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HOBART TAS 7000

13 August 2024

Mr Ben Foxe
Committee Secretary
Standard Committee on Government Administration B
Parliament House
HOBART TAS

By email: assemblygab@parliament.tas.gov.au

Dear Mr Foxe,

Inquiry into the *Electoral Disclosure and Funding Amendment Bill 2024 (No. 9).*

I refer to this inquiry and my evidence before the committee on 26th July 2024. In the course of my evidence the Chair of the inquiry asked about a decision of the High Court which she identified as *Unions New South Wales v. The State of New South Wales*.

There are two decisions at the High Court with that title, one decided in 2019 and another decided in 2023.

In my view, neither of those decisions impacts the proposed clause in the bill being considered by this committee, precluding the making of donations to political parties and candidates by corporate entities. The reasons for this are as follows.

In the 2019 decision, the High Court was concerned with an expenditure cap of $500,000 on third party campaigners. The unions challenged the validity of the provision in question, invoking the implied freedom of communication on governmental and political matters. The High Court held that the spending cap was invalid on the ground that the State failed to justify the burden of having the expenditure cap. The High Court has clearly stated that where a burden is imposed on the communication on government and governmental and political matters, the onus is on the State (or Territory) in question to justify that burden.

In this decision, Justice Gordon specifically identified that New South Wales was required to ensure that sufficient evidence was put before the Court to support its case and that New South Wales failed to do so. And Justice Edelman concluded that in imposing the cap the New South Wales parliament had acted with the purpose of quieting the voices of the third-party campaigners. That purpose was regarded by him as unable to co-exist with the implied freedom of political communication.

In the 2023 decision of the High Court, the court was again concerned with a third party campaigner cap for byelections, this time $180,720. In this 2023 case, Unions New South Wales argued the provision was invalid because it was in conflict with the implied freedom.

Again, the High Court acknowledged that any such burden was to be justified, and that the state or territory that imposed the burden bore the onus of establishing the justification.

However, in this case, the state of New South Wales accepted that s. 29(11) of the Electoral Funding Act 2018 *(NSW)* was invalid and offered nothing to justify the burden on political communications.

In those circumstances the Court held that s. 29(11) imposed a burden on the implied freedom and the burden had not been justified.

In conclusion, neither case speaks to whether or not a ban on corporate donations is invalid as being in conflict with the implied freedom. Rather, these decisions show that where a state makes a law with regard to electoral funding it needs to be able to justify how a limitation on funding or a prohibition on donations burdens the implied freedom.

I suggest that this Committee is well placed to identify the evils of corporate donations to political parties, especially those coming from the gaming, property, resource development sectors, alcohol, tobacco and associated corporate entities. There are a large number of reports from parliamentary committees and integrity commission equivalents throughout Australia identifying the considerable problems associated with large donations and/or corporate donations to political parties and candidates.

Yours faithfully,

Roland Browne