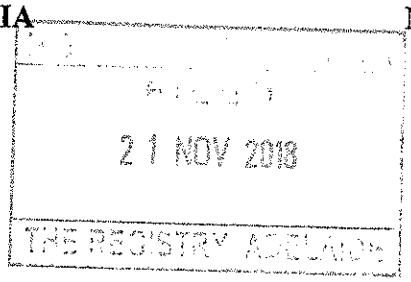
**IN THE HIGH COURT OF AUSTRALIA** **No S204 of 2018**

**SYDNEY REGISTRY**




BETWEEN

**Unions NSW**
First Plaintiff

**New South Wales Nurses and Midwives' Association**
Second Plaintiff

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**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

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**Health Services Union NSW**
Sixth Plaintiff

AND

**State of New South Wales**
Defendant

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# SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

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**Part I: Certification**

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

**Part II: Basis for intervention**

2. The Attorney-General for the State of South Australia (**South Australia**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the defendant.

**Part III: Leave to intervene**

3. Not applicable.

**Part V: Submissions**

4. The Plaintiffs challenge the validity of ss 29(10) and 35 of the *Electoral Funding Act 2018* (NSW) (**EF Act**), which respectively impose an electoral expenditure cap (**the expenditure cap**) applicable to third-party campaigners (**TPCs**) and prohibit TPCs acting in concert with others to incur electoral expenditure that exceeds the expenditure cap (**the acting in concert prohibition**), on the ground that these provisions impermissibly burden the implied freedom of communication on governmental and political matters contrary to the *Commonwealth Constitution*.[1]

5. A majority of this Court has recently held that the determination of whether an impugned legislative provision impermissibly burdens the implied freedom should be answered by reference to the following three questions:[2]

   i. First, does the law effectively burden the freedom in its terms, operation or effect?

   ii. Second, if the answer to question one is 'yes', is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? (**Compatibility testing**)

   iii. Third, if the answer to question two is 'yes', is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of government? (**Proportionality testing**)

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1 *Special Case* (**SC**) at [45].

2 The applicable test is that established by *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, as modified in *Coleman v Power* (2004) 220 CLR 1 and restated in *Brown v Tasmania* (2017) 91 ALJR 1089 at [104] (Kiefel CJ, Bell and Keane JJ), [156] (Gageler J), [277] (Nettle J), [481] (Gordon J).

6. In relation to the first question, the Plaintiffs and Defendant agree that the expenditure cap and the acting in concert prohibition burden the implied freedom of political communication.[3] South Australia accepts that the impugned provisions do burden the implied freedom.

7. In relation to the second question, the Plaintiffs submit that the expenditure cap and the acting in concert prohibition are invalid because they serve the illegitimate purpose of privileging the voices of political parties and candidates over the voices of persons who do not stand for election or field candidates.[4]

8. In response, and in support of the Defendant, South Australia submits that the approach adopted by the Plaintiffs to compatibility testing is not undertaken at an appropriate level of abstraction and fails adequately to distinguish between the purpose and effect of ss 29(10) and 35 of the EF Act. Consequently, South Australia submits that the Plaintiffs mischaracterise the purpose of the impugned provisions at the stage of undertaking compatibility testing. Commencing with the express objects of the EF Act, identified in s 3, the purpose of ss 29 and 35 of the EF Act should be understood to be the establishment of an electoral expenditure scheme that reduces overall election spending, and thereby reduces the potentially corrupting influence that accompanies the need to finance high campaign costs, whilst promoting fairness between the participants in the electoral process. This is a legitimate purpose.

9. In relation to the third question, the Plaintiffs submit that even if ss 29(10) and 35 of the EF Act serve a legitimate purpose, the expenditure cap and the acting in concert prohibition are not reasonably appropriate and adapted to advancing a legitimate purpose in a manner compatible with the constitutionally prescribed system of representative and responsible government.[5]

10. In response, and in support of the Defendant, South Australia submits that the fact that the EF Act regulates State and local elections, rather than Commonwealth elections, is relevant to answering the third question when proportionality testing is undertaken having regard to the extent of the risk presented by the burden imposed by the EF Act to the system of representative and responsible government established by Chs I and II and s 128 of the *Commonwealth Constitution*.

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3 *Plaintiffs' Submissions* (**PS**) at [37], [57]; *Defendant's Submissions* (**DS**) at [31], [52].

4 PS at [43], [60].

**Compatibility testing**

11. Compatibility testing asks whether the purpose of an impugned law is legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. This requires identification of the purpose of the law.

12. It is critical that the identification of purpose be at the level of abstraction that is relevant to the constitutional task. The level of abstraction at which the object of a law is to be identified for the purposes of the question of compatibility lies at the level of identifying the mischief to which the law is directed;[6] the purpose of a law is the "public interest sought to be protected and enhanced" by the law.[7]

13. The legislative object or purpose of an impugned law is to be discerned from the text, the context and, if relevant, the history of the law.[8] It may emerge from this process that the law concerned pursues multiple objects.[9]

14. Where, as here, the law contains an objects clause, Parliament's express statement of the objects of the law provides the starting point for discerning the law's purpose. Section 3 of the EF Act contains five stated objects, of which three are relevant to the impugned provisions. Those objects are to establish a fair and transparent electoral funding, expenditure and disclosure scheme (s 3(a)), to help prevent corruption and undue influence in the government of the State or in local government (s 3(c)) and to promote compliance with the requirements of the electoral funding, expenditure and disclosure scheme (s 3(e)).

15. Sections 29 and 35 of the EF Act can be seen to promote these express objects. Section 29 serves the purpose of helping to prevent corruption and undue influence by limiting electoral expenditure generally which in turn reduces the pressure on political

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5 PS at [47], [62].

6 *Brown v Tasmania* (2017) 261 CLR 328 at [96] (Kiefel CJ, Bell and Keane JJ) referring to *Unions NSW v New South Wales* (2013) 252 CLR 530; *Brown v Tasmania* (2017) 261 CLR 328 at [208], (Gageler J); [321] (Gordon J).

7 *Brown v Tasmania* (2017) 261 CLR 328 at [209] (Gageler J) citing *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 300 (Mason CJ).

8 *Brown v Tasmania* (2017) 261 CLR 328 at [321] (Gordon J), citing *McCloy v New South Wales* (2015) 257 CLR 178 at [320] (Gordon J) (see also [67], [132]); *Unions NSW v New South Wales* (2013) 252 CLR 530 at [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

9 *McCloy v New South Wales* (2015) 257 CLR 178 at [33]-[34] (French CJ, Kiefel, Bell and Keane JJ), at [328] (Gordon J).

parties and candidates to raise substantial sums of money which may have a corrupting influence.[10] Section 29 also promotes fairness in electoral expenditure by seeking to transparently balance the expenditure of different participants in the electoral process in a manner that reflects their respective roles. Section 35 may then be seen to protect the fair balance provided for by s 29 by prohibiting TPCs from acting in concert with others to incur expenditure in excess of the cap imposed on TPCs.

16. Stated at the appropriate level of abstraction, the purpose of ss 29 and 35 is to establish an electoral expenditure scheme that reduces overall election spending, and thereby reduces the potentially corrupting influence that accompanies the need to finance high campaign costs, whilst promoting fairness between the participants in the electoral process. The mischief sought to be addressed by the EF Act is the same as that which was held to be legitimate in the relevant sense in *Unions NSW v New South Wales* ***(Unions No. 1)*** and *McCloy v New South Wales* ***(McCloy)***.[11]

17. Whether or not ss 29 and 35 of the EF Act are reasonably appropriate and adapted to this purpose is, of course, a matter to be determined in accordance with the "graduated inquiry"[12] required by proportionality testing.[13]

18. The process of identification of purpose undertaken by the Plaintiffs pays insufficient regard to the express statement of objects found in s 3 of the EF Act. Rather, the Plaintiffs undertake a detailed analysis of the legal effect of the expenditure cap and the acting in concert prohibition, emphasising those aspects that demonstrate the burdening impact, established already by the first question identified in paragraph [5] above, to support a submission that the purpose of these provisions may be characterised pejoratively as the privileging of the voices of political parties.[14]

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10 *Unions NSW v New South Wales* (2013) 252 CLR 530 at [49] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), citing *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 144 (Mason CJ), 154-155 (Brennan J) and 188-189 (Dawson J).

11 *Unions NSW v New South Wales* (2013) 252 CLR 530 at [9] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), [138] (Keane J); *McCloy v New South Wales* (2015) 257 CLR 178 at [42]-[47] (French CJ, Kiefel, Bell and Keane JJ).

12 *Brown v Tasmania* (2017) 261 CLR 328 at [480] (Gordon J).

13 *Brown v Tasmania* (2017) 261 CLR 328 at [103]-[104] (Kiefel CJ, Bell and Keane JJ).

14 PS at [43].

19. This approach confuses purpose with effect.[15] The purpose of a law is not what the law does in its terms but what the law is designed to achieve in fact.[16] This approach also has the effect of impermissibly truncating the second and third questions identified at paragraph [5] above.[17]

20. The approach pressed by the Plaintiffs is inconsistent with the analytical approach adopted by this Court in *Brown v Tasmania* ***(Brown)***.[18] In *Brown*, the Plaintiffs looked to the burdening effect of the impugned law to argue that its purpose was "to prevent onsite protests that … relate to 'political, environmental, social, cultural or economic issues.'"[19] The Court rejected this approach, holding instead that the impugned law had a legitimate purpose at the stage of compatibility testing. The conclusion that the law was invalid was only reached following proportionality testing.

21. Further, the reliance by the Plaintiffs on *Unions No. 1* is also misplaced. *Unions No. 1* was decided without the benefit of the three stage approach identified in paragraph [5] above. However, as subsequent cases have clarified, *Unions No. 1* should not be understood as a case in which no legitimate purpose could be identified. The legitimate purpose was to secure and promote the actual and perceived integrity of the Parliament of New South Wales, the government of New South Wales and local government bodies within New South Wales, and more specifically, the potential risk to integrity as arising from the exercise of undue, corrupt or hidden influences over those institutions, their members and their processes.[20] Rather, understood by reference to the test as recently refined in *Brown*, *Unions No. 1* should be understood to have been determined at the stage of proportionality testing.[21]

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15 *McCloy v New South Wales* (2015) 257 CLR 178 at [40] (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (2017) 261 CLR 328 at [100] (Kiefel CJ, Bell and Keane JJ).

16 *Brown v Tasmania* (2017) 261 CLR 328 at [209] (Gageler J), citing *McCloy v New South Wales* (2015) 257 CLR 178 at [132] (Gageler J).

17 *Tajjour v New South Wales* (2014) 254 CLR 508 at [42] (French CJ). See also *Brown v Tasmania* (2017) 261 CLR 328 at [322] (Gordon J).

18 *Brown v Tasmania* (2017) 261 CLR 328 at [414] (Gordon J).

19 *Brown v Tasmania* (2017) 261 CLR 328 at [97] (Kiefel CJ, Bell and Keane JJ).

20 *Unions NSW v New South Wales* (2013) 252 CLR 530 at [8] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See also *McCloy v New South Wales* (2015) 257 CLR 178 at [9] (French CJ, Kiefel, Bell and Keane JJ).

21 *Tajjour v New South Wales* (2014) 254 CLR 508 at [126] (Crennan, Kiefel and Bell JJ); *McCloy v New South Wales* (2015) 257 CLR 178 at [9], [80] (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (2017) 261 CLR 328 at [133] (Kiefel CJ, Bell and Keane JJ).

22. Extreme cases may arise where the disconformity between the legal effect of a law and its stated purpose is so manifest that the law cannot be said to serve the asserted purpose. Where, however, a legitimate purpose of an impugned law is plausible, then it is appropriate to proceed to proportionality testing.[22] For the reasons identified at paragraph [16] above, the stated objects identified in s 3 of the EF Act are legitimate, and ss 29(10) and 35 may be seen to advance them. Even if the Plaintiffs' Submissions cast doubt about whether the legal operation of the law conforms to the objects identified in s 3 of the EF Act (although, for the reasons set out in the Defendant's Submissions, South Australia does not accept this), the validity of ss 29(10) and 35 should be determined by reference to the principles developed for that purpose under proportionality testing.

**Proportionality testing**

23. Proportionality testing asks whether an impugned law is reasonably appropriate and adapted to advance a legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of government.

24. The answer to the question arising at the stage of proportionality testing requires the formation of a judgment.[23] Although there are important divergences between members of the Court about the manner by which the evaluative exercise required by proportionality testing is to be undertaken, a majority of the Court eschew the notion that judgments in this context might be made subjectively.[24]

25. Whichever methodology is employed for the purpose of undertaking proportionality testing, the judgment to be arrived at in doing so will be most soundly based where it is made by reference to the constitutional foundation which sustains the implied freedom of political communication.[25] It was held by a majority of this Court in *McCloy* that, "Fundamentally, [proportionality testing] must proceed upon an acceptance of the

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22 *Brown v Tasmania* (2017) 261 CLR 328 at [215]-[216] (Gageler J).

23 *McCloy v New South Wales* (2015) 257 CLR 178 at [2], [89] (French CJ, Kiefel, Bell and Keane JJ), [149], [151] (Gageler J); [309], [336] (Gordon J); *Brown v Tasmania* (2017) 261 CLR 328 at [160] (Gageler J), at [236] (Nettle J), at [434] (Gordon J).

24 *McCloy v New South Wales* (2015) 257 CLR 178 at [89] (French CJ, Kiefel, Bell and Keane JJ), at 238 [151] (Gageler); *Brown v Tasmania* (2017) 261 CLR 328 at [432] (Gordon J).

25 *McCloy v New South Wales* (2015) 257 CLR 178 at [88] (French CJ, Kiefel, Bell and Keane JJ), at 222 [98], [148]-[149] (Gageler J); *Brown v Tasmania* (2017) 261 CLR 328 at [434] (Gordon J).

importance of the freedom and reason for its existence."[26] Justice Gageler observed, in a similar vein, that, "The judgment to be made can never be divorced from the reasons why there is a judgment to be made."[27]

26. The freedom of political communication emerges as an implication from the text and structure of the *Commonwealth Constitution*. The textual and structural underpinnings of the implication have been enunciated in many decisions of this Court.[28] Its content has recently been concisely described in the following terms:[29]

> The content of the implied constitutional freedom is defined by the need to preserve the integrity of both the system of representative and responsible government established by Chs I and II of the *Constitution* and the method of constitutional alteration prescribed by s 128 of the *Constitution*. The freedom implied, as it was put in *Lange*, 'is not absolute', but 'is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the *Constitution*.'

27. Applying the above principles to the present case, and without attempting to discern all of the various matters that may relevantly bear upon the formation of the relevant judgment to be arrived at in undertaking proportionality testing, South Australia submits that some significance should be attached at that stage to the fact that ss 29(10) and 35 of the EF Act regulate communications in the context of State and local, and not Commonwealth, elections.

28. To be clear, South Australia does not submit that the communications that occur in the context of a state or local election fall outside the ambit of the freedom of political communication. It is accepted that a political communication made in the course of a state or local election might bear on the choice that is to be made by the Australian people in the course of a Commonwealth election, or on the assessment by the people of the performance of the Commonwealth executive, or on a decision to be taken under a potential future referendum to be conducted under s 128. Given the interconnectedness

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26 *McCloy v New South Wales* (2015) 257 CLR 178 at [88] (French CJ, Kiefel, Bell and Keane JJ).

27 *McCloy v New South Wales* (2015) 257 CLR 178 at [149] (Gageler J).

28 This reasoning was set out most authoritatively in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557-562 (the Court).

29 *McCloy v New South Wales* (2015) 257 CLR 178 at [121] (Gageler J).

of various issues relevant to federal, state and local elections it would be artificial to attempt to compartmentalise federal, state and local communications.[30]

29. Accordingly, as the parties have agreed, South Australia accepts that the EF Act does impose a burden on the implied freedom of political communication. For the reasons given by this Court in *Unions No 1*, s 7(2)(a) of the EF Act does not quarantine the effect of the EF Act.[31]

30. Nonetheless, the fact that political communications, whether directed to federal, state, or local issues, should be taken to be indivisible for the purpose of determining whether the implied freedom of political communication has been burdened under the first question identified in paragraph [5] above, does not have the result that a law that directly regulates the communications made in the course of Commonwealth elections must be analysed for the purposes of proportionality testing in the same manner as a law that regulates communication in a state or local government electoral setting.

31. Laws directly regulating communications between candidates, electors and third parties at Commonwealth elections have a qualitatively different effect on the operation of representative and responsible government as mandated by the *Commonwealth Constitution* than similar laws operating with respect to state or local elections.

32. The above principles bear upon a structured approach to proportionality testing at the third stage, namely in assessing adequacy of balance. The extent of the burden imposed by a law that regulates state or local elections, relevant to the question of balance, will generally be less than an equivalent law regulating Commonwealth elections. For those members of the Court who undertake proportionality testing by considering whether the law in question is calibrated to the risk that the burden presents to the maintenance of representative and responsible government, the above principles inform the relevant standard of justification or level of scrutiny to be applied in undertaking that analysis.

33. South Australia does not submit that the fact that the EF Act regulates State and local, and not Commonwealth, electoral processes will necessarily be decisive in

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30 *Hogan v Hinch* (2011) 243 CLR 506 at 543 [48] (French CJ); *Unions NSW v New South Wales* (2013) 252 CLR 530 [20]-[27] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), [152] (Keane J); cited with apparent approval in *Brown v Tasmania* (2017) 261 CLR 328 at [238] (Gordon J), [312] (Nettle J).

31 *Unions NSW v New South Wales* (2013) 252 CLR 530 at [34] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). However, the limitations that apply to the regulation of expenditure of TPCs arising from ss 7(1) and (3) of the EF Act may be relevant to proportionality testing more broadly.

proportionality testing in the present case. Nonetheless, it is submitted that the task of proportionality testing should be attuned to the manner in which an impugned law will effect those constitutional processes that the implied freedom protects.

**Part VI: Estimate of time for oral argument**

34. South Australia estimates that 15 minutes will be required for the presentation of oral argument.

Dated: 21 November 2018

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