Committee Secretary
Joint Standing Committee on Electoral Matters
By email: em@aph.gov.au

21 February 2017

Dear Secretary,

Supplementary submission to Joint Standing Committee on Electoral Matters' Inquiry into and report on all aspects of the conduct of the 2016 Federal Election and matters related thereto

This supplementary submission deals with the constitutional issues relating to the implied freedom of political communication posed by bans on 'foreign' political donations.

The two key High Court decisions in this respect are *Unions NSW v New South Wales*[1] and *McCloy v New South Wales.*[2] In *McCloy,* the joint judgment of French CJ, Kiefel, Bell and Keane JJ recasted the test for determining whether a law breaches the implied freedom of political communication in these terms:

> (T)he question whether an impugned law infringes the freedom requires application of the following propositions derived from previous decisions of this Court and particularly *Lange v Australian Broadcasting Corporation* and *Coleman v Power*:

A. The freedom under the Australian Constitution is a qualified limitation on legislative power implied in order to ensure that the people of the Commonwealth may "exercise a free and informed choice as electors." It is not an absolute freedom. It may be subject to legislative restrictions serving a legitimate purpose compatible with the system of representative government for which the Constitution provides, where the extent of the burden can be justified as suitable, necessary and adequate, having regard to the purpose of those restrictions.

B. The question whether a law exceeds the implied limitation depends upon the answers to the following questions, reflecting those propounded in *Lange* as modified in *Coleman v Power*:

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[1] *Unions NSW v NSW* 252 CLR 530 ('*Unions NSW*').
[2] (2015) 89 ALJR 857 (7 October 2015) ('*McCloy*').

1. Does the law effectively burden the freedom in its terms, operation or effect?

   If "no", then the law does not exceed the implied limitation and the enquiry as to validity ends.

2. If "yes" to question 1, are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government? This question reflects what is referred to in these reasons as "compatibility testing".

The answer to that question will be in the affirmative if the purpose of the law and the means adopted are identified and are compatible with the constitutionally prescribed system in the sense that they do not adversely impinge upon the functioning of the system of representative government.

   If the answer to question 2 is "no", then the law exceeds the implied limitation and the enquiry as to validity ends.

3. If "yes" to question 2, is the law reasonably appropriate and adapted to advance that legitimate object? This question involves what is referred to in these reasons as "proportionality testing" to determine whether the restriction which the provision imposes on the freedom is justified.

   The proportionality test involves consideration of the extent of the burden effected by the impugned provision on the freedom. There are three stages to the test – these are the enquiries as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses:

   suitable — as having a rational connection to the purpose of the provision;

   necessary — in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;

   adequate in its balance — a criterion requiring a value

> judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.
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> If the measure does not meet these criteria of proportionality testing, then the answer to question 3 will be "no" and the measure will exceed the implied limitation on legislative power.[3]

In *Unions NSW,* the High Court struck down section 96D(1) of *Election Funding, Expenditure and Disclosures Act 1981* (NSW) on the ground that it infringed the implied freedom. This section provided that:

> 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.

The main basis of this finding of invalidity was that there was no rational connection between the provision and the anti-corruption purposes of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW).[4] This was principally because non-electors who are *part of the Australian community* had a legitimate interest in the Commonwealth governmental processes. As the joint judgment of French CJ, Hayne, Crennan, Kiefel and Bell JJ put it:

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

[3] Ibid [2].
[4] *Unions NSW,* 559. See also *McCloy* [9].

> parties and candidates may seek to influence such persons or entities because it is understood that they will in turn contribute to the discourse about matters of politics and government.[5]

While the judgments of the High Court in *Unions NSW* and *McCloy* clearly recognize the legitimate interest of non-electors in the Australian community in Commonwealth governmental processes, they do *not* mean that the ability of non-electors in the Australian community to engage in political communication cannot be regulated - they along with electors can be subject to laws burdening the implied freedom of political communication if these laws pursue anti-corruption purposes in a manner compatible with the freedom.

Of particular note here is the broad approach taken by joint judgment in *McCloy* to the meaning of corruption. Three types of corruption were identified in this judgment: 'quid pro quo' corruption; 'clientelism' corruption; and 'war-chest' corruption. The first type occurs when political contributions secure specific favours from the recipient public official. The second, 'clientelism' corruption, 'arises from an office-holder's dependence on the financial support of a wealthy patron to a degree that is apt to compromise the expectation, fundamental to representative democracy, that public power be exercised in the public interest'.[6] While the first two types of corruption 'threaten the quality and integrity of governmental decision-making', 'war-chest' corruption arises when 'the power of money . . . pose(s) a threat to the electoral process itself'.[7] Here the joint judgment favourably cited the judgment of Lord Bingham in *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and* Sport *('Animal Defenders*'). for his Lordship's view that 'in a democracy it is highly desirable that the playing field of public debate be so far as practicable level'. [8]

It was in part because of this broad approach towards the meaning of 'corruption' that the joint judgment concluded that caps on political donations under Division 2A, Part 6 of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW); the ban on indirect campaign contributions exceeding $1,000 under section 96E of the same Act; and the ban on 'property developers' under Division 4A, Part 6 of the Act did not infringe the implied freedom of political communication. The upholding of the ban on 'property developers' makes clear that provisions of selective scope are not necessarily in breach of the implied freedom; they can be compatible with the freedom if there is a demonstrated justification for such selectivity.[9]

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[5] Ibid 551-552 (emphasis added; footnotes omitted). See also *McCloy* [26].
[6] *McCloy* [36].
[7] Ibid [38].
[8] ibid [39].
[9] Ibid [63].

Applying these principles to specific regulatory measures, a federal provision framed along the lines of (invalid) section 96D(1) of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) will very likely be unconstitutional for infringing the implied freedom. A ban on political donations from foreign governments, on the other hand, is unlikely to experience such an outcome – these governments are not part of the Australian community and, further, there are significant considerations of national interest for limiting their influence in the Australian political process.

A ban on foreign-sourced political donations (donations being sourced from overseas) like the ban on 'gifts of foreign property' imposed through sections 267-270 of the *Electoral Act 1992* (Qld) is also likely to be compatible with implied freedom. The principal justification for such a ban does not lie with any assumption that those overseas (including Australian citizens and voters) do not have a legitimate interest in the Australian political process. Rather it is one of compliance: enforcement of Australian laws overseas is practically impossible. Such a ban, in my view, is necessary to ensure the integrity of Australia's political finance laws including the present disclosure obligations. It is an anti-avoidance provision like the ban on indirect campaign contributions exceeding $1,000 under section 96E of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW), which was upheld in *McCloy*.[10]

The ban on 'gifts of foreign property' proposed under the Commonwealth Electoral Amendment (Donation Reform and Transparency) Bill 2017 (Cth) strongly appears to mirror the Queensland ban.[11] As such, it is unlikely they will fall foul of the implied freedom of political communication.

I hope this material will be of assistance to the Committee.

Thank you.

Yours sincerely,

Associate Professor Joo-Cheong Tham
Melbourne Law School

[10] See [22].
[11] Proposed sections 306-306AD of the *Commonwealth Electoral Act 1918* (Cth))