HIGH COURT OF AUSTRALIA

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### Details of Filing

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**IN THE HIGH COURT OF AUSTRALIA**

**SYDNEY REGISTRY** **No. S98 of 2022**

**BETWEEN**

**Unions NSW**

First Plaintiff

**New South Wales Nurses and Midwives' Association**

Second Plaintiff

**Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales**

Third Plaintiff

**New South Wales Local Government, Clerical, Administrative, Energy, Airlines & Utilities Union**

Fourth Plaintiff

and

**State of New South Wales**

Defendant

# PLAINTIFFS' REPLY

**Part I: Internet publication**

**1.** This submission is in a form suitable for publication on the internet.

**Part II: Reply**

**2.** ***Legitimate purposes for differential expenditure caps:*** The State (DS[24]-[25]) seeks to establish as a matter of "doctrine" a bright line proposition that there is a "functional distinction" between candidates/political parties and TPCs that justifies substantial variation between their respective expenditure caps. According to the State (cf CS[21]-[23]), challenges to TPC caps will almost inevitably fail at the level of purpose, and fall to be considered under justification. That proposition is wrong. Four Justices in *Unions No 2*[1] expressly rejected the like argument by the State. The claim that parties and candidates have a greater entitlement to contribute to political debate was denied by *ACTV*.[2] Few political parties seek to form government or to campaign in every electorate on all issues; conversely, some parties have a peculiarly singular focus: eg the Voluntary Euthanasia and No Parking Meters Parties (SC[36]-[37]). *Unions No 1*[3] powerfully illustrates that individual capping or aggregating provisions targeting some only of the participants in the contest of political ideas may fail at the level of purpose, even though the purposes of the larger scheme are not impugned.

**3.** ***Legislative history:*** The JSCEM and Expert Panel reports from 2010-2016 do not provide a comprehensive and reasoned basis for ss 29(11) or 35 (cf DS[15]-[21]). The 2010 JSCEM report made no recommendation about the appropriate level of TPC by-election caps; the later reports did not consider that issue; and the Expert Panel justified s 35 by reference to the flawed rationale that "political parties and candidates should have a privileged position in election campaigns" (#183A 10SCB 2533). Nothing that was before Parliament can explain *either* the reduction in the TPC by-election cap *or* how a mere $20,000 could allow a TPC a reasonable opportunity to present its case, and nothing in the Special Case fills that lacuna. That the Government referred both provisions for a JSCEM inquiry in March 2022 (#318 13SCB 3973; #320 13SCB 3983) – without result to date – belies any suggestion that those provisions have already been subject to "careful deliberation" (DS[15]). The State has never undertaken the sort of inquiry into s 29(11) that obviously needed to be done following *Unions No 2*.

**4.** ***S 29(11) - purpose:*** The proffered reason for imposing the dramatically lower cap on TPCs is to prevent "the voices of candidates and parties from being drowned out" (DS[29]). No material, whether before Parliament or proved before the Court, suggests that candidates and

[1] *Unions NSW v NSW (No 2)* (2019) 264 CLR 595 (***Unions No 2***) at [39]-[40], [180].
[2] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (***ACTV***) at 145, 175, 221, 327.
[3] *Unions NSW v NSW (No 1)* (2013) 252 CLR 530 (***Unions No 1***).

parties are at risk of being prevented from conveying their political messages to electors due to TPCs' activities (see SC[91] vs [92]); let alone a risk that "prophylactically" (cf CS[26]) calls for a cap: (i) of **1/12** the candidates' cap; (ii) in an amount **so low** on its face that it cannot be said to allow a reasonable opportunity to present a case; (iii) that was reduced by **19%** from the former miserly cap; (iv) where parties face **no cap**.[4] See Gageler J in *Unions No 2* at [80].

**5.** ***S 29(11) - justification***: The State's arguments on justification travel no distance towards discharging its onus. As to DS [33]: That the JSCEM and the Panel did not recommend a precise level of reduction of the cap, or any further investigation to justify the reduction (cf DS [33]), reflects only the reality that these bodies never addressed the TPC by-election cap at all. That the reduction in 2018 of **19%** is said to be more modest than the **60%** reduction in the general election cap invalidated in *Unions No 2* (cf DS [33]) ignores the matters in [4] above.

**6.** As to DS [35]: By-election caps are not "broadly proportionate" to those in place for general elections, even allowing for the shorter capped period. The legislated by-election cap for candidates is almost **200%** of the applicable cap for party-endorsed candidates in Assembly general elections (s 29(7)); whereas the primary legislated by-election cap for TPCs is a mere **4%** of the legislated TPC general election cap (s 29(10)(a)).

**7.** As to DS[36], [40], [42]: this ignores the regressive impact of a disproportionately small cap on expenditure patterns. The cost of TV and radio campaigns, for example, is so high relative to the TPC by-election cap that engagement in such activities is prohibitive for TPCs. In the Upper Hunter By-Election, the National Party candidate spent **$85,559** on TV advertising and **$27,588** on radio (SC[89]), each of which would have independently exceeded the TPC cap. TPCs' inability to participate lawfully in such activities is incapable of characterisation as anything other than a constraint on their reasonable participation in by-election campaigns.

**8.** Three factual matters warrant clarification. As to DS[37], the intervening version of the Orange by-election proposal only made mathematical corrections to the initial proposal.[5] As to DS[38], the $63,717.90 figure is not limited to expenditure during the capped period, nor to expenditure in connection with the "It's About Jobs" Campaign (SC[45]). As to DS [39], Unions NSW's "novel strategy" was driven by the "expenditure cap" being a "weakness" that needed to be minimised;[6] resulting in suboptimal campaign outcomes (see PS[31]).

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[4] Whilst DS[12] observes that parties may be indirectly subject to some discipline through s 30(3), s 30(3) does not apply where one party (or its leader) campaigns for the candidates of a coalition party, as has occurred: SC [88(d)].
[5] See affidavit of Kathleen Mary Harrison filed 2 November 2022 (**Harrison affidavit**), Exhibit KMH-1, changing the campaign organiser cost from "$2,000 p/w or $7,500" to "$2,000 p/w or $10,000" for the 5-week campaign (p 8), and updating the final estimated cost accordingly (p 9).
[6] #269 11SCB 3272. See also #271 11SCB 3282 ("restrained expenditure to $21,600 meant limited effect").

**9.** As to DS[41], no-one suggests there should be different caps for different kinds of by-elections. But any cap, to be justified, must consider the variability of elections and what would be reasonable to enable a TPC to present its case in an election where the TPC's interest, and therefore participation, is likely to be of greatest significance. That the State has never done.

**10.** ***S 35 - "matter":*** Notwithstanding the belated repeal of s 35 on 2 November 2022, the Court retains jurisdiction to determine the plaintiffs' challenge to s 35 as it stood from 1 July 2018 to 2 November 2022. *First*, the plaintiffs' ability to participate in, and incur expenditure for, *past* elections was constrained by s 35. That law applied to the campaigns they ran for 5 State by-elections, 1 local government election, and, before delivery of judgment in *Unions No 2*, 1 State general election: SC[6](c),(f), [7](d),(g), [18](e),(h), [20](d),(g). The plaintiffs reduced or altered their preferred campaign activities in response to s 35: SC[75]-[84]; cf SC[42], [47]-[48], [69]-[72]. It cannot be said that a declaration "will produce no foreseeable consequences" for them, such that their challenge to s 35 lies beyond the bounds of judicial power.[7] They have a "real interest" in answering a real, not hypothetical, question: whether s 35 wrongfully prevented their coordinated campaigning during previous NSW elections over 4 plus years.[8]

**11.** *Secondly*, the plaintiffs reasonably apprehend that the State may reintroduce a provision in materially similar terms to s 35, and may do so before the March 2023 State election. See: (i) on 17 December 2021 and 4 May 2022, the Government's refusals to undertake to repeal s 35 (#317 13SCB 3970; #320 13SCB 3983); (ii) on 19 October 2022, the Attorney-General's statements that the repeal of s 35 was "shameful", s 35 was a "critical integrity measure", and "the Government will support this amendment, but … under protest because the bill is too critical and too time-sensitive to delay it any longer";[9] and (iii) on 24 and 31 October 2022, the State's refusal to undertake that the Government would not "seek to reintroduce s 35, by amending Act or regulation, in particular before the 2023 election".[10] The plaintiffs' conduct remains overshadowed by the spectre of s 35[11] – particularly during the current capped expenditure period for the 2023 State election, which commenced on 1 October 2022. In the broadly analogous constitutional setting of Art III of the US Constitution, the US Supreme Court has recognised that "a defendant's voluntary cessation of a challenged practice" – including by repealing an impugned law – goes to "the exercise, rather than the existence, of

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[7] *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 (***Plaintiff M61***) at [102]-[103].
[8] *Ainsworth v CJC* (1992) 175 CLR 564 at 581-582, 596-597; *Plaintiff M61* at [103]; *Croome v Tasmania* (1997) 191 CLR 119 (***Croome***) at 126, 127.
[9] New South Wales, *Parliamentary Debates*, Legislative Assembly, 19 October 2022, p 1-4.
[10] Harrison affidavit, Exhibits KMH-6, KMH-7, KMH-9, KMH-10 (letters of 21, 24, 27, 31 October 2022).
[11] See, by analogy, *Croome* at 137-139.

judicial power".[12] If the defendant's "repeal of the objectionable language would not preclude it from re-enacting precisely the same provisions", and there is no certainty that the defendant will refrain from doing so, the repeal is not "effective to defeat federal jurisdiction".[13]

**12.** *Thirdly*, the costs of the s 35 challenge remain in dispute.[14]

**13.** ***S 35 - construction:*** The State's interpretation (DS[51]-[52], [60]-[61]) is inconsistent with s 35's text and unworkable to apply. The "agreement" described in s 35(2) is not "an agreement to incur electoral expenditure" (cf DS[51]), but an agreement "to campaign" for the objects stated in s 35(2). Reading s 35(2)'s definition into s 35(1), a TPC infringes the prohibition where its acts with the other person under that agreement result in the incurring of electoral expenditure that exceeds the TPC's cap.[15] Further, the State's construction ignores the practical reality, reflected in the definition of "electoral expenditure" in s 7, that there is an inexorable link between preparation and communication of political messages in an election campaign and expenditure of money to fund them. The purported neat distinction between "concerted action about the message" and "concerted action about incurring expenditure" is illusory. On any construction, s 35's inevitable practical effect (see CS[13]) is that the only safe way to avoid committing the offence is to avoid preparing and communicating coordinated political messages during the capped period. That is borne out by the plaintiffs' conduct: PS[30]-[31]. The suggestion that their substantial modification of their campaigning activities is wholly attributable to overly cautious legal advice (DS[59]) is fanciful.

**14.** ***S 35 - economies of scale:*** The State submits that s 35 is not concerned with the "legitimate amplification of a message that comes with multiple entities saying the same thing" (DS[56]), but only with TPCs achieving "economies of scale that would tend to defeat the purpose of the expenditure caps" (DS[54]); ie that a TPC's $20,000 cap will "buy more" if multiple TPCs act "as though they were a single buyer of electoral communication" (DS[51]). But there is nothing in the EF Act's scheme to suggest it is premised on any particular view about economies of scale: it treats a dollar as a dollar. Further, there is nothing in the Special Case from which an inference can be drawn that the amount of advertising etc able to be bought in one $40,000 order exceeds that which could be bought in two separate orders of $20,000, let alone that any difference is sufficient to justify the burden that s 35 places on political communication. Even assuming the possibility of a "large order discount" in some cases, there is no basis upon which

[12] *City of Mesquite v Aladdin's Castle, Inc,* 455 US 283 (1982) at 289.
[13] See also *Northeastern Florida Chapter, AGCA v City of Jacksonville*, 508 US 656 (1993) at 661-662.
[14] Harrison affidavit, Exhibits KMH-9, KMH-10, KMH-11 (letters of 27, 31 October and 1 November 2022). See also *Esso Australia Resources Pty Ltd v FCT (No 1)* (2011) 196 FCR 460 at [14].
[15] See *Unions No 2* at [188].

it could be found that joint campaigning by TPCs will likely generate the opportunity to take advantage of it. Many campaigns will involve several forms of media, and there is no reason to think a joint campaign will produce cost savings. Moreover, no rationale is given for why *only* TPCs are banned from combining in this way. If potential subversion of individual caps by "economies of scale" were a genuine concern, it would arise equally in connection with groups of individuals spending less than $2,000 each on coordinated advertising the cost of which exceeds the TPC cap, or different candidates/parties combining to propagate a joint message.

**15.** With no legitimate interest in preventing TPCs from "presenting coordinated messages in respect of the same issues and in support of the same object" (DS[54]), and no serious "economies of scale" problem, there can be no rational justification for preventing TPCs from spending up to their individual cap to communicate a coordinated message. There is no risk of "drowning out" over and above the concededly appropriate "legitimate amplification" of multiple voices speaking together. S 35 suffers from broadly the same false premise discerned in *Unions No 1* (at [63]): that TPCs who combine their election campaigning efforts should be treated as if they are a single voice, even though they are distinct entities with diverse interests.

**16.** ***S 35 - discrimination:*** The State never justifies s 35's discriminatory targeting of TPCs, revealing it to be an underinclusive, inappropriate, measure for facilitating "*equal* participation in the electoral process" and creating a "level playing field".[16] It never explains how s 35 proportionately pursues that purpose in circumstances where candidates or parties may act in concert "as though they were a single buyer of electoral communication" (DS[51]).[17] The anti-aggregation provisions do not preclude this (cf DS[66]). Contrary to DS[66], the evidence received in two JSCEM inquiries and by the Expert Panel shows that the risk of a "proliferation" of high-spending political campaigners extends beyond registered TPCs.[18] And data from past elections reveals no credible prospect that TPCs may "drown out" parties and candidates; least of all the major parties who aim to form government.[19] Without that evidence, there is nothing in the present context that could adequately justify the serious, and selective, burden on political communication that s 35 imposes (cf CS[26]).

**8 November 2022**

**Justin Gleeson SC** **Nicholas Owens SC** **Celia Winnett** **Shipra Chordia**

[16] *Unions No 2* at [5], emphasis added. See also *Unions No 1* at [137].
[17] See *Unions No 2* at [187].
[18] #182 9SCB 2167 [6.196] (expenditure coordination between parties/ candidates and non-associated entities), 2200 [7.63] (risk of public funding changes spurring a proliferation of candidates); #185 10SCB at 2681 [7.13] and #183A 10SCB 2534, 2536 (risk of increase in party registrations to avoid a low TPC expenditure cap). See also the "issue-focused" political parties registered for the 2015 and 2019 State elections: SC[36]-[37] and [74].
[19] SC[35], [37], [51]-[52], [73]-[74], [91]-[92]. Cf DS[24], CS[22], [24].

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## ANNEXURE TO PLAINTIFFS' REPLY

Pursuant to paragraph 3 of *Practice Direction No 1 of 2019*, the particular constitutional provisions and statutes referred to in the plaintiffs' reply are as follows.

| No | Description | Version | Provision(s) |
|---|---|---|---|
| 1. | *Electoral Funding Act 2018* (NSW) | Current | 29, 30, 35 |