IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE 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

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

PART I: SUITABILITY FOR PUBLICATION

1. This submission is in a form suitable for publication on the Internet.

PART II: BASIS OF INTERVENTION

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

Date of Document: 16 October 2013

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PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

4. See Part VI of the Plaintiffs' Written Submissions.

PART V: SUBMISSIONS

5. Western Australia intervenes to address the following issues. First, whether a freedom of political communication is implied or emerges from the express terms of the *Constitution Act 1902* (NSW). Second, to submit that no relevant freedom of political communication can be derived from the Commonwealth *Constitution*; that the reasoning (in this respect) which supports it[1] should be rejected and that the reasoning (in this respect) of McHugh J in *Theophanous*[2], Brennan J in *Stephens*[3], Brennan CJ and Dawson J in *McGinty*[4] and *Muldowney*[5] preferred and accepted. Third, that the two impugned provisions, ss.96D(1) and 95G(6) of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW), are valid.

6. Preceding each of these are matters of construction of the relevant provisions of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW).

Construction of the Act

7. As regards s.96D of the Act, the definitions of "party", "elected member", "group", "candidate" and "third party campaigner" are to be considered, having regard to s.83. It will be for the parties to this action to explain the operation of this provision in respect of the Australian Labor Party and ALP NSW[6], the Australian Greens and the Greens NSW[7], the Nationals and the National Party of Australia – NSW[8], and the Liberal Party of Australia and the Liberal Party of Australia – NSW Division[9]. Even read with s.83, it would appear that s.96D(1) extends to political donations[10] made in New South Wales, the purpose of which is to fund a party in a federal election. This

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[1] *Nationwide News Pty Ltd v Wills* [1992] HCA 46; (1992) 177 CLR 1 at 75 (Deane and Toohey JJ) ('*Nationwide News*'); *Australian Capital Television Pty Ltd v Commonwealth* [1992] HCA 45; (1992) 177 CLR 106 at 168-169 (Deane and Toohey JJ), 216-217 (Gaudron J) ('*Australian Capital Television*'); *Theophanous v Herald & Weekly Times Ltd* [1994] HCA 46; (1994) 182 CLR 104 at 164 (Deane J) ('*Theophanous*'); *Stephens v West Australian Newspapers Ltd* [1994] HCA 45; (1994) 182 CLR 211 at 232 (Mason CJ, Toohey and Gaudron JJ), 257 (Deane J) ('*Stephens*'); *McGinty v Western Australia* [1996] HCA 48; (1996) 186 CLR 140 at 206 (Toohey J), 216 (Gaudron J) ('*McGinty*'); *Muldowney v South Australia* [1996] HCA 52; (1996) 186 CLR 352 at 377 (Gaudron J) ('*Muldowney*'); *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 53; (2001) 208 CLR 199 at 281-282 (Kirby J) ('*Lenah Game Meats*'); *Roberts v Bass* [2002] HCA 57; (2002) 212 CLR 1 at 58 [159] (Kirby J) ('*Roberts*').

[2] *Theophanous* at 201, 202, 205 (McHugh J).

[3] *Stephens* at 235 (Brennan J).

[4] *McGinty* at 175-176 (Brennan CJ), 189 (Dawson J).

[5] *Muldowney* at 365-366 (Brennan CJ), 370 (Dawson J).

[6] Special Case [13]-[17] (SCB1:66).

[7] Special Case [21]-[24] (SCB1:67-68).

[8] Special Case [25]-[28] (SCB1:68).

[9] Special Case [29]-[33] (SCB1:68).

[10] Defined in s.85 to include a donation to a "party".

emerges from the definition of "party". A body that has, as one of its objects or activities, the promotion of the election of its candidates to one of the houses of the Federal Parliament falls within the definition if the party also has an object of promoting election of its candidates to the New South Wales Parliament. Section 96D(1) interacts with s.95B(2), but, even so, it appears that s.96D(1) would preclude (in New South Wales) a donation by a non-elector to a party which had the objects of promoting election of candidates to the federal and New South Wales Parliaments, even if the donation were paid into an account kept exclusively for the purpose of federal election campaigns, in terms of s.95B(2).

8. The caps on "electoral communication expenditure"[11] in s.95F of the Act relate only to New South Wales' general elections[12], by-elections[13] and periodic Legislative Council elections[14], all of which are defined in s.4. The cap is imposed on parties fielding candidates at elections[15], on candidates[16] and on "third party campaigners"[17]. The practical effect of the definition of third party campaigner[18] is that a cap is imposed on all people or entities that are not a party or a candidate. There is no challenge here to the validity of these provisions or these caps[19].

9. Section 95G provides for the merging of the caps of associates. Other than as provided for in s.95G(6), the third party campaigners' cap does not merge with parties' and candidates' caps[20]. "Affiliated organisations", as defined in s.95G(7), will always be third party campaigners[21]. The effect of s.95G(6) is to merge the cap of one class of third party campaigners (affiliated organisations) with that of a party. The provision is, in effect, an exception to the scheme by which third party campaigners' electoral communication expenditure, though the subject of its own cap/s, is outside the cap imposed on parties and candidates[22].

10. As there is no challenge to any of ss.95G(2)-(5), or to s.95F, the plaintiffs' contention is that the *Lange* protected freedom, or field of legislative incapacity, operates upon the merging of a (valid) cap on third party campaigners' electoral communication expenditure with a (valid) cap on a party's and candidates' electoral communication

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[11] Defined in s.87(2).
[12] See ss.95F(2), (4), (6), (7) and (10) and the definition in s.4.
[13] See ss.95F(9) and (11) and the definition in s.4.
[14] See ss.95F(5) and (8) and the definition in s.4.
[15] See ss.95F(2), (4) and (12).
[16] See ss.95F(5), (6), (7), (8) and (9).
[17] See ss.95F(10), (11) and (12).
[18] Defined in s.4.
[19] Despite the terms of the Writ of Summons (SCB1:28), no declaration of invalidity is sought in respect of s.95F. As such, there is no challenge, *per se,* to the validity of electoral communication expenditure caps for elections to the New South Wales Parliament. Similarly, there is no challenge to the validity of s.95I. The only declaration sought is as to s.95G(6).
[20] Because of the definition in s.95G(1), this is likely so even if the third party campaigner endorses a candidate.
[21] Provided they incur electoral communication expenditure during a capped expenditure period that exceeds $2,000 in total: s.4 (definition of "third party campaigner"). This is also confirmed in the terms of the Special Case where each of the affiliated organisations are registered as third party campaigners.
[22] This proceeds on an assumption that affiliated organisations are not themselves "parties" as defined; that is, they do not have the relevant purpose.

expenditure, where the third party campaigner is an affiliated organisation, as defined in s.95G(7)[23].

Matters arising from these issues of construction

11. If the scope of s.96D extends to restriction (in New South Wales) on political donations to parties that promote the election of its candidates to Federal Parliament, the contentions advanced by the plaintiffs as to invalidity can be considered simply as a matter of, what the plaintiffs have referred to as, the "Commonwealth Freedom of Political Communication"[24].

12. Because the issue raised by the plaintiff as to s.95G(6) arises solely in respect of New South Wales parliamentary elections, this "direct" Commonwealth Freedom of Political Communication does not arise, for reasons that will be explained. The challenge to s.95G(6) gives rise to consideration of two other sources of the contended for protected freedom. First, as implied or emerging from the *Constitution Act 1902* (NSW). This is what the plaintiff refers to as "State Freedom of Political Communication"[25]. Second, applying in respect of New South Wales by implication from the Commonwealth *Constitution*. For ease of reference, this latter issue will be referred to as "derivative State Freedom of Political Communication"[26]. Both are addressed below.

A further matter

13. Part 5 of the Act[27] provides for the public funding of New South Wales Parliamentary elections, except by-elections for the Legislative Assembly[28]. It provides that registered parties[29] that satisfy the party eligibility criteria in s.57(3) of the Act, and candidates, attract distributions from the Election Campaign Fund to re-imburse parties and candidates for actual campaign expenditure (that is within the cap/s) in the proportions outlined in the Table to s.58. As [54] of the Case Stated shows, the effect of Part 5 is that eligible registered parties, that spend the cap,

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[23] The scheme of Division 2B of Part 6 of the Act is that a cap is imposed on electoral communication expenditure (ss.95F and 95G). Section s.95I makes it unlawful to incur electoral communication expenditure beyond the cap during the capped period. Section 96HA(1) creates an offence for a person who was at the time of the act "aware of the facts that result in the act being unlawful". The scheme might be thought to have an odd operation in respect of s.95G(6). As noted, s.95F imposes separate caps on parties fielding candidates at elections, on candidates and on third party campaigners, which is everyone and every entity that is not a party or a candidate. The third party campaigners cap does not merge, except if the third party campaigner is an affiliated organisation, as defined in s.95G(7). If a party officer or candidate did not actually know that an affiliated organisation was making or incurring electoral communication expenditure that resulted in the merged party/candidate cap being exceeded, it is difficult to see how such officer or candidate could be guilty of an offence under s.96HA(1). The only way that this could occur is if the party official or candidate actually knew what was spent by both, or perhaps knew that (say) the party had spent the cap and the affiliated organisation spent something.

[24] Plaintiffs' Written Submissions at [13]-[65], [85]-[99].

[25] Plaintiffs' Written Submissions at [66]-[71], [100].

[26] It is what Gummow J in *McGinty* at 291 referred to as "an implication at a secondary level".

[27] See Plaintiffs' Written Submissions at [44]-[48]. The point sought to be made there is (with respect) elusive. This action was commenced in 2013. It relates and can only relate to the Act as it was at the date of commencement of the action, which is the Act in its current form. Part 5 of the Act was amended and in its current form commenced on 1 January 2011 (Special Case [50] (SCB1:75)). The most recent New South Wales State election was in March 2011 (Special Case [48] (SCB1:74)).

[28] Section 57(1).

[29] There is no challenge to the registration of parties.

receive 75% of their actual electoral expenditure from the Election Campaign Fund[30].

14. The only relevance of Part 5 is to the validity of s.96D[31]. At one level, Part 5 of the Act is relevant to the validity of s.96D, as the restriction on making donations is to be considered having regard to the fact that there is extensive public funding of elections for the New South Wales Parliament. If s.96D is to be understood as restricting political donations to parties that promote the election of its candidates to Federal Parliament, Part 5 of the Act is not an answer to invalidity of s.96D and likely not relevant to it[32].

10 15. Before specifically addressing the validity of s.96D and s.95G(6), it is desirable to make plain the position of Western Australia as to certain matters.

First matter – "State Freedom of Political Communication"

16. Western Australia makes no submissions as to whether a protected freedom or field of legislative incapacity is implied or emerges from the express terms of the *Constitution Act 1902* (NSW). This matter is addressed by the defendant.

17. A like issue was considered in respect of the *Constitution Act 1889* (WA) in *Stephens*[33], (in *obiter dictum)* in several of the judgments in *McGinty*[34] and, in respect of South Australia, in *Muldowney*[35].

18. Identifying the principled basis for the implied freedom recognised in *Stephens* is
20 problematic. *Stephens, McGinty* and *Muldowney* were decided after *Nationwide News*[36] and *Australian Capital Television*[37] and before *Lange*[38]. The doctrinal underpinning of the implication of the freedom was variously expressed in *Nationwide News*[39] and *Australian Capital Television*[40] and, no doubt, certain articulations gave rise to concern that the freedom might be thought of as emerging from "penumbras, formed by emanations from those guarantees that help give them life and substance"[41].

19. *Lange*[42] clarified that, as regards the Commonwealth *Constitution*, any implication is founded upon the words of the instrument, and, in respect of the Commonwealth

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[30] The relevance of distributions from the Administration Fund and the Policy Development Fund, referred to at [56]-[63] of the Case Stated, is not entirely clear.
[31] This can be seen in the Plaintiffs' Written Submissions at [43]-[49].
[32] It is for the defendant as to whether it wishes to contend that s.96D, as it operates in respect of federal elections, is to be understood having regard to provisions of the *Commonwealth Electoral Act 1918* (Cth). This is separate from the matter of inconsistency considered in the Defendant's Submissions at [43]-[58].
[33] *Stephens* at 233-234 (Mason CJ, Toohey and Gaudron JJ), 236 (Brennan J), cf. 257-258 (Dawson J).
[34] *McGinty* at 176-177 (Brennan CJ), 206, 211 (Toohey J), 289, 290, 291 (Gummow J).
[35] *Muldowney* at 367 (Brennan CJ), 370 (Dawson J), 374 (Toohey J), 377-378 (Gaudron J), 387-388 (Gummow J, McHugh J agreeing at 381).
[36] [1992] HCA 46; (1992) 177 CLR 1.
[37] [1992] HCA 45; (1992) 177 CLR 106.
[38] *Lange v Australian Broadcasting Corporation* [1997] HCA 25; (1997) 189 CLR 520 ('*Lange*').
[39] *Nationwide News* at 47-48, 50-51 (Brennan J), 72-74 (Deane and Toohey JJ).
[40] *Australian Capital Television* at 138-141 (Mason CJ), 149 (Brennan J), 168 (Deane and Toohey JJ), 210-212 (Gaudron J), 229-230, 231-233 (McHugh J).
[41] *Griswold v Connecticut* 381 US 479 at 484 (Douglas J) (1965).
[42] *Lange* at 559, 560, 566-567.

Constitution, in particular the word "chosen" in ss.7 and 24, requiring choice, and "approve" in s.128, requiring prior consideration. As observed in *Lange*[43], choice and consideration compel protection of communication "between the electors and the elected representatives, between the electors and the candidates for election and between the electors themselves" in respect of matters the subject of such choice and consideration. Although most cases which have dealt with these issues have considered legislative or common law prescription of speech or communication, by the imposition of criminal sanction[44] or other penalty[45], or common law remedy[46], the same issues arise in respect of limitations on receipt of communication.

10 20. This doctrinal underpinning of the implied freedom of political communication – that any implication is drawn from the words of the instrument – is settled[47].

21. Dicta in the joint judgment of Mason CJ, Toohey and Gaudron JJ in *Stephens*, in respect of the *Constitution Act 1889* (WA), might be thought to suggest a different doctrinal underpinning[48]. It is not entirely clear whether Deane J in *Stephens* considered whether such implication arose from the *Constitution Act 1889* (WA)[49]. For Brennan J, the implication derived solely from the express terms of the *Constitution Act 1889* (WA)[50]. Such implication was rejected by Dawson[51] and McHugh JJ[52].

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[43] *Lange* at 560.

[44] See, eg, *Monis v The Queen* [2013] HCA 4; (2013) 87 ALJR 340 ('*Monis*'); *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3; (2013) 87 ALJR 289 ('*Corneloup*'); *Wotton v Queensland* [2012] HCA 2; (2012) 246 CLR 1 ('*Wotton*'); *Hogan v Hinch* [2011] HCA 4; (2011) 243 CLR 506; *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1; *Levy v Victoria* [1997] HCA 31; (1997) 189 CLR 579; *Muldowney*; *Langer v Commonwealth* [1996] HCA 43; (1996) 186 CLR 302; *Cunliffe v Commonwealth* [1994] HCA 44; (1994) 182 CLR 272; *Australian Capital Television*; *Nationwide News*.

[45] See, eg, *APLA Ltd v Legal Services Commissioner (NSW)* [2005] HCA 44; (2005) 224 CLR 322.

[46] See, eg, *Lange*; *Stephens*; *Theophanous*.

[47] Explicit reference to the doctrinal underpinning of the implied freedom is made in *Levy* at 606 (Dawson J), 622 (McHugh J); *Lenah Game Meats* at 280 [194] (Kirby J); *Roberts v Bass* at 26 [64] (Gaudron, McHugh and Gummow JJ); *Coleman v Power* at 25 [80] (McHugh J), 57 [195] (Gummow and Hayne JJ), 61 [209], 62 [214], 67 [228] (Kirby J); *Mulholland v Australian Electoral Commission* [2004] HCA 41; (2004) 220 CLR 181 at 212 [88] (McHugh J); *APLA* at 350 [27] (Gleeson CJ and Heydon J), 358 [56], 360 [61] (McHugh J). See also *Levy* at 610-611 (Toohey and Gummow JJ), 647 (Kirby J); *Roberts v Bass* at 60 [162] (Kirby J); *Coleman v Power* at 10 [26], 13 [33] (Gleeson CJ); *Mulholland* at 190 [27] (Gleeson CJ), 238 [177] (Gummow and Hayne JJ), 263 [256] (Kirby J); *APLA* at 402 [213] (Gummow J), 440 [348] (Kirby J); *Hogan v Hinch* at 542 [47] (French CJ), 554 [92] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Wotton* at 15 [25] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 30 [77] (Kiefel J); *Corneloup* at 312 [67] (French CJ), 322 [131] (Hayne J), 336 [209]-[210] (Crennan and Kiefel JJ); *Monis* at 360 [61] (French CJ), 364-365 [88], 367 [105]-[106] (Hayne J), 395 [274] (Crennan, Kiefel and Bell JJ). While Crennan, Kiefel and Bell JJ re-formulated the second limb of the *Lange* test in *Monis*, their Honours did not question the doctrinal underpinning of the implied freedom. The exceptions to all of this are Heydon J in *Wotton* at 18 [40], and *Monis* at 389 [244]-[245], 390-391 [249]-[251], and Callinan J in *Lenah Game Meats* at 330-323 [338]-[339], 338-339 [348], *Coleman* at 88 [289], 93 [301], *Mulholland* at 287 [322], and *APLA* at 477 [446].

[48] *Stephens* at 232, last sentence of the final full paragraph. Their Honours considered at 233-234 that the freedom could be drawn from the WA Constitution in the same manner as the Commonwealth *Constitution*.

[49] *Stephens* at 257, where his Honour concurred in the answers which Mason CJ, Toohey and Gaudron JJ proposed. There is a most helpful consideration of the various judgments in *Stephens* by Gummow J in *McGinty* at 289-290.

[50] *Stephens* at 236, first paragraph.

[51] *Stephens* at 257-258.

[52] *Stephens* at 259, second full paragraph.

22. In *McGinty,* the implication of freedom of political communication[53] was considered in *obiter dictum* by Brennan CJ, who can be understood as adhering to the view which his Honour expressed in *Stephens*[54]. Dawson J seemingly likewise[55]. Toohey J, in this respect, adhered to his Honour's reasoning in *Stephens*; that the freedom of political communication was inferred from representative democracy which was implied from the terms of the *Constitution Act 1889* (WA)[56]. Aspects of Gaudron J's judgment accord with her Honour's judgment in *Stephens,* but her Honour's reasoning is to be differentiated from that of Toohey J because her Honour observed that:

> "... the words "chosen directly by the people" in s 73(2)(c) of the 1889 Act must, in my view, be applied in the same way as they are in ss 7 and 24 of the *Constitution.* More particularly, they must be viewed as constituting a guarantee of democracy entrenched in the 1889 Act unless and until amended in accordance with s 73(2)."[57]

23. It must follow from her Honour's observation that the "guarantee of democracy", which for her Honour founded an implied freedom of communication, could be avoided by constitutional amendment to the *Constitution Act 1889* (WA). On this understanding, her Honour's reasoning might be thought of as more akin to that of Brennan CJ and Dawson J[58]. McHugh J did not refer to any implied freedom of political communication as such[59], and Gummow J, though alluding to it, is best understood as simply observing that the issue, at the State level, were it to arise, would require further examination[60].

24. In *Muldowney,* a concession was made by South Australia to the effect that the *Constitution Act 1934* (SA) contained "a constitutionally entrenched" limitation on State legislative power "in like manner to the Commonwealth *Constitution*"[61]. In the nomenclature described above, this is to be understood as a concession of a "State Freedom of Political Communication". Brennan CJ adhered to the view expressed in *Stephens* and *McGinty*[62]. Dawson J is to be understood as determining that a *Lange* implication of freedom of political communication could only arise from the express words of South Australian constitutional instruments, and it did not[63]. Toohey J

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[53] As opposed to that of "equality of voting power" which was the issue in *McGinty.*
[54] *McGinty* at 176-177.
[55] *McGinty* at 182, though his Honour's discussion there is in reference to the Commonwealth *Constitution.*
[56] *McGinty* at 210-212, 216.
[57] *McGinty* at 222-223
[58] Her Honour does not seek to differentiate an implied "guarantee of democracy", discussed in *McGinty* from an implied notion of representative government which anchored the implication of freedom of political communication in *Stephens.* They might be different, and if so her Honour's reasoning in *McGinty* might not be thought to have any relevance to any implied freedom of political communication. With respect, this imprecision highlights the essential difficulty with this mode of reasoning by which implications are sought to be drawn from imprecise concepts. With respect, her Honour's judgment illustrates that this kind of reasoning can readily descend into "penumbras, formed by emanations from ... guarantees". It might also be thought that her Honour's judgment in *McGinty* can be read with that in *Muldowney* that was delivered a month later.
[59] Though it is impossible to think, having regard to his Honour's reasoning in *McGinty* at 253-254, that he did not continue to adhere to his essential reasoning in *Stephens.*
[60] *McGinty* at 291.
[61] *Muldowney* at 367.
[62] *Muldowney* at 365-366.
[63] *Muldowney* at 370.

adhered to his previously expressed view[64]. Gaudron J is best understood as deciding the matter in accord with her Honour's view in *Stephens*[65]. Gummow J (with whom McHugh J agreed[66]) avoided the issue[67].

25. This variety of reasoning, in respect of the implication of freedom of political communication in State Constitutions, must be re-considered in light of the determination in *Lange* and later cases that any implication can only be drawn from the words of the State instrument or relevant instruments. This Court should determine that, in the absence of words in State constitutional instruments from which any such freedom can be implied or inferred, it does not exist[68].

10 26. As noted, whether a freedom of political communication is implied or emerges from the express terms of the *Constitution Act 1902* (NSW) is addressed by the defendant.

Second matter – the relevance of entrenchment.

27. In some States, but not Western Australia[69], an issue may arise as to whether an implication of freedom of political communication can only be drawn from entrenched provisions of a constitutional instrument. Because in decisions of this court the implied freedom of political communication has only arisen in the context of the Commonwealth *Constitution,* all the provisions of which are entrenched, the *Constitution Act 1889* (WA), the relevant provision of which is entrenched, and the *Constitution Act 1934* (SA), where in *Muldowney* a concession was made by South
20 Australia to the effect that the *Constitution Act 1934* (SA) contained "a constitutionally entrenched" limitation on State legislative power "in like manner to the Commonwealth *Constitution*"[70], there has been no consideration of whether the implication can be drawn from provisions that can be repealed by a simple parliamentary majority[71]. From the manner in which the plaintiffs have put their case, this question would seem not to arise in this matter.

Third matter – "derivative State Freedom of Political Communication"

28. This is the matter commented upon *(inter alia)* by Deane and Toohey JJ in *Nationwide News*[72], Deane and Toohey JJ, and Gaudron J in *Australian Capital*

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[64] *Muldowney* at 373-374.
[65] *Muldowney* at 377, 381.
[66] *Muldowney* at 381.
[67] *Muldowney* at 387-388.
[68] This is of course not to say that the Commonwealth Freedom of Political Communication does not apply to State legislation or State law that burdens freedom of communication about government or political matters. As will be discussed, it is also trite that that, as the demarcation between federal and state political matters cannot readily be drawn, the stifling of political communication (whether by means of Commonwealth, State or Territory legislation or the common law) may attract the implied freedom derived directly from the Commonwealth *Constitution.*
[69] For reasons explained in *Stephens.* Of course such an issue could arise in the future if (the entrenched) s.73(2)(c) of the *Constitution Act 1889,* upon which the implication of freedom of political communication is drawn, were repealed. This is the point made by Gaudron J in *McGinty* at 222-223, and referred to above at [22].
[70] *Muldowney* at 367.
[71] See recent discussion in Han-Ru Zhou, 'Revisiting the "Manner and Form" Theory of Parliamentary Sovereignty' (2013) 129 *Law Quarterly Review* 610.
[72] *Nationwide News* at 75.

Television[73], Deane J in *Theophanous*[74], Mason CJ, Toohey and Gaudron JJ, and Deane J in *Stephens*[75], Toohey J and Gaudron J in *McGinty*[76], Gaudron J in *Muldowney*[77], Kirby J in *Lenah Game Meats*[78] and *Roberts v Bass*[79]; and to the opposite effect by McHugh J in *Theophanous*[80], Brennan J in *Stephens*[81], Brennan CJ and Dawson J in *McGinty*[82] and *Muldowney*[83].

29. The first view is expressed in the judgment of Mason CJ, Toohey and Gaudron JJ in *Stephens*[84]:

> "... it is desirable that we should state our view that there is an implied freedom of communication deriving both from the Commonwealth *Constitution* and from the State *Constitution* which applies in the present case. First, we consider that the freedom of communication implied in the Commonwealth *Constitution* extends to public discussion of the performance, conduct and fitness for office of members of a State legislature."

30. The opposite view, recited most often by, and most commonly associated with, Sir Gerard Brennan, was concisely stated by McHugh J in *Theophanous*[85]:

> "...the Constitution has nothing whatever to say about the form of government in the States and Territories of Australia. Even if the terms of ss.1, 7, 24, 30 and 41 implied that the institution of representative government as understood in the majority judgments in *Australian Capital Television* was part of the Constitution in relation to the Commonwealth, those sections have nothing to say about the form of government for the States and Territories. If a State wishes to have a system of one party government, to abolish one or both of its legislative chambers or to deny significant sections of its population the right to vote, nothing in the Constitution implies that it cannot do it. There is not a word in the Constitution that remotely suggests that a State must have a representative or democratic form of government or that any part of the population of a State has the right to vote in State elections."

31. Western Australia submits that the so-called derivative State Freedom of Political Communication does not exist; that the reasoning (in this respect) which supports it[86] should be rejected and that the reasoning (in this respect) of McHugh J in

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[73] *Australian Capital Television* at 168-169 (Deane and Toohey JJ), 216-217 (Gaudron J).
[74] *Theophanous* at 164 (Deane J).
[75] *Stephens* at 232 (Mason CJ, Toohey and Gaudron JJ), 257 (Deane J).
[76] *McGinty* at 206 (Toohey J), 216 (Gaudron J).
[77] *Muldowney* at 377.
[78] *Lenah Game Meats* at 281-282.
[79] *Roberts v Bass* at 58 [159].
[80] *Theophanous* at 201, 202, 205 (McHugh J).
[81] *Stephens* at 235 (Brennan J).
[82] *McGinty* at 175-176 (Brennan CJ), 189 (Dawson J).
[83] *Muldowney* at 365-366 (Brennan CJ), 370 (Dawson J).
[84] *Stephens* at 232. In that matter (and in *Muldowney* having regard to the concession made), it was not in dispute that there existed an implied freedom of communication "at the State, as well as the federal, level", and whether the freedom derived from "the Commonwealth *Constitution* or the State *Constitution* or both" was not of great importance.
[85] *Theophanous* at 201.
[86] *Nationwide News* at 75 (Deane and Toohey JJ); *Australian Capital Television* at 168-169 (Deane and Toohey JJ), 216-217 (Gaudron J); *Theophanous* at 164 (Deane J); *Stephens* at 232 (Mason CJ, Toohey and Gaudron JJ), 257 (Deane J); *McGinty* at 206 (Toohey J), 216 (Gaudron J); *Muldowney* at 377 (Gaudron J); *Lenah Game Meats* at 281-282 (Kirby J); *Roberts v Bass* at 58 [159] (Kirby J).

Theophanous[87], Brennan J in *Stephens*[88], Brennan CJ and Dawson J in *McGinty*[89] and *Muldowney*[90] should be preferred and accepted.

32. Before submitting why, it is well to clarify one matter. It is now well understood[91], that, because the demarcation between federal and state political matters cannot readily be drawn, the stifling of political communication (whether by means of Commonwealth, State or Territory legislation or the common law) may attract the implied freedom of communication derived directly from the Commonwealth *Constitution*. Whether any demarcation of such political topics can be drawn[92] is not the issue here. The question here is different, at least as regards the challenged s.95G(6). The limitation imposed by that section applies only to New South Wales elections. It is simply not credible to contend that this section has any impact upon communication about political matters at the Commonwealth level, or matters relevant to choice by electors in federal elections and s.128 referenda.

33. In respect of the divergence of view as to the derivative State Freedom of Political Communication; following *Lange,* the doctrinal underpinning of any such freedom is settled as being implication founded upon the words of the (relevant) instrument[93]. The contention that such implication is derived from the Commonwealth *Constitution* obviously requires consideration of its words. Although a number of provisions of the Commonwealth *Constitution* refer to the Parliaments of States[94], and the executive government of States[95], McHugh J's observation that no provision says anything about the form of government of the States is clearly enough correct. There are no provisions of the Commonwealth *Constitution* akin to ss.7 or 24 or 128 that refer to electoral choice or deliberation about constitutional change in States. The provisions that come closest to any such prescription are ss.41, 30 and 31. Section 41 does not mandate that there be a vote at elections for State Parliaments. Rather, the section provides that, if a person has such a vote, a consequence follows. Sections 30 and 31, read together, pre-suppose that there are electors of and elections for State Parliaments. But reference to elections and electors *per se* is not enough to give rise to the *Lange* implication. The Commonwealth *Constitution* has other provisions that pre-suppose elections and choosing of senators and members of the House of Representatives. If these references were enough there would have been no reason in *Lange* and later cases to concentrate upon the words "directly chosen by the people" in ss.7 and 24. Reference to elections *per se* is insufficient to give rise to the implication of freedom of political communication because elections can be undemocratic and unrepresentative; for instance, there can be an election with severe prescription of candidature and the franchise. What gives rise to the implication in respect of the Commonwealth freedom of political communication – as it did in

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[87] *Theophanous* at 201, 202, 205 (McHugh J).
[88] *Stephens* at 235 (Brennan J).
[89] *McGinty* at 175-176 (Brennan CJ), 189 (Dawson J).
[90] *Muldowney* at 365-366 (Brennan CJ), 370 (Dawson J).
[91] *Lange* at 567, 571-572; *Coleman* at 25-26 [80] (McHugh J), 57-58 [197] (Gummow and Hayne JJ); *Hogan v Hinch* at 543 [48] (French CJ); *Wotton* at 13 [20] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 30 [76] (Kiefel J).
[92] *McGinty* at 291 (Gummow J), *Coleman v Power* at 91 [298] (Callinan J), *Wotton* at 23 [54] (Heydon J), 31 [79] (Kiefel J).
[93] See above at [19]-[20].
[94] Commonwealth *Constitution* ss.7 (Queensland Parliament), 9, 15, 25, 29, 30, 31, 41, 95 (Western Australian Parliament), 107, 108, 111, 123, 124 and 128.
[95] Commonwealth *Constitution* ss.12, 21, 110.

respect of the State freedom of political communication in *Stephens* – are the words of the particular instrument mandating Parliaments directly chosen by the people[96].

34. Any notion that the mere reference to a (State) Parliament in the Commonwealth *Constitution* necessarily connotes or implies an election or electoral choice cannot be sustained having regard *(inter alia)* to s.49, which refers to the Houses of the United Kingdom Parliament, one of which was, in 1901 and remains, unelected.

35. Nothing in the *Australia Act 1986* (Cth) or the *Australia Act 1986* (UK) bears upon this issue. Indeed, s.6 emphasises the centrality of manner and form provisions in State Constitutions and is silent as to the form of government of the States.

THE VALIDITY OF SECTION 96D

LANGE

36. As noted, s.96D(1) makes acceptance by a party in New South Wales of a political donation from any person or entity other than an elector, where the purpose of receiving the political donation is to fund that party or its candidates in a State or federal election, unlawful.

37. The plaintiffs advance two central contentions as to the first *Lange* question. First, that making a donation is communication by a donor, and so a prescription of donation making is a direct burden on this form of communication[97]. Second, the restriction in s.96D on receipt of political donations by parties and candidates will restrict them communicating with electors[98], (correlatively) restrict receipt by electors of information or communications from parties and candidates[99], and (additionally) restrict receipt by electors of information or communications from entities other than electors or parties or candidates who might wish to communicate with electors about political or governmental matters[100].

The plaintiffs' first proposition - donation making as communication

38. The foundation of the *Lange* field of jurisprudence is the protection of communicating, and receiving communications, about the choice which electors make. Even if making a donation is communication in this sense, s.96D(1) does not inhibit electors making this form of communication. The issue to which s.96D gives rise is whether it inhibits electors receiving communications. In this respect, s.96D(1) does not preclude corporations or other non-electors from communicating with electors about the choice which electors are to make or political matters generally. Any corporation or non-elector can do so directly. Section 96D(1) does not restrict receipt by electors of information or communications from (say) a corporation by means of advertising or any other form of communication. A corporation can run whatever political campaign it wishes and can spend whatever it

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[96] It ought to also be observed that the third paragraph of s.128, read with s.30, not only does not mandate adult suffrage in States, but created, for a time, what would now be considered an undemocratic process in referenda votes. Section 25, though referring to voting at elections for State Parliaments, cannot sensibly be understood as implying the existence of electoral choice (as in ss.7 and 24).

[97] Plaintiffs' Written Submissions at [15]-[18], [22].

[98] Plaintiffs' Written Submissions at [19], [21], [36], [41]-[43].

[99] This must be the proposition advanced by the Plaintiffs as a corollary of [19], [21], [36], [41]-[43].

[100] Plaintiffs' Written Submissions at [30]-[35].

wishes (within the unchallenged third party campaigner cap and subject to s.95G(6)). Section 96D imposes no restriction on this.

39. On this understanding, the plaintiffs' proposition narrows to this; s.96D(1) precludes an elector from receiving one form of communication that is relevant to electoral choice – that certain entities that are not electors have made a donation to a party or candidate.

40. It is submitted that because a corporation (or other non-elector) can convey its support for a party or candidate directly to electors, s.96D(1) is not a burden, effective or otherwise, on the receipt by electors of communications about government or political matters.

The plaintiffs' second proposition – s.96D(1) burdens parties and candidates from communicating with electors

41. This is the plaintiffs' central contention. Underlying it is the assertion that s.96D(1) will restrict parties and candidates communicating with electors and receipt by electors of information or communications from parties and candidates[101]. Of course, s.96D(1) does not affect the capacity of a party or candidate to communicate with electors other than by means that require spending money. Parties' and candidates' communications with electors *via* the media and by various other means is unaffected.

42. The assertion that s.96D(1) will restrict parties and candidates communicating with electors is, in turn, premised upon assumptions that s.96D(1) will result in less funds being available to parties and candidates and that these unavailable funds would, or might, have been used by parties and candidates to communicate with electors. There is no evidence before the Court to sustain findings to this effect. Different assumptions are equally plausible. For instance, it can be (equally plausibly) postulated that a party that eschews donations other than from electors could raise greater funds than if it accepted non-elector donations. Further, eschewing corporate donations might inspire electors to donate[102]. Further, donors who know that donations can only be made personally will do so personally rather than by a corporate vehicle.

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[101] Any assertion that the section will restrict receipt by electors of information or communications from entities that might wish to communicate with them and who are not themselves electors or parties or candidates is addressed above.

[102] In the 2012 US presidential campaign, US$550 million of US$738 million in donations to the campaign of President Obama were from individuals: Federal Election Commission, 'Presidential Campaign Receipts Through December 31, 2012' (2011-2012 Election Cycle Data Summaries through 12/31/12) <http://www.fec.gov/press/summaries/2012/ElectionCycle/PresCandYE.shtml>. A contribution limit of US$2,500 per individual applied during that period: Federal Election Commission, 'FEC Announces 2011-2012 Campaign Cycle Contribution Limits' (News Release, 3 February 2011). Of these donations, 57% were under US$200, 33% were between US$200 and US$2,499, and 11% were the maximum of US$2,500: New York Times, 'The 2012 Money Race: Compare the Candidates' <http://elections.nytimes.com/2012/campaign-finance>. In the 2008 US presidential campaign US$659 million of US$748 million in donations to Senator Obama's campaign were from individuals: Federal Election Commission, 'Presidential Receipts Through December 31, 2008' (2007-2008 Election Cycle Data Summaries through 12/31/08) <http://www.fec.gov/press/summaries/2008/ElectionCycle/24m_PresCand.shtml>.

43. There is no basis to conclude that s.96D(1) will have any affect upon receipt of communication by electors.

44. As none of these propositions can be sustained, the first *Lange* question should be answered no.

The second *Lange* question

45. Both of the formulations of the second question, of Hayne J and Crennan, Kiefel and Bell JJ in *Monis*, require identification of the object of an impugned provision. This is done by the defendant in its submissions at [67], and, as there stated, these objects are not disputed by the plaintiffs. The potential for untrammelled and unconstrained political donations to undermine and corrupt democratic government, representative government, free elections and government under the Commonwealth *Constitution* and all Australian State *Constitutions* is obvious and notorious[103]. It cannot be seriously disputed that the object of eliminating corruption and its effect on government is legitimate, in whatever sense that term is understood.

46. Equally evident, it is submitted, is that the means employed in s.96D(1) is proportionate to this object and compatible with it. Electors can donate. Parties and candidates can communicate with electors in any way that they choose. Corporations and other non-electors can communicate with electors about political matters directly. A corporation can run whatever political campaign it wishes. To the assertion that s.96D(1) might limit receipt by electors of information from parties and candidates is speculative at best, for the reasons explained above.

47. As to whether there are other, practicable, obvious, compelling and less drastic means of achieving this object[104] – what might they be – capping corporate donations? What would be a proportionate cap on this? The second *Lange* question involves fine questions of politics and evaluation in the resolution of which the Court can properly be guided by the judgment already made by legislatures. As Brennan J reasoned in *Australian Capital Television,* when engaged in by the Court, this evaluative process is one in which "the Court must allow the Parliament ... a 'margin of appreciation'",[105] or expressed otherwise, "it [is] for the Parliament to make that assessment; it is for the Court to say whether the assessment could be reasonably made".[106] These considerations are particularly apt where the questions at issue concern attempts by the legislature to restrict corrupting of the legislative and executive branches of government.

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[103] The recent observation of Jack Straw is prescient: "Big money's hold over American politics is hard to conceive for anyone brought up in the British system. Here, there are strict expenditure limits, national and local, and a complete ban on political advertising on television. In the United States there are no limits on total spending; no bans on political advertising in any media; donation caps are easier to evade. Big money is a cancer on the American body politic. It can – and does – buy politicians, or send them into oblivion.": Jack Straw, *Last Man Standing: Memoirs of a Political Survivor* (Macmillan, 2012) at 445-446.

[104] *Monis* at 408 [347] (Crennan, Kiefel and Bell JJ). See also *Corneloup* at 336 [206] (Crennan and Kiefel JJ).

[105] *Australian Capital Television* at 159 (Brennan J).

[106] *Australian Capital Television*, at 160 (Brennan J). See also *Coleman* at 31-32 [29]-[32] (Gleeson CJ), at 123-124 [328] (Heydon J); *Rann v Olsen* [2000] SASC 83; (2000) 76 SASR 450, at 483 [184] (Doyle CJ); *Levy* at 598 (Brennan CJ); *Wotton* at 23 [53] (Heydon J).

INCONSISTENCY

48. There is an overlap between the regimes of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) and the *Commonwealth Electoral Act 1918* (Cth). In large part this is because of the overlapping definitions of "party" in the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) and "political party" in the *Commonwealth Electoral Act 1918* (Cth)[107] (which flows through to other defined terms). Certain provisions of the *Commonwealth Electoral Act 1918* (Cth) contemplate the making of, what would be, political donations in terms of s.85 of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) by entities other than enrolled voters[108].

49. The particular provisions of the *Commonwealth Electoral Act 1918* (Cth) contended to be inconsistent with s.96D(1) are; ss.304, 314AC, 314AEC, 305A and 305B[109].

50. All of these provisions contemplate that a non-voter might make a donation to a political party[110]. The articulation by the plaintiffs[111] that these provisions, or the *Commonwealth Electoral Act 1918* (Cth) more generally, "contemplate and permit" non-voter donations is apt to confuse.

51. A number of observations can be made about the interaction of these provisions (and Division 4 of Part XX) of the *Commonwealth Electoral Act 1918* (Cth) and s.96D of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW).

52. First, simultaneous obedience to both is possible. *Colvin v Bradley Brothers Ltd*[112], relied upon the by the plaintiffs, is inapt. In that case, the (State) prohibition on the employment of women in certain work was inconsistent with a Commonwealth award that expressly permitted the employment of women in that work[113]. Here, the *Commonwealth Electoral Act 1918* (Cth) does not expressly permit non-voter donations, even if it contemplates them.

53. Second, no Commonwealth law could cover the field of political donations to political parties which had an object of promoting election of candidates to State parliaments. An obvious *Melbourne Corporation* issue would arise. This is relevant to what Gummow J identified as "indirect inconsistency"[114]. Here, the

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[107] Defined in s.4 of the *Commonwealth Electoral Act 1918* (Cth): *Political party* means an organization the object or activity, or one of the objects or activities, of which is the promotion of the election to the Senate or to the House of Representatives of a candidate or candidates endorsed by it.

[108] Sections 304(4), 306(2A) and (2B) and 306B.

[109] Identified at [77] of the Plaintiffs' Written Submissions

[110] Section 304(4) relates to an unincorporated association, trust fund or foundation, and provides that if this were to occur in any of the circumstances provided for in s.304(2), (3) or (3A), the donation is to be disclosed in the manner provided for in the section. Section 314AC relates to an organisation, and Division 5A provides that in such a case the annual return of a political party must state this. Likewise, s.314AC contemplates that a non-voter might donate, and Division 5A providers that in such a case the annual return of a political party must state this. Section 314AEC is, essentially, in the same terms as s.314AC and relates to other kinds of non-voters. Sections 305A and 305B similarly contemplate the making of donations to candidates and political parties by non-voters and provide for disclosure of this.

[111] Plaintiffs' Written Submissions at [79].

[112] (1943) 68 CLR 151. The plaintiffs rely on it in their submissions at [80].

[113] *Colvin* at 160 (Latham CJ), 161-162 (Starke J) and 163-164 (Williams J).

[114] *Momcilovic v The Queen* [2011] HCA 34; (2011) 245 CLR 1 at 111 [244]. See also *APLA* at 399-400 [202]-[206] (Gummow J).

Commonwealth Electoral Act 1918 (Cth) could not be said to "contain an implicit negative proposition that nothing other than what [it] provides upon a particular subject-matter is to be the subject of legislation"[115]. This is because the Commonwealth cannot cover a field which included funding of State elections.

54. Third, this matter would seem to engage what Gummow J in *Momcilovic* referred to as "class (2)" inconsistency[116]:

> With class (2), the inconsistency does not arise from the impossibility of obedience to both laws ... . But the operation of the State law (in the phrase of Dixon J ...), to "alter, impair or detract from" that of the federal law, may enliven s 109."

55. The purpose and object of the identified provisions of the *Commonwealth Electoral Act 1918* (Cth) is not to regulate or control the character or legal personality of donors but provide for disclosure of donations. The operation (and efficacy) of the *Commonwealth Electoral Act 1918* (Cth) is not altered or impaired affected in any way by s.96D(1).

THE VALIDITY OF SECTION 95G(6)

56. Whether a protected freedom or field of legislative incapacity is implied or emerges from the express terms of the *Constitution Act 1902* (NSW) is addressed by the defendant. The following submissions, in respect of s.95G(6), proceed on an assumption that the Court finds that the *Constitution Act 1902* (NSW) contains an implied freedom of political communication in the terms of *Lange* as explained in *Wotton* and *Monis*.

57. As noted, as there is no challenge to any of ss.95G(2)-(5), or to s.95F, the plaintiffs' contention is that the *Lange* protection operates upon the merging of a (valid) cap on third party campaigners' electoral communication expenditure with a (valid) cap on parties' and candidates' electoral communication expenditure, where the third party campaigner is an affiliated organisation, as defined in s.95G(7).

58. The failure of the plaintiffs to challenge the validity of the caps on parties' and candidates' electoral communication expenditure or the third party campaigners' electoral communication expenditure cap has two effects. First, it deflects entirely the submissions made by the plaintiffs at [85]-[93] of their submissions. Each of the submissions made there apply equally to (the unchallenged) electoral communication expenditure caps of any kind. Second, and more directly, it narrows the issue to this; that the *Lange* legislative incapacity applies to invalidate the merging of one valid cap with another valid cap.

59. In terms of both *Lange* questions, the central proposition of the plaintiffs is that s.95G(6) burdens political communication by limiting one class of third party campaigners – affiliated organisations, being unions affiliated with the ALP – from communicating with electors about government or political matters. Even if this contention can logically be put without attacking the validity of caps *per se,* it falls down because there is an evident basis to differentiate affiliated organisations (the caps of which merge with a party) from other third party campaigners (the caps of

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[115] *Momcilovic* at 111 [244] (Gummow J).
[116] *Momcilovic* at 111 [242] (Gummow J).

which do not merge with a party). Affiliated organisations, as defined, are, in effect, "the party" because of the nature of the affiliation as provided for in s.95G(7). Sections 95G(6) and (7), in practical effect, extend the definition of party to include affiliated organisations. The purpose of the provision is to eliminate subversion or undermining of the caps on parties. This can be illustrated. Assume that there is a (valid) cap on electoral expenditure by corporations, and corporations are defined to include the holder of a (classic) life governor's share[117]. Because the life governor shareholder effectively controls the corporation, the inclusion of the life governor shareholder is not, in effect, a burden on political communication by the life governor shareholder. The definition, in practical effect, avoids the undermining of the valid cap on corporate electoral expenditure.

60. On this understanding, the issue here, in reality, concerns the definition in s.95G(7) and whether this definition captures entities that are "the party" for the purpose of giving the (uncontestably[118] valid) cap on party electoral expenditure meaningful operation.

61. The nature of the defined affiliation in s.95G(7) is intimate. The two criteria in s.95G(7) go the core of what a political party is, its purpose and how it operates.

PART VI: LENGTH OF ORAL ARGUMENT

62. It is estimated that the oral argument for the Attorney General for Western Australia will take 20 minutes.

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[117] That is, person X holds a single share in X Co. to which share is attached 75% of voting power, and a power to appoint and dismiss directors.
[118] Or at least uncontested.