IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY **No. S204 of 2018**

BETWEEN:

Unions NSW
First Plaintiff

New South Wales Nurses and Midwives' Association
Second Plaintiff

Electrical Trades Union of Australia, New South Wales Branch
Third Plaintiff

Australian Education Union
Fourth Plaintiff

New South Wales Local Government, Clerical, Administrative, Energy, Airlines & Utilities Union
Fifth Plaintiff

Health Services Union NSW
Sixth Plaintiff

and

State of New South Wales
Defendant

SUBMISSIONS OF THE UNIVERSITY OF NEW SOUTH WALES GRAND CHALLENGE ON INEQUALITY SEEKING LEAVE TO APPEAR AS AMICUS

PART I: CERTIFICATION

1. It is certified that this submission is in a form suitable for publication on the internet.

PART II: BASIS FOR APPEARING AS AMICUS

2. The University of New South Wales Grand Challenge on Inequality (**UNSW GCI**) seeks leave, as amicus curiae, to be heard and to adduce evidence as to constitutional fact. The source of the Court's power to grant leave is the inherent or implied

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jurisdiction given by Ch III of the Constitution and s 30 of the *Judiciary Act 1903* (Cth).

PART III: REASONS FOR LEAVE

3. The Court should grant the leave sought for the following reasons.

4. *First*, the Court has power to grant the leave sought. If there be doubt as to whether an amicus has leave to place evidence as to constitutional fact before the Court, then the application raises an issue of general importance which is addressed only the applicant.

5. *Secondly*, the submissions and material which the UNSW GCI wishes to put before the Court are not otherwise before the Court. In particular, the UNSW GCI puts the following submissions not addressed elsewhere:

   (a) the power to hear from amicus curiae in constitutional cases is broad and subject only to the condition that proper cause is shown;

   (b) the Court's power in respect of amicus curiae is broad enough to permit an amicus to place evidence before the Court relating to legislative facts;

   (c) the Court should receive the documents identified in paragraph 52 as evidence of the constitutional facts articulated below. The constitutional fact material referred to is all publicly available. It could have been referred to by the interveners.

6. Even if Court were not minded to receive the constitutional fact material, it is submitted that the Court could still address issues (a) and (b), which raise issues of general importance. Further, the second issue – which raises a point on which there is Court of Appeal authority – is one which can probably only be resolved by hearing from an amicus in the High Court in a constitutional case.

PART IV: SUBMISSIONS

Introduction

7. The UNSW GCI wishes to make submissions on four topics: (1) the role of constitutional facts in the implied freedom; (2) the nature of the power to grant leave to

an amicus and the permissible scope of leave; (3) two issues as to compatible ends; and (4) constitutional fact material.

The implied freedom and constitutional facts

8. This Court has drawn a distinction between "legislative facts" (which encompass "constitutional facts") and "adjudicative facts" (or "ordinary questions of fact"): see, eg, *Breen v Sneddon* (1961) 106 CLR 406 at 411 (Dixon CJ); *Gerhardy v Brown* (1985) 159 CLR 70 at 141-142 (Brennan J) (***Gerhardy***); *South Australia v Tanner* (1989) 166 CLR 161 at 179 (Brennan J); *Levy v Victoria* (1997) 189 CLR 579 at 598-599 (Brennan CJ); *Thomas v Mowbray* (2007) 233 CLR 307 at [619]-[629] (Heydon J); *Maloney v R* (2013) 252 CLR 168 at [351] (Gageler J); *Aytugrul v R* (2012) 247 CLR 170 at [71] (Heydon J) (***Aytugrul***). As Gordon J said in *Re Day* (2017) 91 ALJR 262 at [21]:

> Adjudicative facts are "ordinary questions of fact which arise between the parties" [*Breen v Sneddon* (1961) 106 CLR 406 at 411; 35 ALJR 314] and usually go to the jury – "[t]hey relate to the parties, their activities, their properties, their businesses". [Davis, "Judicial Notice" (1955) 55 *Columbia Law Review* 945 at 952] In contrast, legislative facts are "ordinarily general and do not concern the immediate parties". [Davis, "Judicial Notice" (1955) 55 *Columbia Law Review* 945 at 952] Constitutional facts are a species of legislative facts.

9. The Court's approach to evidence and fact-finding differs as between legislative facts and adversarial facts. In respect of the former, the authorities establish several propositions.[1]

10. There is no "a priori constraint on the sources from which the court may inform itself": *Maloney v R* (2013) 252 CLR 168 at [351] (Gageler J) (***Maloney***); *Gerhardy* at 142 (Brennan J). "A court finding constitutional facts is not constrained by the rules of evidence": *Thomas* at [634]-[636] (Heydon J); *Maloney* at [351] (Gageler J). The processes do not readily lend themselves to the normal procedures for the reception of evidence: *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 622 (Jacobs J); *Maloney* at [351] (Gageler J). The sources of the evidence

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[1] The narrow view taken by Dixon J in the *Communist Party Case* (1951) 83 CLR 1 at 196 no longer prevails: see Gageler, "Fact and Law" "Fact and Law" (2008-9) 11 *Newcastle Law Review* 1 at 11.

need not be "official": *Maloney* at [353] (Gageler J). The evidence may be hearsay: *Thomas* at [551] (Callinan J). Indeed, "statements made at the bar" may suffice: *Maloney* at [353] (Gageler J), quoting from *Wilcox Mofflin Ltd v State of NSW* (1952) 85 CLR 488 at 507. The Court is not constrained by the evidence adduced (or admissions made by) the parties:"[t]he legislative will is not surrendered into the hands of the litigants": *Gerhardy* at 141-142 (Brennan J); see also *Coleman v Power* (2004) 220 CLR at [298] (Callinan J); *Thomas* at [634] (Heydon J); *Levy* at 598-599 (Brennan CJ).[2] Further, constitutional fact material may be received and acted upon even though it is disputed by a party: *Thomas* at [642] (Heydon J). The Court's duty is simply to do "as best it can": *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280 at 292 (Dixon CJ).

11. There are only two substantial constraints on the Court's power to act upon constitutional fact material. The first is that the evidence must be sufficiently probative of the relevant fact. The second is that the Court has an overriding obligation to afford procedural fairness. See *Maloney* at [353] (Gageler J); *Thomas* at [613]-[639] (Heydon J); *North Eastern Dairy Co* at 622 (Jacobs J).

12. Issues of constitutional fact arise in implied freedom cases: note Gageler, "Fact and Law" (2008-9) 11 *Newcastle Law Review* at 1 at 10-11. Indeed, each stage of the implied freedom inquiry involves issues of constitutional fact.

13. There are issues of constitutional fact in determining whether a law effectively burdens the freedom and, in particular, the extent of any burden. This is in part because the existence and extent of any burden is to be assessed by reference to the practical effect of the law: note, eg, *Brown v Tasmania* (2017) 261 CLR 328 at [150] (Kiefel CJ, Bell and Keane JJ) (***Brown***). Notably, a number of judges in *Brown* paid close attention to matters of fact in assessing whether there was a burden and what its extent was: see, eg, at [77], [91], [95], [118] (Kiefel CJ, Bell and Keane JJ), [191]-[193] (Gageler J), [238]-[246] , [270] (Nettle J).

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[2] Further, constitutional facts "may legitimately be derived by analysing factual material not tendered in evidence either at trial or on appeal": *Aytugrul* at [71] (Heydon J).

14. Issues of fact also arise at each further stage of the "test" or "tool of analysis" adopted in *McCloy*.[3]

15. The *suitability* of a law – whether it has a rational connection to its end – will often (or at least sometimes) involve issues of fact. The issue of fact is whether the relevant law "ca[n] contribute" to the achievement of the law's purpose: *McCloy* at [80]. Issues of fact were, for example, relevant to the suitability findings in *McCloy* at [233] (Nettle J) and [349]-[355] (Gordon J). This is not to say that evidence will always be necessary. The undemanding[4] nature of the suitability limb means that judicial notice will often suffice. Nevertheless, it will sometimes be necessary or appropriate to go beyond those matters of common knowledge which can properly be noticed. As the Supreme Court of Canada has said, the rational connection limb can be addressed either "by providing concrete evidence" or "on the basis of reason or logic" alone: *Canadian Broadcasting Corp v Canada (Attorney-General)* [2011] 1 SCR 19 at [70] (Deschamps J, for the Court).

16. The *necessity* of a law – whether there are alternative, reasonably practicable means of achieving the law's end – involves issues of fact. The relevant issues of fact include at least (i) how effective is the impugned law at achieving the identified object; (ii) how effective are specific alternative measures at achieving the identified object; (iii) how burdensome of the freedom is the impugned law; and (iv) how burdensome of the freedom are the specific alternative measures. The inquiry involves quantitative and qualitative considerations: see *Tajjour v State of New South Wales* (2014) 254 CLR 508 at [114] (Crennan, Kiefel and Bell JJ), quoting from Barak, *Proportionality: Constitutional Rights and their Limitations* (2012) at 324.

17. Regard to issues of fact when assessing necessity is well-established in the cases. For example, judges in *Brown* had regard to whether there was evidence that existing laws

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3 Matters of legislative fact – such as the content of extrinsic materials and the "context" within which a law was enacted – are also relevant to the ascertainment of the purpose or end of a law. Note, in particular, *Brown* at [209] (Gageler J).

Further, issues of legislative fact – particularly an understanding of the content of the constitutionally-prescribed systems of government from time to time – are relevant to whether the end of a law is compatible with those systems.

4 The Canadian Supreme Court has said that the suitability limb "does not impose a particularly onerous threshold": *Canada (Attorney General) v Federation of Law Societies of Canada* [2015] 1 SCR 401 at [60] (Cromwell J) (LeBel, Abella, Karakatsanis and Wagner JJ concurring).

were ineffective (at [143] (Kiefel CJ, Bell and Keane JJ)). In *McCloy*, the plurality had regard to the "difficulties inherent in detecting and proving bribery in the context of political donations" as a reason for rejecting a proposed alternative: see at [62]. A similar position applies in the related areas of s 92 and the constitutionally-guaranteed franchise. For example, matters of constitutional fact – particularly comparisons between the Western Australian and Tasmanian legislative regimes – were important in *Betfair Pty Ltd v State of Western Australia* (2008) 234 CLR 418 at [109]-[112]. Issues of fact also played an important role in the nascent necessity analysis in *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436: see particularly at 476-7. In *Murphy v Electoral Commissioner* (2016) 261 CLR 28, facts were considered in respect of the efficacy of alternative systems for closing the rolls: see, eg, [251]-[254] (Nettle J).

18. To accept that facts are relevant to the necessity analysis is not inconsistent with the Parliament's constitutional power to make policy judgments and those limitation s inherent in proper exercise of the judicial function. These matters are reflected in the application of a margin of appreciation after constitutional facts (if any) have been properly found.

19. The *adequacy in balance* of a law – calling for a value judgment between the importance of the purpose and the extent of the burden – involves issues of fact. This is so at least so far as this limb involves consideration of the extent of the burden: see paragraph 13 above.

20. It remains to be worked out what precise factors bear on the inquiry into the importance of the purpose. The magnitude of the real-world mischief to be addressed by the law may be relevant and, to that extent, issues of constitutional fact arise: see, eg, *McCloy* at [268]-[269] (Nettle J) and *Brown* at [295] (Nettle J).

21. In assessing the proportionality of a measure, it may be relevant to consider whether other representative democracies have chosen to adopt similar measures: see *McCloy* at [46] (French CJ, Kiefel, Bell and Keane JJ), [330] (Gordon J) (referring, in the context of deciding whether capping of donations impedes the Australian system of representative government, to the fact that capping of a political donations had been adopted by many countries with systems of representative government). There is good

reason in principle for this: see Dixon, "Proportionality & Comparative Constitutional Law versus Studies" (2018) 12(2) *Law & Ethics of Human Rights* 203-224.

22. With the possible exception of those matters of legislative fact bearing on the purpose of an impugned law, the matters of fact which may be relevant at each stage of the *McCloy* analysis are not confined to the material before Parliament at the time the law was enacted. No authority states that proposition. The authorities have often referred to matters of fact which were not (or were not said to be) before Parliament. If the Court were limited to the record before Parliament, Parliament could recite a law into validity by tailoring the record. Further, parliamentary privilege will sometimes restrict a Court's power to receive material placed before Parliament, save where permitted by the various interpretation statutes or any constitutionally-entrenched power to receive evidence of constitutional fact.

23. It can also be noted that the implied freedom does not apply only to statutes. It operates directly on both purely executive power and on the judge-made common law: see, eg, *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [62] (McHugh J). The parliamentary record is irrelevant in these areas. Nor, in these areas, could it be suggested that the Court is limited to the record before some prior decision-maker. For example, before developing the common law of defamation in *Lange*, the Court did not consider itself to be limited to those matters of fact before those prior judicial bodies which had stated the pre-existing law of defamation.

24. Importantly, it will often be beyond the capacity of (or against the interests of) the parties to adduce evidence bearing on the constitutional facts relevant to the implied freedom inquiry. Take, for example, the question of burden. The relevant issue is the effect on the freedom generally, not the effect on the particular plaintiff: note *Unions NSW v State of New South Wales* (2013) 252 CLR 530 at [30], [36], [112], [118]-[119]; *McCloy v State of New South Wales* (2015) 257 CLR 178 at [30]; *Brown v Tasmania* (2017) 261 CLR 328 at [90], [150]. A plaintiff will often not be in a position to fully assist the Court on that issue; and a defendant polity will often have an interest in downplaying the extent of the burden. The same is true of the necessity inquiry.

The scope of an amicus' role and the permissible scope of leave

25. The source of this Court's power to grant leave to amicus is its inherent or implied jurisdiction or power to administer justice fully and effectively and to control its own processes.[5]

26. That being the source of the Court's power, there is no single criterion which a putative amicus must satisfy before the Court will grant leave.

27. In *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 312, the test was described as whether the "prospective amicus curiae can present arguments on aspects of a matter before the Court which are otherwise unlikely to receive full or adequate treatment by the parties". A stricter test was identified in *Roadshow Films Pty Ltd v iiNet Pty Ltd* (2011) 248 CLR 37 at [4], namely, that the Court will "need to satisfied ... that it will be significantly assisted by the submissions of the amicus and that any costs to the parties or any delay consequent on agreeing to hear the amicus is not disproportionate to the expected assistance": *Roadshow Films Pty Ltd v iiNet Pty Ltd* (2011) 248 CLR 37 at [4] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) (***Roadshow Films***); see also *Levy v Victoria* (1997) 189 CLR 578 at 604-5 (Brennan CJ) (***Levy***).

28. The observations in *Wurridjal* and *Roadshow Films* should not be taken to establish rigid prerequisites for the grant of leave. The underlying source of the power to grant leave is the Court's power to administer justice fully and effectively. In *United States Tobacco v Minister for Consumer Affairs* (1988) 20 FCR 520, the test was stated in terms which admit of the appropriate flexibility, namely "[a]n amicus may be heard if good cause is shown for doing so and if the court thinks it proper" (at 536 per Davies, Wilcox and Gummow JJ).

29. While considerations of cost and delay are no doubt relevant, they may be less weighty in constitutional cases. Constitutional cases do not have a purely inter partes character. Further, in constitutional cases "the paramount consideration is the maintenance of the Constitution itself": *Queensland v The Commonwealth* (1977) 139 CLR 585 at 593 (Barwick CJ). The different position of amicus in constitutional cases has been

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5 See *Ontario v Criminal Lawyers' Association of Ontario* [2013] 3 SCR 3 at [111]-[112] (Fish J) (LeBel, Abella and Cromwell JJ concurring). Note also *Karim v R* (2013) 83 NSWLR 268 at [36] (Allsop P); *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520 at 533 (Davies, Wilcox and Gummow JJ).

emphasised both curially and extra-curially by members of this court: see Mason, "Interveners and Amici Curiae in the High Court: A Comment" (1998) 20 *Adelaide Law Review* 173 at 173-174; Gageler, "Fact and Law" (2008-9) 11 *Newcastle Law Review* 1 at 29; *Wurridjal* at 313-4 (Kirby J) (Crennan J agreeing at 314); *Levy* at 651-652 (Kirby J); *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at [104]-[108] (Kirby J).

30. Further, the underlying source of the Court's power suggests that there is and should be no fixed constraint on the role which an amicus may be given leave to play. As the Supreme Court of Canada has said, there is "no precise definition of the role of amicus curiae capable of covering all possible situations in which the court may find it advantageous to have the advice of counsel who is not acting for the parties": *Ontario v Criminal Lawyers' Association of Ontario* [2013] 3 SCR 3 at [117] (Fish J) (LeBel, Abella and Cromwell JJ concurring), quoting from *R v Samra* (1998) 41 OR (3d) 434 (CA) at 444; see also *Levy* at 604 (Brennan J).

31. There is presently some doubt as to whether an amicus can tender evidence.

32. There is a body of authority in courts below this Court suggesting that an amicus is not entitled to adduce evidence. In *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391, the New South Wales Court of Appeal (Hutley JA, Reynolds and Glass JJA agreeing) held that an amicus may not "introduce evidence" (at 399) (***Bradley***).[6] In *Kabushiki Kaisha Sony Computer Entertainment v Stevens* (2001) 116 FCR 490, Sackville J suggested that the authorities did not permit an amicus to adduce evidence "except, perhaps, with the consent of the parties": at [18]. In *Australian Automotive Repairers' Association (Political Action Committee) Inc v NRMA Insurance Limited (No 2)* [2003] FCA 1301, Lindgren J held that "an amicus curiae is not entitled to lead

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6 In *Rushby v Roberts* [1983] 1 NSWLR 350 (***Rushby***), Street CJ observed that at least some of the holdings in *Bradley* "may require consideration in an appropriate case" (at 353), whereas Hutley JA maintained the views he had expressed in *Bradley* (at 360). Kirby P adopted Street CJ's doubts in *Shales v Lieschke* (1985) 3 NSWLR 65 at 80. In *National Australia Bank Ltd v Hokit Pty Ltd* (1996) 39 NSWLR 377, the NSW Court of Appeal acted on the basis that *Bradley* was wrongly decided as regards whether the Court had power to grant leave to an amicus to address argument to the Court (see at 381, 407i), but did not address the Court's power to grant leave to an amicus to adduce evidence. In *Xie v Shaoji* [2008] NSWSC 224, Simpson J held that Street CJ's criticism of *Bradley* in *Rushby* was limited to the holding of *Bradley* as to the existence of an inherent power to permit intervention. See also *Commonwealth Bank of Australia v The Law Debenture Trust Corporation plc (No 4)* [2018] WASC 165 at (Pritchard J) (declining to follow *Bradley* as to the existence of an inherent power to permit intervention).

evidence": at [9]. In *Wilson v Manna Hill Mining Co Pty Ltd* (2004) 51 ACSR 404, Lander J observed that it was "doubtful that an amicus curiae could tender evidence": at [87]. In *Perdaman Chemicals and Fertilisers Pty Ltd v The Griffin Coal Mining Company Pty Ltd (No 7)* (2012) 92 ACSR 281; [2012] WASC 502, Edelman J considered some of these authorities but did not decide whether what his Honour described as the "absolute position" referred to in *Bradley* remained the law: see at [113]-[114].

33. Other judgments arguably manifest a broader view. In *Levy*, Brennan J observed that an amicus may be heard on an issue of "relevant fact": at 604. In *Breckler*, Kirby J held that the Court may permit amicus to provide "any relevant facts, not otherwise called to notice": at [104]. In *Bropho v Tickner* (1993) 40 FCR 165, Wilcox J said that he did "not dispute that it may sometimes be appropriate to allow an amicus curiae to complete the evidentiary mosaic by tendering an item of non-controversial evidence" and reserved his opinion as to whether evidence could be tendered over the objection of a party (at 172-3). In *Re Medical Assessment Panel; ex parte Symons* (2003) 27 WAR 242 (***Symons***), E M Heenan J indicated that an amicus might be permitted to adduce evidence at least in "a rare and exceptional case": at [20]. In *Priest v West* (2011) 35 VR 225, the Victorian Court of Appeal applied *Symons* to hold that "[o]nly in an exceptional case will a friend of the court be permitted to adduce evidence" (at [32]).

34. This Court should now declare that the High Court's power to grant leave does extend to allowing an amicus to tender materials relevant to issues of constitutional or legislative fact and that, while that power may only be exercised where it is proper, the power is not limited to rare and exceptional cases.

35. This outcome accords with principle. The source of the power to hear from amicus does not suggest any rigid constraint on the role an amicus may play. Further, as set out above, in the area of constitutional facts, there is no a priori constraint on the sources from which the court may inform itself. There may be a special need for the reception of evidence from amicus curiae in this Court, having regard to its role at the "apex" of the integrated Australian legal system.[7] This is particularly so in

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[7] Note, by analogy, the observations of Mahoney P in *National Australia Bank Ltd v Hokit Pty Ltd* (1996) 39 NSWLR 377 at 380-382.

constitutional cases, which necessarily raise issues which are not just inter partes. Further, in the area of the implied freedom, hearing from amicus may be proper because of the inherent limitations on the capacity of many plaintiffs to collate relevant evidence and the interest of the defendant polity (and, ordinarily, any polity interveners) to support validity. This outcome also accords with what occurred in *Project Blue Sky Inc v Australian Broadcasting Authority* [1997] HCATrans 302, where leave was given to eleven persons to appear as amicus and to adduce evidence on issues of legislative fact (albeit without there being dispute as to whether the Court had the power to do so).

10 **Compatible Ends**

36. The UNSW GCI submits that it is open to the Court to find that the following are purposes which are compatible with the constitutionally-prescribed systems of government:

(a) working to ensure that each individual has an equal share or a more equal share in political power;[8]

(b) endeavouring to preserve the Australian system of party government.[9]

37. As to the first of these purposes.

38. A "great underlying principle" of the Constitution is that rights are secured by "ensuring, as far possible, to each a share, and an equal share, in political power":
20 Moore, *The Constitution of the Commonwealth of Australia* (1902) 329; see also *McCloy* at [29] (French CJ, Kiefel, Bell and Keane JJ), [110] (Gageler J), [219] (Nettle J), [318] (Gordon J); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 139-140 (Mason CJ) (***ACTV***).

39. The constitutional assumption of equality of political opportunity reflects the fact that the political and legal sovereignty of Australia resides in the people of Australia: *ACTV*

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8 Which is reflected especially in particulars (i)(b) and (c) of paragraph 86 of the Defence (which, in turn, is supported by particulars (ii)(a) and (b), (iii)(a) and (iv) of paragraph 86.

9 Which is reflected especially in particulars (ii)(c) and (iii)(b) and (c) of paragraph 86 of the Defence (which, in turn, are supported by particulars (ii)(a) and (b), (iii)(a) and (iv) of paragraph 86).

at 138 (Mason CJ); *McCloy* at [216] (Nettle J), [318] (Gordon J); *McGinty v Western Australia* (1996) 1856 CLR 140 at 230 (McHugh J). The union established upon federation was a union of each of the people of Australia, not of their governments: see *Thomas v Mowbray* (2007) 233 CLR 307 at [143] (Gummow and Crennan JJ, Gleeson CJ agreeing at [6]), citing Moore, *The Constitution of the Commonwealth of Australia* (1910, 2nd ed) 67. See also *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at [66] (Gleeson CJ, Gummow, Hayne and Heydon JJ) ("constitutional norms, whatever may be their historical origins, are now to be traced to Australian sources").

40. Accordingly, "[e]quality of opportunity to participate in the exercise of political sovereignty is an aspect of the representative democracy guaranteed by our Constitution": *McCloy* at [45] (French CJ, Kiefel, Bell and Keane JJ).

41. The constitutionally-prescribed systems do not require – and indeed may even be adversely affected by – an unqualified freedom of communication: see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568. The constitutionally-prescribed systems beget the freedom; therefore, the freedom cannot usurp them. Accordingly, the Australian polities may, consistently with the Constitution, burden free political communication in pursuit of a more perfect system of representative and responsible government: see *McCloy* at [47] (French CJ, Kiefel, Bell and Keane JJ).

42. For these reasons, it is compatible with the constitutionally-prescribed systems for a polity to "wor[k] to ensure that … *each* individual has an *equal* share, or at least a more equal share then they otherwise would have, in political power": *McCloy* at [324] (Gordon J) (emphasis in original); see also *McCloy* at [249]-[255] (Nettle J), *Coleman v Power* (2004) 220 CLR 1 at [97]-[99] (McHugh J), [324]-[325] (Heydon J), *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 339-340 (Deane J), 383 (Toohey J), *Muldowney v State of South Australia* (1996) 186 CLR 352 at 373 (Toohey J), 375 (Toohey J). Put another way, a "law which operates to promote full, equal and effective participation in the electoral process" pursues the valid end of furthering "the democratic process": see *Muldowney v State of South Australia* (1996) 186 CLR 352 at 378 (Gaudron J).

43. Consistently with these observations, in the context of laws capping third party expenditure on a referendum. the Supreme Court of Canada has held that objectives of "prevent[ing] the most affluent members of society from exerting a disproportionate influence by dominating the referendum debate through access to greater resources" and "permit[ting] an informed choice to be made by ensuring that some positions are not buried by others" are "of pressing and substantial importance in a democratic society": *Libman v Quebec (Procureur-General)* [1997] 3 SCR 569 at 596-7 (per curiam).

44. In this respect, there is a marked difference between the Australian constitutional position and that which prevails in the United States. This Court would not accept the Supreme Court's oft-stated proposition that government may not "restrict the speech of some elements of ... society in order to enhance the relative voice of others": cf *Buckley v Valeo*, 424 US 1, 48-49 (1976). To the contrary, levelling the playing field is not only compatible with the constitutionally-prescribed systems, it is positively conducive to them: see *McCloy* at [35]-[47] (French CJ, Kiefel, Bell and Keane JJ), [181]-[182] (Gageler J), [244]-[245] (Nettle J), [321]-[326] (Gordon J).

45. Turning to the second of the purposes identified in paragraph 36.

46. The Constitution, as initially framed, made no mention of political parties. While factions had, to an extent, been a feature of government in the colonies, it was only around the time of the adoption of the Constitution that those "factions were yielding to modern party political structures": *McGinty v Western Australia* (1996) 186 CLR 140 at 258-9 (***McGinty***), citing Loveday and Martin, *Parliament Factions and Parties* (1996) 1.[10] Political parties now play a critical role in the institutions of representative and responsible government established by the Constitution, such that it can now be said that the "interests of th[e] party political system and of the established parties in a sense have come to be identified with those of representative government itself": *McGinty v Western Australia* (1996) 186 CLR 140 at 258-9 (Gummow J). The role of political parties in the system of representative government is particularly important

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[10] The establishment of the "Australian Labour Party" was approved by a meeting held in Sydney on 24 January 1900: Crisp, *The Australian Federal Labour Party 1901-1951* (1955) 25. However, see *McKenzie v Commonwealth* (1984) 59 ALJR 190 at 191 ("Members of Parliament were organised in political parties long before the Constitution was adopted ...")

because of Australia's system of compulsory voting: *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [29] (Gleeson CJ) (***Mulholland***). In *Unions NSW*, this Court relied on the existence of "national political parties" as a critical step in its conclusion that discussion of State, Territory and local political matters is ordinarily protected by the freedom: see at [25]; see also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 571-2. In *Mulholland*, Kirby J said that "the system of parliamentary democracy in Australia" was "highly reliant ... on political parties": at [264].

47. The influence of political parties on the system of responsible government has been no less profound: see *Williams v The Commonwealth* (2012) 248 CLR 156 at [517] (Crennan J), citing Byers, "The Australian Constitution and Responsible Government" (1985) 1 *Australian Bar Review* 233.

48. These observations are not just true of Australia. For example, the Supreme Court of Canada has relied on the "prominence of political parties in [Canada's] system of representative democracy" to strike down laws restricting the ability to register as a political party: *Figueroa v Canada (Attorney General)* [2003] 1 SCR 912 at 947. See also Royal Commission on Electoral Reform and Party Financing, Canada, *Reforming Electoral Democracy: Volume 1* (1991) 11-13.

49. It is generally accepted by political scientists that political parties help ensure a viable and functioning parliamentary democracy: see Issacharoff, "Outsourcing Politics: The Hostile Takeovers of Our Hollowed out Political Parties" (2017) 54(4) *Houston Law Review* 845; Issacharoff, "Democracy's Deficits" (2017) *University of Chicago Law Review* (forthcoming);[11] see also Barber, "Some Thoughts on Populism and Political Parties" *German Law Journal* (forthcoming). Political parties have a long-term stake in preserving the constitutional systems of government, and they help mediate political disagreements.

50. The role of political parties in the Australian constitutional system is underscored by the express references to political parties in s 15 of the *Constitution*, following the 1977 Senate Casual Vacancies referendum. The precise consequences of the constitutional

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[11] Available at < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3040163>.

reference to "political parties" in s 15 perhaps remain to be worked out.[12] However, for present purposes, it is submitted, consistently with the above observations, that preserving the Australian system of party government is an end that is compatible with the constitutionally-prescribed systems of government.[13] Laws which "preserve and enhance" the constitutionally-prescribed systems of government are compatible with the freedom: see *McCloy* at [47] (French CJ, Kiefel, Bell and Keane JJ); see also *Unions NSW* at [158] (Keane J).

Constitutional facts and constitutional fact material

51. The impugned provisions of the *Electoral Funding Act 2018* (NSW) (**the EFED Act**) are those provisions which directly restrict electoral expenditure by "third-party campaigners". A "third-party campaigner" is a person who is not a political party, group of candidates, candidate, elected member or an organization that operates solely for the benefit of a registered party or elected member: see EFED Act s 4(1). They are persons who exist outside (or largely outside) the party system.

52. The UNSW GCI does not make any submission as to constitutionality of the enforcement machinery provided for in the EFED Act. It does, however, submit that the Court should receive the following publicly-available material relating to the effects of, and regulation of, third party electoral expenditure.

(a) OECD, *Funding of Political Parties and Election Campaigns and the Risk of Policy Capture* (2016) 58 (**OECD Report**);[14]

(b) Joint Standing Committee on Electoral Matters, *Inquiry into the Funding of Political Parties and Election Campaigns* (2011) (**JSCEM Report**);

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12 Note, eg, *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [286] (Kirby J).

13 See also *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [341], [358]-[359] (Heydon J), holding that it is a permissible purpose for the Commonwealth "to seek to ensure genuine political parties (ie those that have a key characteristic of a political party, namely a modest but real level of community participation) can engage effectively in the electoral process".

14 Available at <https://read.oecd-ilibrary.org/governance/financing-democracy_9789264249455-en#page59>.

(c) Australian Electoral Commission, Submission to the Joint Standing Committee on Electoral Matters on the Inquiry into the funding of political parties and election campaigns (24 June 2011) (**AEC Submission**);[15]

(d) Commonwealth of Australia, *Electoral Reform* [16]*Green Paper: Donations, Funding and Expenditure* (2008) (**Green Paper**);

(e) United Kingdom Committee on Standards in Public Life, *Political Party Finance: Ending the Big Donor Culture* (2011) (**CSPL Report**);[17]

(f) Lord Abbotts, "Third Party Election Campaigning – Getting the Balance Right: Review of the operation of the third party campaigning rules at the 2015 General
10 Election" (**Abbotts Review**);[18]

(g) Public Policy Forum, *Transparent and Level: Modernizing Political Financing in Canada* (March 2018), prepared in partnership with Elections Canada (**PPF Report**);[19]

(h) Bipartisan Policy Center, *Campaign Finance in the United States: Assessing an Era of Fundamental Change* (January 2018) (**Bipartisan Policy Center Report**);[20]

(i) Dwyre, "Political Parties and Campaign Finance What Role do the National Parties Play?" (**Dwyre**);[21]

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15 Available at <https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=em/political%20funding/subs.htm>.

16 Available at <https://web.archive.org/web/20090521005334/http://www.dpmc.gov.au/consultation/elect_reform/docs/electoral_reform_green_paper.pdf>.

17 Available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/336913/13th_Report___Political_party_finance_FINAL_PDF_VERSION_18_11_11.pdf>.

18 Available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/507954/2904969_Cm_9205_Accessible_v0.4.pdf>.

19 Available at <https://www.ppforum.ca/wp-content/uploads/2018/03/Transparent-and-Level-Modernizing-Political-Financing-in-Canada.pdf>.

20 Available at < https://bipartisanpolicy.org/wp-content/uploads/2018/01/BPC-Democracy-Campaign-Finance-in-the-United-States.pdf>.

(j) Lawlor and Crandall, "Comparing Third Party Policy Frameworks: Regulating Third Party Electoral Finance in Canada and the United Kingdom" (2018) 33(3) *Public Policy and Administration* 332 (**Lawlor and Crandall**);

(k) Feasby, "Issue Advocacy and Third Parties in the United Kingdom and Canada" (2003) 48 *McGill Law Journal* 11 (**Feasby**);[22]

(l) Tingle, "Business Council of Australia to ramp up role in politics" (1 May 2018) (**Tingle**);[23]

(m) report of Adam Bonica relating to campaign finance regulation (**Bonica Report**);[24]

(n) Miras, "Examining the Influence of Economic Inequality on Campaign Finance in the Pre-Citizens United Era", *Cornell Policy Review* (**Miras**).[25]

53. It can be accepted that some of this material is more weighty than others.

54. By reference to this material, the UNSW GCI submits that it is open to the Court to make the following findings of constitutional fact.

55. ***First***, over the last 20 years, there have been efforts in a number of parliamentary democracies to regulate third party election expenditure: see OECD Report at 58; Lawlor and Crandall at 334-337; *Political Parties, Elections and Referendums Act 2000* (UK) Pt VI; *Canada Election Act 2000* Pt 17; *Electoral Act 1993* (NZ) ss 206S-206ZH. See also Abbotts Review at 17-21 (reviewing the UK laws and finding that restrictions on third party expenditure at elections are necessary); PPF Report at 8-12.

56. ***Secondly***, where there has been regulation of third-party expenditure, no single model has been adopted. There have been a variety of legislative responses and a variety of legislative judgments made: see OECD Report at 117 (Canada), 174-5 (United

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21 Available at <https://bipartisanpolicy.org/wp-content/uploads/2018/01/Political-Parties-and-Campaign-Finance-What-Role-Do-the-National-Parties-Play.-Diana-Dwyre.-Diana-Dwyre.pdf>.

22 Available at <http://www.lawjournal.mcgill.ca/userfiles/other/1865665-Feasby.pdf>.

23 Available at < https://www.abc.net.au/news/2018-04-30/business-council-to-ramp-up-role-in-politics/9710190>.

24 Available at < https://equalcitizens.us/wp-content/uploads/2018/10/Bonica-Expert-Report.pdf>.

25 Available at < http://www.cornellpolicyreview.com/examining-the-influence-of-economic-inequality-on-campaign-finance-in-the-pre-citizens-united-era/>.

Kingdom); Green Paper at 28-32; Lawlor and Crandall at, 334-337; *Political Parties, Elections and Referendums Act 2000* (UK) Pt VI and Sch 10; *Canada Election Act 2000* Pt 17; *Electoral Act 1993* (NZ) ss 206S-206ZH. See also *Attorney-General of Canada v Harper* [2004] 1 SCR 827 at [3]-[8] (McLachlin CJ and Major J).

57. ***Thirdly***, absent restrictions on third party expenditure, other restrictions on electoral expenditure can be evaded by channeling expenditure through third parties: OECD Report at 28, 54; JSCEM Report at 149; AEC Submission at 7-8; CSPL Report at 76; Feasby at 21. See also *BC Freedom of Information and Privacy Association v Attorney-General (British Columbia)* [2017] 1 SCR 93 at [33] (McLachlin CJ, for the Court).

58. ***Fourthly***, absent legislative restriction, third party campaigners in Australia wish to expend considerable sums – in at least the tens of millions of dollars – on electoral expenditure: Tingle.

59. ***Fifthly***, the lowering of constraints on third party electoral expenditure tends to cause an increase in electoral expenditure by third parties. This can probably be perceived by reason and logic alone. It is also supported by empirical evidence: see Bipartisan Policy Center Report at 29-31; see also Dwyre at 40.

60. ***Sixthly***, the lowering of constraints on electoral expenditure tends to cause either or both (i) a decrease in the proportion of total electoral expenditure by political parties relative to third parties, (ii) a decrease in donations to political parties (because donations are diverted to third parties). See AEC Submission at 6-7; Bipartisan Policy Center Report at 29-31, 34; Dwyre at 40; Feasby at, 20 (and references in fn 28). One consequence of this is, to an extent, an undermining of the role of political parties relative to third parties: see Bipartisan Policy Center Report at 34-35; Feasby at 19-20.

61. ***Seventhly***, in the United States, the lowering of constraints on third party electoral expenditure has corresponded with and may have been one cause in political donations by the wealthiest members of society becoming a proportionately greater part of total donations: Bonica at 7-8; Miras.

PART V: ORAL ARGUMENT

62. Unless the Court would be assisted by oral submissions, the UNSW GCI does not seek leave to supplement these submissions with oral argument.

Dated 20 November 2018

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