

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY



NO S 204 OF 2018

BETWEEN:

UNIONS NSW

First Plaintiff

**NEW SOUTH WALES NURSES AND MIDWIVES'
ASSOCIATION**

Second Plaintiff

**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

HEALTH SERVICES UNION NSW

Sixth Plaintiff

AND:

STATE OF NEW SOUTH WALES

Defendant

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

Filed on behalf of the Intervener by:
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Date of this document: 5 December 2018

File ref: 18007506

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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

I. Construction of s 7(2) and (3)

2. Section 7(2) and (3) of the *Electoral Funding Act 2018* (NSW) confine the burden on political communication caused by ss 29(1) and 35(1) of that Act. However, on any construction of s 7, ss 29(1) and 35(1) will burden political communication in a manner that requires justification: *Unions NSW v New South Wales* (2013) 252 CLR 530 (**JBA Vol 5 Tab 24**). The Court therefore need not and should not determine the proper construction of s 7(2)(a), including whether it is affected by the Commonwealth's exclusive power to regulate federal elections.

II. Choice in design of electoral system

3. The constitutional provisions from which the freedom of political communication is implied confer on Parliament a significant degree of choice as to the design of the electoral system.
 - 3.1. *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 121 [386] (Kiefel J) (**Intervenors' JBA, Vol 2 Tab 14**).
 - 3.2. *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 188 [6], 194-195 [26] (Gleeson CJ), 206-207 [63]-[65] (McHugh J), 237 [154]-[155] (Gummow and Hayne JJ) (**JBA, Vol 3 Tab 19**).
 - 3.3. *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 81 [156], 86 [178] (Keane J), 106 [243] (Nettle J) and 113-114 [262]-[264] (Gordon J) (**Intervenors' JBA, Vol 1 Tab 8**).
4. The wide role the Constitution affords to the Commonwealth Parliament to select and develop a model of representative government has two relevant consequences in this case:

4.1. It explains why the Court does not lightly conclude that a purpose is inherently incompatible with the constitutionally prescribed system of representative and responsible government: eg *Monis v The Queen* (2013) 249 CLR 92 at 194 [281] (Crennan, Kiefel and Bell JJ) (**Intervenors’ JBA, Vol 1 Tab 7**).

4.2. It informs the approach to evaluating the necessity of impugned legislation against allegedly available alternatives:

- *McCloy v New South Wales* (2015) 257 CLR 178 at 217 [82] (French CJ, Kiefel, Bell and Keane JJ) and 230 [122]-[123] (Gageler J) (**JBA Vol 3 Tab 18**);
- *Brown v Tasmania* (2017) 261 CLR 328 at 420 [286] (Nettle J) (**JBA Vol 2 Tab 14**).

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5. To recognise the existence of the above choices is not to adopt a “margin of appreciation” or “deference” approach.

III. Differential treatment not illegitimate

6. The plaintiffs seek to deploy the “level playing field” metaphor to support the proposition that differential treatment of a particular source of political communication is inherently illegitimate. The Constitution does not support such a proposition, nor does the “level playing field” concept require some strict and formalistic notion of equal treatment.

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6.1. *ACTV v Commonwealth* (1992) 177 CLR 106 (**JBA Vol 2 Tab 11**) at 132 (Mason CJ), 155 (Brennan J) and 175 (Deane and Toohey JJ);

6.2. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568 (**JBA Vol 3 Tab 16**);

6.3. *McCloy* (2015) 257 CLR 178 at 210 [57] (French CJ, Kiefel, Bell and Keane JJ) and 233-34 [136]-[137] (Gageler J) (**JBA Vol 3 Tab 18**).

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7. The differential treatment of parties and candidates on the one hand and third parties on the other may serve to *promote* a “level playing field”:

- 7.1. *Libman v Quebec (Attorney-General)* [1997] SCR 569 (**JBA Vol 5 Tab 26**);
- 7.2. *Canada (Attorney-General v Harper)* [2004] 1 SCR 927 (**JBA Vol 5 Tab 25**).
- 7.3. *McCloy* (2015) 257 CLR 178 at 207 [45] (French CJ, Kiefel, Bell and Keane JJ),
248 [182] (Gageler J) (**JBA Vol 3 Tab 18**).

8. Candidates and political parties, as the entities between which electoral choices must be made, play a distinctive role in the democratic process. It is open to Parliaments to recognise that distinctive role:

8.1. *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 192 [20]
(Gleeson CJ) (**JBA Vol 3 Tab 19**);

8.2. *Lange* (1997) 189 CLR 520 at 560 (**JBA Vol 3 Tab 16**).

Date: 5 December 2018

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