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 Unions
Fourth Plaintiff

and

State of New South Wales
Defendant

DEFENDANT'S SUBMISSIONS

Part I: Certification for internet publication

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

Part II: Concise statement of the issues

2. Is s 29(11) or s 35 of the Electoral Funding Act 2018 (NSW) (**EF Act**) invalid by reason of infringing the implied freedom of political communication?

3. While these are the issues arising on the current state of the law at the time of these submissions, that may not be the case by the time of the scheduled hearing of this matter. The Electoral Legislation Amendment Bill 2022 (**Amending Bill**) has passed both Houses of Parliament and has received assent. Relevantly, item [12] of Sch 3 to the Amending Bill repeals s 35. Item [12] will commence on a day to be proclaimed: s 2(1).

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

4. The plaintiffs have given notice under s 78B of the Judiciary Act 1903 (Cth). In the course of preparing these submissions in response to the plaintiffs' submissions filed on 7 October 2022 (**PS**), the State has formed the view that further notice is required of the constitutional issues asserted in **PS [57]-[59]** relating to the scope of the matter. The State will liaise with the plaintiffs to ensure that further notice is given.

Part IV: Facts

5. The facts in **PS [5]-[7]** are not in dispute. The plaintiffs, at other points in their argument, contend for certain inferences from the facts agreed in the Special Case. These are in dispute and are addressed at the appropriate point in argument below.

Part V: Defendant's argument

Summary

6. Caps on electoral expenditure are a necessary and justified response to the distorting influence of money in a democracy that values the free flow of political communication for all and not merely for those who can afford to buy it. Parliament may fix expenditure caps that are lower for persons not contesting an election than for those who are, without the cap thereby being necessarily unjustified. Such differentiation serves the legitimate purpose of preventing the voices of candidates and parties from being drowned out by the voices of others. The implied freedom guarantees individuals—and, by association of individuals, other entities—the opportunity to participate in political discourse, and to seek to persuade voters and candidates to their point of view. That constitutional guarantee leaves open to Parliament a considerable domain of selection as to the design of the electoral system, including the design and reasonable regulation of electoral campaign finance.

7. The impugned provisions of the EF Act cap the expenditure of third-party campaigners (**TPCs**) in State by-elections (s 29(11)) and prohibit concerted conduct of a particular kind, being agreements to incur expenditure in excess of that cap (s 35). The cap is reasonably appropriate and adapted to achieving the legitimate object of fairness in electoral campaigns, by ensuring that TPCs do not drown out parties and candidates while allowing them a reasonable opportunity to present their case. The prohibition on concerted conduct to incur expenditure in excess of the cap serves the same purposes, by ensuring the integrity and efficacy of the underlying cap.

8. There is no doubt that some TPCs, perhaps including the plaintiffs, would prefer to have the liberty to spend more in elections. That is the very mischief to which the EF Act is directed. The validity of Parliament's regulatory measures is not to be assessed against what subjects of the law would like to do. It is to be assessed against a constitutional standard of whether Parliament's measures are justifiable in service of a legitimate object of ensuring fair elections.

Statutory scheme for third-party campaigner expenditure caps

9. The EF Act makes provision for public funding of parliamentary election campaigns and, relatedly, for the disclosure, capping and prohibition of certain political donations and electoral expenditure: Long Title. The objects of the EF Act include establishing a "fair and transparent" scheme for electoral funding and expenditure, to "help prevent corruption and undue influence in the government of the State", and to provide for the effective administration of public funding of elections: s 3.

10. Permissible electoral expenditure, as defined in s 7, is capped by s 33, which makes it unlawful for a party, group, candidate, TPC or associated entity to incur electoral expenditure for a State election campaign during the capped State expenditure period if it exceeds the "applicable cap". TPC is defined in s 4 to exclude parties, groups, candidates and associated entities, but does not thereby automatically include everyone else: to be a TPC as defined, one must incur electoral expenditure for a State election during a capped State expenditure period that exceeds $2000 in total. Regulation of TPCs is regulation of bigger spenders, not ordinary electors.

11. Applicable caps are fixed by s 29. Relevantly to this case, the applicable caps in a by-election for the Assembly are $245,600 indexed for a candidate (s 29(9)) and $20,000 indexed for a TPC (s 29(11)).

12. The efficacy and integrity of applicable caps are supported by various provisions. One is s 33(3), which makes clear that any unspent portion of a person's applicable cap is not transferable so as to increase the applicable cap of any other party or person. Other provisions deal with aggregation of expenditure. Certain expenditure of candidates and parties is aggregated for the purposes of the cap in State elections: s 30. This includes, in by-elections, treating expenditure incurred by an endorsed candidate as exceeding the cap if that expenditure, together with expenditure incurred by the party for that by-election, exceeds the cap: s 30(3). This provision is of significance in this case because the plaintiffs repeatedly assert that, in State by-elections, electoral expenditure by political parties is not

subject to *any* cap (e.g. **PS [13], [44]**). In light of s 30(3), that submission should be rejected. The aggregating effect of s 30(3) is reflected in the approach in fact taken by political parties. In the 2021 Upper Hunter by-election, political parties and their endorsed candidates adhered to s 30(3) on an aggregated basis.[1] Under the relevantly identical provision of the Election Funding, Expenditure and Disclosures Act 1981 (**EFED Act**) (s 95G(5)), the same position obtained in the 2015 Orange by-election.[2]

13. Section 30(4) also aggregates the expenditure of parties and "associated entities". "Associated entity" is defined in s 4 to mean a corporation or other entity that "operates solely for the benefit of one or more registered parties or elected members". Section 30(4) can thus be seen to prevent parties and candidates from using such entities to obtain access to multiple expenditure caps. The plaintiffs seek to make something of the fact that, in the EFED Act, the equivalent provision (s 95G(2)) operated by reference to a different notion of "associated" parties (s 95G(1)). However, this overlooks that s 35 is not concerned with "aggregation" in any equivalent sense. The true "aggregation" provisions treat expenditure by multiple entities as expenditure of the capped entity. Section 35 does not aggregate TPC expenditure in such a way. Rather, as will be explained, it targets in a narrower and more tailored way concerted action to incur expenditure in excess of the cap; TPCs remain at liberty independently to spend their own capped amount, quite unlike the entities for which the EF Act truly "aggregates" expenditure.

14. For TPCs, s 35 makes it unlawful to "act in concert with another person or persons to incur electoral expenditure … that exceeds the applicable cap for the [TPC]". The construction of this provision is a critical issue in this proceeding. The plaintiffs give too broad a construction to s 35, as though it captures a TPC who is acting in concert with others *for any purpose* relating to electoral expenditure, for example by agreeing to campaign in support of or against a party or candidate: **PS[62]**. The text of s 35 does not have that effect. As a result, the plaintiff's submissions as to the validity of s 35 are misdirected. Section 35 prohibits only concerted action in the form of acting "under an agreement" *to incur electoral expenditure … that exceeds the applicable cap*. The focus of the provision is on agreements to spend, and the act of incurring expenditure under such an agreement, not on agreements to communicate a particular message to be executed by independent expenditure. We return to this construction more fully below.

[1] SC [92] (**SCB, Vol 1, Tab 9, 231**).

[2] SC [52] (**SCB, Vol 1, Tab 9, 218**).

15. The expenditure caps, including the differentiation between third-party campaigners and candidates and parties, and the adjunct provisions to prohibit certain concerted spending, were enacted in response to careful deliberation by the Joint Standing Committee on Electoral Matters (**JSCEM**) and a panel of experts (**Panel**).[3]

JSCEM 2010

16. As early as 2010, JSCEM recommended that, if expenditure caps are placed on political parties and candidates, then advertising and communication by third parties should also be regulated.[4] JSCEM found that the Premier should give consideration to "adopting an expenditure cap that is significantly lower than that for political parties".[5] That recommendation and finding were based on a substantial body of evidence and submissions,[6] from which emerged a "general view" that "third parties play a legitimate role in our democracy, and should only be regulated to the extent necessary to ensure that they do not drown out the voices of candidates and political parties and cannot be used to circumvent expenditure caps on political parties".[7] The evidence grounded a concern that third parties could "swamp the advertising of political parties",[8] including by "their potential to multiply".[9] There was explicit reference to one submission that "parties and candidates should have a privileged role in election contests".[10] The contrary view of Unions NSW was expressed and taken into account by JSCEM in forming its recommendations and findings.[11]

Panel of Experts 2014

17. In December 2014, a panel of experts established in response to public concerns about the influence of political donations arrived at a similar conclusion. The Panel found

[3] See Explanatory note to the Electoral Funding Bill 2018 (**SCB, Vol 10, #187, 2824**).

[4] JSCEM: Public funding of election campaigns, Report No. 2/54 (13 March 2010) (**JSCEM 2010**), Recommendation 21 (**SCB, Vol 9, #182, 2022**).

[5] JSCEM 2010, Finding 2 (**SCB, Vol 9, #182, 2023**).

[6] JSCEM 2010, [6.135]-[6.204] (**SCB, Vol 9, #182, 2153-2168**).

[7] JSCEM 2010, [6.167] (**SCB, Vol 9, #182, 2161**).

[8] JSCEM 2010, [6.140], [6.189] (Professor Twomey); [6.141], [6.181] (Electoral Commissioner) (**SCB, Vol 9, #182, 2154, 2163, 2165**).

[9] JSCEM 2010, [6.198] (Professor Williams) (**SCB, Vol 9, #182, 2167**).

[10] JSCEM 2010, [6.139] (Professor Tham) (**SCB, Vol 9, #182, 2154**).

[11] JSCEM 2010, [6.144] (**SCB, Vol 9, #182, 2154-2155**).

that third parties "should be free to participate in election campaigns but they should not be able to drown out the voices of parties and candidates who are the direct electoral contestants". [12] The Panel recorded evidence of "concern about the potential for increasingly active third-party campaigners to undermine the role of parties and candidates in election campaigns", linking this concern to the emergence in the United States of well-resourced Political Action Committees,[13] and to the "potential for wealthy protagonists motivated by a particular issue to run effective single-issue campaigns". The Panel was "concerned that a lack of appropriate third-party regulation would work against reformist governments pursuing difficult and controversial issues in the public interest".[14]

10 **18.** To this end, the Panel found that the then current spending cap (equal to that of political parties) was "too high" and should be reduced to "guard against third parties coming to dominate election campaigns".[15] The precise magnitude of the reduction was thought by the Panel to require further review.[16] But the need for a lower cap for third parties was clearly perceived. The Panel referred to submissions about the "primacy" of parties and candidates and of the distinctive need for candidates and parties to respond to third party attacks.[17] Again, the Panel's views were informed by the contrary view of Unions NSW.[18]

JSCEM 2016

19. JSCEM considered the Expert Panel recommendations. It recorded that the
20 recommendation to set a lower cap for third parties "elicited mixed reactions", but ultimately found that "third-party campaigners should be able to spend a reasonable amount of money to run their campaign. However, [JSCEM] agrees with the Panel that this should not be to the same extent as candidates and parties".[19] Like the Panel, JSCEM

[12] Panel of Experts, *Political Donations Final Report – Volume 1* (December 2014) (**Panel Report**) (**SCB, Vol 10, #183, 2432**).

[13] Panel Report (**SCB, Vol 10, #183, 2533-2534**).

[14] Panel Report (**SCB, Vol 10, #183, 2534**).

[15] Panel Report (**SCB, Vol 10, #183, 2432**).

[16] Panel Report (**SCB, Vol 10, #183, 2536**).

[17] Panel Report (**SCB, Vol 10, #183, 2535**).

[18] Panel Report (**SCB, Vol 10, #183, 2535**).

[19] JSCEM, Inquiry into the Final Report of the Expert Panel, Report 1/56 (June 2016) (**JSCEM 2016**) [7.8], [7.20] (**SCB, Vol 10, #185, 2680, 2683**).

considered that the precise extent of the reduction in the third-party cap for general elections should be considered further, but the need for a reduction was clear.

Aggregation issues

20. JSCEM and the Panel also considered that it was necessary to support the efficacy and integrity of expenditure caps with adjacent measures dealing with the problem of aggregation and circumvention of expenditure caps. The Panel supported measures to aggregate the expenditure of political parties and their associated entities as a means to "prevent the party spending caps being circumvented by the establishment of front organisations".[20] The Panel also supported measures to prevent third-party campaigners from acting in concert with others "to incur expenditure in excess of its spending cap" as this would "prevent a number of third-party campaigners with common interests (e.g. unions, mining companies, packaging companies) from launching a coordinated campaign with a combined expenditure cap that would completely overwhelm parties candidates and other third parties acting alone".[21]

21. JSCEM, fully cognisant of Unions NSW's contrary view, agreed with the Expert Panel because it was necessary to "prevent third-party campaigners with common interests from combining their expenditure caps and then overwhelming the expenditure of parties, candidates and other third-party campaigners acting alone".[22]

It is legitimate to fix lower caps for third-party campaigners

22. In Unions NSW v New South Wales (No 2) (2019) 264 CLR 595 (***Unions No 2***), the legitimacy of differential caps arose in the context of s 29(10), governing general elections. On this particular issue, there was no majority view. However, the reasons of Gageler J and Nettle J, in favour of the State, should now be adopted by the Court.

23. Kiefel CJ, Bell and Keane JJ (at [35]) and Gordon J (at [154]) did not find it necessary to decide the legitimacy of the purpose of s 29(10). The plurality noted, however, that, "if any differential treatment is an illegitimate purpose … the legislature would never be in a position to address the risk to the electoral process posed by such groups" as US-style PACs (at [34]). That observation is a sound reason in favour of accepting that differential treatment of third parties is capable of being justified. When their Honours

[20] Panel Report (**SCB, Vol 10, #183, 2539-2540**).

[21] Panel Report (**SCB, Vol 10, #183, 2540**).

[22] JSCEM 2016, [7.34] (**SCB, Vol 10, #185, 2685**).

went on to say that candidates do not occupy a privileged position in the competition to sway the people's vote (at [40]), they were apparently addressing a particular submission to the effect that the "special significance" of candidates and political parties "itself justifies their differential treatment" (at [39]). The State does not advance any such submission: the State accepts that differential treatment must be justified; but it continues to advance its submission that differential treatment *can* be justified and should not be ruled out as illegitimate *per se*. Only Edelman J concluded that s 29(10) was "motivated" by an "additional purpose" of burdening the freedom of political communication of third-party campaigners and, for that reason, was invalid (at [159]-[160], [180]-[181]).

10 **24.** Gageler J explained that "the functional distinction between a political party which aims to form government and a third-party campaigner justifies a substantial variation between the amount of the cap imposed on the electoral expenditure of that political party and the amount of the cap imposed on the electoral expenditure of a third-party campaigner" (at [90]). "Privileging" parties and candidates in this way is not constitutionally objectionable provided that each cap is justified (at [91]). Nettle J also accepted that lower caps for third-party campaigners was not illegitimate or necessarily unjustifiable (at [110], [113]).

25. The reasons of Gageler J and Nettle J should be adopted as the doctrine of the Court. Their Honours' reasoning would allow Parliament scope to fix lower expenditure caps for
20 third party campaigners, on the basis that this serves a legitimate purpose of ensuring fair elections, but always subject to justifying those caps as reasonably appropriate and adapted to that purpose. Acceptance of their Honours' reasoning would not entail giving candidates and parties a "privileged" position in any constitutionally objectionable sense. It would simply recognise that candidates and parties have a function that is distinct from that of third-party campaigners and that, given their difference in circumstances, different treatment *can* be justified in order to achieve a substantive "equality of opportunity to participate in the exercise of political sovereignty": McCloy v New South Wales (2015) 257 CLR 178 at [45] (French CJ, Kiefel, Bell and Keane JJ); see also Mulholland v Australian Electoral Commission (2004) 220 CLR 181 at [147] (Gummow and Hayne JJ);
30 Austin v Commonwealth (2003) 215 CLR 185 at [118] (Gaudron, Gummow and Hayne JJ).

Section 29(11) is valid

Burden

26. The State accepts that s 29(11) burdens the implied freedom and must be justified as reasonably appropriate and adapted to a legitimate purpose.

27. The nature of the burden is a partial limitation on the capacity of a TPC to engage in political communication in the lead up to a by-election. Contrary to the plaintiffs' submissions, there is no viewpoint discrimination: it cannot sensibly be said that TPCs represent a peculiarly distinct viewpoint from that of candidates and parties. What distinguishes a TPC from a candidate or party is that the TPC is not attempting to get themselves elected to Parliament. Apart from that functional distinction, TPCs and candidates and parties alike cover the broadest possible range of viewpoints: [23] Unions No 2 at [85] (Gageler J).

Legitimate purpose

28. The purpose of a law is the "mischief" to which it is directed and is to be discerned through ordinary processes of statutory construction, having regard to text, context and, if relevant, the historical background of the impugned provisions: Brown v Tasmania (2017) 261 CLR 328 (***Brown***) at [96], [101] (Kiefel CJ, Bell and Keane JJ), [208]-[209] (Gageler J), [321] (Gordon J). In the face of an express statement of statutory objects, an additional object, especially a constitutionally impermissible one, should not lightly be inferred: Unions No 2 at [79] (Gageler J); see also at [33] (Kiefel CJ, Bell and Keane JJ).

29. The purposes expressed in s 3, of fairness in expenditure and, relatedly, effective public funding of elections and prevention of undue influence (from private sources of money), are legitimate purposes. So too is the purpose of preventing the voices of candidates and parties from being drowned out by the powerful voices of third-party campaigners, which is an aspect of securing fairness in expenditure. No different purpose motivated the enactment of s 29(11), which continued the existing arrangement of imposing an expenditure cap for third-party campaigners in State by-elections (albeit with a reduction from the indexed level of $24,700 under the EFED Act to $20,000 under the EF Act). The purpose of the change was simply to "give better effect" to the legitimate purposes, and the question becomes one of justification: Unions No 2 at [109] (Nettle J).

[23] SC [35] (**SCB, Vol 1, Tab 9, 209-212**); SC [73] (**SCB, Vol 1, Tab 9, 221-224**).

30. The plaintiffs' submission that an illegitimate purpose should be inferred should not be accepted. Contrary to **PS [44]**, the "facial discrimination" between third-party campaigners and candidates is not illegitimate for the reasons above ([22]-[25]). The plaintiffs also rely on an asserted absence of any cap in by-elections for parties. That argument ignores s 30(3) and can be put aside (see above at [12]). The plaintiffs submit that s 29(11) "exacerbated" the discrimination by preserving the indexed cap for candidates but not for TPCs. That is just another way of saying that s 29(11) reduced the cap applicable to TPCs and therefore merely presents the question, without advancing its answer. Going forward from the enactment of the EF Act, indexation applied to all caps (s 29(14)).

31. Contrary to **PS [45]**, the aggregation provisions for parties, as compared between the EF Act and EFED Act, do not disclose any purpose of s 29(11), which fixes an applicable cap for TPCs. Similarly, contrary to **PS [46]**, the fact that s 35 applies to TPCs and not to parties or candidates does not disclose any purpose of s 29(11).

32. Contrary to **PS [47]**, no illegitimate purpose is to be inferred from statements in the reports preceding the enactment of the EF Act (see above at [22]-[25], [28]).

Justification

33. Section 29(11) is reasonably appropriate and adapted to the legitimate purpose of ensuring that parties and candidates are not drowned out in by-election campaigns. Section 29(11) has a similar genesis to s 29(10), invalidated by this Court in Unions No 2. However, there are critical differences. First, JSCEM, and the Panel before it, did not suggest the precise level of reduction for s 29(11) nor did it recommend that further investigation be undertaken to justify the reduction. Secondly, the magnitude of the reduction is modest by comparison: s 29(10) reduced the cap for general elections by over 60% (from $1,288,500 to $500,000); s 29(11) reduced the cap by 19%.

34. Since the enactment of the EFED Act, there has been a disparity between the expenditure caps for TPCs and for candidates (and, via s 95G(5), parties). The legislative choice to enact disparate caps was supported by the detailed examination of JSCEM and the independent expert Panel. The precise level of the disparity is a matter on which minds might differ and there is scope for legislative choice, that choice being constrained by the need to allow TPCs a reasonable opportunity to participate in electoral campaigning.

35. The absolute amount of the caps for by-elections can be seen to be broadly proportionate to the caps in place for general elections, taking into account that there are

93 electoral districts in contest in a general Assembly election,[24] and that the capped expenditure period for a by-election is typically in the order of a few weeks,[25] rather than the six months for a general election.

36. The agreed facts demonstrate that the level of the expenditure caps does not constrain reasonable TPC participation in by-election campaigns. The Special Case collates the disclosed electoral expenditure (or electoral communication expenditure under the EFED Act) of every registered TPC in every by-election since the EFED Act was introduced.[26] Overwhelmingly, TPCs spent well under the cap. Even the more substantial instances of expenditure involve amounts materially below the cap. For example, in the four 2022 by-elections, the indexed cap was $21,600 "for each by-election", or $86,400 (s 29(11)) and, in the circumstances of multiple by-elections, the cap for each district within the overall cap was $26,700 (s 29(12)(b)).[27] The FBEU spent $19,316 in Bega, which represents about 72% of the cap. There is one anomalous data point, being the AMWU disclosing some $27,134.94 of electoral expenditure in the 2016 Orange by-election, which exceeded the applicable cap.

37. The plaintiffs submit (**PS [31]**) that TPCs are "abandoning" campaigning activities to comply with s 29(11). They suggest two examples. *First*, the plaintiffs submit that Unions NSW changed its campaign proposal in the Orange by-election to comply with s 29(11). As the Special Case discloses, however, the comparison sought to be made is between an initial campaign proposal created without reference to expenditure caps and "v3" of that campaign proposal.[28] The Court has not been given "v2" of the campaign proposal, which would provide a more appropriate point of comparison than "v1". It is unexplored what changes were made between "v1" and "v2" and why.

38. In any event, the initial version shows that Unions NSW and 12 affiliates proposed to expend $35,800 on the "It's About Jobs" campaign. Even after the adjustment to the "It's About Jobs" campaign, Unions NSW and 5 affiliates in fact expended $63,717.90 between them.[29] The alteration of the "It's About Jobs" campaign does not demonstrate

[24] Sections 25-27, Constitution Act 1902.

[25] SC [22] (**SCB, Vol 1, Tab 9, 199-206**), recording capped expenditure periods of 19, 22, 26, 29, 33 and 50 days.

[26] SC [22] (**SCB, Vol 1, Tab 9, 199-206**).

[27] See also Electoral Funding (Adjustable Amounts) Notice 2018.

[28] SC [42], [44] (**SCB, Vol 1, Tab 9, 214-215**).

[29] SC [45] (**SCB, Vol 1, Tab 9, 215**).

that s 29(11) had any constraining effect on the overall expenditure of Unions NSW and its affiliates in the Orange by-election.

39. *Secondly*, the plaintiffs submit that, in the 2021 Upper Hunter by-election, Unions NSW refrained from certain campaign activities. There is no proper connection between the expenditure cap and any suggested decision to refrain from campaigning. Rather, the relevant strategy document discloses that Unions NSW chose to "prioritize using this opportunity to trial new ideas, refine ideas and campaign in a way that should not run at cross-purposes to like-minded affiliates", such as "Peer-to-Peer texting" and "digital campaigning".[30] In other words, Unions NSW recognised that its affiliates would also be campaigning and so chose to run a campaign trialling innovative communication methods. That does not support an inference that the expenditure cap denied Unions NSW full opportunity to participate in political communication. It made a strategic decision to deploy its resources through different channels from those of their affiliates.

40. The State's burden is to show that the $20,000 cap is justifiable as a limitation on TPC expenditure that does not go so far as to deny TPCs a reasonable opportunity to participate in the flow of political communication. The mere fact that a particular TPC might *desire* to spend more than the expenditure cap is beside the point. Expenditure caps are *meant* to constrain expenditure. But the data overwhelmingly shows that TPCs have the requisite opportunity. Actual expenditure is so far below the cap that there is a compelling inference that the cost of a TPC running a reasonable campaign in a by-election is below the amount of the cap.

41. Contrary to **PS [32]**, the possible variation between by-elections – as to interests involved and the impact on the balance of power – does not undermine the utility of the expenditure data. That variation is a fact that can legitimately inform the justification of the expenditure cap. It is legitimate for Parliament to choose to enact a single cap for all by-elections, rather than attempting to prescribe different caps for different by-elections depending on an assessment of whether a by-election is "important" or "interesting" in some contestable and evaluative sense – the uniform approach promotes the objectives of effective administration and compliance expressly stated in s 3. In doing so, Parliament does not have to select a cap that will satisfy the loudest campaigner in the most important

[30] 'Unions NSW – Upper Hunter By-election Strategy' (**SCB, Vol 11, #269, 3272**).

by-election. Provided the cap is reasonably appropriate and adapted to securing the fairness of by-elections, it is justified.

42. As to the level of the reduction enacted in 2018, from $24,700 to $20,000, the data shows that, prior to 2018, $20,000 was sufficient to enable all TPC campaigns that had been mounted in any by-election (with the anomalous data point of the AMWU in Orange in 2016). The amount fixed in the EFED Act should not be ratcheted into a constitutional baseline from which Parliament cannot depart; "It is open to the Parliament to take different views from time to time according to the circumstances as they evolve or are reasonably anticipated as likely to develop in future": Unions No 2 at [113] (Nettle J).

43. In light of the above analysis, it should be concluded that s 29(11), read with s 33(1), is reasonably appropriate and adapted to the legitimate objects of the EF Act. Contrary to **PS [52]-[54]**, s 29(11) is **suitable**, because a cap on TPC expenditure has a "rational connection" to ensuring that TPCs do not overwhelm the communications of parties and candidates. Contrary to **PS [52]**, it is beside the point to compare the expenditure of Unions NSW (one TPC) with that of the major parties: the multiplicity of potential TPCs, and the different expectations of parties in having to address a multitude of issues (Unions No 2 at [89] (Gageler J)), is part of the justification for differential caps. Contrary to **PS [53]**, it is not "relevant to note" government advertising. The Government Advertising Act 2011 (**GA Act**) provides that government advertising may not be designed to influence directly or indirectly support for a political party and is limited in the pre-election period (ss 6, 10). The plaintiffs' argument assumes that government advertising is carried out in breach of the GA Act; a recent Auditor-General's report found no such breach.[31]

44. Section 29(11) is **necessary** in the sense that there is no obvious and compelling alternative which is equally practicable and available and would result in a significantly lesser burden upon the implied freedom: Comcare v Banerji (2019) 267 CLR 373 (***Banerji***) at [35] (Kiefel CJ, Bell, Keane and Nettle JJ). The plaintiffs suggest the trivial alternative of a greater cap, equal to that for candidates or set by reference to a calculation of likely costs (**PS [55]**). The greater cap is self-evidently not an equally effective alternative, in the requisite sense of being "as capable for fulfilling [the] purpose as the means employed by the impugned provision, quantitatively, qualitatively, and probability-wise": Tajjour v

[31] Auditor-General, *Government advertising 2018-19 and 2019-20* (19 November 2020) (**SCB, Vol 12, #313, 3713, 3720**).

New South Wales (2014) 254 CLR 508 at [114] (Crennan, Kiefel and Bell JJ). And there was no need to attempt to estimate likely costs in circumstances where actual costs disclosed by historical practice were a more reliable guide and indicated expenditure overwhelmingly within the cap selected.

45. Section 29(11) is **adequate in its balance**. A law is to be regarded as adequate in its balance unless the benefit sought to be achieved is "manifestly outweighed by the adverse effect on the implied freedom": Banerji at [38] (Kiefel CJ, Bell, Keane and Nettle JJ). This is a very high standard that will be transgressed only in "extreme cases" because such a finding "will often mean that Parliament is entirely precluded from achieving its legitimate policy objective": LibertyWorks Inc v Commonwealth (2021) 95 ALJR 490 at [201] (Edelman J), [292] (Steward J).

Section 35 is valid

The Chapter III matter

46. The State accepts that there is, on the current state of the law (pending the commencement of the Amending Act), a matter concerning the validity of s 35 in its operation upon the cap in s 29(11). The State also accepts that, if s 35 is invalid in its operation upon the cap in s 29(11), it will not have any severable valid operation upon other caps in s 29. Section 35 operates on the assumption of an underlying valid applicable cap, but the precise magnitude of the underlying cap does not matter materially to its justification.

47. If s 29(11) is valid, then the Court clearly does not need to determine whether the justiciable matter extends to the plaintiff's case concerning the validity of s 35 in its hypothetical future operation upon a hypothetical future cap that may or may not be imposed for the 2023 general election (a hypothetical which cannot arise merely from the passage of the Amending Bill as apprehended at the time of the plaintiffs' submissions, given that Bill's repeal of s 35). Any issue about that future scenario will be resolved for practical purposes by the Court determining the validity of s 35 in its operation upon s 29(11), which is, on any view, part of the matter.

48. If s 29(11) is invalid, the analysis may be different. In that event, s 35 would have no remaining operation in the absence of any valid TPC expenditure cap. A prudential course might weigh in favour of not determining the validity of s 35 as in Unions No 2. A different prudential course might permit the Court to determine the validity of s 35 on the hypothesis that s 29(11) is valid, even if it ultimately concludes that s 29(11) is not valid.

The prudential reason in favour of this, admittedly unusual, course is that the Court then would not need to determine whether, as the plaintiffs assert, the justiciable matter extends into the hypothetical realm of possible future legislation. However, given that the Amending Bill, which provides for the introduction of the general TPC cap, also provides for the repeal of s 35, there is no context in which the issue could arise.

49. It would be a significant extension of the prevailing understanding of Ch III to hold that the Court could pronounce on the constitutional validity of legislation not yet in force. Such an extension would require reconsideration of In re Judiciary and Navigation Acts (1921) 29 CLR 257, in which the Court disclaimed jurisdiction under Ch III to make a binding declaration of right in respect of the constitutional validity of legislation yet to come into force. The extension of principle for which the plaintiffs contend could have wide-reaching consequences for the distribution of powers between Parliament and the Judicature. The need for the plaintiffs to extend existing law is illustrated by their recourse to United States caselaw (**PS [59]**, citing FEC v Wisconsin Right to Life Inc, 551 US 449 (2007)). Even then, that case concerned only a question of mootness in relation to the application of a statutory provision to proposed future conduct of a party, more akin to the principles in Croome v Tasmania (1997) 191 CLR 119. The US case did not involve future legislation not yet in force or even enacted.

50. The novel extent of the plaintiffs' assertions in this respect have been fully articulated only in their written submissions, and the requisite constitutional notice will now of necessity be given only shortly prior to the anticipated expedited hearing. In these circumstances, the issues should not be resolved if they can otherwise be avoided. For the reasons above, the State submits that the issues can be avoided.

Proper construction of section 35

51. Section 35 prohibits TPCs from acting in concert with others to incur electoral expenditure that exceeds the applicable cap. Acting in concert is defined as acting under an agreement to campaign with the object or principal object of having a particular party or candidate elected, or opposing their election (s 35(2)). Within that defined scope of concerted action, s 35(1) prohibits only the act of incurring expenditure where the person is so acting under an agreement. In order for the act of incurring expenditure to have that requisite character, the agreement itself must involve an agreement to incur electoral expenditure. The subsection thus does not prohibit TPCs from communicating with other TPCs or other persons about electioneering activities or from coordinating campaign

messages, even to the point of reaching a formal or informal agreement about such matters. Section 35 applies at the point that the TPCs go beyond concerted action about the message, and move to concerted action about incurring expenditure. They cannot pool their respective caps and use the war-chest as though they were a single buyer of electoral communication. That is the mischief to which s 35 is directed: protecting the integrity of the applicable cap for TPCs by prohibiting multiple TPCs from agreeing to incur expenditure as though they were a single entity with a multiplied expenditure cap. The provision does not stop like-minded TPCs from independently incurring electoral expenditure in pursuit of a jointly agreed campaign message.

52. This construction is consistent with the intention disclosed in the extrinsic material. The Minister's reply speech on the second reading of the Bill for the EF Act explicitly met "some of the points raised in the debate" with this explanation of s 35:[32]

> I emphasise that the offence does not seek to aggregate the expenditure caps for multiple [TPCs] who are each campaigning on a particular issue. The offence does not prevent third parties with a common interest from campaigning on the same issue. It applies where a [TPC] acts under an agreement to incur expenditure in excess of the [TPC's] spending cap.

53. Consistent with that explanation, JSCEM had recommended s 35 for the purpose of preventing multiple TPCs "from combining their expenditure caps and then overwhelming the expenditure of parties, candidates and other [TPCs] acting alone" (emphasis added).[33]

54. There is a material difference between a situation in which multiple TPCs wishing to pursue to a coordinated message combine their expenditure caps, and one in which they independently spend money within their individual caps. Part of the vice of TPCs combining their caps is that doing so achieves economies of scale that would tend to defeat the purpose of the expenditure caps. 20 TPCs independently spending $20,000 each in a by-election is different from 20 TPCs establishing a consortium to spend $400,000 and overwhelm the candidates. On the hypothesis that there is a valid underlying applicable cap on which s 35 operates, that cap (say, $20,000) is one that allows a reasonable campaign. If 20 TPCs decide to run 20 reasonable campaigns, all the better for political communication. That can include, if the TPCs so determine and without infringing s 35,

[32] Legislative Assembly, *Hansard*, 23 May 2018 pp.62-63 (**SCB, Vol 10, #189, 2843-2844**).

[33] JSCEM 2016 [7.34] (**SCB, Vol 10, #185, 2685**). See also Panel Report (**SCB, Vol 10, #183, 2540**).

some or all of the 20 TPCs presenting coordinated messages in respect of the same issues and in support of the same object of having a particular party or candidate elected. But if 20 TPCs agree that they should incur a $400,000 expenditure in support of that campaign, that is the kind of overwhelming expenditure to which s 35 is directed. The State's construction thus coheres with the scheme of the EF Act, in which aggregation provisions were enacted to protect the expenditure caps and prevent them from being circumvented.

55. Similarly, this construction highlights why s 35 performs distinctive work from that performed by s 144 (the circumvention offence). Section 35 is directed to conduct that would not necessarily constitute a "scheme" to circumvent a cap. Apart from the obvious differences in subjective purpose to which ss 35 and 144 are directed, s 35 is not concerned merely with "front organisations" or devices to evade a cap. It is also concerned with the mischief of the combined buying power of TPCs acting in concert.

56. By ruling out combined purchasing through agreements to incur combined expenditure, s 35 does not rule out the legitimate amplification of a message that comes with multiple entities saying the same thing. Section 35 simply means that TPCs have to say that thing themselves, and incur any associated expenditure themselves, and not simply contribute the funds for it to be said on their behalf. In this regard, it is necessary to bear in mind that a TPC is only a person or entity who incurs electoral expenditure during a capped State expenditure period in excess of $2,000 in total. Ordinary citizens who do not meet that threshold are unaffected by expenditure caps or s 35.

57. The plaintiffs' construction of s 35 therefore should not be accepted (**PS [60]**). They construe the provision as though it makes it unlawful for a TPC *to act in concert* in any sense if as a result there is expenditure which in combination would exceed the cap applicable to a TPC. But the focus of s 35 is the other way around: it focuses on acting in concert *to incur expenditure*, that is, to combine multiple caps as a single buyer.

Burden

58. The State accepts that s 35 burdens the implied freedom of political communication. However, the burden is not of the character that the plaintiffs allege, essentially because of the proper construction of the provision.

59. Contrary to **PS [29]-[30]**, the facts do not demonstrate that the legal and practical operation of s 35 has constrained the behaviour of Unions NSW. The facts disclose that Unions NSW has modified its behaviour in response to *its legal advice* about s 35. The advice not having been disclosed, the Court cannot be satisfied that Unions NSW was

responding to a correct or complete account of the operation of s 35 and not to an overly cautious, conservative or otherwise erroneous advice. On 15 April 2021, Unions NSW "received a legal briefing concerning s 35 of the EF Act and joint campaigning" and "[d]ue to the legal advice" cancelled a briefing on potential coordinated campaigning in the Upper Hunter by-election and refrained from certain coordinated activity.[34]

60. On the information made available and on the proper construction of s 35, most of the activities refrained from are lawful. No concerted action to incur expenditure is necessarily involved, or even likely to be involved, in TPCs: discussing campaigning ideas, details, research, advertising and plans,[35] providing briefings or updates to each other on their campaigns,[36] or communicating with each other in respect of their individual campaigns.[37] The activities of "managing its campaign jointly" or "jointly conducting or funding any advertising"[38] would be precluded by s 35 only to the extent that the TPCs sought to jointly fund a campaign by pooling resources and purchasing advertisements and the like with that combined buying power.

61. Similarly, **PS [61]** overstates the effect of s 35, which does not prohibit a co-ordinated campaign unless the total cost is within the cap; it prohibits a co-ordinated campaign *to incur* expenditure that exceeds a single cap. Provided the coordination is limited to agreement about political messages, and each TPC expends independently within their cap, s 35 is not contravened. **PS [63]** perpetuates the same misconstruction of s 35. There is no risk of a compliant joint campaign "developing" into unlawful conduct depending on how much is in fact spent. Section 35 does not prohibit joint campaigning where individual TPCs remain responsible for their own electoral expenditure.

62. Contrary to **PS [62]**, there is no "inherent uncertainty" in s 35 which constitutes a burden on the implied freedom. There are constructional choices to be made as to the meaning of s 35, but once the provision is construed its operation will be clear. This is not a case where the provision, on its proper construction, involves highly evaluative or vague standards which may tend to burden the implied freedom. The plaintiffs' reliance on Brown in this respect is inapposite: in that case, the areas to which the impugned

[34] SC [75]-[84] (**SCB, Vol 1, Tab 9, 266-267**).

[35] SC [75(a)], [80(a)], [83(a)] (**SCB, Vol 1, Tab 9, 226-227**).

[36] SC [81(a)] (**SCB, Vol 1, Tab 9, 227**).

[37] SC [81(b)] (**SCB, Vol 1, Tab 9 227**).

[38] SC [75(b)-(c)], [80(b)-(c)], [83(b)-(c)] (**SCB, Vol 1, Tab 9, 226-227**).

restrictions applied were "in many cases … not capable of identification" (at [116]). It should not be accepted that the mere availability of constructional choices gives rise to a burden upon the implied freedom.

Legitimate purpose

63. Section 35 has operation only if there is a valid "applicable cap" underlying it. That is why, in Unions No 2, the invalidity of the applicable cap in s 29(10) meant that there was no occasion to determine the validity of s 35. Thus, any assessment of the purpose and justification for s 35 must take as given that there is a justified cap on TPC expenditure.

64. The purpose of s 35 can therefore be seen to be the same as the purpose of the underlying cap. Any additional purpose is truly complementary, being to ensure the integrity and efficacy of the underlying cap. By preventing concerted action by TPCs to incur expenditure in excess of the cap, s 35 prevents a particular kind of circumvention of that cap, namely, multiple TPCs combining their caps to create, in effect, an entity with the very buying power that the cap seeks to prohibit. Section 35 goes slightly further than s 144 in this respect. Section 144 would only be engaged by a scheme, the purpose of which was circumvention of the cap. Section 35 will capture agreements *to incur* more than the cap by pooling multiple caps.

65. The plaintiffs' submissions alleging an illegitimate purpose should not be accepted. Contrary to **PS [65]**, the application of s 35 to TPCs "exclusively" does not evidence an illegitimate purpose. It applies to TPCs exclusively precisely because it is an adjunct to the caps applicable to TPCs exclusively. Other persons who are not subject to a cap are not regulated by s 35. Candidates and parties are subject to anti-aggregation provisions.

66. **PS [66]** proceeds on a wrong construction of s 35. Further, and contrary also to **PS [67]**, to extend s 35 itself to parties and candidates would be nonsensical. There is not the same risk of proliferation of parties and candidates calling for the particular regulation under s 35. If a party attempted to nominate multiple candidates to achieve a combined pool of funds to support one candidate, s 30(1) and (2) would prevent it. Similarly, there is aggregation of expenditure by "associated entities" of parties.

67. Contrary to **PS [68]**, no illegitimate purpose should be inferred from the asserted "lack of alignment" between ss 35 and 144. As submitted above, those provisions do different work in the statutory scheme.

Justification

68. For the reasons developed above, s 35 is thus properly seen as a justified adjunct to the integrity and efficacy of the applicable cap, the validity of which is a necessary ingredient of the operation of s 35. Section 35 is **suitable** in the sense that it is rationally capable of achieving the same purposes as the underlying caps. Just as the underlying caps promote fairness, s 35 promotes fairness by ensuring that the caps are not circumvented by concerted action to incur expenditure in excess of the cap.

69. Section 35 is **necessary** in the sense described at [44] above. Contrary to **PS [73]**, s 144 is not an obvious and compelling alternative. Section 35 is needed to capture circumventing conduct that may not involve a scheme the purpose of which is to circumvent; each TPC may comply with s 144 if their purpose is to obey their own respective caps individually, but their agreement with others, jointly to incur a multiple of that cap, nonetheless undermines the cap and is a separate mischief to which s 35 is justifiably directed.

70. Similarly, s 35 is **adequate in its balance**. Once it be accepted that there is a justified cap on TPCs, it is not grossly disproportionate to address the adjunct mischief of circumvention by the measure in s 35.

71. In the further alternative, s 35 should be construed so that the words "the applicable cap for the third-party campaigner" refer to the cap that applies to the TPC that incurs the electoral expenditure in question. So construed, s 35 does not impose any greater constraint on a TPC incurring expenditure than the cap otherwise applicable to each TPC.

Conclusion

72. The questions of law should be answered: (1) No. (2) No. (3) The plaintiffs.

Part VI: Time estimate

73. The defendant would seek up to 2 hours for the presentation of its oral argument.

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ANNEXURE A

Constitutional provisions, statutes and statutory instruments referred to.

	Statute	Version	Provision(s)
1.	Constitution Act 1902 (NSW)	Current	25-27
2.	Electoral Funding Act 2018 (NSW)	Current	3, 4, 7, 29, 30, 33, 35, 144
3.	Electoral Funding, Expenditure and Disclosures Act 1981	As repealed on 1 July 2018	95G
4.	Electoral Funding (Adjustable Amounts) Notice 2018	26 April 2019-30 May 2019	--
5.	Government Advertising Act 2011 (NSW)	Current	6, 10
6.	Judiciary Act 1903 (Cth)	Current	78B