IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S204 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

The State of New South Wales
Defendant

DEFENDANT'S SUBMISSIONS

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Filed on behalf of the Defendant:

J McDonnell, Acting Crown Solicitor
Level 5, 60-70 Elizabeth Street
SYDNEY NSW 2000
DX 19 SYDNEY

Date: 14 November 2018

Tel: (02) 9224 5249/(02) 9224 5239
Fax: (02) 9224 5255
Ref: Paolo Buchberger/Megan Caristo

I Internet publication

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

II Issues

2. The issues are the questions stated in the Special Case (**SC**) (SCB 1/116-117).

III Notice of constitutional matter

3. The defendant certifies that it does not consider any further notice pursuant to s 78B of the Judiciary Act 1903 (Cth) to be necessary (SCB 1/48-51).

IV Facts

4. The defendant agrees that the material facts are at SC [1]-[44] (SCB 1/100-116).

V Argument

5. The provisions which the plaintiffs impugn collectively seek to limit the influence or potential influence upon the electoral process of large amounts of money by reducing not only the supply of, but also the demand for, large donations. The central question in the proceeding is whether the Electoral Funding Act 2018 (NSW) (**EF Act**) is justified in imposing a cap for third-party campaigners (**TPCs**) that is lower than the cap for political parties.

The impugned legislation in relation to caps on electoral expenditure

6. According to its Long Title, the EF Act makes provision for the disclosure, capping and prohibition of certain political donations and electoral expenditure for, relevantly, parliamentary election campaigns. The Act also makes provision for the public funding of such campaigns, and for other purposes. The objects of the EF Act, which are set out in s 3, include "to establish a fair and transparent electoral funding, expenditure and disclosure scheme"; "to help prevent corruption and undue influence in the government of the State"; and "to promote compliance by parties, elected members, candidates, groups, agents, third-party campaigners and donors with the requirements of the electoral funding, expenditure and disclosure scheme": s 3.

7. Part 3 of the EF Act deals with political donations and electoral expenditure. Division 3 makes provision for the imposition of caps on political donations, which are specified in s 23 and include a cap on donations to TPCs (s 23(1)(b)(iv)). Section 23 also deals with the aggregation of certain donations. Section 24 of the EF Act provides

that donations that exceed the cap are prohibited (subject to exemptions, as to which see s 26). Donations to more than three TPCs in the same financial year are also prohibited: s 25.

8. Division 4 makes provision for caps on electoral expenditure (as defined in s 7) for election campaigns. It is unlawful for a party, group, candidate, TPC or associated entity to incur electoral expenditure during the "capped expenditure period" if it exceeds the applicable cap (s 33). The capped expenditure period for a State election is, in the ordinary case, the period from 1 October in the preceding year until the end of the election day in March (s 27). The applicable caps themselves are set out in s 29 for parties (sub-ss (2) and (4)), groups (sub-s (5)), candidates (sub-ss (6)-(9)), and TPCs (sub-s (10)). Section 30 deals with aggregation of applicable caps.

9. The plaintiffs do not impugn the imposition of caps on electoral expenditure per se. The focus of their challenge to the cap on the electoral expenditure of TPCs in s 29(10) the EF Act (**TPC electoral expenditure)** is the relative difference between that cap and the caps imposed with respect to the electoral expenditure of parties/candidates.

10. In the second reading speech to the EF Act, the Minister described the cap as allowing "third party campaigners to reasonably present their case while ensuring that the caps are in proportion to those of parties and candidates who directly contest elections" (SCB 5/2105). In his speech in reply, the Minister further described the new caps as "guard[ing] against third parties dominating election campaigns" (SCB 5/2110-2111).

11. The Minister described the EF Act in this respect as implementing the recommendation of a Panel of Experts on Political Donations in New South Wales (**Expert Panel**), in its Final Report of December 2014, to reduce the cap for TPCs. The Explanatory Note for the Election Funding Bill 2018 also explained that the EF Act was "prepared in response to" the Final Report of the Expert Panel (**Expert Panel Report**), and the Report of the Joint Standing Committee on Electoral Matters (**JSCEM**), in June 2016, which responded to the Expert Panel Report (**2016 JSCEM Report**) (SCB 5/2090). Those reports, in turn, followed on from an earlier report of the JSCEM entitled "Public Funding of Election Campaigns" (**2010 JSCEM Report**) (SCB 3/885), which made wide-ranging recommendations, including in relation to caps and bans on political donations; increased public funding for political parties, groups and candidates to partly compensate for the loss of income from donations; and caps on electoral expenditure.

12. In the 2010 JSCEM Report, JSCEM had specifically recognised the link between capping expenditure by parties, groups and candidates and capping expenditure by third parties. It recommended that "if expenditure caps are placed on political parties and candidates, then advertising and communication by third parties is also regulated" (SCB 3/926). The recommendation derived from "evidence from political parties, independent candidates and academics", to the effect that expenditure caps should apply to third parties as well as political parties and candidates; that was so in order to "[p]reserve the integrity of expenditure caps, by preventing political parties and candidates from using 'front organisations' to circumvent caps", and to "[p]revent political communication by parties and candidates from being 'swamped' by third party advertising and communication" (SCB 3/925 [1.101]).

13. The Expert Panel Report was specifically prompted by public concerns about the influence of political donations which emerged from public Independent Commission Against Corruption hearings, with the government establishing the Expert Panel to consider and report on options for long term reform of political donations in New South Wales (SC [39]; SCB 4/1308). The Expert Panel recommended that the Election Funding, Expenditure and Disclosures Act 1981 (NSW) (**Previous Act**) be "rewritten with clear policy objectives in mind" (SCB 4/1308). It described TPCs as "organisations or individuals who are not contesting the election but who finance campaigns on specific issues to influence policy and the election outcome" (SCB 4/1315, 1412). The Expert Panel was of the view that TPCs "should be free to participate in election campaigns but they should not be able to drown out the voices of parties and candidates who are the direct electoral contestants" (SCB 4/1315, 1412). A particular aspect of the Panel's concern was the "potential for third-party campaigners to run well-funded and influential campaigns on niche issues" (SCB 4/1416).

14. The Expert Panel "strongly agree[d] that political parties and candidates should have a privileged position in election campaigns" because they were "directly engaged in the electoral contest", and were "the only ones able to form government and be elected to Parliament to represent the people of New South Wales" (SCB 4/1416). At the same time, however, the Panel acknowledged that "third parties should be treated as recognised participants in the electoral process", having a "right to have a voice and attempt to influence voting at elections" (SCB 4/1416). Against that background, the Expert Panel recommended that the cap on TPC electoral expenditure be decreased to

$500,000, concluding that "third-party campaigners should have sufficient scope to run campaigns to influence voting at an election – just not to the same extent as parties or candidates" and that it "is therefore fair for parties and candidates to have higher spending caps than third-party campaigners" (SCB 4/1419).

15. In considering and reporting on the recommendations of the Expert Panel in the 2016 JSCEM Report (SCB 5/1885), the JSCEM agreed with the Expert Panel that TPCs "should be able to spend a reasonable amount of money to run their campaign" but "this should not be to the same extent as candidates and parties" (SCB 5/1948 [7.20]).

Comparisons between the EF Act and the Previous Act

16. The plaintiffs' challenge to the validity of s 29(10) of the EF Act, read with s 33, relies, in part, upon the difference between the EF Act and the regime that was in force under the Previous Act (see, for example, PS [41]). That reliance is premised upon on a comparison of the expenditure caps as enacted in the Previous Act in 2010 and those enacted in the EF Act in 2018, leading to the conclusion that the EF Act "increases the permitted expenditure of parties and candidates" as compared to the caps in force under the Previous Act, while the cap on TPC electoral expenditure has been reduced. The comparison that the plaintiffs have undertaken does not, however, account for the indexation of the caps between 2010 and 2018 (as to which see s 95F(14) and Sched 1 to the Previous Act).

17. Taking that indexation into account, the amount prescribed as the cap for parties and candidates under the EF Act with respect to electoral expenditure is the same as the cap that applied under the Previous Act at the time of its repeal. Accordingly, while the TPC electoral expenditure cap decreased from the cap that applied under the Previous Act, there was no corresponding upward movement in the electoral expenditure cap for parties and candidates.

Government Advertising Act 2011 (NSW)

18. Something should also be said at the outset about the plaintiffs' reliance upon the provisions of the Government Advertising Act 2011 (NSW) (**GA Act**). True it is, as the plaintiffs observe at PS [25], that in the period from 1 October to 26 January preceding an election, the government can engage in advertising campaigns while electoral expenditure by candidates, parties, and TPCs is capped. However, the GA Act provides that government advertising may not be designed to influence directly or

indirectly support for a political party and is limited in any event in the pre-election period (ss 6, 10); and the facts show that the vast majority of government advertising expenditure is related to programs that can fairly be described as of no political or electoral significance (see SCB 3/841-865). The implicit suggestion that the legitimacy of, or justification for, a cap on TPC electoral expenditure is in any way affected by the GA Act assumes, contrary to the terms of that Act, that there is an identity or correspondence between the government's advertising in relation to its programs, policies and initiatives, and the government party's electoral campaigning.

Applicable constitutional principles

10 The role of candidates and parties in the constitutional system of government

19. The plaintiffs' case depends on the proposition that equality of opportunity in the electoral process cannot be pursued by treating candidates and parties differently from others in respect of electoral expenditure caps. That proposition is not consistent with the constitutional structure, in which candidates for election play a central role as those who are the subject of the mandated electoral choice that sustains the implied freedom.

20. The constitutional freedom of political communication is "a qualified limitation on legislative power implied in order to ensure that the people of the Commonwealth may 'exercise a free and informed choice as electors'": Lange v Australian Broadcasting Corporation (1997) 189 CLR 520 at 560. The required choice by electors is a choice
20 between candidates for office. The primary foundation of the implied freedom is the requirement in ss 7 and 24 of the Constitution that the Senate and House of Representatives be composed of persons "directly chosen by the people". The protected choice is not a choice between ideas, policies, views or beliefs except insofar as such choice may be reflected in the electoral choice between candidates.

21. Electoral choice is also choice between political parties. At the Commonwealth level, but also at the State level, the constitutional provision for electoral choice "contemplate[s] legislative action" to "establish an electoral system for the ascertainment of the electors' choice of representatives": McCloy v New South Wales (2015) 257 CLR 178 (McCloy) at [42] (French CJ, Kiefel, Bell and Keane JJ); Murphy
30 v Electoral Commissioner (2016) 261 CLR 28 at [158] (Keane J). The "processes of choice by electors to which ss 7 and 24 allude ... encompass legislated processes which facilitate and translate electoral choice in order to determine who is or is not

elected as a senator or member of the House of Representatives": Re Nash (No 2) (2017) 92 ALJR 23 at [35].

22. Those legislated processes have long conformed to the reality of the role played by political parties as a long-established means of promoting the election of candidates. As Gibbs CJ stated, "Members of Parliament were organized in political parties long before the Constitution was adopted": McKenzie v Commonwealth (1984) 57 ALR 747 at 749; see also Day v Australian Electoral Officer for the State of South Australia (2016) 261 CLR 1 (Day v AEO) at [23]-[24]. In Mulholland v Australian Electoral Commission (2004) 220 CLR 181 (Mullholland), Gleeson CJ recognised "the practical significance of political parties in the operation of the democratic process" (at [20]), particularly in a system of compulsory voting (at [29]): "When people are compelled to vote, many of them depend heavily on the guidance of others; and the party political system is the main practical source of such guidance" (note also McHugh J at [78]-[80]). In respect of Senate representation, the choice of electors can be by reference to political parties as an alternative to choice by reference to individual candidates: Day v AEO at [6]-[14]. An acceptance of the reality of that choice is reflected in s 15 of the Constitution, which operates by reference to a constitutional conception of a candidate being "publicly recognized by a particular political party" and having "publicly represented himself to be" an "endorsed candidate of that party".

23. The implied freedom of political communication is thus sustained by a particular conception of electoral choice that confers on candidates – and, as an aspect of that, political parties – a distinctive significance in the system of representative and responsible government to which ss 7 and 24 of the Constitution give effect. Candidates and parties are uniquely and directly engaged in the electoral contest, and are the only ones able to be elected to Parliament to represent the people and to form government. The constitutionally distinct position of candidates legitimises the pursuit of legislative objectives that select candidates and political parties for distinctive treatment relative to others who are not directly engaged in the electoral contest and who cannot be elected to Parliament or form government.

24. It is not only candidates and political parties currently capable of exercising legislative or executive power that are subjects, or potential subjects, of electoral choice in this sense. New candidates and new parties may always enter the contest (subject to eligibility and registration requirements of uniform application). Accordingly, a

legislative objective that seeks to take account of the distinct and central role of candidates and political parties should not be conflated with one that would seek to privilege incumbents.

25. No greater restriction can apply to States in organizing their own electoral systems than would apply to the Commonwealth in regulation of federal elections and electoral expenditure.

Differential treatment of parties and candidates

26. In light of their distinctive constitutional significance as the subjects of the protected electoral choice, differential treatment of parties and candidates is not of itself illegitimate. If undertaken on account of a genuine difference in circumstances, differential treatment does not constitute discrimination in a substantive rather than formal sense; and it is not inimical to any substantive rather than formal "[e]quality of opportunity to participate in the exercise of political sovereignty": McCloy at [45] (French CJ, Kiefel, Bell and Keane JJ); see also Mulholland at [147] (Gummow and Hayne JJ); see also Austin v Commonwealth (2003) 215 CLR 185 at [118] (Gaudron, Gummow and Hayne JJ). Discrimination, in legal usage, "signifies the process by which different treatment is accorded to persons or things by reference to considerations which are irrelevant to the object to be attained": Street v Queensland Bar Association (1989) 168 CLR 461 at 570-571 (Gaudron J); see also Bayside City Council v Telstra Corporation Ltd (2004) 216 CLR 595 at [40] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ). Here, there is a significant, relevant, permissible, constitutionally-based difference between those who are the subject of electoral choice and others. That difference may be taken into account in legislation consistently with the constitutional scheme.

27. The Court's decision in Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106 (ACTV) does not call for a contrary conclusion. The difficulty that Mason CJ identified with the impugned provisions in the Broadcasting Act 1942 (Cth) from the perspective of the implied freedom was that the "sweeping prohibitions against broadcasting" had the effect of "directly exclud[ing] potential participants in the electoral process from access to an extremely important mode of communication with the electorate" (at 145). The effect of that prohibition on candidates and political parties was, as Gaudron J described, "mitigated" by the provisions in relation to free

air time; but there was no mitigation of the effect of the prohibition with respect to other individuals and organizations (at 220-221).

28. In that way, as Mason CJ had earlier stated, the provisions "manifestly" favoured the status quo and allowed "no scope for participation in the election campaign by persons who are not candidates or by groups who are not putting forward candidates for election" (at 132). His Honour continued:

> Employers' organizations, trade unions, manufacturers' and farmers' organizations, social welfare groups and societies generally are excluded from participation otherwise than through the means protected by s. 95A. The consequence is that freedom of speech or expression on electronic media in relation to public affairs and the political process is severely restricted by a regulatory regime which evidently favours the established political parties and their candidates without securing compensating advantages or benefits for others who wish to participate in the electoral process or in the political debate which is an integral part of that process. [Emphasis added.]

29. Justices Deane and Toohey were also of the view that there was no proportionate relationship between the impugned provisions and the objective of the law, noting that some elements of the political community, including legitimate special interest groups, had been "effectively excluded" (at 173). Similarly, McHugh J stated that the need for a "level playing field" could not justify legislation which "bans all political advertising on radio and television whether paid for or not"; and still less could it justify "legislation which not only bans all political advertisements but through the free time provisions of Pt IIID favours the sitting members and their political parties at the expense of the views of those who do not hold political power" (at 239, emphasis added).

30. As McHugh J observed in Mulholland (at [82]), the judgment of Mason CJ in ACTV "did not recognise or give effect to a free-standing constitutional principle of non-discrimination or declare that such a requirement was inherent in the constitutionally prescribed system of representative government provided for in ss 7 and 24": see also Brown v Tasmania (2017) 261 CLR 328 (Brown) at [92], [94] (Kiefel CJ, Bell and Keane JJ). A total exclusion from certain channels or forums of political communication of persons and organisations other than candidates and political parties may – as in ACTV – infringe the implied freedom. So also might a complete prohibition on the ability of certain sectors of the community to make political donations, as Unions NSW v New South Wales (2013) 252 CLR 530 (Unions NSW

No 1). However, that will not necessarily be the case. Thus, in McCloy, the differential treatment in relation to property developers was explained by what differentiated them from mainstream donors: they were engaged in a profit making business dependent on the exercise of statutory discretions by public officials (see at [191] (Gageler J)). It follows from the above that caution must be exercised when evaluating assertions as to purpose that depend upon notions of differential treatment.

Validity of the cap on TPC electoral expenditure

The law effectively burdens the implied freedom

31. The defendant accepts that in its operation and effect s 29(10) of the EF Act, read with s 33(1), burdens the implied freedom.

The purpose of the law is compatible with, and enhances, the constitutional system

32. The plaintiffs assert that the impugned legislation, "while maintaining certain features of the earlier statute, deliberately altered the careful balance the latter had struck, thereby transforming a reasonable regulation of electoral expenditure into an unconstitutional restriction of disfavoured voices in the political debate" (PS [5]). They make clear that they accept that the Previous Act "appropriately calibrated the various caps between candidates, parties, groups of candidates and third-party campaigners" (PS [44]). There are a number of immediate problems with the plaintiffs' position.

33. First, the Previous Act itself imposed a much more restrictive cap on TPCs than on political parties. Using the unindexed numbers the plaintiffs invoke at PS [41], the Previous Act imposed an expenditure cap of $9.3m on parties that endorsed candidates for election to the Assembly in all 93 electorates at a general election, $1.05m on a party endorsing candidates in the Legislative Council and in 10 or fewer Assembly electorates, and $1.05m to TPCs. Larger parties could thus spend about 9 times as much as TPCs. The numbers have now changed, but it is apparent that the plaintiffs' true complaint is not that differentiation per se is objectionable; rather, they object to the particular levels of differentiation chosen. That is a matter of policy choice. Yet much of their argument proceeds as though differentiation per se is objectionable. And they have not sought to establish that the new levels chosen by the Parliament fail to achieve the Expert Panel's recommendation that "third-party campaigners should have

sufficient scope to run campaigns to influence voting at an election" (emphasis added) (SCB 4/1419). Any such argument would be unsupported by evidence.

34. Secondly, insofar as there is a suggestion that there has been a deliberate political choice to restrict "disfavoured voices", that is undermined by the fact that the genesis of the current caps is in three reports including, in particular, the report of the Expert Panel (as acknowledged at PS [12]). The Expert Panel was comprised of three persons: two former senior State politicians (one from either side of politics), chaired by a person who had experience at the highest levels in both the business and government sectors (see SCB 5/1710).

35. Thirdly, caution needs to be exercised in comparing the EF Act and the Previous Act, lest the latter be elevated to the status of a constitutional baseline. A legislature can always revise its laws, including to address a newly perceived mischief or a change in policy. Whilst any such revision must occur within constitutional bounds, those constitutional bounds are not of themselves identified by, or dictated by reference to, a legislative predecessor: cf, analogously, Sportsbet Pty Ltd v New South Wales (2012) 249 CLR 298. The support that the plaintiffs seek to draw from the Previous Act in this respect is inconsistent with notions of representative government that underlie the principle given effect in Kartinyeri v Commonwealth (1998) 195 CLR 337 (see at [13]-[16] (Brennan CJ and McHugh J) and [57] (Gummow and Hayne JJ).

36. Turning to the impugned TPC electoral expenditure cap, it operates, in conjunction with the caps on donations and the caps on expenditure by parties and candidates, to reduce the influence of money on the political process. It does so consistently with the expressed object of helping prevent corruption and undue influence in the government of the State (s 3(c)). This Court has accepted in previous cases, and the plaintiffs do not contest, that it is not incompatible with representative and responsible government for Parliament to protect the electoral process from "the corrupting influence of money": McCloy at [43] (French CJ, Kiefel, Bell and Keane JJ); ACTV at 130 (Mason CJ).

37. Consistently with the expressed object of establishing a fair electoral expenditure scheme (s 3(a)), the impugned cap on TPC electoral expenditure is calibrated to be lower than the electoral expenditure cap that is applicable to political parties that field sufficient candidates in an election. The selection of differential caps pursues ends that

may be described compendiously as "levelling the playing field" or ensuring "equality of opportunity".

38. "Third-party campaigners", as the plaintiffs observe at PS [40], are defined by reference to what they are not. Although the plaintiffs draw a negative connotation from that definition, it appropriately reflects the distinction drawn by the EF Act, consistently with the constitutional position described above at [19]-[24], between candidates and parties who are able to be elected to Parliament and form government, and everyone else. The differential caps promote a level playing field and substantive equality of opportunity by "allow[ing] a third-party campaigner to reasonably present its case and a have a genuine voice in the debate" while also "serv[ing] to guard against third-party campaigners dominating election campaigns" by "drown[ing] out the voices of parties and candidates who are the direct electoral contestants" (Minister's speech in reply, SCB 5/2110-2111; see also 5/2105). As the Expert Panel explained, "third-party campaigners should have sufficient scope to run campaigns to influence voting at an election – just not to the same extent as parties or candidates" (SCB 4/1419). The JSCEM agreed (SCB 5/1948 [7.20]).

39. The plaintiffs' attack upon the legitimacy of differential caps (or perhaps, analytically, upon the suitability of differential caps to achieve a legitimate purpose of levelling the playing field) proceeds on the erroneous assumption that equality of opportunity to participate in an electoral contest requires equal treatment of those who are directly engaged in the contest and those who are not so engaged. However, as noted above, insofar as "equality" is meant to invoke no formal differentiation, that is not consistent with the plaintiffs' own case. Moreover, as set out above, there is a substantial and relevant functional difference between candidates and parties on the one hand, and TPCs on the other hand, namely, that only candidates and parties are the subject of the constitutionally prescribed choice by electors. That functional difference justifies differential treatment in the pursuit of substantive and systemic equality of opportunity in the field of electoral campaigning. As observed in the above discussion of the reports which preceded the enactment of the EF Act, the purpose of the caps was to facilitate the system of parliamentary democracy, not by ensuring that political parties and candidates would "dominate", but rather that they would not be "drowned out" (cf PS [33]-[34]).

40. A further, and related, functional difference is the respective incentives of candidates and parties, and TPCs, to engage in single-issue campaigns or campaigns on "niche issues" (SCB 4/1416). The constitutionally prescribed system of representative and responsible government requires political parties and candidates to appeal to a broad audience: "the people". Parties and candidates wishing to form government must, practically, campaign on a variety of issues relevant to the governance of the State in the long term. On the other hand, as the Expert Panel observed, there is "concern[] about the potential for wealthy protagonists motivated by a particular issue to run effective single-issue campaigns" (SCB 4/1417). It stated that the "potential for these sort of campaigns can be seen federally in the well-funded campaigns against the mining tax and WorkChoices", adding that in New South Wales, "issues such as coal seam gas or electricity privatisation have the potential to unite opposition and motivate wealthy interests" (SCB 4/1417; note also at SCB 4/1415, referring to Orr and Gauja, "Third-Party Campaigning and Issue-Advertising in Australia" (2014) 60(1) Australian Journal of Politics and History 73; cf PS [45]).

41. Moreover, there is a significant practical difference between the position of TPCs and parties/candidates. The latter must incur the actual expenses of mounting a campaign to be elected, in practice involving costs for such matters as publicizing the fact of their candidacy, organizing and distributing how-to-vote cards, manning of polling/pre-polling stations, organization of volunteers, administration in relation to these matters, etc (recalling the broad definition of "electoral expenditure" in s 7(1)). That is a practical cost of being (serious) candidates. A major party will incur that cost in every electorate. TPCs, in contrast, do not have these burdens and costs, but may pick and choose who, what, where and how they seek to influence election outcomes.

42. The TPC cap applies to all such campaigners, regardless of what causes or sides they support. In the 2011 election, the largest expenditure was by the NRMA, followed by the NSW Business Chamber (SC [28], 1/112). In the 2015 election, of the top 10 TPC spenders there were six union bodies, two business bodies, the NRMA, and something called "Advocacy Services Australia Ltd" (SC [29], SCB 1/112-113). The plaintiffs assert at PS [50] that the ($500,000) cap "will in practice restrict *non-wealthy* voices". That claim has no foundation.

The law is reasonably appropriate and adapted to advance its legitimate object

43. **Extent of the burden**: The burden imposed by ss 29(10) and 33(1) on the implied freedom is tailored to reflect the functional differences noted above between candidates and parties and TPCs. Contrary to PS [48], the confined application of the cap to the period preceding an election underscores that the law does not burden the implied freedom generally, but does so only in connection with an election campaign: in general, a period of just under six months once every four years, commencing on 1 October (s 27) through to the fourth Saturday in March (Constitution Act 1902 (NSW), s 24A). It is in that context that candidates and political parties have a distinctive position relative to TPCs, by virtue of their unique functional role as those directly engaged in the electoral contest. The burden is neutral as to the substance or content of political communication. It is not properly characterised as "discriminatory" where the differential treatment reflects genuine differences that warrant different treatment.

44. **Suitability**: The impugned law is suitable to achieve the legitimate end of levelling the playing field for the reasons given above at [32]-[39]. There is no "over-inclusiveness" insofar as the cap for TPCs applies to a wide range of persons and organisations: that is the very point of defining "third-party campaigner" negatively so as to catch all who, unlike candidates and parties, do not engage directly in the electoral contest and cannot be elected to Parliament. Similarly, there is no "under-inclusiveness" in the circumstance that a political party or candidate may choose to run a single-issue campaign with the benefit of the different expenditure caps that apply to them. Any individual or organisation can enter the field of electoral contest by nominating as a candidate (in the case of an individual) or forming a party or group to nominate candidates. Further, "[t]he Parliament is not relegated by the implied freedom to resolving all problems … if it resolves any" but may "respond to felt necessities": McCloy at [197] (Gageler J); Brown at [422] (Gordon J).

45. **Necessity**: The necessity criterion "does not involve a free-ranging inquiry as to whether the legislature should have made different policy choices": Brown at [139] (Kiefel CJ, Bell and Keane JJ). Contrary to PS [53], the criterion does not require the defendant to show that "*only* a 50% cut in the [pre-]existing third-party campaigner expenditure cap [could] reasonably achieve the … purpose". As noted above, the plaintiffs accept that some differential treatment of TPCs compared to (at least) major parties is supportable. There is no one right balance between the various relevant

interests; it is a matter of judgment as to the ceiling of the caps once it be accepted that the figures are substantial: see analogously Mulholland at [163] (Gummow and Hayne JJ). Courts "must not exceed their constitutional competence by substituting their own legislative judgments for those of parliaments": McCloy at [58] (French CJ, Kiefel, Bell and Keane JJ). Nor does the necessity criterion require Parliament to wait until there is in fact an unfair election before it may address identified threats to the electoral process (cf PS [53]): see McCloy at [233] (Nettle J).

46. The plaintiffs' complaint is that they preferred the old balance – one that "observed the relativities" between the TPC caps and the caps applicable to parties and candidates (PS [53]) – to the new. Their preference does not make the previous balance an "obvious and compelling" alternative means of achieving the same end (cf McCloy at [58] (French CJ, Kiefel, Bell and Keane JJ)); it simply means they would prefer less emphasis be given to the relevant legitimate end. Nothing about the balance struck by the Parliament, following the reports which pre-empted the change, suggests that "the impugned law was enacted for an ulterior purpose incompatible with the constitutionally prescribed system of representative and responsible government": Brown at [282] (Nettle J). As noted, the plaintiffs have not sought to assert that the TPC cap prevents TPCs from having influence in relation to elections.

47. **Adequacy in balance**: If the Court reaches this element of the proportionality analysis, then it must have concluded that it is legitimate for Parliament to impose differential expenditure caps and the question is one of value judgment about whether the TPC cap selected is disproportionate to the legitimate end. Provided the Court is satisfied that the cap selected is not such as to effectively exclude a TPC from participating in political communication in and around the election campaign – and there is no evidence to suggest that is the case (cf PS [54]) – then the Court should not descend into an examination of whether some different sum should have been selected.

48. Applying a proportionality analysis which shares a number of similarities with the analysis set out in McCloy and modified in Brown, the Supreme Court of Canada has upheld the validity of spending limits that are not overly restrictive but are carefully tailored to ensure that candidates, political parties and third parties are able to convey their information to voters: see especially Harper v Canada (Attorney General) [2004] 1 SCR 827 (Harper) at [72]-[73] (Bastarache J). At a general level, that Court has also recognised that spending limits are "necessary to prevent the most affluent from

monopolizing election discourse and consequently depriving their opponents of a reasonable opportunity to speak and be heard" (see Libman v Québec (Procureur général) [1997] 3 SCR 569 (Libman) at [47] and Harper at [72], [107] and [108] (Bastarache J)).

49. Specifically in relation to third parties, the Supreme Court has accepted that limitations on third party expenditure serve "compelling" objectives, which include: (1) promoting equality in the political discourse; (2) protecting the integrity of the financing regime applicable to candidates and parties, and (3) maintaining confidence in the electoral process (see Harper at [92], [104]-[109] and [120] (Bastarache J)). The Court has also recognised that the limits imposed on third parties should be less than the limits on political parties and candidates because:

a. "a particular candidate who is targeted by a third party [must have] sufficient resources to respond" (see Harper at [116] (Bastarache J) and Libman at [49]-[50]);

b. "[a]lthough what they have to say is important, it is the candidates and political parties that are running for election" (see Libman at [50]);

c. "owing to their numbers, the impact of such spending on one of the candidates or political parties to the detriment of the others could be disproportionate" (see Libman at [50]);

d. third parties generally have lower overall expenses than candidates and political parties (see Harper at [116] (Bastarache J));

e. third parties tend to focus on one issue and may therefore achieve their objective less expensively (see Harper at [116] (Bastarache J)); and

f. it precludes the wealthy from dominating the political discourse (see Libman at [84] and Harper at [118] and [121] (Bastarache J)).

50. In the United Kingdom context, an expenditure cap on third parties has been held to be incompatible with art 10 of the European Convention on Human Rights relating to freedom of expression where it is so low as to constitute a prohibition on expenditure: Bowman v United Kingdom (1998) 26 EHRR 1; Regina v Holding [2006] 1 WLR 1040 (CA). On the basis of the facts in the Special Case, the cap of $500,000 on TPCs under the EF Act is not so low as to constitute a prohibition on expenditure – and the plaintiffs do not so argue.

Validity of the "acting in concert" offence

51. Section 35(1) of the EF Act provides that it is "unlawful for a third-party campaigner to act in concert with another person or other persons to incur electoral expenditure in relation to an election campaign during the capped expenditure period for the election that exceeds the applicable cap for the third-party campaigner for the election". Pursuant to s 35(2) , a person "acts in concert" with another person "if the person acts under an agreement (whether formal or informal) with the other person to campaign with the object, or principal object", of either having a particular party, elected member or candidate elected, or opposing the election of a particular party, elected member or candidate.

The law effectively burdens the implied freedom

52. The defendant accepts that in its operation and effect s 35 of the EF Act burdens the implied freedom.

The purpose of the law is compatible with the constitutional system of government

53. Contrary to the plaintiffs' contention that the test in s 35 is "broad and nebulous" (PS [59]), the section has a number of identifiable elements:

a. There must be an agreement between a TPC and one or more other persons, whether formal or informal.

b. The agreement must have as "the object, or principal object", one or other of the objects specified in sub-s (2), namely supporting or opposing a particular party, elected member or candidate being elected. The reference to "the object" must in context mean the sole object. It is followed by the lesser criterion of "principal object"; and the use of the definite article may be contrasted with the language of "one of its objects" in the definition of "party" in s 4. Thus, the prohibition does not encompass agreements with, say, a principal object of promoting or opposing particular policies or ideas, even if a consequence or secondary object was to make the election of some candidate/party more or less likely.

c. The prohibition is upon the TPC acting under that agreement to incur electoral expenditure, in relation to an election campaign during the capped expenditure period for the election, that exceeds the cap on TPC electoral expenditure.

54. Absent satisfaction of each of those elements, a TPC will not contravene the section. It follows that many of the examples in PS [59] would not be caught by the contravention. A TPC announcing a decision to coordinate campaign activities with another person, or sending another person a draft election poster, or obtaining a quotation for advertising services, or engaging in preliminary discussions with another person to explore shared political aims and a desire to coordinate campaign messages, would each fall short of a contravention under s 35. The section operates at the level of agreements with a sole object or principal object, conduct pursuant to which is directed at a particular result in a particular period.

55. So construed, s 35 complements the cap on TPC electoral expenditure. In its Final Report, the Expert Panel supported the introduction of a provision that precluded a TPC from acting in concert with others to incur expenditure in excess of its spending cap. In the view of the Panel, a provision of that nature would "prevent a number of third-party campaigners with common interests (eg unions, mining companies, packaging companies) from launching a coordinated campaign with a combined expenditure cap that would completely overwhelm parties, candidates and other third parties acting alone" (SCB 4/1423). The Expert Panel considered that such a provision was "important to maintaining a fair and balanced electoral contest and the integrity of the expenditure caps generally" (SCB 4/1423). In supporting the Expert Panel's recommendation and the Government's adoption of it in principle, the JSCEM agreed with the Panel's reasoning in relation to avoiding a situation in which the combined expenditure cap of a coordinated campaign would overwhelm parties, candidates and other TPCs: 2016 JSCEM Report at [7.34] (SCB 5/1950).

56. As a mechanism for ensuring the efficacy of the caps on TPC electoral expenditure, s 35 is compatible with the maintenance of representative and responsible government. Insofar as the plaintiffs rely upon "broadly similar reasons" to those which they advance in relation to the cap on TPC electoral expenditure (PS [60]), and the same contextual tools, the defendant relies upon the submissions it has made above.

<u>The law is reasonably appropriate and adapted to advance its legitimate object</u>

57. **Extent of the burden**: As with the imposition of the cap on TPC electoral expenditure, the prohibition in s 35 of the EF Act applies only to the capped period preceding an election, that being the period in which candidates and political parties are, by reason of their functional role, directly engaged in the electoral contest relative

to TPCs. To the extent that it prohibits conduct facilitating or constituting State election campaigning (PS [63]), s 35 does so by reference only to conduct on the part of TPCs which is undertaken pursuant to agreements which have particular objects and which are entered into in order to incur electoral expenditure above the cap.

58. **Suitability**: Contrary to the plaintiffs' submissions at [64], s 35 is rationally connected to both the equal opportunity object and the purpose of preventing circumvention of the expenditure cap in s 29(10). It proscribes only conduct on the part of TPCs, specifically, conduct pursuant to an agreement that has as its object, or principal object, the election of a party, member or candidate or opposition to the election of a party, member or candidate. To the extent that TPCs exist independently of each other and have their own constituencies and political views (PS [64]), s 35 does not trench upon those views, or the expression thereof, save to the extent that TPCs enter into an agreement to incur electoral expenditure above the cap on TPC electoral expenditure with the principal object of, for example, electing a particular party.

59. By contrast with the difficulty that French CJ, Hayne, Crennan, Kiefel and Bell JJ identified with s 95G(6) of the Previous Act in Unions NSW No 1 at [63], there is no assumption in s 35 of the EF Act that the objectives of the expenditure between the relevant actors are coincident: the objectives of the necessary agreement are stipulated in terms. Nor does the section operate to "aggregate" expenditure in the same manner as s 95G(6), by treating expenditure made by two distinct legal entities as being derived by a single source (cf Unions NSW No 1 at [62], PS [65]). As to the fact that the section operates differentially on the actors under a single agreement (PS [64]), far from tending against suitability, that feature of s 35 highlights that the burden imposed by the section is confined by reference to the concern of the legislature.

60. **Necessity**: The plaintiffs' reliance upon s 144 of the EF Act (PS [67]) does not answer the specific concern raised by the Expert Panel in relation to the cap, it not being co-extensive in its terms with the prohibition in s 35. Notably, s 144 operates by reference to the subjective purpose of the person who enters into or carries out a scheme, that purpose being circumvention of a prohibition or requirement of Pt 3 with respect to political donations or electoral expenditure. Section 35, in contrast, operates by reference to acting under agreements of a particular character. To the extent that the plaintiffs proceed on the premise that, by contrast with s 144, s 35 does not expressly target circumvention of the caps on TPC electoral expenditure (PS [67]), that premise

misconceives the operation of the provision. As noted above, and as its terms make clear, s 35 prohibits conduct on the part of TPCs which is undertaken pursuant to agreements which are entered into "to incur electoral expenditure above the cap".

61. **Adequacy in balance**: The balance struck by s 35, and the elements thereof, is commensurate with the objectives that it seeks to achieve. The Canadian Supreme Court has likewise held that legislative provisions that prevent TPCs acting in concert to incur expenditure above an "electoral expenditure cap" are justifiable as ancillary to provisions limiting the expenditure of TPCs: see Harper at [122] (Bastarache J)).

Alternative construction of s 35

62. If the Court accepts, contrary to the defendant's primary argument, that s 35 of the EF Act as construed above impermissibly burdens the implied freedom, the defendant contends that s 35 can be construed more narrowly, such that the words "the applicable cap for the third-party campaigner" refers to the cap as applied individually to each TPC by s 29(1) of the Act (see Defence [93A], SCB 1/97). Such a construction would be warranted to avoid the constitutional difficulty: note s 31, Interpretation Act 1987. On that construction, s 35 would not preclude a TPC from acting in concert with another TPC (or any other person) to incur electoral expenditure that exceeded $500,000, provided that each TPC did not, in carrying out the agreement, incur expenditure in excess of the cap applicable to them. Section 35 would not, if so construed, give rise to the constitutional difficulties of which the plaintiffs complain on the defendant's primary construction of s 35.

63. Some support for this narrower construction may be found in the Special Minister of State's reply in the Legislative Assembly on 23 May 2018, where he emphasised that the offence in s 35 did "not seek to aggregate the expenditure caps for multiple third-party campaigners who are each campaigning on a particular issue", nor did it "prevent third parties with a common interest from campaigning on the same issue". Rather, the section was to apply "where the third-party campaigner acts under an agreement to incur expenditure in excess of the third-party campaigner's spending cap" (SCB 5/2111). Further, as a matter of statutory context, ss 30 and 32, which expressly provide for the aggregation of certain electoral expenditure in the context of State and local government election campaigns do not provide, as each might have done, that the electoral expenditure incurred by TPCs acting in concert was to be aggregated.

Commonwealth's possible additional issue

64. The Commonwealth Attorney-General has filed and served a s 78B notice, asserting that it is necessary to construe s 7(2)(a) of the EF Act in a particular way so as to avoid trenching upon the claimed exclusive power of the Commonwealth to regulate matters to do with federal elections. That issue has not been raised by the parties, and is not addressed in the pleadings, special case or stated questions. None of the arguments raised by the parties turn on the construction of s 7(2)(a). It appears the Commonwealth may be seeking to pre-empt litigation relating to the validity of certain Queensland provisions. The issue should be determined only when it is properly raised. It is neither necessary nor appropriate that it be addressed here: cf Knight v Victoria (2017) 261 CLR 306 at [32]-[33].

Conclusion

65. For the foregoing reasons the stated questions should be answered as follows:

1. No.
2. No.
3. The plaintiffs.

VI Cross-appeal/notice of contention

66. There is no cross-appeal or notice of contention.

VII Estimate of Time

67. The defendant estimates that it will require 2½ hours for its oral argument.

Date: 14 November 2018

M G Sexton SC SG
T: 02 8093 5502
michael.sexton@justice.nsw.gov.au

J K Kirk SC
T: 02 9223 9477
kirk@elevenwentworth.com

A M Mitchelmore SC
T: 02 9223 7654
amitchelmore@sixthfloor.com.au

Brendan Lim
T: 02 8228 7112
blim@elevenwentworth.com