

2013

The fight for the right to make donations to political parties: *Unions NSW v NSW* (2013) HCA 58

Domenico Cucinotta

Follow this and additional works at: <http://epublications.bond.edu.au/blr>

This Article is brought to you by the Faculty of Law at ePublications@bond. It has been accepted for inclusion in Bond Law Review by an authorized administrator of ePublications@bond. For more information, please contact [Bond University's Repository Coordinator](#).

The fight for the right to make donations to political parties: Unions NSW
v NSW (2013) HCA 58

Keywords

Unions, political donations, implied freedom of speech, High Court, basic rights

CASE NOTE

THE FIGHT FOR THE RIGHT TO MAKE DONATIONS TO POLITICAL PARTIES: *UNIONS NSW V NSW* [2013] HCA 58

DOMENICO CUCINOTTA*

I INTRODUCTION

At the end of 2013 the High Court of Australia handed down its decision in *Unions NSW v NSW* [2013] HCA 58. The last edition of the *Bond Law Review* contains an article which considered the merits of the challenge brought by the Plaintiffs¹ against two provisions of the *Electoral Funding, Expenditure and Disclosures Act 1981* (NSW) (the '*EFED Act*') before the matter was heard by the Court.² In short, the Plaintiffs argued that provisions of the *EFED Act* that limited the ability of corporations and unions to make political donations impermissibly burdened the implied freedom of political communication and were therefore invalid.

The purpose of that article was to evaluate the strengths and weaknesses within the Plaintiffs' case and to try and predict the way in which the High Court of Australia might deal with the issues put before it. The Plaintiffs' challenge was significant for a number of reasons. First, it was the only time the High Court has been faced with a case that questioned the validity of State laws on political donations. Second, the case presented a number of issues that had not been previously determined by the Court – for example, whether a freedom of political communication can be implied directly from the *Constitution Act 1902* (NSW) (the '*NSW Constitution*') – and there was the opportunity for the Court to give an authoritative decision on these novel issues. Third, the case was of interest from a comparative constitutional law perspective. The

* Solicitor of the Supreme Court of New South Wales, Bachelor of Arts/Bachelor of Laws (Hons I) University of Sydney.

¹ The challenge was brought by Unions NSW, the Australian Manufacturing Workers' Union, the New South Wales Local Government, Clerical, Administrative, Energy, Airlines & Utilities Union, the New South Wales Nurses and Midwives' Association, the New South Wales Teachers Federation and the Transport Workers' Union of New South Wales (together, the 'Plaintiffs').

² Domenico Cucinotta, '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' (2013) 25(1) *Bond Law Review* 70.

last five years have seen a flurry of activity in the Supreme Court of the United States relating to political donations and the freedom of speech enshrined in the *First Amendment to the United States Constitution*. The Plaintiffs had placed some reliance on the approach of the US courts and it was unclear whether the High Court of Australia would adopt similar reasoning or decide the case on a different basis.

In between the submission of my earlier article and its publication, the High Court handed down its decision in *Unions NSW v NSW* [2013] HCA 58 and, as predicted, determined that the two provisions under scrutiny were invalid. While the result was not altogether surprising, the approach taken by the Court is noteworthy.

This case note will explain the ratio of the High Court's decision as well as comment on the arguments that were rejected by the High Court and the pleadings that were considered to be unnecessary. It will also consider the recent proceedings of the *NSW Independent Commission Against Corruption* and whether the case might have been decided differently had it been heard only a matter of months later.

II A BRIEF BACKGROUND

In February 2012 the NSW Parliament passed amendments to the *EFED Act* which drastically changed the rules regarding political donations in NSW. The Plaintiffs focused their challenge on two provisions in the *EFED Act*, sections 96D and 95G(6).

Section 96D was amended so that only donations made by natural persons enrolled on the electoral roll could be validly accepted under the *EFED Act*. This meant that it became illegal for any political party or member to accept political donations from a corporation or union. Relevantly, section 96D of the *EFED Act* provided:

1. It is unlawful for a political donation to a party, elected member, group, candidate or third-party campaigner to be accepted unless the donor is an individual who is enrolled on the roll of electors for State elections, the roll of electors for federal elections or the roll of electors for local government elections.
2. It is unlawful for an individual to make a political donation to a party, elected member, group, candidate or third-party campaigner on behalf of a corporation or other entity.
3. It is unlawful for a corporation or other entity to make a gift to an individual for the purpose of the individual making a political donation to a party, elected member, group, candidate or third-party campaigner.
4. Annual or other subscriptions paid to a party by a person or entity (including an industrial organisation) for affiliation with the party that are, by operation of section 85(3), taken to be gifts (and political donations to the party) are subject to

CASE NOTE: THE FIGHT FOR THE RIGHT TO MAKE DONATIONS TO
POLITICAL PARTIES: *UNIONS NSW V NSW* [2013] HCA 58

this section. Accordingly, payment of any such subscription by an industrial organisation or other entity is unlawful under this section.

5. ...

Section 95G(6) was inserted to the *EFED Act* at the same time and deemed that the expenditure of political parties and 'affiliated organisations' was to be aggregated for the purposes of calculating the total amount of expenditure that was permitted to be made by that political party for any given election. Relevantly, section 95G provided:

6. Aggregation of expenditure of parties and affiliated organisations

Electoral communication expenditure incurred by a party that is of or less than the amount specified in section 95F for the party (as modified by subsection (2) in the case of associated parties) is to be treated as expenditure that exceeds the applicable cap if that expenditure and any other electoral communication expenditure by an affiliated organisation of that party exceed the applicable cap so specified for the party.

7. In subsection (6), an affiliated organisation of a party means a body or other organisation, whether incorporated or unincorporated, that is authorised under the rules of that party to appoint delegates to the governing party of that party or to participate in pre-selection of candidates for that party (or both).

The insertion of ss 95G(6) and 95G(7) appeared to be directed against the connections between the Australian Labor Party ('ALP') and the union movement. Effectively this provision would severely affect the ability of the ALP and the unions to campaign since their expenditure would be aggregated and their combined campaign expenditure capped.

III THE UNIONS' CHALLENGE

The Plaintiffs challenged these provisions on a number of grounds and the final questions asked by the parties in the Special Case were:

1. Is s 96D of the Election Funding, Expenditure and Disclosures Act 1981 (NSW) invalid because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution?
2. Is s 95G(6) of the Election Funding, Expenditure and Disclosures Act 1981 (NSW) invalid because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution?

3. Do ss 7A and 7B of the Constitution Act 1902 (NSW) give rise to an entrenched protection of freedom of communication on New South Wales State government and political matters?
4. If so, is s 96D of the Election Funding, Expenditure and Disclosures Act 1981 (NSW) invalid because it impermissibly burdens that freedom, contrary to the New South Wales Constitution?
5. Further, if the answer to question 3 is 'yes', is s 95G(6) of the Election Funding Expenditure and Disclosures Act 1981 (NSW) invalid because it impermissibly burdens that freedom, contrary to the New South Wales Constitution?
6. Is s 96D of the Election Funding, Expenditure and Disclosures Act 1981 invalid under s 109 of the Commonwealth Constitution by reason of it being inconsistent with s 327 of the Commonwealth Electoral Act 1918 (Cth)?
7. Is s 96 of the Election Funding, Expenditure and Disclosures Act 1981 (NSW) invalid under s 109 of the Commonwealth Constitution by reason of being inconsistent with Pt XX of the Commonwealth Electoral Act 1918 (Cth)?
8. Is s 96D of the Election Funding, Expenditure and Disclosures Act 1981 (NSW) invalid because it impermissibly burdens a freedom of association provided for in the Commonwealth Constitution?
9. Who should pay the costs of the special case?

My earlier article deals with the strengths and weaknesses of the arguments raised by the Plaintiffs' writ in detail and I do not intend to repeat any of that analysis for the purposes of this case note.³ Suffice it to say that novel issues in respect of: 1) the existence of a freestanding freedom of political communication implied directly from the *NSW Constitution*; 2) the act of political donation as a form of political communication; and 3) the nature of the implied freedom and the extent of its application, were all open for determination by the Court.

IV THE DECISION

The Court unanimously determined that ss 96D and 95G(6) of the *EFED Act* were invalid on the basis that they impermissibly burdened the freedom of political communication implied from the *Commonwealth Constitution*. This decision rendered the remaining issues unnecessary to answer and so, from the perspective of an interested onlooker, meant that the bulk of contentious issues were left undecided.

³ See Cucinotta, above n 2.

This decision also means that many of those issues are unlikely to be decided in the future.

Five members of the Court: French CJ, Hayne, Crennan, Kiefel and Bell JJ, delivered a joint judgment with Keane J delivering a separate judgment that accorded with the findings of the joint judgment. Gageler J recused himself from this case given that he had previously given a written advice on the validity of the amendments to the *EFED Act* in his earlier capacity as Solicitor-General of the Commonwealth of Australia.

A The extension of the freedom of political communication implied from the Commonwealth Constitution

The Defendant relied heavily on the decision in *Lange v Australian Broadcasting Corporation*.⁴ In particular, *Lange* was relied upon to support the proposition that the freedom of political communication implied from the text of the *Commonwealth Constitution* only extended as far as protecting communication that related to the system of representative and responsible government established by that document. That is to say, the Defendant argued that the freedom implied from the *Commonwealth Constitution* only protects communication which involves federal political matters.⁵

This argument was quickly rejected by the Court. The Court noted in this case, and has made similar observations in obiter in earlier cases,⁶ that the reality of the Australian political landscape is that there is significant overlap between political matters at a federal and State level.⁷ The Court recognised that some issues – for example, the funding of health and education services – are issues that involve both federal and State governments and are matters that are agitated during the discourse about government at both a federal and State level.⁸ The intermingling of issues within the federation, the existence of collaborative exercises between federal and State governments such as the Council of Australian Governments and the existence of national political parties that operate at both federal and State levels all led the Court to decide that ‘a wide view [should] be taken of the operation of the freedom of political communication’.⁹

⁴ (1997) 189 CLR 520.

⁵ *Unions NSW v NSW* [2013] HCA 58, (*‘Unions NSW’*), [18].

⁶ *Hogan v Hinch* (2011) 243 CLR 506, 543 (French CJ).

⁷ *Unions NSW*, [20].

⁸ *Ibid*, [21].

⁹ *Ibid*, [25].

Even though the freedom of political communication arises as a result of an implication drawn from the text of the *Commonwealth Constitution*, it would seem short-sighted if its application was so limited that communications about State political matters were automatically disregarded. Keane J noted:

[that at no point] was a practical example given of a political communication which might relate exclusively to the election of a candidate to the New South Wales Parliament... with no bearing upon the political choices required by the people of the Commonwealth by the *Constitution*.¹⁰

It is difficult to think of such an example and the recent Commonwealth Budget is further evidence of the intermingling of State and federal issues.¹¹ Therefore, when determining if political communication in respect of a State political matter offends the freedom implied from the *Commonwealth Constitution*, a court must determine whether that communication also has the capacity to influence discussion of federal political matters.¹²

The Court in this case has set a marker for the breadth of the freedom of political communication implied from the *Commonwealth Constitution*. This case related to specific provisions of the electoral funding laws for State and local government elections only. There was no direct connection identified between communications made with respect to a State election and discussion of federal political matters. Arguably, this case represents the high watermark of State political communications cases and indicates that almost any communication made with respect to State political matters is capable of protection by the federal implied freedom.

B Political communication made by non-electors

A large part of my earlier article was dedicated to an analysis of the nature of the freedom of political communication and whether corporations or non-electors could invoke that freedom. The Court dealt with this issue quite easily and has authoritatively found that the implied freedom of political communication is not a freedom that only protects communication made by electors.

¹⁰ *Unions NSW*, [159].

¹¹ For example, the recent debate surrounding federal funding of health and education and the potential rise in the GST: See, eg, Mathew Dunckley and Mark Ludlow, 'Health, education funding cut by \$80bn' *Australian Financial Review*, 15 May 2014.

¹² *Unions NSW*, [25].

CASE NOTE: THE FIGHT FOR THE RIGHT TO MAKE DONATIONS TO
POLITICAL PARTIES: *UNIONS NSW V NSW* [2013] HCA 58

The Court quite rightly affirmed the fact that the freedom of political communication is not a personal right.¹³ Rather, the purpose of the implied freedom is to ensure that the free flow of information on political matters is protected to allow electors to decide for themselves how they exercise their vote at federal elections.¹⁴ In this respect, the jurisprudence of the Supreme Court of the United States (“SCOTUS”) was of some utility and the Court referred to the decision in *Buckley v Valeo*. The SCOTUS noted in that case that political speech in particular is afforded ‘the broadest protection [under the First Amendment]... in order to assure unfettered exchange of ideas for the bringing about of political and social change desired by the people’.¹⁵

Importantly, the *Unions NSW* decision unequivocally establishes that the identity of the speaker is irrelevant when considering whether a law offends the implied freedom of political communication.¹⁶ This is not only significant with respect to the notion of corporate speech, but also recognises that without such an approach there are many other stakeholders who might be entirely shut out from political discourse. In particular, minors who have not yet acquired the right to vote, permanent residents and aliens within Australian territory are all classes of people who might have the desire to make political communication and contribute to public discourse even though they are not electors. It would be wrong in principle to say that the political communication made by these persons is capable of restriction simply because those persons making the communication are not entitled to vote. The kind of communication that might be made by these categories of people is clearly capable of influencing public debate and the way electors exercise their right to vote and so is necessarily worthy of the protection of the implied freedom of political communication.

Keane J made this point rather emphatically in his judgment by noting that the limitation of eligible donors to those enrolled to vote:

fail[s] to appreciate two matters. First, un-enrolled individuals may be among the governed whose interests are affected by governmental decisions. Second, and more importantly, the freedom of political communication within the federation is not an adjunct of an individual’s right to vote, but an assurance

¹³ *Ibid*, [30], [36]; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 150; *Cunliffe v Commonwealth* (1994) 182 CLR 272, 326; *Monis v The Queen* (2013) 87 ALJR 340, [266].

¹⁴ *Unions NSW*, [27]-[29].

¹⁵ *Unions NSW*, [29]; *Buckley v Valeo*, 424 US 1, 14 (1976) quoting *Roth v United States*, 354 US 476, 484 (1957).

¹⁶ *Unions NSW*, [30].

that the people of the Commonwealth are to be denied no information which might bear on the political choices required of them.¹⁷

Given the extent of recent authority on point, it appears trite to say that the freedom of political communication implied from the *Commonwealth Constitution* does not operate as a personal freedom but rather a limitation on legislative interference. However, this point is incredibly powerful in order to appreciate the purpose and operation of the implied freedom and is one which is often confused by students and litigants alike.

C Application of the Lange test

Having decided that the freedom of political communication implied from the *Commonwealth Constitution* could apply in this case and that the freedom protects communication regardless of the identity of the speaker, the Court then considered the validity of each section in turn. This required the Court to apply the test established in *Lange v Australian Broadcasting Corporation*, as amended by the qualification in *Coleman v Power*,¹⁸ in order to determine whether each section was invalid.¹⁹ This test comprises two limbs and requires the Court to determine:

1. Whether in its terms, operation or effect, the law effectively burdens freedom of communication about government or political matters.
2. If the answer to the first question is in the affirmative, whether the law is reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government.²⁰

If the second question is answered negatively, then the law will be invalid.

1 Section 96D

The Court swiftly dealt with the first limb of the Lange test, deciding that it was unnecessary to consider whether the act of political donation is a form of communication in and of itself,²¹ but rather, determining that s 96D effectively burdened the freedom of political communication by limiting the amount of funds

¹⁷ *Unions NSW*, [144].

¹⁸ (2004) 220 CLR 1.

¹⁹ (1997) 189 CLR 520, 557-62.

²⁰ *Wotton v Queensland* (2012) 246 CLR 1, 15 citing *Hogan v Hinch* (2011) 243 CLR 506, 542 (French CJ), 555-6 (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

²¹ For an analysis of this issue, see Cucinotta, above n 2, 78-81.

CASE NOTE: THE FIGHT FOR THE RIGHT TO MAKE DONATIONS TO
POLITICAL PARTIES: *UNIONS NSW V NSW* [2013] HCA 58

that would be available to a political party to make political communication. The Defendant argued that any burden on the freedom by virtue of the fact that lesser funding would be available was 'not substantial'.²² However the Court, following its decision in *Monis v The Queen*, stated that the extent of the burden is not a matter of inquiry for the first limb of the Lange test, but is to be considered in the second limb.²³ For the first limb to be made out, the Court only needs to find that there is a burden on the freedom, the Court does not, at this stage, undertake a qualitative analysis of the extent of that burden.²⁴

Having dealt with the first limb of the *Lange* test, the Court then had to determine whether the law was reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. The first task for the Court was to identify the 'legitimate end' to which the law was directed. As suspected, the Court was ready to accept that the law was intended to protect the integrity of the political process by 'reducing pressure on political parties and candidates to raise substantial sums of money, thus lessening the risk of corruption or undue influence'.²⁵

The true controversy in this case was whether the law was reasonably appropriate and adapted to achieving this legitimate end. The Plaintiffs argued that 's 96D does nothing calculated to promote the achievement of those legitimate purposes'.²⁶ The Court accepted this submission. It was found that there was an 'absence of evident purpose' in the complete ban on corporate donations.²⁷

The Defendant argued that the ban was directed toward corporations because 'by reason of their character and size, corporations are more likely to represent a threat to integrity'.²⁸ The Court compared the blanket ban imposed by s 96D, which extends to a number of stakeholders beyond corporations, to the provisions of Division 4A of Part 6 of the *EFED Act* which bans donations from property developers and tobacco, liquor or gambling industry entities. The Court accepted that these provisions were directed toward an identified source of influence and corruption and, without explicitly saying so, hinted that this kind of tailored response would likely be valid.

²² *Unions NSW*, [40].

²³ (2013) 87 ALJR 340, [343].

²⁴ *Unions NSW*, [40].

²⁵ *Ibid*, [49]; a similar 'legitimate end' was identified in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

²⁶ *Unions NSW*, [51].

²⁷ *Unions NSW*, [52].

²⁸ *Ibid*, [54].

By comparison, the blanket ban under s 96D was described as ‘inexplicable’.²⁹ For this reason, the Court determined that the second limb of the Lange test could not be made out in this case and the ‘burden imposed by s 96D on the freedom cannot be justified’.³⁰ For this reason, s 96D was deemed invalid on the basis that it impermissibly burdened the implied freedom of political communication.

2 Section 95G(6)

The Court then turned its mind to s 95G(6). This provision attempted to aggregate the expenditure of political parties and ‘affiliated organisations’ for the purposes of calculating the cap on electoral communication expenditure. Again, the Court’s focus was to identify the purpose of this provision and how it fit in with the ‘legitimate end’ of maintaining the integrity of the NSW electoral system.³¹ The Defendant argued that the aggregation gave efficacy to the cap on electoral communication expenditure by preventing affiliated organisations circumventing the current regime to gain an unfair advantage.³² The Court simply noted that it ‘cannot be deduced... how this purpose is connected to the wider anti-corruption purposes of the EFED Act, or how those legitimate purposes are furthered by the operation and effect of s 95G(6)’.³³ Evidently, no connection was provided by the Defendant between the targeting of affiliated industrial organisations and the anti-corruption purpose of the EFED Act. Given this absence of legislative purpose and justification for the aggregation which would limit the amount of political communication to be made by the ALP and its affiliated unions, the Court also found this provision to be invalid.

D Determination of the questions raised in the Special Case

For the reasons outlined above, the Court found that both ss 96D and 95G(6) were invalid since they impermissibly burdened the freedom of political communication implied from the *Commonwealth Constitution*. As a result, all other questions were unnecessary to answer.

E The act of donation as communication

Keane J was the only justice of the Court to consider whether the act of donation could be considered to be political communication under Australian law. The

²⁹ Ibid, [59].

³⁰ Ibid, [60].

³¹ Ibid, [61].

³² Ibid, [62].

³³ Ibid, [64].

CASE NOTE: THE FIGHT FOR THE RIGHT TO MAKE DONATIONS TO
POLITICAL PARTIES: *UNIONS NSW V NSW* [2013] HCA 58

Plaintiffs argued that, based on the extensive jurisprudence from the SCOTUS, the act of donation should be considered political communication because it 'serves as a general expression of support for the candidate and his views'.³⁴ The Plaintiffs also relied upon the decision in *Citizens United v Federal Election Commission* to support the proposition that the corporate identity of the donor does not entitle the government to treat them differently to natural persons with respect to free speech.³⁵

Keane J rejected this proposition on the basis of differences between the constitutions of Australia and the United States, the key difference being that the First Amendment delivers a personal right to individuals to express views on any topic.³⁶ However, the freedom of political communication implied from the *Commonwealth Constitution* does not grant a personal right to individuals but operates as a limitation upon legislative action in order to give effect to the system of representative and responsible government established by, among other provisions, ss 7 and 24 of the *Commonwealth Constitution*. This fundamental difference between the nature of the rights arising under the First Amendment and the implied freedom demonstrates how an entirely different analysis is needed and how, in Keane J's view, the question of whether donation is communication is unnecessary to determine the validity of s 96D.

V COMMENT

As stated above, the result in this case was not particularly surprising. The NSW Government did not cloak the fact that these provisions were aimed at the ALP and the trade union movement and this was exacerbated by the fact that they were aimed at ridding NSW of an unidentified threat of corruption.

The surprising thing about this case was how quickly the Court managed to invalidate the offending provisions of the *EFED Act* by relying on the freedom implied from the *Commonwealth Constitution*. It was thought prior to the hearing of this case that the existence of a freestanding freedom of political communication implied from the text of the *NSW Constitution* would be a potential stumbling block for this challenge.³⁷ This is because there is a real question about whether the system of representative and responsible government is effectively entrenched in the *NSW*

³⁴ *Unions NSW*, [98]; *Buckley v Valeo*, 424 US 1, 21 (1976).

³⁵ 558 US 50 (2010); *Unions NSW*, [99].

³⁶ *Unions NSW*, [101] citing *Abrams v United States* 250 US 616, 630 (1919); *New York State Board of Elections v Lopez Torres* 552 US 196, 208 (2008); *Citizens United v Federal Election Commission* 558 US 50 (2010).

³⁷ Anne Twomey, 'The Application of the Implied Freedom of Political Communication to State Electoral Funding Laws' (2012) 35(3) *University of New South Wales Law Journal*, 625.

Constitution in the same way it was found to be entrenched in the constitutions of South Australia and Western Australia.³⁸ It was thought that this issue would need to be explored given that the impugned provisions were laws dealing with State electoral funding. This seemed to be an area which could not be covered by the federal freedom. However, the Plaintiffs were not required to prove that a system of representative and responsible government is entrenched in the *NSW Constitution* because the Court determined that the communication burdened was that of parties making electoral communication, not of individuals making political donations. By characterising the burden in such a way, the door is potentially open for all State electoral funding laws to be assessed against the freedom implied from the *Commonwealth Constitution* rather than freedoms implied from the relevant State constitution.

The most interesting thing to come out of the Court's decision was how the lack of an identified source of corruption or threat to the integrity of the NSW Parliament was absolutely decisive.³⁹ This, of course, is intriguing given the revelations emanating from the NSW Independent Commission Against Corruption ("ICAC") a matter of months after the judgment of the Court was handed down. Of particular interest, the testimony that a number of 'prohibited donors' within the meaning of the *EFED Act* were making political donations through slush funds and sham consultancies.⁴⁰ It is uncontroversial to say that between February 2012 – when these amendments were passed – and the time judgment was delivered, there was no pressing or apparent reason for the bulking up of NSW electoral laws. However, now we know that corporations have been used to circumvent the 'prohibited donor' provisions of the *EFED Act* it begs the question whether a decision by the current NSW Parliament to enact similar provisions in light of these ICAC inquiries would be considered 'reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the constitutionally prescribed system of government'.⁴¹ Arguably, the blanket ban on donations from all persons other than electors would still impermissibly burden the implied freedom of political communication. The tenor of

³⁸ *Ibid*, 639-42; *Muldowney v South Australia* (1996) 186 CLR 352; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

³⁹ *Unions NSW*, [52], [59], [65] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), [159] (Keane J).

⁴⁰ Neil Chenoweth, 'The Fund Business', *Australian Financial Review*, 29 April 2014; Geoff Winestock, 'Slush fund link to federal MP', *Australian Financial Review*, 30 April 2014; Samantha Hutchinson, 'Alleged NSW Eightbyfive donors probed', *Australian Financial Review*, 30 April 2014; Joo-Cheong Tham, 'Don't ban political donors', *Australian Financial Review*, 7 May 2014.

⁴¹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567-8.

CASE NOTE: THE FIGHT FOR THE RIGHT TO MAKE DONATIONS TO
POLITICAL PARTIES: *UNIONS NSW V NSW* [2013] HCA 58

the judgments of the Court, particularly the decision of Keane J, is that if the NSW Parliament wanted to ban corporate donations in particular, it would need to tailor the legislation so that the collateral effects on non-electoral natural persons would be avoided. Tailoring provisions in this way would also be a matter of risk-management for the NSW Parliament since a broader law could still be susceptible to challenge by a non-electoral and a finding of invalidity could still be made.

VI CONCLUSION

The decision in *Unions NSW v NSW* is an important one because it reinforces the fact that the freedom of political communication exists to protect the free flow of information regardless of the identity of the speaker. Additionally, the decision struck down laws which, at the time of their enactment, smacked of political opportunism. The decision takes on some interesting colour given that not six months after its delivery, widespread corruption and circumvention of the *EFED Act* has been identified by the ICAC. It is encouraging that the Court is not taking a narrow view of the implied freedom of political communication but it would have been interesting to see how these laws were viewed in light of the public inquiries of the ICAC.
