



HIGH COURT OF AUSTRALIA

15 February 2023

UNIONS NSW & ORS v STATE OF NEW SOUTH WALES [2023] HCA 4

Today, the High Court answered questions in a special case concerning whether ss 29(11) and 35 of the *Electoral Funding Act 2018* (NSW) ("the EF Act") were invalid under the *Constitution* because they impermissibly burdened the implied freedom of political communication.

The EF Act, among other things, provides for the capping of electoral expenditure for election campaigns in NSW. The plaintiffs were registered third-party campaigners ("TPCs") under the EF Act, defined broadly as a person or entity, other than a political party, elected member or candidate, who seeks to participate in an election campaign and incurs over \$2,000.

Section 29(11) capped electoral expenditure by TPCs before a State by-election for the Legislative Assembly to \$20,000 (indexed to inflation). The parties accepted that s 29(11) imposed an effective and direct burden on political communication and that the State of NSW bore the persuasive onus of establishing that the burden was justified. After the Court reserved its decision, the State informed the High Court that the NSW Joint Standing Committee on Electoral Matters had delivered a report to Parliament that recommended the expenditure cap in s 29(11) be increased to \$198,750. In light of that report, the State conceded that the answer to Question 1 in the special case (which asked whether s 29(11) was invalid) should be answered "Yes". By majority, the High Court answered Question 1 that way, holding that the law was invalid because the State did not seek to justify, and had not justified, the burden that s 29(11) imposed on political communication. The plaintiffs had a sufficient interest to seek that relief because s 29(11) remained a purported law of NSW affecting their expenditure in future by-elections.

Section 35 created an offence, applicable only to TPCs, to act in concert with another person or persons to incur electoral expenditure that exceeded the cap applicable to the TPC for the election. Two weeks before the hearing, the Parliament repealed s 35. The plaintiffs sought a declaration that s 35, as it stood from 1 July 2018 to 2 November 2022, was invalid. The amended questions in the special case asked whether the Court had jurisdiction to determine the validity of s 35 and, if so, whether it should in its discretion hear and determine the question. The High Court unanimously held that there was no longer a "matter" within federal jurisdiction with respect to the purported invalidity of s 35, because the plaintiffs did not have standing to seek a declaration of invalidity following its repeal. The plaintiffs did not demonstrate that they had a sufficient interest to seek a declaration or that there would be any foreseeable consequences from the grant of a declaration.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*