

**IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY**

**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  
AND UTILITIES UNION**  
Fifth Plaintiff

**HEALTH SERVICES UNION NSW**  
Sixth Plaintiff

AND

**STATE OF NEW SOUTH WALES**  
Defendant

**ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)**

**OUTLINE OF ORAL ARGUMENT**

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**PART I: SUITABILITY FOR PUBLICATION**

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

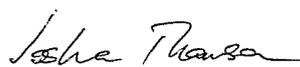
**PART II: OUTLINE OF ORAL SUBMISSIONS**

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2. In the Commonwealth Attorney-General's notice pursuant to s.78B of the *Judiciary Act 1903* (Cth) (the **Commonwealth's Notice**), the Attorney-General specifically states that he "will submit that s 7(2)(a) of the EF Act should be construed so that expenditure is incurred substantially in respect of a federal election if it has more than an insubstantial or incidental connection with such an election. That construction will confine the EF Act within the limits of the New South Wales Parliament's legislative power": [9]
3. Paragraph 2.1 of the Commonwealth's Notice asserts two propositions:
  - (a) the Commonwealth has exclusive power to legislate with respect to federal elections;
  - (b) a law is with respect to federal elections if it has more than an insubstantial or incidental connection with a federal election.
4. The Attorney General of WA contends that the Court should not determine these submissions, to the extent that they are still maintained.
5. **The issue does not arise:** There is no pleaded or actual question about electoral expenditure in a federal election, or how the *Electoral Funding Act 2018* (NSW) (**EF Act**) applies to a federal election. There is no factual basis for considering how such expenditure might burden the implied freedom. The Commonwealth accepts that the question raised does not need to be resolved presently: Commonwealth AG's submissions, [10]. No party or intervener has made submissions about the EF Act and a federal election.
6. Even if the EF Act was partly invalid in its application to a federal election, the EF Act provisions applicable to the forthcoming NSW election would be saved by reason of s.31 of the *Interpretation Act* (NSW).

7. Any judgment of the Court on the Commonwealth propositions would be hypothetical and *obiter dicta*. It would not be binding.
8. **Existence and Extent of Commonwealth's exclusive power is contentious:**  
An exclusive legislative power in respect of federal elections is not specifically conferred by the Commonwealth *Constitution* in s.52. The source of the Commonwealth power to make laws with respect to federal elections depends upon the operation of s.51(xxxvi), in respect of ss.10 and 31. Any inconsistency between Commonwealth and State laws relating to federal elections is to be resolved through the mechanism of s.109 of the Commonwealth *Constitution*.
- 10 9. The Commonwealth power to make laws with respect to federal elections was described in *Smith v Oldham* (1912) 15 CLR 355 as exclusive, but that case did not involve any competing State legislation. There have been subsequent doubts about whether the statements in *Smith v Oldham* were *obiter dicta*, or affected by *Engineers: Local Govt Assoc of Qld v Queensland* [2003] 2 Qd R 354, Davies JA [33]-[50], but cf McMurdo P, [9]-[12], Williams JA, [67]-[72].
10. This Court has not stated that the Commonwealth has exclusive power in respect of all matters which have more than an insubstantial or incidental connection with a federal election.
11. **Characterisation Test is Contentious:** This Court has never considered the appropriate test for characterising whether a State law is with respect to federal elections, or exceeds the State's legislative power. The test that a law is with respect to federal elections if it has more than an insubstantial or incidental connection with a federal election is based upon characterisation for non-exclusive Commonwealth powers in s.51. It is not directly supported by *Bourke v State Bank of NSW* (1990) 170 CLR 276 at 288-289.
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Dated: 6 December 2018



J A Thomson SC  
Solicitor-General for Western Australia



G J Stockton  
Counsel