The NSW government attempted to muzzle GetUp and failed spectacularly

The NSW government didn't bother finding a reason for restricting contributions from third party campaigners like GetUp. The High Court wasn't happy.

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NSW PREMIER GLADYS BEREJIKLIAN (IMAGE: AAP/DEAN LEWIS)

There was a victory for the unions and GetUps of Australia this week as the NSW government's attempt to effectively halve the limits on what they can spend in election campaigns was unanimously declared unconstitutional by the High Court.

Politically speaking, it's a major blow in the increasingly tense stand-off between the Coalition parties and their media backers on the one hand, and the so-called "third party" campaigners — mainly trade unions and social media based political action groups — on the other.

There is a real concern here: the fear that Australian political campaigning could go the same way as the United States, where political parties and candidates are heavily constrained by law in their fundraising and spending but that PACs (political action committees) and super PACs who wield billions of dollars worth of power, are completely unregulated and have an enormous impact on electoral outcomes.

Alongside this is the less legitimate worry of the declining ability of conservative forces in Australia to mobilise popular support and money for their causes, compared to the growing capacity of progressive groups to do so.

Both elements were at play in the NSW government's decision to tinker with its electoral funding laws in relation to third-party campaigners. Back in 2013, in an earlier challenge by Unions NSW, the High Court had upheld the government's right to put caps on donations and electoral spending, including lower caps for non-party entities. At the 2015 state election, those spending caps were $100,000 per electorate for parties, and $1,050,000 in total for third-party campaigners. A number of unions had each spent close to that amount in their campaigning against the Coalition government.

Reelected, the Coalition appointed an independent panel to review the whole act. It recommended, among many other things, a reduction in the third-party cap. The government jumped on this, more than halving the cap to $500,000 for the election coming up in March this year. The unions then took the issue to the High Court.

The case turned on free speech. Although we have no such legal right in Australia, we do have an "implied freedom of political communication", guaranteed but not explicitly stated anywhere in the constitution. It tends not to do a lot for us in practice, but every now and then the High Court pulls it out of the bottom drawer to invalidate a legislative attempt to shut down democratic debate.

In the context of political campaigning, the Court has been particularly vigilant. Over the years, it's stopped many attempts by governments to reduce the noise of electoral campaigning.

This time, the NSW law came a cropper for a simple and really stupid reason.

The Court readily accepted that it's legitimate for the government to regulate political spending, including in a way which protects against development of a super PAC-type model which would risk corrupting the democratic process by sheer volume of spending power. However, the government bears the burden of proving that the laws it makes, which impinge on freedom of communication in political affairs (such as political advertising), go only so far as is reasonably necessary to achieve a legitimate purpose.

The crackdown on third-party campaigners failed because the government could come up with no evidence to prove that halving their spending was reasonably necessary. The independent panel had told the government that it should get that evidence before amending the law, but it ignored that advice. The High Court thought this was pretty dumb, and accordingly kicked the amended law to the kerb.

That was what six of the judges decided. The seventh, and most junior — Justice James Edelman — would have found the law invalid anyway, because he discerned an illegitimate purpose in the government's actions. He pointed out that the government had explicitly justified halving the third-party spending cap on the basis, as the minister at the time explained it, that "third party campaigners should have sufficient scope to run campaigns to influence voting at an election — just not to the same extent as parties or candidates".

Which begs the obvious question: why not? What's legitimate, in a free speech context, about favouring organised political parties over other advocacy groups, in relation to their ability to campaign? Edelman didn't like this way of thinking, and I'm with him. The law's real purpose, he found, was to "shut down protected speech", which is exactly what the constitution prohibits in its design to ensure that democracy remains a noisy beast.

There will be plenty more work for the High Court to do in this field. Grass roots campaigning is only going to grow, and the unions are a resurgent force in politics. On the conservative side, the recent appointment of Tony Abbott to run the federal coalition's social media campaign would tend to indicate that the competition isn't exactly evenly balanced.

Not that there isn't plenty of money available for right wing causes, from the billionaires' club and the big end of town. It's just that here, unlike in the US, that money is rarely interested in "social" issues; rather the spending goes to matters of more direct self-interest like the hatred of taxes or the love of coal.

Which means that the conservative parties will continue to look for legal means of evening the ledger, including more attempts to put a clamp on what unions and the likes of GetUp are allowed to spend. Which the latter will challenge, and so the lawyers will feast.

There are better solutions than this silly turf war, but not much interest from any major party in finding them. So — on with the show.

Did the High Court make the right call? Email us at boss@crikey.com.au and let us know.