HIGH COURT OF AUSTRALIA

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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

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

PART I — CERTIFICATION

1 These submissions are in a form suitable for publication on the Internet.

PARTS II AND III — INTERVENTION

2 The Attorney-General of the Commonwealth (**Commonwealth**) intervenes in this proceeding pursuant to s 78A of the *Judiciary Act 1903* (Cth).

PART IV — ISSUES

3 The Commonwealth makes no submission concerning the validity of s 29(11) of the *Electoral Funding Act 2018* (NSW) (**EF Act**). As to the applicable constitutional principles, the Commonwealth advances the following propositions:

3.1 ***Burden***. A cap on electoral expenditure will ordinarily directly burden political communication by restricting the amount of political communication that may be engaged in. The extent of that burden will vary with the magnitude of the expenditure cap.

3.2 ***Legitimate purpose***. Caps on electoral expenditure (including caps that differentiate between third-party campaigners, on the one hand, and candidates and political parties, on the other) are capable of pursuing purposes (including the creation of a "level playing field") that are compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

3.3 ***Justification***. Whether a particular expenditure cap is "proportionate" in its pursuit of a legitimate purpose can be determined applying the three stages of the structured proportionality analysis. What, if anything, is required by way of factual foundation to justify a particular measure will vary with the circumstances of the case.

4 As s 35 of the EF Act has been repealed,[1] the Commonwealth has not advanced written submissions as to the validity of that provision or the principles that apply when assessing the validity of aggregation provisions. However, if the plaintiffs are permitted to maintain their challenge to the validity of s 35 notwithstanding its repeal,[2] the Commonwealth reserves its right to make brief oral submissions on that matter.

PART V — ARGUMENT

A THE IMPLIED FREEDOM AND THE REGULATION OF ELECTIONS

5 One defining feature of the Constitution is the "spare" manner in which it prescribes the form that the system of representative and responsible government is to take.[3] Section 51(xxxvi) of the Constitution, read with ss 7, 8, 10, 24 and 29-31, confers on the Commonwealth Parliament "plenary power" with respect to federal elections,[4] which provides to the Parliament "a wide leeway of choice, even

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1 *Electoral Legislation Amendment Act 2022* (NSW), Sch 3 item 12. By virtue of the Commencement Proclamation made under the *Electoral Legislation Amendment Act 2022* (NSW), s 35 was repealed on 2 November 2022.

2 See Affidavit of Kathleen Mary Harrison affirmed 1 November 2022, Exhibit KMH-11 at 52 [3].

3 *Murphy v Electoral Commissioner* (2016) 261 CLR 28 (***Murphy***) at [243] (Nettle J), citing *Rowe v Electoral Commissioner* (2010) 243 CLR 1 (***Rowe***) at [200] (Hayne J). See also *Rowe* (2010) 243 CLR 1 at [420] (Kiefel J).

4 *Spence v Queensland* (2019) 268 CLR 355 (***Spence***) at [54] (Kiefel CJ, Bell, Gageler and Keane JJ), [159] (Gordon J), [344] (Edelman J).

concerning the fundamental features of the operation of elections".[5] This sparseness reflects a deliberate design to leave the Commonwealth Parliament largely "free to determine the way in which the notion of representative government is to be given effect at the federal level".[6] By permitting this "scope for variety",[7] "the Constitution makes allowance for the 'evolutionary nature of representative government' … [which] 'is a dynamic rather than a static institution'".[8] Accordingly, in order "to respect the constitutional design",[9] no "overly broad approach restraining Parliament's leeway of choice" should be taken.[10]

6 The system of representative and responsible government for which the Constitution
10 provides "is not intended as a prescription for the States".[11] Nevertheless, while State Parliaments must be taken to have as much "leeway" to legislate with respect to State elections as is available to the Commonwealth Parliament with respect to federal elections, they are clearly subject to the implied freedom of political communication.[12] State Parliaments are therefore somewhat constrained in the design of their electoral processes, although they retain a considerable "domain of selections" in respect of laws that regulate their electoral processes.[13]

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5 *Ruddick v Commonwealth* (2022) 96 ALJR 367 (***Ruddick***) at [149] (Gordon, Edelman and Gleeson JJ). See also *Murphy* (2016) 261 CLR 28 at [263]-[264] (Gordon J).

6 *Murphy* (2016) 261 CLR 28 at [243] (Nettle J), quoting *Rowe* (2010) 243 CLR 1 at [200] (Hayne J). More generally, see *Murphy* (2016) 261 CLR 28 at [156] (Keane J), [263] (Gordon J); *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 (***McKinlay***) at 56-57 (Stephen J); *McGinty v Western Australia* (1996) 186 CLR 140 (***McGinty***) at 182-184 (Dawson J), 283-284 (Gummow J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 (***Mulholland***) at [6] (Gleeson CJ), [63]-[65] (McHugh J), [153] (Gummow and Hayne JJ); *Rowe* (2010) 243 CLR 1 at [29] (French CJ), [125] (Gummow and Bell JJ), [386] (Kiefel J).

7 *McKinlay* (1975) 135 CLR 1 at 56 (Stephen J), quoted in *Ruddick* (2022) 96 ALJR 367 at [16] (Kiefel CJ and Keane J).

8 *Mulholland* (2004) 220 CLR 181 at [78] (McHugh J), quoting *McGinty* (1996) 186 CLR 140 at 279-280 (Gummow J).

9 See *Ruddick* (2022) 96 ALJR 367 at [152] (Gordon, Edelman and Gleeson JJ).

10 *Ruddick* (2022) 96 ALJR 367 at [150] (Gordon, Edelman and Gleeson JJ). See also *Mulholland* (2004) 220 CLR 181 at [156] (Gummow and Hayne JJ); *Murphy* (2016) 261 CLR 28 at [243] (Nettle J), [305] (Gordon J); *Day v Australian Electoral Commissioner (SA)* (2016) 261 CLR 1 at [19] (the Court).

11 *McGinty* (1996) 186 CLR 140 at 189 (Dawson J); see also at 175-176 (Brennan CJ), 206-210 (Toohey J; Gaudron J agreeing), 293 (Gummow J).

12 See, eg, *McCloy v New South Wales* (2015) 257 CLR 178 (***McCloy***); *Unions NSW v New South Wales* (2019) 264 CLR 595 (***Unions (No 2)***).

13 See *McCloy* (2015) 257 CLR 178 at [82] (French CJ, Kiefel, Bell and Keane JJ); *Unions (No 2)* (2019) 264 CLR 595 at [47] (Kiefel CJ, Bell and Keane JJ), [66] (Gageler J), [113] (Nettle J).

B THE BURDEN IMPOSED BY EXPENDITURE CAPS ON THE IMPLIED FREEDOM

B.1 The identification of a burden and its extent

7 As is now well established, the first step in the implied freedom analysis is to ask whether a law, in its legal and practical operation, imposes an "effective burden" on the implied freedom.[14] A law will do so if it "prohibits or limits political communication to any extent".[15] While consideration of individual cases may assist in understanding the practical operation of a statute, and therefore the burden that it imposes, the "burden" question is to be answered by considering whether the impugned law imposes an effective
10 burden on the implied freedom "generally".[16] That is consistent with, and reinforced by, the proposition that the freedom is a structural implication that operates as a restriction on legislative power, rather than a personal right.[17]

8 If a law imposes an effective burden on political communication, it is necessary to identify the *extent* of that burden. That is necessary because, while the extent of the burden is "not relevant to the threshold question as to whether justification is required",[18] it does define "what has to be justified and the questions to be addressed in that process".[19] The extent of the burden will usually be ascertained "by reference to the effect

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[14] See *Brown v Tasmania* (2017) 261 CLR 328 (***Brown***) at [118] (Kiefel CJ, Bell and Keane JJ), [180] (Gageler J), [237] (Nettle J), [307] (Gordon J), [484]-[488] (Edelman J); *Farm Transparency International Ltd v New South Wales* (2022) 96 ALJR 655 (***Farm Transparency***) at [27] (Kiefel CJ and Keane J), [154] (Gordon J).

[15] *Comcare v Banerji* (2019) 267 CLR 373 at [29] (Kiefel CJ, Bell, Keane and Nettle JJ). See also *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490 (***LibertyWorks***) at [45] (Kiefel CJ, Keane and Gleeson JJ), [136] (Gordon J); *Farm Transparency* (2022) 96 ALJR 655 at [26] (Kiefel CJ and Keane J), [154] (Gordon J).

[16] *Brown* (2017) 261 CLR 328 at [90] (Kiefel CJ, Bell and Keane JJ). See also *Unions NSW v New South Wales* (2013) 252 CLR 530 (***Unions (No 1)***) at [35] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *LibertyWorks* (2021) 95 ALJR 490 at [77] (Kiefel CJ, Keane and Gleeson JJ), [135] (Gordon J); *Farm Transparency* (2022) 96 ALJR 655 at [27] (Kiefel CJ and Keane J), [154] (Gordon J).

[17] See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560 (the Court); *Unions (No 1)* (2013) 252 CLR 530 at [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Brown* (2017) 261 CLR 28 at [90] (Kiefel CJ, Bell and Keane JJ), [258] (Nettle J), [433] (Gordon J); *Clubb v Edwards* (2019) 267 CLR 171 (***Clubb***) at [8], [35] (Kiefel CJ, Bell and Keane JJ), [247] (Nettle J), [356] (Gordon J).

[18] *LibertyWorks* (2021) 95 ALJR 490 at [63] (Kiefel CJ, Keane and Gleeson JJ). See also *Brown* (2017) 261 CLR 328 at [127] (Kiefel CJ, Bell and Keane JJ); *Unions (No 2)* (2019) 264 CLR 595 at [162] (Edelman J).

[19] *LibertyWorks* (2021) 95 ALJR 490 at [63] (Kiefel CJ, Keane and Gleeson JJ); see also at [94] (Gageler J), [136] (Gordon J). See also *Brown* (2017) 261 CLR 328 at [118], [128] (Kiefel CJ, Bell and Keane JJ), [164]-[165], [200]-[201] (Gageler J), [291] (Nettle J), [411], [478] (Gordon J); *Farm Transparency* (2022) 96 ALJR 655 at [36] (Kiefel CJ and Keane J).

upon the ability of persons to communicate on the matters the subject of the freedom in various ways".[20]

9 The Commonwealth accepts that a cap on "electoral expenditure" within the meaning of s 7 of the EF Act imposes a direct burden on political communication.[21] Indeed, that burden is more direct than that effected by a cap on political donations,[22] because a cap on electoral expenditure limits the funds that can be spent for or in connection with promoting or opposing a party or candidate, or for the purpose of influencing the voting at an election, and may thereby directly restrict the amount of political communication that can be engaged in.

10 10 The *extent* of that burden depends principally upon the size of the legislated cap. A high cap — for example, of an amount greater than the amount of electoral expenditure ever previously expended by persons within the class that is the subject of the expenditure cap — would impose at most a slight burden (even if the cap was "discriminatory", and applied during a "critical time": cf **PS [50]**). By contrast, an expenditure cap set at a level that substantially reduced the electoral expenditure permitted to one specified class of participant in the electoral process relative to other classes would require a more substantial justification.

11 For the reasons explained in **DS [27]**, the imposition of an expenditure cap upon "third-party campaigners" within the meaning of s 4 of the EF Act does not, without more,
20 constitute viewpoint discrimination.

B.2 The asserted "chilling effect"

12 The plaintiffs' contention that s 29(11) of the EF Act has a "chilling effect" on political communication (**PS [28], [31]-[32]**) is apt to distract attention from the proper analysis.

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[20] *Brown* (2017) 261 CLR 328 at [150] (Kiefel CJ, Bell and Keane JJ).

[21] As to the distinction between "direct" and "incidental" burdens on the implied freedom, see *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (***ACTV***) at 169 (Deane and Toohey JJ); *Mulholland* (2004) 220 CLR 181 at [40] (Gleeson CJ); *Hogan v Hinch* (2011) 243 CLR 506 at [95] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

[22] *Unions (No 2)* (2019) 264 CLR 595 at [15] (Kiefel CJ, Bell and Keane JJ). As to the burden effected by a cap on political donations, see *McCloy* (2015) 257 CLR 178 at [93] (French CJ, Kiefel, Bell and Keane JJ), [367] (Gordon J).

13 As explained by the plurality in *Brown*, the term "chilling effect" may be used "to describe an effect of inhibition or deterrence on the freedom and for the purpose of determining the practical effect upon political communication and debate".[23] To say that a law has a "chilling effect" is therefore to express a conclusion about the practical operation of the law. It implies that a law imposes a burden greater than that which arises from the terms of the law, as a result of fear of contravention of the law. However, just as individual reactions to a restriction are irrelevant to identification of the practical operation of a law, a person's subjective "fear" that they might contravene a law is similarly incapable of bearing upon the extent to which that law, in its practical effect, burdens political communication: cf **PS [30]**.[24] That practical effect must be ascertained by reference to what the impugned law actually does, as established by evidence or inference,[25] not by reference to assertions as to what some people might fear that the law does. As Gordon J has explained, "[i]ndividual or personal reactions to a restriction may be relevant to the ambit of a personal freedom. Individual or personal reactions to a restriction are not relevant to determining the ambit of legislative or executive power".[26] For that reason, the concept of a "chilling effect" is of limited utility in the implied freedom analysis.[27]

C THE PURPOSE OF EXPENDITURE CAPS

C.1 The identification of legislative purpose

14 The second step in the implied freedom analysis is to ask whether the law pursues a purpose that is "legitimate". A purpose will be "legitimate" if it is compatible with the

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23 *Brown* (2017) 261 CLR 328 at [151] (Kiefel CJ, Bell and Keane JJ); see also at [457] (Gordon J). See also *LibertyWorks* (2021) 95 ALJR 490 at [68], [74] (Kiefel CJ, Keane and Gleeson JJ).

24 See *Brown* (2017) 261 CLR 328 at [465] (Gordon J); see also at [307] (Gordon J).

25 See *Mineralogy Pty Ltd v Western Australia* (2021) 95 ALJR 832 (***Mineralogy***) at [55] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ) and the cases cited therein. See also *Rowe* (2010) 243 CLR 1 at [69], [78] (French CJ), [84], [158] (Gummow and Bell JJ), [322], [383] (Crennan J); *Clubb* (2019) 267 CLR 171 at [169]-[170] (Gageler J); *Garlett v Western Australia* (2022) 96 ALJR 888 at [270]-[277] (Edelman J).

26 *Brown* (2017) 261 CLR 328 at [465].

27 Notably, there is no "chilling effect doctrine" akin to that which exists under the First Amendment to the United States Constitution: *Brown* (2017) 261 CLR 328 at [151] (Kiefel CJ, Bell and Keane JJ), [262] (Nettle J), [457]-[466] (Gordon J).

maintenance of the constitutionally prescribed system of representative and responsible government.[28]

15 The purpose of a law is to be discerned through ordinary processes of statutory construction, principally having regard to text, context and the "historical background to the provision, and any apparent social objective".[29] It exists "at a higher level of generality than the meaning of its words".[30] In the implied freedom context, the assessment of purpose looks to the "public interest sought to be protected and enhanced" by the law[31] or, put negatively, "the mischief to which the statute is directed".[32]

16 In identifying the law's purpose, any express statement of purpose — such as that contained in s 3 of the EF Act — is to be given significant weight.[33] Indeed, such a statement must be regarded as a "presumptively accurate declaration of why a law is enacted".[34] Conversely, "[i]n the face of an express statement of statutory objects, an additional object that is not only unexpressed but also constitutionally impermissible should not lightly be inferred".[35] Those propositions constitute a concrete instantiation of the constitutional relationship between the legislature and the judiciary.[36]

C.2 The purposes of an expenditure cap

Expenditure caps generally

17 Caps on electoral expenditure are capable of pursuing a range of purposes that are consistent with the maintenance of the constitutionally prescribed system of

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[28] See, eg, *McCloy* (2015) 257 CLR 179 at [2], [31], [67] (French CJ, Kiefel, Bell and Keane JJ); *Brown* (2017) 261 CLR 328 at [104] (Kiefel CJ, Bell and Keane JJ).

[29] *Ruddick* (2022) 96 ALJR 367 at [133] (Gordon, Edelman and Gleeson JJ), referring to *Unions (No 2)* (2019) 264 CLR 595 at [171] (Edelman J). See generally *Unions (No 1)* (2013) 252 CLR 530 at [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Brown* (2017) 261 CLR 328 at [96] (Kiefel CJ, Bell and Keane JJ), [208] (Gageler J), [321] (Gordon J).

[30] *Unions (No 2)* (2019) 264 CLR 595 at [171] (Edelman J). See also *Brown* (2017) 261 CLR 328 at [208] (Gageler J).

[31] *Farm Transparency* (2022) 96 ALJR 655 at [67] (Gageler J), quoting *Cunliffe v Commonwealth* (1994) 182 CLR 272 (***Cunliffe***) at 300 (Mason CJ).

[32] *Brown* (2017) 261 CLR 328 at [101] (Kiefel CJ, Bell and Keane JJ); see also at [208] (Gageler J), [321] (Gordon J).

[33] *Unions (No 2)* (2019) 264 CLR 595 at [79] (Gageler J); see also at [172] (Edelman J). See also *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 (***Alexander***) at [116] (Gageler J).

[34] *Alexander* (2022) 96 ALJR 560 at [118] (Gageler J); see also at [119] (Gageler J).

[35] *Unions (No 2)* (2019) 264 CLR 595 at [79] (Gageler J). See also *Ruddick* (2022) 96 ALJR 367 at [133] (Gordon, Edelman and Gleeson JJ), and see **DS [28]**.

[36] *Alexander* (2022) 96 ALJR 560 at [118] (Gageler J).

representative and responsible government. One such purpose is the creation of a "level playing field", a metaphor which conveys the notion that it may be necessary to "restrict the voices which dominate the political discourse" — including because of their wealth — "so that others may be heard as well".[37] In that way, expenditure caps "prevent the drowning out of voices by the distorting influence of money".[38]

18 The purpose of providing a level playing field accords with the "great underlying principle" of the Constitution identified by Professor Harrison Moore: "that the rights of individuals are sufficiently secured by ensuring as far as possible to each a share, and an equal share, in political power".[39] The purpose is therefore not only compatible with the
10 maintenance of the constitutionally prescribed system of representative and responsible government; it positively "enhance[s]" that system.[40] A law with such a purpose is "more readily justified … than might otherwise be the case".[41]

Differential expenditure caps for third parties

19 The plaintiffs contend that s 29(11) pursues the unexpressed and constitutionally impermissible purpose of ensuring that third-party campaigners are "suppressed relative to others":[42] **PS [44]-[48]**. Whether the provision can be inferred to have that purpose falls to be determined in accordance with the principles set out in paragraphs 14 to 16 above. For the reasons set out in those paragraphs, the Court should be slow to reach the

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37 *Harper v Canada (Attorney General)* [2004] 1 SCR 827 (***Harper***) at [62] (Bastarache J), quoted in *McCloy* (2015) 257 CLR 178 at [44] (French CJ, Kiefel, Bell and Keane JJ). See also *Unions (No 2)* (2019) 264 CLR 595 at [5], [31] (Kiefel CJ, Bell and Keane JJ), [83] (Gageler J), [110] (Nettle J); *ACTV* (1992) 177 CLR 106 at 144-145 (Mason CJ), 159 (Brennan J), 175 (Deane and Toohey JJ), 188-191 (Dawson J), 239 (McHugh J).

38 *Unions (No 2)* (2019) 264 CLR 595 at [38] (Kiefel CJ, Bell and Keane JJ); see also at [31]-[32] (Kiefel CJ, Bell and Keane JJ), [90] (Gageler J), [109]-[110] (Nettle J), [146] (Gordon J). In this regard, it should be noted that paras (a) and (b) of the definition of "third-party campaigner" only extend to persons or other entities who incur electoral expenditure during the capped expenditure period that exceeds $2,000 in total: see EF Act, s 4.

39 *The Constitution of the Commonwealth of Australia* (1902) at 329. See also *ACTV* (1992) 177 CLR 106 at 139-140 (Mason CJ); *McCloy* (2015) 257 CLR 178 at [27] (French CJ, Kiefel, Bell and Keane JJ); *Unions (No 2)* (2019) 264 CLR 595 at [178] (Edelman J); *LibertyWorks* (2021) 95 ALJR 490 at [44] (Kiefel CJ, Keane and Gleeson JJ).

40 *Unions (No 2)* (2019) 264 CLR 595 at [31] (Kiefel CJ, Bell and Keane JJ). See also *McCloy* (2015) 257 CLR 178 at [5], [42], [47], [93] (French CJ, Kiefel, Bell and Keane JJ).

41 *Clubb* (2019) 267 CLR 171 at [99] (Kiefel CJ, Bell and Keane JJ). See also *McCloy* (2015) 257 CLR 178 at [42], [86] (French CJ, Kiefel, Bell and Keane JJ).

42 See *Unions (No 2)* (2019) 264 CLR 595 at [181] (Edelman J).

conclusion that the purpose of s 29(11) is other than that expressly provided for in the EF Act, absent a "strong reason" to do so.[43]

20 An expenditure cap that differentiates between third-party campaigners, on the one hand, and candidates and political parties, on the other, may have a legitimate purpose of the kind described above. Indeed, there are at least two permissible reasons for imposing such differential expenditure caps, neither of which is underpinned by a purpose of "suppress[ing third party campaigners] relative to others" (see **PS [48]**) or granting candidates and political parties a "privileged" or "preferred" position.[44]

21 The *first* reason stems from the fact that candidates and political parties, unlike third-party campaigners, are necessary actors in the constitutionally prescribed system of representative and responsible government. Candidates "are integral to the very notion of electoral choice which underlies the very concept of representative government",[45] and political parties are practically necessary to that system, in the sense that the "alignment of candidates for election to [such] parties has been a feature of the experience of representative and responsible government in Australia [since] the 1890s".[46]

22 So understood, there is a "functional distinction" between candidates and political parties, and third-party campaigners, that may justify a substantial variation between the expenditure caps applicable to those persons or groups.[47] Parties must have sufficient resources to be able to mount a campaign "in every electorate on all issues",[48] and candidates must have sufficient resources to be able to address all issues relevant to their electorate (themselves or through the political party by which they have been endorsed). In contrast, third-party campaigners "may pick and choose who, what, where and how they seek to influence election outcomes",[49] and therefore may "achieve their objective

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43 *Alexander* (2022) 96 ALJR 560 at [119] (Gageler J).

44 See *Unions (No 2)* (2019) 264 CLR 595 at [39]-[40] (Kiefel CJ, Bell and Keane JJ), [177]-[181] (Edelman J).

45 *Unions (No 2)* (2019) 264 CLR 595 at [87] (Gageler J).

46 *Unions (No 2)* (2019) 264 CLR 595 at [87] (Gageler J). See also *Mulholland* (2004) 220 CLR 181 at [20] (Gleeson CJ); *Spence* (2019) 268 CLR 355 at [292] (Edelman J). That practical necessity has been recognised in the Constitution since 1977, when s 15 (which prescribes the manner in which Senate casual vacancies are to be filled) was amended so as to incorporate express reference to political parties: see *Constitution Alteration (Senate Casual Vacancies) 1977* (Cth); *Unions (No 2)* (2019) 264 CLR 595 at [87] (Gageler J).

47 See *Unions (No 2)* (2019) 264 CLR 595 at [90] (Gageler J).

48 See *Unions (No 2)* (2019) 264 CLR 595 at [29] (Kiefel CJ, Bell and Keane JJ); see also at [89] (Gageler J). See in addition *Harper* [2004] 1 SCR 827 at [116] (Bastarache J).

49 See *Unions (No 2)* (2019) 264 CLR 595 at [29] (Kiefel CJ, Bell and Keane JJ); see also at [89] (Gageler J).

less expensively".[50] Moreover, political parties and candidates require sufficient resources to be able to respond not only to each other, but also to third-party campaigners.[51] In circumstances where the expenditure required to be made by candidates and political parties in order to mount an effective campaign will necessarily be "much greater" than that required to be made by third-party campaigners, the imposition of lower expenditure caps on third-party campaigners may be warranted.[52]

23 The *second* reason is that, as the Supreme Court of Canada observed in *Libman*, "[i]t cannot be presumed that equal numbers of [third-party] individuals or groups will have equivalent financial resources to promote each candidate or political party, or to advocate the various stands taken on a single issue that will ultimately be associated with one of the candidates or political parties".[53] The concern evidently underlying that statement is that electoral expenditure by third parties could skew an election in favour of one candidate or party over others, which could lead to an unequal contest as between the candidates or parties — in other words, it is about ensuring that the flow of political communication is not distorted.[54] The imposition of lower expenditure caps on third-party campaigners than on candidates and political parties minimises the impact of any such inequality.

24 So understood, the imposition of a lower expenditure cap on third-party campaigners than on political parties and candidates may have a legitimate purpose. Indeed, it is inherent in the concept of "levelling the playing field" and preventing the "drowning out" of voices that differential treatment of the relevant actors may be required in order to ensure that "those having access to the most resources [do not] monopolize the election discourse".[55] To hold otherwise would deprive Australian Parliaments of the ability to address the possible future risk to electoral processes that would be posed were US-style PACs to come to play a role in Australian electoral campaigns.[56]

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50 *Harper* [2004] 1 SCR 827 at [116] (Bastarache J). See also *Libman v Quebec (Attorney General)* [1997] 3 SCR 569 (***Libman***) at [50] (the Court).

51 *Unions (No 2)* (2019) 264 CLR 595 at [89] (Gageler J); see also *Harper* [2004] 1 SCR 827 at [116] (Bastarache J).

52 *Unions (No 2)* (2019) 264 CLR 595 at [29] (Kiefel CJ, Bell and Keane JJ); see also at [89]-[90] (Gageler J).

53 [1997] 3 SCR 569 at [50] (the Court).

54 See *Unions (No 1)* (2013) 252 CLR 530 at [136] (Keane J).

55 *Harper* [2004] 1 SCR 827 at [72] (Bastarache J).

56 See *Unions (No 2)* (2019) 264 CLR 595 at [34] (Kiefel CJ, Bell and Keane JJ); and more generally **DS [17]**.

D JUSTIFICATION

25 In circumstances where expenditure caps effect a burden on the freedom, and where the purposes of such caps (including differential caps) may be legitimate, the validity of any *particular* differential expenditure cap will ordinarily turn upon whether that cap is "proportionate" to the identified purpose.

26 Whether a particular expenditure cap is "proportionate" in its pursuit of a legitimate purpose can be determined using the three stages of the structured proportionality analysis,[57] the application of which can turn on questions of constitutional fact. The necessary constitutional facts may be established from the material in a special case,[58] inferences able to be drawn from the material before the Court,[59] or other sources that are "sufficiently probative of the … fact to be found".[60] Importantly, however, in some circumstances the exigency to which the impugned provision responds "may be self-evident or appear with relative clarity", such that there is no need "for extensive if indeed any evidence" in order to conclude that the provision is justified.[61] That may be particularly so where the Parliament legislates "prophylactically" or in response to "inferred legislative imperatives".[62] It would be strongly contrary to the public interest if the Parliament were to be required to wait for a problem to manifest (and thereby to produce evidence of the problem) before the Parliament could validly legislate in

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[57] See, eg, *McCloy* (2015) 257 CLR 178 at [2] (French CJ, Kiefel, Bell and Keane JJ); *LibertyWorks* (2021) 95 ALJR 490 at [46], [48] (Kiefel CJ, Keane and Gleeson JJ), [200] (Edelman J), [247] (Steward J); *Farm Transparency* (2022) 96 ALJR 655 at [29] (Kiefel CJ and Keane J), [250] (Edelman J), [271] (Gleeson J).

[58] *Mineralogy* (2021) 95 ALJR 832 at [55] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

[59] See *Wilcox Mofflin Ltd v New South Wales* (1952) 85 CLR 488 at 507 (Dixon, McTiernan and Fullagar JJ); *Thomas v Mowbray* (2007) 233 CLR 307 at [629] (Heydon J); *Maloney v The Queen* (2013) 252 CLR 168 (***Maloney***) at [353] (Gageler J).

[60] *Maloney* (2013) 252 CLR 168 at [353] (Gageler J), citing *Thomas v Mowbray* (2007) 233 CLR 307 at [526] (Callinan J), [613]-[639] (Heydon J). See also *Re Day* (2017) 91 ALJR 262 at [23] (Gordon J); *Unions (No 2)* (2019) 264 CLR 595 at [95] (Gageler J) (referring to Mason CJ's statement in *Cunliffe* (1994) 182 CLR 272 at 304 that, when considering justification, "[t]he relevant facts must either be agreed or proved or be such that the Court is prepared to take account of them by judicial notice or otherwise").

[61] *Unions (No 2)* (2019) 264 CLR 595 at [117] (Nettle J); see also at [151] (Gordon J) (emphasis added) ("it is for the supporter of the legislation to persuade the Court that the burden is justified — including, *where necessary*, by ensuring sufficient evidence is put on to support its case"). See, by way of example, *Spence* (2019) 268 CLR 355 at [96] (Kiefel CJ, Bell, Gageler and Keane JJ), [264] (Gordon J), [323] (Edelman J).

[62] *McCloy* (2015) 257 CLR 178 at [233] (Nettle J), cited in *Spence* (2019) 268 CLR 355 at [96] (Kiefel CJ, Bell, Gageler and Keane JJ), [323] (Edelman J). See also *Brown* (2017) 261 CLR 328 at [288] (Nettle J); *Unions (No 2)* (2019) 264 CLR 595 at [113] (Nettle J); *Ruddick* (2022) 96 ALJR 367 at [133] (Gordon, Edelman and Gleeson JJ).

response.[63] For that reason, when the authorities speak of the need for "evidence" in the justification analysis,[64] they should not be taken to be referring to "direct evidence"[65] in any strict or technical sense, but rather to the need for the Court to be satisfied of the justification advanced.[66]

27 The Commonwealth makes no submissions as to whether s 29(11) of the EF Act is justified applying the principles summarised above.

PART VI — ESTIMATE OF TIME

28 It is estimated that up to 20 minutes will be required to present the Commonwealth's oral argument.

10 **Dated:** 2 November 2022

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63 See, eg, *Spence* (2019) 268 CLR 355 at [96] (Kiefel CJ, Bell, Gageler and Keane JJ), [264] (Gordon J), [323] (Edelman J). See also *Unions (No 2)* (2019) 264 CLR 595 at [117] (Nettle J).

64 See, eg, *Unions (No 2)* (2019) 264 CLR 595 at [45] (Kiefel CJ, Bell and Keane JJ).

65 See *McCloy* (2015) 257 CLR 178 at [233] (Nettle J); see also at [268] (Nettle J).

66 *Spence* (2019) 268 CLR 355 at [95] (Kiefel CJ, Bell, Gageler and Keane JJ). See also *Unions (No 2)* (2019) 264 CLR 595 at [96] (Gageler J).

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

ANNEXURE TO THE SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

Pursuant to *Practice Direction No 1 of 2019*, the Attorney-General of the Commonwealth sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
	Constitutional provisions		
1.	*Commonwealth Constitution*	Current	ss 7, 8, 10, 15, 24, 29-31, 51(xxxvi)
	Statutory provisions		
2.	*Electoral Funding Act 2018* (NSW)	Current	ss 3, 4, 7, 29(11), 35
3.	*Electoral Legislation Amendment Act 2022* (NSW)	As made	Sch 3 item 12