**ELECTORAL ACT REVIEW - Addendum to *Interim Report***

*Since the Interim Report was released, the High Court of Australia handed down a decision (detailed below) that is relevant to several aspects of the Review into Tasmania’s Electoral Act and associated laws. The decision directly relates to the issues of capping electoral expenditure by third party campaigners (in a differentiated sense to political parties or candidates) and potentially also extends to limits on donations to third parties for the purpose of electoral expenditure. It is clear from the decision that careful analysis, research and evidence gathering is required to support and justify as reasonably necessary the formulation of legislation or policy that seeks to burden the implied freedom of political communication on governmental and political matters. As such, this addendum to the Interim Report seeks to briefly explain the impact of the High Court decision, and pose further specific consultation issues for feedback. The period for consultation on the Interim Report will be extended to 15 April 2019 to allow for this feedback to be provided and for detailed analysis of the High Court’s decision.*

On 29 January 2019, the High Court handed down its decision in *Unions NSW & Ors v NSW* [2019] HCA 1. (A copy of the Court’s decision can be found at <http://eresources.hcourt.gov.au/showCase/2019/HCA/1>).

The High Court held section 29(10) of the *Electoral Funding Act 2018* (NSW) (the EF Act) to be invalid because it impermissibly burdens the implied freedom of political communication on governmental and political matters, implied and protected by the Commonwealth *Constitution*.

The EF Act replaced the *Election Funding, Expenditure and Disclosures Act 1981 (NSW).* Whilst maintaining the general scheme of the 1981 Act, it made two important changes to NSW electoral laws. The first, by section 29(10), was to reduce the capped amount that third party campaigners were permitted to spend on electoral campaigning from $1,050,000 to an amount of $500,000, which is less than half the amount applicable to specified political parties. The second, by section 35, was to prohibit third party campaigners from acting in concert so as to exceed the cap applicable to a third party campaigner. The EF Act was intended to apply to regulate, amongst other things, expenditure by political parties, candidates, elected members and others, including third party campaigners, in the next New South Wales State election (due in March 2019). The plaintiffs, a collection of trade union bodies, commenced proceedings in the High Court shortly after the EF Act commenced, challenging the validity of sub-section 29(10) and section 35 of the EF Act, and noting that three plaintiffs had incurred more than $500,000 in electoral expenditure in the 2015 State election.[[1]](#footnote-1)

The High Court noted the submissions of the defendant, the State of New South Wales, that preparatory materials to the EF Act recommended the reduction in the cap for reasons including that third party campaigners should not be able to “drown out” political parties, which should have a “privileged position” in election campaigns. The defendant argued that a purpose of the EF Act was to prevent the drowning out of voices in the political process by the distorting influence of money.[[2]](#footnote-2)

Chief Justice Keifel and Justices Bell and Keane considered whether the burden imposed by section 29(10) was ‘reasonably necessary’,[[3]](#footnote-3) and whether the defendant had established the necessity, noting:

*“It must of course be accepted that parliament does not generally need to provide evidence to prove the basis for legislation which it enacts. However, its position in respect of legislation which burdens the implied freedom is otherwise. Lange requires that any effective burden be justified. As the Commonwealth conceded in argument, the parliament may have choices* ***but they have to be justifiable choices where the implied freedom is concerned****”.[[4]](#footnote-4)* [Emphasis added].

Prior to passing the EF Act the NSW parliament had received a report from a joint standing committee on electoral matters, noting that it could not be satisfied that reducing the cap for expenditure by third party campaigners to $500,000 would permit a third party campaigner to successfully present its case at an election within that limit.[[5]](#footnote-5) The report suggested that further analysis of the amount that would be required be undertaken. The High Court found that there was no evidence to support that any such consideration had occurred. Accordingly, the High Court found no evidence to justify the burden imposed by section 29(10) of the EF Act on the implied freedom, in the sense of being reasonably necessary.[[6]](#footnote-6)

It is a clear finding of the High Court that there must be material before the Court to allow it to conclude that legislation that burdens the implied freedom of communication on governmental and political matters implied and protected by the Commonwealth Constitution can be justified.

The Court considered that, at least in some circumstances, capping electoral donations and discriminating between political candidates and third party campaigners is legitimate and can be justified, however no specific guidance or criteria was set down by the High Court to determine the process of justification to allow the burden to stand. The issue of what limit or cap can be justified raises difficult questions, which are proposed to be explored in Consultation Issue 20 below.

**Consultation Issue 20:** In light of the High Court’s decision in *Unions NSW & Ors v NSW,* if a cap on electoral expenditure by third party campaigners was to be introduced in Tasmania, what level of expenditure could be justified with reference to relevant example expenditure by third parties in recent State election campaigns? Should the reasoning in the High Court decision have wider application to caps on third party donations or other further matters?

On a final note, for those considering making a submission in relation to this further Consultation Issue 20, it is noted that the matter of *Spence v State of Queensland* (B35/2018) is due to be heard by the Full Court of the High Court on 12 March 2019, with a decision anticipated to be expedited. This matter will have direct relevance to the issue of banning of donations by third party campaigners.

1. *Unions NSW & Ors v NSW* [2019] HCA 1, [10] and [12]. [↑](#footnote-ref-1)
2. *Unions NSW & Ors v NSW* [2019] HCA 1, [30] and [38]. [↑](#footnote-ref-2)
3. *Unions NSW & Ors v NSW* [2019] HCA 1, [35]. [↑](#footnote-ref-3)
4. *Unions NSW & Ors v NSW* [2019] HCA 1, [45]. [↑](#footnote-ref-4)
5. *Unions NSW & Ors v NSW* [2019] HCA 1, [26]. [↑](#footnote-ref-5)
6. *Unions NSW & Ors v NSW* [2019] HCA 1, [53]. [↑](#footnote-ref-6)