HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

File Number:	S98/2022
File Title:	Unions NSW & Ors v. State of New South Wales
Registry:	Sydney
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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S98 of 2022

BETWEEN:

Unions NSW
First Plaintiff

New South Wales Nurses and Midwives' Association
Second Plaintiff

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Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales
Third Plaintiff

New South Wales Local Government, Clerical, Administrative, Energy, Airlines & Utilities Unions
Fourth Plaintiff

and

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State of New South Wales
Defendant

DEFENDANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Internet publication

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

Part II: Propositions to be advanced in oral argument

1. The challenge to section 35 became moot when the provision was repealed:

(a) Hypotheticality: The plaintiffs petition for an advisory opinion intended to influence Parliament rather than to vindicate any justiciable right. The constructional dispute about s 35 is a necessary step in any resolution of validity and would likely inform the terms of any future enactment, highlighting the hypotheticality of the asserted fear.

(b) No concrete interest: The plaintiffs do not assert non-compliance with the law, so
10 there is no spectre of enforcement action (cf *Croome* (1997) 191 CLR 119). The asserted interest in knowing whether they complied with an invalid law is not a sufficient interest to sustain a judicial proceeding: **DSS [4]**.

(c) Parliamentary privilege: The Court should not entertain an argument premised on an insinuated insincerity in the Government's ultimate support in the Assembly of the repeal of s 35. The plaintiffs cannot call into question the intentions and motivations of parliamentarians on such matters: **DSS [5]**.

(d) American mootness doctrine of no assistance: The "voluntary cessation" exception to the mootness doctrine applies to cessation of private or administrative conduct and, perhaps, municipal by-laws. It is wholly inapt to apply to Parliamentary legislation and
20 does not have that operation even in the United States: *Town of Portsmouth v Lewis*, 813 F 3d 54 at 59-60 (2016); *Kremens v Bartley*, 431 US 119 at 129-136 (1977).

(e) Costs: The costs dispute is not a basis on which to determine the merits: **DSS [7]**.

2. Section 29(11) of the EF Act is valid:

(a) Lower expenditure caps for TPCs than for candidates or parties are supported by expert evidence available to the Parliament through JSCEM and a Panel of Experts: **DS [15]-[21]; SCB9, Tab 182, SCB10, Tabs 183A, 183B and 185**.

(b) Lower expenditure caps for TPCs than for candidates or parties are justifiable, having regard to the functional differences between them: **DS [22]-[25];** ***Unions NSW v NSW (No 2)*** (2019) 264 CLR 595 at [90]-[91], [110], [113].

30 **(c)** The $20,000 (indexed) cap in s 29(11) is reasonable:

(i) it is broadly proportionate to the unchallenged caps for general elections, having regard to the number of electoral districts and the shorter capped expenditure

period: **DS [35]**. Plaintiffs' **Reply [6]** rests on an invalid comparison between s 29(9) and the general election cap for endorsed candidates, ignoring the additional cap for parties and thus overlooking (again: see **DS [12]**) that, by reason of s 30(3), s 29(9) is a cap not simply on candidates but on candidates and parties combined. Relative to a party that endorses a candidate in each of the 93 districts, the cap in s 29(9) is 2% of the comparable general election cap, not 200% as the plaintiffs wrongly calculate.

(ii) the historical expenditure by TPCs in by-elections shows that $20,000 is more than enough to allow reasonable participation: **DS [36]; SC [22] (Supp SCB, Tab 15, 4249-4256)**.

10 **(iii)** s 7(4A), inserted by the 2022 amendments, functionally increases the cap by removing travel expenses from the definition of capped electoral expenditure: **JBA1, Tab 6, 303**. The historical data shows that such expenditure can be material: **SC [22] (Supp SCB, Tab 15, 4249-4256)**.

(iv) Parliament has a domain of selection as to the appropriate level of an expenditure cap. Its choice is not to be adjudicated by reference to the distorting possibilities of what the loudest campaigner may wish to spend: **DS [37]-[41]**.

3. If the Court reaches the question, section 35 was valid:

(a) Section 35 prohibited TPCs from acting in concert with others to incur expenditure that exceeded the applicable cap. It did not prohibit coordinated campaigning: **DS [51]-**

20 **[57]**. That construction was supported by the extrinsic material:

(i) JSCEM's recommendation for s 35 on the basis of a perceived need to prevent multiple TPCs "from combining their expenditure caps and then overwhelming the expenditure of parties, candidates and other [TPCs] acting alone": **DS [53]**; **SCB 10, Tab 185, 2685**.

(ii) The Minister's reply speech on the second reading of the Bill for the EF Act that s 35 applies where a TPC "acts under an agreement to incur expenditure in excess of the … spending cap": **DS [52]; SCB 10, Tab 189, 2843-2844**.

(b) On this construction, the plaintiffs' constitutional challenge is misdirected. Section 35 was a justified adjunct to the integrity and efficacy of the applicable

30 expenditure caps: **DS [63]-[70]**.

Date: 16 November 2022

Bret Walker Brendan Lim