

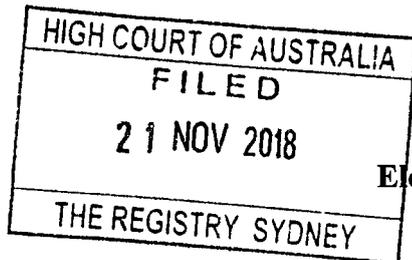
ORIGINAL

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

The State of New South Wales
Defendant

SUBMISSIONS BY THE LIBERAL PARTY OF AUSTRALIA (NSW Division)
("NSW Liberal Party")

I Internet publication

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

II Basis for intervention

2. The NSW Liberal Party seeks leave to intervene in this matter in support of the Defendant.
3. It is a registered political party under Part 6 of the Electoral Act 2017 (NSW) and a “party” within the meaning of section 4 of the Electoral Funding Act 2018 (NSW) (**EF Act**).
4. It seeks to provide submissions that the direct effect of the impugned provisions is to level the playing field such as to not burden the freedom or alternatively, contend that any burden is compatible with the maintenance of a constitutionally prescribed system of government: *Brown v Tasmania* [2017] HCA 43 at [94], [104] and [156].
5. The NSW Liberal Party contends that there are other material facts to those at SC [1]-[44] (SCB 1/100-116) which it seeks to bring before this Honourable Court and annexes to these submissions an affidavit of Christopher Peter Stone sworn 21 November 2018 which it seeks leave to file and read.

III Reasons Why Leave Should be Granted

6. The NSW Liberal Party has a direct interest in the outcome of these proceedings. It receives political donations and endorses candidates for election to the NSW Parliament. The NSW Liberal Party will be directly impacted by any removal of expenditure caps on Third Party Campaigners (**TPC**) and the allowance of TPCs engaging in agreements under section 35 of the EF Act.

IV Submissions Addressing Issues

Challenge to Section 29(10)

Introduction

7. The antecedents of the EF Act, being the Electoral Funding and Expenditure Act 1981 (NSW) (**EFED Act**) introduced the first prohibitions on political donations and caps on electoral donations and expenditure in amendments brought forward in 2009 and 2010 by the then NSW Labor Government.

8. In assessing whether the challenged provisions of the EF Act impose a burden on the implied right under the Federal Constitution, it is submitted that the legislation must be considered in its totality. The full political relationships between the Plaintiffs and any major political parties is also relevant.
9. The Australian Labor Party (ALP) has state branches including a branch in NSW (NSW ALP). The ALP was formed as the political wing of the trade union (**union**) movement.
10. As Mr Stone describes, the NSW ALP has many affiliated unions who provide it with funds via affiliation fees. In addition, as will be demonstrated, TPCs such as the First to Sixth Plaintiffs, each have the ability to give substantial support to the NSW ALP under the EF Act. These modes of political participation are all in addition to the TPC expenditure regulated by section 29 (10) of the EF Act.

Total Expenditure Caps

11. The NSW Parliament has fixed four year terms by virtue of section 24 of the Constitution Act 1902 (NSW).
12. In a general election, each political party has an expenditure cap under section 29 (2) of the EF Act of \$122,900 multiplied by the number of the 93 Assembly seats for which the party has candidates. The NSW ALP usually contests all of the 93 seats affording it a total cap on expenditure of \$ 11.429m.
13. Under its coalition agreement with the National Party, the NSW Liberal Party usually determines with the National Party in which of the 93 Assembly seats that each will endorse a candidate. The result is that the National Party and the NSW Liberal Party do not usually oppose each other in any of the 93 Assembly seats. As a consequence, the National Party and NSW Liberal Party coalition under section 29(2) also has a combined total cap on expenditure of \$11.429m.
14. Prior to the commencement of the capped State expenditure period under section 27 of the EF Act (ie the date of 30 September 2018 being 6 months prior to the NSW election), 20 unions registered as TPCs, entitling each to an expenditure cap of \$500,000 under section 29 (10)(a) of the EF Act. Another two unions have since registered entitling them to a further expenditure cap of \$250,000 under section 29 (10)(b) of the EF Act.
15. That means those 20 unions will have a combined expenditure cap under section 29(10) of the EF Act of \$10m and the 2 other unions will have a further expenditure cap of \$500,000 being a total union TPC expenditure cap of \$10.5 m; which is

additional to the ALP expenditure cap of \$11.429m under section 29(2) if it contests each of the 93 seats in the Assembly. Eleven of the 22 registered unions as TPCs are affiliated with the NSW ALP.

16. In addition to the 20 unions who were registered by 30 September 2018 and therefore subject to an expenditure cap of \$500, 000, only a further 10 TPCs were registered by 30 September 2018. Their combined maximum expenditure of \$5 million is less than half of the union expenditure cap of \$10.5m. These other 10 parties include:

- 10
- a. The Australian Christian Lobby;
 - b. Australian Salaried Medical Officers' Federation NSW;
 - c. The Commercial and Economic Planning Association INC;
 - d. National Roads and Motorists' Association Ltd (commonly known as the NRMA);
 - e. Night Time industries Association;
 - f. No CSG in Barwon – Put the Nats Last Pty Ltd;
 - g. NSW Business Chamber Limited;
 - h. NSW Minerals Council Limited;
 - i. Unanderra Access Group;
- 20
- j. Volunteer Firefighters Association Inc;

17. Of these 10 other TPCs, none are affiliated with the NSW Liberal Party and only the NSW Business Chamber Ltd, can be described as generally supportive of the policies of the NSW Liberal Party.

18. Concerns about the swamping impact upon political parties of multiple TPCs have substance.

30 Electorate by Electorate Expenditure Caps

19. Not only is there a macro expenditure cap under section 29 (2) of the EF Act but each of the political parties have an electorate by electorate expenditure cap for general elections under a combination of the provisions of section 29 (6) and (12) of the EF Act in the total amount of \$184,400 per electorate.

20. Under Section 29(12)(b), each of the 22 registered union TPCs can spend \$24,700 per electorate.

- 40 21. For example, in a marginal seat contested by the NSW Liberal Party and the NSW ALP:

- a. The NSW Liberal Party will be able to spend a maximum of \$184, 400;
- b. The NSW ALP will be able to spend a maximum of \$184, 400; and

- c. Each of the 22 unions will be able to spend a maximum of 22 x \$24,700 or a total of \$543,400.
- d. The combined union, NSW ALP expenditure is therefore \$727,800 compared with the NSW Liberal Party maximum expenditure of \$184,400 plus any other TPCs that support it.

22. It is contended that no burden on the freedom is demonstrated by the Plaintiffs.

10 23. Further, the submissions of the Defendant already identify that the expenditure cap on both the political parties and the TPCs under section 29 of the EF Act is only with regards to the last 6 months of a 4 year electoral cycle.

Important Change from the EFED Act

24. The submissions of the Plaintiffs and the Special Case make various contentions with regards to the EFED Act and the former expenditure caps under it.

20 25. Caution should be exercised with this comparison. Under the EFED Act, the expenditure caps under section 95F applied only to Electoral Communications Expenditure as defined by section 87(2). The expenditure captured by the definition of Electoral Communications Expenditure under the EFED Act is more narrow than expenditure under section 87(1) and did not include the exclusions in section 87 (2)(i) and (j).

26. Under the EF Act, the expenditure which is capped is more broadly defined under section 7. It is submitted that because more expenditure is covered under the EF Act cap than was covered under the EFED Act, there is justification for a greater differential expenditure cap between the expenditure of parties and TPCs under section 29.

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Justification for Differential Caps

27. Much of the expenditure which did not fall within the definition of Electoral Communication Expenditure under the EFED Act but is now subject to a cap are likely to be the sorts of expenses incurred by a political party running candidates for election rather than incurred by a TPC.

40 28. Virtually all campaign expenditure incurred by a political party is now governed by the cap under the EF Act. It is contended parliament had a legitimate justification for adjusting the relative expenditure caps between TPCs and Political Parties.

29. TPCs do not have the same total expenditure as a political party.

30. Also, TPCs can pick and choose where they spend their money. By not being tied down to running candidates in every seat like political parties do, TPCs can choose to conduct their political expenditure in only marginal seats and often in only certain parts of individual electorates where they perceive they will have maximum impact.
31. By contract, political parties by practical necessity must spend money in every seat and in every section of every seat where they have a candidate. This is because they are also interested in gaining upper house votes as well as lower house votes even in areas where they will not win a majority of the lower house votes. TPCs may only be concerned with impacting on who wins government through the lower house and focus their expenditure accordingly.
32. Because the expenditure cap under the EF Act extends beyond the matters regulated by the EFED Act, expenditure on the whole campaign infrastructure of a political party falls within the cap. This means that political parties are likely to have expenditure on a larger scale than TPCs will have. The sort of party campaign infrastructure includes office space, polling, general administrative expenses, phone canvassing, robo calls, motor vehicles, A-frames, signs, bunting, booth kits, instruction manuals for campaign workers, postage to electors (recently increased to \$1 per letter), the organisation and distribution of how to vote cards, the manning of all pre poll (now more significant) and polling stations, the organization of postal voting in addition to the sorts of common costs they would incur with TPCs like advertising and printing costs.
33. All of these factors amply justify different caps applying to political parties and TPCs.

Additional Capacity for Support to ALP by Unions through Political Donations

34. As the affidavit of Mr Stone discloses, in the last financial year in which there is a disclosure, the aggregate union affiliation fees to the NSW ALP were in the order of \$1.5m per annum.
35. In addition, under the EF Act the 5 union Plaintiffs could spend an unlimited amount of money from day 1 of the 4 year parliamentary term in support of the NSW ALP for 3.5 years before the expenditure cap the subject of these proceedings would take effect.
36. At least some unions have substantial financial assets and the capacity to expend the whole of the relevant cap and make political donations. As Tracey J noted in *Australian Building and Construction Commissioner v CFMMEU (No 2)* [2018] FCA 1211 at [70] the union in question had assets valued at over \$58m and revenues of almost \$34m in 2016.

37. It is submitted that these provisions, entitle the Plaintiffs to substantial involvement and engagement in the NSW political process consistent with the freedom of political communication.

Challenge to Section 35

38. The concern that TPCs might work in concert is demonstrated by the six Plaintiffs working together with regard to the conduct of these proceedings.

10 39. Mr Stone deposes to instances in the Gosford by-election where union TPCs were communicating exactly the same message.

40. It is submitted that section 35 of the EF Act operates as an anti-avoidance provision. Section 35 prevents TPCs from avoiding the caps by working together to exceed the various regulation within the legislation including the expenditure caps.

41. Section 35 also acts as a form of political transparency, as TPCs who are affiliated with the NSW ALP are prevented from disguising the fact that they may be working as a proxy for the ALP and not therefore a true TPC.

20 42. There are other anti-avoidance provisions in the legislation. For example, under section 30(2) and (3) the unspent portion of a cap for one candidate cannot be spent by a party to exceed the expenditure cap for another candidate.

Conclusion

43. For the foregoing reasons the stated questions should be answered as follows:

1. No.
2. No.
3. The Plaintiffs.

V Estimate of Time

30 44. The NSW Liberal Party estimates 10 minutes for any oral argument.

Date: 21 November 2018


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