

## **UNIONS NSW & ORS v STATE OF NEW SOUTH WALES (S70/2013)**

Date special case referred to Full Court: 12 August 2013

Certain provisions of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (“the Act”) impose restrictions on the funding and expenditure of political parties, Members of the New South Wales Parliament, third-party campaigners and candidates (and groups thereof) standing for election to the Parliament.

Section 96D of the Act prohibits any such person or body from accepting political donations unless the donor is an individual who is enrolled to vote. (Prior to amendments which took effect on 9 March 2012, political donations could also be accepted from any entity that had an Australian Business Number.)

Section 95F of the Act prescribes caps on the amounts of “electoral communication expenditure” (as defined in s 87(2)) that can be made by parties, candidates and third-party campaigners for a State election campaign. Section 95I makes it unlawful for any of those caps to be exceeded.

If the expenditure of a party is less than or equal to the relevant cap, section 95G(6) then operates to add any electoral communication expenditure made by affiliated organisations. An “affiliated organisation” is defined as a body authorised by a party’s rules to participate in the pre-selection of candidates and/or to appoint delegates to the party’s governing body.

Of political donations made to the major parties in New South Wales, the great majority (in terms of total dollar value) have been made by organisations and associations rather than by individuals. The party with the highest proportion of non-individual donations is the ALP NSW, which is a branch of the Australian Labor Party.

The Plaintiffs are all trade unions or associations thereof. On 8 April 2013 they commenced proceedings in this Court, challenging the validity of sections 95F, 95G(6), 95I and 96D of the Act. Some of the Plaintiffs are affiliated with, and most have made donations to, ALP NSW. Each of the Plaintiffs is registered under the Act as a third-party campaigner and has made “electoral communication expenditure” within the meaning of the Act.

The Plaintiffs also filed a Notice of a Constitutional Matter on 8 April 2013. As at the time of writing, the Attorneys-General of the Commonwealth, Queensland, Western Australia and South Australia have each advised this Court that they will be intervening in this matter.

On 12 August 2013 the parties filed a special case, which Chief Justice French then referred to the Full Court.

The questions of law stated for the Court in the special case are:

1. Is section 96D of the Act invalid because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution?
2. Are sections 95F, 95G(6) and 95I of the Act invalid (in whole or in part and, if in part, to what extent), because they together impermissibly burden the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution?
3. Do sections 7A and 7B of the *Constitution Act* 1902 (NSW) give rise to an entrenched protection of freedom of communication on New South Wales State government and political matters?
4. If so, is section 96D of the Act invalid because it impermissibly burdens that freedom, contrary to the New South Wales Constitution?
5. Further, if the answer to question 3 is “yes”, are sections 95F, 95G(6) and 95I of the Act invalid (in whole or in part and, if in part, to what extent), because they together impermissibly burden that freedom, contrary to the New South Wales Constitution?
6. Is section 96D of the Act invalid under section 109 of the Commonwealth Constitution by reason of it being inconsistent with section 327 of the *Commonwealth Electoral Act* 1918 (Cth)?
7. Is section 96D of the Act invalid under section 109 of the Commonwealth Constitution by reason of it being inconsistent with Part XX of the *Commonwealth Electoral Act* 1918 (Cth)?
8. Is section 96D of the Act invalid because it impermissibly burdens a freedom of association provided for in the Commonwealth Constitution?
9. Who should pay the costs of the special case?