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

State of New South Wales
Defendant

PLAINTIFFS' OUTLINE OF ORAL ARGUMENT

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Part I: Internet publication

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

Part II: Propositions to be advanced in oral argument

2. ***Impugned provisions:*** The implied freedom is impermissibly burdened by two provisions of the *Electoral Funding Act 2018* (NSW) (**EF Act**): s 29(10), read with the prohibition in s 33(1), which caps the "electoral expenditure" of third-party campaigners (**TPCs**) to $500,000 or $250,000 depending on when the TPC registers under the statute; and s 35(1), which imposes an "acting in concert" offence applicable only to TPCs.

3. ***Purpose of s29(10)*** **(P[39]-[41]; Reply [10])*:*** The EF Act itself reveals a gross disproportion between the expenditure caps for parties and independent Council groups (**groups**), on the one hand, and TPCs on the other, indicating that the purpose of the caps is to marginalise the views and messages of TPCs (**Marginalisation Purpose**). A major party fielding one candidate in each Assembly seat has a party cap of $11.4m (s29(2)) plus the benefit of individual candidate caps totalling $11.4m (s29(6)). A minor party or group has a cap of $1.29m (ss29(4)-(5)). A TPC has a maximum cap of $500,000 (s29(10)). Expressed in proportions: major party to TPC: around 23:1 (46:1 including candidate caps); minor party/ group to TPC: 2.6: 1.

4. ***Wider context*** **(P[41]-[46]; Reply [7], [9])*:*** The purpose of a provision that burdens political communication can be illuminated by the increase in burden from a prior legislative baseline together with the evidence available (or otherwise) to justify claims of mischief or necessary solution: see, by analogy, *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at [25], [73], [78], [140], [167], [382], [384].

5. In this case, the wider context includes the following:

(a) The *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (**Previous Act**) capped electoral expenditure in pursuit of a "level playing field" in a manner striking an evident balance between candidates, parties, groups and TPCs. The independent candidate cap ($150,000) drove the setting of the major party cap; the cap for the minor parties and groups was adjusted for that circumstance; and TPCs were treated as entitled to a cap as great as the minor parties and groups (s 95F). The proportions inherent in the former scheme were as follows: major party running a candidate in each Assembly seat to TPC: around 9:1 (18:1 including candidate caps); minor party/ group to TPC: 1:1.

(b) In 2014, the Panel (**4/SCB 1412-1419, 1372**): (i) identified as an alleged mischief in the former scheme its failure to recognise that parties were entitled to a greater role in election campaigns and that its TPC caps risked "drowning out" parties and candidates;

(ii) recommended decreasing the TPC cap to $500,000; (iii) identified no evidence to support its claims of mischief or necessary solution; (iv) caveated that 2015 election data should be considered before making the change; and (v) otherwise recommended maintaining the Previous Act's expenditure caps, adjusted for inflation.

(c) In the 2015 NSW State Election campaign, several TPCs spent within the existing caps but well in excess of the EF Act caps (**SC[29]**), in a manner: (i) evidencing what is reasonably necessary for a TPC to mount an effective media campaign: see, eg, the NSWNMA's TV advertising campaign (**1/SCB 153** and **SC[5](e)**); and (ii) devoid of any evidence of parties or candidates being "drowned out".

(d) The expenditure of the 6 highest-spending parties for the same election (**SC[32]**), and government issue advertising expenditure for the 2014-2015 financial year (**SC[35]**), substantially exceeded TPC expenditure for that election (**SC[29]**).

(e) NSW points to no material either before the Parliament in 2018 or now before the Court showing that the Panel's caveat was heeded.

6. ***The implied freedom precludes attempts to suppress disfavoured political voices and favour others*** **(P[32]-[36], Reply [3]-[4])***:* The implied freedom exists to further communication on political matters between *all* persons, groups and other bodies in the community: *ACTV Pty Ltd v Commonwealth* (1992) 177 CLR 106 (***ACTV***) at 138-139; *Unions NSW v NSW* (2013) 252 CLR 530 (***Unions No 1***) at [25]-[30], [144]-[148].

7. A law restricting political communication in order to favour the political speech of parties/ candidates over that of others has an impermissible purpose: see *ACTV* at 126-132, 144-146, 171-175, 237-238; *McCloy v New South Wales* (2015) 257 CLR 178 at [45]. It is not necessary to show the disfavoured speech is effectively *precluded*: cf **D[45],[47]**. Parties and candidates hold no preferential status in the contest of ideas and opinions protected by the implied freedom, as there is no reason why their speech will best assist the people to make electoral choices and assess the performance of the Executive. Persons and entities independent from the field of candidates play a critical role in political debate. Many examples exist of legal reforms driven by public campaigns of special interest groups and individuals not standing for Parliament: both historical (eg the movement culminating in the *Commonwealth Franchise Act 1902* (Cth)) and recent (eg the campaign for marriage equality).

8. ***"Levelling the playing field"*** **(P[34]; Reply [3]-[5], [8])***:* While a law capping electoral expenditure in pursuit of a "level playing field" may find it necessary to distinguish between those speaking individually and those speaking in groups – and to take into

account whether the speech is targeted to one electorate, one House or the State at large – such distinctions can never start from the premise that one person or group has a greater entitlement to engage in political speech than others by reason of identity or status.

9. A law restricting the political speech of one person/ group purportedly to prevent the "drowning out" of other voices cannot be justified by the polity's mere say-so. There must be evidence available for the Court's consideration which can rationally justify the conclusion that the threat is real and the response required: see *ACTV* at 145, 239; *Unions No 1* at [58]-[59]; *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 (***Betfair***) at [101]-[105], [111]-[112]. Further, it must be clear from the law's terms that the law is connected to and furthers that purpose: *Unions No 1* at [54]-[55], [64].

10. ***Conclusion on purpose:*** s29(10), read in terms and in its wider context, evidences an illegitimate purpose: the Marginalisation Purpose. It infringes the implied freedom.

11. ***Proportionality* (P[47]-[54]; Reply [10])*:*** Section 29(10) is not reasonably appropriate and adapted to achieve any legitimate object in a manner compatible with our constitutional system of government. It substantially burdens the freedom and lacks:

(a) *suitability* (note: its over-inclusiveness and under-inclusiveness);

(b) *necessity* (note: the relativities of the Previous Act's expenditure caps provide a real world example of an appropriate alternative measure – cf *Betfair* at [111]); and

(c) *adequacy in balance* (substantial speech is shut down in pursuit of bare speculation).

12. ***Section 35* (P[55]-[69]; Reply [11])*:*** Section 35 burdens political communication: (i) by preventing any TPC from conducting a joint campaign with any other person where the total cost exceeds the $500,000/$250,000 cap, rendering unlawful, for example, a campaign approximating the "NSW Not For Sale" campaign (**1/SCB 314-320** and **SC[19]-[27]**); and (ii) by its substantial deterrent effects.

13. ***Purpose:*** Section 35 fails compatibility testing, as it adopts differential aggregation for the purpose of relegating the speech of those who do not stand candidates for election to a secondary position behind parties and groups. It cannot be connected to NSW's asserted purposes: see, similarly, *Unions No 1* at [59]-[60], [62]-[64], [140].

14. ***Proportionality:*** Section 35 substantially burdens the freedom and lacks:

(a) *suitability* (note: its application to TPCs but not to parties);

(b) *necessity* (note: the anti-circumvention provision in s 144); and

(c) *adequacy in balance* (substantial speech is shut down in pursuit of bare speculation).

5 December 2018

Justin Gleeson SC **Nicholas Owens SC** **Celia Winnett**