

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

Organisation: United Workers Union

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Friday, 6 May 2022

Mr Lee Evans MP
Chair, Joint Standing Committee on Electoral Matters
NSW Parliament
Via email: electoralmatters@parliament.nsw.gov.au

Re: Inquiry into Caps on third-party campaigners' electoral expenditure in s29(11) and s35 of the Electoral Funding Act 2018

Dear Chair,

United Workers Union (UWU) is pleased to provide this brief submission to the Inquiry, as an active participant in state elections, including in the past as a third-party campaigner. UWU also supports the submission of unions peak body, Unions NSW, and recommends it for detail.

Terms of Reference

This inquiry's terms of reference fall into two key questions of policy in relation to electoral funding. Firstly, whether the expenditure caps on third-party campaigners specified for state Legislative Assembly by-elections are adequate?¹ And secondly, the much broader and more significant matter of whether laws on electoral expenditure by third-party campaigners 'acting in concert' in any state elections should remain prohibited, be amended or be repealed?²

UWU position in brief

Regarding the first issue, UWU notes that the current capped amount of expenditure for a third-party campaigner in an Assembly by-election is \$21,600.³ This amount is very small considering the costs of seeking to communicate via advertising and electoral matter with an 'average-sized' electorate of around 59,000⁴ electors about the campaign during a by-election period. UWU believes this capped amount should be increased.

The cap on electoral expenditure by third-party campaigners 'acting in concert' provisions are problematic, as evidenced by previous successful High Court challenges by unions.⁵

¹ s. 29(11) of the [Electoral Funding Act 2018 No 20](#)

² s. 35 of the [Electoral Funding Act 2018 No 20](#)

³ Accessed 8.4.22 www.elections.nsw.gov.au/Funding-and-disclosure/Electoral-expenditure/Caps-on-electoral-expenditure/What-are-the-expenditure-caps-for-State-elections; the nominated amount is \$20,000, annually indexed, per s.29 (11) of the [Electoral Funding Act 2018 No 20](#)

⁴ Enrolment Quotient NSW LA Districts in April 2022 was 58,827, per roll.elections.nsw.gov.au/stats/

⁵ In [Unions NSW v New South Wales \[2013\] HCA 58](#), the High Court ruled invalid the Election Funding, Expenditure and Disclosures Act 1981 (NSW) Section 96D prohibiting political donations unless made by an individual enrolled on roll of electors and Section 95G(6) aggregating expenditure by a political party and affiliated organisations for purposes of cap on electoral communication, some two years after the 2011 NSW state election. In 2019, the state election campaign was affected by the 29/1/19 decision of the High Court in [Unions NSW v New South Wales \[2019\] HCA 1](#) to invalidate the expenditure cap on third-party campaigners for the 2019 NSW state election.

Unions have historically, and will continue, to work with each other in campaigns in workplaces, in the community, or in the electoral and political spheres. This is common in all Australian jurisdictions and notably, Federal Elections are subject to much less prescription in this regard.⁶

UWU submits the following key reasons as to why s.35 of the *Electoral Funding Act 2018* (the 'acting in concert' provision) should be repealed:

1. It impinges on the implied freedom of political communication in the *Constitution of Australia* and will be subject to future legal challenge.
2. No amendment of s.35 wording will remedy its risk of legal challenge.
3. It disproportionately affects union third-party campaigners acting in solidarity on campaigns subject to electoral law, compared to non-union third-party campaigners.
4. It creates a 'chilling effect' on the campaigning work during election periods of unions which, as non-profit organisations, risk substantial legal costs to seek proactive and defensive legal advice regarding their actions potentially subject to opaque electoral law.
5. Further to point 4, there is an exacerbated risk of intentional political interference through changes to electoral regulations during a state election capped period (after 1 July) that directly impact the capacity of third-party campaigners to participate, due to the delay in having legal challenges heard.

The 2023 State election will be no different to previous NSW elections in terms of unions mounting their own or joint campaigns, just as other organisations and individuals will participate in the democratic process. However, UWU submits that NSW Parliament must take the opportunity this year to increase the cap on by-election expenditure by third-party campaigners and more significantly, to remove the cap on third-party campaigners 'acting in concert'. Such action would reduce both the risk of constitutional challenge and of confusion about electoral expenditure before, during and after the 2023 general election.

For matters relating to this submission, please contact [REDACTED] with United Workers Union via [REDACTED] or on [REDACTED].

Yours Sincerely,

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⁶ Cf. [Commonwealth Electoral Act 1918](#) and associated legislation; also Australian Parliamentary Library, [Election funding and disclosure in Australian jurisdictions: a quick guide](#) by Damon Muller, 16.02.2022.