

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, GORDON, EDELMAN, STEWARD, GLEESON AND JAGOT JJ

UNIONS NSW & ORS

PLAINTIFFS

AND

STATE OF NEW SOUTH WALES

DEFENDANT

Unions NSW v New South Wales
[2023] HCA 4
Date of Hearing: 16 & 17 November 2022
Date of Judgment: 15 February 2023
S98/2022

ORDER

1. *The questions stated by the parties for the opinion of the Full Court in the further amended special case filed on 10 November 2022 should be answered as follows:*

Question 1: Is section 29(11) 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?

Answer: Yes.

Question 1A: As to proposed question 2 below:

- a) Does the Court have jurisdiction to hear and determine the question?*
- b) Should the Court in its discretion hear and determine the question?*

Answer: a) No.
b) Unnecessary to answer.

Question 2: If the answers to questions 1A(a) and (b) are “yes”: was section 35 of the Electoral Funding Act 2018 (NSW), as it stood from 1 July 2018 until 2 November 2022, invalid because it impermissibly burdened the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution?

Answer: Does not arise.

Question 3: Who should pay the costs of the special case?

Answer: In relation to question 1, the defendant. Otherwise, there should be no order as to costs.

Representation

J T Gleeson SC with N J Owens SC and C G Winnett for the plaintiffs (instructed by Gilbert + Tobin)

B W Walker SC with B K Lim for the defendant (instructed by Crown Solicitor (NSW))

S P Donaghue KC, Solicitor-General of the Commonwealth, with S Zeleznikow and S N Rajanayagam for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Unions NSW v New South Wales

Constitutional law (Cth) – Implied freedom of communication on governmental and political matters – Where s 29(11) of the *Electoral Funding Act 2018* (NSW) ("EF Act") capped electoral expenditure by third-party campaigners in "capped State expenditure period" before State by-election for Legislative Assembly – Where third-party campaigners subject to lower cap than candidates – Where s 29(11) restricted capacity of third-party campaigners to engage in political debate and imposed burden on political communication – Where State no longer sought to justify burden – Where State conceded Court should hold s 29(11) invalid – Whether Court should make declaration of invalidity.

Constitutional law (Cth) – Judicial power of the Commonwealth – High Court – Original jurisdiction – Meaning of "matter" – Standing – Offence under s 35 of the EF Act for third-party campaigner to act in concert with other persons to incur electoral expenditure that exceeded applicable cap for third-party campaigner – Where Court had jurisdiction to determine validity of s 35 when plaintiffs commenced proceeding – Where s 35 was repealed before hearing – Whether Court had jurisdiction to determine validity of s 35 – Whether plaintiffs had standing to seek declaration of invalidity.

Words and phrases – "declaration", "electoral expenditure", "federal jurisdiction", "foreseeable consequences", "implied freedom of communication on governmental and political matters", "judicial power of the Commonwealth", "justiciable controversy", "justified", "matter", "special interest", "standing", "sufficient interest", "third-party campaigner".

Constitution, ss 7, 24; Ch III.

Electoral Funding Act 2018 (NSW), ss 29(11), 33(1), 35.

- 1 KIEFEL CJ, GAGELER, GORDON, GLEESON AND JAGOT JJ. There has been a series of cases in the original jurisdiction of this Court concerned with the constitutional validity of provisions of legislation in New South Wales regulating political donations and expenditure on campaigns for elections in that State. This is the second case dealing with the validity of caps on the electoral expenditure of third-party campaigners ("TPCs")¹ – broadly, a person or entity, other than a political party, associated entity, elected member or candidate, who seeks to participate in a New South Wales election campaign and incurs over \$2,000.
- 2 In *Unions NSW v New South Wales*² ("*Unions [No 1]*") and in *McCloy v New South Wales*³, this Court considered the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ("the EFED Act"). In *Unions NSW v New South Wales*⁴ ("*Unions [No 2]*"), the Court considered the *Electoral Funding Act 2018* (NSW) ("the EF Act") which replaced the EFED Act but generally retained the scheme of the EFED Act with respect to caps on electoral expenditure. The EF Act, which was relevantly amended on 2 November 2022⁵, is the legislation at issue in this proceeding.
- 3 The EF Act, among other things, makes "provision for the disclosure, capping and prohibition of certain political donations and electoral expenditure for parliamentary and local government election campaigns"⁶. It creates a comprehensive scheme regulating the extent and sources of funding for elections⁷, and requiring regular disclosure to the New South Wales Electoral Commission⁸ of political donations and of electoral expenditure by parties, elected members,

1 *Electoral Funding Act 2018* (NSW), s 4 definition of "third-party campaigner".

2 (2013) 252 CLR 530.

3 (2015) 257 CLR 178.

4 (2019) 264 CLR 595.

5 By the *Electoral Legislation Amendment Act 2022* (NSW).

6 EF Act, Long Title.

7 EF Act, Div 2 of Pt 4.

8 EF Act, ss 15-17; see generally Div 2 of Pt 3.

<i>Kiefel</i>	<i>CJ</i>
<i>Gageler</i>	<i>J</i>
<i>Gordon</i>	<i>J</i>
<i>Gleeson</i>	<i>J</i>
<i>Jagot</i>	<i>J</i>

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candidates, groups of candidates and associated entities⁹, as well as by major political donors¹⁰ and TPCs¹¹ in certain circumstances.

4 The objects of the EF Act, stated in s 3, include to establish a fair and transparent electoral funding, expenditure and disclosure scheme¹²; to help prevent corruption and undue influence in the government of the State or in local government¹³; and to promote compliance by parties, elected members, candidates, groups, agents, associated entities, TPCs and donors with the requirements of the electoral funding, expenditure and disclosure scheme¹⁴.

5 Division 4 of Pt 3 of the EF Act is headed "Caps on electoral expenditure for election campaigns". That Division sets the "capped State expenditure period"¹⁵ and the applicable caps on "electoral expenditure" for State election campaigns in respect of parties, candidates and TPCs¹⁶. "[E]lectoral expenditure" is defined to mean expenditure of specified kinds (such as expenditure on advertisements, the production and distribution of election material and employing staff) "for or in connection with promoting or opposing, directly or indirectly, a party or the election of a candidate or candidates or for the purpose of influencing, directly or indirectly, the voting at an election"¹⁷. For a TPC, expenditure will only be "electoral expenditure" if it is incurred "for the dominant purpose of promoting or

9 EF Act, s 12(1).

10 EF Act, s 12(3).

11 EF Act, s 12(2).

12 EF Act, s 3(a).

13 EF Act, s 3(c).

14 EF Act, s 3(e).

15 EF Act, s 27.

16 EF Act, s 29.

17 EF Act, s 7. By item 3 of Sch 3 of the *Electoral Legislation Amendment Act* and with effect from 2 November 2022, for the purposes of Div 4 of Pt 3, the definition of "electoral expenditure" was amended to exclude expenditure incurred on travel and travel accommodation for candidates and staff engaged in electoral campaigning: s 7(4A).

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opposing a party or the election of a candidate or candidates or influencing the voting at an election"¹⁸. It is unlawful for a party, group, candidate, TPC or associated entity to incur electoral expenditure for an election campaign during the capped State expenditure period if it exceeds the applicable cap¹⁹. The "capped State expenditure period", in the case of a by-election, is the period from and including the day of the issue of the writ or writs for the election until the end of election day²⁰.

6 Each of the plaintiffs was registered under the EFED Act and EF Act as a TPC for past New South Wales State elections and by-elections. Each plaintiff asserted an intention to be registered as a TPC under the EF Act for future NSW State elections and by-elections, and asserted an intention to incur "electoral expenditure" during the "capped State expenditure period" in those elections and by-elections, to the extent permitted by law. The plaintiffs contended that two provisions of the EF Act governing TPCs impermissibly burdened the implied freedom of communication on governmental and political matters protected by the *Constitution*, and sought declarations of invalidity.

7 The first provision, s 29(11) of the EF Act, caps TPCs' "electoral expenditure" in the "capped State expenditure period" before a State by-election for the Legislative Assembly to \$20,000 indexed for inflation²¹. Section 29(11), read with s 33(1), prohibits TPCs from incurring electoral expenditure exceeding that \$20,000 indexed cap.

8 After the Court reserved its decision on the validity of s 29(11) of the EF Act, the State informed the Court that, on 23 November 2022, the New South Wales Joint Standing Committee on Electoral Matters ("JSCEM") had delivered Report 2/57 entitled "Caps on third-party campaigners' electoral expenditure in s 29(11) and s 35 of the *Electoral Funding Act 2018*" ("the 2022 JSCEM Report"). Among other things, the 2022 JSCEM Report recommended that the expenditure

18 EF Act, s 7(3).

19 EF Act, s 33(1). It is an offence for a person to contravene the cap if the person was, at the time of the act, aware of the facts that result in the act being unlawful: s 143(1). It is also an offence for a person to enter into or carry out a scheme for the purpose of circumventing the cap: s 144(1).

20 EF Act, s 27(b).

21 EF Act, s 29(11), (14).

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cap for TPCs in by-elections be increased to \$198,750. In light of that Report, the State said that it now conceded that s 29(11) was invalid. Orders were made by the Court to supplement the Further Amended Special Case with the 2022 JSCem Report. The invalidity of s 29(11) is addressed later in these reasons.

9 The second provision, s 35 of the EF Act, created an offence, applicable only to TPCs, for acting in concert with another person or persons to incur electoral expenditure in relation to an election campaign during the capped expenditure period that exceeded the cap applicable to the TPC for the election. Section 35(2) provided that 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 having a particular party, elected member or candidate elected, or opposing the election of a particular party, elected member or candidate.

10 Two weeks before the hearing of this proceeding, the New South Wales Parliament repealed s 35 of the EF Act²². Following the repeal, the plaintiffs amended their statement of claim to seek a declaration that s 35, as it stood from 1 July 2018 until 2 November 2022, was invalid. The plaintiffs submitted that the Court retains jurisdiction in the matter so far as it concerns the validity of s 35. The State, and the Commonwealth intervening, contended that, in the circumstances, the Court no longer has jurisdiction to determine the validity of s 35.

11 After the repeal of s 35 of the EF Act, the following questions were stated for the opinion of the Full Court:

"1. Is section 29(11) of the [EF Act] invalid because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution?

1A. As to proposed question 2 below:

a. Does the Court have jurisdiction to hear and determine the question?

b. Should the Court in its discretion hear and determine the question?

22 *Electoral Legislation Amendment Act*, Sch 3 item 12.

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2. If the answer[s] to questions 1A(a) and (b) are 'yes': was section 35 of the [EF Act], as it stood from 1 July 2018 until 2 November 2022, invalid because it impermissibly burdened 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?"

Question 1A – Jurisdiction to determine validity of s 35

12 The Court first heard argument on question 1A: whether, given the repeal of s 35, the Court had jurisdiction to hear and determine the constitutional validity of that section, and if it had jurisdiction, whether it should determine the question. At the end of argument, the Court informed the parties and the intervener that at least a majority of the Court would answer either question 1A(a) or 1A(b), "No". The Court therefore did not hear argument on question 2, as that question does not arise. What follows are the reasons for answering question 1A(a) "No", and question 1A(b) "Unnecessary to answer".

The requirement of a "matter"

13 The judicial power of the Commonwealth is vested by s 71 of the *Constitution* in the High Court, and such other federal courts as the Parliament creates or vests with federal jurisdiction. "Jurisdiction" is the "generic term" for the authority to adjudicate²³. Federal jurisdiction is the authority to adjudicate – the authority to exercise the judicial power of the Commonwealth – derived from the *Constitution* and laws passed by the Commonwealth Parliament under the *Constitution*²⁴. The extent of this Court's authority to exercise that power (and the authority of other courts invested with federal jurisdiction) is limited by the

23 *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 570 [2], quoting *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142.

24 *Rizeq v Western Australia* (2017) 262 CLR 1 at 12 [8], 22 [49]-[50]; *Burns v Corbett* (2018) 265 CLR 304 at 330 [20]-[21], 346-347 [70]-[71], 365 [124], 378 [159]-[160].

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*Constitution*²⁵, reflecting notions of the separation of powers, and of responsible and representative government, found in the text and structure of the *Constitution*.

14 Consistent with those fundamental principles, the function of the Court is not the giving of legal answers or the declaration of legal principle – it is the resolution of a controversy about a legal right, duty or liability²⁶. The giving of answers or the making of declarations is an exercise of judicial power only where the seeking and giving of those answers or declarations arise in or out of the judicial determination of the rights and liabilities in issue in the dispute²⁷. That understanding of the Court's function is reflected in the constitutional requirement that a dispute involves a "matter" for the purposes of Ch III of the *Constitution*.

15 Exceptional categories aside²⁸, there can be no "matter" within the meaning of Ch III of the *Constitution* unless "there is some immediate right, duty or liability to be established by the determination of the Court" in the administration of a law²⁹ and unless the determination can result in the Court granting relief which both quells a controversy between parties and is available at the suit of the party seeking that relief³⁰. Standing to seek relief is in that way "subsumed within the

25 *Ah Yick v Lehmert* (1905) 2 CLR 593 at 603; *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 264; *R v Kirby*; *Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 267-268.

26 See *Mineralogy Pty Ltd v Western Australia* (2021) 95 ALJR 832 at 846 [57]; 393 ALR 551 at 565-566.

27 *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 303-305, explaining *In re Judiciary* (1921) 29 CLR 257 at 266-267.

28 *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 at 378 [8], referring to *R v Davison* (1954) 90 CLR 353 at 368. See also *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339 at 352 [29]; *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234 at 247 [35], 248 [41], 249 [46]; 399 ALR 214 at 224-225, 226, 227.

29 *In re Judiciary* (1921) 29 CLR 257 at 265-266.

30 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 612 [48]; *Hobart International Airport* (2022) 96 ALJR 234 at 245-246 [31], 249-250 [49]; 399 ALR 214 at 223, 228.

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constitutional requirement of a 'matter'"³¹. While the concepts of standing and matter are not entirely co-extensive, both are concerned to "mark out the boundaries of judicial power"³²; their attempted severance is "conceptually awkward, if not impossible"³³.

16 What is required to establish standing varies with the nature of the relief that is sought³⁴ and will apply differently to different sorts of controversies³⁵. Where, as here, the relief sought is declaratory of the invalidity of legislation, standing has traditionally been explained in terms of a requirement for the party seeking the relief to have a "real" or "sufficient" interest in obtaining the relief³⁶. That requirement is closely aligned with the requirement that, for the making of a declaration to constitute an exercise of judicial power, the declaration must be seen at the time of its making to produce foreseeable consequences for the parties³⁷.

31 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 68 [152].

32 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 262 [37], quoting *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582. See also *Kuczborski v Queensland* (2014) 254 CLR 51 at 60 [5].

33 *Kuczborski* (2014) 254 CLR 51 at 60 [5], quoting *Croome v Tasmania* (1997) 191 CLR 119 at 132.

34 *Australian Conservation Foundation v The Commonwealth* (1979) 146 CLR 493 at 511, quoted with approval in *Bateman's Bay* (1998) 194 CLR 247 at 266 [47], 282 [97]. See also *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 659 [68], quoting *Allan v Transurban City Link Ltd* (2001) 208 CLR 167 at 174 [15]; *Hobart International Airport* (2022) 96 ALJR 234 at 246 [32], 251 [56]; 399 ALR 214 at 224, 230.

35 *Hobart International Airport* (2022) 96 ALJR 234 at 246 [33]; 399 ALR 214 at 224, quoting *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 5th ed (2015) at 626 [19-175].

36 *Croome* (1997) 191 CLR 119 at 125-126, referring to *Toowoomba Foundry Pty Ltd v The Commonwealth* (1945) 71 CLR 545 at 570, 584. See also *Hobart International Airport* (2022) 96 ALJR 234 at 246 [32], 253 [65]; 399 ALR 214 at 224, 233.

37 *Ainsworth* (1992) 175 CLR 564 at 582, quoting *Gardner v The Dairy Industry Authority of New South Wales* (1977) 52 ALJR 180 at 188; 18 ALR 55 at 69.

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17 *Croome v Tasmania*³⁸ confirmed the "long-standing doctrine" that a "matter" can "consist of a controversy between a person who has a sufficient interest in the subject and who asserts that a purported law is invalid and the polity whose law it purports to be"³⁹. The sufficiency of the interest in such a case provides standing to seek a declaration that the law is invalid. The immediate right, duty or liability to be established by the determination of the Court is the right to the declaration sought⁴⁰. The law that is administered by the Court is the *Constitution*⁴¹.

18 As the standing of a party to seek declaratory relief depends on the sufficiency of the interest of that party in obtaining that relief, a sufficient interest must continue to subsist up until the time at which relief is granted or refused. If, after the commencement of a proceeding, a party ceases to have a sufficient interest in obtaining the relief sought, that party no longer has standing to obtain that relief, the "matter" ceases to exist and, in consequence, the jurisdiction of the Court comes to an end. But that is not to say that the interest must remain the same throughout the proceeding; the nature of a party's interest may change but still remain sufficient.

19 The need for standing, as a component of a "matter", to continue to exist throughout a proceeding for the Court to have jurisdiction to continue to entertain the proceeding is consistent with the settled understanding that a "matter" is a justiciable controversy identifiable independently of a proceeding⁴². If a "matter" can exist whether or not a proceeding has been commenced, a "matter" can cease to exist after a proceeding has been commenced.

20 In this case, the question whether there is a justiciable controversy in relation to the constitutional validity of a law – s 35 of the EF Act – that was repealed after the proceeding had been filed is able to be addressed by asking if the applicable principles permit the plaintiffs to seek a declaration of invalidity.

38 (1997) 191 CLR 119.

39 (1997) 191 CLR 119 at 125.

40 *Croome* (1997) 191 CLR 119 at 127.

41 *Croome* (1997) 191 CLR 119 at 126.

42 *Fencott v Muller* (1983) 152 CLR 570 at 603.

Standing to seek a declaration

21 A plaintiff will have and maintain a real or sufficient interest in obtaining relief if and for so long as they seek a declaration of their own rights, legal interests or liabilities, or if and for so long as the declaration sought will directly affect their rights, legal interests or liabilities⁴³. Generally, such a declaration will have foreseeable consequences for the plaintiff because they will be able to legally enforce those rights, interests or liabilities. So, for example, a declaration of invalidity of a law (even where the law has been repealed or amended) may have foreseeable consequences for that plaintiff where such a declaration assists to negative a statutory defence to a common law cause of action such as an intentional tort, or where the plaintiff is being prosecuted for breach of that law⁴⁴. The past infringement of certain personal rights or interests of a plaintiff, such as reputation and liberty, may also be sufficient for seeking declaratory relief even where there are no other asserted legal consequences⁴⁵.

22 But when a plaintiff seeks a declaration not of personal rights or liabilities – for example, a declaration of invalidity of a law for breach of the implied freedom of political communication, which is not a personal right⁴⁶ – a plaintiff must establish an interest other than that which any other ordinary member of the public

43 *Aussie Airlines Pty Ltd v Australian Airlines Ltd* (1996) 68 FCR 406 at 414; *Bateman’s Bay* (1998) 194 CLR 247 at 264 [43]; *Truth About Motorways* (2000) 200 CLR 591 at 611-612 [46]; *Edwards v Santos Ltd* (2011) 242 CLR 421 at 434-435 [34], see also 425 [1]; *CGU Insurance* (2016) 259 CLR 339 at 356-357 [42], 371 [96], 376 [109]; *Hobart International Airport* (2022) 96 ALJR 234 at 246-247 [34], 258 [86]; 399 ALR 214 at 224, 239.

44 See *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177 at 223 [105]-[106], 257 [198].

45 *Ainsworth* (1992) 175 CLR 564 at 581-582, 596-597; *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 65 [20], 65-66 [22]-[23], 76 [64], 89 [109], 90 [112], 123 [235]-[236], 151-152 [349]-[350]. See also *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 358-359 [100]-[103].

46 See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560-561, 567.

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has in upholding the law generally⁴⁷. A person is not sufficiently interested "unless [they are] likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if [their] action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if [their] action fails"⁴⁸. The test for a sufficient interest is broad and flexible, varying according to the nature and subject matter of the litigation⁴⁹. However, whether a plaintiff's interest is sufficient is a question of degree, not a question of discretion⁵⁰. The plaintiff must show that "success in the action would confer on [them] ... a benefit or advantage greater than [that] conferred upon the ordinary member of the community; or ... relieve [them] of a detriment or disadvantage to which [they] would otherwise have been subject ... to an extent greater than the ordinary member of the community"⁵¹. They must have more than a mere intellectual or emotional concern, and more than a belief, however strongly held, that the law or the *Constitution* should be upheld⁵². As *Croome* demonstrates, a plaintiff may have a sufficient interest where their freedom of action is particularly affected by the impugned law⁵³. Other cases, such as *Onus v Alcoa of*

47 *Anderson v The Commonwealth* (1932) 47 CLR 50 at 51-52; *Australian Conservation Foundation* (1980) 146 CLR 493 at 526, 539, 547. See also *Hobart International Airport* (2022) 96 ALJR 234 at 252-253 [62]-[65], 259-260 [90]-[95]; 399 ALR 214 at 232-233, 240-242.

48 *Australian Conservation Foundation* (1980) 146 CLR 493 at 530.

49 *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 36; *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552 at 558; *Bateman's Bay* (1998) 194 CLR 247 at 265 [46].

50 *Onus* (1981) 149 CLR 27 at 75, quoted in *Hobart International Airport* (2022) 96 ALJR 234 at 253 [66]; 399 ALR 214 at 233.

51 *Onus* (1981) 149 CLR 27 at 75-76.

52 *Australian Conservation Foundation* (1980) 146 CLR 493 at 530, 539, 548.

53 (1997) 191 CLR 119 at 127, 138. See also *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 257; *Pharmaceutical Society of Great Britain v Dickson* [1970] AC 403 at 433, quoted in *Buckley v Tutty* (1971) 125 CLR 353 at 381; *Kuczborski* (2014) 254 CLR 51 at 107 [178].

*Australia Ltd*⁵⁴, demonstrate that the breadth of the categories of interest include economic, cultural and environmental interests⁵⁵.

No continuing matter in relation to s 35 of the EF Act

23 When the plaintiffs commenced these proceedings in June 2022, the matter within the Court's jurisdiction included the plaintiffs' challenge to the validity of s 35 of the EF Act. As TPCs registered under the EF Act whose expenditure and campaigning had been affected by that provision and could be expected to be affected in future elections, the plaintiffs had standing and a sufficient interest to seek a declaration as to the invalidity of s 35⁵⁶.

24 However, that state of affairs changed on 2 November 2022 when the Parliament of New South Wales repealed s 35⁵⁷. As mentioned, following that repeal, the plaintiffs amended the prayer for relief in their statement of claim to seek a declaration that s 35 of the EF Act, as it stood from 1 July 2018 until 2 November 2022, was invalid. The plaintiffs submitted that the Court retains jurisdiction in the matter so far as it concerns the validity of s 35, because the plaintiffs suffered for four years under the burden of the statutory norm in s 35 and modified their behaviour to avoid its criminal sanction. The plaintiffs also submitted that they have a reasonable apprehension that the State may reintroduce a provision in "materially similar" terms to s 35, and may do so before the State general election in May 2023. Neither of those matters assists the plaintiffs.

25 The plaintiffs have not demonstrated that they continue to have standing, or a real or sufficient interest, to seek a declaration as to the invalidity of s 35. The plaintiffs cannot and do not assert that any of their rights, duties or legal interests have been infringed by the past application of s 35. The plaintiffs are not the subject of enforcement action for any past breach of s 35, nor do they claim to

54 (1981) 149 CLR 27 at 36-37, 42, 43, 45, 62, 77-78.

55 See also *Robinson v Western Australian Museum* (1977) 138 CLR 283 at 301-302; *Australian Conservation Foundation* (1980) 146 CLR 493 at 530, 547.

56 *Toowoomba Foundry* (1945) 71 CLR 545 at 570; *Croome* (1997) 191 CLR 119 at 126, 137.

57 *Electoral Legislation Amendment Act*. Item 12 of Sch 3 commenced by proclamation of the Governor on 2 November 2022.

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have contravened s 35 in the past⁵⁸. Nor do they assert that a declaration of invalidity would assist them in vindicating any right, duty or legal interest. The plaintiffs assert invalidity solely by reference to the implied freedom of political communication. That implied freedom is not a personal right⁵⁹; it is a freedom from unjustified legislative interference.

26 At best, the plaintiffs' concern is whether their past compliance with s 35 was necessary. It can be accepted that the plaintiffs modified their behaviour to comply with the law, and that persons should not be disadvantaged in seeking to challenge the validity of a law because of their compliance with the law⁶⁰. However, unlike the impugned law in *Croome*, s 35 of the EF Act no longer restricts the plaintiffs' freedom of action or interferes with their activities⁶¹. The only advantage that the plaintiffs would achieve from a declaration of invalidity would be the satisfaction of a statement by the Court validating their contentions of an historical wrong⁶². The plaintiffs cannot point to any other foreseeable consequences from the grant of a declaration. There is not a justiciable controversy and not a matter.

27 The plaintiffs' argument based on their apprehension of what the New South Wales Parliament might do in future can be dealt with briefly. It may be accepted that, in some cases, a plaintiff may be able to show that there will be foreseeable consequences from the grant of a declaration where the plaintiff can satisfy the Court that, even though the asserted wrong has ceased, there is a risk of repetition⁶³. For example, in *Plaintiff M68/2015 v Minister for Immigration and Border Protection* the plaintiff did not lose standing to seek a declaration as to the lawfulness of her detention on Nauru by reason of the change of circumstances after the commencement of the litigation when the Nauruan Government announced its intention to allow for freedom of movement of asylum seekers and

58 See *Smethurst* (2020) 272 CLR 177 at 223-224 [107].

59 See fn 46 above.

60 cf *Croome* (1997) 191 CLR 119 at 138.

61 (1997) 191 CLR 119 at 127, 136-138. See also *Brown v Tasmania* (2017) 261 CLR 328 at 343 [17]. cf *Kuczborski* (2014) 254 CLR 51 at 107 [178].

62 *Australian Conservation Foundation* (1980) 146 CLR 493 at 530.

63 See *Wragg v New South Wales* (1953) 88 CLR 353 at 370-371; *Plaintiff M68* (2016) 257 CLR 42 at 66 [23], 76 [64], 123 [235].

to introduce legislation to that effect at the next sitting of the Nauruan Parliament⁶⁴. There remained the issue of whether what had been done could be repeated⁶⁵. While that line of reasoning may be available in respect of administrative decisions or delegated legislation⁶⁶, it is a different matter when it comes to Acts of Parliament. The Courts and the Parliament must be astute to recognise their respective constitutional roles⁶⁷. Plainly, the Court cannot be asked to rule on the past invalidity of s 35 in anticipation that the Parliament may re-enact the provision, or to rule on the validity of possible future legislation that might be "materially similar" to s 35⁶⁸.

28 For those reasons, the Court no longer has jurisdiction to hear and determine the plaintiffs' claim with respect to the purported invalidity of s 35 of the EF Act, now repealed. The scope of the constitutional "matter" before the Court has contracted and the only remaining issue is the validity of s 29(11). Question 1A(a) should be answered "No".

29 Given that conclusion, it is unnecessary to answer question 1A(b) – whether the Court, in its discretion, should hear and determine the question of the purported invalidity of s 35 of the EF Act, now repealed. That question was premised on the Court having jurisdiction to hear and determine that claim.

64 *Plaintiff M68* (2016) 257 CLR 42 at 64-65 [19], 65-66 [23], 90 [111]-[112], 123 [235].

65 *Plaintiff M68* (2016) 257 CLR 42 at 123 [235], quoting *Wragg* (1953) 88 CLR 353 at 371; see also 66 [23], 76 [64], 90 [112]. See also *Brown* (2017) 261 CLR 328 at 343 [17].

66 cf *City of Mesquite v Aladdin's Castle, Inc* (1982) 455 US 283 at 289; *Northeastern Florida Chapter of the Associated General Contractors of America v City of Jacksonville, Florida* (1993) 508 US 656 at 661-662. cf *Massachusetts v Oakes* (1989) 491 US 576 at 582-584, 586.

67 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 332.

68 See generally *Osborne v The Commonwealth* (1911) 12 CLR 321 at 351-352, 356; *Hughes and Vale Pty Ltd v Gair* (1954) 90 CLR 203 at 205; *Cormack v Cope* (1974) 131 CLR 432 at 453-454, 464-465.

Kiefel CJ
 Gageler J
 Gordon J
 Gleeson J
 Jagot J

14.

Question 1 – Validity of s 29(11) of the EF Act

30 It was accepted by the parties and the Commonwealth that caps on electoral expenditure (including s 29(11) of the EF Act) impose an effective and direct burden on political communication by restricting the capacity of the persons to whom they apply to participate in political debate during an election campaign⁶⁹, and that where a law imposes a burden on the freedom, it must be justified⁷⁰.

31 It was also accepted that the polity imposing the burden on political communication bears the persuasive onus of establishing that justification⁷¹. That is, at least in a practical sense, it is for the State defending the validity of the impugned provisions to justify the burden⁷². The Court must be satisfied of the existence of facts on which the State's justification for the burden depends⁷³. That requirement was determinative in *Unions [No 2]*.

32 As explained earlier in these reasons, shortly after oral argument had completed, the State told the Court that it now accepted that s 29(11) of the EF Act was invalid. The State said that it had changed its position because the JSCEM had just reported to the Parliament of New South Wales, among other things, that the cap on TPCs for a by-election should be increased to \$198,750 indexed.

69 *Unions [No 1]* (2013) 252 CLR 530 at 560 [61], 584-585 [161]-[163]; *Unions [No 2]* (2019) 264 CLR 595 at 607-608 [15], 632 [96], 646-647 [138]-[140], 655 [164].

70 *Lange* (1997) 189 CLR 520 at 567-568; *Unions [No 1]* (2013) 252 CLR 530 at 556 [44]; *McCloy* (2015) 257 CLR 178 at 193-195 [2], 258 [220]; *Brown* (2017) 261 CLR 328 at 359 [88], 368 [123], 369 [127], 394 [218], 431 [317]-[318], 433 [324]; *Unions [No 2]* (2019) 264 CLR 595 at 616 [45], 631-632 [93]-[95], 640 [117], 650-651 [151]-[152]; *LibertyWorks Inc v The Commonwealth* (2021) 95 ALJR 490 at 504 [45]; 391 ALR 188 at 199-200.

71 *Unions [No 2]* (2019) 264 CLR 595 at 616 [45], 631 [93], 640-641 [117]-[118], 650 [151]-[152].

72 *Brown* (2017) 261 CLR 328 at 370 [131]; *Unions [No 2]* (2019) 264 CLR 595 at 618 [53], 632 [95]-[96], 640-641 [117]-[118], 651 [153].

73 *Unions [No 2]* (2019) 264 CLR 595 at 616 [45], 622 [67], 632 [95]-[96]. See also *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 222; *Hughes and Vale Pty Ltd v New South Wales [No 2]* (1955) 93 CLR 127 at 165; *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280 at 307.

15.

The plaintiffs and the State consented to the 2022 JSCEM Report being brought to the attention of the Court. The parties submitted that the Court should answer question 1 stated for the opinion of the Full Court (which asked whether s 29(11) is invalid) "Yes".

33 Questions of the validity of a law cannot be decided by agreement of the parties. It is for the Court to be satisfied that a law is invalid before answering in that way a question reserved for the opinion of the Full Court and before granting any final declaratory or other relief. In the present case, the point of determinative significance is that the State no longer seeks to justify the burden which s 29(11) imposes on communication on governmental and political matters. And, as explained above, the polity imposing the burden bears the persuasive onus of establishing that the burden is justified.

34 The plaintiffs maintain their complaint that s 29(11) is invalid. This provision (unlike s 35) has not been repealed. It remains a purported law of New South Wales. The State has said nothing about any proposal to repeal or amend s 29(11). The plaintiffs have a sufficient interest to seek relief and the State accepts (by its agreement that question 1 should be answered "Yes") that there is continued utility in answering question 1 in that way. Only if that is done (and the law is declared invalid) are the plaintiffs relieved of the purported effect of s 29(11) on their electoral expenditure in future by-elections and the risk of the attempted enforcement of that provision. Section 29(11) imposes a burden on the implied freedom and that burden has not been justified. For those reasons, question 1 should be answered "Yes".

Question 3 – Costs

35 There was no dispute that the State should pay the plaintiffs' costs in relation to question 1. The plaintiffs, however, submitted that the State should pay all of the plaintiffs' costs. That submission is rejected. In all the circumstances, there should be no order as to costs in relation to question 1A and question 2. The costs in relation to those questions should lie where they fall⁷⁴.

⁷⁴ *Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin* (1997) 186 CLR 622 at 624-625.

Kiefel *CJ*
Gageler *J*
Gordon *J*
Gleeson *J*
Jagot *J*

16.

Answers

36 For those reasons, the questions stated by the parties for the opinion of the Full Court should be answered as follows:

Question 1: Yes.

Question 1A: (a) No.

(b) Unnecessary to answer.

Question 2: Does not arise.

Question 3: In relation to question 1, the defendant. Otherwise, there should be no order as to costs.

EDELMAN J.

An urgent hearing of what became a non-urgent case

37 This proceeding, by way of special case in the original jurisdiction of this Court, involves a challenge by the plaintiff trade union bodies to two provisions of the *Electoral Funding Act 2018* (NSW) ("the EF Act"). Each provision was challenged on the basis that it was inconsistent with the implied freedom of political communication in the *Constitution*.

38 Question 1 challenged s 29(11) of the EF Act which set the applicable cap on electoral expenditure at \$20,000 for a third-party campaigner in a by-election. Question 2 challenged s 35 of the EF Act which created an offence for a third-party campaigner to act in concert with others to incur electoral expenditure that exceeded the applicable cap for the third-party campaigner.

39 Question 1 was not urgent because there was no pending by-election. Indeed, the absence of a pending by-election meant that this Court did not have before it the extent of facts it might otherwise have had, such as additional facts concerning how the \$20,000 electoral expenditure cap might have been expected to constrain the behaviour of third-party campaigners in a by-election. Further, on 10 March 2022, an inquiry had been referred to the Joint Standing Committee on Electoral Matters ("the JSCEM") to examine the cap on third-party campaigners' electoral expenditure in s 29(11) and whether the prohibition on acting in concert in s 35 should be retained, amended, or repealed. On 23 November 2022, after this Court heard the special case, the JSCEM report was tabled in Parliament. The JSCEM report was subsequently added to the special case by an order that was not opposed by the defendant to this proceeding, the State of New South Wales. In light of the JSCEM report, the defendant conceded that question 1 should be answered "Yes" in favour of invalidity and that it should pay the costs related to that question.

40 Unlike question 1, question 2 initially required an urgent answer due to the State general election pending in New South Wales in 2023. As late as the directions hearing on 28 September 2022, it was anticipated that a proceeding would be heard in this Court with some expedition on 16 and 17 November 2022. But on 19 October 2022, an amended version of the *Electoral Legislation Amendment Bill 2022* (NSW) was passed by both Houses of Parliament, repealing s 35 of the EF Act. There was no longer any urgency to whatever remained of the challenge.

41 The consequence of these developments was that the hearing on 16 and 17 November 2022 raised two significant constitutional issues where the only immediate purpose of adjudicating those issues was to determine who should pay the costs of the hearing. And, even then, the issue of costs in relation to question 1

was the subject of agreement. The central issues in dispute concerned whether there were sufficient issues in dispute.

The new issues that emerged: what remained of the dispute?

42 By the time of the hearing, the first issue was whether there was even jurisdiction for this Court to determine the previously urgent question 2 in light of the repeal of s 35. In the absence of standing of the plaintiffs, there could be no matter before this Court and therefore no jurisdiction for this Court to decide the question. A new question 1A(a) therefore asked: "Does the Court have jurisdiction to hear and determine the question?" And, if this Court had jurisdiction, a new question 1A(b) asked: "Should the Court in its discretion hear and determine the question?"

43 As to question 1, concerning the validity of s 29(11), the answer to that question was conceded by the State of New South Wales shortly after the oral hearing. As outlined above, that concession was prompted by the JSCEM report which recommended that the electoral expenditure cap for third-party campaigners in by-elections be increased to \$198,750. The Committee "accepted the evidence of various stakeholders that the current cap makes it very difficult for third-party campaigners to participate effectively in campaigning during by-elections".

The first issue: do the plaintiffs still have standing?

44 During the oral hearing, this Court indicated that at least a majority of the Court would answer "no" to either question 1A(a) or 1A(b). For the reasons below, in addition to those in the joint reasons of Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ, I would answer "no" to question 1A(a). This Court has no jurisdiction to hear and determine question 2. The discussion on this issue below is in addition to the joint reasons.

Standing in private and public legal relations

45 Standing is an essential element of, and is thus "subsumed within"⁷⁵, the constitutional requirement of a matter. If the plaintiffs lack standing to agitate their

75 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 68 [152], citing *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 550-551, *Croome v Tasmania* (1997) 191 CLR 119 at 124-126, 132-136, *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 262 [37], and *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 610-613 [42]-[50], 629-633 [101]-[109], 659-660 [177]-[179]. See also *Kuczborski v Queensland* (2014) 254 CLR 51 at 60-61 [5].

asserted controversy, then there can be no matter before the Court⁷⁶. The rules of standing have, however, long been different between, on the one hand, a person's own, or private, legal relations and, on the other hand, legal relations involving the public generally (rather than any specific person or persons). The distinction was described by Lord Wilberforce as "fundamental"⁷⁷.

46 Every person has standing to seek legal remedies concerning their own legal relations (rights, freedoms, powers, and immunities) or "rights" in a loose sense. But, apart from exceptional cases, a person who is not acting on behalf of another does not have standing to intervene to seek legal remedies concerning the rights of others⁷⁸. That is why, for example, a person cannot generally sue on a contract to which they are not a party⁷⁹. But where a person's private rights are infringed, that person will have standing to vindicate those rights, even if no future consequences would arise from the remedy sought.

47 The position is different in public law. In *Gouriet v Union of Post Office Workers*⁸⁰, Lord Diplock said:

"[T]he jurisdiction of a civil court to grant remedies in private law is confined to the grant of remedies to litigants whose rights in private law have been infringed or are threatened with infringement. To extend that jurisdiction to the grant of remedies for unlawful conduct which does not infringe any rights of the plaintiff in private law, is to move out of the field of private into that of public law with which analogies may be deceptive and where different principles apply."

48 In other words, different principles apply in circumstances where relief is not sought for any contravention of or encroachment upon a person's own legal relations but is instead sought in respect of legal relations affecting the public as a whole, such as a public right that a statutory duty be enforced or that a statutory power be properly considered or exercised. These different principles also apply in respect of a public freedom from legislative power which has the effect that a

76 *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234 at 245-246 [31], 249-250 [49], 256-257 [79]; 399 ALR 214 at 223, 228, 237.

77 *Gouriet v Union of Post Office Workers* [1978] AC 435 at 482.

78 See *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234 at 257-258 [84]-[86]; 399 ALR 214 at 239.

79 *Wilson v Darling Island Stevedoring and Lighterage Co Ltd* (1956) 95 CLR 43 at 67.

80 [1978] AC 435 at 500.

purported law is invalid. In *Croome v Tasmania*⁸¹, Gaudron, McHugh and Gummow JJ recognised that issues of standing to bring an action challenging the validity of a statute were analogous to "the sufficiency of an interest to support an action to prevent the violation of a public right or to enforce the performance of a public duty".

49 Traditionally, where it is alleged that there was an omission to perform a public duty, an improper exercise of a public power, or a contravention of a public freedom, and the alleged omission, exercise, or contravention was not one that affected an individual's own rights, the decision to commence proceedings was generally the prerogative of the relevant Attorney-General, either *ex officio* or on the relation of an individual⁸². The "fine judgment as to what the public interest truly requires" was seen as one "that is arguably best made by the Attorney-General who must answer to the people, rather than by unelected judges"⁸³.

50 Over time, perhaps due to the increasingly political nature of the role of the Attorney-General⁸⁴, the rules of standing for individuals were relaxed. Their content came to be determined by the doubly elastic concept of "special interest" which combines the elasticity of "interest" with that of "special"⁸⁵. But even the loose, common law concept of a special interest has limits.

81 (1997) 191 CLR 119 at 132, referring to *Davis v The Commonwealth* (1986) 61 ALJR 32 at 35; 68 ALR 18 at 23, and *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582.

82 *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 526; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 276 [82]; *Taylor v Attorney-General (Cth)* (2019) 268 CLR 224 at 262 [105]. See also *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 473-474 [287].

83 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 278 [86].

84 Mason, "Access to Constitutional Justice: Opening Address" (2010) 22(3) *Bond Law Review* 1 at 2-4; Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 7th ed (2022) at 850-851 [14.70].

85 *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27; *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247; *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234; 399 ALR 214.

51 Reference to a "special interest" is to the connection between the plaintiff and the outcome of the litigation. If standing were to be recognised without an interest of the plaintiff that is sufficiently special to mark the plaintiff out from the rest of the public in relation to that outcome, the judiciary would, in effect, have abolished the rules of standing. The connection between a plaintiff and a subject matter will only be sufficiently special if the outcome has "foreseeable consequences"⁸⁶ for the plaintiff that are significantly different from the rest of the general public: some prospective advantage or disadvantage beyond mere expectations, desires, or intellectual or emotional interests⁸⁷.

52 If standing is established in respect of either private or public legal relations it is not necessarily established for all time. For instance, subject to legislation, standing to vindicate private rights will be extinguished with the death of a plaintiff. And standing to seek a declaration of invalidity of legislation on the grounds of a public freedom can be extinguished if the declaration ceases to have any foreseeable consequences. In this respect, the position in Australia is the same as that in the United States: "The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence"⁸⁸.

No continued standing to enforce a public freedom in this case

53 This Court has said that the implied freedom of political communication in the *Constitution* does "not confer personal rights on individuals"⁸⁹. It is a public freedom from laws that impose an unjustified burden upon political communication. The plaintiffs' challenge to the validity of s 35 of the EF Act in question 2 of the special case relied upon that public freedom in its effect on the public at large. It was a claim that could only be brought by the Attorney-General for the State of New South Wales or by any person with a sufficiently special interest.

86 *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 359 [103].

87 See *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 530-531; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 423-424 [115].

88 *United States Parole Commission v Geraghty* (1980) 445 US 388 at 397, quoting Monaghan, "Constitutional Adjudication: The Who and When" (1973) 82 *Yale Law Journal* 1363 at 1384. See Chemerinsky, *Federal Jurisdiction*, 6th ed (2012) at 131-132.

89 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560.

54 Prior to the repeal of s 35 the plaintiffs had a sufficiently special interest in the answer to question 2 as to the validity of s 35 of the EF Act. Unlike members of the public at large, the answer to that question would affect the extent of their liberty to campaign with another person or other persons at future by-elections. But once s 35 was repealed a declaration of the past invalidity of s 35 would have no consequence that affected the plaintiffs differently from any other member of the public in relation to whether or not s 35 had previously been invalid.

55 The plaintiffs submitted that they had a special interest in the outcome of that question because they had been affected by s 35 in the past. They relied upon this Court's decision in *Plaintiff M68/2015 v Minister for Immigration and Border Protection*⁹⁰. In that case, the plaintiff had standing to seek a declaration that she had been unlawfully detained in Nauru despite the fact that the Government of Nauru had published a notice in its Gazette of its intention to introduce legislation at the next sitting of the Parliament of Nauru to provide for freedom of movement for asylum seekers.

56 In *Plaintiff M68/2015*, the published notice had the effect of removing any basis for an injunction or a writ of prohibition. But the plaintiff remained entitled to seek a declaration. That entitlement existed even if there were no future consequences for the plaintiff, such as if the plaintiff had brought a claim for damages or if there were a prospect that the Parliament of Nauru might reintroduce similar legislation that could permit detention of the plaintiff in the future. The reason for the entitlement, and the difference between this case and *Plaintiff M68/2015*, is that the latter concerned the plaintiff's private right to liberty. The past infringement of that right was sufficient to establish standing. No public right needed to be declared or enforced. No future consequences needed to be shown.

57 The plaintiffs also relied on the decision of this Court in *Croome*⁹¹. In that case, the plaintiffs had standing to challenge the validity of a Tasmanian criminal law on the basis that it was inconsistent with a Commonwealth law and therefore inoperative by way of s 109 of the *Constitution*. The plaintiffs' interest was sufficient because their past conduct rendered them liable to future prosecution, conviction, and punishment. That liability was not removed because the State of Tasmania, by the Director of Public Prosecutions, did not presently propose to prosecute⁹². The plaintiffs' mere liability was a sufficiently special interest for them to have standing to challenge the Tasmanian law.

90 (2016) 257 CLR 42.

91 (1997) 191 CLR 119.

92 (1997) 191 CLR 119 at 127-128, 138.

58 By contrast with *Croome*, the repeal of s 35 of the EF Act had the effect of removing, on the present law, even the mere possibility of a future liability for the plaintiffs and therefore any special interest⁹³. As the plaintiffs submitted, the effect of this reasoning is that a plaintiff who has contravened a criminal provision in the past has standing to bring a challenge to that provision, but a plaintiff who reluctantly complied with the provision cannot. But the rules of standing in public law are neither sanctions for past conduct nor rewards for compliance with the law. They are concerned with identifying the proper person to assert and vindicate public legal relations.

59 The plaintiffs then submitted that they had a special interest because they might be exposed to a provision like s 35 in the future. In effect, they relied on an analogy with a *quia timet* ("because one fears") or "apprehension" injunction in private law. They submitted that such an apprehension arose due to the refusal by the State of New South Wales, acting by its Executive government, to give an undertaking that the New South Wales Parliament would not reintroduce a provision in similar form to s 35.

60 Again, this analogy with the violation of private rights is inapt. Even putting to one side any issues concerning whether the Executive can offer an undertaking affecting the legislative power of Parliament, the mere possibility that potentially invalid legislation might be introduced into the New South Wales Parliament in the future is neither a subject matter suitable for challenge nor a sufficiently foreseeable consequence to establish a special interest. This case is not one which seeks to test the extent to which otherwise valid primary legislation might be disapplied (such that it "could not validly apply"⁹⁴) from empowering future, threatened regulations⁹⁵. Nor does it raise any exceptional circumstances that might arguably permit a challenge to a possible future law, including issues of constitutional urgency⁹⁶ or legislative action by a "manipulative litigant ... immunizing itself from suit indefinitely, altering its behaviour long enough to secure a dismissal and then reinstating it immediately after"⁹⁷.

93 See *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177 at 223-224 [106]-[107].

94 *Australian Boot Trade Employees' Federation v The Commonwealth* (1954) 90 CLR 24 at 46.

95 Compare *Wragg v New South Wales* (1953) 88 CLR 353 at 367, 371, 399-400.

96 *Massachusetts v Oakes* (1989) 491 US 576 at 586.

97 *Town of Portsmouth, Rhode Island v Lewis* (2016) 813 F 3d 54 at 59, quoting *American Civil Liberties Union of Massachusetts v United States Conference of Catholic Bishops* (2013) 705 F 3d 44 at 54-55.

The second issue: large questions but no remaining dispute

61 On 25 November 2022, an affidavit was filed on behalf of the plaintiffs exhibiting correspondence between the parties, including a concession by the State of New South Wales that "[i]n light of the JSCEM Report, the State now concedes that Question 1 in the Further Amended Special Case [concerning the validity of s 29(11)] should be answered 'Yes'".

62 This Court has previously declined to answer a question posed in a special case where the parties were no longer in dispute about the answer to the question. In *Brown v Tasmania*⁹⁸ the first question posed by the special case was whether the plaintiffs had standing to seek the relief they sought. The issue was disputed in written submissions, but the State of Tasmania ultimately conceded that the plaintiffs had standing. Despite standing being an essential condition for a matter, and therefore jurisdiction, this Court answered the question by saying only that it was unnecessary to answer.

63 On the other hand, just as a court might make a declaration in the absence of a contradictor⁹⁹, there may be circumstances where this Court will answer a question although the parties agree upon the answer. But in the particular circumstances of this case, it is unnecessary and inappropriate to answer question 1. The particular circumstances are threefold: (i) the weakness of the plaintiffs' interest; (ii) the lack of any substantial controversy; and (iii) the prudential consideration of not addressing constitutional questions, particularly those that have not been argued, when it is unnecessary to do so.

(i) *The weakness of the plaintiffs' interest*

64 It can be assumed that, while s 29(11) of the EF Act remains in force, the plaintiffs' interest remains sufficient to obtain an answer to question 1. But that interest is not strong. In light of the concession by the State of New South Wales, the strength of the plaintiffs' interest reduces to the possibility of a concatenation of all of the following circumstances:

1. a by-election will be held at some unknown time in the future;
2. the plaintiffs will wish to campaign at that by-election;

98 (2017) 261 CLR 328.

99 *IMF (Australia) Ltd v Sons of Gwalia Ltd* (2004) 211 ALR 231 at 244 [47]. See also *Oil Basins Ltd v The Commonwealth* (1993) 178 CLR 643 at 649-650; *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* (2012) 201 FCR 378 at 387 [30].

3. the plaintiffs will each wish to spend more than \$20,000 in the course of that by-election campaign; and
4. by that unknown time in the future, the \$20,000 electoral expenditure cap which the State now concedes to be invalid, and which the JSCem has recommended be replaced with a \$198,750 cap, will still be extant and enforceable.

65 In *Bruce v The Commonwealth Trade Marks Label Association*¹⁰⁰, the plaintiffs sought a declaration that the defendants were not entitled to register a mark or label on the basis that Pt VII of the *Trade Marks Act 1905* (Cth) was invalid, in circumstances in which they alleged that the particular application for registration of a mark would injure them in their business. Prior to the hearing in this Court the application for registration was withdrawn. In the course of the hearing, each member of the Court made observations to the effect that there was no longer any controversy. This Court unanimously ordered that the case be struck out of the list.

66 If the plaintiffs' interest in *Bruce* had been judged by today's more liberal rules of standing concerning public rights or freedoms, it may be that the plaintiffs would have had a sufficient interest to satisfy the jurisdiction of this Court for a special case. That special interest would be based on a real possibility that future registration of another mark might have been sought that would injure the plaintiffs in their business. But it is hard to see why this Court would not decline to answer the question as a matter of discretion. The slight nature of the plaintiffs' interest, with the serious unlikelihood that an answer would have any consequences for the plaintiffs, would dramatically reduce the utility of answering the question. The same is true of the present special case.

(ii) *The lack of any substantial controversy*

67 There are cases where a plaintiff seeks to establish a freedom "to act in a particular way, free from criminal liability or free from interference by government" but "in cases of this class, the plaintiff is seeking to establish a [freedom] which is denied by the defendant, and the declaration (if made) settles the [freedom] in controversy between the parties"¹⁰¹. But in this case there is no longer any substantial controversy between the parties.

100 (1907) 4 CLR 1569 at 1571.

101 *Re Tooth & Co Ltd* (1978) 19 ALR 191 at 206-207. See also *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 596, referring to *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438 at 448.

68 The concession by the State of New South Wales that s 29(11) is invalid removes the substance of the controversy between the plaintiffs and the State of New South Wales. It is possible in theory that the Parliament of New South Wales will not repeal s 29(11) despite the State conceding it to be invalid. But that does not mean that the plaintiffs are exposed to a liability for future prosecution based on that law. In this respect, the position is different from the plaintiffs' situation in *Croome*, where the State did not have a present intention to enforce a law that it asserted to be valid but the plaintiffs remained exposed to a liability to prosecution. In this case — whatever may be the position concerning estoppel in relation to the exercise of a statutory discretion¹⁰² — it is strongly arguable that, just as it would be an abuse of process for the prosecution to resile from a promise not to prosecute¹⁰³, it could be an abuse of process for the State to prosecute the plaintiffs if they were to rely on the concession in their expenditure decisions in a future by-election.

(iii) *Prudence*

Large constitutional questions prior to the concession by the State of New South Wales

69 Prior to the concession by the State of New South Wales, this Court could not have concluded that s 29(11) of the EF Act had an illegitimate purpose, or was not justified, without examining significant, and difficult, constitutional questions that arise from the material that the parties put before the Court. The matters relied upon by the State of New South Wales for justification included agreed facts and alleged absences of facts, such as the alleged absence of any significant number of third-party campaigners who had spent close to \$20,000 at a by-election.

70 The first significant question that arose in relation to the legal issues of justification was whether the purpose of s 29(11) of the EF Act is legitimate. That question could not be resolved by a simple application of this Court's decision in *Unions NSW v New South Wales* ("*Unions [No 2]*")¹⁰⁴. In that case, Gageler J and Nettle J were the only members of the Court to conclude that the purpose of the

102 See *Laker Airways Ltd v Department of Trade* [1977] QB 643 at 707; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 18. Compare *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 220-221.

103 *Delellis v The Queen* (1989) 4 CRNZ 601 at 604; *Williamson v Trainor* [1992] 2 Qd R 572 at 583; *R v Croydon Justices; Ex parte Dean* [1993] QB 769 at 778. See also *R v Horseferry Road Magistrates' Court; Ex parte Bennett* [1994] 1 AC 42 at 61; *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* (2018) 266 CLR 325 at 408 [246]-[247].

104 (2019) 264 CLR 595.

impugned law, namely s 29(10) of the EF Act, was legitimate¹⁰⁵. I was the only member of this Court to conclude that the purpose of s 29(10) of the EF Act was illegitimate. In my view, one purpose of that provision, not merely an effect of it, was the suppression of political communication by third-party campaigners, particularly in light of Parliament's decision to introduce s 29(10) with an electoral expenditure cap for third-party campaigners at less than half the previous level whilst increasing the cap for others¹⁰⁶.

71

The approach taken by Kiefel CJ, Bell and Keane JJ¹⁰⁷, and Gordon J¹⁰⁸, was to assume a legitimate purpose and then to assess whether the burden on the freedom of political communication could be justified by reference to that assumed purpose. There are, with respect, grave difficulties in applying that approach consistently with structured proportionality analysis. Such an approach of applying an imagined purpose undermines the legitimacy of structured proportionality analysis where justification of a provision depends at every stage upon application of the actual or "true"¹⁰⁹ purpose of the provision at the appropriate level of generality. As Dr Chordia has observed, without determination of the "true 'purpose'" of a law "it is not possible to carry out the analysis required under each of the stages of structured proportionality analysis"¹¹⁰. For instance, one of the very reasons for the "suitability" inquiry is to ensure that the actual purpose has been correctly identified at the appropriate level of generality¹¹¹. One might also wonder whether it would be necessary to assume other legitimate purposes if the initially assumed purpose were found to be insufficient to justify the provision. It may be that there is a point at which the benefit of transparent reasoning is so substantially

105 (2019) 264 CLR 595 at 628 [83], 637-638 [109]-[110].

106 (2019) 264 CLR 595 at 674 [222].

107 (2019) 264 CLR 595 at 608 [19], 613 [35]-[38].

108 (2019) 264 CLR 595 at 648-649 [146], 651 [154].

109 *Brown v Tasmania* (2017) 261 CLR 328 at 362 [96].

110 Chordia, *Proportionality in Australian Constitutional Law* (2020) at 175-176. See also Carter, *Proportionality and Facts in Constitutional Adjudication* (2021) at 23, 32; Barak, *Proportionality: Constitutional Rights and their Limitations* (2012) at 529-530.

111 *Clubb v Edwards* (2019) 267 CLR 171 at 335 [472]-[473]; *LibertyWorks Inc v The Commonwealth* (2021) 95 ALJR 490 at 536 [201]; 391 ALR 188 at 242. See also at (2021) 95 ALJR 490 at 504 [45]; 391 ALR 188 at 199-200. See also *McCloy v New South Wales* (2015) 257 CLR 178 at 212-213 [67]-[68].

diminished by applying structured proportionality without coherent structure that it will be necessary to say *le jeu n'en vaut pas la chandelle*¹¹².

72 If the legislative purpose or purposes of s 29(11) were all held to be legitimate, that conclusion might need to be reached without reference to the vague metaphors of "avoiding drowning out" or "levelling the playing field". It became apparent during the oral hearing of this case that those metaphors — used by members of this Court in *Unions [No 2]*, including me — are capable of being understood in different ways. The extent of the burden upon political communication would need to be tested by reference to a coherently identified legitimate purpose to determine whether it is justified. The present approach of this Court is to conduct that testing, and assess that justification, by an approach of structured proportionality based upon the facts before the Court. But, as will be explained below, there are large (and unargued) questions about the manner in which those facts should be used in that analysis.

The effect of the concession by the State of New South Wales

73 This Court is not bound by a concession of law made by a party. The parties, by agreement between themselves, cannot dictate the answer to be given by the Court. In circumstances where this Court has facts before it that were said during a contested hearing to justify the legislation, it would be a large step for this Court to invalidate legislation on the say-so of the parties without being satisfied of the correctness of that conclusion.

74 If this Court could not have answered question 1 prior to the concession by the State of New South Wales without transparent reasoning that engages with substantial constitutional questions, and if the concession cannot itself satisfy the Court of the answer, the issue becomes whether the JSCCM report (upon which the concession was based) is itself sufficient to satisfy the Court either that there is an illegitimate purpose for s 29(11) or that the legitimate purpose cannot justify the extent of the burden upon political communication.

75 One difficulty with reaching any conclusion based on the JSCCM report is that no substantial submissions about that report were made by either party. This Court had no contradictor to address the report's effect on purpose or justification. The lack of any substantial submissions, or contradiction, concerning the JSCCM report also means that another large issue of constitutional law was not raised: the manner in which the JSCCM report can be used in the justification analysis.

76 As the State of New South Wales accepted in oral argument, the purposes of s 29(11) must be determined at the time the section was enacted in 2010, with

112 "The game's not worth the candle": *The Oxford-Hachette French Dictionary*, 3rd ed (2001) at 1028.

any modifications to that purpose that arose as a result of subsequent amendments to the statutory scheme. Statutory purposes do not alter based on subsequent facts. How, then, does a report in 2022 shed light on the legislative purpose in 2010 as modified by subsequent amendments to related provisions? No submissions were made on this significant question.

77 If the relevance of the JSCem report, and the basis of the concession, was not that the JSCem report supported an illegitimate purpose of s 29(11) but was instead that it demonstrated an inability to justify the burden on political communication by reference to a legitimate purpose, then, again, this Court had no submissions on why that was so. If the JSCem report is to be taken into account as providing evidence of the reasonable costs of conducting a by-election campaign, thus supplementing the agreed facts in the special case, then questions arise as to: (i) how costs in 2022 could invalidate legislation passed many years earlier; (ii) whether those costs might have been reasonably anticipated when enacting the legislation; (iii) whether the costs would have the effect of invalidating s 29(11) entirely or requiring its disapplication in so far, and for so long, as it unreasonably prevented a by-election campaign being conducted by third-party campaigners¹¹³.

78 It is commonly accepted that facts subsequent to the enactment of legislation can be used to justify (or to preclude justification of) a burden on political communication by demonstrating the effects that could reasonably have been anticipated at the time of enactment or modification¹¹⁴. But it is far more controversial for subsequent facts that were not reasonably foreseeable to be used to justify (or to preclude justification of) that burden.

79 In some cases, a blunt approach has been applied which appears even to exclude consideration of reasonably foreseeable subsequent facts, at least where those facts are used with the benefit of hindsight. On one view, that was the approach taken by some members of this Court in *Murphy v Electoral Commissioner*¹¹⁵, where this Court did not invalidate a law that had existed for many years which provided for the close of the Electoral Rolls on the seventh day after the date of the writ for an election. In applying an approach of structured proportionality, French CJ and Bell J said of advances in technology that might make it possible to keep electoral rolls open for longer than making the provisions invalid on this basis "would allow a court to pull the constitutional rug from under

113 Compare, for instance, *Australian Textiles Pty Ltd v The Commonwealth* (1945) 71 CLR 161 at 180-181; *Australian Boot Trade Employees' Federation v The Commonwealth* (1954) 90 CLR 24 at 46.

114 *Clubb v Edwards* (2019) 267 CLR 171 at 334-335 [470]-[471].

115 (2016) 261 CLR 28.

a valid legislative scheme upon the court's judgment of the feasibility of alternative arrangements"¹¹⁶. And Keane J described the possibility that "a law valid when made may become invalid by changes in the milieu in which it operates" as "unorthodox at a fundamental level"¹¹⁷.

Prudential considerations applied

80 It has occasionally been said in apparently absolute terms that a lack of necessity to resolve constitutional questions means that it is inappropriate to do so: if an issue need not be determined then it should not be determined. That is too absolute a proposition. With sufficient will, and a little creativity, it could very often be "unnecessary" for this Court to deal with large and difficult issues despite full argument by the parties. Such avoidance of an "unnecessary" issue might turn out to be a subterfuge, merely suppressing the issue by assuming, without deciding, what an answer to it might be and proceeding upon the basis of that assumption. And it might give rise to questions about the proper scope of this Court's constitutional responsibilities to elucidate and develop the law in addition to resolving disputes between parties.

81 On other occasions it has been said that the avoidance of constitutional questions where it is possible to do so should be the approach that is "ordinarily" applied. But even descriptions of this as the "ordinary" approach stretch the meaning of "ordinary" in light of the practice of this Court. More accurately, there is a pragmatic principle based upon considerations of prudence that is sometimes employed to avoid resolving constitutional questions when a different means of resolution permits the question to be avoided¹¹⁸. It is important, however, that the use of this "pragmatic principle" does not degenerate into an idiosyncratic exercise based upon unstated preferences for when a question should be answered. To avoid such a consequence, this Court should articulate the reasons that weigh in favour of, or against, answering constitutional questions when a constitutional question need not be answered¹¹⁹.

82 In this case, the most significant of the prudential considerations is the lack of submissions on relevant and large issues before this Court. The prudential

116 (2016) 261 CLR 28 at 55 [42].

117 (2016) 261 CLR 28 at 92 [196].

118 *Zhang v Commissioner of the Australian Federal Police* (2021) 95 ALJR 432 at 438 [22]-[23]; 389 ALR 363 at 368-369.

119 See *Mineralogy Pty Ltd v Western Australia* (2021) 95 ALJR 832 at 852-854 [100]-[107]; 393 ALR 551 at 574-576.

considerations point strongly towards the appropriate course being to answer question 1 "unnecessary to answer".

(iv) Conclusion on question 1

83 Three circumstances combine to make it unnecessary and, in my view, inappropriate to answer question 1: (i) the weakness of the plaintiffs' interest; (ii) the lack of any substantial controversy; and (iii) the prudential consideration of not addressing constitutional questions, particularly issues that have not been argued, when it is unnecessary to do so.

Conclusion

84 In circumstances where the lack of necessity to answer question 1 arises largely from the defendant's concession, it is appropriate that the defendant pay the costs of question 1, as the defendant properly accepted. There should be no order as to costs in relation to the remainder of the special case: the plaintiffs were unsuccessful in their legal arguments as to standing, but that issue only arose because of the late repeal of s 35 of the EF Act by the Parliament of New South Wales.

85 The questions stated by the parties in the special case for the opinion of the Full Court of this Court should be answered as follows:

Question 1: Unnecessary to answer.

Question 1A: (a) No.

(b) Unnecessary to answer.

Question 2: Does not arise.

Question 3: In relation to question 1, the defendant. Otherwise, there should be no order as to costs.

86 STEWARD J. The hearing and determination of the Further Amended Special Case concerning s 29(11) of the *Electoral Funding Act 2018* (NSW) ("the EF Act") proceeded in this Court in unsatisfactory and unrealistic ways. In practical terms, the question the Court was asked to determine was whether \$20,000 (indexed for inflation) was a sufficiently reasonable amount to permit a third-party campaigner to run a campaign in a by-election for an electoral district in the Legislative Assembly of New South Wales. There were three problems. The material before the Court did not establish whether or not \$20,000 was a reasonable amount. None of the plaintiffs could state whether they wished to campaign at an actual future by-election because none was forthcoming. And, in the lead up to the hearing of this case, the Joint Standing Committee on Electoral Matters of the New South Wales Parliament ("the JSCEM") had been investigating the very issue practically posed for consideration by this Court. None of the evidence or submissions that the JSCEM had received about that issue, however, were before the Court for the hearing of the Further Amended Special Case.

87 As explained by Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ, a week after the hearing of this Further Amended Special Case, the JSCEM did indeed publish its findings into the adequacy of the \$20,000 cap. By consent, the JSCEM Report was added to the Further Amended Special Case. The JSCEM found, based on the evidence that it had received and considered, that \$20,000 was inadequate and that a cap of \$198,750 should instead be introduced. In correspondence then sent to the Court by the solicitor for New South Wales, the Court was informed as follows:

"In light of the JSCEM Report, the State now concedes that Question 1 in the Further Amended Special Case should be answered 'Yes' and that Question 3 should be answered 'The State in relation to Question 1'."

88 Given the parties' stated position, the real issue is whether it is appropriate to answer question 1 of the Further Amended Special Case and grant the consequential declaration sought by the plaintiffs in circumstances where there has ceased to be any controversy between the parties. In that respect, I will assume that the Court retains its jurisdiction to make orders; the real question is whether it should make such orders and supply full reasons in support of them.

89 In *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd*, Viscount Dunedin famously said about the conditions for the grant of a declaration¹²⁰:

¹²⁰ [1921] 2 AC 438 at 448, quoted with approval in *Forster v Jododex Aust Pty Ltd* (1972) 127 CLR 421 at 437-438 per Gibbs J and *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 596 per Brennan J.

"The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought."

90 Because of the concession made by New South Wales, there is no longer a proper contradictor who retains a true interest to oppose the declaration sought by the plaintiffs. In that respect, it is well established that a true contradictor need not be someone who actually contests the form of relief sought by a plaintiff. As French J observed in *IMF (Australia) Ltd v Sons of Gwalia Ltd*¹²¹:

"The requirement of a proper contradictor in a declaratory context is not merely to ensure that the court will be provided with all materials but also that absent a contradictor there is no person to be bound by the relief sought: *Acs v Anderson* [1975] 1 NSWLR 212 at 215 per Hutley JA citing P W Young, *Declaratory Orders*, 1st ed, Butterworths, Sydney, 1975, p 210. A proper contradictor, for jurisdictional purposes, in my opinion cannot be confined to the class of party who comes to court ready to oppose the relief sought. There may be a case in which a party, whether a private person or body or a statutory regulator, expresses opposition to, and an intention to oppose, a proposed course of action by another party on the basis that it is in breach of some contractual or statutory prohibition. The party opposing the conduct may however decide for any one or more of a variety of reasons not to contest declaratory proceedings about the lawfulness of the proposed conduct. So the declaration may be made by consent or may be uncontested. This does not mean that the court lacks jurisdiction or power to grant the declaration in such a case."

91 Following from the report of the JSCem, New South Wales made a decision to agree with the plaintiffs that s 29(11) is invalid and that it should pay their costs. It therefore ceased to have any "real interest" in opposing the position of the plaintiffs. Given the concession now made by New South Wales, it could hardly be said that it retains some "interest", in the broadest possible sense of that word, in upholding the validity of a law which it now proclaims to be unconstitutional. I would therefore decline to answer question 1 and I would not, exercising my discretion, make the consequential declaration sought. Different considerations might arise were New South Wales to seek in the future to resile from what it has said.

¹²¹ (2004) 211 ALR 231 at 244 [47]. See also *Oil Basins Ltd v The Commonwealth* (1993) 178 CLR 643 at 648-650 per Dawson J; *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* (2012) 201 FCR 378 at 387 [30] per Greenwood, Logan and Yates JJ.

92 In the past, this Court has declined to answer important questions posed when relevant concessions have been made. Two examples will suffice. In *Bruce v The Commonwealth Trade Marks Label Association*¹²², the plaintiffs sought to restrain the registration of a trademark or label. They contended that the Commonwealth Parliament did not have the power to enact what was then Pt VII of the *Trade Marks Act 1905* (Cth). Barton J referred for consideration the validity of Pt VII to a Full Court. It was then discovered that the application for registration had been withdrawn. The Court refused to answer the question that had been posed by Barton J. O'Connor J aptly observed that "the Court is not empowered to decide moot questions"¹²³.

93 More recently, in *Brown v Tasmania*¹²⁴ the first question posed by the Special Case was whether the plaintiffs had standing to seek the relief they sought. Tasmania conceded this issue. The Court held that that question did not need to be answered¹²⁵.

94 I otherwise respectfully refer to and agree with the reasons of Edelman J, which are in addition to those of Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ, in relation to questions 1A and 2, which concern what was previously s 35 of the EF Act. I would also give the same answers to the questions posed for consideration by the Court as the plurality, save that, like Edelman J, I would answer question 1 by responding that it is unnecessary to answer it. New South Wales agrees that s 29(11) of the EF Act is invalid and has agreed to pay the costs of the plaintiffs in relation to question 1. I further respectfully agree with Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ that costs in relation to questions 1A and 2 should lie where they fall.

122 (1907) 4 CLR 1569.

123 (1907) 4 CLR 1569 at 1571.

124 (2017) 261 CLR 328.

125 (2017) 261 CLR 328 at 507-508; see also at 340 [5], 343 [17], 375 [154] per Kiefel CJ, Bell and Keane JJ, 397-398 [235] per Gageler J, 426 [298] per Nettle J, 479 [483] per Gordon J, 484 [499] per Edelman J.

