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The High Court's decision on third-party campaign spending

by Rowena Johns

1. Introduction

On 29 January 2019, the High Court handed down its decision in [Unions NSW v New South Wales](#), a case with implications for the 2019 State election. The case examined provisions in the [Electoral Funding Act 2018](#), including s 29(10) which reduced the monetary limit of electoral expenditure by third-party campaigners from over \$1.2 million to \$500,000 in the six months leading up to a State election. The High Court found s 29(10) to be invalid as it breached the implied freedom of political communication in the Commonwealth [Constitution](#).

In NSW, since 2011 it has been unlawful for political parties, candidates and third-party campaigners to incur electoral expenditure for a State election during the capped expenditure period that exceeds the applicable cap. Third-party campaigners can be individuals or organisations, including trade unions, business groups and motoring associations. Electoral expenditure applies to a range of activities including all forms of advertising, the production and distribution of election material, staffing costs and research.

This paper will briefly re-cap the events which influenced electoral reforms in 2018, before examining in greater detail the relevant legislative provisions, the concept of implied freedom of political communication under the [Constitution](#), and the reasoning of the High Court in [Unions NSW v New South Wales](#).

2. Background to legislative changes

A 2017 e-brief, [Recent developments in NSW electoral law](#),¹ broadly covers the events prompting the reforms under the [Electoral Funding Act 2018](#). The summary below focuses on third-party campaigners.

ICAC investigations

The Independent Commission Against Corruption (ICAC) in 2014 held public hearings in Operations Spicer and Credo which highlighted alleged breaches of NSW electoral funding laws. Allegations against candidates and parties included receiving

donations from banned donors, accepting donations above donation caps and devising schemes to conceal prohibited donations. Although these ICAC inquiries were not primarily concerned with campaign expenditure, they contributed to the impetus for reforms to foster transparency and guard against corruption.

The Operation Spicer report, [*Election funding, expenditure and disclosure in NSW: Strengthening accountability and transparency*](#) (December 2014), dealt with donations and disclosures, and made recommendations on those issues as well as on governance and compliance. One recommendation related to third-party expenditure.²

A subsequent ICAC report on the [*Investigation into NSW Liberal Party Electoral Funding for the 2011 State Election Campaign and Other Matters*](#) (August 2016), also focused on donations. Rather than recommendations, it made findings, some of which related to a third-party campaign.³

Expert panel

Premier Mike Baird established an expert panel, comprised of Dr Kerry Schott (chair) and former Members of Parliament, Andrew Tink and John Watkins, to report on options for the reform of political donations. The [*final report*](#) (issued in December 2014) asserted that third-party campaigners "should be treated as recognised participants in the electoral process", with a "right to have a voice and attempt to influence voting", but they "should not be able to drown out the voice of political parties".⁴

The expert panel "strongly" agreed that political parties and candidates should have a privileged position in election campaigns because they are directly engaged in the electoral contest and are the only ones able to form government and be elected to Parliament.⁵ This point was later relied on by the unions in argument in [*Unions NSW v New South Wales*](#), as disclosing the "real" purpose of reducing the cap for third-party campaigners in 2018.

The expert report noted a long-standing concern of the conservative side of politics in Australia that trade unions provide an unfair advantage to the Labor Party. Also of concern was the possible emergence of Political Action Committees modelled upon those in the United States of America, which incur very large expenditure and have the potential to undermine the role of parties and candidates in election campaigns.⁶

The expert report accepted that there is widespread support for third-party participation in elections "within limits".⁷ It found the cap of \$1.05 million (plus adjustment for inflation) was too high and suggested it be halved to \$500,000 "to guard against third parties coming to dominate election campaigns".⁸ Whilst the spending cap "should not be set so low as to prevent third parties from having a genuine voice", the report noted that \$500,000 was well above the highest sum spent by third-party campaigners in the 2011 State election. It was "a sufficient amount that strikes the right balance between the rights of third parties and those of parties and candidates".⁹

The panel suggested that third-party spending cap levels be reviewed after the 2015 election "if it becomes apparent that they are causing concern".¹⁰

The panel's recommendations included Recommendation 31: that the cap on electoral expenditure by third-party campaigners be decreased to \$500,000 (adjusted annually for inflation); and Recommendation 32: that third-party campaigners be prohibited from acting in concert with others to incur electoral expenditure that exceeded the cap.

The [Government's response](#) in 2015 supported in principle the expert panel's 50 recommendations, except for one which is not relevant to this paper.

Parliamentary Committee inquiry

Following a referral from the Premier, the Joint Standing Committee on Electoral Matters (JSCEM) conducted an inquiry in 2015 into the final report of the expert panel and the Government's response. The JSCEM's [report](#) in June 2016 found that third-party campaigners should be able to spend a reasonable amount of money to run their campaign; however, the JSCEM agreed with the expert panel that this should not be to the same extent as candidates and parties.¹¹

The JSCEM specified that, before implementing a reduction in the cap to \$500,000, the NSW Government should consider whether there was sufficient evidence that a third-party campaigner could reasonably present its case within that reduced expenditure limit (Recommendation 7).¹² Evidence was given at the JSCEM hearings of expenditure by a number of unions for the 2015 State election that significantly exceeded \$500,000 and business organisations that came close to that amount.¹³

This evidentiary issue became a key point in the High Court's decision in 2019 in [Unions NSW v New South Wales](#). The joint judgment confirmed that no material was placed before the court to suggest that such an evidentiary analysis was undertaken by the Government.¹⁴

The JSCEM also supported the expert panel's reasoning that an aggregation provision would prevent third-party campaigners from acting in concert to overwhelm parties, candidates or other campaigners operating alone.¹⁵

3. Reduction of third-party expenditure caps

Electoral Funding Bill

The Electoral Funding Bill was introduced in May 2018. In the Second Reading Speech, the Special Minister of State confirmed that the reforms were intended "to increase transparency, to reduce the risk of corruption and undue influence, and promote compliance with electoral funding laws."¹⁶

In relation to the cap on electoral expenditure by third-party campaigners, the Minister asserted:

The proposed caps will allow third-party campaigners to reasonably present their case while ensuring that the caps are in proportion to those of parties and candidates who directly contest elections.¹⁷

In the debate, the Minister confirmed that the expert panel had recommended the reduction in the cap to \$500,000 "to guard against third parties dominating election campaigns". He referred to the JSCEM's support for reducing the amount of the cap, but not to the caution expressed by the

JSCEM that enquiries should be made into the level of expenditure reasonably required before the cap was decreased.¹⁸

In opposing the bill, the Shadow Attorney General claimed the provisions attempted to “stifle the voice of trade unions and third-party campaigners”.¹⁹

The bill was assented to on 30 May 2018 and the Act commenced on 1 July 2018. Section 157 of the [Electoral Funding Act 2018](#) repealed the [Election Funding, Expenditure and Disclosures Act 1981](#).

Key provisions of the Electoral Funding Act 2018

The **objects** of the [Electoral Funding Act 2018](#) (EF Act) under s 3 were referred to by the High Court in [Unions NSW v New South Wales](#):

- “(a) to establish a fair and transparent electoral funding, expenditure and disclosure scheme,
- (b) to facilitate public awareness of political donations,
- (c) to help prevent corruption and undue influence in the government of the State or in local government,
- (d) to provide for the effective administration of public funding of elections...
- (e) to promote compliance by parties, elected members, candidates, groups, agents, associated entities, third-party campaigners and donors...”

Some other key provisions of the [EF Act](#) which are integral to understanding third-party campaign expenditure are:

Electoral expenditure: is defined by s 7 as expenditure for, or in connection with, promoting or opposing a party or candidate, directly or indirectly, or for the purpose of influencing the voting at an election. The list of types of expenditure includes: all forms of advertising; production and distribution of election material; internet, telecommunications, stationery and postage; campaign travel and accommodation; employing staff engaged in election campaigns; and conducting research beyond in-house research.

For example, the breakdown of spending by Unions NSW for the 2015 election included: advertising (\$380,000); electoral materials (\$264,000); communications (\$15,000); staff costs (\$120,000); travel (\$8,000); and research (\$52,000).²⁰

Caps on electoral expenditure for election campaigns: were introduced in 2011 under the [Election Funding, Expenditure and Disclosures Act 1981](#) (EFED Act), inserted at Part 6, Division 2B.²¹ Expenditure caps are currently found under Part 3, Division 4 of the EF Act.

Capped State expenditure period: For a general State election, this is “the period from and including 1 October in the year before which the election is to be held to the end of the election day...”: s 27. The expenditure period is therefore almost six months.

Third-party campaigner: is defined under s 4 as a person or entity “who incurs electoral expenditure for a State election during a capped State expenditure period that exceeds \$2,000 in total”. Excluded from this definition

is a party, elected member, group, candidate or associated entity.²² The register of third-party campaigners is outlined at Part 7, Division 4.

Expenditure cap for third-party campaigners: The concept of capping of campaign expenditure applies under s 29 to parties and candidates as well as third-party campaigners. Section 29(10) sets a cap for third-party campaigners of \$500,000 if they are registered under the EF Act prior to the expenditure period. If a third-party campaigner is not registered, the cap is \$250,000. These amounts are to be adjusted for inflation under Schedule 1 of the EF Act.

Previously the cap for third-party campaigners under the EFED Act was more than \$1.2 million. Section 95F(10)(a) provided a cap of \$1,050,000, but indexing for inflation meant that the cap for the March 2015 election was \$1,288,500 if the third-party campaigner was registered.²³

Acting in concert: Section 35(1) prohibits a third-party campaigner from acting in concert with another person to incur electoral expenditure during the capped expenditure period in excess of the applicable cap. Section 35(2) defines "acts in concert" as acting under an agreement, whether formal or informal, with another person to campaign with the object of electing or opposing a particular party, elected member or candidate.

Offences: Part 10, Division 1 creates offences relating to donations, expenditure and other matters. Contravening an expenditure cap carries a maximum penalty of 2 years imprisonment and/or a fine of \$44,000 under s 143. Involvement in a scheme or arrangement to circumvent a prohibition or requirement with respect to electoral expenditure is punishable by a maximum penalty of 10 years imprisonment under s 144.

4. Implied freedom of political communication

The High Court has found an implied freedom of political communication in the Commonwealth [Constitution](#), having regard to ss 7, 24 and 128. Sections 7 and 24 provide that Parliament shall be composed of members and senators "directly chosen by the people", while s 128 provides that a proposed constitutional amendment must be submitted to electors at a referendum.

The current test in *Brown v Tasmania*

In 1997, the High Court outlined a two-limb test in [Lange v Australian Broadcasting Corporation](#),²⁴ modified slightly in [Coleman v Power](#),²⁵ to determine whether a law offends against the implied freedom of political communication. In 2015 in [McCloy v NSW](#),²⁶ the test was expressed in three stages or limbs. In 2017 in [Brown v Tasmania](#),²⁷ the High Court restated the wording from *McCloy*, as the court acknowledged a practical difficulty with assessing a phrase in the second limb. The test now reads:²⁸

1. Does the law **effectively burden** the implied freedom of political communication?
2. If "yes" to question 1, is the purpose of the law **legitimate**, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

3. If a legitimate purpose is identified (“yes” to question 2), is the law **reasonably appropriate** and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

This third question involves “proportionality testing” to consider whether the law is suitable, necessary, and adequate in its balance. (“Suitable” means having a rational connection to the purpose of the provision; “necessary” means there is no obvious and compelling alternative; and “adequate in its balance” refers to the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.)

A law is invalid if question 1 is answered “yes” and either question 2 or question 3 is answered “no”.

[*Brown v Tasmania*](#) concerned protest laws which had the stated objective of ensuring that protesters did not impede work being carried out. The majority of the High Court found the laws to impermissibly burden the implied freedom of political communication and to be invalid.²⁹ The three questions in the test were answered as follows: yes, the provisions effectively burdened the implied freedom as they deterred protesters; yes, the purpose of the provisions was legitimate in the sense of compatible; but no, the provisions were not reasonably appropriate, as they went beyond or were disproportionate to the stated purpose of the legislation.

See the 2017 e/brief, [*The High Court’s decision in Brown v Tasmania*](#),³⁰ for further analysis of this case.

Unions NSW v New South Wales [No 1]

In 2013 in [*Unions NSW v New South Wales*](#),³¹ the High Court struck down two provisions under the now-repealed [*Election Funding, Expenditure and Disclosures Act 1981*](#) (EFED Act). Section 96D made it unlawful for a political donation to be accepted unless the donor was an individual enrolled to vote, while s 95G(6) provided for the aggregation of electoral expenditure of political parties and their affiliated organisations, such as unions, for the purposes of caps on spending.

The court rejected the argument by NSW that the implied freedom of political communication in the Constitution might not apply to a State election, because communication occurring in the context of State matters did not illuminate or affect the choice to be made by electors at federal elections or the opinions they form as to governance at the federal level. Rather, the court found “the complex interrelationship between levels of government, issues common to State and federal government and the levels at which political parties operate necessitate that a wide view be taken of the operation of the freedom of political communication”.³² Generally, political communication cannot be compartmentalised in respect of either State or federal issues, and “a free flow of communication between all interested persons is necessary to the maintenance of representative government”.³³

The court also clarified that the freedom of political communication was “not simply a two-way affair between electors and government or candidates”. There are those in the community who are not electors but are affected by

government decisions and have a legitimate interest in governmental action and the direction of policy. They may seek to influence who should govern and may do so through supporting a party or candidate who they consider best represents or expresses their viewpoint.³⁴

The court concluded that s 96D was a burden on the implied freedom of political communication (first limb of [Lange](#) test) and did not serve a legitimate end (second limb of [Lange](#) test). The requirement under s 96D that a donor be an individual who was enrolled to vote was not connected to and in furtherance of the anti-corruption purposes of the Act.³⁵ A similar conclusion applied to s 95G(6), which effected a burden on political communication in restricting the amount that a political party may incur by way of expenditure in a relevant period. There was also nothing in this provision to connect it to the anti-corruption purposes of the Act.³⁶

For additional commentary, see the 2014 e-brief, [The High Court's decision in the electoral funding law case](#).³⁷

McCloy v NSW

[McCloy v NSW](#)³⁸ in 2015 is also of interest as it relates to electoral law and the implied freedom of political communication. McCloy was a property developer who challenged the validity of several provisions (under the EFED Act) which imposed a cap on political donations, prohibited property developers from making such donations, and restricted indirect campaign contributions such as office accommodation. The High Court upheld the validity of the provisions on the basis that, despite burdening the freedom, they were a legitimate means of pursuing the objective of removing the risk and perception of corruption and undue influence in NSW politics.

The joint judgment accepted the submission of NSW that a problem had been identified with the activities of property developers relating to planning decisions and government approvals. The provisions reduced the risk of corruption and there was not a reasonably practicable alternative to achieving the same anti-corruption purpose.³⁹ The provisions did not affect the ability of property developers to communicate about matters of politics and government, nor to seek access to or influence politicians (other than with monetary payment). Reducing the funds available to election campaigns represented some restriction on communication by parties to the public, but on the other hand, there was public interest in removing the risk and perception of corruption. The restriction on the freedom was more than balanced by the benefits sought to be achieved.⁴⁰

In the course of its reasoning, the joint judgment confirmed that the freedom of political communication is not a personal right, as McCloy seemed to assert, but is “best understood as a constitutional restriction on legislative power”.⁴¹

In 2018, Queensland passed laws banning political donations from property developers, similar to the NSW laws that were found by the High Court to be valid in *McCloy*. The Queensland laws are currently the subject of a High Court challenge in [Spence v State of Queensland](#). The case is expected to be heard in March 2019, prior to the Federal election, due to a possible conflict between Commonwealth and State laws.⁴²

5. The High Court's decision in *Unions NSW v New South Wales* [No 2]

In August 2018, Unions NSW (the peak body for the State's trade unions) and five other unions filed a challenge in the High Court against the third-party campaign expenditure provisions introduced under the [EF Act](#). The challenge encompassed the expenditure cap (s 29(10)) and the restriction on joint activity (s 35).

Each of the six plaintiffs (except the Health Services Union NSW) is registered as a third-party campaigner under the EF Act for the NSW State election in March 2019.

Three of the plaintiffs spent more in the March 2015 election campaign on "electoral communication expenditure" than the reduced cap of \$500,000 that was subsequently introduced in 2018. Unions NSW (first plaintiff) incurred \$719,802.81; the NSW Nurses and Midwives' Association (second plaintiff), spent \$907,831.22; and the Electrical Trades Union of Australia, NSW Branch (third plaintiff) spent \$793,713.14.⁴³

The Attorneys General of the Commonwealth, Queensland, Western Australia and South Australia intervened to appear in support of NSW. The Full Court heard the special case on [5 December](#) and [6 December](#) 2018.

On 29 January 2019, the High Court handed down a unanimous decision in [Unions NSW v New South Wales](#). A joint judgment was issued by Chief Justice Kiefel, Justice Bell and Justice Keane, while Justices Gageler, Nettle and Gordon each agreed with the result in a separate judgment. Justice Edelman also gave a separate judgment, and solely answered question 2 (relating to s 35), which the other justices found unnecessary to answer.

Arguments and common ground

The parties asked the High Court whether ss 29(10) and 35 were invalid on the basis that they impermissibly burdened the implied freedom of political communication, contrary to the Commonwealth [Constitution](#).

The plaintiff unions did not dispute that the wider purposes of the capping provisions introduced in 2011 under the previous EFED Act were legitimately to produce a more "level playing field" and to prevent some campaigners "drowning out" the voices of others. The unions also accepted that the current EF Act retained those wider purposes. However, they argued that ss 29(10) and 35 had a different or further purpose, namely, to privilege the voices of political parties in State election campaigns over those of third-party campaigners. The unions' alternative argument in relation to s 29(10) was that halving the third-party expenditure cap lacked a factual basis and the burden was therefore not justified.

The State of NSW submitted in defence that the real point in dispute was the amount of the third-party expenditure cap, as the unions did not suggest there should be no differentiation between third-party campaigners and parties or candidates. The Commonwealth, intervening in support of NSW, pointed to what it described as an obvious tension between the unions' argument that the purpose of s 29(10) was illegitimate and their acceptance that the purposes of the EF Act generally were legitimate.

Question 1: Is s 29(10) invalid? Yes

Joint judgment (Kiefel CJ, Bell and Keane JJ): The purpose of s 29(10) can be accepted as being to prevent the drowning out of voices by the distorting influence of money.⁴⁴ Where a compatible purpose is identified by those contending for the validity of a statutory provision, the court may proceed upon the assumption that it is the relevant purpose upon which validity will depend.⁴⁵ It may be assumed that the purpose of s 29(10) is legitimate and attention directed immediately to the issue which is clearly determinative of question 1, namely whether the further restrictions which s 29(10) places on the freedom of political communication can be said to be reasonably necessary and for that reason justified.⁴⁶

NSW's submission that candidates and political parties "enjoy a special significance" which "justifies their differential treatment", as reflected in ss 7 and 24 of the [Constitution](#), cannot be accepted.⁴⁷ The requirement of ss 7 and 24 that the Senate and House of Representatives "be 'directly chosen by the people' in no way implies that a candidate in the political process occupies some privileged position in the competition to sway the people's vote simply by reason of the fact that he or she seeks to be elected."⁴⁸

Rather, ss 7 and 24 guarantee the political sovereignty of the people of the Commonwealth,⁴⁹ by ensuring that their choice of elected representatives is a real choice that is free and well-informed.⁵⁰ There is nothing in the authorities which supports the submission that the Constitution impliedly privileges candidates and parties over the electors as sources of political speech.⁵¹

Although NSW is correct in submitting that Parliament does not generally need to provide evidence to prove the basis for legislation which it enacts, the position is different where legislation burdens an implied freedom. Any such effective burden is required to be justified.⁵² NSW also raised the concept of deference to Parliament by the courts, following the case of [Harper v Canada \(Attorney General\)](#)⁵³ which considered third-party advertising expense limits. However, no statements favouring a deferential approach to Parliament have been found in decisions of the High Court with respect to the implied freedom since [Lange](#), nor would this seem appropriate given the High Court's constitutional role.⁵⁴

As the unions pointed out, no basis was given in the expert panel report for halving the amount previously allowed for third-party campaign expenses. The report suggested that the figure be checked against expenditure for the 2015 election. Furthermore, despite the JSCEM's recommendation, no enquiry as to what in fact is necessary to enable third-party campaigners reasonably to communicate their messages appears to have been undertaken. NSW has not justified the burden on the implied freedom by halving the cap as necessary to prevent third-party campaigners "drowning out" other voices, and s 29(10) is invalid.⁵⁵

Other judgments:

The lack of evidence advanced by NSW to justify the greatly reduced spending cap under s 29(10) was a recurring issue in the other judgments. It was not self-evident, nor was it shown, that the \$500,000 cap gave a third-party campaigner a reasonable opportunity to present its case to voters.

The concern raised by the JSCEM remained unanswered. Consequently it was not demonstrated that the extent of the cut was adapted to the achievement of the legitimate purpose of maintaining a level playing field.⁵⁶

Gageler J and Gordon J each highlighted that NSW bore the persuasive onus of substantiating the cap. Gordon J noted that, while the onus issue was the subject of competing views of members of the High Court in the past, it must now be accepted that where a legislative provision burdens the implied freedom, it is for the supporter of the legislation to persuade the court that the burden is justified.⁵⁷

Gageler J expressed a somewhat different view to the other justices on the issue of whether parties and candidates had a “privileged” status. The unions’ argument that the nefarious purpose of s 29(10) marginalised third-party campaigners and privileged parties and candidates, involved an implicit assertion that the “privileging” of one voice and “marginalising” of another is incompatible with maintaining the constitutionally prescribed system of representative and responsible government.⁵⁸ On their own, the labels of “privilege” and “marginalise” have no constitutional significance if the amount of each cap can be justified.⁵⁹

Nettle J rejected the unions’ argument that an obvious, compelling alternative to achieve the purpose of the “level playing field” was to retain the \$1.2 million cap that applied under the EFED Act.⁶⁰ This would assume that once Parliament enacted the provisions for a level playing field, it is precluded from taking a different view according to circumstances evolving in future.⁶¹ The fact that the EF Act prevents the same level of expenditure does not, of itself, mean the new, lower cap is outside the range of reasonable measures for achieving the legitimate purpose. It is conceivably within the range.⁶² In deciding the case, the more forceful submission was the lack of evidence presented, making it impossible to say whether the differential in the cap is within the bounds of what might reasonably be required.⁶³

Edelman J went the furthest in finding that s 29(10) had an additional purpose, as did s 35, and the two provisions could not be assessed independently of the other.⁶⁴ The large reduction of the cap for third-party campaigners and the associated introduction of an “acting in concert” offence were not random decisions. Rather, the only rational explanation for the two measures is that, in implementing the recommendations and reasoning of the expert panel report, the Parliament acted with the additional purpose, not merely the effect, of quietening the voices of third-party campaigners compared to political parties and candidates.⁶⁵

In summary: The court unanimously found s 29(10) invalid, as the burden on the implied freedom of communication was not justified. A majority formed by the joint judgment and Edelman J rejected the notion that political parties and candidates occupy a privileged position in election campaigns.⁶⁶

Question 2: Is s 35 invalid? Unnecessary to decide

The joint judgment reasoned that, because the answer to question 1 is “yes” and s 29(10) is invalid, there is now no third-party expenditure cap upon which the “collusion” provision under s 35 of the EF Act operates. The joint judgment declined the invitation of NSW to nevertheless answer question 2, reasoning that it was an invitation to speculate.⁶⁷

Each of the separate judgments also found it unnecessary to answer the second question with regard to the validity of s 35, except for the judgment of Edelman J. His Honour would have also found that provision invalid.⁶⁸ The collusion offence was created only for third-party campaigners and, in seeking to quieten their voices, it could not co-exist with the implied freedom of political communication.⁶⁹

Consequences and commentary

As the third-party expenditure cap has been struck down, there is theoretically no limit on third-party campaign spending for the 2019 State election. The law does not revert to the previous expenditure cap, as that operated under the EFED Act which has been repealed. The provision will need to be redrafted and passed according to the usual legislative process.

Constitutional law experts have anticipated the potential steps that could be taken after the election. Professor Anne Twomey of the University of Sydney observed that the legislature could restore the previous cap (of around \$1.28 million) or enact a lower cap with express reasoning to justify it. Another option could be for the government to hold an inquiry into the appropriate level of third-party expenditure and then use the outcome as a basis for imposing a new cap.⁷⁰ Professor Twomey also pointed out that any such inquiry could provide sufficient evidence to justify a similar cap to the one that was struck down, as the High Court did not decide that the \$500,000 cap was inadequate, rather that the court had not received sufficient evidence to be satisfied that lowering the cap to such a level was necessary.⁷¹ Professor George Williams of the University of NSW was quoted as saying that the decision would be “frustrating to those candidates and parties who traditionally through this type of legislation have looked for a privileged position.”⁷² Several of the unions which were plaintiffs in the court challenge were reported as not intending to exceed the previous cap of \$1.28 million in their spending in the 2019 election campaign, including Unions NSW, the Nurses and Midwives' Association and the Teachers' Federation.⁷³

6. Conclusion

The High Court's decision in [Unions NSW v New South Wales](#) suggests that the court will continue to scrutinise “with scrupulous care” any legislation that is challenged on the basis of contravening the implied freedom of political communication under the Constitution. This long-standing scrutiny has previously been expressed by the court as ensuring that a restriction introduced, for example to combat corruption, is “no more than is reasonably necessary to achieve the protection of the competing public interest which is invoked to justify the burden on communication”.⁷⁴ The latest decision also serves as a reminder to Parliament that, while it does not generally need to show an evidentiary basis for the legislation it enacts, the situation is different when constitutional freedoms are affected. In that context, “the Parliament may have choices but they have to be justifiable choices...”⁷⁵

¹ Ismay L, [Recent developments in NSW electoral law](#), NSW Parliamentary Research Service, e-brief 6/2017, October 2017.

² Recommendation 21 was that third-party campaigners be required to disclose all electoral expenditure, p 6.

³ Independent Commission Against Corruption NSW, [Investigation into NSW Liberal Party Electoral Funding for the 2011 State Election Campaign and Other Matters](#), ICAC Report, August 2016, pp 21-22.

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- ⁴ Panel of Experts, [Political Donations – Final Report](#) (Vol 1), December 2014, p 109.
- ⁵ Panel of Experts, [Final Report](#), p 109.
- ⁶ Panel of Experts, [Final Report](#), pp 108-109. The rise of third-party advertising is examined by Orr G and Gauja A, "[Third-Party Campaigning and Issue-Advertising in Australia](#)" (2014) 60(1) *Australian Journal of Politics and History* 73.
- ⁷ Panel of Experts, [Final Report](#), p 8.
- ⁸ Panel of Experts, [Final Report](#), p 8.
- ⁹ Panel of Experts, [Final Report](#), p 112.
- ¹⁰ Panel of Experts, [Final Report](#), p 112.
- ¹¹ NSW Parliament, Joint Standing Committee on Electoral Matters (JSCEM), Inquiry into the Final Report of the Expert Panel – Political Donations and the Government's Response, [Report](#) 1/56, June 2016, at [7.20].
- ¹² JSCEM, [Report](#), 2016, at [7.22].
- ¹³ JSCEM, [Report](#), 2016, at [7.17]-[7.18]. Note, however, that most of the expenditure was measured by the 2014-15 financial year, which is a longer period than the six months leading up to the election.
- ¹⁴ [2019] HCA 1 at [26].
- ¹⁵ JSCEM, [Report](#), 2016, at [7.34]-[7.35].
- ¹⁶ A Roberts MP, Electoral Funding Bill, [Second Reading Speech](#), NSWPD, 17 May 2018.
- ¹⁷ A Roberts MP, Electoral Funding Bill, NSWPD, 17 May 2018.
- ¹⁸ A Roberts MP, Electoral Funding Bill, NSWPD, 23 May 2018.
- ¹⁹ P Lynch MP, Electoral Funding Bill, NSWPD, 17 May 2018.
- ²⁰ Evidence by Mark Lennon, Secretary, Unions NSW, to JSCEM inquiry, 30 October 2015, quoted in JSCEM [report](#), June 2016, at 7.18, p 48.
- ²¹ [Election Funding and Disclosures Amendment Act 2010](#), commenced on 1 January 2011.
- ²² An "associated entity" means "a corporation or another entity that operates solely for the benefit of one or more registered parties or elected members": s 4.
- ²³ The actual indexed amount was stated in the [Election Funding, Expenditure and Disclosures \(Adjustable Amounts\) Notice](#), Sch 1, cl 2(8).
- ²⁴ (1997) 189 CLR 520 at 567-568.
- ²⁵ (2004) 220 CLR 1 at [93], [196], [211]. The phrase "the fulfilment of which" in the second limb of *Lange* was replaced with "in a manner which" in *Coleman*.
- ²⁶ (2015) 257 CLR 178 at [2] per French CJ, Kiefel, Bell and Keane JJ.
- ²⁷ (2017) 261 CLR 328 at [104], [156], [277].
- ²⁸ *McCloy v NSW* (2015) 257 CLR 178 at [2]; as modified in *Brown v Tasmania* (2017) 261 CLR 328 at [104].
- ²⁹ (2017) 261 CLR 328 at [154] per Kiefel CJ, Bell and Keane JJ; at [235] per Gageler J and at [298] per Nettle J, each agreeing in a separate judgment; at [439], [483] per Gordon J agreeing in part; at [568] per Edelman J dissenting.
- ³⁰ Gotsis T, [The High Court's decision in Brown v Tasmania](#), NSW Parliamentary Research Service, e-brief 7/2017, November 2017.
- ³¹ (2013) 252 CLR 530.
- ³² (2013) 252 CLR 530 at [25] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.
- ³³ (2013) 252 CLR 530 at [27].
- ³⁴ (2013) 252 CLR 530 at [30].
- ³⁵ (2013) 252 CLR 530 at [60].
- ³⁶ (2013) 252 CLR 530 at [64]-[65].
- ³⁷ Roth L, [The High Court's decision in the electoral funding law case](#), NSW Parliamentary Research Service, e-brief 2/2014, February 2014.
- ³⁸ (2015) 257 CLR 178 at [2] per French CJ, Kiefel, Bell and Keane JJ.
- ³⁹ (2015) 257 CLR 178 at [50], [53], [61]-[62].
- ⁴⁰ (2015) 257 CLR 178 at [93].
- ⁴¹ (2015) 257 CLR 178 at [29]-[30].
- ⁴² Pelly M, "[High Court to hear developer donations case before election](#)", *Financial Review*, 13 January 2019.
- ⁴³ *Unions NSW v New South Wales* [2019] HCA 1 at [12].
- ⁴⁴ [2019] HCA 1 at [38].
- ⁴⁵ [2019] HCA 1 at [36]; *ACTV v Commonwealth* (1992) 177 CLR 106.
- ⁴⁶ [2019] HCA 1 at [35].
- ⁴⁷ [2019] HCA 1 at [39]-[40].
- ⁴⁸ [2019] HCA 1 at [40].

- ⁴⁹ *Unions NSW v New South Wales* (2013) 252 CLR 530 at [135].
- ⁵⁰ *ACTV v Commonwealth* (1992) 177 CLR 106 at 138-139; *Brown v Tasmania* (2017) 261 CLR 328 at [88].
- ⁵¹ [2019] HCA 1 at [40].
- ⁵² [2019] HCA 1 at [45]; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
- ⁵³ [2004] 1 SCR 827.
- ⁵⁴ [2019] HCA 1 at [51].
- ⁵⁵ [2019] HCA 1 at [53].
- ⁵⁶ [2019] HCA 1 at [101] per Gageler J; at [117]-[118] per Nettle J; at [153] per Gordon J. Edelman J did not make such an explicit statement about the lack of evidence for the cap, but his Honour referred to the JSCEM's recommendation that the NSW Government obtain evidence: at [215].
- ⁵⁷ [2019] HCA 1 at [93] per Gageler J; at [151] per Gordon J.
- ⁵⁸ [2019] HCA 1 at [84].
- ⁵⁹ [2019] HCA 1 at [87], [91].
- ⁶⁰ [2019] HCA 1 at [112]-[113].
- ⁶¹ [2019] HCA 1 at [113].
- ⁶² [2019] HCA 1 at [115].
- ⁶³ [2019] HCA 1 at [117]-[118].
- ⁶⁴ [2019] HCA 1 at [159]-[160], [220].
- ⁶⁵ [2019] HCA 1 at [221]-[222].
- ⁶⁶ [2019] HCA 1 at [40] per Kiefel CJ, Bell and Keane JJ; at [180] per Edelman J. An explicit statement in those exact terms was not made by Gordon J or Nettle J. Gageler J did not regard a "privileged" status for parties and candidates, or a "marginalised" status for third-party campaigners, as incompatible with the constitutionally prescribed system of representative and responsible government: at [84], [87], [91].
- ⁶⁷ [2019] HCA 1 at [54].
- ⁶⁸ [2019] HCA 1 at [223].
- ⁶⁹ [2019] HCA 1 at [220], [222].
- ⁷⁰ Smith A et al, "[Liberal Party 'ups the ante' as court win frees unions to unleash election war chest](#)", *SMH*, 31 January 2019.
- ⁷¹ Whitbourn M, "[High Court strikes down NSW laws slashing unions' election ad spending](#)", *SMH*, 29 January 2019.
- ⁷² Smith A et al, "[Liberal Party 'ups the ante' as court win frees unions to unleash election war chest](#)", *SMH*, 31 January 2019.
- ⁷³ Smith A et al, "[Liberal Party 'ups the ante' as court win frees unions to unleash election war chest](#)", *SMH*, 31 January 2019.
- ⁷⁴ *ACTV v Commonwealth* (1992) 177 CLR 106 at 143-144 per Mason CJ.
- ⁷⁵ *Unions NSW v New South Wales* [2019] HCA 1 at [45] per Kiefel CJ, Bell and Keane JJ.

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