HIGH COURT OF AUSTRALIA

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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 **No. S98 of 2022**

BETWEEN: **UNIONS NSW**

First Plaintiff

NEW SOUTH WALES NURSES AND MIDWIVES' ASSOCIATION

Second Plaintiff

PUBLIC SERVICE ASSOCIATION AND PROFESSIONAL OFFICERS' ASSOCIATION AMALGAMATED UNION OF NSW

Third Plaintiff

NEW SOUTH WALES LOCAL GOVERNMENT, CLERICAL, ADMINISTRATIVE, ENERGY, AIRLINES AND UTILITIES UNIONS

Fourth Plaintiff

and

STATE OF NEW SOUTH WALES

Defendant

OUTLINE OF ORAL SUBMISSIONS OF THE PLAINTIFFS

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Part I: Certification

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

Part II: Outline of Propositions

1. ***Question 1A:*** The Court retains **jurisdiction** in the matter so far as it concerns the validity of s35 of the *EF Act*. With the commencement of the 2022 Amending Act, the matter now concerns s35's past invalidity from 1 July 2018 until 2 November 2022, but has not vanished. There remains a live dispute in which the plaintiffs have standing, as they assert (and the State denies) that they have suffered for 4 years under the burden of the invalid norm of s35 and have modified their behaviour to avoid its criminal sanction: SC [75]-[84]; cf [23]-[34], [38]-[50], [69]-[72].
2. On **discretion**: the answer to Question 2, in the nature of declaratory relief, will quell the controversy remaining on the pleadings (see Defence 08.11.22 at [137]-[141A], Supp SCB #13) as to whether s35 was invalid over its life. The plaintiffs' interest in obtaining the answer is not "academic" or "emotional". Where a polity enacts an invalid law with a tendency to chill constitutionally protected political communication, it remains a proper exercise of judicial power to declare that invalidity, thereby creating an issue estoppel, *res judicata* and a binding precedent. There are foreseeable consequences as there is a risk of repetition, particularly via regulation shortly before the March 2023 election, which may otherwise evade judicial review.
3. As to the related **costs** question, the chilling effects on protected communication would only be exacerbated if, as the State urges, a polity can maintain an impugned law on the statute book for 4 years and withdraw it just before hearing and not face the usual costs sanction unless the plaintiffs prove unreasonable conduct: **PS[57]-[59]; PR [9]-[11]**.
4. ***Principles:*** In emphasis of **PS [33]-[42]**: In *Unions No 1* (2013) 252 CLR 530 (6 JBA p1679), the plaintiffs established the invalidity of a selective prohibition on donations and a selective aggregation clause. Per the plurality, individual provisions may be invalid as having no justifying purpose other than to burden political communication, with no rational connection to the scheme's larger legitimate purposes: [54]-[60], [62]-[65]. Per Keane J, individual provisions may be invalid because they disfavour some communication sources in favour of others: [140]-[141].
5. In *Unions No 2* (2019) 264 CLR 595 (6 JBA p1739), the plaintiffs established the invalidity of the *EF Act*'s drastic reduction in the TPC expenditure cap for general elections. While a majority assumed in NSW's favour that the reduced cap might be

rationally related to the *EF Act*'s larger legitimate purposes, Edelman J correctly held that the provision failed at the level of purpose: [222], contra Gageler J ([79]ff) and Nettle J ([109]). Six Justices held that the State could not justify the reduced cap as allowing TPCs a reasonable opportunity to communicate their messages: [53], [102], [118], [153]. Four Justices rejected the proposition that candidates and parties occupy a constitutionally distinct position which legitimises their preferential treatment in political debate: [39]-[40], [180]. While Gageler J considered that "functional differences" between candidates/parties and TPCs might justify substantial variations in their respective electoral expenditure caps ([88]), this was subject to the qualification at [80]. The need to campaign broadly across many electorates and on many issues, and with a view to forming government (see DS[43], CS[22]), is not applicable to all, or even most, parties and candidates: see eg SC[36]-[37]. It cannot justify the wholesale differential treatment reflected by ss29(11) (cf s29(9)) or 35: **PR [1]**.

6. ***S 29(11) fails at the level of purpose:*** The cap on electoral expenditure of TPCs in State by-elections is so obviously low, in relative and absolute terms, as to be incapable of explanation as a legislative attempt to promote the statutory objects expressed in s3 of the *EF Act*: (a) TPCs are allowed an expenditure cap of only **1/12** of that given to candidates; (b) **$20,000** could hardly be thought to allow a TPC reasonably to present its messages, given the breadth of "electoral expenditure" as defined in s7; and (c) TPCs (and candidates) are exposed to the criminal law, whereas **parties** are not, even where one party supports the candidate of another party: **PS [44]-[46]**.

7. Legislative history confirms: (a) the TPC cap of $20,000 for by-elections was introduced in 2011 as **1/10** of the cap for candidates, without any material in the 2010 JSCEM report (9 SCB #182) or otherwise before Parliament either to explain the differential or to justify that $20,000 would allow a TPC a reasonable opportunity to present its messages; (b) the 2014 Expert Panel report (10 SCB #183) recommended the halving of the cap for TPCs for general elections, subject to further evidence, but did not make any recommendation in relation to the by-election cap; likewise with the 2016 JSCEM report (10 SCB #185); and (c) the direct extrinsic material for the *EF Act* was wholly silent on why the TPC by-election expenditure cap was being reduced by 19%, and on whether a TPC could reasonably present its case within a $20,000 cap: **PS [47]**; **PR [2]**.

8. The $20,000 cap cannot be explained as a law directed towards restricting the voices of otherwise dominating TPCs to make room for the candidates/parties to be heard (cf

Gageler J in *Unions No 2* at [83]). Its only purpose is to quieten TPCs' voices relative to those of candidates/parties (cf Edelman J in *Unions No 2* at [222]): **PS [48]**; **PR [3]**.

9. ***Alternatively, the State fails to justify s29(11):*** There was no material before the State in 2018 (or earlier) to justify the harsh differential, the miserly cap or the decrease in the cap. The Special Case shows: (a) by-elections are of increasing frequency and importance for TPCs to communicate their political messages: SC [21]-[22]; **PS [32], [51]**; (b) for the 2016 Orange By-Election, the then TPC expenditure cap of $24,700 did not allow a TPC a reasonable opportunity to present its messages to voters, and any "drowning out" was all the other way: SC [39]-[52]; (c) the 2021 Upper Hunter By-Election further illustrates the point: SC [85]-[92]; (d) N.B. the scale of Government "issue advertising": SC [93]-[94]; and (e) the material leading up to the 2022 Amending Act (13 SCB #314 and #315) takes the State no further: **PS [49]-[56]**; **PR [4]-[8]**.

10. ***Construction of s35:*** Section 35 denies the public the benefit of a united campaign message from a TPC and another person where the combined incurred expenditure exceeds the TPC cap; even though two parties, or two or more persons falling below the TPC expenditure threshold, could lawfully engage in the identical conduct. The State's distinction between "concerted action about the message" (lawful) and "concerted action about incurring expenditure" (unlawful) is not reflected in s35's text and is practically impossible to apply. Section 35 imposes a burden on political communication by TPCs that is not imposed upon candidates/parties. Section 30(4) (governing parties and elected members), and s144 (governing all persons), do different work, of a true anti-avoidance nature: *Unions No 2* at [185]ff; **PS [60]-[63]**; **PR [12]**.

11. ***S 35 fails at the level of purpose:*** Textually, as history confirms, s35 has no purpose other than to quieten the voices of TPCs relative to parties/candidates: **PS [64]-[69]**.

12. ***Alternatively, the State fails to justify s35:*** There was no material before the State in 2018 to justify s35's differential burden on TPCs. TPCs were combining in offering united political messages to the public, notwithstanding their differing constituencies and interests, without risk of "drowning out" parties or candidates – who remain free to do the same thing: SC [23]-[52], [69]-[92]. Section 35 prohibits conduct of TPCs *whether or not* there are economies of scale (cf DS [51], [54], [55], [64]), and conversely does not prohibit like conduct by parties or candidates which *may* achieve economies of scale: **PS [70]-[75]**; **PR [13]-[15]**.

Justin Gleeson

Justin Gleeson SC

16 November 2022