HIGH COURT OF AUSTRALIA

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

UNIONS NSW & ORS PLAINTIFFS

AND

STATE OF NEW SOUTH WALES DEFENDANT

Unions NSW v New South Wales
[2019] HCA 1
29 January 2019
S204/2018

ORDER

The questions stated by the parties for the consideration of the Full Court be answered as follows:

1. *Is s 29(10) of the* Electoral Funding Act 2018 *(NSW) invalid because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth* Constitution*?*

   Answer

   Yes.

2. *Is s 35 of the* Electoral Funding Act 2018 *(NSW) invalid (in whole or in part and, if in part, to what extent), because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth* Constitution*?*

   Answer

   Unnecessary to answer.

3. *Who should pay the costs of the special case?*

Answer

The defendant.

Representation

J T Gleeson SC with N J Owens SC and C G Winnett for the plaintiffs (instructed by Holding Redlich Lawyers)

M G Sexton SC, Solicitor-General for the State of New South Wales, and J K Kirk SC with B K Lim for the defendant (instructed by Crown Solicitor's Office (NSW))

S P Donaghue QC, Solicitor-General of the Commonwealth, with C L Lenehan and C J Tran for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

P J Dunning QC, Solicitor-General of the State of Queensland, with F J Nagorcka for the Attorney-General of the State of Queensland, intervening (instructed by Crown Solicitor (Qld))

J A Thomson SC, Solicitor-General for the State of Western Australia, with G J Stockton for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor's Office (WA))

M J Wait SC with K M Scott for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor's Office (SA))

CATCHWORDS

Unions NSW v New South Wales

Constitutional law (Cth) – Implied freedom of communication on governmental and political matters – Where s 29(10) of *Electoral Funding Act 2018* (NSW) ("EF Act") substantially reduced cap on electoral expenditure applicable to third-party campaigners from cap applicable under previous legislation – Where third-party campaigners subject to substantially lower cap than political parties – Where s 35 of EF Act prohibits third-party campaigner from acting in concert with another person to incur electoral expenditure exceeding cap – Where preparatory materials to EF Act recommended reduction in cap for various reasons, including that third parties should not be able to "drown out" political parties, which should have a "privileged position" in election campaigns – Where subsequent parliamentary committee report recommended that, before reducing cap, government consider whether proposed reduced cap would enable third-party campaigners reasonably to present their case – Where no evidence that such consideration was undertaken – Whether s 29(10) enacted for purpose compatible with maintenance of constitutionally prescribed system of representative government – Whether s 29(10) necessary to achieve that purpose – Whether necessary to decide validity of s 35.

Words and phrases – "capped expenditure period", "compatible with maintenance of the constitutionally prescribed system of representative government", "deference to Parliament", "domain of selections", "domain of the legislative discretion", "effect of the law", "electoral expenditure", "expenditure cap", "justified", "legislative purpose", "legitimate purpose", "level playing field", "marginalise", "margin of appreciation", "necessity", "reasonably appropriate and adapted", "third-party campaigner".

Constitution, ss 7, 24.
Electoral Funding Act 2018 (NSW), ss 3, 29, 33, 35.
Election Funding, Expenditure and Disclosures Act 1981 (NSW), ss 4, 4A, 95F.

1 KIEFEL CJ, BELL AND KEANE JJ. In *Unions NSW v New South Wales*[1] ("*Unions NSW [No 1]*") and in *McCloy v New South Wales*[2] consideration was given by this Court to the general structure, key provisions and purposes of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ("the EFED Act"). The *Electoral Funding Act 2018* (NSW) ("the EF Act") replaced the EFED Act although it generally retains the scheme of the EFED Act with respect to caps on political donations and electoral expenditure. The questions stated in the parties' special case concern certain changes effected by the EF Act. The first involves the reduction in the amount that third-party campaigners, such as the plaintiffs, are permitted to spend on electoral campaigning[3]. The second is a prohibition on third-party campaigners acting in concert with others so that the cap applicable to the third-party campaigners is exceeded[4]. The plaintiffs contend that each of the provisions effecting these changes is invalid because it impermissibly burdens the implied freedom of communication on matters of politics and government which is protected by the *Constitution*.

The EFED Act

2 The general scheme of the EFED Act was to limit the amount or value of political donations to, and the amounts which could be expended in campaigning by, parties, candidates, elected members and others such as third-party campaigners. These amounts were capped by provisions in Pt 6 of the EFED Act[5]. The effect of these limitations was ameliorated to some extent by provisions made for public funding of State election campaigns[6].

3 The caps on "electoral communication expenditure" – which was defined to include expenditure on advertisements, the production and distribution of election material, the internet and telecommunications[7] – were introduced in

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1 (2013) 252 CLR 530; [2013] HCA 58.

2 (2015) 257 CLR 178; [2015] HCA 34.

3 EF Act, s 29(10); cf EFED Act, s 95F(10).

4 EF Act, s 35.

5 EFED Act, Pt 6, Div 2A and Div 2B.

6 EFED Act, Pt 5.

7 EFED Act, s 87.

2011[8]. A party, group, candidate or third-party campaigner was prohibited from incurring electoral communication expenditure for a State election campaign during the "capped State expenditure period"[9] for an election if it exceeded the cap on electoral communication expenditure.

4 The base caps imposed by the EFED Act (not taking account of the effects of provisions for indexation at any particular point) with respect to general elections differed as between political parties and others. A party which endorsed more than ten candidates for election to the Legislative Assembly was subject to a cap of $100,000 multiplied by the number of electoral districts in which a candidate was endorsed[10]. "Third-party campaigners", which were defined to mean any person or entity, not being a registered party, elected member, group or candidate, who incurs more than $2,000 electoral communication expenditure during the capped State expenditure period[11], were subject to a total cap of $1,050,000 if registered before the commencement of the capped State expenditure period for the election and $525,000 in any other case[12]. This was the same cap which applied to both a party which endorsed candidates for election to the Legislative Council but endorsed ten or fewer candidates for election to the Legislative Assembly[13] and a group of independent candidates for election to the Legislative Council[14]. Individual or non-grouped candidates were subject to a cap of $150,000[15].

5 The amount of money available for campaign expenditure is linked with what is received by way of political donations. In *Unions NSW [No 1]* the general purpose of the provisions of the EFED Act which imposed caps on that receipt and expenditure was not in issue. The purpose was to secure the integrity of the legislature and government in New South Wales, which was at risk from

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8 *Election Funding and Disclosures Amendment Act 2010* (NSW), Sch 1.

9 As defined by EFED Act, s 95H.

10 EFED Act, s 95F(2).

11 EFED Act, s 4(1).

12 EFED Act, s 95F(10).

13 EFED Act, s 95F(3), (4).

14 EFED Act, s 95F(5).

15 EFED Act, s 95F(7), (8).

corrupt and hidden influences of money[16]. In *McCloy* it was also accepted that a purpose of capping donations was to ensure that wealth does not create an obstacle to equal participation in the electoral process by allowing the drowning out of the voices of others. In that sense the provisions seek to create a "level playing field" for those who wish to participate[17].

The EF Act

6 In the period between the decisions in *Unions NSW [No 1]* and *McCloy* the EFED Act was amended to include a statement of its objects[18]. The objects of the EF Act, stated in s 3, are in similar terms:

> "(a) to establish a fair and transparent electoral funding, expenditure and disclosure scheme,
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> (b) to facilitate public awareness of political donations,
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> (c) to help prevent corruption and undue influence in the government of the State or in local government,
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> (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,
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> (e) to promote compliance by parties, elected members, candidates, groups, agents, associated entities, third-party campaigners and donors with the requirements of the electoral funding, expenditure and disclosure scheme."

7 In the Second Reading Speech to the Bill which became the EF Act[19] it was said that the EF Act is designed to "preserve[] the key pillars of [the EFED Act], namely, disclosure, caps on donations, limits on expenditure and public funding". Accordingly, the EF Act generally retains, with some amendments, the

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16 *Unions NSW [No 1]* (2013) 252 CLR 530 at 545 [8].

17 *McCloy v New South Wales* (2015) 257 CLR 178 at 206-208 [43]-[47].

18 EFED Act, s 4A.

19 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 17 May 2018 at 2.

scheme that applied under the EFED Act, including with respect to caps on political donations[20] and caps on electoral expenditure[21].

8 The applicable caps for "electoral expenditure" in respect of parties, groups, candidates and third-party campaigners are provided for in s 29. The definition of "third-party campaigner" remains the same[22]. "Electoral expenditure" is defined to mean expenditure on specific items such as advertising and staff "for or in connection with ... influencing, directly or indirectly, the voting at an election"[23]. It is unlawful for a party, group, candidate or third-party campaigner to incur electoral expenditure for a State election campaign during the capped State expenditure period if it exceeds the applicable cap[24]. That period is defined in similar terms to the definition in the EFED Act, namely, in the case of a general election held at the expiry of the Legislative Assembly's fixed term, the period from and including 1 October the year prior to the election until the end of the election day[25]. Some public funding of election campaigns is provided for[26].

9 Although the scheme remains largely the same as the EFED Act, the EF Act introduced some changes and in particular those referred to at the outset of these reasons. Section 29(10) provides that the cap on electoral expenditure which now applies to third-party campaigners registered before the commencement of the capped State expenditure period is $500,000. Section 35(1) makes it unlawful for a third-party campaigner to act in concert with another person or persons to incur electoral expenditure during the capped expenditure period that exceeds the cap applicable to the third-party campaigner. Section 35(2) provides that a person "acts in concert" with another person if the person "acts under an agreement (whether formal or informal) with the other person to campaign with the object, or principal object, of: (a) having a

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20 EF Act, Pt 3, Div 3.

21 EF Act, Pt 3, Div 4.

22 EF Act, s 4.

23 EF Act, s 7.

24 EF Act, s 33(1).

25 EF Act, s 27; cf EFED Act, s 95H.

26 EF Act, Pt 4.

particular party, elected member or candidate elected, or (b) opposing the election of a particular party, elected member or candidate".

The plaintiffs

10 The plaintiffs are a collection of trade union bodies. The first plaintiff, Unions NSW, is a peak body consisting of certain unions or branches of unions with members in New South Wales and is the "State peak council" for employees for the purposes of the *Industrial Relations Act 1996* (NSW) ("the IR Act"). Each of the second, third, fifth and sixth plaintiffs are organisations of employees formed for the purposes of the IR Act. The fourth plaintiff is a federally registered association of employees under the *Fair Work (Registered Organisations) Act 2009* (Cth), with a State branch registered under Ch 5, Pt 3, Div 1 of the IR Act.

11 With the exception of the sixth plaintiff, each plaintiff has registered as a third-party campaigner under the EF Act for the New South Wales State election scheduled for March 2019. With respect to that election the capped State expenditure period commenced on 1 October 2018. The sixth plaintiff, although it was registered under the EFED Act as a third-party campaigner for the State elections in 2011 and 2015, has not registered under the EF Act in respect of the March 2019 election, although it asserts an intention to do so in respect of future elections. Each plaintiff also asserts an intention to incur electoral expenditure during the capped State expenditure period in connection with future New South Wales State elections and to coordinate its campaigns with other trade unions or entities where sufficient common interest exists.

12 In the March 2015 election campaign, which was regulated by the EFED Act, three of the plaintiffs spent more on electoral communication expenditure than would now be permissible under the EF Act. The first plaintiff spent $719,802.81 in electoral communication expenditure. The second plaintiff, the New South Wales Nurses and Midwives' Association, spent $907,831.22. The third plaintiff, the Electrical Trades Union of Australia, New South Wales Branch, spent $793,713.14.

The questions

13 The following questions have been stated by the parties for the opinion of the Full Court:

> "1. Is section 29(10) of [the EF Act] invalid because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution?

2. Is section 35 of [the EF Act] invalid (in whole or in part and, if in part, to what extent), because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution?

3. Who should pay the costs of the special case?"

Question 1

The issues

14 In *Lange v Australian Broadcasting Corporation*[27] it was declared that "each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters". That freedom is implied by the provision the Commonwealth *Constitution* makes for representative government and the choice to be made by the people. The validity of a statutory provision which restricts or burdens that freedom depends upon the answers to questions posed in *Lange*[28].

15 There can be no doubt about the answer to the first enquiry so far as concerns the capping provisions of the EF Act. The capping of both political donations and electoral expenditure restricts the ability of a person or body to communicate to others, to an extent. In *Unions NSW [No 1]* and in *McCloy* there was no dispute about the burden effected by the EFED Act on the implied freedom and no party contends to the contrary so far as concerns the EF Act. It may also be observed that a cap on electoral expenditure is a more direct burden on political communication than one on political donations[29] and that the reduction of the cap applicable to third-party campaigners by half effects a greater burden than the previous cap.

16 The plaintiffs' arguments are directed to the second and third questions of the test which was identified in *Lange* and, with some modifications, confirmed in later decisions of this Court[30].

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27 (1997) 189 CLR 520 at 571; [1997] HCA 25.

28 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567.

29 *McCloy v New South Wales* (2015) 257 CLR 178 at 220-221 [93], 294-295 [367].

30 *Coleman v Power* (2004) 220 CLR 1; [2004] HCA 39; *Monis v The Queen* (2013) 249 CLR 92; [2013] HCA 4; *Unions NSW [No 1]* (2013) 252 CLR 530; *McCloy v*

(Footnote continues on next page)

17 So far as concerns the second question, the plaintiffs submit that the purpose of s 29(10) is not legitimate, in the sense that it is not compatible with the maintenance of the constitutionally prescribed system of representative government. This has been referred to as "compatibility testing"[31]. The plaintiffs submit that the purpose of s 29(10) is essentially discriminatory. It aims to privilege the voices of political parties in State election campaigns over the voices of persons who do not stand or field candidates, by preventing third-party campaigners from campaigning on a basis equal to parties or groups of independent candidates.

18 This submission is subject to two important qualifications. The plaintiffs do not dispute that the wider purposes of the EFED Act were legitimate in the sense discussed in *Lange*. They accept as accurate the summary of the purposes given for the capping provisions when they were introduced in 2011, namely that they would produce a more level playing field, limit the "political arms race" and prevent the "drowning out" of other voices. The plaintiffs also accept that the EF Act builds upon the EFED Act. It can therefore be inferred that the plaintiffs accept that the EF Act has these wider purposes, but say that s 29(10) does not.

19 The plaintiffs' alternative argument relies upon the requirements of the third *Lange* question. That question assumes that the statutory provision has a legitimate purpose and enquires whether the burden which the statute imposes is justified[32]. A provision may be justified if it is "reasonably appropriate and adapted" or proportionate in the means chosen to advance that purpose[33].

20 The plaintiffs' principal contention in this regard is that it cannot be said that a halving of the cap on third-party campaigners' electoral expenditure is necessary and the burden cannot therefore be justified. There is no historical or factual basis shown for the reduction, nor can there be. By contrast, the figure of $1,050,000 provided for in the EFED Act was not "plucked out of the air"[34] and had regard to the relativities established by that Act. It is not shown that the level

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New South Wales (2015) 257 CLR 178; *Brown v Tasmania* (2017) 261 CLR 328; [2017] HCA 43.

31 *McCloy v New South Wales* (2015) 257 CLR 178 at 194 [2(B)].

32 *McCloy v New South Wales* (2015) 257 CLR 178 at 194 [2(B)], 231 [131].

33 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

34 See Schott, Tink and Watkins, *Political Donations: Final Report* (2014), vol 1 at 110.

of expenditure there provided for was not effective for the purpose of preventing wealthy voices drowning out others. Nothing in the reports[35] which preceded the adoption of the sum in s 29(10) and which form part of the special case agreed by the parties explains the need for the reduction.

The Expert Panel Report

21 In May 2014 the New South Wales Government appointed an independent expert panel to consider and report on options for long-term reform of the State's electoral funding laws. The panel delivered a report to government in December 2014 ("the Expert Panel Report"). The Expert Panel Report generally endorsed the key components of the EFED Act, but noted that "it ha[d] become a complicated and unwieldy piece of legislation and this impedes compliance". It recommended the EFED Act be completely rewritten.

22 The Expert Panel Report described the regulation of third-party campaigners as "a challenge". It stated a belief that third-party campaigners "should be free to participate in election campaigns but they should not be able to drown out the voices of parties and candidates who are the direct electoral contestants". It noted a long-standing concern of the conservative side of politics in Australia that trade unions provide an unfair advantage to the Labor Party and referred to a high level of concern about the possible emergence of political action committees ("PACs") modelled upon those in the United States of America, which incur very large expenditure and have the potential to undermine the role of parties and candidates in election campaigns.

23 The Expert Panel Report accepted that there is widespread support for third-party participation in elections "within limits". It supported an approach which caps their expenditure in the same way as for parties and candidates, but was of the view that the current cap is "too high" and suggested it be halved to $500,000 "to guard against third parties coming to dominate election campaigns". It observed that third-party campaigners had spent far less than the $1 million allowance under their spending cap for the 2011 election. Whilst the spending cap "should not be set so low as to prevent third parties from having a genuine voice in debate", the report considered $500,000 to be well above the highest sum spent by third-party campaigners in the 2011 election and said that it believed it to be "a sufficient amount that strikes the right balance between the

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35 Schott, Tink and Watkins, *Political Donations: Final Report* (2014), vol 1; New South Wales, Joint Standing Committee on Electoral Matters, *Inquiry into the Final Report of the Expert Panel – Political Donations and the Government's Response* (2016).

rights of third parties and those of parties and candidates". Perhaps assuming that its recommendations would be implemented by the 2015 election, the panel further recommended that the level of third-party spending caps be reviewed after that date "if it becomes apparent that they are causing concern". In fact, the caps remained the same for the capped expenditure period relevant to that election and the expenditure of third-party campaigners such as the plaintiffs rose, as outlined earlier in these reasons.

24 There is a statement in the Expert Panel Report which the plaintiffs rely upon as disclosing the real purpose of s 29(10): "[t]he [p]anel strongly agrees that political parties and candidates should have a privileged position in election campaigns [because they] are directly engaged in the electoral [contest] and are the only ones able to form government and be elected to Parliament". It should be added that the report then went on to say: "That said, we also strongly support the principle that third parties should be treated as recognised participants in the electoral process. Third parties have a right to have a voice and attempt to influence voting at elections … However, third parties should not be able to drown out the voice of the political parties."

The Joint Standing Committee on Electoral Matters report

25 Following the release of the Expert Panel Report, the New South Wales Government indicated its in-principle support for all but one of the Expert Panel Report's 50 final recommendations. It referred the report and the Government's response to it to the Joint Standing Committee on Electoral Matters ("the JSCEM"), which published a report in June 2016 entitled *Inquiry into the Final Report of the Expert Panel – Political Donations and the Government's Response* ("the JSCEM Report").

26 The JSCEM Report noted that three unions had spent considerably more than the proposed cap in the period 1 July 2014 to 30 June 2015. The JSCEM Report endorsed the Expert Panel Report's conclusion that third parties should not be able to run campaigns to the same extent as candidates and parties. However, noting submissions from constitutional lawyers that the cap must not be set so low that a third-party campaigner cannot reasonably present its case, the JSCEM recommended that before decreasing the cap to $500,000, the New South Wales Government consider whether there was sufficient evidence that a third-party campaigner could reasonably present its case within that expenditure limit. No material has been placed before the Court which suggests that such an analysis was undertaken.

The Electoral Funding Bill 2018

27 Speaking of the cap on electoral expenditure applying to third-party campaigners in the *Electoral Funding Bill 2018*, the relevant Minister advised the New South Wales Legislative Assembly that "[t]he expert panel considered that third party campaigners should have sufficient scope to run campaigns to influence voting at an election – just not to the same extent as parties or candidates. The proposed caps will allow third party campaigners to reasonably present their case while ensuring that the caps are in proportion to those of parties and candidates who directly contest elections."[36]

28 The Minister later said[37] that the panel had recommended the reduction in the cap to $500,000 "to guard against third parties dominating election campaigns". He said that the JSCEM considered the panel's recommendation and supported reducing the amount of the cap. He made no reference to the caveat of the JSCEM, namely that enquiries should be made as to what was reasonably required by way of expenditure before the cap was decreased.

The real issue?

29 The defendant submits that the real point in dispute between the parties is the amount of the cap which applies to third-party campaigners. So much may be inferred from the fact that the plaintiffs do not contend that there should be no differentiation as between parties, candidates and third-party campaigners so far as concerns capping of electoral expenditure. The scheme of the EFED Act was to differentiate and the plaintiffs accept this as appropriate. The difference in those relativities can be explained on the basis that parties must incur the expenses of mounting a campaign in every electorate on all issues, so their expenditure is much greater than third-party campaigners, who may pick and choose who, what, where and how they seek to influence election outcomes.

30 The Commonwealth, intervening, points to what it describes as an obvious tension between the plaintiffs' argument that the purpose of s 29(10) is illegitimate and their acceptance that the purposes of the EFED Act were not. It is accepted by the plaintiffs that a purpose of the EFED Act was to prevent the drowning out of voices by the distorting influence of money and that it did so in relevant part by differentiating between political parties, candidates and third-

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36 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 17 May 2018 at 4.

37 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 May 2018 at 63.

party campaigners. That purpose and that treatment has not altered. That differential treatment is properly to be seen as an effect of the pursuit of that purpose. The real issue, the Commonwealth says, is one of justification of the extent of the effect of s 29(10) on the implied freedom, which falls to be determined at step 3 of the approach mandated by *Lange*.

31 It is correct to observe that the plaintiffs accept as legitimate the purposes of the capping provisions of the EFED Act. The plaintiffs accept that those purposes include ensuring that wealthy voices do not drown out others. They do so by providing something of a level playing field[38]. In *McCloy* it was held that these purposes not only do not impede the system of representative government provided for by the *Constitution*; they enhance it[39].

32 The plaintiffs do not suggest that these purposes are not also those of the EF Act generally. But they argue that s 29(10) has a different or further purpose, namely, to privilege the voices of political parties in State election campaigns over those of third-party campaigners. However, the purposes of s 29(10) of the EF Act must be considered in context. That context includes the scheme and purposes of the EF Act as a whole and it includes the legislative history of the capping provisions, which is to say the EFED Act and its purposes. So understood there may be a real question about whether, as the Commonwealth contends, s 29(10) simply seeks to further those purposes but, in doing so, effects a greater burden on the freedom.

33 There may also be a question whether a new and different purpose for s 29(10) can properly be discerned from opinions stated in the reports to government which preceded it. There may be such a question even though s 34(1) of the *Interpretation Act 1987* (NSW) permits "any material not forming part of the Act … [which] is capable of assisting in the ascertainment of the meaning of the provision" to be considered.

34 The statements in the Expert Panel Report must be read in the context of the report as a whole. It is difficult to read the report as directed to suppressing third-party speech, given its recognition of the importance of it in the electoral process. The concerns expressed in the report were directed to what might occur in the future, particularly the possibility that US-style PACs might come to dominate campaigns. It may further be observed that if any differential treatment is an illegitimate purpose in respect of caps on donations or electoral expenditure,

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38 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 146, 175, 239; [1992] HCA 45 ("*ACTV*").

39 *McCloy v New South Wales* (2015) 257 CLR 178 at 196 [5].

the legislature would never be in a position to address the risk to the electoral process posed by such groups, as the Commonwealth points out.

35 These questions concerning the plaintiffs' argument as to the purpose of s 29(10) may be put to one side. The legitimacy of the purpose of s 29(10) may be assumed and attention directed immediately to the issue which is clearly determinative of question 1 of the special case, namely whether the further restrictions which s 29(10) places on the freedom can be said to be reasonably necessary and for that reason justified.

36 Taking an approach of this kind is not to deny that *Lange* and the cases which followed it require that the issue of compatibility of purpose be addressed before proceeding to determine whether a statutory provision is justified in the burden it places on the freedom[40]. But where a compatible purpose is identified by those contending for the validity of the statutory provision, the Court may proceed upon the assumption that it is the relevant purpose and then consider the issue upon which validity will nevertheless depend.

37 This was the approach taken in *ACTV*[41]. In *Unions NSW [No 1]*[42] it was noted that members of the Court in *ACTV* were prepared to assume that the purposes of the provisions in question were as stated by those contending that the legislative provisions burdening the freedom were justified. The purposes there contended for were purposes which were legitimate, in the sense later discussed in *Lange*. So too are the purposes for which the defendant here contends, namely those purposes which had applied to the provisions of the EFED Act.

38 Nothing said in *Lange* precludes the approach taken in *ACTV*. It is a well-recognised aspect of judicial method to take an argument at its highest where it provides a path to a more efficient resolution of a matter. It may be otherwise with respect to the implied freedom where no legitimate purpose can be identified, but then that would be the issue most obviously determinative of the case and there would be no need to proceed further. These reasons therefore proceed on the assumption, favourable to the defendant, that the purpose of the law is to prevent the drowning out of voices by the distorting influence of money.

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40 *Unions NSW [No 1]* (2013) 252 CLR 530 at 556 [46]; *McCloy v New South Wales* (2015) 257 CLR 178 at 203 [31], 231 [130], 284 [320].

41 (1992) 177 CLR 106 at 144, 156-157, 188-189.

42 (2013) 252 CLR 530 at 557 [49].

Justification – a privileged position?

39 The defendant submits that candidates and political parties occupy a constitutionally distinct position which legitimises the preferential treatment of candidates and political parties relative to others who are not directly seeking to determine who shall be elected to Parliament or form government. The defendant argues that the foundation of the implied freedom is ss 7 and 24 of the *Constitution*, which require that the Senate and House of Representatives be composed of persons "directly chosen by the people". It is said that the choice that is protected by the implied freedom is not a choice between ideas, policies, views or beliefs except insofar as such choice may be reflected in the electoral choice between candidates. Further in this regard, it is said that the "processes of choice by electors to which ss 7 and 24 allude ... encompass legislated processes which facilitate and translate electoral choice in order to determine who is or is not elected as a senator or member of the House of Representatives"[43]. On that basis, the defendant argues that candidates and political parties enjoy special significance as the subjects of the protected electoral choice, which itself justifies their differential treatment.

40 Those submissions should not be accepted. The requirement of ss 7 and 24 of the *Constitution* that the representatives be "directly chosen by the people" in no way implies that a candidate in the political process occupies some privileged position in the competition to sway the people's vote simply by reason of the fact that he or she seeks to be elected. Indeed, to the contrary, ss 7 and 24 of the *Constitution* guarantee the political sovereignty of the people of the Commonwealth by ensuring that their choice of elected representatives is a real choice, that is, a choice that is free and well-informed[44]. Because the implied freedom ensures that the people of the Commonwealth enjoy equal participation in the exercise of political sovereignty[45], it is not surprising that there is nothing in the authorities which supports the submission that the *Constitution* impliedly privileges candidates and parties over the electors as sources of political speech. Indeed, in *ACTV*, Deane and Toohey JJ observed that the implied freedom[46]:

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43 *Re Nash [No 2]* (2017) 92 ALJR 23 at 30 [35]; 350 ALR 204 at 212; [2017] HCA 52.

44 *ACTV* (1992) 177 CLR 106 at 138-139; *Brown v Tasmania* (2017) 261 CLR 328 at 359 [88].

45 *Unions NSW [No 1]* (2013) 252 CLR 530 at 578 [135].

46 *ACTV* (1992) 177 CLR 106 at 174.

> "extends not only to communications by representatives and potential representatives to the people whom they represent. It extends also to communications from the represented to the representatives and between the represented."

Justification – a reasonable necessity?

41 The provisions in question in *ACTV* prohibited the broadcasting of political advertisements or information during an election period. They were held to infringe the implied freedom and to be invalid. Invalidity resulted because the nature or extent of the restrictions could not be justified[47]. In *Lange*[48] it was observed that the provisions in question in *ACTV* were held to be invalid because there were other, less drastic, means by which the objects of the law could have been achieved. This passage in *Lange* was referred to in the joint judgment in *McCloy*[49], where it was explained that if there are other equally effective means available to achieve the statute's legitimate purpose but which impose a lesser burden on the implied freedom, it cannot be said that one which is more restrictive of the freedom is reasonably necessary to achieve that purpose.

42 It is well understood that an enquiry as to the necessity of a provision which effectively burdens the implied freedom is one of the tests of structured proportionality analysis. If the provision fails the necessity test, then, on that approach, it will be held invalid[50]. Such a test also mirrors to an extent the enquiry which has been applied to test the validity of legislation which restricts the freedom guaranteed by s 92 of the *Constitution*, as was observed in *McCloy*[51]. In *Unions NSW [No 1]*[52], reference was made to the most recent of these cases: *Betfair Pty Ltd v Western Australia*[53]. In that case it was not doubted that the provisions in question, which restricted interstate betting on horse races,

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47 *ACTV* (1992) 177 CLR 106 at 147, 175, 235.

48 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568.

49 *McCloy v New South Wales* (2015) 257 CLR 178 at 210 [57].

50 *McCloy v New South Wales* (2015) 257 CLR 178 at 194 [2(B)].

51 *McCloy v New South Wales* (2015) 257 CLR 178 at 210 [57].

52 (2013) 252 CLR 530 at 556-557 [48].

53 (2008) 234 CLR 418; [2008] HCA 11.

addressed perceived problems relating to the integrity of the racing industry in Western Australia. The legislation was held to be invalid because a complete prohibition was not necessary to achieve its objects. This was made evident by legislation adopted in another State which was directed to achieving the same purpose but effected a much lesser burden on the freedom[54]. A similar approach was taken to existing legislative measures in the joint judgment in *Brown v Tasmania*[55].

43 In an earlier case concerning s 92, *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW*[56], Mason J said that the regulation of the milk trade was not shown to be the "only practical and reasonable mode" of regulation which could achieve the law's stated objective of ensuring high-quality milk and the protection of public health. In *Betfair*, that view was accepted as "the doctrine of the Court"[57]. That doctrine was held to be consistent with the explanation given in *Cole v Whitfield*[58] of the justification of the total prohibition of the sale of undersized crayfish in Tasmania, irrespective of origin, namely that it was a "necessary means" of enforcing the prohibition on catching undersized fish in Tasmania because inspections necessary for that purpose were not practicable.

44 The defendant submits that the sum of $500,000 which may be expended by third parties in campaigning is a substantial sum. Pressed as to how it could be said to be sufficient, given in particular that the further research recommended by the JSCEM as to what is reasonably required by third-party campaigners appears not to have been undertaken, the defendant responded that Parliament does not need to provide evidence for the legislation it enacts. It is entitled to make the choice as to what level of restriction is necessary to meet future problems.

45 It must of course be accepted that Parliament does not generally need to provide evidence to prove the basis for legislation which it enacts. However, its position in respect of legislation which burdens the implied freedom is otherwise.

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54 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 468-469 [64], 479 [110].

55 (2017) 261 CLR 328.

56 (1975) 134 CLR 559 at 616; [1975] HCA 45.

57 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 477 [103].

58 (1988) 165 CLR 360; [1988] HCA 18.

Lange requires that any effective burden be justified[59]. As the Commonwealth conceded in argument, the Parliament may have choices but they have to be justifiable choices where the implied freedom is concerned.

46 The defendant seeks to mark out an area within which it might make a choice and which might not be subject to a requirement of justification. It submits that the choice it made, to reduce the third-party campaigners' cap to $500,000, lies within the domain of its choice.

47 The phrase "domain of the legislative discretion" appears in Professor Barak's text[60]. The joint judgment in *McCloy*[61] referred to this concept as the legislature's "domain of selections", in a discussion of the respective roles of the Court and of the Parliament in the context of the question of necessity. It was there said that that question does not deny that it is the role of the Parliament 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. The domain of selections open to the Parliament was described as comprising those provisions which fulfil the legislative purpose with the least harm to the implied freedom. And as the Commonwealth pointed out in argument, there may be a multitude of options available to the Parliament in selecting the desired means.

48 The defendant's submission that the decision concerning the level of capping of electoral expenditure is reserved to the Parliament and not subject to scrutiny by the Court may be understood to imply a requirement of some kind of deference to Parliament on the part of the Court or a "margin of appreciation". It may derive some support from what was said by the majority in *Harper v Canada (Attorney General)*[62].

49 The legislation in question in *Harper* contained provisions which imposed caps on spending by third parties on election advertising in a manner similar to the EFED Act and the EF Act. The provisions were very restrictive. Third parties were limited to expenditure of $3,000 in a given electoral district or $150,000 nationally.

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59 *McCloy v New South Wales* (2015) 257 CLR 178 at 213-214 [68]-[69]; *Brown v Tasmania* (2017) 261 CLR 328 at 359 [88], 361 [92].

60 Barak, *Proportionality: Constitutional Rights and Their Limitations* (2012) at 409.

61 *McCloy v New South Wales* (2015) 257 CLR 178 at 217 [82].

62 [2004] 1 SCR 827.

50 Neither the majority nor the minority in *Harper* doubted that the purposes for restricting expenditure of this kind could be legitimate. Statements by the majority as to those proper purposes, such as preventing the drowning out of voices and enhancing the electoral process, were referred to in *McCloy*[63] with respect to the EFED Act. However, no reference was made in *McCloy* to the decision arrived at by the majority in *Harper* as to the validity of the provisions, or to the reasons given by McLachlin CJ, Major and Binnie JJ in their Honours' strong dissent.

51 The majority in *Harper* concluded that the restrictions affecting third parties were valid. At one point in their reasons the majority pointed to a number of contextual factors which, it was said, "favour a deferential approach to Parliament" in determining whether the third-party advertising expense limits were demonstrably justified[64]. The minority likewise accorded "a healthy measure of deference"[65] to Parliament, although their Honours came to a different conclusion. No statements of the kind made in *Harper* are to be found in decisions of this Court since *Lange* respecting the implied freedom. Indeed it has been observed that deference would seem not to be appropriate given this Court's role in relation to the freedom and a margin of appreciation therefore cannot apply[66].

52 There were other differences of view as between the majority and minority in *Harper*, including as to whether the effect of the legislation was to prevent effective communication and as to the evidence on that question. The real question in the case, the minority said[67], was whether the limits effected by the statute on free political expression go too far. That question was answered in large part by an enquiry as to whether the legislation infringes the right to free expression provided by the *Canadian Charter of Rights and Freedoms* in a way that is "measured and carefully tailored" to the goals sought to be achieved[68]. The test of "minimal impairment" established by prior Canadian authority

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63 *McCloy v New South Wales* (2015) 257 CLR 178 at 207 [44].

64 *Harper v Canada (Attorney General)* [2004] 1 SCR 827 at 879 [88].

65 *Harper v Canada (Attorney General)* [2004] 1 SCR 827 at 849 [39].

66 *Unions NSW [No 1]* (2013) 252 CLR 530 at 553 [34], 556 [45]; *McCloy v New South Wales* (2015) 257 CLR 178 at 220 [90]-[91].

67 *Harper v Canada (Attorney General)* [2004] 1 SCR 827 at 846 [31].

68 *Harper v Canada (Attorney General)* [2004] 1 SCR 827 at 846 [32].

requires that the rights be impaired no more than is necessary[69]. An analogy with a requirement of reasonable necessity is evident. The restrictions in *Harper* were considered by the minority to be severe. Critically, from their Honours' perspective, the Attorney-General had not demonstrated that limits so severe were required to meet perceived dangers such as inequality[70].

53 The same conclusion is compelling with respect to s 29(10). As the plaintiffs point out, no basis was given in the Expert Panel Report for a halving of the figure previously allowed for third-party campaigning expenses. It may have been thought to be a reasonable allowance given the level of expenditure by third-party campaigners at the 2011 election. The report recommended that the figure be checked against expenditure for the 2015 election. If that enquiry had been undertaken, a different conclusion might have been reached. And despite the recommendation of the JSCEM, no enquiry as to what in fact is necessary to enable third-party campaigners reasonably to communicate their messages appears to have been undertaken. The defendant has not justified the burden on the implied freedom of halving the cap in s 29(10) as necessary to prevent the drowning out of voices other than those of third-party campaigners. The plaintiffs' submissions in this regard should be accepted. Section 29(10) is invalid.

Question 2

54 Because the answer to question 1 is "yes", there is no cap upon which s 35 of the EF Act operates. The defendant invited the Court nevertheless to answer question 2 because some provision might be made in the remainder of the capped State expenditure period to replace that cap. That is an invitation to speculate. It is not necessary to answer the question.

Applications to intervene

55 The University of New South Wales Grand Challenge on Inequality ("the UNSW GCI") sought leave, as amicus curiae, to be heard and to adduce evidence as to constitutional facts. Those facts did not form part of the special case agreed by the parties. The Liberal Party of Australia (NSW Division) ("the NSW Liberal Party") sought leave to intervene in support of the defendant. Both applications were refused by the Court in advance of the hearing.

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69 *Harper v Canada (Attorney General)* [2004] 1 SCR 827 at 846-847 [32].

70 *Harper v Canada (Attorney General)* [2004] 1 SCR 827 at 849 [38].

56 It cannot be doubted that there are occasions when the Court is assisted by the submissions of a person or body not a party to the proceedings or having a right to intervene. It may be assisted most obviously when there is no contradictor or the parties do not present argument on an issue which the Court considers necessary to be determined. It may be otherwise where the parties have fully canvassed all relevant issues. This observation is apposite to the NSW Liberal Party's application for intervention. The issues raised by the special case were comprehensively dealt with by the parties and the Commonwealth and the States which intervened. There was no basis for the NSW Liberal Party's application.

57 So far as concerns the application by the UNSW GCI it is possible that in a particular case additional constitutional facts may provide a wider perspective and facilitate the Court's determination of constitutional issues. It is to be expected that this will occur only rarely and that the Court will be cautious about what would amount to an expansion of a case agreed by the parties by permitting an intrusion of new facts or issues. There was no warrant for adding to the case in the manner suggested by the UNSW GCI.

Answers

58 The questions stated by the parties for the opinion of the Full Court should be answered as follows:

Question 1: Yes.

Question 2: Unnecessary to answer.

Question 3: The defendant.

59 GAGELER J. Forty years before the first articulation of the constitutionally implied freedom of political communication in *Nationwide News Pty Ltd v Wills*[71] and *Australian Capital Television Pty Ltd v The Commonwealth* ("*ACTV*")[72], a law purporting to dissolve the Australian Communist Party and to authorise banning by Commonwealth Executive order of incorporated or unincorporated associations professing similar ideology was held to exceed the legislative power of the Commonwealth Parliament in *Australian Communist Party v The Commonwealth* ("the *Communist Party Case*")[73].

60 An argument rejected in the *Communist Party Case* was that the prohibition of any organisation solemnly determined by the Commonwealth Parliament to be subversive of the *Constitution* is within the power conferred on the Commonwealth Parliament by s 51(xxxix) to make laws with respect to matters incidental to the execution and maintenance of the *Constitution* vested in the Commonwealth Executive by s 61. The response of Dixon J to that argument was one of theory informed by experience[74]:

> "History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected. In point of constitutional theory the power to legislate for the protection of an existing form of government ought not to be based on a conception, if otherwise adequate, adequate only to assist those holding power to resist or suppress obstruction or opposition or attempts to displace them or the form of government they defend."

61 Of the limits of the power of the Commonwealth Parliament to make laws with respect to matters incidental to the execution and maintenance of the *Constitution*, Dixon J went on to say[75]:

> "The power is ancillary or incidental to sustaining and carrying on government. Moreover, it is government under the Constitution and that is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial

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71 (1992) 177 CLR 1; [1992] HCA 46.

72 (1992) 177 CLR 106; [1992] HCA 45.

73 (1951) 83 CLR 1; [1951] HCA 5.

74 (1951) 83 CLR 1 at 187-188.

75 (1951) 83 CLR 1 at 193.

> power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption. In such a system I think that it would be impossible to say of a law of the character described, which depends for its supposed connection with the power upon the conclusion of the legislature concerning the doings and the designs of the bodies or person to be affected and affords no objective test of the applicability of the power, that it is a law upon a matter incidental to the execution and maintenance of the Constitution and the laws of the Commonwealth."

62 Dixon J's observation that the rule of law was assumed in the framing of the *Constitution* corresponded with Fullagar J's observation that "in our system the principle of *Marbury v Madison* is accepted as axiomatic, modified in varying degree in various cases (but never excluded) by the respect which the judicial organ must accord to opinions of the legislative and executive organs"[76]. Conformably with that principle, which itself is no more than an application of the rule of law to a system in which a written constitution has the status of a higher law, "[i]t is the courts, rather than the legislature itself, which have the function of finally deciding whether an Act is or is not within power"[77].

63 The *Communist Party Case* bears on the implied freedom of political communication in a number of respects relevant to the resolution of issues raised in the present case. First, it provides a stark illustration of a purpose – to "assist those holding power to resist or suppress obstruction or opposition or attempts to displace them or the form of government they defend" – legislative adoption of which is not legitimate in the sense that the purpose is not compatible with maintenance of the constitutionally prescribed system of representative and responsible government.

64 Second, the *Communist Party Case* forms part of the historical background to the reason given by Mason CJ in *ACTV* for why the High Court "should be astute not to accept at face value claims by the legislature and the Executive that freedom of communication will, unless curtailed, bring about corruption and distortion of the political process". Mason CJ said[78]:

> "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

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76 (1951) 83 CLR 1 at 262-263 (citation omitted).

77 *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 570 [66]; [2003] HCA 67.

78 (1992) 177 CLR 106 at 145.

> 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."

65 Mason CJ referred to the need for the Court to "scrutinize with scrupulous care" a legislative restriction on political communication in order to ensure that the restriction is "no more than is reasonably necessary to achieve the protection of the competing public interest which is invoked to justify the burden on communication"[79]. Gleeson CJ later explained in *Mulholland v Australian Electoral Commission* ("*Mulholland*")[80] that "reasonably necessary" in that formulation is not to be taken to mean "unavoidable or essential" but "to involve close scrutiny, congruent with a search for 'compelling justification'". That, his Honour held, was the level of scrutiny and the corresponding standard of justification applicable to a Commonwealth legislative restriction on political communication in the conduct of an election for Commonwealth political office[81].

66 Contrary to an argument advanced on behalf of the Attorney-General for South Australia intervening in the present case, the level of scrutiny and the corresponding standard of justification applicable to a State legislative restriction on political communication in the conduct of an election for State political office can be no less onerous than those applicable to a Commonwealth legislative restriction on political communication in the conduct of an election for Commonwealth political office. The same level of scrutiny and the same standard of justification are warranted because the risk to maintenance of the system of representative and responsible government established by Chs I and II of the *Constitution* that inheres in the representative character of a State Parliament is of the same nature as the risk to maintenance of that system that inheres in the representative character of the Commonwealth Parliament. The risk arises from the propensity of an elected majority to undervalue, and, at worst, to seek to protect itself against adverse electoral consequences resulting from, political communication by a dissenting minority[82].

67 Third, the *Communist Party Case* is authority for a specific principle of constitutional adjudication, amounting to an application of the more general

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79 (1992) 177 CLR 106 at 143-144.

80 (2004) 220 CLR 181 at 200 [40]; [2004] HCA 41.

81 (2004) 220 CLR 181 at 200-201 [40]-[41].

82 *McCloy v New South Wales* (2015) 257 CLR 178 at 227-228 [114]-[117], 265 [245]; [2015] HCA 34.

principle in *Marbury v Madison*[83], which bears directly on the Court's determination of whether legislation burdening political communication meets the requisite standard of justification. The specific principle of constitutional adjudication, as expounded by Williams J, is that "it is the duty of the Court in every constitutional case to be satisfied of every fact the existence of which is necessary in law to provide a constitutional basis for the legislation"[84]. That principle is ultimately determinative in the present case.

68 Agreeing that the questions reserved for the consideration of the Full Court should be answered as proposed by Kiefel CJ, Bell and Keane JJ, I set out my own reasoning on two issues. One concerns the identification and legitimacy of the purposes of s 29(10) of the *Electoral Funding Act 2018* (NSW) ("the EF Act"). The other concerns the absence of justification for the amount of the cap which s 29(10) imposes on electoral expenditure incurred by a third-party campaigner during the capped State expenditure period for a State election.

Legitimacy of purposes

69 The stated objects of the EF Act are materially identical to those of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ("the EFED Act"), provisions of which were considered in *Unions NSW v New South Wales*[85] and *McCloy v New South Wales* ("*McCloy*")[86]. The stated objects include "to establish a fair and transparent electoral funding, expenditure and disclosure scheme" and "to help prevent corruption and undue influence in the government of the State"[87].

70 The purposes of s 29(10) of the EF Act are argued by the State of New South Wales to fall squarely within those stated objects. The State emphasises that the cap on the electoral expenditure of third-party campaigners is one element of an overall scheme which also provides for caps on electoral

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83 (1803) 5 US 137.

84 (1951) 83 CLR 1 at 222. See *Hughes and Vale Pty Ltd v New South Wales [No 2]* (1955) 93 CLR 127 at 165; [1955] HCA 28; *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280 at 307; [1959] HCA 11.

85 (2013) 232 CLR 530; [2013] HCA 58.

86 (2015) 257 CLR 178.

87 Section 3(a) and (c) of the EF Act. See also s 4A(a) and (c) of the EFED Act.

expenditure by candidates for election, groups of candidates and political parties endorsing candidates for election[88] as well as for caps on political donations[89].

71 Capping electoral expenditure by third-party campaigners, the State argues, serves two complementary purposes. It increases fairness, by preventing a well-funded source of information or opinion from being able to dominate and distort political discourse during an election period[90]. And it reduces the risk of corruption or undue influence in the government of the State which can arise from elected office holders finding themselves beholden to those whose funding, or whose withholding of funding, contributed to the office holders' electoral success[91].

72 The plaintiffs do not dispute that the legislative purposes which the State asserts are compatible with maintenance of the constitutionally prescribed system of representative and responsible government. The plaintiffs do not dispute that a cap on electoral expenditure by third-party campaigners can have those purposes. Indeed, the plaintiffs do not dispute that the cap on electoral expenditure by third-party campaigners formerly imposed under the EFED Act was properly explained as having those purposes and was reasonably appropriate and adapted to advance those purposes in a manner compatible with maintenance of the constitutionally prescribed system of representative and responsible government.

73 The plaintiffs' argument is that in the parliamentary processes which resulted in the replacement of the cap on electoral expenditure by third-party campaigners under the EFED Act with the cap on electoral expenditure by third-party campaigners under the EF Act, an additional and nefarious legislative purpose intruded. The additional and nefarious legislative purpose is said to be that of "marginalising" the contribution of third-party campaigners to political discourse during an election period and correspondingly of "privileging" the contribution of candidates and parties. This purpose is said to inhere in a legislative design which seeks to ensure that the contribution of a third-party campaigner to political discourse will not be so large as to be capable of determining the result of an election.

74 To support the inference of an intrusion of such an additional and nefarious legislative purpose into the design of the EF Act, the plaintiffs point to

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88 Division 4 of Pt 3 of the EF Act.

89 Division 3 of Pt 3 of the EF Act.

90 cf *McCloy* (2015) 257 CLR 178 at 207 [45], 248 [182].

91 *McCloy* (2015) 257 CLR 178 at 204-205 [36], 248 [181].

the equation under the EFED Act of the cap on electoral expenditure for a third-party campaigner with the cap on electoral expenditure for both a party endorsing candidates for election to the Legislative Council and a group of candidates not endorsed by any party for election to the Legislative Council[92]. The plaintiffs point to the relativity under the EFED Act between the amount of those caps on electoral expenditure and the amount of the cap on electoral expenditure for a party endorsing candidates for all electoral districts of the Legislative Assembly. As initially imposed by the EFED Act in 2011, those amounts were, respectively, $1,050,000[93] and $9,300,000[94], the former amount being a little more than 11 per cent of the latter. The EF Act maintains the same real value of, and essentially the same relativity between, the amounts of the caps on electoral expenditure for a party endorsing candidates only for the Legislative Council and a group of candidates for the Legislative Council, both of which are set at $1,288,500[95], and the amount of the cap on electoral expenditure for a party endorsing candidates for all electoral districts of the Legislative Assembly, which is set at $11,429,700[96].

75 The plaintiffs contrast the retention of that status quo with the reduction under the EF Act of the cap on electoral expenditure for a third-party campaigner to $500,000 (a reduction in real terms of a little more than 60 per cent from the previous cap of $1,050,000, as adjusted for inflation, under the EFED Act[97]), the effect of which is to reduce the maximum electoral expenditure available to a third-party campaigner to less than five per cent of the maximum electoral expenditure available to a major party.

76 The plaintiffs also rely on the reasons given in the Final Report of the Panel of Experts on Political Donations in New South Wales in 2014 for the Panel's recommendations that "the cap on electoral expenditure by third-party campaigners be decreased to $500,000"[98] and that "a third-party campaigner be

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92 Section 95F(4)-(5), (10)(a) of the EFED Act.

93 Section 95F(4)-(5) read with s 95F(14) and Sch 1, cl 3 of the EFED Act.

94 Section 95F(2)-(3) read with s 95F(14) and Sch 1, cl 3 of the EFED Act.

95 Section 29(4)-(5) of the EF Act.

96 Section 29(2)-(3) of the EF Act.

97 See *Election Funding, Expenditure and Disclosures (Adjustable Amounts) Amendment Notice 2015* (NSW), Sch 1 [8].

98 Panel of Experts, *Political Donations: Final Report* (2014), vol 1 at 14, 113 (Recommendation 31).

prohibited from acting in concert with others to incur electoral expenditure that exceeds the third-party campaigner's expenditure cap"[99]. The plaintiffs point out that the Special Minister of State, when sponsoring the Bill for the EF Act in 2018 in the Legislative Assembly, identified implementation of the first of those recommendations as the sole basis for the choice of the amount which came to be specified in s 29(10)[100].

77 The Panel prepared its Final Report following consultations which it described as having revealed "a high level of concern about the increase in third-party campaigning" and alarm at "the prospect of New South Wales following the lead of the United States, where Political Action Committees have come to dominate election campaigns"[101]. The Panel referred to a recent academic study indicating that in Australia, as elsewhere, "third-party advertising appears to be on the increase, in both the frequency and size of campaigns"[102]. The Panel agreed with the proposition put to it in submissions by one of the authors of that study to the effect that "political parties and candidates should have a privileged position in election campaigns" for the reason that political parties and candidates alone are directly engaged in the electoral contest and that they alone are able to be elected to Parliament and to form government[103]. The Panel also agreed with the proposition that third parties "should be treated as recognised participants in the electoral process" but that third parties "should not be able to drown out the voice of the political parties"[104]. The Panel expressed concern that "a lack of appropriate third-party regulation would work against reformist governments pursuing difficult and controversial issues in the public interest"[105]. Noting that electoral expenditure by a third party at the then most recent State election, in 2011, had not exceeded $400,000, and recording that it would be appropriate to review the level of third-party expenditure caps after the 2015 State election, the

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99 Panel of Experts, *Political Donations: Final Report* (2014), vol 1 at 14, 116 (Recommendation 32(c)).

100 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 17 May 2018 at 4.

101 Panel of Experts, *Political Donations: Final Report* (2014), vol 1 at 8, 108.

102 Panel of Experts, *Political Donations: Final Report* (2014), vol 1 at 108, quoting Orr and Gauja, "Third-Party Campaigning and Issue-Advertising in Australia" (2014) 60 *Australian Journal of Politics and History* 73 at 74.

103 Panel of Experts, *Political Donations: Final Report* (2014), vol 1 at 108-109.

104 Panel of Experts, *Political Donations: Final Report* (2014), vol 1 at 109.

105 Panel of Experts, *Political Donations: Final Report* (2014), vol 1 at 110.

Panel took the view that $500,000 was "a sufficient amount that strikes the right balance between the rights of third parties and those of parties and candidates"[106]. The Panel also recommended that the aggregation of third-party expenditure be prohibited, by a provision along the lines of that which came to be enacted as s 35 of the EF Act, as a means of preventing third-party campaigners "from launching a coordinated campaign with a combined expenditure cap that would completely overwhelm parties, candidates and other third parties acting alone"[107].

78 Finally, the plaintiffs point to the apparent failure of the New South Wales Government, before introduction of the Bill for the EF Act in 2018, to act on the recommendation of the Joint Standing Committee on Electoral Matters in 2016 "that, before decreasing the cap on electoral expenditure by third-party campaigners to $500,000 ... the NSW Government considers whether there is sufficient evidence that a third-party campaigner could reasonably present its case within this expenditure limit"[108]. That is despite evidence having been publicly available from 2016 of Unions NSW, the Electrical Trades Union of Australia, New South Wales Branch and the New South Wales Nurses and Midwives' Association, as third-party campaigners, each having in fact incurred electoral expenditure in excess of $500,000 during the capped expenditure period for the 2015 State election.

79 Where, as here, legislation includes an express statement of statutory objects, identification of legislative purpose must start with the objects so stated, and as illuminated, to the extent their expression might be obscure or ambiguous, by the statutory context. In the face of an express statement of statutory objects, an additional object that is not only unexpressed but also constitutionally impermissible should not lightly be inferred.

80 In the legislative history on which the plaintiffs rely, there is no smoking gun. The agreement of the Panel of Experts on Political Donations in New South Wales with the proposition that "political parties and candidates should have a privileged position in election campaigns" cannot be divorced from its agreement with the proposition that third parties "should not be able to drown out the voice of the political parties"[109]. The apparent failure of the New South Wales Government to act on the recommendation of the Joint Standing Committee on

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106 Panel of Experts, *Political Donations: Final Report* (2014), vol 1 at 112.

107 Panel of Experts, *Political Donations: Final Report* (2014), vol 1 at 116.

108 Joint Standing Committee on Electoral Matters, *Inquiry into the Final Report of the Expert Panel – Political Donations and the Government's Response* (2016) at ix, 49 (Recommendation 7).

109 Panel of Experts, *Political Donations: Final Report* (2014), vol 1 at 109.

Electoral Matters is as consistent with oversight as it is with deliberate inattention. And the cap on the electoral expenditure of a third-party campaigner imposed by s 29(10) of the EF Act cannot be said to have been set at an amount that is obviously so low in absolute or relative terms that the cap is incapable of being explained as a legislative attempt to promote the statutory objects expressed in the EF Act in the manner propounded by the State.

81 Quite apart from the strength or weakness of the indications on which the plaintiffs rely, however, the plaintiffs' attempt to have the Court take the extraordinary step of accepting that s 29(10) of the EF Act (and, with it, s 35 of the EF Act) has an unexpressed and constitutionally impermissible purpose encounters two interrelated difficulties concerning the manner in which the plaintiffs seek to identify that purpose.

82 One difficulty is that the plaintiffs fail to engage with the substantive and inherently fact-dependent dimension of the stated object of the EF Act to establish a scheme of expenditure that is "fair". The notion of fairness referred to in that statement is that captured in the reference by the majority of the Supreme Court of Canada in *Harper v Canada (Attorney General)*[110] to the creation of a "level playing field for those who wish to engage in the electoral discourse" which in turn "enables voters to be better informed; no one voice is overwhelmed by another". Within a field of institutional design in which metaphors abound and often clash, the notion of fairness is more akin to that of a "public square meeting" in which all points of view get to be aired than that of an unregulated "marketplace of ideas" in which the purveyor who can afford the largest megaphone gets to drown out his or her competitors[111].

83 The legislative purpose of promoting such substantive fairness amongst those wishing to engage in the electoral discourse was accepted in *McCloy* to be compatible with the constitutionally prescribed system of representative and responsible government[112]. The point, crisply put in the written submissions of the Attorney-General of the Commonwealth, is that it is permissible within our constitutional system "to restrict certain voices – those that may otherwise dominate the debate – to make room for *all* to be heard and thereby ensure that electoral choice is as fully informed as possible".

84 The more conceptual and more fundamental difficulty is that the illegitimate legislative purpose sought to be identified by the plaintiffs has

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110 [2004] 1 SCR 827 at 868 [62].

111 Tham, *Money and Politics: The Democracy We Can't Afford* (2010) at 17, referring to Fiss, *The Irony of Free Speech* (1996) at 4.

112 (2015) 257 CLR 178 at 207-208 [44]-[47].

embedded within it a notion of want of justification. Informing the asserted illegitimacy of the purpose of "privileging" candidates and parties on the one hand and "marginalising" third-party campaigners on the other hand is an implicit assertion that the "privileging" of one voice and "marginalising" of another is incompatible with maintenance of the constitutionally prescribed system of representative and responsible government. Yet, stripped of their pejorative connotations, "privileging" and "marginalising" refer to nothing more than differential treatment and unequal outcomes. Once it is recognised that "differential treatment and unequal outcomes may be the product of a legislative distinction which is appropriate and adapted to the attainment of a proper objective"[113], it becomes apparent that the compatibility of the "privileging" and "marginalising" of which the plaintiffs complain with maintenance of the constitutionally prescribed system of representative and responsible government cannot be determined without further analysis.

85 Unlike the Commonwealth electoral legislation held to infringe the implied freedom of political communication in *ACTV*, there is no suggestion that the EF Act is "weighted in favour of the established political parties represented in the legislature immediately before the election" as against "new and independent candidates"[114]. There is no suggestion of abuse of incumbency. The differential treatment of which the plaintiffs complain is rather between all "candidates" and "parties" as defined in the EF Act, on the one hand, and all "third-party campaigners" as defined in the EF Act, on the other hand.

86 According to the definitions in the EF Act, a "candidate" is any person who has nominated as a candidate for election to the Legislative Assembly or the Legislative Council, a "party" is "a body or organisation, incorporated or unincorporated, having as one of its objects or activities the promotion of the election to Parliament ... of a candidate or candidates endorsed by it or by a body or organisation of which it forms a part", and a "third-party campaigner" is "a person or another entity (not being an associated entity, party, elected member, group or candidate) who incurs electoral expenditure for a State election during a capped State expenditure period that exceeds $2,000 in total"[115]. "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"[116] but "does not include expenditure incurred by an entity or other person (not being a

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113 *Mulholland* (2004) 220 CLR 181 at 234 [147].

114 (1992) 177 CLR 106 at 146.

115 Section 4 of the EF Act.

116 Section 7(1) of the EF Act.

party, an associated entity, an elected member, a group or a candidate) if the expenditure is not incurred for the dominant purpose of promoting or opposing a party or the election of a candidate or candidates or influencing the voting at an election"[117]. For a periodic general election, the "capped State expenditure period" is the period from "1 October in the year before which the election is to be held to the end of the election day"[118], being the fourth Saturday in March following the expiry of the previous Legislative Assembly[119].

87 On no conceivable basis could it be suggested that participation of candidates and political parties in election campaigns and endorsement of candidates by political parties is incompatible with maintenance of the constitutionally prescribed system of representative and responsible government. Candidates for election are integral to the very notion of electoral choice which underlies the very concept of representative government, alignment of candidates for election to political parties has been a feature of the experience of representative and responsible government in Australia from the 1890s to the present[120], and the fact that a successful candidate may have been publicly recognised by a particular political party as being an endorsed candidate of that party and may have publicly represented himself or herself to be such a candidate has been expressly recognised in the manner which has been prescribed by s 15 of the *Constitution* for the filling of casual vacancies in the Senate since 1977[121]. The reasoning of Gleeson CJ and of Kirby J in *Mulholland*[122] illustrates how differences between candidates who are endorsed by registered political parties and those who are not can justify, consistently with the implied freedom of political communication, differences in the provision of electoral information to voters.

88 Given that the plaintiffs accept the legitimacy of the cap on electoral expenditure by third-party campaigners that was formerly imposed under the EFED Act, it is plain that it is no part of the plaintiffs' argument to dispute that differences between candidates and political parties on the one hand and third-party campaigners on the other hand can legitimately lead to very substantial variations in the caps on electoral expenditure applicable to each. There is a need

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117 Section 7(3) of the EF Act.

118 Section 27(a) of the EF Act.

119 Sections 24(1) and 24A(a) of the *Constitution Act 1902* (NSW).

120 See Jaensch, *Power Politics: Australia's Party System*, 3rd ed (1994) at 18-37.

121 *Constitution Alteration (Senate Casual Vacancies) 1977* (Cth).

122 (2004) 220 CLR 181 at 201 [41], 271-273 [264]-[267].

to be clear about what those differences are, in order to be clear about how those differences have the potential to explain differential treatment and differential outcomes in the ultimate pursuit of substantive fairness.

89 Professor Crisp long ago explained the "crucial distinction" between political parties and "interest-groups" of the kind which might now meet the definition of third-party campaigners in the EF Act as lying "in the different purpose of their respective commitments to political activity and the different directions that their activities take"[123]. The functional distinction important for present purposes is that, during a period leading up to an election, a political party which aims to form government must be in a position to communicate on the whole range of issues of potential concern to voters whereas a third-party campaigner can concentrate its resources on a single issue of concern to it. To be equipped not only to communicate on a range of issues but also to respond meaningfully to third-party campaigners, the political party needs to be able to marshal greater resources.

90 Once it is accepted that it is a legitimate legislative purpose to promote a level playing field for all participants in political discourse during an election period, it becomes obvious that the functional distinction between a political party which aims to form government and a third-party campaigner justifies a substantial variation between the amount of the cap imposed on the electoral expenditure of that political party and the amount of the cap imposed on the electoral expenditure of a third-party campaigner. To ensure that the political party is able to communicate on the range of issues of potential concern to voters without being overwhelmed by the targeted campaigns of any number of third-party campaigners acting alone or in concert, the cap on the third-party campaigner must be substantially lower than the cap on the political party.

91 No doubt, it might be said of any substantial variation between the amount of the cap applicable to candidates or political parties and the amount of the cap applicable to third-party campaigners, imposed in the ostensible pursuit of the objective of substantive fairness, that a purpose of the variation is to "privilege" candidates and parties and to "marginalise" third-party campaigners. The point is that those labels have no constitutional significance if the amount of each cap can be justified on the basis that each amount is reasonably appropriate and adapted to advance the objective of substantive fairness in a manner compatible with maintenance of the constitutionally prescribed system of representative and responsible government.

92 Whether the amount of the cap on the electoral expenditure of a third-party campaigner set by s 29(10) of the EF Act is illegitimate on the basis

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123 Crisp, *Australian National Government*, 5th ed (1983) at 163.

advanced by the plaintiffs is accordingly indistinguishable from the question of whether the amount is justified on the basis advanced by the State. The latter question is the real question in the present case.

Want of justification

93 Having concluded that the provisions of the EFED Act in issue in *McCloy* burdened political communication, the plurality in that case stated that "[i]t is, then, incumbent upon New South Wales to justify that burden"[124]. The plurality thereby recognised that a polity asserting a justification for a burden on political communication imposed by its legislation bears the persuasive onus of establishing that justification. Given that other views have been expressed[125], it is important to be clear about how that comes to be so.

94 Whether a legislative provision infringes the implied freedom of political communication is a question of law. "Highly inconvenient as it may be", questions of law and especially questions of constitutional law "sometimes depend on facts, facts which somehow must be ascertained by the court responsible for deciding the validity of the law"[126]. Questions of fact of that nature cannot form issues between parties to be tried like ordinary questions of fact[127]. They do not lend themselves to notions of proof or of onus of proof[128]. A court called upon to pronounce on the validity of legislation must ascertain constitutional facts "as best it can"[129].

95 If a court cannot be satisfied of a fact the existence of which is necessary in law to provide a constitutional basis for impugned legislation, however, the court has no option but to pronounce the legislation invalid. That is the present significance of the principle in the *Communist Party Case*. The principle applies

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124 (2015) 257 CLR 178 at 201 [24].

125 See *Coleman v Power* (2004) 220 CLR 1 at 124 [329]; [2004] HCA 39; *Brown v Tasmania* (2017) 261 CLR 328 at 421-422 [288]; [2017] HCA 43.

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

127 *Breen v Sneddon* (1961) 106 CLR 406 at 411; [1961] HCA 67; *South Australia v Tanner* (1989) 166 CLR 161 at 179; [1989] HCA 3; *Re Day* (2017) 91 ALJR 262 at 268-269 [21]; 340 ALR 368 at 374-375; [2017] HCA 2.

128 *Thomas v Mowbray* (2007) 233 CLR 307 at 514-522 [620]-[639]; [2007] HCA 33; *Maloney v The Queen* (2013) 252 CLR 168 at 298-299 [351], 299-300 [355]; [2013] HCA 28.

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

in the same way to legislation impugned on the basis of infringing a prohibition on legislative power[130] as to legislation impugned on the basis of being insufficiently connected to a grant of legislative power[131]. Applied to the determination of whether impugned legislation infringes the implied freedom of political communication, the principle requires that a court pronounce a burden on political communication imposed by the legislation to be unjustified, unless the court is satisfied that the burden is justified. The result is as Mason CJ stated in *Cunliffe v The Commonwealth*[132]:

> "In the context of an implication of freedom of communication, in order to justify the imposition of some burden or restriction on that right, it is generally not enough simply to assert the existence of facts said to justify the imposition of that burden or restriction. The relevant facts must either be agreed or proved or be such that the Court is prepared to take account of them by judicial notice or otherwise."

96 The State's justification for the burden on political communication imposed by s 29(10) of the EF Act therefore cannot succeed unless the Court can be satisfied of the existence of facts on which that justification depends.

97 In *Wilcox Mofflin Ltd v New South Wales*[133], in which the ultimate question was whether State legislation infringed the express guarantee of freedom of interstate trade in s 92 of the *Constitution*, the majority remarked that it was unfortunate that the parties had not entered into proof of matters which would have enabled it to obtain a more adequate understanding "of the real significance, effect and operation of the statutes, information of a kind that we have come to think almost indispensable to a satisfactory solution of many of the constitutional problems brought to this Court for decision". The majority added that it was "bound to say that it is not an opinion commanding much respect among the parties to issues of constitutional validity, not even those interested to support legislation, who, strange as it seems to us, usually prefer to submit such an issue in the abstract without providing any background of information in aid

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130 eg, *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 477; [1990] HCA 1; *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 479-480 [109]-[112]; [2008] HCA 11.

131 eg, *Andrews v Howell* (1941) 65 CLR 255 at 278; [1941] HCA 20; *Stenhouse v Coleman* (1944) 69 CLR 457 at 470-472; [1944] HCA 36.

132 (1994) 182 CLR 272 at 304; [1994] HCA 44.

133 (1952) 85 CLR 488 at 507; [1952] HCA 17.

of the presumption of validity and to confine their cases to dialectical arguments and considerations appearing on the face of the legislation"[134].

98 The same criticism cannot be levelled at the parties in the present case. The special case which the parties have agreed and stated for the Court contains a full and succinct account of the practical operation of expenditure caps under the EFED Act and of the legislative history of the EF Act.

99 On the critical question of the justification for the amount of the cap on the electoral expenditure of a third-party campaigner set by s 29(10) of the EF Act, however, the special case exposes a gap in the factual substratum of the justification advanced by the State. The Joint Standing Committee on Electoral Matters recognised in 2016 that there was an unanswered question of fact as to whether a $500,000 cap on electoral expenditure by third-party campaigners would allow a third-party campaigner to be reasonably able to present its case to voters. The special case contains no material which would allow that question to be answered by the Court in the affirmative.

100 On that critical question, the State is accordingly driven to rely on such arguments of principle as are available to it on the face of the EF Act. The amount of the cap, the State argues, is a matter for legislative choice, and the amount that has been chosen, the State argues, is substantial.

101 The principled answer to the State's arguments is that the legislative choice open to the legislature is constrained by the implied freedom of political communication and that the implied freedom constrains the choice of the amount of the cap that is open to the legislature. The choice is limited to an amount that (in the already quoted language of Mason CJ in *ACTV*[135]) restricts the ability of a third-party campaigner to engage in political communication "no more than is reasonably necessary to achieve the protection of the competing public interest which is invoked to justify the burden on communication". To be justified as no more than is reasonably necessary to achieve a level playing field for all participants in political discourse during an election period, the amount of the cap must, at the very least, leave a third-party campaigner with an ability meaningfully to compete on the playing field. The third-party campaigner must be left with a reasonable opportunity to present its case to voters. It is not self-evident, and it has not been shown, that the cap set in the amount of $500,000 leaves a third-party campaigner with a reasonable opportunity to present its case.

102 In short, it is not possible to conclude that the $500,000 cap on the electoral expenditure of a third-party campaigner set by s 29(10) of the EF Act is

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134 (1952) 85 CLR 488 at 507.

135 (1992) 177 CLR 106 at 143.

justified because it is not possible to be satisfied that the cap is sufficient to allow a third-party campaigner to be reasonably able to present its case to voters. Without satisfaction that the amount of the cap is justified, the imposition of the cap in that amount stands unjustified.

103 NETTLE J. The question for decision in this special case is whether ss 29(10) and 35 of the *Electoral Funding Act 2018* (NSW) impose an unjustified burden on the implied freedom of political communication.

104 From 2011[136] until it was repealed[137] by the *Electoral Funding Act*, the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ("the Previous Act") imposed a range of caps on expenditure incurred for the dominant purpose of promoting or opposing a party or candidate or influencing the voting at an election during a specified period preceding a State election[138]. Under that regime, the expenditure cap which applied[139] to a "third-party campaigner"[140] was $1,050,000 if the third-party campaigner was registered before the commencement of the capped State expenditure period (or $525,000 in any other case)[141]. The cap of $1,050,000 was identical to the expenditure cap which applied[142] to a "party"[143] endorsing candidates for election to the Legislative

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136 See *Election Funding and Disclosures Amendment Act 2010* (NSW), s 2.

137 *Electoral Funding Act*, s 157.

138 See *Election Funding, Expenditure and Disclosures Act*, Pt 6 and especially ss 87(4), 95F, 95H.

139 *Election Funding, Expenditure and Disclosures Act*, s 95F(10).

140 Defined in s 4(1) of the *Election Funding, Expenditure and Disclosures Act* to mean, for a State election, "an entity or other person (not being a registered party, elected member, group or candidate) who incurs electoral communication expenditure for a State election during a capped State expenditure period that exceeds $2,000 in total".

141 On 25 November 2011, the caps for the election period beginning 27 March 2011 were increased to account for inflation to $1,166,600 and $583,300 respectively: *Election Funding, Expenditure and Disclosures (Adjustable Amounts) Notice* (NSW), Sch 1 cl 2(8) (as made). On 19 June 2015, the caps for the election period beginning 29 March 2015 were increased to $1,288,500 and $644,300 respectively: *Election Funding, Expenditure and Disclosures (Adjustable Amounts) Amendment Notice 2015* (NSW), Sch 1 [8].

142 *Election Funding, Expenditure and Disclosures Act*, s 95F(4). As with the caps for third-party campaigners, the cap was increased for the election period beginning 27 March 2011 to $1,166,600 and for the election period beginning 29 March 2015 to $1,288,500: *Election Funding, Expenditure and Disclosures (Adjustable Amounts) Notice*, Sch 1 cl 2(2) (as made); *Election Funding, Expenditure and Disclosures (Adjustable Amounts) Amendment Notice 2015*, Sch 1 [2].

Council of New South Wales and candidates in up to ten electoral districts for the Legislative Assembly of New South Wales and to the expenditure cap which applied[144] to a group of candidates for election to the Legislative Council who were not endorsed by any party. The expenditure cap which applied[145] to a party endorsing only candidates for the Legislative Assembly or endorsing candidates for the Legislative Council and candidates in more than ten electoral districts for the Legislative Assembly was the product of $100,000 and the number of electoral districts for which the party was endorsing candidates.

105 By contrast, under the regime imposed by the *Electoral Funding Act*, the expenditure cap applicable to a party is effectively unchanged at $1,288,500 (having regard to the mandatory increase in the figure under the Previous Act for inflation)[146] for a party endorsing candidates for the Legislative Council and candidates in up to ten electoral districts for the Legislative Assembly[147], and the product of $122,900 and the number of electoral districts for which a party is endorsing candidates in the case of a party endorsing only candidates for the Legislative Assembly or endorsing candidates for the Legislative Council and candidates in more than ten electoral districts for the Legislative Assembly[148] –

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143 Defined in s 4(1) of the *Election Funding, Expenditure and Disclosures Act* to mean "a body or organisation, incorporated or unincorporated, having as one of its objects or activities the promotion of the election to Parliament or a local council of a candidate or candidates endorsed by it or by a body or organisation of which it forms a part".

144 *Election Funding, Expenditure and Disclosures Act*, s 95F(5). As with the caps for third-party campaigners, the cap was increased for the election period beginning 27 March 2011 to $1,166,600 and for the election period beginning 29 March 2015 to $1,288,500: *Election Funding, Expenditure and Disclosures (Adjustable Amounts) Notice*, Sch 1 cl 2(3) (as made); *Election Funding, Expenditure and Disclosures (Adjustable Amounts) Amendment Notice 2015*, Sch 1 [3].

145 *Election Funding, Expenditure and Disclosures Act*, s 95F(2), (3). For the election period beginning 27 March 2011, the cap was increased to account for inflation to $111,200, and for the election period beginning 29 March 2015, the cap was increased to $122,900: *Election Funding, Expenditure and Disclosures (Adjustable Amounts) Notice*, Sch 1 cl 2(1) (as made); *Election Funding, Expenditure and Disclosures (Adjustable Amounts) Amendment Notice 2015*, Sch 1 [1].

146 See *Election Funding, Expenditure and Disclosures Act*, s 95F(14), Sch 1; see above at fnn 142, 144, 145.

147 *Electoral Funding Act*, s 29(4).

148 *Electoral Funding Act*, s 29(2), (3).

whereas the expenditure cap applicable[149] to third-party campaigners has been reduced by more than 50 per cent to $500,000 if the third-party campaigner was registered before the commencement of the capped State expenditure period (or $250,000 in any other case).

106 The change in relativities between the expenditure caps applicable to parties and third-party campaigners gives effect to recommendations[150] of an expert panel that, in order to maintain a level playing field, parties and candidates should be given greater expenditure caps than third-party campaigners: for the reason that only parties and candidates are directly engaged in the electoral contest, they are the only ones able to form government and be elected to represent the people of New South Wales and, as a consequence, they have greater expenditure commitments which must be spread more thinly than third-party campaigners able to concentrate on single issues. The expert panel opined[151] that third-party campaigners should be free to participate in election campaigns but should not be able to drown out the voices of parties and candidates. The expert panel were concerned[152], however, that while the expenditure cap for third-party campaigners should be set below the expenditure cap for parties, it should not be set so low as to deprive third-party campaigners of the capacity to have a real voice in an election campaign. With that in mind, the expert panel suggested[153] the figure of $500,000, being $100,000 more than the greatest expenditure incurred by a single third-party campaigner during the three months preceding the 2011 election, but recommended that the level of third-party campaigner caps be reviewed after the 2015 election.

107 In a report dated June 2016, the Joint Standing Committee on Electoral Matters recorded[154] its agreement with the expert panel's recommendation to

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149 *Electoral Funding Act*, s 29(10).

150 Schott, Tink and Watkins, *Political Donations: Final Report*, December 2014, vol 1 at 8, 109-113.

151 Schott, Tink and Watkins, *Political Donations: Final Report*, December 2014, vol 1 at 8, 29, 109.

152 Schott, Tink and Watkins, *Political Donations: Final Report*, December 2014, vol 1 at 112.

153 Schott, Tink and Watkins, *Political Donations: Final Report*, December 2014, vol 1 at 112-113.

154 Parliament of New South Wales, Joint Standing Committee on Electoral Matters, *Inquiry into the Final Report of the Expert Panel – Political Donations and the Government's Response*, June 2016 at 49 [7.20].

reduce the cap on third-party campaigner expenditure but added that before implementing the change, the Government should consider whether there was sufficient evidence that a third-party campaigner could reasonably present its case with an expenditure cap of $500,000. The scheme of the *Electoral Funding Act* reflected the recommendations in that report[155].

108 It is accepted that the change in relativities imposed under the *Electoral Funding Act* burdens the implied freedom of political communication. The issue, in the plaintiffs' submission, is whether a purpose of privileging parties relative to third-party campaigners is a legitimate purpose consistent with the system of representative and responsible government mandated by the *Constitution*. The plaintiffs accepted that the creation of a "level playing field"[156] is a legitimate purpose. But they contended that the purpose of the change in relativities imposed under the *Electoral Funding Act*, far from being the creation of a level playing field, is to create an unlevel playing field by privileging parties relative to third-party campaigners.

109 I do not accept the argument. Although an object of s 29(10) of the *Electoral Funding Act* is to "privilege" parties relative to third-party campaigners, it appears the Parliament's purpose in legislating to achieve that objective[157] was to give better effect to the purpose of the Previous Act of

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155 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 23 May 2018 at 64; New South Wales, *Electoral Funding Bill 2018*, Explanatory Note at 1.

156 See *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 175 per Deane and Toohey JJ; [1992] HCA 45; *McCloy v New South Wales* (2015) 257 CLR 178 at 265 [245] per Nettle J; [2015] HCA 34.

157 See and compare *Levy v Victoria* (1997) 189 CLR 579 at 619 per Gaudron J; [1997] HCA 31.

preventing voices being drowned out by the powerful[158]. So much is apparent from the expert panel's report, which stated[159]:

> "The Panel strongly agrees that political parties and candidates should have a privileged position in election campaigns. Parties and candidates are directly engaged in the electoral [contest], and are the only ones able to form government and be elected to Parliament to represent the people of New South Wales. That said, we also strongly support the principle that third parties should be treated as recognised participants in the electoral process. Third parties have a right to have a voice and attempt to influence voting at elections … *However, third parties should not be able to drown out the voice of the political parties*." (emphasis added)

110 There is no reason to doubt that the purpose of preventing voices being drowned out is legitimate[160]. The question is whether the means chosen to achieve it are appropriate and adapted to the achievement of that purpose[161]. And

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158 See and compare *Electoral Funding Act*, s 3; New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 28 October 2010 at 27168; New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 10 November 2010 at 27458; New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 23 May 2018 at 93, 105. See also Parliament of New South Wales, Joint Standing Committee on Electoral Matters, *Inquiry into the Final Report of the Expert Panel – Political Donations and the Government's Response*, June 2016 at 49 [7.20]; Parliament of New South Wales, Joint Standing Committee on Electoral Matters, *Public Funding of Election Campaigns*, March 2010 at 20-21 [1.101], [1.104].

159 Schott, Tink and Watkins, *Political Donations: Final Report*, December 2014, vol 1 at 109.

160 See and compare *Australian Capital Television* (1992) 177 CLR 106 at 144-145 per Mason CJ, 154-156 per Brennan J, 175 per Deane and Toohey JJ, 188-189 per Dawson J, 239 per McHugh J; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 557 [49] per French CJ, Hayne, Crennan, Kiefel and Bell JJ, 579 [138] per Keane J; [2013] HCA 58; *McCloy* (2015) 257 CLR 178 at 206-208 [43]-[47] per French CJ, Kiefel, Bell and Keane JJ, 248 [184] per Gageler J, 257-258 [218], 260 [227] per Nettle J.

161 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567-568; [1997] HCA 25; *McCloy* (2015) 257 CLR 178 at 193-195 [2] per French CJ, Kiefel, Bell and Keane JJ, 258 [220] per Nettle J; *Brown v Tasmania* (2017) 261 CLR 328 at 363-364 [104] per Kiefel CJ, Bell and Keane JJ, 375-376 [155]-[156] per Gageler J, 416 [277] per Nettle J, 478 [481] per Gordon J; [2017] HCA 43.

in my view, that is best assessed by reference to the tests of whether the *Electoral Funding Act* is suitable, necessary, and, if so, adequate in its balance[162].

111 The *Electoral Funding Act* is evidently suitable for the achievement of the purpose of maintaining a level playing field, because it is rationally connected to preventing third-party campaigners drowning out parties and candidates. The plaintiffs' argument to the contrary, on the basis that the cap was not the most effective means of achieving the purpose, is misplaced. The selection of means goes to the issue of necessity.

112 The plaintiffs contended that the *Electoral Funding Act* is not necessary, because there is an obvious and compelling alternative capable of achieving the purpose of levelling the playing field, with a substantially lesser burden on the implied freedom: namely, the retention of the expenditure cap for third-party campaigners which applied under the Previous Act.

113 Inasmuch as that contention suggests that the expenditure cap for third-party campaigners under the Previous Act set a minimum amount for allowable electoral expenditure consistent with the implied freedom of political communication, I reject it. It assumes that, once the Parliament has enacted a set of provisions for the achievement of a level playing field, the Parliament is thereafter precluded from enacting further measures for the better achievement of the objective. That is not so. It is open to the Parliament to take different views from time to time according to the circumstances as they evolve or are reasonably anticipated as likely to develop in future[163]. Nor is the notion of the level playing field susceptible to precise quantification. Views may reasonably differ as to whether the expenditure caps imposed on third-party campaigners should be the same as or different from the caps imposed on parties and candidates. The limits are set by what is reasonable. In effect, the level playing field is comprised of a theoretically unlimited number of combinations and permutations of relativities within the range bordered by points at which the extent of disparity becomes unreasonable. And within that range, it is for the Parliament to make selections[164]. It is only when and if a selection lies beyond the range of reasonable selection that it is invalid.

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162 *Brown* (2017) 261 CLR 328 at 416-417 [278]-[280] per Nettle J.

163 See *McCloy* (2015) 257 CLR 178 at 261-262 [233] per Nettle J.

164 *Australian Capital Television* (1992) 177 CLR 106 at 187-188 per Dawson J; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 206-207 [63]-[65] per McHugh J, 236-237 [154]-[155] per Gummow and Hayne JJ; [2004] HCA 41; *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 121 [386] per Kiefel J; [2010] HCA 46; *McCloy* (2015) 257 CLR 178 at 217 [82] per French CJ, Kiefel, Bell and Keane JJ; *Murphy v Electoral Commissioner* (2016) 261 CLR 28

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114 In this case, the plaintiffs did not essay the task of demonstrating that the selection of relativities under the *Electoral Funding Act* is beyond the range of reasonable selection. They contended that it was enough to demonstrate that the cap on third-party campaigner expenditure imposed by that Act is an unjustified burden on the implied freedom that it would prevent the plaintiffs from mounting as effective a campaign as occurred in the 2015 election.

115 I do not accept that argument either. The plaintiffs' complaint is, in effect, that any cut in expenditure relative to parties and candidates was too much and would prevent third-party campaigners from having a meaningful voice in the coming election. But logically, that cannot be so. The fact that the *Electoral Funding Act* prevents the same level of expenditure as was permitted under the Previous Act does not of itself take the *Electoral Funding Act* outside the range of reasonable measures for the achievement of the legitimate purpose of maintaining a level playing field. It is conceivable that the new cap and its relativities with the caps imposed on parties and candidates is within the range.

116 In the alternative, the plaintiffs invoked the reasoning[165] of the minority (McLachlin CJ, Major and Binnie JJ) in *Harper v Canada (Attorney General)*: that limits on electoral expenditure must be supported by a clear and convincing demonstration of why the limits are necessary, do not go too far and enhance more than harm the democratic process. The plaintiffs contended that, in this case, there is not any, let alone clear and convincing, demonstration of why a cut in the third-party campaigner expenditure cap to half of that which applied under the Previous Act is necessary, and thus that it should be concluded that the reduction, or at least the amount of it, is an unjustified burden on the implied freedom.

117 There is more force in those submissions. As the plurality observe[166], *Lange* requires[167] that any effective burden on the implied freedom be justified. And what is required to justify an effective burden on the implied freedom depends on the circumstances of the case. Sometimes[168], perhaps often, the need

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at 81 [156], 86-87 [178] per Keane J, 106 [243] per Nettle J, 113-114 [262]-[264] per Gordon J; [2016] HCA 36; *Brown* (2017) 261 CLR 328 at 420 [286] per Nettle J.

165 [2004] 1 SCR 827 at 843-844 [21].

166 See reasons of Kiefel CJ, Bell and Keane JJ at [45].

167 (1997) 189 CLR 520 at 567-568; *McCloy* (2015) 257 CLR 178 at 193-195 [2] per French CJ, Kiefel, Bell and Keane JJ, 258 [220] per Nettle J.

168 See, eg, *Langer v The Commonwealth* (1996) 186 CLR 302 at 318 per Brennan CJ, 334 per Toohey and Gaudron JJ; [1996] HCA 43; *Muldowney v South Australia*

(Footnote continues on next page)

for a limit on electoral expenditure or other legislative measure which burdens the implied freedom may be self-evident or appear with relative clarity without the need for extensive if indeed any evidence on the point. Other times[169], the need will be apparent from expert reports or commissions of inquiry which precede the enactment of the legislation. And in some circumstances, the fact that a plaintiff is unable to identify any obvious and compelling alternative productive of a significantly lesser burden on the implied freedom may be enough to conclude that the impugned law is needed. But here, although it is apparent from the expert panel's report that the panel considered it to be desirable for the achievement of a level playing field to limit the expenditure of third-party campaigners relative to parties and candidates, it is also clear that the expert panel considered it was necessary to gather evidence to establish the appropriate relativity before the change was enacted. Yet, for reasons which do not appear, that recommendation went unheeded. It is as if Parliament simply went ahead and enacted the *Electoral Funding Act* without pausing to consider whether a cut of as much as 50 per cent was required.

118 In the result, it is impossible to say whether or not the differential remains within the bounds of what might reasonably be required and, for that reason, impossible for the Court to be persuaded that the extent of the cut in the third-party campaigner expenditure cap is necessary. Therefore, it has not been demonstrated that the extent of the cut is appropriate and adapted to the achievement of the legitimate purpose of maintaining a level playing field.

119 For these reasons, I agree in the answers proposed by the plurality to the questions set out in the special case.

(1996) 186 CLR 352 at 366-367 per Brennan CJ, 374-375 per Toohey J, 375-376 per Gaudron J; [1996] HCA 52; *Levy* (1997) 189 CLR 579 at 597-599 per Brennan CJ, 608-609 per Dawson J, 614-615 per Toohey and Gummow JJ, 619-620 per Gaudron J, 627-628 per McHugh J, 647-648 per Kirby J.

169 See, eg, *McCloy* (2015) 257 CLR 178 at 208-209 [49]-[53], 211 [61] per French CJ, Kiefel, Bell and Keane JJ, 250-251 [191]-[196] per Gageler J, cf at 272-273 [266]-[268] per Nettle J.

120 GORDON J. Unions NSW, together with five other plaintiffs, challenges the validity of two provisions of the *Electoral Funding Act 2018* (NSW) ("the EF Act") which affect the extent of electoral expenditure that can be incurred by a third-party campaigner during a set period leading up to New South Wales State elections.

121 The plaintiffs – all but one registered as a third-party campaigner under the EF Act for the March 2019 election and each asserting an intention to incur electoral expenditure in connection with New South Wales State elections – contend that s 29(10) (read with s 33(1)) of the EF Act ("the TPC Expenditure Cap") and s 35(1) of the EF Act each impermissibly burden the implied freedom of political communication.

122 I agree that the questions reserved for the consideration of the Full Court should be answered in the terms proposed by Kiefel CJ, Bell and Keane JJ. However, I wish to set out my reasons for concluding that the TPC Expenditure Cap is invalid. I agree with the reasons of Kiefel CJ, Bell and Keane JJ for the orders made prior to the hearing refusing the applications for leave to intervene or to be heard as amicus curiae.

Statutory framework and history

123 The EF Act implements[170] a number of reforms to New South Wales electoral funding legislation recommended by an independent panel of experts[171] ("the Expert Panel") in December 2014 ("the Expert Panel Report") and by the Joint Standing Committee on Electoral Matters[172] ("the JSCEM") in June 2016 ("the JSCEM Report").

124 In relation to electoral expenditure, the Expert Panel considered the March 2011 election[173]. The special case recorded that during the capped State expenditure period for the March 2011 election, the most that a registered third-party campaigner spent on "electoral communication expenditure"

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170 See New South Wales, *Electoral Funding Bill 2018*, Explanatory Note at 1; New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 17 May 2018 at 1.

171 Panel of Experts, *Political Donations: Final Report* (2014).

172 New South Wales, Joint Standing Committee on Electoral Matters, *Inquiry into the Final Report of the Expert Panel – Political Donations and the Government's Response*, Report No 1/56 (2016).

173 See Panel of Experts, *Political Donations: Final Report* (2014), vol 1 at 105-106.

(as defined under the EF Act's predecessor[174]) was $358,439.33. For illustrative purposes only, that amount indexed for inflation (that is, in present day terms) would be over $400,000. Indeed, all but four registered third-party campaigners spent less than $100,000 in present day terms during the capped State expenditure period for the March 2011 election. The Expert Panel Report recommended that "the cap on electoral expenditure by third-party campaigners be decreased[175] to $500,000 and adjusted annually for inflation" ("Recommendation 31")[176].

125 The Expert Panel Report was considered by the JSCEM, whose final report was delivered in June 2016. Given the passage of time, the JSCEM had before it what had occurred in the March 2015 election. The position during that election was a little different. Twelve of the 36 registered third-party campaigners incurred "electoral communication expenditure"[177] greater than $100,000 in present day terms, with six (including a number of the plaintiffs in this special case) incurring expenditure that would have come close to, or exceeded, the $500,000 cap.

126 In ch 7 of the JSCEM Report, titled "Third-party campaigners", the details of third-party expenditure during the financial year in which the March 2015 election took place (that is, not just the capped State expenditure period) were described as follows[178]:

> "7.17 The NSW Electoral Commission has now published third-party campaigners' disclosures for the period 1 July 2014 to 30 June 2015. The third-party campaigners with the largest expenditure during this period are as follows:

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174 See *Election Funding, Expenditure and Disclosures Act 1981* (NSW), s 87.

175 The cap at the time of the Expert Panel Report was $1,050,000: see *Election Funding, Expenditure and Disclosures Act 1981*, s 95F(10).

176 Panel of Experts, *Political Donations: Final Report* (2014), vol 1 at 14; see also at 8-9, 105-113.

177 See *Election Funding, Expenditure and Disclosures Act 1981*, s 87.

178 New South Wales, Joint Standing Committee on Electoral Matters, *Inquiry into the Final Report of the Expert Panel – Political Donations and the Government's Response*, Report No 1/56 (2016) at 48 [7.17]-[7.18] (footnote omitted).

No	Name of third party campaigner	Total expenditure
1	Electrical Trade[s] Union of Australia NSW Branch	$997,555.58
2	NSW Nurses and Midwives' Association	$907,831.22
3	Unions NSW	$843,283.14
4	NSW Business Chamber Limited	$490,375.64
5	NSW Minerals Council Limited	$481,479.51

> 7.18 [The Secretary of Unions NSW] explains that Unions NSW's spending for the 2015 election included:
>
> ... $380,000 on advertising expenditure; $264,000 on production and distribution of electoral materials; $15,000 on the internet, telecommunications, stationery and postage; $120,000 on staff costs; $8,000 on travel; and $52,000 on research."

127 The JSCEM addressed the Expert Panel's Recommendation 31 as follows[179]:

> "Committee comment
>
> 7.20 The Committee believes that third-party campaigners should be able to spend a reasonable amount of money to run their campaign. However, the Committee agrees with the Panel that this should not be to the same extent as candidates and parties.
>
> 7.21 The Committee acknowledges the third-party campaigner expenditure from the 2015 State Election.

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179 New South Wales, Joint Standing Committee on Electoral Matters, *Inquiry into the Final Report of the Expert Panel – Political Donations and the Government's Response*, Report No 1/56 (2016) at 49 [7.20]-[7.22].

> 7.22 The Committee supports the Panel's recommendation to reduce the cap on expenditure for third-party campaigners. *The Committee is of the view that, before implementing this change, the NSW Government should consider whether there is sufficient evidence that a third-party campaigner could reasonably present its case with an expenditure cap of $500,000*." (emphasis added)

128 The JSCEM's formal recommendation ("Recommendation 7") addressed the need for the New South Wales Government to consider whether there was sufficient evidence that a third-party campaigner could reasonably present its case with an expenditure cap of $500,000 before decreasing the cap. As is self-evident, the JSCEM had a concern about the level of the cap. There is nothing in the special case to suggest that evidence directed to addressing that concern was obtained and considered, or even sought to be obtained.

129 The EF Act was enacted with effect from 1 July 2018. Like its predecessor – the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ("the EFED Act") – the EF Act creates a comprehensive scheme regulating the extent and sources of funding for elections, and requiring annual disclosure to the Electoral Commission[180] of political donations, and of electoral expenditure by parties, elected members, candidates, groups and associated entities[181], as well as by third-party campaigners in certain circumstances[182].

130 The express objects of the EF Act are[183]:

> "(a) to establish a fair and transparent electoral 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 or in local government,
>
> (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,

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180 EF Act, s 17; see generally Div 2 of Pt 3.

181 EF Act, s 12(1), (3).

182 EF Act, s 12(2).

183 EF Act, s 3.

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

131 Division 4 of Pt 3 of the EF Act, headed "Caps on electoral expenditure for election campaigns", contains the two impugned provisions. That Division sets the upper limits of permissible expenditure on election campaigns for various categories of persons and organisations during the "capped State expenditure period"[184].

132 Two definitions, which operate as limits, lie at the core of this part of the scheme: the definitions of "electoral expenditure" and "capped State expenditure period". "Electoral expenditure" is defined exhaustively in s 7 as "expenditure for or in connection with promoting or opposing, directly or indirectly, a party or the election of a candidate or candidates or for the purpose of influencing, directly or indirectly, the voting at an election, and which is expenditure of one of the [kinds set out in s 7(1)]". Sub-sections (2) and (3) of s 7 set out a number of express exclusions from the definition of "electoral expenditure", one of which (in s 7(3)) – applicable to entities or persons other than parties, associated entities, elected members, groups or candidates – is "expenditure … not incurred for the dominant purpose of promoting or opposing a party or the election of a candidate or candidates or influencing the voting at an election". Expenditure is taken to be "incurred" for the purposes of the EF Act "when the services for which the expenditure is incurred are actually provided or the goods for which the expenditure is incurred are actually delivered"[185].

133 "Capped State expenditure period" is defined in s 27 by reference to two distinct time periods during which the applicable caps on electoral expenditure apply:

> "(a) in the case of a general election to be held following the expiry of the Assembly by the effluxion of time – the period from and including 1 October in the year before which the election is to be held to the end of the election day for the election,
>
> (b) in any other case – the period from and including the day of the issue of the writ or writs for the election to the end of the election day for the election."

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184 See EF Act, s 27.

185 EF Act, s 34(1).

134 Section 29 sets out the caps on electoral expenditure for State election campaigns. The caps applicable to third-party campaigners[186] are in s 29(10) and (11). Section 29(10) provides:

> "For a State general election, the applicable cap for a third-party campaigner is:
>
> (a) $500,000 if the third-party campaigner was registered under [the EF Act] before the commencement of the capped State expenditure period for the election, or
>
> (b) $250,000 in any other case."

135 Section 29(12) provides that the applicable cap for parties and third-party campaigners is subject to an additional cap (within the overall applicable cap) for electoral expenditure incurred substantially for the purposes of the election in a particular electoral district: in respect of each such electoral district, $61,500 in the case of a party and $24,700 in the case of a third-party campaigner. Each cap is to be adjusted for inflation[187].

136 Section 33(1) then prohibits parties, groups, candidates, third-party campaigners and associated entities from incurring expenditure that exceeds the applicable cap during the capped State expenditure period. The TPC Expenditure Cap arises from s 29(10) read with s 33(1).

The TPC Expenditure Cap is invalid

137 The implied freedom of political communication has been recently explained[188]. It cannot be understood as being "confined to communications between elected representatives and candidates for election on the one hand and the electorate on the other"[189]. That is because the "efficacy of representative

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186 "Third-party campaigner" is defined, relevantly, in s 4 of the EF Act as: "(a) for a State election – a person or another entity (not being an associated entity, party, elected member, group or candidate) who incurs electoral expenditure for a State election during a capped State expenditure period that exceeds $2,000 in total, … (c) a registered third-party campaigner for an election for which it is registered".

187 EF Act, s 29(14).

188 *Brown v Tasmania* (2017) 261 CLR 328 at 430 [312]-[313]; [2017] HCA 43.

189 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 139; [1992] HCA 45, cited in *Unions NSW v New South Wales* ("*Unions No 1*") (2013) 252 CLR 530 at 551 [28]; [2013] HCA 58.

government depends … upon free communication … between all persons, groups and other bodies in the community"[190]. Put another way, third-party campaigners have a legitimate interest in governmental action and the direction of policy[191].

138 New South Wales concedes that the TPC Expenditure Cap burdens the implied freedom. The validity of the TPC Expenditure Cap therefore turns on whether that burden can be justified. The level of justification required will depend on the nature and extent of the burden that the TPC Expenditure Cap imposes[192].

139 The TPC Expenditure Cap's burden on the implied freedom is direct. It effects a restriction on third-party campaigners' "electoral expenditure", thereby limiting the funds that a third-party campaigner may permissibly spend on goods and services such as advertisements[193], production and distribution of election material[194], internet, telecommunications and postage[195], and staffing[196].

140 It sets the amount of $500,000 (an adjustable amount that is indexed for inflation[197]) as the upper limit for such expenditure. That limitation, in turn, directly affects the ability of third-party campaigners to engage in political communication. The restriction applies during a set period – the capped State expenditure period – which runs either from 1 October in the year before an election is to be held to the end of the election day (following the "expiry of the Assembly by the effluxion of time")[198] or from the day of the issue of the writ for the election to the end of the election day (in any other case)[199]. Under the

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190 *ACTV* (1992) 177 CLR 106 at 139, cited in *Unions No 1* (2013) 252 CLR 530 at 551 [28].

191 *Unions No 1* (2013) 252 CLR 530 at 551 [30].

192 *Brown* (2017) 261 CLR 328 at 367 [118], 369 [128], 378-379 [164]-[165], 389-390 [200]-[201], 460 [411], 477-478 [478].

193 EF Act, s 7(1)(a).

194 EF Act, s 7(1)(b).

195 EF Act, s 7(1)(c).

196 EF Act, s 7(1)(d).

197 EF Act, s 29(14).

198 EF Act, s 27(a).

199 EF Act, s 27(b).

EF Act, third-party campaigners are entitled to spend $500,000 on communications that promote or oppose, directly or indirectly, a party or the election of a candidate or are for the purpose of influencing, directly or indirectly, the voting at an election[200] during the capped State expenditure period. Of course, they are free to communicate about those matters outside of the capped State expenditure period, without restriction under the EF Act, and are free to communicate about governmental or political matters that fall outside the election campaign.

141 The plaintiffs' complaint is not about the existence of the cap or about the fact that there is a difference between the limits imposed by the various caps[201]. The imposition of expenditure caps is not new. And differentiation between the caps for the various participants in the electoral process is not new. Rather, the plaintiffs' complaint is directed to the reduction in the cap (from that which existed under the EFED Act) and the relative difference between the caps imposed on third-party campaigners and on political parties.

142 In the EF Act, the statutory purpose of protecting the integrity of the political process is made express by the Act's stated objects. As has been seen, those objects are stated to include establishing a "fair and transparent electoral funding, expenditure and disclosure scheme"[202] and helping prevent corruption and undue influence[203]. The TPC Expenditure Cap is said to advance those objects.

143 Indeed, the idea of fairness was central to the independent inquiries, reports and debates that led to the substantial amendments to electoral funding regulation by the enactment of the EF Act. As the Second Reading Speech for the *Electoral Funding Bill 2018* (NSW) ("the EF Bill") records, the Expert Panel Report considered that third-party campaigners "should have sufficient scope to run campaigns to influence voting at an election – just not to the same extent as parties or candidates"[204] and that the cap would "allow third party campaigners to

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200 See the definition of "electoral expenditure" in s 7 of the EF Act.

201 See generally EF Act, s 29.

202 EF Act, s 3(a).

203 EF Act, s 3(c).

204 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 17 May 2018 at 4.

reasonably present their case while ensuring that the caps are in proportion to those of parties and candidates who directly contest elections"[205].

144 In reply during the second reading debate, the Special Minister of State responded to concerns raised about the $500,000 cap by noting that it was a specific recommendation of the Expert Panel, who had examined the amount of the cap closely and considered that third-party campaigners should not be able to "drown out the voices of parties and candidates who are the direct electoral contestants"[206].

145 That is true. The Expert Panel Report did state that the $500,000 cap was recommended in order to "guard against" third parties dominating election campaigns[207]. But only part of that recommendation was subsequently supported by the JSCEM. The reduction in the cap was approved subject to the New South Wales Government considering "whether there [was] sufficient evidence that a third-party campaigner could reasonably present its case with an expenditure cap of $500,000"[208]. And, as noted earlier, there is nothing before the Court to suggest that the New South Wales Government subsequently obtained any evidence addressing third-party expenditure, let alone evidence sufficient to establish that "a third-party campaigner could reasonably present its case with an expenditure cap of $500,000".

146 Thus, to adopt and adapt the reasoning of Mason CJ in *Australian Capital Television Pty Ltd v The Commonwealth* ("*ACTV*"), even if it is *assumed*: that the purpose of the TPC Expenditure Cap is to advance one or more of the objects of the legislation set out in the objects clause; that giving a "privileged position"[209] to candidates for election is a purpose consistent with the system of representative and responsible government to which ss 7 and 24 of the *Constitution* give effect; and that "[t]he enhancement of the political process and

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205 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 17 May 2018 at 4.

206 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 May 2018 at 62.

207 Panel of Experts, *Political Donations: Final Report* (2014), vol 1 at 105, cited in New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 May 2018 at 63.

208 New South Wales, Joint Standing Committee on Electoral Matters, *Inquiry into the Final Report of the Expert Panel – Political Donations and the Government's Response*, Report No 1/56 (2016) at 49 [7.22].

209 See Panel of Experts, *Political Donations: Final Report* (2014), vol 1 at 109.

the integrity of that process are by no means opposing or conflicting interests"[210], the Court should, nonetheless, "scrutinize very carefully [the] claim that freedom of communication must be restricted in order to protect the integrity of the political process"[211].

147 As Mason CJ explained, "[e]xperience 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" and "[a]ll too often attempts to restrict the freedom in the name of some imagined necessity have tended to stifle public discussion and criticism of government"[212].

148 Thus, his Honour considered that "[t]he Court should be astute not to accept at face value claims by the legislature and the Executive that freedom of communication will, unless curtailed, bring about corruption and distortion of the political process"[213]. Just as in *ACTV*, the Court must, here, be astute not to accept at face value the assertion that freedom of communication will, unless curtailed by a reduction in the cap to $500,000, bring about corruption and distortion of the political process.

149 Here, the need to be astute is heightened by the fact that it is not possible to accept at face value the claims by the legislature and the executive. Given Recommendation 7 of the JSCEM and the content of the special case, it is not clear on what basis (if any) the Special Minister of State was able to observe during the second reading debate for the EF Bill that the $500,000 cap "strikes the right balance"[214].

150 It may be accepted that the burden is limited to a particular time period, is limited to particular kinds of political communication, and amounts to a restriction on, rather than exclusion of, third-party campaigners with respect to electoral expenditure required for political communication. However, even if the TPC Expenditure Cap is rationally connected to the legitimate purposes it seeks to serve, the Court is unable to assess whether the burden is justified and is not

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210 *ACTV* (1992) 177 CLR 106 at 145.

211 *ACTV* (1992) 177 CLR 106 at 145; see also at 144.

212 *ACTV* (1992) 177 CLR 106 at 145.

213 *ACTV* (1992) 177 CLR 106 at 145.

214 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 May 2018 at 63.

"undue"[215]. That is, the Court cannot answer, one way or another, the final aspect of the *Lange* questions[216]: it cannot be satisfied that the level of the expenditure cap is reasonably appropriate and adapted to achieve the asserted constitutionally permissible end.

151 That conclusion proceeds on the premise that it is New South Wales that must demonstrate that the burden on the implied freedom is justified. While issues relating to onus have been the subject of competing views of members of this Court[217], it must now be accepted that once it has been demonstrated that a legislative provision burdens the implied freedom, it is for the supporter[218] of the legislation to persuade the Court that the burden is justified – including, where necessary, by ensuring sufficient evidence is put on to support its case.

152 Here, that task fell to New South Wales. New South Wales did not fulfil that task. Even if the Court accepts that it is open for the legislature to impose some cap on third-party campaigners' electoral expenditure; that some differentiation between the caps for third-party campaigners, on the one hand, and parties and candidates, on the other, is permissible; and that it is not for this Court to descend into an examination of whether some other figure for the cap should have been selected by the legislature, it is apparent on the face of the record that the JSCEM itself did not, because it could not, determine whether $500,000 was the right level of reduction – with the result that the JSCEM expressed its support for a reduction in the cap without specifying the figure to

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215 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 569, 575; [1997] HCA 25.

216 *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. cf *McCloy v New South Wales* (2015) 257 CLR 178 at 193-195 [2]; [2015] HCA 34, as modified by *Brown* (2017) 261 CLR 328 at 363-364 [104]; see also at 398 [236], 413 [271], 416-417 [277]-[278].

217 See and compare *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 304-305 per Mason CJ; [1994] HCA 44; *Levy v Victoria* (1997) 189 CLR 579 at 598-599 per Brennan CJ; [1997] HCA 31; *Coleman v Power* (2004) 220 CLR 1 at 124 [329] per Heydon J; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 362 [69] per McHugh J; [2005] HCA 44; *McCloy* (2015) 257 CLR 178 at 201 [24] per French CJ, Kiefel, Bell and Keane JJ; *Brown* (2017) 261 CLR 328 at 370 [131] per Kiefel CJ, Bell and Keane JJ; cf at 421-422 [288] per Nettle J. See generally *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 38-39 [78] per French CJ, 120-121 [384] per Crennan J; [2010] HCA 46.

218 *McCloy* (2015) 257 CLR 178 at 201 [24]; *Brown* (2017) 261 CLR 328 at 370 [131].

which the cap should be reduced[219]. Given the recommendation of the JSCEM Report, it is not apparent how the legislature could assert that the TPC Expenditure Cap "allows a third-party campaigner to reasonably present its case and have a genuine voice in the debate" or serves to "guard against" third-party campaigners dominating election campaigns[220].

153 That s 29(10) responds to concerns identified by the Expert Panel about the risk of third-party campaigners drowning out the voices of those at the core of the electoral process is not in doubt. It is the size of the reduction in the cap that is, and remains, in issue and not justified. That the "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"[221] is also not in doubt. But, here, the concern of the JSCEM as to whether there is sufficient evidence that a third-party campaigner could reasonably present its case with an expenditure cap of $500,000 was, and remains, unanswered. Given that unaddressed concern, the Court cannot be satisfied that the burden of the TPC Expenditure Cap on the implied freedom is justified. The burden is therefore impermissible, and the TPC Expenditure Cap invalid.

154 As will be observed, the reasons given for reaching those conclusions assume, in favour of New South Wales, that the provisions have purposes consistent with the system of representative and responsible government to which ss 7 and 24 of the *Constitution* give effect. It is not necessary in this case to consider whether those assumptions are right. It is therefore neither necessary nor desirable to offer any view about either how the relevant purposes can or should be identified or what are to be treated as the relevant elements of the system of representative and responsible government. Both may be very large issues. And, at least in respect of the system of government, that issue would require consideration of whether the system has essential elements beyond those identified in ss 7 and 24 of the *Constitution*. Indeed, it may be observed that the role of political parties in the Australian political system may have changed since Federation and may continue to change.

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219 See New South Wales, Joint Standing Committee on Electoral Matters, *Inquiry into the Final Report of the Expert Panel – Political Donations and the Government's Response*, Report No 1/56 (2016) at 49 [7.20]-[7.22] and Recommendation 7.

220 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 May 2018 at 63.

221 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 50; [1992] HCA 46, quoted in *Brown* (2017) 261 CLR 328 at 467 [436]. See also *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 197 [32]; [2004] HCA 41; *McCloy* (2015) 257 CLR 178 at 229-230 [122]-[123].

EDELMAN J.

Introduction

155 Absolute freedom for the pike is death for the minnow[222]. The text and structural design of the *Constitution* of the Commonwealth of Australia requires a qualified, not an absolute, freedom of political communication. The qualification is that legislative purposes can be pursued even if they burden the freedom of political communication provided that the purposes are legitimate and that the burden is justified. The first limb of that proviso exists because the constitutional freedom of political communication would be stultified by a law that burdens the freedom with the purpose of doing so.

156 The special case and the detail of the parties to it are set out in the joint judgment. The question at the heart of this case is whether it is legitimate for legislation to have a purpose to ensure a greater freedom of political communication of one group, namely candidates and political parties, over another, namely third-party campaigners. The plaintiffs submit that such a purpose is illegitimate. The defendant submits that such a purpose is legitimate and contemplated by ss 7 and 24 of the *Constitution*.

157 Until mid-2018, the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) as amended in 2011[223] ("the Previous Act") fixed caps on State "electoral communication expenditure" for third-party campaigners. Section 95F(10) capped third-party campaigner expenditure at $1,050,000 if the third-party campaigner was registered before the commencement of the capped State expenditure period, or $525,000 if not. That Act did so for purposes including: (i) the reduction of the possibility for, or the perception of, corruption; (ii) ensuring equality of opportunity for participation in the political process; and (iii) avoiding the "drowning out" by third parties of the voices of candidates and parties campaigning for election. Those purposes might arguably have justified a much lower cap on expenditure by registered third-party campaigners of $500,000. Indeed, in the election that followed a few months after the amendments took effect, the largest amount of electoral communication expenditure by a third-party campaigner was $358,000, although this was for a truncated capped State expenditure period.

158 On 30 May 2018, the *Electoral Funding Act 2018* (NSW) was enacted, replacing the Previous Act. It commenced operation on 1 July 2018.

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222 Berlin, "Two Concepts of Liberty", in Hardy and Hausheer (eds), *The Proper Study of Mankind: An Anthology of Essays* (1998) 191 at 196, quoting Tawney, *Equality*, 3rd ed (1938) at 208.

223 *Election Funding and Disclosures Amendment Act 2010* (NSW), Sch 1.

The *Electoral Funding Act* increased the electoral expenditure cap for political parties and candidates. But, in s 29(10), it reduced the cap for third-party campaigners by more than half. The general purposes for the caps remained the same as in the Previous Act. Those general, abstract purposes could easily have been seen as exhausting the purposes of s 29(10) if the Previous Act had never existed. They could also have been seen as the purpose for the reduction in the third-party campaigner cap from the Previous Act if there were any rational link between them and a reduction in the cap. But no such link was asserted in any contextual material. None was a matter of submission. Without any additional purpose the significant change effected by s 29(10) is purposeless or random. An identification of legislative purpose proceeds on the basis that the legislature is a body that acts rationally and not without any rhyme or reason. Here, an additional purpose that explains the reduction in the third-party campaigner cap is revealed by the terms, the context, and the legislative history of s 29(10) and was, unsurprisingly, common ground.

159 The additional purpose, as described by the 2014 Expert Panel Report[224], was that "political parties and candidates should have a privileged position in election campaigns" because they are "directly engaged in the electoral [contest], and are the only ones able to form government and be elected to Parliament"[225]. In other words, the additional purpose was to ensure that the voice of third-party campaigners was quieter than that of political parties and candidates. This additional purpose is also reflected in s 35 of the *Electoral Funding Act*, which prevents only third-party campaigners from acting in concert with others to incur electoral expenditure that exceeds the third-party campaigner's cap. There is no similar restriction for candidates or political parties, or even closely associated political parties.

160 The additional purpose that motivated the introduction of ss 29(10) and 35 of the *Electoral Funding Act* was to burden the freedom of political communication of third-party campaigners. Such a purpose is incompatible with the maintenance of the constitutionally prescribed system of representative and responsible government. That additional purpose means that both provisions are invalid. It is, therefore, neither necessary nor appropriate to consider whether the lower cap and the "acting in concert" offence could have been justified by other, legitimate, purposes.

The three stages of assessing the implied freedom

161 The implied freedom of political communication is not absolute. It exists within a Constitution that is based upon, and respects, the existence of laws

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224 Panel of Experts, *Political Donations: Final Report* (2014).

225 Panel of Experts, *Political Donations: Final Report* (2014), vol 1 at 109.

affecting a multitude of different rights, privileges, powers, and immunities. Laws that have the purpose of enhancing or burdening some other interest are not invalid merely because they have the effect of burdening the freedom of political communication. The three questions set out in the joint judgment in *Brown v Tasmania*[226] provide a clear and principled way of approaching the issue of whether a law is invalid as contrary to the implied freedom of political communication. Each question must be considered before the next.

162 As to the first question, since the fundamental basis for the implied freedom is to prevent illegitimate burdens on the freedom of political communication, a precondition to the operation of the implied freedom as a constraint on legislative power is that the law must burden the freedom of political communication. That is why the first question to be asked is whether the law, "in its terms, operation or effect" – or, put another way, "in its legal or practical operation" – burdens the freedom of political communication[227]. This question is not concerned with the extent of the burden[228].

163 The point of asking the first question is to ensure that the implication is not applied beyond the circumstances required by its textual and structural foundations in the *Constitution*. Hence, since the constitutional implication is of a freedom from unjustified legislative burdens on *political* communication there cannot be a burden if some communication is affected but political communication is not[229]. The meaning of "political", in determining whether a communication is a political communication, is informed by communications

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226 (2017) 261 CLR 328 at 359 [88], 364 [104]; [2017] HCA 43. See also at 375-376 [156], 398 [237], 416 [277].

227 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567; [1997] HCA 25; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 553 [35], 573 [115]; [2013] HCA 58; *McCloy v New South Wales* (2015) 257 CLR 178 at 201 [24], 230-231 [126]-[127], 258 [220], 280 [306]; [2015] HCA 34; *Brown v Tasmania* (2017) 261 CLR 328 at 359 [88], 376 [156], 398 [237], 431 [316].

228 *Monis v The Queen* (2013) 249 CLR 92 at 145 [118]-[120], 212-213 [343]; [2013] HCA 4; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 555 [40]; *Tajjour v New South Wales* (2014) 254 CLR 508 at 548 [33], 558 [61], 569-570 [106]-[107], 578 [145]; [2014] HCA 35; *McCloy v New South Wales* (2015) 257 CLR 178 at 218 [83]; *Brown v Tasmania* (2017) 261 CLR 328 at 360 [90], 382-383 [180], 398-399 [237], 431 [316].

229 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 124-125; [1994] HCA 46; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351 [28], 362 [70]-[71], 404 [220], 449 [376], 481 [459]-[460]; [2005] HCA 44; *Tajjour v New South Wales* (2014) 254 CLR 508 at 605 [238]-[241].

necessary for the effective operation of the system of representative and responsible government[230]. It must also be a lawful political communication. There can be no burden upon the freedom of political communication by a law that prohibits acts that are independently unlawful[231].

164 It is common ground, and rightly so, that ss 29(10) and 35 of the *Electoral Funding Act* place a burden upon the freedom of political communication.

165 The second question only arises if there is a burden upon the freedom of political communication[232]. The second question asks: "is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?"[233] The second question exists because a law cannot, compatibly with the constitutional freedom, have a purpose to impose a burden upon the freedom that the *Constitution* protects. The second question does not involve assessing the appropriateness of the law including the extent to which its *effect* is to burden the freedom. That is the province of the third question.

166 The third question can only arise once a legitimate purpose has been identified. It has been expressed in terms that ask: "is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?"[234] The third question is concerned with whether the effect of the law in burdening the freedom is justified by its

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230 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 124-125; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 350-351 [27]-[28], 361-362 [67]-[68], 481 [460].

231 *Levy v Victoria* (1997) 189 CLR 579 at 622, 625-626; [1997] HCA 31; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 223-224 [107]-[108], 246 [184], 247 [186]-[187], 298 [337], 303-304 [354]; [2004] HCA 41; *Brown v Tasmania* (2017) 261 CLR 328 at 502-506 [557]-[563].

232 See *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 218 [90], 225 [112], 249 [192]; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 359 [59], 404 [220]; *McCloy v New South Wales* (2015) 257 CLR 178 at 231 [127]-[128]; *Brown v Tasmania* (2017) 261 CLR 328 at 506-507 [565].

233 *Brown v Tasmania* (2017) 261 CLR 328 at 364 [104]; see also at 376 [156], 416 [277], 432 [319]-[320].

234 *Brown v Tasmania* (2017) 261 CLR 328 at 364 [104]; see also at 376 [156], 416 [277], 433 [324].

legitimate purpose or purposes. Because the third question is dependent upon the legitimate purposes, the third question should not be answered without first identifying the legitimate purposes served by the law[235]. And the question of what legislative purposes the law serves "cannot be answered simply by [reliance upon] what may appear to have been legislative purpose"[236] or what one or more parties assert to be the legislative purposes.

167 For the reasons below, this special case should be resolved at the stage of the second question. The third question therefore does not arise.

The second question: legitimate purpose

The nature of legislative purpose

168 The statutory purpose, or purposes – since a legislature might have multiple purposes[237] – are the intended aims of the legislature. In some circumstances, such as this case, the identification of legislative purposes may prove elusive and divisive[238]. It is necessary to explain what is involved in the search for legislative purpose.

169 A search for the purposes or intended aims of the legislature involves a construct used to determine the meaning of the words used by that legislature. It is not a search for subjectively held purposes of any or all of the members of the Parliament that passed the law. Rather, it is a construct that accords with our conventions for understanding language, which are the techniques by which we understand words[239]. The same language techniques require a concurrent consideration of the meaning of words used in their context together with the

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235 *Wotton v Queensland* (2012) 246 CLR 1 at 31 [81], 32 [83]; [2012] HCA 2; *Monis v The Queen* (2013) 249 CLR 92 at 140 [98]; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 556 [46], 560 [60], 561 [64]; *McCloy v New South Wales* (2015) 257 CLR 178 at 203 [31], 212-213 [67], 231 [130].

236 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 61 [166]; [2010] HCA 46; *Monis v The Queen* (2013) 249 CLR 92 at 147 [125].

237 See *McCloy v New South Wales* (2015) 257 CLR 178 at 203-204 [33]-[34].

238 See, and cf, *Coleman v Power* (2004) 220 CLR 1 at 32 [32], 53 [102], 54 [104], 78 [198], 98-99 [256], 112 [297], 121-122 [323]-[324]; [2004] HCA 39; *Monis v The Queen* (2013) 249 CLR 92 at 133-134 [73]-[74], 139-140 [97], 161-163 [175]-[184], 173 [214], 174 [220]-[221], 205 [318], 207 [325], 214-215 [348]-[349].

239 See Hoffmann, "Language and Lawyers" (2018) 134 *Law Quarterly Review* 553 at 558-560.

purpose for which the words are used, in the sense of their intended aim. Hence, purpose must be identified by the same context, and hence the same extrinsic materials, that elucidate the meaning of the words[240].

170 Consistently with the concept of intention in law and language generally[241], an intended purpose of a law is different from its foreseeable consequences or effects[242]. A useful example of the distinction can be seen in a law that places caps on political donations for the *purpose* of reducing corruption but with the foreseeable *effect* or *consequence* of restricting the funds available to political parties and candidates to meet the costs of political communication[243].

171 The intended aim of legislation exists at a higher level of generality than the meaning of its words[244]. The meaning of a provision in its context is informed, at a higher level of generality, by the goal or "mischief"[245] to which the law is directed. Identifying that goal, or intended aim, relies upon the same ordinary processes of interpretation, including considering the meanings of statutory words in the provision[246], meanings of other provisions in the statute, the historical background to the provision, and any apparent social objective[247].

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240 Here, the *Interpretation Act 1987* (NSW), s 34.

241 *SZTAL v Minister for Immigration and Border Protection* (2017) 91 ALJR 936 at 943 [27], 955-957 [96]-[101]; 347 ALR 405 at 412-413, 430-432; [2017] HCA 34.

242 *McCloy v New South Wales* (2015) 257 CLR 178 at 205 [40]; *Brown v Tasmania* (2017) 261 CLR 328 at 362 [99], 392 [209], 432-433 [322].

243 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 555 [41]; *McCloy v New South Wales* (2015) 257 CLR 178 at 203 [33], 205 [40].

244 *Brown v Tasmania* (2017) 261 CLR 328 at 391-392 [208].

245 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 394 [178]; *McCloy v New South Wales* (2015) 257 CLR 178 at 232 [132]; *Brown v Tasmania* (2017) 261 CLR 328 at 363 [101], 391-392 [208]-[209], 432 [321]. See also *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 528 [56]; [2011] HCA 33.

246 *Monis v The Queen* (2013) 249 CLR 92 at 147 [125]; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 557 [50]; *McCloy v New South Wales* (2015) 257 CLR 178 at 212 [67]; *Brown v Tasmania* (2017) 261 CLR 328 at 362 [96].

247 *Monis v The Queen* (2013) 249 CLR 92 at 205 [317]. See also *Unions NSW v New South Wales* (2013) 252 CLR 530 at 557 [50]; *Brown v Tasmania* (2017) 261 CLR 328 at 432 [321].

172 In circumstances where a statute expressly sets out its own objects or purposes, that express statement will almost always be relevant to identifying the objects and purposes of a particular provision. But a court should not blindly accept that the high-level, abstract purposes of the whole Act must be the exhaustive statement of the purposes of a single provision. A generally stated objects clause that applies to the entirety of a statute will, usually of necessity, be stated at a high level of generality that might not touch upon, or might barely touch upon, some provisions. Nor should a court recognise any presumption or strong inference that objects expressly stated are the exclusive, constitutionally valid purposes of every provision, characterised at the appropriate level of generality. The characterisation of the purpose of a provision at the appropriate level of generality, and the adjudication of its legitimacy, are matters for the courts[248].

Determining when a legislative purpose is legitimate

173 The concern of the second question is whether a law, in imposing a burden, has that imposition as one of its purposes. If so, it will be illegitimate. The second question is not concerned with identifying a "reason" why an object or purpose is legitimate[249]. A purpose will always be illegitimate in the "rare"[250] circumstance where it has an aim to impair the freedom of political communication required by representative and responsible government. Since the implied freedom of political communication is a necessary incident of the system of representative and responsible government required by the *Constitution*, legislation that has an aim, namely a purpose, to burden that freedom could never be compatible with the constitutionally prescribed system of government, which requires the existence of that freedom. If it is no purpose of the law to burden the freedom then for the assessment of infringement of that implied freedom it will be necessary to ask the third question, namely whether the effect of the law, in imposing the burden, is justified by its purpose.

174 There are some cases where it has been said that the law imposes a burden upon the freedom of political communication but no legislative purpose can be identified separately from the effect of the law. In other words, the law's "purpose is properly described as the prevention of the conduct which it prohibits"[251]. In such cases, it has been said that the second question and third

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248 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1; [1951] HCA 5.

249 cf *Monis v The Queen* (2013) 249 CLR 92 at 164 [185].

250 *Monis v The Queen* (2013) 249 CLR 92 at 194 [281].

251 *Monis v The Queen* (2013) 249 CLR 92 at 133 [73]. See also *Unions NSW v New South Wales* (2013) 252 CLR 530 at 557-558 [51]-[52].

question "collapse into one"[252]. It is unnecessary in this case to consider whether, or when, the effects of the law, including burdening of political communication, will be treated as its purposes.

175 A purpose is illegitimate as part of the assessment of consistency with the implied freedom of political communication only where the purpose is to impair the freedom of political communication. Such a conclusion of illegitimacy is not a matter of discretion or of giving latitude to Parliament. It is true that, as the Attorney-General of the Commonwealth submitted, the *Constitution* leaves significant room for legislative choice in the design of an electoral system. Parliament has a wide range of choices over matters such as the type of electoral system and manner of voting, the size of any electoral districts, and whether voting is compulsory. However, the broad range of legislative choice exists only for laws that comply with the "bare foundations"[253] of the electoral system required by the *Constitution*. The *Constitution* requires laws to comply with those bare foundations. The foundations expressly include the electors' direct choice[254], and therefore their freedom to choose. Hence, laws requiring voting to be compulsory[255], or requiring full preferential voting[256], will be valid only so long as they "preserve[] freedom of choice of possible candidates". The foundations also impliedly include the electors' freedom to receive information on and to comment upon political matters[257]. As Gummow J said in *McGinty v Western Australia*[258]:

> "It is hardly to be expected that the Constitution was framed so as to present an impermanent or incomplete statement of the incidents of responsible government on the footing that the Parliament which would

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252 *Monis v The Queen* (2013) 249 CLR 92 at 133-134 [73]-[74].

253 *McGinty v Western Australia* (1996) 186 CLR 140 at 283; [1996] HCA 48; *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 121 [386], quoting Reid and Forrest, *Australia's Commonwealth Parliament 1901-1988* (1989) at 86. See also *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 188 [6], 207 [64], 237 [154].

254 *Constitution*, ss 7, 24.

255 *Judd v McKeon* (1926) 38 CLR 380 at 385; [1926] HCA 33.

256 *Langer v The Commonwealth* (1996) 186 CLR 302 at 315-316; [1996] HCA 43.

257 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560-561.

258 (1996) 186 CLR 140 at 286. See also *McCloy v New South Wales* (2015) 257 CLR 178 at 227-228 [114]-[115].

> make changes and remedy deficiencies perceived from time to time would be composed other than by the representatives of electors who had been free of legislative impediment in informing themselves and in receiving information and comment upon matters of political interest."

176 An example of a purpose that is illegitimate, in the context of inconsistency with electors' express freedom to choose rather than the implied freedom of political communication, can be seen in the dissenting decision of Dawson J in *Langer v The Commonwealth*[259]. In that case, one issue was whether s 329A of the *Commonwealth Electoral Act 1918* (Cth) was invalid. Dawson J concluded that s 329A was not within the ambit of Commonwealth legislative power. His Honour held that the purpose of s 329A was to prevent voters from becoming aware of the existence of their right to engage in optional preferential voting[260]. In other words, s 329A had the "intended effect of keeping from voters an alternative method of casting a formal vote which they are entitled to choose"[261]. Although this characterisation of the purpose of the law was a dissenting view, its acceptance inevitably led to the conclusion that the law was invalid. A law cannot validly have the purpose of undermining the requirement for choice by the people that is expressly required by the *Constitution*. The same must be true of a law that has a purpose of undermining the implied freedom of electors to engage in political communication.

A law with the purpose of silencing or preferring political communication is illegitimate

177 As I have explained, an implied freedom of political communication cannot co-exist with a law that undermines the freedom of political communication with a purpose of doing so. But a law will only have a purpose of burdening the freedom of political communication if that is one of its intended aims. That proscribed purpose will not exist simply because the law is with respect to, or even directed at, political communications as a means to achieve some other purpose[262].

178 Nor will a law that has the effect of burdening the freedom of political communication necessarily have that as its purpose even if the effect of

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259 (1996) 186 CLR 302.

260 (1996) 186 CLR 302 at 323.

261 (1996) 186 CLR 302 at 326.

262 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 143, 169, 234-235; [1992] HCA 45; *Levy v Victoria* (1997) 189 CLR 579 at 618-619.

burdening the freedom is a necessary step towards or consequence of some other purpose. For instance, a law might aim to increase the overall communicated content of political communication to electors by "silenc[ing] the voices of some in order to hear the voices of the others"[263]. On a Rawlsian, egalitarian model[264], the purpose of increasing communicated content is not a purpose that aims to undermine political communication. Indeed, it is consistent with, and reinforces, political communication with the electorate: it "enables voters to be better informed; no one voice is overwhelmed by another"[265]. Even though the effect of such a law would be to burden the freedom of political communication for some, the purpose of the law is consistent with the "great underlying principle" of the *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"[266]. The purpose of the law would be compatible with the system of representative and responsible government provided for in the *Constitution*[267].

179 There is, however, an essential distinction between a law that has the *effect* of "different treatment" by the quietening or silencing of some, even an effect that is a necessary step to achieving a legitimate purpose, and a law that has a *purpose* of the same different treatment by the quietening or silencing of some. Many laws have a justified effect of burdening the freedom of political communication but this does not mean that further analysis is needed before concluding that a law that has the purpose of burdening the freedom is

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263 Fiss, *The Irony of Free Speech* (1996) at 4. See *Harper v Canada (Attorney General)* [2004] 1 SCR 827 at 868 [62].

264 Feasby, "*Libman v Quebec (AG)* and the Administration of the Process of Democracy under the *Charter*: The Emerging Egalitarian Model" (1999) 44 *McGill Law Journal* 5; Pasquale, "Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform" [2008] *University of Illinois Law Review* 599.

265 *Harper v Canada (Attorney General)* [2004] 1 SCR 827 at 868 [62]. See also *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] AC 1312 at 1346 [28].

266 Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 616. See *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 139-140; *McCloy v New South Wales* (2015) 257 CLR 178 at 202 [27]. See also *Muldowney v South Australia* (1996) 186 CLR 352 at 378; [1996] HCA 52.

267 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 545-546 [8]-[9], 579 [138]; *McCloy v New South Wales* (2015) 257 CLR 178 at 207-208 [45]-[47], 248 [183]-[184], 257-258 [218], 259 [224], 285 [324]-[325].

illegitimate. In short, it is an error to conflate purpose with effect by reasoning that because an effect of quietening or silencing some might be justified, therefore a purpose of quietening or silencing some can be legitimate.

180 The defendant, with the support of the Attorney-General of the Commonwealth, met this issue head-on. The defendant submitted that a purpose of different treatment could be legitimate, arguing that "the constitutionally distinct position of candidates legitimises the pursuit of legislative objectives that select candidates and political parties for distinctive treatment relative to others who are not directly engaged in the electoral contest and who cannot be elected to Parliament or form government". That submission cannot be accepted.

181 In *Australian Capital Television Pty Ltd v The Commonwealth*[268], Mason CJ said that one reason why freedom of political communication was indispensable to a system of representative and responsible government was that "[o]nly by exercising that freedom can the citizen criticize government decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence the elected representatives". Similarly, Deane and Toohey JJ said that the implied freedom extends not merely to communications by candidates and political parties but also to "communications from the represented to the representatives and between the represented"[269]. A law will have the goal of undermining that freedom if its purpose is to silence the voices of part of the citizenry, not merely as a necessary step towards or consequence of achieving some other purpose, but for the very reason of ensuring that the position of some is suppressed relative to others.

Illegitimate purpose revealed by the meaning of ss 29(10) and 35 and the parties' pleadings

The meaning of ss 29(10) and 35

182 Sections 29(10) and 35 of the *Electoral Funding Act* are part of a scheme that regulates the electoral expenditure of political parties, candidates for election, and third-party campaigners. The core of the definition of "electoral expenditure" in s 7(1), subject to exceptions that can be put to one side, encompasses two limbs: first, expenditure "for or in connection with promoting or opposing, directly or indirectly, a party or the election of a candidate or candidates"; secondly, expenditure "for the purpose of influencing, directly or indirectly, the voting at an election".

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268 (1992) 177 CLR 106 at 138. See also *Unions NSW v New South Wales* (2013) 252 CLR 530 at 548 [17].

269 (1992) 177 CLR 106 at 174.

183 The relevant provisions in relation to electoral expenditure of third-party campaigners are as follows:

"**29 Applicable caps on electoral expenditure for State election campaigns**

(1) **General**

The applicable caps on electoral expenditure for a State election campaign are as provided by this section, as modified by section 30 (Aggregation of applicable caps – State election campaigns).

...

(10) **Third-party campaigners**

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

(a) $500,000 if the third-party campaigner was registered under this Act before the commencement of the capped State expenditure period for the election, or

(b) $250,000 in any other case.

...

35 Limit on electoral expenditure – third-party campaigner acting in concert with others

(1) It is unlawful for a third-party campaigner to act in concert with another person or other persons to incur electoral expenditure in relation to an election campaign during the capped expenditure period for the election that exceeds the applicable cap for the third-party campaigner for the election.

(2) In this section, a person ***acts in concert*** with another person if the person acts under an agreement (whether formal or informal) with the other person to campaign with the object, or principal object, of:

(a) having a particular party, elected member or candidate elected, or

(b) opposing the election of a particular party, elected member or candidate."

184 Section 33(1), read with s 143(1), makes it unlawful for third-party campaigners to exceed the expenditure cap and renders such conduct an offence with a maximum penalty of 400 penalty units or imprisonment for two years or both.

185 As the defendant submitted, s 35(1) does not prohibit all agreements to incur electoral expenditure that exceeds the third-party campaigner's cap during the capped period of the election. This is because the proscribed sole object, or proscribed principal object, does not include the second limb of the definition of electoral expenditure, namely the object of "influencing, directly or indirectly, the voting at an election". Nevertheless, it is likely that there will be few clear cases where a third-party campaigner could be confident that electoral expenditure is (i) incurred for the purpose of influencing voting at an election, but (ii) outside s 35(1) because it is not incurred with a principal object of supporting or opposing the election of a person or party.

186 Contrary to the submissions of the defendant, s 35 is not merely a general anti-avoidance provision. The *Electoral Funding Act* contains a general anti-avoidance provision in s 144 which includes a prohibition on schemes to circumvent electoral expenditure restrictions. Section 30 is another example of an anti-avoidance provision that strictly proscribes contrivances that would have the effect of circumventing the caps on parties and elected members. For instance, s 30(4) prohibits a party or elected member from incurring electoral expenditure for a State election campaign that exceeds the applicable cap if added to the electoral expenditure of an "associated entity". An associated entity is defined in s 4 as "a corporation or another entity that operates solely for the benefit of one or more registered parties or elected members". Section 30(4) thus prohibits a contrivance by an elected member or registered party to use a corporation that operates solely for its benefit in order to circumvent the cap.

187 Although s 30 is concerned with avoidance of the capped limit on electoral expenditure, it does not preclude two or more political parties, even if they are very closely aligned, from acting in concert to combine their electoral expenditure caps and thereby exceed their individual caps. It does not preclude two or more individual candidates in different electoral districts in the Legislative Assembly, or candidates in the Legislative Council, from acting in concert to combine their electoral expenditure caps and thereby exceed their individual caps. It does not preclude a party from acting in concert with another party or one or more individual candidates in different electoral districts to combine their electoral expenditure caps and thereby exceed their individual caps.

188 In contrast, s 35 is a provision that prohibits co-ordination by third parties even where the agreement may not result in a third-party campaigner exceeding its individual expenditure cap. For instance, two third-party campaigners could each use $300,000 of electoral expenditure on an advertising campaign on the same subject matter. But they could not spend $600,000 jointly on exactly the same advertising campaign with the purpose of communicating to the public that they were united in a political message. This restriction in s 35 has different purposes from the prohibition in s 144 upon schemes to circumvent a cap. Section 144 would preclude ten third-party campaigners from developing a scheme to run a $5 million campaign in order to circumvent their legislative caps. In contrast, s 35 precludes co-ordination that is not a scheme and might have nothing to do with legislative caps. It prohibits the force of some political communications that reveal that a message is being sent by multiple third parties jointly rather than individually. It reveals not merely a purpose to avoid drowning out the voices of parties and candidates for election but also one to quieten the voices of third parties in contrast with parties or candidates for election.

The general and specific purposes of ss 29(10) and 35 and the pleaded purposes

189 Section 3 of the *Electoral Funding Act* recites five general objects: (a) to establish a fair and transparent electoral 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 or in local government; (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; and (e) to promote compliance by parties, elected members, candidates, groups, agents, associated entities, third-party campaigners and donors with the requirements of the electoral funding, expenditure and disclosure scheme.

190 These objects are expressed at a high level of generality. Plainly, they do not exhaust the objects or purposes of every one of the particular provisions of the *Electoral Funding Act*. In particular, the provisions that impose caps on electoral expenditure were also based on the same purposes as the Previous Act, which the *Electoral Funding Act* developed and referred to in Sch 2, cl 2 as a defined term (the "former Act"). The purposes of the expenditure caps in the Previous Act included[270] "reducing the advantages of money in dominating political debate", "provid[ing] for a more level playing field for candidates

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270 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 10 November 2010 at 27458. See also New South Wales, Joint Standing Committee on Electoral Matters, *Public funding of election campaigns*, Report No 2/54 (2010) at 20 [1.101].

seeking election, as well as for third parties who wish to participate in political debate" and "putting a limit on the political 'arms race', under which those with the most money have the loudest voice and can simply drown out the voices of all others". As explained above, those broadly "anti-drowning out" purposes are legitimate. Indeed the legitimacy of the general purposes of the Previous Act was not doubted when different provisions of the Previous Act were challenged in *Unions NSW v New South Wales*[271].

191 If the Previous Act had never been enacted then it might have been easy to see ss 29(10) and 35 as based only upon the anti-drowning out purposes. But that would be to ignore, as senior counsel for the plaintiffs submitted, that ss 29(10) and 35 were effectively amending provisions. Their purpose must be assessed in light of the fact that there had not been, and has not been, any suggestion, either inside or outside Parliament, that there was any inadequacy in the manner in which the previous caps served their purpose.

192 The amendments were not the random acts of Parliament, effecting significant change to the legislative provisions for no additional purpose or reason. Instead, the two provisions contained the additional, illegitimate, purpose to quieten the voices of third-party campaigners in contrast with parties or candidates for election. As explained above, that additional purpose is revealed by the meaning and operation of s 35. It is brought into even sharper focus, as explained below, by the legislative history of those provisions. Unsurprisingly, the additional purpose was effectively common ground in the pleadings.

193 In their statement of claim in this case, the plaintiffs pleaded that one of the purposes of s 29(10), when read with s 33(1) of the *Electoral Funding Act*, is to "privilege political communication by parties and/or candidates over political communication by third-party campaigners during State general election campaigns". That purpose is additional to the purposes of the Previous Act, which, although treating third-party campaigners differently from parties and candidates, did so for purposes other than privileging parties and candidates.

194 In its defence, the defendant denied this purpose in the terms in which it had been pleaded by the plaintiffs but asserted that the purposes of imposing lower caps on electoral expenditure by third-party campaigners included:

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271 (2013) 252 CLR 530 at 545-546 [8]-[9], 557 [49], 579 [138].

> "to accord to candidates and political parties – as those who are directly engaged in the electoral contest and the only ones able to be elected to Parliament to represent the people of New South Wales and to form government – the capacity to spend more than third party campaigners who are not so engaged and who are not able to be elected to Parliament".

195 Although expressed in different words, there is common ground in the pleadings about this additional purpose. It is a purpose of quietening the voices of third-party campaigners relative to political parties or candidates for election.

Illegitimate purpose revealed by the history of ss 29(10) and 35

196 Apart from being common ground in the pleadings and apparent from the meaning and operation of s 35, the additional, illegitimate purpose served by ss 29(10) and 35 is clear from the historical context in which the provisions were enacted. That historical context includes the Previous Act, the 2014 Expert Panel Report[272], and a Joint Standing Committee on Electoral Matters report in 2016[273], to which the *Electoral Funding Bill* responded[274].

The Previous Act

197 As I have mentioned, caps on electoral communication expenditure were first introduced in the Previous Act by amendments which commenced operation on 1 January 2011[275].

198 A registered political party endorsing candidates for the Legislative Assembly became subject to a cap of $100,000 multiplied by the number of districts in which a candidate was endorsed[276], and was subject to an additional cap of $50,000 for expenditure incurred substantially for the purposes of the election in a particular electorate[277]. An endorsed candidate for the

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272 Panel of Experts, *Political Donations: Final Report* (2014).

273 New South Wales, Joint Standing Committee on Electoral Matters, *Inquiry into the Final Report of the Expert Panel – Political Donations and the Government's Response*, Report No 1/56 (2016).

274 New South Wales, *Electoral Funding Bill 2018*, Explanatory Note at 1.

275 *Election Funding and Disclosures Amendment Act*, Sch 1.

276 Previous Act, s 95F(2).

277 Previous Act, s 95F(12)(a).

Legislative Assembly had a separate cap of $100,000[278]. An independent candidate for the Legislative Assembly[279] and a non-grouped candidate for the Legislative Council[280] were each capped at $150,000. A party endorsing candidates for the Legislative Council and no more than ten candidates for the Legislative Assembly[281] had a cap of $1,050,000, as did an independent group of candidates for the Legislative Council[282].

199 The electoral expenditure cap on third-party campaigners was derived from the cap on expenditure for an independent group of candidates in the Legislative Council. If the third-party campaigner was registered before the commencement of the capped State expenditure period, the cap was $1,050,000[283]. Otherwise it was $525,000[284]. The rationale by which this amount was chosen was that if the cap for third-party campaigners was substantially less than the cap for independent groups in the Legislative Council then third-party campaigners could conduct the same campaign by running for election to the Legislative Council[285]. An additional cap on third-party campaigners was $20,000 per electorate for electoral communication expenditure incurred substantially for the purposes of the election in that electorate[286].

The 2011 State election

200 A general election for the Parliament of New South Wales was held on 26 March 2011. As the expenditure caps had only been inserted into the Previous Act shortly before the 2011 election, the "capped State expenditure period" was a truncated period from 1 January 2011 to the close of polls[287].

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278 Previous Act, s 95F(6).

279 Previous Act, s 95F(7).

280 Previous Act, s 95F(8).

281 Previous Act, s 95F(4).

282 Previous Act, s 95F(5).

283 Previous Act, s 95F(10)(a).

284 Previous Act, s 95F(10)(b).

285 See Panel of Experts, *Political Donations: Final Report* (2014), vol 1 at 110.

286 Previous Act, s 95F(12)(b).

287 Previous Act, s 95H.

201 In the capped period, five political parties incurred a total combined electoral communication expenditure of approximately $20 million: the Australian Labor Party (NSW Branch) – $8.79 million; the Liberal Party of Australia NSW Division –$7.24 million; the National Party of Australia (NSW) – $1.75 million; the Greens – $1.35 million; and the Country Labor Party – $500,000.

202 In contrast with the $20 million incurred by the five political parties, the 43 registered third-party campaigners incurred a total combined electoral communication expenditure of $1.51 million. The highest amount was by the National Roads and Motorists Association Ltd – $358,000; followed by the NSW Business Chamber – $354,000; and Unions NSW – $197,000.

The Expert Panel Report

203 Following a series of investigations by the Independent Commission Against Corruption into illegal political donations, the New South Wales Government appointed an "Expert Panel" to consider and report on options for long-term reform of political donations in New South Wales[288]. The Panel was chaired by Dr Kerry Schott. The other members were Mr Andrew Tink AM, the former Liberal Shadow Attorney-General, and the Hon John Watkins, the former Labor Deputy Premier.

204 The Panel delivered its report in December 2014. In relation to the expenditure caps in the Previous Act for political parties and candidates, the Panel concluded that the *Election Funding, Expenditure and Disclosures Act* "adequately accommodates" the New South Wales electoral system and that "[t]he current caps provide for a fair contest in Legislative Assembly electorates, by seeking to provide equal spending for party and independent candidates"[289]. However, the Panel was more sceptical about the caps that applied to third-party campaigners. The Panel said that although third-party campaigners "should be free to participate in election campaigns"[290], this participation should be more restricted than that of individual candidates or political parties. The Panel might be said to have had two reasons for desiring this restriction.

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288 Panel of Experts, *Political Donations: Final Report* (2014), vol 1 at 24.

289 Panel of Experts, *Political Donations: Final Report* (2014), vol 1 at 64.

290 Panel of Experts, *Political Donations: Final Report* (2014), vol 1 at 8.

205 First, the Panel was concerned about an increase in third-party campaigning[291] and the emergence of US-style Political Action Committees[292]. This concern led the Panel to reiterate that third-party campaigners "should not be able to drown out the voices of parties and candidates who are the direct electoral contestants"[293]. However, the Panel did not suggest that these concerns, which were also purposes of the Previous Act, required a reduction in the present cap because third-party campaigners were presently drowning out the voices of parties and candidates or because the existing cap was insufficient to guard against potential future increases in third-party campaigns. Nor was it said that a reduction was required for any other arguably legitimate purpose such as preserving public confidence in the conduct of public affairs[294].

206 Secondly, the Panel "strongly" agreed that "political parties and candidates should have a privileged position in election campaigns" as they are "directly engaged in the electoral [contest], and are the only ones able to form government and be elected to Parliament"[295]. In contrast with this reasoning, the third-party campaigner cap in the Previous Act had been derived from the cap on expenditure for an independent group of candidates in the Legislative Council. Separately from its concern about the voices of candidates or parties being "drowned out" and in contrast with the reasons for the previous cap, the Panel regarded political parties and candidates as deserving of a privileged position, with a danger arising from third-party campaigners running single-issue campaigns that were effective[296]:

> "The Panel is concerned about the potential for wealthy protagonists motivated by a particular issue to run effective single-issue campaigns. The potential for these sort of campaigns can be seen federally in the well-funded campaigns against the mining tax and WorkChoices. In New South Wales, issues such as coal seam gas or electricity privatisation have the potential to unite opposition and motivate wealthy interests. The

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291 Panel of Experts, *Political Donations: Final Report* (2014), vol 1 at 108, quoting Orr and Gauja, "Third-Party Campaigning and Issue-Advertising in Australia" (2014) 60 *Australian Journal of Politics and History* 73 at 74, but compare at 82.

292 Panel of Experts, *Political Donations: Final Report* (2014), vol 1 at 8, 108.

293 Panel of Experts, *Political Donations: Final Report* (2014), vol 1 at 8.

294 *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 75-76.

295 Panel of Experts, *Political Donations: Final Report* (2014), vol 1 at 109.

296 Panel of Experts, *Political Donations: Final Report* (2014), vol 1 at 110.

> Panel is concerned that a lack of appropriate third-party regulation would work against reformist governments pursuing difficult and controversial issues in the public interest."

207 Notably, the Panel did not suggest that the voices of candidates or political parties at previous elections had been drowned out by campaigns against the mining tax, or against WorkChoices, or, most relevantly to New South Wales, in relation to coal seam gas or electricity privatisation. Indeed, as will be explained below, there was no suggestion of any drowning out caused by a co-ordinated campaign, within the existing caps, against privatisation during the subsequent 2015 election period. The concern was simply that, unlike parties or candidates, third-party campaigners should not have a voice that was significant enough to "work against reformist governments". This second concern echoes the language of the proscribed purpose described by Keane J in *Unions NSW v New South Wales*[297], which is the partial suppression of political communication "by reference to the political agenda".

208 The Panel thus concluded that[298]:

> "third-party campaigners should have sufficient scope to run campaigns to influence voting at an election – just not to the same extent as parties or candidates. It is therefore fair for parties and candidates to have higher spending caps than third-party campaigners."

209 The Panel's recommendation (recommendation 31) was to reduce the third-party expenditure cap to $500,000, which "strikes the right balance between the rights of third parties and those of parties and candidates". The Panel said that this was "still well above the approximately $400,000 that the NRMA, the highest spending third party, spent at the 2011 election"[299].

210 The Panel also said that it would be appropriate to review the level of the third-party spending caps after the 2015 election[300]. The reason for review after the 2015 election, explained earlier, was that the period of capped electoral expenditure at the 2011 election had been truncated, precluding meaningful assessment of the effectiveness of the expenditure caps[301]. The Panel said that

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297 (2013) 252 CLR 530 at 581 [146].

298 Panel of Experts, *Political Donations: Final Report* (2014), vol 1 at 112.

299 Panel of Experts, *Political Donations: Final Report* (2014), vol 1 at 112-113.

300 Panel of Experts, *Political Donations: Final Report* (2014), vol 1 at 112.

301 Panel of Experts, *Political Donations: Final Report* (2014), vol 1 at 64.

the 2015 election "will be a better test of the level of the caps and the timing of the capped expenditure period"[302].

211 The Panel also recommended (recommendation 32) the introduction of a provision "to prevent ... third-party campaigners from acting in concert with others to incur electoral expenditure in excess of the caps on third-party expenditure"[303]. A legitimate purpose for this "aggregation" provision was to avoid third-party campaigners acting "with a combined expenditure cap that would completely overwhelm parties, candidates and other third parties acting alone"[304]. However, the Panel did not explain why the provision should go beyond merely schemes to avoid the cap which, by s 144, apply to all persons or why the anti-aggregation provision should extend significantly further than the much lighter restraints on aggregation by parties or candidates. The obvious inference is that the same reasons for different treatment of third-party campaigners required a different, stricter provision for the "new aggregation provision" that the Panel said should "occur along with" the spending cap reduction[305].

The 2015 State election

212 At the general election for the Parliament of New South Wales on 28 March 2015, the electoral communication expenditure by eight political parties during the capped State expenditure period commencing on 1 October 2014[306] amounted to approximately $21.4 million, and included the following amounts: the Liberal Party of Australia NSW Division – $7.05 million; the Australian Labor Party (NSW Branch) – $6.55 million; the Greens – $2.60 million; the Country Labor Party – $2.53 million; the National Party of Australia (NSW) – $1.88 million; and the Shooters, Fishers and Farmers Party – $717,000.

213 In the same period 36 registered third-party campaigners incurred a total combined electoral communication expenditure of $5.04 million. Three of the third-party campaigners incurred expenditure significantly in excess of $500,000: the NSW Nurses and Midwives' Association – $908,000; the Electrical Trades

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302 Panel of Experts, *Political Donations: Final Report* (2014), vol 1 at 64.

303 Panel of Experts, *Political Donations: Final Report* (2014), vol 1 at 8-9. Based upon what was then s 205H of the *Electoral Act 1992* (ACT).

304 Panel of Experts, *Political Donations: Final Report* (2014), vol 1 at 116.

305 Panel of Experts, *Political Donations: Final Report* (2014), vol 1 at 8.

306 Previous Act, s 95H.

Union of Australia NSW – $794,000; and Unions NSW – $720,000. Five union third-party campaigners ran a co-ordinated campaign against privatisation, including electricity privatisation, entitled "NSW Not For Sale". Each participating union incurred less electoral communication expenditure on the co-ordinated campaign than their individual caps, with a combined total expenditure of approximately $1.1 million.

The Joint Standing Committee reports

214 The New South Wales Government indicated its support in principle for 49 of 50 of the Panel's recommendations and referred both the Expert Panel Report and the Government's Response to the Joint Standing Committee on Electoral Matters to consider together with the administration of the 2015 New South Wales election. The Committee delivered reports in June 2016[307] and November 2016[308]. The November 2016 report can be put to one side as it does not discuss matters relevant to this case.

215 In the June 2016 report, the Joint Standing Committee said that "third-party campaigners should be able to spend a reasonable amount of money to run their campaign" but it agreed with the Panel that "this should not be to the same extent as candidates and parties"[309]. Hence, the Joint Standing Committee supported in principle the Panel's recommendation that the expenditure cap for third-party campaigners be reduced[310]. However, in light of the third-party expenditure in relation to the 2015 election, including by the three unions mentioned who spent considerably more than $500,000, the Committee recommended (recommendation 7) that before decreasing the limit to $500,000, the New South Wales Government should consider whether "there is sufficient

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307 New South Wales, Joint Standing Committee on Electoral Matters, *Inquiry into the Final Report of the Expert Panel – Political Donations and the Government's Response*, Report No 1/56 (2016).

308 New South Wales, Joint Standing Committee on Electoral Matters, *Administration of the 2015 NSW Election and Related Matters*, Report No 2/56 (2016).

309 New South Wales, Joint Standing Committee on Electoral Matters, *Inquiry into the Final Report of the Expert Panel – Political Donations and the Government's Response*, Report No 1/56 (2016) at 49 [7.20].

310 New South Wales, Joint Standing Committee on Electoral Matters, *Inquiry into the Final Report of the Expert Panel – Political Donations and the Government's Response*, Report No 1/56 (2016) at 49 [7.22] and recommendation 7.

evidence that a third-party campaigner could reasonably present its case within this expenditure limit"[311].

216 The Joint Standing Committee also supported the Panel's recommendation to enact an "acting in concert" offence, and recommended that the offence be enacted without further suggestions (recommendation 1)[312]. It supported the Panel's reasoning for recommending the offence be enacted[313].

The purpose of ss 29(10) and 35 against this history

217 The Explanatory Note to the *Electoral Funding Bill* explains that the Bill was prepared in response to the reports discussed above[314]. The caps for parties and candidates for election were substantially increased, consistently with the need acknowledged in the Previous Act, seven years earlier, for the caps to be indexed[315]. The cap for an independent group of candidates in the Legislative Council, upon which the third-party campaigner cap had previously been based, became $1,288,500[316], increased from $1,050,000. However, the cap for third-party campaigners was decreased by more than half.

218 In the second reading speech introducing the *Electoral Funding Bill*, the Special Minister of State explained the reason for adopting the Expert Panel's recommendation to reduce the cap for third-party campaigners to $500,000[317].

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311 New South Wales, Joint Standing Committee on Electoral Matters, *Inquiry into the Final Report of the Expert Panel – Political Donations and the Government's Response*, Report No 1/56 (2016) at viii-ix.

312 New South Wales, Joint Standing Committee on Electoral Matters, *Inquiry into the Final Report of the Expert Panel – Political Donations and the Government's Response*, Report No 1/56 (2016) at v, viii.

313 New South Wales, Joint Standing Committee on Electoral Matters, *Inquiry into the Final Report of the Expert Panel – Political Donations and the Government's Response*, Report No 1/56 (2016) at 51.

314 New South Wales, *Electoral Funding Bill 2018*, Explanatory Note at 1. See also New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 17 May 2018 at 2.

315 Previous Act, s 95F(14), Sch 1.

316 *Electoral Funding Act*, s 29(5).

317 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 17 May 2018 at 4.

He reiterated that "third party campaigners should have sufficient scope to run campaigns to influence voting at an election – just not to the same extent as parties or candidates"[318]. Then, after concerns were raised during the second reading debate about the reduction of the cap, the Minister said that the Bill was adopting "a specific recommendation of an independent panel of experts"[319]. He also reiterated the concerns that had been present in the Previous Act about third-party campaigners "drowning out" candidates and "dominating election campaigns"[320].

219 The Special Minister of State also explained that the *Electoral Funding Bill* implemented the recommendation of the Panel that third-party campaigners be prohibited from acting in concert with others to exceed the expenditure cap[321]. In his reply speech, the Minister reiterated that the provision implemented the Panel report and said[322] that "[t]hird-party campaigners should not be permitted to circumvent the expenditure caps by setting up 'front' organisations" and that it "does not prevent third parties with a common interest from campaigning on the same issue". However, as I have explained, the provision goes further than this and imposes significant constraints on third-party campaigners that are not imposed upon parties or candidates. The close association in the Panel report between this provision and the spending cap reduction invites the inference that the additional purposes for each measure were common.

Conclusion

220 The *Electoral Funding Act* increased the cap of $1,050,000 for an independent group of candidates for the Legislative Council to $1,288,500[323].

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318 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 17 May 2018 at 4. See also New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 May 2018 at 75-76.

319 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 May 2018 at 62.

320 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 May 2018 at 62-63. See also New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 23 May 2018 at 67, 79, 93, 105.

321 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 17 May 2018 at 4.

322 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 May 2018 at 63. See also New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 23 May 2018 at 67, 93-94.

323 *Electoral Funding Act*, s 29(5).

But, instead of making the same indexed increase to the previously identical cap for third-party campaigners, the cap for those third parties was decreased by more than half. The new cap for registered third-party campaigners was $500,000[324]. At the same time a new "acting in concert" offence was created for third-party campaigners only. At the stage of assessing the legitimacy of purpose, the purpose of one cannot be assessed independently of the purpose of the other.

221 The *Electoral Funding Act* preserved the "key pillars" of the Previous Act[325]. But in replacing the Previous Act with a "new, modernised Act"[326] it implemented an additional purpose. The large reduction of the cap for third-party campaigners and the associated introduction of an "acting in concert" offence were not irrational or random decisions but were the product of a considered legislative decision to adopt a purpose to privilege political parties and candidates. As senior counsel for the plaintiffs submitted, it was clear "what this law is doing" but one simply does not "know why it is doing that other than to shut down that protected speech". That submission should be accepted.

222 The only rational explanation for the reduction in the cap for third-party campaigners and the introduction of the "acting in concert" offence is that in implementing the recommendations and reasoning of the Expert Panel Report, the Parliament of New South Wales acted with the additional purpose, not merely the effect, of quietening the voices of third-party campaigners relative to political parties and candidates. That purpose, which was effectively, and properly, common ground between the plaintiffs and the defendant in this case, cannot co-exist with the implied freedom of political communication.

223 The answers to the questions in the special case should be as follows:

Question 1: Is section 29(10) of the *Electoral Funding Act 2018* (NSW) invalid because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution?

Answer: Yes.

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324 *Electoral Funding Act*, s 29(10).

325 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 17 May 2018 at 2.

326 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 17 May 2018 at 2.

Question 2: Is section 35 of the *Electoral Funding Act 2018* (NSW) invalid (in whole or in part and, if in part, to what extent), because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution?

Answer: Yes, in its entirety.

Question 3: Who should pay the costs of the special case?

Answer: The defendant.