IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S70 of 2013

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 Nurses and Midwives' Association
Fourth Plaintiff

New South Wales Teachers Federation
Fifth Plaintiff

Transport Workers' Union of New South Wales
Sixth Plaintiff

AND

State of New South Wales
Defendant

PLAINTIFFS' REPLY

Filed on behalf of the Plaintiffs:

Holding Redlich
Level 65, MLC Centre
19 Martin Place
SYDNEY NSW 2000
DX 529 SYDNEY

Date of Document: 25 October 2013

Tel: (02) 8083 0388
Fax: (02) 8083 0399
Ref: 12660004
Solicitor on record: Ian Robertson
Contact: Nicholas Riordan

Part I Publication of Submissions

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

Part II Reply

The Commonwealth Freedom in the Context of State Elections

2. New South Wales submits that the freedom of political communication inferred from the Commonwealth Constitution has no operation in the context of "State laws regarding the conduct of State elections": NSW [33]-[35]; see also Qld [13]-[24] and Vic [17]-[29]. The fallacy in that submission is succinctly exposed by the Commonwealth: Cth [28].

3. There is nothing in the Constitution capable of supporting the view that a State, through the regulation of its electoral system, may deny the free and informed choice of electors in federal elections. The Constitution does not thereby "prescribe the mode of State elections" (Qld [22]) – it simply prohibits legislation inconsistent with the mode of federal elections for which the Constitution provides. As Gaudron J observed in *Muldowney v South Australia*, the Commonwealth Constitution does not interfere with State regulation of State elections, so long as such regulation "does not interfere with the democratic processes of the Commonwealth": (1996) 186 CLR 352 at 376.

4. New South Wales, of course, submits that section 96D has no impact on Commonwealth democratic processes: NSW [32]; see also Qld [23] and Vic [15]. Queensland and Western Australia also submit that section 95G(6) has no such impact: Qld [23], [58]; WA [12], [32]. Those submissions ought to be rejected:

   a. The suggestion that the prohibition in section 96D does not apply to some donations (in addition to those dealt with in accordance with section 95B(2)), depending on whether the donation can be described as "in relation to State elections and elected members of [State] Parliament and local government elections and elected members of councils" (NSW [32]; Cth [17]), should not be accepted. Such a construction would be simply unworkable, and the plain intention of section 96D is that it applies to the full extent of its terms. Western Australia correctly recognises that section 96D prohibits donations not held in a segregated account that are intended, or actually, used to fund activities directly relating to federal elections: WA [7].

   b. Even if that construction were adopted, however, it does not follow that expressions of support for parties or candidates for election to State Parliament have no relevance to the choice to be exercised by voters in federal elections (see Plaintiffs' Submissions at [26]-[27]). And the potential for communications, funded by donations, made in and for the purpose of State elections to be *also* relevant to the choice of federal voters is obvious.

   c. The previous point also demonstrates why the communications burdened by section 95G(6) are relevant to the choice of federal voters in federal elections. The fact that a candidate makes a statement, for the purpose of encouraging voters to vote for him or her in a State election, does not mean that that statement may not be relevant to a federal election (indeed, it is likely to be so).

5. Overall, therefore, the attempts of the States to diminish the practical significance of the overlap between federal and State political matters, and to suggest that anything said or done in connection with a State election can have no relevance to federal elections,

should be rejected.

6. Finally, in this context, it ought to be noted that the plaintiffs do not contend that there is to be inferred from the Commonwealth Constitution what Western Australia describes as the "derivative State Freedom of Political Communication": WA [12], [28]-[35]. For the reasons given above, however, the submission that the plaintiffs can only succeed if there is such an implication is wrong.

Section 96D Burdens the Commonwealth Freedom of Political Communication

7. The submission of New South Wales that section 96D places "no material burden on the constitutionally protected freedom, or alternatively any burden is incidental and not substantial" (NSW [66]), does not answer the first limb of the *Lange* test.

8. That enquiry asks simply whether a law "effectively burdens" freedom of communication about government or political matters; an expression that has been held to mean "nothing more complicated than that the effect of the law is to prohibit, or put some limitation on, the making or the content of political communications": *Monis v The Queen* (2013) 87 ALJR 340 at [108]. In the plaintiffs' submission, questions of "degree" of burden are properly dealt with in the context of the second limb of the test, not the first: see *Monis v The Queen* (2013) 87 ALJR 341 at [113]-[122]; cf. at [343].

9. In any event, the burden on political communication imposed by section 96D is greater than New South Wales and the interveners are prepared to accept:

   a. Neither New South Wales, nor any of the interveners, acknowledge that the inclusion of affiliation fees in the definition of political donation means that the effect of the section is to prohibit a long-established form of political association (i.e., between the ALP and affiliated unions). That the act of affiliation is a political communication cannot seriously be disputed (indeed, Queensland relies on it: Qld [31]), and it is prohibited by this law.

   b. It is wrong to treat the communication constituted by political donations and other forms of expressions of support as equivalent. The provision of financial support, and verbal articulations of support, convey a different message. Parting with money says something that mere words do not and cannot. It is thus not the case that the communication constituted by a donation "could also be expressed by mere words" (NSW [62]).

   c. It is also not true that donations are "not inherently communicative to electors" (NSW [63]; Cth [33], Qld [30]). When a corporation pays for a table at a fundraising dinner attended by its employees, that donation is communicated to (at least) the employees in question. When a union is affiliated with the ALP, any person who knows that fact knows that an affiliation fee has been paid. When a donation is disclosed pursuant to the EFED Act, or the *Commonwealth Electoral Act*, the communication constituted thereby is not diminished by any delay between the making of the donation and the reporting of it (cf. NSW [63]). Moreover, any verbal communication *about* the donation necessarily publicises the donation itself.

   d. The Commonwealth's submission that section 96D does not burden the communication constituted by making a donation (because the prohibited act is *accepting* a donation) must be rejected (Cth [32]). The making and accepting of a donation are two aspects of the same event: a prohibition on the latter plainly burdens the former.

e. The Commonwealth properly accepts, however, that section 96D burdens communications by political parties and candidates, by reducing the amount of money available to them to be spent (Cth [27]). New South Wales accepts that "there may be" a burden in this regard, but that its "significance" is "greatly reduce[d]" by reason of the availability of public funding and the existence of expenditure caps (NSW [64]). For the reasons given above, the "significance" of a burden is not relevant to the first limb of the *Lange* test. But, in any event, section 96D plainly reduces the funds available to parties and candidates to bridge the gap between public funding and the expenditure cap. In particular:

i. The plaintiffs' submissions concerning the significance of the public funding available before and after the enactment of section 96D do not suffer from the conceptual flaws suggested by New South Wales and the Commonwealth: NSW [64]-[65]; Cth [55]. The plaintiffs simply make the point that the burden imposed by section 96D must be assessed by comparing the legal position before and after its enactment.

ii. Taking the ALP as an example, based on historical patterns, the ban on non-elector donations will catch about 98% of the ALP's donors (as opposed to only 75% of the Liberal Party's donors: Special Case [47]. Assuming maximum permitted expenditure, public funding will reimburse 75% of the ALP's actual "electoral communication expenditure": EFED Act, section 58. Three points should be noted in this regard:

1. The ALP must spend money before it becomes entitled to reimbursement from the Fund. It must thus first obtain funds equal to the amount of its public entitlement.

2. Section 96D plainly burdens the ALP's ability to attract donations equal to 25% of its expenditure cap.

3. It must be borne in mind that donations must fund expenditure other than "electoral communication expenditure" (to the extent not reimbursed by payments from the Administration Fund: EFED Act, sections 97B, 97E) (including, it might be expected, the costs involved in seeking to attract donations from individuals).

Section 96D is not Reasonably Appropriate and Adapted

10. New South Wales says that *all* political donations have the potential to create integrity concerns: NSW [80]. That submission ought not to be accepted, absent some proper factual basis being advanced. Certainly, the basis upon which a donation, within the applicable cap, could be thought to give rise to integrity concerns is not obvious.

11. New South Wales then submits that it is entitled to address its integrity concerns "in part", so long as "no undue distortion results": NSW [80]. In the plaintiffs' submission, the prohibition of a particular kind of political communications by one class of person, without any legitimate apprehension of elevated risk, necessarily produces "undue distortion", and the discriminatory criterion selected must be reasonably appropriate and adapted to serving a legitimate end. (It might also be noted, as mentioned above, that there is a concern that the prohibition also produces distortion by reason of the different levels of corporate donations between the two major parties, and the level of public funding).

12. None of the reasons advanced by New South Wales for the selection of corporate donors as the subjects of a complete prohibition on political donations withstands scrutiny:

a. The economic and other advantages enjoyed by corporations (although, it must be noted, not ordinarily unions) are irrelevant when it is remembered that there is a generally applicable cap on donations. The substantial resources of corporations are thus unable to be deployed beyond the applicable cap.

b. The fact that corporations act in their own self-interest does not distinguish them from individual voters. Nor does the fact that the amount of resources possessed by a corporation is unlikely to correlate directly with the popularity of its political views.

c. There is no "disconnection" between voting and seeking to influence political parties or candidates. It is entirely rational that a corporation may seek to persuade politicians (or voters) that its views and objectives are in the best interests of the nation.

d. The idea that corporations pose a "circumvention" risk is purely speculative. For one thing, the argument cannot apply to unions. For another, the costs of incorporating and running a compliant corporation would make it an unappealing option for attempts to circumvent the modest cap on donations (and makes the "rapid proliferation of juristic persons" feared by the Commonwealth highly unlikely: Cth [47]). Finally, the notion that related corporations (as to which, see EFED Act, section 84(6)) and their controllers ought to be subject to one cap would be a simple solution.

13. The alternative, less restrictive measures, identified by the plaintiffs do not require, in order that the Court may assess whether they are "as practical", any fact or matter other than knowledge of society (cf. Cth [54]).

Freedom of Association

14. The plaintiffs made clear in their primary submissions that the freedom of association is an aspect of the freedom of political communication. So to accept does not mean, however, that the freedom of association "adds nothing" to the analysis (cf. NSW [91]). It is vitally important to appreciate that section 96D prohibits a particular form of political association (being a form adopted by the ALP from its beginning), and the communication constituted by that structure. The argument thus does not merely express a preference for a particular pronoun (cf. NSW [91]) – it focuses on the prohibition of a traditional means by which certain groups of persons have associated with other groups of persons for the purpose of advancing a political agenda.

Section 95G(6) Burdens the Commonwealth Freedom of Political Communication

15. New South Wales appears to accept that the aggregation provisions burden the freedom of parties and affiliated organisations to make political communication, although it again attempts to characterize that burden as "limited": NSW [94]-[95]. In the plaintiffs' submission, it is important to appreciate that the aggregation provisions impose an additional burden, over and above the imposition of a generally applicable expenditure cap. That is so for two reasons, namely:

a. because the effect of the aggregation provision is to reduce, compared to other parties and organisations, the amount able to be spent on electoral communication expenditure; and

b. because of the chilling effect on otherwise permitted expenditure, by reason of the coordination and agreement necessary to ensure compliance with the law.

16. The suggestion that the chilling effect is "speculative" (see Qld [66]), must be rejected. There is absolutely no basis, in the Special Case or otherwise, upon which the Court could conclude that the relationship between *all* affiliated unions and the ALP is such that the necessary coordination and agreement could exist. The "close eye" that New South Wales says must be kept on electoral communication expenditure would need, for the reasons set out in the plaintiffs' primary submissions, not only to see into the private affairs of others, but to see into the future.

Section 95G(6) is not Reasonably Appropriate and Adapted

17. The "close relationship" that New South Wales relies on to justify the selection of affiliation as the criterion upon which expenditure caps are aggregated amounts to nothing more than a right to participate (not control) in certain processes of the ALP: NSW [100]. The corporate analogy advanced by Western Australia (WA [59]) in fact demonstrates the plaintiffs' point: affiliated unions simply do not have that level of control or influence.

18. The fact that, in the aggregate, the union delegates comprise at least 50% of delegates to the annual conference does not mean that all affiliated unions should be treated as an undifferentiated whole. Affiliated unions may disagree with one another, just as much as they may disagree with the ALP. The mere fact of an affiliation connection or relationship is not sufficient to justify the law.

The Freedom Inferred from the State Constitution

19. For the reasons set out in the plaintiffs' primary submissions, the provisions of the New South Wales Constitution do imply a freedom of political communication. The concept of an "election", which is a fundamental feature of the entrenched provisions, necessarily imports the notion of a choice to be made by voters, which must be understood as a genuine, free, and fully informed choice.

20. If sections 95G(6) and 96D infringe the *Lange* test, then it follows, in the plaintiffs' submission, that those provisions do not "leave the terms and operation of the entrenched provisions intact": NSW at [39]. That is because they impede the ability of electors to make an informed choice.

21. Even if it should be accepted that "not every matter which touches the election of members of a Parliament is a matter affecting the Parliament's constitution": *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at [77]; and that "a law which merely changes the qualifications of members of the Legislative Council does not effect a change in the constitution of that body within the meaning of [the WA manner and form provision]": *Western Australia v Wilsmore* (1982) 149 CLR 79 at 102-3; laws which deny the freedom of choice required by the notion of an "election" fall into a different category. Such laws strike at the heart of the entrenched provisions.

Bret Walker
Tel: (02) 8257 2527
Fax: (02) 9221 7974
E-mail: maggie.dalton@stjames.net.au

Nicholas Owens
Tel: (02) 8257 2578
Fax: (02) 9221 7974
E-mail: nowens@stjames.net.au