



HIGH COURT OF AUSTRALIA

29 January 2019

UNIONS NSW & ORS v STATE OF NEW SOUTH WALES [2019] HCA 1

Today the High Court unanimously answered a question stated in a special case to the effect that s 29(10) of the *Electoral Funding Act 2018* (NSW) ("the EF Act") is invalid because it impermissibly burdens the freedom of communication on governmental and political matters implied and protected by the Commonwealth *Constitution*.

The EF Act replaced the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ("the EFED Act"). The general scheme of the relevant provisions of the EFED Act was to limit the amount or value of political donations to, and the amounts which could be expended by, political parties, candidates, elected members and others, including "third-party campaigners". According to the Second Reading Speech to the Bill which became the EF Act, it was designed to "preserve[] the key pillars of [the EFED Act], namely, disclosure, caps on donations, limits on expenditure and public funding". Although the scheme of the EFED Act remains largely intact, s 29(10) of the EF Act reduces the expenditure cap applicable to registered third-party campaigners from \$1,050,000 to \$500,000, which is less than half the amount applicable to, for example, certain political parties. Section 35 of the EF Act prohibits a third-party campaigner from acting in concert with others to incur electoral expenditure above the applicable cap for the third-party campaigner. The EF Act will apply to the next New South Wales State election, which is due to occur in March 2019 ("the 2019 election").

The plaintiffs are a collection of trade union bodies. With the exception of the sixth plaintiff, each plaintiff has registered as a third-party campaigner under the EF Act. Each of the plaintiffs has asserted an intention to incur electoral expenditure during the capped State expenditure period for the 2019 election. In the March 2015 election campaign, three plaintiffs incurred more than \$500,000 in electoral communication expenditure. The plaintiffs commenced proceedings in the High Court shortly after the EF Act commenced, seeking declarations of invalidity in respect of ss 29(10) and 35 of the EF Act, and the parties agreed a special case for the consideration of the Full Court.

The defendant, the State of New South Wales, contended that a purpose of the EF Act, and in particular s 29(10), was to prevent the drowning out of voices in the political process by the distorting influence of money ("the identified purpose"). A majority of the Court held that, accepting or assuming that the identified purpose was the real purpose of s 29(10) and that it was a legitimate purpose, the reduction in the cap applicable to third-party campaigners was not demonstrated to be reasonably necessary to achieve that purpose. As a result, s 29(10) was held to be invalid. For the majority, that invalidity had the result that it was unnecessary to answer the question concerning s 35 of the EF Act, because there was no applicable cap upon which the section could operate.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*