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' SUBMISSIONS

Holding Redlich
Level 65, MLC Centre
19 Martin Place
SYDNEY NSW 2000

Telephone: (02) 8083 0388
Fax: (02) 8083 0399
Ref: 18660014
Solicitor on record: Ian Robertson

Part I: Internet publication

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

Part II: Concise statement of issues

2. This case concerns the constitutional validity of two provisions of the *Electoral Funding Act 2018* (NSW) (**EF Act**). The issues are identified in the questions set out in the Special Case (**SC**) at [45] (**Questions**).

Parts III and IV: Section 78B of the *Judiciary Act 1903* (Cth) and judgments below

3. The plaintiffs have served notices under s 78B of the *Judiciary Act 1903* (Cth). There are no judgments below: the proceeding is brought in the original jurisdiction of the Court conferred by s 76(i) of the Constitution and s 30(a) of the *Judiciary Act 1903* (Cth).

Part V: Facts

4. The material facts are set out at **SC [1]-[44]**.

Part VI: Argument

Legislative framework

The Previous Act

5. In many cases concerning the implied freedom, it is enough to begin with the impugned legislation. However, one cannot understand the purpose and operation of the EF Act without appreciating certain features of the statute that it replaced. The impugned legislation, while maintaining certain features of the earlier statute, deliberately altered the careful balance the latter had struck, thereby transforming a reasonable regulation of electoral expenditure into an unconstitutional restriction of disfavoured voices in the political debate. For that reason, we start with, and give some emphasis to, the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (**Previous Act**).

6. From 2011[1] until its repeal by the EF Act, the Previous Act capped certain expenditure incurred for the dominant purpose of promoting or opposing a party or candidate or influencing the voting at an election (**ECE**) during a fixed period preceding a State election (**capped period**).[2] Key provisions as at the repeal date are summarised below.

7. ***Expenditure caps:*** Under s 95F, different expenditure caps applied for political parties (ss 95F(2)-(4), (12)(a)); candidates for election (ss 95F(6)-(9)); independent groups of candidates (**independent Council groups**) for election to the Legislative Council (s 95F(5)); and "third-party campaigners" (ss 95F(10), (12)(b)), relevantly defined in s 4(1)

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[1] *Election Funding and Disclosures Amendment Act 2010* (NSW), Sch 1, commencing 1 January 2011 (see s 2).
[2] See Previous Act, ss 87(1) (defining "electoral expenditure"), 87(2) (defining "electoral communication expenditure" (**ECE**), a subset of "electoral expenditure"), 95F, 95H.

to mean any person or entity (not being a registered party,[3] elected member, group or candidate) incurring ECE for a State election during a capped period exceeding $2,000.

8. A third-party campaigner registering under the Previous Act before the capped period commenced could incur up to *$1,050,000* in ECE during that period (s 95F(10)(a)). An *identical* cap applied to: (i) a party endorsing candidates for the Council and endorsing no candidates, or candidates in no more than 10 electoral districts, for the Legislative Assembly (s 95F(4)); and (ii) an independent Council group (s 95F(5)). By contrast, a party endorsing only Assembly candidates, or endorsing Council candidates and Assembly candidates in over 10 electoral districts, enjoyed a cap of $100,000 multiplied by the number of electoral districts in which a candidate was so endorsed (s 95F(2)).

9. ***Aggregation of party expenditure:*** The applicable caps for registered parties were subject to *aggregation* pursuant to s 95G. Where two or more registered parties were "associated", their caps were to be shared between them (s 95G(2)). Two or more registered parties were "associated" within s 95G if they endorsed the same candidate for a State election, endorsed candidates in the same group in a periodic Council election, or formed a recognised coalition and endorsed different candidates (s 95G(1)).

10. ***Offences:*** Section 95I(1) provided that it was unlawful for a party, group, candidate or third-party campaigner to incur ECE for a State election campaign during the capped period in excess of the applicable cap. Contravention or circumvention of that prohibition could give rise to two offences. *First*, under s 96HA(1), a person who did an act that was unlawful under (inter alia) s 95I(1), with knowledge of the facts rendering the act unlawful, was guilty of an offence punishable by 400 penalty units, imprisonment for 2 years or both (**cap offence**). *Secondly*, under s 96HB(1), a person who entered into or carried out a scheme (whether alone or with others) for the purpose of circumventing a prohibition or requirement of (inter alia) the electoral expenditure provisions was guilty of an offence punishable by imprisonment for 10 years (**circumvention offence**).

11. ***Public funding:*** The Previous Act entitled registered parties to public funding for State election campaigns through the Election Campaigns Fund (Pt 5), and administrative and policy development funding through the Administration Fund and Policy Development Fund respectively (Pt 6A).[4] Relevantly, a party meeting the criteria in s 57 was eligible for payments from the Election Campaigns Fund of a percentage of its total ECE incurred

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[3] A party registered under Pt 4A of the *Parliamentary Electorates and Elections Act 1912* (NSW): s 4(1).

[4] Certain candidates were also eligible for payments from the Election Campaigns Fund (ss 59, 103D), and independent members of Parliament could access payments from the Administration Fund (s 97F).

in connection with the election, calculated according to a prescribed formula (s 58). A "dollar per vote" calculation method applied for the 2015 State election (s 103C).

EF Act

12. The EF Act was prepared in response to 3 reports (Explanatory Note, **SCB 2090**): the *Final Report on Political Donations* of December 2014 (**Final Report**), authored by a panel (**Panel**) appointed to report on options for long term reform of political donations in NSW (**SC [39]-[41]; SCB 1300**); a report by the Joint Standing Committee on Electoral Matters (**JSCEM**), dated June 2016 (**First JSCEM Report**), addressing the Final Report and the government's response (**SC [42]; SCB 1886**); and a further JSCEM Report dated November 2016 (**Second JSCEM Report**), examining the administration of the 2015 State election and related matters (**SC [43]; SCB 1994**).

13. The EF Act was asserted to "preserve … the key pillars" of the Previous Act with respect to "disclosure, caps on donations, limits on expenditure and public funding" (**SCB 2103**). However, consistent with the recommendations made in the Final Report and accepted by the JSCEM, the new Act "introduce[d] targeted reforms" to the pre-existing regime ostensibly for the purpose of "increas[ing] the integrity, transparency and accountability of political donations in New South Wales" (**SCB 2103**). For present purposes, the key "reforms" effected by the EF Act were as follows.

14. ***Increased party/ candidate expenditure caps:*** The EF Act *increased* the applicable caps on relevant expenditure (now defined simply as "electoral expenditure"[5]) incurred by *parties and candidates* for State election campaigns during the "capped State expenditure period" – which, in the case of a general election, runs from 1 October the year before the election to the end of election day: s 27(a). The cap for a party that endorsed only Assembly candidates, or endorsed Council candidates and Assembly candidates in more than 10 electoral districts, became $122,900 multiplied by the number of electoral districts in which a candidate was so endorsed (s 29(2)). The cap for a party that endorsed candidates for the Council and endorsed no candidates, or candidates in no more than 10 electoral districts, for the Assembly became $1,288,500 (s 29(4)). The cap for an independent Council group also became $1,288,500 (s 29(5)).

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[5] Section 7 relevantly defines "electoral expenditure" as expenditure for or in connection with promoting or opposing, directly or indirectly, a party or the election of a candidate or candidates or for the purpose of influencing, directly or indirectly, the voting at an election, which is expenditure of one of the kinds set out in s 7(1)(a)-(i). This includes expenditure on advertisements (s 7(1)(a)), on the production and distribution of election material (s 7(1)(b)), and on the internet, telecommunications, stationery and postage (s 7(1)(c)).

15. ***Relaxation of aggregation provisions:*** As well as increasing party expenditure caps: by operation of a new definition of "associated entity", the EF Act no longer aggregates the expenditure of parties that endorse the same candidates or form a recognised coalition (see ss 30(4), 4). That reform responded to the Panel's Recommendation 32(b), supported by the First JSCEM Report (**SCB 1950, [7.35]**), which proposed that the new definition should "exclude organisations that … exist independently of parties and have their own constituencies and political views" (**SCB 1423**).

16. ***Decreased third-party campaigner expenditure cap*:** While increasing the permitted expenditure of parties and candidates, the EF Act *reduced by more than 50%* the expenditure cap for "third-party campaigners" (broadly, any person/ entity other than a party, associated entity, group or candidate who incurs more than $2,000 in electoral expenditure for a State election during a capped State expenditure period: s 4(1)). Under the new cap (**TPC expenditure cap**), a third-party campaigner can spend up to *$500,000* if the campaigner registered before the commencement of the capped State expenditure period, or *$250,000* in any other case (ss 29(10), 33(1)). In the second reading speech, the Minister explained this reform in the following terms (**SCB 2105**, emphasis added):

> Division 4 in part 3 of the bill generally preserves the existing caps on electoral expenditure for State election campaigns. **It also implements the expert panel's recommendation to reduce the amount of the current cap on electoral expenditure by third party campaigners to $500,000.**
>
> … The expert panel considered that third party campaigners should have sufficient scope to run campaigns to influence voting at an election – **just not to the same extent as parties or candidates.** The proposed caps will allow third party campaigners to reasonably present their case while **ensuring that the caps are in proportion to those of parties and candidates who directly contest elections.**

17. In its discussion of this proposal in the Final Report, the Panel "strongly agree[d] that political parties and candidates should have a privileged position in election campaigns", as they were "directly engaged in the electoral contest" and the "only ones able to form government and be elected to Parliament to represent the people of New South Wales" (**SCB 1416**). It expressed concern about "the potential for wealthy protagonists motivated by a particular issue to run effective single issue campaigns" – for example, the issue of electricity privatisation, which had "the potential to unite opposition and motivate wealthy interests" – and stated that "a lack of appropriate third-party regulation would work against reformist governments pursuing difficult and controversial issues in the public interest" (**SCB 1417**).

18. Nonetheless, the Panel commented that "[s]pending caps should not be set so low as to prevent third parties from having a genuine voice in debate", and caveated its recommendation to decrease the third-party campaigner cap to $500,000 with the

statement that the Panel "only ha[d] data on third party spending from the [2011 State] election" – which indicated that the highest spending third-party campaigner, the NRMA, had only spent approximately $400,000 for that campaign (**SCB 1419**). As such, the Panel considered that it "would be appropriate to review the level of the third party spending caps after the 2015 election, if it becomes apparent that they are causing concern" (**SCB 1419**). The JSCEM took the same view in the First JSCEM Report. Noting that the NSW Electoral Commission's figures demonstrated that at least 5 third-party campaigners incurred expenditure exceeding $481,000 in the 2014-2015 financial year (**SCB 1947, [7.17]**), the JSCEM recommended that, "before decreasing the cap on electoral expenditure by third-party campaigners to $500,000 ... the NSW Government considers whether there is sufficient evidence that a third-party campaigner could reasonably present its case within this expenditure limit" (**SCB 1948, [7.22]**).

19. ***New offence applicable to third-party campaigners:*** Mirroring the Previous Act, the EF Act provides that it is unlawful to incur electoral expenditure for a State election campaign during the capped State expenditure period if it exceeds the applicable cap (s 33(1)). Further, it maintains the two offences of general application described at [10] above: the cap offence (s 143(1)) and the circumvention offence (s 144(1)). However, the statute also introduced a new offence, applicable only to third-party campaigners, which proscribes "acting in concert" with another person to incur electoral expenditure exceeding the third-party campaigner's cap for the election (s 35(1)) (**"acting in concert" offence**). "Act[ing] in concert" is defined in s 35(2) to mean

> act[ing] under an agreement (whether formal or informal) with the other person to campaign with the object, or principal object, of:
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> (a) having a particular party, elected member or candidate elected, or
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> (b) opposing the election of a particular party, elected member or candidate.

20. The Minister explained in the second reading speech that s 35 "implements the expert panel and joint standing committee's recommendation that third party campaigners be prohibited from acting in concert with others to incur electoral expenditure that exceeds the expenditure cap", and continued (**SCB 2105**):

> Third party campaigners should not be permitted to engage in conduct to circumvent spending caps. The anti-avoidance offence in clause 35 is important to maintain a fair and balanced electoral contest and to ensure the integrity of the expenditure caps.

21. In the Final Report, the Panel stated that the new offence (**SCB 1423**)

> would prevent a number of third-party campaigners with common interests (e.g. unions, mining companies, packaging companies) from launching a coordinated campaign with a combined expenditure cap that would completely overwhelm parties, candidates and other third parties acting alone. The Panel considers that such a provision is important to maintaining a fair and balanced electoral contest and the integrity of the expenditure caps generally.

22. The JSCEM supported the Panel's recommendation (**SCB 1950, [7.34]-[7.35]**).

23. ***Amendments to public funding regime:*** Finally, the EF Act preserved existing entitlements to public funding from the Election Campaigns Fund in respect of State elections, but introduced a "dollar per vote" formula for calculating the amount of funding received, capped at the amount of electoral expenditure incurred by the party or candidate during a prescribed period preceding the election (ss 67, 69). It also increased the quantum of the advance payments to which registered parties[6] were entitled from the Election Campaigns Fund (ss 72(1)-(2)), renamed the Policy Development Fund as the "New Parties Fund", and provided that electoral expenditure incurred during a capped State expenditure period could be reimbursed from that fund (ss 85(1)(a)(ix), 93(3)).

Government Advertising Act 2011 (NSW) (**GA Act**)

24. Before leaving the topic of relevant legislation, it is instructive to mention that the EF Act's expenditure caps do not bind the Executive. Instead, the scheme regulating State Government advertising is contained in the GA Act.

25. The GA Act defines "government advertising campaign" as the dissemination to the public of information about a government program, policy or initiative, or about any public health or safety or other matter, that is funded by or on behalf of a Government agency and is disseminated under a commercial advertising distribution agreement (s 4(1)). Government advertising must not be designed to influence support for a party, and must not name or give prominence to any Minister, elected member, candidate or party (ss 6(1)-(3)). Further, a government advertising campaign generally may not be carried out in a State election year between 27 January and election day (s 10). However, the statute imposes no cap on government advertising expenditure. Thus, between 1 October and 26 January immediately before the State election – a period during which parties, candidates and third-party campaigners are subject to expenditure caps under the EF Act – the State Government may incur expenditure, without regard to the limitations found in the EF Act, on advertising campaigns promoting government policies, programs or initiatives (**issue advertising**), subject to ss 6(1)-(3) of the GA Act.

Freedom of political communication

26. The Australian Constitution protects freedom of communication on matters of government and politics for one critical reason: to give effect to the political sovereignty reposed in the people by the constitutional system of representative and responsible

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[6] Parties registered under the *Electoral Act 2017* (NSW): s 4. Under s 59 of that Act, a party applying for registration must have a written constitution and 750 members, and pay a $2000 fee.

government. The choice bestowed upon electors by ss 7 and 24 cannot be a "true choice" unless it is "free and informed", accompanied by "an opportunity to gain an appreciation of the available alternatives".[7] Similarly, the provisions establishing the framework for responsible government and providing for constitutional amendment "imply a limitation on legislative and executive power to deny the electors and their representatives information concerning the conduct of the executive branch".[8] As Archibald Cox declared, "[o]nly by freedom of speech ... and of association can people build and assert political power, including the power to change the men who govern them"[9] – a remark described by Mason CJ as a "striking comment" on Harrison Moore's statement that the Constitution's "great underlying principle" was that "the rights of individuals were sufficiently secured by ensuring each an equal share in political power".[10]

27. In *McCloy* (at [114]-[115]), Gageler J explained that the need for the implied freedom arose from an "ever-present risk" within the Australian governmental system, inhering in the "nature of the majoritarian principle which governs ... electoral choice": namely, that

> communication of information which is either unfavourable or uninteresting to those currently in a position to exercise legislative or executive power will, through design or oversight, be impeded by legislative or executive action to an extent which impairs the making of an informed electoral choice and therefore undermines the constitutive and constraining effect of electoral choice.

28. Thus, the freedom recognises that electors' capacity to receive material relevant to their electoral choices, including communications critical of politicians or policies, underpins their ability to change their representatives in the constitutionally prescribed manner.

29. From that context emerges the following relevant principles.

30. *First*, the communications protected by the freedom include political communications "between all persons and groups in the community".[11] As this Court stated in *Unions No 1*, those in the community who are not electors, but who are nonetheless affected by governmental decisions, may legitimately "seek to influence the ultimate choice of the people as to who should govern" (at [30]). Electors' judgment will then "turn upon free public discussion, often in the media, of the views of all those interested" (at [28]).

31. *Secondly*, given the interrelationship between governmental levels, issues common to State and federal government, and levels at which Australian political parties operate,

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[7] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (***Lange***) at 560 (per curiam).
[8] *Lange* at 561 (per curiam).
[9] Cox, *The Court and the Constitution* (1987), p212, approved in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (***ACTV***) at 139 (Mason CJ); and in *Unions NSW v NSW* (2013) 252 CLR 530 (***Unions No 1***) at [29] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) and *McCloy v NSW* (2015) 257 CLR 178 (***McCloy***) at [26] (French CJ, Kiefel, Bell and Keane JJ) (without the words "including ...").
[10] *ACTV* at 139-140 (Mason CJ); *McCloy* at [27] (French CJ, Kiefel, Bell and Keane JJ), [111] (Gageler J).
[11] *Unions No 1* at [28] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); see also *ACTV* at 139 (Mason CJ).

discussion at State level may bear upon the people's choices at federal elections or referenda, or in evaluating the performance of federal Ministers and departments.[12] In particular, expressions of support for parties/ candidates at State level are relevant to electoral choice under ss 7 and 24,[13] and protected by the freedom on that basis.

32. *Thirdly*, where a law has a discriminatory *effect* on certain sources of political communication or political viewpoints, it requires a compelling justification[14] – at least where it imposes a substantial burden on the freedom.[15] This is because the favouring of some viewpoints over others is "apt to distort the flow of political communication within the federation",[16] and to "mandate ... an inequality of political power which strikes at the heart" of the "Australian constitutional conception of political sovereignty".[17] Relatedly, the basis for the law's selectivity must be apparent, and justifiable.[18]

33. *Fourthly*, a law whose *purpose* is to favour, or suppress, certain sources of political communication or political viewpoints is incompatible with the maintenance of the constitutionally prescribed system of representative and responsible government. This is usefully illustrated by reference to the Court's treatment in *ACTV*, *Unions No 1* and *McCloy* of the legitimate objective that can conveniently be labelled "levelling the playing field". In *ACTV*, Deane and Toohey JJ accepted that a law regulating political communication might permissibly attempt to "create a '*level* playing field' or to ensure some *balance* in the presentation of different points of view".[19] Similarly, in *McCloy*, the plurality accepted the legitimacy of legislative attempts to place "all in the community on an *equal* footing so far as the use of the public airwaves is concerned",[20] or, more broadly, to "*equalise* participation in the electoral process".[21] And in *Unions No 1*, Keane J considered that the caps on donations and expenditure respectively imposed by ss 95A and 95I of the Previous Act "may reasonably be seen to enhance the prospects of a *level* electoral playing field", and to "ensure that wealthy donors are not permitted to

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[12] *Unions No 1* at [25] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), [151]-[152], [158]-[159] (Keane J); *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 at 122 (Mason CJ, Toohey and Gaudron JJ), 164 (Deane J).

[13] See *Unions No 1* at [25] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), citing *Roberts v Bass* (2002) 212 CLR 1 at [73] (Gaudron, McHugh and Gummow JJ).

[14] *ACTV* at 144-146 (Mason CJ), 172-174 (Deane and Toohey JJ), 235-239 (McHugh J); *McCloy* at [222], [251], [255] (Nettle J); *Brown v Tasmania* (2017) 91 ALJR 1089 (***Brown***) at [202]-[203] (Gageler J).

[15] *Brown* at [94] (Kiefel CJ, Bell and Keane JJ).

[16] *Unions No 1* at [140] (Keane J); see also *ACTV* at 174 (Deane and Toohey JJ).

[17] *McCloy* at [271] (Nettle J, relevantly dissenting in the result).

[18] *Unions No 1* at [53]-[59] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), [144] (Keane J).

[19] *ACTV* at 175 (Deane and Toohey JJ, emphasis added); see also at 146 (Mason CJ).

[20] *McCloy* at [43] (French CJ, Kiefel, Bell and Keane JJ, emphasis added), quoting *ACTV* at 130 (Mason CJ).

[21] *McCloy* at [44] (French CJ, Kiefel, Bell and Keane JJ, emphasis added).

distort the flow of political communication to and from the people of the Commonwealth".[22] In each case, their Honours were describing a law directed towards facilitating "equality of access"[23] to the political process – for example, by "terminat[ing] ... the advantage enjoyed by wealthy persons and groups".[24] But a law that aims to *create* new advantages or disadvantages in individuals' and groups' participation in the political discourse, such that certain voices *dominate* over others, is not aimed at "ensuring each an equal share in political power". A law of this kind necessarily impedes the functioning of representative democracy. Within the *Lange* framework, its purpose is illegitimate.[25]

34. *Fifthly*, it follows from the discussion at [26]-[33] above that a law with the purpose of affording political parties a privileged position in political debate is not compatible with our constitutionally prescribed system of government. Political parties are mentioned only once in the Constitution, in the section dealing with casual Senate vacancies (s 15). Broadly speaking, they are associations of people subscribing to similar political views, usually by reference to some governing set of objects or policies. In those core characteristics, they are not unique: the first plaintiff, for example, consists of affiliated unions made up of many hundreds of thousands of members, and has objects that include "improv[ing] the conditions and protect[ing] the interest of all classes of labour within the sphere of its influence" and "secur[ing] the direct representation of the Industrial Movement in Parliament" (**SC [2], [3](a)**). The point is that individuals build and assert political power in different ways – sometimes through political parties, but often through other means, such as membership of unions or supporting crowdfunding campaigns run by GetUp and other organisations. Within the edict of ss 7 and 24 that the representatives be "directly chosen by the people", the starting point is that *no* participants in the political process should be secured to a dominant position in the competition to sway the people's votes simply by reason of their identity or status.

35. It is true that political parties typically have one key characteristic not shared by other interest groups: they seek the election of candidates endorsed by them for that purpose.[26] But the proposition that this gives parties some greater entitlement to communicate their views to the people undermines the implied freedom's capacity to guard against the majoritarian difficulty identified by Gageler J (see [27]-[28] above). In election

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[22] *Unions No 1* at [136] (Keane J, emphasis added).
[23] *McCloy* at [43] (French CJ, Kiefel, Bell and Keane JJ).
[24] *ACTV* at 144 (Mason CJ).
[25] See *McCloy* at [31] (French CJ, Kiefel, Bell and Keane JJ).
[26] See the definition of "party" in s 4 of the EF Act.

campaigns, parties promote candidates for election, many of whom may be sitting members of Parliament. Interest groups that are independent from the field of candidates are uniquely placed to hold those candidates and their parties to account in the political discourse. Conversely, given that information about the competence of those candidates, and about the policies pursued by them in office (including on a bipartisan basis), may be "unfavourable or uninteresting" to the candidates' parties, laws deliberately affording those parties privileged access to the public debate risk the entrenchment of incumbents.

36. This analysis is supported by *ACTV*. There, this Court struck down legislation that allocated free election broadcasting time on a basis that favoured political parties represented in the previous Parliament, and allowed no scope for participation by persons who were not candidates or by groups who were not putting forward candidates.[27] The constitutional vice in the provisions was that they were "inimical to equal participation by all the people in the political process".[28] The majority recognised that participants in the electoral process include "not only the candidates and established political parties but also the electors, individuals, groups and bodies who wish to present their views to the community", and that the laws failed to preserve or enhance fair access to a critical mode of political communication.[29] The notion that the implied freedom permits Parliament to legislate with the purpose of favouring political parties in the public discourse is inconsistent with this Court's condemnation of the distorting effect of the impugned laws in *ACTV*[30] – and with its subsequent reaffirmation in *McCloy* that "*[e]quality of opportunity* to participate in the exercise of political sovereignty is an aspect of the representative democracy guaranteed by our Constitution".[31]

The TPC expenditure cap is invalid

Section 29(10) read with s 33(1) of the EF Act burdens the freedom

37. In *Unions No 1*, this Court held that a law restricting the amount of ECE that a political party could incur effected a burden on the freedom.[32] So, too, does the TPC expenditure cap. Section 29(10) read in conjunction with s 33(1) of the EF Act prohibits a third-party campaigner from spending money on (eg) advertisements or election material directed

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[27] See *ACTV* at 131-132, 145-146 (Mason CJ).
[28] *McCloy* at [45] (French CJ, Kiefel, Bell and Keane JJ); see also at [43]; [134]-[137] (Gageler J); *Unions No 1* at [137] (Keane J).
[29] *ACTV* at 145-146 (Mason CJ); see also at 221 (Gaudron J), 237, 239 (McHugh J).
[30] See *ACTV* at 146 (Mason CJ), 174-175 (Deane and Toohey JJ), 236-237 (McHugh J).
[31] *McCloy* at [45] (French CJ, Kiefel, Bell and Keane JJ, emphasis added).
[32] *Unions No 1* at [61] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), [161]-[163] (Keane J).

towards influencing the voting at a State election,[33] to the extent that this would cause the campaigner to exceed the cap. It burdens the freedom in its terms, operation and effect.

38. The issue, then, is: can the law be justified under the second limb of the *Lange* test? Applying the tools of analysis used by this Court in *McCloy* and *Brown,* that is resolved by *compatibility testing*, to assess the legitimacy of the law's purpose by reference to the maintenance of the constitutionally prescribed system of representative and responsible government; and, where the purpose is legitimate, *proportionality testing*, to determine if the law is suitable, necessary and adequate in its balance.[34]

Section 29(10) read with s 33(1) of the EF Act has an illegitimate purpose

39. The purpose of a law is not simply what it does in terms but what it is "designed to achieve in fact",[35] ascertained "by the ordinary processes of statutory construction".[36] Whilst purpose is sometimes spelled out in the law's text, it more often emerges from an examination of the law's context.[37] In the present case: the text of s 29(10) does not explain what the cap applicable to third-party campaigners is designed to achieve. Rather, that explanation emerges from five critical pieces of statutory context.

40. *First*, "third-party campaigners" are defined in the EF Act by reference to what they are *not*: political parties, candidates, groups, elected members, or their associated entities. The statutory definition does not identify any characteristics common to them such as corporate status or connection to certain industries,[38] aside from the criterion that a campaigner must incur more than a relatively nominal amount of electoral expenditure in the capped State expenditure period ($2,000) or be registered for a particular election.

41. *Secondly*, s 29(10) forms part of an expenditure scheme that (i) allocates a maximum of **$11,429,700**[39] to a party endorsing Assembly candidates, **$1,288,500** to a party endorsing Council candidates and Assembly candidates in fewer than 10 electoral districts (if any), or an independent Council group, and only **$500,000** to third-party campaigners; and (ii) *replaces* a framework that allocated **$9,300,000**, **$1,050,000** and **$1,050,000** respectively to those entities and persons. The scheme in s 29 of the EF Act deliberately *refers* to the

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[33] See the definition of "electoral expenditure" in s 7 of the EF Act.
[34] *McCloy* at [2] (French CJ, Kiefel, Bell and Keane JJ); *Brown* at [104] (Kiefel CJ, Bell and Keane JJ), [271], [277]-[280] (Nettle J).
[35] *Brown* at [209] (Gageler J); see also at [100]-[101] (Kiefel, Bell and Keane JJ).
[36] *Unions No 1* at [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[37] *Brown* at [209] (Gageler J).
[38] Cf the definition of "prohibited donor" in s 51 of the EF Act.
[39] See the note to s 29(3) of the EF Act.

pre-existing regime[40] – one in which third-party campaigners enjoyed the same cap as certain political parties and independent Council groups – but replaces it with one that *increases* party and candidate caps by over **22%** and *reduces* third-party campaigner caps by over **50%**. *Thirdly*, s 29(10) forms part of an expenditure scheme that (i) permits two parties with the same electoral objectives and political messages to incur electoral expenditure under two separate caps, unless one is controlled by (s 9(1)(d)) or "operates solely for the benefit of" (s 30(4) and s 4, "associated entity" definition) the other; and (ii) replaces a regime that aggregated those caps where registered parties endorsed the same candidates or formed a recognised coalition. *Fourthly*, s 29's expenditure caps operate against the backdrop of public funding provisions reimbursing eligible parties and candidates for electoral expenditure incurred in connection with State elections.

42. *Fifthly*, the desired goal of the legislation is expressed pithily in the extrinsic material: in the Minister's words, to ensure that third-party campaigners do not have as much "scope to run campaigns to influence voting at an election" as "parties or candidates", and in the Panel's words, to give parties and candidates "a privileged position in election campaigns" ([16]-[17] above[41]).

43. Understood in this context, the purpose of the TPC expenditure cap is clear. It aims to privilege the voices of political parties (and, to a lesser extent, candidates) in State election campaigns over the voices of persons who do not stand or field candidates for election, by preventing third-party campaigners from running campaigns with a scope equal to or even approaching campaigns run by parties or independent Council groups. That purpose is directed towards undermining equality of opportunity to participate in the exercise of political sovereignty, and distorting the flow of political communication. Thus, it *impedes* the functioning of the constitutional system of representative and responsible government.[42] It is illegitimate.[43]

44. In its Defence, the State describes a (non-exhaustive) number of possible purposes for the impugned law. Some of those purposes are explicitly revealed as the illegitimate purpose

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[40] See s 29's title, containing: "(cf section 95F EFED Act)".

[41] See also the Minister's speech in reply, suggesting that the existing TPC expenditure cap was too high because it was "the same as the cap for parties that only contest Legislative Council elections" (**SCB 2111**).

[42] *McCloy* at [31] (French CJ, Kiefel, Bell and Keane JJ).

[43] The position in Canada on this precise question may be different to the correct position reached in the Australian authorities. See *Libman v Quebec* [1997] 3 SCR 569 (***Libman***) at [49]-[50] (per curiam), approved in *Harper v Canada* [2004] 1 SCR 827 at [116] (Bastarache J for the majority); cf *Somerville v Canada* (1996) 136 DLR (4th) 205 at 232-236 (Conrad JA), disapproved in *Libman* at [55]-[56], [79] (per curiam).

described at [43] above.[44] Somewhat inconsistently, other alleged purposes suggest that the TPC expenditure cap aims to *enhance* the prospects of a level playing field, and to prevent third parties from "dominating" election campaigns,[45] as if, under the Previous Act, there was some inequality of opportunity that required remediation. Whilst "levelling the playing field" is no doubt one of the broader statutory objects of the EF Act, it cannot be said that ss 29(10) read with 33(1) connect with and further that purpose.[46] The deliberately vast disparity between the TPC expenditure cap and the applicable caps for political parties – viewed in light of the pre-existing expenditure regime that appropriately calibrated the various caps between candidates, parties, groups of candidates and third-party campaigners; the liberal treatment of parties' associated entities; the financial benefits available to parties and candidates under the public funding provisions; and the State Government's privileged capacity to engage in issue advertising during the capped State expenditure period – demonstrates that ss 29(10) and 33(1) cannot be directed towards correcting some illegitimate advantage hitherto enjoyed by the amorphous "third-party campaigner" during State election campaigns. Instead, those provisions aim to create and magnify advantages enjoyed by political parties (and candidates) in disseminating their views concerning the State election to the public; and the relativities of the respective caps means that they will readily achieve that outcome.

45. Nor can the State draw support for a "levelling" purpose from recent NSW election campaigns. There is no historical basis for the proposition that third-party campaigner expenditure capped consistently with the Previous Act risks overwhelming political parties' communications in State election campaigns. Neither the Final Report nor the JSCEM Reports nor the second reading speech indicate that this purported threat manifested in 2015 or 2011. For the 2015 State election, the $907,831.22 in ECE incurred by the NSWNMA (**SC [5](e)**), the highest spending plaintiff, was still dwarfed by the ECE of the Liberal Party ($7.05m), ALP ($6.55m), Country Labor Party ($2.53m), National Party ($1.88m) and The Greens ($2.60m) (**SC [32]**). Further, against the backdrop of the GA Act, it cannot rationally be suggested that third-party campaigner expenditure prevents "reformist governments" in NSW from pursuing issues in the public interest (see [16]-[17] above). Despite the "NSW Not For Sale" (**NSWNFS**) Campaign

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[44] See Defence [86], particulars (ii)(c) and (iii)(b).
[45] See Defence [86], particulars (i)(b), (ii)(a) and (c) and (iii)(a). On the numerous other purposes described in that paragraph, the plaintiffs will respond to the State in reply if necessary.
[46] *Unions No 1* at [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

mounted by 4 plaintiffs and the NSWTF (**SC [19]-[27]**), the State Government's media expenditure in 2014-2015 of $1,319,358 and $351,739 on campaigns respectively entitled "NSW Energy Deregulation" and "NSW Gas Plan" (**SCB 843**) suggests that the government would have encountered few difficulties in explaining and defending its privatisation policy in the leadup to the 2015 State election – a policy which was then implemented after the re-election of the Baird government.

46. In summary, the impugned provisions do not *level* the playing field. They deliberately ensure imbalance.[47] The stark disconformity between this asserted object and the legal operation of the TPC expenditure cap means that the cap cannot be explained by that object.[48] As such, the cap's purpose is incompatible with the maintenance of our constitutional system of government, and its burden on the freedom cannot be justified.[49]

Section 29(10) read with s 33(1) of the EF Act is not proportionate to a legitimate end

47. Alternatively, even if this Court accepts that the purpose of the TPC expenditure cap is legitimate, then ss 29(10) read with 33(1) are nonetheless not reasonably appropriate and adapted to advancing their end in a manner compatible with the constitutionally prescribed system of representative and responsible government.

48. ***Extent of the burden:*** The burden effected by the TPC expenditure cap is direct and substantial. It is *direct* because the cap limits the only practical means by which political communications may be effectively disseminated to the public: the expenditure of funds for the broad range of campaigning activities encompassed by the defined term "electoral expenditure". Even more starkly than the provisions impugned in *ACTV*, which only regulated TV and radio advertising, ss 29(10) and 33(1) may be seen as a partial "legislative prohibition not of advertising as such but of political communication to and by the people of the Commonwealth".[50] The burden is *substantial* for three reasons. It is discriminatory, disfavouring third-party campaigners relative to the position of political parties. It has a very significant limiting effect on the flow of political discourse between those campaigners and the public,[51] as illustrated by the size of the reduction effected to the applicable cap and by the practical examples of how that reduction to $500,000 will operate in respect of the plaintiffs[52] – three of whom incurred ECE *exceeding $700,000*

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[47] See *ACTV* at 131-132, 146 (Mason CJ).
[48] *Brown* at [215] (Gageler J).
[49] See *Unions No 1* at [60] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[50] *ACTV* at 171 (Deane and Toohey JJ).
[51] See, similarly, *ACTV* at 132, 145-146 (Mason CJ).
[52] See *Unions No 1* at [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

during the last State election almost 4 years ago. And it applies during a fixed period preceding a State election – the time at which "electors are consciously making their judgments as to how they will vote",[53] and "political communications by persons who are not candidates or political parties are likely to be most important and effective".[54]

49. A burden of this magnitude requires a significant justification.[55]

50. ***Suitability:*** The TPC expenditure cap is not rationally connected to the asserted purpose of ensuring equality of opportunity to participate in the State election process (**equal opportunity object**). As explained at [41]-[46] above, it will operate to ensure *unequal* access to the political discourse. The cap is both overinclusive and underinclusive in significant respects. As to overinclusiveness: a "third-party campaigner" can be anyone from a natural person to a community organisation to a publicly listed company. So, for example, the cap will limit the capacity of unions, religious groups, charities, ethnic associations, crowdfunding entities, and business organisations to express political views on behalf of their respective members and supporters. Far from simply preventing domination of the debate by powerful corporations or well-resourced citizens, the TPC expenditure cap will in practice restrict *non-wealthy voices* in their attempts to channel their limited individual political power into advertising campaigns of sufficient scale to reach State electors. There is no explanation for a discriminatory restriction of this scope.

51. As to underinclusiveness: the provisions leave *political parties* free to dominate the State election political discourse up to the limits of their much larger caps. This is so even though they are no less capable of drowning out voices in the political process than "third-party campaigners". For example, groups such as the Shooters, Fishers and Farmers Party, No Parking Meters Party and Voluntary Euthanasia Party (see **SC [32]**) are surely just as willing and able to run "effective single issue campaigns" ([17] above) as unions or community associations – and yet they may access a $1.29m expenditure cap simply by endorsing several candidates for election to the Council.

52. Accordingly, the equal opportunity object does not explain, and is not advanced by, the TPC expenditure cap's discriminatory targeting of *all* participants in the political process *other than* parties, candidates and associated entities. The cap fails the suitability test.

53. ***Necessity:*** The existence of alternative, reasonably practicable means of achieving the equal opportunity object that have a less restrictive effect on the freedom[56] is obvious

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[53] *ACTV* at 146 (Mason CJ).
[54] *ACTV* at 173 (Deane and Toohey JJ).
[55] See *Brown* at [118], [128] (Kiefel CJ, Bell and Keane JJ), [203] (Gageler J), [291] (Nettle J), [478] (Gordon J).

from the legislative history. An expenditure cap for third-party campaigners that: (i) *matched or exceeded* the limits applicable under s 95F(10) of the Previous Act, and (ii) *observed the relativities* between those caps and the caps for parties and candidates under ss 95F(2)-(8), would impose a substantially smaller burden on the freedom, create a much lesser risk of distorting the public debate in favour of political parties, and still ensure that parties, candidates and third-party campaigners have a fair chance of communicating their political views to the public. There is no evidence for a claim that *only* a 50% cut in the existing third-party campaigner expenditure cap can reasonably achieve the State's asserted purpose – particularly given the absence of evidence that recent NSW election campaigns were imbalanced or unfair (see [45] above), and the Panel's conclusions that the costs of such campaigns have increased significantly in recent years (**SCB 1366**). Indeed, a *less restrictive cap* was a proposal flagged in the Final Report and First JSCEM Report for further investigation in light of 2015 expenditure (see [18] above), but there is no evidence in the Second JSCEM Report or otherwise that the State government considered any such alternatives before introducing the EF Act into Parliament.

54. ***Adequacy in balance:*** Finally, the TPC expenditure cap's direct, substantial and discriminatory restriction on the freedom is grossly disproportionate to, or goes far beyond, what can reasonably be conceived as justified in the pursuit of the equal opportunity object.[57] Ensuring fair State election campaigns in which all participants may be heard is a legitimate goal. But ss 29(10) and 33(1) of the EF Act, understood in the legislative context described above, subject third-party campaigners to such a significant disadvantage in the political discourse relative to political parties that the provisions can only be described as a "manifestly excessive response"[58] to that objective.

The "acting in concert" offence is invalid

55. The only sensible construction of s 35(1) is that it prohibits a third-party campaigner from incurring electoral expenditure pursuant to a joint campaign to support or oppose a party/ candidate's election, to the extent that the *joint campaign's total expenditure* would exceed *the third-party campaigner's cap* (for State elections, $500,000 or $250,000 as applicable). This follows from the text. The conduct prohibited is acting in concert with another person "to incur electoral expenditure in relation to an election campaign", where

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[56] See *Brown* at [139] (Kiefel CJ, Bell and Keane JJ).
[57] See *Brown* at [290] (Nettle J).
[58] *Brown* at [290] (Nettle J).

that expenditure "exceeds the applicable cap for *the third-party campaigner* for the election" (emphasis added). It also aligns with former s 205H of the *Electoral Act 1992* (ACT), which the Panel and then the Parliament used as a model for s 35.[59]

56. The State's alternative reading of s 35(1) (Defence [93A]) is that the phrase "the applicable cap for the third-party campaigner" means, in the case of several third-party campaigners conducting a joint campaign, the TPC expenditure cap applied individually to each campaigner – such that campaigners may "combine" their caps, and the prohibition only attaches where a campaigner's contribution to the joint campaign expenditure exceeds that campaigner's cap. This reading strains s 35(1)'s language, and leaves the provision no work to do beyond the cap offence and circumvention offence.

Section 35 of the EF Act burdens the freedom

57. The "acting in concert" offence burdens the freedom in two interrelated ways. *First*, taking as an illustration the NSWNFS Campaign, conducted and funded by the 5 participating campaigners (**SC [19]-[27]**): s 35 would prevent *any* of the plaintiffs that registered as third-party campaigners before 1 October 2018 from undertaking a joint State election campaign of that kind unless its *total* cost was $500,000 or less (see s 29(10)(a)). It would prevent the HSU, which has not yet registered (see **SC [18](d)**), from doing so unless the campaign's cost was $250,000 or less (see s 29(10(b)). This burdens the freedom for the reasons given at [37] above.

58. *Secondly*, s 35 imposes further burdens due to its "substantial deterrent effects" and the inherent uncertainty surrounding the conduct to which the provision applies.[60]

59. The test of "act[ing] under an agreement" (s 35(2)) with another person to "incur electoral expenditure" that "exceeds the applicable cap for the third-party campaigner" (s 35(1)) is broad and nebulous. As soon as a "formal or informal" agreement to campaign in support of or against a party or candidate is identifiable, the prohibition might arguably apply to any conduct by the third-party campaigner broadly consistent with that object – from announcing the decision to coordinate campaigning activities with the other person, to sending that person a draft election poster, to obtaining a quotation for advertising services, to incurring electoral expenditure. Moreover, the test is continuously operative: conduct under an agreement to conduct a joint campaign might commence compliantly with s 35 but develop into unlawful conduct once initial forecasts become firm quotations or campaign costs are revised upwards to meet contingencies. In

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[59] See s 35's heading, and **SCB 1423**, recommending the introduction of "a provision similar to section 205H".
[60] See *Brown* at [144]-[145] (Kiefel CJ, Bell and Keane JJ).

circumstances where a third-party campaigner risks 2 years' imprisonment and/ or a $44,000 fine by contravening s 35,[61] the prohibition will discourage a large penumbra of lawful political communications: joint election campaigns costing less than $500,000; agreements between third-party campaigners and others to promote their joint political views during the capped State expenditure period; preliminary discussions between third-party campaigners and others to ascertain whether they hold shared political aims and desire to coordinate their election campaign messages; and, logically, all of the political discourse facilitated by those communications. This chilling effect is an indicator of the law's practical impact on political communication and debate.[62]

Section 35 of the EF Act has an illegitimate purpose

60. For broadly similar reasons to those outlined above in relation to the TPC expenditure cap, the purpose of the "acting in concert" offence is incompatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

61. The contextual tools that assist in identifying s 35's purpose include: (i) the operation of s 35 exclusively on third-party campaigners; (ii) the TPC expenditure cap with which s 35 interacts, and the corresponding cap under the Previous Act; (iii) the EF Act and Previous Act expenditure caps for political parties; (iv) the relaxation of the aggregation provisions applicable to parties; (v) the public funding regime; (vi) the circumvention offence in s 144(1); (vii) the State Government's capacity to engage in issue advertising under the GA Act; and (viii) the asserted explanation of the need for s 35 in the extrinsic material (see [19]-[21] above). Viewed through this prism, s 35 aims to privilege the voices of political parties (and, to a lesser extent, candidates) in State election campaigns over the voices of persons who do not stand or field candidates for election, and of persons sharing their views, in the manner described at [43] above. The law cannot be directed towards ensuring fair access to the political process, or preventing domination by certain voices or circumvention of the EF Act's expenditure regime,[63] because it governs *only* third-party campaigners and is *additional* to the circumvention offence of general application in s 144(1). Section 35 fails the compatibility test.

Section 35 of the EF Act is not proportionate to a legitimate end

62. Even if the purpose of s 35 is legitimate, the provision is not reasonably appropriate and adapted to advancing that end consistently with the second *Lange* inquiry.

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[61] See s 143(1) of the EF Act and s 17 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).
[62] See *Brown* at [78], [150]-[151] (Kiefel, Bell and Keane JJ), [269] (Nettle J); cf [168] Gageler J).
[63] See Defence [91], particulars (i)(a) and (i)(b), and [20]-[21] above.

63. ***Extent of the burden***: Like the TPC expenditure cap, s 35 of the EF Act imposes a direct and substantial burden on the freedom. It expressly prohibits conduct facilitating or constituting State election campaigning. It discriminates against third-party campaigners. The various burdens it imposes will severely restrict the flow of political communication between third-party campaigners, other persons with similar political views, and the public – for example, in the manner described at [57] above in respect of the NSWNFS Campaign. And it will necessarily apply to activities constituting or facilitating election campaigning during the capped State expenditure period.

64. ***Suitability:*** Section 35 is rationally connected to neither the equal opportunity object nor the purpose of preventing circumvention of the EF Act's expenditure caps. Its discriminatory operation makes that connection impossible. In addition to the matters explained in the context of the TPC expenditure cap at [50]-[52] above, it is notable that the EF Act envisages that a *political party* may lawfully use its expenditure cap to run a shared campaign with one or more parties, persons or entities (see [15] above) – including one that could be viewed as "overwhelming the expenditure of parties, candidates and ... third-party campaigners acting alone" (Defence [91], particular (i)(a)). Neither rationale just described explains s 35's selectivity in proscribing the same conduct by *third-party campaigners* – entities which, no differently from political parties and their associates, may "exist independently" of each other and "have their own constituencies and political views". Indeed, these objects are positively undermined by the fact that s 35 will operate differentially on the various actors under a single "agreement". If Unions NSW and the ALP[64] implement a plan to run a joint advertising campaign criticising Liberal candidates in the leadup to the March 2019 State election, Unions NSW will contravene s 35 to the extent that the electoral expenditure for the joint campaign exceeds $500,000, but the ALP will face no such sanction. If Unions NSW's conduct in this scenario is properly characterised as "circumvention" of the expenditure caps, why does the ALP's conduct escape the same treatment?

65. More broadly, "[i]mplicit in the notion of circumvention" is that s 35 "is concerned with expenditure derived in fact by a single source, notwithstanding that it may be made by two legally distinct entities"[65] – but, much like former s 95G(6) of the Previous Act, the criteria for s 35's operation do not reveal why a third-party campaigner and another

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[64] Through "persons" such as its party agent: see, eg, s 38(4)(b).
[65] *Unions No 1* at [62] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

person should be treated as the same source for the purposes of the expenditure caps.[66] The fact that they share at least one political view, motivating them to coordinate certain campaigning activities, does not make them the same organisation.

66. For these reasons, s 35's "wide, but incomplete, prohibition"[67] cannot contribute to the realisation of key statutory purposes on which the State relies.[68]

67. ***Necessity***: An alternative, reasonably practicable means of achieving the equal opportunity object or preventing avoidance of the EF Act's expenditure caps is the anti-circumvention mechanism that has for some years formed part of NSW's electoral funding scheme. Section 144(1) of the EF Act prohibits entering into or carrying out a "scheme for the purpose of circumventing" (inter alia) the expenditure caps, on pain of liability for a serious imprisonment term (10 years). That provision has a less restrictive effect on the freedom: it is of general application, unlike s 35,[69] and expressly targets *circumvention* of the expenditure caps, rather than conduct facilitating or constituting political communication. There is no suggestion in the Final Report, JSCEM Reports or second reading speech that s 144(1)'s predecessor provision under the Previous Act was ineffective in promoting compliance with the electoral expenditure regime.

68. ***Adequacy in balance:*** Finally, the "acting in concert" offence is not adequate in its balance. Its discriminatory burden on the freedom is a manifestly excessive response to the objectives of ensuring equal access to the political process and preventing circumvention of the expenditure caps.

69. Accordingly, s 35 imposes a burden on political communication that cannot be justified within the *McCloy/ Brown* framework. The provision is invalid.

Part VII: Orders sought

70. The Questions should be answered: (1) Yes. (2) Yes, in its entirety. (3) The defendant.

Part VIII: Estimated time for oral argument

71. The plaintiffs estimate that they will require 3 hours in chief and 45 minutes in reply.

Dated: 24 October 2018

Justin Gleeson SC
T: (02) 8239 0200
justin.gleeson@banco.net.au

Nicholas Owens SC
T: (02) 8257 2578
nowens@stjames.net.au

Celia Winnett
T: (02) 8915 2673
cwinnett@sixthfloor.com.au

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[66] See *Unions No 1* at [63] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[67] *Unions No 1* at [59] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[68] See *McCloy* at [80] (French CJ, Kiefel, Bell and Keane JJ).
[69] See, by analogy, *McCloy* at [271] (Nettle J, relevantly dissenting in the result).