IN THE HIGH COURT OF AUSTRALIA **No. S70 of 2013**
SYDNEY REGISTRY

BETWEEN:

UNIONS NSW
First Plaintiff

AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION KNOWN AS THE AUSTRALIAN MANUFACTURING WORKERS' UNION (AMWU)
Second Plaintiff

NEW SOUTH WALES LOCAL GOVERNMENT, CLERICAL, ADMINISTRATIVE, ENERGY, AIRLINES & UTILITIES UNION
Third Plaintiff

NEW SOUTH WALES TEACHERS FEDERATION
Fifth Plaintiff

TRANSPORT WORKERS' UNION OF NEW SOUTH WALES
Sixth Plaintiff

AND:

STATE OF NEW SOUTH WALES
Defendant

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

I. CERTIFICATION

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

Date of document: 18 October 2013
Filed on behalf of: Attorney-General for the State of Queensland

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HIGH COURT OF AUSTRALIA
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II. BASIS OF INTERVENTION

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

III. WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

IV. APPLICABLE LEGISLATION

4. The applicable legislation is identified in the submissions of the plaintiffs and the defendant.

V. ARGUMENT

Introduction

5. The plaintiffs submit that s 96D of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ('the Funding Act') is invalid because:

   (a) it infringes the freedom of political communication derived from the Commonwealth Constitution;
   (b) it infringes a freedom of political communication derived from the *Constitution Act 1902* (NSW) ('the NSW Constitution Act');
   (c) it infringes the freedom of political association derived from the Commonwealth Constitution; and
   (d) it is inconsistent with Part XX and/or s 327 of the *Electoral Act 1918* (Cth).[1]

6. The plaintiffs further submit that s 95G(6) of the Funding Act is invalid because:

   (a) it infringes the freedom of political communication derived from the Commonwealth Constitution;[2] and
   (b) it infringes a freedom of political communication derived from the NSW Constitution Act.[3]

7. The Attorney-General for the State of Queensland adopts the submissions of the defendant regarding the freedom of political communication derived from the NSW Constitution Act, the freedom of association under the

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1 Plaintiffs' submissions, para 12.
2 Plaintiff's submissions, para 67. See also para 70.
3 Plaintiff's submissions, para 80.

Commonwealth Constitution and inconsistency with the Commonwealth Electoral Act.

8. He makes the following additional submissions in support of the defendant.

A. Construction of s 96D of the Funding Act

9. It is well established that the first step in determining whether impugned legislation is valid is to construe it.[4]

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10. Subsection 96D(1) of the Funding Act makes it unlawful[5] for parties, elected members, groups and third party campaigners to accept 'political donations'[6] except where the donor is an individual enrolled on the roll for State, federal or local government elections. Subsection 96D(2) makes it unlawful for an individual to make political donations on behalf of a corporation or other entity, while 96D(3) makes it unlawful for a corporation or other entity to make a 'gift'[7] to an individual for the purpose of that individual making a political donation.

20 11. Because s 96D is found in Part 6 of the Funding Act, s 83 expressly limits its application to State elections and local government elections. The definitions of the terms used in s 96D(1), including 'party', 'group', 'elected member', reinforce that view: all are concerned with State and local government elections.[8] It follows that s 96D must be construed, in light of its purpose, as having no application to federal elections.

12. The significance of these matters will become apparent below.

B. Implied freedom will generally not apply to State electoral laws, including
30 s 96D

13. In *Lange v Australian Broadcasting Corporation* ('*Lange*'), all members of the Court described ss 7 and 24 of the Constitution, and related provisions, as necessarily protecting 'that freedom of communication between the people

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4 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at [11] (Gummow, Hayne, Heydon and Kiefel JJ).

5 No offence, however, is committed unless a person does an act that is unlawful under s 96D and, at the time of the act, is aware of the facts that result in the act being unlawful: Funding Act, s 96I.

6 The term is defined in the Funding Act, s 85.

7 The term is defined in the Funding Act, s 84(1).

8 See the relevant definitions in the Funding Act, s 4(1). For example, the definition of 'group' refers to a group of candidates or part of a group of candidates for periodic Council elections. The definition of 'third-party campaigner' means an entity or person who incurs 'electoral communication expenditure' during a 'capped expenditure period'. The definitions of those terms in s 87 and s 95H respectively makes it clear that a third-party campaigner is referring to State or local government elections.

concerning political or government matters which enables the people to exercise a free and informed choice as electors'.[9] The Court recognised, however, that the implied freedom was 'limited to what is necessary for the effective operation' of the constitutionally prescribed system of representative and responsible government.[10]

14. Given its origin, the implied freedom is confined to matters that bear upon the choices to be made by the electors in federal elections and referenda.[11] It does not encompass communication on all political and governmental matters.[12] That remains the case notwithstanding the existence of national political parties operating at federal, State and local government levels, the financial dependence of State, Territory and local governments on federal funding and policies, and the increasing integration of social and economic matters.[13] While these facts mean that there may, in some cases, be an overlap between State and federal political matters, they do not abolish the distinction between them.

15. That understanding is reflected in authority before and after *Lange*. In *Muldowney v South Australia*,[14] for example, the Court rejected a challenge to South Australian legislation that made it an offence to publicly advocate that a person entitled to vote in a State election should abstain from voting or should vote informally.[15] Chief Justice Brennan remarked that none of the provisions from which a freedom of political discussion was inferred affected the method of election of members of a State Parliament.[16] Justice Dawson took a similar view.[17]

16. In *Levy v Victoria* ('*Levy*'), McHugh J stated:[18]

> For the plaintiff to establish that the Regulations infringed the constitutional implication, however, it is not enough that he has shown that they prevented him and others from communicating with the public on a political matter. He must also show:
>
> (i) that that political matter related to the operation of the system of representative and responsible government provided for in the Constitution; and

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9 (1997) 189 CLR 520 at 560.
10 (1997) 189 CLR 520 at 561.
11 (1997) 189 CLR 520 at 560-561.
12 (1997) 189 CLR 520 at 571.
13 (1997) 189 CLR 520 at 571-572.
14 (1996) 186 CLR 352.
15 *Electoral Act 1985* (SA), s 76.
16 (1996) 186 CLR 352 at 365-366.
17 (1996) 186 CLR 352 at 370.
18 (1997) 189 CLR 579 at 626. See also at 596 (Brennan CJ).

(ii) that the Regulations were not reasonably appropriate and adapted to a legitimate end that was compatible with the freedom of communication concerning that system of government.

17. His Honour observed that the message that the protesters in Victoria wished to send in that case seemed 'remote from choosing members of the Senate or House of Representatives or the conduct of the federal government'.[19]

18. Similarly, in *John Fairfax Publications v Attorney-General (NSW)*,[20] Spigelman CJ indicated that the interconnection between the systems of government did not mean that any subject of political communication was protected by the implied freedom. His Honour explained:[21]

> The interconnection between the systems of government and the overlapping of issues between the levels of government is such that the Court must not approach these matters with any rigid conception of the respective responsibilities of the Commonwealth and the States. Nevertheless, in a situation in which the proposition is advanced that the relevant impingement relates to the accountability to the electorate and the responsibility of members of the executive, the focus of attention must be upon the mechanisms for accountability and responsibility of Commonwealth ministers, not State ministers.

19. He added:[22]

> The issue is whether in the exercise of statutory powers under a State act which involves the responsibility of a State Minister to a State Parliament and of his or her accountability to a State electorate, falls within the scope of the constitutional freedom. Nothing in *Lange* itself, or any of the other authorities on the constitutional immunity, suggest that such a relationship on its own is sufficient.

20. The conclusion that political and government matters are divisible is particularly relevant to laws governing the conduct of State elections. Because of their importance to the independence of the States, such laws would generally attract the operation of the *Melbourne Corporation* principle. Thus, in *Australian Capital Television Pty Ltd v Commonwealth* ('*ACTV*'), McHugh J said:[23]

> It is for the people of the State, and not for the people of the Commonwealth, to determine what modifications, if any, should be made

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19 (1997) 189 CLR 579 at 626.
20 (2000) 158 FLR 81.
21 (2000) 158 FLR 81 at 97 [87].
22 (2000) 158 FLR 81 at 97 [89].
23 (1992) 177 CLR 106 at 242. See also at 163-164 (Brennan CJ).

> to the Constitution of the State and to the electoral processes which determine what government the State is to have.

21. The present case does not involve the validity of any Commonwealth law that purports to regulate State electoral processes. Yet it involves the same conception that underpins the *Melbourne Corporation* principle, which Dixon J identified in these terms:[24]

> The foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities.

10 22. That conception suggests that the implied freedom—which is subject to the express terms of the Constitution and must be weighed against other implications[25]—should not be treated as extending to laws about a State's electoral processes except in the rare cases where the failure to do so would unambiguously threaten or deny the 'free choice' of the people at a federal election. Any different approach would invite regular conflict between the constitutional imperatives of federalism and the system of representative and responsible government. It would be to accept, in effect, that the implied freedom of political communication prescribes the mode of State elections. That proposition was rejected in *Muldowney v South Australia*[26] and is
20 inconsistent with the recognition that the Constitution does not mandate any particular form of representative government in the States.[27]

23. If this approach is adopted, there is little doubt that s 96D will not be subject to the implied freedom. Section 96D of the Funding Act does not apply to federal elections. It applies only in relation to State elections and local government elections.[28] It does not purport to inhibit making communications between electors of any kind. It forms part of a complex package of provisions in Part 6 of the Funding Act designed to deal with perceived problems in the State electoral process through the disclosure of political donations and
30 expenditure,[29] limits on political donations,[30] caps on electoral communication expenditure,[31] and the prohibition of certain donations.[32] The responsibility for

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24 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 82. See also *Austin v Commonwealth* (2003) 215 CLR 185 at 245-246 [111]-[115] (Gaudron, Gummow and Hayne JJ); *New South Wales v Commonwealth* (*Work Choices Case*) (2006) 229 CLR 1 at 119-120 [194](Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Fortescue Metals Group Limited v Commonwealth* (2013) 87 ALJR 935 at [130] (Hayne, Bell and Keane JJ).

25 *McGinty v Western Australia* (1996) 186 CLR 140 at 234 (McHugh J).

26 (1996) 186 CLR 352 at 365-366 (Brennan CJ), 370 (Dawson J). See also at 377 (Gaudron J).

27 See *McGinty v Western Australia* (1996) 186 CLR 140 at 272-273 (Gummow J).

28 See para 11 above and Funding Act, s 83.

29 Funding Act, Part 6, Div 2.

30 Funding Act, Part 6, Div 2A.

31 Funding Act, Part 6, Div 2B.

32 Funding Act, Part 6, Div 4.

addressing these matters rests peculiarly with the State of New South Wales and no other entity.

24. Accordingly, the implied freedom of political communication can have no application to s 96D. On that basis, the provision is valid.

B. Section 96D would not infringe the implied freedom in any event

25. Even if the implied freedom were capable of applying, in order for the implied freedom to invalidate s 96D, the plaintiffs must establish that:

(a) s 96D effectively burdens political communication; and

(b) it is not reasonably appropriate and adapted to serve a legitimate end in a manner that is compatible with the maintenance of representative and responsible government provided for in the Constitution.

26. The plaintiffs fail at each step.

(a) Section 96D does not effectively burden on political communication

27. As stated earlier, *Lange* held that the provisions of the Constitution prescribing a system of representative and responsible government necessarily protected that freedom of communication between the people concerning political or government matters which enabled the people to exercise a free and informed choice as electors.[33] The Court described communication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics as 'an indispensable incident' of the constitutionally prescribed system.[34]

28. Entities such as corporations can never be part of 'the people'. The extent to which the implied freedom can apply to communications by such entities will therefore be limited. It can apply to their communications only to the extent those communications can be said to shed light on the choices to be made by electors in federal elections or throw light on the conduct of the federal executive.[35] Otherwise, their communications are irrelevant.

29. Assessed in light of these principles, s 96D does not effectively burden freedom of political communication. Its legal and practical effect is not to prohibit or restrict discussion about any political or government matter between 'the people'. It leaves electors free to engage in communication about any

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33 (1997) 189 CLR 520 at 560 (emphasis added).

34 (1997) 189 CLR 520 at 559-560. See also *Aid/Watch Incorporated v Federal Commissioner of Taxation* (2010) 241 CLR 539 at 556 [44].

35 *Lange* (1997) 189 CLR 520 at 571.

subject that they choose, including the merits of s 96D of the Funding Act and other State campaign finance laws. It leaves corporations and similar entities free to communicate their positions to the electors on any subject that they choose, and it leaves them free to indicate their support for, or disapproval of, particular candidates and political parties. It also leaves the shareholders in corporations and the members of other entities free to make donations under the Funding Act and to communicate with electors.[36]

30. The plaintiffs contend that s 96D directly burdens political communication because those donations are a form of political communication protected by the Constitution.[37] But that is not so. Although donations have been described in the United States 'as a general expression of support for the candidate and his views',[38] they are not communications directed to electors. Nor is the acceptance of a donation. Unless the donor or recipient choses to publicise a donation or it is disclosed as required by law, electors may never find out about it.[39] Even if a donation is disclosed pursuant to the Funding Act and other legislation, however, that does not convert a donation or its acceptance into a communication to the electors; in any event, such disclosure may occur well after the donation is made.[40]

31. In addition, any 'general expression of support' conveyed by a donation can be and often is conveyed in a myriad of other ways, including actual affiliation[41] or by a statement of support.[42]

32. These matters make it difficult to treat the making and acceptance of donations as communications about political and government matters that are capable of affecting the choice that the people have to make in federal elections or in

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36 It should be remembered that a corporation is a legal construct. Incorporation gives rise to certain relationships between directors, officers and shareholders, enforceable by reference to statutory obligations and the notion of a contract between shareholders, for example. A law that prohibits corporate donations does not strike at the capacity of individuals to do things in other ways.

37 Plaintiff's submissions, paras 16-21.

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

39 Where donations fall below the threshold for 'reportable political donations' under the Funding Act, for example, the individual donors do not have to be identified: see Funding Act, s 86 and s 92(3). In the *Commonwealth Electoral Act 1918* (Cth), the relevant threshold is $10,000: see s 305B(1).

40 Funding Act, ss 89, 91 and 95 (requiring disclosure eight weeks after 30 June in each year). See also *Commonwealth Electoral Act 1918* (Cth), s 305B(1) (requiring a person who makes gifts totalling more than $10,000 to furnish a return to the Australian Electoral Commission within 20 weeks after the end of the financial year).

41 The second, third and sixth plaintiffs are affiliated with the Australian Labor Party: see Special Case, paras [3]-[6], [12].

42 The plaintiffs claim that donations to a candidate or party are the equivalent of affiliation: see plaintiffs' submissions, para 17. That claim, however, ignores the reality that corporations, in particular, may donate to different political parties or candidates and reasons for donations may vary.

voting to amend the Constitution. Those actions, in short, are not equivalent to the sort of expressive conduct that has been considered to be political communication by this Court in cases such as *Levy*.[43] Section 96D therefore imposes no direct burden.

33. Nor does s 96D impose an indirect burden upon political communication. The plaintiffs claim that s 96D imposes a practical burden on political communication because it restricts the receipt of funds that would otherwise be available to make political communications.[44] That, however, ignores the fact that donations may not translate into any political communication by the recipient.[45] It ignores or discounts the fact that the Funding Act provides for a regime of public funding that offers considerable financial support to political parties.[46] More importantly, it discounts the fact that capped donations from individuals on electoral rolls are permitted.[47] In these circumstances, the asserted impact of s 96D on the making of political communications is speculative.

34. For these reasons, there is no basis for concluding that s 96D effectively imposes a burden on political communication. The first limb of *Lange* is not satisfied.

(b) Section 96D is reasonably appropriate and adapted to serve a legitimate end

The relevant inquiry

35. The second limb of *Lange*, as reformulated in *Coleman v Power*, asks whether the law is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

36. In *Monis v The Queen*, it was said that the second limb of the test in *Lange* involved two distinct inquiries:

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43 (1997) 189 CLR 579 at 595 (Brennan CJ), 613 (Toohey and Gummow JJ), 641 (Kirby J).

44 Plaintiffs' submissions, para 17.

45 *Buckley v Valeo* 424 US 1 at 263 (1976) (White J, dissenting).

46 Funding Act, Part 5. See also Special Case, para 54 (indicating that the parties will have access to millions of dollars in funding).

47 The plaintiffs suggest that the effect of s 96D on campaign contributions is likely to be substantial, because the bulk of donations to the major parties between 1 July 2008 and 30 June 2011 were from non-individuals: see plaintiffs' submissions, paras 43-44 and Special Case, para 54. Yet it is impossible to determine if that prediction will be true. The experience in the United States, which has contribution limits on individuals, suggests that their individual contributions can be vast. In the last presidential campaign, for example, President Obama raised $550 million from individuals. Total donations to his campaign amounted to $738 million. Mitt Romney, President Obama's Republican opponent, raised $304 million from individual contributions out of total donations of $483 million: see http://www.fec.gov/press/summaries/2012/ElectionCycle/file/presidential_summaries/Pres1_2012_24m.pdf.

(a) whether the means go further than is reasonably necessary to achieve the legislative object, and are disproportionate to it;[48] and

(b) whether there is proportionality between the law and the maintenance of the constitutionally prescribed system of representative and responsible government.[49]

37. For the purpose of the first inquiry, it was said that '[w]here there are other, less drastic means of achieving a legitimate object, the relationship with the legislative purpose may not be proportionate, at least where those means are equally practicable and available'.[50]

38. These reformulations of second limb of *Lange* should not be accepted without qualification.

39. First, the initial step should be to identify whether the law that burdens political communication has a legitimate end. Absent such an end, it can serve no purpose to inquire whether the means pursued by a law go beyond what is reasonably necessary.

40. Secondly, the significance of other alternatives may depend on the standard of scrutiny that the court applies to the impugned law. If the direct purpose of the law is to restrict or prohibit political communication or (which in substance is the same thing[51]) the law is properly characterised as a law with respect to the prohibition of political communication, the law is harder to justify,[52] and the fact that there are other, less drastic alternatives will suggest that it is invalid. But it may be otherwise where the law incidentally burdens political communication. As Gleeson CJ observed in *Coleman v Power*:[53]

> [T]he 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.

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48 (2013) 87 ALJR 340 at [280], [347] (Crennan, Kiefel and Bell JJ).
49 (2013) 87 ALJR 340 at [282] (Crennan, Kiefel and Bell JJ).
50 (2013) 87 ALJR 340 at [280], [347] (Crennan, Kiefel and Bell JJ).
51 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [39] (Gleeson CJ).
52 *Hogan v Hinch* (2011) 243 CLR 506 at 555-556 [95]-[99] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Wotton v Queensland* (2012) 246 CLR 1 at [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ).
53 (2004) 220 CLR 1 at [31].

41. Several other statements in the authorities are consistent with these observations.[54]

42. Thirdly, insofar as *Lange*[55] suggests that *ACTV* is authority for the contrary view, it is, with respect, mistaken. *ACTV* invalidated Part IIID of the *Broadcasting Act 1942* (Cth). That Part had the direct purpose and effect of prohibiting political communications on television and radio during elections.[56] Although Part IIID coupled the prohibition with a regime for 'free time' for the use of political parties and candidates, the majority found that regime to discriminate against new and independent candidates and to favour established political parties.[57] The availability of other, less drastic alternatives to remedy the evils at which the legislation was aimed was only a factor that suggested Part IIID was invalid. Indeed, it played no significant role in the reasoning of at least two members of the majority. [58]

43. Fourthly, caution must be applied in transposing the test of reasonable necessity found in s 92 cases to the second limb of *Lange*. Section 92 is expressed in absolute terms and it applies to a narrow category of laws; namely, those that impose discriminatory burdens of a protectionist kind on interstate trade.[59] Given that context, it is unsurprising that a fairly demanding test of reasonable necessity would apply.[60] As Dawson J observed in *Levy*, however, the implied freedom exists to further the free elections which ss 7 and 24 and related provisions require.[61] Those elections assume a degree of regulation. His Honour made the point in these terms:[62]

> Free elections do not require the absence of regulation. Indeed, regulation of the electoral process is necessary in order that it may operate effectively

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54 *Levy v Victoria* (1997) 189 CLR 579 at 598 (Brennan CJ), 619 (Gaudron J); *Coleman v Power* (2004) 220 CLR 1 at [100] (McHugh J), [328] (Heydon J). See also *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [39] (Gleeson CJ).

55 (1997) 189 CLR 520 at 568. See also *Monis v The Queen* (2013) 87 ALJR 340 at [280] (Crennan, Kiefel and Bell JJ).

56 (1992) 177 CLR 106 at 145-146 (Mason CJ).

57 (1992) 177 CLR 106 at 146 (Mason CJ), 172 (Deane and Toohey JJ), 239 (McHugh J).

58 Only three members of the majority appear to have referred to the possibility of other alternatives: see (1992) 177 CLR 106 at 175 (Deane and Toohey JJ) (suggesting that the argument for a 'level playing field' might support a total blackout of political advertisements on election day), 239 (McHugh J) (mentioning 'the creation of special offences, disclosure of contributions by donors as well as political parties, public funding, and limitations on contributions'). Neither Mason CJ nor Gaudron J relied on alternatives as a factor in their conclusions.

59 *Cole v Whitfield* (1988) 165 CLR 360.

60 See *Northeastern Dairy Co Ltd v Dairy Industry Authority (NSW)* (1975) 134 CLR 559 at 616 (Mason J) (holding a regulation invalid because it was not shown to be 'the only practical and reasonable mode of regulating the trade in milk'). See also *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at [102]-[104], [110] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

61 (1997) 189 CLR 579 at 608.

62 (1997) 189 CLR 579 at 608.

> or at all. Not only that, but some limitations upon freedom of communication are necessary to ensure the proper working of any electoral system.

44. These considerations suggest that legislatures should be given a margin of choice or appreciation in cases involving the implied freedom,[63] particularly where the laws do not have the direct purpose of prohibiting political communication.

45. Finally, and relatedly, as the Canadian Supreme Court has acknowledged, campaign finance reform is complex and often involves assessments of harm and the efficacy of remedies that are difficult, if not impossible, to measure scientifically.[64] That reinforces the need for legislatures to have a margin of choice or appreciation in this area.

Application to s 96D

46. The plaintiffs appear to accept that s 96D was enacted to further at least one legitimate end; namely, to secure and promote the integrity of the NSW Parliament, government and local government bodies.[65]

47. They contend, however, that s 96D fails to meet the second limb of *Lange* because there is no proportionality between that end and the means that s 96D employs.[66] They also contend that s 96D imposes an undue burden on the freedom of political communication because, among other things, it imposes a 'blanket ban' on a particular form of political communication by corporations, associations, unions, aliens and others not enrolled to vote.[67] On these bases, they claim that s 96D is invalid.

48. These submissions should be rejected.

49. First, s 96D cannot be characterised as a law the direct purpose of which is to prohibit political communication. It is not comparable to a law that, for example, prohibits political advertising on television during elections. As stated earlier,[68] the section leaves corporations and other entities free to communicate their views directly to the electors on any subject that they choose. It leaves them free to indicate their support for, or disapproval of, particular candidates and political parties. It also leaves electors free to communicate with each other

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63 *ACTV* (1992) 177 CLR 106 at 159-160 (Brennan J); *Coleman v Power* (2004) 220 CLR 1 at [100] (McHugh J), [328] (Heydon J).

64 *Harper v Canada* [2004] 1 SCR 827 at 878-879 (Bastarache J).

65 The plaintiffs also appear to accept that s 96D is intended to address the problem of corporations and other organisations making political donations in a manner inconsistent with views of significant portions of the membership of those entities: see plaintiffs' submissions, para 52.

66 Plaintiffs' submissions, paras 50-62.

67 Plaintiffs' submissions, para 64.

68 Para 29 above.

on political and government matters. It leaves the individual members of corporations and other artificial entities free to do the same. The burden on political communication created by s 96D is therefore indirect and incidental.

50. Secondly, the burden that s 96D imposes on political communication among 'the people' is not substantial. The matters mentioned in the preceding paragraph, coupled with restriction of s 96D to State and local government elections, demonstrate this.[69]

10 51. Thirdly, any decrease in the overall quantity of political communication caused by contribution or spending limits would not, without more, make those limits incompatible with the constitutionally prescribed system of representative and responsible government. In *ACTV*, McHugh J mentioned limits on contributions as one means of addressing concerns about the integrity of federal elections.[70] Justices Deane and Toohey, likewise, suggested that some spending limitations might be permissible.[71] None of their Honours hinted that a reduction in the amount of political communication caused by such limits would mean that they were invalid.

20 52. Fourthly, the plaintiffs have not suggested that the effect of s 96D is to advantage those who currently have political power. That was one factor that influenced the majority in *ACTV*.[72] It does not exist here.

53. Fifthly, corporations and other entities that are not on the electoral rolls do not form part of 'the people' who lie at the heart of the implied freedom. Such entities may not even be controlled by persons resident in Australia. The fact that s 96D makes it unlawful to accept donations from such bodies is therefore not surprising.[73]

54. Finally, the plaintiffs have not established that the alternatives would be
30 equally effective in meeting the end that s 96D seeks to address.[74] It is not evident that increased disclosure and 'generally applicable restrictions' on the amount of donations would prevent a person or group circumventing a cap on donations through their control of corporate entities. In any case, given that

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69 Any suggestion that the burden is substantial would discount the fact that the public funding provisions give the major political parties access to millions of dollars for political expenditure: see Special Case, para 54. It would also discount the ability of individuals who are on the electoral rolls to donate to political parties and candidates. See footnote 46 above.

70 (1992) 177 CLR 106 at 239.

71 (1992) 177 CLR 106 at 175.

72 (1992) 177 CLR 106 at 146 (Mason CJ), 172 (Deane and Toohey JJ), 239 (McHugh J).

73 Prohibitions on corporations donations can be found in Belgium and France. In the United States, at least before the decision in *Citizens United v Federal Election Commission* 130 SCt 876 (2010), special limitations on corporations were well accepted: see *Federal Election Commission v Beaumont* 539 US 146 at 155 (2003) (Souter J, with whom Rehnquist CJ, Stevens, O'Connor, Ginsburg and Breyer JJ joined); *Citizens United v Federal Election Commission* 130 SCt 876 at 930, 947, 953-957, 979 (2010) (Stevens J, with whom Ginsburg, Breyer and Sotomayor joined).

74 Plaintiffs' submissions, para 62.

s 96D does not have the direct purpose of prohibiting political communication, the mere fact that there may be equally practical alternatives is not decisive.[75]

55. In these circumstances, s 96D is reasonably appropriate and adapted to serve a legitimate end in a manner that is compatible with the maintenance of representative and responsible government provided for in the Constitution. The submissions of the plaintiff to the contrary should be rejected.

C. Implied freedom does not apply to section 95G

56. Section 95I of the Funding Act prohibits parties, groups, candidates or third-party campaigners from incurring 'electoral communication expenditure'[76] for a State campaign during the 'capped expenditure period'[77] in excess of the applicable cap. These caps are provided in s 95F and s 95G.

57. Subsection 95G(6) relevantly provides that, for the purpose of determining whether a party has exceeded the applicable cap, its electoral communication expenditure is to include any electoral communication expenditure by an 'affiliated organisation'.

58. The whole of s 95G, like s 96D, forms part of a complex package of laws governing the State electoral process. It does not purport to affect federal elections in any way.[78] For reasons like those outlined in paragraphs 13 to 22 above, the implied freedom of political communication would therefore not apply to it.

D. Implied freedom would not invalidate s 95G(6) in any event

59. If the implied freedom is capable of applying to s 95G(6), then that provision effectively burdens political communication. It does so because it limits the ability of parties and affiliated organisations to spend on electoral communication expenditure. The next question is whether s 95G(6) nonetheless satisfies the second limb of the test in *Lange*.

60. It is submitted that it does.

61. First, s 95G(6) has a legitimate end: it is designed to ensure that the caps created by s 95F are not circumvented.[79]

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75 *Coleman v Power* (2004) 220 CLR 1 at [31] (Gleeson CJ).

76 See Funding Act, s 87 (including expenditure on advertisements in radio, television, the Internet and newspapers).

77 See Funding Act, s 95H.

78 That is apparent not only from s 83 of the Funding Act but also from the definitions of 'party', 'group', 'candidate' and 'third party campaigner' in s 4.

79 The legitimate end of preventing circumvention of valid contribution limits is well recognised in the United States jurisprudence: see *Federal Election Commission v Beaumont* 539 US 146 at

62. Secondly, s 95G(6) does not have the direct purpose of prohibiting or restricting political communications. It instead supplements the Funding Act's cap on electoral communication expenditure, a cap that the plaintiffs do not challenge. The burden that it imposes on political communication is thus incidental.

63. Thirdly, the burden imposed on political communication is not extensive. Affiliated organisations can continue to communicate their views on political matters. They can continue to spend on the matters permitted by s 87 of the Funding Act.[80] Outside the capped expenditure period, moreover, there is no limitation on expenditure.

64. Fourthly, the plaintiffs have not identified an alternative means for achieving the legitimate end of s 95G(6). That alone suggests that the measure is reasonably appropriate and adapted, or reasonably proportionate.

65. Fifthly, given the close link between affiliated organisations and political parties, there is nothing irrational or inappropriate about including those organisations within the cap for political parties. The fact that the interests of affiliated organisations and political parties, are not identical, does not suggest otherwise.

66. Sixthly, contrary to the plaintiffs' submissions,[81] the asserted 'chilling effect' remains speculative. Given the close relationship between affiliated organisations and the parties, there is nothing to suggest that it would be impractical for the affiliated organisations to determine whether they would exceed the relevant cap.

67. Finally, limits on expenditure are a well-established means of addressing integrity concerns in many electoral systems, including those in Australia. Between 1902 and 1980, for example, Part XIV of the *Commonwealth Electoral Act 1918* (Cth) provided for limits on expenditure. It has never been suggested that doing so was invalid. Indeed, in *ACTV*, Deane and Toohey JJ referred to the possibility of spending limits in the context of federal elections with evident approval.[82]

68. Furthermore, overseas countries have imposed limitations on spending by political parties or other groups. In Canada, for example, the Supreme Court

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155 (2003) (Souter J, with whom Rehnquist CJ, Stevens, O'Connor, Ginsburg and Breyer JJ joined).

80 This expenditure does not include expenditure on travel and travel accommodation, expenditure on research associated with election campaigns and expenditure incurred in raising funds for an election or in auditing campaign accounts: see s 87(2)(g)-(j).

81 Plaintiffs' submissions, para 91.

82 (1992) 177 CLR 106 at 175.

dismissed a challenge to federal legislation that capped the expenditure of third party campaigners.[83] It held that legislation to be a valid means of giving effect to the goal of creating a 'level playing field' for those who wish to engage in the electoral discourse.

69. Subsection 95G(6) is designed to ensure that the expenditure limits chosen by the New South Wales Parliament are not subverted. The means that it employs are reasonable, and its impact on political communication is modest. Accordingly, s 95G(6) is reasonably appropriate and adapted to serve a legitimate end in a manner that is compatible with the maintenance of representative and responsible government provided for in the Constitution.

70. The special case should be answered in the way suggested by the defendant.

VI. ESTIMATE OF TIME REQUIRED FOR ORAL ARGUMENT

71. The Attorney-General estimates that 30 minutes should be sufficient to present his oral argument.

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83 *Harper v Canada* [2004] 1 SCR 827.