

BETWEEN

UNIONS NSW

First Plaintiff

& OTHERS

AND



THE STATE OF NEW SOUTH WALES

Defendant

OUTLINE OF ORAL ARGUMENT OF THE DEFENDANT

10 **PART I PUBLICATION**

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

PART II PROPOSITIONS

Cap on electoral expenditure of third party campaigners (“TPCs”)

2. The cap on the electoral expenditure of TPCs operates, as a component part of the whole Electoral Funding Act 2018 (NSW) (“EF Act”), to reduce the influence of money on politics and to help prevent undue influence in the electoral process: EF Act, s 3(a), (c); Defendant’s Submissions (“DS”) [36]-[37]. The Election Funding, Expenditure and Disclosures Act 1981 (NSW) was a similar scheme, but has been overtaken by the EF Act: DS [32]-[35].
- 20 3. The implied freedom exists to enable “the people to exercise a free and informed choice as electors”: Lange v ABC (1997) 189 CLR 520 at 560; McCloy v NSW (2015) 257 CLR 178 at [42]. That choice is between candidates standing for election to office. Both historically and presently, political parties are of significance in the making of this electoral choice: McKenzie v Commonwealth (1984) 57 ALR 747 at 749; McGinty v Western Australia (1996) 186 CLR 140 at 258-259; Mulholland v AEC (2004) 220 CLR 181 at [20], [29]; DS [19]-[24].
4. The Defendant accepts that, in operation and effect, ss 29(10) and 33(1) of the EF Act burden the implied freedom.

5. In the view of the legislature, differential caps on electoral expenditure were required to promote a level playing field and to protect the integrity of election campaigns: DS [12]-[15], [38]-[40]. It is a legitimate purpose to seek to enhance the electoral process by preventing certain voices from drowning out others in political discourse: McCloy at [42]-[45]; Harper v Canada [2004] 1 SCR 827 at [62]; DS [27]-[30].
6. There are significant differences between those the subject of electoral choice (that is, candidates and political parties) and others (that is, TPCs, defined in s 4 as entities not directly involved in the electoral contest). The differential treatment of TPCs on account of such differences is compatible with the constitutionally prescribed system of government: DS [26], [38]-[41].
7. As to suitability, there is a rational connection between the purpose of ensuring that TPCs have sufficient scope to participate in election campaigns, but do not drown out those seeking election, and the imposition of a \$500,000 cap on the electoral expenditure of TPCs: DS [39], [44].
8. As to necessity, the plaintiffs do not argue that TPCs are prevented from influencing election campaigns. A cap of \$500,000 was selected to ensure that TPCs could have some, but not undue or disproportionate, influence. There is nothing impermissible about the balance struck by the legislature: DS [45]-[46]. It need not wait until there is an unfair election before addressing identified threats to the electoral process: McCloy at [197], [233]; Brown v Tasmania (2017) 261 CLR 328 at [288]; DS [35].
9. As to adequacy in balance, the burden imposed is not substantial and the restriction on political communication is neutral as to content: DS [42]-[43]. The purpose of the law, in seeking to protect and enhance the electoral process, is compelling. Sections 29(10) and 33(1) are not disproportionate to the pursuit of that purpose: DS [47].

“Acting in concert” offence

10. “Acting in concert” means acting under an agreement that has specified characteristics. The agreement itself (as distinct from a party to the agreement) must have the sole object or principal object of having elected, or opposing the election of, a particular party, elected member or candidate: DS [51], [53]. The prohibition on acting in concert does not encompass, for example, agreements with a principal object of promoting or opposing particular policies or ideas, even if seeking to influence voting: DS [54].

11. Section 35 has two purposes, each of which is a legitimate purpose: to support the expenditure and donation caps by targeting coordinated action and to allow participation in election campaigns by TPCs without them overwhelming the voices of those actually seeking to be elected: DS [55]; SCB 4/1252-1260, 1315, 1420; SCB 5/2105. Section 35 goes further than merely preventing circumvention of expenditure caps (cf s 144). Section 35 also goes further than merely preventing expenditure by “associated entities” (cf s 30(4)).
12. Section 35 imposes only a limited burden on the implied freedom having regard to the timing and scope of its application: DS [57]; SCB 4/1413, 1422. The burden is not
10 aggravated by virtue of its application only to TPCs, or by the public funding regime, or the possibility of issue advertising under the Government Advertising Act 2011.
13. As to suitability, the burden rationally advances each of the two identified purposes: DS [58]-[59]. Contrary to PS [64], the application of s 35 only to TPCs is not irrational as part of the purpose is to prevent parties/candidates using TPCs as surrogates to defeat their own expenditure caps and there is in any event no lack of rational connection merely because a provision might have gone further. Contrary to PS [65], s 35 does not involve any impermissible assumption that the parties acting in concert are in truth a single source of money: Unions NSW (No 1) (2013) 252 CLR 530 at [63]. Contrary to Reply [11], the additional TPC cap in s 29(12)(b) does not
20 sufficiently achieve the purpose of preventing TPCs from overwhelming candidates in light of s 29(13) which limits the operation of that cap.
14. As to necessity, s 35, in its application to coordinated action, performs work beyond the general circumvention offence in s 144, which would therefore not achieve the purposes of s 35 to the same extent: DS [60].
15. As to adequacy in balance, no disproportionality is shown given the limited burden and the absence of alternative means to achieve the objects to the same extent: DS [61].
16. Alternatively, “the applicable cap for the third-party campaigner” should be construed not to include expenditure by other persons who have their own caps: Interpretation Act 1987, s 31; DS [62]-[63].

30 Date: 5 December 2018

M G Sexton SC SG

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