

Unions NSW v State of New South Wales [2013] HCA 58

By Anne Twomey*

Background

During the turbulent years of the Iemma, Rees and Keneally Governments (known to political scientists as the IRKs or 'irksome' era) there was great concern that political donations were being used as a means of influencing governments, both at the local government level (particularly after the 'table of knowledge' scandal in Wollongong) and in relation to development proposals at the State level. Various steps were taken to alleviate public concern.

First, laws were enacted in 2009 to ban political donations from property developers including their directors, officers, major shareholders and their spouses.¹ It was later extended in 2011 to ban donations from tobacco, liquor and gambling industry entities. Curiously, despite a deal of huffing and puffing, these provisions were not challenged.

Next, in 2010,² there was a more comprehensive reform:

- Political donations were capped at a maximum of \$5000 for parties and \$2000 for candidates and third party campaigners. This meant that influence could no longer be obtained through the making of large donations.
- Caps were also placed upon electoral communications expenditure in the 6 months prior to an election. The caps for parties were approximately \$100,000 per electorate (around \$9.3 million if a party endorsed candidates in all Legislative Assembly seats) and a maximum of \$1,050,000 for 3rd party campaigners. The intention was to permit 3rd party campaigners to spend a reasonable amount to fund a campaign, but not to swamp political parties.
- Public funding was increased. It now covers approximately three-quarters of the actual expenditure of political parties (within the cap) on electoral communications.³

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¹ *Election Funding and Disclosures Amendment (Property Developers Prohibition) Act 2009* (NSW).

² *Election Funding and Disclosures Amendment Act 2010* (NSW).

³ The formula is more complicated. A registered party may claim with respect to Legislative Assembly elections, 100% of expenditure made under the first 10% of its expenditure cap, then 75% of expenditure for the next 80% of its expenditure cap, and then 50% of its expenditure on the last 10% of its expenditure cap.

The 2012 amendments

The critical changes, the subject of the *Unions NSW v New South Wales* ('*Unions NSW*')⁴ challenge, occurred in 2012 under the O'Farrell Government.⁵

- First, there was a ban placed on all political donations to parties, candidates and third-party campaigners that came from anyone other than persons enrolled on the electoral roll – s 96D.
- Secondly, the electoral communication expenditure of political parties and their affiliates was aggregated for the purposes of the caps. Affiliation was defined by reference to bodies that can appoint delegates to the governing body of a party or participate in pre-selection of candidates for that party – s 95G(6). It only affected the Australian Labor Party ('ALP').

Back in 1992, when the High Court struck down the Commonwealth's laws concerning political advertising,⁶ there were two aspects of those laws that particularly concerned the High Court:

1. the allocation of 'free' political advertising to parties unduly favoured the incumbents; and
2. the ban on third-party campaigners from advertising on the electronic media chilled political communication.

What is remarkable about the NSW legislation, 20 years later, is that it managed to hit both those buttons. First, it was politically unbalanced as it attacked the relationship between unions and the ALP. It prohibited the payment of affiliation fees or donations by unions to the ALP (because unions are not natural persons enrolled on the electoral roll). It prevented *Unions NSW*⁷ from receiving money from its member unions to run its own campaigns and it reduced the ALP's expenditure cap every time an affiliated union spent money on electoral communications within the 6 months prior to the election.

What was particularly notable about these amendments was how flagrant the political purpose was. There was actually a genuine problem with parties, including the ALP, using closely related bodies to campaign on their behalf and avoiding the expenditure cap. If it had been dealt with generally, so that *all* political parties that used closely associated bodies to campaign on their behalf were equally affected, it would probably have passed muster. But narrowing the provision so that it only affected *one* party structure was spectacularly foolish.

Secondly, the amendments chilled political communication by third-party campaigners. This is because most third party campaigners are peak bodies that get donations from

⁴ [2013] HCA 58.

⁵ *Election Funding, Expenditure and Disclosures Amendment Act 2012* (NSW).

⁶ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

⁷ 'Unions NSW' is the peak body for trade unions in NSW. Its members are affiliated unions and Regional Trades and Labor Councils, not natural persons enrolled on the electoral roll.

local grass-roots bodies, and conduct campaigns on their behalf. These amendments prevented them from receiving donations from constituent bodies.

They also had the practical effect of preventing third party campaigns funded directly by donations from members of the public because the burden of checking the electoral details of every donor was too great. The person dressed as a koala collecting money on the streets and the person passing the election plate in church is hardly equipped to do so. The effect of the amendment would have wiped out most third-party campaigning during elections – except of course by corporations who can use money they raise commercially (which does not amount to a political donation) to fund their campaigns.

This problem was raised during committee hearings on the bill and an amendment was made, purportedly to allow ‘issues campaigns’ by third party campaigners. But it only applied if the expenditure was not incurred for the dominant purpose of promoting or opposing a party or candidates at an election or ‘influencing voting at an election’.⁸ What campaign run by a third-party campaigner at an election, be it about the environment, or homelessness, or drinking hours in pubs, or gambling, is not intended to influence voting? It was therefore pointless.

It was clear that these 2012 amendments would fail the second limb of the *Lange* test⁹ if they got to that point. The apparent primary purpose behind them was to disadvantage the ALP and weaken its links with the unions. A secondary purpose appeared to be to get rid of pesky third-party campaigners. Neither could be regarded as being reasonably appropriate and adapted to achieve the legitimate end of avoiding the reality or perception of undue influence and corruption in exchange for donations. As there was already an existing cap on donations of \$5000,¹⁰ it was hard to see how a corporation’s \$5000 or a union’s \$5000 was any more likely to induce corruption than a billionaire’s \$5000 or your \$5000. While there were muffled arguments that only voters should be allowed to donate, they were not persuasive. The High Court dismissed them quickly, noting that non-voters are also affected by government decisions and are entitled to seek to influence policies and the outcomes of elections by supporting parties or candidates,¹¹ just as they are entitled to participate in public debate.

As for the aggregation provision, an argument could have been run that it was intended to achieve the legitimate end of creating a level playing field for parties, if all were to be treated alike. However, this particular amendment was directed at one particular party, rendering such an argument implausible. It also faced the problem that unions are organisations created separately from the ALP and are entitled to represent the views and interests of their members, which may be different from the ALP.¹² It wasn’t simply a

⁸ *Election Funding, Expenditures and Disclosures Act* 1981 (NSW), s 87(4).

⁹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567, as altered by *Coleman v Power* (2004) 220 CLR 1 50[93] (McHugh J); 78 [196] (Gummow and Hayne JJ); and 82 [211] (Kirby J).

¹⁰ Note that these figures are to be adjusted for inflation, so that the \$5000 cap has now moved to \$5500.

¹¹ *Unions NSW v New South Wales* [2013] HCA 58, [30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); and [144] (Keane J).

¹² [2013] HCA 58, [63] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); and [165] (Keane J).

matter of the ALP creating front organisations to avoid the imposition of an expenditure cap.¹³

The real question in the litigation, however, was whether a court would get to the point of making such an assessment. First, other hurdles had to be jumped.

1. Does a law that prohibits some political donations burden political communication?
2. Does the freedom of political communication implied from the Commonwealth Constitution, which is necessary to support the system of government established by the Commonwealth Constitution, apply to State laws that have nothing to do with the Commonwealth system of government?

These are the issues that make this case particularly interesting.

Short points of interest in the case

Before getting to these issues, here are some small points of interest in the case:

1. The Court ducked the issue of whether or not there is an implied freedom of political communication derived from the NSW Constitution. Hence this question remains unresolved.
2. Both the plurality judgment of French CJ, Hayne, Crennan, Kiefel and Bell JJ,¹⁴ and the separate judgment of Keane J,¹⁵ revive the notion of sovereign power resting with ‘the people’. The Court had gone quiet since the Mason era on the subject of popular sovereignty, but it appears to have revived in this case.
3. The Court again stressed that the implied freedom is not a personal right¹⁶ – it is a limitation on legislative power. Hence, instead of focusing on whether a particular communication is ‘political’ in nature, one should instead focus on whether the *law* in its operation and effect, burdens freedom of political communication.
4. Both judgments acknowledged, but didn’t resolve, the Court’s split in *Monis v The Queen*¹⁷ on the identification of the purpose and scope of a law.¹⁸
5. In a brief, but far from illuminating, discussion, the plurality held that the *Melbourne Corporation* principle is subordinate to the implied freedom of

¹³ See also the amendment proposed by the Select Committee on the Bill, which would have confined the application of the aggregation provision to cases in which the union directly campaigned for votes for the ALP or campaigned at the request of, or in co-operation with, the ALP: NSW Select Committee on the Election Funding Bill, *Inquiry into the provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011*, (15 February 2012), recommendation 1.

¹⁴ [2013] HCA 58, [17] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

¹⁵ [2013] HCA 58, [104], [135] (Keane J).

¹⁶ [2013] HCA 58, [30], [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); [109]-[110] (Keane J).

¹⁷ (2013) 87 ALJR 340.

¹⁸ [2013] HCA 58, [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); [129] (Keane J).

political communication.¹⁹ It appears that ‘federal considerations’ are of greater interest to the High Court when it is trying to reign in Commonwealth executive power, than when legislative power is at issue.

6. Keane J reconceptualised the implied freedom as a guarantee ‘that the people of the Commonwealth are to be denied no information which might bear on the political choices required of them’.²⁰ This opens up interesting questions about how this fits with Commonwealth Government secrecy in relation to turning back the boats, particularly where information is denied to the Senate. Surely such information might bear upon the political choices to be made by the people? Indeed, Keane J dropped a pretty heavy hint about its significance, referring to the relevance of advocacy by individuals or corporations on behalf of ‘undocumented immigrants’ to the political choices to be made by the electors of the Commonwealth.²¹
7. Both judgments discussed an argument about whether State Parliaments have a margin of choice or a margin of appreciation in how they decide to implement a legitimate purpose. While Keane J expressed concern about the courts exercising legislative, rather than judicial power, if they struck down laws because the court could devise of a less burdensome form of law,²² the plurality dismissed the argument for a margin of appreciation out of hand, noting that it had never been given majority support.²³ It continued to prefer the ‘reasonably appropriate and adapted’ test, rather than the more deferential test of ‘reasonably *capable* of being *seen* as appropriate and adapted’. The latter test has been used in relation to purposive powers.²⁴ The plurality’s adamant dismissal of such a test makes one wonder whether the Court’s attitude to this test in relation to the implied freedom of political communication might flow on to affect the use of the more deferential test in relation to purposive powers.

The application of the implied freedom to State laws

The early cases on the implied freedom of political communication, from 1992 and 1994, sought to avoid the categorisation of political communication into State and Commonwealth spheres, by contending that it was indivisible.²⁵ This was because:

¹⁹ [2013] HCA 58, [34] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

²⁰ [2013] HCA 58, [144] (Keane J).

²¹ [2013] HCA 58, [148] (Keane J).

²² [2013] HCA 58, [104], [129] (Keane J). See also [134] where he decides that it doesn’t matter in this case because the outcome would be the same anyway.

²³ [2013] HCA 58, [45] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

²⁴ *Victoria v Commonwealth* (1996) 187 CLR 416, 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

²⁵ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 75-6 (Deane and Toohey JJ); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 142 (Mason CJ); 168-9 (Deane and Toohey JJ); 215-7 (Gaudron J); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 122 (Mason CJ, Toohey and Gaudron JJ); *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211, 232 (Mason CJ, Toohey and Gaudron JJ); and 257 (Deane J).

- Commonwealth policies and funding (especially through s 96 grants) affect state political affairs;
- the same political parties operate across state and federal levels;
- political issues, such as the environment, education and health, may be dealt with by more than one level of government;
- political ideas and debate flow across all levels of government; and
- what one learns from political experience with one level of government may affect how one votes in relation to the other level of government.²⁶

But from 1996, the Court made efforts to tie back the implication to the Commonwealth Constitution. It only operated to the extent that it was necessary to support the federal system of government established by the Commonwealth Constitution. Thus, in *Muldowney v South Australia*, three Justices held that a law that prohibited a person from publicly advocating a way of ordering the ballot paper in a State election, did not burden the implied freedom of political communication under the Commonwealth Constitution. This was because the Commonwealth Constitution does not apply in relation to State elections, and the law in question could have no impact upon how voters might vote in Commonwealth elections or referenda.²⁷

In *Lange v Australian Broadcasting Corporation* the Court held that the implied freedom is derived from ss 7, 24, 64 and 128 of the Constitution and only extends so far as is necessary to give effect to those sections and the system of government they establish.²⁸

While for the most part States have conceded the application of the Commonwealth implied freedom to State laws,²⁹ preferring to fight on the 2nd limb of the *Lange* test, there have been a number of cases where it has been held that the State law in question has no potential bearing on communication relevant to Commonwealth political matters and is therefore not affected by the implied freedom.³⁰

Stephen Gageler, when Commonwealth Solicitor-General, argued in *Hogan v Hinch* that a State law ‘which involves no realistic threat to any freedom of communication about

²⁶ Anne Twomey, ‘The Application of the Implied Freedom of Political Communication to State Political Funding Laws’ (2012) 35(3) UNSWLJ 625, 629.

²⁷ *Muldowney v South Australia* (1996) 186 CLR 352, 365-6 (Brennan CJ); 373-4 (Toohey J); 370 (Dawson J). Gummow and McHugh J found it unnecessary to decide. Only Gaudron J held that the Commonwealth Constitution requires the States to maintain systems of democratic government.

²⁸ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561 and 567.

²⁹ See eg: *Sellars v Coleman* (2001) 2 Qd R 565, [20] (Muir J); *Roberts v Bass* (2002) 212 CLR 1, [159] (Kirby J); and *Sunol v Collier (No 2)* [2012] NSWCA 44, [83] (Basten JA). See also: *Coleman v Power* (2004) 220 CLR 1, [78]-[80] (McHugh J); [197] (Gummow and Hayne JJ); [228]-[232] (Kirby J). Callinan J (dissenting) at [298] rejected the concession and Heydon J at [317]-[319] exhibited unhappiness with it.

³⁰ See, eg: *Harkianakis v Skalkos* (1999) 47 NSWLR 302, 306-7 [17]-[18] (Dunford J); *Direct Factory Outlets Homebush Pty Ltd v Property Council of Australia Ltd* (2005) 148 FCR 12, 29-30 [70]-[72] (Sackville J); *Treby v Local Government Standards Panel* [2010] WASAT 81 [53]; *McLure v City of Stirling [No 2]* [20008] WASC 286, [80]-[88] (Beech J).

federal political or government affairs will not impinge the freedom’.³¹ Leslie Zines has also contended that the old 1992 view that political communication is indivisible ‘has been rejected’ although there is still a wide area of political communication on State affairs that may also be of concern to the Commonwealth and fall within the implied freedom.

Into this historic progression came the High Court in *Unions NSW*, heading straight back to 1992. *Lange* was explained away by giving it a different ‘context’.³² The Court reverted to its earlier simplistic assertions about political issues flowing across State and Commonwealth boundaries,³³ without addressing the more nuanced development of the distinction over the last decade. It is certainly the case that discussion of most State political matters does have the potential to affect the way in which people might vote at Commonwealth elections. But this is not always the case. The *Muldowney* case was a good example. Laws about the technical rules of voting in State elections provide an example of laws that have no bearing on how people might vote in Commonwealth elections.³⁴

What the Court did in *Unions NSW* was simply to tick the box saying that most communication about State political matters also influences Commonwealth political matters, without actually conducting any analysis as to how the particular law in issue in *this* case burdened the implied freedom of political communication in a way that had the potential to affect how people might vote at Commonwealth elections or referenda.

If one takes s 96D, which prohibits the receipt of political donations from anyone other than enrolled voters, it is not a law that affects the *content* of political communications. Nor is it a law that regulates *how* political communications may be made. It only affects the *resources* that might be called upon to secure political communications. How does a law, which prohibits the receipt of political donations in relation to State elections from those not enrolled to vote, have the slightest bearing on how people might vote in Commonwealth elections? It does not affect the resources involved in funding Commonwealth elections at all. At most it can have an indirect effect. It might result in parties raising less money in relation to State campaigns, which in turn might result in them spending less on political communications, which might affect the quantity of communications made.

It must be remembered, however, that there is a cap on electoral communications expenditure. Three-quarters of that expenditure by parties is reimbursed by the tax-payer. Parties only have to fund one quarter and can still get donations from any of the 15 million persons on the electoral roll. President Obama in the United States showed that

³¹ *Hogan v Hinch* (2011) 243 CLR 506, 520.

³² [2013] HCA 58, [19] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

³³ [2013] HCA 58, [21]-[22] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

³⁴ Compare Keane J’s observation that no practical example was given of a political communication which might relate exclusively to State political matters with no bearing upon the political choices required by the people of the Commonwealth: [2013] HCA 58, [59]. In addition to the *Muldowney* example, State laws concerning information on above the line preferential voting (which only applies in NSW) would be another relevant example.

the collection of small donations across a large number of individual voters can be an extremely effective way of funding an election. Just because Australian political parties have in the past relied heavily upon donations from corporations, unions and other bodies, does not mean that they could not re-direct their fund-raising to individual voters. Political parties can also still rely on other sources of revenue, such as investment income. It may be the case that the quantity of political advertising during an election campaign is not affected at all, if parties gain the means to spend up to the maximum cap.

Further, why is it assumed that greater quantity of advertising in State elections has any impact upon voting in Commonwealth elections? Even if the number of times an ad is repeated on television or radio is reduced from ‘ad nauseam’ to merely irritating levels, does this affect the free flow of political information in any way at all? The same content is available for all to see – it is simply inflicted upon people at a marginally lower frequency in one State every four years. Can this seriously be said to burden the political communication necessary to support the Commonwealth system of representative and responsible government?

Indeed, there is an argument that by reducing the quantity of election advertising by parties during election periods, one opens up the airwaves to a greater variety of voices, enhancing political communication by increasing the free flow of ideas and messages. On this basis, the State law, by banning certain donations, might have the indirect effect of increasing the diversity and quality of political communications during a State election period. Although, again, whether this would have any impact on how people vote in Commonwealth elections is doubtful.

No such analysis or assessment of the impact of the law in question in *Unions NSW* was made by the High Court. It did not explore *how* the law would burden the freedom of political communication needed to support Commonwealth elections and referenda. If the laws had been directed at the *content* of political communications, then this would have been more plausibly capable of affecting the way people might vote in Commonwealth elections and referenda. However there was no assessment about how a law directed at potential fund-raising sources for parties in relation to State elections would have such an effect. Reliance was simply placed upon the indivisibility of Commonwealth and State political communication. This was so, even though the plurality observed that ‘*generally speaking*, political communication cannot be compartmentalised’,³⁵ thereby admitting that there may be occasions upon which it can be compartmentalised.

The burden on political communication

Related to the above assessment is the question of whether the law amounted to a burden on political communication. The plurality avoided the difficult issue of whether the making of a political donation itself amounts to a political communication,³⁶ by instead

³⁵ [2013] HCA 58, [27] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

³⁶ [2013] HCA 58, [37] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

relying on the potential reduction of resources to a political party or candidate as amounting to the burden on political communication.³⁷

The plurality noted that the effect of s 96D was to restrict the funds available to political parties and candidates by restricting the source of those funds. It observed that public funding does not support the entirety of political advertising spending up to the cap and that parties and candidates would need to fill the gap. It then made the leap in logic that: ‘It follows that the freedom is effectively burdened’.³⁸

Keane J took a similar approach. He noted the statement of Hayne J in *Monis* that an effective burden means ‘that the effect of the law is to prohibit, or put some limitation on, the *making* or the *content* of political communications.’³⁹ Keane J then concluded that the limiting of *funds* available to political campaigns is therefore a burden.⁴⁰ The logical connection between the two was not explained.

Although he did not expressly decide that the making of a political donation in itself amounts to a political communication, some of his remarks seem to assume that this is the case. Keane J contended that prohibiting some sources of donations ‘favours other sources’ and that this ‘discrimination is apt to distort the flow of political communication within the federation’.⁴¹ Later, this turned into favouring and disfavouring ‘sources of political communication’ and hence distorting the flow of political communication.⁴² He went on to argue that corporations are ‘accepted sources and conduits of political information’ and seemed to believe that prohibiting corporations from making donations affects their role as a ‘source’ or ‘conduit’ of political communication.⁴³

It is difficult to see how this could be so, unless the making of a donation itself amounts to the making of a political communication. Clearly, even if corporations cannot make political donations, they will remain the primary source and conduit for political communications (through advertising as well as news and current affairs reporting). The banning of political donations from corporations does not prevent this at all. The only other impact it would have on corporations would be to prevent them from donating to other third-party campaigners, such as business groups, for them to run political campaigns. But corporations can be effective third-party campaigners in their own right if they use their commercially acquired funds to run a campaign.

As for the claim that a law limiting the number of potential sources of political campaign funding amounts to a burden on political communication, the primary difficulty here is the remoteness of the connection. If the making of a donation is not itself a political communication, then banning it does not prevent or limit the *making* or the *content* of

³⁷ [2013] HCA 58, [38] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

³⁸ [2013] HCA 58, [38] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

³⁹ [2013] HCA 58, [119] (Keane J) referring to *Monis v The Queen* (2013) 87 ALJR 340, 367 [108] [my emphasis].

⁴⁰ [2013] HCA 58, [120] (Keane J).

⁴¹ [2013] HCA 58, [137] (Keane J).

⁴² [2013] HCA 58, [140] (Keane J).

⁴³ [2013] HCA 58, [142] (Keane J).

political communications. It only limits the number of potential sources from which money can be raised to fund communications. As noted above, there are still 15 million Australian voters from whom donations can be raised.⁴⁴

Many laws have the potential to reduce the amount that can be spent on political campaigning. Taxes imposed upon candidates or parties will have a more direct effect to the extent that they reduce the resources available to pay for political advertising. Does the *Income Tax Assessment Act* or the imposition of the goods and services tax in relation to political advertising amount to a burden on political communication? At what point is the connection too remote?

The plurality justified its analysis by observing that the ‘same conclusion’ was reached in *Australian Capital Television Pty Ltd v Commonwealth* (‘ACTV’) regarding the restrictions placed upon political advertising.⁴⁵ This is incorrect. ACTV did not involve the restriction of potential sources for raising money to spend upon political advertising. Instead, the relevant law directly prohibited paid electoral advertising and provided for ‘free’ advertising, as allocated. There is a vast difference between the two laws. The law in ACTV prohibited the *making* of political communications and imposed controls over the *content* of permitted political communications. In contrast, the law in *Unions NSW* did not prohibit or control any political communications at all – it simply limited potential sources of funding.

The plurality noted that the caps on the amount of political donations and the caps on expenditure also burden the implied freedom,⁴⁶ although they were not challenged in this case. While it has been more commonly accepted in other countries that expenditure limits may burden political communication,⁴⁷ caps on donations have been considered less likely to do so, because political parties are still able to fund their political communications. As the US Supreme Court noted in *Buckley v Valeo*, the only effect of a cap of \$1000 on donations by individuals was to require the political parties and candidates to raise funds from a wider field of people. They could still raise large amounts if they had sufficiently broad public support.⁴⁸ Indeed, this one of the purposes of imposing a cap, rather than eliminating all political donations and providing full public funding instead. It is intended to place pressure on political parties to connect with constituents and gain their electoral and financial support through good policies and worthy candidates. The imposition of caps on donations and the prohibition of some sources of donations are not intended to reduce the quantity of political communication (this being the role of expenditure caps), but rather to give incentives to parties to gain broader public support.

⁴⁴ Political parties, which have access to electoral rolls and have the mechanisms and administration available to be able to check the sources of donations, are far better equipped to raise money from individuals than third party campaigners, such as community groups, as noted above. They may also rely on public funding for three-quarters of their expenditure, unlike third-party campaigners.

⁴⁵ [2013] HCA 58, [39] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

⁴⁶ [2013] HCA 58, [41] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See also Keane J at [136].

⁴⁷ *Buckley v Valeo* 424 US 1 (1976), 14-21; *Harper v Canada* [2004] 1 SCR 827.

⁴⁸ *Buckley v Valeo* 424 US 1 (1976), 22.

Legitimate end

The other interesting aspect of the *Unions NSW* case is the High Court's focus on whether or not there was a legitimate end against which the proportionality of the law could be tested in accordance with the second limb of the *Lange* test. This raises again the very interesting question of what is a legitimate end, by what criteria it is assessed and by whom it should be decided.

What if the legitimate end was claimed to be 'a level playing-field'?⁴⁹ Should all political parties be treated as equal, or is politics inherently unequal in nature, with some parties attracting more support than others? Is it legitimate to impose financial equality or any other kind of equality on political parties? The US Supreme Court has contended that as the Constitution confers on the people, rather than Congress, the role of choosing their representatives, it is a 'dangerous business' for Congress to use election laws to level electoral opportunities and choose which strengths should be permitted to contribute to the outcome of the election and which should not.⁵⁰ A similar view might be taken in Australia to the election of Houses of Parliament that must be 'directly chosen by the people'.

What if the NSW Government had said that the legitimate end of the law was to break the links between the unions and the ALP and to make it harder for the ALP to fund its election campaigns? Intuitively, we know that the High Court would not accept that as a legitimate end, but the High Court has never articulated by what criteria a legitimate end is to be identified.

Instead, the NSW Government took the more orthodox approach of nominating an ostensible purpose of seeking to reduce or eliminate the risk or perception of undue influence or corruption as a result of political donations. Normally, the legitimacy of this end is accepted by the Court and then in the second limb of the *Lange* test, the question is asked whether the law is reasonably appropriate and adapted to achieve that legitimate end in a manner that is consistent with the system of representative and responsible government required by the Commonwealth Constitution. The point of this test is to determine whether the law is really for the ostensible purpose. If the law is disproportionately burdensome, then it would appear that it was actually enacted to achieve a different purpose.

The purpose nominated by the government responsible for the impugned law is described above as an 'ostensible' purpose, because for the most part it is apparent that it was not the real purpose and that is the whole reason for the case. For example, the plurality noted that the High Court found in *Castlemaine Tooheys*⁵¹ that the legitimate end was the

⁴⁹ See the reference by the plurality to the 'level playing field' as being a possible legitimate end in *ACTV*: [2013] HCA 58, [39] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See also the observation by Keane J at [136] that caps on electoral expenditure 'may reasonably be seen to enhance the prospects of a level electoral playing field'.

⁵⁰ *Davis v Federal Election Commission* 554 US 724 (2008).

⁵¹ *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436.

conservation of energy resources and amelioration of litter problems.⁵² It was quite clear at the time, however, that the purpose was actually to protect a local beer brewer from interstate competition. But everyone pretended it had an environmental purpose, to sustain the niceties, and the Court knocked the law down on the basis that it was not reasonably appropriate and adapted to achieve that legitimate end.

The curious thing about *Unions NSW* is that the plurality refused to play the game as normally played. It could have simply concluded that the laws in question were not reasonably appropriate and adapted to achieve a legitimate end of avoiding the risk or perception of undue influence or corruption. Instead, it took the unprecedented step of pointing out that there was no legitimate end for the laws at all.⁵³ This is tantamount to saying that the Emperor has no clothes.

Why did their Honours take this unusual approach? Perhaps it was because the laws in question were so flagrant in their political attack⁵⁴ that the Court was not even prepared to give them the fig leaf of a legitimate end. It was, however, sufficiently polite not to point to the ‘illegitimate end’ of the laws, and simply to say that the court could not even speculate upon what their intended purpose was at all!⁵⁵

It does provide a lesson for governments – if a government intends to enact laws that will have the effect of burdening political communication, then it must first work out some kind of legitimate end that it can be plausibly argued that those laws support and it must be able to show that those laws are reasonably appropriate and adapted to advance that particular end.

The NSW Government might have had a chance at arguing that the legitimate end for the aggregation provision was to ensure that the laws applied fairly to all political parties and the expenditure caps were not thwarted. However, to get there, its law would have had to apply fairly to *all* parties that hived off campaign expenditure to other bodies, not just one of them. Moreover, as the High Court noted, just because unions may have similar interests to the Labor Party, does not mean that they are effectively the same body or that their objectives are necessarily the same.⁵⁶ The aggregation of their expenditure was therefore not justified.

Where to from here?

Where does this leave political finance laws? While the High Court accepted that caps on political donations and expenditure did amount to burdens on political

⁵² [2013] HCA 58, [48] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

⁵³ [2013] HCA 58, [53] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). Compare Keane J at [141] who just applied the ordinary test against the ‘rationale identified by the defendant’.

⁵⁴ Note that even conservative groups, such as the Institute of Public Affairs, raised concern about the partisan nature of the laws: Chris Berg, ‘O’Farrell’s Campaign Finance Reforms are Abominable’, *The Drum*, ABC, 15 February 2012: <http://www.abc.net.au/unleashed/3842514.html>.

⁵⁵ [2013] HCA 58, [56] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

⁵⁶ [2013] HCA 58, [63] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); [165] (Keane J).

communication,⁵⁷ it also hinted that such laws would be regarded as reasonably appropriate and adapted to achieve the legitimate end of avoiding the risk or perception of corruption and undue influence. Keane J also suggested that caps might be seen to ‘enhance the prospects of a level playing field’.⁵⁸ Such laws would therefore most likely survive, if challenged, and could therefore be enacted in other States and at the Commonwealth level, as long as they were carefully calibrated.

Laws that ban all political donations are likely to be invalid unless it can be shown that it is a proportionate response to actual cases of corruption.⁵⁹

Laws that ban certain groups from donating will depend for their validity on whether they can be shown to be advancing a legitimate end. Hence, it is possible that the laws that ban property developers from making political donations are valid, but it would need to be shown that such laws are still reasonably appropriate and adapted to the avoidance of corruption in the light of the existence of caps upon donations.

Most importantly, the case provides a lesson for governments not to try to be too clever in manipulating electoral laws to their advantage. Where the courts have a degree of discretion in applying a proportionality test, they do not take kindly to such action. Such is the price, and the virtue, of the separation of powers.

⁵⁷ [2013] HCA 58, [41] and [61] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); [136] (Keane J).

⁵⁸ [2013] HCA 58, [136] (Keane J).

⁵⁹ [2013] HCA 58, [59] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).