

UNIONS NSW & ORS v STATE OF NEW SOUTH WALES
(S204/2018)

Date writ of summons filed: 10 August 2018

Date special case referred to Full Court: 23 October 2018

On 1 July 2018 the *Electoral Funding Act 2018* (NSW) (“the EF Act”) came into operation. The EF Act makes provision for the disclosure, capping and prohibition of certain donations and expenditure in relation to electoral campaigns for State and local government elections in New South Wales.

Section 29 of the EF Act imposes various caps on electoral expenditure for State election campaigns. Section 29(10) provides as follows:

For a State general election, the applicable cap for a third-party campaigner is:

- (a) \$500,000 if the third-party campaigner was registered under this Act before the commencement of the capped State expenditure period for the election, or*
- (b) \$250,000 in any other case.*

Section 35 of the EF Act is in the following terms:

- (1) 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.*
- (2) In this section, 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:
 - (a) having a particular party, elected member or candidate elected, or*
 - (b) opposing the election of a particular party, elected member or candidate.**

Each of the plaintiffs is an employee organisation which either is, or intends to become, registered as a “third-party campaigner” under the EF Act for the New South Wales State general election to be held on 23 March 2019. The first plaintiff is also the “State peak council for employees” prescribed by s 215 of the *Industrial Relations Act 1996* (NSW). On 10 August 2018 the plaintiffs commenced proceedings in this Court, seeking declarations that sections 29(10) and 35 of the EF Act are both invalid.

The parties filed a special case, which Justice Bell referred to the Full Court for hearing. The special case states the following questions:

1. Is section 29(10) of the *Electoral Funding Act 2018* (NSW) invalid because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution?
2. Is section 35 of the *Electoral Funding Act 2018* (NSW) invalid (in whole or in part and, if in part, to what extent) because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution?
3. Who should pay the costs of the special case?

The plaintiffs have filed a Notice of a Constitutional Matter, as has the Attorney-General of the Commonwealth, who is intervening in the proceeding. The Attorneys-General of South Australia, Queensland and Western Australia are also intervening.

The Liberal Party of Australia (NSW Division) has applied for leave to intervene in the proceeding, and the University of New South Wales Grand Challenge on Inequality has applied for leave to be heard as *amicus curiae*.