HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

UNIONS NSW
First Plaintiff

NEW SOUTH WALES NURSES AND MIDWIVES' ASSOCIATION
Second Plaintiff

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 UNION
Fourth Plaintiff

and

STATE OF NEW SOUTH WALES
Defendant

SUPPLEMENTARY SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

PART I — CERTIFICATION

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

PART II — ARGUMENT

2 The plaintiffs' reply (**PR**) advances three reasons why the Court retains jurisdiction to determine their challenge to s 35 of the *Electoral Funding Act 2018* (NSW) despite its repeal (**PR [10]-[12]**). Each reason should be rejected.

3 ***Past conduct*** (**PR [10]**). The fact that the plaintiffs' past conduct was constrained by, and may have been moulded to, s 35 does not entitle the plaintiffs to challenge the validity of that provision despite its repeal. The plaintiffs do not claim to have contravened s 35 in the past, and no such contravention is alleged.[1] In those circumstances, "the plaintiffs have no more interest than anyone else in clarifying what the law is".[2] That is, they lack a sufficient interest in the past validity of s 35 to give them standing. Separately, but relatedly, declaratory relief cannot issue in respect of s 35 following its repeal as it would "produce no foreseeable consequences".[3] While **PR [10]** asserts the contrary, no such consequence is identified. The conclusion that, following the repeal of s 35, the plaintiffs lack standing to seek a declaration that s 35 is invalid has the consequence that the validity of s 35 can form no part of the "matter" before the Court.[4] That is a conclusion that goes to jurisdiction; it is not a question of discretion: cf **PR [11]**.

4 ***Risk of re-enactment of s 35*** (**PR [11]**). The entirely speculative possibility that s 35 might be re-enacted at some unknown future time does not affect the position. It is "by no means obvious"[5] that a Bill to re-enact s 35 will be introduced into the New South Wales Parliament, or that the Parliament would enact any such Bill if it is introduced. The defendant's refusal to provide the undertakings sought by the plaintiffs is irrelevant, because an undertaking by the Executive Government could never "tie the hands of future

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1 See Further Amended Statement of Claim (**FASOC**) at [109]-[110]; Special Case at [75]-[84].

2 See *Smethurst v Commissioner of the Australian Federal Police* (2020) 94 ALJR 502 at [106]-[107] (Kiefel CJ, Bell and Keane JJ; Gordon J agreeing); cf *Croome v Tasmania* (1997) 191 CLR 119.

3 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582 (Mason CJ, Dawson, Toohey and Gaudron JJ); cf *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at [103] (the Court).

4 See *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234 at [31] (Kiefel CJ, Keane and Gordon JJ), [49] (Gageler and Gleeson JJ), [79] (Edelman and Steward JJ).

5 See *Esso Australia Resources Pty Ltd v Federal Commissioner of Taxation (No 1)* (2011) 196 FCR 560 (***Esso***) at [13] (the Court). It may be noted that the New South Wales Government does not have a majority in either House of Parliament.

Parliaments" (cf **PR [11(iii)]**; also **[11(i)]**).[6] Finally, there is a real question as to whether this Court may take account of the statements made in Parliament by the Attorney-General (which obviously are not relevant to the constitutional validity of s 35): Defendant's Supplementary Submissions (**DSS**) [5]; cf **PR [11(ii)]**. However, even if they can be considered, those statements do not establish that s 35 will be re-enacted.

5 Even if there were an evidential basis to apprehend that s 35 is likely to be re-enacted, it does not follow that the validity of the provision can or should be determined. In support of their contention to the contrary, the plaintiffs rely on United States authorities concerning the "voluntary cessation" exception to the mootness doctrine. Those 10 authorities are of no assistance. *First*, as a result of the significant differences between Art III of the US Constitution and Ch III of the Australian Constitution,[7] they cannot be uncritically transposed to the present context. *Secondly*, the doctrine has not been applied by the Supreme Court to primary legislation.[8] *Thirdly*, the cases upon which the plaintiffs rely are distinguishable: in one, the government party expressly stated an intention to re-enact the repealed provision if the case were held to be moot;[9] in the other, the repealed law had been replaced by a scheme that affected those to whom it applied "in the same fundamental way".[10]

6 ***Costs*** **(PR [12])**. The plaintiffs have not provided a principled explanation as to why the existing costs dispute leads to the conclusion for which they contend.[11] The conventional 20 and correct position as to the relevance of costs is set out in **DSS [7]**.

Dated: 11 November 2022

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6 *Magrath v Commonwealth* (1944) 69 CLR 156 at 169-170 (Rich J).

7 See *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at [21] (Gleeson CJ and McHugh J), [42] (Gaudron J), [156] (Kirby J), [213] (Callinan J).

8 Both cases upon which the plaintiffs rely involved municipal ordinances. The Supreme Court has "consistently and summarily held that a new … statute moots a case": *Town of Portsmouth v Lewis* (2016) 813 F 3d 54 at 59 (the Court) (emphasis added). See, eg, *United States Department of Treasury v Galioto* (1986) 477 US 556 at 559-560 (the Court); *Massachusetts v Oakes* (1989) 491 US 576 at 582-584 (the Court).

9 *City of Mesquite v Aladdin's Castle Inc* (1982) 455 US 283 at 289 fn 11 (Stevens J for the Court).

10 *Northeast Florida Chapter of Associated General Contractors of America v City of Jacksonville* (1993) 508 US 656 at 660-662 (Thomas J for the Court).

11 *Esso* (2011) 196 FCR 560 (cited at **PR fn 14**) does not assist the plaintiffs. That was a case where there was an existing order about trial costs: at [14]. In the present case, there is no subsisting costs order.