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## **Keywords**

political donation reform, political communication, Election Funding, Expenditure and Disclosures Act, political financing laws

## **Cover Page Footnote**

On 8 April 2013 Unions NSW announced that it would challenge the validity of laws made by the New South Wales Parliament in 2012 that only permit political donations from persons who are on the electoral roll, thereby prohibiting donations from corporations and unions. The matter was heard by the High Court in November 2013 and raised two quite novel issues. The first is whether political donations are a form of political communication and the second is whether political communication made by corporations or other associations is protected by the implied freedom of political communication. In addition to these issues, the Court will also have the opportunity to clarify under what circumstances State laws can be invalidated as a result of a freedom implied by the Commonwealth Constitution and whether a free-standing freedom of political communication is implied by the NSW Constitution. Further, the Court will be asked to determine whether a freedom of association is an indispensable incident of the implied freedom of political communication. This article considers how the High Court might resolve these issues, paying particular attention to recent jurisprudence of the United States Supreme Court relating to political donation regulation.

# THE COST OF POLITICAL DONATION REFORM: A BURDEN ON THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION - UNIONS NSW AND OTHERS V STATE OF NEW SOUTH WALES

DOMENICO CUCINOTTA\*

## ABSTRACT

*On 8 April 2013 Unions NSW announced that it would challenge the validity of laws made by the New South Wales Parliament in 2012 that only permit political donations from persons who are on the electoral roll, thereby prohibiting donations from corporations and unions. The matter was heard by the High Court in November 2013 and raised two quite novel issues. The first is whether political donations are a form of political communication and the second is whether political communication made by corporations or other associations is protected by the implied freedom of political communication. In addition to these issues, the Court will also have the opportunity to clarify under what circumstances State laws can be invalidated as a result of a freedom implied by the Commonwealth Constitution and whether a free-standing freedom of political communication is implied by the NSW Constitution. Further, the Court will be asked to determine whether a freedom of association is an indispensable incident of the implied freedom of political communication. This article considers how the High Court might resolve these issues, paying particular attention to recent jurisprudence of the United States Supreme Court relating to political donation regulation.*

## I INTRODUCTION

Amendments to the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (the 'Act') passed the New South Wales Parliament in the early hours of the morning of 16 February 2012.<sup>1</sup> In his Second Reading speech, the Minister proclaimed that the 'measures in this bill are designed to rid this State of both the risk and the perception

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<sup>1</sup> Liz Foschia, *Donations shake-up passes NSW Parliament* (16 February 2012) ABC News <<http://www.abc.net.au/news/2012-02-16/political-donations-shake-up-passes-nsw-parliament/3833144>>.

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of corruption and undue influence'.<sup>2</sup> The amendments to the Act heralded a major shift in political donation law in Australia since it became unlawful for anyone other than an individual enrolled on the electoral roll for a federal, State or local election to donate money to a political party, candidate or third-party campaigner with respect to New South Wales State elections. Additionally, in a direct broadside against the Australian Labor Party and the union movement, the amendments to the Act included provisions, which aggregated expenditure of political parties and 'affiliated organisations', thereby capping the combined power of the Australian Labor Party and 'affiliated' unions. These changes have not gone unnoticed amongst the unions and so, on 8 April 2013, Unions NSW<sup>3</sup> filed a writ of summons with the High Court arguing on various grounds that the amendments to the Act are invalid.<sup>4</sup>

The matter was heard by the High Court between 5-6 November 2013,<sup>5</sup> and the Court must now determine whether: a) a complete ban on direct political donations made by a non-electoral is invalid since it burdens a freedom of political communication implied by the *Commonwealth Constitution* or the *Constitution Act 1902* (NSW) (the 'NSW Constitution'); b) the aggregation of political communication expenditure of political parties and affiliated organisations is invalid because it impermissibly burdens a freedom of political communication implied by the *Commonwealth Constitution* or the *NSW Constitution*; c) the ban on political donations from non-electors is invalid because it is inconsistent with provisions of the *Commonwealth Electoral Act 1918* (Cth); and d) the ban on political donations from non-electors is invalid because it offends a freedom of association implied by the *Commonwealth Constitution*.

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<sup>2</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 15 February 2012 (Michael Gallacher, Minister for Police and Emergency Services, Minister for the Hunter, and Vice-President of the Executive Council).

<sup>3</sup> With the Australian Manufacturing Workers' Union; New South Wales Local Government, Clerical, Administrative, Energy, Airlines & Utilities Union; New South Wales Nurses and Midwives' Association; New South Wales Teachers Federation; and Transport Workers' Union of New South Wales ('the plaintiffs').

<sup>4</sup> Will Ockenden, *Unions take donation law challenge to High Court* (8 April 2013) ABC News <<http://www.abc.net.au/news/2013-04-08/unions-take-donation-law-challenge-to-high-court/4615498>>.

<sup>5</sup> The matter was heard by the full court except for Gageler J who recused himself because he had provided advice to the Commonwealth Government on the validity of this legislation during his appointment as Commonwealth Solicitor-General; Dan Harrison, *Judge withdraws from NSW political donations hearing* (5 November 2013) <<http://www.smh.com.au/federal-politics/political-news/judge-withdraws-from-nsw-political-donations-hearing-20131105-2wyiy.html>>

The scope of this article is limited to a consideration of the relevant Australian authority on point and provides a view on how the High Court might deal with the arguments presented. Given the abundance of authority from the United States Supreme Court, much of which has been generated in the last five years, this article will pay particular attention to the jurisprudence of the United States Supreme Court in relation to political donation regulation and the First Amendment.

This article takes the view that the High Court should avoid a narrow approach towards the implied freedom of political communication and should, in appropriate cases, expand the circumstances in which that implied freedom extends. The current case offers a timely opportunity for the High Court to clarify and determine some significant issues relating to the implied freedom of communication that have been untraversed thus far. The final outcome of the challenge – that is to say, whether s 96D is valid or invalid – is, to an extent, of secondary interest to the broader issues raised by the case, such as those relating to the *NSW Constitution* and the concept of donation as a form of political communication.

It should also be acknowledged that discussions of political donation and political financing laws are likely to encourage broader public debate in relation to the appropriateness of those laws generally. There is a growing body of scholarship and literature in Australia on political funding and expenditure laws, much of which engages in a comparative analysis with approaches to such laws in the United States and the United Kingdom.<sup>6</sup> This scholarship deals mainly with the legislative regimes in place and suggests areas for further legislative reform.<sup>7</sup> This article does not include consideration of, or propose places for, law reform in political funding regulation. Such an inquiry is best left to scholarship focusing directly and solely on point.

Rather, this article undertakes a legalistic analysis of the issues and arguments raised by the challenge of Unions NSW. Consideration ought to be given to these issues alone, since this is the first case in Australia dealing with the validity of political donation legislation.

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<sup>6</sup> For example Joo-Cheong Tham, *Money and Politics: the democracy we can't afford* (UNSW Press, 2010); Deborah Cass and Sonia Burrows, 'Commonwealth Regulation of Campaign Finance – Public Funding, Disclosure and Expenditure Limits' (2000) 22 *Sydney Law Review* 477; Graeme Orr, 'The Currency of Democracy: Campaign Finance Law in Australia' (2003) 26 *University of New South Wales Law Journal* 1.

<sup>7</sup> See generally Joo-Cheong Tham and David Grove, 'Public Funding and Expenditure Regulation of Australian Political Parties: Some Reflections' (2004) 32 *Federal Law Review* 397.

## II THE IMPLIED FREEDOM AND THE BAN ON DIRECT POLITICAL DONATIONS

### *A Background*

Prior to the 2012 amendments, section 96D of the Act permitted individuals enrolled on the electoral roll and entities with an Australian Business Number or some other identifying number registered with the Australian Securities and Investments Commission to make political donations. The 2012 amendments wound back the scope of this provision significantly so that it is now unlawful for a party, elected member, group, candidate or third-party campaigner to accept political donations from any body or individual other than a person who is enrolled on the roll of electors for federal, State or local government elections. It was argued before the Court that the 2012 amendments are invalid since they impermissibly burden a freedom of political communication implied by the *Commonwealth Constitution* and/or the *NSW Constitution*. The Court has been asked to decide: a) whether there is a separate and independent freedom of political communication implied by the *NSW Constitution*; b) whether the freedom of political communication implied by the *Commonwealth Constitution* extends to laws of a State that concern State electoral matters; c) whether political donations are in and of themselves ‘political communication’ or facilitate political communication; and d) whether the laws are valid because they are reasonably appropriate and adapted to serve a legitimate end.

### *B The Genesis of the Implied Freedom of Political Communication*

That a freedom of communication about political or governmental matters is implied by text of the *Commonwealth Constitution* was first established by the High Court in 1992 in *Australian Capital Television v Commonwealth*<sup>8</sup>. The rationale behind this implication is that free discussion of government and political matters is necessary to ensure the efficacy of the constitutionally prescribed system of representative government.<sup>9</sup>

In the landmark decision of *Lange v Australian Broadcasting Commission* (*‘Lange’*),<sup>10</sup> the High Court held that the operative provisions from which the implied freedom of political communication is drawn include: ss 7 and 24, which provide that members of the Senate and House of Representatives respectively must be ‘directly chosen by the people’; s 64, which requires Ministers to be members of the House of

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<sup>8</sup> (1992) 177 CLR 106.

<sup>9</sup> *Ibid* 138.

<sup>10</sup> (1997) 189 CLR 520.

Representatives or the Senate; and s 128, which provides for referenda if the *Constitution* is to be amended.<sup>11</sup> A consequence of these provisions establishing a form of representative, democratically elected, government is that the free flow of information about governmental matters is necessary in order to assist electors to make an informed choice when exercising the constitutionally enshrined right to choose their representatives.<sup>12</sup>

Further, *Lange* marked a leap forward since the High Court set down a two-limb test to be used when determining whether a law is invalid because it impermissibly burdens the implied freedom of political communication. The test was slightly reformulated in 2004 in *Coleman v Power*,<sup>13</sup> and was most recently restated by the High Court in *Wotton v Queensland*,<sup>14</sup> as follows:

[W]hether in its terms, operation or effect, the law effectively burdens freedom of communication about government or political matters. If this is answered affirmatively, the second question asks whether the law nevertheless is reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government...<sup>15</sup>

If the second question is answered negatively, then the law will be invalid because it impermissibly burdens the implied freedom of political communication (this is known as the '*Lange Test*').<sup>16</sup>

### ***C A Freedom of Political Communication Implied Directly from the NSW Constitution***

No matter has yet raised, and therefore the High Court has never decided, whether there exists within the *NSW Constitution* an entrenched system of representative and responsible government, which would give rise to its own freestanding, independent, implied freedom of political communication. By way of comparison, there are decisions of the High Court finding that in two other States, Western Australia<sup>17</sup> and

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<sup>11</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 557-62.

<sup>12</sup> *APLA Ltd v Legal Services Commissioner of New South Wales* (2005) 224 CLR 322, 350-351 (Gleeson CJ and Heydon J).

<sup>13</sup> (2004) 220 CLR 1.

<sup>14</sup> (2012) 246 CLR 1.

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

<sup>16</sup> *Hogan v Hinch* (2011) 243 CLR 506, 542 [47] (French CJ).

<sup>17</sup> *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 ('Stephens').

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South Australia,<sup>18</sup> a freedom of political communication is directly implied by the text of those State constitutions. There is currently some academic debate as to whether such an implication could be drawn directly from the text of the *NSW Constitution*,<sup>19</sup> and there remains a further concern that even if such an implication could be drawn, the provisions for the system of representative government are not effectively entrenched. If those provisions were not effectively doubly entrenched, any law that abrogates such a freedom would implicitly amend the *NSW Constitution* and would, nevertheless, be valid.<sup>20</sup>

As discussed above, the textual lynchpin in the *Commonwealth Constitution* upon which the implication of the freedom of political communication rests are the words 'directly chosen by the people'. Identical words exist in s 73(2)(c) of the *Constitution Act 1889 (WA)* ('*WA Constitution*'), which states that a bill, which proposes that members of the Legislative Council or Legislative assembly be composed of persons other than those 'directly chosen by the people', will not receive Royal Assent until passed by an absolute majority of the parliament and the electors of WA at a referendum. Section 73 of the *WA Constitution* appears to be effectively doubly entrenched, protecting the requirement that members be 'directly chosen by the people' from amendment by ordinary legislation passed by the WA Parliament.<sup>21</sup> With respect to the *WA Constitution*, Mason CJ, Toohey and Gaudron JJ observed in *Stephens* that:

So long, at least, as the *Western Australian Constitution* continues to provide for a representative democracy in which the members of the legislature are 'directly chosen by the people', a freedom of communication must necessarily be implied in that *Constitution*, just as it is implied in the *Commonwealth Constitution*, in order to protect the efficacious working of representative democracy and government.<sup>22</sup>

In *Muldowney*, the Solicitor-General of South Australia conceded that there existed within the *Constitution Act 1934 (SA)* ('*SA Constitution*') an entrenched freedom of

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<sup>18</sup> *Muldowney v South Australia* (1996) 186 CLR 352.

<sup>19</sup> Anne Twomey, 'The Application of the Implied Freedom of Political Communication to State Electoral Funding Laws' (2012) Volume 35(3) *University of New South Wales Law Journal* 625, 638-40; Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 1<sup>st</sup> ed, 2006) 45, 133.

<sup>20</sup> Anne Twomey, 'The Application of the Implied Freedom of Political Communication to State Electoral Funding Laws' (2012) Volume 35(3) *University of New South Wales Law Journal* 625, 639-42.

<sup>21</sup> *Constitution Act 1889 (WA)* s 73(2)(e).

<sup>22</sup> *Stephens*, above n 17, 233-4.



political communication 'in like manner to the *Commonwealth Constitution*'.<sup>23</sup> Sections 11 and 27 of the *SA Constitution* require that members of the South Australian Legislative Council and Legislative Assembly be 'elected by the inhabitants of the State legally qualified to vote'. Similarly, the system of representative government provided for in the *SA Constitution* appears to be effectively doubly entrenched by s 10A and therefore not subject to implicit repeal by ordinary legislation of the SA Parliament.

No similar provisions as those found in the Commonwealth, Western Australian or South Australian constitutions exist in the *NSW Constitution*. The salient provisions of the *NSW Constitution* include: s 11A, which provides for general elections to be held periodically pursuant to writs issued by the Governor; s 11B, which mandates compulsory voting at a general election; s 26, which requires each electoral district to be represented by one Member of the Legislative Assembly; and s 28, which ensures that voting districts are generally composed of an equal number of electors. The Seventh Schedule of the *NSW Constitution* sets out the method of voting at general elections and prescribes a method of optional preferential voting. Despite all of these sections, which appear to establish a system of representative democracy in NSW, an implied freedom of political communication can still be rendered inoperative by an inconsistent law if those provisions from which the implication is drawn are not effectively entrenched.<sup>24</sup>

Entrenchment would appear to be effected by ss 7A and 7B of the *NSW Constitution*. Section 7A requires a referendum to be held on a bill which, amongst other things, abolishes, dissolves or alters the powers of the Legislative Council or a bill that attempts to amend any provision with respect to the ability of persons to be elected as a Member of the Legislative Council or Member of the Legislative Assembly. Section 7B operates in a similar way with respect to bills regarding the Legislative Assembly. Arguably, ss 7A and 7B entrench a bicameral parliamentary system in NSW with that Parliament to be comprised of representatives who are chosen on the basis of periodic and democratic elections.<sup>25</sup> The High Court has, particularly in *Stephens*, indicated that the rationale behind the implication of the freedom of political communication is to preserve a constitutionally prescribed system of representative government rather than simply to give effect to the formulaic use of

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<sup>23</sup> *Muldowney v South Australia* (1996) 186 CLR 352, 367 (Brennan CJ).

<sup>24</sup> *McGinty v Western Australia* (1996) 186 CLR 140, 212 (Toohey J); Anne Twomey, 'The Application of the Implied Freedom of Political Communication to State Electoral Funding Laws' (2012) Volume 35(3) *University of New South Wales Law Journal* 625, 638-9.

<sup>25</sup> *Ibid* 640; Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 1<sup>st</sup> ed, 2006) 133.

the words 'directly chosen by the people'.<sup>26</sup> On this basis, it is likely that the Court would find that a system of representative democracy is entrenched within the *NSW Constitution* and so a freestanding freedom of political communication is implied directly by the *NSW Constitution* 'as a matter of necessity in order to protect the efficacious working of the system of representative government mandated by the *Constitution*'.<sup>27</sup>

*D Extending the Implied Freedom of Political Communication from the Commonwealth Constitution to State Laws*

In the event that no such implication were drawn directly from the *NSW Constitution*, State laws that restrict political communication may still be invalidated by the operation of a federal implied freedom. State and federal political matters are largely indivisible and sometimes indistinguishable. In recent times, State and Federal governments have worked cooperatively on major initiatives ranging from healthcare to school reform, matters that have traditionally been within the exclusive control of the States.<sup>28</sup> There is often a conflation between the State and the federal spheres and it is plain that communication about State political matters has the capacity to contribute to discussion of federal political matters. The Court has considered this point in obiter before and noted that:

the implied freedom of communication extends to all matters of public affairs and political discussion, notwithstanding that a particular matter at a given time might appear to have a primary or immediate connexion with the affairs of a State, a local authority or a Territory and little or no connexion with Commonwealth affairs. Furthermore, there is continuing inter-relationship between the various tiers of government... That continuing inter-relationship makes it inevitable that matters of local concern have the potential to become matters of national concern.<sup>29</sup>

A similar sentiment was recently expressed in obiter by French CJ, in *Hogan v Hinch*:

It was submitted for the Commonwealth that the implied freedom applies only to communications in relation to politics or government at the Commonwealth level. That limitation may be a logical consequence of the implied freedom... The limit propounded, despite its logical attraction, is not

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<sup>26</sup> Ibid, 152; *Stephens* above n 17, 232 (Mason CJ, Toohey and Gaudron JJ).

<sup>27</sup> Ibid.

<sup>28</sup> Daniel Hurst, *Gonski school funding reforms now law* (26 June 2013) *Sydney Morning Herald* (online) <<http://www.smh.com.au/federal-politics/political-news/gonski-school-funding-reforms-now-law-20130626-2own5.html>>.

<sup>29</sup> *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 142.

of great practical assistance. There is today significant interaction between the different levels of government in Australia.<sup>30</sup>

This is particularly relevant to the case of political donations to political parties or candidates. The reality of modern Australian politics is that there often exists significant overlap and comity in the policy platforms and ideology of political parties at a State and federal level. For example, federal members, including federal ministers, will often visit State electorates during elections in an attempt to garner further support under a single unified national political brand. This intermingling of State and federal politics can lead to a blurred distinction between the two and the Court has recognised that this sometimes arbitrary distinction means that State laws that impinge upon, or are capable of impinging upon, communication about federal political matters can be invalidated by operation of the freedom of political communication implied from the *Commonwealth Constitution*.<sup>31</sup> As communication about State political matters has the capacity to influence federal political matters, it is likely that the Court will decide that communication about State matters should also be protected by the implied freedom of political communication. Therefore, even if the plaintiffs fail to show that there is a freestanding freedom of political communication implied by the *Commonwealth Constitution*, the matter will not fail, and they are likely to be able to argue that the Act is incompatible with the federal implied freedom.

### *E Political Donation as a form of 'Communication'*

The High Court has never considered a matter involving political donation laws, hence an important question, yet to be considered by the Court, is whether the making of a political donation can be considered 'political communication'. In *Levy v Victoria*,<sup>32</sup> the Court held that non-verbal forms of communication could be protected by the implied freedom because they were 'capable of communicating an idea about the government or politics of the Commonwealth'.<sup>33</sup> There is a body of jurisprudence from the US Supreme Court in relation to non-verbal communication and the protection of free speech under the First Amendment. The trend of that jurisprudence

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<sup>30</sup> *Hogan v Hinch* (2011) 243 CLR 506, 543 (French CJ).

<sup>31</sup> *Nationwide News Pty Ltd v Willis* (1992) 177 CLR 1, 75-6; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 571-2 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Levy v Victoria* (1997) 189 CLR 579, 619 (Gaudron J); 622 (McHugh J); 633 (Kirby J); Gerard Carney, 'The Implied Freedom of Political Discussion – Its Impact on State Constitutions' (1995) 23 *Federal Law Review* 180, 187ff.

<sup>32</sup> (1997) 189 CLR 579.

<sup>33</sup> *Ibid* 594-5 (Brennan CJ).

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has similarly been to hold that non-verbal forms of communication ought to be considered protected speech under the First Amendment.<sup>34</sup>

The leading decision of the US Supreme Court with respect to political donations and the First Amendment is *Buckley v Valeo*.<sup>35</sup> This case considered whether capping political donations breached the First Amendment. Importantly, the US Supreme Court found that

[political donation] serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support... [therefore, putting a cap on donations is permissible] for it permits the symbolic expression of support evidenced by a contribution but does not infringe the contributor's freedom to discuss candidates and issues.<sup>36</sup>

Acknowledging that 'American decisions on protection of "expressive activity" under the First Amendment must be viewed with caution within the context of our *Constitution*',<sup>37</sup> the reason for holding that donation is a form of communication in relation to the First Amendment applies with equal weight in Australia. The act of donation allows a person to express support for a particular party, candidate or issue. The act of donation expresses a general support for the 'conduct, policies and fitness for office of government'<sup>38</sup> and should thus be considered 'political discussion'.

One counter-argument raised by the State of New South Wales is that donation is usually a private act, which does not express an idea to the public generally. To overcome this proposition, one must examine the Act holistically and recognise that it also makes provision for the public disclosure of donations if they exceed an aggregate of \$1000 within the same financial year.<sup>39</sup> In fact, s 95 of the Act requires the Election Funding Authority of New South Wales to publish on its website the disclosures of those 'reportable political donations',<sup>40</sup> which identify the donor, the amount donated and the date of donation.<sup>41</sup> Political parties, candidates and third-

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<sup>34</sup> See generally *Brown v Louisiana*, 383 US 131 (1966) (a case relating to silent protest); *Texas v Johnson*, 491 US 397 (1989) (a case relating to the burning of the American flag).

<sup>35</sup> 424 US 1 (1976).

<sup>36</sup> *Ibid* 21.

<sup>37</sup> *Levy v Victoria* (1997) 189 CLR 579, 594 (Brennan CJ).

<sup>38</sup> *Theophanous v The Herald & Weekly Times* (1994) 183 CLR 104, 124.

<sup>39</sup> *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ss 86, 88, 90, 91, 92.

<sup>40</sup> *Ibid* s 86. A 'reportable political donation' includes single donations greater than or equal to \$1,000 or a number of donations by the same donor which, when aggregated over the financial year, are greater than or equal to \$1,000.

<sup>41</sup> *Ibid* s 92(2). For example Election Funding Authority of New South Wales, *Donor Analysis Report*, <<http://searchdecs.efa.nsw.gov.au/donorreportpivot.aspx>>.

party campaigners are also required to disclose how much money was raised by way of donations less than \$1000, and how many people contributed to that amount.<sup>42</sup> The disclosure regime necessarily requires many donation recipients to make public the fact of the donation. As such, the making of a political donation is not a private or a secretive act, relevant only to the person making the donation, but rather an act that reveals to the world at large that a particular individual, corporation or interest group supports a political party or candidate and the policy that it promotes. Between 2004 and 2011, \$62,772,000.33 was donated to political parties in New South Wales and details of those donations are publically accessible.<sup>43</sup> Therefore, the act of donating money to a political party (a fact that is required to be disclosed and made publically available) is an act that is capable of 'communicating an idea about the government or politics of the Commonwealth',<sup>44</sup> and ought therefore to be considered 'political communication' to be protected by the implied freedom.

The question whether less public forms of communication still constitute political communication arose in the decision of the High Court in *Monis v The Queen*.<sup>45</sup> In that case, when considering the prosecution of individuals under the *Criminal Code* (Cth) for sending abusive or offensive letters to the relatives of Australian soldiers or officials, Hayne J observed the following in obiter:

Whether a law burdens [the implied] freedom is not to be determined by some attempted survey of whether there is sufficient communication on government or political matters either to make the constitutional system of government work, or to make it work satisfactorily. That is too large and diffuse an inquiry. The more confined and manageable inquiry, which the cases require, is to look to the effect of the impugned law on the freedom of political communication.<sup>46</sup>

This are strong indications that the court might consider a less explicit form of political communication, such as the making of political donations, to be equally worthy of protection.

Even if the Court were to determine that a political donation is not a 'political communication', the laws may nevertheless be invalid because they *indirectly* burden the making of political communication by others, namely, the political parties to whom those donations are made. Political donations are the lifeblood of political

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<sup>42</sup> Election Funding, Expenditure and Disclosures Act 1981 (NSW) s 92(3).

<sup>43</sup> Election Funding Authority of New South Wales, *Registered Political Parties Analysis Report*, <<http://searchdecs.efa.nsw.gov.au/partyreportpivot.aspx>>.

<sup>44</sup> *Levy v Victoria* (1997) 189 CLR 579, 594-5 (Brennan CJ).

<sup>45</sup> [2013] HCA 4.

<sup>46</sup> *Monis v The Queen* [2013] HCA 4, [119] (Hayne J).

advertising and election campaigning, and a limit on available funds would seriously limit the ability of political parties to produce and disseminate material that would undoubtedly fall within the definition 'political communication'. This would have the effect of making it difficult for electors to readily access information about political parties and policies and therefore affects the ability of those electors to make an informed decision on polling day. The rationale behind the implied freedom of political communication is to ensure the open and free exchange of ideas so that electors can make an informed decision when asked to exercise their democratic function under the *Commonwealth Constitution*. It does not matter whether the discussion of State issues has a significant or trivial effect on an elector as he or she fills out his or her ballot at a federal election. The key inquiry for the High Court will be whether the discussion of those State issues has the capacity to influence debate on federal political matters and, as indicated above, in the author's view it plainly does.

***F Are Non-Electors Protected by the Implied Freedom of Political Communication?***

The challenge by the plaintiffs raises another interesting controversy, which has not yet been finally determined by the High Court. That is, whether the implied freedom of political communication protects communications made by those who are not entitled to vote.

A perhaps unintended effect of the current political donations regime in NSW, as brought about by the amendments in question, is that political parties are obliged to refuse donations from any non-electors, including minors or aliens, since they will not be enrolled on the electoral roll for a federal, State or local government election. This case will provide a good opportunity for the High Court to reiterate that the implied freedom is a protection from interference rather than a personal right and to demonstrate that non-electors, be they corporations or natural persons, are entitled to that protection.

***1 The Current Australian Position***

Following the MV Tampa incident in 2001, the asylum seekers on that vessel and their legal representatives raised arguments based upon the implied freedom of political communication. In *Victorian Council for Civil Liberties v Minister for Immigration*,<sup>47</sup> North J found as follows:

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<sup>47</sup> (2001) 110 FCR 452.

All judges, except Mason CJ, held that the constitutional freedom [of political communication] could only be claimed for the benefit of Australian citizens and not aliens. For example, Brennan J [sic] said at 335-336:

While an alien who is within this country enjoys the protection of the ordinary law, including the protection of some of the *Constitution's* guarantees, directives and prohibitions, he or she stands outside the people of the Commonwealth whose freedom of political communication and discussion is a necessary incident of the *Constitution's* doctrine of representative government. That being so, the implication does not operate to directly confer rights or immunities upon an alien. Any benefit to an alien from the implication must be indirect in the sense that it flows from the freedom or immunity of those who are citizens.<sup>48</sup>

The finding of North J, when read together with obiter of the High Court, which refers only to electors and members of government, such as the statement of the High Court in *Aid/Watch Incorporated v Commissioner of Taxation of the Commonwealth of Australia*, that: '[c]ommunication between *electors and legislators* and the officers of the executive, and between *electors themselves*, on matters of government and politics is an indispensable incident of that constitutional system [of representative and responsible government]',<sup>49</sup> begs the question as to whether corporations and aliens are able to enjoy the protection from government interference that the implied freedom of political communication clearly affords citizens.

## ***2 A Freedom from Interference not a Personal Right***

The reasoning underlying *Victorian Council of Civil Liberties v Minister for Immigration* has since been clarified by the High Court to show that the implied freedom does not confer a personal right upon individuals but is instead a freedom from interference by the government<sup>50</sup>. The implied freedom protects political communication, whoever makes that communication; it does not confer an individual right solely upon Australian citizens to make communications about government or political matters.

The High Court has often held that the implied freedom does not grant personal rights to Australian citizens. In *Lange*, the High Court was extremely careful to state that 'those sections [ss 7, 24, 64 and 128] do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of

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<sup>48</sup> Ibid 489, quoting *Cunliffe v Commonwealth* (1994) 182 CLR 272, 335-6 (Deane J).

<sup>49</sup> (2010) 241 CLR 539 (emphasis added).

<sup>50</sup> *Wotton v Queensland* (2012) 246 CLR 1, 24.

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legislative or executive power'.<sup>51</sup> Constitutional law scholars have similarly concluded that the implied freedom does not confer personal rights but is instead a freedom from government interference.<sup>52</sup>

This point was reiterated in the decision of the High Court in *Wotton v Queensland*. In that case, Heydon J made special mention of the fact that:

The *Lange* 'freedom' generates a limitation on legislative power. It is not a personal right. It exists to protect the institutions of representative and responsible government created by the *Constitution*.<sup>53</sup>

It seems relatively certain, therefore, that the implied freedom is not a personal right but instead operates as a restriction on government interference to ensure that political communication is free. The corporate identity of the plaintiffs in the matter currently before the High Court should not therefore preclude them from seeking to rely on the implied freedom of political communication. A decision by the High Court on this point will have broader application with respect to the way rights are protected under the *Commonwealth Constitution*. The reasoning with respect to this issue is explored in further detail below.

### ***3 The Implied Freedom as a Protection of Speech, Regardless of the Speaker***

Because the protections under the *Commonwealth Constitution* are not personal rights but freedoms from interference, it is the communication that is protected since it is the communication that assists electors to make a genuinely informed choice about political matters. This is consistent with the overarching rationale of the implied freedom to preserve, and ensure the proper functioning of, the constitutionally prescribed system of representative government.<sup>54</sup> As Mason CJ, Toohey and Gaudron JJ noted in *Theophanous v The Herald & Weekly Times*, political communication is 'all speech relevant to the development of public opinion in the whole range of issues which an intelligent citizen should think about'.<sup>55</sup> With that in mind, the implied freedom must protect the communication itself since it is the communication, and not necessarily the identity of the speaker, which has the

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<sup>51</sup> *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520, 560.

<sup>52</sup> Leslie Zines, *The High Court and the Constitution* (The Federation Press, 5<sup>th</sup> ed, 2008) 549; Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25 *Melbourne University Law Review* 374, 406-408.

<sup>53</sup> *Wotton v Queensland* (2012) 246 CLR 1, 24.

<sup>54</sup> Zines, above n 52, 560.

<sup>55</sup> (1994) 183 CLR 104, 124.



potential to influence the way in which Australian citizens cast their vote during an election.

In this respect, the reasoning in *Victorian Council of Civil Liberties v Minister for Immigration*, which determines that non-electors are not entitled to plead the protection of the implied freedom, should be rejected, since the implied freedom clearly protects political communication generally, including speech made by aliens, corporations and minors. Interestingly, later in the judgment of Deane J in *Cunliffe v Commonwealth*, to which North J refers, his Honour comments that:

In the context of the broad national environment, the implication's confinement of the content of legislative power protects the freedom and communication of non-citizens, be they corporations and aliens, to the extent necessary to ensure that the freedom of citizens to engage in discussion and obtain information about political matters is preserved and protected.<sup>56</sup>

Gaudron J adopted a similar line of reasoning in *Nationwide News Pty Ltd v Willis*,<sup>57</sup> when her Honour said:

Free elections necessarily entail, at the very least, freedom of political discourse. And that discourse is not limited to communication between candidates and electors, but extends to communication between the members of society generally.<sup>58</sup>

In light of these statements, the High Court may now finally decide that the implied freedom of political communication extends beyond communications made by electors and in fact protects communication about political or governmental matters generally, regardless of the speaker, since all political communication has the capacity to affect the way in which an elector may exercise their constitutionally enshrined right to vote. A political communication made by a corporation or by an alien is no less valuable simply because that speaker is not a natural person or an Australian citizen. In fact, to limit the scope of the protection to communications made by Australian citizens would greatly limit the diversity of viewpoints that different stakeholders, like corporations and permanent residents, may raise for consideration by electors in the lead up to a general election.

Even if the High Court were to find that the implied freedom is a personal right, the amendments ought still be found invalid since, as a matter of general principle, it would be incorrect to limit constitutional rights so as to benefit Australian citizens alone. In *Cunliffe*, Toohey J stated that:

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<sup>56</sup> *Cunliffe v Commonwealth* (1994) 182 CLR 272, 336.

<sup>57</sup> (1992) 177 CLR 1.

<sup>58</sup> *Ibid* 212.

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It is the plaintiffs, as citizens of the Commonwealth who attack Part 2A. That is not to say that those who are aliens lack the protection of Australian law. As Lord Scarman observed in *Reg v Home Secretary; Ex parte Khawaja* [[1984] AC 74, 111]: 'He who is subject to English law is entitled to its protection (see also *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 29)'.<sup>59</sup>

In *Victorian Council of Civil Liberties v Minister for Immigration*, North J recognised that aliens are protected by the express rights of the *Commonwealth Constitution* under s 80 (right to trial by jury), s 92 (freedom of interstate trade and commerce) and s 116 (freedom of religion),<sup>60</sup> and yet provided no reason why implied rights or freedoms do not protect aliens and corporations in the same way that they protect Australian citizens. This seems especially incongruous when we consider that the exercises of those freedoms by non-electors assist the manner in which Australian citizens exercise their constitutional rights.

Further, in other cases heard by the High Court that involved the implied freedom, such as *APLA Ltd v Legal Services Commissioner of New South Wales*<sup>61</sup> and *Aid/Watch Incorporated v Commissioner of Taxation of the Commonwealth of Australia*,<sup>62</sup> the corporate identity of the plaintiffs was never raised as a barrier to seeking the protection of the implied freedom.<sup>63</sup>

### 4 *The United States Approach*

Given that the High Court has never had cause to consider a case dealing with political donation laws, it is helpful to look at how such cases have been dealt with in the United States. The United States has a well-established body of jurisprudence on the First Amendment and has examined issues relating to political speech on many occasions. This comparative analysis is apposite given that, in the last five years, there have been a number of high profile cases in the US Supreme Court dealing with laws attempting to limit political donations.

Relevantly, the First Amendment provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of

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<sup>59</sup> *Cunliffe v Commonwealth* (1994) 182 CLR 272, 378.

<sup>60</sup> *Victorian Council for Civil Liberties v Minister for Immigration* (2001) 110 FCR 452, 489, quoting *Cunliffe v Commonwealth* (1994) 182 CLR 272, 335-6 (Deane J).

<sup>61</sup> (2005) 224 CLR 322.

<sup>62</sup> (2010) 241 CLR 539.

<sup>63</sup> See also Gavin Anderson, 'Corporations, Democracy and the Implied Freedom of Political Communication: Towards a Pluralistic Analysis of Constitutional Law' (1998) 22 *Melbourne University Law Review* 1, 9.

the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Much of the American jurisprudence is similar in its reasoning to Australian jurisprudence concerning the implied freedom of political communication. On the spectrum of speech protected under the First Amendment (keeping in mind that the First Amendment is much broader than the Australian implied freedom) political speech is afforded 'the broadest protection... in order to assure unfettered exchange of ideas for the bringing about of political and social change desired by the people'.<sup>64</sup>

However, the jurisprudence of the US Supreme Court has not always been entirely consistent. The landmark case on the protection of corporate speech is *First National Bank of Boston v Bellotti*,<sup>65</sup> in which the US Supreme Court found that a Massachusetts law prohibiting election expenditure by corporations breached the First Amendment. The US Supreme Court noted that the government is not able to limit speech simply based upon the identity of the speaker. This changed in 1990 when, in *Austin v Michigan Chamber of Commerce*,<sup>66</sup> the US Supreme Court decided to overrule *Bellotti* and held that, because corporations have access to a larger source of funds, the use of those funds to support or campaign against political candidates may be a corrupting force and that, as such, it is permissible to limit corporate speech.

The issue of corporate speech was again reconsidered in the decision of *Citizens United v Federal Election Commission* ('*Citizen's United*').<sup>67</sup> That case dealt with a restriction on independent political campaign expenditure by corporations and other organisations, such as unions. The majority of the US Supreme Court in that case overruled *Austin* and returned to the reasoning in *Bellotti*. Relevantly, Justice Kennedy, writing the majority opinion, remarked:

Political speech is 'indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual' (*Bellotti*, 435 US 765, 777 (1978)). The worth of speech does not depend upon the identity of its source, whether corporation, association, union or individual (*Buckley v Valeo*, 424 US 1, 48-9 (1976)).

This line of reasoning is consistent with a long line of American authority on the issue of corporate speech under the First Amendment. In *Pacific Gas and Electric Co v Public Utility Commission of California*<sup>68</sup> the US Supreme Court noted that

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<sup>64</sup> *Buckley v Valeo*, 424 US 1, 14 (1976), quoting *Roth v United States*, 354 US 476, 484 (1957).

<sup>65</sup> 435 US 765, 784-5 (1978).

<sup>66</sup> 494 US 652 (1990).

<sup>67</sup> 558 US 50 (2010).

<sup>68</sup> 475 US 1 (1986).

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‘corporations and other associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster’. A similar sentiment was expressed in the *United States v Automobile Workers* case,<sup>69</sup> in which the Court said that it is vitally important that ‘all channels of communication be open to [electors] during every election, that no point of view be restrained or barred and that the people have access to the views of every group in the community’.<sup>70</sup>

The *Citizens United* decision has met with some criticism in relation to the broader public policy question of whether unlimited corporate campaign financing should be permitted,<sup>71</sup> and the US Supreme Court was asked to reconsider *Citizens United* later in 2012 in *Western Tradition Partnership v Montana*,<sup>72</sup> a case concerning corporate election funding and campaigning in Montana, a State which is historically notorious for corruption and corporate influence.<sup>73</sup> On 25 June 2012 the US Supreme Court dealt summarily with this case, and a 5:4 majority held that there was no reason to doubt the correctness of the decision in *Citizens United*.<sup>74</sup>

Recently, the limits of *Citizens United*’s applicability have been brought into question. In February 2013 the US Supreme Court denied a petition for a writ of certiorari in *Danielczyk v United States of America*.<sup>75</sup> In that case, wealthy Alabama businessmen William Danielczyk and Eugene Biagi were prosecuted under US campaign finance laws for reimbursing their employees who had donated money towards the Hilary Clinton Presidential campaign. In denying the petition, the US Supreme Court

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<sup>69</sup> 352 US 567 (1957).

<sup>70</sup> Ibid 593.

<sup>71</sup> Jeffrey Toobin, *Money Unlimited: How Chief Justice John Roberts orchestrated the Citizens United decision* (21 May 2012) The New Yorker (online) <[http://www.newyorker.com/reporting/2012/05/21/120521fa\\_fact\\_toobin](http://www.newyorker.com/reporting/2012/05/21/120521fa_fact_toobin)>; Adam Liptak, *Justices, 5-4, Reject Corporate Spending Limit* (21 January 2010) The New York Times (online) <<http://www.nytimes.com/2010/01/22/us/politics/22scotus.html?pagewanted=all>>.

<sup>72</sup> Supreme Court of the United States of America, *Docket Search – Western Tradition Partnership*, <<http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-1179.htm>>.

<sup>73</sup> *Western Tradition Partnership v Montana*, 363 Mont. 220, [23] (2011); Robyn Hagan Cain, *How Will Western Tradition Partnership Affect Citizens United?*, (6 January 2012) FindLaw <[http://blogs.findlaw.com/supreme\\_court/2012/01/how-will-western-tradition-partnership-affect-citizens-united.html](http://blogs.findlaw.com/supreme_court/2012/01/how-will-western-tradition-partnership-affect-citizens-united.html)>.

<sup>74</sup> *American Tradition Partnership, Inc (formerly known as Western Tradition Partnership, Inc) et al v Steve Bullock, Attorney General of Montana et al* 567 US \_\_\_ (2012).

<sup>75</sup> United States Supreme Court, docket summary for *Danielczyk v United States of America* <<http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-579.htm>>.

indicated that *Citizens United* is certainly correct in so far as it deals with indirect campaign contributions, but questions its applicability to laws that prohibit direct contributions by corporations. The decision not to hear this case is profound since it suggests that the scope of *Citizens United* is narrower than previously thought.

An important point of distinction is that the US Supreme Court in *Citizens United* and later in *Western Tradition Partnership* dealt with laws that banned completely the ability of corporations to spend money in relation to election campaigns. A different outcome may have been reached if the laws, as in *Buckley v Valeo*, merely capped the amount of money that could be spent on campaigning rather than providing for an absolute ban.

The decision in *Buckley v Valeo* will be reconsidered by the US Supreme Court in 2013. In *McCutcheon v Federal Electoral Commission*,<sup>76</sup> the Petitioner has argued that the current caps on direct donations made by individuals to political parties violate the First Amendment. It will be interesting to see whether the Supreme Court overturns *Buckley v Valeo* or simply uses this case as an opportunity to affirm its applicability in light of the significant volume of challenges to political donation reforms in the last five years.

Whenever the US Supreme Court has been asked to consider the First Amendment in relation to speech made by aliens, similar arguments as those discussed above in relation to corporations have been raised. Aliens' rights were directly considered in 1999 in the case of *Reno v American-Arab Anti-Discrimination Committee*.<sup>77</sup> The plaintiffs in that case were undocumented migrants who argued that their deportation was based upon their affiliation with a particular political group and that their deportation upon this basis violated their First Amendment rights. The plaintiffs were ultimately unsuccessful because even if the government did decide to deport them on the basis of their political views, the government was nevertheless entitled at its discretion to deport people who are, in fact, illegal immigrants. However, Justice Ginsburg observed in obiter dictum that:

It is well settled that '[f]reedom of speech and of press is accorded aliens residing in this country' (*Bridges v Wixon* 326 US 135, 148 (1945)).<sup>78</sup>

It is clear that in the United States the identity of the speaker is largely irrelevant as long as the communication is capable of contributing to the free flow of information

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<sup>76</sup> United States Supreme Court, docket summary for *McCutcheon v Federal Electoral Commission* <<http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-536.htm>>. The matter was argued on 8 October 2013 and is awaiting determination.

<sup>77</sup> 525 US 471 (1999).

<sup>78</sup> *Ibid* 497.

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about government and political matters. The speech or political communication is the matter protected, not the individual. For this reason, both corporate and aliens' speech has been protected under the First Amendment in the United States.

The High Court is presented with an opportunity in the current matter to consolidate its reasoning in earlier decisions, which is similar to the reasoning of the US Supreme Court in cases dealing particularly with political donation laws, and confirm that constitutional freedoms are for the benefit of any person, be they individuals, corporations or non-citizens. A decision in such terms would have general significance to the law with respect to rights under the *Commonwealth Constitution*. This is particularly important in the Australian context since, without a bill of rights, the *Commonwealth Constitution* does the majority of the heavy lifting with respect to the protection of human rights in Australia.

### *G An Application of the Lange Test (with Coleman v Power qualification)*

Assuming that the High Court accepts that the act of donation is political communication, and that corporations and aliens are afforded protection under the implied freedom of political communication, it would then fall to the Court to consider whether the *Lange* test is made out so as to invalidate s 96D of the Act. It seems likely that this test will be satisfied. First, assuming that political donations are considered political communication as discussed above, it would be uncontroversial to conclude that the law prohibiting the making of donations by non-electors burdens the implied freedom of political communication in its operation and effect.<sup>79</sup> It would also be uncontroversial to accept that the elimination of corruption in the electoral process is a legitimate end, which would maintain the constitutionally prescribed system of representative and responsible government. Indeed, this has been conceded by the plaintiffs.<sup>80</sup> Therefore, the contentious issue for determination will be whether the law is reasonably appropriate and adapted to achieve that legitimate end.

In the author's view, the legislature's use of a blanket ban on all donations by those who are not electors is not reasonably appropriate and adapted to stamp out corruption within NSW elections. The overall level of corruption that was generated on the basis of corporate donations generally is questionable, especially since no specific example was identified by the Minister in his second reading speech. Instead, the Minister said that the amendment was intended to alleviate the 'risk' and the

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<sup>79</sup> See generally *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520, 561-2, 567-8; *Coleman v Power* (2004) 220 CLR 1, 30-32 (Gleeson CJ).

<sup>80</sup> *Ibid.*

'perception' of corruption by corporate donations.<sup>81</sup> While eliminating the risk and perception of corruption can be, in and of itself, a legitimate end, broader political discourse should not be sacrificed to achieve it. This can be contrasted to the well-reported history of property developer influence linked to political donations in New South Wales until 2010.<sup>82</sup> In response to that particular and identifiable source of corruption, the New South Wales Government passed the *Election Funding and Disclosures Amendment (Property Developers Prohibition) Act 2009* (NSW), which inserted s 96GA, making it unlawful for a political party to accept donations from property developers. Section 96GA is an example of a law that may more readily be considered reasonably appropriate and adapted since it targets a particular source of corruption, which was well documented and threatened the function of government in New South Wales, despite the fact that it limited the ability of property developers to make political communication by way of donations.

The current amendments drastically limit the ability of a corporation or union to make a political communication in what was already a highly regulated regime. As discussed above, political donations are already subject to expenditure caps and disclosure requirements and so the ability of large corporations or unions to buy influence on the basis of their relative strength is already limited. The previous regime at least permitted the making of a small donation, which, in a largely symbolic way, demonstrated the approval of a given organisation for its chosen political party. The amendments to s 96D do not justifiably limit this political communication further, since the scope for corruption was already significantly ameliorated.

A similar approach was taken by the High Court in *Rowe v Electoral Commissioner*.<sup>83</sup> In that case, the Howard government had amended the *Commonwealth Electoral Act 1918* (Cth) in 2006 so that, once the writs for a federal general election had been issued, new electors had until 8:00 pm on the day the writs were issued to enroll, and other electors had only 3 working days to register any change to their electoral information instead of 7 days as was the case under the old regime.<sup>84</sup> The government justified

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<sup>81</sup> It is arguable that the elimination of the risk and perception of corruption is a legitimate end in and of itself. New South Wales, *Parliamentary Debates*, Legislative Council, 15 February 2012 (Michael Gallacher, Minister for Police and Emergency Services, Minister for the Hunter, and Vice-President of the Executive Council).

<sup>82</sup> See, eg, John Hatton, *Planning in NSW is out of control* (2 November 2009) Sydney Morning Herald (online) <<http://www.theage.com.au/opinion/politics/planning-in-nsw-is-out-of-control-20091102-hrt0.html>>.

<sup>83</sup> (2010) 243 CLR 1.

<sup>84</sup> *Ibid* [83] (Gummow and Bell JJ).

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this amendment by arguing that it was a measure designed to protect the integrity of the electoral roll from electoral fraud. This was, seemingly, a legitimate end. However, the court found that the ‘practical operation goes beyond any advantage in preserving the integrity of the electoral process from a hazard which so far has not materialised to any significant degree’.<sup>85</sup> That is to say, until ‘previous systemic fraud’ is proved,<sup>86</sup> an amendment of this kind fails for proportionality even though it may be trying to preemptively achieve a legitimate end.

It is important to allow corporations to make political donations as separate legal personalities because, as was noted in the *Western Tradition Partnership* judgment, the expression of support by way of donation may have been more persuasive had it come from an organisation rather than an individual.<sup>87</sup> It is therefore important to preserve the ability of corporations to express their political opinion and aid their chosen party or candidate in his or her campaign.

By way of comparison, Queensland amended its political donation laws in 2009 and opted to deal with perceived corruption and undue influence by capping the amount that could be donated by each person, corporations included.<sup>88</sup> New South Wales’ existing regime already had measures in place to curb corruption before taking a broad-brush approach and banning corporate donation altogether. The Act already had provisions, which capped the amount that could be donated in any given financial year and,<sup>89</sup> as previously discussed, had extensive disclosure requirements to the Electoral Funding Authority of New South Wales to aid transparency.<sup>90</sup> The approach taken by the New South Wales government in these current amendments is far too broad and ought not to be considered reasonably appropriate and adapted to serve a legitimate end.

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<sup>85</sup> Ibid [167] (Gummow and Bell JJ).

<sup>86</sup> Ibid.

<sup>87</sup> *Western Tradition Partnership v Montana*, 363 Mont. 220, [18] (2011). Compare this approach with the argument made by Tham and Grove, above n 7, 418 in discussing the anti-corruption rationale for campaign expenditure limits. Tham and Grove posit that donations made by corporations amount to undue influence simply because corporations are not entitled to democratic representation and their own internal structures are undemocratic. As discussed throughout this article, such an argument has a place in the debate about caps on political donations made by corporations but this argument does neglect to consider the burden that an overall ban would place on corporate speech.

<sup>88</sup> *Electoral Act 1992* (Qld) ss 250-266.

<sup>89</sup> *Election Funding, Expenditure and Disclosures Act 1981* (NSW) s 95A.

<sup>90</sup> Ibid ss 88-95.



As a matter of public policy, it is important to protect the ability of non-electors to make political donations since they have no right to vote and no other direct means of contributing to a political party or candidate's electoral campaign. Therefore, for the reasons outlined above, s 96D of the Act is likely to be found to impermissibly burden the implied freedom of political communication. Section 96 is too blunt an instrument with which to achieve a legitimate end, and would not be considered reasonably appropriate and adapted, since it unnecessarily limits the ability of corporations to donate and express their political will.

### III AGGREGATION OF EXPENDITURE

#### *A Background*

The plaintiffs have also challenged the constitutional validity of ss 95F, 95G(6) and 95I, arguing that these provisions also impermissibly burden the implied freedom of political communication. The analysis undertaken above in relation to whether a political donation is political communication and the extension of the federal implied freedom to State laws, or alternatively whether an independent freedom can be implied from the *NSW Constitution*, is equally relevant to this matter.

The practical effect of ss 95F, 95G(6) and 95I, taken together, is to aggregate electoral communication expenditure of a party – for example, the Australian Labor Party – and an affiliated organisation – for example a trade union – so that the group as a whole is limited to one capped electoral expenditure amount. The provision that really bites in this case is s 95G(7), which defines an ‘affiliated organisation’ of a party as:

a body or other organisation, whether incorporated or unincorporated, that is authorised under the rules of that party to appoint delegates to the governing body of that party or to participate in pre-selection of candidates for that party (or both).

It is plain that this provision is directed squarely at trade unions and the Australian Labor Party.

#### *B The Lange Test (with Coleman v Power qualification)*

In the light of the analysis undertaken above, this set of provisions is likely to be found invalid on the basis that they impermissibly burden the implied freedom of political communication. Sections 95F, 95G(6) and 95I directly burden the freedom by limiting the amount of electoral communication expenditure that may be made by persons who are likely to share a particular ideology. Despite this likelihood, the views of any given union will not necessarily be the same as the views of, for example, the Australian Labor Party. The effect of aggregation of electoral

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communication expenditure will therefore greatly limit the ability of unions to make any electoral communication that differs from that of the Australian Labor Party or any other party. Taken together, these provisions therefore impose a significant burden on political communication and greatly limit the availability of information that might be disseminated to the public during an election campaign.

As is the case in relation to s 96D, the plaintiffs have conceded that the provisions are aimed at serving a legitimate end, but contend that they are not reasonably appropriate or adapted to serving that end. The capping of electoral communication expenditure does not, in and of itself, limit corruption or undue influence upon the system of representative and responsible government. This is particularly pertinent since the Act defines 'electoral communication expenditure' as expenditure on advertising, which is broadcast or published, the production and distribution of election material and the employment of staff during elections. The significant limitation upon the ability of political parties and affiliated organisations to make this kind of expenditure, which goes directly towards disseminating information about the election and political parties, is undoubtedly a burden on the implied freedom of political communication and is unlikely to be considered reasonably appropriate and adapted to serve a legitimate end.

### **IV INCONSISTENCY WITH THE COMMONWEALTH ELECTORAL ACT 1918 (CTH)**

A further matter for the High Court's consideration is whether s 96D is inconsistent with Part XX and s 327 of the *Commonwealth Electoral Act 1918* (Cth) (the '*Electoral Act*') and therefore invalid pursuant to s 109 of the *Commonwealth Constitution*. Part XX of the *Electoral Act* sets up a regime regulating election funding and financial disclosure. This Part contemplates the making of donations to State political entities and requires disclosure if a donor makes donations of more than \$10 000 to a registered political party or State branch of a registered political party in one financial year.<sup>91</sup> Section 327 makes it an offence for a person to hinder or interfere with the free exercise or performance of any political right or duty relevant to an election under the *Electoral Act*. The plaintiffs have argued that there exists within those provisions an implied right to make political donations and that s 96D alters, impairs or detracts from this right. For the sake of completeness, it should be noted that this is not a case where inconsistency is asserted on the grounds that simultaneous obedience is

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<sup>91</sup> *Commonwealth Electoral Act 1918* (Cth) 305B(1)(b).

impossible or that the Commonwealth intends to cover the field in relation to political donation regulation.<sup>92</sup>

Therefore, in this case, the appropriate test for inconsistency will be the second form of 'direct inconsistency', also known as the 'denial of rights' test. For inconsistency to arise in this circumstance, s 96D must be found to alter, impair or detract from a right conferred by the *Electoral Act*.<sup>93</sup> For inconsistency to be found, there must be a real conflict between the law of the Commonwealth and the law of a State,<sup>94</sup> not simply a verbal or theoretical inconsistency.<sup>95</sup> This will require the Court to examine the practical operation of the laws and the rights that are created and said to be affected.<sup>96</sup> As to the first part of this inquiry, it is unclear whether Part XX or s 327 do in fact create or confer rights. It will likely be difficult to convince the Court that the federal regime, which requires disclosure of donations to State branches and protects the making of donations from interference, is enough to constitute an 'absolute right or positive authority' to make political donations.<sup>97</sup> This is in comparison with earlier decisions of the High Court, for example *Commercial Radio Coffs Harbour v Fuller*, where the holder of a licence granting permission to broadcast was not considered to have a right to broadcast such that he was 'immune or exempt from compliance with State laws'.<sup>98</sup> An important aspect of the analysis in *Fuller*, which will be relevant in the Unions NSW case, is that the *Electoral Act* 'leaves room for the operation of laws, both State and Commonwealth, dealing with other matters', relevant in this case, to the making of political donations.<sup>99</sup> The counterpoint is that Part XX and s 327 of the *Electoral Act* simply regulate the disclosure of political donations but do not regulate

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<sup>92</sup> See generally *R v Brisbane Licensing Court; Ex parte Daniell* (1920) 28 CLR 23; *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466; Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (The Federation Press, 5<sup>th</sup> ed, 2010) 333.

<sup>93</sup> *Victoria v The Commonwealth* (1937) 58 CLR 618, 630 (Dixon J); *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61, 76-7; *Dickson v The Queen* (2010) 241 CLR 491, 502.

<sup>94</sup> *Jemena Asset Management Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508, 525; *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529, 533.

<sup>95</sup> *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 432 (Kirby J); *The Commonwealth v Western Australia* (1999) 196 CLR 392, 417 (Gleeson CJ and Gaudron J), 441 (Gummow J); *P v P* (1994) 181 CLR 583, 603 (Mason CJ, Deane, Toohey and Gaudron JJ).

<sup>96</sup> *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 432-3 (Kirby J).

<sup>97</sup> *Commercial Radio Coffs Harbour v Fuller* (1986) 161 CLR 47, 56 (Wilson, Deane and Dawson JJ).

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.* 57.

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the way in which those donations may be made, nor who is permitted to make those donations. In this respect, the *Electoral Act* is only enlivened if a political donation is first made in accordance with the relevant State legislation. To that extent, s 96D does not alter, impair or detract from any right purportedly created by the *Electoral Act* but simply impacts upon the likelihood of persons having to comply with the disclosure requirements. By way of example, s 305B of the *Electoral Act* requires disclosure of political donations made in one financial year, which, when aggregated, exceed \$10 000. If a law of a State prohibited making donations in a financial year greater than \$5000 then the requirement to disclose under s 305B is not enlivened. This does not raise an issue of inconsistency because the *Electoral Act* will simply not apply in practice, since the person cannot make donations that would reach the level necessary to require them to make a disclosure under the *Electoral Act*. Therefore, it would seem unlikely that the Court will find any inconsistency under s 109 of the *Commonwealth Constitution*.

### V FREEDOM OF ASSOCIATION

Sections 96D(4) and 85(3) include within the definition of ‘political donations’ subscription fees or membership fees paid to a party by another entity or individual for affiliation with that party. These provisions, like ss 95F, 95G(6) and 95I, are another example of how the amendments are plainly directed towards weakening the financial connection between the Australian Labor Party and the union movement. Therefore, the plaintiffs have argued that ss 96D and 85(3) are invalid because they burden the freedom of association.

In her dissenting judgment in *Kruger v Commonwealth*,<sup>100</sup> Gaudron J suggested that a free-standing freedom of association was a necessary incidence of the implied freedom of political communication. To date, a majority of the High Court has eschewed the notion that there exists an independent freedom of association implied from the *Commonwealth Constitution*, and the position taken by Gummow and Hayne JJ in *Mulholland v Australian Electoral Commission*, that while ‘freedom of association to some degree may be a corollary of the freedom of communication formulated in *Lange v Australian Broadcasting Corporation*, there is no such free-standing right to be implied from the *Constitution*’,<sup>101</sup> has been cited repeatedly in recent decisions concerning outlaw motorcycle gangs and the freedom of association.<sup>102</sup> Given the

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<sup>100</sup> (1997) 190 CLR 1.

<sup>101</sup> *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 234.

<sup>102</sup> *South Australia v Totani* (2010) 242 CLR 1, 99-100 (Heydon J); *Wainohou v New South Wales* (2011) 243 CLR 181, 230 (Gummow, Hayne, Crennan and Bell JJ); Tony Blackshield and

recent trend in High Court decisions to avoid a free-standing freedom of association, it would seem unlikely that the High Court would now resile from this position. Of course, this outcome is by no means certain given that the composition of the High Court has changed since the last time it considered the freedom of association. There is therefore a possibility, however remote, that the Court may take a broader view in the current case. If it were to do so, it may adopt the view of Gaudron J in *Kruger*, that the test to determine whether a law infringes the freedom of association would be 'the same as that applicable in the case of the implied freedom of political discussion'.<sup>103</sup> In light of the analysis undertaken above, the current author believes that if a freedom of association were supported by the *Commonwealth Constitution*, s 96D would likely be found invalid because it is not reasonably appropriate and adapted since it takes too expansive an approach in attempting to achieve the legitimate end in curbing political corruption. This is particularly so in the case of s 96D(4), which appears to be directed to proscribing the connection between the Australian Labor Party and the union movement.

## V CONCLUSION

The amendments to the Act passed largely unnoticed despite their significant impact on political donation laws. The challenge launched by Unions NSW now puts these issues in the spotlight and the likelihood of success is a real unknown, since there are some contentious and novel issues that the High Court must grapple with. It is unquestionable that the laws tread the line of validity. This has been contemplated by the New South Wales Government's own report into the amendments.<sup>104</sup> This case will be an important test case because the High Court is faced with issues relating to corporate rights, the scope of the implied freedom and the freedom of association. The current author contends that the Court ought not take a narrow approach to the implied freedom of political communication since the expression of ideas by all classes of person, be they corporations, minors or Australian citizens have the ability to influence the way electors exercise their constitutionally prescribed right to vote and add to the overall political debate, which is desirable within the context of

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George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (The Federation Press, 5<sup>th</sup> ed, 2010) 1334.

<sup>103</sup> *Kruger v Commonwealth* (1997) 190 CLR 1, 126 (Gaudron J).

<sup>104</sup> Legislative Council Select Committee, Parliament of New South Wales, Inquiry into the provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011 (2012) 89-107; Sean Nicholls, Political donations from corporations to be banned in NSW (15 February 2012) Sydney Morning Herald (online) <<http://www.smh.com.au/nsw/political-donations-from-corporations-to-be-banned-in-nsw-20120215-1t5pr.html>>.

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Australia's constitutionally prescribed system of representative and responsible government.