

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

S204 of 2018

BETWEEN:

UNIONS NSW
First Plaintiff

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**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

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**NEW SOUTH WALES LOCAL
GOVERNMENT, CLERICAL,
ADMINISTRATIVE, ENERGY, AIRLINES
AND UTILITIES UNION**
Fifth Plaintiff

HEALTH SERVICES UNION NSW
Sixth Plaintiff

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AND

STATE OF NEW SOUTH WALES
Defendant

**ANNOTATED WRITTEN SUBMISSIONS ON BEHALF OF THE ATTORNEY
GENERAL FOR WESTERN AUSTRALIA (INTERVENING)**

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Date of Document: 26 November 2018

Filed on behalf of the Attorney General for Western Australia by:

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PART I: SUITABILITY FOR PUBLICATION

1. These submissions are in a form suitable for publication on the Internet.

PART II: BASIS OF INTERVENTION

2. The Attorney General for Western Australia intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth), but supporting neither party. He intervenes only in respect of the issue raised in the Commonwealth's Notice of a Constitutional Matter filed in the Canberra Registry of the High Court on 7 November 2018 (**Commonwealth's Notice**).

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

- 10 3. Not applicable.

PART IV: SUBMISSIONS

4. The State of WA makes no submissions in respect of the stated questions.

The Constitutional Issue Raised by the Commonwealth's Notice

5. The Commonwealth contends that s 7(2)(a) of the *Electoral Funding Act 2018* (NSW) (**EF Act**) should be construed to exclude electoral expenditure "incurred substantially in respect of [ie having more than an insubstantial or incidental connection with] an election of members to a Parliament other than the NSW Parliament".¹ That construction is said to conform with the limits of the legislative power of the State Parliament, having regard to the exclusivity of the Commonwealth power with respect to federal elections.²
6. It follows that the Commonwealth contends that a State Parliament has no legislative power in respect of electoral expenditure which has more than an insubstantial or incidental connection with an election of members to federal Parliament (**Commonwealth's Further Issue**).

¹ Commonwealth Submissions (CS) [7].

² CS [8].

Submissions upon Commonwealth's Notice

7. In relation to the Commonwealth's Further Issue, the State of WA:
- (a) adopts and expands upon the State of NSW's submissions,³ and the Commonwealth's submissions,⁴ that the Commonwealth's Further Issue should be determined only when it is properly raised;
 - (b) submits, in any event, that the Commonwealth's Further Issue does not arise, because s 7(2)(a) of the EF Act is not properly characterised as a law which regulates federal elections; and
 - (c) submits, should the court consider it necessary to determine the Commonwealth's Further Issue, that the Commonwealth's submissions on this point should be rejected.
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Commonwealth's Further Issue Not Properly Raised

8. The Commonwealth's Further Issue was raised by the Commonwealth "[o]ut of abundance of caution" to allow it to distinguish between the legislative power of the Commonwealth and the States with respect to State and federal elections.⁵
9. It indirectly raises the issue of the extent of State legislative power in relation to Commonwealth elections as a second limitation upon State legislative power to enact the relevant provisions of the EF Act. This is in addition to the limits placed upon State legislative power by the implied freedom of political communication.⁶
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10. No party to the proceedings has pleaded or raised this further issue.

³ New South Wales Submissions (NSWS) [64].

⁴ CS [10].

⁵ CS [10].

⁶ The Commonwealth refers to the importance of keeping distinct "the two quite separate limits on the legislative power of the New South Wales Parliament": CS [10].

11. Further, the State of NSW has accepted that the relevant provisions of the EF Act impose a burden upon the implied freedom of political communication.⁷
12. The nature of the burden which the State of NSW accepts has been imposed by reason of the provisions of the EF Act is that:
- (a) these provisions restrict political communication in respect of the election of candidates to the NSW Parliament; and
- (b) such a restriction affects the system of representative and responsible government established by the Commonwealth *Constitution* for the Commonwealth level of government in so far as it requires a free and unfettered flow of political communication: (a) between electors on the one hand and elected members, members of the Commonwealth executive and Commonwealth candidates on the other hand; (b) between electors; and (c) between electors on the one hand and all other persons, groups and other bodies in Australia.⁸
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13. The second step in paragraph [12](b) above is because the State of NSW has accepted that: (a) the discussion of matters at State or local government level might bear upon the choice that the people have to make in federal elections or in voting to amend the *Constitution*, and on their evaluation of the performance of federal ministers and their departments; (b) there is a continuing inter-relationship between the three tiers of government, including by reason of funding provided to the States by or under the authority of the Commonwealth Parliament, whether pursuant to s 96 or otherwise; and (c) there exist national political organisations, operating at federal, State and local government levels.⁹
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14. In these circumstances, all parties and interveners (including the Commonwealth) address the constitutional validity of the EF Act only by reference to the effect of the relevant statutory provisions of the EF Act upon proposed electoral expenditure in respect of NSW Parliamentary elections

⁷ NSW [31], [52].

⁸ Writ of Summons [83], Special Case Book (SCB) 39; Defence [83] [84] [89], SCB 93, 96. See also NSW [23] [24].

⁹ Writ of Summons [82], SCB 39-40; Defence [82] SCB 93.

and the implied freedom of political communication which protects the Commonwealth system of representative and responsible government. None of the parties or interveners has addressed the effect of the relevant statutory provisions of the EF Act upon the Commonwealth system of representative and responsible government by reason of electoral expenditure in respect of any other elections.

15. The extent of the power of the NSW Parliament to make laws which regulate electoral expenditure in respect of Commonwealth or other elections should not be determined where:

- 10 (a) no party has raised this issue in the pleadings;
- (b) the NSW Parliament undoubtedly has legislative power to regulate electoral expenditure in relation to a NSW Parliamentary election (subject to the implied freedom of political communication); and
- (c) the parties and interveners have all prepared the case upon the basis that the effect of the EF Act is to be determined only by reference to electoral expenditure upon an election for candidates to the NSW Parliament.

Commonwealth's Further Issue does not arise

20 16. The Commonwealth's Further Issue depends upon construing s 7(2)(a) by reference to the proposed limits of State legislative power. That is because the Commonwealth contends that there is ambiguity about the word "substantially", and the protean meaning of that term should be resolved by reference to the extent of exclusive Commonwealth power in respect of federal elections.¹⁰ Two points should be made about this argument.

17. First, a Commonwealth law would not be characterised as being with respect to a particular subject matter because in some of its applications it would

¹⁰ CS [7]-[8].

regulate that subject matter.¹¹ Similarly, the mere fact that s 7(2)(a) may, in some cases (not under present consideration), operate to exclude the application of the EF Act because the relevant electoral expenditure is incurred substantially in respect of a federal election does not mean the provision should be construed as regulating federal elections.

18. The effect of the Commonwealth submissions is that the EF Act exceeds legislative power if it only excludes electoral expenditure which is incurred substantially in respect of a federal election. If it does not also exclude electoral expenditure which has more than an insubstantial or incidental connection with a federal election, the EF Act would impermissibly regulate federal elections.
19. In other words, because the Commonwealth contends that the EF Act might regulate electoral expenditure which is not substantially in respect of a federal election, but which is not insubstantially or incidentally connected with a federal election, it is a law with respect to federal elections. That is so, even though the Commonwealth accepts that the focus of the EF Act is upon the government of NSW at both State and local levels.¹²
20. To the extent that it is necessary to characterise whether the EF Act is a law with respect to a particular subject matter, ie Commonwealth elections, it should be characterised as a law with respect to electoral expenditure within NSW, even if it has the effect of regulating some aspects of electoral expenditure in respect of Commonwealth candidates.
21. Secondly, s 31(2) of the *Interpretation Act 1987* (NSW) provides that if any provision of an Act, or the application of any such provision to any person, subject-matter or circumstance, would, but for that section, be construed as being in excess of the legislative power of the NSW Parliament, it shall be a valid provision to the extent to which it is not in excess of power, and the

¹¹ *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468, 502-503 (Menzie J), 516 (Walsh J); *New South Wales v Commonwealth* (2006) 229 CLR 1, 107-108 [155]-[156] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

¹² CS [7].

remainder of the Act, and the application of the provision to other persons, subject-matters or circumstances, shall not be affected.

22. Even if the Commonwealth is correct that the meaning of s 7(2)(a) is to be resolved by reference to the extent of exclusive Commonwealth power in respect of federal elections, the precise extent of exclusive Commonwealth power is irrelevant to anything in the present case, due to the operation of s 31(2) of the *Interpretation Act* (NSW).

Extent of Exclusive Commonwealth Power in respect of Federal Elections

- 10 23. Briefly, in the event the Court considers that the Commonwealth's Further Issue does arise, the State of WA submits that the Court should not accept that a State Parliament has no legislative power in respect of electoral expenditure which:

- (a) has more than an insubstantial or incidental connection with an election of members to federal Parliament;
- (b) yet, is not substantially in respect of election of members to a federal Parliament.

24. The Shorter Oxford English Dictionary relevantly defines "substantially" as meaning "in substance", "in essentials, to all intents and purposes, in the main".

- 20 25. Applying this definition, the effect of the Commonwealth's submission is that a State has no legislative power to make laws which affect a Commonwealth election if the law has more than an insubstantial or incidental connection with an election, even if the connection is something less than being the main or essential purpose of the law.

26. There is no established test to determine if a State law impermissibly interferes with the Commonwealth's exclusive legislative power with respect to federal elections. It appears that the test of more than "an insubstantial or

incidental connection with ... an election"¹³ has been suggested by the Commonwealth by analogy to the limitation on the Commonwealth's power with respect to banking (*Constitution*, s 51(xiii)), as articulated by the High Court in *Bourke v State Bank of New South Wales*.¹⁴

27. However, s 51 contains an enumeration of non-exclusive Commonwealth legislative powers. The use of a test of connection in respect of that type of power is not necessarily the same as for an exclusive legislative power. Section 52 of the *Constitution* sets out the exclusive legislative powers of the Commonwealth Parliament. No test has been stated for characterising a law relating to the exclusive powers contained in this provision.¹⁵
28. Indeed, consideration of s 52 of the *Constitution* raises another matter. It does not specifically contain an exclusive power relating to federal Parliamentary elections or the conduct of candidates for federal Parliamentary elections, even though it enumerates certain exclusive powers related to the operation of the Commonwealth.
29. It is not controversial that the Commonwealth has power to legislate with reference to federal elections and all matters incidental thereto (*Constitution*, ss.10, 31, 51(xxxvi), 51(xxxix)).¹⁶ In *Smith v Oldham*, each of Griffith CJ,¹⁷ Barton J¹⁸ and Isaacs J¹⁹ made statements to the effect that the Commonwealth's power in this respect was "exclusive", although there was no competing State legislation in that case. Subsequent cases have referred to this power as exclusive to the Commonwealth.²⁰
30. However, the scope of this exclusive power is not settled, and has even been doubted in subsequent case law.²¹ In *Smith v Oldham*, Griffith CJ stated that

¹³ Commonwealth's Notice [2.1].

¹⁴ (1990) 170 CLR 276. See CS [8] fn 12.

¹⁵ The operation of the provision was considered in a different context in *Paliflex Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2003) 219 CLR 358.

¹⁶ *Smith v Oldham* (1912) 15 CLR 355, 359, 361 (Barton J), 362 (Isaacs J).

¹⁷ *Smith v Oldham* (1912) 15 CLR 355, 358.

¹⁸ *Smith v Oldham* (1912) 15 CLR 355, 360.

¹⁹ *Smith v Oldham* (1912) 15 CLR 355, 365.

²⁰ See CS [8] fn 10.

²¹ See *Local Government Association of Queensland (Incorporated) v State of Queensland* [2003] 2 Qd R 354, 369-373 [33]-[50] (Davies JA).

the nature of the Commonwealth's exclusive power is to not to regulate federal elections generally, but to deal with the "conduct of persons with regard to [federal] elections".²² Further, this power is not at large.²³ It is "subject to" the *Constitution* (ss 10, 31), which means that the power is subject not only to other express provisions of the *Constitution*, but also to other implications drawn from the *Constitution*.²⁴

31. Ultimately, it is for the people of the relevant State to determine the electoral processes which determine what government that State may have.²⁵ A State continues to possess the ability to control these processes even if a less than substantial connection exists with a federal election. It does not follow from any power the Commonwealth has to legislate with respect to federal elections that State electoral laws cannot have more than an insubstantial or incidental connection to federal elections. If the Commonwealth Parliament considers that there is a particular difficulty about any electoral funding law which may affect Commonwealth candidates, it is always open for it to enact its own funding law.
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32. For these brief reasons, the Commonwealth's submissions should not be accepted to the effect that a State does not have the power to legislate in respect of electoral expenditure which has more than an insubstantial or incidental connection with an election of members to federal Parliament.
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²² *Smith v Oldham* (1912) 15 CLR 355, 358 (Griffith CJ). See also 360 (Barton J).

²³ *Langer v Commonwealth* (1996) 186 CLR 302, 324 (Dawson J).

²⁴ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 69 (Deane and Toohey JJ). See also *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297, 313 (the Court).

²⁵ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 242 (McHugh J).

PART V: LENGTH OF ORAL ARGUMENT

33. It is estimated that the oral argument for the Attorney General for Western Australia will take 15 minutes.

Dated: 26 November 2018



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