**IN THE HIGH COURT OF AUSTRALIA**
**SYDNEY REGISTRY** **No. S211 of 2014**
BETWEEN:

**JEFFERY RAYMOND McCLOY**
First Plaintiff

**McCLOY ADMINISTRATION PTY LIMITED**
Second Plaintiff

10 **NORTH LAKES PTY LIMITED**
Third Plaintiff



AND

**STATE OF NEW SOUTH WALES**
First Defendant

**INDEPENDENT COMMISSION AGAINST CORRUPTION**
20 Second Defendant

# ANNOTATED WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

## PART I: SUITABILITY FOR PUBLICATION

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

## PART II: BASIS OF INTERVENTION

2. Section 78A of the *Judiciary Act 1903* (Cth) in support of the First Defendant.

## PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

30 3. Not applicable.

## PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

4. See Part VII of the Plaintiffs' submissions.

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## PART V: SUBMISSIONS

5. The Attorney General of Western Australia intervenes in support of the First Defendant.

6. This matter requires consideration of various aspects of the second *Lange* question, posed by application of the implied freedom of communication on governmental or political matters. The second limb requires consideration of sequential elements[1], and the order of address is important.

### *First* - legislative *purpose, object* or *end*

7. All articulations of the second question require identification of the object, purpose or end of the impugned law[2]. As observed (*inter alia*) by French CJ, Hayne, Crennan, Kiefel and Bell JJ in *Unions NSW*[3], identification of the purpose of statutory provisions, impugned on the basis of *Lange*, is critical to answering the second *Lange* question. Although their Honours observed that "[t]he identification of the true purpose of a statutory provision which restricts a constitutionally guaranteed freedom is not often a matter of difficulty"[4], often times it will be problematic. A single purpose can be variously expressed, with different layers of abstraction. Legislation may have more than one object, and this can be true also of particular provisions. Although divining object obviously enough involves construction of the impugned provision, it is a process of construction different to the ordinary[5] process of determining the meaning of words in an instrument, even where sought to be construed purposively[6], and different too from construing a law to answer whether it is one with respect to a head of power. An example is the characterisation of purpose in *Coleman v Power*[7]. The impugned law prohibited use of threatening, abusive, or insulting words in a public place[8]. Its object, for the purpose of the second *Lange* question, was identified as; a public order measure for the prevention of (retaliatory) violence in public places[9]. In *Wotton*[10], the object of the impugned law[11] was not prevention of the prohibited conduct, largely because the prohibition was read with the administrative power to authorise it. So its object was; "crime prevention through humane containment, supervision and rehabilitation

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[1] This is perhaps best illustrated in the judgment of Gageler J in *Tajjour v New South Wales* [2014] HCA 35; (2014) 88 ALJR 860 at 893 [148] ("*Tajjour*") where his Honour refers to various "steps" in the second question, and within some of such steps, various "stages".

[2] *Monis v the Queen* [2013] HCA 4; (2013) 249 CLR 92 at 134 [74] (French CJ), 147 [125] (Hayne J), 214 [347] (Crennan, Kiefel and Bell JJ) ("*Monis*"). See also *Unions NSW v New South Wales* [2013] HCA 58; (2013) 88 ALJR 227 at 237 [46] ("*Unions NSW*"). Object, purpose and end are, in this context, synonymous.

[3] *Unions NSW* [2013] HCA 58; (2013) 88 ALJR 227 at 238 [50].

[4] *Unions NSW* [2013] HCA 58; (2013) 88 ALJR 227 at 237 [47].

[5] Contra *Monis* [2013] HCA 4; (2013) 249 CLR 92 at 161 [175] (Hayne J).

[6] In the sense stated in *Thiess v Collector of Customs* [2014] HCA 12; (2014) 250 CLR 664 at 672 [23] (French CJ, Hayne, Kiefel, Gageler and Keane JJ): "Objective discernment of statutory purpose is integral to contextual construction."

[7] *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1 ("*Coleman*").

[8] Section 7(1)(d) of the *Vagrants, Gaming and Other Offences Act 1931* (Qld).

[9] See the explanation of Hayne J in *Monis* [2013] HCA 4; (2013) 249 CLR 92 at 149 [129].

[10] *Wotton v Queensland* [2012] HCA 2; (2012) 246 CLR 1 ("*Wotton*").

[11] Section 132(1)(a) of the *Corrective Services Act 2006* (Qld).

of offenders"[12]. *Monis* was easier. For French CJ, the impugned law's purpose was; "the prevention of uses of postal or similar services which reasonable persons would regard as being, in all the circumstances, offensive"[13]. Similarly for Hayne J, the purpose was, "the prevention of offence to recipients of, and others handling, articles committed to a postal or similar service"[14]. For Crennan, Kiefel and Bell JJ, the purpose was protective – to protect recipients from, "intrusion of seriously offensive material into a person's home or workplace"[15]. The formulations of French CJ and Hayne J on the one hand, and that of Crennan, Kiefel and Bell JJ on the other, are likely different sides of the same coin, and essentially coterminous – preventing a person from doing X as opposed to protecting a potential victim (or victims) from X.

8. As *Coleman* and *Wotton* illustrate, even with statutory provisions that create offences, the object of such laws, for the purpose of the second *Lange* inquiry, is often times not, or is much more than, prevention of the prohibited or criminalised conduct or protection of the public (or potential victims) from such conduct.

9. This matter is a further illustration. Even though the impugned provisions create offences if contravened, it would be far too narrow a characterisation of the purpose of Division 4A of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) to express it as the prevention of the making of political donations by property developers; and too narrow a characterisation of the purpose of Division 2A to construe it as preventing political donations above the capped levels.

10. In this field of discourse the purpose or object or end of an impugned statutory provision might not coincide with the "general purposes" of the legislation in which it appears. No doubt there will be instances where the general legislative purpose of an Act and that of impugned provisions of that Act will coincide. But, naturally enough, the purpose or object of an entire Act will, at times, be different from the purpose or object of a particular provision.

11. There are (at least at the present time) no settled rules as to how relevant purpose, for the second *Lange* question, is determined. No doubt, what is a relevant purpose, and the appropriate means for identifying it, is to be approached having regard to the reason why it needs to be identified; that is to assess its "legitimacy".

***Second – legitimacy* of purpose**

12. In all contemporary articulations of the second *Lange* question, purpose is identified to determine whether it is "legitimate". Although the word legitimate, and synonyms such as "valid legislative object"[16], continue to be invoked, this invocation is for a relatively limited reason. As Crennan, Kiefel and Bell JJ make clear in *Tajjour*[17], the criterion of, or inquiry as to, the legitimacy of a statutory

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[12] *Wotton* [2012] HCA 2; (2012) 246 CLR 1 at 16 [31] (French CJ, Gummow, Hayne, Crennan and Bell JJ).
[13] *Monis* [2013] HCA 4; (2013) 249 CLR 92at 133-134 [73].
[14] *Monis* [2013] HCA 4; (2013) 249 CLR 92at 163 [184].
[15] *Monis* [2013] HCA 4; (2013) 249 CLR 92at 214 [348].
[16] *Monis* [2013] HCA 4; (2013) 249 CLR 92 at 193 [280].
[17] *Tajjour* [2014] HCA 35; (2014) 88 ALJR 860 at 888 [112].

purpose is not a test of "desirability", or wisdom, appropriateness or good sense. In the articulations of Hayne J[18] and Gageler J in *Tajjour*, whether a legislative purpose is legitimate (in this sense) is answered by considering whether such purpose is "compatible with the system of representative and responsible government established by the Constitution"[19]. Similar is that of Crennan, Kiefel and Bell J in *Tajjour*[20]. Of course, if this is the question, some might think that words such as 'legitimate' or 'valid' obscure rather than clarify.

13. No doubt, the means by which compatibility of purpose is assessed against maintenance of representative and responsible government will be developed. In most cases, the answer will be quite simple[21].

14. It might be supposed that the requirement of legitimacy of purpose, as explained, encourages proponents of the validity of impugned legislation to articulate broad and diffuse statements of purpose. For example, it could never be doubted that "the prevention of crime" is legitimate in this sense.

**The purpose of the impugned provisions here and their legitimacy**

15. It is for New South Wales to state the purpose of the impugned provisions. The object articulated by New South Wales[22] is plainly legitimate in the sense explained. It is the same purpose as that found to be legitimate in *Unions NSW*.

16. An issue arising from the judgment of French CJ, Hayne, Crennan, Kiefel and Bell JJ in *Unions NSW* ought to be noted. It would be wrong to extract from [51][23] of their Honours' judgment a proposition that a statutory provision which simply and solely effects or "achieves" a purpose of prohibiting particular conduct is *ipso facto* illegitimate.

***Third* - ends and means**

17. All contemporary articulations of the second *Lange* limb require, after finding legitimate purpose, to then address the link between this legislative end and the means adopted to 'achieve' it, having regard to the practical operation of the impugned law.

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[18] *Tajjour* [2014] HCA 35; (2014) 88 ALJR 860 at 883 [76]-[77].
[19] *Tajjour* [2014] HCA 35; (2014) 88 ALJR 860 at 895 [160] (Gageler J).
[20] *Tajjour* [2014] HCA 35; (2014) 88 ALJR 860 at 888 [112].
[21] An example of this ease is to be seen in the judgments of Hayne J in *Tajjour* [2014] HCA 35; (2014) 88 ALJR 860 at 883 [77] and of Gageler J at 895 [160].
[22] First Defendant's Submissions at [8].
[23] Relevantly: "The plaintiffs accept that it is the legitimate aim of the [*Election Funding, Expenditure and Disclosures Act 1981* (NSW)] to regulate the acceptance and use of political donations in order to address the possibility of undue or corrupt influence being exerted. However, it is the plaintiffs' submission that s 96D does nothing calculated to promote the achievement of those legitimate purposes. There is no purpose to the prohibition, other than its achievement. It is therefore simply a burden on the freedom without a justifying purpose."

**Articulations of the link between ends and means**

18. There are different articulations of the nature of the inquiry between ends and means; "rational connection"[24], "degree of fit"[25], whether the means adopted are "not necessary" to achieve the object[26], "proportionate in the means it employs to achieve its object"[27], "reasonably necessary to achieve the end"[28], "reasonably appropriate and adapted, or proportionate"[29].

19. All articulations do and mean the same thing. Rational connection is not a precedent step to proportionality[30].

20. It is in this context, or in taking this step, that the derivative issue arises as to whether there are other, less drastic, equally practicable and available means, that are obvious and compelling, of achieving the (legitimate) object[31].

**The link between obvious and compelling alternatives and the proportionality of means and end**

21. There are two issues here. *First*, what if a proponent of the invalidity of a law (on *Lange* grounds) establishes that there is an obvious and compelling alternative to the law, to achieve its end. Is the law, *ipso facto,* "not proportionate" or not "reasonably appropriate and adapted"? *Second* is the obverse; what if the proponent of invalidity cannot state an obvious and compelling alternative, to achieve the impugned law's end. Is the law, *ipso facto,* "proportionate" or "reasonably appropriate and adapted"?

22. It is instructive to consider how these matters were treated and considered in *Tajjour*. There, the proponent of invalidity proffered alternatives but failed to convince that they were obvious and compelling.

23. Hayne J moved directly from dismissing putative obvious and compelling alternative to considering the final stage of the process, the extent of the burden imposed by the law[32], though his Honour had earlier found a rational connection between end and means[33]. (With respect) his Honour can be understood to accept that if the proponent of invalidity cannot establish an obvious and compelling alternative to the law to achieve its end, then the impugned law is "proportionate" or "reasonably appropriate and adapted".

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[24] *Tajjour* [2014] HCA 35; (2014) 88 ALJR 860 at 888 [110], [112] (Crennan, Kiefel and Bell JJ); 883 [78] (Hayne J).
[25] *Tajjour* [2014] HCA 35; (2014) 88 ALJR 860 at 893 [149] (Gageler J).
[26] *Unions NSW* [2013] HCA 58; (2013) 88 ALJR 227 at 237 [48] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[27] *Unions NSW* [2013] HCA 58; (2013) 88 ALJR 227 at 237 [44].
[28] *Monis* [2013] HCA 4; (2013) 249 CLR 92 at 214 [347] (Crennan, Kiefel and Bell JJ).
[29] *Tajjour* [2014] HCA 35; (2014) 88 ALJR 860 at 875 [32] (French CJ).
[30] One reading of the judgment of Hayne J in *Tajjour* [2014] HCA 35; (2014) 88 ALJR 860 at 883 [78]-[80] might suggest otherwise.
[31] This is a conflation of *Monis* [2013] HCA 4; (2013) (2013) 249 CLR 92 at 214 [347]. See also *Unions NSW* [2013] HCA 58; (2013) 88 ALJR 227 at 237 [44].
[32] *Tajjour* [2014] HCA 35; (2014) 88 ALJR 860 at 885 [90]-[91].
[33] *Tajjour* [2014] HCA 35; (2014) 88 ALJR 860 at 883 [78]-[79].

24. Crennan, Kiefel and Bell JJ stated that; "If no other means can be identified that are as practicable in achieving the purpose but less restrictive to the freedom, it may be concluded that the legislative provision goes no further than is reasonably necessary in achieving its purpose"[34] (underlining added). Their Honours, are then (with respect) to be understood as accepting the same proposition. "May", although perhaps equivocal, means "can".

25. There appears to be majority support for the proposition that failure by the proponent of invalidity to convince of obvious and compelling alternative, to achieve the impugned law's end results in the means adopted by law being proportionate or reasonably appropriate and adapted to its legitimate end.

26. In the unusual circumstance of an obvious and compelling alternative to the impugned law (to achieve its legitimate end), there appears to be a division of opinion in certain of the judgments in *Tajjour*. Crennan, Kiefel and Bell JJ suggest that:

> "... if other means are shown to be available and equally practicable, the impugned legislation has gone further than is reasonably necessary. It would follow that the legislature has exceeded the limits of its power to make laws which burden the freedom and no further enquiry is necessary."[35]

27. Gageler J might be thought to contend otherwise[36]:

> "Alternative means of achieving the end which are less burdensome on communication on governmental or political matter have long been recognised as relevant to the inquiry. But their presence or absence will not necessarily be decisive. The weight they will be accorded will vary with the nature and intensity of the burden to be justified." (footnote omitted)

**What are obvious and compelling alternatives?**

28. A number of observations can be made about this step in the *Lange* second limb process. *First*, "obvious and compelling" is, as a simple matter of language, a high hurdle. *Second*, it is in this stage of the *Lange* second limb process that the margin of appreciation issue arises. This notion, in this place, needs to be clear.

**Margin of appreciation**

29. It is twice (in effect) stated in the judgment of French CJ, Hayne, Crennan, Kiefel and Bell JJ in *Unions NSW*[37] that, "the allowance of what is sometimes called the grant to the legislature of a margin of appreciation[38] has [not] been accepted by a majority of this Court".

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[34] *Tajjour* [2014] HCA 35; (2014) 88 ALJR 860 at 889 [116].
[35] *Tajjour* [2014] HCA 35; (2014) 88 ALJR 860 at 889 [116].
[36] *Tajjour* [2014] HCA 35; (2014) 88 ALJR 860 at 894 [152].
[37] *Unions NSW* [2013] HCA 58; (2013) 88 ALJR 227 at 235-236 [34] and 237 [45].
[38] In the passage quoted, the authority cited for this is; *Australian Capital Television Pty Ltd v The Commonwealth* [1992] HCA 45; (1992) 177 CLR 106 at 158-159 ("*ACTV*"); *Cunliffe v The Commonwealth* [1994] HCA 44; (1994) 182 CLR 272 at 325 ("*Cunliffe*").

30. The authorities cited for this proposition are Brennan CJ in *Levy v Victoria*[39] and McHugh J, Gummow and Hayne JJ and Kirby J in *Coleman*[40].

31. The passage cited in the judgment of Brennan CJ in *Levy v Victoria* is (presumably) the following:

> "Under our Constitution, the courts do not assume the power to determine that some more limited restriction than that imposed by an impugned law could suffice to achieve a legitimate purpose. The courts acknowledge the law-maker's power to determine the sufficiency of the means of achieving the legitimate purpose, reserving only a jurisdiction to determine whether the means adopted could reasonably be considered to be appropriate and adapted to the fulfilment of the purpose."

32. So, this passage from the judgment of Brennan CJ in *Levy v Victoria* supports a proposition of deference. It should also be noted that Brennan CJ in *Levy v Victoria* cited as authority for this proposition; his Honour's own judgment in *Gerhardy v Brown*[41] (at 138-139, 143) and that of Deane J (at 149 and 153); his Honour's own judgment in *ACTV*[42]; and *Theophanous*[43]; and his Honour's own judgment and that of Dawson J in *Cunliffe*[44].

33. In respect of the passages cited by French CJ, Hayne, Crennan, Kiefel and Bell JJ in *Unions NSW*[45] from various judgments in *Coleman*[46], the passage cited from the judgment of McHugh J does not appear to deal directly with the proposition. Likewise, the passage cited from the judgment of Gummow and Hayne JJ. That the matter dealt with in the cited passages from *Coleman* may be different from that for which they are cited by French CJ, Hayne, Crennan, Kiefel and Bell JJ in *Unions NSW*[47] emerges from the cited passage in Kirby J's judgment:

> "I also agree with McHugh J and the joint reasons [Gummow and Hayne JJ] that the submission by the Attorneys-General of the Commonwealth and of New South Wales should be rejected, namely that, to be valid, the law need only be "reasonably capable of being seen as appropriate and adapted". The latter formulation has never attracted a majority of this Court [no citation]. It would involve a surrender to the legislature of part of the judicial power that belongs under the Constitution to this Court."

34. This would appear to be a different contention than that for which it is cited in *Unions NSW*; that "the allowance of what is sometimes called the grant to the legislature of a margin of appreciation has [not] been accepted by a majority of this Court".

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[39] *Levy v Victoria* [1997] HCA 31; (1997) 189 CLR 579 at 598 (per Brennan CJ).
[40] *Coleman* [2004] HCA 39; (2004) 220 CLR 1 at 48 [89] (per McHugh), 78 [196] (per Gummow and Hayne JJ) and 82 [212] (Kirby J).
[41] *Gerhardy v Brown* [1985] HCA 11; (1985) 159 CLR 70.
[42] *ACTV* (1992) 177 CLR 106 at 159.
[43] *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 at 156, 162-163.
[44] *Cunliffe* (1994) 182 CLR 272 at 325, 357.
[45] *Unions NSW* [2013] HCA 58; (2013) 88 ALJR 227 at 235-236 [34] and 237 [45].
[46] *Coleman* [2004] HCA 39; (2004) 220 CLR 1 at 48 [89] (per McHugh), 78 [196] (per Gummow and Hayne JJ) and 82 [212] (Kirby J).
[47] *Unions NSW* [2013] HCA 58; (2013) 88 ALJR 227 at 235-236 [34] and 237 [45].

35. In any event, further to the decisions cited by French CJ, Hayne, Crennan, Kiefel and Bell JJ in *Unions NSW*[48] in respect of the status of the proposition as to deference, can be added the following - that suggest deference or margin of appreciation in this sense; *Coleman*, per Gleeson CJ[49] and Heydon J[50]; *Rann v Olsen*, per Doyle CJ[51]. Relevant also is the observation of Keane J in *Unions NSW*; that to hypothesise about competing alternatives is "to countenance a form of decision-making having more in common with legislative than judicial power"[52]. Further, as French CJ stated in *Tajjour*[53]:

> "The cautionary qualification that alternative means be "obvious and compelling" ensures that consideration of the alternatives remains a tool of analysis in applying the required proportionality criterion. Courts must not exceed their constitutional competence by substituting their own legislative judgments for those of parliaments."

36. Whatever is the formal status of this notion of deference in this precise context, or whether it is "precedent-mandated"[54], likely does not matter much. It is now uncontroversial that the meaning of the aggregated formulation – whether there are other, less drastic, equally practicable and available means, that are obvious and compelling, of achieving the (legitimate) object – puts the hurdle high.

**Obvious and compelling alternatives to the laws impugned here**

37. It is for the Plaintiffs to establish that there are obvious and compelling alternatives, in the sense explained, to the impugned provisions, and for New South Wales to state the rational connection of or proportion between means and end in respect of the impugned provisions.

38. In considering the alternative proffered by the Plaintiffs here, it is critical to have regard to the impugned law's purpose, as contended by New South Wales – to regulate electoral funding and expenditure in a transparent manner with a view to securing and promoting the actual and perceived integrity of the Parliament of New South Wales, the government of New South Wales and local government bodies within New South Wales, and to maintain the integrity of New South Wales political institutions, *inter alia*, through the creation of a transparent system that seeks to prevent corruption and undue influence.

39. Relevant in respect of proportion here are matters of history and perhaps political culture in New South Wales which underlay (or are anterior to) this purpose. These are addressed in the New South Wales submissions[55], and relate specifically the

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[48] *Unions NSW* [2013] HCA 58; (2013) 88 ALJR 227 at 235 [34] and 237 [45].
[49] "... the Court will not strike down a law restricting conduct which may incidentally burden freedom of political speech simply because it can be shown that some more limited restriction "could suffice to achieve a legitimate purpose". This is consistent with the respective roles of the legislature and the judiciary in a representative democracy." See *Coleman* [2004] HCA 39; (2004) 220 CLR 1 at 31-32 [29]-[32] (Gleeson CJ).
[50] *Coleman* [2004] HCA 39; (2004) 220 CLR 1 at 123-124 [328].
[51] *Rann v Olsen* [2000] SASC 83; (2000) 76 SASR 450 at 483 [184] (Doyle CJ).
[52] *Unions NSW* [2013] HCA 58; (2013) 88 ALJR 227 at 248 [129] (Keane J).
[53] *Tajjour* [2014] HCA 35; (2014) 88 ALJR 860 at 876 [36].
[54] *Tajjour* [2014] HCA 35; (2014) 88 ALJR 860 at 892 [144] (Gageler J).
[55] First Defendant's Submissions [38]-[46].

nature of the business of property developers and the nature of the public powers that they may seek to influence.

40. It is uncontroversial that in certain States and regions legislative prohibitions are directed at and respond to particular social and political imperatives, which must be relevant to a judicial evaluation of the proportionality of the link between legislative purpose and legislative means. So, for instance, it would be relevant when considering, for the second *Lange* question, bans on certain classes associating in certain (say) licensed premises or areas of notorious criminal activity to have regard to such vulnerabilities and the character of such areas. Characterisation of purpose and assessment of proportion must have regard to such matters, even though their evidentiary foundation might be problematic.

41. In considering the compelling obviousness of any proposed alternatives, regard must necessarily be had to such matters of history and culture.

42. Again, at this stage of the inquiry, (with respect) the Court should, without abnegation, pay overwhelming regard to the legislative choice made to achieve a legitimate legislative end. To do otherwise will necessarily involve "decision-making having more in common with legislative than judicial power"[56].

***Fourth* - undue or unjustified burden**

43. In contemporary formulations of the second *Lange* limb, the final step involves consideration of whether the burden on the freedom of political communication is "justified" or not "undue"[57].

44. This step is reached, it would seem, only if the purpose of the impugned law is 'legitimate'.

45. But the relationship between a disproportionate legislative means of effecting a legitimate legislative purpose, and the extent of the burden imposed by the law on freedom of political communication, is not yet fully resolved.

46. Logic suggests that a lack of proportion between legislative means and legitimate legislative purpose might not result in invalidity, if the burden imposed on the freedom of political communication is slight[58]. Even if there is an obvious, compelling and equally effectual alternative legislative means, does it really matter if the burden on 'the freedom' of the impugned law is little more than *de minimis?* Similarly, logically, proportionate legislative means may be invalid if the burden imposed on the freedom of political communication is 'undue'.

47. This further step is illustrated by the observation of Gageler J in *Tajjour*[59]:

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[56] *Unions NSW* [2013] HCA 58; (2013) 88 ALJR 227 at 248 [129] (Keane J).
[57] These are the terms used by Hayne J in *Tajjour* [2014] HCA 35; (2014) 88 ALJR 860 at 885 [91], 890 [127] and 891 [133] (Crennan, Kiefel and Bell JJ); 893 [149] (Gageler J).
[58] This is the point made by Gageler J in *Tajjour* [2014] HCA 35; (2014) 88 ALJR 860 at 894 [152]. Crennan, Kiefel and Bell JJ are to be understood as being *contra* to this proposition in *Tajjour.* See *Tajjour* [2014] HCA 35; (2014) 88 ALJR 860 at 889 [116].
[59] *Tajjour* [2014] HCA 35; (2014) 88 ALJR 860 at 895 [163].

> "The consequence of the implied constitutional freedom is that there are some legitimate ends which cannot be pursued by some means, the result of which in some circumstances is that some ends will not be able to be pursued to the same extent as they might have been pursued absent the implied constitutional freedom. Means which come at too great a cost to the system of representative and responsible government established by the Constitution must be abandoned or refined."

48. There remains much ground to traverse with this element of 'undueness' and its interaction with a disproportionate, and (perhaps) proportionate, legislative means of achieving legitimate legislative ends. Often, determining whether the burden of a proportionate means of effecting a legitimate legislative purpose is undue will be easy. This can be illustrated by the ease with which the question was answered in certain of the judgments in *Tajjour*[60].

49. But again, and as with consideration of connection between, or the fit of, ends and means, consideration of whether a rationally connected, or proportionate, burden is "unjustified" or "undue" may involve fine distinction, fine judgment and evaluation. This too is demonstrated by the judgments of Hayne J, Crennan, Kiefel and Bell JJ on the one hand and Gageler JJ, on the other, in *Tajjour*. Even though each of their Honours could arrive at the answer to the same question about burden, in respect of a law that was a proportionate means of effecting a legitimate legislative purpose, the answer of Hayne J, Crennan, Kiefel and Bell JJ was different to that of Gageler J[61].

50. No doubt future cases will provide guidance as to what burdens, or extents of burden, are "unjustified" or "undue" and the nature of the interaction of such burdens with laws that achieve legitimate legislative means proportionately or, alternatively disproportionately. This inquiry is unlikely to be resolved by measurement or quantitative assessment, but rather by impression and factors of immediate relevance to the precise burden at issue.

**The burden here**

51. As to the nature or extent of the burden in this matter; in addition to the factors identified by the Plaintiffs and New South Wales might be thought to be the following.

52. In respect of Division 4A; the Plaintiffs here do not contend, as (for instance) did the plaintiff in *Unions NSW,* that donation making is communication and that the prohibition in s.96GA(1) unduly limits his right (though he does not have such a right) to communicate through donation making[62]. So, the only issue posed by this burden is then the extent of its affect upon "the funds available to political parties and candidates to meet the costs of political communication by restricting the

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[60] *Tajjour* [2014] HCA 35; (2014) 88 ALJR 860 at 885 [91]-[93] (Hayne J), 891 [133] (Crennan, Kiefel and Bell JJ), 896 [167] (Gageler J).

[61] *Tajjour* [2014] HCA 35; (2014) 88 ALJR 860 at 885 [91]-[93] (Hayne J), 891 [133] (Crennan, Kiefel and Bell JJ), 896 [167] (Gageler J).

[62] This is referred to in *Unions NSW*, but did not need to be resolved because of the question of burden was otherwise, "simply resolved" by the observation that the restriction there was obvious "upon the funds available to political parties and candidates to meet the costs of political communication by restricting the source of those funds"; see *Unions NSW* [2013] HCA 58; (2013) 88 ALJR 227 at 236 [38].

source of those funds"[63]. In this respect, it is difficult to be convinced that the prohibition in s.96GA(1), in respect of property developers, will preclude or restrict in any meaningful way political parties and candidates communicating with electors. There are plenty of non-prohibited donors. Public funding is provided, no doubt in part to alleviate any shortfall created by donor restrictions.

53. Further to this, the prohibition in s.96GA(1) does not affect the capacity of property developers to communicate with members of political parties, parliamentarians, candidates or electors. Nor does it impede members of political parties, parliamentarians, candidates or electors seeking the views of property developers. Division 4A does not inhibit a property developer from being a member of a political party, and seeking to engage in the political process through such membership[64]. Nothing in Division 4A precludes a property developer industry body from communicating to the public, members of political parties, parliamentarians or candidates about issues relevant to the industry.

54. It might also be observed, without any intended disrespect to the Plaintiffs, that consideration of burden in this matter is reached after it is concluded that the legislative purpose contended by New South Wales is legitimate and the legislative means adopted proportionate, or (*per* Gageler J), if the disproportion is countervailed by the insignificance of the burden. If it is found that the purpose of the prohibition in s.96GA(1) is as contended by New South Wales, and that this is legitimate, and that s.96GA(1) is a proportionate legislative response to it; it would be odd if the burden imposed by this provision was found to be undue at the suit of a person wishing to make a donation contrary to such a law. No doubt if any political party or candidate in New South Wales is of the view that the burden imposed this provision will unduly affect "the funds available to [it or them] to meet the costs of political communication by restricting the source of those funds"[65], they will be intervening in this matter to so contend.

55. In respect of Division 2A; again, the Plaintiffs here do not complain that this burdens any right that they might have to communicate.

56. As to any affect of the donation caps here to unduly restrict the source of funds available to parties and candidates to meet the costs of political communication; there is no reason to believe that donation caps result in less funds being available to political parties or candidates.

57. There is no evidence before the Court to sustain findings that donation caps result in less donated funds. Even if, in the absence of evidence, this might be thought likely, different speculations are equally plausible. For instance, it can be (equally plausibly) postulated that donation caps encourage those who might not otherwise donate to donate[66].

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[63] *Unions NSW* [2013] HCA 58; (2013) 88 ALJR 227 at 236 [38].

[64] See also s.96GD of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW), that exempts political party membership fees from being political donations.

[65] *Unions NSW* [2013] HCA 58; (2013) 88 ALJR 227 at 236 [38].

[66] In the 2012 US presidential campaign, US$550 million of US$738 million in donations to the campaign of President Obama were from individuals: Federal Election Commission, 'Presidential Campaign Receipts Through December 31, 2012' (2011-2012 Election Cycle Data Summaries through 12/31/12)

58. Without wishing to delve into whether this is a contention of the margin of appreciation genus, it is relevant again to observe that it would be (at least) ironic if the judicial branch was to consider that caps of this type imposed an undue burden on political communication by improperly restricting political parties and candidates communicating with electors, when these caps have been imposed by the Parliament - which comprises representatives of political parties and one time candidates.

## PART VI: LENGTH OF ORAL ARGUMENT

59. It is estimated that the oral argument for the Attorney General for Western Australia will take no more than 30 minutes.

Dated: 9 March 2015

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<http://www.fec.gov/press/summaries/2012/ElectionCycle/PresCandYE.shtml>. A contribution limit of US$2,500 per individual applied during that period: Federal Election Commission, 'FEC Announces 2011-2012 Campaign Cycle Contribution Limits' (News Release, 3 February 2011). Of these donations, 57% were under US$200, 33% were between US$200 and US$2,499, and 11% were the maximum of US$2,500: New York Times, 'The 2012 Money Race: Compare the Candidates' <http://elections.nytimes.com/2012/campaign-finance>. In the 2008 US presidential campaign US$659 million of US$748 million in donations to Senator Obama's campaign were from individuals: Federal Election Commission, 'Presidential Receipts Through December 31, 2008' (2007-2008 Election Cycle Data Summaries through 12/31/08) <http://www.fec.gov/press/summaries/2008/ElectionCycle/24m_PresCand.shtml>.