

**CAPS ON THIRD-PARTY CAMPAIGNERS' ELECTORAL EXPENDITURE IN
S29(11) AND S35 OF THE ELECTORAL FUNDING ACT 2018**

Organisation: The Greens NSW

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The Greens NSW



Submission to Joint Select Committee on Electoral Matters inquiry into Third Party Caps and s35 of the Election Funding Act 2018

Introduction

We thank the committee for the opportunity to contribute to this inquiry. The committee would be well aware of the legislative complexity around third party caps on expenditure and the ability to capture all the aspects that need consideration. The Greens NSW have fought for reform in this area for a long time and we appreciate the opportunity to give the committee our thoughts.

Caps on third party expenditure in the Electoral Funding Act 2018

The Greens NSW are very supportive of the need for campaign expenditure caps for third party campaigns.

The Greens NSW note that the judgment in *Unions NSW v New South Wales* [2019] HCA 1 was that s29(10) of the Electoral Funding Act which imposed caps on third parties is invalid. The Government amendment of the Electoral Funding Regulation 2018 via the Electoral Funding Amendment (Savings and Transitional) Regulation 2019 reinstated the caps that were contained in the earlier Election Funding, Expenditure and Disclosures Act 1981 with adjustments for CPI. That amendment to the regulations lapsed on 31 December 2019. As a result, at the present moment there are no caps on third party expenditure for general elections.

The Greens NSW guiding principle is that any caps that are imposed should be proportional to the caps that are imposed on Political Parties and candidates. The Greens NSW note this comment from the plurality in the above mentioned high court case “The requirement of ss 7 and 24 of the *Constitution* that the representatives be ‘directly chosen by the people’ in no way implies that a candidate in the political process occupies some privileged position in the competition to sway the people's vote simply by reason of the fact that he or she seeks to be elected. Indeed, to the contrary, ss 7 and 24 of the *Constitution* guarantee the political sovereignty of the people of the Commonwealth by ensuring that their choice of elected representatives is a real choice, that is, a choice that is free and well-informed.” This clearly points to the need that the system not unfairly weight towards candidates / parties over third parties.

The implication of the judgement is that the third party caps were a disproportionate response by being significantly smaller than those applying to candidates and political parties.

The obvious approach to resolving the need for expenditure caps for third party campaigns is to bring these caps to be closer or equal to the caps imposed on registered political parties and candidates as was the case under the previous EFED Act. Amendments to the Election Funding Act could achieve that by increasing the third party caps, by decreasing the applicable caps for political party and candidate campaigns or a combination of both.

The Greens NSW has long argued that the current caps on electoral expenditure for registered parties and candidates are too generous (\$12.3m) and do not adequately remove the appearance of corruption of the political process arising from the need for significant fundraising to be competitive. We would suggest that the caps on third party expenditure be harmonised with those

applicable to registered political parties and candidate groups at around \$90,000 per assembly district contested (2018 dollars), with caps for parties contesting fewer than ten assembly seats and third parties to be set at around \$900,000 (2018 dollars). The applicable amounts would indexed for inflation from 2018

Recommendation:

1. That the Government amend the Electoral Funding Act 2018 to reduce the amounts in s29(2) to \$90,000, with other caps in s29 to be reduced proportionately, and to re-instate a cap on third party expenditure for general elections in s29(10) equivalent to that applying to parties and groups contesting the Legislative Council only..

Third party registration

The Greens NSW are also concerned about the ability for third parties to expend money and campaign without being registered. In one case we are aware of, an organisation entered into expenditure without being registered. This was brought to the attention of the NSW Electoral Commission and they were allowed to register retrospectively. In response to inquiries from the media the NSW Electoral Commission stated it was "not unlawful for a third-party campaigner to make payment for electoral expenditure after registration, even if that expenditure was incurred prior to registration". This is a significant loophole that must be closed. No significant expenditure should be incurred unless the organisation is registered.

Recommendation:

2. That much smaller caps apply to third parties which are not registered prior to the commencement of the capped State expenditure period. The cap amount should be no more than 50% of the cap applicable to registered third parties.
3. Third party registration requirements be strengthened to prevent retrospective registrations.

Disclosure of third party information suppliers

The level of information that is required to be disclosed by a third party campaigner is inadequate. The NSW Electoral Commission should require information that would allow for the third party campaigner to be identified. It should be a requirement that the name of the organisation and the ABN/ACN be included in authorisations.

Recommendation:

4. Authorisations of electoral communications by third parties must include the name of the organisation and its ABN/ACN if applicable.

Section 35 of the Electoral Funding Act

The Greens NSW supports the repeal of this section of the Act. It is clear that the principle intention was to limit expenditure by unions as a group. We support the view that s35 unreasonably burdens the implied freedom of political communication. We believe that collective action such as coming together should be permitted under the Act without any detriment.

The Greens NSW notes that the court's orders in *Unions NSW v NSW* [2019] HCA 1 did not deal with the question of s35 as they believed that removing the caps made it impractical to make a finding. In contrast Edelman J in his judgement of the case did canvas the section and made this comment "In contrast, s35 precludes co-ordination that is not a scheme and might have nothing to

do with legislative caps. It prohibits the force of some political communications that reveal that a message is being sent by multiple third parties jointly rather than individually. It reveals not merely a purpose to avoid drowning out the voices of parties and candidates for election but also one to quieten the voices of third parties in contrast with parties or candidates for election.” As such the Greens NSW believe the most appropriate thing would be for this section to be repealed

Recommendation:

5. That Section 35 of the Electoral Funding Act 2018 should be repealed and that regulation of expenditure by third parties should be constrained only by the caps specified in s29..