

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY



No. S204 of 2018

BETWEEN:

Unions NSW

First Plaintiff

and

New South Wales Nurses and Midwives' Association

Second Plaintiff

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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

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State of New South Wales

Defendant

**OUTLINE OF ORAL ARGUMENT OF THE ATTORNEY-GENERAL FOR THE
STATE OF SOUTH AUSTRALIA (INTERVENING)**

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Part I: Publication

1. This outline is in a form suitable for publication on the internet.

Part II: Outline of Propositions

2. It is relevant to the task of proportionality testing, that the Court is required to undertake in the present proceedings, to have regard to the fact that the EF Act regulates expenditure in the context of New South Wales, rather than Commonwealth, elections (WS [27]).
- 10 3. The judgment to be arrived at in undertaking proportionality testing should be formed by reference to the constitutional foundation that sustains the implied freedom (WS [25]).

McCloy, [88] (French CJ, Kiefel, Bell & Keane JJ), [99], [148]-[149] (Gageler J)
Brown, [434] (Gordon J)

4. The freedom of political communication emerges as an implication from the *Commonwealth Constitution* in order that the people are able to exercise sovereign power over the executive and legislative branches by means of a free and informed electoral choice (WS [26]).

Lange, 559, 561 (The Court)
Unions no. 1, [17] (French CJ, Hayne, Crennan, Kiefel & Bell JJ)
McCloy, [108]-[113] (Gageler J), [215]-[219] (Nettle J)

5. South Australia does not advance submissions that state laws, including state electoral laws, are incapable of offending the implied freedom by virtue of the *Melbourne Corporation* doctrine or that any greater latitude should be afforded to a law of a state in determining its validity (WS [28]).

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Unions no. 1, [31]-[34] (French CJ, Hayne, Crennan, Kiefel & Bell JJ), [134] (Keane J)
McCloy, [304] (Gordon J), [125] (Gageler J)

6. South Australia accepts that communications that occur at various levels of government in Australia are practically indivisible such that a burden of political communication in the context of local or state elections will constitute a burden for the purposes of stage 1 of *Lange* testing (WS [28]-[29]).

Unions no. 1, [25], [27] (French CJ, Hayne, Crennan, Kiefel & Bell JJ), [134] (Keane J)
McCloy, [304] (Gordon J), [125] (Gageler J)
Brown, [238] (Nettle J), [312] (Gordon J)

- 10 7. The fact that a relevant burden may arise for the purposes of stage 1, does not mean that a burden imposed on communications in the context of local or state elections will have the same qualitative effect on the system of representative and responsible government, by impairing the electoral choice of the people of the Commonwealth, as a burden imposed in a Commonwealth electoral context (WS [30]).

8. Proportionality testing invokes a graded or calibrated approach which acknowledges a spectrum of affectation upon Commonwealth electoral choice. The development of proportionality testing should be incremental rather than proceed by reference to rigid categories of types of communication (WS [32]).

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McCloy, [150]-[152] (Gageler J), [222] (Nettle J), [337] (Gordon J)
Brown, [118], [128] (Kiefel, Bell and Keane JJ), [164]-[165], [201] (Gageler J),
[291] (Nettle J), [473]-[478] (Gordon J)

- 30 9. In accordance with structured proportionality testing, the fact that the EF Act regulates local and state, but not federal, elections, is relevant to consideration of adequacy of balance, and in particular the assessment of the correspondence between the extent of the burden and the sufficiency of the justification. In assessing whether the law is reasonably appropriate and adapted without reference to structured proportionality testing, this feature of the EF Act bears upon the extent of the burden and the assessment of the risk that the EF Act presents to the electoral choice of the people of the Commonwealth (WS [32]).

Dated: 5 December 2018

MJ Wait SC KM Scott