Chapter 3

Implied Freedoms and Political Donations
The *Unions NSW* and *McCloy* cases

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Since its enactment the *Election Funding, Expenditure and Disclosures Act* 1981 (NSW) (hereafter the "*EFED Act*") has been amended 17 times to date (including a name change in 2008).[1] Some of these amendments have been relatively minor, others more substantial. Some have been more politically controversial than others. Perhaps not surprisingly, it is some of the most politically controversial amendments to the *EFED Act* which were the subject of constitutional challenge in *Unions NSW v State of New South Wales*[2] and *McCloy v State of New South Wales*.[3] In *Unions NSW* the High Court held that section 96D of the *EFED Act,* which made it unlawful to accept a political donation unless the donor was on the electoral roll, and section 95G(6), which included spending by an affiliated organisation in a political party's cap on electoral communication expenditure, fell foul of the implied freedom of political communication in the Commonwealth Constitution.[4] In *McCloy* the High Court has heard argument on whether sections 96GA and 96GB (a ban on political donations by "prohibited donors," in particular from property developers), section 95B (caps on political donations) and section 96E (restrictions on indirect campaign contributions) similarly fall foul of the implied freedom of political communication. Judgment in *McCloy* is currently reserved.

Legislative background

In 2008 section 96E was inserted into the *EFED Act*, prohibiting certain indirect campaign contributions. In 2009, a new Division 4A (sections 96GA – 96GE) was inserted into Part 6 of the *EFED Act*,[5] in particular banning political donations by property developers. As enacted in 2009, section 96GA made it unlawful both for property developers to make political donations and for others to accept a political donation from a property developer. In 2010 this ban on political donations by property developers was expanded to include donations by tobacco, liquor and gambling industry business entities as well.[6] At the same time new divisions 2A (sections 95AA – 95D) and 2B (sections 95E – 95J) were inserted into Part 6 of the Act.[7] Division 2A of Part 6 places caps on political donations in State elections (for example, section 95A sets a cap of $5 000 for donations to registered parties and to groups and a cap of $2 000 to candidates, to unregistered parties and to third-party campaigners) while Division 2B of Part 6 places a cap on electoral communication expenditure in State election campaigns (for example, section 95F(2) sets a cap per party of $100 000 per electoral district in which an endorsed candidate stands, meaning that a party endorsing candidates in all 93 seats of the Legislative Assembly would be allowed to spend a maximum of $9.3 million on electoral communication in a State general election).

Following a change in government after the March 2011 New South Wales State election, section 95G was amended in 2012 by adding subsections (6) and (7) to include "affiliated

organisations" in the calculation of a party's electoral communications spending cap. As originally enacted in 2010, section 95G placed a cap on the amount of money registered political parties could spend on electoral communication; as a result of the 2012 amendments this cap on a party's electoral communication spending would now also include spending by affiliated organisations (notably by trade unions affiliated with the ALP). Also amended in 2012 was section 96D. Prior to this, section 96D had made it unlawful to accept a political donation unless the donor was on the electoral roll or was an entity with a "relevant business number" (that is, an ABN or some other number allocated or recognised by the Australian Securities and Investments Commission for the purposes of identifying the entity). The 2012 amendment to section 96D removed reference to donations from entities with a "relevant business number," leaving only persons on the electoral roll able to make political donations.

Factual background to the *Unions NSW* and *McCloy* cases

The 2012 amendments (which were introduced by a Liberal-National Coalition Government) quite clearly had an adverse impact on trade unions and the Australian Labor Party, the latter of which has long relied on affiliated trade unions for donations and campaign support. Section 96D had the effect of preventing all trade unions from making political donations; in addition, the provision as amended in 2012 also covered corporations and all natural persons not on the electoral roll. Section 95G(6) had the effect of including in the ALP's electoral communication spending cap expenditure by trade unions affiliated with the ALP.

Unions NSW and a number of trade unions sought to challenge the constitutional validity of the 2012 amendments to sections 95G(6) and 96D. They argued that these provisions were outside the power of the New South Wales Parliament to enact on account of the implied freedom of political communication in the Commonwealth Constitution or, alternatively, an implied freedom of political communication in the *Constitution Act* 1902 (NSW) or an implied freedom of association under the Commonwealth Constitution.

The High Court challenge to the 2008-10 amendments (which were introduced by a Labor Government) in *McCloy* came about less directly. In August 2014, during the course of hearings arising out of the Independent Commission Against Corruption's (ICAC's) Operation Spicer, it was revealed that two Liberal members of the New South Wales Legislative Assembly — Tim Owen, the member for Newcastle, and Andrew Cornwell, the member for Charlestown — had accepted political donations as candidates in the 2011 State election from Jeffery McCloy, a local property developer (who at the time of the ICAC hearings was the independent Lord Mayor of Newcastle), contrary to the *EFED Act*. In light of these revelations Owen and Cornwell resigned their seats in the Legislative Assembly; McCloy resigned the Lord Mayoralty. McCloy, however, together with two related companies, subsequently launched a High Court challenge to the constitutionality of the various provisions of the *EFED Act* which had rendered the donations to Owen and Cornwell unlawful, viz. section 96GA (the ban on political donations by prohibited donors — in this case property developers), section 95A (caps on political donations) and section 96E (the outlawing of certain indirect campaign contributions). Just as the trade unions had argued in respect of the 2012 amendments in *Unions NSW*, McCloy argued that the 2008-10 amendments were outside the power of the New South Wales Parliament to enact on account of the implied freedom of political communication under the Commonwealth Constitution.[8]

Constitutional background: implied freedom before *Unions NSW*

The implied freedom of political communication was first held by the High Court to exist in *Nationwide News v Wills*[9] and *Australian Capital Television v Commonwealth,*[10] a pair of decisions in which judgment was handed down on the same day. Its existence was controversial at the time and has remained so. In *Australian Capital Television* Justice Daryl Dawson strongly dissented, arguing that no such implication could or should be drawn from the Constitution.[11] More recently, the implication's existence has been subject to judicial criticism by Justice Ian Callinan in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[12] and by Justice Dyson Heydon in his final judgment on the High Court in *Monis v The Queen*.[13]

The implied freedom has also been the subject of considerable academic criticism.[14] In spite of this, the implied freedom of political communication now appears to be a prominent feature of the Australian constitutional landscape and it seems unlikely that the High Court would seek to re-open the fundamental question of its existence. As Williams, Brennan and Lynch have noted, the "rejectionist strain of thought" on the High Court espoused by the likes of Justices Dawson, Callinan and Heydon JJ "is an isolated position and the unanimous judgment in *Lange* appears to have successfully entrenched the implied freedom in Australian constitutional law."[15] And, as Michael Sexton, SC, remarked to The Samuel Griffith Society in 2012, "Following its imaginary origins twenty years ago, it [sc. the implied freedom of political communication] has had an erratic but steadily upward trajectory in the courts, and most particularly in the High Court."[16] However, even putting to one side the question of whether the implied freedom of political communication exists outside the mind of the High Court, there remains much about it that is unclear.

Since it was first enunciated in 1992 the implied freedom of political communication has undergone significant development and substantial reformulation by the High Court, most notably in *Lange v Australian Broadcasting Corporation*[17] as modified in *Coleman v Power*.[18] The current "orthodoxy" is what is known as the *Lange* test as modified in *Coleman* ("the *Lange-Coleman* test"). The implication is said to arise from the system of representative and responsible government (at the federal level) set up by the Commonwealth Constitution, in particular sections 7 and 24, and the amendment procedure in section 128 and consists of two limbs, viz. (1) whether a law effectively burdens freedom of communication about government or political matters either in its terms, operation or effect; and (2) if so, whether the law is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by section 128 for submitting a proposed amendment of the Constitution to the informed decision of the people. As is apparent, the second limb itself contains two distinct aspects, viz. (a) the legitimacy of the law's end; and (b) the proportionality of the means of achieving the law's legitimate end. This, then, leaves us with essentially three enquiries in asking whether a law falls foul of the implied freedom of political communication:

- Does the law effectively burden political communication?
- If so, does it do so for a legitimate end? and
- If so, does it do so in a proportionate manner?

Recent case law makes it clear that answering these questions is far from straightforward. Some have pointed to the "deeply subjective nature of the tests that have been formulated by the High Court to assess whether a particular legislative provision contravenes the implied freedom."[19]

A particularly significant recent development is the decision in *Monis v The Queen*.[20] *Monis* is an interesting decision for a number of reasons. Only six judges sat in *Monis*; the six-judge bench of the High Court was evenly split 3-3 in the result and the outcome was determined by a statutory majority under section 23 of the *Judiciary Act* 1903 (Cth). Moreover, the way in which *Monis* made its way to the High Court made a real difference to the result on account of the two differing statutory majority provisions in section 23 of the *Judiciary Act*. Since the case had come on appeal from a State Supreme Court, the statutory majority which prevailed was that provided for by section 23(2)(a), viz. that which agreed with the outcome in the court below; the result of this was that the law in question was held to be within the power of the Commonwealth Parliament[21] and Monis's convictions under that law stood.

Had the same case come to the High Court by a route other than appeal, say an application for removal under section 40 of the *Judiciary Act* for determination by the High Court of the constitutional issue before final judgment had been given in the court below, a different statutory majority — that comprising the Chief Justice of the High Court – would have prevailed in accordance with section 23(2)(b) of the *Judiciary Act* and the law in question would have been held to be beyond the power of the Commonwealth Parliament and Monis's conviction would have been quashed.

Another interesting thing about *Monis* is that the 3-3 split corresponded with the 3-3 gender divide on the High Court (with the three male judges finding the legislation constitutionally invalid and the three female judges finding it valid) and this aspect of the case has also not gone without comment.[22]

Perhaps the most interesting thing about the decision in *Monis*, however, was that half of the High Court (and, as we have noted, a half that would have constituted a statutory majority had the matter come before the High Court on an application for removal rather than on appeal) was prepared to hold that section 471.12 of the *Criminal Code* (Cth) served no legitimate purpose under the *Lange-Coleman* test.

Hitherto, cases involving the implied freedom of political communication had typically been decided on the basis (or, at any rate, a concession by the relevant parties) that the law was not proportionate in the way it burdened political communication which assumed that the law at least pursued a legitimate end. In *Monis*, however, not only were several High Court judges prepared to hold that a law which criminalised the use of the postal service in a way which "reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive" did not serve a legitimate purpose under the *Lange-Coleman* test but also on display was a stark divide in judicial opinion on this question. How could three judges find that the law served no legitimate purpose while another three find that it did? Is a decision about the legitimacy of a law's purpose based on non-legal (for example, political) criteria and dependant on the subjective views of judges or are there objective legal criteria which judges (whatever their personal political opinions concerning the laws under challenge) can apply to determine a law's legitimacy (and, indeed, its proportionality in achieving this end)? This is a vexed question which

goes to the heart of some of the criticisms of whether courts of law can and should exercise judicial review on grounds of proportionality.[23]

Regardless of such questions about the propriety of courts engaging in this form of review, questions about the application of the *Lange-Coleman* test abound. What counts as political communication? What kind of burdening of political communication is necessary to implicate the implied freedom? When will the end of legislation which burdens political communication be illegitimate and when will the means be disproportionate? If the implication arises from the system of representative and responsible government at the *federal* level, should the implied freedom apply to *State* laws about purely *State* political matters? As Professor Anne Twomey has argued, if the implication is not to degenerate into an implied freedom of communication *simpliciter*, but is to remain an implied freedom of *political* communication that is in fact *derived from* the constitutional basis stated in *Lange*, might there not be some "political" matters that are of purely State concern (for example, State electoral funding laws pertaining purely to State elections) which sit outside the operation of the implication and cannot be explained away by a simplistic invocation of the "indivisibility" of political communication?[24] What is the relationship, if any, between the implied freedom of political communication and other constitutional implications, such as the *Melbourne Corporation*[25] principle? Is there, in addition to an implied freedom derived from the system of representative *federal* government, a separate implication in the Commonwealth Constitution derived from the system of representative *State* government? And, regardless of whether there is or is not, can an implied freedom of political communication be found in *State* constitutions (and, if so, which State constitutions for there are some important differences among State constitutions, not least with respect to entrenchment)? Many of these questions were present in *Unions NSW* and *McCloy*.

Unions NSW

The case came before a full bench of the High Court as a special case. The questions referred to the full bench were:

(1) whether sections 95G(6) and 96D were invalid on account of the implied freedom of political communication under the Commonwealth Constitution;
(2) whether there was an implied freedom of political communication under the *Constitution Act* 1902 (NSW) and, if so, whether sections 95G(6) and 96D were invalid on account of this;
(3) whether section 96D was invalid under section 109 of the Commonwealth Constitution on account of inconsistency with section 327 or Part XX of the *Commonwealth Electoral Act* 1918 (Cth); and
(4) whether section 96D was invalid on account of any freedom of association provided for in the Commonwealth Constitution.[26]

The High Court answered the first question in the affirmative and, consequently, found it unnecessary to answer the remaining questions. Bound up in this first question, however, are a number of further questions about the application of the implied freedom of political communication to State electoral laws such as the *EFED Act*.

Scope of the implied freedom under the Commonwealth Constitution: does it apply to (purely) State matters?

In some of its early implied freedom decisions before the important re-formulation in *Lange*, the

High Court had seemingly proclaimed the indivisibility of political communication along Commonwealth-State lines – that is, even though the implication was said to arise from the system of *federal* government set up by the Commonwealth Constitution it was, nevertheless, believed by many that it would apply to political communication generally (that is, not only to political communication about matters directly of federal political concern).[27] And, in *Lange* itself, the High Court stated that, as a result of the implied freedom, the defence to defamation of qualified privilege must be recrafted to allow for political communication and that this communication should not be limited to matters of federal politics but should also include communication about matters of State, territory, local and even foreign/international politics.

As a result of this, many concluded that the pre-*Lange* indivisibility of political communication continued post-*Lange*. In a paper published before the *Unions NSW* case, however, Professor Anne Twomey argued that to draw this conclusion is to misread *Lange*: while *Lange* had held that the defence of qualified privilege which had to be re-crafted as a result of the implied freedom was to include matters of State, territory, local or even international politics, *Lange* did not decide that the constitutional implied freedom itself necessarily extended to include all matters of State, territory, local or even international political concern.[28]

If this was a misreading of *Lange* it was, however, a common one. Twomey then argued that when its precise constitutional basis is considered the implied freedom may not apply to State electoral laws concerned purely with State elections (such as the *EFED Act*).

Whether the Commonwealth implied freedom of political communication would apply to such provisions is doubtful, especially as they are not intended to affect political donations in relation to Commonwealth elections and would seem to have little if any bearing upon Commonwealth political matters. The Commonwealth implied freedom is only likely to apply if:

(a) The attempt to isolate the limitations on political donations so that they only have an impact on State electoral campaigns has failed and the law is regarded as having an impact upon Commonwealth elections;
(b) The High Court reverts to its *Stephens* view that all political discourse is "indivisible"; or
(c) The High Court draws a new implication of representative government and freedom of political communication at the State level from provisions in the Commonwealth Constitution concerning the States or achieves the same outcome through attributing essential characteristics to a constitutional expression.[29]

Perhaps not surprisingly, in *Unions NSW* the Solicitor-General for New South Wales, Michael Sexton, SC, argued along these very lines:

> While there may be an overlap between political discussion of federal and State matters, that [sc. the sections of the *EFED Act* under challenge] is an area that is by definition outside the scope of the implied freedom. The making of a political donation at State or local level does not affect the capacity of the people to exercise a free and informed choice in a federal election or referendum.[30]

The majority, however, responded in its judgment:

> The complex interrelationship between levels of government, issues common to State and federal government and the levels at which political parties operate necessitate that a wide view be taken of the operation of the freedom of political communication. As was observed in *Lange*, these factors render inevitable the conclusion that the discussion of

> matters at a State, Territory or local level might bear upon the choice that the people have to make in federal elections and in voting to amend the *Constitution*, and upon their evaluation of the performance of federal Ministers and departments.[31]

Has the High Court adequately answered the argument of Professor Twomey and others that, notwithstanding what the High Court held in *Lange*, the implied freedom does not apply to State electoral laws only affecting State elections because the purported constitutional basis for the implied freedom (essentially matters that could affect the informed decision of the electorate at a federal election or a federal constitutional referendum) does not extend that far, lest the implied freedom of political communication degenerate into an implied freedom of communication *simpliciter*?

In my view, the answer is "no." While the courts are there to resolve disputes between litigants and not enter into academic debates for the sake of entering into academic debates, this is an important question about the constitutional basis and extent of the implied freedom. It would appear that the High Court has, as Professor Twomey suggested might happen, effectively reverted to its *Stephens* view that all political discourse is indivisible without adequately grounding it in the stated basis for the implication in *Lange* (as modified in *Coleman*).

Interplay between the implied freedom of political communication and the Melbourne Corporation principle

In *Unions NSW* counsel for New South Wales, and for Queensland and Victoria intervening, all mounted arguments that the *Melbourne Corporation* principle influences the way in which the implied freedom of political communication applies in relation to State electoral laws. For instance, the Solicitor-General for New South Wales argued that the regulation of State electoral processes is a "fundamental constitutional function of the State" and that the ambit of the implied freedom must therefore be construed so as not to impair a State's capacity to exercise its constitutional functions such as this one.[32]

The High Court rejected these arguments with the answer that "there is no constitutional principle which accepts that the States can legislate to affect the *Commonwealth Constitution*, including its implications."[33] With respect to their Honours, this is hardly an adequate response to the arguments raised by these States. The States were not arguing that they could legislate to affect the Commonwealth Constitution; rather, they were arguing that, properly construed, the Commonwealth Constitution did not affect the States' own legislation.

The question is not whether the States can legislate while invoking *Melbourne Corporation* to avoid the application of another part of the Constitution; rather, the question is what the true extent of the implied freedom of political communication is and that, in discerning its true extent, other constitutional implications such as the *Melbourne Corporation* principle may be relevant, especially given that we are dealing with an implication of, and not an explicit textual requirement for, the freedom of political communication.

What is political communication?

In the United States the making of a political donation has been held to be an act of speech protected by the First Amendment to the United States Constitution.[34] The plaintiffs in *Unions*

NSW argued that "the making and acceptance of a political donation constitutes political communication" as "it serves as a general expression of support for a candidate or a party,"[35] while the defendant and the interveners all disputed this. The High Court in *Unions NSW* did not decide the issue but did offer the following broad statement on political communication:

> Political communication may be undertaken legitimately to influence others to a political viewpoint. It is not simply a two-way affair between electors and government or candidates. There are many in the community who are not electors but who are governed and are affected by decisions of government. Whilst not suggesting that the freedom of political communication is a personal right or freedom, which it is not, it may be acknowledged that such persons and entities have a legitimate interest in governmental action and the direction of policy. The point to be made is that they, as well as electors, may seek to influence the ultimate choice of the people as to who should govern. They may do so directly or indirectly through the support of a party or a candidate who they consider best represents or expresses their viewpoint. In turn, political parties and candidates may seek to influence such persons or entities because it is understood that they will in turn contribute to the discourse about matters of politics and government.[36]

Does the law burden political communication?

As already mentioned, the plaintiffs in *Unions NSW* had argued that the making of a political donation was itself an act of political communication. If this were the case then the ban in section 96D on the making of a donation would seem ipso facto to amount to a burdening of political communication. As the High Court did not resolve the issue of whether a donation itself is an act of political communication it could not hold that political communication was burdened in this way. Instead, it held that there was a burdening of political communication because section 96D "effects a restriction upon the funds available to political parties and candidates to meet the costs of political communication by restricting the source of those funds."[37] With respect to section 95G(6) the Court held that it burdens political communication "in restricting the amount of electoral communication expenditure in a relevant period."[38]

Legitimacy of legislative ends

The general purpose of the legislation as a whole was not in dispute; the plaintiffs readily accepted that the legislation as a whole had a legitimate aim, viz, "to regulate the acceptance and use of political donations in order to address the possibility of undue or corrupt influence being exerted."[39] The plaintiffs argued, however, that section 96D did nothing calculated to promote the achievement of those legitimate purposes and that there was no purpose to the prohibition on donors not on the electoral roll other than its own achievement.

In other words, the plaintiffs argued that there was no rational connexion between the legitimate overall aim of the legislation and this particular provision with the result that the particular provision served no legitimate end. The High Court agreed.[40]

With respect to section 95G(6) the defendant had argued its purpose was to render efficacious the cap on expenditure by registered parties, arguing that it was legitimate to ensure that the effectiveness and fairness of the generally applicable caps were not circumvented.[41] The High Court, however, did not accept this argument. Instead, it inferred that the section's purpose was to reduce the amount which a political party affiliated with industrial organisations may incur by way of electoral communication expenditure and likewise limit the amount able to be spent by

an affiliated industrial organisation and seeing no logical connexion between this and the general anti-corruption purposes of the *EFED Act* held that it, too, served no legitimate purpose under the *Lange-Coleman* test.[42]

Proportionality of the legislative means

Finally, it is worth noting that the High Court held that because there were no legitimate ends the question of the proportionality of the means did not arise for consideration.[43]

The Issues in *McCloy*

Not only does *McCloy* involve a challenge under the same constitutional principle to sections of the same Act as in *Unions NSW*, a number of the issues argued and decided – or argued but *not* decided – in *Unions NSW* are relevant to the claim in *McCloy*. And, given the decision in *Unions NSW*, one might be tempted to conclude that what is sauce for the trade unions' goose is sauce for the property developers' gander. However, despite their apparent similarities, there are also a number of points of possible distinction between the two cases.

In light of the decision in *Unions NSW* it seems difficult to contemplate the High Court holding that the implied freedom of political communication cannot (*a priori* as a threshold matter, as Professor Twomey had argued prior to *Unions NSW*, and as the Solicitor-General for NSW had unsuccessfully argued in *Unions NSW*) apply to the sections of the *EFED Act* under challenge in *McCloy*. If the sections challenged in *Unions NSW* were potentially subject to the implied freedom it would now appear to be beyond doubt that, for all practical purposes, the sections challenged in *McCloy* are also subject to the implied freedom and the case will have to be decided on an application of the *Lange-Coleman* test rather than on the basis that the provisions under challenge are simply outside the scope of the implied freedom of political communication.

Is making a donation itself an instance of political communication?

In *Unions NSW* the plaintiffs had argued that the making and receiving of a political donation is itself an instance of political communication. The High Court, however, avoided deciding the issue, finding that it was possible to resolve the case without doing so. Interestingly, while a similar argument could have been raised on the facts in *McCloy*, the plaintiffs did not seek to advance their case on this basis and, indeed, during oral argument, a number of judges seemed quite hostile towards such a view, instead arguing a less direct burdening of political communication.

Burdening of political communication

In the absence of arguments that the making of political donations is itself an instance of political communication there are essentially three conceivable ways in which restrictions on political donations might indirectly burden political communication.

(a) Restrictions on donations burden political communication on the part of the donor

Absent an argument that a donation itself is not an instance of political communication, does a law restricting the making of donations nevertheless still effectively burden the donor's political communication? The argument of the defendant44 and a number of the interveners was no; in

their view, restrictions on making political donations do not impose any effective burden on a would-be donor's ability to engage in political communication for the simple reason that the would-be donor remains free to make his political views known to politicians and, indeed, to the general public.[45]

Simply put, on this view restrictions on political donations (whether a general cap on political donations, a restriction on donations in kind or, indeed, an outright ban on donations by property developers) do not prevent the donor from doing anything other than making a political donation (or from making whatever kind of political donation is prohibited). Contrary to this, however, the plaintiffs argued that such laws do effectively burden the donor's political communication; in their view, there is a nexus between political donations, political influence and political communication.[46] The plaintiffs argued that these laws target "a means by which members of the community may create for themselves an opportunity more effectively to communicate a message to a party or candidate."[47] As the plaintiffs put it:

> By becoming known to a candidate or party, a donor may increase the visibility of his or her message in the eyes of both the recipient of the donation and potentially subsequent persons with whom the recipient communicates. Participation of members of the community in the political funding process can thereby affect the content of political messages which parties and candidates then communicate. By targeting one of the means by which a member of the community may seek to become better known to political actors (i.e. by donations), the impugned provisions reduce the effectiveness of future communication from those community members to parties and candidates, and interfere with the processes by which parties and candidates determine the messages they will communicate.[48]

More crudely put, one reason why persons may choose to make political donations is to secure access to politicians in order to seek to influence the course of political debate and policy development – the more one donates the more influence with politicians and political parties one expects to have – and that laws restricting political donations place an effective burden on would-be donors exerting political influence – and thereby impose an effective burden on political communication – in this manner. As counsel for the plaintiffs stated in oral argument, "one effect of making political donations is that it may improve one's access to the candidate once the candidate becomes a member for the purpose of making representations to that member; we put that as a legitimate objective directed at the facilitation of political communication."[49] It must be said that of the three conceivable ways in which these laws might effectively burden political communication, the argument that they burden the donor's ability to engage in political communication is the most controversial.

(b) Restrictions on donations burden political communication on the part of the recipient

A second line of argument would be to argue that restrictions on donations burden the recipient's ability to engage in political communication – and, indeed, the defendant conceded as much.[50] It would also appear that the decision in Unions NSW in respect of the aggregation provision (that is, the provision which included an affiliated organisation's spending in the party's spending cap) lends itself to this interpretation; the High Court, in Unions NSW, noted the impact this provision had upon a political party's ability to engage in political communication.[51]

It would not seem too much of an extension to apply similar reasoning to conclude that restrictions on the ability to make political donations effectively burden the ability of the would-be recipients of those funds to engage in political communication; while still free to engage in political communication, in the absence of political donations prohibited by the legislation those who would have been the recipients of such donations must now do so with fewer resources available to them. In my view the argument that restrictions on political donations burden a recipient's ability to engage in political communication is the least controversial of the ways in which these kinds of laws can indirectly burden political communication.

(c) Restrictions on donations burden political communication generally

A third possible line of argument would be to seize upon the statement of the majority in Unions NSW that political communication "is not simply a two-way affair between electors and government or candidates"[52] and argue that political donations help to make political communication generally possible, without focusing specifically on whether restrictions on donations burden either the donor's or the recipient's ability to engage in political communication. In my view, however, this kind of approach would seem too imprecise for the High Court to adopt.

Legitimacy of legislative ends

Given what the High Court decided in *Unions NSW*, is there a legitimate purpose to the sections under challenge in *McCloy*, viz, a ban on political donations by developers, caps on donations and ban on certain types of donations in kind? Recall that in *Unions NSW* the High Court held that the two provisions under challenge served no legitimate purpose: in the High Court's view the ban on donors not on the electoral roll served no purpose other than its own achievement and the true purpose of the aggregation provisions was not a measure aimed at ensuring the efficacy and fairness of the general caps but rather was squarely aimed at reducing the amount which a political party affiliated with industrial organisations (viz, the ALP) may incur by way of electoral communication expenditure and likewise limit the amount able to be spent by an affiliated industrial organisation.

As in *Unions NSW*, the defendant in *McCloy* can and did point to a legitimate *general* purpose of the Act to reduce corruption and undue influence (or, at any rate, the *appearance* of corruption and undue influence). The important question, however, is whether there is some logical connexion between a specific provision of the Act and any legitimate *general* purpose of the Act as a whole. Do the three specific provisions subject to challenge in *McCloy* serve a legitimate purpose such as reducing corruption and undue influence (or their appearance)?

Caps

Does a cap on the amount an individual donor may donate serve any legitimate purpose other than its own achievement? The plaintiffs argued that it does not,[53] essentially claiming that, since there is no basis to infer that making a large donation necessarily entails a quid pro quo, the purpose of the caps cannot be to proscribe corrupt donations and that it must have some other purpose. The plaintiffs then argued that people can and do gain political influence by many means and it is not legitimate for the legislature to single out any of these – such as wealth – to

prevent people from exerting such influence.

Contrary to this, the defendant argued that the legitimate end of the caps is to reduce the *perception* if not the actuality of corruption and undue influence over the political process;[54] while it is true that large donations do not *necessarily* involve a quid pro quo, in the defendant's view large donations are still likely to "buy" influence which can be seen to create a threat to the integrity of the system of representative and responsible government and maintaining public confidence in the integrity of the system, is in the defendant's view, a legitimate end.

Indirect campaign contributions

Does the ban on non-monetary donations serve any legitimate purpose other than its own achievement? The plaintiffs contended that it does not, essentially arguing that its purpose cannot be to avoid the difficulty of valuing non-monetary donations (since non-monetary donations valued under $1000 are permitted and must necessarily be valued to determine whether they come in under the threshold) and nor can its purpose be to enhance transparency (since in the absence of the ban on in-kind donations these donations would be subject to the *EFED Act*'s disclosure requirements). The plaintiffs also argued that the purpose of the ban cannot be to bolster the effectiveness of the disclosure requirements or the caps since nothing in the Act provides any link between section 96E (which was enacted in 2008) and Division 2 of Part 6 (the disclosure requirements) or Division 2A of Part 6 (which contains the caps and which was enacted in 2010). Contrary to this the defendant argued that section 96E aids the disclosure requirements in Division 2 of Part 6 by enabling the expression of benefits in monetary terms, that it aids the efficacy of the caps in Division 2A of Part 6 by cutting off routes for circumvention where detection may be difficult, and that section 96E can therefore rationally be taken "to further the purpose of minimising the risk to the actual and perceived integrity of the State Parliament and the institutions of local government."[55]

Developer ban

Does the ban on donations by property developers[56] serve any legitimate purpose other than its own achievement? This is undoubtedly the most controversial of the three provisions under challenge and the plaintiffs argued strongly that it served no legitimate purpose.[57] The plaintiffs argued essentially that it was illegitimate to single out prohibited donors such as property developers in this way because the provision as drafted did not actually prevent corruption and was, instead, "an attempt to prevent socially undesirable persons from being seen to contaminate political parties and candidates with their influence".[58] The plaintiffs argued further that there is nothing intrinsic to property developers that makes them more prone to engage in corruption than anyone else who seeks to advance his own interests through participation in the political process and that any inference the State drew from past cases (or alleged cases) of corruption involving property developers was too generalised and therefore a law preventing *all* property developers from making donations was not legitimate.

Contrary to this, the defendant argued that property developers are sufficiently unique to warrant special regulation in light of the nature of the business activities they undertake and the nature of the public powers they may seek to influence in their self-interest.[59] That is, in light of what property developers do, the way planning decisions are made and a history of allegations of

corruption (whether proven or not) involving property developers outlined in ICAC and parliamentary committee reports, there are legitimate concerns about the actual and perceived susceptibility of members of State and local government to influence from property developers and it is legitimate for the Parliament to respond in the way it did.

Proportionality of means

While the plaintiffs in McCloy argued that the ends of the provisions under challenge were all illegitimate they also argued in the alternative that the means were disproportionate to achieving the stated end while the defendant unsurprisingly argued that they were proportionate.

Caps

The plaintiffs advanced several arguments as to why the caps were disproportionate to the stated ends.[60] The plaintiffs argued, inter alia, that if the end is to prevent actual instances of corruption the caps are disproportionate in that they prevent many things other than actual corruption and that, if the end is preventing the perception that wealthy donors can buy political influence, the caps are disproportionate in that disclosure and public scrutiny of all donations would be effective in achieving the stated end. In reply the defendant argued that no hypothetical provision advanced by the plaintiffs would be as effective as the caps in achieving the purpose of reducing the perception of undue or corrupt influence.[61]

Indirect campaign contributions

The plaintiffs argued that the ban on indirect campaign contributions was disproportionate to the stated end of bolstering the efficacy of the donation caps in that the law could instead have insisted on the provision of a reliable valuation as a condition to the liberty to make a non-pecuniary donation; in other words, with the stated end in mind it was not necessary to ban non-pecuniary donations when valuation and disclosure would suffice.[62] Contrary to this the defendant argued that the plaintiffs' proffered alternative is not an obvious and compelling means of achieving the same end since it would impose significant transaction costs, would raise issues as to what was sufficient evidence of a reliable valuation and would raise potentially complex definitional issues.[63]

Developer ban

The plaintiffs advanced a number of arguments as to why a total ban on political donations by property developers was disproportionate to the stated aims.[64] First, the plaintiffs argued that nowhere else in the world is there a law of this kind suggesting that the property development sector is inherently inclined to corruption by way of political donations; the complete absence of any such laws anywhere else in the world might suggest that the approach of New South Wales is not proportionate to the end of preventing actual or even perceived corruption and undue influence.

Secondly, they argued that limiting the prohibitions in Division 4A to making donations with some form of intention corruptly to solicit favour (as secret commissions legislation and the common law of bribery do) would have been a more proportionate means of achieving the stated end. And, thirdly, they argued that the way the law operates in practice, in part owing to the way

it defines "property developer" and "close associate," is that it catches too much activity including, for instance, a property developer wanting to use his company's resources to fund his own election campaign, the spouse of a property developer being unable to donate to a property developer's *own* electoral campaign, and a close associate of a property developer being unable to donate to support political causes wholly unrelated to the perceived dangers of undue influence from property developers.

In reply the defendant argued that the plaintiffs' proposed alternative of confining the ban to developer donations where there is some form of intention corruptly to solicit favour is not a viable alternative as the measures the plaintiffs refer to are dealing with the aftermath of the problem rather than attempting to prevent its occurrence. Moreover, in light of the scale of the problem it is open to the Parliament to adopt more extreme measures to address it both because of the reality of the problem and because of the damage that public recognition does to public confidence in the electoral or governmental system.[65] Furthermore, the defendant argued that a prohibition of the kind the plaintiffs suggested does not advance the regulatory end to the same extent as the provisions under challenge and therefore is not a true alternative.

Political donations and the implied freedom of political communication: some tentative conclusions

Although there are certain similarities between *McCloy* and *Unions NSW*, and one might be tempted to conclude that what is sauce for the trade unions' goose is sauce for the property developers' gander, it is far from certain that the plaintiffs in *McCloy* will succeed in any, let alone on all three, of their constitutional challenges. Of the three constitutional challenges in *McCloy* it would seem that the plaintiffs' greatest chance of success lies with the ban on donations by property developers; the caps and the restrictions on indirect campaign contributions would appear to be easier for the State to justify in terms of the ends they pursue and the means adopted in pursuit of those ends.

It seems unlikely that the High Court would hold that making a political donation is itself an act of political communication which will result in an important distinction between the approach of the High Court under the implied freedom of political communication and the United States Supreme Court under the First Amendment to the US Constitution when it comes to laws concerning political donations. As a result of such an approach the High Court will be required to decide upon the way (if any) in which laws restricting political donations *indirectly* burden political communication. Do they burden the donor's or the recipient's political communication? The less controversial approach, and one that would seem to be justified by the ratio in *Unions NSW* (not to mention one that was conceded by the defendant in *McCloy*) would seem to be the latter. To hold that laws which limit donations implicate the implied freedom because they prevent a donor from effectively "buying" access to a politician (as the plaintiffs had effectively sought to argue) may go beyond what the High Court is willing to decide.

The most challenging aspect of the case for the High Court would appear to be deciding the legitimacy of the ends, especially in light of the decision in *Monis* where an evenly divided High Court disagreed on whether the ends in that case were legitimate and the decision in *Unions NSW* where the Court held that certain provisions of the *EFED Act* served no legitimate purpose. Of course there have been personnel changes on the High Court since each of those

decisions was decided so it will be particularly interesting to see how the Court deals with this aspect of the case.

The legitimacy of the ban on donations by property developers will probably present the greatest difficulty for the High Court as cogent arguments can be mounted both in favour of and against the legitimacy of its end under the *Lange-Coleman* test. The legitimacy of the ends of the other two provisions, as well as the proportionality of their means in my view, would appear to present less difficulty for the High Court.

Endnotes

1. Prior to its amendment in 2008 the Act was known as the *Election Funding Act* 1981 (NSW).

2. (2013) 252 CLR 530.

3. High Court of Australia, S211/2014 (argued 10 and 11 June 2015). At the time this paper was delivered (August 2015) judgment in the matter was reserved.

4. The implied freedom of political communication was first held to exist in *Nationwide News v Wills* (1992) 177 CLR 1 and *Australian Capital Television v Commonwealth* (1992) 177 CLR 106. Since then it has undergone substantial reformulation by the High Court, with the current "test" to be applied deriving from the decision in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 as modified in *Coleman v Power* (2004) 220 CLR 1.

5. *Election Funding and Disclosures Amendment (Property Developers Prohibition) Act* 2009 No 113 (NSW), Schedule 1, item 1.

6. *Election Funding and Disclosures Amendment Act* 2010 No 95 (NSW) Schedule 1, items 28-30.

7. *Election Funding and Disclosures Amendment Act* 2010 No 95 (NSW) Schedule 1, item 23.

8. In distinction to *Unions NSW*, however, it is worth noting that the plaintiffs in *McCloy* did not seek to argue the case on the basis of an implied freedom of association under the Commonwealth Constitution, most probably as a result of the decision in *Tajjour v State of New South Wales* (2014) 88 ALJR 860 where the High Court held that a freedom of association independent of the implied freedom of political communication is not to be implied into the Commonwealth Constitution.

9. (1992) 177 CLR 1.

10. (1992) 177 CLR 106.

11. Ibid. at 177-191.

12. (2001) 208 CLR 199 at [251]-[277], [337]-[348].

13. (2013) 249 CLR 92 [237]-[251]. Cf his remarks in *Wotton v Queensland* (2012) 246 CLR 1 at [39]-[40].

14. See, for example, Jeffrey Goldsworthy, "Constitutional Implications and Freedom of Political Speech: A Reply to Stephen Donaghue", *Monash University Law Review,* 1997, vol

23(2), 362-374; Adrienne Stone, "Freedom of Political Communication, the Constitution and the Common Law", *Federal Law Review,* 1998, vol 26(2) 219-257; Adrienne Stone, "The Australian Free Speech Experiment and Scepticism about the UK Human Rights Act", Tom Campbell, K. D. Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights*, OUP, 2001 391-410. These are all referred to by Heydon J in *Monis v The Queen* (2013) 249 CLR 92 at [243] fn 221.

15. George Williams, Sean Brennan and Andrew Lynch, *Blackshield & Williams' Australian Constitutional Law and Theory*, Federation Press, 6th ed., 2014, 1334.

16. Michael Sexton, "Flights of Fancy: The Implied Freedom of Political Communication 20 Years On", *Upholding the Australian Constitution*, vol 24, Proceedings of The Samuel Griffith Society, 2012, 17-36, 17.

17. (1997) 189 CLR 520.

18. (2004) 220 CLR 1.

19. Michael Sexton, "Flights of Fancy: The Implied Freedom of Political Communication 20 Years On", *Upholding the Australian Constitution*, vol 24, Proceedings of the Samuel Griffith Society, 2012, 17-36, 17.

20. (2013) 249 CLR 92.

21. Monis had been convicted of the offence of using a postal or similar service in a menacing, threatening or offensive manner pursuant to s 471.12 of the *Criminal Code (Cth)*.

22. See, for example, Helen Irving "Constitutional Interpretation: A Woman's Voice?" http://blogs.usyd.edu.au/womansconstitution/2013/03/constitutional_interpretation_1.html

23. For a critique of proportionality analysis, see Francisco J. Urbina, "A Critique of Proportionality", *American Journal of Jurisprudence*, 2012, vol 57(1), 49-79.

24. Anne Twomey, "The Application of the Implied Freedom of Political Communication to State Electoral Funding Laws," *UNSW Law Journal*, 2012, vol 35(3), 625-647, 630.

25. *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

26. There were actually nine questions reserved for determination: see *Unions NSW v State of New South Wales* (2013) 252 CLR 530 at [66] and [170]. For present purposes I have reduced these to four.

27. See, generally, Anne Twomey, "The Application of the Implied Freedom of Political Communication to State Electoral Funding Laws," *UNSW Law Journal*, 2012, vol 35(3), 625-647, 630-631.

28. Ibid., 632.

29. Ibid., 645. The reference to *Stephens* is *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

30. *Unions NSW v State of New South Wales* (2013) 252 CLR 530, 535 (summary of argument, M. G. Sexton, SC).

31. Ibid., at [25] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

32. Ibid., at 535 (summary of argument, M. G. Sexton, SC); cf 539 (summary of argument, W. Sofronoff, QC) and 541 (summary of argument, S. G. E. McLeish, SC).

33. Ibid., at [34].

34. See, for example, *Buckley v Valeo* 424 US 1 (1976) at 21.

35. *Unions NSW v State of New South Wales* (2013) 252 CLR 530 at 532 (summary of argument, B. W. Walker, SC).

36. Ibid. [30].

37. Ibid. [38].

38. Ibid. [61].

39. Ibid. [51].

40. Ibid. [51]-[60].

41. Ibid. [62].

42. Ibid. [64].

43. Ibid. [46].

44. Strictly speaking reference throughout this paper should be to the first defendant, that is, the State of New South Wales, rather than to the defendant. There were in fact two defendants in *McCloy*, viz, the State of New South Wales and the Independent Commission Against Corruption. For present purposes, however, we need only concern ourselves with the first defendant.

45. See, generally, *McCloy*, First Defendant's Submissions [29]-[32].

46. See, generally, *McCloy*, Plaintiffs' Reply [1]-[9].

47. *McCloy*, Plaintiffs' Reply [2].

48. *McCloy*, Plaintiffs' Reply [3].

49. *McCloy v State of New South Wales* [2015] HCATrans 141 (10 June 2015).

50. *McCloy*, First Defendant's Submissions [28], [65], and [95].

51. *Unions NSW v State of New South Wales* at [61].

52. Ibid. [30]. See also text accompanying (n37) above.

53. See, generally, *McCloy*, Plaintiffs' Submissions [88]-[102].

54. See, generally, *McCloy*, First Defendant's Submissions [67]-[80].

55. *McCloy*, First Defendant's Submissions [97]. See, generally, also ibid [96]-[100].

56. Although the ban on political donations by property developers was extended to include a ban on donations by tobacco, liquor and gambling industry business entities as well, it is worth noting that the case was argued on the basis that the plaintiffs had standing to challenge the ban on developer donations but not the ban on donations from other classes of prohibited donors.

57. See, generally, *McCloy*, Plaintiffs' Submissions [52]-[75].

58. *McCloy*, Plaintiffs' Submissions [65].

59. See, generally, *McCloy*, First Defendant's Submissions [33]-[54].

60. See, generally, *McCloy*, Plaintiffs' Submissions [103]-[112].

61. See, generally, *McCloy*, First Defendant's Submissions [81]-[90].

62. See, generally, *McCloy*, Plaintiffs' Submissions [125]-[129].

63. See, generally, *McCloy*, First Defendant's Submissions [101]-[104].

64. See, generally, *McCloy*, Plaintiffs' Submissions [76]-[87].

65. See, generally, *McCloy*, First Defendant's Submissions [55]-[64].