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

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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

30 **PLAINTIFFS' REPLY**

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Part I: Internet publication

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

Part II: Reply

2. ***"Equality":*** To establish that the TPC expenditure cap's purpose[1] is to "promote a level playing field and substantive equality of opportunity" (**D[38]**), in the face of provisions that radically discriminate between parties and independent Council groups (**groups**) vis-à-vis TPCs, NSW is driven to argue that some campaigners are more equal than others. It identifies two bases on which the impugned provisions justifiably distinguish between parties and groups relative to TPCs: one functional and one practical. Similarly, the Commonwealth lists practical differences between these entities that might justify differential treatment of TPCs (**C[40]-[45]**). None of these amount to relevant distinctions explaining the gross disproportion between the party/ group and TPC caps. None displace the statutory, contextual and evidentiary support for the contrary proposition: that s29(10)'s purpose is to marginalise the political messages of one category of participant (TPCs) in State election campaigns.

3. *Appeal to (constitutionally-derived) functional differences:* NSW contends that the "constitutionally distinct position of candidates", as persons directly engaged in the system of representative government to which ss7 and 24 give effect, justifies distinctive legislative treatment of candidates and parties relative to others (**D[23],[39]**). There are four problems with that analysis. *First*, a person's participation in the *electoral contest* is distinct from his or her status in the separate contest that is protected by the implied freedom and burdened by the EF Act's electoral expenditure regime: the *contest of ideas and opinions* about who should represent the people in Parliament and form government. The implied freedom facilitates the people's access to information "concerning political or government matters which enables the people to exercise a free and informed choice as electors"[2] – and there is no reason, flowing from the "system of parliamentary democracy" (**D[39]**) or otherwise, why the information that will best assist the people for this purpose need originate wholly or substantially from the electoral contestants themselves.[3] The separation between these two contests is even starker in circumstances where the persons being privileged by the impugned laws are candidates for *State election*, whereas the implied freedom is concerned with the flow of information necessary to sustain representative and responsible government at the *federal* level. *Secondly*,

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[1] The purposes South Australia asserts (**SA[8],[16]**) are identified at such a high level of abstraction, and have so little connection with the operation of the provisions impugned here, that they provide no assistance: cf *Unions NSW v NSW* (2013) 252 CLR 530 (***Unions No 1***) at [50]-[60] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[2] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (***Lange***) at 560 (per curiam).
[3] See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (***ACTV***) at 139 (Mason CJ).

and relatedly, candidates for State election hold no "constitutionally distinct position" (**D[23]**) rendering them more capable of informing the people about "the conduct of the executive branch of government throughout the life of a federal Parliament"[4] than TPCs.

4. *Thirdly*, the status of *candidates* in the electoral contest does not in any event justify distinctive treatment of *political parties* in election campaigns simply because they "promot[e] the election of candidates" (cf **D[22]-[23]**). The fact that the EF Act caps TPC expenditure incurred for the purpose of influencing the voting at an election (ss7(1), (3)) demonstrates that parties are not the only entities fulfilling that function. Whilst TPCs' promotional activities take on a different character given their independence from the candidates, that promotion is no less valuable – and has the advantages described at **P[35]**. *Fourthly*, the proposition that parties and candidates have a greater entitlement to contribute to political debate is denied by *ACTV* (cf **D[27]-[29]**) – where the majority acknowledged the legitimate role of "employee, industry or other special interest groups" in the political discourse,[5] and the vice in the impugned legislation was (as Keane J later explained) "the discriminatory character of its proscription of some sources of political communication relating to electoral campaigning".[6] The "level playing field" envisaged in *ACTV* (at 146, 175) was not one in which only parties and candidates occupy the privileged terrain.

5. *Appeal to practical differences:* Attempting to give a more concrete explanation of s29's markedly preferential treatment of parties and groups vs TPCs, NSW suggests that candidates face higher costs (**D[41]**), TPCs as distinct from parties and candidates are incentivised to run "single-issue campaigns or campaigns on 'niche issues'" (**D[40]**), and TPC campaigning "drown[s] out the voices of parties and candidates" (**D[38]**). No evidence supports these claims,[7] let alone the proposition that they are addressed by an expenditure regime reflecting the relativities summarised at **P[41]**.[8] Even the assertion that TPC expenditure "increase[d]" during 2015 (**C[53]**) requires qualification, given that the capped period was 3 months in 2011 and 6 months in 2015 (Previous Act, s95H(a)-(b)). It is true that parties attempting to *win government* through their candidates' election face a practical burden of convincing the State at large that those candidates are equipped to govern and have the policies to do so. But

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[4] *Lange* at 561 (per curiam).
[5] *ACTV* at 175 (Deane and Toohey JJ); see also at 145 (Mason CJ), 221 (Gaudron J), 237 (McHugh J).
[6] *Unions No 1* at [137]; see also at [27]-[30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *McCloy v NSW* (2015) 257 CLR 178 (***McCloy***) at [39], [43] (French CJ, Kiefel, Bell and Keane JJ), [136] (Gageler J).
[7] Cf EF Act, s29(12)(b) (imposing a further cap on TPC spending in a given electorate); **P[45]** ("drowning out" argument); **P[51]** ("single issue" campaigns); and the advertisements at **SCB 281** (privatisation), **277** (healthcare), **278** (TAFE cuts), **279** (council mergers), **280** (electricity), **287** (public services).
[8] See *ACTV* at 144-146 (Mason CJ), 175 (Deane and Toohey JJ), 239 (McHugh J).

that need was accounted for under the Previous Act (see [9] below), and there is no evidence of any resulting unfairness (**P[45]**). Further, it does not account for the gross disparity between the TPC cap and the caps for minor parties and groups (ss29(10) vs (4)-(5)).

6. The Commonwealth contends that TPCs can be treated differently to guard against distorted election results in favour of one candidate over others (**C[41]**). The difficulties in squaring that analysis with s29(10) are that any such risk: (i) applies equally in respect of coordinated campaigns by several parties against one candidate (noting that 19 parties and 36 TPCs registered for the 2015 State election: **SC[29],[31]**), which the EF Act permits; (ii) does not account for the TPC expenditure cap's application to electoral expenditure directed towards promoting or opposing *a party* as distinct from a candidate (cf s7(1)); and (iii) fails to explain the disproportion between *party* and TPC expenditure in circumstances where candidates enjoy separate caps and a TPC may not spend over $24,700 in one electoral district (s29(12)(b)). Similar responses apply to the asserted rationale of allowing candidates to respond to multiple TPCs (**C[42]**). Nor are problems of "clientelism" restricted to TPCs (cf **C[44]**) in a context where (eg) a minor party fielding Council candidates can devote some of its cap to promoting another party's Assembly candidate and thereby create a dependence that encourages the elected Assembly candidate's capitulation to the minor party's policy agenda.

7. ***Parliamentary sovereignty:*** **D[35]** overlooks an important qualification that our Constitution places on the doctrine of parliamentary sovereignty: "a law which amends a valid law by modifying its operation will be supported *unless there be some constitutional limitation on the power to effect the amendment*".[9] It is orthodox for this Court to assess legislation's validity against the backdrop of extant or pre-existing laws,[10] and to do so by asking whether amendments are impermissible due to relevant constitutional constraints.[11] In the present context, the Previous Act serves three important functions. It sheds light on the purpose of the amendments effected by the EF Act.[12] It evidences a scheme that Parliament reasonably considered to be appropriate for affording equal opportunity to participate in electoral campaigning[13] – which scheme has not been shown to have caused any "drowning

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[9] *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at [15] (Brennan CJ and McHugh J, emphasis added).
[10] See, eg, *Brown v Tasmania* (2017) 261 CLR 328 (***Brown***) at [111] (Kiefel CJ, Bell and Keane JJ).
[11] See, eg, *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at [25], [73], [78] (French CJ), [140], [167] (Gummow and Bell JJ), [382], [384] (Crennan J); *Roach v Electoral Commissioner* (2007) 233 CLR 162 at [9]-[11], [24] (Gleeson CJ), [90] (Gummow, Kirby and Crennan JJ); *Cunningham v Commonwealth* (2016) 259 CLR 536 at [40], [44] (French CJ, Kiefel and Bell JJ), [63]-[71] (Gageler J), [223]-[224] (Nettle J).
[12] See *Attorney-General (Vic); Ex rel Black v Commonwealth* (1981) 146 CLR 559 at 576 (Barwick CJ).
[13] See further the second reading speech for the Election Funding and Disclosures Amendment Bill 2010 (NSW), NSW Legislative Council, *Parliamentary Debates* (Hansard), 10 November 2010, 27458 at p27458.

out" of candidates or parties. And it provides a real world example of alternative measures that may achieve that object whilst imposing a lesser burden on the freedom.[14]

8. ***"Policy choice":*** NSW contends that the plaintiffs' objection to s29(10) cannot sit with their acceptance of the Previous Act's caps, as the "particular levels of differentiation" between parties/ candidates and TPCs are "a matter of policy choice" (**D[33],[45]**). If that is a claim that this Court should not examine whether Parliament's particular choice in designing the EF Act caps is disproportionate to its asserted purpose (**D[45],[47]**), it is inconsistent with the *McCloy/ Brown* framework, which requires any effective burden on the freedom to be justified.[15] Likewise, the Commonwealth's appeal to Parliament's "discretion and flexibility" in "crafting electoral processes" (**C[48]**), with its overtones of "margin of appreciation" doctrine,[16] must be viewed with caution: "[t]he Court should be astute not to accept at face value claims by the legislature and the Executive that freedom of communication will, unless curtailed, bring about corruption and distortion of the political process."[17]

9. If NSW claims that the Previous Act's differentials are irrelevant to a contextual analysis of the EF Act, the radical differences between the two schemes should be recalled. Section 95F of the Previous Act reveals a logic that achieves broad equality between State election campaign participants, allowing for the practical burdens faced by the major parties (see [5] above). Independent candidates' expenditure was capped at $150,000 (ss95F(7), 95F(8)), the same amount that party candidates had available to influence their electorates to elect them (ss95F(6) read with 95F(12)(a)). Major parties, targeting the Assembly and perhaps also the Council, were allocated the same as the party candidate cap under s95F(6), multiplied by the number of Assembly seats the party was trying to win (s95F(2)). Of each such amount, half could be directed towards attempting to secure votes for the party's candidate(s) in the relevant electorate (s95F(12)(a)), and the remainder arguably reflected the party's need to campaign more broadly to muster sufficient State-wide support for its candidates to form government. Minor parties, primarily targeting the Council and fielding Assembly candidates in 10 or fewer districts, were allocated roughly 10x the party candidate cap (s95F(4)). Groups, also targeting the Council, received the same cap (s95F(5)), as did TPCs (s95F(10)(a)). This reflected a judgment that minor parties, groups and TPCs should have equivalent campaigning entitlements. That treatment was appropriate to the functional similarities

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[14] See *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at [110]-[112] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).
[15] *Brown* at [127], [131] (Kiefel CJ, Bell and Keane JJ).
[16] Cf *Unions No 1* at [34] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[17] *ACTV* at 145 (Mason CJ).

between these entities, which each have interests in advancing various policy positions and influencing voting in favour of certain candidates but are not aiming to form government. The scheme afforded equality of opportunity. It did not seek to advantage parties.

10. By contrast, the TPC expenditure cap under s29(10) of the EF Act is less than 39% of the cap for minor parties and groups, and less than 4.4% of the cap for a major party endorsing Assembly candidates in each district. Those caps, viewed in context (**P[40]-[45],[54]**), reveal a purpose of privileging parties and marginalising TPCs. Alternatively, they create a scheme that disproportionately burdens the freedom by operation of s29(10). From the evidence of the 2015 TPC expenditure that will be stifled under the EF Act (**SC[29];P[48]**), and from the absence of any suggestion that Parliament heeded recommendations to investigate the proposed cap's adequacy (**P[18],[53]**), the Court *can* infer that s29(10) does not give TPCs "sufficient scope" to campaign (cf **D[33],[38]**) – particularly when "sufficiency" is understood as TPCs' capacity to be heard *relative to* the ability of other participants in the debate to disseminate their views. The cap does not allow TPCs to "reasonably present" their case; nor is it aimed at preventing TPCs from "drowning out" parties or candidates. The Minister's explanation (**D[38]**) is not an accurate summary of the law.

11. ***Section 35:*** *First,* the claim that an agreement with a "principal object of promoting or opposing particular policies" would fall outside s35 (**D[53](b)**): puts a gloss on the statutory text; introduces a distinction without a difference, as "electoral expenditure" incurred during the capped period will inevitably be directed towards influencing votes for or against candidates or parties;[18] and, if correct, would lead to a chilling of political speech given the difficulties in applying such a test (see **P[58]-[59]**). *Secondly,* NSW does not engage with the plaintiffs' arguments concerning the relaxation of aggregation provisions applicable to parties (**P[15],[64]**). *Thirdly,* there is no evidence that TPC joint campaigns would "completely overwhelm" parties and candidates (cf **D[55]**), particularly given s29(12)(b); and the fact that s35 allows several aligned *parties* to "overwhelm" other voices in the debate signals that the provision is concerned with privileging rather than levelling. *Fourthly,* the appeal to "anti-circumvention" suffers the problems described at **P[64]-[65]**, and is inconsistent with the proposition that "individuals may legitimately come together in … groups, to procure political communication".[19] Underpinning NSW's defence of s35 remains the impermissible premise that parties have a special status entitling them to a greater voice in election campaigns.

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[18] See *Libman v Quebec* [1997] 3 SCR 569 at [49] ("People do not vote for issues; nevertheless, the purpose or effect of the debate on the issues will be to influence the final vote").
[19] *ACTV* at 175 (Deane and Toohey JJ).

12. ***Irrelevancies:*** s 7(2)(a)'s carveout from the definition of "electoral expenditure" bears neither on the extent of the burden imposed by the impugned provisions nor on proportionality testing (**C[9]**, cf **SA[32]**), as there is no neat alignment between the excluded communications and the core of the political expression protected by the implied freedom.

13. ***Proposed interventions:*** The NSW Liberal Party's application to intervene and adduce additional evidence, and UNSWGCI's application to be heard and adduce evidence as amicus, should be refused. The Liberal Party is not directly affected by these proceedings, in the sense that it would be "bound by the decision albeit not a party".[20] Nor has it demonstrated any "substantial affectation"[21] of its legal interests: it is impacted no more than any other entity regulated by the electoral expenditure regime. Nor would its submissions materially assist the Court. In large part, they are grounded in propositions asserted by Mr Stone, whose evidence should not be admitted given that the parties have agreed relevant facts concerning (eg) expenditure data, the affidavit has questionable relevance and weight, and the evidence cannot be tested by cross-examination within the hearing timetable.

14. UNSWGCI does not propose to "present arguments on aspects of a matter before the Court which are otherwise unlikely to receive full or adequate treatment by the parties":[22] the points sought to be ventilated at **U[36]-[50]** do not materially add to the parties' submissions. As to the 14 purported repositories of constitutional fact relied upon at **U[52]ff**, consisting of 7 reports/ papers, 4 academic articles, a parliamentary submission, a news article and an unsigned document purporting to be an expert report: UNSWGCI invokes them to establish propositions that provide no assistance in determining whether the EF Act's particular means of limiting TPC expenditure infringes the implied freedom. UNSWGCI fails to articulate how its alleged facts are relevant to an application of the *Lange* test to the impugned provisions; the burden on the parties and the Court to sift through the materials and determine their weight (**U[53]**) is disproportionate to any assistance they might provide; and it would be procedurally unfair for the Court to receive this so-called evidence from a non-party without focused guidance on how it is said that it should influence the outcome in the case.

Dated: 28 November 2018

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[20] *Levy v Victoria* (1997) 189 CLR 579 (***Levy***) at 601 (Brennan CJ).
[21] *Levy* at 602 (Brennan CJ).
[22] *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 312 (French CJ).