plaintiffs identify is something in the nature of a personal right. The plaintiffs' argument appears to mistakenly equate the freedom under our Constitution with an individual right such as is conferred by the First Amendment to the United States Constitution, which operates in the

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35 (1992) 177 CLR 106 at 139; [1992] HCA 45.

36 (2013) 252 CLR 530 at 551 [29].

37 (2013) 252 CLR 530 at 551-552 [30].

38 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 139-140.

39 Harrison Moore, *The Constitution of the Commonwealth of Australia*, (1902) at 329; that statement as summarised by Mason CJ.

field of political donations and is in the nature of both a right of political expression and a right of political association[40].

30 It has repeatedly been explained, most recently in *Unions NSW*[41], that the freedom is not a personal right. In *ACTV*[42], Brennan J said that "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". The freedom is best understood as a constitutional restriction on legislative power and the question is more generally as to the effect that the impugned legislation has upon the freedom. The EFED Act is not to be approached by viewing the restrictions it imposes upon the plaintiffs' ability to access politicians as a burden on the freedom. The relevant burden is that identified in *Unions NSW*.

Compatibility of the legitimate purpose and means with the Constitution?

31 Accepting that Div 2A and Div 4A burden the freedom, in the way explained in *Unions NSW*, the process of justification for which *Lange* provides commences with the identification of the statutory purpose or purposes. The other questions posed by *Lange* are not reached unless the purpose of the provisions in question is legitimate. A legitimate purpose is one which is compatible with the system of representative government provided for by the Constitution[43]; which is to say that the purpose does not impede the functioning of that system and all that it entails. So too must the means chosen to achieve the statutory object be compatible with that system[44].

Div 2A and s 96E

32 The plaintiffs' argument in support of their submission that the effect of Pt 6 of the EFED Act shows that its true legislative purpose is other than that described in s 4A of the EFED Act does not identify any matter which detracts

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40 *Buckley v Valeo* 424 US 1 at 21-22 (1976).

41 (2013) 252 CLR 530 at 551 [30], 554 [36].

42 (1992) 177 CLR 106 at 150.

43 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-562, 567.

44 *Coleman v Power* (2004) 220 CLR 1 at 50-51 [92]-[96], 78 [196], 82 [211].

from the view expressed in *Unions NSW*[45]. It may be accepted that the words "corruption" and "undue influence" did not appear in the legislation until after that decision but, in relevant aspects, s 4A simply reflects the opinion stated in *Unions NSW* as to the general purpose of the EFED Act. The fact that the words are not repeated in Div 2A or other parts of the EFED Act does not detract from that purpose.

33 The provisions of Div 2A are most clearly directed to the object stated in s 4A(c), the prevention of "corruption and undue influence in the government of the State". The capping provisions of Div 2A are intended to reduce the risk of corruption by preventing payments of large sums of money by way of political donation. It may be accepted, as the plaintiffs submit, that the EFED Act targets money which may be used for political communication, but this is not inconsistent with a purpose to prevent corruption.

34 The provisions of Div 2A, and those of the EFED Act more generally, may additionally have an ancillary purpose. They are also directed to overcoming perceptions of corruption and undue influence, which may undermine public confidence in government and in the electoral system itself. In a report of the Parliament of New South Wales Joint Standing Committee on Electoral Matters, which made recommendations as to capping[46], the Committee noted the submission that the purchase of access to politicians through large donations, which is not available to ordinary citizens, can result in "actual or the perception of undue influence"[47] and said that "the need for reform to restore public confidence in the integrity of the system was recognised by most of the political parties that are currently represented in the New South Wales Parliament"[48].

35 The plaintiffs submit that gaining access through political donations to exert persuasion is not undue influence. This mirrors what was said by

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45 (2013) 252 CLR 530 at 545-546 [8].

46 New South Wales, Parliament, Joint Standing Committee on Electoral Matters, *Public Funding of Election Campaigns*, Report No 2/54, (2010) at 3-5.

47 New South Wales, Parliament, Joint Standing Committee on Electoral Matters, *Public Funding of Election Campaigns*, Report No 2/54, (2010) at 90 [5.34], summarising the submission of the Public Interest Advocacy Centre.

48 New South Wales, Parliament, Joint Standing Committee on Electoral Matters, *Public Funding of Election Campaigns*, Report No 2/54, (2010) at 90 [5.33].

Kennedy J, writing the opinion of the Court in *Citizens United v Federal Election Commission*[49], that "[i]ngratiation and access … are not corruption." In practice, however, the line between them and corruption may not be so bright.

36 There are different kinds of corruption. A candidate for office may be tempted to bargain with a wealthy donor to exercise his or her power in office for the benefit of the donor in return for financial assistance with the election campaign. This kind of corruption has been described as "quid pro quo" corruption[50]. Another, more subtle, kind of corruption concerns "the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder."[51] This kind of corruption is described as "clientelism". It arises from an office-holder's dependence on the financial support of a wealthy patron to a degree that is apt to compromise the expectation, fundamental to representative democracy, that public power will be exercised in the public interest. The particular concern is that reliance by political candidates on private patronage may, over time, become so necessary as to sap the vitality, as well as the integrity, of the political branches of government.

37 It has been said of the nature of the risk of clientelism that[52]:

> "unlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize. The best means of prevention is to identify and to remove the temptation."

38 Quid pro quo and clientelistic corruption threaten the quality and integrity of governmental decision-making, but the power of money may also pose a threat to the electoral process itself. This phenomenon has been referred to as "war-chest" corruption[53]. This form of corruption has been identified, albeit using

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49 558 US 310 at 360 (2010).

50 *Buckley v Valeo* 424 US 1 at 26-27 (1976); *McCutcheon v Federal Election Commission* 188 L Ed 2d 468 at 485, 495-498 (2014).

51 *McConnell v Federal Election Commission* 540 US 93 at 153 (2003).

52 *McConnell v Federal Election Commission* 540 US 93 at 153 (2003).

53 *Federal Election Commission v Beaumont* 539 US 146 at 154-155 (2003).

different terminology, as a matter of concern both in Australia[54] and in other liberal democracies of the common law tradition.

39 In *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport*[55], Lord Bingham of Cornhill said that in a democracy it is highly desirable that the playing field of public debate be so far as practicable level and that:

> "This is achieved where, in public discussion, differing views are expressed, contradicted, answered and debated. … It is not achieved if political parties can, in proportion to their resources, buy unlimited opportunities to advertise in the most effective media, so that elections become little more than an auction."

40 The plaintiffs' submission, that the relevant provisions of the EFED Act have as their true purpose the removal of the ability of persons to make large donations in the pursuit of political influence, would appear to confuse the *effect* of Div 2A, and other measures employed, with the overall *purpose* of these provisions. In so far as the submission also seeks to make the legitimacy of legislative purpose contingent upon consistency with a personal right to make political donations as an exercise of free speech, it appears once again to draw on First Amendment jurisprudence.

41 In *Austin v Michigan Chamber of Commerce*[56], the prospect that the power of money concentrated in corporate hands could distort the electoral process, by dominating the flow of political communication, was identified by the Supreme Court of the United States as a threat to the democratic political process sufficient to justify restrictions on political campaign contributions. However, this First Amendment jurisprudence has not been maintained. More recently, it has been held that the United States Congress may impose restrictions on campaign contributions only to target quid pro quo corruption and the appearance of such corruption[57]. The decision in *Austin* is now regarded as inconsistent with the primacy awarded by the First Amendment to an individual's right to free

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54 Discussed in *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 144-145, 154-155, 188-189.

55 [2008] AC 1312 at 1346 [28].

56 494 US 652 at 660 (1990).

57 *McCutcheon v Federal Election Commission* 188 L Ed 2d 468 at 494-495 (2014).

speech and has been overruled[58]. The view that now prevails is that an attempt by the legislature to level the playing field to ensure that all voices may be heard is, prima facie, illegitimate.

42 That is not the case with respect to the Australian Constitution. As this Court said in *Lange*[59], ss 7, 24, 64 and 128 of the Constitution, and related provisions, necessarily imply a limitation on legislative and executive power in order to ensure that the people of the Commonwealth may "exercise a free and informed choice as electors." Sections 7 and 24 contemplate legislative action to implement the enfranchisement of electors, to establish an electoral system for the ascertainment of the electors' choice of representatives[60] and to regulate the conduct of elections "to secure freedom of choice to the electors."[61] Legislative regulation of the electoral process directed to the protection of the integrity of the process is, therefore, prima facie, legitimate.

43 In *ACTV* it was accepted that the fact that a legislative measure is directed to ensuring that one voice does not drown out others does not mean that measure is illegitimate for that reason alone[62]. The legitimacy of the concerns that the electoral process be protected from the corrupting influence of money and to place "all in the community on an equal footing so far as the use of the public airwaves is concerned" was accepted[63]. The legislation struck down in that case did not give equality of access to television and radio to all candidates and parties. The constitutional vice identified by Mason CJ was that the regulatory regime severely restricted freedom of speech by favouring the established political parties and their candidates. It also excluded from the electoral process

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58 *Citizens United v Federal Election Commission* 558 US 310 at 365, 469 (2010).

59 (1997) 189 CLR 520 at 560.

60 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 56; [1975] HCA 53; *McGinty v Western Australia* (1996) 186 CLR 140 at 182; [1996] HCA 48.

61 *Smith v Oldham* (1912) 15 CLR 355 at 358; [1912] HCA 61.

62 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 144-145, 159, 175, 188-191, 239.

63 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 130, see also at 161, 175, 189, 239.

action groups who wished to present their views to the community without putting forward candidates[64].

44 In *Harper v Canada (Attorney General)*[65] the Supreme Court of Canada upheld legislative restrictions on electoral advertising. Bastarache J, delivering the opinion of the majority of the Court, explained[66] that the restrictions were legitimately imposed in accordance with "the egalitarian model of elections adopted by Parliament as an essential component of our democratic society." His Honour continued that the premise for the model is equal opportunity for participation, and wealth is the major obstacle to equal participation. His Honour said that the state can equalise participation in the electoral process in two ways:

> "First, the State can provide a voice to those who might otherwise not be heard. … Second, the State can restrict the voices which dominate the political discourse so that others may be heard as well."

Speaking of the provisions in question as seeking to create a "level playing field for those who wish to engage in the electoral discourse", his Honour observed that, in turn, this "enables voters to be better informed; no one voice is overwhelmed by another."

45 Equality of opportunity to participate in the exercise of political sovereignty is an aspect of the representative democracy guaranteed by our Constitution[67]. In *ACTV*, the law which was struck down was inimical to equal participation by all the people in the political process and this was fatal to its validity. The risk to equal participation posed by the uncontrolled use of wealth

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64 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 132, 145-146; see also at 171-173 per Deane and Toohey JJ, 220-221 per Gaudron J, 236-237, 239 per McHugh J.

65 [2004] 1 SCR 827.

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

67 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 72; [1992] HCA 46; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 136; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 578 [135]-[136]; *Tajjour v New South Wales* (2014) 88 ALJR 860 at 901 [197]; 313 ALR 221 at 271; [2014] HCA 35.

may warrant legislative action to ensure, or even enhance, the practical enjoyment of popular sovereignty[68].

46 The risks that large political donations have for a system of representative government have been acknowledged since Federation. Part XIV of the *Commonwealth Electoral Act* 1902 (Cth) contained certain limits on expenditure in electoral campaigns and would appear to have been based upon the *Corrupt and Illegal Practices Prevention Act* 1883 (UK)[69]. Speaking of that latter Act, J Renwick Seager[70] said:

> "if its provisions are honestly carried out, the length of a man's purse will not, as now, be such an important factor; and the way will be opened for many men of talent, with small means, to take part in the government of the country".

Capping of political donations is a measure which has been adopted by many countries with systems of representative government[71]. It is a means that does not impede the system of representative government for which our Constitution provides.

47 The purpose of Div 2A and the means employed to achieve that purpose are not only compatible with the system of representative government; they preserve and enhance it.

Div 4A

48 The plaintiffs submit that the prohibitions in Div 4A cannot be based upon any rational perceived risk that property developers are more likely to make corrupt payments than others. Whilst they accept that the commercial interests of property developers are affected by the exercise of public power, they argue that the same may be said of any number of persons in the community. There is nothing special about property developers.

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

69 46 & 47 Vict c 51.

70 Seager, *The Corrupt Practices Act, 1883, with Introduction and Full Index*, (1883) at 3.

71 Transparency International, *Money, Politics, Power: Corruption Risks in Europe*, (2012) at 54 identifies 13 European countries which have done so.

49 New South Wales submits that the degree of dependence of property developers on decisions of government about matters such as the zoning of land and development approvals distinguishes them from actors in other sectors of the economy. Property developers are sufficiently distinct to warrant specific regulation in light of the nature of their business activities and the nature of the public powers which they might seek to influence in their self-interest, as history in New South Wales shows.

50 These submissions of New South Wales should be accepted. Recent history in New South Wales tells against the plaintiffs' submission. The plaintiffs may be correct to say that there is no other legislation in Australia or overseas which contains a prohibition of the kind found in Div 4A, but a problem has been identified in New South Wales and Div 4A is one means to address it.

51 The Independent Commission Against Corruption ("ICAC") and other bodies have published eight adverse reports since 1990 concerning land development applications. Given the difficulties associated with uncovering and prosecuting corruption of this kind, the production of eight adverse reports in this time brings to light the reality of the risk of corruption and the loss of public confidence which accompanies the exposure of acts of corruption. In ICAC's *Report on Investigation into North Coast Land Development*[72], the report author, Mr Roden QC, said that:

> "A lot of money can depend on the success or failure of a lobbyist's representations to Government. Grant or refusal of a rezoning application, acceptance or rejection of a tender, even delay in processing an application that must eventually succeed, can make or break a developer. And decisions on the really mammoth projects can create fortunes for those who succeed. The temptation to offer inducements must be considerable."

52 True it is that the eight reports relate to applications processed at a local level and that local councils consider most development applications. However, decisions as to land development are also made by relevant State departments, and Ministers are often consulted in the approval process. Pursuant to the EPA Act[73], the Minister determines applications for State significant development. It

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72 New South Wales, Independent Commission Against Corruption, *Report on Investigation into North Coast Land Development*, (1990) at 652-653.

73 *Environmental Planning and Assessment Act* 1979, ss 89D-89E.

is the Minister who is responsible for making local environmental plans[74], which contain zoning and development controls[75]. State environmental planning policies are made by the Governor on the recommendation of the Minister and they may make provision for any matter that, in the Minister's opinion, is of State or regional environmental planning significance[76].

53 The purpose of Div 4A is to reduce the risk of undue or corrupt influence in an area relating to planning decisions, where such risk may be greater than in other areas of official decision-making. This purpose furthers the general purpose of Pt 6 of the EFED Act and is "legitimate" within the meaning given to that term in *Lange*, as are the means adopted to achieve it.

No rational connection to purpose?

54 The plaintiffs submit that Div 2A and Div 4A have no rational connection to the purpose of targeting corruption. In the language of proportionality analysis, discussed later in these reasons, that is a submission that the impugned provisions are not "suitable". By analogy with the reasons of the joint judgment in *Unions NSW*, the plaintiffs submit that it is not explained why Div 4A targets only corporations and their close associates who are property developers and not individuals or firms. Other deficiencies are pointed to in Div 2A such as a failure to distinguish between corrupt political donations and those made without a corrupting purpose, and a failure to capture personal gifts.

55 These factors bear no similarity to the problem associated with the provisions at issue in *Unions NSW*. In that case, s 96D(1) prohibited the acceptance of a political donation unless it was from a person enrolled as an elector. Section 95G(6) effectively aggregated the amount spent by way of electoral communication expenditure by a political party and its affiliated organisations for the purposes of the capping provisions in Div 2A. Unlike other provisions in Pt 6, it was not possible to discern how these provisions could further the general anti-corruption purpose of the EFED Act.

56 The provisions of Div 2A and Div 4A do not suffer from such a problem. New South Wales submits that it may be expected that most commercial land developments will be undertaken by corporations, but it does not matter whether

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74 *Environmental Planning and Assessment Act* 1979, Pt 3, Div 4.

75 *Environmental Planning and Assessment Act* 1979, s 26.

76 *Environmental Planning and Assessment Act* 1979, s 37.

that was the reason for excluding other entities and persons from the operation of Div 4A. If there is a deficiency of the kind contended for by the plaintiffs, it is not one which severs the connection to the anti-corruption purpose of the EFED Act. The same may be said of the other alleged deficiencies in Div 2A.

An equally practicable alternative? – necessity

57 In *Lange*[77] it was observed that the law in question in *ACTV* was held to be invalid because there were other, less drastic, means by which the objects of the law could have been achieved. In *Unions NSW*[78] it was said that the *Lange* test may involve consideration of whether there are alternative, reasonably practicable means of achieving the same purpose which have a less restrictive effect on the freedom. If there are other equally appropriate means, it cannot be said that the selection of the one which is more restrictive of the freedom is necessary to achieve the legislative purpose. This method of testing mirrors, to an extent, that which has been applied with respect to legislation which restricts the freedom guaranteed by s 92 of the Constitution.

58 In *Monis v The Queen*[79] it was said that any alternative means must be "obvious and compelling", a qualification which, as French CJ pointed out in *Tajjour v New South Wales*[80], ensures that the consideration of alternative means is merely a tool of analysis in applying this criterion of proportionality. Courts must not exceed their constitutional competence by substituting their own legislative judgments for those of parliaments.

59 The plaintiffs put forward two alternatives to the measures in Div 2A. They say that it would be less restrictive of the freedom if the prohibition on receiving political donations in excess of the applicable caps were confined to those donations which are intended as corrupting; which is to say to limit it to occasions of bribery. They also say that the best method of targeting corruption is transparency and that the requirements in the EFED Act for disclosure of donations could be strengthened.

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77 (1997) 189 CLR 520 at 568.

78 (2013) 252 CLR 530 at 556 [44].

79 (2013) 249 CLR 92 at 214 [347]; [2013] HCA 4.

80 (2014) 88 ALJR 860 at 876 [36]; 313 ALR 221 at 238.

60 Division 2 of Pt 6 of the EFED Act contains provisions requiring the disclosure to the Electoral Commission[81] of political donations made or received during a relevant disclosure period and of electoral expenditure[82]. The Commission publishes reportable donations and electoral expenditure on its website[83].

61 The plaintiffs do not explain how these provisions might be strengthened in a way which would render the capping provisions unnecessary. Whilst provisions requiring disclosure of donations are no doubt important, they could not be said to be as effective as capping donations in achieving the anti-corruption purpose of the EFED Act.

62 Limiting restrictions on political donations to acts of bribery would undoubtedly reduce the efficacy of the statutory scheme. The difficulties inherent in detecting and proving bribery in the context of political donations do not suggest that it can be considered a reasonable alternative to capping. Further, it is not the subjective intention of the donor so much as the objective tendency of large payments of money to corrupt both government and the electoral system which is the justification for the restriction.

63 In the course of argument there was some discussion about whether, given the provision made for capping in Div 2A, the outright prohibition of some donors in Div 4A could be said to be necessary. However, the matter is complicated by the fact that capping and the associated public funding for election campaign purposes are not extended to local government elections, whereas the prohibition in Div 4A is. It was not suggested that the legislature should allocate resources to extend the capping and public funding provisions in order to give them the same scope as the prohibition, nor was it suggested that a partial removal of the prohibition, for local government elections, would be practicable. The plaintiffs did not pursue such a line of argument, eschewing capping altogether for being unnecessary.

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81 *Election Funding, Expenditure and Disclosures Act* 1981, s 91(2); formerly, disclosures had to be to the Election Funding Authority of New South Wales.

82 *Election Funding, Expenditure and Disclosures Act* 1981, ss 88, 92, 93.

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

Other submissions as to proportionality

64 The plaintiffs submit that Div 2A, and s 95B in particular, does not go far enough and does not achieve its object comprehensively because it does not capture all dealings between a donor and donee. Whether or not this identifies a shortcoming of the provisions, the submission does not identify a want of proportionality.

65 Turning to the object of Div 2A, the plaintiffs say that it goes further than is necessary to target actual corruption and pursues a "wider cosmetic objective" of targeting a "perceived lack of integrity". It is difficult to accept that the public perception of possible corruption in New South Wales is a "cosmetic" concern. Even First Amendment jurisprudence accepts that the "appearance" of corruption in politics is a legitimate target of legislative action[84]. The submission is also at odds with the plaintiffs' concession that the maintenance of public confidence is a public benefit which can be relied upon as a justification for a legislative restriction on the freedom.

Justification: compatibility and proportionality testing

66 The plaintiffs' submissions as to proportionality proceed on a correct basis, that proportionality analysis of some kind is part of the *Lange* test. However, those submissions, and others which have been put to the Court, tend to treat the question of proportionality as one at large and involving matters of impression, such as whether the legislative measures go too far, or not far enough. Something more should be said about the reason why it is necessary to enquire into the proportionality of a legislative measure which restricts the freedom. This requires examination of the nature of the proportionality enquiries which *Lange* renders necessary, their limits and their relationship with the *Lange* test of compatibility.

67 The process of justification called for by *Lange* commences with the requirement that the purpose of the provisions in question, which is to be identified by a process of construction, must be compatible with the system of representative government for which the Constitution provides. Other legal systems which employ proportionality testing to determine the limits of legislative power to restrict a right or freedom also require, before that testing commences, that there be a legitimate purpose, because only a legitimate purpose

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84 *Buckley v Valeo* 424 US 1 at 27-28 (1976).

can justify a restriction[85]. But what is there spoken of as legitimate is that the purpose is one permitted by the relevant constitution. The test in *Lange* requires more, both as to what qualifies as legitimate, and as to what must meet this qualification. It requires, at the outset, that consideration be given to the purpose of the legislative provisions and the means adopted to achieve that purpose in order to determine whether the provisions are directed to, or operate to, impinge upon the functionality of the system of representative government. If this is so, no further enquiry is necessary. The result will be constitutional invalidity.

68 Otherwise, if this first test, of compatibility, is met, attention is then directed to the effect of the provisions on the freedom itself. It is at this point that proportionality testing is applied. The reason it is required is that any restriction of the freedom must be justified, given that the freedom is protective of the constitutionally mandated system of representative government. It is not sufficient for validity that the legislative provisions in question are compatible with the system of representative government, for if the protective effect of the freedom is impaired the system will likely suffer. Therefore, it is also necessary that any burden on the freedom also be justified, and the answer to whether this is so is found by proportionality testing. The difference between the test of compatibility and proportionality testing is that the latter is a tool of analysis for ascertaining the rationality and reasonableness of the legislative restriction, while the former is a rule derived from the Constitution itself.

Proportionality testing in relation to the freedom

69 A legislative measure will not be invalid for the reason only that it burdens the freedom. It has been pointed out on many occasions that the freedom is not absolute[86]. On the other hand, legislative incursions upon the freedom are not to be simply accepted without more. It was said by members of

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85 Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence", (2007) 57 *University of Toronto Law Journal* 383 at 387-388; Lübbe-Wolff, "The Principle of Proportionality in the Case-Law of the German Federal Constitutional Court", (2014) 34 *Human Rights Law Journal* 12 at 13-14.

86 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 76-77, 94-95; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 142, 159, 169, 217-218; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 299, 336-337, 363, 387; [1994] HCA 44; *Monis v The Queen* (2013) 249 CLR 92 at 141 [103], 190 [267], 207 [324].

the Court in *Nationwide News Pty Ltd v Wills*[87] and in *ACTV*[88] that what is called for is a justification for a burden on the freedom. Similar statements were made in cases which followed, both before[89] and after[90] *Lange*. Until *Lange*, questions remained about how a legislative restriction of the freedom, and that restriction's means, could be said to be justified. Since *Lange*, the focus has been upon what is involved in the conditions the *Lange* test states for validity.

70 In the present case, the Commonwealth submitted that the second question in the *Lange* test is directed to the "sufficiency of the justification", but did not say how such a conclusion is reached, or is not reached. It is true that in some judgments in *ACTV*[91], and in cases which followed[92], it was said that a "compelling justification" may be required, but this is to say no more than that a more convincing justification will be required when the restrictive effect of

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87 (1992) 177 CLR 1 at 76-77, 78 per Deane and Toohey JJ.

88 (1992) 177 CLR 106 at 143, 146, 147 per Mason CJ, 169, 171, 175 per Deane and Toohey JJ, 233, 234, 238 per McHugh J.

89 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 178-179, 183-184 per Deane J; [1994] HCA 46; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 299, 300, 301, 304, 306 per Mason CJ, 339-340, 341-346 per Deane J.

90 *Levy v Victoria* (1997) 189 CLR 579 at 647; [1997] HCA 31; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 92-93, 128, 129; [1997] HCA 27; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 284 [205]; [2001] HCA 63; *Coleman v Power* (2004) 220 CLR 1 at 43 [76], 53-54 [102]-[103], 123 [326]; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 200 [40], 201 [41], 279 [292]; [2004] HCA 41; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 404 [222]; [2005] HCA 44; *Wotton v Queensland* (2012) 246 CLR 1 at 22 [52], 34 [90]; [2012] HCA 2; *Monis v The Queen* (2013) 249 CLR 92 at 129 [62], 146 [124], 148 [126], 191 [271], 193-194 [280], 213 [343]; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 555 [39], 557 [50]-[51], 560 [60], 561 [65], 586 [166]; *Tajjour v New South Wales* (2014) 88 ALJR 860 at 892-893 [145], 893-894 [149]-[152], 895-896 [160]-[167]; 313 ALR 221 at 259-260, 260-262, 263-264.

91 (1992) 177 CLR 106 at 143, 147, 233, 234-235, 236, 238.

92 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 299; *Levy v Victoria* (1997) 189 CLR 579 at 647; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 200 [40], 201 [41]; *Tajjour v New South Wales* (2014) 88 ALJR 860 at 896 [164]; 313 ALR 221 at 264.

legislation on the freedom is direct and substantial. It does not explain how the legislation may be justified. However, *Lange*, in addition to noting the other requirements arising from the Constitution, pointed clearly in the direction of proportionality analysis.

71 *Lange* is a judgment of the whole Court. Its terms may be expected to reflect some compromise reached. It is not to be expected that, in its reference to a legislative measure being "reasonably appropriate and adapted" to achieve a legitimate end, which the Court equated with "proportionality"[93], it was providing a complete statement of what is involved in that enquiry. *Lange* did identify as relevant in *ACTV* the availability of alternative measures, as mentioned earlier in these reasons. It identified as relevant the relationship between the legitimate end and the means by which this is achieved[94]. It identified as relevant the extent of the effect the legislative measure has on the freedom, when it expressed concern that the burden not be "undue"[95]. In so doing, it identified elements of proportionality testing.

72 Much has been written since *Lange* and *Coleman v Power* on the topic of proportionality analysis, including, perhaps most influentially, by Professor Aharon Barak. In the period since those decisions the use of proportionality in other jurisdictions, to test the justification of a restriction on a constitutional right or freedom, has gained greater acceptance. Nevertheless, it is not to be expected that each jurisdiction will approach and apply proportionality in the same way, but rather by reference to its constitutional setting and its historical and institutional background. This reinforces the characterisation of proportionality as an analytical tool rather than as a doctrine. It also explains why no decision of this Court has imported into Australian jurisprudence the scrutiny of compelling government interests applied in United States constitutional jurisprudence. More importantly, since *Lange* and *Coleman v Power*, considerable attention has been given in judgments in this Court to what the test in *Lange* requires. A majority of the Court in *Unions NSW* identified as relevant to, if not inhering in, the test, the first two tests of proportionality. The submissions in this case now direct

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93 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562, 567 n 272.

94 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568. This is now part of the *Lange* test following *Coleman v Power* (2004) 220 CLR 1 at 50-51 [92]-[96], 78 [196], 82 [211].

95 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 569, 575.

attention to the relevance of purpose in connection with the extent to which the freedom is burdened.

73 The freedom which is implied from provisions of the Australian Constitution is not a *right*, of the kind to which proportionality testing is applied by courts in other constitutional systems. Nevertheless, such testing has evident utility as a tool for determining the reasonableness of legislation which restricts the freedom and for resolving conflicts between the freedom and the attainment of legislative purpose.

74 Proportionality provides a uniform analytical framework for evaluating legislation which effects a restriction on a right or freedom. It is not suggested that it is the only criterion by which legislation that restricts a freedom can be tested. It has the advantage of transparency. Its structured nature assists members of the legislature, those advising the legislature, and those drafting legislative materials, to understand how the sufficiency of the justification for a legislative restriction on a freedom will be tested. Professor Barak suggests that "members of the legislative branch want to know, should know, and are entitled to know, the limits of their legislative powers."[96]

75 So far as concerns the courts, the question whether a legislative measure which restricts the freedom can be said to be justified is not to be approached as a matter of impression. It should not be pronounced as a conclusion, absent reasoning. It is not to be inferred that, in stating the test in *Lange*, it was intended that the test was to be answered by reference to a value judgment as to what is reasonable, made without reference to any generally applicable criteria.

76 To the contrary, as earlier explained, *Lange* identifies the structure for and, to an extent, the content of proportionality testing. Accepting that value judgments cannot be avoided altogether, their subjectivity is lessened and a more objective analysis encouraged by this process. In so far as proportionality may be considered to involve a conclusion that a statutory limitation is or is not reasonably necessary, the means of testing for this conclusion have already been identified in the test of reasonable necessity, as *Unions NSW* confirms. It cannot then be said that another, more open ended, enquiry is also required. Something more, and different, must be required.

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96 Barak, *Proportionality: Constitutional Rights and their Limitations*, (2012) at 379.

77 In an article by a former member of the Federal Constitutional Court of Germany[97], referred to by Lord Mance JSC in *Pham v Secretary of State for the Home Department (Open Society Justice Initiative intervening)*[98], it was said that proportionality testing may be seen:

> "as a tool directing attention to different aspects of what is implied in any rational assessment of the reasonableness of a restriction. … [It] is designed to … help control intuitive assessments, [and] make value judgments explicit. Whether it is also used as a tool to *intensify* judicial control of state acts is not determined by the structure of the test but by the degree of judicial restraint practised".

In a system operating according to a separation of powers, judicial restraint should be understood to require no more than that the courts undertake their role without intruding into that of the legislature.

78 In *Bank Mellat v HM Treasury (No 2)*[99], Lord Reed JSC observed that, in the domestic courts of the United Kingdom, a more clearly structured approach to proportionality analysis was necessary than that taken by the European Court of Human Rights because the former accords with the analytical approach to legal reasoning which is characteristic of the common law. Its attraction as a heuristic tool, his Lordship explained, "is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit."

79 It is generally accepted that there are at least three stages to a test of proportionality[100]. As stated in the introduction to these reasons, they are whether the statute is suitable, necessary, and adequate in its balance.

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97 Lübbe-Wolff, "The Principle of Proportionality in the Case-Law of the German Federal Constitutional Court", (2014) 34 *Human Rights Law Journal* 12 at 16 (emphasis in original).

98 [2015] 1 WLR 1591 at 1622 [96]; [2015] 3 All ER 1015 at 1044.

99 [2014] AC 700 at 790 [72]-[74].

100 The Supreme Courts of the United Kingdom and Canada divide the same concepts into four: see *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 at 771 [20], 790-791 [74], 805 [132], 814 [166]; *R v Oakes* [1986] 1 SCR 103 at 138-139.

80 Suitability is also referred to as "appropriateness" or "fit"[101]. Despite this language, it does not involve a value judgment about whether the legislature could have approached the matter in a different way. If the measure cannot contribute to the realisation of the statute's legitimate purpose, its use cannot be said to be reasonable. This stage of the test requires that there be a rational connection between the provision in question and the statute's legitimate purpose, such that the statute's purpose can be furthered. This was the approach followed in *Unions NSW*[102]. It is an enquiry which logic requires.

81 The second stage of the test – necessity – generally accords with the enquiry identified in *Unions NSW*[103] as to the availability of other, equally effective, means of achieving the legislative object which have a less restrictive effect on the freedom and which are obvious and compelling. If such measures are available, the use of more restrictive measures is not reasonable and cannot be justified.

82 It is important to recognise that the question of necessity does not deny that it is the role of the legislature to select the means by which a legitimate statutory purpose may be achieved. It is the role of the Court to ensure that the freedom is not burdened when it need not be. Once within the domain of selections which fulfil the legislative purpose with the least harm to the freedom, the decision to select the preferred means is the legislature's[104].

83 The first two stages of the test for the proportionality, or reasonableness, of a legislative measure concern the relationship between the legitimate legislative purpose ("ends") and the means employed to achieve it ("means"). Neither the importance of the legislative purpose nor the extent of the effect on the freedom are examined at these stages. The *Lange* test identifies the extent of the effect on the freedom as relevant[105], but does not say what, if anything, is to be balanced against the effect on the freedom in order to determine whether the measure is justified. The *Lange* test does not expressly identify assessment of the importance of the legislative purpose as a relevant factor.

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101 Barak, *Proportionality: Constitutional Rights and their Limitations*, (2012) at 303.

102 (2013) 252 CLR 530 at 557-558 [50]-[55], 561 [64], 579 [140], 586 [168].

103 (2013) 252 CLR 530 at 556 [44].

104 Barak, *Proportionality: Constitutional Rights and their Limitations*, (2012) at 409.

105 *Coleman v Power* (2004) 220 CLR 1 at 50 [92].

84 It is not possible to ignore the importance of a legislative purpose in considering the reasonableness of a legislative measure because that purpose may be the most important factor in justifying the effect that the measure has on the freedom. The submissions for the Commonwealth bear this out. The Commonwealth submitted that the Court cannot consider the relationship between the means adopted by the law and "the constitutional imperative" to not infringe the freedom without having the object of the law in view, for some statutory objects may justify very large incursions on the freedom. The example the Commonwealth gave was the object of protecting security of the nation at a time of war.

85 If, by "the constitutional imperative", it is meant the maintenance of the system of representative government, the submission may blur the distinction between the first *Lange* requirement, of compatibility with that system, and the second test, for proportionality of the effects on the freedom. Nevertheless, this submission correctly directs attention to the legislative purpose as a key element of a justification.

86 The last stage of the *Lange* test did not mandate an enquiry limited to the extent of the burden on the freedom. The question whether a statutory effect on the freedom is "undue" or "impermissibly burdens" the freedom must, logically, bring into consideration the statutory purpose. To leave it out of consideration is to deny the most important aspect of justification from the perspective of the legislature. The cases before and after *Lange* speak in terms of legislative justification as earlier mentioned[106]. The enquiry must be whether the burden is undue, not only by reference to the extent of the effect on the freedom, but also having regard to the public importance of the purpose sought to be achieved. This is the balance which necessarily, and logically, inheres in the *Lange* test.

87 The purpose of and benefit sought to be achieved by legislative provisions assume relevance in the third stage of the test for proportionality. This stage, that of strict proportionality or balancing, is regarded by the courts of some legal systems as most important. It compares the positive effect of realising the law's proper purpose with the negative effect of the limits on constitutional rights or freedoms. It requires an "adequate congruence between the benefits gained by the law's policy and the harm it may cause"[107], which is to say, a balance. Balancing is required because it is rare that the exercise of a right or freedom will

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106 See [69] above.

107 Barak, *Proportionality: Constitutional Rights and their Limitations*, (2012) at 340.

be prohibited altogether. Only aspects of it will be restricted, so what is needed, to determine whether the extent of this restriction is reasonable, is a consideration of the importance of the purpose and the benefit sought to be achieved[108]. Logically, the greater the restriction on the freedom, the more important the public interest purpose of the legislation must be for the law to be proportionate. It has been observed[109] that notions of balancing may be seen in *Castlemaine Tooheys Ltd v South Australia*[110], in the context of the s 92 freedom.

88 It will be evident from the conclusion to these reasons that the methodology to be applied in this aspect of proportionality does not assume particular significance. Fundamentally, however, it must proceed upon an acceptance of the importance of the freedom and the reason for its existence. This stands in contrast to the basic rule of balancing as applied to human rights, which has been subject to criticism for failing to explain the reasons underlying the creation of the right in order to put the reasons for its protection, or which justify its limitation, in perspective[111].

89 The balance struck between the importance of the purpose and the extent of the restriction on the freedom necessarily involves a value judgment. The fact that a value judgment is involved does not entitle the courts to substitute their own assessment for that of the legislative decision-maker[112]. This accords with the view, so often expressed by this Court, as to the role of Chapter III courts under the separation of powers effected by the Constitution. However, the courts have a duty to determine the limit of legislative power affecting constitutionally guaranteed freedoms, and assessments by courts of the public interest and benefit in a piece of legislation are commonplace. In *ACTV* and *Nationwide News*, and

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108 Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence", (2007) 57 *University of Toronto Law Journal* 383 at 396.

109 Zines, *The High Court and the Constitution*, 5th ed (2008) at 59.

110 (1990) 169 CLR 436; [1990] HCA 1.

111 Barak, *Proportionality: Constitutional Rights and their Limitations*, (2012) at 542.

112 *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 at 789-790 [71] per Lord Reed JSC; *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2015] AC 945 at 964 [20] per Lord Sumption JSC.

in later cases, the public interest pursued by the legislation in question was identified as relevant to whether a restriction on the freedom was justified[113].

90 To say that the courts are able to discern public benefits in legislation which has been passed is not to intrude upon the legislative function. The courts acknowledge and respect that it is the role of the legislature to determine which policies and social benefits ought to be pursued. This is not a matter of deference. It is a matter of the boundaries between the legislative and judicial functions.

91 Deference to legislative opinion, in the sense of unquestioning adoption of the correctness of these choices, does not arise for courts. It is neither necessary nor appropriate for the purposes of the assessment in question. The process of proportionality analysis does not assess legislative choices except as to the extent to which they affect the freedom. It follows from an acceptance that it is the constitutional duty of courts to limit legislative interference with the freedom to what is constitutionally and rationally justified, that the courts must answer questions as to the extent of those limits for themselves.

92 It should also be said that deference in the sense mentioned is not to be confused with a "margin of appreciation", a term which is sometimes given an extended meaning. In the context of courts of the European Community and now European Union, it is best understood as reflecting an acceptance by those courts of the advantage that courts of member states have with respect to particular matters, for example, moral standards applicable and the necessity for a restriction or penalty to meet them[114]. In the national context, it is said to require the examination of the constitutionality of a limitation on a human right from the standpoint of the international community[115]. Neither meaning would appear to have any application in the context of an Australian court determining the limits to legislative power affecting the freedom.

93 In this case, the third stage of the test presents no difficulty for the validity of the impugned provisions. The provisions do not affect the ability of any

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113 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 77; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 142, 143, 146, 169, 171; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 183-184; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 341-344.

114 *Handyside v United Kingdom* (1976) 1 EHRR 737.

115 Barak, *Proportionality: Constitutional Rights and their Limitations*, (2012) at 420.

person to communicate with another about matters of politics and government nor to seek access to or to influence politicians in ways other than those involving the payment of substantial sums of money. The effect on the freedom is indirect. By reducing the funds available to election campaigns there may be some restriction on communication by political parties and candidates to the public. On the other hand, the public interest in removing the risk and perception of corruption is evident. These are provisions which support and enhance equality of access to government, and the system of representative government which the freedom protects. The restriction on the freedom is more than balanced by the benefits sought to be achieved.

94 The questions stated should be answered as follows:

1. In so far as Div 4A prohibits the making by a property developer of a political donation or acceptance of a political donation from a property developer, it is not invalid. It does not impermissibly burden the implied freedom of communication on governmental and political matters contrary to the Constitution.

2. No.

3. No.

4. The plaintiffs.

GAGELER J.

Introduction

95 This is the second case in as many years in which provisions of Pt 6 of the *Election Funding, Expenditure and Disclosures Act* 1981 (NSW) have been challenged in the original jurisdiction of this Court on the ground that they impermissibly burden the implied constitutional freedom of political communication.

96 The challenge in the first case, *Unions NSW v New South Wales*[116], was to s 96D and to s 95G(6). Section 96D prohibited political donations by corporations, industrial associations and individuals who were not on the roll of electors. Section 95G(6) aggregated electoral communication expenditure of a political party with that of an affiliated organisation for the purpose of determining whether the political party exceeded the applicable cap on electoral communication expenditure imposed by Div 2B. Both provisions were held to impose impermissible burdens on the implied constitutional freedom.

97 The challenge in this case is to Div 2A (ss 95AA to 95D), s 96E and Div 4A (ss 96GAA to 96GE) in Pt 6 of the Act. Division 2A imposes a general cap on the amounts which all persons are permitted to give as political donations in relation to State elections. Section 96E prohibits the making of certain indirect contributions to election campaigns. Division 4A relevantly prohibits the making of any political donations by corporate property developers and individuals closely associated with corporate property developers.

98 Together with a majority of the Court, I hold that none of the provisions challenged in this case imposes an impermissible burden on the implied constitutional freedom. Unlike a majority of the Court, however, I do not reach that result through the template of standardised proportionality analysis. I reach that result instead by concluding that the restrictions on political communication imposed by the provisions are no greater than are reasonably necessary to be imposed in pursuit of a compelling statutory object. The compelling statutory object is the object of preventing corruption and undue influence in the government of the State.

99 To explain my analysis, it is appropriate to commence by reiterating the structural reasons identified in *Lange v Australian Broadcasting Corporation*[117] for the implication of the constitutional freedom of political communication, and by relating those structural reasons to the analytical framework established by

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116 (2013) 252 CLR 530; [2013] HCA 58.

117 (1997) 189 CLR 520; [1997] HCA 25.

that case for determining whether or not a law impermissibly burdens the implied constitutional freedom.

Explaining why the freedom exists

100 Brennan CJ explained in *McGinty v Western Australia*[118]:

> "Implications are not devised by the judiciary; they exist in the text and structure of the Constitution and are revealed or uncovered by judicial exegesis. No implication can be drawn from the Constitution which is not based on the actual terms of the Constitution, or on its structure."

Brennan CJ went on to restate the explanation given by Mason CJ in *Australian Capital Television Pty Ltd v The Commonwealth* ("*ACTV*")[119] that "where the implication is structural rather than textual ... the term sought to be implied must be logically or practically necessary for the preservation of the integrity of that structure".

101 Freedom of political communication, as authoritatively expounded in *Lange*, is an implication drawn from the structure of the Constitution. In *Lange*, as in its earliest expositions in *ACTV* and in *Nationwide News Pty Ltd v Wills*[120], the implication was explained to be necessary for the preservation of the integrity of the system of representative and responsible government established by Chs I and II of the Constitution, and for the preservation of the integrity of the method of constitutional alteration prescribed by s 128 of the Constitution.

102 Neither the scope nor the content of the freedom can adequately be understood except by reference to the features of that system of representative and responsible government, and that method of constitutional alteration, which give rise to the necessity for its implication.

103 Chapter I of the Constitution establishes and sustains the Parliament of the Commonwealth. Section 1 vests the legislative power of the Commonwealth in the Federal Parliament, which that section provides is to consist of the Senate, the House of Representatives and the Queen. The composition of the Senate is governed by the requirement of s 7 that it "shall be composed of senators for each State, directly chosen by the people of the State". The composition of the House of Representatives is governed by the corresponding requirement of s 24 that it

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118 (1996) 186 CLR 140 at 168; [1996] HCA 48 (footnotes omitted).

119 (1992) 177 CLR 106 at 135; [1992] HCA 45. See *McGinty v Western Australia* (1996) 186 CLR 140 at 169.

120 (1992) 177 CLR 1; [1992] HCA 46.

"shall be composed of members directly chosen by the people of the Commonwealth", and by the additional requirement of that section that the number of members "shall be, as nearly as practicable, twice the number of the senators". Section 13, and ss 28 and 32, respectively require the holding of an election for half of the Senate, and the holding of a general election for the House of Representatives, at least once every three years. Sections 8 and 30 combine: to equate the qualifications of electors of senators with the qualifications of electors of members of the House of Representatives; to equate the qualifications of electors of members of the House of Representatives with the qualifications of electors of the more numerous House of Parliament of each State until otherwise provided by the Parliament under s 51(xxxvi); and to mandate that, in the choosing of senators and members, "each elector shall vote only once".

104 The Parliament is required, by ss 5 and 6 respectively, to be summoned to meet not later than 30 days after the day appointed for the return of the writs for a general election and to hold a session at least once every year. Questions in the Senate and in the House of Representatives are required, through the operation of ss 23 and 40 respectively, to be determined by a majority of votes, with no senator or member having more than one vote. Section 53 makes clear that the Senate has "equal power with the House of Representatives in respect of all proposed laws", with the exceptions that proposed laws appropriating revenue or moneys, or imposing taxation, cannot originate in the Senate, and that the power of the Senate to amend such laws is limited. Disagreements between the Senate and the House of Representatives about any proposed law are capable of resolution under s 57: by simultaneous dissolution of the Senate and the House of Representatives (resulting, under ss 12 and 32, in the issuing of writs for elections to both); and, if disagreement persists after such a dissolution, by holding a joint sitting of the Senate and the House of Representatives, in which the proposed law is taken to be duly passed if affirmed by an absolute majority of the total number of senators and members.

105 Chapter II of the Constitution establishes and sustains the Executive Government of the Commonwealth. Section 61 vests the executive power of the Commonwealth in the Queen, and makes that executive power "exercisable by the Governor-General as the Queen's representative". Section 64 empowers the Governor-General to appoint officers to administer departments of State for the Commonwealth, who are to be Ministers of State for the Commonwealth. Tying the structure of the Executive Government to the structure of the Parliament, s 64 adds the centrally important qualification 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".

106 The link made in that qualification in s 64 – between the structure of the Parliament established and sustained by Ch I and the structure of the Executive Government established and sustained by Ch II – makes plain the design of those chapters to facilitate the application of the particular system of representative

government, known as "responsible government", to the "indissoluble Federal Commonwealth" established by the Constitution. That system had developed in the second half of the nineteenth century in each of the six colonies which, on federation, became the Australian States. Evatt J was not inaccurate in stating that "prior to the establishment of the Commonwealth of Australia in 1901, responsible government had become one of the central characteristics of our polity"[121]. And Isaacs J did not exaggerate in proclaiming that "the Constitution is for the advancement of representative government"[122] and that responsible government "is part of the fabric on which the written words of the Constitution are superimposed"[123].

107 The theory and practical operation of responsible government, as it had come to be understood in the Australian colonies by the end of the nineteenth century, were encapsulated in the explanation given by Sir Samuel Griffith in notes he prepared on the 1891 draft of the Constitution. Sir Samuel wrote[124]:

> "The system called Responsible Government is based on the notion that the head of the State can himself do no wrong, that he does not do any act of State of his own motion, but follows the advice of his ministers, on whom the responsibility for acts done, in order to give effect to their volition, naturally falls. They are therefore called Responsible Ministers. If they do wrong, they can be punished or dismissed from office without effecting any change in the Headship of the State. Revolution is therefore no longer a necessary possibility; for a change of Ministers effects peacefully the desired result. The system is in practice so intimately connected with Parliamentary Government and Party Government that the terms are often used as convertible. The present form of development of Responsible Government is that, when the branch of the Legislature which more immediately represents the people disapproves of the actions of Ministers, or ceases to have confidence in them, the head of the State dismisses them, or accepts their resignation, and appoints new ones. The

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121 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 114; [1931] HCA 34.

122 *Federal Commissioner of Taxation v Munro; British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1926) 38 CLR 153 at 178; [1926] HCA 58.

123 *The Commonwealth v Kreglinger & Fernau Ltd and Bardsley* (1926) 37 CLR 393 at 413; [1926] HCA 8.

124 Griffith, *Notes on Australian Federation: Its Nature and Probable Effects*, (1896) at 17, quoted in Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 704.

effect is that the actual government of the State is conducted by officers who enjoy the confidence of the people."

108 Brennan J drew on that explanation in *Nationwide News*[125] to identify responsible government as amongst the "constitutional imperatives which are intended – albeit the intention is imperfectly effected – to make both the legislative and executive branches of the government of the Commonwealth ultimately answerable to the Australian people". The entire Court drew again on that explanation in *Lange* to make the pivotal point that the confidence of the Australian people which the legislative and executive branches of the government of the Commonwealth are to enjoy "is ultimately expressed or denied by the operation of the electoral process"[126].

109 Within the structure of representative and responsible government established by Chs I and II of the Constitution, "the Australian people" are more precisely identified as the electors, who are to vote at least once every three years, in an election for at least one half of the Senate and in a general election for the House of Representatives[127]. Although that structure could be changed by a constitutional alteration under s 128 of the Constitution, the method of constitutional alteration for which that section provides is an extension of the legislative process established by Ch I of the Constitution, which relies directly on the participation of the same electors. They are to vote on a proposed law for the alteration of the Constitution within six months of the passage of the proposed law by an absolute majority of each of the House of Representatives and the Senate. The proposed law is then to be presented to the Governor-General for assent only if approved by a majority of all electors as well as a majority of electors in each State.

110 Professor Harrison Moore, writing in 1902, identified "the prevalence of the democratic principle" as the "predominant feature" of the Constitution[128]. After noting the studied absence of a constitutionally entrenched bill of rights, he explained that "[t]he great underlying principle is, that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power"[129].

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125 (1992) 177 CLR 1 at 47.

126 (1997) 189 CLR 520 at 559.

127 Cf *McGinty v Western Australia* (1996) 186 CLR 140 at 279.

128 Moore, *The Constitution of the Commonwealth of Australia*, (1902) at 327.

129 Moore, *The Constitution of the Commonwealth of Australia*, (1902) at 329.

111 That "great underlying principle" was prominent in the reasoning of Mason CJ in *ACTV*[130]. Its exposition underlines an important aspect of the manner in which the system of representative and responsible government established by Chs I and II of the Constitution is dependent on the choice made by electors. Electoral choice is the means of constituting the Parliament of the Commonwealth, and of indirectly constituting the Executive Government of the Commonwealth. Electoral choice thereby constitutes the principal constraint on the constitutional exercise by the Parliament of the legislative power of the Commonwealth, and on the lawful exercise by Ministers and officers within their departments of the executive power of the Commonwealth.

112 The concept of electoral choice acting as a constraint on the exercise of Commonwealth legislative and executive power accords with the classic explanation given in the joint reasons for judgment in the *Engineers' Case*[131], that "the extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituencies and not by the Courts". The explanation continued[132]:

> "When the people of Australia, to use the words of the Constitution itself, 'united in a Federal Commonwealth,' they took power to control by ordinary constitutional means any attempt on the part of the national Parliament to misuse its powers. If it be conceivable that the representatives of the people of Australia as a whole would ever proceed to use their national powers to injure the people of Australia considered sectionally, it is certainly within the power of the people themselves to resent and reverse what may be done. No protection of this Court in such a case is necessary or proper."

113 The constitutional freedom of political communication does not contradict that *Engineers' Case* orthodoxy. The implication of the constitutional freedom is founded on an acceptance that electoral choice constitutes the "ordinary constitutional means" of constraining "the extravagant use of the granted powers in the actual working of the Constitution".

114 The necessity for the implication of the constitutional freedom as a limitation on legislative and executive power arises from a paradox inherent in the nature of the majoritarian principle which governs that electoral choice. The

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130 (1992) 177 CLR 106 at 136, 139-140.

131 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 151; [1920] HCA 54.

132 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 151-152.

paradox is that communication of information relevant to the making of an informed electoral choice is peculiarly susceptible to being restricted or distorted through the exercise of legislative or executive power precisely because the exercise of legislative or executive power is subject to the ultimately controlling influence of electoral choice.

115 The ever-present risk within the system of representative and responsible government established by Chs I and II of the Constitution is that communication of information which is either unfavourable or uninteresting to those currently in a position to exercise legislative or executive power will, through design or oversight, be impeded by legislative or executive action to an extent which impairs the making of an informed electoral choice and therefore undermines the constitutive and constraining effect of electoral choice. The risk, in other words, is of legislative or executive impairment of "the capacity of, or opportunity for, the Australian people to form the political judgments required for the exercise of their constitutional functions"[133].

116 The judicial power, insulated from the electoral process by the structural requirements of Ch III of the Constitution, is uniquely placed to protect against that systemic risk. Here, as elsewhere within our constitutional tradition, "the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive"[134].

117 Mason CJ emphasised the reality of the ever-present risk to the system of representative and responsible government of legislative or executive restriction of information relevant to the making of an informed electoral choice when he said in *ACTV*[135]:

> "Experience has demonstrated on so many occasions in the past that, although freedom of communication may have some detrimental consequences for society, the manifest benefits it brings to an open society generally outweigh the detriments. All too often attempts to restrict the freedom in the name of some imagined necessity have tended to stifle public discussion and criticism of government."

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133 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 51.

134 *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529 at 540; [1957] AC 288 at 315.

135 (1992) 177 CLR 106 at 145.

The risk has been demonstrated by experience to be greatest in respect of legislation which has as its subject-matter the restriction of political association[136] or the restriction of communication within a category of communication which has an inherently political content[137]. Referring to a subset of that latter category, Mason CJ suggested in *ACTV*[138] that it is in the area of "restrictions affecting free communication in the conduct of elections for political office" that the implied freedom "fulfils its primary purpose". That suggestion has been borne out by the outcomes in *ACTV* and in *Unions NSW*.

118 The necessity which gives rise to the implication of the constitutional freedom of political communication also defines its scope and content. That was the point made in *Lange* when, after it was said 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", it was added that "to the extent that the freedom rests upon implication, that implication defines the nature and extent of the freedom"[139].

119 The freedom implied as a matter of necessity does not go beyond freedom of political communication. The freedom exists to protect: systemic integrity, not personal liberty; communication, not expression; and political communication, not communication in general. The protection "creates an area of immunity from legal control" as a consequence of its operation and not as a reason for its existence[140].

120 That limitation in its scope immediately distinguishes the implied freedom of political communication from express guarantees of freedom of speech or expression in many other constitutional systems. Securing the "flow of information" necessary for people to "build and assert political power" has long been recognised as an important purpose of the free speech clause of the First

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136 See *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 187-188; [1951] HCA 5.

137 See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

138 (1992) 177 CLR 106 at 144.

139 (1997) 189 CLR 520 at 560, referring in the latter quote to *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 326; [1994] HCA 44.

140 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560, quoting *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 327.

Amendment to the Constitution of the United States[141], but the time when that might have been argued to be its only purpose has long passed[142]. A range of purposes also informs the guarantees of individual freedom of expression in the Canadian Charter of Rights and Freedoms[143] and in the European Convention on Human Rights[144]. United States, Canadian and European judicial decisions have provided analogical assistance in the development of the case law on the implied freedom. But, as has been recognised from an early stage in that development, those judicial decisions must be treated "with some caution" given that "[t]heir constitutional provisions are not the same as ours"[145].

121 The content of the implied constitutional freedom is defined by the need to preserve the integrity of both the system of representative and responsible government established by Chs I and II of the Constitution and the method of constitutional alteration prescribed by s 128 of the Constitution. The freedom implied, as it was put in *Lange*, "is not absolute", but "is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution"[146].

122 The freedom constitutionally afforded to political communication is not the laissez-faire of an unregulated marketplace of ideas[147]. Nor is it fully described in terms of freedom in "an ordered society"[148] or a "society organized

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141 Cox, *The Court and The Constitution*, (1987) at 212, quoted in *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 139. See to similar effect Barendt, *Freedom of Speech*, (1985) at 152 and Meiklejohn, *Political Freedom*, (1960) at 42, both quoted in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 124; [1994] HCA 46.

142 See, eg, *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council* 425 US 748 (1976); *Sorrell v IMS Health Inc* 180 L Ed 2d 544 (2011). See also *Citizens United v Federal Election Commission* 558 US 310 at 329 (2010); *McCutcheon v Federal Election Commission* 188 L Ed 2d 468 at 484 (2014).

143 Section 2(b).

144 Article 10.

145 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 125.

146 (1997) 189 CLR 520 at 561.

147 Cf *Abrams v United States* 250 US 616 at 630 (1919).

148 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 142, quoting *Hughes and Vale Pty Ltd v New South Wales [No 2]* (1955) 93 CLR 127 at 219; [1955] HCA 28.

under and controlled by law"[149]. The freedom is freedom within a constitutional system in which the accountability of the legislature and the executive to electors constitutes the ordinary constitutional means of preventing misuse of the exercise of legislative and executive power, and in which the role of the judiciary is relevantly limited to safeguarding that mechanism of accountability.

123 That vital, and necessarily limited, role for the judiciary in the preservation of the implied freedom of political communication was highlighted by Brennan J in *Nationwide News*[150] when he said that "[t]he balancing of the protection of other interests against the freedom to discuss governments and political matters is, under our Constitution, a matter for the Parliament to determine and for the Courts to supervise".

124 The two-step analytical framework formulated in *Lange* for determining whether or not a law impermissibly burdens political communication guides the performance of that supervisory role. The two steps are "together a functional reflection of the nature of the protected freedom"[151].

Determining whether the freedom is infringed

125 The two steps in the *Lange* analysis are together directed to the determination of whether a law impermissibly burdens the implied constitutional freedom of political communication. The systemic risk of impairment of electoral choice by State or Territory legislative or executive action being not materially different from the systemic risk of impairment of electoral choice by Commonwealth legislative or executive action, the *Lange* analysis applies equally to a State law or Territory law as to a Commonwealth law.

126 The first step in the *Lange* analysis is to inquire whether, and if so how, the law effectively burdens political communication in its legal or practical operation. "The expression 'effectively burden'", as Hayne J pointed out in *Monis v The Queen*[152] and Keane J reiterated in *Unions NSW*[153], "means nothing

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149 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 142, quoting *Samuels v Readers' Digest Association Pty Ltd* (1969) 120 CLR 1 at 15; [1969] HCA 6.

150 (1992) 177 CLR 1 at 50.

151 *Tajjour v New South Wales* (2014) 88 ALJR 860 at 892 [144]; 313 ALR 221 at 259; [2014] HCA 35.

152 (2013) 249 CLR 92 at 142 [108]; [2013] HCA 4.

153 (2013) 252 CLR 530 at 574 [119].

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."

127 The simplicity of the inquiry should not detract from its importance. The oral argument in this case seemed at times to proceed on the assumption that the first step is perfunctory – no more than a box to be ticked before moving to the second step. If that were the case, the *Lange* analysis would be detached from the function that it was formulated to perform. The first step is critical. If a law does not operate to impose a meaningful restriction on political communication, the supervisory role of the courts is not engaged. If the law does operate to impose a meaningful restriction on political communication, the supervisory role of the courts is engaged to consider the justification for that restriction.

128 The whole point of the second step in the *Lange* analysis is to determine whether the restriction on political communication identified at the first step is consistent with the preservation of the integrity of the system of representative and responsible government established by Chs I and II of the Constitution, and of the method of constitutional alteration prescribed by s 128 of the Constitution.

129 The second step, as refined and restated by a majority in *Coleman v Power*[154], is to inquire into whether the law, in operating to restrict political communication, is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the system of representative and responsible government established by the Constitution. To conclude that the law is so reasonably appropriate and adapted "requires finding that the object of the law is of importance and the method of achieving that object is reasonable when regard is had to the demands of representative government"[155]. The inquiry necessarily proceeds in two stages.

130 The first stage is concerned to identify the end – the object or purpose – of the law. To be legitimate, a legislative end must itself be compatible with the system of representative and responsible government established by the Constitution. The first stage requires that the imposition of the restriction on political communication is *explained* by the law's pursuit of an end which is consistent with preservation of the integrity of the system of representative and responsible government. Explanation precedes justification.

131 The second stage is concerned to examine whether the law imposing the restriction on political communication pursues that end in a manner which is consistent with preservation of the integrity of the system of representative and responsible government. The second stage requires that the restriction on

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154 (2004) 220 CLR 1; [2004] HCA 39.

155 Stellios, *Zines's The High Court and the Constitution*, 6th ed (2015) at 589.

political communication that is imposed by the law be *justified* by the law's reasonable pursuit of the identified legitimate end.

132 The object or purpose of a law is what the law is designed to achieve in fact. Identification of what the law is designed to achieve in fact is akin to identification of the "mischief" which the law is designed to address[156]. The object or purpose will sometimes be stated in the text of the law and will sometimes emerge from the context. Where identification of the object or purpose is controversial, the degree of congruence between the legal criterion by which communication is burdened and such object or purpose as the party seeking to uphold its validity ascribes to the law will bear on the determination of that controversy. Absent some rational connection between that criterion of legal operation and the asserted end, it may not be possible to conclude that the restriction on political communication imposed by the law is explained by the law's pursuit of that putative object or purpose.

133 In *Unions NSW*, French CJ, Hayne, Crennan, Kiefel and Bell JJ considered such a rational connection to be wanting. Their Honours found ss 96D and 95G(6) of the Act to impose a practical restriction on political communication, and found that the practical restriction was sufficiently identified for the purposes of the analysis in that case as the removal of a source of donor funding which would otherwise have been available to political parties and candidates to meet the costs of engaging in political communication, as regarded s 96D[157], and the restriction of the amount that a political party could incur by way of electoral communication expenditure, as regarded s 95G(6)[158]. They noted the argument of the State that the provisions were designed to protect its electoral and governmental system from corruption and undue influence, and stated that they saw no reason to doubt that to be the legitimate end of the Act as a whole[159]. The problem they identified lay in the absence of any satisfactory explanation as to how the terms of the prohibition imposed by the two challenged provisions were calculated to promote that legitimate end. The absence of such an explanation led them to conclude that the restriction on political communication imposed by those provisions was not *explained* by the law's pursuit of that end, let alone *justified* by the law's pursuit of that end[160].

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156 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 394 [178]; [2005] HCA 44.

157 (2013) 252 CLR 530 at 554 [38].

158 (2013) 252 CLR 530 at 560 [61].

159 (2013) 252 CLR 530 at 545-546 [8], 557 [49].

160 (2013) 252 CLR 530 at 559-560 [59]-[60], 561 [64].

134 Keane J took a different route to conclude that ss 96D and 95G(6) of the Act failed the *Lange* analysis. His Honour held that the restrictions on political communication imposed by those provisions did not pursue the identified end in a manner consistent with preservation of the integrity of the system of representative and responsible government established by Chs I and II of the Constitution because the restrictions unjustifiably disfavoured some sources of political information and favoured others[161]. The vice so identified was the same vice which had led to invalidity in *ACTV*.

135 *ACTV* was said in *Lange* to be a case in which the majority holding was "that a law seriously impeding discussion during the course of a federal election was invalid because there were other less drastic means by which the objectives of the law could be achieved"[162]. A reference to "less drastic means" in this context is to other means of achieving the objectives of the law that are less restrictive of political communication. The existence of other means of achieving the objectives of the law that are less restrictive of political communication will always be relevant to the inquiry, and will sometimes be decisive.

136 There is, however, another, more specific, explanation for the holding of the majority in *ACTV*. As Keane J pointed out in *Unions NSW*, the legislation 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 campaigning"[163].

137 The discriminatory character of the legislative proscription considered in *ACTV* was brought out most strongly in the reasons for judgment of Mason CJ. Mason CJ was prepared to assume that the legislation in question, which restricted political advertising on television and radio during an election campaign to allocated and publicly funded time slots, had as its legitimate end the safeguarding of "the integrity of the political process by reducing pressure on parties and candidates to raise substantial sums of money, thus lessening the risk of corruption and undue influence"[164]. The fundamental problem which he identified was that the method of allocation of publicly funded time slots discriminated in favour of incumbent participants in the political process and

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161 (2013) 252 CLR 530 at 579 [140]-[141], 586 [167]-[168].

162 (1997) 189 CLR 520 at 568.

163 (2013) 252 CLR 530 at 578-579 [137], citing *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 131-132, 145-146, 171-173, 218, 236.

164 (1992) 177 CLR 106 at 144.

against potential participants in that process[165]. It was that problem which led to the conclusion of invalidity, which Mason CJ expressed in terms that there was "no reasonable justification for the restrictions on freedom of communication imposed" by the legislation[166].

138 The words "reasonably appropriate and adapted" were explained in *Lange* to have been adopted in the formulation of the second step in the *Lange* analysis to ensure uniformity. It was recorded that some members of the Court had favoured different expressions in earlier cases, and that no member of the Court then thought it necessary to distinguish between them. Other expressions of the formulation were noted to have included "proportionality"[167].

139 Gleeson CJ demonstrated in *Mulholland v Australian Electoral Commission*[168] that the alternative expressions may be used interchangeably. The advantage of the expression "reasonably appropriate and adapted" is that there is a long history of its judicial application in Australia[169]. The advantage of "proportionality" is that "it is commonly used in other jurisdictions in similar fields of discourse"; the disadvantage of "proportionality" is that "in the course of such use, it has taken on elaborations that vary in content, and that may be imported sub silentio into a different context without explanation"[170]. Gleeson CJ noted that its use is unobjectionable "provided such use does not bring with it considerations relevant only to a different constitutional context"[171]. There is no magic in a label.

140 This case does not require a choice to be made between the alternative expressions of the "reasonably appropriate and adapted" formulation. Much less does this case warrant consideration of the benefits and detriments of the wholesale importation into our constitutional jurisprudence, under the rubric of proportionality, of a particular and prescriptive form of proportionality analysis

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165 (1992) 177 CLR 106 at 132, 144-147.

166 (1992) 177 CLR 106 at 147.

167 (1997) 189 CLR 520 at 562.

168 (2004) 220 CLR 181 at 195-200 [27]-[40]; [2004] HCA 41.

169 (2004) 220 CLR 181 at 199-200 [39].

170 (2004) 220 CLR 181 at 197-198 [34].

171 (2004) 220 CLR 181 at 200 [39]. See also *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 178-179 [17]; [2007] HCA 43; *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 59 [162]; [2010] HCA 46.

drawn from that which has come to be applied in relation to the Canadian Charter of Rights and Freedoms and the European Convention on Human Rights.

141 The content and consequences of the approach now propounded by a majority of this Court must await consideration in future cases. Issues which have the potential to arise in relation to such an approach were anticipated more than a decade ago in the published scholarship of Professor Adrienne Stone[172]. Without the benefit of full argument in this case, I limit myself to recording two principal reservations.

142 First, I am not convinced that one size fits all. In particular, I am not convinced that standardised criteria, expressed in unqualified terms of "suitability" and "necessity", are appropriate to be applied to every law which imposes a legal or practical restriction on political communication irrespective of the subject-matter of the law and no matter how large or small, focussed or incidental, that restriction on political communication might be.

143 I think it important in that respect to bear in mind the significance to proportionality analysis, as actually undertaken in other jurisdictions, of the varying degrees of latitude that are in practice afforded to governmental action. Those degrees of latitude are rarely captured in generic descriptions of "tests" of proportionality. Often they are not articulated but are embedded within the institutional arrangements and practices within which those tests are applied. Within a national jurisdiction, the degree of latitude afforded by the judiciary to the legislature or executive has sometimes been referred to as the "zone of proportionality". Between national jurisdictions, the degree of latitude afforded to nation states is commonly referred to as the "margin of appreciation"[173].

144 Two examples of judicial recognition of those varying degrees of latitude are sufficient. Both relate to the European Convention on Human Rights. The first example concerns the Supreme Court of the United Kingdom. The Supreme Court has of late adopted a four-part proportionality test as a "heuristic tool" for determining whether or not a legislative or executive measure infringes a Convention right[174]. The Supreme Court has nevertheless simultaneously

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172 Eg Stone, "The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication", (1999) 23 *Melbourne University Law Review* 668 at 676-679, 681-684; Stone, "The Limits of Constitutional Text and Structure Revisited", (2005) 28 *University of New South Wales Law Journal* 842 at 844-845.

173 Barak, *Proportionality: Constitutional Rights and their Limitations*, (2012) at 396-421.

174 *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 at 790-791 [74].

emphasised that "the intensity of review ... varies according to the nature of the right at stake and the context in which the interference occurs"[175]. The second example concerns the European Court of Human Rights, sitting at Strasbourg. The Strasbourg Court has long expressly afforded European States a margin of appreciation in the determination of whether or not national measures introduced by their national governments infringe Convention rights. That margin of appreciation has featured prominently in the reasoning of the Strasbourg Court in relation to the determination of whether or not a restriction on "the right to freedom of expression" guaranteed by Art 10(1) of the Convention answers the description in Art 10(2) of being "necessary in a democratic society"[176]. The margin of appreciation featured with particular prominence in the 2013 judgment of the Strasbourg Court which upheld a longstanding ban on political advertising in the broadcast media as re-enacted by the United Kingdom Parliament in 2003 and as upheld by the Appellate Committee of the House of Lords in 2008[177]. The Strasbourg Court emphasised that, in light of the institutional, cultural and historical differences between them, it was "for each state to mould its own democratic vision"[178]. The Strasbourg Court stated[179]:

> "The central question as regards such measures is not ... whether less restrictive rules should have been adopted or, indeed, whether the state could prove that, without the prohibition, the legitimate aim would not be achieved. Rather the core issue is whether, in adopting the general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it."

145 Second, I am not convinced that to require a law which burdens political communication to be "adequate in its balance" is to adopt a criterion of validity which is sufficiently focussed adequately to reflect the reasons for the implication of the constitutional freedom and adequately to capture

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175 Eg *Lawrence v Fen Tigers Ltd (No 3)* [2015] 1 WLR 3485 at 3497 [32], quoting *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 at 789 [71]. See generally Rivers, "Proportionality and Variable Intensity of Review", (2006) 65 *Cambridge Law Journal* 174.

176 Eg *Handyside v United Kingdom* (1976) 1 EHRR 737.

177 *R (Animal Defenders) v Culture Secretary* [2008] AC 1312.

178 *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21 at 644 [111].

179 *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21 at 644 [110].

considerations relevant to the making of a judicial determination as to whether or not the implied freedom has been infringed.

146 I think it important in that respect to bear in mind that the equation of "strict proportionality" with "specific (or ad hoc) balancing" has always been controversial. Indeed, it has been the subject of reservation even by its most prominent proponent. In his influential treatise tracing the Germanic origins and global expansion of structured proportionality analysis, published in 2012, Professor Aharon Barak described the transition involved from the expression of the "basic rule" of balancing to the concrete application of that basic rule through specific (or ad hoc) balancing on a case-by-case basis as "particularly sharp" and "not desirable"[180]. He wrote[181]:

> "The basic rule of balancing is too abstract. It does not specifically relate to many of the aspects in which the particular right in question becomes a special object of either limitation or protection. It does not contain the required focus on the reasons underlying the creation of those rights, and thus does not directly relate to the reasons that justify their limitation or protection. It also does not include a proper roadmap of all the considerations that would justify the protection of a constitutional right. In contrast, the specific rule of balancing is at too low a level of abstraction. It only relates to the case at hand, and lacks a more general viewpoint of the system as a whole."

147 Professor Barak went on to advocate the development of what he termed an "intermediate-level rule" of "principled balancing" in accordance with which the "basic rule" would be implemented through the adoption of a number of "principled rules or principled formulas"[182]. He proposed that each such rule or formula "would be phrased in a lower level of abstraction" and that the choice and phrasing of each such rule or formula "would express the principled consideration which underlies the constitutional right and the justification of its limitation"[183].

148 Were such element of balancing as might be incorporated into the *Lange* analysis to be formulated in terms of "principled balancing", along the lines Professor Barak has advocated, it would go some way to alleviating the concern

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180 Barak, *Proportionality: Constitutional Rights and their Limitations*, (2012) at 542.

181 Barak, *Proportionality: Constitutional Rights and their Limitations*, (2012) at 542.

182 Barak, *Proportionality: Constitutional Rights and their Limitations*, (2012) at 542.

183 Barak, *Proportionality: Constitutional Rights and their Limitations*, (2012) at 542-543.

which underlies the second of the reservations I have recorded. The adoption of principled balancing only at a final stage of a standardised proportionality analysis would, however, bring the first of the reservations I have expressed into even sharper relief. It would do so by highlighting the question of why a refinement of that nature should be limited to that final stage of analysis.

149 Why shouldn't the principled consideration which underlies a constitutional right or freedom, and the justification of its limitation, permeate the entirety of the analysis? In the context of the judicial consideration of an express constitutional right which is conferred subject to an express constitutional limitation, it might well be possible to dismiss such a question as entirely rhetorical. The text enshrining the right requires that a judgment be made and, by one means or another, that judgment must be made. In the context of a constitutional freedom which arises only by implication, the question demands an answer. The judgment to be made can never be divorced from the reasons why there is a judgment to be made.

150 In my view, it is imperative that the entirety of the *Lange* analysis is undertaken in a manner which cleaves to the reasons for the implication of the constitutional freedom which it is the sole function of the *Lange* analysis to protect. Whatever other analytical tools might usefully be employed, fidelity to the reasons for the implication is in my view best achieved by ensuring that the standard of justification, and the concomitant level or intensity of judicial scrutiny, not only is articulated at the outset but is calibrated to the degree of risk to the system of representative and responsible government established by the Constitution that arises from the nature and extent of the restriction on political communication that is identified at the first step in the analysis.

151 No refinement of the formulation of the second step in the *Lange* analysis could ever be expected to remove the element of judgment required in the exercise of supervisory jurisdiction by a court. Nor should it ever be expected to remove the need for reasoned elaboration of that judgment in a particular case. Judicial identification of the standard of justification, or level of scrutiny, actually applied in a particular case or category of cases nevertheless forms an essential part of that reasoned elaboration. It contributes to consistency and predictability in the application of the implied freedom.

152 No unitary standard of justification can or should be applied across all categories of cases. To date that has repeatedly been recognised when it has been accepted that a law which operates to impose a content-based restriction will demand closer scrutiny than a restriction based on the form or manner of communication[184], just as when it has been recognised that a law which operates

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184 Eg *Levy v Victoria* (1997) 189 CLR 579 at 618-619; [1997] HCA 31.

to prohibit or regulate communications which are inherently political will demand closer scrutiny than a law which operates incidentally to restrict political communication[185]. Those distinctions are not complete dichotomies, and each distinction may or may not have analytical utility in a particular case. Other considerations which bear on the degree of risk which a particular legislative or executive restriction on political communication poses to the making of an informed electoral choice will also bear on the standard of justification applicable to that restriction.

153 Gleeson CJ went on in *Mulholland* to identify the standard of justification applicable to a restriction on political communication in the conduct of elections for political office. The standard he identified was that stated by Mason CJ in *ACTV*[186] in a passage cited by Gaudron J in *Levy v Victoria*[187]. The identified standard requires both a "compelling justification" for the restriction, and that the restriction be "no more than is reasonably necessary to achieve the protection of the competing public interest which is invoked"[188]. Gleeson CJ explained that he did not "take the phrase 'reasonably necessary' to mean unavoidable or essential, but to involve close scrutiny, congruent with a search for 'compelling justification'"[189].

154 Here, the context for the application of the *Lange* analysis is relevantly the same: the conduct of elections for political office. Constitutional principle and judicial consistency combine to require that the standard applied at the second step in the analysis remains that stated by Mason CJ in *ACTV* and adopted by Gleeson CJ in *Mulholland*.

155 What is required to sustain the validity of Div 2A, s 96E and Div 4A in the application of the second step in the *Lange* analysis is therefore appropriately stated as being: that such restriction as each imposes on political communication is imposed in pursuit of an end which is appropriately characterised within our system of representative and responsible government as compelling; and that the

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185 Eg *Coleman v Power* (2004) 220 CLR 1 at 31 [30]-[31]; *Hogan v Hinch* (2011) 243 CLR 506 at 555-556 [95]; [2011] HCA 4; *Wotton v Queensland* (2012) 246 CLR 1 at 16 [30]; [2012] HCA 2.

186 (1992) 177 CLR 106 at 143.

187 (1997) 189 CLR 579 at 618-619.

188 (2004) 220 CLR 181 at 200 [40], quoting *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 143.

189 (2004) 220 CLR 181 at 200 [40].

imposition of the restriction in pursuit of that compelling end can be seen on close scrutiny to be a reasonable necessity.

156 In the application of that standard, much turns on identification of the precise nature and degree of the restriction which each of the impugned provisions imposes on political communication. Much also turns on the identification and characterisation of the end each is designed to achieve.

157 It is convenient to address those topics globally in relation to Div 2A, s 96E and Div 4A before going to address the necessity for the particular restrictions imposed by each of Div 2A and Div 4A. The necessity for s 96E can then be dealt with shortly and distinctly.

The nature and degree of the restrictions on political communication

158 Conformably with the finding in *Unions NSW* in relation to s 96D and s 95G(6), it is common ground between the parties that Div 2A, s 96E and Div 4A operate to restrict political communication by restricting the funds available to candidates and political parties to meet the costs of political communication. The nature and degree of that practical restriction differs for each of Div 2A and Div 4A. It is as well to mention that difference now.

159 The cap on political donations imposed by Div 2A applies in relation to State elections, not in relation to local government elections. The Division's relevant legal operation is to prohibit a candidate or political party accepting a political donation from a person in excess of the applicable cap, being $2,000 per person per financial year for political donations to candidates or $5,000 per person per financial year for political donations to registered political parties[190]. The practical effect of the prohibition in restricting the funds available to candidates and to political parties is to some extent mitigated by two related sets of legislative provisions. One is the capping of their permitted electoral communication expenditure[191]. The other is the provision of public funding to meet a proportion of their electoral communication expenditure[192]. The structure of those related provisions, and also of Div 2, which governs public disclosure of political donations, was sufficiently described in *Unions NSW*[193]. Their detail is not now relevant.

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190 See ss 95A(1)(a) and (e), 95A(2) and 95B(1).

191 Division 2B of Pt 6.

192 Part 5.

193 (2013) 252 CLR 530 at 544-545 [4]-[6].

160 The prohibition on political donations imposed by Div 4A applies equally in relation to local government elections, in respect of which no public funding is available, and where there are no caps on the permitted electoral communication expenditure imposed on candidates and political parties. The relevant legal operation of Div 4A is to make it unlawful for a corporate property developer, or a close associate of a corporate property developer, to make any political donation to a candidate or political party[194].

161 For completeness, it can be noted that the relevant practical effect of the prohibition on indirect campaign contributions in s 96E is complementary to Div 2A and Div 4A. Its legal operation is to prohibit any person from conferring on candidates and political parties specified kinds of benefits which might be of assistance in the conduct of an election campaign. Its practical operation is thereby to limit the assistance capable of being received by candidates and political parties engaged in State and local government elections to political donations regulated, relevantly, by Div 2A and Div 4A.

162 The plaintiffs eschew any argument that the payment of money (or the conferral of other benefits) could itself be political communication. They are right to do so. Whether or not it might in another context be capable of being characterised as a form of expression, mere payment of money can hardly be regarded as a form of communication. The mere fact of making a political donation communicates nothing. As New South Wales rightly points out, making a political donation does not even necessarily communicate support for the recipient's policies. It is not unheard of for donors to donate to more than one party.

163 The plaintiffs do, however, argue that the impugned provisions restrict political communication in another way. Indeed, they place that other restriction on political communication at the forefront of their argument that the provisions impermissibly burden the implied constitutional freedom. What the plaintiffs say is that, by restricting political donations (the payment of money or the provision of other benefits), the provisions restrict political communication by removing a means of facilitating donors making political representations to candidates and parties.

164 The plaintiffs' principal argument, in effect, is that Div 2A, s 96E and Div 4A restrict political communication by removing the preferential access to candidates and political parties which would otherwise come to those who have the capacity and incentive to make large political donations. The argument is as perceptive as it is brazen. It goes to the heart of the mischief to which the provisions are directed.

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194 Sections 96GAA(a), 96GA(1) and 96GB(1).

The identification and compelling nature of the legislative ends

165 Section 4A of the Act, inserted by amendment after the decision in *Unions NSW*[195], includes amongst the express objects of the Act "to help prevent corruption and undue influence in the government of the State"[196]. To explain the restrictions imposed on political communication by Div 2A and Div 4A, it is unnecessary to go beyond that express legislative object. Section 96E is more readily explained by reference to the separately stated object "to promote compliance … with the requirements of the election funding, expenditure and disclosure scheme"[197].

166 What it is necessary to do in order to explain the restrictions imposed on political communication by Div 2A and Div 4A is to unpack the relevant meaning of corruption and undue influence.

167 Corruption is perhaps more readily recognised than defined. One universally recognised form of corruption, however, is for a public official to receive money in a private capacity in circumstances calculated to influence the performance of the official's public duties. The corrosive impact of that form of corruption on the functioning of representative and responsible government was addressed in two decisions of this Court in the 1920s, in terms which resonate with the reasons later held to necessitate the implication of the constitutional freedom of political communication.

168 The issue in *Horne v Barber*[198] was as to the status of an agreement between private individuals, the performance of which involved the payment of money to a member of the Victorian Parliament as an inducement to use his official position for the purpose of procuring a sale of land which could only result from favourable exercises of statutory discretions on the part of an administrative board and a Minister performing functions under the *Closer Settlement Act* 1915 (Vic) and the *Discharged Soldiers Settlement Act* 1917 (Vic). The agreement was held to be contrary to public policy because of its tendency to interfere with the proper discharge of the duties of the member.

169 Knox CJ and Gavan Duffy J described the tendency of the agreement to interfere with the proper discharge of the duties of the member as twofold: it

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195 Inserted by item [4] of Sched 2 to the *Electoral and Lobbying Legislation Amendment (Electoral Commission) Act* 2014 (NSW).

196 Section 4A(c).

197 Section 4A(e).

198 (1920) 27 CLR 494; [1920] HCA 33.

"afforded an inducement to [the member] to misuse his position and influence as a member of Parliament for his own pecuniary gain … and was also calculated to hamper him in forming an unbiased judgment and in expressing a free and honest criticism on the transaction as an act of the Executive Government or its agents"[199]. The separate reasons for judgment of Isaacs J and of Rich J expanded on those two themes.

170 Isaacs J explained that "the whole essence of responsible government, which is the keystone of our political system, and is the main constitutional safeguard the community possesses", lay in the performance of a duty on the part of each member of Parliament of "watching on behalf of the general community the conduct of the Executive"[200]. Isaacs J continued[201]:

> "The effective discharge of that duty is necessarily left to the member's conscience and the judgment of his electors, but the law will not sanction or support the creation of any position of a member of Parliament where his own personal interest may lead him to act prejudicially to the public interest by weakening (to say the least of it) his sense of obligation of due watchfulness, criticism, and censure of the Administration."

Rich J said[202]:

> "Members of Parliament are donees of certain powers and discretions entrusted to them on behalf of the community, and they must be free to exercise these powers and discretions in the interests of the public unfettered by considerations of personal gain or profit. So much is required by the policy of the law."

171 In *R v Boston*[203], the holding of the majority was that an agreement by which a member of the New South Wales Parliament agreed to accept money as an inducement to use his official position for the purpose of influencing or putting pressure on a Minister or another public official constituted a criminal conspiracy at common law, irrespective of whether the end sought to be induced

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199 (1920) 27 CLR 494 at 499.

200 (1920) 27 CLR 494 at 500.

201 (1920) 27 CLR 494 at 500.

202 (1920) 27 CLR 494 at 501.

203 (1923) 33 CLR 386; [1923] HCA 59.

by the payment was lawful and irrespective of whether the pressure was to be exercised by conduct inside or outside Parliament. Knox CJ said[204]:

> "Payment of money to a member of Parliament to induce him to persuade or influence or put pressure on a Minister to carry out a particular transaction tends to the public mischief in many ways, irrespective of whether the pressure is to be exercised by conduct inside or outside Parliament. It operates as an incentive to the recipient to serve the interest of his paymaster regardless of the public interest, and to use his right to sit and vote in Parliament as a means to bring about the result which he is paid to achieve. It impairs his capacity to exercise a disinterested judgment on the merits of the transaction from the point of view of the public interest, and makes him a servant of the person who pays him, instead of a representative of the people."

After restating the views they had each separately expressed in *Horne v Barber*, Isaacs and Rich JJ together summed up the "fundamental obligation" of a member of Parliament in terms of "*the duty to serve* and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community"[205]. The reasons for judgment of the remaining member of the majority, Higgins J, were to similar effect[206].

172 Undue influence has different meanings in different contexts. Influence is a matter of degree; whether or not influence is undue is a matter of judgment; and judgment is a matter of perspective. The perspective here is the effect on the integrity of government. The influence which comes with the preferential access to government resulting from the making of political donations does not necessarily equate to corruption. But the line between a payment which increases access to an elected official and a payment which influences the official conduct of an elected official is not always easy to discern.

173 The difficulty of drawing such a line was highlighted in a report to the Parliament of New South Wales made by the Independent Commission Against Corruption soon after its establishment in 1988[207]. The report was in relation to an investigation into possible corrupt conduct with respect to land development on the north coast of New South Wales. The investigation was conducted, and

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204 (1923) 33 CLR 386 at 393.

205 (1923) 33 CLR 386 at 400 (emphasis in original).

206 (1923) 33 CLR 386 at 410-411.

207 Independent Commission Against Corruption, *Report on Investigation into North Coast Land Development*, (1990).

the report was prepared, by Adrian Roden QC. The report revealed a practice by which the lobbying of members of the New South Wales Parliament on behalf of some land developers was accompanied by the making of political donations. Turning to his concluding observations regarding that practice, Mr Roden explained the nature of the problem by reference to the submissions of counsel made in the course of the investigation. Mr Roden said[208]:

> "Mr Davison argued in favour of the practice of paying for access to Ministers and Members of Parliament. He said that donors to party funds were invited to functions where they had the opportunity of mixing with Ministers and other Parliamentarians at a social level. He said, *'One has better prospects dealing with anybody, if one is able to deal with them on a personal basis'*.
>
> Speaking on Dr Munro's behalf, he said, with disarming frankness:-
>
> *'One pays money to get in the door. One can't dance at the ball unless one has paid the entry fee.'*
>
> Developing the argument further, Mr Davison said that those who paid money for access, were simply putting themselves on the same footing so far as access is concerned, as members of the particular Minister's party or party branch, who had the opportunity of enjoying access to the Minister on a regular basis. The proposition is really that there are some people who enjoy privileged access through mateship, or membership of the party or the 'Old Boys' Club', and that outsiders should have the right to buy their way into the select group, and out of the disadvantage which they would otherwise suffer.
>
> Senior counsel assisting the Commission [Mr Toomey] put the contrary argument. It is that rather than speaking in terms of outsiders paying to enjoy the same advantages as mates, the advantage of privileged access for commercial purposes should not be enjoyed by anyone. It is one thing, and proper, for a party member to be able to discuss political issues at close quarters with Government leaders who are members of his party. It is another thing, and improper, for advantage to be taken of that relationship to push personal or commercial interests.
>
> Mr Toomey was arguing a matter of principle. Mr Davison was asserting a fact of life."

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208 At 651 (italics in original).

174 Under the heading "Payment for Favours", Mr Roden then stated and illustrated the reality of the threat to the integrity of government posed by the making of political donations. He said[209]:

> "Corruption of the system is complete, when it allows the payment of money for political favours, and when decisions by public officials can be bought. That is almost universally understood.
>
> Corruption of the system is well on the way, when it allows favours even without payment, or payment without obvious favour. That is not so well understood.
>
> **Favours without payment**
>
> Mr Watkins acknowledged that he saw Dr Munro more readily than he would see members of the general public. He undoubtedly made representations for Dr Munro's and Mr Cassell's clients, more readily than he would for members of the general public. Mr Watkins and Mr Enderbury both lent their names and their positions to representations they did not know to be true. They did that because Dr Munro asked them to. They both showed favour to Mr Cassell and Dr Munro. They both said they received no payment for that.
>
> If what they say is true, that is favour without payment.
>
> One consequence is denial of the fundamental right of all citizens to equality of treatment at the hands of public officials. The more time spent on the favoured, the less there is available for others. People suffer unfairly, and the system fails, even if there was no payment. And how is the ordinary citizen who is kept waiting, or who misses out altogether, to be satisfied that there was no payment?
>
> The next step is for those who are missing out, to try to share in the favoured treatment. How can they go about that? Mr Davison's argument must seem attractive to them. If they have to pay to get through the door, then those who can, and are prepared to, will. Those who cannot, or are not prepared to, will still miss out.
>
> The corruption of the system will then be complete.

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209 At 654-656 (italics in original).

Payment without favour

Mr Beck knew of Ocean Blue's $25,000 gift to his party's funds. He helped arrange its receipt. At that very time, he was making representations to Ministers on behalf of the donors. He continued to do so, even when they were involved in a competitive process. He said he treated them no differently because of the gift.

If what he says is true, that is payment without favour.

But how is anyone to know whether he was influenced or not? How is he to know himself? He said that if he suspected an ulterior motive, there would have been *'no further support or action'* from him. He was clearly doing something for them which he could do or not, as he chose.

It is impossible to expect people to have confidence in a system which allows public officials to receive money or benefits, directly or indirectly, from people with whom they are dealing in their official capacity.

Ocean Blue, after paying $25,000, were successful in achieving what they were seeking. Others missed out. It is not too cynical to suggest that those facts alone will be encouragement enough to others to do as Ocean Blue did, to give themselves a better chance next time.

Selling to the highest bidder could take on a new meaning. The corruption of the system would then be complete."

175 The thrust of what Mr Roden was saying was that, although there might be favours without payment and payment without favours, the basic human tendency towards reciprocity means that payments all too readily tend to result in favours. Whether the causal sequence is that of payment for favours or that of favours for payment, the corrupting influence on the system of government is little different.

176 In the preface to his report, Mr Roden wrote[210]:

"It is for the community to decide what level of integrity it requires of its public officials, and in particular the extent to which, if at all, it will allow access to decision-makers, and influence upon them, to depend upon considerations such as friendship or payment."

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210 At xxv.

177 One of the individuals named elsewhere in Mr Roden's report, Mr Glynn, was subsequently indicted on two counts framed as follows[211]:

> "On 29 January 1988 at Sydney in the State of New South Wales [Mr Glynn] did bribe a public officer, namely, Jack Hallam, then Minister for Lands in the New South Wales Government by the payment of $20,000 to the Australian Labour [sic] Party (New South Wales), to incline the said Jack Hallam to act in a manner contrary to his duty. ...
>
> On 26 May 1988, at Sydney in the State of New South Wales [Mr Glynn] did bribe a public officer, namely, Ian Causley, the Minister for Natural Resources in the New South Wales Government by the payment of $25,000 to the National Party (New South Wales), to incline the said Ian Causley to act in a manner contrary to his duty."

178 The Court of Criminal Appeal of the Supreme Court of New South Wales, affirming the upholding of a demurrer to the indictment, held the facts alleged in the two counts to disclose no crime known to the common law. Allen J (with whom Hunt CJ at CL and Finlay J agreed), after stating that at common law "the crime of bribery is constituted by the offering to the public officer of reward for the desired improper conduct"[212], identified the essential deficiency in the allegation of fact contained in each count as being that "[t]he payment communicated no offer to the politician that if he accepted the money it would be upon the implied understanding that he would act dishonestly or improperly for the benefit of the payer"[213]. He continued[214]:

> "Indeed the principle can be more nicely demonstrated. Assume having made the payment to the campaign funds of the politician, accepted by the politician as being a wholly proper contribution from a political supporter with no strings attached, the person who made the payment thereafter approaches the politician and says: 'I made this contribution to your campaign funds, I now need this favour. It is irregular but don't you think you owe it to me?' Is that a bribe by the person soliciting the favour? Again the answer must be 'No'. The payment when made implied no condition that if it were accepted the recipient would act improperly in the future in the payer's favour."

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211 *R v Glynn* (1994) 33 NSWLR 139 at 140.

212 (1994) 33 NSWLR 139 at 144.

213 (1994) 33 NSWLR 139 at 145.

214 (1994) 33 NSWLR 139 at 145.

179 Allen J added[215]:

> "It well may be thought that the law should be developed to make the subsequent request for the improper favour, or at least the giving by the political figure of the subsequent favour, criminal. This is a matter for the legislature."

180 The capacity to make the legislative choice to which Mr Roden referred in the preface to his report, and to which the reasons for judgment of Allen J drew further attention, is undoubtedly within the competence of the New South Wales Parliament.

181 There is no place within the system of representative and responsible government as it has developed in Australia for the notion, recently reiterated by a narrow majority of the Supreme Court of the United States, that the legitimate end of limiting campaign financing is the elimination of "*quid pro quo* corruption"[216]. The legitimate end of limiting campaign financing here surely extends to the elimination of what has there been labelled "clientelism"[217]: "the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder"[218].

182 In Canada, where the system of government is closer to that of Australia, it has been recognised that preventing wealthy voices from dominating political discourse so that other voices may be heard "is necessary for meaningful participation in the electoral process and ultimately enhances the right to vote"[219]. The same has been recognised in the United Kingdom[220].

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215 (1994) 33 NSWLR 139 at 145-146.

216 *Citizens United v Federal Election Commission* 558 US 310 at 345, 359 (2010); *McCutcheon v Federal Election Commission* 188 L Ed 2d 468 at 494-495 (2014).

217 Issacharoff, "On Political Corruption", (2010) 124 *Harvard Law Review* 118 at 127.

218 *McConnell v Federal Election Commission* 540 US 93 at 153 (2003).

219 *Harper v Canada (Attorney General)* [2004] 1 SCR 827 at 872 [72].

220 *R (Animal Defenders) v Culture Secretary* [2008] AC 1312 at 1346 [28].

183 The legitimacy of the elimination of undue influence, understood in the sense of unequal access to government based on money, was expressly accepted by all members of the Court in *Unions NSW*[221].

184 Gauged by reference to the system of representative and responsible government established by Chs I and II of the Constitution, as that system is extended by s 128 to permit alteration of the Constitution, the elimination of preferential access to government which results from the making of political donations is a legitimate legislative objective. More than that, the elimination of that form of influence on government is properly characterised as a compelling legislative objective.

The necessity for Div 2A to cap political donations

185 Once elimination of unequal access to members of the New South Wales Parliament based on money is recognised as a legitimate and compelling objective of the Act, the plaintiffs' arguments that the practical restriction on political communication imposed by Div 2A's cap on political donations is not reasonably and appropriately adapted to serving a legitimate end in a manner compatible with the system of representative and responsible government fall away.

186 It is not to the point that the cap on political donations is not tailored to the elimination of the actuality or appearance of corruption in the narrow sense of payment for favours. The targeting of the actuality or appearance of corruption in that narrow sense would not meet the systemic problem of the corrupting influence that inequality of access based on money may have on the pursuit of public duties by elected public officials. It would not address the mischief.

187 Nor is it plausible to think that the mischief of inequality of access based on money could be addressed only through the promotion of transparency. The preferential access which the plaintiffs accept is removed by the cap on political donations would not be removed by the existing provisions governing public disclosure of political donations in Div 2, and could not be expected to be removed by another regime merely requiring public disclosure of large donations.

188 Moreover, it does not assist the plaintiffs' argument to point out that a person who is able to influence a large number of other people each to give smaller amounts under the caps would be able to have exactly the same degree of influence as a single person who makes a larger donation. The equivalence of influence to which the argument points is the equivalence of the influence which results, on the one hand, from the organised political action of many individuals

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221 (2013) 252 CLR 530 at 545 [8], 557 [51], 579 [138].

who are motivated to act in a common cause and the influence which, on the other hand, a wealthy individual is able alone to exert by reason only of wealth. The argument only demonstrates the beneficial operation of the cap on the democratic process.

189 On close scrutiny, congruent with a search for compelling justification, there is no warrant for considering Div 2A's restrictions on political communication to be other than reasonably necessary for the fulfilment of its identified statutory purpose.

The necessity for Div 4A to prohibit donations by corporate property developers and their close associates

190 Division 4A on its face presents more difficulty. The plaintiffs argue that it discriminates against them. How can it be reasonably necessary for the elimination of *preferential* access to government, they ask, to deny corporate property developers and their close associates the same degree of access to candidates and political parties that comes with the making of a political donation available to everyone else?

191 The answer is that the reasonable necessity for singling out corporate property developers and their close associates for differential treatment as political donors is to be found in what differentiates them from the mainstream of political donors when it comes to the potential for corruption and undue influence in the government of the State.

192 The definition of "property developer" for the purpose of the Division is "a corporation engaged in a business that regularly involves the making of relevant planning applications by or on behalf of the corporation in connection with the residential or commercial development of land, with the ultimate purpose of the sale or lease of the land for profit"[222]. The definition of "relevant planning application"[223] encompasses specified forms of requests and applications for approval or consent under the *Environmental Planning and Assessment Act* 1979 (NSW). The scheme of that Act is to make the success of those requests and applications dependent, at least in the first instance, on the exercise of one or more statutory discretions, many of which are exercisable at the level of local government and some of which are exercisable at the level of State government.

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222 Section 96GB(1)(a).

223 Section 96GB(3). See also s 147(2) of the *Environmental Planning and Assessment Act* 1979 (NSW).

193 What it is that relevantly differentiates corporate property developers from the mainstream of political donors is the nature of the business in which they are engaged. By definition, it is a profit-making business which is dependent on the exercise of statutory discretions by public officials. It is the nature of their business that gives corporate property developers a particular incentive to exploit such avenues of influence as are available to them, irrespective of how limited those avenues of influence might be.

194 The problem is not merely theoretical. The unfortunate experience in New South Wales has been one of exploitation of influence leading too readily to the corruption of official conduct. Property development was the particular focus of the report authored by Mr Roden, to which extensive reference has already been made. The special case reveals that, between then and 2008, property development was the focus of seven further adverse reports presented to the New South Wales Parliament.

195 Debating the introduction of Div 4A in 2009, the Attorney-General, the Hon John Hatzistergos, said[224]:

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

196 Despite the cap on political donations in relation to State elections later imposed by Div 2A, which was introduced in 2010[225], there is no basis on which it could be concluded that the total prohibition on property developers making any political donations does not continue to make a material contribution to the prevention of corruption and undue influence in the government of the State, and does not continue to be reasonably necessary.

197 The plaintiffs point out that participants in many other forms of business which routinely rely on favourable exercises of statutory discretions in order to carry on a profit-making enterprise are not subject to the prohibition in Div 4A.

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224 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 3 December 2009 at 20570.

225 By item [23] of Sched 1 to the *Election Funding and Disclosures Amendment Act* 2010 (NSW).

That may be so. But, without more, it provides no reason to conclude that, in its application to property developers, Div 4A is not squarely aimed at preventing corruption and undue influence in the government of the State and is not a reasonably necessary means of preventing corruption and undue influence in the government of the State. The Parliament is not relegated by the implied freedom to resolving all problems of corruption and undue influence if it resolves any. The Parliament can respond to felt necessities. The special case discloses no basis for thinking that property developers have been singled out because of the unpopularity of their views.

198 The plaintiffs also draw attention to the width of the definition of "close associate", which extends to encompass persons, including electors, who are directors or officers of the corporation or who have significant voting power in the corporation (or a related body corporate), as well as their spouses[226]. The definition is not so wide as to cause the prohibition of political donations by close associates of corporate property developers to go beyond what is justified by reference to the same reasonable necessity which justifies the primary ban on political donations by corporate property developers. The prohibition of political donations by close associates, like the prohibition of political donations by corporate property developers, does not prevent them from expressing political views. It does not prevent them from making contact with elected officials.

Section 96E

199 Section 96E presents no such difficulty. It is an anti-avoidance provision. If Divs 2A and 4A are reasonably necessary means of preventing corruption and undue influence in the government of the State, then s 96E is reasonably necessary to ensure their efficacy.

Formal answers to questions reserved

200 The three substantive questions stated for the opinion of the Full Court in the special case ask whether each of Div 2A of Pt 6, s 96E and Div 4A of Pt 6 of the Act is invalid in its application to the plaintiffs because it impermissibly burdens the implied constitutional freedom of political communication. Each question should be answered in the negative. The plaintiffs should pay the costs of the special case.

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226 Section 96GB(3).

201 NETTLE J. The issue in this special case is whether certain of the provisions of Divs 2A and 4A of Pt 6 and s 96E in Div 4 of Pt 6 of the *Election Funding, Expenditure and Disclosures Act* 1981 (NSW) ("the EFED Act") infringe the implied constitutional freedom of political communication.

202 Section 4A of the EFED Act provides that the objects of the Act are:

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

Although s 4A was not enacted until after the impugned provisions[227], its enactment confirms that the statutory objective of the EFED Act is to keep State political institutions free of corruption and to maintain public confidence in the integrity of those institutions.

203 Apart from Divs 2A and 2B, Pt 6 of the EFED Act applies both to State elections and elected members of the State Parliament and to local government elections and elected members of local councils[228]. Division 2 of Pt 6 requires certain disclosures of both political donations and electoral expenditure. Division 2A, which is restricted to State elections and elected members of the State Parliament (and so does not apply to local government[229]), imposes restrictions on the maximum amount of each political donation. Division 2B caps the amount of electoral communication expenditure which can be incurred during the period leading up to a State election. Division 4 (which applies to

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227 See *Electoral and Lobbying Legislation Amendment (Electoral Commission) Act* 2014 (NSW), Sched 2 [4].

228 EFED Act, s 83.

229 EFED Act, s 95AA.

State elections and elected members of the State Parliament and also to local government[230]) prohibits certain types of political donations, and Div 4A (which also applies at both State and local government levels[231]) prohibits political donations by persons associated with particular kinds of businesses.

204 A "political donation" includes gifts made (directly or indirectly) to or for the benefit of a party, elected member, candidate or group of candidates[232]; amounts paid by persons as a contribution, entry fee or other payment to entitle a person to participate in or otherwise obtain any benefit from a fund-raising venture or function[233]; an annual or other subscription paid to a party by a member of the party or a person for affiliation with the party[234]; dispositions of property to the New South Wales branch of a party from the federal or another State or Territory branch of the party, or to a party from an associated party[235]; and uncharged interest on a loan to an entity or other person[236]. Gifts made to individuals in a private capacity for the individual's personal use and that he or she has not used, and does not intend to use, solely or substantially for a purpose related to an election or to his or her duties as an elected member are excluded from the definition[237]. If, however, any part of such a gift is subsequently used to incur electoral expenditure[238], that part of it becomes a political donation[239].

205 Section 95A(1) in Div 2A of the EFED Act imposes a cap on the amount of political donations that can be made per person per financial year to or for the benefit of a registered party ($5,000); an unregistered party ($2,000 – thus encouraging registration); an elected member ($2,000); a group ($5,000); a candidate ($2,000); and a third-party campaigner ($2,000). These amounts, like

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230 EFED Act, s 83.

231 EFED Act, s 83.

232 EFED Act, s 85(1).

233 EFED Act, s 85(2).

234 EFED Act, s 85(3).

235 EFED Act, s 85(3A).

236 EFED Act, s 85(3B).

237 EFED Act, s 85(4).

238 As defined in EFED Act, s 87.

239 EFED Act, s 85(5).

other relevant monetary amounts in the EFED Act[240], are indexed[241], but it is sufficient for present purposes to refer to the amounts set out in the Act. For the purposes of the donation caps, a party subscription[242] is to be disregarded, provided it does not exceed the maximum subscription[243] (eg, $2,000 for membership of a party[244]). Section 95A includes a number of aggregation provisions the purpose of which is to ensure that a person cannot circumvent the applicable cap by making more than one donation in a financial year[245] or by making more than one donation to elected members, groups or candidates of the same party[246].

206 Section 95B(1) prohibits a person from accepting a political donation to a party, elected member, group, candidate or third-party campaigner if the donation exceeds the applicable cap. The prohibition is subject to a number of exceptions, including: (a) if the donation (or the part exceeding the cap) "is to be paid into (or held as an asset of) an account kept exclusively for the purposes of federal or local government election campaigns"[247]; and (b) if the donation exceeds the cap because of the aggregation of political donations made to other persons and the person who received the donation did not know and could not reasonably have known of the political donations made to the other persons[248].

207 Division 4 of Pt 6 prohibits making or accepting certain kinds of political donations by reference to:

(a) their source: if the donor is a party, or a candidate or elected member endorsed by a party, and the candidate or group of candidates to whom the donation is made is not endorsed by that or any other party[249]; or if the

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240 See Sched 1.

241 EFED Act, s 95A(5).

242 As defined in EFED Act, s 95D(2).

243 EFED Act, s 95D(1).

244 EFED Act, s 95D(3).

245 EFED Act, s 95A(2).

246 EFED Act, s 95A(3), (6).

247 EFED Act, s 95B(2).

248 EFED Act, s 95B(5).

249 EFED Act, s 96EA.

donor does not identify his or her name or address to the person accepting the donation[250];

(b) their nature: indirect campaign contributions such as provision of office accommodation or full or part payment of electoral expenditure for advertising or other purposes to be incurred by a party, elected member, group or candidate[251]; or

(c) the conditions of their receipt: the receipt of a reportable loan other than from a financial institution without recording the terms and conditions of the loan and the name and address of the lender[252].

208 Division 4A of Pt 6, which is entitled "Prohibition of donations from property developers or tobacco, liquor or gambling industries", prohibits political donations by certain classes of donor. The proscribed categories of donor are defined individually in s 96GB and collectively as "prohibited donor[s]" in s 96GAA. One of the proscribed categories is "property developer", which is defined as[253]:

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

209 A "relevant planning application", which is defined[254] by reference to s 147 of the *Environmental Planning and Assessment Act* 1979 (NSW) ("the EPA Act"), covers a broad range of planning-related applications that may be made under that Act, including: to initiate the making of an environmental planning instrument; to request that development on a particular site be declared as "State significant development", "State significant infrastructure" or a project to which

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250 EFED Act, s 96F.

251 EFED Act, s 96E.

252 EFED Act, s 96G.

253 EFED Act, s 96GB(1).

254 EFED Act, s 96GB(3).

Pt 3A of the EPA Act (now repealed) applies; for approval of a concept plan or project under Pt 3A; or for development consent under Pt 4 of the EPA Act.

210 A "close associate" of a corporation is defined in s 96GB(3) of the EFED Act as meaning each of:

> "(a) a director or officer of the corporation or the spouse of such a director or officer,
>
> (b) a related body corporate of the corporation[255],
>
> (c) a person whose voting power in the corporation or a related body corporate of the corporation is greater than 20% or the spouse of such a person[256],
>
> (d) if the corporation or a related body corporate of the corporation is a stapled entity in relation to a stapled security—the other stapled entity in relation to that stapled security,
>
> (e) if the corporation is a trustee, manager or responsible entity in relation to a trust—a person who holds more than 20% of the units in the trust (in the case of a unit trust) or is a beneficiary of the trust (in the case of a discretionary trust)."

211 Pursuant to s 96GA it is unlawful for a prohibited donor, or someone on behalf of a prohibited donor, to make a political donation[257] and it is unlawful for a prohibited donor to solicit another person to make such a donation[258]. It is also unlawful for a person to accept a political donation that was made (wholly or partly) by a prohibited donor or by a person on behalf of a prohibited donor[259], or to solicit a person on behalf of a prohibited donor to make a political donation[260].

212 In the following reasons, the provisions of Div 2A of Pt 6 of the EFED Act will be referred to as "the donation caps". The provisions of Div 4A of Pt 6,

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255 See *Corporations Act* 2001 (Cth), s 50.

256 See *Corporations Act*, ss 9, 10-17, 610.

257 EFED Act, s 96GA(1)-(2).

258 EFED Act, s 96GA(4).

259 EFED Act, s 96GA(3).

260 EFED Act, s 96GA(5).

in so far as they apply to the plaintiffs, will be referred to as "the prohibited donor provisions".

The plaintiffs

213 The facts agreed in the special case record that each of the plaintiffs has breached, or intends to breach, the donation caps or the prohibited donor provisions. Hence, the questions reserved raise for decision the validity of those provisions in their application to the plaintiffs.

214 The first plaintiff is a director of the second and third plaintiffs and of Nuove Castelli Pty Ltd ("Nuove Castelli"). The third plaintiff is a property developer within the meaning of s 96GB(1)(a), and thus the first plaintiff is a close associate within the meaning of s 96GB(1)(b). The first plaintiff made political donations in excess of the donation caps in connection with the New South Wales State election held in March 2011 ("the 2011 election"). To the extent permitted by law, he intends to make further donations in excess of the donation caps in the future. The second plaintiff made an indirect campaign contribution, within the meaning of s 96E, in connection with the 2011 election. Though not itself a property developer, the second plaintiff is related to Nuove Castelli, which made some five relevant planning applications in 2008-2009. The plaintiffs' standing to challenge the impugned provisions in so far as applicable to them was not challenged. It is convenient to assume, therefore, that the planning applications are sufficiently regular to render Nuove Castelli a property developer, and the second plaintiff its close associate, within the meaning of s 96GB(1).

The implied freedom of political communication

215 A law infringes the constitutionally implied freedom of political communication if it so burdens, restricts or distorts the free flow of political communication between the governed, their representatives and candidates for elected office as to be incompatible with the continued existence of the political sovereignty which resides in the people and is exercised by their representatives according to ss 7, 24, 62, 64, 128 and related provisions of the Constitution[261].

216 "Political sovereignty" in this sense means the freedom of electors, through communication between themselves and with their political representatives, to implement legislative and political changes[262]. It may be

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261 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557-562; [1997] HCA 25.

262 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 137-138 per Mason CJ; [1992] HCA 45 ("*ACTV*").

infringed by restricting the freedom of electors and their political representatives to disseminate or receive information bearing on electoral choices. It may be infringed, too, by restrictions on political communications to and from persons other than electors[263].

217 Political sovereignty further necessitates that those who govern take account of the interests of all those whom they govern and not just the few of them who have the means of buying political influence[264].

218 Reducing opportunities for the purchase of political influence tends to reduce undue influence, encourage candidates and parties to seek support from more individuals and broader segments of society, and motivate individuals with common interests to build political power groups. Each of those effects is conducive to enhancing the system protected by the implied freedom of political communication by increasing the amount of communication between electors and parties and between electors themselves. For that reason, it has previously been suggested, but not yet determined, that laws which put a general limit on political donations and expenditure and which provide for wholly or partly state-funded political campaign expenses are unlikely to infringe the freedom[265].

219 Recent changes in the interpretation of the Free Speech Clause of the First Amendment to the Constitution of the United States suggest that laws which put a general limit on private political donations would be considered to be unconstitutional in that country[266]. However, unlike the "great underlying principle" of the Australian Constitution – "that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power"[267] – United States constitutional law puts emphasis on individual rights. Consequently, much of the United States judicial discourse regarding the First Amendment's right to free speech and what it necessitates by way of political freedom cannot be transposed to Australia's constitutional context without making allowances for that difference.

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263 *ACTV* (1992) 177 CLR 106 at 139.

264 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 578 [136] per Keane J; [2013] HCA 58.

265 *ACTV* (1992) 177 CLR 106 at 155-156 per Brennan J, 175 per Deane and Toohey JJ.

266 *McCutcheon v Federal Election Commission* 188 L Ed 2d 468 (2014).

267 Harrison Moore, *The Constitution of the Commonwealth of Australia*, (1902) at 329; see *ACTV* (1992) 177 CLR 106 at 139-140 per Mason CJ.

220 As was established in *Lange v Australian Broadcasting Corporation*[268], in this country the question of whether a law offends the constitutionally implied freedom of political communication is to be determined according to the two-limbed test of whether the law in its legal or practical operation effectively burdens communication on governmental or political matters; and, if so, whether it is reasonably appropriate and adapted, or in other words proportionate, to serving a legitimate end in a manner that is compatible with the maintenance of the system of representative and responsible government established by the Constitution.

221 As a result of differences between some of the views expressed in *Monis v The Queen*[269], *Unions NSW v New South Wales*[270] and *Tajjour v New South Wales*[271], a degree of uncertainty has arisen as to several aspects of the second limb of the *Lange* test. Those aspects include whether the standard of appropriateness and adaptedness varies according to the nature and extent of the burden; what significance should be attributed to the availability of less restrictive alternative means; and whether the criterion of appropriateness and adaptedness necessitates a test of "strict proportionality".

222 For reasons which will later be explained, it should now be accepted that the standard of appropriateness and adaptedness does vary according to the nature and extent of the burden. A law which imposes a discriminatory burden will require a strong justification. And the availability of alternative means is a relevant but not determinative consideration. For present purposes, however, it is unnecessary to delve into strict proportionality.

Division 2A of Pt 6 – donation caps

223 In this case, it is not in issue that the donation caps imposed by Div 2A indirectly burden, restrict or distort the free flow of political communication by restricting the flow of money to political parties to fund their political communications. The question is whether the donation caps are imposed for a legitimate end and, if so, whether they are appropriate and adapted to the achievement of that end in a manner which is compatible with the maintenance

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268 (1997) 189 CLR 520 at 561-562. The formulation of the second limb of the test was revised in *Coleman v Power* (2004) 220 CLR 1 at 50 [92]-[93], 51 [95]-[96] per McHugh J, 77-78 [196] per Gummow and Hayne JJ, 82 [211] per Kirby J; [2004] HCA 39.

269 (2013) 249 CLR 92; [2013] HCA 4.

270 (2013) 252 CLR 530.

271 (2014) 88 ALJR 860; 313 ALR 221; [2014] HCA 35.

of the system of representative and responsible government established by the Constitution.

224 As appears from the terms of Div 2A read in conjunction with s 4A, the aim of the Division is to reduce the risk of State political parties and individual politicians being induced to extend political patronage to large-scale political donors and, concomitantly, to ameliorate the perception that those who have the capacity to make large-scale political donations are likely to be accorded commensurately greater political influence.

225 Each of those objectives is a legitimate aim. As Mason CJ said in *ACTV*, "the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people"[272]. They must exercise their public powers solely in the public interest and upon the merits of any particular proposal, not in their private interest. To the same effect, as Brennan J observed in *ACTV*[273]:

> "[T]he salutary effect of freedom of political discussion on performance in public office can be neutralized by covert influences, particularly by the obligations which flow from financial dependence. The financial dependence of a political party on those whose interests can be served by the favours of government could cynically turn public debate into a cloak for bartering away the public interest."

226 As was submitted on behalf of the Attorney-General for Victoria, *any* instance of public decision-making affecting a person's interests which is influenced by that person making a substantial political donation to the decision-maker or his or her party or group may be regarded as an unduly influenced decision.

227 Thus, provisions which seek to remove the need for and ability to make large-scale donations to a political party or candidate are properly to be viewed as directed to the mischief of possible corruption or undue influence. As Keane J remarked in *Unions NSW*[274], it is consistent with the implied freedom of political communication that wealthy donors not be permitted to distort the flow of political communication according to the size of their political donations.

228 Contrary to the central theme of the plaintiffs' submissions, which at least in part were based on the recent shift in the interpretation of the United States

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272 (1992) 177 CLR 106 at 138.

273 (1992) 177 CLR 106 at 159.

274 (2013) 252 CLR 530 at 578 [136].

First Amendment right of free speech earlier referred to, there is also nothing new or otherwise remarkable about limiting the size of political donations. The idea that unregulated political donations pose a threat to the integrity of the system of representative and responsible government established by the Constitution is logical and of long standing.

229 As recorded in the 19th edition of *Rogers on Elections*, which was published in 1918[275]: "The evil consequent on the enormous expense commonly incurred at elections has long been acknowledged." As far back as 1695, the preamble to the *Treating Act* 1695[276] referred to "excessive and exorbitant expenses, contrary to the laws, and in violation of the freedom due to the election of representatives for the commons of England in parliament, to the great scandal of the kingdom, dishonourable, and may be destructive to the constitution of parliaments". One of the objects of that Act and of a succession of subsequent enactments was to regulate the amount of election expenses and to prohibit donors funding expenses in excess of the limits. The *Treating Act* was directed to preventing candidates or persons on their behalf buying votes by payment of money, or provision of meat, drink, gifts, reward or entertainment to potential electors. The next step, which was taken in the *Corrupt Practices at Parliamentary Elections Act* 1729[277], was to prohibit voters themselves from offering or receiving inducements in exchange for a vote (or a refusal to vote) in an election. That was followed by the *Corrupt Practices Prevention Act* 1854[278], which required the appointment of an auditor to be responsible for payment of all election expenses and to publish a detailed statement of all expenses incurred by candidates. The *Corrupt and Illegal Practices Prevention Act* 1883[279] then introduced a limit on both the nature and amount of election expenses which might be incurred. Comparable provisions were enacted in South Australia in 1893[280].

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275 *Rogers on Elections*, 19th ed (1918), vol 2 at 192.

276 7 & 8 Will III c 4.

277 2 Geo II c 24.

278 17 & 18 Vict c 102, ss 15, 19, 26.

279 46 & 47 Vict c 51. See *Rogers on Elections*, 19th ed (1918), vol 2, ch XIII.

280 *Electoral Law Amendment Act* 1893 (SA).

Prohibited donor provisions – nature and extent of the burden on the implied freedom

230 The prohibition imposed by s 96GA against certain classes of political donors making political donations raises different considerations.

231 The plaintiffs contended that, because the prohibition is narrowly focussed on a small group of identified prohibited donors who are not united by any feature of particular susceptibility to corruption, and drafted in a manner which leaves open opportunities for avoidance, the prohibition does not appear to have a rational connection with the aim or effect of preventing corruption.

232 That submission should be rejected. Approaching the question first as one of statutory interpretation[281], it is apparent from the text of the legislation that the prohibition in so far as it applies to property developers is rationally directed to dealing with corruption and undue influence, and the perception of it, arising as the result of political donations from property developers. Hence, the mischief at which the prohibition is aimed[282] is a perceived risk of susceptibility of members of State and local government to corruption and undue influence in relation to planning and property development decisions.

233 There is, too, an apparently strong factual basis for the perception of a risk of corruption and undue influence as the result of political donations from property developers. A series of seven reports and a position paper of the New South Wales Independent Commission Against Corruption ("ICAC") has identified corruption and other misconduct in the handling of property development applications since 1990, and the existence of a large measure of public concern over the influence which property developers have hitherto exercised over State and local government members and officials. Admittedly, those concerns are more based upon inference than on direct evidence of widespread corruption by property developers. But it is not illogical or unprecedented for the Parliament to enact legislation in response to inferred legislative imperatives. More often than not, that is the only way in which the Parliament can deal prophylactically with matters of public concern.

234 Contrary to the plaintiffs' submissions, it does not detract from that conclusion that the prohibition might have been crafted in a manner which was more effective in restricting corruption in relation to planning and property development decisions or that there might not be the same rational connection

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281 *Monis* (2013) 249 CLR 92 at 147 [125] per Hayne J; *Unions NSW* (2013) 252 CLR 530 at 557 [50] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

282 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 394 [178] per Gummow J; [2005] HCA 44.

between the perception of the risk of corruption and the prohibition against political donations by other prohibited donors. As Hayne J explained in *Tajjour*[283], once it is seen that an impugned law is rationally connected to a legitimate end, it logically follows that the impugned law is capable of realising that end, and it is neither possible nor appropriate to attempt assessment of the efficacy of the impugned law in realising the desired end. For the same reason, it is not inconsistent with the prohibition being capable of dealing with corruption and undue influence that its effectiveness in that respect might have been enhanced by extending the prohibition to a broader class of political donors.

235 As the plaintiffs further contended, however, the fact that the prohibition may be rationally connected to a legitimate end of dealing with corruption and undue influence as the result of political donations from property developers is not determinative of whether it is consistent with the maintenance of the system of government established by the Constitution. The way in which the prohibition discriminates against property developers is also of importance.

236 As Mason CJ said in *ACTV*[284], whether a restriction on the implied freedom of political communication which discriminates against a particular group or groups is justified calls for a balancing of the public interest in free communication against the competing public interest which the restriction is designed to serve. If the restriction imposes a burden on free communication which outweighs the competing public interest, it is indicative that the purpose and effect of the restriction is to impair the implied freedom of communication.

237 New South Wales emphasised that the implied freedom of political communication is not a personal right of communication but a systemic guarantee of the free flow of information and ideas between the electors and the elected and each of them inter se. It submitted that the prohibited donor provisions do nothing of themselves to curtail the ability of prohibited donors to communicate their wishes and ideas to candidates and the electorate and, therefore, nothing to reduce the free flow of information and ideas within the political system.

238 Superficially, that presents as an attractive solution to the problem. In one sense it is true and, therefore, it is convenient for New South Wales to say that the prohibited donor provisions leave prohibited donors free to be as vocal as they choose in the expression of their political views.

239 But upon closer examination it will be seen that the submission is unconvincing. In the practical reality of the political system, the ability of a

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283 (2014) 88 ALJR 860 at 884 [81]-[82]; 313 ALR 221 at 247-248.

284 (1992) 177 CLR 106 at 143-145.

corporation to make a political donation is likely to be considered as important a method as any of expressing ideas about politics and government; especially where there is a requirement for public disclosure of political donations. As the Supreme Court of the United States recognised in *Buckley v Valeo*, the fact of a political contribution, as opposed to its amount, serves as a "general expression of support" for a candidate and his or her views, albeit not the underlying basis for the support, and as a "symbolic expression of support"[285]:

> "Making a contribution, like joining a political party, serves to affiliate a person with a candidate [and] enables like-minded persons to pool their resources in furtherance of common political goals."

240 It is therefore beside the point that the prohibited donor provisions leave prohibited donors free to express their political preferences by other means. As McHugh J observed in *Levy v Victoria* (with respect to a prohibition upon a particular form of protest)[286]:

> "It is beside the point that [the protesters'] arguments against the alleged cruelty of duck shooting could have been put by other means during the periods when the Regulations operated. What the Regulations did was to prevent them from putting their message in a way that they believed would have the greatest impact on public opinion".

And to the same effect, Brennan CJ concluded that[287]:

> "The [implied freedom] denies legislative or executive power to restrict the freedom of communication about the government or politics of the Commonwealth, whatever be the form of communication, unless the restriction is imposed to fulfil a legitimate purpose and the restriction is appropriate and adapted to the fulfilment of that purpose. In principle, therefore, non-verbal conduct *which is capable of communicating an idea* about the government or politics of the Commonwealth and *which is intended to do so* may be immune from legislative or executive restriction so far as that immunity is needed to preserve the system of representative and responsible government that the Constitution prescribes."

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285 424 US 1 at 21-22 (1976) per curiam.

286 (1997) 189 CLR 579 at 625; [1997] HCA 31.

287 (1997) 189 CLR 579 at 594-595 (emphasis added, footnote omitted).

Other members of the Court in *Levy* agreed that non-verbal conduct that is a means of communicating a message is within the scope of the freedom[288].

241 In the result, to deny one section of donors the ability to make political donations while leaving others free to make them is both a significant restriction of the freedom of the prohibited donors to communicate their ideas about politics or government through the non-verbal means of making political donations and, logically, also a significant relative enhancement of the ability of non-prohibited donors to have their ideas about politics and government prevail. It follows that, although the implied freedom of political communication is properly conceived of as a safeguard of systemic integrity as opposed to protecting individual liberties, the prohibited donor provisions necessarily lessen the free flow of information and ideas within the system and thereby burden the freedom of political communication.

242 New South Wales countered that, even if that were so, the burden was bound to be small because of the relatively small number of prohibited political donors and thus the relatively small effect on the resources available to recipients for political purposes[289].

243 Superficially, that also presents as an attractive submission. Although there is no evidence about the number of prohibited donors disposed to make political donations, it is fair to assume that they represent only a small proportion of the electorate; and the extent of the burden cast on the freedom of political communication is a plainly relevant consideration in the determination of whether the prohibition and the means by which it is implemented satisfy the second limb of the *Lange* test[290].

244 It would be wrong to conclude, however, that, just because the prohibited donor provisions affect only a small section of the electorate, they can have only a small effect on the implied freedom. As Deane and Toohey JJ observed in *ACTV*[291]:

> "[T]he fact that the number of groups or individuals who might wish to express their political views in a particular way is limited, does not suffice

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288 (1997) 189 CLR 579 at 613 per Toohey and Gummow JJ, 625 per McHugh J, 641 per Kirby J.

289 Cf *Unions NSW* (2013) 252 CLR 530 at 555 [40].

290 *Tajjour* (2014) 88 ALJR 860 at 890 [126]-[127] per Crennan, Kiefel and Bell JJ; 313 ALR 221 at 256.

291 (1992) 177 CLR 106 at 175.

> to justify a law suppressing the freedom of communication in that particular way."

Given that the prohibition discriminates against a class of political donors who, if afforded the same freedom to make political donations as other sections of the electorate, would *ex hypothesi* have a significant effect on ideas about politics and government, the prohibition has the capacity to have a significant effect on the free flow of political communication between the governed, the candidates and the representatives.

245 More generally, any measure like the prohibited donor provisions is likely to suppress a minority's expression of ideas about politics and government, thus distorting the level playing field which is considered to be the essence of the political system, and, in that sense, have a significant effect on the free flow of information and ideas within the system. Consequently, as Gageler J concluded in *Tajjour*[292]:

> "To confine constitutional protection to a law which operates to place some 'general' constraint on communication on governmental or political matter – in the apparently volumetric sense in which New South Wales and some of the interveners would employ that term – would be inimical to the nature of the freedom to be protected, which exists to ensure that even the smallest minority is not, without justification, denied by law an ability to be heard in the political process. That minority, as the cases illustrate, might be as small as those who seek to engage in non-verbal protests in a hunting area during restricted hours in a hunting season, or those who seek to express political views to named individuals by means of offensive communications sent through the post."

246 It is to be noted that, although the parties were not in dispute that the prohibited donor provisions imposed some burden on the implied freedom of political communication, they appeared to accept that the only relevant burden was a reduction in the amount of money available to members, parties and candidates to spend on election campaigning. The plaintiffs pleaded that the impugned provisions burden the implied freedom by "effect[ing] 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". New South Wales admitted that the provisions restrict the funds available to political parties. The plaintiffs also pleaded in the alternative that the impugned provisions inhibit or prohibit affected donors from associating with elected members "by means of making political donations", and those allegations were denied. But counsel for

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292 (2014) 88 ALJR 860 at 892-893 [145]; 313 ALR 221 at 259-260 (footnotes omitted).

the plaintiffs stated in argument that there was "no real disagreement" as to the nature of the burden.

247 Possibly, the parties' lack of "real disagreement" was based on observations in the joint judgment in *Unions NSW* that the implied freedom does not seek to protect a personal right but rather political communication more generally, and, therefore, that[293]:

> "the question is not whether a person is limited in the way that he or she can express himself or herself, 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?
>
> 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.
>
> 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 parties might have considered that the kind of effect on the implied freedom so identified in *Unions NSW* was the only relevant burden that the impugned provisions impose[294].

248 Whether or not, however, that was the reason for their lack of "real disagreement", it should be understood that the reasoning in *Unions NSW* did not foreclose the conclusion that the nature and extent of the burden imposed by the political donation provisions in this case is different from, and greater than, the reduction in the total funds available for election spending. The central question posed by the first limb of the *Lange* test is "what the impugned law does, not how

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293 (2013) 252 CLR 530 at 554 [36]-[38] per French CJ, Hayne, Crennan, Kiefel and Bell JJ (footnote omitted).

294 The plaintiffs also submitted that the impugned provisions "also [take] away from the system a means by which electors and others may express support and seek to communicate with political parties or candidates", being facilitating access to candidates and incumbents as a consequence of making (or offering) a large donation.

an individual might want to construct a particular communication"[295]. That is what informed the emphasis given in the joint judgment in *Lange* to identifying the burden of an impugned provision on the constitutionally protected *system* of government, rather than on any particular individual's abilities to communicate[296]. But as was further noted in *Unions NSW*, "identification of that limiting effect [upon an individual] may be necessary to an understanding of the operation of a statutory provision upon the freedom more generally"[297].

Appropriateness and adaptedness

249 As was earlier observed, one important aspect of the justification for the donation caps imposed by Div 2A is the countervailing benefit in terms of the implied freedom that results from the caps. To reiterate, the imposition of relatively low donation caps is conducive to "levelling the playing field" by reducing the distortion of political communication which results from purchased political influence, encouraging candidates and parties to seek support from more individuals and broader segments of society and encouraging individuals with common interests to build political power groups. Each of those effects is likely to enhance the system protected by the implied freedom by tending to increase the amount of communication between electors and parties and between electors themselves.

250 In contrast, the prohibited donor provisions tend to undermine those effects by denying particular individuals the ability to donate. To do so is likely to diminish their incentive to build political power by becoming a donor bloc, reduce the incentive of candidates and parties to identify them as a political interest group which needs to be considered, and so render affected persons less likely to seek to communicate between themselves and with candidates and parties.

251 Authority establishes that burdens which discriminate between, or have an unequal effect upon, segments of the community, political parties and candidates or certain political viewpoints require strong justification. In *ACTV*, the disparate effect of the scheme as between incumbents and challengers and as between major and minor parties formed a key part in the reasoning of Mason CJ[298] and

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295 *APLA* (2005) 224 CLR 322 at 451 [381] per Hayne J, quoted with approval in *Monis* (2013) 249 CLR 92 at 129 [62] per French CJ and *Unions NSW* (2013) 252 CLR 530 at 572 [110] per Keane J.

296 (1997) 189 CLR 520 at 559-560.

297 (2013) 252 CLR 530 at 554 [36] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

298 (1992) 177 CLR 106 at 146.

Deane and Toohey JJ[299]. That reasoning assumed significance in Keane J's judgment in *Unions NSW*[300] and was cited with approval by Gageler J in *Tajjour*[301].

252 In *ACTV*, Mason CJ distinguished between restrictions on communication which targeted ideas or information and restrictions on an activity or mode of communication by which ideas are transmitted. He observed that[302]:

> "Generally speaking, it will be extremely difficult to justify restrictions imposed on free communication which operate by reference to the character of the ideas or information. ...
>
> On the other hand, restrictions imposed on an activity or mode of communication by which ideas or information are transmitted are more susceptible of justification."

To similar effect, Deane and Toohey JJ distinguished between direct and incidental burdens on political communication[303], thus:

> "[A] law whose character is that of a law with respect to the prohibition or restriction of [political communications] will be much more difficult to justify as consistent with the [implied freedom] than will a law whose character is that of a law with respect to some other subject and whose effect on such communications is unrelated to their nature as political communications."

McHugh J also reasoned that regulations which restrict the freedom of electoral communications require a "compelling justification", unless they are merely "[r]easonable time, place, and manner regulations, *which do not discriminate* among speakers or ideas"[304] (emphasis added).

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299 (1992) 177 CLR 106 at 172, 175.

300 (2013) 252 CLR 530 at 580-581 [144]-[148], 585-586 [163]-[168].

301 (2014) 88 ALJR 860 at 894 [152]; 313 ALR 221 at 262, citing *Unions NSW* (2013) 252 CLR 530 at 581 [147]-[148] per Keane J.

302 (1992) 177 CLR 106 at 143.

303 (1992) 177 CLR 106 at 169.

304 (1992) 177 CLR 106 at 235, quoting *Buckley* 424 US 1 at 18 (1976).

253 The distinction between direct and indirect burdens was later accepted in *Hogan v Hinch*[305] albeit that, in subsequent cases, there has been an apparent lack of unanimity as to what follows from the distinction, and in particular as to whether different kinds of burden attract different levels of scrutiny. Hitherto, the prevailing view appears to have been that the *Lange* test may not require different standards of scrutiny but that laws which directly burden the implied freedom of political communication are more difficult to justify, and, therefore, fail the *Lange* test more easily, than laws that impose incidental burdens. Leastways, that seems to have been the gist of the reasoning of French CJ and Crennan, Kiefel and Bell JJ in *Monis*[306] and again in *Tajjour*[307]. In contrast, in *Tajjour*, Gageler J concluded that "the sufficiency of the justification will be calibrated to the nature and intensity of the burden" imposed by the measure; with the result that a rational relationship between the means and ends may suffice to justify slight burdens, whereas more significant burdens will require "close scrutiny, congruent with a search for 'compelling justification'" in terms of a "pressing and substantial" public interest[308]. The weight given to putative less restrictive means will vary according to the nature and intensity of the burden[309].

254 In recent decisions there have also been some differences as to whether the second limb of the *Lange* test necessitates the consideration of "strict proportionality". In *Tajjour*, Crennan, Kiefel and Bell JJ observed that strict proportionality, as applied in other jurisdictions that employ proportionality analysis, had been described as involving "the ultimate question whether the severity of the effect on a right outweighs the importance of the legislative objective"[310] and that, if strict proportionality were to be accepted, it would be

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305 (2011) 243 CLR 506 at 555-556 [95] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; [2011] HCA 4.

306 (2013) 249 CLR 92 at 130 [64] per French CJ, 212 [342] per Crennan, Kiefel and Bell JJ citing *Wotton v Queensland* (2012) 246 CLR 1 at 16 [30]; [2012] HCA 2.

307 (2014) 88 ALJR 860 at 877 [37] per French CJ, 891 [132] per Crennan, Kiefel and Bell JJ; 313 ALR 221 at 238, 257.

308 (2014) 88 ALJR 860 at 894 [151]; 313 ALR 221 at 261, quoting *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 200 [40] per Gleeson CJ; [2004] HCA 41.

309 (2014) 88 ALJR 860 at 894 [152]; 313 ALR 221 at 262.

310 (2014) 88 ALJR 860 at 890 [128]; 313 ALR 221 at 256, citing *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 at 791 [74] per Lord Reed JSC; *R (Nicklinson) v Ministry of Justice* [2015] AC 657 at 808-809 [168]; Barak, *Proportionality: Constitutional Rights and their Limitations*, (2012) at 340.

applied "only when the burden effected by the legislation is substantial" rather than incidental[311]. As against that, the spectrum of scrutiny proposed by Gageler J suggested a different kind of balancing such that, as the nature and extent of the burden imposed by the law increases, the corresponding burden of justification also increases, and therefore, at the upper end, requires a "public interest which is itself so pressing and substantial as properly to be labelled compelling"[312].

255 For present purposes, it is unnecessary to attempt to resolve such differences. It is enough to observe that each approach involves questions of judgment. Each implies that a direct or severe burden on the implied freedom requires a strong justification in order to satisfy the second limb of the *Lange* test. And each is consistent with the view that a burden which discriminates between segments of the electorate, political parties, candidates or political viewpoints requires no less as strong a justification to satisfy the second limb of the test.

Donation caps valid but prohibited donor provisions invalid

256 For the reasons already stated, the burden imposed by the donation caps[313] and the restrictions on indirect contributions[314] is not great and those provisions are rationally connected to the object of eliminating or reducing corruption and undue influence in the manner already described. Hence, it should be concluded that the donation caps are consistent with the second limb of the *Lange* test. The same applies to the restriction on indirect contributions.

257 In contrast, for the reasons already stated and those which follow, it should be concluded that, because of the way in which the prohibited donor provisions discriminate against a particular segment of the community, and thus against the expression of their particular political views, the prohibited donor provisions are not sufficiently justified to satisfy the second limb of the *Lange* test.

258 In *Unions NSW*[315], the plurality considered that resolution of the question of whether a provision is appropriate and adapted to the achievement of a

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311 (2014) 88 ALJR 860 at 891 [133]; 313 ALR 221 at 257.

312 (2014) 88 ALJR 860 at 894 [151]; 313 ALR 221 at 261.

313 EFED Act, Div 2A.

314 EFED Act, s 96E.

315 (2013) 252 CLR 530 at 556 [44] per French CJ, Hayne, Crennan, Kiefel and Bell JJ, citing *Monis* (2013) 249 CLR 92 at 214-215 [347]-[348] per Crennan,

(Footnote continues on next page)

legitimate end in a manner which is compatible with the maintenance of the system of representative and responsible government established by the Constitution is likely to be aided by consideration of whether there are any obvious and compelling alternatives of at least equal efficacy which would be productive of a lesser burden on the freedom of political communication than the impugned provision. In this case, the plaintiffs submitted that there were a number of obvious and compelling alternatives. The first was a prohibition limited to donations that constituted *quid pro quo* corruption. It was also submitted that the mandatory disclosure of all political donations according to the regime enacted in Div 2 of Pt 6 of the EFED Act, or a more stringent version of it, would be equally effective in reducing actual and apparent corruption and undue influence.

259 The idea that a prohibition limited to corrupt donations could be as effective at stemming corruption and less restrictive of the freedom of political communication is not compelling; because of the ease with which such a limited prohibition could be circumvented. Furthermore, as New South Wales submitted, it would not address the legitimate end of reducing undue influence not amounting to *quid pro quo* corruption.

260 The idea of mandatory disclosure of all donations is more compelling; for, as counsel for the plaintiffs posed the question rhetorically, why would not mandatory disclosure of political donations from property developers do just as much to ameliorate corruption and undue influence as denying property developers the ability to make any form of political donation at all? How likely is it that a politician would risk making an improper decision in consideration of political donations if the source and amount of political donations were readily available to the press and public?

261 But, as against that, as New South Wales responded, mandatory disclosure might not be as effective as the prohibited donor provisions because of the time which would elapse between the making of a political donation and when it was required to be disclosed[316]; even though it is not immediately apparent why that would be so if a political donation were required to be disclosed at the time of payment or shortly afterwards, or why the disclosure regime could not be amended in those terms.

262 Assuming, however, that the disclosure regime is not an obvious and compelling alternative to the prohibited donor provisions and that there are no other obvious and compelling alternatives, that is not the end of the matter.

Kiefel and Bell JJ. Cf *Unions NSW* (2013) 252 CLR 530 at 576 [129] per Keane J; *Tajjour* (2014) 88 ALJR 860 at 876 [36] per French CJ; 313 ALR 221 at 237-238.

316 See EFED Act, s 89.

Nothing which was said in *Unions NSW* implies that such a lack of obvious and compelling alternatives would necessarily be dispositive of the constitutional validity of the prohibition. It is still necessary to decide whether, despite the lack of an obvious and compelling alternative, the prohibition is productive of sufficient benefit in terms of eliminating or reducing property developer related corruption to justify the discriminatory burden on the implied freedom which the prohibition entails.

263 The plaintiffs contended that, given the availability of donation caps of the kind imposed under Div 2A, there was no evident or sufficient justification for taking the further step of subjecting prohibited donors to a discriminatory total prohibition against the making of political donations. Alternatively, it was contended that the effect of the prohibition on corruption and undue influence was bound to be so limited that it could not justify the significant discriminatory restriction on the implied freedom of which it is productive. Counsel for the plaintiffs argued that the prohibited donor provisions were not likely to deter those who are disposed to the giving and receiving of "paper bags". If corruption be their aim, they are more likely to find other covert or clandestine means of perpetuating their corruption. Perhaps it might be easier to mask corrupt payments as political donations than as other forms of legitimate benefaction. But there is no evidence or other indication of the likelihood of that being so.

264 Those submissions cannot be accepted in the terms in which they were stated. To start with, as New South Wales responded, there are no donation caps applicable at the local government level and it may be presumed that is so because the Parliament took the view that there were insufficient resources to provide for State-subsidised local government elections. If so, the Parliament may justifiably have considered that it faced a choice between either tolerating such corruption and undue influence as unrestricted donations from property developers and other prohibited donors might involve or imposing a total prohibition against such donations.

265 Secondly, whether or not the prohibited donor provisions add anything in fact to the anti-corruptive effect of the donation caps at State level or otherwise have a significant effect on corruption or undue influence at either State or local level is essentially irrelevant to whether they meet the requirements of the second limb of the *Lange* test. As Hayne J observed in *Tajjour*, once it can be seen that an impugned law is rationally connected to a legitimate end, it is not for the Court to attempt an assessment of how likely it is to achieve that objective: "[t]he relevant inquiry is about how the law relates to the identified end or object and about the nature and extent of the burden the law imposes on political communication"[317].

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317 (2014) 88 ALJR 860 at 884 [82]; 313 ALR 221 at 248.

266 That said, however, it remains that the discriminatory nature of the prohibition is objectionable. Although there might be a solid basis for inferring that property developers are prone to engage in corruption and undue influence[318], it would be unrealistic to suppose that there is not also a broad spread of political donors apart from property developers and other prohibited political donors who make political donations with a view to obtaining political favours, exerting political influence or otherwise advancing their self-interest. Hence, by focussing on property developers, the prohibited donor provisions arbitrarily discriminate against property developers in a manner which deprives them as a section of the electorate of an ability enjoyed by other sections of the electorate of making political donations and so participating in the political system.

267 It would be different if the only political donations that property developers were ever disposed to make were calculated to effect corruption. It might also be different if the only political donations that property developers were ever disposed to make were calculated to achieve some degree of undue influence. But, even then, who is to say what is or is not "undue" as opposed to being inconsistent with the interests of others? Although there is a clear conceptual difference between a political donor corruptly purchasing political favours and a political donor supporting a political candidate because of the candidate's espoused political convictions, views may reasonably differ about where one process ends and the other begins.

268 Obviously, the larger the amount of a donation, the greater the potential for corruption and plainly unacceptable undue influence in the sense earlier described. Hence the legitimacy of the donation caps previously explained. But the difficulty with the prohibited donor provisions is the assumption, upon which they appear to be predicated, that any prohibited donation will lead to corruption or plainly undue influence. Common sense and the ICAC reports justify the assumption that some donations from property developers would do so. But there is no direct evidence or sufficient basis for inference that all political donations, of any amount, from property developers, let alone all prohibited political donations, were or would be of a corrupt or unduly influential character.

269 In the result, it should be concluded that the degree of burden which the prohibited donor provisions impose on the implied freedom of political communication is not reasonably appropriate and adapted, or proportionate, to serving a legitimate end in a manner that is compatible with the maintenance of the system of representative and responsible government established by the Constitution.

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318 See above at [233].

270 It remains to mention two things. First, although the considerations which apply to all prohibited donors appear to be similar, the prohibition of political donations by donors other than property developers may involve different considerations and, therefore, what is said in these reasons is not determinative of their position.

271 Secondly, a general prohibition on political donations, as opposed to one which discriminates against a class of political donors, would also be likely to involve different considerations. The Court has previously expressed itself unlikely to gainsay the Parliament's determination that it would be desirable that political donations be outlawed in order to prevent political corruption and otherwise preserve the integrity of the political system[319]. A general prohibition on political donations might have a large effect on the flow of funds to political parties and in that sense on political communication. But it would preserve the equality of political power which is at the heart of the Australian constitutional conception of political sovereignty. In contrast, an impugned law which restricts the ability of some sections of the electorate to engage in a significant aspect of the political process while leaving others free to do as they choose mandates an inequality of political power which strikes at the heart of the system.

Conclusion

272 Division 4A of Pt 6 of the EFED Act is invalid to the extent that it applies to property developers. The plaintiffs' challenge otherwise fails. The questions reserved in the special case should be answered as follows:

1. Sections 96GAA(a) and 96GB(1)-(2) are invalid. It is unnecessary to answer the question whether the other provisions of Div 4A of Pt 6 of the EFED Act are invalid.

2. No.

3. No.

4. No order as to costs.

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319 *ACTV* (1992) 177 CLR 106 at 157-158 per Brennan J, 175 per Deane and Toohey JJ.

GORDON J.

Introduction

273 The plaintiffs contend that certain provisions in Pt 6 of the *Election Funding, Expenditure and Disclosures Act* 1981 (NSW) ("the Act") are invalid because they impermissibly burden the implied freedom of political communication.

274 Four questions were stated for the opinion of the Full Court. The first three questions asked whether particular provisions in Pt 6 of the Act (Div 4A, Div 2A and s 96E) were invalid (in whole or in part and, if in part, to what extent) in their application to the plaintiffs because each impermissibly burdens the implied freedom of communication on governmental and political matters contrary to the Commonwealth Constitution. Question 4 was who should pay the costs of the special case.

275 For the reasons that follow, I agree that the four questions should be answered in the manner proposed in the joint reasons.

Structure

276 These reasons will consider the facts, the Act (including the impugned provisions), the issues, the implied freedom of political communication, whether a law infringes that implied freedom, the methods of analysis and structure of the reasoning and then each of the four stated questions.

Facts

277 The first plaintiff, Mr McCloy, is a director of the second plaintiff ("McCloy Admin") and the third plaintiff ("North Lakes"). Mr McCloy is also a close associate of North Lakes within the meaning of s 96GB(3) of the Act and, by reason of that last relationship, a property developer within the meaning of s 96GB(1)(b) of the Act.

278 Mr McCloy from about October 2010 made political donations (within the meaning of the Act) exceeding the cap imposed in Div 2A of Pt 6 of the Act to and for the benefit of candidates in connection with the March 2011 New South Wales State election. Mr McCloy intends, to the extent permitted by law, to make further political donations (within the meaning of the Act) to political parties in excess of the cap.

279 McCloy Admin made an indirect campaign contribution (within the meaning of the Act) in full or part payment of the remuneration of a member of the staff of the election campaign of a candidate for the seat of Newcastle in the Legislative Assembly in the March 2011 New South Wales State election. Each of McCloy Admin and North Lakes intends, to the extent permitted by law, to

make political donations (within the meaning of the Act) to political parties in excess of the cap.

The Act

280 The Act, as its long title explains, makes "provision for the public funding of Parliamentary election campaigns and to require the disclosure of certain political donations and electoral expenditure for Parliamentary or local government election campaigns; and for other purposes".

281 The Act seeks to regulate electoral funding and expenditure in a transparent manner and 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 in New South Wales[320]. The regulatory regime is multi-faceted.

282 Part 5 of the Act makes provision for some public funding of State election campaigns through the Election Campaigns Fund established under s 56.

283 Part 6, entitled "[p]olitical donations and electoral expenditure", applies in relation to State elections and elected members of the Parliament of New South Wales, and local government elections and elected members of councils[321]. Relevantly, there are restrictions on political donations by type (Div 4), from certain kinds of businesses and persons associated with them (Div 4A) and by amount in relation to State elections (Div 2A). A limitation is imposed on electoral communication expenditure for State election campaigns (Div 2B). Political donations and electoral expenditure are required to be disclosed (Div 2).

284 Aspects of Pt 6 require closer examination.

Restriction on political donations

285 Part 6 regulates "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"[322]. Division 2A deals with caps on political donations for State elections. It does not

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320 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 545 [8]; [2013] HCA 58.

321 s 83.

322 *Unions NSW* (2013) 252 CLR 530 at 545 [7].

apply to donations in relation to local government elections and elected members of councils[323].

286 The phrase "political donation" is defined in s 85 of the Act. It comprises gifts made (directly or indirectly) to or for the benefit of a party, elected member, candidate or group of candidates[324]. Certain things are taken to be gifts: an amount paid as a contribution or an entry fee to a fund-raising venture or function[325]; a subscription paid to a party for affiliation with the party[326]; certain dispositions of property to the New South Wales branch of a party, or to a party from an associated party[327]; and uncharged interest on a loan to an entity or other person[328].

287 Section 85(4)(a) provides that a gift to an individual in a private capacity for his or her personal use that the individual has not used, and does not intend to use, solely or substantially for a purpose related to an election or to the individual's duties as an elected member is *not* a political donation. However, if any part of a gift referred to in s 85(4)(a) is subsequently used to incur "electoral expenditure", that part of the gift becomes a political donation[329].

288 The phrases "electoral expenditure" and "electoral communication expenditure" are defined in s 87. "Electoral expenditure" is "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". "Electoral communication expenditure" is a subset of electoral expenditure, and includes, for example, expenditure on radio, television and billboard advertisements.

289 Section 95A(1), in Div 2A of Pt 6, identifies a cap on the amount of political donations to or for the benefit of a registered party ($5,000), an unregistered party ($2,000), an elected member ($2,000), a group ($5,000), a candidate ($2,000) and a third-party campaigner ($2,000). The caps are imposed

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323 s 95AA(1).

324 s 85(1).

325 s 85(2).

326 s 85(3).

327 s 85(3A).

328 s 85(3B).

329 s 85(5).

per person per financial year[330] and there are aggregation provisions to ensure that a person cannot circumvent the cap by making multiple donations in a financial year[331] or by making multiple donations to elected members, groups or candidates of the same party[332].

290 Section 95B contains a general prohibition 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[333]. There are exceptions, qualifications and defences to this general prohibition[334].

291 Division 4 of Pt 6 imposes a series of prohibitions on making or accepting certain political donations. The donations are proscribed including by reference to their source[335] and their nature[336].

292 Section 96E provides that it is unlawful to make certain indirect campaign contributions, including: the provision of office accommodation, vehicles, computers or other equipment for no or inadequate consideration for use solely or substantially for election campaign purposes; and payment or waiver of payment of electoral expenditure for advertising or other purposes incurred or to be incurred by a party, elected member, group or candidate[337].

293 Division 4A of Pt 6 concerns donors defined as "prohibited donors". That phrase is defined in s 96GAA to mean:

> "(a) a property developer, or
>
> (b) a tobacco industry business entity, or

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330 s 95A(2).

331 s 95A(2).

332 s 95A(3), (6).

333 s 95B(1).

334 See, eg, s 95B(2)-(5).

335 s 96D(1).

336 s 96E.

337 Certain things that are *not* indirect campaign contributions are specified in s 96E(3).

(c) a liquor or gambling industry business entity,

and includes any industry representative organisation if the majority of its members are such prohibited donors."

294 It is unlawful for a prohibited donor to make a political donation[338]. It is unlawful for a person to make a political donation on behalf of a prohibited donor[339]. It is unlawful for a person to accept a political donation that was made (wholly or partly) by a prohibited donor or by a person on behalf of a prohibited donor[340]. It is unlawful for a prohibited donor to solicit another person to make a political donation[341] and, finally, it is unlawful for a person to solicit another person on behalf of a prohibited donor to make a political donation[342].

295 Section 96GB defines "property developer":

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

(a) a corporation engaged in a business that regularly involves the making of relevant planning applications by or on behalf of the corporation in connection with the residential or commercial development of land, with the ultimate purpose of the sale or lease of the land for profit,

(b) a person who is a close associate of a corporation referred to in paragraph (a).

…

(3) In this section:

close associate of a corporation means each of the following:

(a) a director or officer of the corporation or the spouse of such a director or officer,

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338 s 96GA(1).

339 s 96GA(2).

340 s 96GA(3).

341 s 96GA(4).

342 s 96GA(5).

(b) a related body corporate of the corporation,

(c) a person whose voting power in the corporation or a related body corporate of the corporation is greater than 20% or the spouse of such a person,

(d) if the corporation or a related body corporate of the corporation is a stapled entity in relation to a stapled security – the other stapled entity in relation to that stapled security,

(e) if the corporation is a trustee, manager or responsible entity in relation to a trust – a person who holds more than 20% of the units in the trust (in the case of a unit trust) or is a beneficiary of the trust (in the case of a discretionary trust).

..."

296 Section 96GE(1) provides that a person may apply to the Electoral Commission[343] ("the Commission") for a determination that the applicant or another person is not a prohibited donor for the purposes of Div 4A. The Commission is authorised to make such a determination if the Commission is satisfied that it is more likely than not that the person is not a prohibited donor[344]. The Commission is to make its determination solely on the basis of information provided by the applicant[345].

Disclosure requirements

297 The disclosure and publication regime in Div 2 of Pt 6 applies not only to parties, elected members, groups of candidates and individual candidates, but also to "third-party campaigners"[346] and "major political donors"[347]. That division requires parties, elected members, groups of candidates and individual candidates to disclose political donations received or made, as well as electoral

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343 s 4(1) of the Act. Prior to 1 December 2014, the Election Funding Authority of New South Wales: *Electoral and Lobbying Legislation Amendment (Electoral Commission) Act* 2014 (NSW), Sched 2.

344 s 96GE(2).

345 s 96GE(2).

346 Defined in s 4(1).

347 Defined in s 84(1).

expenditure incurred, during the "relevant disclosure period", being each 12-month period ending on 30 June[348].

298 Third-party campaigners are required to disclose electoral communication expenditure incurred in a capped expenditure period during the relevant disclosure period and political donations received during the relevant disclosure period for the purposes of incurring that expenditure[349]. Major political donors are required to disclose reportable political donations[350] made during the relevant disclosure period[351]. The Commission is required to publish on its website the disclosures of reportable political donations and electoral expenditure[352].

Issues

299 The plaintiffs contend that each of Div 2A of Pt 6 (Question 2), Div 4A of Pt 6 (Question 1) and s 96E in Pt 6 (Question 3) is invalid, in whole or in part, because it impermissibly burdens the implied freedom of communication on government or political matters contrary to the Constitution.

300 Each stated question will be considered separately. Before undertaking that task, it is important to identify some premises that underpin what follows.

Implied freedom of political communication

301 Freedom of communication on matters of government and politics is an *indispensable element* of the system of representative and responsible government which the Constitution creates and requires[353]. The system of

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348 ss 88(1), 89.

349 s 88(1A).

350 Those of or exceeding $1,000: s 86(1).

351 s 88(2).

352 s 95.

353 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 138; [1992] HCA 45; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559; [1997] HCA 25; *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 at 555-556 [44]; [2010] HCA 42.

representative and responsible government is part of the "fabric on which the written words of the Constitution are superimposed"[354].

302 Communication concerning government or political matters can occur between electors and legislators and officers of the Executive, and between electors themselves[355]. It is not one-way traffic[356], or even a two-way affair[357].

303 The implied freedom of political communication operates as a constraint on legislative and executive power[358]. The freedom is implied because ss 7, 24 and 128 of the Constitution (with Ch II, including ss 62 and 64) create a system of representative and responsible government[359]. As the electoral choice given by ss 7 and 24 of the Constitution must be a true choice with "an opportunity to gain an appreciation of the available alternatives"[360], ss 7 and 24 (and the related sections of the Constitution) necessarily protect that freedom of communication which enables the people to exercise a free and informed choice as electors[361].

304 The implied freedom also operates as a constraint on the legislative power of the States[362].

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354 *ACTV* (1992) 177 CLR 106 at 135, citing *The Commonwealth v Kreglinger & Fernau Ltd and Bardsley* (1926) 37 CLR 393 at 413; [1926] HCA 8.

355 *Lange* (1997) 189 CLR 520 at 559-560; *Aid/Watch Inc* (2010) 241 CLR 539 at 555-556 [44].

356 *ACTV* (1992) 177 CLR 106 at 139.

357 *Unions NSW* (2013) 252 CLR 530 at 551 [30].

358 *Lange* (1997) 189 CLR 520 at 560; *Hogan v Hinch* (2011) 243 CLR 506 at 554 [92]; [2011] HCA 4; *Unions NSW* (2013) 252 CLR 530 at 554 [36]; *Tajjour v New South Wales* (2014) 88 ALJR 860 at 880-881 [59], 892 [140]; 313 ALR 221 at 243, 258-259; [2014] HCA 35.

359 *Lange* (1997) 189 CLR 520 at 557-562.

360 *Lange* (1997) 189 CLR 520 at 560, quoting *ACTV* (1992) 177 CLR 106 at 187.

361 *ACTV* (1992) 177 CLR 106 at 186-187; *Lange* (1997) 189 CLR 520 at 557, 560; *Unions NSW* (2013) 252 CLR 530 at 570-571 [103], 572 [112].

362 *Unions NSW* (2013) 252 CLR 530 at 550 [25].

305 The freedom of communication which the Constitution protects is not absolute[363]. The limit on legislative power is not absolute[364]. It is restricted to what is necessary for the effective operation of the system of representative and responsible government provided for by the Constitution[365].

Does a law infringe the implied freedom of political communication?

306 When a law is alleged to infringe the freedom of political communication protected by the Constitution, two questions must be answered to determine the validity of the law[366].

> Question 1: does the law effectively burden the freedom of communication about government or political matters either in its terms, operation or effect?
>
> Question 2: if the law effectively burdens that freedom, is the law reasonably appropriate and adapted[367] to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

307 If question 1 is answered "yes" and question 2 is answered "no", the law is invalid[368].

Methods of analysis and structure of the reasoning

308 No party or intervener challenged the decision in *Lange v Australian Broadcasting Corporation*[369] or the reasoning which justifies the implication of

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363 *Lange* (1997) 189 CLR 520 at 561.

364 *Tajjour* (2014) 88 ALJR 860 at 881 [59]; 313 ALR 221 at 243.

365 *Tajjour* (2014) 88 ALJR 860 at 891-892 [140]-[141]; 313 ALR 221 at 258-259.

366 *Lange* (1997) 189 CLR 520 at 561, 567 as modified by *Coleman v Power* (2004) 220 CLR 1 at 50 [93], 51 [95]-[96]; [2004] HCA 39; *Tajjour* (2014) 88 ALJR 860 at 874-875 [32], 888 [113]; 313 ALR 221 at 235-236, 254.

367 For the reasons given by Gleeson CJ in *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 196-197 [31]-[32]; [2004] HCA 41, the phrase "reasonably appropriate and adapted" is sufficient to describe the "substance" of the relevant idea.

368 *Lange* (1997) 189 CLR 520 at 567-568.

369 (1997) 189 CLR 520.

the freedom of political communication. No party or intervener sought to have the Court discard or modify the substance of the two questions identified in *Lange*[370] and restated in *Coleman v Power*[371] as the questions that must be asked and answered in deciding whether a statutory provision is beyond power because it infringes the implied freedom. No party or intervener suggested that the Court should now state a new method of analysis of the two questions or a new mandatory structure for the reasoning that should be adopted in considering those questions.

309 More recent decisions of this Court may be understood as attaching some significance to distinctions drawn between conclusions about the second question expressed in terms of the legislation being "reasonably appropriate and adapted to serve a legitimate end" and conclusions which are expressed according to a framework of proportionality[372]. It may be suggested that a statement that a law is "reasonably appropriate and adapted to serve a legitimate end" is a statement of conclusion rather than a statement of the reasoning which supports a conclusion. Taken in isolation from the context in which it appears, a statement of that kind may warrant that description. But the two questions call for judgment. However expressed, identifying the relevant objects or ends of an impugned law and considering whether those objects or ends can be classed as "legitimate" is, and must be, a question for judgment. And considering whether that impugned law advances those legitimate objects or ends in a manner compatible with the maintenance of the constitutionally prescribed system of representative and responsible government also is, and must be, a question for judgment. As Gleeson CJ said in *Mulholland v Australian Electoral Commission*[373], "[w]hichever expression is used, what is important is the substance of the idea it is intended to convey".

310 The two questions to be asked to determine if a law impermissibly burdens the implied freedom of communication on government or political matters contrary to the Constitution, and the tools of analysis used in answering those questions, are known and have been applied without apparent difficulty since the decision in *Lange*. Observing that the Court has divided in opinion about the outcome of particular cases shows no more than that the questions at

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370 (1997) 189 CLR 520 at 561, 567.

371 (2004) 220 CLR 1 at 50 [93], 51 [95]-[96]. See also *Tajjour* (2014) 88 ALJR 860 at 874-875 [32], 888 [113]; 313 ALR 221 at 235-236, 254.

372 See, eg, *Monis v The Queen* (2013) 249 CLR 92 at 213-214 [344]-[347]; [2013] HCA 4.

373 (2004) 220 CLR 181 at 197 [32].

issue call for judgment, and that opinions may differ about the answers that should be given to them in a particular case.

311 The questions stated for the opinion of the Court in this case are able to be answered by reference to the known questions and tools. This is not one of those cases where the Court is required to address a question which cannot be answered applying accepted methods of reasoning and analysis. The method or structure of reasoning to which the plurality refers does not yield in this case an answer any different from that reached by the accepted modes of reasoning. It does not avoid the judgments that the two questions require and, as always, it is necessary to explain how and why those judgments are formed.

312 It is now appropriate to address Div 2A of Pt 6 (Question 2), then Div 4A of Pt 6 (Question 1) and finally s 96E in Pt 6 (Question 3).

Donation caps in Div 2A of Pt 6

313 Division 2A of Pt 6 deals with caps on political donations for State elections[374]. It does not apply to donations in relation to local government elections and elected members of councils[375].

Question 1 – is the implied freedom burdened?

314 Section 95B(1) (with s 95A) operates to impose a limit on the amount of political donations that may be accepted from any one person. New South Wales accepts that it imposes a restriction on the funds available to political parties and candidates and therefore imposes a burden on the implied freedom[376]. Accordingly, and to that extent, Div 2A effectively burdens the freedom of communication about government or political matters in its terms, operation or effect. The answer to the first of the two questions is "yes".

315 The plaintiffs' contention that Div 2A imposes a restriction on the means by which members of the community may choose to engage with political affairs and thereby express their support for, and lend support to the expression by others of support for, political positions and objectives should be rejected. Division 2A does not directly restrict political communication. It does not directly touch upon the "indispensable element" of the system of representative and responsible government. Division 2A does not constrain any donor from voicing support for or otherwise publicly associating themselves with (or

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374 See [289]-[290] above.

375 s 95AA(1).

376 See *Unions NSW* (2013) 252 CLR 530 at 554 [38].

disassociating themselves from) a party or candidate or the policies of the party or candidate. Division 2A does not constrain any donor from advocating or communicating as they wish, subject to the general expenditure caps[377] (the validity of which is not in dispute). Division 2A operates to impose a cap upon the amount of political donations that may be made, as opposed to imposing any limit on "publicising the support which the making of donations might be taken to imply"[378].

316 Are the plaintiffs correct to contend that question 1 is also satisfied because Div 2A imposes a restriction on the ability of members of the community to "build and assert" political power? The answer is no.

317 The implied freedom does *not* "create a personal right akin to that created by the First Amendment to communicate in any particular way one might choose"[379]. Sections 7 and 24 of the Constitution "do not confer personal rights on individuals"[380]. The implication which is drawn from those and related sections "preclude[s] the curtailment of the protected freedom by the exercise of legislative or executive power"[381].

318 Any constitutional implication must be securely based[382] and must inhere in the Constitution[383]. There is no constitutionally protected right that permits an

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377 Pt 6 Div 2B.

378 cf *Unions NSW* (2013) 252 CLR 530 at 572 [112].

379 *Unions NSW* (2013) 252 CLR 530 at 571 [109]; also at 554 [36], 572 [110]-[111]. See also *ACTV* (1992) 177 CLR 106 at 150; *Lange* (1997) 189 CLR 520 at 560; *Levy v Victoria* (1997) 189 CLR 579 at 622, 625-626; [1997] HCA 31; *Mulholland* (2004) 220 CLR 181 at 223-224 [107]-[109], 246 [184]; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 451 [381]; [2005] HCA 44; *Monis* (2013) 249 CLR 92 at 189 [266], 192 [273].

380 *Lange* (1997) 189 CLR 520 at 560.

381 *Lange* (1997) 189 CLR 520 at 560. This statement was affirmed by Kiefel J in *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 127 [407]; [2010] HCA 46. That the implied freedom of political communication is a limitation on the exercise of legislative *as well as* executive power was recently confirmed in *Tajjour* (2014) 88 ALJR 860 at 880-881 [59], 891-892 [140], 901 [195]; 313 ALR 221 at 243, 258-259, 271.

382 *ACTV* (1992) 177 CLR 106 at 134.

383 *ACTV* (1992) 177 CLR 106 at 135.

individual to "build and assert" political power[384]. That "right" does not inhere in the Constitution and there is no basis, let alone any secure basis, to imply such a right. Indeed, a right of an individual to "build and assert" political power would be, and is, contrary to the "great underlying principle" of the Constitution that the rights of individuals are secured by ensuring that *each* individual has an *equal* share in political power[385]. As Mason CJ said in *Australian Capital Television Pty Ltd v The Commonwealth*[386]:

> "The very concept of representative government and representative democracy signifies government by the people through their representatives. Translated into constitutional terms, it denotes that the sovereign power which resides in the people is exercised on their behalf by their representatives."

319 The plaintiffs' reference to and reliance on the statement by Archibald Cox cited by Mason CJ in *ACTV*[387] that people can "build and assert" power is misplaced. That statement was that "[o]nly by freedom of speech, of the press, and of association can people build and assert political power"[388]. It says nothing about an implied right. It may be put to one side.

Question 2, first condition – legitimate object of the impugned law?

320 The first condition that Div 2A must satisfy under the second question is that the object or end that it serves is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government[389]. That condition directs the inquiry to the purpose (the object or end) of the impugned law as disclosed by its text and context and, if relevant, its history. An aspect of the condition is that the operation of the impugned law must be rationally connected to the end that it serves[390].

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384 cf *ACTV* (1992) 177 CLR 106 at 139.

385 *ACTV* (1992) 177 CLR 106 at 139-140.

386 (1992) 177 CLR 106 at 137.

387 (1992) 177 CLR 106 at 139.

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

389 *Lange* (1997) 189 CLR 520 at 561-562; *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at 61 [131]; [2013] HCA 3; *Unions NSW* (2013) 252 CLR 530 at 556 [46].

390 *Unions NSW* (2013) 252 CLR 530 at 557 [50], 558-560 [55]-[60].

321 As has already been noted, ss 95A and 95B of the Act operate to impose a cap upon the amount of political donations that may be made by any one person by reference to the nature of the recipient. The provisions operate generally so as to limit the amount of political donations that may be accepted from any one person.

322 What then is the object or end of the division, as disclosed by its text and context and, if relevant, its history? First, the caps remove the need for, and ability to make, large-scale political donations to a party or candidate. In so doing, they reduce the risk to the actual *and* perceived integrity of governmental processes. That is so because it is self-evident that the larger the donation provided or obtained, the greater the influence the donor is likely to have, as well as be seen to have, in relation to those processes.

323 Second, by imposing a uniform limit on the amount that can be obtained from any one source, ss 95A and 95B reduce the extent to which those persons or entities with more money have, and are perceived to have, greater political influence than others who do not have such substantial funds.

324 Third, Div 2A works to ensure that the rights of individuals are secured so that *each* individual has an *equal* share, or at least a more equal share than they would otherwise have, in political power[391].

325 Each of those objects or ends is legitimate and compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

326 The plaintiffs contended that donation caps do not rationally serve the objects or ends of reducing the risk to the actual and perceived integrity of governmental processes. For the reasons just explained, that contention should be rejected[392].

Question 2, second condition – is the law reasonably appropriate and adapted to serve that legitimate end?

327 The second condition that Div 2A must satisfy under the second question is that the law is reasonably appropriate and adapted to serve the identified legitimate objects or ends in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

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391 See *ACTV* (1992) 177 CLR 106 at 139-140.

392 cf *Unions NSW* (2013) 252 CLR 530 at 558 [53], 578 [136].

328 The answer to this condition *may* involve and be assisted by a consideration of whether there are alternative, reasonably practicable and less restrictive means of achieving the same end which are obvious and compelling[393]. To qualify as a true alternative for this purpose, a hypothetical law must be as effective as the impugned law in achieving the identified objects and ends[394]. The requirement that the alternative means be "obvious and compelling" ensures that consideration of the alternatives remains a tool of analysis in applying the required criterion[395] and that the courts do "not exceed their constitutional competence by substituting their own legislative judgments for those of parliaments"[396]. If no other hypothetical legislative measure that would be as effective can be identified it may be concluded that the impugned law goes no further than is reasonably necessary in achieving its object or end[397].

329 The plaintiffs' contention that Div 2A was not reasonably appropriate and adapted to serve the identified legitimate objects or ends relied upon four primary submissions. Each submission will be dealt with in turn.

330 First, the plaintiffs submitted that Div 2A goes too far because it "fails to target only actual instances of corruption". That submission should be rejected. Division 2A legitimately targets both actual *and* perceived threats to the integrity of the system of representative and responsible government. The plaintiffs' submission postulates an alternative law confined to donations which are intended as corrupting, or, in other words, constitute bribery. Bribery, generally or in the context of political donations, is inherently difficult to detect and prove. The law proposed by the plaintiffs would address actual but not perceived threats to the integrity of the system. It would not achieve the identified legislative objectives. In this context, it is relevant to observe that donation caps are used in many other countries[398]. This suggests that caps have commonly been perceived

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393 *Monis* (2013) 249 CLR 92 at 214 [347]; *Unions NSW* (2013) 252 CLR 530 at 556 [44].

394 *Tajjour* (2014) 88 ALJR 860 at 888 [114]; 313 ALR 221 at 254.

395 *Tajjour* (2014) 88 ALJR 860 at 876 [36], 889 [115]; 313 ALR 221 at 238, 254.

396 *Tajjour* (2014) 88 ALJR 860 at 876 [36]; 313 ALR 221 at 238. See also *ACTV* (1992) 177 CLR 106 at 159; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 325; [1994] HCA 44; *Coleman v Power* (2004) 220 CLR 1 at 52-53 [100]; *Adelaide City Corporation* (2013) 249 CLR 1 at 42-43 [65]; *Monis* (2013) 249 CLR 92 at 214 [347].

397 *Tajjour* (2014) 88 ALJR 860 at 889 [115]-[116]; 313 ALR 221 at 254.

398 For example, a 2012 report referred to in the Special Case and extracted in part in the Special Case Book states that caps on donations by individuals were imposed

(Footnote continues on next page)

to be a useful means to the ends identified. The plaintiffs' alternative law is not an obvious and compelling alternative to Div 2A.

331 Second, the plaintiffs submitted that requirements of public disclosure[399] could achieve the identified ends. That submission should be rejected. Disclosure is one of the tools already employed in Pt 6 of the Act. That fact does not establish that it is a sufficient tool of itself to achieve the identified ends.

332 Next, the plaintiffs submitted that the provisions do not achieve the stated legislative objective "comprehensively". That submission does not advance the matter. That the Parliament might have gone further does not establish that the law is not reasonably appropriate and adapted to serve the identified legitimate objects or ends. Questions of legislative judgment form no part of the analysis of the second condition[400].

333 Finally, the plaintiffs submitted that Div 2A imposes a burden on political communication "in a discriminatory way", first by "singling out those kinds of donors who might otherwise have wished to make donations in amounts above the applicable caps" (said to be a minority of overall donors), and second by having "an unequal practical effect upon the *recipients* of those donations" (because those who might have greater financial support from fewer sources are "effectively discriminated against"). That submission should be rejected.

334 The law affects those whom the law affects. The donation cap provisions in ss 95A and 95B operate in a uniform manner as between all donors and all recipients, regardless of what parties, members, candidates or causes donors wish to support. Division 2A is addressed in part to the inequality of political influence in favour of wealthy entities or persons that results from large political donations. Parliament was entitled to take the view that that inequality should be addressed.

335 The plaintiffs have not advanced any hypothetical provision that would be as effective as Div 2A in achieving the legislative purposes[401]. No other hypothetical legislative measure that would be as effective having been

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by Belgium, Bulgaria, Finland, France, Greece, Ireland, Latvia, Lithuania, Poland, Portugal, Romania, Slovenia and Spain: Transparency International, *Money, Politics, Power: Corruption Risks in Europe*, (2012) at 54.

399 See [297]-[298] above.

400 *Tajjour* (2014) 88 ALJR 860 at 876 [36]; 313 ALR 221 at 238.

401 cf *Tajjour* (2014) 88 ALJR 860 at 888-889 [114]; 313 ALR 221 at 254.

identified, it may be concluded that the impugned law goes no further than is reasonably necessary in achieving its object or end.

336 The next available tool of analysis to assess the second condition in question 2 is to examine the extent of the identified burden on the implied freedom[402]. This is not "an 'ad hoc *balancing*' process without criteria or rules for measuring the value of the means (the burden of the provision) against the value of the end (the legitimate purpose)"[403] (emphasis added). Because there are no criteria or rules by which a "balance" can be struck between means and ends, the question is not one of balance or *value* judgment but rather whether the impugned law *impermissibly* impairs or tends to impair the maintenance of the constitutionally prescribed system of representative and responsible government having regard not only to the *end* but also to the *means* adopted in achieving that *end*[404]. That, of course, is a question of judgment. It is a question of judgment about the nature and extent of the effect of the impugned law on the maintenance of the constitutionally prescribed system of representative and responsible government.

337 The extent and nature of the burden on the implied freedom of political communication imposed by the means adopted to achieve an identified end will be case specific and, therefore, any analysis must be case specific. This common law approach has at least two distinct advantages. It recognises that we are dealing not with protected individual rights[405] but with negative restrictions on legislative powers and, secondly, it permits the development of different criteria for different constitutional contexts[406].

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402 *Tajjour* (2014) 88 ALJR 860 at 885 [91], 889 [116]; 313 ALR 221 at 250, 254-255.

403 *Coleman v Power* (2004) 220 CLR 1 at 46 [83], citing Stone, "The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication", (1999) 23 *Melbourne University Law Review* 668.

404 *Coleman v Power* (2004) 220 CLR 1 at 50 [92].

405 cf *Charter of Human Rights and Responsibilities Act* 2006 (Vic); *Human Rights Act* 2004 (ACT).

406 See *Dietrich v The Queen* (1992) 177 CLR 292 at 319-321; [1992] HCA 57; *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at 199 [141]; [2009] HCA 51. See also, eg, the incremental development of the law in negligence: *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 481; [1985] HCA 41; *Hill v Van Erp* (1997) 188 CLR 159 at 178-179; [1997] HCA 9; *Cattanach v Melchior* (2003) 215 CLR 1 at 24 [39]; [2003] HCA 38.

338 Thus, when asking what is "the extent of the burden effected by [Div 2A] on the freedom"[407] or to what extent does Div 2A affect or burden the freedom[408], it is neither right nor relevant to ask whether the benefits which will follow from application of the impugned law are "larger than" or "outweigh" the diminution in political communication (a test of proportionality strictly so called and sometimes seen as part of proportionality analysis[409]).

339 In this and other respects, there can be no automatic adoption or application of forms of legal analysis made in overseas constitutional contexts[410]. Not only do those analyses reflect the contexts in which they are made, they are analyses made for purposes different from the application of the accepted principles of *Lange* (as now understood) and the constitutional framework which underpins those principles in Australia. The danger of uncritical use of proportionality from other legal contexts was explained by Gleeson CJ in *Roach v Electoral Commissioner*[411]. After reviewing decisions of the European Court of Human Rights and the Supreme Court of Canada, Gleeson CJ acknowledged that aspects of reasoning from other contexts could be instructive but said[412]:

> "There is a danger that uncritical translation of the concept of proportionality from [other] legal context[s] ... to the Australian context could lead to the application in this country of a constitutionally inappropriate standard of judicial review of legislative action. Human rights instruments which declare in general terms a right, such as a right to vote, and then permit legislation in derogation of that right, but only in the case of a legitimate objective pursued by means that are no more than necessary to accomplish that objective, and give a court the power to

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407 *Tajjour* (2014) 88 ALJR 860 at 889 [116]; 313 ALR 221 at 254.

408 *Unions NSW* (2013) 252 CLR 530 at 554 [36], 555 [40].

409 cf *Canada (Attorney General) v Bedford* [2013] 3 SCR 1101, especially at 1150-1152 [120]-[123].

410 *Coleman v Power* (2004) 220 CLR 1 at 46-50 [83]-[91]; *Mulholland* (2004) 220 CLR 181 at 200 [39]; *Tajjour* (2014) 88 ALJR 860 at 890 [129]; 313 ALR 221 at 256-257, citing Barak, *Proportionality: Constitutional Rights and their Limitations*, (2012) at 240-241.

411 (2007) 233 CLR 162; [2007] HCA 43.

412 (2007) 233 CLR 162 at 178-179 [17]. See also Zines, "Federalism and Administrative Discretion in Australia, with European Comparisons", (2000) 28 *Federal Law Review* 291 at 302.

> decide whether a certain derogation is permissible, *confer a wider power of judicial review than that ordinarily applied under our Constitution. They create a relationship between legislative and judicial power significantly different from that reflected in the Australian Constitution*". (emphasis added)

340 So, what is the extent of the burden imposed on the implied freedom by Div 2A? That is, does the impugned law *impermissibly* impair or tend to impair the maintenance of the constitutionally prescribed system of representative and responsible government having regard not only to the *end* but also to the *means* adopted in achieving that *end*? In the case of Div 2A, the burden on the freedom is slight.

341 First, Div 2A imposes a cap on the amount of political donations that may be made, thereby limiting the funds available to a party, candidate or member[413]. However, that limitation is addressed, at least in part, by a regime of public funding for parties and candidates in State elections in Pt 5 of the Act.

342 Second, as already noted, Div 2A does not directly restrict political communication[414]. It does not directly touch upon the "indispensable element" of representative and responsible government.

343 Third, making a donation communicates no content to electors. The act of donating is private. The donation may be made to support the political process generally (donors may donate to more than one party), to garner influence, to support the recipient's policies or for other reasons. If any particular message is to be communicated by the donor, it would need to be expressed by words separate from, and in addition to, the donation. The public disclosure requirements in the Act do not alter that conclusion. The fact that details of donations of or exceeding $1,000 are required to be disclosed within weeks of the end of June of each year, and made public as soon as practicable thereafter[415], does not alter the character or effect of any donation, regardless of amount.

344 Fourth, Div 2A arguably maintains and enhances the implied freedom. It seeks to prevent corruption *and* the appearance of corruption by restricting large contributions that could be given to secure a political quid pro quo[416]. Division 2A seeks to prevent patronage, undue influence or buying access (or the

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413 ss 95A and 95B.

414 See [315] above.

415 ss 89, 91 and 95.

416 cf *Citizens United v Federal Election Commission* 558 US 310 at 345 (2010).

appearance of them) by restricting large contributions. And Div 2A works to ensure that the rights of individuals are secured so that *each* individual has an *equal* share, or at least a more equal share than they would otherwise have, in political power. These effects may be seen not to distort and corrupt the political process, but to enhance it.

345 For those reasons, Div 2A is reasonably appropriate and adapted to achieve its legitimate objects or ends. The answer to Question 2 stated for the opinion of the Full Court is "No".

Division 4A as it relates to property developers

346 Section 96GA, the central operative provision in Div 4A, prohibits a property developer from making political donations and prohibits a person from accepting political donations from a property developer. It applies to both State and local government.

Question 1 – is the implied freedom burdened?

347 Section 96GA restricts the funds available to political parties and candidates to meet the costs of political communication[417]. Accordingly, and to that extent, Div 4A effectively burdens freedom of communication about government or political matters in its terms, operation or effect. Indeed, the burden is admitted. The answer to question 1 is "yes".

348 Are the plaintiffs correct to contend that question 1 is *also* satisfied because Div 4A imposes a restriction on the means by which members of the community may choose to engage with political affairs and thereby express support for, and lend support to the expression by others of support for, political positions and objectives? The answer is no. The implied freedom does not create a personal right[418]. No less importantly, as with Div 2A, s 96GA does not directly restrict political communication. It does not directly touch upon the "indispensable element" of representative and responsible government[419]. The fact of making a donation communicates no content to electors[420].

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417 See *Unions NSW* (2013) 252 CLR 530 at 554 [38].

418 See [316]-[319] above.

419 See [301] above.

420 See [343] above.

Question 2, first condition – legitimate object of the impugned law?

349 Is the object or end that Div 4A serves compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? As already seen, that condition directs the inquiry to the purpose of the impugned law as disclosed by its text and context and, if relevant, its history.

350 Section 96GA prohibits the making and acceptance of political donations from "prohibited donors". A "property developer" is a prohibited donor[421]. A property developer, as defined, has certain characteristics. A corporation is a property developer if it is engaged in a business that regularly involves the making of planning applications of a specified nature by or on behalf of the corporation, where those applications are in connection with the residential or commercial development of land with the ultimate purpose of the sale or lease of the land for profit[422]. A person who is a close associate of such a corporation is also a property developer[423].

351 Section 96GA is part of a larger suite of measures in the Act, the purpose of which is to closely regulate political donations. The Act is evidently directed to seeking to address the potential for persons and entities to exercise – or to be perceived to exercise – undue, corrupt or hidden influence over the Parliament of New South Wales, the government of New South Wales and local government bodies within New South Wales, together with their members and processes[424].

352 Division 4A is specific – not general. It prohibits donations by particular types of businesses, and by associated persons – relevantly, property developers.

353 The plaintiffs contended that there is no rational connection between the operation of Div 4A in its application to property developers and the achievement of the identified purpose. The plaintiffs also contended that setting out to prohibit a class of persons from participating in the political process, to the extent that Div 4A does so, does not serve a legitimate end. The plaintiffs asserted that there "is nothing different or special … about property developers as a class of persons, or their business", seeking "to encourage social or regulatory change in [their] own interest by participating in public political affairs". Those contentions should be rejected.

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421 s 96GAA(a).

422 s 96GB(1)(a).

423 s 96GB(1)(b). The definition of close associate is extracted at [295] above.

424 See [280]-[298] above.

354 The plaintiffs observed that all members of the community are subject to varying forms of regulation and submitted that there is nothing to distinguish property developers from "trade unions, banks, lawyers, accountants, financial advisers, real estate agents, media proprietors, supermarket chains, or pharmaceutical companies". But property developers are sufficiently distinct from these other classes of persons to merit specific regulation in light of the nature of their business activities and the nature of the public powers which they may seek to influence in their self-interest. The value of land is peculiarly tied to governmental decisions relating to such matters as zoning and whether or not particular development applications are approved. These governmental decisions often involve State and local government officers in an individualised, discretionary decision-making process. It is therefore unsurprising that there are concerns about the actual and perceived susceptibility of members of State and local government to influence from property developers.

355 Accordingly, there is a rational connection between the class of persons (property developers) and the end sought to be achieved. The prohibition in s 96GA as it relates to property developers is rationally directed to serving a legitimate end that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government[425].

Question 2, second condition – is the law reasonably appropriate and adapted to serve that legitimate end?

356 Is Div 4A reasonably appropriate and adapted to serve the identified legitimate objects or ends in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

357 There are a number of points to be made about the plaintiffs' submissions about whether Div 4A meets this standard.

358 First, the plaintiffs have not identified any material distortion of the constitutional system resulting from the prohibition on property developers (as defined) making political donations to parties or candidates, and on parties or candidates accepting such donations, which might suggest that the law does not meet the standard.

359 Second, so far as the plaintiffs rely upon the absence of any equivalent provision in other jurisdictions as indicating a legislative assumption that political donations by property developers are not "inherently corrupt", that assumption, even assuming it to be correct, says nothing about whether the means in Div 4A are reasonably appropriate and adapted to serve the object or

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425 *Unions NSW* (2013) 252 CLR 530 at 556 [46], 557 [50].

end of that division. New South Wales has its own history[426]. The implied freedom does not mandate some lowest common denominator approach to regulation.

360 Third, the plaintiffs' argument did not squarely address the existence and operation of s 96GE. Section 96GE(1) provides that a person, the applicant, may apply for a determination by the Commission that the applicant or another person is *not* a prohibited donor for the purposes of Div 4A. The Commission is authorised to make such a determination if the Commission is satisfied that it is more likely than not that the person is not a prohibited donor[427]. Not insignificantly, the Commission is to make its determination solely on the basis of information provided by the applicant[428].

361 Fourth, the key alternative hypothetical advanced by the plaintiffs (namely that Div 4A could have been confined to "the making of political donations with some form of intention corruptly to solicit favour") does not assist. Provisions of that kind already exist[429] and those measures deal directly with the aftermath of corruption, not its prevention. They deal with actual corruption, not with the perception of corruption. Those provisions do not and cannot achieve the regulatory end to the same extent. They are not a true alternative for the purposes of the analysis[430]. Finally, the other suggestion seemingly proffered by the plaintiffs – that there be no regulation of property developers – is also not a true alternative and is not obvious and compelling.

362 No other, less drastic, means of achieving the legitimate end have been identified. No other hypothetical legislative measure that would be as effective

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426 See, eg, Independent Commission Against Corruption, *Report on Investigation into North Coast Land Development*, (1990); Independent Commission Against Corruption, *Report on Investigation into the Conduct of Brian Zouch*, (1993); Independent Commission Against Corruption, *Report on Investigation into Randwick City Council*, (1995); Independent Commission Against Corruption, *Report into corrupt conduct associated with development proposals at Rockdale City Council*, (2002); Independent Commission Against Corruption, *Corruption risks in NSW development approval processes*, (2007). See also, for example, *Environmental Planning and Assessment Act* 1979 (NSW), ss 89D and 89E.

427 s 96GE(2).

428 s 96GE(2).

429 See, eg, *Crimes Act* 1900 (NSW), ss 249B(1), 249B(2), 249D, 249F.

430 *Monis* (2013) 249 CLR 92 at 214 [347]; *Tajjour* (2014) 88 ALJR 860 at 888-889 [113]-[114]; 313 ALR 221 at 254.

having been identified, it may be concluded that the impugned law goes no further than is reasonably necessary in achieving its object or end.

363 It is then necessary to move to consider how, or to what extent, Div 4A affects or burdens the freedom. As stated above, this requires answering the following question – does the impugned law impermissibly impair or tend to impair the maintenance of the constitutionally prescribed system of representative and responsible government having regard not only to the *end* but also to the *means* adopted in achieving that *end*? This question should be addressed at two levels – the burden on political communication generally and the specific burden on property developers.

364 Division 4A does not impose a significant burden on political communication. In particular, Div 4A does not directly restrict political communication. It does not constrain a prohibited donor from voicing support for or otherwise publicly associating themselves with (or disassociating themselves from) a party or candidate. It does not constrain them from advocating or communicating as they wish, subject to the general expenditure caps[431] (which are not the subject of challenge). Division 4A "proscribes the making of donations" – it does not proscribe "publicising the support which the making of donations might be taken to imply"[432].

365 Indeed, Div 4A maintains and arguably enhances the implied freedom. It seeks to prevent corruption and the appearance of corruption by contributions from property developers that could be given to secure a political quid pro quo[433]. Division 4A seeks to prevent patronage, undue influence or buying access (or the appearance of one of them) by restricting contributions from property developers. And Div 4A works to ensure that the rights of individuals are secured by ensuring that *each* individual has an *equal*, or at least a more equal, share in political power. These may be seen not to distort and corrupt the political process, but to enhance it.

366 The other aspect is to consider whether Div 4A imposes an undue burden on political communication by *property developers*. Or, to put it in other terms, is Div 4A discriminatory in its nature in relation to property developers such that it is invalid? The answer is no. As has been explained[434], property developers are one of a limited group of entities and individuals defined as "prohibited

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431 Pt 6 Div 2B.

432 See *Unions NSW* (2013) 252 CLR 530 at 572 [112].

433 cf *Citizens United* 558 US 310 at 345 (2010).

434 See [293]-[295] above.

donors". Under the Act, a property developer is a corporation that meets certain criteria (or a close associate of such a corporation). The extent of the burden peculiar to property developers (as defined in the Act) is that they are prevented from making any political donations in State elections and local government elections.

367 The burden on the freedom of communication in relation to a property developer is slight. As we have seen, Div 4A does not constrain a property developer from voicing support for or otherwise publicly associating themselves with (or disassociating themselves from) a party or candidate. It does not constrain a property developer from advocating or communicating as they wish, subject to the general expenditure caps (which are not the subject of challenge). Why then the focus on property developers as distinct from other donors? For the reasons outlined at [354] above, property developers are sufficiently distinct from other classes of persons to merit specific regulation.

368 And, of course, the ban can be lifted. A property developer can apply under s 96GE for a determination by the Commission that the applicant or another person is *not* a prohibited donor for the purposes of Div 4A. Finally, the burden on property developers may in fact enhance the implied freedom[435].

369 For those reasons, Div 4A is reasonably appropriate and adapted to achieve its legitimate purpose. I agree with the answer to Question 1 stated for the opinion of the Full Court proposed by the plurality.

Section 96E – indirect benefits

370 Section 96E of the Act makes it unlawful (subject to certain exceptions[436]) to make indirect campaign contributions of four kinds: first, the provision of office accommodation, vehicles, computers or other equipment for no consideration or inadequate consideration for use solely or substantially for election campaign purposes[437]; second, the full or part payment by a person other than the party, elected member, group or candidate of electoral expenditure for advertising or other purposes incurred or to be incurred by the party, elected member, group or candidate (or an agreement to make such a payment)[438]; third, the waiving of all or any part of payment to the person by the party, elected member, group or candidate of electoral expenditure for advertising incurred or

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435 See [365] above.

436 s 96E(3).

437 s 96E(1)(a).

438 s 96E(1)(b).

to be incurred by the party, elected member, group or candidate[439]; and fourth, any other goods or services of a kind prohibited by the regulations[440] – of which there are presently none.

Question 1 – is the implied freedom burdened?

371 As is apparent from their collective description as "indirect campaign contributions" in s 96E(1), the making of each of the contributions identified in s 96E is not as readily detectable as a political donation.

372 Indeed, in each instance listed in s 96E(1) there is a particular character required – each category involves the provision of something of value. The first category involves the provision of certain goods or services for no or inadequate consideration and for use solely or substantially for election campaign purposes. The second and third categories involve payment, or waiver of payment, for electoral expenditure for advertising for the party, member, group or candidate. A person wishing to benefit the party, member, group or candidate in the relevant way could instead do so in money, to equivalent effect.

373 There is no dispute that these constraints operate as a burden on the implied freedom. The answer to question 1 is "yes".

Question 2, first condition – legitimate object of the impugned law?

374 Is the object or end that s 96E serves compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

375 Section 96E prohibits indirect campaign contributions (subject to the exclusions), thus directing the provision of benefits into a monetary form. The provision aids the disclosure requirements in Div 2 of Pt 6 by enabling the ready expression of benefits in monetary terms. It also aids the efficacy of the caps, cutting off a possible route of circumvention where detection may be difficult[441]. It is an anti-avoidance provision. Viewed in the context of the suite of legislative measures in the Act which are aimed at the transparent regulation of political donations and expenditure, s 96E can be taken to further the purpose of minimising the risk to the actual and perceived integrity of the State Parliament and the institutions of local government.

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439 s 96E(1)(c).

440 s 96E(1)(d).

441 See, eg, New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 18 June 2008 at 8579.

376 The purposes of s 96E are legitimate within the context of the constitutionally prescribed system of representative and responsible government for the same reasons that the disclosure and donation cap provisions are legitimate.

377 The plaintiffs' contention that because there is no textual link between s 96E and the disclosure provisions in Div 2 of Pt 6 and, further, that the donation caps in Div 2A of Pt 6 were only introduced later and so any congruence of operation between them and s 96E "is sheer happenstance" may be put to one side. It is not necessary for the provision to refer expressly to the other divisions to draw the conclusion that because the provision does aid the other divisions, aiding those divisions can be taken to be a purpose of the provision. The amendments are to be read together "as a combined statement of the will of the legislature"[442].

Question 2, second condition – is the law reasonably appropriate and adapted to serve that legitimate end?

378 Is s 96E reasonably appropriate and adapted to serve the identified legitimate objects or ends in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

379 The only alternative that the plaintiffs advanced is that there could be a requirement for either the donor or recipient of an indirect campaign contribution to provide "a reliable valuation". Such a requirement is impractical. It would impose a potentially significant transaction cost. It would raise issues as to what was sufficient evidence of a reliable valuation. And it would also raise potentially complex definitional issues. The proffered alternative is not an obvious and compelling means of achieving the same end as s 96E. The plaintiffs have not advanced any hypothetical provision that would be as effective as s 96E in achieving the legislative purposes[443]. It may therefore be concluded that s 96E goes no further than is reasonably necessary in achieving its purpose.

380 The burden imposed on the freedom is incidental and slight. The provision operates as a partial limit on the ability of parties, members and candidates to raise funds, or equivalent benefits, which might be used by those

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442 *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 463; [1995] HCA 44; *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 88 ALJR 722 at 726-727 [25]; 309 ALR 209 at 214; [2014] HCA 24.

443 cf *Tajjour* (2014) 88 ALJR 860 at 888-889 [114]; 313 ALR 221 at 254.

recipients to engage in political communication. Equivalent monetary benefits could otherwise be provided – subject to the limits which have been addressed above. The provision is only a restriction on the form in which donations may be made.

381 Section 96E is reasonably appropriate and adapted to serve its legitimate object or end. It seeks to prevent corruption *and* the appearance of corruption by restricting indirect campaign contributions. This may be seen not to distort and corrupt the political process but to maintain and enhance the implied freedom.

382 For those reasons, the answer to Question 3 stated for the opinion of the Full Court is "No".

Question 4

383 The plaintiffs should pay the costs.