Case Note

Caps on Electoral Expenditure by Third-Party Campaigners: *Unions NSW v New South Wales*

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Abstract

Unions NSW v New South Wales is a recent decision of the High Court of Australia regarding the implied freedom of political communication. It involved a challenge to two provisions of the *Electoral Funding Act 2018* (NSW) relevant to third-party campaigners and followed a period of significant reform in the NSW electoral sphere. The focus of this case note is the Court's conceptual development of two key principles in electoral case law: the 'level playing field' and the principle of 'political equality'. It suggests that with both principles purporting to serve the same purpose — the equalising of the electoral field — the Court's work in this area will remain of interest in the continuing evolution of the implied freedom jurisprudence.

I Introduction

The constitutional implied freedom of political communication ('the implied freedom') has been reaffirmed and redefined by the High Court of Australia over a number of years since it was first recognised in 1992.[1] Within this context, the recent decision in *Unions NSW v New South Wales*[2] — which raised, but left unchanged, the broad framework of the implied freedom — is worthy of consideration. The case has shown that a majority of the High Court is willing to embrace a principle of 'political equality' developed in *McCloy v New South Wales*.[3] Conceptually, the principle is an important addition to electoral case law given its effect on the evidentiary standard against which threats to the implied freedom will be judged. At the same time, insofar as it is a principle concerned with equality among political actors, its novelty should not be overestimated, given the continued presence of a longstanding 'level playing field' principle in constitutional jurisprudence. With both principles purporting to serve the same purpose — the equalising of the electoral field — their ongoing evolution and potential merging will remain of interest in the continuing development of the implied freedom jurisprudence.

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1 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 ('*ACTV*').

2 (2019) 363 ALR 1 ('*Unions No 2*').

3 (2015) 257 CLR 178 ('*McCloy*').

This case note examines the High Court's decision in *Unions No 2* within the context of the implied freedom. Due to the complexity of the underlying facts, it sets out the background and arguments of the parties in detail in Parts II and III, along with an outline of the implied freedom in Part IV. Following discussion of the decision in Part V, the case note focuses on the Court's use of the principles of the 'level playing field' and 'political equality' in its determination of the legitimacy of the purpose of the law in question.

II The Facts

Unions No 2 was a challenge by six plaintiffs ('the unions') — five of whom were trade unions registered as 'third-party campaigners'[4] for the 2019 NSW State Election — to the validity of two provisions in the *Electoral Funding Act 2018* (NSW) ('*EF Act*'). One of two key pieces of electoral legislation in NSW,[5] the *EF Act* regulates electoral funding, electoral expenditure, political donations and disclosures in State and local government elections.

The *EF Act* itself was the product of a long line of independent and government inquiries into NSW's electoral funding legislation, spurred on by the findings of the NSW Independent Commission Against Corruption ('ICAC') in its so-called 'Operation Spicer' and 'Credo' investigations.[6] This string of inquiries began in May 2014, with the appointment of a 'Panel of Experts — Political Donations' ('the Expert Panel'), which was tasked with investigating options for the long term reform of NSW's election funding laws, previously governed by the *EFED Act*.[7]

While the Expert Panel's report in December 2014 made a number of recommendations for NSW's electoral funding system generally,[8] it was their recommendations regarding the regulation of third-party campaigners that had the greatest consequence for this case. Specifically, the Expert Panel recommended a

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4 *EF Act* s 4 defines a 'third-party campaigner' for a State election as: 'A person or another entity (not being an associated entity, party, elected member, group or candidate) who incurs electoral expenditure for a State election during a capped State expenditure period that exceeds $2,000 in total.' The sixth plaintiff, while previously registered as a third-party campaigner, was not registered under the *EF Act* at the time proceedings commenced, although it confirmed its commitment to register for future elections.

5 The other being the *Electoral Act 2017* (NSW), which regulates the administration of State elections in NSW.

6 Operation Spicer involved investigations into allegations that during the lead-up to the 2011 NSW State Election, certain NSW Liberal Party candidates and others solicited and received political donations that were not declared as required by the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ('*EFED Act*'). The allegations included that some of these political donations were made by and received from prohibited donors, including property developers and some exceeded the applicable caps on political donations.

7 Department of Premier and Cabinet (NSW), 'Political Donations Panel of Experts Terms of Reference' (May 2014) <https://www.dpc.nsw.gov.au/updates/2014/05/27/panel-of-experts-political-donations/>.

8 The Expert Panel's report contained as its primary recommendation an immediate, comprehensive review of NSW's previous electoral funding legislation, the *EFED Act* (n 6), with the Expert Panel describing years of ad-hoc amendments as having created a 'complicated and unwieldy' Act: Kerry Schott, Andrew Tink and John Watkins, *Political Donations: Final Report* (Report, December 2014) vol 1, 1 ('*Expert Panel Report*').

reduction of the expenditure cap for third-party campaigners from $1,050,000 — the applicable cap at the 2015 NSW State Election — to $500,000, prior to the 2019 NSW State Election.[9] At the same time, the Expert Panel recommended that caps for political parties and candidates be increased in line with inflation.[10] It also recommended a prohibition on third-party campaigners pooling their electoral expenditure to incur electoral expenditure that exceeded the third-party campaigner cap, via the introduction of an 'acting in concert' offence.[11] Although the Expert Panel noted that it had found 'widespread support' for third-party campaigners participating in elections,[12] it also confirmed a clear view held by many stakeholders that third parties 'must not drown out the voice of the real players, the candidates and political parties'.[13] This was accompanied by a 'high level of concern' about the growth of third-party campaigners,[14] based on the rapid growth of political action committees in the United States ('US').[15] The Expert Panel thus recommended these changes to guard against third-party campaigners 'coming to dominate election campaigns',[16] agreeing 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'.[17]

The findings and recommendations of the Expert Panel were reviewed on three occasions over the following two years — via the Government response to the *Expert Panel Report*,[18] an inquiry by the Joint Standing Committee on Electoral Matters ('JSCEM'),[19] and the Government response to the JSCEM Inquiry.[20] While

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9 Ibid 8, 113 (Recommendation 31).

10 Ibid 8, 65 (Recommendation 10).

11 Ibid 116 (Recommendation 32).

12 Ibid 107.

13 Ibid quoting NSW Electoral Commission, Submission No 43 to Panel of Experts – Political Donations (17 September 2014) 6. See also NSW Greens, Submission No 40 to Panel of Experts – Political Donations (17 September 2014) 5.

14 *Expert Panel Report* (n 8) 108.

15 *Unions No 2* (n 2) 9 [22]. Political action committees ('PACs'), are organisations in the US 'that obtain contributions from individuals and distribute donations to candidates for political office', in a manner similar to that of third-party campaigners in Australia: see definition in David Mervin, 'PAC' in Garrett W Brown, Iain McLean and Alistair McMillan (eds) *A Concise Oxford Dictionary of Politics and International Relations* (Oxford University Press, 4th ed, 2018). Following the decision of the US Supreme Court in C*itizens United v Federal Election Commission*, 558 US 310 (2010), a new form of 'Super PAC' emerged. These Super PACs are permitted to 'spend unlimited amounts of political donations on political activities and political campaigning [for candidates,] as long as they operate independently of a candidate's official campaign and party', resulting in criticism that they disproportionately influence electoral outcomes: see definition in Mervin.

16 *Expert Panel Report* (n 8) 105.

17 Ibid 109.

18 NSW Government, *Final Report of the Panel of Experts – Political Donations: Government Response* (Report, 5 March 2015) ('*Government Response No 1*').

19 Joint Standing Committee on Electoral Matters, Parliament of New South Wales, *Inquiry into the Final Report of the Expert Panel: Political Donations and the Government's Response* (Report No 1/56, June 2016) ('*JSCEM Report*').

20 NSW Government, *Government Response to the Inquiry into the Final Report of the Expert Panel—Political Donations and the Government's Response* (Report, 22 December 2016) 5 ('*Government Response No 2*').

the reduction of the expenditure cap to $500,000 was supported on each occasion,[21] this recommendation was consistently tempered by the additional recommendation that the NSW Government consider whether there was sufficient evidence that a third-party campaigner could still run an effective electoral campaign with a cap of $500,000.[22] At the end of the inquiry process, the NSW Government confirmed its support for this limitation, committing to 'analyse disclosures lodged by third-party campaigners for the 2014–15 disclosure period (which cover[ed] the 2015 State Election) to assess whether the proposed $500,000 expenditure limit [was] reasonable'.[23] This statement would prove to be of particular significance to the Court's determination, as discussed below in Part V.

Coming into effect on 1 July 2018, the *EF Act* repealed the *EFED Act* in totality, while purportedly maintaining the *EFED Act*'s approach to 'disclosure, caps on donations, limits on expenditure and public funding'.[24] Two key provisions implemented the recommendations of the Expert Panel with respect to third-party campaigners. The first — *EF Act* s 29(10) — reduced the electoral expenditure cap for third-party campaigners to $500,000 for those registered before the commencement of the capped State expenditure period,[25] and $250,000 for those registered after.[26] The second — *EF Act* s 35(1) — made it an offence for third-party campaigners 'to act in concert with another person or persons to incur electoral expenditure in relation to an election campaign during the capped expenditure period'.[27] More broadly, the *EF Act* also increased the electoral expenditure caps for registered political parties and candidates,[28] as well as relaxing the aggregation provisions that applied to 'associated entities'.[29]

III The Challenge

With the NSW State Election set for March 2019, there was a tight timeframe within which any disputed legislation could be challenged before the commencement of the capped expenditure period on 1 October 2018. Accordingly, the unions commenced proceedings just over a month after the *EF Act*'s commencement, describing the

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21 *Government Response No 1* (n 18) attachment A, 8*; JSCEM Report* (n 19) 49; *Government Response No 2* (n 20) attachment A, 5.

22 Ibid.

23 *Government Response No 2* (n 20) attachment A, 5.

24 New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 May 2018, 2 (Anthony Roberts, Minister for Planning, Minister for Housing, and Special Minister of State).

25 *EF Act* (n 4) s 29(10)(a). The 'capped State expenditure period' for a general election applies from 1 October in the year before the election, to the end of the election day for the election: *EF Act* (n 4) s 27(a).

26 Ibid s 29(10)(b).

27 Acting in concert is where a person 'acts under an agreement (whether formal or informal) with [another] person to campaign with the object of having a particular party, elected member or candidate elected, or opposing the election of a particular party, elected member or candidate': *EF Act* (n 4) s 35(2).

28 Ibid s 29(2)–(9). Note that NSW argued in its submissions that this was not an 'increase' as such. Rather, it said that this increase simply accounted for the indexation of the caps between 2010 and 2018: New South Wales, 'Defendant's Submissions', Submission in *Unions NSW v New South Wales*, S204/2018, 14 November 2018, 4 [16] ('*NSW Submissions*').

29 *EF Act* (n 4) s 30(4). 'Associated entities' are defined as 'a corporation or another entity that operates solely for the benefit of one or more registered parties or elected members': *EF Act* (n 4) s 4.

changes introduced by the Act as 'deliberately alter[ing] the careful balance the [*EFED Act*] had struck, thereby transforming a reasonable regulation of electoral expenditure into an unconstitutional restriction of disfavoured voices in the political debate'.[30]

The unions confined their challenge to ss 29(10) and 35, seeking declarations to the effect that the provisions were invalid as they infringed the implied freedom of political communication. The parties agreed that the provisions burdened the implied freedom.[31] The focus of the arguments before the Court was whether there was a legitimate purpose for the provisions and whether the means used to achieve the purpose were proportionate. The unions' arguments consisted of two limbs, argued in the alternate. Either:

1. The purpose of s 29(10) was illegitimate in aiming to 'privilege the voices of political parties (and, to a lesser extent, candidates)';[32] or,
2. If the purpose was legitimate, s 29(10) was not justified; that is, it was not reasonably appropriate or adapted to advancing its end either because:
    a. It would prevent third-party campaigners from mounting as effective a campaign as other participants in the electoral system;[33] or,
    b. There was no demonstration to why a cut to $500,000 was necessary.[34]

Section 35 was argued to be invalid '[f]or broadly similar reasons'.[35]

In response, the submissions of the defendant ('NSW') contended that the purposes of both sections were legitimate. At its core, NSW's submission was that the purposes of the *EF Act* remained the same as those of its precursor. In so submitting, NSW sought to capitalise on the legitimacy bestowed upon those purposes in *McCloy*, where the Court had held that the anti-corruption and fairness aims of the *EFED Act* were legitimate.[36] On the provisions' justification, NSW referred to the 'constitutionally distinct position of candidates',[37] arguing that the provisions did not privilege political parties to ensure they dominated the electoral process, but rather, to prevent them being 'drowned out'.[38] Moreover, it argued that the provisions were appropriate and adapted to advancing this aim, based on 'the functional difference between candidates and parties on the one hand, and TPCs [third party campaigners] on the other hand'.[39]

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30 Unions NSW, 'Plaintiffs' Submissions', Submission in *Unions NSW v New South Wales*, S204/2018, 24 October 2018, 1 [5] ('*Unions Submissions*').

31 It was agreed by both parties in their submissions that the provisions burdened the implied freedom in their 'terms, operation and effect' and thus, the required first step of the *Lange* test was satisfied: *Unions Submissions* (n 30) 10 [37]; *NSW Submissions* (n 28) 9 [31].

32 *Unions Submissions* (n 30) 12 [43].

33 Ibid 16 [54].

34 Ibid 15 [53].

35 Ibid 18 [60].

36 *McCloy* (n 3) 209 [53].

37 *NSW Submissions* (n 28) 6 [23].

38 Ibid 11 [39].

39 Ibid.

IV The Implied Freedom of Political Communication

Grounded in the structure and content of the *Australian Constitution* ('the *Constitution*'), the implied freedom has been found to be a necessary implication from the system of representative democracy for which the *Constitution* provides. As stated by McHugh in *ACTV*, 'the proper conclusion to be drawn from the terms of ss. 7 and 24 of the *Constitution* is that the people of Australia have constitutional rights of freedom of participation, association and communication in relation to federal elections'.[40]

The implied freedom has woven its way through cases involving protest laws,[41] the postal service,[42] preaching in public places,[43] and the distribution of flyers.[44] However, given its origins in the constitutional provisions mandating a parliament 'directly chosen by the people',[45] it is arguably exhibited in its purest form in the electoral sphere. Here, it has been held to be essential to protect 'the free expression of political opinion … which is indispensable to the exercise of political sovereignty by the people of the Commonwealth',[46] as well as being 'essential to the maintenance of a representative democracy ... especially during an election campaign'.[47] While early cases relying on the implied freedom had little success in their challenges to federal electoral law,[48] the doctrine has shown itself to be a powerful force in recent years, particularly in scenarios involving political donations and electoral expenditure.[49]

Determining whether a law impermissibly burdens the implied freedom is a multi-step process established in *Lange* ('the *Lange* test'),[50] reformulated in *McCloy*[51] and *Brown*[52] and most recently expounded in *Spence*.[53] The first step of the process requires that the law be found to 'effectively burden the implied freedom'.[54] Within the doctrine's history, it is the second step of the *Lange* test that has undergone the most refinement. Originally a single limb which asked if the impugned law was 'reasonably appropriate and adapted to achieving a legitimate end', the introduction of 'compatibility testing' under *McCloy* split this limb in

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40 *ACTV* (n 1) 227.
41 *Levy v Victoria* (1997) 189 CLR 579; *Brown v Tasmania* (2017) 261 CLR 328 ('*Brown*').
42 *Monis v The Queen* (2013) 249 CLR 92.
43 *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1.
44 *Coleman v Power* (2004) 220 CLR 1.
45 *Constitution* ss 7, 24.
46 *Brown* (n 41) 359 [88] (Kiefel CJ, Bell and Keane JJ).
47 *ACTV* (n 1) 157 (Brennan J).
48 *Langer v Commonwealth* (1996) 186 CLR 352; *Muldowney v South Australia* (1996) 186 CLR 352; *McClure v Australian Electoral Commission* (1999) 163 ALR 734. See also Gerard Carney, 'The High Court and the Constitutionalism of Electoral Law' in Graeme Orr, Bryan Mercurio and George Williams (eds), *Realising Democracy: Electoral Law in Australia* (Federation Press, 2003) 170, 178.
49 *Unions NSW v New South Wales* (2013) 252 CLR 530 ('*Unions No 1*'); *McCloy* (n 3); *Spence v Queensland* (2019) 367 ALR 587 ('*Spence*').
50 (1997) 189 CLR 520, 567–8.
51 *McCloy* (n 3) 194–5 [2].
52 *Brown* (n 41) 359 [88].
53 *Spence* (n 49). Note that the Court in this case addressed the implied freedom 'discretely and with relative brevity': at [14] (Kiefel CJ, Bell, Gageler and Keane JJ).
54 *Lange* (n 50) 567; *Brown* (n 41) 360 [90] (Kiefel CJ, Bell and Keane JJ); *McCloy* (n 3) 194 [2].

two.[55] A Court is now required to ask itself two questions, should it be satisfied of the existence of a burden on the implied freedom:

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?
2. If a legitimate purpose is identified ('yes' to the previous question), 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?[56]

Under the second part of the second step of the *Lange* test, a law that is reasonably appropriate and adapted must also be shown to be suitable, necessary and adequate in its balance.[57] Only then may it be said that the law is 'justified'.[58]

V The Decision

The High Court handed down its decision on 29 January 2019, unanimously finding s 29 of the *EF Act* invalid on the basis that it impermissibly burdened the implied freedom. A joint judgment was issued by Kiefel CJ, Bell and Keane JJ, while Gageler, Nettle and Gordon JJ each agreed with the result in separate concurring judgments. Justice Edelman's judgment alone also addressed the validity of s 35, which the other justices found it unnecessary to consider.[59]

As was the case between the parties, there was unanimous agreement across the bench that the provision in question burdened the implied freedom and that the first step of the *Lange* test was satisfied.[60] Describing the burden, the joint judgment stated that

> [t]he capping of both political donations and electoral expenditure restricts the ability of a person or body to communicate to others … [with] a cap on electoral expenditure [being] a more direct burden on political communication than one on political donations …[61]

Justice Edelman elaborated further on the content of the communication being burdened,[62] stressing that the communication must be both inherently political and independently lawful before the burden could be considered unconstitutional.[63]

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55 *McCloy* (n 3) 194 [2].
56 *Brown* (n 41) 363–4 [104] (Kiefel CJ, Bell and Keane JJ).
57 This involves what is known as a 'proportionality analysis': see *McCloy* (n 3) 195 [3].
58 Ibid 195 [2].
59 Based on the focus of the majority of the Court being on *EF Act* (n 4) s 29(10), Edelman J's approach to s 35 will not be discussed in this case note.
60 *Unions No 2* (n 2) 8 [15] (Kiefel CJ, Bell and Keane JJ), 19 [68] (Gageler J), 31 [110] (Nettle J), 38 [138] (Gordon J), 44 [164] (Edelman J).
61 Ibid 8 [15] (Kiefel CJ, Bell and Keane JJ).
62 Ibid 44 [163] (Edelman J).
63 For a recent discussion of the nature of political communication, see Shireen Morris and Adrienne Stone, 'Abortion Protests and the Limits of Freedom of Political Communication: *Clubb v Edwards; Preston v Avery*' (2018) 40(3) *Sydney Law Review* 395. See also *Brown* (n 41) 502–6 [557]–[563] (Edelman J).

A *Determining the Purpose of the Provisions*

It was the second step of the *Lange* test — requiring the Court to consider the legitimacy of the impugned provision — that marked the initial division of the Court and solidified the significance of this case. Here, despite varying degrees of thoroughness in their assessment of the provision's purpose, six judges of the Court reaffirmed their decision in *McCloy*: that the purpose of providing a 'level playing field' (that is to say, to prevent certain voices from drowning out others in political discourse) is legitimate in the sense that it enhances the system of representative government provided for by the *Constitution*.[64]

For Kiefel CJ, Bell and Keane JJ, determination of the legitimacy of s 29(10) was swift, based on a willingness to assume its purpose as being that which was asserted by NSW.[65] NSW submitted that the purpose of 'levelling the playing field' be imputed to s 29(10) of the *EF Act*,[66] based on the argument that the *EF Act* had wholly inherited the purposes of the previous *EFED Act*.[67] While their Honours justified this quick assessment based on Mason CJ's reasoning in *ACTV*,[68] the brevity of their Honours' assessment arguably led them to overlook the nuances present in *McCloy*: namely, the differences in the mischief the law in this case sought to address.[69] Justice Nettle was also willing to accept NSW's characterisation of the purpose as legitimate.[70] In doing so, his Honour cited a long line of authority for the proposition that the prevention of voices being drowned out was legitimate.[71]

Justice Gordon was the only member of the Court willing to dispense with determining the provision's purpose, finding its purpose irrelevant and unnecessary in the face of more pressing questions of its justification.[72] However, her Honour noted that the approach that she preferred did not negate the Court's need to 'scrutinize very carefully [the claim] that freedom of communication must be restricted in order to protect the integrity of the political process'.[73]

Of the judges who recognised the legitimacy of the purpose of s 29(10) of the *EF Act*, Gageler J's assessment was the most considered. Unlike his colleagues, Gageler J was willing to consider the unions' contention that the Act introduced 'an additional and nefarious legislative purpose'.[74] In examining the potential presence

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64 *McCloy* (n 3) 206 [42].
65 *Unions No 2* (n 2) 12 [37] (Kiefel CJ, Bell and Keane JJ).
66 Ibid 20 [70] (Gageler J).
67 Ibid.
68 *ACTV* (n 1) 144. See also at 156–7 (Brennan J), 188–9 (Dawson J). Chief Justice Mason made a number of assumptions about the purpose of law in question in favour of focusing on what he saw as the more determinative issue — its justification. In applying this approach in *Unions No 2*, the plurality described it as a 'well-recognised aspect of judicial method to take an argument at its highest where it provides a path to a more efficient resolution of a matter: (n 2) 12 [38] (Kiefel CJ, Bell and Keane JJ).
69 In *McCloy* (n 3) 261 [231], the mischief being addressed was the corrupting influence of property developers, as evidenced by 'a series of seven reports and a position paper' from ICAC.
70 *Unions No 2* (n 2) 31 [110] (Nettle J).
71 Ibid.
72 Ibid 41 [153].
73 Ibid [146] quoting *ACTV* (n 1) 145 (Mason CJ).
74 Ibid 20 [73].

of this additional purpose, his Honour was wary of inferring its existence, particularly in light of the express statement of statutory objects contained in s 3 of the Act.[75] Ultimately, it was one of these objects — that which describes the purpose of the *EF Act* as being 'to establish a fair and transparent electoral funding, expenditure and disclosure scheme' — that led Gageler J to reject the unions' initial assertion.[76] In doing so, his Honour referred to their failure 'to engage with [this particular object]'[77] and the fact that such a purpose had previously been accepted by members of the Court as legitimate.[78] Furthermore, Gageler J noted that the unions' characterisation of the provision as 'privileging' candidates and 'marginalising' TPCs was pejorative.[79] His Honour went on to state that without such connotations, the words 'privileging' and 'marginalising' refer to nothing more than differential treatment and unequal outcomes of political participants.[80] In this sense, Gageler J aligned himself with one of the arguments put forward by NSW, finding the purpose of the provision to be the legitimate levelling of the playing field.[81]

It was Edelman J, writing separately, who declined to recognise the legitimacy of the provisions' purpose. The distinction for Edelman J was in the very fine line between a law's *effect* and its purpose — a theme he returned to numerous times throughout his judgment. For his Honour, there was 'an essential distinction'[82] between a law that has the *effect* of treating various political actors differently, versus a law that has this *purpose*.[83] In this case, his Honour's refusal to characterise the 'quietening or silencing'[84] of third-party campaigners as an inevitable *consequence* of otherwise valid provisions was inextricably linked to his refusal to acknowledge the 'constitutionally distinct position of candidates'.[85] This refusal appears to be grounded in Edelman J's belief that the right of citizens to 'criticize government decisions'[86] should not be sacrificed for the protection of candidates and parties.[87] Moreover, his Honour took clear aim at the lack of evidentiary basis for the cap reduction, based on his opinion that it could not be shown that, under the previous cap, third-party campaigners were coming to dominate the electoral system. On this, Edelman J stated that 'there had not been any suggestion, either inside or outside Parliament, that there was any inadequacy in the manner in which the previous caps served their purpose'[88] — as if the new provisions were a solution looking for a problem.

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75 Ibid 22–3 [79].
76 *EF Act* (n 4) s 3(a).
77 *Unions No 2* (n 2) 23 [82].
78 Ibid 23 [82]–[83]; *McCloy* (n 3) 207–8 [45]–[50] (French CJ, Kiefel, Bell and Keane JJ).
79 *Unions No 2* (n 2) 23–4 [84].
80 Ibid. See also *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 234 [147] ('*Mulholland*').
81 *Unions No 2* (n 2) 25 [90].
82 Ibid 48 [179].
83 Ibid 47–8 [176], 48–9 [179].
84 Ibid 48 [179].
85 Ibid 49 [180].
86 Ibid 49 [181] quoting Mason CJ in *ACTV* (n 1) 138.
87 *Unions No 2* (n 2) 47–8 [176], 49 [181].
88 Ibid 52 [191].

B *Were the Provisions Justified?*

As noted above, a number of the judges in *Unions No 2* considered the ascertainment of the law's purpose as secondary to the determination of its 'justification'.[89] Yet despite its importance, the majority of the Court dealt with the law's justification swiftly and with little orthodox application of the proportionality test established in *McCloy*.[90] As noted above, that test involves an assessment of the suitability, necessity and adequacy of balance of the impugned provision. The six judges who addressed this stage of analysis focused on the same component of it — the test of necessity. Here their Honours asked themselves: was there an obvious and compelling alternative expenditure cap level that could achieve the purpose of levelling the playing field, but with a less restrictive impact on the freedom? And here their Honours answered a resounding: No.

The fundamental failure of NSW's case and the determinative issue for the Court was the fact that only one level of expenditure cap was ever considered and presented by the State.[91] Absent the presentation of an alternative measure, the Court had no comparator against which to judge the suitability of the option chosen. Therefore, a majority of the Court accepted the unions' argument that the lack of evidence provided by NSW rendered the Court unable to perform the requisite analysis as to the provision's necessity. The irony of this stumbling block for NSW was the fact that it had consistently reiterated its commitment to assessing the suitability of the $500,000 expenditure limit before its imposition, but had failed to act on this commitment.[92] Had the State provided evidence of its consideration of alternative expenditure limits,[93] it appears a majority of the High Court may have been swayed to decide the case differently.

In affirming the unions' argument, the Court also revisited its discussion of the concept of judicial deference in *McCloy.* In *McCloy*, the majority referred to the tendency to incorrectly conflate judicial deference with a 'margin of appreciation', noting that neither have any application in the Australian context.[94] Rather, it was clearly established in *McCloy* that consideration by a Court of the necessity of the alternative chosen by a legislature does not constitute inappropriate judicial intrusion.[95] Instead, it forms a 'constitutional duty' of the Court, requiring it to assess

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89 Ibid 12 [35] (Kiefel CJ, Bell and Keane JJ), 26 [92] (Gageler J). This approach was also taken by the majority in *McCloy*, with French CJ, Kiefel, Bell and Keane JJ noting '[t]his stage [involving] strict proportionality or balancing, is regarded by the courts of some legal systems as most important': (n 3) 219 [87].

90 *McCloy* (n 3) 193–5 [2].

91 *Unions No 2* (n 2) 16 [53] (Kiefel CJ, Bell and Keane JJ). In this context, Gageler J's statement four years earlier in *McCloy* is particularly pertinent, where his Honour said: '[t]he existence of other means of achieving the objectives of the law … will always be relevant … and will sometimes be decisive': (n 3) 233 [135].

92 *JSCEM Report* (n 19) 49; *Government Response No 2* (n 20) attachment A, 5.

93 The majority in *McCloy* refer to the alternative choices presented as the 'domain of selections', from which — subject to the requirement that they cause 'least harm to the freedom' — the legislature is free to choose: (n 3) 217 [82].

94 Ibid 220 [92]. See also Murray Wesson, '*Unions NSW v New South Wales [No 2]:* Unresolved Issues for the Implied Freedom of Political Communication' (2019) 23(1) *Media and Arts Law Review* 93.

95 *McCloy* (n 3) 217 [81]–[82], 219–20 [89]–[91] (French CJ, Kiefel, Bell and Keane JJ), 230 [123], 231 [127] (Gageler J).

the extent to which various legislative choices affect the implied freedom.[96] Therefore, NSW's argument that the expenditure caps in this case should be accepted, relying on a concept of judicial deference, was rejected. In dismissing NSW's argument, the Court took one of two alternative approaches. Chief Justice Kiefel, Bell and Keane JJ acknowledged the existence of the concept of judicial deference in other jurisdictions,[97] referring to the Supreme Court of Canada decision in *Harper v Canada* (*Attorney General*) where both the majority and minority recognised varying levels of appropriate deference to Parliament by the Court.[98] However, their Honours swiftly distinguished the Australian experience based on the absence of an equivalent statement in case law.[99] Justice Gordon left the question of the domain's effect much more open, appearing willing to consider the appropriateness of the Court's 'descend[ing] into an examination' of a choice of the legislature.[100] In any case, the High Court ultimately agreed that despite a variance of views on the level of appropriate deference,[101] NSW was not exonerated from proving that the burden was justified.[102] Rather, it bore a positive onus, which, unless satisfied, would require the Court to pronounce the legislation invalid — as it did.[103]

VI The Existence of Two Principles

Unions No 2 suggests that the High Court retains a fascination with the principle of the 'level playing field' in the electoral context. Yet at the same time, following the enunciation of the principle of 'political equality' in *McCloy*,[104] it also suggests certain members of the Court are open to further developing this new principle. Given the difference in the evidentiary standard of each principle, this arguably presents one of two options for the Court. On one hand, it may continue to apply both principles in their strict form, resulting in the potential for inconsistency. On the other, *Unions No 2* could be interpreted as a sign of a merging of the two principles, as the evidentiary standard of one is adopted by the other.

A *The Level Playing Field Principle*

As noted in the submissions of the Attorney-General of the Commonwealth as intervener in this case, the 'level playing field' principle entered Australian constitutional discourse in *ACTV*.[105] Within the context, the expression described

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96 Ibid 220 [91].

97 *Unions No 2* (n 2) 15 [48]–[51].

98 [2004] 1 SCR 827, 849 [37] (McLachlin CJ), 879 [87] (Bastarache J) ('*Harper*').

99 *Unions No 2* (n 2) 15 [51] (Kiefel CJ, Bell and Keane JJ). The Court also referred to its constitutional role with respect to the freedom as justification for its decision: 15 [51].

100 Ibid 40–41 [152].

101 Note that as Edelman J found that the case should be resolved at the stage of the second question, questions of judicial deference did not arise for his Honour: ibid 45 [167].

102 Ibid 40 [151] (Gordon J). See also *ACTV* (n 1) 143 (Mason CJ).

103 *Unions No 2* (n 2) 40 [151] (Gordon J).

104 Graeme Orr (ed), *The Law of Politics: Elections*, *Parties and Money in Australia* (Federation Press, 2nd ed, 2019) 170; Joo-Cheong Tham, 'Political Equality as a Constitutional Principle: Constitutional Lessons from *McCloy v New South Wales*' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart, 2018) 151, 151.

105 *ACTV* (n 1) 131–2 (Mason CJ).

measures to allow equal participation in and access to the electoral sphere.[106] In its orthodox form — that is, the form pronounced by Mason CJ in that case — the breadth of the contemplated political actors is wide, including not only candidates and political parties, but also '[e]mployers' organizations, trade unions, manufacturers' and farmers' organizations, social welfare groups and societies generally'.[107] Yet despite its wide scope, commentators have noted the 'level playing field' principle, like the wider doctrine in which it sits, is not unqualified.[108] In enunciating the principle in *ACTV*, both McHugh J and Mason CJ stressed that a party seeking to invoke the 'level playing field' needed to present *compelling evidence* of the threat to the implied freedom. Their Honours stressed that this evidence needed to go beyond a mere assertion, proving that 'the ability of the electors to make reasoned and informed choices in electing their parliamentary representatives' was threatened, before legislation could be found to be for the legitimate purpose of levelling the playing field.[109]

B *The Principle of Political Equality*

The principle of 'political equality' is said to have been identified in *McCloy*,[110] where the joint judgment stated that 'equality of opportunity to participate in the exercise of political sovereignty … is guaranteed by our *Constitution*'.[111] While still in its infancy, this principle has been described by some as representing a directional shift for the Court, moving it away from the 'quasi-American idea of "free political communication"'[112] towards more domestic conceptions of the *Constitution*.[113] In particular, what has been described as Moore's 'great underlying principle' of the *Constitution* — the idea that the *Constitution* secures the rights of individuals by ensuring each an equal share in political power — appears to have shaped the principle's development in the joint judgment in *McCloy*.[114] While some members of the Court had considered the idea of political equality in earlier cases,[115] *McCloy* was significant in that it hinted at the principle's potential constitutional

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106 Note that the Court in *ACTV* found the provisions in question did *not* level the playing field, based on their discriminatory effect on new and independent candidates: ibid 146 (Mason CJ).

107 Ibid 132. It is important to note contextual aspects likely influencing this development, with the High Court at this time being described by many as 'activist' and 'progressive': see Carney (n 48) 178; Anthony Gray, 'Donation and Spending Limits in Political Finance and their Compatibility with the *Australian Constitution*' (2014) 60(4) *Australian Journal of Politics & History* 592, 596.

108 Tom Campbell and Stephen Crilly, 'The Implied Freedom of Political Communication, Twenty Years On' (2011) 30(1) *University of Queensland Law Journal* 59, 67. See also *Mulholland* where Gleeson CJ held that 'compelling justification' remained the relevant standard: (n 80) 200 [40].

109 *ACTV* (n 1) 110, 239 (McHugh J). See also at 143 (Mason CJ),

110 Orr (n 104) 170; Tham (n 104) 151.

111 *McCloy* (n 3) 207 [45] (French CJ, Kiefel, Bell and Keane JJ). See also Nettle J at 274 [271].

112 Graeme Orr, 'In *McCloy* Case, High Court Finally Embraces Political Equality ahead of Political Freedom', *The Conversation* (online, 8 October 2015) <https://theconversation.com/in-mccloy-case-high-court-finally-embraces-political-equality-ahead-of-political-freedom-48746>. See also Tham (n 104) 156.

113 See William Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1902) 329.

114 *McCloy* (n 3) 202 [27]–[28] quoting Moore, ibid.

115 *Unions No 1* (n 49) 579 (Keane J); *Tajjour v New South Wales* (2014) 254 CLR 508, 593.

underpinning, in the sense of it being an aspect of the system of government established by the *Constitution*.[116]

Drawing on *Harper*,[117] the Court in *McCloy* defined the principle's evidentiary standard, against which threats to the implied freedom would be judged. Here, Nettle J's judgment was key, as his Honour held that where legislation was introduced with the purpose of ensuring equality of access for all political participants (regardless of their financial capability), it was 'not illogical or unprecedented for the Parliament to enact in response to *inferred* legislative imperatives'.[118] This standard, when compared with that required under the 'level playing field' principle, is arguably much lower,[119] allowing parliaments to take a much more proactive approach to threats to the implied freedom and limit such threats before they are felt.

C *Which Principle did the Court Apply?*

Based purely on the terminology of the High Court in *Unions No 2*, it seems reasonable to assume the continued primacy of the principle of the 'level playing field'. As discussed in Part III, locating the purpose of s 29(10) of the *EF Act* within the framework of the 'level playing field' appeared crucial to the entire Court's acceptance of its legitimacy. Yet, of the Court, only three judges can be said to have engaged with the evidentiary standard associated with this principle.

Justice Edelman gave the strongest nod to the principle's orthodox requirement of 'compelling evidence', with his Honour noting that the Expert Panel's *concerns* about an increase in third-party campaigning did not translate into strong evidence for a reduction in their caps.[120] Similarly, Nettle J recognised the strength in the unions' assertion that a 'clear and convincing demonstration of why a cut … to half … is necessary' must be shown before a law can be justified.[121] Justice Gordon's approach is the most subtle, in appearing to hint at a level of justification akin to 'compelling justification', albeit without stating it explicitly.[122]

The approaches of the remaining members of the Court — Kiefel CJ along with Bell, Keane and Gageler JJ — are more difficult to locate squarely in one camp

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116 *McCloy* (n 3) 207 [45]–[46], 208 [46].

117 In *Harper*, it was contended by the party challenging the expenditure caps that 'evidence of the actual pernicious effect of the lack of spending limits' needed to be presented before it could be said that such caps served the purpose of 'electoral fairness': (n 98) 883 [98]. Based on what they saw as the difficulty in measuring the harm posed by third-party campaigners, the majority in *Harper* accepted a 'reasoned apprehension' of their threat as a sufficient standard against which to assess the justification for a law. The majority stated that '[s]urely, Parliament does not have to wait for the feared harm to occur before it can enact measures to prevent the possibility of the harm occurring?': (n 98) 879 [88], 883 [98].

118 *McCloy* (n 3) 262 [233] (emphasis added).

119 Note that some judges in *McCloy* held that the standard remained the same as was established in *ACTV*: ibid 239 [153]–[154] (Gageler J) citing *ACTV* (n 1) 143.

120 *Unions No 2* (n 2) 54 [205].

121 Ibid 32–3 [116]–[117] quoting *Harper* (n 98) 843–4 [21].

122 Specifically, Gordon J echoes the cautioning words of Mason CJ in *ACTV* when her Honour warns the Court against 'accept[ing] *at face value* the assertion that freedom of communication will, unless curtailed by a reduction in the cap to $500,000, bring about corruption and distortion of the political process': ibid 40 [148] (emphasis added) citing *ACTV* (n 1) 145.

or the other. At no point in their judgments do any of their Honours make any reference to 'political equality'. Yet at the same time, while their Honours refer to the 'level playing field' on a number of occasions,[123] they do not appear to demand the requisite 'compelling evidence' of the threat posed. Rather, their Honours, like the majority in *Harper*, appear willing to accept the State's argument that third-party campaigners have 'the *potential* to undermine the role of parties and candidates in election campaigns'.[124] For their Honours, the evidentiary basis for this conclusion came from the Expert Panel's reference to the 'high level of concern' surrounding the growth of third-party campaigners in Australia,[125] which stemmed from the rapid growth of political action committees in the US.[126]

VII Conclusion

Concerns about the equality of the electoral playing field are not new; nor are they likely to disappear any time soon. Rather, as the cost of running election campaigns increases, discussions around the equality of access and participation in the electoral contest — and about the limits that may be set to ensure this equality — are likely to become more frequent.[127] On one hand, the decision in *Unions No 2* offers some certainty, as it suggests the principle of the 'level playing field' remains relevant in contemporary electoral law. However, it also shows that some of the High Court are willing to embrace the principle of 'political equality'. With both principles purporting to serve the same purpose — equal participation in, and access to, the electoral sphere — the Court's work in this area will remain of interest in the continuing evolution of the implied freedom jurisprudence.

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123 *Unions No 2* (n 2) 5 [5], 8 [18], 11 [31] (Kiefel CJ, Bell and Keane JJ), 23 [82], 25–6 [90], 28 [101] (Gageler J).

124 Ibid 9 [22] (Kiefel CJ, Bell and Keane JJ) (emphasis added).

125 *Expert Panel Report* (n 8) 108.

126 See above n 15.

127 Note that at the local government level in NSW, concerns about the expenditure caps for third-parties — set at one-third of those applying to candidates and parties — have already been raised: see Joint Standing Committee on Electoral Matters, Parliament of New South Wales, *Inquiry into the Impact of Expenditure Caps for Local Government Election Campaigns* (Report No 4/56, October 2018) 19.