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JOINT MEMORANDUM OF ADVICE

RE - CONSTITUTIONAL ADVICE FOR QUEENSLAND-BASED CHARITIES AND NOT-FOR-PROFITS ON THE

ELECTORAL AND OTHER LEGISLATION (ACCOUNTABILITY, INTEGRITY AND OTHER MATTERS) AMENDMENT BILL 2019

INTRODUCTION

1. On 28 November 2019, the Honourable Yvette D'Ath MP, Attorney-General and Minister for Justice introduced the *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019* (the **Bill**). The Economics and Governance Committee has been nominated to conduct a public inquiry into the Bill.[1]

2. The Bill is an 'amending Act' only.[2] The Bill amends various Acts on the Queensland statute book, relevantly, for present purposes, the *Electoral Act 1992* (Qld) (the **Electoral Act**). It must be read with the current provisions of the Electoral Act.

3. The Human Rights Law Centre (the **HRLC**) seeks our view on whether particular provisions of the Bill might be impugned on the basis that they impermissibly burden the implied freedom of political communication (the *implied freedom*).

4. The Bill amends the Electoral Act (by amending existing provisions and inserting new provisions) to regulate funding and expenditure for State elections. In summary, the Bill:

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[1] Queensland Parliament, https://www.parliament.qld.gov.au/work-of-committees/committees/EGC/inquiries/current-inquiries/Electoralexpenditurecaps (accessed 17 December 2019).
[2] *Acts Interpretation Act 1954* (Qld) section 22C(4).

a. introduces a new regulatory scheme for 'political donations' (beyond mere disclosure of obligations and prohibiting certain types of donations such as property developer donations) – 'political donations' that are given to 'participants' in elections (for the meaning of which, see below) will be subject to 'caps' which operate for a 'donation cap period' (usually 4 years);

b. introduces a new regulatory scheme for 'participants' in elections who incur electoral expenditure – 'electoral expenditure' is capped depending on the type of participant that incurs the expenditure for a particular 'capped expenditure period' (usually 1 year); and

c. creates administrative obligations for entities who make political donations, or provide amounts of money to participants in elections for the purpose of 'electoral expenditure'.

5. ***Participants in elections***: The Bill regulates the receipt and expenditure of money for 'participants' in an election. A participant is either a candidate, a registered political party or a third party: new s 197A. Third parties may be further divided into two categories: 'registered third parties' and 'unregistered third parties': new ss 197A(1)(c) and (1)(d). Third parties who incur electoral expenditure of more than $1,000 must be registered with the Electoral Commission: new s 297(1).

THE BILL IN DETAIL

The donation cap provisions

6. Clause 22 of the Bill inserts new part 11 division 6 (***new pt 11 div 6***) into the Electoral Act. New pt 11 div 6 imposes 'donation caps' on 'participants' in elections during 'donation cap periods'.

7. ***Donation cap period***: a donation cap period is, other than for a by-election, a four-year period that begins 30 days after the day of the last general election and ends 30 days after the polling day for the election: new s 247.

8. ***Political donation***: so far as third parties are concerned, the definition of political donation is given by new s 250. A political donation is a gift that is made to, or for the benefit of, a third party to do one of the following things:

a. enable the third party (directly or indirectly) to make a gift to, or for the benefit of, a registered political party or a candidate in an election;

b. reimburse the third party (directly or indirectly) for making a gift to, or for the benefit of, a registered political party or a candidate in an election;

c. enable the third party (directly or indirectly) to incur electoral expenditure;[3] or

[3] The third parties to whom this advice relates are more likely to be impacted by restrictions which restrict the ability to engage in their own 'electoral expenditure'. While entities such as trade unions and employer or industry associations may be likely to make donations to candidates or parties or engage in electoral expenditure in order to influence support for a political party or a candidate for election, many NGOs will be concerned to raise for consideration and action by voters issues upon which major political parties may not be particularly

d. reimburse the third party for incurring electoral expenditure.

9. ***Donation cap*:** the amount of the donation cap for a particular participant in an election depends on the type of participant to whom the donation is being made. For registered political parties and registered third parties, the donation cap is $4,000: new ss 252(1)(a) and (1)(c). For candidates, the donation cap is $6,000: new s 252(1)(a). The donation cap is adjusted in accordance with the consumer price index for Brisbane: new s 253.[4]

10. ***Offences:*** new ss 254 to 256 makes it an offence for a person to make a donation to participants in elections above the donation cap during the donation cap period. The relevant offence that applies to a person making a donation in respect of third parties is set out in new s 256.

11. ***Recovery of unlawful donations:*** if a person receives a donation that is more than the applicable donation cap for the period, then the amount that exceeds the donation is payable to the State: new s 259A.

The electoral expenditure provisions

12. Clause 31 of the Bill inserts new part 11 division 9 (***new pt 11 div 9***) into the Electoral Act. New pt 11 div 9 imposes caps on participants in elections incurring 'electoral expenditure' during a 'capped expenditure period'.

13. ***Electoral expenditure*:** a lengthy and broad definition of 'electoral expenditure' is created by new s 199. The term electoral expenditure has a two-part test (a test of 'purpose' and a test of 'kind').

    a. *Purpose:* electoral expenditure must be incurred for, or related to the *purpose* of: (1) promoting or opposing (either directly or indirectly) a political party in relation to an election; (2) promoting or opposing (either directly or indirectly) the election of a candidate; or (3) to otherwise influence (directly or indirectly) voting at an election;[5]

    b. *Kind:* electoral expenditure must also be of one of the following *kinds*: (1) expenditure for designing, producing, printing, broadcasting or publishing an advertisement or other election material;[6] (2) expenditure for the direct cost of distributing an advertisement or other election material; (3) expenditure for carrying out an opinion poll or research; or (4) other expenditure prescribed by a regulation.

14. In the case of third parties, the definition has an extra requirement that expenditure is only 'electoral expenditure' if the dominant purpose for which it was incurred is one of: (1)

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focussed. (NGOs will be also disproportionately impacted because the source of their electoral expenditure is more likely to be from political donations.)

[4] A donation cap will impact differentially upon different political parties and different third parties. Third parties which have industrial concerns may be able to engage in making electoral expenditure without ever having to raise a single donation. On the other hand, a charity concerned about a proper SunSafe campaign may have to raise by donation any money it wishes to devote to electoral expenditure. A political party that has a large number of strong affiliates may not need to raise money by way of political donation. (See, new s 201(3)(c): a 'gift', for the purposes of a political donation, does not include an amount paid for membership of, or affiliation with, a political party.)

[5] The third element of the 'purpose test' will often be particularly relevant to third parties in that a third party may be seeking to influence voters (and, through them, political parties) by asking voters to place weight on particular issues when casting their votes.

[6] A number of examples are given of this type of expenditure, such as: radio, television, SMS or email broadcasts; publication in newspapers, magazines, billboards, how-to-vote cards and distribution in letters.

promoting or opposing (either directly or indirectly) a political party in relation to an election; (2) promoting or opposing (either directly or indirectly) the election of a candidate; or (3) to otherwise influence (directly or indirectly) voting at an election: new s 199(5).[7]

15. ***Expenditure cap*:** the amount of the electoral expenditure cap depends on the type of participant that incurs the electoral expenditure. It increases with the consumer price index for Brisbane: new s 218F.

    a. *Registered political parties:* A registered political party's expenditure *generally* is capped at $92,000 multiplied by the number of districts in which the party has endorsed a candidate: new s 281C(1). This gives a total potential *general cap* of $8.556 million for a registered political party that endorses a candidate in *each* electorate.[8] A cap of $92,000 applies for any one particular electoral district.

    b. *Candidates*: a candidate, endorsed by a registered political party, has an expenditure cap of $58,000: new s 218C(2). In a by-election, that amount is increased to $87,000: new s 218C(3). An independent candidate has a cap of $87,000 whether the particular election is a general election or a by-election: new s 218D.

    c. *Third parties:* Third parties who are *registered third parties* have a total general cap of $1 million and $87,000 for an electoral district: new s 281E. (Note that this operates differently to the cap on political parties. A political party's cap expands by $92,000 for every time it endorses a candidate but the money can be spent anywhere. A registered third party's expenditure is limited, overall, to a million dollars but, it would appear, the expenditure directed at voters in a single electorate is also limited to $87,000. A third party with a regional issues focus might, therefore, be much more restricted.) Third parties who are not 'registered third parties' are only permitted to incur $1,000 worth of electoral expenditure: new s 281H. If a third party incurs more than $1,000 worth of electoral expenditure, it must become a registered third party.[9]

16. ***Capped expenditure period*:** a capped expenditure period for amounts of electoral expenditure starts, other than in a by-election or in an extraordinary general election, 1 year before the next normal polling day and ends at 6pm on the polling day for the election.[10]

17. ***Offences:*** if a third party or a person acting with the third party's authority exceeds the third party's expenditure cap, then the person commits an offence and is liable to a penalty of 200 penalty units: new s 281G. If an unregistered third party incurs electoral expenditure that is more than $1,000, then the unregistered third party commits an offence: new s 281H.

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[7] This is particularly important for charities and NGO interest groups as there is likely to be significant crossover between campaigning to influence people's behaviour, generally, and campaigning which affects people's behaviour as electors. Amnesty International's campaigns against torture and capital punishment provide an example of this kind of crossover.

[8] There are currently 93 electoral districts in Queensland: *Electoral Act 1992* s 34. ($92,000 multiplied by 93 equals $8.556 million).

[9] Registration brings with it many obligations and potential liabilities which are discussed elsewhere in the text.

[10] New s 280. In a *by-election*, the capped expenditure period starts the day that the writ for the by-election is issued and ends at 6pm on the polling day. In an *extraordinary general election*, the capped expenditure period starts the day that the writ for the extraordinary general election is issued.

18. ***Recovery of unlawful expenditure:*** if a person incurs electoral expenditure in contravention of the expenditure cap, then an amount that is twice the amount over the cap is recoverable by the State as a debt payable to the State: new s 281J.

Other administrative provisions

19. The Bill creates administrative obligations on participants in elections. For example, clause 17 inserts new divisions into part 11 of the Electoral Act.

20. ***Agents:*** new pt 11 div 2 requires election participants, including third parties, to register agents. Agents have particular obligations, and are exposed to particular liabilities, under the amendments contained in the Bill. For example, agents have obligations to keep the Electoral Commission informed about a participant's State campaign account.

21. ***State campaign accounts***: new pt 11 div 3 is about State campaign accounts. Third parties that are registered for an election are required to keep a separate bank account (called a 'State campaign account') for the election: new s 215(1). All political donations must be paid into a participant's State campaign account: new s 219. The election participant must keep records of political donations of property (other than gifts of money) that cannot be deposited into a State campaign account: new s 220. Any participant that incurs electoral expenditure must pay for the electoral expenditure from the participant's State campaign account: new s 221A.

22. ***Returns of electoral expenditure:*** new s 283 requires that, within 15 weeks after the polling day for an election, the agent of a registered political party, candidate in the election, registered third party for the election or a third party required to be registered for the election, must give the Electoral Commission a return (in the approved form) about the electoral expenditure incurred for the election. A return is required, even if no electoral expenditure was incurred for the election by or for the election participant: new s 283(4).

23. ***Notice obligations:*** new s 258 requires participants in an election to give a person who makes a political donation a receipt for the donation. The receipt must include specific information (such as the name of the participant and an acknowledgement of the donation) along with a statement, in the approved form, that notifies the person of the circumstances in which it is an offence, under ss 254, 255 and 256 for a person to make a political donation to, or for the benefit of, a registered political party or a candidate or a third party. Failure to comply with this provision is an offence.

Interaction between 'political donations' and 'electoral expenditure'

24. A gift, given by a donor, to a participant in an election for the participant to use on electoral expenditure is always a political donation: new section 250(1)(a) and 250(1)(b)(iii)-(iv). However, that does not necessarily mean that all electoral expenditure is sourced through donations.

25. Electoral expenditure might be funded otherwise than by a political donation. For example, a proprietary limited company can register as a registered third party and can allocate $1 million from retained earnings to expend on electoral expenditure.

26. Under the proposals in the Bill, no individual or body corporate will be able to donate to any one or more participants in a capped election an amount that is greater than the donation cap for the participant to expend on electoral expenditure. There is no *express* prohibition, up to the electoral expenditure cap, on an entity using funds to incur electoral expenditure *otherwise* than through political donations. However, in the case of registered political parties and candidates (but not third parties),[11] because of the *requirement* for each payment of electoral expenditure to be made from a participant's State campaign account, it will not be possible for a participant in an election to incur electoral expenditure otherwise than by those funds set out in new s 216. While most of these sources of funds are political donations or sourced indirectly from political donations, they include moneys received by way of the candidate's own funds and membership fees and affiliation fees (in each case up to $500). Political parties may receive other donations and other amounts in affiliation and membership fees and allocate those funds to non-electoral expenditure such as the cost of renting office space or buying a new building.

Policy rationale for the proposals

27. The Electoral Act does not contain an objects clause and the Bill does not amend the Electoral Act to insert an objects clause. Instead, the policy rationale for the amendments are wholly contained within the explanatory notes. The policy rationale for the amendments, including how they operate, are analysed under the 'compatibility testing' heading of the implied freedom analysis.

The implied freedom

28. The *Constitution* establishes a system of representative and responsible government in Australia. Sections 7 and 24 of the *Constitution* require that senators and members of the House of Representatives be 'directly chosen' by the people. That expression of 'direct choice', along with other provisions of the *Constitution*,[12] give rise to an implied freedom to communicate on political matters in Australia.[13]

29. The nature of the implied freedom was explained in *Cunliffe v The Commonwealth* (1994) 182 CLR 272 as being '*negative in nature: it invalidates laws and consequently creates an area of immunity from legal control, particularly from legislative control*'.[14]

30. Although the implied freedom inheres in the system of *federal* representative and responsible government established by the *Constitution*, political communication at a State level may also have a 'federal dimension'.[15] It was recognised in *Lange v Australian Broadcasting Corporation* ("Political Free Speech Case") [1997] HCA 25; (1997) 189 CLR 520 ('***Lange***') at 571-572 that the federal dimension of state political communication arises by implication in the Constitution.

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[11] New s 216(1) restricts the moneys that can be paid into a State campaign account but it only applies to registered political parties and candidates.
[12] Most notably sections 64 and 128.
[13] [1997] HCA 25; (1997) 189 CLR 520.
[14] *Cunliffe* (1994) 182 CLR 272 at 327 (Brennan J).
[15] See the discussion in *Unions NSW v New South Wales (No 1)* [2013] HCA 58 (***Unions (No 1)***) at [21] to [26].

The three-part 'test'

31. The test for whether a law impermissibly burdens the implied freedom of political communication is commonly referred to as the '*Lange-McCloy-Brown*' test, owing to the development that that test has undergone since it was first expressed as a two-stage inquiry in *Lange* (and refined in *Coleman v Power* (2004) 220 CLR 1), reformulated to a three-stage inquiry in *McCloy v New South Wales* [2015] HCA 34; (2015) 257 CLR 178 ('***McCloy***') and modified in *Brown v Tasmania* [2017] HCA 43; (2017) 261 CLR 328 ('***Brown***').

32. The three questions posed are as follows:

    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 inquiry as to validity ends.

    2. If 'yes' to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?[16]

    3. If 'yes' to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?[17]

33. The third question involves determining whether the restriction which the legislation imposes on the freedom is justified[18]. The question *may* be answered by application of a three-stage structured proportionality test which is as follows:

    a. Suitable – as having a rational connection to the purpose of the provision;

    b. Necessary – in the sense that there is no obvious and compelling alternative means of achieving the same purpose which has a less restrictive effect on the freedom; and

    c. Adequate in its balance – whether the extent of the restriction imposed by the law is outweighed by the importance of the purpose it serves.

34. If the law does not meet these criteria, then the answer to question 3 of the *Lange-McCloy-Brown* test will be 'no' and the law will exceed the implied limitation on legislative power.

Stage 1: Burden

35. The first question of the three-part *Lange-McCloy-Brown* test is whether the law 'effectively' burdens the implied freedom in its terms, operation or effect. Usually, this will be the easiest of the tests to satisfy.

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[16] This is known as 'compatibility testing'.
[17] This is known as 'proportionality testing'.
[18] *Brown* (2017) 261 CLR 328 at [123].

36. The Bill effectively burdens the implied freedom. It places limitations on the way in which entities can communicate on political matters by restricting the making of political donations or by engaging in electoral expenditure.[19] The consequences for engaging in speech outside of the Bill's regulatory scheme includes criminal sanctions.

Stages 2 and 3: Compatibility and proportionality testing

37. The second stage of the inquiry is to determine whether the purpose of the law is legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. With respect to the third stage of the *Lange-McCloy-Brown* test, in *McCloy*, the High Court stated that the difference between compatibility testing and structured proportionality testing is that '*the latter is a tool of analysis for ascertaining the rationality and reasonableness of the legislative restriction, while the former is a rule derived from the Constitution itself*'.[20] As outlined above, structured proportionality involves three considerations: suitability, necessity and adequacy in balance.

38. Arguments at the compatibility stage and at the structured proportionality stage can, and often do, overlap with one another. Often, considerations relevant to the legitimacy test are also analysed under the proportionality test.

39. Outlined below are two reasons why the second/third question in the *Lange-McCloy-Brown* test may be answered negatively. What follows is caveated by the fact that we have been asked to provide this advice in what is, essentially, a factual vacuum. The outcome of each specific case will turn on its facts. It is primarily for that reason that we do not consider it useful, for the purposes of this advice, to categorise these arguments into either being relevant to the compatibility or proportionality aspects of the *Lange-McCloy-Brown* test. That would be appropriate if we were advising on the prospects of a constitutional challenge by reference to a specific factual scenario.

40. ***The starting point***: Generally, measures adopted by a legislature the purpose of which is to ensure that there is a level playing field – or that each participant in an election is able to communicate on an even playing field – is a legitimate purpose for a law.[21] The High Court has been prepared to assume, or find, that caps on political donations and caps on electoral expenditure serve a legitimate purpose *as a general matter*. In *McCloy*, the High Court held that capping political donations has a legitimate purpose. In *Unions (No 2)*, the Court was prepared to assume that the capping of electoral expenditure *to a degree* had a legitimate purpose. They key question is whether a third party is left with a reasonable opportunity to present its case to voters.[22]

41. ***Argument 1: The proposal to subject third parties who spend more than $1,000 on electoral expenditure to detailed regulation, unjustifiably, impacts on the political discourse of many NGOs whose participation in political discourse is an important adjunct to their core activities and, thereby, offends against the implied freedom of political speech.***

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[19] Authority suggests that making donations is not, ipso facto, political speech. Rather, the impact on political communication is the inability of the donee to use the donation to engage in communication. See *McCloy* (2015) 257 CLR 178, [25].
[20] *McCloy* at [68] majority.
[21] *McCloy*, [44]-[46]
[22] *Unions (No 2)* per Gageler J at [101].

42. The $1,000 threshold for registration is very restrictive.[23] It is restrictive when measured against the donation cap as it applies to one person and restrictive when measured against the expenditure caps in the legislation. As a trigger for third party charities and NGOs to be subjected to elaborate and expensive regulatory requirements, the threshold is vanishingly tiny. It is hard to conceive of any expenditure on political communication that would not exceed the threshold amount.

43. It is hard to understand how any third party incurring electoral expenditure in moderate amounts can impact on the institution of representative government in a negative way. Amnesty International spends much of its resources seeking to convince foreign and domestic governments to observe the rule of law and not to torture people. In certain periods of 12 months prior to an election period, Amnesty may choose to bring those matters to the attention of voters asking voters to take them seriously in deciding how to vote. If Amnesty spent $100,000 on persuading electors, it is difficult to see how that would in any way contribute to the corruption of government processes. It seems unjustifiable for Amnesty to have to distinguish between donations for its core work and donations for its electoral campaigning. It seems unreasonable for Amnesty to have to spend tens of thousands of dollars on auditors and accountants and warning letters to its donors to ensure it avoids committing criminal offences under the new provisions.

44. A local North Queensland conservation group may not usually engage in electoral politics. In a particular election year, a proposed local development may be controversial and be perceived by the group as creating hazards to the local Cassowary population. The group may raise $10,000 to run a local newspaper and letterbox campaign which urges voters to support candidates who support the environment and oppose the development. In this case, also, there can be no threat to the integrity of elections and government decision making from a $10,000 campaign. However, the threat of compliance costs and the need to engage in all that comes with registration may inhibit the local people from engaging in the political debate. The discouragement of local interest groups from taking part in political discussion is likely to be a substantial loss of political discourse.[24]

45. The SunSafe charity example may represent a body similar to both Amnesty and the local conservation group. Encouraging voters to vote for those candidates who take skin cancer prevention seriously may be a minor adjunct to the charity's overall work. Nonetheless, engaging in a relatively small amount of electoral campaigning will come with administrative obligations and costs which are likely to hamper the charity's overall work and discourage its participation in the political debate.

46. There are many examples of ways in which the $1,000 threshold for regulation is likely to impose a significant burden on political discussion. It seems an extraordinarily low threshold if the objective is to make the playing field level and to avoid big money distorting the electoral process and politics.

47. One can equally imagine a local undertaker's firm or farming group moved to participate in a small way in drawing attention to issues they feel strongly about being discouraged by

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[23] The majority in *Unions (No 2)* when discussing the Supreme Court of Canada's decision in *Harper v Canada (Attorney-General)* [2004] 1 SCR 827 descripted expenditure caps of $3,000 in a given electoral district or $150,000 nationally as "very restrictive".

[24] While each contribution may be minor, the cumulative impact on groups across the State upon a multiplicity of issues is likely to be great both conceptually and by any measurable parameter. When one compares this impact to the impact of the law under consideration in *Coleman*, the burden upon political fee speech is very significant.

the need to fill out forms and to file returns concerning every drop of election expenditure incurred.

48. The amount of the expenditure threshold, and whether it results in an infringement of the implied freedom is answered initially by considering questions of compatibility. As Gageler J said in *Unions (No 2)* (in respect of expenditure caps):

> [whether] the amount of each cap can be justified on the basis that each amount is reasonably appropriate and adapted to advance the objective of substantive fairness in a manner compatible with maintenance of the constitutionally prescribed system of representative and responsible government.[25]

49. Although the question of compatibility is a question of law, the answer to the question will heavily depend on facts. The key issue becomes whether *in fact* the legislation imposes an expenditure threshold for registration and resulting regulation that is so restrictive as to impermissibly burden the implied freedom.[26] But the burden of proving that the threshold amount is not too restrictive rests with the supporter of the law.[27] In that sense, Queensland has the 'onus' of showing that the impact on the political free speech of third parties of subjecting them to an intense regulatory regime where their electoral expenditure is miniscule is justified to achieve the putative legislative purpose.

50. Further, although Gageler J would have struck the New South Wales third party electoral expenditure cap provisions down at the compatibility stage, the plurality's approach shows that, assuming the Bill has *some* legitimate purpose, a spending threshold as part of a regulatory regime that is ostensibly directed at promoting fairness, but results in disproportionate restrictions, can still impermissibly burden the implied freedom.

51. Nothing in the Bill shows that Queensland has considered the amounts that third parties *need* or indeed *routinely spend* on electoral expenditure. The rationale of indexing amounts in the 2011 Act does not reveal any deeper analysis. The explanatory notes to the 2011 are similarly silent on any evidence considered by the Parliament to arrive at the threshold amount on the one hand or even the third party overall electoral expenditure cap on the other.[28] Similarly, the ENs show a paucity of analysis concerning where the amendments come from – for example, there was no CCC inquiry, no parliamentary inquiry and, while there is a bald assertion that laws in other jurisdictions were considered, no comprehensive analysis of those laws appears to have been done.

52. Any not-for-profit entity that wishes to participate in the next election by paying for some kind of advertising has to choose between keeping its electoral expenditure *under* the $1,000 cap and subjecting itself to the whole regulatory regime by registering itself under the Electoral Act. With that latter choice comes the obligation to open a State campaign account, appoint an agent, comply with donor statement obligations and give returns to the Electoral Commission. The costs that come with these obligations will discourage many such charities and interest groups from participating and their voices will be lost to voters and the political representatives who are elected.

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[25] *Unions (No 2)* at [91].
[26] *Unions (No 2)* at [94].
[27] *Unions (No 2)* at [93].
28 Electoral Reform and Accountability Amendment Bill 2011, Explanatory Notes, https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2011-1588. However, the ENs to that Bill similarly explain, as in the current Bill, that '*any adverse effect of [the 2011 caps] is proposed to be offset by additional injections of public funding*'.

53. Although this advice does not have the benefit of instructions to confirm the hypothetical scenarios discussed in the context of this argument, we feel confident that very many smaller participants in the political debate will be discouraged and prevented from taking part because the cost and inconvenience of being registered is just too great. The threshold is not only low. It is absurdly low. Almost any form of advertising in a single town, whether by circulating flyers to a thousand letter boxes or advertising in a local newspaper, would almost certainly breach the threshold. Rather than levelling the playing field, the imposition of restrictions is likely to push charities and NGOs at the lower end of the expenditure continuum completely out of the political debate. It is impossible to see how this could constitute a legitimate objective or how it could constitute a justifiable burden on political discussion in Australia.

54. Consistently with Harper's case,[29] we consider that the threshold should be at least $50,000. Indeed, in our opinion, a threshold of $100,000 would not, conceivably, lead to any form of corruption or undermining of the system of representative government. This solution would, in our view, apply equally across the third party sector and would not delineate between different types, or characteristics of, third parties.

55. We have been asked to consider some alternative proposals for preventing the legislation from having unjustifiable impacts on the political free speech of third parties. One such alternative may be to exclude from the need to register as third parties (and to comply with the administrative requirements imposed by the Bill) those entities most likely to suffer hardship from the threshold amount for registration. Because registered charities are subjected to rigorous oversight pursuant to specific legislation,[30] they are likely to cause no threat to the integrity of electoral politics or representative government. Any attempts to sway voters are likely to be associated with promoting the central objectives of the charity as discussed above with regard to Amnesty International and the notional SunSafe charity. By excluding registered charities from reach of the legislation, many of the unintended and unjustifiable burdens on their free political speech can be avoided.

56. Another group of entities who could usefully be excluded from the reach of the proposals are small NGO interest groups. Interest groups whose annual income is less than $50,000 (and even $100,000) are likely to pose no threat to representative government by any politically directed expenditure in which they may engage. Significant unintended and unjustifiable burdens on free speech could also be avoided by excluding such small (defined by general income) non-profit interest groups. This could be done without harm to the effectiveness of the legislative proposals in terms of levelling the playing field, more generally, and protecting electoral politics from the distorting effects of large moneyed interests.

57. This is likely to be achieved because, not surprisingly, those bodies which are most likely to suffer from excessive administrative burdens are the entities which are least likely to pose a threat to honest government and fair elections.

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[29] See footnote 21 above.
[30] Administered by the Australian Charities and Not-for-Profits Commission.

Argument 2: Are the donation caps too low for charities and non-profit organisations?

58. The categories of participant in an election are explained in new s 197A. Candidates are those who stand for election. Registered political parties are those who endorse candidates for elections. A registered third party is a person who becomes registered under the registration provisions. An unregistered third party is an entity (which does not fall into the other categories) which 'incurs electoral expenditure': new s 197A(1)(d).

59. Third parties do not have any other common features. They are simply any entity (an individual, unincorporated association or a body corporate) that incurs electoral expenditure. The *type* of electoral expenditure is not important. Nor is the *source* of the funds used to incur the electoral expenditure.

60. The definition of political donation in new s 250(1) requires two actors. First, the *donor* who gives the gift to, or for the benefit of, the *recipient*. But a third party who incurs electoral expenditure from its *own* funds is not making a political donation for the benefit of *someone else*, which is an essential characteristic of a donation under new s 250. Neither is it dependent on donations in order to engage in electoral expenditure. It incurs 'electoral expenditure' on its own behalf.

61. Generally, the structure created by the existing Act with the amendments proposed by the Bill does much to level the playing field and to avoid the political process being distorted by those with large sums of money. The expenditure caps restrict political parties to less than $10 million in total electoral expenditure during the period of the cap. Candidates are prevented from using large personal fortunes to distort the electoral process by spending tens of millions of their own money to dominate all media spaces. And third parties, whether they be charities or NGOs, on the one hand, or trade unions, employer or industry groups or trading corporations, on the other, are each limited to spending no more than a million dollars in the cap period.

62. We do question, however, whether the donation caps are so low as to disadvantage NGOs and charities. The donation cap for donors to third parties and political parties is $4,000. We do not quibble with the different cap for donors to candidates of $6,000. We note, however, that the 'donation cap period' extends over four years, the whole period between one election and another. Any entity (individual, unincorporated association or body corporate), therefore, can donate *no more* than an average of $1,000 per year to an NGO or charity third party in political donations and an entity cannot make more than seven political donations of any amount to third parties.[31] So, in terms of political donations, an individual who is not enamoured of existing political parties is limited to an average of $5,000 in donations per year.

63. This means that NGOs who are actively engaged in political debate and make it their business to do so need at least 250 donors to raise money equivalent to the spending cap in one election. Smaller NGO third parties who may wish to spend much less than the expenditure cap must still seek out multiple donors (at least 25, each donating their personal cap amount) to raise an amount of $100,000 to publicise a matter of concern to that organisation. Many small organisations (championing important but not well-known or

[31] New s. 256

popular causes) are only effective because one or two donors can contribute several thousand dollars per year to the cause.

64. It seems unfair that a rich corporation or a rich individual can spend a million dollars running their own political campaigns while a minor philanthropist is restricted from donating to non-profit interest groups more than $5,000 per year in political donations.

65. As with the extremely low threshold for third party registration, it is very unclear as to why legislation that is so very restrictive of political donations to non-profit third parties is necessary to prevent corruption of parliamentary politics or distorting of electoral politics. It seems to create a particularly unlevel playing field as between charities and non-profit third parties compared to unions, employer groups, trading corporations and industry associations.

66. It seems to us arguable that such a restrictive cap on donations may offend against the implied freedom of political speech. For the reasons outlined above, raising the donation threshold would make a significant difference, in an equitable manner, to third parties and allow them to participate effectively in the political debate that occurs around election. Having said that, because the negative effects are most likely to impact registered charities (whose electoral expenditure is likely to be ancillary to their pursuit of their charitable objectives) and small NGOs (in terms of annual income) because they are more likely to be dependent on a small number of donors (and less able to access large numbers of donors), the exemptions we discussed above[32] are likely to lower the possibility that the donor caps proposed in the legislation will infringe the implied freedom.

CONCLUSION

67. It appears that the Bill represents the Queensland government's attempt to produce legislation that does not suffer from the same issues that resulted in New South Wales' version of similar legislative provisions being struck down by the High Court in *Unions (No 2)*. In our view, for at least the reasons outlined above, the Queensland government's attempt has fallen short of achieving that desired result and there is a risk that, if challenged, certain parts of the Bill may be held to be invalid. We have suggested possible changes to the proposals which are likely to ameliorate the difficulties we have identified.

Stephen Keim SC
Chambers

Kate Slack
Chambers

Arron Hartnett
Chambers

[32] [54]-[56]