HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN:

UNIONS NSW
First Plaintiff

NEW SOUTH WALES NURSES AND MIDWIVES' ASSOCIATION
Second Plaintiff

PUBLIC SERVICE ASSOCIATION AND PROFESSIONAL OFFICERS' ASSOCIATION AMALGAMATED UNION OF NEW SOUTH WALES
Third Plaintiff

NEW SOUTH WALES LOCAL GOVERNMENT, CLERICAL, ADMINISTRATIVE, ENERGY, AIRLINES & UTILITIES UNION
Fourth Plaintiff

and

STATE OF NEW SOUTH WALES
Defendant

OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

A. Jurisdiction to hear and determine the validity of s 35 (FASC [106(1A)(a)])

The plaintiffs' past conduct (CSS [3])

2. The material before the Court indicates that the plaintiffs conformed their behaviour to s 35 of the *Electoral Funding Act 2018* (NSW) (**EF Act**) for the period that it remained in force. No material before the Court indicates that the plaintiffs contravened that provision, nor that they face prosecution under s 143(1) of that Act: FASC [75]-[84].

3. In those circumstances, the plaintiffs do not have standing to challenge the historical validity of s 35. Like the plaintiffs in *Smethurst* who attempted to challenge a repealed law, the plaintiffs in this case "have no more interest than anyone else in clarifying what the law is": *Smethurst* (2020) 94 ALJR 502 at [105]-[107], [198] (**Supp JBA 2, Tab 9**). *Croome* (1997) 191 CLR 119 (**JBA 4, Tab 18**) is not analogous, as in that case the plaintiffs pleaded that they had engaged in, and intended to continue to engage in, conduct which, if the impugned provisions of the *Criminal Code* (Tas) were operative, rendered them liable to prosecution, conviction and punishment: see *Smethurst* (2020) 94 ALJR 502 at [107]; cf **PS [58]; PR [10]**.

4. Because the plaintiffs lack standing to challenge s 35 following its repeal, the validity of s 35 forms no part of the "matter" before the Court. That follows because, in federal jurisdiction, questions of standing are "subsumed" within the constitutional requirement that there be a "matter": *Hobart International Airport* (2022) 96 ALJR 234 at [29]-[31], [49], [79] (**Supp JBA 2, Tab 3**).

5. Neither *Plaintiff M68* (2016) 257 CLR 42 (**Supp JBA 1, Tab 1**) nor *Wragg* (1953) 88 CLR 353 (**Supp JBA 1, Tab 2**) assists the plaintiffs.

The possibility of re-enactment does not affect the position (CSS [4]-[5])

6. The plaintiffs cannot avoid the operation of these principles by asserting that they have a reasonable apprehension that s 35 or a "materially similar" provision may be re-enacted: cf **PR [11]**. Even if there were a reasonable basis to apprehend that s 35 might be re-enacted, it does not follow that the Court has jurisdiction to decide the question of its

historical validity. The plaintiffs' reliance on US authorities concerning the "voluntary cessation" exception to the mootness doctrine is misplaced: cf **PR [11]**.

(a) The two cases on which the plaintiffs rely concerned delegated legislation, whereas the US Supreme Court has consistently held that where an impugned provision in primary legislation is repealed the case is rendered moot (save in cases concerning contraventions prior to repeal): see *Town of Portsmouth*, 813 F 3d 54 (2016) at 59 (**Supp JBA 2, Tab 11**).

(b) In both cases on which the plaintiffs rely, the Court could be satisfied that the Government would re-enact, or already had substantively re-enacted, the impugned law: *Aladdin's Castle*, 455 US 283 (1982) at 289 fn 11 (**Vol 7, Tab 29**); *Northeastern Florida*, 508 US 656 (1993) at 660-661 (**Vol 7, Tab 35**). Here, by contrast, the possibility that s 35 might be re-enacted is entirely speculative.

B. Principles applicable to determining the validity of s 29(11) (FASC [106(1)])

The burden analysis and "chilling effect" (CS [12]-[13])

7. The plaintiffs' contention that s 29(11) of the EF Act has a "chilling effect" on political communication is apt to distract attention from the proper analysis: *Brown* (2017) 261 CLR 328 at [151], [262], [307], [465] (**Vol 3, Tab 15**).

The legitimacy of purpose analysis and differential expenditure caps (CS [20]-[24])

8. A law that imposes lower expenditure caps on third parties than on political parties and candidates is capable of pursuing a legitimate purpose: *Unions (No 2)* (2019) 264 CLR 595 at [30]-[34], [83] and [89]-[90], [110] (**Vol 6, Tab 28**); *Harper* [2004] 1 SCR 827 at [116] (**Vol 7, Tab 31**); *Libman* [1997] 3 SCR 569 at [50] (**Vol 7, Tab 33**).

The factual basis for the justification analysis (CS [26])

9. The facts that may be required to justify a particular legislative measure will vary with the circumstances of the individual case: *Spence* (2019) 268 CLR 355 at [95]-[96], [323] (**Vol 5, Tab 25**); *Unions (No 2)* (2019) 264 CLR 595 at [53], [99]-[102], [117]-[118], [152]-[153] (**Vol 6, Tab 28**).

Dated: 16 November 2022

Stephen Donaghue Sarah Zeleznikow Shawn Rajanayagam