Cap on electoral expenditure by third party campaigners struck down

Douglas McDonald-Norman reports on *Unions NSW v State of New South Wales* [2019] HCA 1

In *Unions NSW v State of New South Wales*, the High Court considered the validity of two provisions of the *Electoral Funding Act 2018* (NSW). Section 29(10) of that Act imposed caps on electoral expenditure by 'third-party campaigners'. These caps were significantly lower than the permitted expenditure of those political parties which had endorsed more than ten candidates for election to the NSW Legislative Assembly. Section 35 of the Act prohibited third-party campaigners from acting in concert with other persons to exceed the applicable cap for the third-party campaigner within specified periods. In five separate judgments, every member of the Court concluded that s 29(10) impermissibly burdened the implied freedom of communication on matters of politics and government protected by the Constitution. With the exception of Edelman J, who found that s 35 was invalid (at [160]), all members of the Court found it unnecessary to decide the question of the validity of s 35 in circumstances where there was no cap upon which that section could operate. This decision further illuminates the extent and implications of the implied freedom following the re-articulation of the test for what is 'reasonably appropriate and adapted' in *McCloy v New South Wales* (2015) 257 CLR 178.

'Third-party campaigners', for the purposes of State elections, are persons or other entities (subject to exemptions) who incur electoral expenditure for a state election within a specified period exceeding $2000 in total. They include unions and industry groups. Restrictions upon their ability to spend money in state elections are potentially highly significant for the conduct of politics in this state.

The *Electoral Funding Act* was enacted on 30 May 2018, replacing the *Election Funding, Expenditure and Disclosures Act 1981*. Both of the impugned provisions were introduced as part of the new Act. Prior to the new Act's enactment, third-party campaigners registered before the capped state expenditure period for an election were able to spend up to $1,050,000 in respect of a state general election. By contrast, political parties which had endorsed more than ten candidates for election to the Legislative Assembly were subject to a cap of $100,000 multiplied by the number of electoral districts in which they had endorsed candidates. (Logically, this cap would hence always equal or exceed $1,000,000.) Section 29(10) of the new Act reduced the applicable cap for third-party campaigners registered before the capped state expenditure period to $500,000 – less than half of its previous total.

The new limits on the activities of third-party campaigners were a purported response to the recommendations of an Expert Panel (comprised of Dr Kerry Schott, Andrew Tink AM and the Hon John Watkins) on political donations in New South Wales. The panel's report, delivered in December 2014, recommended reduction of the expenditure cap on third-party campaigners. The expert panel suggested an expenditure cap of $500,000, which exceeded the highest sum spent by any third-party campaigner in the 2011 state election. The expert panel asserted, in this regard, 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' (at [24]). Third-party campaigners, while 'recognised participants' in the electoral process and entitled to a voice, 'should not be able to drown out the voice of the political parties' (at [24]).

The expert panel's report was referred to the Joint Standing Committee on Electoral Matters. While accepting the expert panel's premise that 'third-party campaigners should not be able to run campaigns to the same extent as candidates and parties' (at [26]), the committee recommended that, before reducing the cap to $500,000, the New South Wales Government should 'consider whether there was sufficient evidence that a third-party campaigner could reasonably present its case within that expenditure limit' (at [26]). Significantly, no evidence was put before the High Court that any such consideration had taken place prior to the enactment of the expenditure cap into law. The expert panel had similarly recommended that its proposed $500,000 figure be checked against third-party expenditure at the 2015 election (so as to determine its continued suitability); no evidence was put before the High Court that this had occurred. Several third-party campaigners spent significantly in excess of $500,000 at the 2015 state election (at [213]).

The six plaintiffs were unions (and hence prospective third-party campaigners). They challenged ss 29(10) and 35 as inconsistent in two key respects with the test as to whether a law infringes the implied freedom of political communication:

- whether the law effectively burdens the implied freedom in its terms, operation or effect;
- whether the purpose of the law is legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government; and
- whether the law is reasonably appropriate and adapted to achieve that legitimate object in a manner compatible with the constitutionally prescribed system of representative and responsible government, having regard to whether the law is suitable, necessary and adequate in its balance.

First, as to whether the provisions served a legitimate purpose, the plaintiffs argued that both sections were discriminatory in that they aimed to privilege the voices of political parties over those of third-party campaigners. While they acknowledged that the Act as a whole did not share this purpose, and that the broader statute possessed a legitimate purpose, the plaintiffs asserted that the impugned sections (to the extent that they privileged the voices of certain participants in the political process over others) served an illegitimate purpose and were to that extent invalid.

Second, as to whether the provisions were reasonably appropriate and adapted or proportionate in the means chosen to serve this purpose, the plaintiffs contended that the State had not established that the new, restrictive cap on electoral expenditure by third-party campaigners was suitable, necessary or adequate in their balance.

Kiefel CJ, Bell and Keane JJ, who delivered a joint judgment, found it unnecessary to decide the question of whether the purpose of the impugned provisions was legitimate, because the question of whether the law was reasonably appropriate and adapted was 'the issue which is clearly determinative' (at [35]). Gordon J proceeded upon a similar assumption (at [154]). Gageler JJ (at [81]-[90]) and Nettle J (at [108]-[110]) both found the asserted purpose of the impugned sections to be legitimate – whether to ensure that political parties are able to communicate 'without being overwhelmed by the targeted campaigns of any number of third-party campaigners acting alone or in concert' (Gageler J at [90]), or more simply so as to 'preven[t] voices being drowned out by the powerful' (Nettle J at [109]).

Edelman J, by contrast, found the identified illegitimate purpose of the impugned sections – 'to burden the freedom of political communication of third-party campaigners' (at [160]) – sufficient to invalidate both provisions. The significant reduction in the cap for third-party campaigners (and associated prohibition on 'acting in concert' so as to circumvent this cap) was found by his Honour to reflect an 'additional' purpose to the Act, absent from the prior *Election Funding, Expenditure and Disclosures Act 1981*: 'to privilege political parties and candidates' (at [221]). This purpose, 'of quietening the voices of third-party campaigners relative to political parties and candidates', was found by Edelman J to be inconsistent with the implied freedom of political communication. (Given his Honour's findings in this regard, he did not proceed to determine whether the impugned provisions in question were 'reasonably appropriate and adapted' to achieve a legitimate object.)

Each other judge of the Court found that the State had not established that s 29(10) was 'reasonably appropriate and adapted' to serve any constitutionally legitimate purpose. Kiefel CJ, Bell and Keane JJ observed that no enquiry appeared to have been undertaken 'as to what in fact is necessary to enable third-party campaigners reasonably to communicate their messages'; the expert panel gave no basis for 'halving' the figure of permitted third-party electoral expenditure, and the figure adopted was not checked against what had been spent in 2015 (at [53]). As Nettle J put it (at [117]):

> [T]he expert panel considered it was necessary to gather evidence to establish the appropriate relativity before the change was enacted. Yet, for reasons which do not appear, that recommendation went unheeded. It is as if Parliament simply went ahead and enacted the *Electoral Funding Act* without pausing to consider whether a cut of as much as 50 per cent was required.

Gageler J similarly found that the State had not satisfied the Court that the burden upon the implied freedom imposed by a cap of $500,000 was justified (at [99]-[101] per Gageler J and at [151]-[153] per Gordon J).

The Court's approach to the establishment of facts in this regard warrants mention. Kiefel CJ, Bell and Keane JJ emphasised that while Parliament ordinarily need not provide evidence to prove a basis for legislation, 'its position in respect of legislation which burdens the implied freedom is otherwise'; Parliament must justify the burdens it chooses to impose in this regard (at [45]). Gageler J sought to qualify this position, noting that questions of constitutional fact 'cannot form issues between parties to be tried like ordinary questions of fact' (at [94]). These questions of constitutional fact do not involve notions of proof or onus (at [94]). This is subject, however, to the nature of the Court's task in this regard: '[i]f a court cannot be satisfied of a fact the existence of which is necessary in law to provide a constitutional basis for impugned legislation … the court has no option but to pronounce the legislation invalid' (at [95]).

By this decision, the High Court has continued to reaffirm that there are a range of permissible options by which a legitimate statutory purpose may be achieved within the discretion of Parliament – a 'domain of selections'. But these options must be capable of justification when subjected to judicial scrutiny as the method best suited to fulfil a legitimate legislative purpose with the least resulting harm to the implied freedom of communication on governmental and political matters.