

Joint Standing Committee  
on Electoral Matters



PARLIAMENT OF  
NEW SOUTH WALES

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



Report 2/57 – November 2022

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The motto of the coat of arms for the state of New South Wales is "Orta recens quam pura nites". It is written in Latin and means "newly risen, how brightly you shine".

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# Membership

<b>Chair</b>	Mr Lee Evans MP
<b>Deputy Chair</b>	The Hon Robert Borsak MLC (from 13 May 2022) Ms Felicity Wilson MP (until 31 March 2022)
<b>Members</b>	The Hon Scott Barrett MLC (from 30 March 2022) Mr Kevin Conolly MP (from 31 March 2022) The Hon Catherine Cusack MLC (until 30 March 2022) The Hon Scott Farlow MLC (until 30 March 2022) Mr Christopher Gulaptis MP The Hon Courtney Houssos MLC The Hon Peter Primrose MLC The Hon Chris Rath MLC (from 30 March 2022) Mr Paul Scully MP Mr Nathaniel Smith MP
<b>Contact details</b>	Joint Standing Committee on Electoral Matters Parliament of NSW Macquarie Street SYDNEY NSW 2000
<b>Telephone</b>	(02) 9230 3051
<b>E-mail</b>	<a href="mailto:electoralmatters@parliament.nsw.gov.au">electoralmatters@parliament.nsw.gov.au</a>
<b>Website</b>	<a href="https://www.parliament.nsw.gov.au/electoralmatters">https://www.parliament.nsw.gov.au/electoralmatters</a>

## Chair's foreword

I am pleased to present this report of the Joint Standing Committee on Electoral Matters. The report contains the Committee's comments and recommendations for the inquiry into caps on third-party campaigners' electoral expenditure in sections 29(11) and 35 of the *Electoral Funding Act 2018*. These sections covered electoral expenditure for third-party campaigners acting in concert and during by-elections respectively.

The Committee supports the participation of a broad section of the community in the electoral process. Third-party campaigners play an important role in highlighting specific issues that are relevant to them and the wider public. Along with other participants in the electoral process, third-party campaigners can be expected to incur expenditure to run election campaigns.

The introduction of expenditure caps for third-party campaigners was an important development, in that they aimed to ensure fairness between third-party campaigners and other participants in elections, including candidates and political parties. It is my view that electoral contests should be a battle of competing visions and ideas, not a contest of resources.

However, the Committee found that there is a risk that third-party campaigners acting in concert may be able to spend unreasonable amounts of money and therefore have excessive influence on the outcome of elections. I note that, during the course of this inquiry, section 35 of the *Electoral Funding Act*, which outlined the caps on third-party campaigners acting in concert, was removed. It will be interesting to monitor what effect this has on spending by third-party campaigners during the 2023 State General Election.

The Committee considered that section 35, as it operated, was an overly blunt instrument, but that limits on expenditure by third-party campaigners acting in concert remain necessary. To this effect, the Committee recommended that the Government reintroduce expenditure caps, but that more consultation be undertaken with stakeholders from all sides of the political arena to determine an appropriate level. The intention of this is to ensure that the voices of other participants in elections are not drowned out, but also to ensure that third-party campaigners can effectively work together to campaign for the issues that they support.

The Committee also recommended that the expenditure cap for third-party campaigners in by-elections be increased to \$198,750. This represents a 75 per cent increase from the current candidate cap in by-elections. The Committee accepted the evidence of various stakeholders that the current cap makes it very difficult for third-party campaigners to participate effectively in campaigning during by-elections.

On behalf of the Committee, I would like to sincerely thank each of the individuals and organisations that made submissions to this inquiry and gave evidence at the Committee's public hearing. The contributions were most valuable to the Committee's understanding of the issues under consideration, and in formulating our final findings and recommendations.

I would also like to thank my committee colleagues for their diligence, insight and input, and for the collegiate way in which they worked together throughout this inquiry.

**Lee Evans MP**  
Chair

## Findings and recommendations

Finding 1 \_\_\_\_\_ 5

The Committee finds that caps on electoral expenditure for third-party campaigners acting in concert are necessary.

Recommendation 1 \_\_\_\_\_ 6

The Committee recommends that the Government, in consultation with relevant stakeholders, identify an appropriate cap for third-party campaigners acting in concert.

Recommendation 2 \_\_\_\_\_ 6

The Committee recommends that the Government consider options to manage third-party campaigners acting in concert with a view to:

- introducing a new, appropriate cap for electoral expenditure of third-party campaigners acting in concert; and
- providing more information and clarity on the definition of acting in concert and the expenditure that is covered in this new cap.

Recommendation 3 \_\_\_\_\_ 6

The Committee recommends that, if a new cap for electoral expenditure for third-party campaigners acting in concert is introduced, the NSW Electoral Commission develop, distribute and promote clear and accessible information about the new regime to affected stakeholders.

Recommendation 4 \_\_\_\_\_ 12

The Committee recommends that the cap on electoral expenditure for a third-party campaigner for a by-election be increased to \$198 750, and indexed to CPI or other increases to spending caps for registered political parties and candidates.

# Chapter One – Caps on electoral expenditure for third-party campaigners acting in concert

**Acting in concert caps are necessary to protect the balance of voices in election campaigns. The Government should examine options to ensure that third-party campaigners do not work together to spend unreasonable amounts during elections. This Chapter discusses the history of the acting in concert provisions and their operation.**

- 1.1 This inquiry was referred to the Joint Standing Committee on Electoral Matters (the Committee) by the Attorney General to inquire into and report on:
- ... whether the prohibition on third-party campaigners acting in concert with others to incur electoral expenditure in excess of the applicable cap on electoral expenditure in section 35 of the *Electoral Funding Act 2018* should be retained, amended or repealed.
- 1.2 On 19 October 2022, the Electoral Legislation Amendment Bill 2022 (the 2022 Amendment Bill) was passed by the NSW Parliament. The bill amended the *Electoral Funding Act 2018* so that section 35 was omitted, thereby removing the acting in concert provisions in their entirety. With much of this inquiry being conducted with section 35 still in force, the evidence received and recorded in this report reflects this.
- 1.3 Third-party campaigners (TPCs) are persons or entities that incur more than \$2000 in electoral expenditure during a capped expenditure period.<sup>1</sup> Capped expenditure periods for State General Elections and by-elections are defined in the *Electoral Funding Act 2018*. For State General Elections they begin on 1 October of the year before the election, meaning that they are in place for about 6 months.<sup>2</sup> A register of TPCs for each election period is managed by the NSW Electoral Commission (the Commission).<sup>3</sup>
- 1.4 TPCs are not political parties, candidates or entities that act on behalf of political parties or candidates.<sup>4</sup> They may, for example, be unions, charities, religious groups, environmental groups, business groups, or groups interested in a specific policy, issue, or government area.
- 1.5 Electoral expenditure is money spent to influence voting at an election, including promoting or opposing a particular party or candidate. It can be incurred by a wide range of activities, including advertising, posters, social media campaigns, research, and 'how-to-vote' cards.<sup>5</sup>

<sup>1</sup> [Electoral Funding Act 2018 \(NSW\)](#), s4.

<sup>2</sup> [Electoral Funding Act 2018](#), s4.

<sup>3</sup> NSW Electoral Commission, [Register of Third-party Campaigners](#), 26 July 2022, accessed online 12 September 2022.

<sup>4</sup> [Electoral Funding Act 2018](#), s4.

<sup>5</sup> [Electoral Funding Act 2018](#), s7(1).

### **Acting in concert provisions (s35 of the *Electoral Funding Act 2018*)**

- 1.6 Prior to the passing of the 2022 Amendment Bill, section 35 of the *Electoral Funding Act 2018* (the *EF Act*) read:

It is unlawful for a [TPC] to act in concert with another person or other persons to incur electoral expenditure in relation to an election campaign during the capped expenditure period for the election that exceeds the applicable cap for the third-party campaigner for the election.<sup>6</sup>

### **Third-party campaigners and the development of electoral legislation in NSW**

- 1.7 In 2010 a scheme for regulating election expenditure and political donations in NSW was introduced by the *Election Funding and Disclosures Amendment Act 2010* (the *EFED Act*).<sup>7</sup>
- 1.8 The *EFED Act* introduced caps on TPCs' electoral expenditure, as well as that of candidates and parties. TPCs that spent more than \$2000 on electoral expenditure prior to a general election were also required to register with the Commission. These TPCs were subject to disclosure laws, but could spend up to a cap of \$1 050 000, with a limit of \$20 000 in any one electorate.
- 1.9 In 2012 amendments were made to the *EFED Act* that sought to restrict the source of political donations. They also aggregated the expenditure of political parties and affiliated organisations. The intention of this was so that a party could not circumvent the caps applying to it by spending through a third-party to which it was affiliated.
- 1.10 The 2012 amendments were challenged by Unions NSW in the High Court and declared invalid. Professor Anne Twomey notes that, due to the wording of the 2012 amendments, the aggregation of electoral expenditure by a political party and its affiliated organisations, in practice, only applied to the Labor Party and its relationship to unions. The High Court held that this burdened the implied freedom of political communication, as it limited the amount organisations, such as unions and the Labor Party, could spend on political communication. In applying a test for validity, the Court concluded that the law did not serve a legitimate end.<sup>8</sup>
- 1.11 In 2014 there was an Expert Panel review of political donations laws. The Joint Standing Committee on Electoral Matters also conducted a review of this Panel's final report in 2016.
- 1.12 The 2014 review suggested that the regulation of TPCs should be approached in the same way as the regulation of political parties. While acknowledging that third parties also have the right to participate in the electoral process and have a voice, the Expert Panel concluded that they shouldn't be able to drown out the

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<sup>6</sup> [Electoral Funding Act 2018](#), s35(1).

<sup>7</sup> [Election Funding and Disclosures Amendment Act 2010](#) (NSW), sch 1.

<sup>8</sup> [Background Paper – Inquiry into caps on third-party campaigners' electoral expenditure in s29\(11\) and s35 of the Electoral Funding Act 2018](#), Professor Anne Twomey, 5 May 2022, p 11.

voices of those actually 'engaged in the electoral [contest]'.<sup>9</sup> In particular, the Expert Panel cited concerns about the development of 'Political Action Committees', where the campaigns of political parties and candidates are frequently 'swamped' by the campaigns of well-funded interest groups.<sup>10</sup>

- 1.13 The Expert Panel recommended that the cap on electoral expenditure by TPCs be decreased to \$500 000. The Panel also recommended that TPCs be prohibited from acting in concert with others to incur electoral expenditure that exceeds the TPC expenditure cap.<sup>11</sup> However, the Panel noted the lack of data and considered it appropriate to review the level of third-party spending after the 2015 State General election.
- 1.14 The Electoral Matters Committee supported reducing the cap on expenditure for TPCs in its 2016 report. The Committee also recommended that the NSW Government assess whether the proposed caps imposed on TPCs were reasonable before implementing them.<sup>12</sup>

### **The Electoral Funding Act 2018**

- 1.15 The restriction on TPC spending when acting 'in concert' was introduced by the *EF Act*. The commencement of the *EF Act* in 2018 completely rewrote the legislation governing political donations and electoral expenditure in NSW.
- 1.16 As well as introducing TPC acting in concert provisions (s35), the *EF Act* also capped TPC electoral expenditure at \$500 000 for state elections (s29(10)), and \$20 000 for by-elections (s29(11)).<sup>13</sup> This removed the indexed caps that were introduced in the *EFED Act*.
- 1.17 Section 35 made it an offence for TPCs to act in concert to incur more electoral expenditure during the capped expenditure period than the applicable cap for a single TPC for that election.<sup>14</sup> 'Acting in concert' was defined as a formal or informal agreement to campaign with the object or principal object of supporting or opposing the election of a party, elected member, or candidate.<sup>15</sup>

### **Unions NSW v State of New South Wales (2019)**

- 1.18 After the *EF Act* was passed, Unions NSW challenged sections 29(10) and 35 in the High Court (*Unions NSW (No 2)*). The organisation submitted that these sections were invalid because they 'impermissibly' burdened the implied freedom of political communication in the *Constitution Act 1902*.<sup>16</sup>

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<sup>9</sup> Expert Panel on Political Donations, [Final Report](#), December 2014, p 109.

<sup>10</sup> Expert Panel on Political Donations, [Final Report](#), December 2014, pp 36, 107, 109-110.

<sup>11</sup> Expert Panel on Political Donations, [Final Report](#), Recommendations 31 and 32, December 2014, p14.

<sup>12</sup> Joint Standing Committee on Electoral Matters, Inquiry into the Final Report of the Expert Panel – Political Donations and the Government's Response, [Report 1/56](#), June 2016, p 49, esp. cf recommendation 7; Expert Panel on Political Donations, [Final Report](#), December 2014, p 112 (pgph 5)

<sup>13</sup> [Electoral Funding Act 2018](#) (NSW), s29 (10-11).

<sup>14</sup> [Electoral Funding Act 2018](#) (NSW), s35(1).

<sup>15</sup> [Electoral Funding Act 2018](#) (NSW), s35(2).

<sup>16</sup> [Unions NSW v New South Wales \(No 2\) \(2019\)](#) 264 CLR 595, [1].

- 1.19 Using a test developed in previous electoral financing cases, the Court ruled that the TPC expenditure cap under section 29(10) was invalid. Limiting what TPCs could spend burdened the implied freedom to participate in influencing who governs through elections. The High Court also rejected the argument that political parties and candidates have a privileged status in elections, concluding that the Constitution guarantees equal participation in the exercise of political sovereignty. However, it was generally accepted that the cap for TPCs could justifiably be lower than that for political parties because parties had to deal with a wider variety of issues across every electorate, leading to higher expenditure.<sup>17</sup>
- 1.20 The Justices accepted that it was legitimate to seek to level the playing field and avoid voices being drowned out by well-funded campaigns. However, they also found that there was insufficient evidence to suggest that this was actually occurring, or that it was a risk. A key concern was that the NSW Government had not provided any evidence to justify the cutting of the capped amount.<sup>18</sup> The Court did not make a ruling on section 35, because the ruling on section 29(10) meant there was no TPC cap to be exceeded.<sup>19</sup>
- 1.21 The Committee notes that, in *Unions NSW (No 2)*, Unions NSW also accepted that capping provisions have a legitimate purpose in 'levelling the playing field' by preventing wealthy voices from drowning out other voices in elections. Their concern with the provisions of the EF Act was that the specified capped amount and accompanying restrictions were unreasonable.<sup>20</sup>

### **Electoral Legislation Amendment Bill 2022**

- 1.22 In June 2022, the Hon Gabrielle Upton MP introduced the Electoral Legislation Amendment Bill 2022 on behalf of the Attorney General. The Bill sought to make a number of changes to the EF Act, including introducing revised TPC expenditure caps set at \$1 288 500.<sup>21</sup>
- 1.23 During consideration of the Bill in the Legislative Council, an amendment was passed that section 35 of the EF Act also be omitted. These amendments were agreed to by the Legislative Assembly and the Bill passed the Parliament on 19 October 2022.
- 1.24 The Committee notes that this has effectively reinstated the caps that were in place prior to the introduction of the EF Act. The 2019 NSW State General Election also operated under these TPC expenditure caps after the Electoral Funding Regulation 2018 came into force.<sup>22</sup> The 2023 General Election will also operate without restrictions on TPCs acting in concert.

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<sup>17</sup> [Background Paper – Inquiry into caps on third-party campaigners' electoral expenditure in s29\(11\) and s35 of the Electoral Funding Act 2018](#), Professor Anne Twomey, 5 May 2022, p 8 & 9

<sup>18</sup> [Unions NSW v New South Wales \(No 2\) \(2019\)](#) 264 CLR 595, [53].

<sup>19</sup> [Unions NSW v New South Wales \(No 2\) \(2019\)](#) 264 CLR 595, [54].

<sup>20</sup> [Unions NSW v New South Wales \(No 2\) \(2019\)](#) 264 CLR 595, [31-32].

<sup>21</sup> [Electoral Legislation Amendment Bill 2022 \(NSW\)](#), sch 3 s11; cf. [Election Funding and Disclosures Amendment Act 2010](#) (NSW), sch 1 s23.

<sup>22</sup> [Electoral Funding Regulation 2018](#) s47

## The need for caps on electoral expenditure for third-party campaigners acting in concert

### Finding 1

**The Committee finds that caps on electoral expenditure for third-party campaigners acting in concert are necessary.**

- 1.25 Expenditure caps play an important role in ensuring that money does not become the prime influencer of elections. The Committee notes that there is general support for electoral expenditure caps set at reasonable levels. It is therefore important that there are also mechanisms in place to prevent organisations from circumventing these caps by pooling their resources to spend above the relevant capped amount. The Committee is concerned that, without specific provisions to prevent TPCs acting in concert, these campaigners could easily drown out other voices during election campaigns.
- 1.26 The *EF Act* was introduced by then Minister for Planning, Minister for Housing and Special Minister of State, the Hon Anthony Roberts MP. In his second reading speech, the Minister explained that section 35 prohibited TPCs from acting in concert with others to incur electoral expenditure that exceeds the relevant expenditure cap. He stated that this was necessary to prevent organisations from circumventing the cap, 'to maintain a fair and balanced electoral contest and to ensure the integrity of the expenditure caps'.<sup>23</sup>
- 1.27 The NSW Government has argued that expenditure caps support representative and responsible government by:
- reducing demand for donations to candidates and parties
  - reducing actual or perceived undue or hidden influence being exerted on the political process, and
  - promoting between parties and candidates a fair contest of ideas and policies rather than a contest of fundraising capacity, thereby promoting equality of opportunity to participate in the political process.<sup>24</sup>
- 1.28 Expenditure caps for TPCs ensure that the voices of candidates and parties are not overwhelmed by well-funded third-party campaigns.<sup>25</sup> Professor Anne Twomey noted that all the Justices in *Unions NSW v New South Wales (No 2) (2019)* accepted that this was a legitimate purpose for caps, as it enhances political communication by expanding the sources of it.<sup>26</sup>
- 1.29 Business NSW, NSW's peak business organisation with more than 30 000 member businesses, supported section 35 as it read in the *EF Act*. They stated that, while

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<sup>23</sup> The Hon Anthony Roberts MP, [NSW Legislative Assembly Hansard](#), 17 May 2018

<sup>24</sup> [NSW Government Response](#) to Report of the Joint Standing Committee on Electoral Matters – Administration of the 2019 NSW Election, Report 1/57, 28 April 2021, p5.

<sup>25</sup> [NSW Government Response](#) to Report of the Joint Standing Committee on Electoral Matters – Administration of the 2019 NSW Election, Report 1/57, 28 April 2021, p5.

<sup>26</sup> [Background Paper – Inquiry into caps on third-party campaigners' electoral expenditure in s29\(11\) and s35 of the Electoral Funding Act 2018](#), Professor Anne Twomey, 5 May 2022, p9.

they do not usually work in concert with other organisations, there was the possibility for them to do so. They were 'of the view that section 35 of the [EF] Act continues to achieve the right balance and should be retained'.<sup>27</sup>

1.30 In response to a question about the risk of TPCs working in concert and overwhelming candidate expenditure, Mr Mark Morey, Secretary, Unions NSW argued that was unlikely to happen:

If you look at the expenditure of third-party campaigners and unions, the majority of us never hit the caps, and we would never spend necessarily up to that point every time.<sup>28</sup>

1.31 Unions NSW also argued that the provisions outlined in section 144 of the EF Act would prevent TPCs from acting together to exceed the relevant expenditure caps, therefore making section 35 unnecessary.<sup>29</sup> Section 144 of the *EF Act* makes it an offence for a person to enter into an arrangement (whether alone or with others) for the purpose of circumventing electoral expenditure caps. This section applies to all parties to which expenditure caps apply, including candidates, parties and TPCs.

1.32 The Committee notes these other provisions that make it an offence for candidates and political parties to circumvent limits on their electoral expenditure as well. However, the Committee considers it important that there are specific provisions preventing TPCs from acting in concert to exceed relevant expenditure caps.

### **Recommendation 1**

**The Committee recommends that the Government, in consultation with relevant stakeholders, identify an appropriate cap for third-party campaigners acting in concert.**

### **Recommendation 2**

**The Committee recommends that the Government consider options to manage third-party campaigners acting in concert with a view to:**

- **introducing a new, appropriate cap for electoral expenditure of third-party campaigners acting in concert; and**
- **providing more information and clarity on the definition of acting in concert and the expenditure that is covered in this new cap.**

### **Recommendation 3**

**The Committee recommends that, if a new cap for electoral expenditure for third-party campaigners acting in concert is introduced, the NSW Electoral**

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<sup>27</sup> [Submission 3](#), Business NSW, p 3.

<sup>28</sup> Mr Mark Morey, Secretary, Unions NSW, [Transcript of evidence](#), 27 July 2022, p 10.

<sup>29</sup> Mr Thomas Costa, Assistant Secretary, Unions NSW, [Transcript of evidence](#), 27 July 2022, p 13 and 15.

**Commission develop, distribute and promote clear and accessible information about the new regime to affected stakeholders.**

- 1.33 The Committee recognises the arguments made by the majority of the stakeholders that section 35, as it appeared in the EF Act was an unnecessarily blunt instrument. While the Committee supports a cap on electoral expenditure for TPCs acting in concert, the restrictions as they existed in the EF Act, particularly when operating during by-elections, were unreasonably restrictive. The Committee notes that, during this inquiry, there were no caps on TPCs' electoral expenditure for State General Elections. It is therefore difficult to comment on what an appropriate cap for acting in concert might be.
- 1.34 The Committee notes that the amendments enacted by the *Electoral Legislation Amendment Act 2022* have set a new cap for electoral expenditure for TPCs. From the evidence received during this inquiry, it is unclear whether this cap would be appropriate for TPCs working together. The Committee considers that the Government should consult with TPCs on the effect of this new cap.
- 1.35 Given that section 35 of the EF Act has been removed, the Committee will be interested in how this effects electoral expenditure during the 2023 General Election. It is usual practice for this Committee to undertake a review of the General Election that has just taken place upon the resumption of Parliament. This will provide an opportunity to examine this issue.
- 1.36 As has been stated, the Committee considers it necessary to retain some restrictions on TPCs' electoral expenditure when acting in concert. However, in devising a new, more suitable cap, the Government should aim to conduct a more thorough analysis of what would be an appropriate cap for TPCs working together. The Committee considers that this cap may need to be greater than the caps for the expenditure of individual TPCs.
- 1.37 The Committee recognises that the legislation was unclear on the precise definition of acting in concert, and on what expenditure should and shouldn't be included under that cap. The Committee therefore recommends that the Government provide more information and clarity on what 'acting in concert' constitutes in order to support the participation of TPCs in elections.
- 1.38 Should this information be developed, the Committee also considers that the Commission would be best placed to promote it. The Commission is a well-respected and trusted agency that has the authority, expertise and established networks to communicate this information clearly and accessibly to relevant parties. The provision of this information should be able to be incorporated into the Commission's ongoing information and awareness raising work.

**Confusion over what is covered by electoral expenditure**

- 1.39 A number of stakeholders raised the issue that what is considered as 'electoral expenditure' under the relevant caps on TPCs is unclear. The stakeholders explained that they took a conservative approach and included 'business as usual'

expenses as well. However, this was not considered to be an efficient or effective solution and did not necessarily achieve the aims of the EF Act.<sup>30</sup>

- 1.40 Several stakeholders explained that they had to pause their ongoing, business-as-usual work during election periods due to concerns that it may be considered electoral expenditure and therefore be subject to the cap.<sup>31</sup> Mr Thomas Costa, Assistant Secretary, Unions NSW, suggested that, if the current work of their organisation continues into the election period, it may become unlawful:

Should that bargaining negotiation continue into the election period, we are concerned that activities we do involved in bargaining could be misconstrued as actual election campaigning activity, and that would include communicating with our affiliates, which is six unions, and communicating with their members...All of that would be us just performing our business-as-usual work that just happens to track into a period of time which is now called the capped period.<sup>32</sup>

- 1.41 When considering section 35 in particular, several TPCs argued that the provision was unclear. Unions NSW stated that the lack of clarity in the legislation meant that it was difficult to determine what activities constitute 'acting in concert' and which do not:

Is sharing research acting under an agreement to campaign? Is dividing areas of an electorate to cover, or jointly planning a campaign event, an agreement to campaign? Can unions provide campaign volunteer lists to each other? Does agreement on an election theme constitute an agreement to campaign? These examples illustrate both the lack of clarity in the definition and the consequent uncertainty for TPCs about what they can and cannot lawfully do...<sup>33</sup>

- 1.42 Other stakeholders agreed that the definition of 'acting in concert' was very broad and not clearly defined. The Australian Education Union - NSW Teachers Federation Branch raised concerns that 'acting in concert' could cover formal and informal agreements and, given that it is untested, it was unclear which campaign activities would be covered by the provisions. This made it difficult for TPCs to plan their campaigns effectively.<sup>34</sup>

- 1.43 The NSW Nurses and Midwives' Association also stated that, 'It is unclear exactly what is prohibited under s35 which makes avoiding contravening the [EF] Act very challenging'.<sup>35</sup> The Association stated that it now takes a very conservative approach when considering whether to work with other organisations during capped election periods. As a consequence, this is hampering its capacity to publicise and advocate for its causes.

- 1.44 Mr Brett Holmes, General Secretary, NSW Nurses and Midwives' Association told the Committee that a women's group that was campaigning against domestic

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<sup>30</sup> [Submission 2](#), NSW Minerals Council, p 2 & 3.

<sup>31</sup> [Submission 1](#), Public Service Association of NSW, p 1; [Submission 2](#), NSW Minerals Council, p 3; [Submission 6](#), Australian Education Union – NSW Teachers Federation Branch, p 8.

<sup>32</sup> Mr Thomas Costa, Assistant Secretary, Unions NSW, [Transcript of evidence](#), 27 July 2022, p 10.

<sup>33</sup> [Submission 8](#), Unions NSW, p 22.

<sup>34</sup> [Submission 6](#), Australian Education Union – NSW Teachers Federation Branch, p 9.

<sup>35</sup> [Submission 7](#), NSW Nurses and Midwives' Association, p 6.

violence wanted to work with them to amplify their message. However, because the Nurses and Midwives Association was concerned that any work they might do together would be captured as 'acting in concert' and would cause both organisations to exceed the cap, they were unable to do so.<sup>36</sup>

1.45 The Commission provides information to TPCs, and their official agents on their requirements under the EF Act. This includes information about:

- campaign finance rules and management of accounts, donations and expenditure by TPC individuals and entities;
- caps on electoral expenditure, and that it was an offence to exceed a cap by acting in concert with another; and
- general guidance on what is acting in concert.<sup>37</sup>

1.46 The Commission outlined the work that it will do to support TPCs in the lead up to the 2023 State General Election. This includes direct support and broad awareness raising activities through a combination of webinars, online fact sheets and guidance, videos, written communication, phone calls and SMS messages.<sup>38</sup>

1.47 During the public hearing representatives from the Commission explained that the Commission strives to provide high quality information and advice to TPCs, but noted that it is unable to give legal advice about individual activities. Ms Rachel McCallum, Executive Director, Funding, Disclosure & Compliance and General Counsel, NSW Electoral Commission stated:

... in relation to providing guidance to third-party campaigners, or any other political participants, we do our very best to provide guidance. We don't provide legal advice about the specific circumstances of a particular political participant's activities. That would not be appropriate for us to do, and so, whilst we do our best to explain the obligations under electoral funding law to participants, we cannot give a final ruling, or even advice. We cannot consider the particular circumstances of that particular person, particularly in advance of the actual campaign, because at the time the material might be used, circumstances may have changed.<sup>39</sup>

1.48 The NSW Electoral Commissioner highlighted that it was a challenge to provide simple information to assist all stakeholders because of the complexity of the EF Act:

We try and make the information on the website as clear as possible. But ... there comes a point with the Electoral Funding Act 2018 in general—by the very nature of it, it is a complex bit of legislation.<sup>40</sup>

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<sup>36</sup> Mr Brett Holmes, General Secretary, NSW Nurses and Midwives' Association, [Transcript of evidence](#), 27 July 2022, p 11.

<sup>37</sup> NSW Electoral Commission, [Answers to questions on notice](#), 15 August 2022, p 1.

<sup>38</sup> NSW Electoral Commission, [Answers to questions on notice](#), 15 August 2022, p 2.

<sup>39</sup> Ms Rachel McCallum, Executive Director, Funding, Disclosure & Compliance and General Counsel, NSW Electoral Commission, [Transcript of evidence](#), 27 July 2022, p 4.

<sup>40</sup> Mr John Schmidt, NSW Electoral Commissioner, [Transcript of evidence](#), 27 July 2022, p 4.

### **The effect of section 35 of the *Electoral Funding Act 2018***

- 1.49 The main opponents of section 35 of the EF Act during this inquiry were unions. They argued that unions have historically worked together in campaigns in workplaces, communities, and in political spheres.<sup>41</sup> Collective campaigning is considered to be the default approach for unions, which made it particularly difficult to work within the limits outlined by section 35.<sup>42</sup> Unions NSW noted that, as an affiliate-based organisation, they often work with their affiliated organisations on campaigns. This allows them to reach a wider audience and also allows for more cost-effective campaigns.
- 1.50 Unions NSW submitted that, prior to section 35 coming into force, the organisation 'routinely engaged in electoral campaigning which involved or was co-ordinated with affiliated unions' during elections.<sup>43</sup> While they continue to jointly campaign with their affiliates in all other aspects of their work, they are no longer able to do so in electoral campaigns.
- 1.51 According to Unions NSW:
- ...the breadth and uncertainty in the operation of s. 35, its prohibition of so much of the business-as-usual joint campaigning of unions during elections, and the harsh penalties for breaching the provision, have had a significant deterrent or chilling effect on any joint electoral campaigning for Unions NSW and its affiliates.<sup>44</sup>
- 1.52 Unions NSW emphasised the finding of Justice Edelman in *Unions 2 (2019)* that the wording of section 35(1) meant there would be very few cases where TPCs working together would not be considered to be 'acting in concert', and thereby contravening the section. Unions NSW further argued that the wording, as it read, meant that two or more TPCs cannot be confident that they were not contravening section 35, regardless of how low the engagement, co-ordination, or information sharing might be.<sup>45</sup>
- 1.53 Unions NSW also highlighted the practical difficulties if TPCs did choose to work together. It argued that TPCs would need to manage and monitor one another's spending to ensure that information remains up to date and no party inadvertently exceeded the relevant cap.<sup>46</sup>
- 1.54 The complexities and harsh penalties for exceeding the caps is also preventing some organisations from participating in elections altogether. Mr Mark Morey, Secretary, Unions NSW, gave the example of smaller, 'community-based' organisations that are often unaware of the legislation. When the requirements are explained to them, they opt not to engage with the process because it is too administratively difficult for them to comply with the rules. He stated:

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<sup>41</sup> [Submission 10](#), United Workers Union, p 2.

<sup>42</sup> [Submission 8](#), Unions NSW, p 10.

<sup>43</sup> [Submission 8](#), Unions NSW, p 6.

<sup>44</sup> [Submission 8](#), Unions NSW, p 6.

<sup>45</sup> [Submission 8](#), Unions NSW, p 21.

<sup>46</sup> [Submission 8](#), Unions NSW, p 22.

That has a further, not just a cooling effect, but a financial impact on organisations who then participate in an election, because they've got to have a system in place that is foolproof for your spending. So, yes, they just don't participate. It's all too hard. In fact, a number of our affiliates in the last state election just said, "It's all too hard. We're not even going to register or bother."<sup>47</sup>

### **Challenges to section 35 of the *Electoral Funding Act 2018***

- 1.55 In *Unions NSW v New South Wales (No 2)* (2019), Unions NSW challenged both the expenditure cap reduction for TPCs, and the 'acting in concert' provisions in section 35 of the EF Act. As has been discussed, the expenditure caps were held to be invalid.
- 1.56 As there was no longer a valid expenditure cap for TPCs, the acting in concert provisions no longer had any effect (because there were no caps to be exceeded). Therefore, the High Court did not decide on the validity of section 35.<sup>48</sup>
- 1.57 In July 2022, following the introduction of the 2022 Amendment Bill, Unions NSW filed pleadings in the High Court that specifically challenged the acting in concert provisions.<sup>49</sup> The case is currently set to be heard in November 2022.
- 1.58 The Committee notes that one of the key considerations in the previous judgement of the High Court in *Unions NSW v New South Wales (No 2)* (2019) was whether the Government had sufficient evidence that a higher cap was allowing wealthy voices to drown out others. There wasn't proof that this analysis had been undertaken and the Court considered that the expenditure cap wasn't suitably justified. Therefore, the Court was unable to be satisfied that it was suitable or necessary, and it was held to be invalid.<sup>50</sup>

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<sup>47</sup> Mr Mark Morey, Secretary, Unions NSW, [Transcript of evidence](#), 22 July 2022, p 12.

<sup>48</sup> [Background Paper – Inquiry into caps on third-party campaigners' electoral expenditure in s29\(11\) and s35 of the Electoral Funding Act 2018](#), Professor Anne Twomey, 5 May 2022, p 12

<sup>49</sup> Mr Morey, Secretary, Unions NSW, [Transcript of evidence](#), 27 July 2022, p 8; Mr Brett Holmes, General Secretary, NSW Nurses and Midwives' Association, [Transcript of evidence](#), 27 July 2022, p 9.

<sup>50</sup> [Background Paper – Inquiry into caps on third-party campaigners' electoral expenditure in s29\(11\) and s35 of the Electoral Funding Act 2018](#), Professor Anne Twomey, 5 May 2022, p13-15

## Chapter Two – Caps on electoral expenditure for third-party campaigners in by-elections

**Current expenditure caps on electoral expenditure for third-party campaigners in by-elections are overly restrictive. They are limiting the ability of third-party campaigners to effectively campaign during by-elections and should be increased. This Chapter discusses the operation of the current caps on third-party campaigners during by-elections and recommendations for them to be increased.**

### Recommendation 4

**The Committee recommends that the cap on electoral expenditure for a third-party campaigner for a by-election be increased to \$198 750, and indexed to CPI or other increases to spending caps for registered political parties and candidates.**

- 2.1 This inquiry also considered the adequacy of expenditure caps for third-party campaigners (TPCs) in State by-elections. This cap is governed by section 29(11) of the *Electoral Funding Act 2018* (the EF Act).
- 2.2 The current indexed cap for electoral expenditure by a TPC in a by-election cap is \$21 600.<sup>51</sup> The Committee accepts the argument that this cap is too low for TPCs to run effective campaigns and properly participate in the electoral process during by-elections.
- 2.3 The Committee is concerned that the level of the cap is causing TPCs to choose not to participate in elections. The Committee supports the participation of a wide variety of groups and different voices in the political process.
- 2.4 The Committee agrees with those stakeholders that support increasing the cap for TPCs' electoral expenditure in by-elections. The Committee considers that increasing the cap to \$198 750 is an appropriate level. This represents 75 per cent of the current candidate cap, which is \$265 000, as was suggested by one of the stakeholders.<sup>52</sup> This will allow TPCs adequate resourcing to run campaigns in by-elections, while preserving the voices of candidates. The Committee recognises that currently, candidates in a by-election can spend approximately 12 times more than TPCs.
- 2.5 The Committee notes the arguments of Mark Morey, Secretary, Unions NSW, who suggested that expenditure caps in by-elections should be the same for both candidates and TPCs.<sup>53</sup> However, the Committee considers that this would introduce the significant risk of creating an 'uneven playing field', where TPC campaigns could overpower the campaigns of candidates and political parties.

<sup>51</sup> NSW Electoral Commission, [What are the expenditure caps for State elections?](#), 22 September 2022, accessed online 27 September 2022.

<sup>52</sup> [Submission 7](#), NSW Nurses and Midwives Association, p 4.

<sup>53</sup> Mr Mark Morey, Secretary, Unions NSW, [Transcript of evidence](#), 27 July 2022, p 10.

- 2.6 We received substantial evidence that the current caps are not adequate, which is discussed below.

## The current cap on electoral expenditure for third-party campaigners in by-elections is inadequate

### Caps on electoral expenditure for third-party campaigners in by-elections

- 2.7 The cap on electoral expenditure for TPCs in by-elections is outlined in section 29(11) of the EF Act. When the EF Act came into force, the cap was set at \$20 000. It is currently indexed at \$21 600. When caps for TPCs in by-elections were introduced in the *Election Funding and Disclosures Amendment Act 2010*, they were also set at \$20 000.
- 2.8 The capped expenditure period for by-elections runs from the day of the issuing of the writ for the election until election day.<sup>54</sup> This is usually around three to four weeks.

### Campaign costs

- 2.9 A number of stakeholders told us that the current section 29(11) cap is inadequate for covering campaign costs.<sup>55</sup> Mr Brett Holmes, General Secretary, NSW Nurses and Midwives' Association, said:

Twenty thousand dollars can be spent very quickly by a large organisation. It's totally inadequate to run a proper campaign, even in a small electorate with a small number of people, but manifestly inadequate if you wish to have a voice in a by-election run in metropolitan areas.<sup>56</sup>

- 2.10 Other stakeholders also raised concerns about the costs associated with campaign materials and advertising, particularly in metropolitan areas, where media and advertising are substantially more expensive.<sup>57</sup> Mr Mark Morey, Secretary, Unions NSW, noted that during election periods, advertising costs often 'skyrocket' in recognition of the increased demand.<sup>58</sup>
- 2.11 Unions NSW estimated that campaigning in an average state by-election costs \$114 000.<sup>59</sup>

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<sup>54</sup> [Electoral Funding Act](#) 2018, s27(b)

<sup>55</sup> [Submission 8](#), Unions NSW, p 8; [Submission 10](#), United Workers Union, p 1; [Submission 7](#), NSW Nurses and Midwives' Association, p 2; [Submission 6](#), Australian Education Union – New South Wales Teachers Federation Branch, p 8; [Submission 11](#), NSW Labor, p 4.

<sup>56</sup> Mr Brett Holmes, General Secretary, NSW Nurses and Midwives' Association, [Transcript of evidence](#), 27 July 2022, p 9.

<sup>57</sup> [Submission 10](#), United Workers Union, p 1; [Submission 8](#), Unions NSW, pp 14-15; [Submission 7](#), NSW Nurses and Midwives' Association, pp 3-4.

<sup>58</sup> Mr Mark Morey, Secretary, Unions NSW, [Transcript of evidence](#), 27 July 2022, p 14.

<sup>59</sup> [Submission 8](#), Unions NSW, pp 15-16.

Third-party campaigners' caps in s29(11) and s35 of the Electoral Funding Act 2018  
Caps on electoral expenditure for third-party campaigners in by-elections

They provided the following breakdown of costs:

Cost category	Components	Unions NSW minimum estimate
TV advertising	N/A	\$0
Radio advertising and production	2 weeks of 8 radio ads per day on radio stations	\$4,000
Digital advertising	2 weeks of digital advertising in the lead up to election day consisting of: - Facebook and Instagram: \$10,000 - Catch-up TV: \$7,000 - YouTube: \$5,000	\$22,000
Signage	4 weeks of 1x billboard in a high traffic area	\$3,500
Corflutes	800 corflutes split into: - 650 distributed between 45 polling day and pre-poll booths - 150 distributed to union members and supporters within the community	\$4,500
Paid distribution of flyers	One flyer to every household – approximately 34,000 households	\$10,000
Flyers and how-to-votes	50,000 A4 how-to-votes to be handed out at polling booths for every vote: \$3,650 15,000 DL size flyers for letterboxing for specific areas in the electorate: \$1,350	\$5,000
T-shirts	200 T-shirts for volunteers	\$2,500
Internet, telecommunications, stationery and postage.	Texts: \$2,000 10,000 persuasion calls: \$1,500	\$3,500
Staff costs (salary and allowances)	Salary for 2 campaigners – 3 weeks full time Additional support staff Travel and meal allowances	\$30,000
Staff costs (travel and accommodation)	Regional accommodation and travel costs for 2 people over 3 weeks	\$9,000
Research	One quantitative survey research	\$20,000
<b>Total</b>		<b>\$114,000</b>

2.12 The NSW Nurses and Midwives' Association estimated that the average cost of campaigning in a regional state by-election is \$65 000, and that the average cost of a metropolitan state by-election is \$190 000.<sup>60</sup> The Association provided the following breakdown of costs:

<sup>60</sup> [Submission 7](#), NSW Nurses and Midwives' Association, p 4.

Third-party campaigners' caps in s29(11) and s35 of the Electoral Funding Act 2018  
Caps on electoral expenditure for third-party campaigners in by-elections

Following are estimates of by-election campaign costs:

**Regional by-election campaign cost guide**

Print adverts - local press	\$	12,000
Radio adverts - local stations	\$	10,000
Shopping centre billboards	\$	10,000
Social media	\$	5,000
Corflutes and other collateral	\$	3,000
Direct mail campaign	\$	25,000
<b>Total for a regional campaign</b>	<b>\$</b>	<b>65,000</b>

**Metro by-election campaign cost guide**

Radio adverts*	\$	35,000
TV adverts*	\$	100,000
Print adverts - local press	\$	12,000
Shopping centre billboards	\$	10,000
Social media	\$	5,000
Corflutes and other collateral	\$	3,000
Direct mail campaign	\$	25,000
<b>Total for a metro campaign</b>	<b>\$</b>	<b>190,000</b>

\* TV and radio typically only justifiable if at least 3 by-elections are on in a similar timeframe. These figures represent an allocation of one-third of the cost of a campaign aligned to respond to three metro by-elections.

2.13 The comparatively small increase in the level of the cap in relation to increases in campaigning costs was also highlighted as a difficulty by other stakeholders. Mr Glen Bacic, Director Governance, NSW Labor, stated:

...in the last 12 years, what would be regarded as a minimum sort of base for effective campaigning has increased as well. Certainly, that cap for third-party campaigners is a very low figure.<sup>61</sup>

2.14 The NSW Electoral Commission (the Commission) provided us with its advertising costs for recent by-elections:

- \$187 000 (Bega, Willoughby, Monaro, and Strathfield by-elections combined, 2022)
- \$119 500 (Upper Hunter by-election, 2021)

<sup>61</sup> Mr Glen Bacic, Director Governance, NSW Labor, [Transcript of evidence](#), 27 July 2022, p 25.

- \$98 500 (Wagga Wagga by-election, 2019)
- 2.15 The Commission noted that these costs included an elector brochure posted to each enrolled voter in these electorates. The figures do not include the cost of postage.<sup>62</sup>
- 2.16 In terms of TPC electoral expenditure, the Commission explained that since the commencement of the EF Act they had conducted six by-elections. However, there was a limited amount of data available on TPC electoral expenditure during these by-elections. For one by-election, there were no TPCs registered. For another four, the due date for expenditure disclosure had not passed at the time that the Commission's submission was made.<sup>63</sup>
- 2.17 For the by-election where there was data, TPC electoral expenditure ranged from \$526.35 to \$21 104. The Commission noted that 'no TPC exceeded the statutory cap on electoral expenditure in that campaign, and that only one TPC came close to reaching the cap.'<sup>64</sup>
- 2.18 In contrast, Business NSW was the only stakeholder to voice support for section 29(11) as it currently stands. They said the capped amount is 'reasonable and adequate', and reflects the 'level playing field' principle discussed in *Unions NSW (No 2)*.<sup>65</sup>
- 2.19 It's clear that by-election campaigns are generally expected to incur costs significantly higher than \$21 600, and as such, the current cap is inadequate.
- 2.20 The Committee heard that the current expenditure cap discourages TPCs from campaigning in by-elections, even if they're registered. Mr Mark Morey, Secretary, Unions NSW highlighted:
- The cap that you're considering today, the \$20,000, is just, frankly, a joke. That's why we often don't campaign in by-elections. We might see if our members have a particular issue, and put out a bit, but it's not an effective campaign. We know that that \$20,000 does not have enough reach in a campaign to make any real impact.<sup>66</sup>
- 2.21 Similarly, the NSW Nurses and Midwives Association explained that, due to the restrictions of the cap, they:
- ... decided not to participate in the last few by-elections (2021 and 2022). It is the view of the NSWNMA that there is no value in spending members' funds on a campaign that cannot achieve its objectives.<sup>67</sup>
- 2.22 Additionally, the Public Service Association raised the issue that TPCs, especially unions, may have longer-term campaigns running that intersect with a by-election period. Campaign materials produced during the by-election period are

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<sup>62</sup> NSW Electoral Commission, [Answers to questions on notice](#), 15 August 2022, p 4.

<sup>63</sup> [Submission 5](#), NSW Electoral Commission, p 2.

<sup>64</sup> [Submission 5](#), NSW Electoral Commission, p 2.

<sup>65</sup> [Submission 3](#), Business NSW, p 2.

<sup>66</sup> Mr Mark Morey, Secretary, Unions NSW, [Transcript of evidence](#), 27 July 2022, p 14.

<sup>67</sup> [Submission 7](#), NSW Nurses and Midwives Association, p 3.

subject to the section 29(11) cap, even if the campaign continues outside of the capped period. They said that this makes it difficult for the union to run broader issues campaigns around by-elections.<sup>68</sup>

### **By-election cap amounts adjusted for inflation**

- 2.23 The Commission highlighted that the TPC expenditure cap under section 29(11) did not align with other caps introduced by the EF Act. They noted that, under section 29(11), the cap for TPC electoral expenditure for a by-election being held in one district is \$20 000. Under section 29(12)(b), if by-elections are being held in more than one electoral district, the TPC electoral expenditure cap is \$24 700. When adjusted for inflation following the 2019 State General Election, these figures are now \$21 600 and \$26 700, respectively.<sup>69</sup>
- 2.24 The Commission submitted that this discrepancy may have occurred due to an oversight when the respective figures were being developed for the EF Act. The figures appear to have used the earlier *Electoral Funding and Disclosures Act 1981* (the EFED Act) as a template.<sup>70</sup>
- 2.25 The EFED Act contained very similar provisions to the EF Act. It provided that the cap for electoral expenditure for TPCs in a by-election was \$20 000, and that the same cap applied in any additional electorate if there were multiple by-elections being held.
- 2.26 Following the 2015 State General Election, these figures were adjusted for inflation, and both values were \$24 700 when the EFED Act was repealed and replaced by the EF Act. The Commission notes that, while the figure of \$24 700 was carried over for section 29(12)(b) in the EF Act, it appears that the incorrect 'unadjusted' figure of \$20 000 was carried over for section 29(11).<sup>71</sup>

### **The definition of 'electoral expenditure'**

- 2.27 As discussed in Chapter One, stakeholders raised issues with the definition of 'electoral expenditure' in the EF Act, which also affected TPCs campaigning in by-elections. The most common issue was that the current definition captures a broad range of costs, and that there is a lack of clarity about what is included or not included within the cap. In combination with the low threshold of the section 29(11) cap, we heard this creates budgeting issues for TPC campaigns.
- 2.28 Staffing, travel, and accommodation costs are included under the current definition of electoral expenditure. The Committee heard that these costs alone may reach the limit of the section 29(11) cap.<sup>72</sup> We also heard that the broad definition in the EF Act can make it difficult to separate 'business as usual'

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<sup>68</sup> [Submission 1](#), Public Service Association of NSW, p 1.

<sup>69</sup> [Submission 5](#), NSW Electoral Commission, p 3.

<sup>70</sup> [Submission 5](#), NSW Electoral Commission, p 4.

<sup>71</sup> [Submission 5](#), NSW Electoral Commission, p 4.

<sup>72</sup> [Submission 6](#), Australian Education Union – New South Wales Teachers Federation Branch, p 8.

activities from 'electoral' activities, particularly for TPCs who run issues campaigns outside of election periods.<sup>73</sup>

- 2.29 The NSW Minerals Council noted that it had obtained external legal advice to work out how to best comply with the relevant caps. The organisation expressed frustration that the costs of this legal advice would also need to be included in the capped expenditure amount for the relevant election period.<sup>74</sup>
- 2.30 A number of TPCs also told us that the cost and time involved in tracking expenditure in order to comply with the current section 29(11) cap deters them from running campaigns.<sup>75</sup> The NSW Minerals Council summarised that TPC caps are currently 'poorly framed' within the EF Act.<sup>76</sup>
- 2.31 The Committee notes that the *Electoral Legislation Amendment Act 2022* has made some changes to the definitions of 'electoral expenditure'.<sup>77</sup> It is unclear, however, whether these changes will address the concerns of TPCs.
- 2.32 The Commission told us that the current legislation operates under a 'dominant purpose' test, which means the definition is 'open'. As a result, the straightforwardness of assessing expenditure varies based on the unique context of each TPC.<sup>78</sup> The NSW Electoral Commissioner noted the changes proposed in the 2022 Act, but did not comment on them.<sup>79</sup>

#### *Specific context of by-elections*

- 2.33 The Committee heard evidence that by-election campaigns are different to State General Election campaigns, particularly because of their short timeframes and limited scope. We also heard that these issues are amplified if multiple by-elections are held on the same day.
- 2.34 Unions NSW suggested that the development of expenditure caps for by-elections should be set with "'bet the farm" by-elections in mind', which are those 'of greatest importance' to voters and campaigners. These include by-elections that may result in the loss of a government majority, or those involving electorate-specific political issues.<sup>80</sup>
- 2.35 Mr Seamus Lee, Registered Officer, the Greens NSW, told us that smaller community groups acting as TPCs may not be aware of their expenditure cap obligations, particularly for by-elections, because they are 'short and sharp' election periods.<sup>81</sup> Similarly, Mr Glenn Bacic, NSW Labor, said that the current

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<sup>73</sup> Mr Morey, [Transcript of evidence](#), 27 July 2022, p 9.

<sup>74</sup> [Submission 2](#), NSW Minerals Council, p 2.

<sup>75</sup> [Submission 7](#), NSW Nurses and Midwives' Association, p 3; [Submission 6](#), Australian Education Union – New South Wales Teachers Federation Branch, p 8; [Submission 8](#), Unions NSW, p 16.

<sup>76</sup> [Submission 2](#), NSW Minerals Council, p 3; [Submission 10](#), United Workers Union, p 2;

<sup>77</sup> [Electoral Legislation Amendment Bill 2022](#) (NSW), sch 3, s3.

<sup>78</sup> Ms Rachel McCallum, Executive Director, Funding, Disclosure & Compliance and General Counsel, NSW Electoral Commission, [Transcript of evidence](#), 27 July 2022, p 4.

<sup>79</sup> Mr John Schmidt, Electoral Commissioner, NSW Electoral Commission, [Transcript of evidence](#), 27 July 2022, p 4.

<sup>80</sup> [Submission 8](#), Unions NSW, p 12.

<sup>81</sup> Mr Seamus Lee, Registered Officer, the Greens NSW, [Transcript of evidence](#), 27 July 2022, pp 21, 22.

capped amount for by-elections is 'pretty unrealistic, to conduct a campaign in a by-election'.<sup>82</sup>

- 2.36 The Committee heard several examples of specific instances during 2021 by-elections that highlighted the current inadequacies of section 29(11) caps. Unions NSW told us that, during the Upper Hunter by-election in 2021, they spent almost a third of the section 29(11) capped amount on staff costs, and that this ultimately accounted for only 57 hours of work. Despite consuming a large proportion of expenditure, this wasn't sufficient 'staff time' to organise a three to four week by-election campaign.<sup>83</sup> Additionally, Unions NSW suggested that the capped amount is limiting for regional by-elections in particular, because they often require extensive travel in order to campaign effectively.<sup>84</sup>

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<sup>82</sup> Mr Glenn Bacic, Director Governance, NSW Labor, [Transcript of evidence](#), 27 July 2022, p 25.

<sup>83</sup> [Submission 8](#), Unions NSW, p 14.

<sup>84</sup> [Submission 8](#), Unions NSW, p 16.

## Appendix One – Terms of reference

That the Joint Standing Committee on Electoral Matters inquire into and report on:

- 1 whether the existing cap on electoral expenditure by third-party campaigners for an Assembly by-election under section 29(11) of the *Electoral Funding Act 2018* is reasonably adequate;
- 2 if the answer to question 1 above is 'no', what the amount of the applicable cap should be; and
- 3 whether the prohibition on third-party campaigners acting in concert with others to incur electoral expenditure in excess of the applicable cap on electoral expenditure in section 35 of the *Electoral Funding Act 2018* should be retained, amended or repealed.

## Appendix Two – Conduct of inquiry

On 23 March 2022, following a referral from the Attorney General, the Joint Standing Committee on Electoral Matters adopted terms of reference to inquire into and report on caps on third-party campaigners' electoral expenditure in s29(11) and s35 of the *Electoral Funding Act 2018*.

The full terms of reference for this inquiry have been set out in Appendix One.

The Committee commissioned a research paper from Professor Anne Twomey to assist them in their consideration of the issues and published the paper for the benefit of stakeholders.

The Committee wrote to key stakeholders to call for public submissions. The closing date for submissions was 22 April 2022.

The Committee received 11 submissions from stakeholder organisations and individuals. A complete list of the submissions received can be found in Appendix Three.

The Committee held a public hearing on 27 July 2022 at Parliament House, Sydney. The Committee took oral evidence from 11 witnesses. These included representatives from the NSW Electoral Commission, unions, and political parties. A list of the witnesses who appeared before the Committee can be found in Appendix Four.

## Appendix Three – Submissions

<b>No.</b>	<b>Author</b>
1	Public Service Association of NSW
2	NSW Minerals Council
3	Business NSW
4	The Greens NSW
5	NSW Electoral Commission
6	Australian Education Union - NSW Teachers Federation Branch
7	New South Wales Nurses and Midwives' Association
8	Unions NSW
9	The Australian Workers' Union
10	United Workers Union
11	NSW Labor

## Appendix Four – Witnesses

27 July 2022

Room 814 / 815, Sydney, NSW

<b>Witness</b>	<b>Position and Organisation</b>
Mr John Schmidt	NSW Electoral Commissioner, NSW Electoral Commission
Ms Rachel McCallum	Executive Director, Funding, Disclosure & Compliance and General Counsel, NSW Electoral Commission
Mr Hugo Bergeron	Director, Compliance, NSW Electoral Commission
Mr Mark Morey	Secretary, Unions NSW
Mr Thomas Costa	Assistant Secretary, Unions NSW
Mr Brett Holmes	General Secretary, New South Wales Nurses and Midwives' Association
Ms Lucy Walker	Manager - Business Services and Compliance, New South Wales Nurses and Midwives' Association
Mr Stephen Galilee	CEO, NSW Minerals Council Ltd
Ms Christina Langby	Company Secretary, NSW Minerals Council Ltd
Mr Seamus Lee	Registered Officer, The Greens NSW
Mr Glenn Bacic	Director Governance, NSW Labor

## Appendix Five – Extracts from minutes

### Meeting no. 11

<b>TIME &amp; DATE</b>	<b>9.03 AM, 23 MARCH 2022</b>	<b>LOCATION</b>	<b>ROOM 1254 AND WEBEX</b>
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#### MEMBERS PRESENT

Mr Lee Evans MP (**Chair**), Ms Felicity Wilson MP (**Deputy Chair**), the Hon. Robert Borsak MLC, the Hon. Catherine Cusack MLC (via Webex), the Hon. Scott Farlow MLC (via Webex), Mr Christopher Gulaptis MP, the Hon. Courtney Houssos MLC (via Webex), the Hon. Peter Primrose MLC, Mr Paul Scully MP, Mr Nathaniel Smith MP.

#### OFFICERS PRESENT

Rohan Tyler (via Webex), Leon Last, Ilana Chaffey, Abegail Turingan.

#### APOLOGIES

None.

#### AGENDA ITEM

##### 1. Confirmation of minutes

Resolved, on the motion of Mr Scully: That the minutes of the meeting of 24 February 2022 be confirmed.

##### 2. \*\*\*

##### 3. New inquiry – Caps on third-party campaigners' electoral expenditure in s29(11) and s35 of the *Electoral Funding Act 2018*

The Committee noted correspondence received from the Attorney General, the Hon Mark Speakman MP, referring an inquiry into third-party campaigners' electoral expenditure, dated 10 March.

##### 3.1. Briefing

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Resolved, on the motion of Mr Gulaptis, seconded by Mr Smith: That the Committee authorise the attendance of Dr Peter Phelps and Ms Katie Ellinson to provide a briefing on the referral received from the Attorney General.

Ms Ellinson (via Webex), and Dr Phelps were admitted to the meeting at 9.07am.

Dr Phelps and Ms Ellinson briefed the Committee.

Ms Ellinson and Dr Phelps left the meeting at 9.15am.

### 3.2. Consideration of terms of reference

The Committee considered the referral from the Attorney General and the enclosed terms of reference.

Discussion ensued.

Resolved, on the motion of Ms Wilson, seconded by Mr Gulaptis:

- That the Committee conduct an inquiry into caps on third-party campaigners' electoral expenditure as per the terms of reference contained in the referral from the Attorney General in his letter dated 10 March 2022;
- That the Committee call for submissions and advertise the inquiry on the Committee's webpage;
- That the closing date for submissions be 22 April 2022;
- That the Chair issue a media release announcing the inquiry; and
- That the key stakeholders on the list circulated and other suggested stakeholders from members, be informed of the inquiry and invited to make a submission.

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**3.**     \*\*\*

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### **4.     Next meeting**

The meeting adjourned at 9.33 am until a date and time to be confirmed.

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## Meeting no. 12

<b>TIME &amp; DATE</b>	<b>10.07AM, 13 MAY 2022</b>	<b>LOCATION</b>	<b>JUBILEE ROOM AND VIDEOCONFERENCE</b>
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### MEMBERS PRESENT

Mr Lee Evans MP (**Chair**), the Hon. Robert Borsak MLC (**Deputy Chair**), the Hon. Scott Barrett MLC (via videoconference), Mr Kevin Conolly MP, Mr Chris Gulaptis MP, the Hon. Courtney Houssos MLC, the Hon. Peter Primrose MLC (via videoconference), the Hon. Chris Rath MLC, Mr Paul Scully MP (via videoconference), Mr Nathaniel Smith MP.

### OFFICERS PRESENT

Rohan Tyler, Leon Last, Ilana Chaffey, Abegail Turingan.

### AGENDA ITEM

#### 1. Deliberative meeting

##### 1.1. Membership changes

The Chair advised the Committee of the of the change in membership recorded in:

- The Legislative Council Minutes of 30 March 2022, No 8, Item 1(b), in which Scott Barrett and Chris Rath were appointed to the Committee in place of Catherine Cusack and Scott Farlow.
- The Legislative Assembly Votes and Proceedings of 31 March 2022, No 17, Item 1(e), in which Gabrielle Upton was appointed to the Committee, in place of Felicity Wilson.
- The Legislative Assembly Votes and Proceedings of 31 March 2022, No 21, Item 1, in which Kevin Conolly was appointed to the Committee, in place of Gabrielle Upton.

##### 1.2. Election of Deputy Chair

There being a vacancy in the office of the Deputy Chair of the Committee, the Chair called for nominations for the office of Deputy Chair.

Mr Conolly proposed himself to be the Deputy Chair, seconded by Mr Smith.

Ms Houssos proposed Mr Borsak to be the Deputy Chair, seconded Mr Primrose.

There being two nominations, the Chair put the question that Mr Conolly be the Deputy Chair of the Committee.

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Ayes: Mr Conolly, Mr Smith

Noes: Ms Houssos, Mr Primrose, Mr Scully, Mr Borsak

The Chair put the question that Mr Borsak be the Deputy Chair of the Committee.

Ayes: Ms Houssos, Mr Primrose, Mr Scully, Mr Borsak

Noes: Mr Smith, Mr Conolly.

The Chair declared Mr Borsak to be the Deputy Chair.

### **1.3. Confirmation of minutes**

Resolved, on the motion of Mr Smith, seconded Mr Scully: That the minutes of the meeting of 23 March 2022 be confirmed.

### **1.4. \*\*\***

### **1.5. Inquiry into caps on third party campaigners' electoral expenditure in s29(11) and s35 of the *Electoral Funding Act 2018***

#### **1.5.1. Correspondence**

The Committee noted the following correspondence received:

- From Local Government NSW, declining to make a submission, dated 24 March 2022
- From the Health Services Union, declining to make a submission, dated 5 April 2022

#### **1.5.2. Submissions**

The following submissions were received as part of the inquiry:

- Public Service Association of NSW
- NSW Minerals Council
- Business NSW
- The Greens NSW
- NSW Electoral Commission
- AEU NSW Teachers Federation Branch
- Australian Workers' Union
- Unions NSW
- The Australian Workers' Union
- United Workers Union

Resolved, on the motion of Mr Primrose, seconded Mr Borsak: That the listed submissions be accepted and published on the Committee's webpage with relevant contact details redacted.

#### **1.5.3. Briefing paper**

The Committee received a briefing note prepared by Professor Anne Twomey, which discusses key issues related to the inquiry.

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Resolved on the motion of Mr Borsak, seconded Mr Primrose: That the briefing note be accepted and published on the Committee's webpage.

**1.6. \*\*\***

The deliberative meeting concluded at 10.16 am.

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**2. \*\*\***

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**3. Deliberative meeting**

**3.1. \*\*\***

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**4. Next meeting**

The meeting adjourned at 2.06 pm until a date and time to be confirmed.

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## Meeting no. 13

<b>TIME &amp; DATE</b>	<b>1.15 PM, 22 JUNE 2022</b>	<b>LOCATION</b>	<b>MEETING ROOM 814/815</b>
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<b>MEMBERS PRESENT</b>	
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Mr Lee Evans MP (**Chair**), Mr Chris Gulaptis MP, Mr Kevin Conolly MP, Mr Nathaniel Smith MP, Mr Paul Scully MP, the Hon Chris Rath MLC, the Hon Courtney Houssos MLC, the Hon Peter Primrose MLC, the Hon Scott Barrett MLC.

<b>OFFICERS PRESENT</b>	
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Rohan Tyler, Leon Last, Ilana Chaffey, Jennifer Gallagher, Ze Nan Ma.

<b>APOLOGIES</b>	
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The Hon Robert Borsak MLC.

<b>AGENDA ITEM</b>
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**1. Confirmation of minutes**

Resolved, on the motion of Mr Conolly, seconded Mr Smith: That the minutes of the meeting and public hearing of 13 May 2022 be confirmed.

**2. \*\*\***

**3. Inquiry into caps on third party campaigners' electoral expenditure in s29(11) and s35 of the *Electoral Funding Act 2018***

**3.1. Conduct of inquiry**

The Committee discussed potential dates for a public hearing, and asked the secretariat to canvass dates in July.

**4. Next meeting**

The meeting adjourned at 1.25pm until a date and time to be confirmed.

## Meeting no. 14

<b>TIME &amp; DATE</b>	<b>10.18 AM, 27 JULY 2022</b>	<b>LOCATION</b>	<b>ROOM 814/815 AND VIDEOCONFERENCE</b>
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### MEMBERS PRESENT

Mr Lee Evans MP (**Chair**), the Hon. Robert Borsak MLC (**Deputy Chair**), the Hon. Scott Barrett MLC (via videoconference), Mr Kevin Conolly MP (via videoconference), the Hon. Courtney Houssos MLC, the Hon. Peter Primrose MLC, the Hon. Chris Rath MLC, Mr Paul Scully MP, Mr Nathaniel Smith MP (via videoconference).

### OFFICERS PRESENT

Sam Griffith, Leon Last, Ilana Chaffey, Nicolle Gill, Gerard Rajakariar

### APOLOGIES

An apology was received from Mr Gulaptis.

### AGENDA ITEM

#### 1. Deliberative meeting

##### 1.1. Confirmation of minutes

Resolved, on the motion of Mr Rath, seconded by Mr Borsak: That the minutes of the meeting of 22 June 2022 be confirmed.

##### 1.2. \*\*\*

#### 1.3. Inquiry into caps on third-party campaigners' electoral expenditure in s29(11) and s35 of the *Electoral Funding Act 2018*

##### 1.3.1. Public hearing

Resolved, on the motion of Mr Primrose: That the Committee invite the witnesses listed in the notice of hearing for Wednesday, 27 July 2022 to give evidence in relation to the inquiry into caps on third-party campaigners' electoral expenditure in s 29(11) and s35 of the *Electoral Funding Act 2018*, noting that invitations have been issued.

##### 1.3.2. Media orders

Resolved, on the motion of Mr Rath, seconded Mr Scully: That the Committee authorises the audio-visual recording, photography and

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broadcasting of the public hearing on 27 July 2022, in accordance with the Legislative Assembly's guidelines for the coverage of proceedings for parliamentary committees administered by the Legislative Assembly.

**1.3.3. Answers to questions taken on notice**

Resolved, on the motion of Ms Houssos: That witnesses be requested to return answers to questions taken on notice and supplementary questions within 2 weeks of the date on which the questions are forwarded to the witnesses.

The Chair adjourned the meeting at 10.24 am.

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**2. Public hearing – Inquiry into caps on third-party campaigners' electoral expenditure in s29(11) and s35 of the *Electoral Funding Act 2018***

Witnesses were admitted. The Chair opened the hearing at 10.29 am and made a short opening statement.

John Schmidt, Electoral Commissioner, NSW Electoral Commission, affirmed and examined.

Rachel McCallum, Executive Director, Funding, Disclosure & Compliance and General Counsel, NSW Electoral Commission, affirmed and examined.

Hugo Bergeron, Director Compliance, NSW Electoral Commission, affirmed and examined.

Mark Morey, Secretary, Unions NSW, affirmed and examined.

Thomas Costa, Assistant Secretary, Unions NSW, affirmed and examined.

Brett Holmes, General Secretary, NSW Nurses and Midwives' Association, affirmed and examined.

Lucy Walker, Manager, Business Services and Compliance, NSW Nurses and Midwives' Association, affirmed and examined.

The hearing adjourned at 12.10 pm, and resumed at 12.50 pm.

Stephen Galilee, CEO, NSW Minerals Council, affirmed and examined by videoconference.

Christina Langby, Company Secretary, NSW Minerals Council, affirmed and examined by videoconference.

Seamus Lee, Registered Officer, the Greens NSW, affirmed and examined.

The hearing adjourned at 1.34 pm and resumed at 2.15 pm.

Glenn Bacic, Director Governance, NSW Labor, affirmed and examined by videoconference

The public hearing concluded at 2.30 pm.

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**3. Post-hearing deliberative meeting**

The Chair resumed the meeting at 2.31 pm.

**3.1. Publication orders**

Resolved, on the motion of Mr Primrose: That the corrected transcript of public evidence given today be authorised for publication and uploaded on the inquiry webpage.

**3.2. \*\*\***

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**4. Next meeting**

The meeting adjourned at 2.40 pm until a date and time to be confirmed.

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## Meeting no. 15

<b>TIME &amp; DATE</b>	<b>1.31 PM, 21 SEPTEMBER 2022</b>	<b>LOCATION</b>	<b>ROOM 1043</b>
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**MEMBERS PRESENT**

Mr Lee Evans MP (**Chair**), the Hon Scott Barrett MLC, Mr Chris Gulaptis MP, the Hon Courtney Houssos MLC, the Hon Peter Primrose MLC, the Hon Chris Rath MLC, Mr Paul Scully MP.

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**OFFICERS PRESENT**

Rohan Tyler, Leon Last, Ilana Chaffey, Jennifer Gallagher, Edward Lloyd.

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**APOLOGIES**

Apologies were received from Mr Borsak, Mr Conolly, and Mr Smith.

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**AGENDA ITEM****1. Confirmation of minutes**

Resolved on the motion of Mr Rath, seconded Mr Scully: That the minutes of the meeting and public hearing of 27 July 2022 be confirmed.

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**2. \*\*\***

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### 3. Inquiry into caps on third party campaigners' electoral expenditure in s29(11) and s35 of the *Electoral Funding Act 2018*

#### 3.1. Answers to questions on notice

The Committee received answers to questions on notice from:

- The Greens NSW, received 8 August, and
- The NSW Electoral Commission, received 15 August

Resolved, on the motion of Mr Gulaptis, seconded Mr Rath: That the Committee accept the answers to questions on notice and publishes them on the inquiry webpage.

#### 4. \*\*\*

#### 5. Next meeting

The meeting adjourned at 1.35 pm until a date and time to be confirmed.

## Meeting no. 17

<b>TIME &amp; DATE</b>	<b>1.38 PM, THURSDAY 17 NOVEMBER 2022</b>	<b>LOCATION</b>	<b>ROOM 1254 AND VIA WEBEX</b>
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#### MEMBERS PRESENT

Mr Lee Evans MP (Chair), the Hon Robert Borsak MLC (Deputy Chair), the Hon Scott Barrett MLC, Mr Kevin Conolly MP, the Hon Courtney Houssos MLC, the Hon Peter Primrose MLC, the Hon Chris Rath MLC, Mr Paul Scully MP, Mr Nathaniel Smith MP (via videoconference)

#### OFFICERS PRESENT

Rohan Tyler, Leon Last, Ilana Chaffey, Hayley Jarrett, Gerard Rajakariar.

#### APOLOGIES

An apology was received from Mr Gulaptis.

#### AGENDA ITEM

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**1. Confirmation of minutes**

Resolved, on the motion of Mr Rath, seconded by Ms Houssos: That the minutes of the meeting of 13 October 2022 confirmed.

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**2. Caps on third-party campaigners' electoral expenditure in s29(11) and s35 of the *Electoral Funding Act 2018***

- Consideration of Chair's draft report.

With the concurrence of all members, the Committee considered the report chapter-by-chapter.

The Committee considered Chapter One.

Ms Houssos moved, in globo:

- That the words 'acting in concert' be omitted from Finding 1.
- That the words 'acting in concert' be omitted from Recommendation 1.
- That Recommendation 2 be omitted.
- That the words 'acting in concert' be omitted from Recommendation 3.

Discussion ensued.

Question put – that the amendments be agreed to.

The Committee divided.

Ayes 4 [Mr Borsak, Ms Houssos, Mr Primrose, Mr Scully]

Noes 5 [Mr Evans, Mr Barrett, Mr Conolly, Mr Rath, Mr Smith]

The amendment was negatived.

Resolved, on the motion of Mr Borsak: That Chapter One stand part of the report.

The Committee considered Chapter Two.

Resolved, on the motion of Ms Houssos: That the words 'and indexed to CPI or other increases to spending caps for registered political parties and candidates' be inserted at the end of Recommendation 4.

Resolved, on the motion of Mr Conolly, seconded by Mr Barrett: That Chapter Two, as amended, stand part of the report.

Resolved on the motion of Mr Rath, seconded by Mr Barrett:

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1. That the draft report, as amended, be the report of the Committee and that it be signed by the Chair and presented to the House.
  2. That the Chair and Committee staff be permitted to correct stylistic, typographical, and grammatical errors.
  3. That, once tabled, the report be posted on the Committee's webpage.

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3. \*\*\*

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4. \*\*\*

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5. **Next meeting**

The meeting adjourned at 1.56 pm until a date and time to be confirmed.

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