IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S70 of 2013

BETWEEN:

UNIONS NSW AND ORS
Plaintiffs

and

STATE OF NEW SOUTH WALES
Defendant

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

PART I: CERTIFICATION

1. These submissions are suitable for publication on the internet.

PART II: BASIS OF INTERVENTION

2. The Attorney-General for Victoria intervenes in this proceeding pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the Defendant.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

4. The Plaintiffs have referred to the relevant constitutional and legislative provisions.

PART V: ARGUMENT

Summary of argument

5. The Attorney-General for Victoria submits:

(a) the freedom of political communication implied from the Commonwealth Constitution must operate consistently with the Constitution's recognition

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of the continuing existence of the States and their functioning as independent governments in the federation;

(b) in the field of State electoral laws, these federal considerations affect the test for determining whether the implied freedom has been infringed — either by demanding adoption of a test specific to State electoral laws or by requiring a particular application of the *Lange* test;

(c) laws regulating political donations are not laws respecting the constitution of a State Parliament within the meaning of s 6 of the *Australia Act 1986*, and are therefore able to be enacted without compliance with "manner and form" provisions in State Constitutions;

(d) the *Commonwealth Electoral Act 1918* (Cth) gives rise to no relevant inconsistency in this case.

Q 1-2. Implied freedom of political communication derived from the Constitution

6. This case involves the operation of the implied freedom of political communication, which protects the freedom of choice of electors in respect of the Commonwealth Parliament, in the particular context of State electoral laws. The implied freedom operates in a special way in that context because the Constitution recognises and assumes the continuing existence of the States and the functioning of their governments,[1] of which State Parliaments and the laws respecting the election of their members form an integral part.

7. The only case in which the Court has considered the potential for the application of the implied freedom of political communication to limit the powers of a State to enact electoral laws is *Muldowney v South Australia*.[2] Those members of the Court who articulated a test in that case asked whether the impugned State law concerning the method of preferential voting for the Legislative Council was "reasonably capable of being regarded by Parliament as appropriate and adapted"

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1 *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272 (***Clarke***) at 289 [15] (French CJ), 313 [95] (Hayne J).

2 (1996) 186 CLR 352 (***Muldowney***).

to the achievement of a legitimate legislative purpose.[3] That language was not adopted when the general principles governing the implied freedom were reconsidered in *Lange v Australian Broadcasting Corporation*.[4]

8. However, whether or not the test to be applied in this context is that stated in *Muldowney* or the approach outlined in *Lange*,[5] the implied freedom must operate in a manner that pays proper regard to the status of the States as independent constitutional polities.

9. The Attorney-General for Victoria makes submissions addressing these general principles, by reference to the challenge to s 96D of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (**the Act**), concerning political donations.

10. Section 96D of the Act prohibits a party, elected member, group, candidate or third party campaigner from accepting political donations from persons and entities other than individuals who are enrolled to vote on the State or federal electoral roll.

Does the law effectively burden the freedom of political communication?

11. The first *Lange* question asks whether in its terms, operation or effect, the impugned law effectively burdens freedom of communication about Commonwealth government or political matters.[6] In answering that question it is important to identify clearly the nature and extent of the burden imposed, for the purposes of considering the second question.[7]

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3 (1996) 186 CLR 352 at 366-367 (Brennan CJ); see also at 373 (Toohey J), 376 (Gaudron J).

4 (1997) 189 CLR 520 (***Lange***) at 562 (the Court).

5 (1997) 189 CLR 520 at 567-568 (the Court).

6 *Wotton v Queensland* (2012) 246 CLR 1 (***Wotton***) at 15 [25] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Hogan v Hinch* (2011) 243 CLR 506 at 542 [47] (French CJ), 555-556 [94]-[97] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

7 *Monis v The Queen* [2013] HCA 4; (2013) 87 ALJR 340 (***Monis***) at 407 [343] (Crennan, Kiefel and Bell JJ).

12. There are two issues in respect of s 96D of the Act.

(a) The first is whether s 96D operates to limit or restrict freedom of communication about government or political matters.

(b) The second is whether, being directed to the electoral processes of a State, s 96D operates to limit or restrict freedom of communication of the relevant kind, namely communication concerning political or government matters which enable the people to exercise a free and informed choice as electors in elections to the Commonwealth Parliament or concerning the conduct of the executive branch of the Commonwealth government.

13. The making of a political donation is not easily characterised as a political communication. Even assuming the act of donating may itself constitute "a general expression of support"[8] for a party or candidate, that expression rests, as the United States Supreme Court said in *Buckley v Valeo*, "solely on the undifferentiated, symbolic act of contributing".[9] The symbolic significance of that act should not be overstated. A donor's identity need not be publicly disclosed if the amount of the donation does not meet the threshold for a "reportable political donation" under s 92 of the Act;[10] the underlying basis of the donor's support for the recipient is not articulated;[11] some donors may give to competing parties or candidates; and some donors may give their support, not as a signal of their support, but in the hope or expectation of securing access to or influence over a party or candidate. Such a donation is not a political communication at all; it is the very type of conduct that s 96D seeks to curtail.

14. In any event, the relevant inquiry is not whether the making of a political donation itself constitutes communication but the effect, if any, that the law has on freedom

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8 *Buckley v Valeo* 424 US 1 (1975) at 21 (the Court).

9 424 US 1 (1975) at 21.

10 Cf Plaintiff's Written Submissions dated 18 September 2013 (**Plaintiffs' WS**) at [18].

11 *Buckley v Valeo* 424 US 1 (1975) at 21 (the Court).

of political communication.[12] To the extent to which political donations facilitate political communication by others, a prohibition on donations by persons or entities other than individual electors at most constitutes an indirect burden on such communication.

15. Moreover, when considering the extent of the restriction imposed by the law upon political communication,[13] it is necessary to do so by reference to the effect of the law on freedom of political communication respecting elections to the Commonwealth Parliament, not upon a general freedom of political communication, which may embrace matters of purely State or local concern.[14] It should not be too readily accepted that s 96D, being directed toward the integrity and fairness of *State* government and electoral processes,[15] is capable of burdening the freedom of communication implied from the Commonwealth Constitution.[16] The degree of interaction between the levels of government in Australia[17] and the existence of national political parties operating at the different levels[18] mean that matters of federal significance may arise in the course of a State election campaign, but they will do so in the context and as an incident of the discussion of State political and governmental issues.

16. The distinction between laws which regulate or prohibit communications which are inherently political and those which only incidentally restrict political

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12 *APLA v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 (***APLA***) at 451 [381] (Hayne J), endorsed in *Hogan v Hinch* (2011) 243 CLR 506 at 544 [50] (French CJ); *Wotton* (2012) 246 CLR 1 at 31 [80] (Kiefel J).

13 *Monis* [2013] HCA 4; (2013) 87 ALJR 340 at 397 [282], 409 [350] (Crennan, Kiefel and Bell JJ).

14 *Lange* (1997) 189 CLR 520 at 566-567 (the Court); cf *Wotton* (2012) 246 CLR 1 at 15 [27] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

15 See ss 83, 96(3), (5)(a) and (7) and the definitions of relevant terms such as "candidate", "election", "elected member", "group", "Parliament" and "third party campaigner" in s 4(1). The Plaintiffs accept that each of the relevant terms "is confined to political activities connected with State, rather than federal, Parliament": see Plaintiffs' WS at [6] fn 1.

16 See *Lange* (1997) 189 CLR 520 at 566-567 (the Court). Cf *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 (***ACTV***) at 142 (Mason CJ).

17 *Hogan v Hinch* (2011) 243 CLR 506 at 543 [48] (French CJ).

18 *Lange* (1997) 189 CLR 520 at 571-572 (the Court).

communication[19] therefore requires some refinement in this context. In so far as s 96D can be said to be directed at communications which are inherently political, it is directed at communication of *State* governmental and political matters and still affects the discussion of matters of Commonwealth significance only incidentally.[20]

Is the law reasonably and appropriately adapted to serve a legitimate end in a manner that is compatible with the maintenance of the constitutionally prescribed system of government?

17. The fact that s 96D is concerned with State government and electoral processes is of particular significance to the application of the second *Lange* question. Considerations of "constitutional coherence"[21] require that the boundaries of the limitation on legislative power that is marked out by the implied freedom must respect and conform to other provisions of the Constitution and any necessary implications to be drawn from them. In *Lange* the Court said:[22]

> [T]he Constitution gives effect to the institution of "representative government" only to the extent that the text and structure of the Constitution establish it. ... Under the Constitution, the relevant question is not, "What is required by representative and responsible government?" It is, "What do the terms and structure of the Constitution prohibit, authorise or require?"

18. Furthermore, in *McGinty v Western Australia*, McHugh J said of the implied freedom:[23]

> Because the principle arises by implication, it must be subject to the express terms of the Constitution and be weighed in appropriate cases against other implications drawn from the text and structure of the Constitution.

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19 *Wotton* (2012) 246 CLR 1 at 16 [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ), citing *Hogan v Hinch* (2011) 243 CLR 506 at 555-556 [95]-[99] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

20 See *Monis* [2013] HCA 4; (2013) 87 ALJR 340 at 369 [119] (Hayne J).

21 *Williams v The Commonwealth* [2012] HCA 23; (2012) 86 ALJR 713 at 753-754 [157] (Gummow and Bell JJ).

22 (1997) 189 CLR 520 at 566-567.

23 (1996) 186 CLR 140 (***McGinty***) at 234; see also at 229-230. See further *ACTV* (1992) 177 CLR 106 at 210 (Gaudron J).

19. Relevantly, the boundaries of the implied freedom must be drawn in a manner consistent with the principle underlying the line of cases beginning with *Melbourne Corporation v The Commonwealth*.[24]

20. That line of cases concerns a limitation on Commonwealth legislative power that is "derived from the federal structure of the Constitution and consistent with its express terms".[25] While that limitation is not itself relevant to the present case, the principle which underlies it is. In *Melbourne Corporation*, Dixon J identified that principle as being that:[26]

> [t]he 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.

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21. More recently, in *Austin v The Commonwealth*, Gaudron, Gummow and Hayne JJ considered that the limitation protected "one of the fundamental premises of the Constitution, namely, that there will continue to be State governments separately organised".[27]

22. Brennan J explained in *Street v Queensland Bar Association*:[28]

> The necessity to preserve the institutions of government and their ability to function is an unspoken premise of all constitutional interpretation ... for it is the necessity to preserve the Constitution itself.

20 23. Four members of the Court in that case instanced laws governing the State franchise as examples where the express protection against disability or discrimination against residents of other States for which s 117 of the Constitution

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24 (1947) 74 CLR 31 (***Melbourne Corporation***).

25 *Clarke* (2009) 240 CLR 272 at 305 [60] (Gummow, Heydon, Kiefel and Bell JJ).

26 (1947) 74 CLR 31 at 82.

27 (2003) 215 CLR 185 (***Austin***) at 246 [115].

28 (1989) 168 CLR 461 at 513; see also at 491-492 (Mason CJ), 528 (Deane J), 548 (Dawson J), 559-560 (Toohey J), 583-584 (McHugh J). Deane J observed at 528 that the Constitution "is founded upon the existence of the various States as distinct entities under the federation".

provides needs to be read down to accommodate the constitutional system of government.[29] The implied freedom must operate subject to a similar limitation.[30]

24. Furthermore, the provisions of the Constitution from which the implied freedom is derived themselves entrench "matters concerned [with] issues of federalism".[31] As Gummow J said in *McGinty*, in framing the Commonwealth Constitution "it was necessary to adapt notions of representative government to the requirements of federalism as hammered out in forming the federal compact."[32]

25. The freedom of the States to select the manner and method for the discharge of their constitutional functions is an essential aspect of the continued existence of the
10 States as independent entities.[33] The constitutional functions of the States include the management of their electoral processes.[34] In *ACTV*, Brennan J, in concluding that the Commonwealth legislation in question infringed the *Melbourne Corporation* principle, said:[35]

> a law which purports to control, for good or ill, political discussion relating to State elections purports to burden the functioning of the States with the constraints it imposes. ... Among the functions of the State I would include the discussion of political matters by electors, the formation of political judgments and the casting of

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29 *Street v Queensland Bar Association* (1989) 168 CLR 461 at 512-513 (Brennan J), 528 (Deane J), 559-560 (Toohey J), 583-584 (McHugh J).

30 Stellios concludes that "stripped of all the verbiage, it would appear that the fundamental textual or structural constitutional enquiry in *Lange* is whether the law in question is compatible or consistent with the system of government established by the *Australian Constitution*" (citing *Coleman v Power* (2004) 220 CLR 1 at 51 (McHugh J), 78 (Gummow and Hayne JJ), 82 (Kirby J), 110 (Callinan J); and *APLA* (2005) 224 CLR 322 at 351 (Gleeson CJ and Heydon J)): J Stellios, "Using Federalism to Protect Political Communication: Implications from Federal Representative Government" (2007) 31 MULR 239 at 263.

31 *McGinty* (1996) 186 CLR 140 at 277 (Gummow J).

32 (1996) 186 CLR 140 at 270.

33 *Austin* (2003) 215 CLR 185 at 264 [165] (Gaudron, Gummow and Hayne JJ), where their Honours referred to "the exercise by the State of its freedom to select the manner and method for the discharge of its constitutional functions respecting the remuneration of the judges of the courts of the State". See also *Melbourne Corporation* (1947) 74 CLR 31 at 75 (Starke J); *Clarke* (2009) 240 CLR 272 at 305 [62] (Gummow, Heydon, Kiefel and Bell JJ).

34 In *McGinty* the Court confirmed that the system of representative government for which Ch I of the Constitution provides is confined to the Commonwealth Parliament and is not intended as a prescription for the States: (1996) 186 CLR 140 at 175-176 (Brennan CJ), 189 (Dawson J), 207-210 (Toohey J), 250-251 (McHugh J), 289 (Gummow J); cf at 216 (Gaudron J).

35 (1992) 177 CLR 106 at 163-164; see also at 202 (Dawson J), 241-242 (McHugh J, referring to "the States and their people in the exercise of their constitutional functions").

> votes for the election of a parliament or local authority. Laws which affect the freedom of political discussion in matters relating to the government of a State, whether by enhancement or restriction of the freedom, are laws which burden the functioning of the political branches of the government of the State ...

26. In *Muldowney*[36] the Court was presented with the question whether the preferential voting system established by s 126 of the *Electoral Act 1985* (SA) infringed the freedom of political communication to be implied from either the Commonwealth Constitution or the *Constitution Act 1934* (SA). All members of the Court upheld the validity of the law. All members of the Court also considered that, whether the relevant implication[37] was drawn from the Commonwealth or South Australian Constitution, it would lead to the same conclusion.[38]

27. Brennan CJ and Gaudron J directly addressed the interaction between the Commonwealth implied freedom and State electoral laws. Brennan CJ held that the challenge on the basis of the Commonwealth freedom was misconceived because "none of the provisions from which a freedom of political discussion is inferred affects the method of election of the members of a State Parliament".[39] Gaudron J held that the constitutional guarantee of the continued existence of the States as "constituent elements of the federation"[40] required that the implied freedom of political communication derived from the Commonwealth Constitution:[41]

> not operate to strike down a law which curtails freedom of communication in those limited circumstances where that curtailment is reasonably capable of being viewed as appropriate and adapted to furthering or enhancing the democratic processes of the States. At least that is so if it does not interfere with the democratic processes of the Commonwealth.

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36 (1996) 186 CLR 352.

37 Dawson J drew the implication somewhat more narrowly than the other members of the Court: (1996) 186 CLR 352 at 370-371.

38 (1996) 186 CLR 352 at 367 (Brennan CJ), 370-371 (Dawson J), 374-375 (Toohey J), 377-378 (Gaudron J), 387-388 (Gummow J, with whom McHugh J agreed).

39 (1996) 186 CLR 352 at 365-366, citing *McGinty* (1996) 186 CLR 140 at 175-176 (Brennan CJ), 189 (Dawson J). See also (1996) 186 CLR 352 at 370 (Dawson J), 374 (Toohey J).

40 (1996) 186 CLR 352 at 376.

41 (1996) 186 CLR 352 at 376.

28. *Muldowney* preceded the reformulation of the relevant test in *Lange* and the "reasonably capable of being viewed as appropriate and adapted" test was rejected, albeit not in the context of State electoral laws, in *Coleman v Power*.[42] Nevertheless, the considerations identified by Gaudron J in *Muldowney* indicate that the implied freedom of political communication must be applied in a manner which protects the freedom of the States to select the manner and method for the discharge of their electoral processes. Whether or not the test to be applied in this particular context is that stated in *Muldowney* or that outlined in *Lange*[43] and *Coleman v Power*, these considerations have at least the following consequences for the application of the second limb of the *Lange* test.

29. First, the second limb should be applied in a manner that recognises the variety of alternative means available to a State Parliament to make provision for its own constitution, including laws governing the election of its members. Recognition of that latitude and autonomy must be built in to the notion of proportionality in this context.[44]

30. Even aside from the special considerations attaching to laws providing for the constitution of State Parliaments, proportionality is a test that is sensitive to context and in areas such as electoral campaign financing where the variety of available measures and the manner of their interaction is particularly complex, the courts should be slow to "substitute judicial opinion for legislative choice in the face of a genuine and reasonable attempt to balance the fundamental value of freedom of expression against the need for fairness in the electoral process".[45] While notions

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42 (2004) 220 CLR 1 at 48-53 [87]-[100] (McHugh J), 78 [196] (Gummow and Hayne JJ), 82 [212] (Kirby J).

43 (1997) 189 CLR 520 at 567-568 (the Court).

44 See generally, as to less restrictive means: *Monis* [2013] HCA 4; (2013) 87 ALJR 340 at 396 [280], 408 [347] (Crennan, Kiefel and Bell JJ); *Momcilovic v The Queen* (2011) 245 CLR 1 at 214 [556] (Crennan and Kiefel JJ); *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 134 [438] (Kiefel J); *Coleman v Power* (2004) 220 CLR 1 at 31 [29]-[31] (Gleeson CJ), 52-53 [100] (McHugh J); *Levy v Victoria* (1997) 189 CLR 579 at 598 (Brennan CJ); and *Uebergang v Australian Wheat Board* (1980) 145 CLR 266 at 306 (Stephen and Mason JJ). Cf Plaintiffs' WS at [62].

45 *Canada (Attorney-General) v Harper* [2004] 1 SCR 827 (***Harper***) at 888 [111] (Bastarache J, for the majority, quoting Berger JA in the judgment under appeal). See also *Coleman v Power* (2004) 220 CLR 1 at 52-53 [100], where McHugh J observed that the second limb of the *Lange* test "gives

of "deference" or the "margin of appreciation" to be afforded to the legislature must be treated with caution, it may be observed that this approach is consistent with that in other jurisdictions.[46]

31. Secondly, for the same reasons, in the field of electoral laws the second limb of the *Lange* test should not require proof of the existence of the harm which a State Parliament has sought to curtail or prevent or of the likelihood of the legislative means achieving that objective.[47] Again, this has been recognised elsewhere, even aside from the federal considerations applicable in the present case. In the context of the regulation of electoral campaign financing, as Bastarache J, for the majority, said in *Harper*,[48] "the nature of the harm and the efficaciousness of Parliament's remedy in this case is difficult, if not impossible, to measure scientifically" and that, consequently, "a reasoned apprehension"[49] that the means chosen by Parliament will achieve their intended object will be sufficient.

32. As noted above, since s 96D is directed to the integrity and fairness of State government and electoral processes, its effect on the free discussion of federal political and government matters will be incidental and more limited than its effect on the discussion of State matters.

33. Further, while s 96D may restrict the *quantity* of political communication by some parties or candidates, the State Parliament has made a considered judgment that it will enhance the democratic processes in the State overall by promoting the actual and perceived integrity of the Parliament. The potential for money to dominate political discussion was recognised, in the context of expenditure limits, in the

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legislatures within the federation a margin of choice as to how a legitimate end may be achieved at all events in cases where there is not a total ban on such communications".

46 See eg *Harper* [2004] 1 SCR 827 at 878-879 [86]-[88], 888-889 [111] (Bastarache J); *R (Animal Defenders International) v Secretary of State for Culture* [2008] 1 AC 1312 at 1347-1348 [33] (Lord Bingham); *Animal Defenders International v United Kingdom* [2013] ECHR 362 (Application no. 48876/08, Grand Chamber, 22 April 2013) at [99]-[125]; and *Federal Election Commission v Beaumont* 539 US 146 (2003) at 155, 156-157 (Souter J); but cf *Citizens United v Federal Election Commission* 558 US __ (2010) slip op at 23 (Kennedy J).

47 Cf Plaintiffs' WS at [54]-[55]; *ACTV* (1992) 177 CLR 106 at 239 (McHugh J).

48 [2004] 1 SCR 827 at 875 [79].

49 [2004] 1 SCR 827 at 879 [88].

Second Reading Speech to the Commonwealth *Electoral Bill 1902*, when it was said:[50]

> If we wish to secure a true reflex of the opinions of the electors, we must have ... a system which will not allow the choice of the electors to be handicapped for no other reason than the inability of a candidate to find the enormous amount of money required to enable him to compete with other candidates.

34. McHugh J said in *Coleman v Power*:[51]

> Communications on political and governmental matters ... may be regulated in ways that enhance or protect communication of those matters. Regulations that have that effect do not detract from the freedom. On the contrary, they enhance it.

35. The regulation of political campaign financing is a notoriously complex area and the difficulties of striking a balance that respects freedom of communication and promotes fairness and openness in the democratic process are readily apparent.[52] There are many possible approaches, including: contribution bans, contribution caps, disclosure requirements, tax deductibility of donations, advertising bans, advertising expenditure caps, and public funding. In this respect, it is relevant that the statutory context of s 96D tempers its impact – the electoral communication expenditure limits (which, but for one aspect, are not challenged) and the public funding regime reduce the dependence of candidates and parties on donations. Given that the prohibition on certain political donations forms part of the comprehensive and detailed regime to be found in the Act, it is difficult, if not impossible, to say that there were any other "obvious and compelling" alternative means available to the Parliament that would be equally effective in achieving the purposes of these measures in a manner that is less restrictive of the implied freedom of communication.

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50 Commonwealth, *Parliamentary Debates*, Senate, 31 January 1902 at 9542 (Senator O'Connor, as his Honour then was).

51 (2004) 220 CLR 1 at 52 [97].

52 See eg *Harper* [2004] 1 SCR 827 at 879 [87] (Bastarache J) ("The difficulties of striking this balance are evident").

Q3-5. Implied freedom of communication derived from the *Constitution Act 1902* (NSW)

36. It is not necessary to decide whether a freedom of political communication can be implied from the *Constitution Act 1902* (NSW) because, even if it can, the analysis would be essentially the same as set out above.[53] Although, as noted above, the effect of the provision on any implied freedom of political communication in respect of elections to the State Parliament may be more significant than its effect on the freedom of political communication in respect of federal elections, that should not, in this case, result in any different conclusion. If anything, the justification for the State Parliament seeking to enhance its electoral processes is enlarged, rather than diminished, as the focus of the relevant laws is directed more towards State, rather than federal, elections.

37. There is, in any event, a threshold question whether s 96D, or the *Electoral Funding, Expenditure and Disclosures Amendment Act 2012* (NSW) (**the 2012 Act**), which enacted it, constitutes a law "respecting the constitution, powers or procedure of the Parliament of the State" for the purposes of s 6 of the *Australia Act 1986* (Imp & Cth).[54] It is submitted that neither s 96D nor the 2012 Act is a law of that kind. It was said in *Attorney-General (WA) v Marquet* that "[t]he 'constitution' of a State Parliament includes (perhaps it is confined to) its own 'nature and

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53 In *Muldowney* (1996) 186 CLR 352 at 367 (Brennan CJ), 373-374 (Toohey J), 387-388 (Gummow J), 377-378 (Gaudron J) and in *Levy v Victoria* (1997) 189 CLR 579 at 599-600 (Brennan CJ), 609 (Dawson J), 620 (Gaudron J), 626 (McHugh J), 643-644 (Kirby J), the Court considered it unnecessary to decide whether a similar freedom could be implied from a State Constitution Act for this reason (albeit that the point was conceded in *Muldowney*).

54 See *Muldowney* (1996) 186 CLR 352 at 387 where Gummow J, with whom McHugh J agreed, said that it was unnecessary to determine whether the concessions by the Solicitor-General (SA) that the *Constitution Act 1934* (SA) contained an implication of representative government and that the manner and form provisions of that Act extended to laws which abrogated or varied the implication were correctly made because the provisions in question did not infringe the freedom. The plaintiffs do not contend that there is any basis other than s 6 of the *Australia Act* upon which a State Parliament can impose a manner and form requirement. To the extent that it is necessary to do so, it should now be accepted that that section provides the only power to do so: *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 (***Marquet***) at 574 [80] (Gleeson CJ, Gummow, Hayne and Heydon JJ), 616-617 [214]-[215] (Kirby J); *McGinty* (1996) 186 CLR 140, 297 (Gummow J). See generally A Twomey, "The Application of Implied Freedom of Political Communication to State Electoral Funding Laws" (2012) 35 UNSWLJ 625 at 640-641.

composition'"[55] and, at least to some extent, "extends to features which go to give it, and its Houses, a representative character".[56]

38. The Plaintiffs' argument rests on characterising freedom of political discussion as a feature which gives to the Parliament its representative character.[57] Even if the concept extends that far, not every law which is inconsistent (according to the *Lange* test) with an implied freedom of political communication is a law "respecting" the "constitution" of a State Parliament, just as not every law which touches the election of members of a Parliament is such a law.[58] The question at this point is not whether the implied freedom is infringed, it is whether the law said to have that operation is a law "respecting" the "constitution" of a State Parliament.[59] The 2012 Act and s 96D in particular are plainly not laws of that kind. They leave the constitution of the Parliament, and its representative character, unchanged. At most, s 96D is a law respecting the funding of political parties seeking election of candidates to the Parliament.

39. It follows that s 6 of the *Australia Act* is inapplicable and ss 7A and 7B of the *Constitution Act 1902* (NSW) were not engaged with respect to the enactment of s 96D. In other words, even if those sections provide for an implied freedom of political communication in respect of matters bearing on elections to the New South Wales Parliament, they were not effective to direct the manner and form of enactment of s 96D or to affect its validity.

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55 (2003) 217 CLR 545 at 572 [75] (Gleeson CJ, Gummow, Hayne and Heydon JJ), citing *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394 at 429 (Dixon J).

56 (2003) 217 CLR 545 at 573 [76] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

57 Plaintiffs' WS at [69].

58 *Marquet* (2003) 217 CLR 545 at 572 [75] (Gleeson CJ, Gummow, Hayne and Heydon JJ), citing *Clydesdale v Hughes* (1934) 51 CLR 518 at 528 (Rich, Dixon and McTiernan JJ).

59 But cf *Muldowney* (1996) 186 CLR 352 at 370-371, where Dawson J expressed the view that "neither the Commonwealth parliament nor the South Australian parliament, save in the latter case in accordance with any applicable entrenching provisions, can validly legislate in a manner which is incompatible with the exercise by electors of a genuine choice" (footnotes omitted). See also *Stephens v Western Australian Newspapers Ltd* (1994) 182 CLR 211 at 233 (Mason CJ, Toohey and Gaudron JJ).

Q6-7. Section 109 questions – inconsistency of s 96D of the Act and Pt XX, Divs 4 and 5A, and s 327 of the *Commonwealth Electoral Act 1918* (Cth)

40. There is no inconsistency between s 96D of the Act and the provisions of the *Commonwealth Electoral Act 1918* (Cth).

41. Divisions 4 and 5A of the *Commonwealth Electoral Act* do no more than regulate the disclosure of donations actually received by political parties registered under Pt XI of the Act and candidates for elections to the Commonwealth Parliament[60] in excess of specified thresholds. They do not purport to create a right or a general liberty or "permission"[61] to make political donations to parties and candidates.

10 42. Section 327(1) of the *Commonwealth Electoral Act* applies to conduct in relation to "elections" and "by-elections" to the Commonwealth Parliament. It depends on identification of a "political right or duty" which is lacking in relation to s 96D.[62]

43. Section 327(2) prohibits discrimination by a "person" against another person on the ground of the making by the other person of a political donation. Section 96D effects no discrimination on the ground of making a political donation. It applies at an anterior stage, before any donation is made.

44. More fundamentally in any event, the Plaintiffs' submissions, which refer to the effect of s 96D of the Act as if the State, or perhaps the State Parliament, were the "person" engaging in the discrimination prohibited by s 327(2) are misconceived.[63]
20 Section 327 does not purport to direct the States in the exercise of their legislative powers, nor could it validly do so. Invalidity of State laws is effected only by s 109 of the Constitution.

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60 See the definitions of "by-election" and "election" in s 303(1) and "general election" in s 4(1).

61 Plaintiffs' WS at [80].

62 Cf *Hudson v Entsch* (2005) 216 ALR 188 at [48]-[49] (Dowsett J).

63 Plaintiffs' WS at [82]. To the extent that the Queensland Court of Appeal held otherwise in *Local Government Association of Queensland (Inc) v Queensland* [2003] 2 Qd R 354, that decision should not be followed.

45. Moreover, for the reasons given in paragraph 25 above, to the extent, if any, that s 327 may be construed to limit State electoral laws, it should be read down to ensure it does not infringe the *Melbourne Corporation* principle.

Q8. Freedom of association – is s 96D of the Act invalid because it impermissibly burdens an implied freedom of association?

46. The asserted freedom of association would not add anything to the foregoing analysis of the validity of the impugned provisions by reference to the freedom of political communication.[64]

PART VI: ESTIMATE OF TIME FOR ORAL ARGUMENT

10 47. Approximately 20 minutes is likely to be required for oral submissions.

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64 *Wainohu v New South Wales* (2011) 243 CLR 181 at 230 [112] (Gummow, Hayne, Crennan and Bell JJ).